STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP911-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN M. LATTIMORE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE TODD W. BJERKE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant John M. Lattimore, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Lattimore was charged with second-degree sexual assault of S.M., false imprisonment of S.M., and third-degree sexual assault of M.H. (5:1; 8:1). He was convicted following a jury trial of sexually assaulting and falsely imprisoning S.M. and acquitted of sexually assaulting M.H. (86:1-3; 94:1).

Lattimore argues on appeal that the court erroneously admitted other acts evidence of his alleged sexual assault of M.H., that the court erroneously excluded evidence of a threatening Facebook message that S.M.'s brother sent to Lattimore, that the court erroneously admitted evidence of S.M.'s character, that his trial counsel was ineffective, and that he is entitled to a new trial in the interest of justice. Because Lattimore is not entitled to relief on any of his claims, the court should affirm the judgment of conviction and the order denying postconviction relief.

I. EVIDENCE OF LATTIMORE'S ALLEGED SEXUAL ASSAULT OF M.H. WAS NOT OTHER ACTS EVIDENCE BECAUSE THE CHARGE THAT LATTIMORE ASSAULTED M.H. WAS JOINED FOR TRIAL WITH THE CHARGE THAT HE SEXUALLY ASSAULTED S.M.

Lattimore argues that the trial court erroneously admitted other acts evidence regarding his alleged sexual assault of M.H. *See* Lattimore's brief at 16-23. The flaw in that argument is that the evidence regarding Lattimore's sexual assault was not admitted at trial as other acts evidence. That is because the trial court, after ruling that the M.H. evidence would be admissible as other acts evidence at the S.M. trial, reversed its prior ruling severing the counts relating to S.M. from the count relating to M.H. (130:19-20; 135:9-12; A-Ap. 10-13). Once the court determined that the charges relating to S.M. and M.H. would be tried jointly, the evidence of Lattimore's conduct towards M.H. was not other acts evidence but was evidence of the charged sexual assault against M.H.

Lattimore does not argue that the charges were improperly joined. Although he moved the trial court to sever the cases, a motion that the court initially granted, he does not argue on appeal that the trial court erred by rejoining the cases.

Several months after a criminal complaint was filed alleging that Lattimore sexually assaulted and falsely imprisoned S.M., the State

filed an amended complaint that added a third count that Lattimore sexually assaulted M.H. (3:1; 5:1). Lattimore moved to sever the S.M.-related counts from the M.H. count (27:1-10), and the court granted that motion (130:19-20).

The State subsequently moved to admit other acts evidence relating to M.H. and three other women at the trial on the S.M.-related charges (38:1-5). At a hearing on that motion, the court granted the State's request with respect to the M.H.-related evidence (135:10-11; A-Ap. 11-12). The court then asked defense counsel whether he "want[ed] to have Count 3 unsevered" (135:12; A-Ap. 13). Counsel responded, "[w]e see no basis to sever them if you are allowing that evidence in" (*id.*).

Because defense counsel acquiesced in re-joining the charges only because the court had granted the State's motion to admit the other acts evidence, which Lattimore opposed (135:2-6), the State will not argue that Lattimore forfeited his objection to rejoining the charges. But after the charges were joined for trial, the evidence of Lattimore's conduct towards M.H. was not other acts evidence but evidence of the crime of sexually assaulting M.H. that was before the jury. Accordingly, Lattimore's objection to the other acts ruling was rendered moot by the rejoinder of the cases. His only potential appellate issue is whether the M.H. charge was properly joined with the S.M.-related charges.

Although Lattimore objected to joinder in the circuit court, he has not done so on appeal. Accordingly, he has abandoned his claim that the

cases were not properly joined. *See A.O. Smith Corp. v. Allstate Ins. Co.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("an issue raised in the trial court, but not raised on appeal, is deemed abandoned").

