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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1
Appeal No. 2014AP 867-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES RICHARD COLEMAN

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED MARCH 24, 2014, BY HON. STEPHANIE ROTHSTEIN, AND A JUDGMENT OF CONVICTION ENTERED ON JUNE 27, 2012, BY HON. DENNIS R. CIMPL, BOTH IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Given the fact that Coleman's attorney did not know whether Coleman would testify at trial, did he provide ineffective assistance of counsel when he promised the jury during opening argument that Coleman would testify, and then, without explanation, broke that promise?

The trial court ruling: No.

2. Was trial counsel ineffective in telling the jury during *voir dire* that "Mr. Coleman has been convicted of a crime before" and disclosing during opening statements that Coleman had "done all kind of things in his past" and that "he's not an angel."

   The trial court ruling: No.

3. Was trial counsel ineffective in failing to present evidence that, contrary to the alleged victim's testimony, she stayed up watching television with Coleman on the night following the first alleged assault?

   The trial court ruling: No.

4. Was trial counsel ineffective in failing to present evidence that the alleged victim had told others that Coleman had ejaculated during the second assault, thereby making the lack of DNA more probative?

   The trial court ruling: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Coleman welcomes oral argument to clarify any questions the court may have. There are no published binding Wisconsin decisions regarding the issue of whether counsel is ineffective in promising the jury that the defendant will testify, and then not fulfill that promise. Therefore, as to this issue, publication is warranted.

STATEMENT OF THE CASE

On October 4, 2011, the State filed a criminal complaint charging James Coleman with two counts of second degree sexual assault of child under the age of 16, Wis. Stats. § 948.02(2). (2:1).

The case was tried before a jury on February 16-17, 2012, Hon. Dennis Cimpl, presiding. The jury found Coleman guilty of both counts.

On June 27, 2012, the court sentenced Coleman to prison terms totaling 25 years (15 years initial confinement plus 10 years extended supervision) (61:35-36) (Attached as Appendix A).

On October 9, 2013, Coleman filed a postconviction motion pursuant to Wis. Stats. §§ 809.30 and 974.02. (35). On March 18, 2014, the court, Hon. Stephanie Rothstein presiding, conducted a postconviction hearing (62). At the conclusion of the hearing, the court denied each of Coleman's claims. (62; 63) (Attached as Appendix B and C).

STATEMENT OF FACTS

In July or August, 2011, two people moved to the Oak Creek apartment of Floyd Miller and his fiancé, Sarah Bergman (55:60-61; 55:86-87). One was Miller's 13 year old daughter, CB, who had previously been living with her mother in Green Bay (54:101-102; 55:61, 86). The other was the defendant, James Coleman (55:60, 87). Miller and Coleman were cousins to each other, and Miller and Bergman agreed to let Coleman live them for "a couple of weeks until he got on his feet." (55:62-63). A few weeks later, on September 3, Miller and Bergman were married (55:86), and CB referred to Bergman as her "stepmom." (54:102).

Around that time, CB began attending West Middle School in Oak Creek. On September 23, 2011 CB told the school social worker, Jennifer Handlen, that two days earlier, on the mornings of September 21 and 22, she had been sexually assaulted by Coleman (who she and others called "Rick.") (57:16, 18-21). Handlen contacted the Oak Park Police Department, and Det. Ann Golombowski came to the school and interviewed CB (55:107-108). CB's statements led to two sexual assault charges filed against Coleman.

The case was tried before a Milwaukee County jury. At trial, CB testified that she got along well with Coleman, and that she confided in him and told him about problems she was having (54:104). Some of these problems concerned CB's stepmother, Sarah Bergman, with whom she had "a lot of arguments (54:105). CB also told Coleman about problems she was having with her boyfriend, Demetrian (54:106). CB testified that Coleman was "always there" if she needed something, and that he sometimes bought her food and once, jewelry (54:108).

CB testified that Coleman slept in the living room, but that he kept his clothes in the closet of CB's bedroom (54:111). Her bed was positioned up against the closet door (114). She stated that Miller and Bergman generally left for work at 4:30 a.m., leaving her and Coleman alone (118).

CB testified that on the morning of September 21, 2011, Coleman came into her bedroom, moved her bed "because he had his clothes in the closet," and put his leg over her (54:122-23). She said that while she pretended to sleep, Coleman was "acting like he was grabbing his clothes from a hanger," but that his body was "moving against" her body (54:124). CB said that Coleman's "private" was inside his pants but "making the fabric of the pants poke out," and that

she could feel his "private" part "between her upper thighs." (54:125-26). CB did not say anything to Coleman or anyone else about the incident that day (55:4).

CB testified that on the following day, again in early morning, Coleman entered her room, and again went on top of her to get the clothes out of the closet (55:6). She said that this time, however, he got in bed with her, and attempted to put his penis in her vagina (55:14-21). She also said that he and then licked her vagina (55:14-21). She said that he then said that he had to go (55:24).

CB testified that once Coleman had left her room, she locked herself in the other bedroom, and slipped a note under the door telling Coleman that she was going to tell her father that he had "raped" her (55:25). CB said that Coleman tried to talk to about it, but she refused to say anything to him (55:26).

After Coleman left the apartment, CB went to school but did not tell anyone about what had happened (55:27, 33-34). When she returned from school, she saw Coleman sitting on the porch waiting, so she continued walking past her house (55:29). Soon thereafter, she saw her father driving his car, at which point she stopped him, and told him that Coleman had sexually assaulted her.

