COURT OF APPEALS OF WISCONSIN

DISTRICT I
Appeal No. 2013AP190 - CR

STATE OF WISCONSIN,

Plaintiff - Respondent,

v.

JAMES HOWARD,

Defendant - Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
AND THE DENIAL OF A POSTCONVICTION MOTION IN THE
CIRCUIT COURT OF MILWAUKEE COUNTY
L.C. 2009CF1245
JEAN A. DIMOTTO, JUDGE.

APPELLANT'S BRIEF and APPENDIX

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ISSUES PRESENTED FOR REVIEW

This court is asked to review whether the circuit court erroneously exercised discretion denying Howard a hearing on two postconviction claims of ineffective assistance of trial counsel, and from an order after a hearing denying Howard's remaining claim alleging ineffective assistance of counsel for the failure to file a pretrial motion to suppress a search warrant. Thus, Howard seeks reversal of a jury verdict convicting him of two counts relating to allegations that he had sexual contact, and non-consent sexual contact with an inmate of the Milwaukee County Jail, on March 7, 2009. The Judgment of Conviction and the orders denying Howard's postconviction motion were entered in the circuit court for Milwaukee County.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant would welcome the opportunity for Oral Argument. Publication of this case would clearly advance and clarify the issues presented herein concerning the important 4th Amendment issues raised herein.

STATEMENT OF THE CASE

A Criminal Complaint (R2; App. 101), was filed on March 12, 2009. An Information (R5; App 104), was filed on March 19, 2009, and an Amended Information was filed on September 14, 2010. Howard was charged in Count 1 with Second Degree Sexual Assault (Inmate by Correctional Officer), a Class C Felony, in violation of WIS. STAT. § 940.225(2)(h), and in Count 2 with Third Degree Sexual Assault, a Class G Felony, in violation of WIS. STAT. § 940.225(3); both counts relating to allegations of sexual contact with Shanika T, on March 7, 2009, in the Milwaukee County Jail.

Howard was charged in Count 3 with Second Degree Sexual Assault (Inmate by Correctional Officer), a Class C Felony, in violation of WIS. STAT. § 940.225(2)(h), and in Count 4 with Third Degree Sexual Assault, a Class G Felony, in violation of WIS. STAT. § 940.225(3); both counts relating to allegations of sexual contact with Marletha R., on March 7, 2009, in the Milwaukee County Jail.

Howard filed no pretrial motions, and a jury trial commenced on September 14, 2009, with the return of verdicts on September 17, 2009. R62-R68. Howard was found not guilty of Counts 1 and 2, and guilty of Counts 3 and 4. Prior to sentencing, Howard's trial counsel filed a Motion to Suppress Physical Evidence, R16, which was denied on April 7, 2011, after a additional briefing and a motion hearing. R69. That order is not the subject of this appeal.

Sentencing occurred on May 17, 2011. Howard was sentenced to prison for a total of 5 years, 8 months on Count 3, with a confinement period of 4 years and 6 months. On Count 4 Howard was sentenced to prison for a total of 5 years, 8 months, with a confinement period of 4 years and 6 months. The sentences were ordered concurrent to each other and consecutive to any other sentence. The period of Extended Supervision was 14 months. See R22, R24-26; App 106-108. Howard, still represented by trial counsel, filed his WIS. STAT. § 809.30 Rule, postconviction motion on January 16, 2012, R34. The state filed a response, R36, however when the appellant's wife read on CCAP that Howard's trial/postconviction counsel had notified the court that no reply brief was to be filed, Howard moved the court to substitute new counsel by way of a letter from the undersigned counsel, filed March 21, 2012. R40.

On July 23, 2012, Howard, with new counsel, filed his Amended Postconviction Motion For New Trial, R47-48, alleging that Howard, despite acquittal on counts 1 and 2, had received ineffective assistance of counsel concerning the guilty verdicts

returned in Counts 3 and 4. After the state filed a response, R50, and Howard filed a Reply, R51, the postconviction court issued a Decision and Order, R52; App 110, partially denying the motion for postconviction relief, and ordering a hearing on Howard's claim that trial counsel was ineffective in failing to file a motion to suppress a search warrant for his penile swabs.

After Howard filed a Motion in Limine concerning the proposed hearing procedures, R55, and the state filed a response, R56, a motion hearing was held on January 10, 2013, R71, wherein 3 witnesses testified for the state, and 4 exhibits were admitted, in support of the state's effort to meet its burden of proof in attempting to reconstruct a missing search warrant affidavit. In denying Howard's remaining postconviction claims, the court found that the state had successfully reconstructed the missing search warrant affidavit, and therefore Howard was not prejudiced by his trial counsel's failure to file a suppression motion concerning the penile swab search warrant. R71:62-69; App 117, 121. Howard filed a timely Notice of Appeal, R60. Therefore, this is a direct appeal from a Judgment of Conviction, and denial of a §809.30 postconviction motion filed in the Circuit Court of Milwaukee County.

STATEMENT OF FACTS

Howard was accused of sexually assaulting two female inmates of the Milwaukee County Jail on March 7, 2009. At the time Howard was a corrections officer working in the pods. R2, App 101. After the two women complained that Howard had forced them into sexual favors he was arrested, interviewed, and then taken to the Sexual Assault Treatment Center (hereinafter: SATC) for forensic processing. Somewhere in that time period (all on March 7, 2009) detectives obtained a warrant to search Howard's residence and collect, among other items, clothing believed worn by Howard at the time of the alleged assaults. This warrant, signed on March 7, 2009, at 10:46 pm, by the Hon. Thomas P. Donegan, at his residence, is not challenged on appeal.

What is challenged in this appeal is whether detectives possessed a valid search warrant for Howard's external penile swabs, as more fully detailed below. What is further challenged is whether the penile swab warrant (it is often referred to in the proceedings as "the Santiago warrant"), was supported by a valid Affidavit. The penile swab warrant was never filed, and a copy of the signed and notarized Affidavit in support of the penile swab warrant has never been located. It is (at least now) acknowledged by the state that the penile swab warrant does not authorize the taking of buccal swabs, although until the filing of the appellant's Amended Postconviction Motion, R47, the state had invariably asserted that the penile swab warrant also authorized the taking of buccal swabs. It is undisputed, and was found by the postconviction court, that no buccal swab warrant was ever sought or prepared.

