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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. Appeal No.: 14-AP-518

BERNARD I. ONYEUKWU,
Defendant-Appellant.

Grant County Circuit Court Case No.: 11-CF-68

DEFENDANT-APPELLANT'S BRIEF

Appeal from the Circuit Court for Grant County, Robert P. VanDeHey, Judge.

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TRIAL COURT ANSWERED: NO

3. ONYEUKWU MUST BE RESENTENCED TO ENSURE A FAIR SENTENCING BASED UPON ACCURATE INFORMATION

TRIAL COURT ANSWERED: NO

4. THERE WAS AN EX POST FACTO VIOLATION BY DEPRIVING ONYEUKWU OF THE BENEFIT OF THE RISK REDUCTION PROGRAM THAT WAS IN EFFECT AT THE TIME OF HIS OFFENSE

TRIAL COURT ANSWERED: NO

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented by the first, third, and fourth issues are either issues of first impression or require the application of newly established precedent and are thus issues of statewide importance. Therefore, both oral argument and publication are requested.

STATEMENT OF THE CASE AND FACTS

1. PROCEDURAL BACKGROUND

Based upon an April 8, 2011, encounter, the defendant-appellant, Bernard Onyeukwu ("Onyeukwu") was charged with the following offenses:

1. Kidnaping, contrary to Wis. Stat. § 940.31(1)(b).
2. Second degree sexual assault with a dangerous weapon for forcible contact with the victim's breasts, contrary to Wis. Stat. § 940.225(2)(a) and § 939.63(1)(b).
3. Second degree sexual assault with a dangerous weapon for forcible cunnilingus, contrary to Wis. Stat. § 940.225(2)(a) and § 939.63(1)(b).
4. Second degree sexual assault with a dangerous weapon for forcible contact with the victim's vagina, contrary to Wis. Stat. § 940.225(2)(a) and § 939.63(1)(b).
5. Second degree sexual assault with a dangerous weapon for forcing the victim to perform fellatio upon him,

contrary to Wis. Stat. § 940.225(2)(a) and § 939.63(1)(b).

6. Second degree sexual assault with a dangerous weapon for forcible sexual intercourse with the victim, contrary to Wis. Stat. § 940.225(2)(a) and § 939.63(1)(b).

7. Second degree sexual assault with a dangerous weapon for contact with a mentally deficient victim's breasts, contrary to Wis. Stat. § 940.225(2)(c) and § 939.63(1)(b).

8. Second degree sexual assault with a dangerous weapon for cunnilingus with a mentally deficient victim, contrary to Wis. Stat. § 940.225(2)(c) and § 939.63(1)(b).

9. Second degree sexual assault with a dangerous weapon for contact with a mentally deficient victim's vagina, contrary to Wis. Stat. § 940.225(2)(c) and § 939.63(1)(b).

10. Second degree sexual assault with a dangerous weapon for engaging in fellatio with a mentally deficient victim, contrary to Wis. Stat. § 940.225(2)(c) and § 939.63(1)(b).

11. Second degree sexual assault with a dangerous weapon for sexual intercourse with a mentally deficient victim, contrary to Wis. Stat. § 940.225(2)(c) and §

939.63(1)(b).

(R:9)

The initial six charges were contained in the criminal complaint filed on April 12, 2011 (R:6), and the information filed on April 21, 2011 (R:9). The subsequent five charges were added by the information. Onyeukwu stood mute to the charges and the matter was set for trial (R:48:2).

A motion to dismiss counts 7 through 11 was filed on August 9, 2011. The motion argued that counts 7 through 11 were identical in fact and in law to counts 2 through 6 and were therefore multiplicitous and in violation of Onyeukwu's right to not be subjected to double jeopardy (R: 10).

The motion to dismiss was heard immediately prior to the trial before a jury in the Grant County Circuit Court on August 10, 2011 (R. 50:3-12). Judge VanDeHey considered the arguments briefly and decided the issue promptly in his opening to the jury, he stated:

> The allegations are that on April 8th, 2011, Mr. Onyeukwu, by force or threat of imminent force, did confine Tiffany Logan. And then there are five allegations that by threat of violence he had sexual contact with Ms. Logan without her consent, and they involve allegations of kissing and touching breasts, cunnilingus, looks like vaginal penetration, five separate acts. And then there are also five allegations that Mr. Onyeukwu did have those acts with a person who suffers from a mental deficiency which renders the person temporarily or permanently incapable of appraising the person's conduct and that he knew of such condition (R. 50:14-15).

After the jury was selected and outside the presence of

the jury, Judge VanDeHey provided his reasoning for his decision to permit five acts to lead to potentially ten sexual assault convictions (R. 50:47).

At the trial, there was testimony by the victim (R. 50:62), a woman who works at a doctor's Boscobel doctor's office (R. 50:101), a friend of the victim (R. 50:106), a nurse practitioner (R. 50:110), a registered nurse (R. 50:118), two detectives (R. 50:123, 132), a police officer (R. 50:128), a forensic toxicologist (R. 50:144), a forensic scientist (R. 50:147), Onyeukwu's son (R. 50:167), and Onyeukwu (R. 50:177).

Among the testimony by Laurie Meighan, a nurse practitioner, was that the victim "is probably functioning at about a sixth grade level. She cannot read" (R. 50:112-113). Just before making that assertion, Ms. Meighan noted, "and this was not through me, this was through her paperwork that came to our clinic" (R. 50:112-113). Despite this statement being crucial to the State's proof that the victim suffered a deficiency, no motion was made to strike this testimony as hearsay, not within an exception.

Later that day, the jury returned the following verdicts:

1. Not guilty (R. 13).
2. Guilty of a lesser-included-offense, fourth degree sexual assault for kissing and touching of the breasts

without consent (R. 14).

3. Not guilty (R. 15).

4. Not guilty (R. 16).

5. Not guilty (R. 17).

6. Guilty of a lesser-included-offense, third degree sexual assault for sexual intercourse without consent (R. 18).

7. Guilty of second degree sexual assault for kissing and touching of the breasts of a mentally deficient victim (R. 19).

8. Not guilty (R. 20).

9. Not guilty (R. 21).

10. Not guilty (R. 22).

11. Guilty of second degree sexual assault for sexual intercourse with a mentally deficient victim (R. 23).

As to each of the dangerous weapon enhancers that were charged, Onyeukwu was found not guilty (R. 14, 18, 19, 23).

A presentence investigation was neither requested nor ordered (50:305-306) and sentencing occurred 1 week later on August 17, 2011 (R. 51). Sentences were as follows:

2. 9 months jail (R. 28).

6. 10 years Wisconsin State Prison consisting of 5 years initial confinement followed by 5 years of extended supervision (R. 25, 26).

7. 10 years Wisconsin State Prison consisting of 5 years initial confinement followed by 5 years of extended supervision (R. 26).

11. 15 years Wisconsin State Prison consisting of 8 years initial confinement followed by 7 years of extended supervision (R. 26).

All sentences were concurrent to each other (R. 26, 28). Judge VanDeHey was unsure if early release continued to be available through a "risk reduction sentence," stating as follows:

> There is no more risk reduction sentence, I don't believe. Even if there would be – well, *I guess I just don't know* [emphasis added]. My recollection is there is no more risk reduction sentence. If that goes by the date of the offense versus the date of the sentencing, I don't have a problem with you doing that. It lets you out a little early if you come up with a plan to show that you won't be subject to a higher risk of re-offending (R. 51:22-23).