CB's father, Floyd Miller, testified that upon hearing CB's allegations, he packed up all of Coleman's belongings, presumably evicting him from the house (55:67, 69). Miller said he discussed with CB whether to call the police or take her to the hospital, but he did not because CB did not want to do that, and he wondered whether she was "lying because I could never believe my cousin would do that, I could never ever believe that." (55:71).

Sarah Bergman also testified. She said that in the few weeks of seeing CB and Coleman interact, she came to think that Coleman was "too close" to CB (55:89). She also said that Coleman had allowed CB to use a phone at times when she was not allowed (55:89-90). Bergman also stated that upon hearing of CB's allegations, "I didn't understand, that is a really strong accusation and I am not inclined to go ahead with it, she's had problems with lying." (55:91). Like Miller, she decided to not call the police or take CB to the hospital that night (55:93).

Jenifer Handlen, the school social worker, testified at trial that on September 23 (the day after CB had told Miller and Berman of the allegations), CB told her that Coleman had sexually assaulted her (57:16). Handlen contacted the Oak Park Police Department, and Det. Ann Golombowski came to the school and interviewed CB (55:107-108). After the interview, CB was taken to the Child Protection Center, where she was examined by pediatric nurse practitioner Judy Walczak (57:33). Walczak also collected swabs from CB's body and gave them to police (57:35).

Det. Golombowski testified at trial that after interviewing CB, she went to the house and collected the sheets, blankets, and clothing CB had worn at the time of the alleged incidents (57:4-5). These items were sent to the Wisconsin Crime Lab for analysis (57:5). Debra Kaurala, the crime lab analyst testified that she conducted DNA tests on these items, along with swabs taken from the sexual assault examination of CB (57:42-43). Kaurala testified that she did not find any semen, or any male DNA on any of the items (57:43).

Coleman did not testify, and the defense rested at the conclusion of the State's evidence (57:65). Following

deliberations, the jury returned guilty verdicts as to both counts against Coleman.

Postconviction Motion

Following conviction, Coleman filed a postconviction motion claiming that his trial attorney was ineffective for a number of reasons (35). The claims relevant to this appeal were:

- That trial counsel was ineffective for failing to call Coleman to testify after promising the jury during opening statements that he would testify. (35:4-6).

- That trial counsel was ineffective in failing to present evidence inconsistent with CB's testimony. CB testified that on the evening after the first assault, she went to bed at 6:00 p.m. so she would not have to see Coleman. However, the jury did not hear evidence that she was watching TV with Coleman until about 8:15 p.m. (35:10).

- That trial counsel was ineffective in failing to present evidence that CB had told others that Coleman had ejaculated on the second assault, which would have made the fact that no DNA was found much more probative (35:11-12).

- That trial counsel was ineffective in telling the jury during *voir dire* and in opening statements, that Coleman had been convicted of a crime before, and that he had "done all kind of things in his past." (35:14-15).

On March 18, 2014, the court conducted a *Machner* hearing on Coleman's claims, Hon. Stephanie Rothstein

presiding. At the conclusion of the hearing, the court denied Coleman's motion on all grounds, finding that counsel's performance was neither deficient nor prejudicial (62:116-129) (Attached as Appendix B).

Additional facts will be set forth in the argument below.

ARGUMENT

I. Trial counsel was ineffective in promising to the jury that Coleman would testify, and then not keeping that promise.

A defendant establishes ineffective assistance of counsel when he shows that counsel's performance was deficient, and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). An attorney's performance is deficient when the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. To prove deficient performance, a defendant must show that specific acts or omissions of counsel were outside the "wide range of reasonable professional assistance." *Id.* at 690. Prejudice occurs if, without counsel's errors, there is a reasonable probability of a different outcome. *Id.* at 694. The prejudice standard is a "non-outcome determinative test." *State v. Pitsch*, 124 Wis. 2d 628, 641-2, 369 N.W.2d 711 (1985). If this Court finds multiple deficiencies in defense counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice. *State v. Thiel*, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305.

A. **Counsel's performance was deficient.**

1. Facts surrounding counsel's broken promise.

There was only one way the jury could have interpreted the opening statement of Coleman's attorney, Robert Taylor. Without qualification, Atty. Taylor told the jury the jury that his client would testify:

> We're going to show through our cross examination, Mr. Coleman will testify because he has to testify here from my point of view. It's my call to make as a defense attorney. We're going to testify and show through cross examination that the facts are not as Ms. Falk said and weaved this third grade story, telling this story.

(54:96).

Despite this strong statement, Coleman did not testify. Thereafter, in his closing argument to the jury, Atty. Taylor made no reference to his earlier statement that Coleman would testify, and never offered the jury any explanation for why Coleman did not testify (58:29-39).

There is no reasonable explanation for Atty. Taylor's opening statement that Coleman would testify. Atty. Taylor later testified at the postconviction hearing that Coleman and he "discussed whether or not he would testify throughout our conversations before trial and during trial." (62:14). He said that he just gave Coleman his "options," and that "Mr. Coleman never wanted to testify." (62:15). As to when the decision was made, Atty. Taylor testified:

> The only time he came – when the decision was made that he wasn't going testify was at the time when the Court asked him was he gonna testify. That's when the decision was made.

….

> But the decision to testify or not testify is Mr. Coleman's and always was and that's it. That decision was not made until the final moment even though he had some apprehension about testifying from the beginning.

(62:17-18).