The significance of the challenged warrants to the guilty verdicts in counts 3 and 4 is clear. The state, at trial, called John McCormack, a DNA analyst with the Wisconsin State Crime Lab. R67:3. Throughout his testimony he referred to buccal swabs, and

penile swabs obtained from Howard. R67:3-85, *passim.* McCormack was able to identify Howard as the main contributor to the penile and the buccal developed DNA profiles. R67:34-35. That seems obvious, but the state thought it highly significant. See R67:35-38. The buccal swab DNA profile was necessary for McCormack to testify that the Y-STR profile developed from sperm cells found on scraps of toilet paper identified as coming from Cell 39, Pod 6-D, Marletha R.'s cell, was consistent with the Y-STR profile of James Howard. R67:50-53.

On September 17, 2010, a jury returned a verdict of not guilty on two counts of sexual assault (Counts 1 and 2 of the Information) based on allegations made by Shanika T., whose trial testimony, given September 14, 2010, can be found at R63:83-144. The jury found Mr. Howard guilty of two counts of sexual assault (Counts 3 and 4 of the Information) based on allegations made by Marletha R., whose trial testimony, given September 15, 2010, can be found at R64:3-96. Howard makes one claim concerning the testimony and rulings made during the trial; that trial counsel was ineffective in failing to object to testimony, by a nurse that examined Marletha R., that violated the rule announced in ***State v. Haseltine,*** 120 Wis.2d 92 (Ct. App. 1984), as more fully detailed below.

Because what happened after the verdict spawned all the remaining issues, the procedural events are more fully detailed. Howard filed no pre-trial motions seeking suppression of physical evidence. But on February 15, 2011, several months after the jury's September 17, 2010, verdict Howard, with the same counsel that represented him at trial, filed a self proclaimed "strange" Motion to Suppress Physical Evidence, alleging that all evidence obtained during a search of the defendant's person based on a search warrant issued on March 7, 2009, which authorized the taking of buccal swabs, should be suppressed. See R16.

In response to inquires by Attorney Boyle requesting a copy of the buccal swab warrant, the state explained that a "copy of the search warrant that authorized the collection of buccal swabs from Mr. Howard," could not be located. Mr. Tiffin then stated, at R48:7; App 109:

> However, in looking at the exhibit list, exhibit 20 is described as a search warrant and exhibit 21 is described as a search warrant return. I believe, but cannot be certain without looking at them, that exhibit 20 is the search warrant that authorized the collection of buccal swabs from Mr. Howard and exhibit 21 is the search warrant return (although it appears, based upon a very brief review by Det. Rosenstein, that the return was not filed in the clerk's office).

In the State's Response to Howard's motion, R17:1, filed March 3, 2011, the state asserted:

> As the court is aware, having heard the trial, a detective from the Milwaukee County Sheriff's Department obtained buccal swabs from Mr. Howard pursuant to a valid search warrant. The buccal swabs were the source of Mr. Howard's DNA and DNA evidence was presented at trial. The State has not been able to find any record that the Sheriff's Department filed a return of the search warrant.

In this filing, some 18 months after the trial, as with the letter to trial counsel, the state continued to assert, falsely, that buccal swabs were obtained pursuant to a valid search warrant. At the April 7, 2011, hearing, trial counsel asserted that she had been informed by Mr. Tiffin that, "he contacted the sheriff's department and they have no such authenticated copy or no such search warrant on file anywhere as a copy." R69:5. The court denied the motion. R69:5-6. The Court then set sentencing for May 17, 2011.

On July 23, 2012, Howard filed an Amended Postconviction Motion For New Trial, R47, with an attached supporting Affidavit,

R48. The amended motion noted that it was the motion alleging ineffective assistance of trial counsel forecast by the state after Howard's trial counsel filed her untimely Motion to Suppress. See R16, R17:2. Howard alleged that trial counsel was ineffective in failing to file a pretrial motion to suppress evidence obtained from the buccal swabs, because, as detailed at R47:8-10, there was never any warrant ordering the seizure and search of Howard's bodily tissue - by way of obtaining buccal swabs. Howard noted that he had found a search warrant filed in the office of the clerk of circuit court, together with an Affidavit and Return, authorizing the search of Mr. Howard's residence and collection of clothing and underwear, See App 115, but with no mention of buccal or penile swabs. See R47:8, citing to Milwaukee County Circuit Court file 2009SW000333, found at R48:6.

Howard argued the collection of buccal swabs was without benefit of a search warrant, and it was ineffective assistance of trial counsel to fail to understand that the penile swab warrant did not authorize the collection of buccal swabs, and thus the collection of buccal swabs was a forbidden warrantless search requiring suppression of the evidence - Howard's DNA profile - that was crucial to the state's case and without which it was highly unlikely the state would have met its burden of proof in counts 3 and 4, relating to Marletha R. R47:11.

Howard's second argument was that trial counsel's performance was deficient and prejudicial because she failed to move to suppress the seizure of Howard's underwear and penile swabs, because the state had failed to file the warrant (not just the return), and had failed to ever provide an affidavit in support of the warrant, and thus there was no way for the state to support the conclusion that the warrant met standards of reasonableness or that it was supported by probable cause. R47:13.

Howard's third claim was that trial counsel was ineffective in failing to object to inadmissible and highly prejudicial trial testimony from Karen Hogan, who testified concerning the injuries she observed on Ms. R. R47:15-16. Direct examination of Ms. Hogan was a walk-through of her report, until the prosecutor, at R65:68-69, asked:

> Q. You had an adult woman presenting who had said a man had forced penis-to-vagina sexual intercourse, correct?
> A. Yes.
> Q. You see no injuries, correct?
> A. I see - -
> Q. Other than the posterior fourchette, the one that is drawn?
> A. Yes, that is correct.
> **Q. Is the absence of more injury a reason to disbelieve her story?**
> A. No.

The state's response, R50, with exhibits, acknowledged that the warrant authorizing the collection of "underwear and penile swabs" from Mr. Howard, "did not authorize the collection of buccal swabs," and that, "there is no other warrant that authorized the collection of buccal swabs from the defendant." R50:2. In what seemed to be an unusually candid admission, the state conceded, at R50:2, n.2, that,

> In the State's response to that motion [R16], the State incorrectly wrote that "a detective from the Milwaukee County Sheriff's Department obtained buccal swabs from Mr. Howard pursuant to a valid search warrant." It was not until this [R47] postconviction motion was received that the State noticed that the search warrant did not authorize the collection of buccal swabs from the defendant."

