STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP518-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BERNARD IKECHUKWEL ONYEUKWU,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE GRANT COUNTY CIRCUIT COURT, THE HONORABLE ROBERT P. VANDEHEY PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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C O U R T O F A P P E A L S

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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 application of established legal principles to the

facts of record. *See* Wis. Stat. §§ (Rules) 809.22, 809.23.[1]

STATEMENT OF THE CASE

Defendant-appellant Bernard Onyeukwu was found guilty after a jury trial of the following four (of eleven total) counts:

- Count 2: Fourth-degree sexual assault for kissing and for touching the breasts of the victim, TRL,[2] without her consent, Wis. Stat. § 940.225(3m) (14);

- Count 6: Third-degree sexual assault for penis-to-vagina sexual intercourse with TRL without her consent, § 940.225(3) (18);

- Count 7: Second-degree sexual assault for kissing and for touching the breasts of TRL, a mentally deficient victim, § 940.225(2)(c) (19); and

- Count 11: Second-degree sexual assault for sexual intercourse with TRL, a mentally deficient victim, § 940.225(2)(c) (23).

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[1]Unless otherwise indicated, references to the Wisconsin Statutes are to the 2011-12 edition.

[2]Regrettably, Onyeukwu has chosen to identify his victim by full name at least four times in his brief-in-chief and appendix, and by her full first name throughout his brief. To better protect her privacy, the State chooses to identify her only by her initials. The State also asks this court to protect her privacy by using initials or other nonspecific identifiers in its decision and opinion.

The charges were based on an incident one morning in April 2011, when Onyeukwu gave TRL a ride in his car and, according to TRL, eventually took her to his home and forced multiple sex acts on her (6:3-7). The court sentenced Onyeukwu on the four counts to concurrent terms totaling fifteen years' imprisonment, including eight years' confinement and seven years' extended supervision (29; A-Ap. 110-12).

Onyeukwu filed multiple postconviction motions, interspersed with two appeals that this court dismissed without prejudice so that Onyeukwu could seek further relief in circuit court (*see* 30 (motion for new trial); 31 (decision and order denying motion for new trial); 33 (court of appeals' order dismissing appeal without prejudice); 34 (motion to modify sentence); 37 (circuit court order denying motion to modify sentence); 39 (court of appeals' order dismissing second appeal without prejudice); 40 (third postconviction motion, for a new trial or to modify sentence); 44 (circuit court order denying motion for new trial or to modify sentence)). Following his most recent motion, the circuit court granted Onyeukwu a *Machner* hearing to examine whether trial counsel had rendered ineffective assistance (*see* 52:28-100). In denying Onyeukwu's motion, the circuit court noted that even the request for a *Machner* hearing likely should have been denied (*see* 44:1; 52:115).

Onyeukwu now appeals, raising many of the same issues as in his last appeal. Further relevant facts will be included in the "Argument" section.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT ONYEUKWU VIOLATED WIS. STAT. § 940.225(2)(C).

A. Legal principles governing sufficiency of the evidence.

In *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990), the supreme court explained the deferential standard of review for a challenge based on the sufficiency of the evidence:

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state 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. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

(Citations omitted.)

The trier of fact is charged with weighing the evidence, and is the sole arbiter of the credibility of witnesses. *See id*. at 506. In other words, it is exclusively within the province of the trier of fact to decide which evidence is worthy of belief, which is not, and to resolve any conflicts. *Id*. Moreover, when more than one inference can reasonably be drawn from the evidence, the

reviewing court must follow the inference that supports the trier of fact's verdict. *Id.* at 506-07.

Accordingly, "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence [that] conflicts with the laws of nature or with fully[]established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

> It is vitally important to maintain this standard of review. An appellate court should not sit as a jury making findings of fact and applying the hypothesis of innocence rule de novo to the evidence presented at trial.