II. THE TRIAL COURT PROPERLY EXCLUDED THE FACEBOOK MESSAGE.

Lattimore argues that the trial court erred when it ruled that he could not introduce the content of a message that S.M.'s brother Josh sent to Lattimore via Facebook. The court ruled that the message was not relevant (135:24; 137:9; 139:16; A-Ap. 16, 23) and that the message was hearsay, at least with respect to Lattimore's statements in the exchange of messages with Josh (138:14-15).

Although it excluded the message itself, the court allowed the defense to ask any witness if that witness had actual knowledge of threats towards Lattimore (137:15; A-Ap. 22). The court explained that the defense "may -- depending on how they found out about it, . . . it may not be something where they can actually testify about the nature of the threat, but if that's what led up to [Lattimore] hiring an attorney, and S.M. knew that an attorney was hired, and whether her brother was gonna get kicked out of school or that's what the attorney could have sought or whatever that is, and she knew about that -- . . . that's what you need to show for your motive on that side" (*id.*).

Lattimore argues on appeal that the Facebook threat was not hearsay because it was not asserted for the truth of the matter but "was offered to show how it motivated the chain of events that led to S.M. reporting the assault to the police." Lattimore's brief at 26. The State agrees with that contention. *See State v. Kutz,* 2003 WI App 205, ¶36, 267 Wis. 2d 531, 671 N.W.2d 660. But the State also agrees with the trial court's ruling that the content of the Facebook message was not relevant.

Lattimore argues that the content of the threat was relevant because "[i]t explained why Lattimore did not contact S.M. after the night in question, why he asked [S.M.'s friend] Amber Schade about the threat, and why he told Schade he was taking legal action against Josh." Lattimore's brief at 27. However, that sentence is the full extent of Lattimore's discussion on those points. Because this court does not consider undeveloped arguments, *see State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994), the State will not attempt to respond.

Lattimore's principle argument regarding the relevance of the Facebook threat is that it "explain[ed] S.M.'s motive for reporting the allegation to police." Lattimore's brief at 26 (capitalization omitted). He articulates his theory of relevancy as follows:

> Most importantly, it provided a reason for S.M. to be concerned that legal action would be taken against Josh. This, in turn, provided S.M. motive to falsely tell police Lattimore raped her, which she did five days after learning Lattimore was supposedly getting Josh banned from campus. Since S.M.'s motive to lie is clearly a fact "of consequence

> to the determination of the action," the Facebook threat was relevant.

Id. at 27 (citing Wis. Stat. § 904.01).

The problem with Lattimore's argument is that the actual language of the threat would be relevant only if S.M. were aware of that language. There is nothing in the record, however, that establishes that S.M. had any knowledge of the threatening language in the Facebook message.

S.M. testified on cross-examination that she had not seen the actual message (141:148). She testified that when her parents told her about the message about a week after the incident (141:149), they said that her brother "sent John a message through Facebook saying that it was not consensual and that, you know, if you try to contact S[.], that like the police would get involved" (141:148). Defense counsel then asked S.M., "They didn't say anything about that it would be dangerous for Mr. Lattimore's health; they didn't say that he threatened Mr. Lattimore?" (141:148-49). S.M. answered, "No" (141:149).

Moreover, as Lattimore acknowledges, *see* Lattimore's brief at 24, the court allowed witnesses to testify regarding their knowledge of the Facebook threat (137:15; A-Ap. 22). In his cross-examination of S.M., defense counsel elicited testimony from S.M. that she learned about the threat five days before she reported the assault to the police.

> Q What about Amber Schade, did she talk to you about anything involving her communication with Mr. Lattimore?

A Yes, it was -- I don't remember the exact date, but yes, she did.

Q Sometime around October 22nd, I assume?

A Correct.

Q She said that -- that John Lattimore was saying that you were lying, right?

A Correct.

Q She said John Lattimore was saying that -- asked about the threat he received from your brother. She said that to you, right?

A Correct.