The postconviction court adopted Atty. Taylor's testimony on this point (62:120-21).[1] The court found that Coleman "never made a firm decision" until the "very ninth hour when the judge asks." (62:118).

At the *Machner* hearing, Atty. Taylor was asked why he told the jury that Coleman would testify when Coleman had never said that he intended to testify (62:16). Atty. Taylor responded:

> You don't want to start the jury off by saying "My guy's not going to testify" or something like that. I wanted to try to give Mr. Coleman some sort of credibility in the face of these horrendous allegations. So we start off by saying: Oh, we're gonna testify. It's his right to testify and we've got something to say.
>
> ….

[1] At the postconviction hearing, Coleman disputed Atty. Taylor's statement that no early decision had been made on whether he would testify. At the hearing, Coleman testified that he was always under the impression that he *would* testify in his own behalf, thus making Atty. Taylor's opening statement consistent with that plan (62:73-73). However, Judge Rothstein found that Atty. Taylor was a "more credible witness" than Coleman on this point (62:120). In this appeal, Coleman is not challenging the court's credibility determination on this specific issue.

> When I stated in opening statements to the jury, I gave that as an opening statement. That's not the evidence. That's what I thought we would do. I just gave them a ballpark picture of what we planned to do because I didn't know what Mr. Coleman was going to do. That's ultimately his decision even though I stated it at the time it was mine.

(62:17-18).

Judge Rothstein accepted Atty. Taylor's rationale. The court stated:

> And for Attorney Taylor to address why he told the jury what he did, he testified that he said that to the jury because it was a strategic reason that he wanted to leave the door basically open and have that information come from the defense because he knew – we all know the state can't comment on it. But that way if the defendant decided to testify, it would not be a surprise to the jurors. If the defendant decided not to testify, Ms. Falk knows, Mr. Pray and Mr. Chandler knows,[2] that Judge Cimpl continued and repeatedly instructed the jury that the defendant has a right not to testify and remain silent.

(62:119-20).

This court should reject the rationale articulated by Atty. Taylor and adopted by the postconviction court. It makes little sense. Telling the jury that Coleman would testify could not have generated "some kind of credibility." Instead, it could only hurt the credibility of the entire defense when it failed to carry out its promise of presenting Coleman's testify.

[2] At the postconviction motion hearing, ADA Miriam Falk represented the State, Atty. Pray and law student Michael Chandler represented Coleman (62:1).

Although Atty. Taylor and the court deemed it a "strategic" decision to promise the jury that Coleman would testify, that should not end this Court's inquiry. The decision must still be reasonable. *See State v. Felton,* 110 Wis.2d 485, 503, 329 N.W.2d 161 (1983) (trial counsel's decisions must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied, and although courts should not second-guess a reasonable trial strategy, it may conclude that an attorney's performance was deficient if it was based on an "irrational trial tactic" or "based upon caprice rather than upon judgment.")

There is simply no reasonable strategic reason to promise the jury that the defendant will testify when it is not known whether that promise will be kept. Contrary to Atty. Taylor's stated rationale, announcing that Coleman would testify did not "open the door" to having that information coming in. Atty. Taylor could have reasonably told the jury during opening that Coleman "may or may not" testify, or simply not addressed the subject. Such a statement would not have "closed any doors," or prevented Coleman from testifying later. He also could have opted for not giving an opening statement until the close of the State's case. The only thing that must have been a "surprise" to the jury was the fact that Coleman did not testify.

2. Caselaw

While no Wisconsin cases have directly addressed this issue,[3] other courts have held that, absent an unforeseeable

[3] Two Wisconsin courts have addressed related issues. In *State v. Grayer*, 2011 WI App 114, 336 Wis. 2d 475, 801 N.W.2d 349, (unpublished), the Court of Appeals evaluated whether defense counsel was ineffective when he mistakenly told the jury during opening statements that a recorded conversation was not available. In fact, the recording was used at trial, leading to Grayer claiming on appeal that his

event at trial, defense counsel's broken promise that the defendant will testify can provide a valid basis for an ineffective assistance of counsel claim.

The Seventh Circuit has recognized that unfulfilled promises to present testimony from a criminal defendant are highly suspect under *Strickland*. *United States ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003). When the failure to fulfill the promise is not the result of unforeseeable events, the attorney's broken promise may cause harm, for "little is more damaging than to fail to produce important evidence that had been promised in an opening." *Id.* at 257 (citing *Anderson v. Butler,* 858 F.2d 16, 17 (1st Cir.1988)).

In Saesee v. McDonald, 725 F.3d 1045, 1049-50 (9th Cir. 2013) the Court explained:

> A juror's impression is fragile. It is shaped by his confidence in counsel's integrity. When counsel

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attorney's mistaken comment undermined the credibility of the defense. *Id.* at ¶11. The Court of Appeals concluded that Grayer's attorney had not promised any specific testimony that would be "strikingly significant," and that since Grayer admitted to making the prior statement, and did not contest its content, no substantive promise to the jury had been unfulfilled. *Id.* at ¶15. (Attached as Appendix D).

In *Moeck*, 2005 WI 57, 280 Wis. 2d 277; 695 N.W.2d 783, defense counsel told the jury what he expected Moeck to testify about during trial, but Moeck did not testify. *Id.* at ¶¶46-49. The circuit court granted the State's motion for a mistrial on the theory that Moeck had, in effect, gotten to testify without being subject to cross-examination. *Id.* at ¶¶53-60. The Supreme Court held that a curative instruction would have been sufficient to avoid prejudice to the State's case. Crucially, the Court did so in large part because "any prejudice to the State by defense counsel's opening statement would be outweighed by defense counsel's loss of credibility with the jury for his unsubstantiated opening statement." *Id.* at ¶78.