State v. Watkins, 2002 WI 101, ¶ 77, 255 Wis. 2d 265, 647 N.W.2d 244 (citing *Poellinger*, 153 Wis. 2d at 505-06).

B. Elements of Wis. Stat. § 940.225(2)(c).

Wisconsin Stat. § 940.225(2)(c) criminalizes, under certain circumstances, sexual contact or intercourse with a person who suffers from a mental illness or deficiency. To convict Onyeukwu of that crime as charged in counts Seven and Eleven,[3] the State needed to prove to the jury

[3]Because Onyeukwu was acquitted on counts Eight through Ten, the State addresses his challenges only as pertains to those counts for which he was convicted; here, counts Seven and Eleven, as well as counts Two and Six, discussed *infra*.

beyond a reasonable doubt the following four elements:

1. Onyeukwu had sexual contact or intercourse with TRL.

2. TRL suffered from a mental illness or deficiency at the time of the sexual contact or intercourse.

3. The mental illness or deficiency rendered TRL temporarily or permanently incapable of appraising her conduct. In other words, TRL must have lacked the ability to evaluate the significance of her conduct because of her mental illness or deficiency.

4. Onyeukwu knew that TRL was suffering from a mental illness or deficiency and knew that the mental condition rendered TRL temporarily or permanently incapable of appraising her conduct.

See Wis. JI-Criminal 1211 (2002). Onyeukwu's sufficiency challenge focuses on the third and fourth elements.

C. The evidence, taken in the light most favorable to the State and the conviction, is sufficient to satisfy both the third and fourth elements.

1. The evidence supports the finding that TRL suffered from a mental illness or deficiency that rendered her incapable of appraising her conduct.

The question whether TRL suffered from a mental deficiency that rendered her unable to appraise her conduct under Wis. Stat. § 940.225(2)(c) is one within the common knowledge and understanding of a jury. *State v. Perkins*, 2004 WI App 213, ¶ 21, 277 Wis. 2d 243, 689 N.W.2d 684. As noted in the comments following the jury instructions describing the elements of § 940.225(2)(c), "'mental illness or deficiency' has a meaning within the common understanding of the jury" and any additional guidance is provided by the qualifying phrase, "'which renders that person . . . incapable of appraising the person's conduct.'" Wis. JI–Criminal 1211 n.1; *Perkins*, 277 Wis. 2d 243, ¶ 19.

Although expert testimony may be introduced to support this element, it is not required. Rather, supporting evidence may be provided through testimony from lay individuals who have interacted with the victim, as well as direct testimony from the victim herself. *See id.* ¶ 20 (favorably invoking a persuasive extra-jurisdictional case in which the victim's direct testimony provided evidence of her lack of

capacity); ¶¶ 22-23 (observing that testimony from the victim's caregiver, the owner of the facility where the victim lived, and a police officer who interviewed the victim provided an adequate basis for the jury to find that the State satisfied the third element).

Here, the jury heard testimony from a family nurse practitioner,[4] Laurie Meighan, who worked at a clinic where TRL received care (50:110-11). Meighan stated that TRL was diagnosed with mild mental retardation, attention deficit hyperactivity disorder (ADHD), and bipolar disorder with anxiety-related issues (50:111). She stated that all of those diagnoses negatively affected TRL's ability to make decisions (50:112). Meighan noted that because of that difficulty, TRL's mother successfully petitioned to be her guardian when TRL was 17 or 18 because TRL was incapable of making appropriate decisions (*id.*). Meighan elaborated that TRL could not make basic financial decisions, and that TRL does not choose appropriate friendships or say socially appropriate things (*id.*). Meighan stated that according to clinic reports, TRL was functioning at a sixth-grade level and cannot read (50:112-13).