Q She said John Lattimore said that your brother may be banned from UW-L campus, right?

A It wasn't phrased that way, but correct.

Q Sure, but she said he talked to an attorney?

A Correct.

Q You had contact with your parents after that, correct?

A Correct.

Q Five days later you made a report to UW-L police, correct?

A Correct.

Q Five weeks after being in the dorm room with Mr. Lattimore?

A Correct.

(141:132.)

Lattimore argues that "the content of Josh's message was relevant to S.M.'s state of mind and whether Lattimore's threat of legal action actually gave cause for concern, and therefore motive to lie." Lattimore's brief at 27. But the content of the message was relevant to S.M.'s state of mind only to the extent that she was aware of the content. There is no evidence in the record that S.M. saw the message. To the contrary, S.M. testified that she had not (141:148). Lattimore was able to present, through his cross-examination of S.M., evidence about what S.M. actually knew about the message.

Lattimore also argues that the jury should have been informed of the content of the message because S.M.'s mother testified that "[a]ll the Facebook message was as a brother was saying, please do not have any contact with . . . his sister, and if he did – all he wanted was for him to stay away from her" (141:195). He contends that that testimony "completely mischaracterized the message" and that "the jury was left with the completely incorrect impression that the 'Facebook threat' contained no actual threat." Lattimore's brief at 28. He argues that "[i]n the absence of any actual threat, the jury wouldn't find credible the claim that S.M. had reason to believe Lattimore could get Josh banned from campus. If Lattimore's statement was not a credible threat, then the motive to fabricate is not credible either." *Id*.

Once again, that argument founders on the lack of any evidence that S.M. had knowledge of the actual content of the Facebook message. Lattimore contends that the message was necessary to demonstrate that S.M. found credible Lattimore's threat to get her brother banned from campus. Demonstrating that, he says, requires

proof that her brother's Facebook threat to Lattimore itself was a credible threat. But Lattimore's theory of relevance requires one additional step – that S.M. knew that her brother had made a credible threat against Lattimore. That is where Lattimore's theory of relevance falls apart, because there is no evidence that S.M. saw the actual message or that she knew anything more about the Facebook message than what she testified that her parents and her friend told her about it.

III. THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF A CHANGE IN THE VICTIM'S DEMEANOR.

Lattimore next argues that the trial court erroneously exercised its discretion when it admitted evidence about S.M.'s personality and character before and after the sexual assault. He argues that the evidence was irrelevant under *State v. Jacobs*, 2012 WI App 104, 344 Wis. 2d 142, 822 N.W.2d 885.

In *Jacobs*, the defendant was charged with homicide by use of a vehicle while operating with a prohibited blood alcohol concentration and with a detectable amount of a restricted controlled substance in his blood. *Id.*, ¶11. The State called as a witness the victim's mother, who was not present at the scene of the accident, who testified about the victim's childhood, employment, and history of helping out on the family farm, about his long-term relationship with his wife, his high school sweetheart, whom he had married just a month before his death, and that since his death

the family had been forced to close down one of its barns. *Id*., 12.

Jacobs argued that his lawyer was ineffective for failing to object to that evidence. *Id*., ¶25. The court declined to determine whether counsel performed deficiently because it determined that Jacobs was not prejudiced by the evidence. *Id*., ¶¶28-33. However, the court did hold that the mother's testimony was inadmissible because it did not make more or less probable the facts needed to convict Jacobs of the charged offense. *Id*., ¶26.

In this case, the trial court found that evidence of a change in S.M.'s demeanor following the incident was relevant to a fact at issue – indeed, the central fact at issue – whether S.M. consented to sexual intercourse with Lattimore. The court explained:

> The "character" testimony elicited during trial was limited to changes in the victim's demeanor after the alleged assault occurred. The Court finds that this evidence was directly relevant to the central issue in the case, consent. Wisconsin Criminal Jury Instruction 1208, Second Degree Sexual Assault defines "did not consent" as follows"
>
> > "Did not consent" means that (name of victim) did not *freely agree* to have sexual [contact] [intercourse] with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, *along with all the other facts and circumstances*. This element does not require that (name of victim) offered physical resistance.