> promises a witness will testify, the juror expects to hear the testimony. If the promised witness never takes the stand, the juror is left to wonder why. The juror will naturally speculate why the witness backed out, and whether the absence of that witness leaves a gaping hole in the defense theory. Having waited vigilantly for the promised testimony, counting on it to verify the defense theory, the juror may resolve his confusion through negative inferences. In addition to doubting the defense theory, the juror may also doubt the credibility of counsel. By failing to present promised testimony, counsel has broken "a pact between counsel and jury," in which the juror promises to keep an open mind in return for the counsel's submission of proof. When counsel breaks that pact, he breaks also the jury's trust in the client. Thus, in some cases—particularly cases where the promised witness was key to the defense theory of the case and where the witness's absence goes unexplained—a counsel's broken promise to produce the witness may result in prejudice to the defendant.

Id. at 1049-50 (internal citations omitted) *See also Barrow*, 398 F.3d at 606; *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166-67 (3rd Cir. 1993) ("The rationale for holding such a failure to produce promised evidence ineffective is that when counsel primes the jury to hear a different version of the events from what he ultimately presents, one may infer that reasonable jurors would think the witnesses to which counsel referred in his opening statement were unwilling or unable to deliver the testimony he promised").

Of course, there are times when defense counsel knows that the defendant will testify, and in such circumstances, it may make sense to let the jury know that such testimony is expected. But when counsel is unsure, there is no reason to take the risk of announcing that he will. As the First Circuit has explained:

> The Commonwealth argues that a defendant's decision about whether to invoke the right to remain silent is a strategic choice, requiring a balancing of risks and benefits. Under ordinary circumstances, that is true. It is easy to imagine that, on the eve of trial, a thoughtful lawyer may remain unsure as to whether to call the defendant as a witness. If such uncertainty exists, however, it is an abecedarian principle that the lawyer must exercise some degree of circumspection. Had the petitioner's counsel temporized—he was under no obligation to make an opening statement at all, much less to open before the prosecution presented its case, and, even if he chose to open, he most assuredly did not have to commit to calling his client as a witness—this would be a different case.

Ouber v. Guarino, 293 F.3d 19, 28 (1st Cir. 2002)

In Coleman's case, Atty. Taylor's promise that Coleman would testify was unequivocal—"Mr. Coleman will testify." Worse, he told the jury that Coleman "*has* to testify," leaving the jury with an unmistakable impression that something had gone terribly awry when the defense failed to produce that testimony. At a bare minimum, counsel could have explained in his closing argument that there was no need for Coleman to testify given the weakness of the State's case, but he did not even do that. He simply ignored his earlier promise and statement that Coleman "has to testify," and allowed his client to absorb the resulting damage. *See Ouber*, at 28 (defense counsel was deficient when he made his opening statement at the "earliest possible time," and "did not hedge his bets, but, rather, acted as if he had no doubt about whether his client should testify).

By unilaterally making and then breaking his promise to the jury, counsel's performance dropped below the "wide range of reasonable professional assistance" demanded by the

Sixth Amendment, and constituted ineffective assistance of counsel.

B. Coleman was prejudiced by counsel's deficient performance.

The circuit court found that, even if trial counsel's performance was deficient, Coleman was not prejudiced (62:127). The court's decision both underestimates the damaging nature of counsel's broken promise, and overestimates the strength of the State's case against Coleman.

1. The harmfulness of the broken promise.

As shown above, damage is done to the credibility of the defense when counsel promises the jury evidence that is not produced. The damage is magnified when trial counsel promises, but does not deliver, the defendant's testimony. *Ouber*, 293 F.3d at 28. In Coleman's case, there were only two possible witnesses with direct knowledge as to what did or did not happen—CB and Coleman himself. To then not hear the other side of the story, after it had been promised—was much more significant than if a minor piece of evidence had been left out of the defense case. *See Hampton*, 347 F.3d at 258 (noting that "Hampton's unexplained failure to take the stand may well have conveyed to the jury the impression that in fact there was no alternate version of the events that took place").

In *Hampton,* the Seventh Circuit recognized the devastating toll that such unfulfilled promises can have on a jury's assessment of the defense:

> Where a lawyer has promised the jury that a criminal defendant will testify in his own defense, and then

> unreasonably breaks this promise by not calling the defendant to the stand, such an error is both objectively unreasonable and prejudicial to the defendant.

Further, the Court in *Ouber*, explained:

> When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made.

Ouber, 293 F.3d at 28.

Finally, the First Circuit found that such a broken promise was prejudicial as a matter of law, without the need for a case-by-case finding of prejudice:

> But even if this is not, in itself, a finding of prejudice, we cannot but conclude that to promise even a condensed recital of such powerful evidence, and then not produce it, could not be disregarded as harmless. We find it prejudicial as matter of law. There is, accordingly, no occasion to remand for the consideration of the district court, which otherwise would be the proper course.

Anderson, 858 F.2d at 19.