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[4]In his brief-in-chief, Onyeukwu seems to challenge Meighan's credentials as a nurse practitioner (Onyeukwu's brief at 28 n.2). Such a factual assertion, never raised in the circuit court, is inappropriate on appellate review. *See In re Country Side Rest., Inc.*, 2012 WI 46, ¶ 31 n.15, 340 Wis. 2d 335, 814 N.W.2d 159. Moreover, Onyeukwu's misunderstanding of the relevant credentials may be resolved by reference to the provisions governing licensure for nurses in Wisconsin. *See* Wis. Stat. § 441.16(2) and Wis. Admin Code N § 8.02(1) and (2) (providing that a nurse who is academically certified as a "nurse practitioner" may be eligible to obtain licensure as an "advanced practice nurse prescriber").

Most significantly, the jury heard testimony from TRL herself and had an opportunity to observe her mannerisms and behavior. The jury learned that TRL was twenty-two years old, lived with her mother, and had never had a job (50:63-64). Although TRL was generally responsive to questions, specifics had to be drawn out from her, and her testimony generally demonstrated that she functioned and communicated at a lower developmental level.

For example, TRL's version of events reflected that her functioning and reasoning were significantly below that of a typical twenty-two year old. TRL claimed that on the morning of the assaults, Onyeukwu pulled her into his car as she walked to her father's house (50:65-67). She stated that she then rode in the back seat while Onyeukwu drove his son to a medical appointment at a Fennimore clinic (50:68). She said that Onyeukwu forced her to go into the clinic with him and his son (50:68). She acknowledged, however, that Onyeukwu left her alone in the waiting room during his son's appointment; during that time, not only did she not try to leave, but she also refused an offer of assistance from a clinic staff person (50:68-69). TRL also stated that Onyeukwu drove to his son's school to drop him off, again leaving her alone in the car for about fifteen minutes, during which time she claimed she tried to get out from both the front and the back seats but was locked in (50:71), despite the fact that Onyeukwu's car did not appear to have the capability to prevent someone inside from opening the doors (50:179-80).

Having heard TRL's testimony, the jury might have inferred that TRL was not mentally deficient as contemplated under Wis. Stat.

§ 940.225(2)(c), and that she was just making things up. Indeed, given its acquittal of Onyeukwu on several counts, the jury was not convinced beyond a reasonable doubt regarding several aspects of TRL's account. But the jury also could have reasonably inferred that TRL's recitation of that day's events and her understanding of them reflected a mental deficiency that rendered her unable to appraise her conduct. *See Poellinger*, 153 Wis. 2d at 506-07 (where evidence permits competing inferences, reviewing court must follow inference that supports trier-of-fact's verdict).

Other aspects of TRL's testimony support that inference, including her language and demeanor. For example, TRL described her response to the clinic staff member who asked if she needed assistance as saying that she "just want[ed] to go home to [her] mommy" (50:69). She also used childish language in describing the assaults. She described Onyeukwu as having touched her "boob" (50:78). When asked to be more specific when she said that Onyeukwu had touched her with his "private area," she described that as "his wiener" (50:82). When asked, she stated that she had never heard the term "penis" and had difficulty describing what functions a penis or "wiener" typically served (50:82-83).

Moreover, a written transcript cannot always effectively convey how a witness testifies. This court's deferential standard of review in reviewing findings by a court or jury is based, in part, on the idea that the court and jury have "the superior opportunity . . . to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." *State v. Searcy*, 2006 WI App 8, ¶ 35, 288 Wis. 2d 804, 709 N.W.2d 497 (citation and internal quotation marks omitted).

Several statements by the court and both counsel suggest that TRL's demeanor while testifying was especially telling of her mental deficiency. For example, during the line of questioning in which the prosecutor was drawing out of TRL what Onyeukwu did sexually to her, defense counsel objected to the prosecutor's using leading questions (50:83-84). The court remarked, "Well . . . *given the witness'[s] level of functioning*, some leading, I think, is appropriate," but cautioned the prosecutor to try to keep it to a minimum (50:84) (emphasis added).