> (emphasis added). In other words, consent is viewed under the totality of the circumstances.
>
> Since there were no direct witnesses to the issue of consent, other than Lattimore and the victim, any extrinsic evidence on this issue is relevant and highly probative. Evidence of a significant change in the victim's demeanor – from "high spirited" and "fun loving" (JT1: 193) to "scared" and "untrustworthy [*sic*] of others (JT1: 183) – would tend to support the victim's claim that she was raped and would undermine the defense theory that she merely regretted her decision to have consensual intercourse.

(117:5; A-Ap. 33.)

The circuit court distinguished this case from *Jacobs*. It noted that in *Jacobs*, the court of appeals determined that the character of the victim was irrelevant because it made no element of the crime of vehicular homicide more or less probable (117:5-6; A-Ap. 33-34). The circuit court said that "[w]hile that may be true for vehicular homicide, a change in the victim's demeanor in a rape case is very relevant to the element of consent" (117:6; A-Ap. 34). The court explained that "[t]estimony regarding a victim's change in demeanor after an alleged assault is highly relevant, because the issue of consent must be determined, in part, upon the totality of the circumstances presented to the trier of fact. This demeanor evidence, if believed by the jury, corroborates her testimony that she suffered a traumatic event, just as would medical evidence of a physical injury, and therefore it is probative of the issue of consent" (*id.*).

Lattimore's argument why he believes the evidence was irrelevant does not acknowledge,

much less attempt to refute, the circuit court's reasoning. An appellant's failure to refute the grounds of the trial court's ruling is a concession of the validity of those grounds. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

Moreover, the circuit court's explanation of why the evidence of S.M.'s change in demeanor was relevant was eminently reasonable. According to S.M.'s version of events, she was forcibly sexually assaulted. According to Lattimore, S.M. and he had consensual sex and S.M. subsequently decided to falsely accuse him because she regretted her decision. As the trial court correctly observed, evidence that S.M.'s character changed from being high spirited and fun loving to being scared and untrusting of others is probative of the fact that S.M. experienced a significant traumatic event rather than merely regretting her decision to have consensual sex. Because the evidence of S.M.'s change in demeanor related to an element of the offense – S.M.'s non-consent – and made that element more probable, the evidence was relevant. *See* Wis. Stat. § 904.01; *State v. Davidson*, 2000 WI 91, ¶94, 236 Wis. 2d 537, 613 N.W.2d 606.

Lattimore also argues that the evidence should have been excluded under Wis. Stat. § 904.03 because its probative value was substantially outweighed by the danger of unfair prejudice. *See* Lattimore's brief at 32. His argument on that point starts from an incorrect premise: that "[t]he probative value (if any) of the character evidence is extremely low." *Id*.

The circuit court found that the evidence was highly probative and that its probative value

substantially outweighed any risk of unfair prejudice:

> In this case, the Court has already found that such evidence was highly probative on the issue of consent. Any resulting prejudice against Lattimore was completely fair in that it made the victim's claim that she did not consent more believable and Lattimore's theory of defense less believable. That the testimony regarding the change in the victim's demeanor was damaging to Lattimore and made the victim more sympathetic can be said about nearly any evidence offered against any defendant. Because the testimony was limited to evidence of a change in her demeanor after the assault, and it was not shocking to the jury's sensibilities or inflammatory, any risk of unfair prejudice against Lattimore was substantially outweighed by the evidence's highly probative value.

(117:7; A-Ap. 35) (footnote omitted.)