However, the opportunity for a reduced sentence was short-lived. By a letter dated August 26, 2011, Offender Records Assistant 2 Justin Nally, informed Judge VanDeHey that Wis. Stat. § 973.031 was repealed by 2011 Wis. Act 38, which had an effective date of August 3, 2011 (R. 54:1). Without any notice or opportunity to be heard, an amended judgment of conviction and sentence was prepared (R. 29). The amended judgment of conviction and sentence revoked the prior determination that:

> **On counts #6, #7 & #11 if applicable pursuant to**

> **§973.031 Wisconsin Statutes, the court determines the following:** [emphasis in original] That a risk reduction sentence is appropriate and the person agrees to cooperate in an assessment of his or her criminogenic factors and his or her risk of reoffending, and to participate in programming or treatment the department develops for the person under §302.042(1). The court imposes a Risk Reduction sentence (R. 26:2, R. 29:2).

A notice of intent to pursue post-conviction relief was filed on August 31, 2011 (R. 27). A motion for a new trial was filed April 26, 2012 (R. 30), and denied by decision and order filed May 9, 2012 (R. 31). A notice of appeal was then filed on July 27, 2012 (R. 32). That appeal was dismissed by a decision and order, dated December 10, 2012 (R. 33).

By a motion dated December 24, 2012, Onyeukwu moved the trial court to modify its sentence as the original sentence was not based upon accurate information (R. 34). By an order dated February 8, 2013, that motion was denied as granting Onyeukwu an opportunity for a reduced sentence was a mere "house keeping" [*sic*] matter and the confusion about the program's existence was triggered by an "outdated form" (R. 37:3).

A notice of appeal was then filed on February 28, 2013 (R. 38). That appeal was dismissed by an opinion dated October 14, 2013 (R. 39).

A second motion for a new trial and a second motion to modify sentence was filed on November 13, 2013 (R. 40). The bases for the new trial were:

1. Sufficiency of evidence that the victim suffered from a mental illness or deficiency that rendered her incapable of appraising her conduct and that Onyeukwu knew of such a condition.
2. Counts two through six were multiplicitous and that trial counsel was ineffective in failing to properly argue this.
3. Counts seven through eleven were multiplicitious and trial counsel was ineffective in failing to properly argue this.

(R. 40).

Additionally, it was argued that Onyeukwu should be resentenced because he was deprived of the benefit of the risk reduction program that was in effect at the time of his offense in violation of the ex post facto clause of the U.S. Constitution (R. 40).

The November 13, 2013, motion was heard on January 29, 2014, before Judge VanDeHey. At the hearing, there was testimony of trial counsel Jeffrey Erickson and by Onyeukwu (R. 52) In addition to the issues raised by the motion, additional issues were raised at the hearing. In particular:

1. Ineffectiveness of counsel for failure to object to hearsay evidence that the victim functioned at the sixth grade level (R. 52:38).

2. Ineffectiveness of counsel for failure to discuss with Onyeukwu the importance of the DNA evidence and the value of a defense DNA expert (R. 52:43).

3. Ineffectiveness of counsel for failure to discuss with Onyeukwu his right not to testify and the potential absurdity of his proposed testimony (R. 52:45).

4. Ineffectiveness of counsel for failure to introduce into evidence a phone record that corroborated Onyeukwu's version of events (R. 52:62).

By a decision dated February 19, 2014, Judge VanDeHey denied all sought post-conviction relief (R. 44).

Onyeukwu now appeals to the Wisconsin Court of Appeals by a notice of appeal filed March 4, 2014.

2. FACTUAL BACKGROUND

On the morning of April 8, 2011, Onyeukwu was driving his son, Dino, to the medical clinic in Fennimore to be treated for a soccer injury (R. 50:178-179). Once they got to Fennimore, a woman who Onyeukwu had not previously met (R. 50:199), later identified as Tiffany Logan ("Tiffany"), approached their vehicle, and asked Onyeukwu if he could drive her to Lancaster (R. 50:180-181). After the doctor visit, Onyeukwu drove to Platteville to take his son to the middle school, which was in-session (R. 50:185-186). Then, before continuing on the trip to Lancaster, Onyeukwu needed to stop

at his house to "get some money" to "buy McDonald's to eat" (R. 50:188). Next, when Onyeukwu gets out of his car to go in his house, Tiffany follows him in and sits down on his couch in his living room (R. 50:189). According to Onyeukwu, they engage in a brief conversation, which is followed by a brief period of consensual sexual activity that was initiated by Tiffany (R. 50:190-194). Next, they get back in Onyeukwu's car and Onyeukwu drives Tiffany to Lancaster, as previously planned (R. 50:195).

Tiffany's version of the events of that day is similar, however, she claims that she was forced into the car and forced to remain in the car until arriving at Onyeukwu's house (R. 50:62-75). However, given the acquittal of the kidnaping charge and the acquittals on the weapons enhancers, it seems clear that the jury found Onyeukwu's version of the couple's interaction in those respects more credible. Once she went in Onyeukwu's house, Tiffany agrees that there was a couch in the living room and that she sat down on that couch (R. 50:76). Next, Tiffany says that the following sexual activity occurred at Onyeukwu's initiation:

1. Onyeukwu touched Tiffany's "boob" (R. 50:78).
2. Onyeukwu kissed Tiffany "on the lips" (R. 50:79).
3. Onyeukwu then took off Tiffany's pants and underwear and told her to lay [*sic*] down (R. 50:80-81).

4. Onyeuwku then touched Tiffany "in the privates" with his hand and then with "his private area" (R. 50:81).

5. In response to leading questions by the prosecutor, Tiffany indicated that Onyeukwu put his mouth on her vagina, put his fingers in her vagina, put his penis in her vagina, and put his penis in her mouth (R. 50:81-86).

Following this sexual encounter, Tiffany says that Onyeukwu then drove her to the McDonald's in Lancaster, at which time Tiffany went to her cousin's residence in the trailer park behind the McDonald's (R. 50:88). After talking to her cousin about what had happened with Onyeukwu, the decision was made to report the incident to the police (R. 50:88).

There was also testimony from Laurie Meighan ("Meighan"). Meighan is a family nurse practitioner at the Grant Community Clinic in Lancaster (R. 50:110). Meighan testified that Tiffany has been diagnosed with "mild mental retardation," "attention deficit hyperactivity disorder," "bipolar disorder and anxiety-related issues" (R. 50:111). Further, she testified that, "physically she is okay," but that, "[s]he has a difficult time making decisions" (R. 50:112). Additionally, Meighan stated:

> With finances, it's difficult for her to go to a store and make a purchase and make appropriate change. She

> probably would not know if somebody gave her back the correct amount of change. In choosing what would be appropriate, you know, as far as friendships and appropriate things to say sometimes, she doesn't necessarily have that control. You know, she just will say what's on her mind. In school she struggled intellectually. I believe she was - and this was not through me, this was through her paperwork that came to our clinic - she's probably functioning at about a sixth grade level. She cannot read (R. 50:112-113).