It might be contended that the impact of counsel's broken promise was blunted when the jury was instructed that "the defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner." (58:13). But this instruction did not adequately cure the problem. *See Ouber*, 203 F.3d at 35 ("The fact that the jury was advised not to draw a negative

inference from the petitioner's failure to testify is likewise irrelevant; the attorney's mistake was not in invoking the petitioner's right to remain silent, but in "the totality of the opening and the failure to follow through.")

Further damaging is the fact that, since Coleman's trial was relatively short, the jurors would surely have remembered Atty. Taylor's promise from his opening statement.[4] *See Anderson* 858 F.2d at 17 (finding it significant that defense counsel's promise in his opening statement was only the day before the jury deliberated).

Thus, the impact of an unfulfilled promise is significant, especially in circumstances as exist in Coleman's case.

2. The weakness of the State's case against Coleman.

The prejudicial effect of a broken promise is magnified by the weakness of the evidence the State presented against Coleman. The State's case largely depended on the testimony of CB, who reported that she was sexually assaulted on the previous two nights while she was "sleeping" in her bed. There were a number of weaknesses in the State's case, even as heard by the jury:

- There was no physical evidence showing that Coleman had molested CB. Judy Walczak, a pediatric nurse practitioner at the Child Protection Center testified that she conducted an examination on CB on the same day of the second alleged assault, and found no physical

[4] The opening statements of counsel were made near the end of the first day of trial, February 15, 2013 (54:86-97). All evidence was presented on February 15 and 16, and the defense rested near the end of the second day (57:65). The jury deliberated and returned verdicts on February 17 (58:58).

evidence related to a sexual assault (57:32-33). While she also testified that this did not mean that there was no sexual assault, this was a significant weakness in the State's case (57:35).

- Deb Kaurala, a DNA analyst from the Wisconsin State Laboratory testified that she examined a large number of items collected from the scene and CB The items from the house were collected on the same day that CB made her allegations (55:110, 57:4), and included oral, vaginal and rectal swabs and smears, external genitalia swabs, two pairs of underwear, a dress, tank top, shorts pants, and a bed sheet (57:42-43). Kaurala testified that she found no semen or any male DNA on any of the items (57:43).[5]

- Upon hearing of CB's allegations, CB's father, Floyd Miller, had grave uncertainties as to whether they were truthful. He stated, "I was, like, what? Because I couldn't believe it because this is my cousin, I would never in my life believed that, you know, I just couldn't believe it," (55:57) and wondered "is she lying because I could never believe my cousin would do that." (55:71) (55:57). He also testified at trial that he is "still not sure" what really happened (55:70). He also testified that CB would "sometimes be truthful and sometimes she's not, like any other child (55:78).

[5] As set forth later in this brief, Coleman argues that trial counsel was ineffective in failing to elicit testimony that CB claimed that Coleman ejaculated on the second occasion. The fact that no male semen or male DNA was found on CB's clothing or the sheets would have carried much greater significance if the jury had known that CB claimed that Coleman supposedly ejaculated in the bed on the same day the sheets and clothing were collected. See Point Heading IIIB.

- Miller's wife testified that when she heard of CB's allegations she thought, "I didn't understand, that is a really strong accusation and I am not inclined to go ahead with it, she's had problems with lying." (55:91).

- Upon hearing of the allegations, Miller (and his wife) did not take CB to the hospital or call police because CB did not want the police involved (55:71).

- In addition, in his postconviction motion, Coleman argued that trial counsel was ineffective in failing to present other evidence that would have undermined CB's credibility. (35:10-11). This includes evidence that CB had stayed up with Coleman until after 8:00 p.m. on the same night as the first allegation, contrary to her testimony that she had gone to bed at "probably" at 6:00 p.m. that night (55:5). See Point Heading IIIA.

Absent trial counsel's deficient performance, there is a reasonable probability of a different outcome. The jury's fragile impression of trial counsel and Coleman was damaged by the unfulfilled promise, making it more difficult to believe the defense. Counsel's failure was therefore prejudicial to Coleman's case, and he was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

II. Trial counsel was ineffective for telling the jury during *voir dire* and opening statements that Coleman had a prior criminal record.

At trial, the jury heard extremely negative information about Coleman from his own attorney. During *voir dire,* Atty. Taylor told the jury:

> There is going to be some evidence in this case that my client, *Mr. Coleman, has been convicted of a crime*

> *before*. Is there anybody here who feels because a person has been convicted of a crime in the past that some way conjures them from being a good citizen. Anybody feels that? Does your criminal past follow you the rest of your life and you're a bad person. No.

(54:65-66) (emphasis added). Then, during his opening statement, Atty. Taylor told the jury:

> Mr. Coleman by the way is a person that *spent time in prison.* Mr. Coleman is a man, 57 years old, that done all kind of things in his past. *So he's not an angel here*, but what we are trying to talk about here is what happened in the month of September, the day specifically of the 21st, and 22nd, 2011.

(54:94) (emphasis added).

Coleman did not testify at trial. He did not present any character witnesses, or put on any defense. The State did not present any evidence regarding Coleman's prior criminal record at trial. Therefore, there was no legitimate reason that the jury should have learned that Coleman had had prior criminal convictions, or brushes with the law.

At the postconviction hearing, Atty. Taylor was asked why he told the jury panel that there would be evidence that Coleman had been convicted of a crime. Atty. Taylor responded:

> A: To sort of take the thunder away from the state. It's going to come out at some point, some way or another, and I wanted to get it out there first.
>
> Q: Right. And I think you stated at the time as well that you wanted to remove any jurors that might have been biased to somebody who had been convicted of a crime.