In response to Howard's claim that trial counsel was ineffective in failing to move to suppress the penile swab warrant, the state supplied, "an unsigned copy of Det. Santiago's affidavit in

support of the search warrant." R50:5, Exhibit D. Nonetheless, the state acknowledged that had trial counsel brought a suppression motion concerning the penile swab warrant, "it would not have been able to locate the original affidavit or a signed copy thereof." R50:6.

Howard filed a Reply, R51, asserting that the state should be judicially estopped from now arguing a position thoroughly inconsistent with that taken in all earlier proceedings - the state had always asserted that it had obtained a buccal swab warrant on or about March 7, 2009, indeed the state had always asserted that one warrant authorized buccal swab and external penile swab collection. Howard argued this false assertion amounted to an intentional manipulation of the judicial system. R51:2. The state was now arguing that an actual warrant was unnecessary! Moreover, Howard argued that *inevitable discovery* would not aid the state because the state had never sought or obtained a buccal swab warrant. R51:3.

On September 17, 2012, R52; App 110, the court issued its Decision and Order Partially Denying Motion For Postconviction Relief For New Trial and Order For Evidentiary Hearing on Claim Two. The court found, "it is undisputed that a search warrant for the taking of buccal swabs from the defendant does not exist. R52:2; App. 111. The court further noted that, "it is undisputed that a search warrant for the taking of penile swabs is not supported by a signed affidavit from the detective who sought the search warrant because no one can locate one." Id.

Despite these findings, the court found that the state's lack of any warrant would not have necessitated suppression because, "even if a motion to suppress were granted, the State would simply have filed a motion asking the court to order the defendant to provide buccal swabs." Id. Thus the court denied Howard's motion

for an evidentiary hearing and a new trial on that basis. Id. The court further found that the state had not intentionally manipulated the system, citing to ***State v. Petty,*** 201 Wis.2d 337 (1996), and thus was not estopped from asserting the admittedly inconsistent positions of first claiming (falsely) to have a buccal swab search warrant and then claiming the non-existent warrant was unnecessary. Id.

The court found that the state's loss (if loss it was) of a signed affidavit to support the warrant for the taking of the external penile swabs was "more problematic" and therefore ordered a hearing to permit the state to reconstruct the existence and contents of the unsigned affidavit before determining if trial counsel was ineffective in not challenging the warrant. Id.

As to Howard's claim that Nurse Hogan's testimony violated the rule announced in ***State v. Haseltine,*** 120 Wis.2d 92 (Ct. App. 1984), the court found that the testimony was admissible, because the testimony objected to (in postconviction proceedings) was followed by a medical explanation of why it was not necessarily required to disbelieve the victim. R52:3; App. 112. The court's citation to the testimony, in part, and found in its entirety at R65:68-69; see also App. 112, was:

> Q. Why not?
> A. Because the vaginal area, a woman's genital areas, especially the vaginal area is very elastic. I kind of compare it to like a balloon.

After the court's September 17, 2012, Order scheduling a hearing, R52, Howard filed a Motion in Limine, R55, seeking an Order limiting or prohibiting the testimony of Judge Donegan, and limiting the testimony of Detective Santiago. The Motion further asserted that because the state's witnesses had no recollection of the original search warrant process, the state could not adequately

reconstruct the record of the search warrant process, and Mr. Howard's right to due process and his right to a meaningful appeal would be unfairly compromised by the procedure proposed by the state. R55:1.

The state's plan for the 'reconstruction' hearing, Howard asserted, was to introduce a copy of the signed search warrant (already of record as Exhibit A to the state's response to Howard's amended motion, see R50); and to introduce, through Detective Santiago, Exhibit D of the state's response and thereby claim that it was a true copy (although lacking a signature) of the affidavit prepared on March 7, 2009 and presented to Judge Donegan. Howard complained that the state had failed to so much as proffer an affidavit from Det. Santiago asserting that the unsigned affidavit was identical to one presented to Judge Donegan, or that indeed one was presented to Judge Donegan. R55:2-4. Howard argued that pursuant to ***State v. Raflik,*** 2001 WI 129, the delay in reconstruction was per se unreasonable, therefore the court should find that Howard's motion to suppress must be granted. Howard asserted that the introduction exemplar affidavits

Howard also attached to R55 a copy of a report dated October 2, 2012, prepared by Detective Todd A. Rosenstein, detailing his interview with Judge Thomas Donegan. Det. Rosenstein asserted that Judge Donegan, when shown a copy of the penile swab search warrant, "confirmed it was indeed his signature on the search warrant." R55:9. Judge Donegan also stated to the detective that he had no specific recollection of signing the document back on March 7, 2009. The detective asked Judge Donegan if the judge would have noticed that the affidavit was not signed and notarized, and indicated the judge said, "I'm sure I would have." Judge Donegan stated he would not have signed the warrant if the affidavit was not signed. Id. Howard argued, as he does herein, that the purpose of a reconstruction hearing would be thwarted by permitting testimony

of "usual and customary" practices, and that by permitting the issuing judge to contribute to the record after the probable cause determination was made (assuming that it was, which is doubtful) violates the holding in ***Glodowski v. State,*** 196 Wis 265 (1928), which remains good law.

The state's Response to the Motion in Limine, R56, asked that the hearing proceed unimpeded by Howard's arguments. The state asserted that (as he was employed in March 2009) Det. Santiago would testify that he prepared an affidavit in support of the warrant to obtain underwear and penile swabs; that he swore to and signed the affidavit, and (for the first time during the pendency of the case it would be revealed) that Det. Santiago would testify that he along with Det. Rosenstein met with Judge Donegan, presented Judge Donegan with the affidavit and warrant, and saw Judge Donegan sign the warrant. The state conceded that Judge Donegan, consistent with the report (R55:9) would testify that he had no 'specific' recollection of seeing the search warrant affidavit, or signing the warrant, or meeting with Det. Rosenstein and Det. Santiago. The state maintained that Judge Donegan would testify "about his habit" with respect to reviewing affidavits before signing warrants. R56:2. Detective Rosenstein would testify that he, with Detective Santiago, met with Judge Donegan, who reviewed two affidavits and signed, after review, two warrants. R56:2-3.