Despite the testimony of Meighan, which was largely based upon Tiffany's medical records, any documented mental deficiency of Tiffany was not necessarily obvious in a brief and casual interaction. The prosecutor attempted to establish that Onyeukwu knew or should have known of Tiffany's mental deficiency, but she was entirely unable to do so, both with her direct examination of Tiffany (R. 50:62-89) and with her cross examination of Onyeukwu (R. 50:195-214). Especially worth noting is the following cross examination of Onyeukwu:

> Q. And when you were talking with her, did you get a sense that maybe she had some intellectual struggles?
> A. Like I said, she was talking to me the way I'm talking to you right now.
> Q. You didn't find it strange the way she was speaking to you?
> A. I didn't find -- no, I didn't. I didn't (R. 50:206).

ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT THAT TIFFANY SUFFERED FROM A MENTAL ILLNESS OR DEFICIENCY WHICH RENDERS THAT PERSON TEMPORARILY OR PERMANENTLY INCAPABLE OF APPRAISING THE PERSON'S CONDUCT, AND ONYEUKWU KNEW OF SUCH CONDITION

In counts 7-11, Onyeukwu was charged with violations

of Wis. Stat. § 940.225(2)(c) prohibiting sexual contact with a mentally ill or mentally deficient person. In order to convict Onyeukwu under this statute the State must prove that Onyeukwu had sexual contact with Tiffany and that:

> Tiffany suffered from a mental illness or deficiency at the time of the alleged sexual intercourse.
>
> The third element requires that the mental illness or deficiency rendered Tiffany temporarily or permanently incapable of appraising her conduct. In other words, Tiffany must have lacked the ability to evaluate the significance of her conduct because of her mental illness or deficiency.
>
> The fourth element requires that the defendant knew that Tiffany was suffering from a mental illness or deficiency and knew that the mental condition rendered Tiffany temporarily or permanently incapable of appraising her conduct.
>
> Wis. JI-Criminal 1211; see also, ***State v. Smith,*** 215 Wis.2d 84, 572 N.W.2d 496 (Ct. App. 1997).

The evidence was insufficient, as a matter of law, that Tiffany suffered from a mental illness or deficiency rendering her incapable or appraising her own conduct.

The State's sole witness that testified to Tiffany's mental illness or deficiency was a nurse practitioner. Her opinion was based upon information in Tiffany's file at the medical clinic. There was no testimony as to the date of the diagnosis, as to whether it was a permanent diagnosis or a temporary diagnosis that has been subsequently effectively treated. The diagnoses suggested by the Meighan consisted of the following:

1. mild mental retardation

2. attention deficit hyperactivity disorder

3. bipolar disorder and anxiety-related issues

4. difficult time make decisions

(R. 50:110-113).

Of these four diagnoses, only mild mental retardation seems as if it has any potential for meeting the statutory criteria for a mental illness or deficiency that would cause someone to be unable to appraise their conduct.

In the testimony from the nurse practitioner, there was no development as to what it means to be mildly mentally retarded. Further research indicates that mental retardation is categorized as mild, moderate, severe, and profound. It is notable that mild retardation may have no unusual physical signs. This is consistent with testimony about Tiffany. Further, the mildly retarded can acquire practical skills, can conform socially, can acquire skills for self-maintenance, and can be integrated into general society.[1] These characteristics are at odds with the level of dysfunction contemplated by the statute that criminalizes sex with the mentally deficient.

A conviction should be reversed for insufficient evidence if the evidence, "viewed most favorably to the state

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[1]Donna K. Daily, M.D., Holly H. Ardinger, M.D., and Grace E. Holmes, M.D., *Identification and Evaluation of Mental Retardation*, American Family Physician, 2000 Feb 15;61(4):1059-1067.

and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt" ***State v. Poellinger,*** 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Convictions for counts 7 and 11 must be reversed because there was insufficient evidence that Tiffany suffered from a mental illness or deficiency that rendered her incapable of appraising her conduct and that, even if she did suffer from such a condition, Onyeukwu did not know that she did.

In ***State v. Perkins,*** 2004 WI App 213, 277 Wis. 2d 243, 689 N.W.2d 684, (Ct. App. 2004), Perkins and the victim lived in the same small community-based residential facility for the elderly. According to a witness who was a caregiver at the facility, the victim suffered from severe Alzheimer's, was unable to converse coherently, and did not remember things that had happened in the past or even earlier in the day. According to the witness, the victim was not physically impaired, but did require 24-hour supervision because of her mental deficits. Perkins argued that in the absence of expert testimony, the evidence was insufficient, as a matter of law, to establish that the victim was mentally ill or deficient to the extent that it rendered her unable to appraise her conduct. The Court of Appeals ruled that there was sufficient credible lay opinion testimony establishing that the victim suffered from

either a mental illness or incapacity under Wis. Stat. § 940.225(2)(c), thereby obviating the need for expert testimony. The jury could reasonably conclude from the circumstantial evidence presented that Onyeukwu was aware of the victim's mental illness.

The instant case can be easily distinguished as the victim in ***Perkins*** has a far more advanced deficiency than Tiffany and, given that Perkins is a resident of the same facility as his victim, there was far more evidence to establish that Perkins was aware of his victim's mental condition.

Oregon's Supreme Court was faced with a similar appeal in ***State v. Reed***, 339 Ore. 239, 118 P.3d 791 (2005). Defendant argued that the State's evidence at trial was insufficient to prove that the victim had been incapable of consent by reason of mental defect with regard to the various sex crimes for which defendant ultimately was convicted. The supreme court agreed. An expert witness never was asked directly whether the victim's mental condition rendered her incapable of consenting to sexual contact. The witness's testimony did not address either directly or inferentially the element of "incapable of consent" due to "mental defect" in the sex crimes at issue. The State conceded that it had offered no direct evidence at trial regarding how the victim's mental capacity had affected her ability to appraise the nature of the

sexual conduct that defendant had initiated. The witness testified that the victim was not socially independent in her daily affairs and had difficulty maintaining a job. Although that testimony might have had some bearing on the victim's qualifications to manage money or to participate in the work force, it failed to describe, either directly or by permissible inference, her ability to understand and to consent to sexual relations.

As in the instant case, there was testimony that the victim in Reed suffered from "mild mental retardation" ***State v. Reed,*** 339 Ore. 239, 246, 118 P.3d 791 (2005). The victim was an adult child of the defendant, so there was not the additional issue of whether the defendant knew of the victim's mental condition. The Oregon Supreme Court methodically unpacked the key statutory language:

> ORS 163.305(3) defines "mentally defective" in terms of a "mental disease or defect" but requires that the mental disease or defect be one that renders the person "incapable" of "appraising the nature of the conduct of the person." The key words of that statute are "incapable," "appraising," "nature," and "conduct." "Incapable" means "lacking capacity, ability, * * * qualification for the purpose or end in view[;] * * * lacking legal qualification or power esp. because of some fundamental legal disqualification[;] lacking the personal ability, * * * or understanding required in some legal matter[.]" Webster's Third New Int'l Dictionary 1141 (unabridged ed 2002). "Appraise" means "to judge and analyze the worth, significance or status of[.]" Id. at 105. "Nature" means "the essential character or constitution of something[.]" Id. at 1507. "Conduct" means "a mode or standard of personal behavior esp. as based on moral principles[.]" Id. at 473. See generally PGE, 617 Ore. at 611 (in statutory construction, words

> of common usage ordinarily given their common meanings).
>
> Applying all the foregoing definitions, we conclude that ORS 163.305(3) refers to a mental defect that prevents one from appraising the nature of one's own conduct. The "appraisal" must constitute an exercise of judgment and the making of choices based on an understanding of the nature of one's own conduct. Further, in circumstances such as those presented in this case, we view that standard in the context of interactions with other persons, such as offers and proposals from other persons to engage in certain kinds of conduct.
>
> It is also necessary to point out that the statutory definition of mentally defective does not support the notion that a person who has a mental disability is necessarily incapable of consenting to sexual relations under any circumstances. Rather, a person who can understand that another person has initiated some kind of sexual activity with that person may be capable of appraising the nature of the conduct and, thus, may be capable of consenting to a sexual act for purposes of the statutory provisions at issue here.
>
> ***State v. Reed,*** 339 Ore. 239, 244, 118 P.3d 791, (2005).