> A: That too. The primary was to take the thunder away from the state.

(62:21-22).

Atty. Taylor was then asked why he told the jury that Coleman had spent time in prison during his opening statement. Atty. Taylor responded:

> For the same reasons. The same reasons. I wanted to get it out in the open. I didn't want the jury to hear it for the first time from the state that my client had been convicted of a crime. I didn't want them to hear for the first time from the state that my client had been to prison. I didn't want them to hear any of that negative stuff for the first time from the state. I wanted to say it to the jury myself. That way I could kind of clothe it in some sort of way that wouldn't be so harsh towards my client.

(62:22).

In its ruling, the circuit court accepted Atty. Taylor's reasoning, and added to it: The court stated:

> No. 3, the fact that Mr. Taylor told the jury in advance that the defendant had been convicted of a crime, actually asked that question during voir dire, it's a very valid question to ask during voir dire and does in fact serve to weed out, if you will, individuals who have prior preconceived notions about people who have been convicted of crimes, once or twice or perhaps more often in their lives.

There are a number of problems with trial counsel's explanation, and the court's analysis. First, it makes little sense that informing the prospective jurors of Coleman's criminal history is a valid way to "weed out" jurors who might be biased against criminals. The reasons are apparent:

- Questioning the panel to "weed out" biased jurors does not require informing them that the defendant has a criminal record. If such a question is somehow effective in accomplishing that goal—which is far from certain—it would be easy, and much less prejudicial, to simply ask prospective jurors whether they would hold a criminal record against *any* witness who might appear for the State or for the defense. Such a question would not inform the jury that the defendant has a criminal record.

- It makes no sense "get it out in the open" or to "take the thunder" away from the State by telling the jury that Coleman had been to prison when Atty. Taylor did not know whether Coleman would testify. As it turns out, Coleman did *not* testify, so it was completely unnecessary to inform the jurors of extremely negative information that would not have otherwise been disclosed. As to the possibility that other witnesses would "blurt" out such information, there are ways to prevent this by instructing all witnesses out of the jury's presence that they should not include anything about Coleman's criminal history in their testimony. If a witness violated such an order, there would be grounds for a mistrial motion, or appropriate curative jury instructions.

- Even if Coleman had testified, the jury would not have learned that he had spent time in *prison*. They would have only heard the number of Coleman's prior

convictions. Once given the correct number, that would have been the end of it. *See* Wis. Stats. § 906.09(1), *Voith v. Buser*, 83 Wis. 2d 540, 546, 266 N.W.2d 304 (1978) ("where accurate and responsive answers are given to the questions, 'Have you been convicted of a crime:" and "How many times,' the examiner is concluded and is not permitted to introduce proof of the nature of the conviction"). Thus, absent trial counsel's disclosure, jurors would not have heard that Coleman had served time in *prison*, which only served to inform them that his prior crimes were serious enough to require incarceration in a prison, as opposed to probation or jail.

- Even if Coleman had testified, the jury would not have learned that he had "done all kind of things in his past," or that "he's not an angel." These statements implied that Coleman had been involved in a large number of widely ranging bad acts.

Therefore, the court erred in finding that Atty. Taylor had a valid strategic reason for disclosing this damaging information to the jury.

Coleman was prejudiced by Atty. Taylor's disclosures. It is true that Atty. Taylor's comments about Coleman's history were not offered as evidence, and the jury was instructed that it was to decide the case based on the evidence (58:3, 8). However, if jurors are truly unaffected by such comments of the attorneys, there would be no limits on what attorneys could tell jurors during *voir dire*, opening statements, or closing argument, as long as they do not offer those convictions into evidence during the presentation of their case. This would directly contradict the rationale that animates Wis. Stat. § 906.09, which acknowledges the

inherently prejudicial nature of such evidence and requires the Court's close oversight of its admission into evidence.

It is well established that evidence of prior convictions is extremely prejudicial, and the more often a jury is reminded of one's prior convictions, the more likely it is that the jury will be negatively influenced by it. *See State v. Pitsch*, 124 Wis. 2d 628, 646, 369 N.W.2d 711 (1985) (counsel was ineffective in needlessly allowing the jury to hear of evidence of defendant's prior convictions). Indeed, it is widely known by defense attorneys that a primary reason that defendants choose to not testify is to avoid the possibility that the jury will hear that he or she has been convicted of a crime.

In such circumstances, Coleman's trial attorney's performance was deficient, resulting in prejudice.

III. Trial counsel was ineffective in failing to present evidence that would have been favorable to Coleman.

A. Counsel failed to impeach CB's testimony that she went to bed at 6:00 on the night of the first alleged assault.

At trial, CB testified that she usually went to bed around 7:30 or 8:00 o'clock (55:5). However, she testified that on the evening following the first alleged assault, she went to bed earlier ("probably been 6 o'clock"). (55:5). CB said that she went to bed early because Coleman "was in the house and I would have to look at him." (55:5).

Trial counsel could have presented evidence contradicting CB's testimony. At the postconviction hearing, Coleman introduced a police report of Det. Golombowski's

interview with CB's father, Floyd Miller (67:Exh. 1). The report states:

> Floyd states that on Wednesday night he was already in bed and decided he wanted to get something to eat. He thinks it was about 8:15 p.m. or so when he came downstairs. He found Rick and [CB] sitting on the couch together. [CB] was texting on Floyd's phone and Floyd got upset that Rick was again letting her use the phone, since she was grounded from it and it was already after 8:00 p.m. She was supposed to be in her room by that time. Floyd sent [CB] to bed and took his phone away from Rick.