As he does with the trial court's relevancy analysis, Lattimore ignores the court's Wis. Stat. § 904.03 analysis. He does so at his peril, *see Schlieper*, 188 Wis. 2d at 322, especially where, as here, the trial court provided a reasoned and reasonable explanation for why the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

A trial court's discretionary decision to admit evidence "will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). Because the record in this case demonstrates that the trial court properly exercised its discretion when it admitted evidence concerning S.M.'s character

before and after the sexual assault, this court should reject Lattimore's claim that the trial court erred when it admitted that evidence.

IV. LATTIMORE'S LAWYER WAS NOT INEFFECTIVE.

Lattimore argues that his trial counsel was ineffective for failing to "sufficiently object to inadmissible character evidence." Lattimore's brief at 34 (capitalization omitted). The circuit court held that counsel did not perform deficiently because he "objected to the demeanor evidence sufficiently to preserve the issue for appeal" (117:10; A-Ap. 38). The State agrees with that assessment. While an analysis under a ineffective assistance rubric would be necessary if counsel had not objected sufficiently, *see State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31, it is not necessary to resort to an ineffective assistance analysis here because counsel sufficiently preserved the character evidence issue for appellate review.

Lattimore also argues that counsel was ineffective for "failing to submit impeaching evidence regarding S.M.'s motive to lie." Lattimore's brief at 35 (capitalization omitted). For the reasons that follow, Lattimore has not carried his burden on that claim.

A. Applicable legal standards.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687

(1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id*. at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id*. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689. A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687.

To demonstrate prejudice, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. The defendant cannot meet his burden merely by showing that the error had some conceivable effect on the outcome. *Id*. Rather, he must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. The trial court's findings

of fact will be upheld unless they are clearly erroneous. *Id*. Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an appellate court reviews without deference to the trial court's conclusions. *Id.*

B. Defense counsel was not ineffective.

Lattimore claims that his trial counsel was ineffective for failing to introduce evidence that S.M. lied to the sexual assault nurse examiner (SANE nurse) when she said that Lattimore's assault was her first sexual experience. S.M.'s statement was a lie, he says, because S.M. subsequently told a police officer that this was not her first sexual encounter (106:8) and because one of S.M.'s high school friends sent Lattimore's postconviction counsel an email in which he said that he and S.M. had sex twice one night in the summer of 2008 (106:11). *See* Lattimore's brief at 36-37.[1]

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[1]That individual did not testify at the postconviction hearing, but the parties agreed that the court could proceed under the assumption that he would testify consistent with what he told postconviction counsel in the email (145:2-3).

Citing the SANE examination report, Lattimore claims that S.M. gave two false answers to the SANE nurse: 1) when she said that this was her first sexual experience; and 2) when she said that "she had no previous consensual encounters" when asked "when her most recent consensual encounter occurred." Lattimore's brief at 36. However, the second question asked for the "Date/time of last consensual coitus (if <120 hours)" (106:2). Lattimore does not explain why S.M.'s answer to that question was false, given that the question asked about consensual coitus within the previous 120 hours and he claims that S.M.'s prior sexual experience was more than two years earlier. *See* Lattimore's brief at 36-37.

The circuit court concluded that trial counsel did not perform deficiently and that Lattimore was not prejudiced by counsel's performance (117:10-15; A-Ap. 38-43). The court was right on both points.

No deficient performance. Lattimore acknowledges that the evidence he claims that trial counsel should have sought to have admitted was barred by the rape shield statute, Wis. Stat. § 972.11(2). *See* Lattimore's brief at 38. He argues that his lawyer performed deficiently by not seeking to introduce that evidence on constitutional grounds. *See id*. at 38-40.

Lattimore faults counsel for not being familiar with *Olden v. Kentucky*, 488 U.S. 227 (1988), a case in which the Supreme Court held that exclusion of evidence of a prior sexual relationship that provided evidence that the complainant had a motive to lie violated the defendant's Sixth Amendment right to confrontation. *Id*. at 230-33. However, counsel testified at the *Machner*[2] hearing that he was familiar with *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), a case in which our supreme court held that "in the circumstances of a particular case evidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected" and that Wis. Stat. § 972.11, "as applied, may in a given case impermissibly infringe upon a defendant's rights to confrontation and compulsory process." *Id*. at 647-48.