Thus, prior to the hearing that was eventually held on January 10, 2013, it was established that no search warrant to obtain Howard's buccal swabs existed or had ever existed, nonetheless the state had maintained throughout the case (at least until Howard's amended postconviction motion was filed) that the authority to obtain buccal swabs was stated on the penile swab warrant - a warrant that was never filed and was not supported by a signed affidavit. The only warrant that was filed authorized the search of Howard's residence and collection of any evidence located at the

residence - and nothing more. It was also established that Howard's trial counsel was unaware (although we don't know why) the penile swab warrant did not authorize collection of buccal swabs; as late in the case as the filing of the (procedurally challenged) post-verdict (pre-sentencing) Motion to Suppress Physical Evidence (R16), trial counsel believed that a search warrant, "was drafted for his penile and buccal swabs." R16:1-2. It is logical (although we don't have her testimony before us) that trial counsel, because she did not raise the buccal swab warrant issue in the Motion for Postconviction Relief (R34) filed on January 16, 2012, to assert she did not even then recognize the deficiency in the warrant procedures.

The hearing on January 10, 2013, see R71, began with a challenge by Howard to the procedure. Howard asserted the hearing should proceed according to the rules governing reconstruction hearings, however the state disagreed, asserting that it did not recreate an affidavit but had found the original (?) unsigned Affidavit "in the Sheriff's Department's files." R71:5. In response Howard argued that the proposed testimony of Judge Donegan as to his usual practices could not *per se* overcome his lack of any recollection of the events of March 7, 2009; that the state was intending to hold a suppression hearing too removed in time from the events to comply with ***Raflik.*** The court decided to hear the testimony before ruling on Howard's motion in limine. R71:7.

Fernando Santiago testified that on March 7, 2009, he prepared a search warrant affidavit and warrant for the collection of Howard's penile swabs, that he signed the affidavit in the presence of a Sheriff's Department notary, and that he presented both documents to Judge Thomas Donegan, at the Judge's residence, and that he was accompanied by Detective Rosenstein. Santiago stated that he has no idea what became of the signed affidavit. R71:9-15.

Officer Santiago could not explain, other than to say he used a

different warrant format, why the penile swab warrant (the one never filed) claimed to have been signed by Judge Donegan, had no file stamp, and no time indicating when it was signed. R71:25-27. On re-direct, the state asked Santiago if he typed up Exhibit 2, the unsigned affidavit, in response to the post-conviction motion filed by Mr. Howard, and he said, "No." He was asked if he located the unsigned affidavit, and he said, "No." He said he believed Exhibit 2, "the body of it" was the affidavit presented to Judge Donegan. R71:27-28.

Detective Rosenstein testified that he remembered going with Detective Santiago to Judge Donegan's residence, and observing Judge Donegan review the affidavits and the warrants and sign the warrants. R71-32-33. Rosenstein testified that he made extensive efforts (looked in a lot of places) for the signed penile swab affidavit but did not find it, that he had no idea what happened to it. R71:35. He testified he was able to retrieve the penile swab warrant from the Sexual Assault Treatment Center. R71-36. Detective Santiago forwarded to Detective Rosenstein an email from Assistant District Attorney Erin Karshen that contained a copy of the unsigned affidavit. R71-36-37.

Detective Rosenstein did not, but did not recall why he did not, take both the penile swab warrant and the residence/underwear warrant and affidavit with him for filing on March 9, 2010, at 12:52 p.m. R71:40. He did not remember having a conversation with Santiago about getting the penile swab warrant and affidavit filed. R71:41. But he and Santiago were "the only two that would have had the time to do it ... we... would have been the only two that would have probably done it." R71:43. He recalled he was looking for a signed copy of the affidavit during the trial. R71:43-44.

Detective Rosenstein explained that he met with Judge

Donegan in his chambers at "Children's Court" on October 2, 2012. Judge Donegan told him that the signature on Exhibit 1, shown to him by Rosenstein (Santiago warrant) was his, but Judge Donegan had "no specific recollection" of reading the affidavit, Exhibit 2. R71:44-45. Judge Donegan had no recollection of being presented with two warrants and two affidavits. R71:46. Detective Rosenstein explained that ordinarily there would be 3 copies of a signed warrant and a signed affidavit, but he did not know where any of the copies of the Santiago warrant were. R71:50.

Judge Thomas Donegan, retired, was asked to look at Exhibits 1 - 4, and identify what Exhibit 1 was; to which he stated, "It is a search warrant signed by me." When asked whether he recognized the handwriting, "First Judicial Branch" he said, "I'm not as certain of that." He recognized the signature as his. R71:52; App 114. Judge Donegan, when asked about the signature on Exhibit 3, said, "That is my signature." R71:53; App 115. He did not recall signing either Exhibit 1 or 3. Id. Asked if he recalled two Sheriff's Department detectives coming to his residence on March 7, 2009, he said, "I do not have a specific recollection of particular officers on that night." R71:53-54.

Judge Donegan's usual practice was to determine that an affidavit was signed, and that the contents provided probable cause to authorize the warrant. R71:54. He would not sign anything that did not have the signature in the affidavit. Id. On cross exam the Judge conceded that he had no memory of encountering two detectives with two affidavits and two warrants on March 7, 2009. R71:55. He remembered being presented with an unsigned affidavit on October 2, 2012, but did remember that it was an unsigned affidavit with Detective Santiago's name on it. Id.

When asked to compare the signature on Exhibit 1 with that on Exhibit 3, Judge Donegan said, "They are not perfectly - - they

are not perfect replicas of one another, but they are basically - - look to me like the same signature." R71:56. When asked to examine the last name of both exhibits, he said,

> It's difficult to read the N. So I would say it's D, the O is slipped into the D, N-E-G-A, and then I slurred the N. To me it looks like I wrote it faster. Not with the detail that I did in the other one. Id.

Asked to comment on the handwriting he was less certain of, he said,

> Well, it doesn't - - the letters do not look like they are necessarily the same manner in which I make my letters in my signature and in the printed Thomas P. Donegan. R71:57.

Judge Donegan acknowledged other differences in the signatures, but maintained the differences were due to writing faster or slower. R71:58.

The postconviction court's findings and decision denying Howard's postconviction motion, is provided at R71:66-69; App 117. The court, at least not expressly, did not address Howard's concerns raised in his Motion in Limine, and found that the state had met its burden relating to the affidavit in support of the warrant authorizing the collection of penile swabs, and thus found that Howard was not prejudiced by trial counsel's failure to file and argue a motion to suppress the penile swab warrant. R71:68-69.

Additional facts in support of the Arguments will be provided with citation to the record.

ARGUMENTS

1. The Postconviction Court Erroneously Exercised Discretion in Denying Howard a Hearing on His Claim That Trial Counsel Failed to File a Motion To Suppress Evidence Obtained From the Warrantless Taking of Buccal Swabs.