The Reed court found significant that the "victim's own testimony indicated that she had the capacity to consent and to understand that having sexual relations with defendant was wrong, and that to understand what Onyeukwu was attempting was not something that she wanted to do" ***State v. Reed***, 339 Ore. 239, 245, 118 P.3d 791 (2005).

Likewise, Tiffany testified that she similarly objected to Onyeukwu's attempt to engage in sexual activity with her.

> Q. Did he kiss you?
> A. He kissed me.
> Q. Did you say anything at this point in time?
> A. I said, "No, just let me go."
> (R. 50:79).

Regarding Onyeukwu knowing of any mental deficiency of Tiffany, the two had met that morning in

Fennimore, at which time Onyeukwu took his son to the doctor. Then, the three of them drove to Platteville where they dropped-off Onyeukwu's son at school and proceeded immediately to Onyeukwu's house where the sexual activity occurred. With respect to the trip from Fennimore to Platteville, Tiffany testified:

> Q: As you're driving from Fennimore to Platteville, does anybody say anything?
> A. He was talking to his son.
> Q. Did he say anything to you?
> A. No.
> Q. Did you say anything to him?
> A. No.
> Q. Had – by the time you were driving to Platteville, had you said anything to Mr. Onyeuwku really?
> A. No.
> Q. You hadn't spoken to him at all?
> A. No.
> (R. 50:93)

Thus, there is insufficient evidence to permit a rational juror to conclude that the victim was incapable of consent by reason of mental defect, and, even if there were, there is insufficient evidence that the Onyeukwu knew of this condition.

2. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AND HIS ERRORS WERE PREJUDICIAL

Whether counsel was deficient and whether prejudice resulted from the deficiency presents mixed questions of law and fact. ***State v. Sanchez,*** 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). When reviewing an ineffective assistance of counsel claim, Wisconsin appellate courts pay deference to a

trial court's findings of fact under the "clearly erroneous" standard of review as to what the attorney did or did not do. ***State v. Hubert,*** 181 Wis. 2d 333, 339, 510 N.W.2d 799 (Ct. App. 1993). However, whether counsel's performance was deficient and whether the deficient performance prejudiced the defendant are legal conclusions this court reviews de novo. ***State v. Stewart,*** 2012 WI App 73, 342 Wis. 2d 250, 816 N.W.2d 351 (citing ***State v. Sanchez,*** 201 Wis. 2d at 236-37).

The Sixth Amendment right to counsel exists to protect the defendant's fundamental right to a fair trial. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). Accordingly, the United States Supreme Court mandates that, if trial counsel's assistance is insufficient and counsel's performance prejudices the defendant, he is entitled to a remedy tailored to the constitutional violation, typically, a new trial. ***United States v. Morrison,*** 449 U.S. 361, 364- 65 (1981). In ***Strickland,*** the Supreme Court held that a defendant asserting ineffective assistance of counsel must demonstrate: (1) that his attorney's performance fellow below the appropriate standards; and (2) that the deficient performance prejudiced the defense.

When measured against an objective standard of reasonableness, Onyeukwu's trial counsel was deficient. While an attorney's performance is presumed reasonable, it is

constitutionally deficient if it falls outside the range of professionally competent representation. ***State v. Pitsch,*** 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). A reviewing court measures performance by the objective -- what would a reasonably prudent attorney would do in similar circumstances? ***Strickland,*** 466 U.S. at 688.

A convicted defendant claiming ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. ***Strickland,*** 466 U.S. at 690. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function is to make the adversarial testing process work in the particular case. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." ***Strickland,*** 466 U.S. at 691.

Here, Onyeukwu trial counsel did not engage in a full inquiry and reasoned decision-making process that meets even the minimum standard of competence. For reasons further explained below, trial counsel's performance was objectively unreasonable.

To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed,*** 2002 WI App 209, ¶ 17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "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." ***Strickland,*** 466 U.S. at 694.

a. COUNTS TWO THROUGH SIX ARE MULTIPLICITOUS AND PROSECUTION OF FOUR OF THESE FIVE COUNTS IS BARRED; COUNTS SEVEN THROUGH ELEVEN ARE ALSO MULTIPLICITOUS AND PROSECUTION OF FOUR OF EACH THESE FIVE COUNTS IS BARRED. TRIAL COUNSEL'S FAILURE TO PROPERLY CRAFT AND ARGUE THIS MOTION WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

Prior to trial, a motion was made to dismiss counts 7 through 11 as multiplicitous with respect to counts 2 through 6. As stated above, counts 2 through 6 disaggregate the brief period of sexual activity into five forbidden acts. Each act involves a different combination of two body parts. Each act was charged as forbidden because it was alleged it occurred without consent and by use or threat of force or violence. Counts 7 through 11 mirror counts two through six with

respect to the same five body part combinations, but these five "acts" are forbidden because of Tiffany's mental deficiency. The trial court, in the opinion of appellate counsel, properly ruled that the first five counts were different in law than the second five acts and therefore not multiplicitous with respect to each other. However, the proper multiplicitous challenge is that neither the first five charges are different in fact nor law than each other nor are the second five charges different in fact and law from each other.

Multiplicity of sexual assault charges are a fairly commonly litigated issue in Wisconsin and elsewhere. Multiplicity exists when the defendant is charged in more than one count for a single offense. ***State v. Rabe,*** 96 Wis. 2d 48, 61, 291 N.W.2d 809 (1980). Multiplicity concerns the question of merger: whether a single criminal episode or course of conduct that contains the elements of more than one distinct offense merges into a single offense. ***Harrell v. State,*** 88 Wis. 2d 546, 555, 277 N.W.2d 462 (Ct. App. 1979). Multiplicitous charges are impermissible because they violate the double jeopardy provisions of the state and federal constitutions. ***Rabe,*** 96 Wis. 2d at 61. "No person for the same offense shall be twice put in jeopardy of punishment." Wis. Const. art. I, sec. 8.

Directly on-point with the instant case is ***State v. Hirsch,*** 140 Wis. 2d 468, 410 N.W.2d 638 (Ct. App. 1987). In ***Hirsch,*** the State charged defendant with three counts of first-degree sexual assault for allegedly having sexual contact with a five-year-old child. The lower court dismissed the information as multiplicitous based on its determination that the information improperly divided a single offense or course of conduct into three separate offenses. The State claimed that the information was constitutionally sound and properly brought in three counts because, although the three counts were concededly identical under the law, each count required proof of a separate touching. The court rejected this claim and affirmed the lower court's judgment. The court held that the charged acts were not so significantly different that they could be properly denominated separate crimes. The court found that defendant allegedly committed all three touchings with his hand and two of the three touchings involved the same body part of the victim. In addition, the court held that the touchings were part of the same general transaction or episode because the episode took no more than a few minutes and there was little, if any, lapse of time between the acts.