[2]*State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Indeed, defense counsel testified that he considered making a constitutionally based argument for admitting the evidence. Counsel explained why he did not do that:

> I considered -- I knew that there were certain exceptions, not the statutory exceptions, but I was aware of and I have previously litigated, essentially trumping the rape shield statute with the constitutional right to present a defense. I very much considered doing that in this case. I did not feel confident that this would be -- that this would fall into that category, and I also was -- as I was researching or as I was basically considering it and reading the -- I believe it was the Pulizzano, but I was doing some research on these -- on the -- presenting a Sixth Amendment exception to the rape shield statute, and I was having a hard time articulating in my mind that this would reach that criteria. But there was also a secondary concern of mine and that was that I was more concerned -- I was very concerned about what -- how I -- how we could or would respond if [S.M.] were to testify that she in fact was a virgin and that she did not lie to the SANE examiners and that she had no idea why Officer Miller would write whatever Officer Miller wrote. I thought that was a potential problem.

(145:27-28.)

Trial counsel also testified that he considered making a constitutional argument for admitting evidence of S.M.'s lying about the prior sexual conduct during the SANE examination but that he did not do so because he "didn't think it motivated her allegation in this case" (145:29). Counsel explained that he did not view the

purported lie to the SANE nurse as necessary to the defense:

> My belief was that this was essentially another instance of dishonesty regarding sexual conduct. I did not feel that it was a pivotal or a fundamental element of our defense. I didn't think it -- I mean it was -- it was a statement made after the accusation was already made, so I didn't feel that it was a fundamental element of our defense to the extent -- whereas by not allowing it, we weren't able to present our defense.

(145:29-30.)

Defense counsel further testified that even if that evidence had been admitted, he did not believe that he "would have tried to make that the pivotal aspect of the defense" (145:30). He explained that he thought that he would have lost credibility with the jury had he emphasized that evidence.

> I think I would have essentially lost credibility in front of the jury trying to make a strong parallel between accusing somebody of raping her almost immediately after a sexual encounter and simply not disclosing the sexual encounter that happened a long time ago. I presume she did not make a sexual assault allegation in regards to the previous sexual encounter, so I didn't think they were so parallel as to emphasize. I think I would have treated it more like another instance of dishonesty regarding a sexual encounter.

(145:31.)

Lattimore's postconviction counsel asked trial counsel whether he agreed "that there can arguably be some degree of parallel there, that she

basically lied here about John [Lattimore], lied to her friend and to her mother, to her father, that it kind of snowballed out of control because of . . . shame and embarrassment, and that arguably she lied to the SANE examiner with her mother in the room, again, because of shame and embarrassment" (145:31-32). Trial counsel agreed that that could be argued (145:32).

The circuit court ruled that trial counsel did not perform deficiently (117:12-14; A-Ap. 40-42). It first found that the evidence was inadmissible under the rape shield statute (117:12; A-Ap. 40). With regard to whether counsel was ineffective for not making a constitutionally based argument for admission, the court rejected the argument that counsel should have made such an argument based on *Olden*. The court observed that *Pulizzano* was decided after *Olden* and that *Pulizzano* contains "an analysis of the interaction of our Rape Shield Law with the Sixth Amendment" (117:13; A-Ap. 41). The court noted that *Pulizzano* "determined that Wisconsin's Rape Shield Law is so broad that, even though it is not unconstitutional on its face, there are exceptional cases in which evidence of past sexual conduct should be admitted" (*id.*).