Later, in closing, the prosecutor reminded the jury that several of TRL's inactions on the day of the assaults—such as her failure to try to leave the clinic or Onyeukwu's car when she had chances to do so—did not make sense, but were consistent with Meighan's testimony that TRL was functioning at a sixth-grade level due to her diagnoses and cognitive problems (50:224). The prosecutor went on to remark that TRL's demeanor added much more to her testimony than can be gleaned from simply reading the transcript:

> You saw the way [TRL] testified. You heard her speak. You saw her mannerisms. And it's for you to determine if you all believe that she has this mental deficiency and how well known it is. Is it something that you see right away? Is it something that you needed the doctor to tell you about before you realized it?

(50:227-28.) Additionally, defense counsel acknowledged that TRL was "an individual who, the testimony is, functions at a sixth grade level and, obviously, has got cognitive problems in that she has trouble sussing out what's really happening" (50:247).

In sum, taking the evidence in the light most favorable to the State, the testimony as to TRL's diagnoses, history, and behavior, as well as her own testimony, allowed the jury to reasonably conclude that TRL has a mental deficiency that caused her to be incapable of appraising her conduct.

2. The evidence supports the finding that Onyeukwu was aware of TRL's deficiency and that it made her unable to appraise her conduct.

The evidence likewise provided a reasonable basis by which the jury could conclude—as it did—that Onyeukwu was aware of TRL's mental deficiency making her unable to appraise her conduct. As noted above, the jury had the opportunity to observe TRL's demeanor and behavior on the stand, which demonstrated to both counsel and the court that TRL was functioning well below her age of twenty-two. The jury could then reasonably infer that Onyeukwu, after interacting with TRL for several hours on the morning of the assault, similarly had to recognize her limitations as well. Moreover, the jury was entitled to find incredible—based on its observations of TRL's and Onyeukwu's respective demeanors and testimony—Onyeukwu's statements that he did not find TRL's manner of speaking strange or sense that she had "intellectual struggles" when he talked with her (50:206).

3. Onyeukwu's arguments to the contrary are not persuasive.

Onyeukwu first argues that of all of TRL's diagnoses, only her mild mental retardation "seems as if it has any potential for meeting the statutory criteria" (Onyeukwu's brief at 16). But he does not explain why the jury should have considered only that diagnosis in isolation. Indeed, Nurse Meighan testified that all of TRL's diagnoses contributed to her limited functioning (50:112). Further, it is not reasonable to suggest that an individual with mild mental retardation would not face additional cognitive and developmental hurdles if she were also dealing with ADHD, bipolar disorder, and anxiety.

Onyeukwu further argues that this case is unlike *Perkins* because the victim in that case had much more severe deficiencies than TRL did here. Moreover, he points out that Perkins had a much closer relationship with the victim than Onyeukwu had with TRL (Onyeukwu's brief at 18-21). But *Perkins* was not a close case: nothing in that decision suggests that the State would be unable to prove the third and fourth elements of § 940.225(2)(c) when the victim was a person with any less severe or obvious deficiencies than those of the *Perkins* victim. Even though TRL may be more functional than the victim in *Perkins* or though she and Onyeukwu only interacted for a few hours, those facts did not foreclose the jury from determining that the State satisfied its burden as to both the third and fourth elements.

Onyeukwu also invokes for persuasive support an Oregon case, *State v. Reed*, 118 P.3d

791 (Or. 2005). *Reed* is obviously not controlling in Wisconsin, and it also does not provide persuasive support for Onyeukwu's position. Nonetheless, Onyeukwu argues that, based on language in *Reed*, TRL's testimony that she objected when Onyeukwu began forcing her to engage in sexual acts indicated that she had the capacity to consent and thus was able to appraise the nature of her conduct (Onyeukwu's brief at 20).