Similarly, Tiffany's testimony is that Onyeukwu proceeded swiftly from touching her "boob" to touching her "in the privates" with his hand and then with "his private

area." In response to leading questions from the prosecutor, Tiffany responded in the affirmative when asked if Onyeukwu had put his mouth on her vagina and put his penis in her mouth. The question is, are these touchings part of the same transaction or episode? As described by Tiffany's testimony, they are. Further, was there a lapse of time between the alleged acts? Based upon the testimony, no, there wasn't. Therefore, Onyeukwu did not have sufficient time for reflection between the assaultive acts to again commit himself. As in ***Hirsch*** and ***Harrell***, there was no pausing for contemplation. As in ***Hirsch*** and ***Eisch,*** there was not a significant change in activity. Thus, counts 2 through 6 should be found to be multiplicitous as should counts 7 through 11.

Onyeukwu was prejudiced in the failure of his trial counsel to effectively craft and argue a multiplicity objection. Trial counsel therefore failed to render effective assistance of counsel and defendant is entitled to a new trial in which the multiple counts are stricken.

b. TRIAL COUNSEL'S FAILURE TO MAKE PROPER HEARSAY OBJECTIONS CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

Under Wis. Stat. § 908.02, hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute. Hearsay is defined in Wis.

Stat. § 908.01(3) as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Laurie Meighan, a nurse[2], testified as follows:

> Her diagnosis **that I'm familiar with on the chart,** [emphasis added] she has mild mental retardation. She has attention deficit hyperactivity disorder. She has bipolar disorder and anxiety-related issues. Oh, and did I – I'm not sure if I said mild mental retardation or not, but yeah. Page 111

She testified further:

> . . . **and this was not through me, this was through paperwork that came to our clinic - she's probably functioning at about a sixth grade level. She cannot read.**

(R. 50:112-113)

Given that an element of counts 7, 8, 9, 10, and 11 was that the victim was mentally deficient, this is compelling testimony. Compelling, but objectionable as hearsay, inadmissible hearsay, hearsay for which no exception applies.

At the ***Machner*** post-conviction hearing, trial counsel was questioned as to why he would not have objected to the inadmissible and prejudicial hearsay testimony. He was asked:

> Q: [I]s there something that you can think of is a good reason not to object to that testimony?
> A:No. I don't remember what was said around it. So if there was some reason that's contained in something, I have no idea. Just nakedly saying, "Hearsay," and she said, "She is underage, and that's her mental state," then

[2]Although she testified she was a family nurse practitioner, there is no such license in the State of Wisconsin. Her licenses are as a Registered Nurse and Advanced Practice Nurse Prescriber (Appendix 139-141).

> I don't have anything, no, but I don't know the context beyond that. Maybe there isn't any, but I have no idea.
> Q: Okay. So it's safe to say that if you could keep out testimony that victims operate at a sixth grade level, that's something you ought to do, right?
> A: Yes.
> Q: Or should have done? Yes?
> A: Yes.

(R. 52:40-41)

Thus, trial counsel concedes he had no strategic reason for failing to object to the testimony. While he initially attempted to evade that question by denying he recalled anything much about the trial, when asked if he could think of any strategic reason at all for failing to object to that testimony (perhaps even a strategic reason he had not formulated contemporaneously with the testimony), he simply conceded that, no, he could not think of any such reason and that one should object to such testimony and that he should have objected to such testimony (R. 52:42).

Not only was the objectionable, inadmissible testimony used to convict Onyeukwu, it was highlighted, as the centerpiece of the prosecutor's closing argument: (R. 50:224).

> Ms. RINIKER: May it please the Court, counsel, ladies and gentleman of the jury. Certainly, no matter if you believe Ms. Logan or if you believe the defendant, this is an amazing story. I think that when you look at all of this, you have to remember who Tiffany Logan is. **You heard the doctor[3] testify that she has mild mental retardation. You heard the doctor testify that she can't read. You heard the doctor testify that she functions at a sixth grade level.**

[3]In fact, there was not a doctor that testified. The prosecutor mis-spoke. The prosecutor was referring to the testimony of Nurse Meighan. That there was not an objection by trial counsel or a motion for a mistrial follows this issue.

(R. 50:224)

It is well-established that trial counsel is deficient for failing to object to inadmissible testimony. ***State v. Domke,*** 2009 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364. Thus, the first prong of a ***Strickland*** analysis is met. As to the second prong, the failure to challenge this testimony clearly prejudiced Onyeukwu. He was convicted of counts 6, 7, and 11, all of which had as an element that the victim was mentally deficient. Furthermore, these three counts were all felonies for which he was sentenced to prison. The only other count for which he was convicted of was a misdemeanor for which he received a jail sentence. Therefore, but for these three convictions, Onyeukwu would not have been sentenced to prison, a prison sentence he continues to serve.

c. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S REFERENCE TO TESTIMONY OF A DOCTOR WHEN NO DOCTOR TESTIFIED IN HER CLOSING STATEMENT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

As noted above, the prosecutor led off her closing statement by declaring that:

> **You heard the doctor testify that she has mild mental retardation. You heard the doctor testify that she can't read. You heard the doctor testify that she functions at a sixth grade level.**

(R. 50:224).

Yet, this testimony was not given by a doctor. This testimony was given by a nurse. Never mind for now that this was inadmissible hearsay testimony that was not objected to. Never mind that these statements should never have been in evidence had trial counsel properly discharged his duty. But, these statements were in evidence. What was not in evidence was that these statements were made by a doctor. They were not made by a doctor. They were made by a nurse. Trial counsel failed to object and to move to strike the statements that these statements were made by a doctor.

Understandably, an appropriate remedy for prosecutor's prejudicial misstatements in their closing argument is a new trial. ***State v. Mayo,*** 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115. A proper objection by trial counsel and a curative instruction by the court may have obviated the need for a new trial, but neither of those occurred. Onyeukwu should be granted a new trial on this basis alone.

d. TRIAL COUNSEL'S FAILURE TO DISCUSS ONYEUKWU'S DECISION OF WHETHER OR NOT TO TESTIFY CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

> A criminal defendant's constitutional right not to testify is a fundamental right that must be waived knowingly, voluntarily, and intelligently. However, we conclude that circuit courts are not required to conduct an on-the-record colloquy to determine whether a defendant is knowingly, voluntarily, and intelligently waiving his or her right not to testify. While we recommend such a colloquy as the better practice, we decline to extend the mandate pronounced in Weed. In

> any case, once a defendant properly raises in a post-conviction motion the issue of an invalid waiver of the right not to testify, an evidentiary hearing is an appropriate remedy to ensure that the defendant knowingly, voluntarily, and intelligently waived his or her right not to testify.

State v. Denson, 2011 WI 70, ¶8, 335 Wis. 2d 681, 799 N.W.2d 831

Onyeukwu testified at the trial. In other words, he waived his right not to testify. There was no record made at the trial whatsoever as to whether he was knowingly, voluntarily, and intelligently waiving his right not to testify. At a post-conviction hearing, Onyeukwu testified unequivocally that he did not understand that he had the right not to testify and had not knowingly, voluntarily, and intelligently waived that right. His trial counsel vaguely asserted that it is his practice to discuss this right without clients, but he no specific recollection of doing so with Onyweukwu.