A. Standard of Review.

The postconviction Decision and Order, R52, denying Howard a hearing on his claim that trial counsel was ineffective in failing to file a motion to suppress evidence obtained pursuant to a warrantless seizure of Howard's DNA (buccal swabs), although not employing the ***Bentley-Allen,*** *infra,* terminology, seems to hold that 'the record conclusively demonstrates' that Howard was not entitled to relief. See, R52:2.

When a defendant challenges the effectiveness of trial counsel in a postconviction motion, the circuit court must hold an evidentiary hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), if the defendant alleges facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. If, however, "the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Ibid., see also, State v. Bentley,*** 201 Wis.2d 303, 318, 548 N.W.2d 50 (1996)(If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the court erroneously exercised its discretion in making this determination).

B. The postconviction court's findings denying Howard's motion were clearly erroneous on his claim that the evidence obtained from the warrantless seizure of his buccal swabs should have been suppressed.

The finding that a motion to suppress buccal swabs would not have been granted "due to the doctrine of inevitable discovery" (R52:2; App 111) is clearly erroneous. *See,* ***State v. Ward,*** 2011 WI App 151, ¶9, 337 Wis.2d 655, 807 N.W.2d 23. The finding that the state would simply have filed a motion asking the court to order the defendant to provide buccal swabs is clearly erroneous. ***Id.***

Herein, the court appears, although without citation, to be applying the *Ward* holding to Howard's substantially different and unusual fact scenario. In Ward a commissioner issued an order directing Ward to provide a DNA sample without first requiring supporting evidence under oath, 2011 WI App 151, ¶4, a clearly invalid order, which could have been suppressed. But not so fast. Trial counsel failed to move for suppression, so Ward was required to show both deficient performance and prejudice as part of an ineffectiveness claim. Had Ward's counsel filed a motion to suppress the state simply would have produced an affidavit establishing probable cause for the warrant, and thus Ward could not show prejudice under ***Strickland v. Washington,*** 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because a lawyer need not do things that accomplish nothing. 2011 WI App 151, ¶11.

Nothing in ***Ward*** illuminates why Ward's trial counsel failed to file a motion to suppress the evidence obtained after issuance of the invalid order. There doesn't appear to be any question of misinformation supplied by the prosecutor making the motion to the commissioner, and there was of course no question that the order was issued and valid unless challenged. It might be that

Ward's trial counsel understood the futility of such a motion, or it might be that counsel failed to understand the requirements for a valid order - we don't know, at least not from the Opinion. But we do know herein.

From March 7, 2009 until (as the state admitted) the filing of Ward's Amended Postconviction Motion on July 23, 2012, the state asserted (not just in correspondence but in pleadings, too) that it had a search warrant authorizing the collection of penile swabs *and* buccal swabs. For reasons that remain unexplained the state never, unprompted, timely corrected that misinformation - adding to the deception was the circumstance that the penile swab warrant was never filed, a signed affidavit (or any affidavit for that matter) was never produced. All of which might have provided clues for trial counsel that there was no warrant in existence authorizing the collection of buccal swabs.

And there is no explanation, because the postconviction court erroneously denied a hearing on this issue, why two veteran detectives believed (if that's the right word) or asserted that they had a valid buccal swab warrant. Detectives obviously told the SATC nurse who examined Howard that she was authorized by warrant to swab his mouth and collect cells so that his DNA could be extracted and a profile developed. Because a hearing was erroneously denied on this issue we don't know whether the misinformation, indeed untrue representations, were because of inadvertent error or a more sinister desire to simply shortcut constitutionally mandated search warrant procedures.

And to the extent that we know anything about what happened on March 7, 2009, in the presence of Judge Donegan, we can be assured that the detectives knew then that they did not have a buccal swab warrant in their files when they left the Judge's residence. Both had remarkable memories at the hearing of the

events of March 7, 2009, but apparently did not that very day, when they left the judge with (so they say) two warrants - neither of which authorized the taking of buccal swabs, yet they drove to the SATC and told the nurse they had a warrant for buccal swabs. Seriously?

This case is not ***Ward,*** it is ***Mapp v. Ohio,*** 367 U.S. 643, 659 (1961). In ***Mapp*** officers gained entry into the home of the defendant by, at least in part, showing to the defendant a paper claimed to be a warrant. 367 U.S. at 644. At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. 367 U.S. at 645. In Howard the state, first by their investigating officers and then by the prosecution, mislead the nurse at the SATC, then defense counsel, and obviously, the court itself, into believing something they had to have known was untrue - that they had a buccal swab warrant. The conduct condemned in ***Mapp*** pales by comparison. The conduct of the state in this case should find, "no sanction in the judgments of the courts." 367 U.S. at 648. To the extent that ***Ward*** superficially mirrors Howard that must be balanced against the obvious misconduct of the officers and the prosecution herein. It is appalling that no one on the state's side of this case came forth and admitted the mistake or the misconduct. The state's conduct was dishonest. 367 U.S. at 660.

In the final analysis it is absurd to find, as the postconviction court did herein, that the doctrine of inevitable discovery or simply filing a motion is sufficient to overcome the misconduct of officers and the prosecution that began within hours of the victim's complaints. A motion filed by trial counsel would not have been denied pursuant to ***Ward,*** indeed there is no question that officers intentionally misinformed persons critical to the prosecution that they had a warrant; this is grounds alone to suppress.

Additionally there should be no question that the DNA profile

of Howard was critical to the state's case concerning counts 3 and 4. Without the STR and Y-STR profile developed from the buccal swabs, the state's expert, McCormack, would not have been able to offer the opinion that the Y-STR profile developed from the toilet paper taken from Cell 39, R67:50, "is consistent with the Y-STR DNA profile of James Howard." R67:53-54. Mr. McCormack would not have been able to offer the opinion that the semen stain found on boxer shorts, R67:55, was from Howard; McCormack would not have been able to say:

> Q. And you reached that opinion by comparing the DNA profile from the semen stain with Mr. Howard's profile developed from the buccal swabs?
> A. That is correct. R67:57.

C. Inevitable Discovery principles cannot save this warrantless search.

The postconviction court applied the doctrine of inevitable discovery to save the warrantless seizure/search of Howard's DNA. This finding required that the court hold that the evidence, the DNA profile, was admissible because it would have been discovered in searches conducted pursuant to a subsequent warrant, which of course was never pursued, because the state never acknowledged or conceded that it did not have a valid buccal swab warrant! See ***State v. Schwegler,*** 170 Wis.2d 487, 499, 490 N.W.2d 292 (Ct. App.1992).