This argument ignores the fact that after the *Reed* court observed that the victim testified to resisting the defendant, it wrote that the jury was nevertheless free to reject that portion of the victim's testimony and rely on other relevant evidence to determine whether her mental defect rendered her incapable of consenting to sexual contact. *See Reed*, 118 P.3d at 793-94. Moreover, the fact that a mentally deficient victim resists the assault in some form is not dispositive. Indeed, the victim in *Perkins* told her assailant "no, no," and pushed away from him during the attack. *See Perkins*, 277 Wis. 2d 243, ¶ 6.

Finally, Onyeukwu argues that because he spent only a few hours with TRL and barely spoke to her, the State failed to demonstrate that he knew of her mental deficiency and incapacity to consent (Onyeukwu's brief at 20-21). The jury learned, however, that (1) Onyeukwu was a well-educated, smart man; (2) Onyeukwu talked to TRL outside of his car before she got in; (3) Onyeukwu spent several hours with TRL accompanying him on errands before the assaults; and (4) by Onyeukwu's version of events, TRL talked to him extensively inside the house before the assaults. In addition, the jury had an opportunity to observe Onyeukwu during his testimony and make credibility determinations.

The jury further had an opportunity to listen to and observe TRL's testimony and make credibility assessments. Given all of that, there was sufficient evidence available to the jury to allow it to assess whether someone in Onyeukwu's shoes would have known of her mental defect and her inability to appraise her conduct.

In summary, the evidence, viewed in the light most favorable to the State and the conviction, was sufficient to support the jury's finding that the State established the third and fourth elements of counts Seven through Eleven. Onyeukwu is not entitled to relief on this claim.

II. ONYEUKWU HAS NOT ESTABLISHED DEFICIENT PERFORMANCE OR PREJUDICE ON ANY OF HIS INEFFECTIVE ASSISTANCE CLAIMS.

In his current appeal, Onyeukwu claims that five alleged errors, not raised at trial, demonstrate that trial counsel was ineffective. Because Onyeukwu cannot show either deficient performance or prejudice arising from the alleged errors, he is not entitled to relief on his claims of ineffective assistance.

A. Legal standards governing ineffective assistance claims.

The benchmark for an ineffective assistance of counsel claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied

on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under *Strickland*'s familiar two-pronged standard, a defendant must show both that his counsel's performance was deficient and that that deficient performance resulted in prejudice to the defendant. *See State v. Domke*, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 805 N.W.2d 364.

To establish deficient performance, a defendant must show that counsel's representation fell below an objective standard of "reasonably effective assistance." *Id*. (quoting *Strickland*, 466 U.S. at 687-88). On review of a claim of ineffective assistance, courts should be "highly deferential" to trial counsel's strategic decisions, and should make "every effort . . . 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." *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting *Strickland*, 466 U.S. at 689) (internal quotation omitted). There is a "'strong presumption' that counsel's conduct 'falls within the wide range of reasonable professional assistance.'" *Id*. (quoting *Strickland*, 466 U.S. at 689).

If a defendant can show that counsel's performance was outside the wide range of competent assistance, the defendant must also establish that the deficient performance caused prejudice. To establish prejudice, a defendant must show that the attorney's error was "of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.'" *State v. Erickson*, 227

Wis. 2d 758, 769, 596 N.W.2d 749 (1999) (citations omitted).

If the defendant fails to show either deficient performance or prejudice, the ineffective assistance claim fails: "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

B. Trial counsel was not ineffective for failing to convince the circuit court that counts Two through Six and counts Seven through Eleven were multiplicitous.

As Onyeukwu acknowledges in his brief, trial counsel argued before trial that counts Two through Six and counts Seven through Eleven were multiplicitous as corresponding pairs (*see* Onyeukwu's brief at 24-25; *see also* 10 (motion in limine)). In his current appeal, though, Onyeukwu argues that trial counsel made the wrong multiplicity argument, and that he should have argued that the two sets of charges were multiplicitous within each set (i.e., that the charges in counts Two through Six were multiplicitous within that set, not in relation to counts Seven through Eleven). But Onyeukwu's new multiplicity argument is wrong as a matter of law, and therefore trial counsel was not ineffective for not raising that challenge.