Clearly, the best practice is for the trial judge to make the inquiry as prescribed in the Wisconsin Jury Instructions, Special Materials, SM-28, which is as follows:

> DIRECT THE FOLLOWING QUESTIONS TO THE DEFENDANT:
>
> "Do you understand that you have a constitutional right to testify?"
>
> "And do you understand that you have a constitutional right not to testify?"
>
> "Do you understand that the decision whether to testify is for you to make?"

"Has anyone made any threats or promises to you to influence your decision?"

"Have you discussed your decision whether or not to testify with your lawyer?"

"Have you made a decision?"

"What is that decision?"

DIRECT THE FOLLOWING QUESTIONS TO DEFENSE COUNSEL:

"Have you had sufficient opportunity to thoroughly discuss this case and the decision whether to testify with the defendant?"

"Are you satisfied that the defendant is making the decision knowingly, intelligently, and voluntarily?"

THE COURT SHOULD STATE THE APPROPRIATE FINDING ON THE RECORD

Wis. J.I.–Criminal S.M.-28 (2009)

The court did not make the appropriate inquiry to the defendant. The court did not make the appropriate inquiry to the defense counsel. The court did not state the appropriate findings on the record as no findings could have been made or were made without the appropriate inquiries.

The court's inquiry was limited to asking the following two questions: [To defense counsel] "Are you still planning on having your client testify?" to which it was answered, "Yes, sir." Then, the court asked, "And he's aware he doesn't have to?" to which it was answered, "Right." (R. 50:164).

At the post-conviction hearing, the court, with the benefit of hindsight had this colloquy with defense counsel:

> Court: And I guess maybe if you can't recall, you can't recall, but what has always bothered me about this case is why he would testify without any ability to refute the DNA evidence that he had intercourse. He had DNA evidence showing he had intercourse, and he gets up there and says, "No, I didn't." What -- wouldn't it have been better not to have him testify?
>
> Erickson: Yes. And certainly in every case I have ever represented an individual on, I have always talked to the defendant about the benefits and detriments to testifying. For example, my most recent case is a theft case. We talked about it, and he said he wasn't going to testify. So certainly that is part of my rubric in discussing cases with individuals. Again, I don't remember the specifics about this case much at all besides that crazy number about the DNA and him disputing the DNA. Whether I told him, you know, "Don't testify ," I have no idea.

(R. 52:44-45)

So, the court concedes that even two and one-half years after the trial, it still has been wondering why Onyeukwu testified, given his testimony. Trial counsel's answers, if uncontradicted and believed, offer the barest support for the proposition that Onyeukwu knowingly, voluntarily, and intelligently waived his right not to testify consistent with ***Denson.*** However, when Onyeukwu's testimony is considered, the weak support there would otherwise be for the integrity of the waiver is whittled away. Onyeukwu testified as follows:

> Nagel: And a jury shouldn't use your silence against you; do you remember learning that at some point?
>
> Onyeukwu: Right.
>
> Nagel: Prior to trial?
>
> Onyeukwu: No, I never did. I never did.
>
> Nagel: And your lawyer never told you that?

Onyeukwu: No.

(R. 52:52)

Later in the hearing, there was this more detailed colloquy about this issue:

> Nagel: And he called you to testify because you had earlier during the trial told him, "I want to testify?"
>
> Onyeukwu: Yes.
>
> Nagel: Yes. That was the first time you ever said, " I want to testify?"
>
> Onyeukwu: That was the first time.
>
> Nagel: You had never told him before you didn't want to testify?
>
> Onyeukwu: No.
>
> Nagel: You were never told that you could testify if you wanted to until that time?
>
> Onyeukwu: No, he didn't tell me.
>
> Nagel: You just said , "I want to testify"?
>
> Onyeukwu: Yes. I was sitting very close to you there and getting upset.
>
> Nagel: And then after you said you wanted to testify, there was no discussion of what the benefits and costs of testifying might be?
>
> Onyeukwu: There was none.
>
> Nagel: And especially with regard to what you were going to testify to, and I think we sort of -- are coming back to where we started on this maybe?
>
> Onyeukwu: Yeah, there was no discussion.

(R. 52:60-61)

Thus, by not ensuring that Onyeukwu knowingly, voluntarily, and intelligently waived his right not to testify, Onyeukwu was deprived of his 5th Amendment right against self-incrimination. The failure of his trial counsel to ensure

that his 5th Amendment rights were protected deprived him of his 6th Amendment right to counsel. Deprivation of these rights prejudiced Onyeukwu. A new trial is indicated on this basis alone.

e. TRIAL COUNSEL'S FAILURE TO INTRODUCE AVAILABLE EVIDENCE TO CORROBORATE ONYEUKWU'S TESTIMONY CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

A court views an omitted piece of evidence in the context of the "totality of the evidence" when evaluating whether its omission prejudiced the defendant. ***State v. Moffett,*** 147 Wis. 2d 343, 357, 433 N.W.2d 572 (1989). When the omitted evidence would have cast doubt on the credibility of a key witness, it undermines confidence in the verdict. ***Stewart,*** 342 Wis. 2d 250, ¶ 23. Wisconsin Courts reject "a simplistic 'outcome-determinative standard'" when determining whether an omission was prejudicial to the defense. The focus is on the reliability of the proceedings - "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." ***Moffett,*** 147 Wis. 2d at 354. Prejudice does not require a finding that the final result of the trial would have been different. To establish ineffective

assistance, the defendant need not show that the final result of the proceeding would have been different. Rather, "[t]he defendant need only demonstrate to the court that the outcome is suspect." ***State v. Smith,*** 207 Wis. 2d 258, 275, 558 N.W.2d 379 (1997). Counsel's failure to present the jury with a corroborating phone record, without any sound rationale for the decision to not do so, has clearly undermined confidence in the ultimate outcome of the jury trial. Trial counsel's failures prejudiced Onyeukwu's case.

Wisconsin courts have routinely held that the failure to introduce evidence that impeaches a key adverse witness or bolster's the defense's theory falls below the objective standard of reasonableness. In ***Moffett,*** for example, defense counsel failed to introduce a police report containing statements that would have impeached an adverse witness's testimony at trial. 147 Wis. 2d at 353. The circuit court concluded that defense counsel's failure to introduce the witness's prior statements was an unintentional oversight and was not the product of reasoned, deliberate defense strategy. The circuit court also found that the defense counsel's representation fell below an objective standard of reasonableness, thus satisfying the first element of the Strickland test. ***Strickland*** binds this Court.

Here, trial counsel failed to introduce into evidence a phone record[4] that corroborated Onyeukwu's version of the events: that they were in Onyeukwu's house for a very brief time and there simply was not time for the series of sex acts that he allegedly committed. At the post-conviction hearing, Onyeukwu testified about the phone record as follows:

> Nagel: Did he ask you how long the interaction in your living room took place, the time period?
>
> Onyeukwu: I remember, yes, he did ask me, and he asked me if I have a phone record to that effect , and I gave him my Sprint phone bill that I got that showed exactly, you know, how long we stayed. And I took it to him to resolve this, and he just , you know, put it away. That was all he did.
>
> Nagel: All right. Do you remember what the phone records supported as far as how much time she would have been in your living room?
>
> Onyeukwu: She – I – I – as I recall real wel1, we did not even stay in my house for up to 20 minutes, but I give that phone record to support that.
>
> Nagel: You had phone records at this point?
>
> Onyeukwu: I gave it to him, yes.
>
> Nagel: Did he ask any questions about that at tria l? No , he didn't. And he didn't introduce the phone record at trial?
>
> Onyeukwu: No.
>
> Nagel: – as evidence?
>
> Onyeukwu: No.