In order for the inevitable discovery doctrine to apply, the state must demonstrate by the preponderance of the evidence that the tainted fruits inevitably would have been discovered; in doing so, it must prove:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct;

(2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and
(3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation.

170 Wis.2d. at 500, 490 N.W.2d 292. The postconviction court found that the state had met the requirements. Because the inevitable discovery doctrine is an exception to the exclusionary rule protecting 4th Amendment interests, its application presents a constitutional question which this court reviews de novo. ***State v. Thorstad,*** 2000 WI App 199, ¶4, 238 Wis.2d 666, 618 N.W.2d 240.

As Howard has explained, and the state concedes, the state asserted throughout the pre-trial and trial proceedings herein that they had obtained a search warrant authorizing the taking of penile and buccal swabs, and of course obtained the swabs they were seeking. Thus law enforcement would not have continued a subsequent search for evidence - they had what they needed. Thus the first requirement for inevitable discovery was not met.

As to the second requirement, the facts do not vary; detectives asserting that they had a warrant they did not have accompanied Howard to the SATC and obtained what they needed - his DNA. There is nothing else for detectives to do, at least concerning Howard, and no continued search was necessary. Thus, the second requirement is not met.

The third requirement requires the state to demonstrate that prior to the March 7, 2009 search, it was actively pursuing an alternate line of investigation. ***Schwegler,*** 170 Wis.2d at 500, 490 N.W.2d 292. Again, the only searching occurring was that of Howard's DNA, obtained at the SATC. Thus, this case falls within the court's holding in ***State v. Pickens,*** 2010 WI App 5, 323 Wis.2d 226, 779 N.W.2d 1, that the inevitable discovery rule requires "that

the police be actively pursuing the legal alternative—here, a warrant—prior to the unlawful search." ***Id.,*** ¶¶ 47–49. At issue in *Pickens* was whether evidence discovered during an illegal search of a hotel safe was admissible under the inevitable discovery doctrine. ***Id.,*** ¶¶ 48–49. The state in Pickens argued that "by the time police illegally searched the safe, they had enough information to obtain a search warrant for the safe," therefore "it follows that the police would have inevitably acquired a warrant and legally obtained the contents of the safe." ***Id.,*** ¶49. The ***Pickens*** court concluded that because there was "nothing in the record to support the view that the police were actively pursuing an alternative legal means," the State's inevitable discovery argument failed. ***Id.,*** ¶50. Like in Pickens, the detectives herein were not, in fact, operating under an existing warrant pertaining to the defendant's DNA. Parenthetically, it would be absurd to reward their deception that they were (to the SATC nurse), by permitted them to take advantage of the inevitable discovery doctrine.

Thus there is no question that the detectives were not actively pursuing a warrant for the obtaining of Howard's DNA after the deed was done at the SATC. The third requirement is not met. Therefore, the postconviction court erred in denying Howard's postconviction motion alleging that his trial counsel was ineffective in not challenging the taking of Howard's buccal swabs.

D. It was clear error for the postconviction court to find that the state had not intentionally manipulated the system.

It was clearly erroneous for the postconviction court to find that the state had not "intentionally manipulated the system," R52:2, citing to ***State v. Petty,*** 201 Wis.2d 337, 353 (1996). The same issue popped up in ***Ward,*** where Ward claimed, in his reply brief!, that judicial estoppel should be applied against the state because the

prosecutor told the commissioner that the reason for seeking Ward's DNA was to exclude Ward. The *Ward* court found this to be a "silly argument" because the state told the commissioner there may have been an error made into the data bank. ***Ward,*** 2011 WI App 151, ¶11, n4. In this same footnote the court explained, that "judicial estoppel" is intended to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions. ***State v. Petty,*** 201 Wis.2d 337, 347, 548 N.W.2d 817, 820 (1996). Although discretionary, whether there are requisite elements that permit a court's invocation of judicial estoppel is an issue of law. *Id.,* 201 Wis.2d at 346–347, 548 N.W.2d at 820. There are two requisite elements: (1) the party against whom judicial estoppel is sought to be invoked must have argued two "irreconcilably inconsistent positions"; and that party must have "intentionally manipulated the judicial system." ***Id.,*** 201 Wis.2d at 353, 548 N.W.2d at 823.

The postconviction court's decision found that Howard's claims satisfied the first ***Petty*** criteria. Without repeating the misleading assertions and misconduct attributable to the state herein, it was clearly erroneous to deny that the sum of this conduct was not an intentional manipulation of the system. Falsely asserting at every turn that they had a warrant for buccal swabs isn't merely an alternate theory of how the evidence was obtained, nor was it "unthinking or confused blunder." 201 Wis.2d at 347. Thus, it was error for the postconviction court to deny Howard a hearing on his motion to suppress the buccal swab warrant based on the finding that the state had not intentionally manipulated the system - the manipulation was not only intentional it was pervasive and result driven.

2. Trial Counsel's Performance Was Deficient and Prejudicial in Failing to File a Pretrial Motion to Suppress the Search Warrant Authorizing Seizure of Underwear and Penile Swabs at the SATC.

A. Standard of Review

The standards for assessing whether trial counsel's performance was deficient and prejudicial were stated above and are reincorporated herein. To the extend that the postconviction court's rulings were clearly erroneous, those claims are detailed herein below.

The postconviction court found that the state had adequately reconstructed the affidavit in support of the penile swab search warrant, Exhibit 1, introduced at the January 10, 2013, motion hearing. A copy of this warrant can be found at R48:5, R50:17 (Exhibit A), and R56:12, and at App 114. The existence and the provenance of this warrant were challenged at the hearing, and Howard asserts herein that the finding that the affidavit was reconstructed is clearly erroneous.

B. The penile swab warrant bears an unauthorized signature.

It is critical to point out, again, that the penile swab warrant, the so called Santiago warrant, was never filed, and a signed affidavit in support of the warrant was never found, if it ever existed. No report of the generation of the affidavit or the travel to Judge Donegan's residence to have a penile swab warrant signed was ever introduced. It is also important that the failure to file the penile swab warrant clouded, at best, the ability of defense counsel, and then the trial court, to weave through the layers of misrepresentation concerning the warrant and discover what was true and not true concerning the warrant. And as asserted above, it seems that officers took Exhibit 1 to the SATC, shortly after it was obtained, and asserted, knowingly and falsely, that it authorized the obtaining of buccal swabs. This scenario is the best that can be said of the state's actions, and only if the warrant itself is valid. For

reasons stated below, the validity of the warrant itself became an issue at the hearing.