1. No multiplicity violation occurs where the charged conduct is different in fact from conduct charged in other counts.

A multiplicity challenge requires that a defendant be "charged in more than one count for a single offense.'" *State v. Davison,* 2003 WI 89, ¶ 34, 263 Wis. 2d 145, 164, 666 N.W.2d 1 (quoting *State v. Rabe,* 96 Wis.2d 48, 61, 291 N.W.2d 809 (1980)). But even where this requirement is met, if the legislature intended to allow multiple punishments for the same course of conduct, no multiplicity violation will be found. *See Davison*, 263 Wis. 2d 145, ¶¶ 35-36.

Thus, under the established methodology for analyzing a multiplicity claim, a court first examines whether the charged offenses are identical in law and fact. *See Davison*, 263 Wis. 2d 145, ¶ 43. Determining whether charges are the same in law requires examining the language of the statute or statutes under which the defendant is charged. *See State v. Derango*, 2000 WI 89, ¶¶ 28-30, 236 Wis. 2d 721, 613 N.W.2d 833. To determine whether charges are the same in fact, courts examine whether "the offenses are either separated in time *or* significantly different in nature." *State v. Warren*, 229 Wis. 2d 172, 180, 599 N.W.2d 431 (Ct. App. 1999). "To be of a significantly different nature, each charged offense must require proof of an additional fact that the other charges do not." *State v. Swinson*, 2003 WI App 45, ¶ 31, 261 Wis. 2d 633, 660 N.W.2d 12.

If the charges are not the same in law and fact, a presumption arises that the legislature intended to allow multiple punishments. *See Davison*, 263 Wis. 2d 145, ¶ 44. While it may be shown that legislature still intended that multiple offenses be brought as a single count, it is the defendant's burden to show that the legislature intended to so limit punishment for multiple offenses. *See id.* ¶ 45.

2. Onyeukwu cannot show that the charged offenses were identical in fact, and he also fails to show any prejudice that arose from counsel's failure to raise the current challenge at trial.

To succeed on his ineffective assistance claim, Onyeukwu must show that counsel rendered deficient performance by failing to persuade the court that counts Two through Six and Seven though Eleven, respectively, were identical in fact. Onyeukwu attempts to show that the various acts of sexual assault were "part of the same transaction or episode," (Onyeukwu's brief at 27), but that formulation is not the test for whether different acts were the same in fact for multiplicity purposes. Rather, the proper test is whether the different acts charged were "significantly different in nature," such that each charged offense requires "proof of an additional fact that the other charges do not." *Swinson*, 261 Wis. 2d 633, ¶ 31.

Looking at the charged conduct, there can be no question that each count required proof of a

different act than each other charge: Counts Two and Seven required hand-to-breast contact; Counts Three and Eight, cunnilingus; Counts Four and Nine, finger-to-vagina contact; Counts Five and Ten, penis-to-mouth contact; Counts Six and Eleven, penis-to-vagina intercourse. Thus, regardless of the amount of time involved, each count required proof of a separate and distinct act, and the counts are therefore different in fact from each other.

More fundamentally, because Onyeukwu's multiplicity challenge comes after his conviction, he is limited to challenging his sentence by seeking to have one of the allegedly multiplicitous convictions vacated and to be resentenced on the remaining conviction. *See* 5 Wayne R. LaFave et al., Criminal Procedure § 19.3(c), at 288 (3d ed. 2007) (a defendant raising a multiplicity objection after conviction may be "entitled to relief from an improperly imposed multiple sentence" but cannot object to the possible impact of the multiplicity upon the jury's evaluation of his guilt). But resentencing is unnecessary where "the invalidation of one count on double jeopardy grounds has no [e]ffect at all on the overall sentence structure," such as where the defendant was given concurrent sentences. *See State v. Church*, 2003 WI 74, ¶ 26, 262 Wis. 2d 678, 665 N.W.2d 141; *accord United States v. Lemons*, 941 F.2d 309, 319 (5th Cir. 1991) (a defendant is precluded from asserting a multiplicity challenge to concurrent sentences).