[4]The phone record shows that there was an incoming call to Onyeukwu on April 8, 2011, at 11:41 a.m. from phone number 608-377-1062. The duration of that phone conversation was 2 minutes. A second phone conversation between Onyeukwu's phone and 608-377-1062 occurred 12:19 p.m., 36 minutes after the first conversation was completed. The duration of the second conversation was 5 minutes (R. 43, Appendix 142).

> Nagel: Do you recall how it is that the phone record showed how long you were with Tiffany in your living room?
>
> Onyeukwu: It showed,yes, it did, because even then while we were at my house, my ex-girlfriend called me, and I was talking to her while Tiffany was sitting there, and when I was going to drop her off at Lancaster here at McDonald 's, I was talking to my girlfriend, and I told him that, too.
>
> Nagel: Okay. So you 're saying the time between the two phone calls was the time she was in the – was the time Tiffany was in the living room?
>
> Onyeukwu: Yes. One in the living room, then one in my truck when I went to drop her off.
>
> Nagel: But the first – what – how long had she been in your living room before you got the first phone call?
>
> Onyeukwu: The first phone call I was there for like less than five minutes.
>
> Nagel: And then how long was it after she left the living room that you got the second phone call at the Lancaster McDonald' s?
>
> Onyeukwu: I would say roughly – roughly about 12 to 15 minutes, and I was on the phone – I was on the phone talking to my girlfriend, or ex girlfriend rather.
>
> Nagel: Okay. So once you do this math, the conclusion is she was in your room for [no] more than 20 minutes. You have you added the five minutes before and 12 to 15 after; is that correct?
>
> Onyeukwu: That is correct.

(R. 52:52-54)

Then, in somewhat dramatic fashion, the trial counsel produced the phone record at issue from his file. He was, however, argumentative and evasive about the value of the phone record. Eventually, the court, having become frustrated with trial counsel's evasiveness intervened and asked him the following:

Court: He was wondering why you didn't bother following through on this phone record when your client, obviously, felt it was important.

Erickson: I don't know. Like I said, I don't have any recollection of it at all. It's in the file and –

Nagel: Oh, yeah, I think that was my question. How did it get in your file?

Erickson: Right. Well, I presume Mr. Onyeukwu gave it to me, but I don't know.

Nagel: He testified today that he gave it to you.

Erickson: Okay.

Nagel: Do you have any reason to believe that that' s not how it got in your file?

Erickson: No.

Nagel: You have no reason why somebody tampered with your file?

Erickson: No, nobody tampered with my file, but somebody else may have given it to me for him. I don' t know.

Nagel: Okay.

Erickson: It didn' t come from me. And does it have his name on it? I mean I don't know.

Court: I assume Mr. Onyeukwu's number is 957-6179?

Onyeukwu: Yes.

Nagel: You don't -- may be I don't want to beat a dead horse, but you don't recall any discussion with him about the phone records; is that your testimony?

Erickson: Right. I have none. No recollection at all.

(R. 52:100)

So, in a somewhat roundabout fashion, trial counsel acknowledges that:

1. Onyeukwu provided him with phone records.
2. That Onyeukwu believed that they were exculpatory.
3. That he did nothing more with the records.
4. That he did not introduce them into evidence.

5. That he has no recollection of any strategic reason for not doing so.

These phone records were vital to corroborating that the two were at Onyeukwu's house for a brief period of time notwithstanding the victim's testimony that she was lying on the floor with the defendant for "about an hour" (R. 50:84). The short period of time the two were together as corroborated by the phone records also supports the multiplicity argument as presented by post-conviction motion and within this brief.

As Strickland notes, a reasonable attorney's actions are usually based on informed strategic choices made by the defendant and on information supplied by the defendant. That did not occur here - counsel ignored the defendant's input and failed to introduce it at trial. That conduct was not objectively reasonable.

When a trial attorney's omissions undermine the plausibility of the primary defense theory, they are prejudicial. ***Moffett v. Kolb,*** 930 F.2d 1156 (7th Cir. 1991). Here, it was crucial to corroborate Onyeukwu's testimony. Trial counsel was provided with corroborating phone records but failed to introduce them into evidence at the trial. Its omission constitutes prejudice. Onyeukwu did not receive a fair trial. For this reason alone, this court should find trial counsel to be

ineffective and that Onyeukwu was prejudiced as a result and should therefore grant him a new trial.

3. ONYEUKWU MUST BE RESENTENCED TO ENSURE A FAIR SENTENCING BASED UPON ACCURATE INFORMATION

A defendant has a constitutionally protected due process right to be sentenced upon accurate information pursuant to the 14th Amendment of the U.S. Constitution and ***State v. Tiepelman,*** 2006 WI 66, 291 Wis.2d 179, 717 N.W.2d 1. Tiepelman's motion was based on his claim that the circuit court relied on inaccurate information at his sentencing hearing. In particular, the circuit court mistakenly stated that the presentence investigation showed "something over twenty prior convictions at the time of the commission of this offense back in [November] 1995." The defendant had, in fact, 20 charged offenses reflected on the presentence investigation as of that date, however only five of those offenses resulted in convictions. The supreme court determined that a defendant who requested resentencing due to the circuit court's use of inaccurate information at the sentencing hearing had to show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. Defendant had to establish that some of the information presented was inaccurate and that the sentencing court

actually relied on that misinformation in reaching its determination in regard to the sentence imposed. The State conceded that the information was inaccurate, and the record made clear that the sentencing court specifically considered the inaccurate information in its decision. The matter was remanded to the circuit court for resentencing. ***State v. Tiepelman,*** 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1 (2006).

Reviewing the procedural history in the instant case:

1. The convictions are for an incident of 4/8/11.
2. Trial was 8/10/11.
3. Sentencing was 8/17/11.
4. Risk reduction sentences were eliminated by 2011 Wisconsin Act 38, effective 8/3/11.
5. At sentencing, this court stated:

> There is no more risk reduction sentence, I don't believe. Even if there would be -- well, I guess I just don't know. My recollection is there is no more risk reduction sentence. If that goes by the date of the offense versus the date of the sentencing, I don't have a problem with you doing that. It lets you out a little early if you come up with a plan to show that you won't be subject to a higher risk of re-offending.