(67:Exh. 1 at p. 2).

Attorney Taylor did not question Det. Golombowski, Floyd Miller, or CB about this obvious discrepancy from CB's testimony. At the *Machner* hearing, Atty. Taylor testified that he read the police report in preparation for trial, and was aware of Miller's statement. However, he testified that he did not ask Miller about it, stating:

> It's a minor detail. It's a much minor detail to me. And it's like -- if I can finish my answer. It's like even the judge in a sentencing transcript, there were inconsistencies sure but they didn't amount to anything. I mean they weren't like inconsistencies you want to find in this kind of case. We can beat every little inconsistency all we want to. But my point of view as defense attorney at that time, some of these things just would have drawn out something that I wanted to get away from.
>
> ….

> I don't agree that would have helped us, no. I don't agree with that at all. I mean in these sexual assault cases of children, it's not unusual for the children to continue to have some sort of intimate or close relationship with these people after allegations have been had in my experience, okay. So to nitpick at something like that before a jury of 12 is not something I want to do. A big issue, yeah. But something small to keep going at it and attacking the victim as a liar, you gotta be very careful about that. Just very careful.

(62:31-33).

The circuit court found that Atty. Taylor's explanation was satisfactory. The court stated:

> With regard to No. 2, the reasons for not calling the witnesses or impeaching a victim or the father or going into the DNA issue, Mr. Taylor again gave very particular strategic reasons for making these decisions. He explained why he deliberately stayed away from attacking the victim's credibility.
>
> …
>
> [T]he fact that this victim being with the defendant or in the defendant's company alone on the night following a sexual assault is not inconsistent with sexual assault cases, especially involving children in the same household, that these kind of situations which happen over a period of time do involve the adult abuser spending time alone and quote unquote "grooming the victim" for further sexual assaults and attempts to make the victim feel comfortable with the abuser.
>
> So frankly, Mr. Taylor opening the door to the victim being alone with the defendant the night after the sexual assault could have very likely had the exact

> opposite affect which the defense now asserts it would have had. And with regard to the time that anybody went to bed or didn't go to bed, I don't find that to be particularly persuasive or important given the defense in this case.
>
> (62:121-22).

The circuit court is wrong. Atty. Taylor's reasons for not impeaching CB on this issue do not amount to a reasonable strategy decision. This case revolved around the credibility of CB, and it was therefore critical to demonstrate that her trial testimony was contradicted by Miller's statements to police. In giving credence to Atty. Taylor's "strategic" decision to not attack CB's credibility, the court ignored the fact that attacking CB's credibility was the only defense Coleman had. Without that tool, there was no real defense. That does not mean that defense counsel had to "beat up" on CB during cross examination. Instead, it could have been done here by simply asking Miller about his statement to police, and then arguing to the jury that CB's testimony did not add up. This would have been especially strong evidence because Miller was CB's father and was a witness for the State.

Credibility is an important factor that the jury must consider in determining whether a defendant is guilty beyond a reasonable doubt, particularly in sexual assault cases where the only evidence is the victim's allegation. *See State v. Bell*, 231 Wis. 2d 237, 604 N.W.2d 304 (Ct. App. 1999) ("In a sexual assault case such as this, the credibility of the witnesses is critical. Because only [the victim and defendant] were present during the assault, a jury verdict would hinge on a credibility contest between the accused and the victim."), citing *State v. O'Brien*, 223 Wis. 2d 303, 326, 588 N.W.2d 8, 18 (1999) (In most sexual assault cases, the jury's verdict is a

matter of which person the jury finds more credible-the victim or the defendant.).

Here, there were two important reasons for introducing evidence that CB stayed up with Coleman on the night of the first alleged assault. First, Miller's account would have shown that C.B. *was* willing to be alone with Coleman on that night. This would have effectively contradicted CB's testimony that she went to bed early because Coleman "was in the house and I would have to look at him." (55:5). Second, Miller's account would have shown that she was a poor historian or that her testimony was not as trustworthy as otherwise believed.

Atty. Taylor's performance was deficient in failing to present evidence that CB stayed up with Coleman on the night following the first alleged assault. Counsel's deficient performance prejudiced Coleman because of the importance of impeaching the key State's witness at trial, and because of the overall weakness of the State's case. See Point Heading IB.

B. Trial counsel was ineffective in failing to present evidence that would have dramatically increased the probative value of the DNA analysis.

At trial, Det. Golombowski testified that she went to CB's house after CB reported that she had been assaulted (57:3).[6] Det. Golombowski collected the bed sheets, blankets, CB's underwear, and the clothing CB wore both

[6] According to CB, the first assault occurred on the morning of September 21, and the second assault occurred on the morning of September 22. (55:4). CB reported the assault to her father and Sarah Bergman on September 22, but authorities did not learn of the allegations until September 23, when C.B. told her school social worker, Jennifer Handlen (57:16, 18-21).

mornings of the alleged incidents (57:4-5). These items were then sent to the crime lab for DNA analysis (57:5). Debra Kaurala, the crime lab analyst, testified at trial that:

> I examined a buccal swab standard from [CB], oral swabs, oral smear, vaginal swabs, vaginal smear, rectal swabs, rectal smear, external genitalia swabs, right thigh swabs, two pairs of underwear, a dress tank top, shorts pants and a bed sheet.