For this reason, Onyeukwu is also unable to show that he was prejudiced by the failure of trial counsel to object to the counts as charged. That is, even assuming that any of the charges were multiplicitous, the concurrent sentences for all the

charges are subsumed into the longest sentence on Count Eleven (eight years' confinement, seven years' extended supervision). Thus, Onyeukwu is unable to show a reasonable probability that the overall result of his sentencing would have been different had counsel raised the asserted multiplicity challenge, and this aspect of his ineffective assistance challenge fails.

C. No hearsay violation occurred when Nurse Meighan testified about TRL's medical history, and therefore counsel was not ineffective for not objecting.

Onyeukwu next asserts that trial counsel was ineffective for failing to object to Meighan's discussion of TRL's medical history, particularly "paperwork that came through [the] clinic" (*see* Onyeukwu's brief at 27-28 (citing 50:112-13). The objection that Onyeukwu longs for, however, would have been based on an incorrect understanding of the law, and would have been overruled.

Onyeukwu claims that the material relied on by Meighan in discussing TRL's mental deficiencies was hearsay "for which no exception applies" (Onyeukwu's brief at 28). Onyeukwu is wrong: Wis. Stat. § 908.03(4) covers precisely such statements.

That section provides that statements (either written or oral) are not hearsay when "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or

external source thereof insofar as reasonably pertinent to diagnosis or treatment." Wis. Stat. § 908.03(4). On the plain language of the statute, then, statements in reports, records, and other materials in TRL's medical chart at the clinic are unquestionably excepted from the definition of hearsay.

This understanding of the statute is borne out in case law addressing similar challenges based on the hearsay exception for medical records.[5] In *Rennick v. Fruehauf Corp.*, 82 Wis. 2d 793, 808, 264 N.W.2d 264 (1978), the court acknowledged that "the medical opinions and diagnoses contained in the report of a consulting specialist, used by the testifying medical expert in making his diagnosis has sufficient trustworthiness to permit admission in direct proof." This recognition of the trustworthiness of such reports is well established, and derives from two equally persuasive propositions: (1) that the statements at issue "are made and relied upon in affairs of life and death," *Hagenkord v. State*, 100 Wis. 2d 452, 470, 302 N.W.2d 421 (1981); and (2) that a testifying medical expert is qualified to examine relevant records in reaching a conclusion about a patient's diagnosis, *see Vinicky v. Midland Mut. Cas. Ins. Co.*, 35 Wis. 2d 246, 254, 151 N.W.2d 77 (1967).

[5]While the cited cases dealt with medical records under Wis. Stat. § 908.03(6m) and its predecessors, the rationale is equally applicable to statements made for the purpose of medical treatment or diagnosis, under Wis. Stat. § 908.03(4). Indeed, the dearth of reported cases dealing with the medical statements exception under Wis. Stat. § 908.03(4) may be due to the near-universal understanding that such statements are admissible through another testifying witness, based on the analogous reasoning applied to the physical records covered by sub (6m).

Given this clear hearsay exception for statements made for purposes of medical diagnosis and treatment, and given that Nurse Meighan's testimony unquestionably related to her understanding of TRL's diagnoses, Onyeukwu's challenge on this point lacks merit.