(R. 51:22-23)

Risk reduction sentences were a short-lived effort to better protect the public through inducing inmates to undertake rehabilitative efforts while reducing prison overcrowding and saving taxpayer money. They became effective on June 30,

2009. Specifically, a risk reduction sentence enabled a defendant to be released to extended supervision early, with up 25 percent of the confinement portion of the sentence remaining, provided they had completed Department of Corrections-provided risk reduction programming and treatment.[5] Given that Judge VanDeHey had sentenced Onyeukwu to a risk reduction sentence, Judge VanDeHey implicitly recognized that Onyeukwu would be eligible to be released after serving 6 years of confinement, 25 percent less than the 8 years of confinement to which he was nominally sentenced. Had Judge VanDeHey had proper information that the program had been dissolved by 2011 Act 38, effective August 3, 2011, it would be logical to presume that Judge VanDeHey may have sentenced Onyeukwu to no more than 6 years of initial confinement. It is certainly not logical to assume that had Judge VanDeHey had accurate information, the sentence would be the same given that a sentencing judge is to sentence a defendant to the minimum of amount of confinement necessary to achieve the sentencing goals. Judge VanDeHey articulated his sentencing goals and he sentenced Onyeukwu to a sentence where the judge believed Onyeukwu could be released after 6 years. That it was unknown to the

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[5]Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 Marq. L. Rev. 1551 (2012).

judge that Onyeukwu could not be released until the full 8 years was served suggests that the inaccurate information renders the sentence inconsistent with the sentencing goal of sentencing the offender to the minimum amount of confinement necessary to achieve the sentencing goals. In fact, the resulting sentence forces Onyeukwu to be confined to prison 2 years longer than necessary to achieve the sentencing goals.

The law established by ***Tiepelman*** was reinvigorated with a recent Wisconsin Supreme Court decision, ***State v. Travis,*** 2013 WI 38, 347 Wis. 2d 142 (2013). Travis was charged with one count of attempted first-degree sexual assault of a child in violation of Wis. Stat. § 948.02(1)(d). The complaint and information charged a violation of Wis. Stat. § 948.02(1)(d), but did not contain any allegations supporting the "use or threat of force or violence" element. Travis was convicted on his plea of guilty to a violation of Wis. Stat. § 948.02(1)(d). The appellate court ordered the judgment of conviction to be amended according to the agreement of the prosecuting attorney, defense counsel, defendant, and the trial court to list the correct crime, a violation of Wis. Stat. § 948.02(1)(e). It also directed that defendants be RESENTENCED accordingly. The state supreme court found that the trial court's error in incorrectly concluding that the

five-year mandatory minimum sentence of the incorrect statutory provision applied did not belong to the class of cases involving structural error. Nevertheless, it determined that the State had not met its burden of showing that the error in not applying the correct statutory provision, which had no minimum, did not affect the eight-year sentence the trial court imposed.

Likewise, in the instant case, having established that the court erred in granting Onyeukwu the opportunity for early release by sentencing him to to a no-longer-in-existence program, the burden shifts to the State to show that the error did not affect the length of his sentence. The State has not met this burden and Onyeukwu must be resentenced to ensure a fair sentence based upon accurate information.

4. THERE WAS AN EX POST FACTO VIOLATION BY DEPRIVING ONYEUKWU OF THE BENEFIT OF THE RISK REDUCTION PROGRAM THAT WAS IN EFFECT AT THE TIME OF HIS OFFENSE

The applicability of the ex post facto clause of the U.S. Constitution to this case is clarified by a U.S. Supreme Court decision of June 10, 2013, ***Peugh v. United States,*** 133 S.Ct. 2072 (2013). In delivering the court's opinion, Justice Sotomayor outlined the meaning of the ex post facto clause:

> The Constitution forbids the passage of ex post facto laws, a category including, as relevant here,

> "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." ***Calder v. Bull,*** 3 Dall. 386, 390, 3 U. S. 386, 1 L. Ed. 648. The "scope of this Latin phrase" is given "substance by an accretion of case law." ***Dobbert v. Florida,*** 432 U. S. 282, 292, 97 S. Ct. 2290, 53 L. Ed. 2d 344. The touchstone of the inquiry is whether a given change in law presents a "'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" ***Garner v. Jones,*** 529 U. S. 244, 250, 120 S. Ct. 1362, 146 L. Ed. 2d 236. Pp. 7-8.
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> ***Peugh*** at 2076.

Prior to Peugh, there had been a split among the federal circuits as to whether the court should use the sentencing guidelines that were in effect at the time of the offense or the sentencing gridlines that were in effect at the time of sentencing. At the time of Peugh's bank fraud, the 1998 Federal Sentencing Guidelines were in effect, but he was not sentenced until May 2010, using the then-current 2009 Guidelines. Peugh's bank fraud was in the Northern District of Illinois, which followed the Seventh Circuit Court of Appeals practice and precedent of using the sentencing guidelines that were in effect at the time of sentencing. The result of applying these guidelines was to recommend a penalty that called for 33 more months imprisonment on the low end of the sentencing guidelines range.

Justice Sotomayor determined that the inquiry should be "whether a given change in law presents a sufficient risk of

increasing the measure of punishment attached to the covered crimes." ***Peugh*** at 2082. By eliminating risk reduction sentences retrospectively, the legislature has indeed increased the measure of punishment attached to covered crimes.

Our Court of Appeals quickly applied ***Peugh*** to the repeal of the sentencing reforms that are at issue here. In ***State ex rel. Singh v. Kemper,*** 2014 WI App 43, 353 Wis. 2d 520, 846 N.W.2d 820, the District 2 Court of Appeals held that applying 2011 Act 38 to Singh results in a significant risk he would serve more time in prison than under 2009 Act 28. When Singh committed his offenses, he was eligible for early release under statutes enacted by 2009 Wisconsin Act 28. But, by the time he arrived at prison, the early release statutes had been repealed by 2011 Wisconsin Act 38, so DOC told him he was not eligible for early release. Our Court of Appeals determined that the exp post fact clauses of the United States and Wisconsin constitutions require that Singh be eligible for early release under the provisions of the repealed 2009 Act 28.

In the instant case, the retrospective elimination of risk reduction sentences increased Onyeukwu's expected confinement by 25 percent. One could make the argument that the judge could employ his discretion, recognizing that this early release program has been eliminated and sentence Onyeukwu to 25 percent less confinement, so there is no net

increase in confinement. However, the record is simply to the contrary here. The judge granted a risk reduction sentence, and, after learning that doing so was in error, did not reduce Onyeukwu's confinement by 25 percent. In fact, he did not reduce it at all, thus laying bare the full effect of the ex post facto actions of the legislature.

For these reasons, Onyeukwu's sentence must be vacated and he must be resentenced consistent with these recent Supreme Court and Wisconsin Court of Appeals decisions.

CONCLUSION

For the above-stated reasons, Bernard I. Onyeukwu urges this court:

1. To vacate the convictions for counts 7 and 11 as there was insufficient evidence to support those convictions.
2. To grant Onyeukwu a new trial 2 and 6.
3. To dismiss count 6 as multiplicitous with respect to count 2 or alternatively to dismiss count 2 as multiplicitous with respect to count 6.
4. To grant a new trial on the remaining count as trial counsel rendered ineffective assistance prejudicing Onyeukwu because he failed to make proper hearsay objections, failed to object to prosecutors closing argument making reference to a doctors testimony when

no doctor testified, failed to assist Onyeukwu in knowingly, voluntarily, and intelligently waiving his right not testify, and failed to introduce an available corroborating phone record as evidence.

5. At a minimum, Onyeukwu must be resentenced as his sentence is based on inaccurate information and violates his Constituional protection against ex post facto sentences.

Dated: August 6, 2014

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CERTIFICATION AS TO FORM, LENGTH,

ELECTRONIC FILING, AND CONFIDENTIALITY

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The text is 13-point type with quotations in 11-point type. The length of this brief is 50 pages and the word count for the body of the brief is 10,815. I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

I further certify that if the record is required 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 person, 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.

A copy of this certificate is included in the paper copies of this brief filed with the court and served on the opposing party.

August 6, 2014

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