(57:42-43). Kurala then testified that she did not detect any semen or male DNA on any of the evidentiary items (57:43).

The fact that none of Coleman's DNA was found on any of these items was of limited use to the defense. In his closing argument, Atty. Taylor made brief reference to the lack of DNA evidence (58:35, 39). The State then effectively minimized the value of the crime lab report by telling the jury on rebuttal:

> The defense suggests to you that there is supposed to be DNA, really? The first day in the sexual contact case Mr. Coleman was wearing gray sweatpants, so which DNA would that be? *And where is the evidence that he ejaculated so we could find his semen?*

(58:42) (emphasis added).

Actually, although the jury heard nothing of it, CB *did* tell three others that a wet substance was left on her leg during the second assault. Each of these was noted in Det. Golombowski's police reports of interviews with CB, Social Worker Handlen, and Sarah Bergman:

- CB told Det. Golombowski: "he was grunting while doing this and then she felt something sticky on her thigh." (67:Exh. 2 at p. 5).

- Sarah Bergman told Det. Golombowski: "[CB] also told her that Rick had rubbed his penis against her vagina until he came on her leg." (67:Exh. 3 at p. 1).

- Det. Golombowski's interview with Jennifer Handlen (school social worker) stated: "[CB] told HANDLEN she could feel his thing on her body and felt a wet sticky substance on the back of her right thigh at some point." (67:Exh. 4 at p. 3).

Atty. Taylor testified at the postconviction hearing that he did not bring this evidence out at trial because:

> As an attorney for Mr. Coleman, the state had no DNA to substantiate any allegations of that sort. I see no reason to open the door on it for one thing. No. 2, I didn't want to talk about any sticky, wet substance on a 13-year-old girl before the jury that's already heard it.

(63:39) Later, on examination by the State, Atty. Taylor testified:

> I did not want to question her anything at all about any wet, sticky substance. You never know what a young person is going to say and it was bad enough she has to say those words before the jury and as a young girl there.

(62:46).

The circuit court concluded that:

> The jury heard that there was no evidence to support that there was a sexual assault. And regardless of whether the victim said there was ejaculate or not, let's say that the victim's statement that there was ejaculate came out in front of the jury. Let's imagine that there was. We would still have a situation where the DNA expert found no ejaculate. How would that change what the jury had to consider? It wouldn't except to perhaps impeach the victim on a point that a reasonable argument could be made she doesn't have any knowledge of given her age and lack of experience, or maybe she did, which would make her lie even bigger.
>
> So, you know, it doesn't change the fact that there wasn't anything found and there was cross-examination. And if the defense was to be believed, there wouldn't have been any ejaculate found regardless. And I understand that that further impunes [sic] the credibility of the victim. But Mr. Taylor did state some very valid reasons for not wanting to go down that road too aggressively.

(62:123-24).

The circuit court's analysis is flawed. While the jury knew that Coleman's DNA was not found on any items, this was of limited significant, as the prosecutor emphasized during her closing argument ("And where is the evidence that he ejaculated so we could find his semen?") (58:42)

The significance of the no-DNA finding becomes dramatically more probative with knowledge that CB described a wet substance on her leg. It is hard to image that, if Coleman had ejaculated, there would be no DNA found anywhere on the clothing or sheets. This is true even though CB stated that the wet substance was on her leg. Of course,

anything on the leg would have been washed off. But surely the substance would have touched the clothing or sheets, and then been identified by the crime lab analyst. Therefore, the fact that there was no DNA found should have been of great significance.

Atty. Taylor's stated reasons for not raising this issue are inadequate. His statement that he didn't want to "talk about any stick, wet substance on a 13-year old girl" does not provide a reasonable strategy. If the crime lab had found semen, it is understandable why the defense would not want to highlight that fact. But since the crime lab did *not* find semen or male DNA, there is no legitimate reason for not bringing that out. Further, CB's knowledge about ejaculation might cause concern for the defense in a much younger child, but CB was 13, and the State would not have a sound argument that the only way CB knew about such matters was because of the assault.

In light of CB's allegation that Coleman ejaculated on her leg, there is a reasonable probability that the verdict would have been different.

IV. The multiple deficiencies of counsel establishes cumulative prejudice.

If this Court finds multiple deficiencies in defense counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice. *State v. Thiel*, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. Here, Coleman's attorney was deficient in:

- Atty. Taylor was deficient in promising to the jury that Coleman would testify, and then reneging on that promise without explanation.

- Atty. Taylor was deficient in needlessly telling the jury that Coleman had been in prison, that he had "done all kinds of things in his past" and that "he's not an angel."

- Atty. Taylor was deficient in failing to impeach CB with evidence that she had not gone to bed at 6:00 pm on the night of the first assault, but instead stayed up with Coleman until much later.

- Atty. Taylor was deficient in failing to introduce evidence that CB claimed Coleman ejaculated, given the crime lab's finding that no semen was found on the bed sheets or clothing.

Each of these deficiencies is prejudicial, especially given the fact that the case against Coleman was far from overwhelming, as argued in Point Heading IB2. However, even if any particular deficiency is not sufficient to establish prejudice, the combined deficiencies certainly establish prejudice. The circuit court erred in denying the postconviction motion, and Coleman is entitled to a new trial.

CONCLUSION

For the above reasons, Coleman is entitled to a new trial.

Respectfully submitted this ____ day of _____, 2014.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 8,611 words.

_____

John A. Pray

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

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CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve.

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John A. Pray

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