Both Detectives Santiago and Rosenstein opined that the "Thomas P Donegan" signatures on Exhibit 1 and Exhibit 3 looked alike. R71:25, 39. The testimony at the January 10, 2013 hearing was consistent that Exhibit 1 and Exhibit 3 were signed "at the same time," "within moments of each other." Id; and 40. When asked if he acknowledged any differences, Detective Rosenstein observed that there was a minor difference in the last part of Donegan, that the last "n" in Donegan was completely absent. But Rosenstein did not acknowledge any other differences. R71:39-40.

Howard respectfully directs the court's attention to the following observable facts. The penile swab warrant [Exhibit 1, 1/10/ 2013, hearing; App 114], never filed, allegedly retrieved (but we don't know when) from the SATC, has a signature markedly different from that placed on the residence/underwear warrant filed as 2009SW333. Moreover, as seen more clearly in App 116:

- The "Thomas" in Exh 3 is placed entirely above the signature line, while in Exh 1 "Tho" dip well below the line.
- The letter height in the "Thomas" is different - significantly higher in Exh 3 than in Exh 1.
- The only "s" in the Judge's signature has a loop in Exh 3 that is missing in Exh 1.
- The "D" in Exh 3 is without the loop-back that is prominent in the "D" in Exh 1.
- The "D" and the "o" in Exh 3 are clearly separated and made by separate pen strokes, but in Exh 1 the letters largely overlap, are virtually indistinguishable, and made with the same uninterrupted stroke.

- The first “n” in Exh 3 is significantly dissimilar from the first “n” in Exh 1.

- The end “n” in Donegan, prominent in Exh 3, is entirely missing in Exh 1.

- The Exh 3 signature is relatively clear, despite several generations of copies. The Exh 1 signature is clearly made with a different instrument and appears to be a stamp.

Summarizing, there is a warrant never filed, with writing the Judge acknowledged he was “not as certain” it was his, an unsigned affidavit, and a signature on the warrant significantly different from that placed on the filed warrant authorizing the search of Howard’s residence. There is not affidavit from ADA Erin Harshen that she reviewed two affidavits on March 7, 2009, and the email that the Santiago affidavit was retrieved from was not produced. There is no affidavit from the notary that she witnessed the signature of two different detectives on March 7, 2009 - the burden in the reconstruction hearing was on the state; the state knew Judge Donegan could not gainsay whatever the two detectives would say, and elected to limit the testimony. The penile swab warrant signature is perhaps not literally forged, but unauthorized, most likely by way of use of a stamp, or a clever copy and paste from some other document signed (or stamped) by Judge Donegan. Absent a more extensive inquiry we will not know, except to acknowledge, even without expert testimony, the obviousness of the differences of the signatures, which even a casual observer can see. *See* ***Jorgensen v. Beach `n' Bay Realty, Inc.,*** 125 Cal.App.3d 155, 163 (1981)(The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: You don't need a weatherman to know which way the wind blows.)

C. It was error to proceed in a reconstruction hearing with the testimony of Judge Donegan's usual practices, and especially at nearly 3 years from the date of the presenting of the document for signature.

In ***State v. Raflik,*** 2001 WI 129, the government mistakenly failed to record the application for a warrant by telephone, nonetheless the circuit court did not suppress the evidence because the search warrant was grounded in probable cause, and the search was not unreasonable because the court *promptly* took steps to reconstruct the application. ***Raflik,*** ¶¶8-10. Indeed, the reconstruction of the record occurred "within 24 hours of the original warrant application." ***Id,*** at ¶12. The ***Raflik*** court, at ¶¶18-19, cited to ***State v. Myers,*** 815 P.2d 761 (Wash. 1991), wherein the Washington Supreme Court determined:

> that the failure to record the warrant application was a "gross deviation" from the rule. *Myers,* 815 P.2d at 768. The court went on to state that reconstruction of the application might have been acceptable if it did not "impair the reviewing court's ability to ascertain what the magistrate considered when he issued the warrant." *Id.* The court noted that the only evidence of the telephonic affidavit was the police officer's testimony, offered four months after the original application, and the officer's report made after the warrant was executed, and after it was discovered that there was no recording. The court held that, under the circumstances, the reconstruction made it "impossible to accurately review what the judge considered" when he issued the warrant. *Id.*

The ***Raflik*** court, at ¶23, then cited to ***United States v. Hittle,*** 575 F.2d 799 (10th Cir. 1978), wherein:

> the court found a search warrant inadequate when there was no oral testimony and an inadequate affidavit. The court held that the probable cause requirement of the Fourth Amendment would

> be "significantly weakened if a court can rely on the recollection of those concerned to support a probable cause finding long after the search warrant has been issued." *Id.* at 802.

The ***Raflik*** Court took these policies into account in holding that, "the time between the application and reconstruction can be taken into consideration by the trial court when determining the adequacy of the reconstruction." ***Raflik,*** at ¶26, see also at ¶43. Of particular relevance to this case is the ***Raflik*** Court's admonishment, at¶¶26, 38:

> With regard to the possibility of the issuing judge becoming a prosecution witness, we recognize that it is not an ideal situation. In the reconstruction of a warrant application, however, we find that a limited amount of judicial involvement is appropriate as long as the judge's participation is not excessive and the participation does not compromise the judge's neutral and detached role.

In setting the parameters for a reconstruction hearing, the ***Raflik*** Court, at ¶41, provided the factors to be taken into consideration:

> particularly the length of time between the application and the reconstruction, and the length of the reconstructed segment in relation to the entire warrant request. In addition to these factors, a trial court should also consider if there were any contemporaneous or nearly contemporaneous written documents, such as notes, that were used to reconstruct the record, the availability of witnesses used to reconstruct the record, and the complexity of the segment reconstructed.

Under Raflik, Judge Donegan's customary practices in issuing warrants, was irrelevant in a reconstruction effort. It is one thing to allow a Judge to participate in reconstructing a trial record by resolving disputes based upon the Judge's recollection, ***Raflik,*** at ¶45, but permitting the Judge to testify as to usual practices, aside

from being irrelevant, places the Judge in the position of abandoning the neutral and detached role Judges must have when issuing particular warrants.