The court held that "[w]hile counsel could have attempted to use *Pulizzano* to establish a constitutional right to admit evidence of prior sexual conduct, failing to do so does not constitute deficient performance" (*id.*). The court explained:

> As trial counsel testified at the *Machner* hearing, the victim's alleged lie regarding her being a virgin was not remotely connected to the incident of the sexual assault. Trial counsel made the strategic decision to not alienate the jury by trying to make a strained parallel between not disclosing a prior sexual

> encounter to the SANE nurse and accusing Lattimore of rape immediately after the incident.
>
> In other words, the argument that the victim lied about being a virgin and therefore she must be lying about having been raped was not essential to the presentation of a defense. It is clear from the testimony at the *Machner* hearing that Lattimore's trial counsel considered impeaching the victim with the prior inconsistent statement but determined that it was not necessary for the defense and could have instead been potentially harmful to the defense by alienating the jury – if it was even admissible. Rational strategic decisions cannot be questioned in hindsight simply because a different strategic decision could have been made. *Felton*, 110 Wis. 2d at 502.[3] Because his trial counsel's strategic decision was objectively very reasonable Lattimore has failed to rebut the strong presumption that he was afforded effective assistance of counsel.

(117:13-14; A-Ap. 41-42.)

In his appellate brief, Lattimore discusses the reasons why he believes the evidence would have been admissible and why "[t]he beliefs of [defense counsel] and the trial court that this evidence would have been barred were erroneous." Lattimore's brief at 40. However, Lattimore ignores trial counsel's testimony about the weakness of that evidence and the potential pitfalls of presenting that evidence to the jury.

[3]*State v. Felton,* 110 Wis. 2d 485, 329 N.W.2d 161 (1983).

Lattimore's failure to discuss counsel's strategic reasons for not seeking to introduce the evidence dooms his claim. Recognizing the temptation for a defendant "to second-guess counsel's assistance after conviction or adverse sentence," the Supreme Court held in *Strickland* that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. To properly assess an attorney's performance, a court must "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (internal citation omitted).

Consistent with those principles, this court has held that "[a]n appellate court will not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" *State v. Elm*, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (quoting *State v. Felton,* 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983)). "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *Id*. at 464-65.

Defense counsel testified that he was aware that *Pulizzano* allowed him to make a constitutionally based argument for admitting evidence that was barred by the rape shield law (145:27-28). However, he was "very concerned" about "how we could or would respond if [S.M.] were to testify that she in fact was a virgin and that she did not lie to the SANE examiners and that she had no idea why Officer Miller would write whatever Officer Miller wrote" (145:28). He also "did not feel that it was a pivotal or a fundamental element of our defense" because "it was a statement made after the accusation was already made" (145:29-30). And he was concerned that he "would have essentially lost credibility in front of the jury trying to make a strong parallel between accusing somebody of raping her almost immediately after a sexual encounter and simply not disclosing the sexual encounter that happened a long time ago" (145:31).

Lattimore's brief also ignores the circuit court's conclusion that trial counsel's strategic decision not to seek introduction of that evidence was "objectively very reasonable" (117:14; A-Ap. 42). A trial court's determination that counsel had a reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." *State v. Maloney*, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd,* 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436.

Lattimore has not carried his burden of demonstrating that his trial counsel performed deficiently by not seeking to introduce evidence that S.M. lied to the SANE nurse about her prior

sexual experience. Accordingly, the court should reject his claim that his lawyer was ineffective.

No prejudice. The circuit court also held that Lattimore had failed to show that he was prejudiced by counsel's failure to introduce evidence that S.M. lied to the SANE nurse about her prior sexual experience. The court wrote:

> The conclusion that the victim lied about being a virgin to the SANE nurse and therefore she is lying about her lack of consent in the present case is tenuous at best. The victim was being questioned about her sexual history in a hospital, in front of her mother, and she had been raped just hours before. The jury would likely have concluded that the need to be truthful about a sexual encounter from two years prior was not at the forefront of her concerns, if she even clearly understood that question. Furthermore, Lattimore's trial counsel had already significantly attacked the victim's credibility through other means. Due to the very weak correlation between the prior inconsistent statement and the defense theory that the victim was lying to the jury about her lack of consent, it is not reasonably probable that the jury would have reached a different conclusion had it heard the evidence. Therefore, Lattimore was not prejudiced by his trial counsel's failure to present this particular evidence.

(117:14-15; A-Ap. 42-43.)

Lattimore argues that he was prejudiced by the failure to introduce evidence that S.M. lied during the SANE examination because "anything that affected credibility would have affected the weight of the evidence." Lattimore's brief at 41.

But Lattimore does not attempt to argue that the trial court was wrong when it found that the impeachment value of that evidence was "tenuous at best" given the circumstances under which S.M. made the statement. Nor does he dispute the circuit court's finding that he was not prejudiced because "trial counsel had already significantly attacked the victim's credibility through other means." His failure to refute the trial court's reasoning is a tacit concession of its correctness. *See Schlieper*, 188 Wis. 2d at 322.

Lattimore additionally argues that S.M.'s lie about her prior sexual experience "also demonstrated her initial motive to fabricate the rape charge – that she was ashamed to have her parents learn that she had engaged in consensual sex." Lattimore's brief at 41. That theory does not withstand scrutiny. S.M. called her parents to report the sexual assault soon after it happened: she testified that she went to Lattimore's room around midnight and that she called her parents around 1:30 a.m. (141:71-72).[4] If, as Lattimore posits, S.M. did not want her parents to know that she had consensual sex, why would she have called them? Not calling them would have been a far simpler method of preventing them from knowing that she had consensual sex with Lattimore than immediately calling them to tell them he had raped her.

Lattimore's theory would require the jury to believe that, rather than simply not telling her parents that she had sex, she decided to tell them that she and Lattimore had sex and to also tell them that she had been raped, and that she

[4]S.M.'s mother testified that S.M. called around 1:30 or 2:00 in the morning (141:190).

perpetuated that story by lying to the SANE nurse. It is sheer speculation that the jury would accepted that convoluted explanation for S.M.'s actions.

"A showing of prejudice requires more than speculation." *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). Rather, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. The defendant cannot meet his burden merely by showing that the error had some conceivable effect on the outcome. *Id*.

Lattimore has not met his burden of showing that there is a reasonable probability that had counsel introduced evidence that S.M. lied to the SANE nurse about her prior sexual experience, the result would have been different. *Id*. at 694. This court should conclude, therefore, that he has not met his burden of establishing prejudice.

V. LATTIMORE IS NOT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE.

Lattimore also asks this court to grant him a new trial in the interest of justice. Under Wis. Stat. § 752.35, the court of appeals may order a new trial in the interest of justice on either of two grounds: "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. Lattimore seeks relief under the "real

controversy not tried" branch. To establish that the real controversy has not been fully tried, a defendant must demonstrate "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." *Cleveland*, 237 Wis. 2d 558, ¶21 (quoted sources omitted).

An appellate court will exercise its discretion to grant a new trial in the interest of justice "'only in exceptional cases.'" *Id.* (quoting *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983)); *see also State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60. In *Avery*, the supreme court emphasized that the fact that the jury did not hear evidence with some exculpatory value does not meet that demanding standard. *See id.*, ¶¶37-58.

Lattimore's request for a new trial in the interest of justice simply rehashes his meritless claims that the court erroneously admitted character evidence and that he was prejudiced by the failure of the jury to learn that S.M. allegedly lied to the SANE nurse about her prior sexual experience. "Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; '[z]ero plus zero equals zero.'" *State v. Echols*, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989) (quoting *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976)).

This is not a "truly exceptional case." *Avery*, 345 Wis. 2d 407, ¶57. Accordingly, the court should deny Lattimore's request for a new trial in the interest of justice.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 10th day of March, 2014.

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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 6,736 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

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 10th day of March, 2014.

_____
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