The facts of this case draw it squarely within the fact scenario recited in ***Glodowski v. State,*** 196 Wis. 265, 220 N.W. 227 (1928), cited by the ***Raflik*** majority, at ¶27, and in Justice Bradley's dissent, at ¶¶65-69. It is clear that ***Glodowski*** remains good law. That good law holds that the warrant judge is prohibited from contributing to the record after the probable cause determination has been made. ***Glodowski,*** 196 Wis. at 266 (248 Wis.2d 629). The Supreme Court, 196 Wis. at 271, stated that:

> It is an anomaly in judicial procedure to attempt to review the judicial act of a magistrate issuing a search warrant upon a record made up wholly or partially by oral testimony taken in the reviewing court long after the search warrant was issued. Judicial action must be reviewed upon the record made at or before the time that the judicial act was performed. The validity of judicial action cannot be made to depend upon the facts recalled by fallible human memory at a time somewhat removed from that when the judicial determination was made.

For the reasons cited in both arguments, above, it was clear error for the court to find that the affidavit in support of the penile swab warrant had been adequately reconstructed. Moreover, the sum of the facial errors in the warrant mandate that it be suppressed, and thus the conviction reversed.

3. The Postconviction Court erred in denying Howard a hearing on his claim that trial counsel's failure to object to inadmissible trial testimony was deficient performance that prejudiced Howard.

A. Standard of Review.

This claim by Howard was denied without a hearing in the court's September 17, 2012, Decision and Order. R52:3. Howard reincorporates herein the ***Bentley/Allen*** standards of review cited above.

B. The testimony of the SATC Nurse examiner violated the rule in *State v. Haseltine,* and progeny, that a witness should not be permitted to give her opinion on whether another witness is telling the truth.

The trial court's ruling was that, "Nurse Hogan did not testify that the witness was telling the truth, only that what occurred may not have resulted in "more injury." R52:3. After describing the extent of injury to Marletha R., Hogan, as cited above, was asked without objection, "Is the absence of more injury a reason to disbelieve her story?" As the state must have anticipated her reply was, "No." And contrary to the court's belief that the next question posed to Hogan (the prosecutor asked her, "Why not?") mitigated the answer, in fact Hogan was asked to amplify her opinion why Marletha R. should be believed.

The prosecutor could have asked the first question in any number of ways that would not have triggered ***Haseltine*.** The prosecutor could have asked if in her training and experience significant injury invariably accompanies forced sex; she could have been asked to simply describe the vagina/genital area response to forced penetration - Hogan could have been asked what was typical, without being asked whether the absence of more injury was a reason to disbelieve R.' story. Moreover, since Hogan examined R. on March 7, 2009, and R. testified at trial, the improper question was likely interpreted as a comment on the credibility of both of R.' accounts, of her "story."

Perhaps the court, in its ruling, was swayed by the clever use of the word "disbelieve" in the prosecutor's question, but clearly the last word in the question, "story" clarifies that Hogan was being asked to opine whether R. was telling the truth when she told her story. Thus an objection to the question put to Hogan would have been sustained in the proper exercise of discretion.

The defendant in ***State v. Haseltine,*** 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984), was on trial for having sexual contact with his sixteen-year-old daughter. ***Id.*** at 93-94. The daughter testified that the defendant had repeatedly had sexual intercourse with her over a two-year period. ***Id.*** at 95. The State's expert witness, a psychiatrist, subsequently testified that there "was no doubt whatsoever" the daughter was an incest victim. ***Id.*** at 95-96. The court held that such testimony was impermissible and that generally a witness should not be permitted to give his or her opinion on whether another witness is telling the truth. ***Id.*** at 96.

Hogan's testimony most clearly addressed the consent element in the charge of 3rd Degree Sexual Assault. Consent was, whatever the testimony, an element the state was required to prove beyond a reasonable doubt. As Howard's trial counsel recognized in her opening statement and throughout the trial, this case would be a credibility contest between Howard [who testified] and Ms. R.. The prosecutor recognized in his closing argument that, "It's as simple as credibility." R68:64. Counsel was required to object to this exchange, because as our Supreme Court has explained, "There is a significant possibility that the jurors, when faced with the determination of credibility, [will] simply defer[] to witnesses with experience in evaluating the truthfulness of victims of crime." ***State v. Romero***, 147 Wis.2d 264, 279, 432 N.W.2d 899, 905 (1988). ***Haseltine*** and ***Romero*** do not permit third-party testimony as to whether a witness seen by the jury is in fact credible. The rationale is to preserve for the jury issues of witness credibility.

Moreover, Hogan's opinion, on its face, was not offered for any other purpose; for example, it was not offered to demonstrate that R.' behavior was consistent with the behavior of a sexual assault victim. See ***State v. Jensen***, 147 Wis.2d 240, 250, 255-56, 432 N.W.2d 913 (1988). Nor can it be said, at least not reasonably so, that Hogan's opinion was offered to explain why Hogan continued her investigation into R.' allegations, or that it was part of Hogan's thought process in conducting her examination of R.. *See* ***State v. Smith***, 170 Wis.2d 701, 718-19, 490 N.W.2d 40 (Ct. App. 1992). There was no testimony that Hogan confronted Howard at the SATC with her belief that Marletha R.'s lack of observable injuries was not a reason to disbelieve her story, to see how Howard responded.

It is well established that an expert witness cannot testify as to the credibility of another witness, and trial counsel's failure to object when Hogan did so was unreasonable. ***Haseltine***, 120 Wis.2d at 96. Moreover, the admission of Hogan's opinion cannot be said to be harmless; this trial, as all acknowledged, was (even with the DNA evidence) a credibility contest. Thus the postconviction court erred in denying Howard a hearing on whether trial counsel was ineffective in failing to object to the prosecutor's question.

CONCLUSION

James Howard seeks reversal of the order partially denying his postconviction motion without a hearing**.** Howard seeks reversal of the order finding the penile swab Affidavit was adequately reconstructed. Howard avers that penile swab warrant was facially inadequate. Thus, Mr. Howard's convictions should be reversed.

Dated this _____ day of June 2013.

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,356 words.

_____
Lew A. Wasserman 1019200

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of June, 2013.

_____
Lew A. Wasserman 1019200

COURT OF APPEALS OF WISCONSIN
DISTRICT I
No. 2013AP000190-CR

APPELLANT'S APPENDIX

CERTIFICATION

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 s. 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 been so reproduced to preserve confidentiality and with appropriate references to the record.

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