D. Onyeukwu's challenge based on the mistaken reference to "doctor" instead of "nurse" is borderline frivolous.

Onyeukwu claims that he should be granted a new trial because his trial counsel did not object when the prosecutor, in closing arguments, mistakenly referred to Nurse Meighan as a "doctor." This argument is so lacking in substance and merit that the State declines to address it any more than to ask this court to reject it summarily.[6]

E. The circuit court found that trial counsel did discuss with Onyeukwu whether to testify at trial, and there is no suggestion that the court's credibility determination on this point was clearly erroneous.

Onyeukwu next claims that counsel was ineffective for failing to thoroughly discuss with

[6]*See State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."), cited with approval in *State v. Pettit*, 171 Wis. 2d 627, 647 n.9, 492 N.W.2d 633 (Ct. App. 1992).

Onyeukwu whether he would testify.[7] This claim is belied by the record; most importantly, the circuit court found Onyeukwu incredible on this point.

1. Waiver of the right not to testify.

As Onyeukwu correctly notes, the supreme court in *State v. Denson*, 2011 WI 70, 335 Wis. 2d 681, 799 N.W.2d 831, recognized that the right *not to testify*, similar to the right *to testify*, must be waived knowingly, intelligently, and voluntarily. *See Denson*, 335 Wis. 2d 681, ¶ 56. But the *Denson* court declined to require an on-the-record colloquy to demonstrate a valid waiver, and instead directed that where a defendant makes a sufficient showing in a postconviction motion alleging invalid waiver, the appropriate remedy is to hold a hearing with the defendant and trial counsel to determine whether the defendant's decision to testify was made knowingly, intelligently, and voluntarily. *See id.* ¶¶ 58-68.

Where the defendant makes a prima facie showing that there was a defect in the waiver of

[7]Onyeukwu's argument on this point is phrased in terms of an ineffective-assistance challenge. Such waiver issues, however, may more properly be framed in terms of trial error subject to harmless error analysis. *See State v. Nelson*, 2014 WI 70, ¶¶ 18-32, 355 Wis. 2d 722, 849 N.W.2d 317. Because Onyeukwu is not entitled to relief under either standard (i.e., under the ineffective-assistance rubric, no prejudice resulted from counsel's failure to inform Onyeukwu of the right not to testify; or, under the harmless error analysis, it is clear beyond a reasonable doubt that the result would have been the same had Onyeukwu not testified), the State addresses the issue as Onyeukwu has framed it.

the right not to testify, the burden shifts to the State to show that the wavier was knowing, intelligent, and voluntary. *See id.* ¶ 70. The State can meet this burden by showing, from the entire record, including testimony at any postconviction hearings, that the defendant validly waived the right. *See id.* A circuit court's credibility findings in this context will be sustained unless clearly erroneous. *Id.* ¶ 48.

2. Onyeukwu received the appropriate remedy for his allegedly improper waiver—a postconviction hearing—at which the circuit court concluded that, in light of the testimony presented, Onyeukwu's protestations were not credible, and that his waiver had been valid.

After Onyeukwu claimed in his most recent postconviction motion that he had not validly waived his right not to testify, the issue was explored during the evidentiary hearing, and both Onyeukwu and his trial counsel testified (*see* 52:43-45, 48-52, 60-63, 70-100). After hearing all the testimony, the circuit court found that trial counsel's account was more credible, and that Onyeukwu's allegations to the contrary were wholly unbelievable, both in light of the testimony at the hearing and the trial record (*see, e.g.*, 52:113 (stating that Onyeukwu was "not a credible witness"); *see also* 52:113-15). Specifically, the court relied on trial counsel's statements about his practice of always discussing with his clients whether to testify; counsel's assurances that he

had specifically discussed Onyeukwu's testimony in light of the damning DNA evidence; and the trial court record, which indicated that on at least two occasions, the court asked about Onyeukwu's decision to testify and was assured by counsel that Onyeukwu remained intent on testifying (*see* 52:113-14; *see also* 52:43-45, 70-76, 86-87).

Now on appeal, rather than attempting to show that the circuit court's findings were clearly erroneous, Onyeukwu seeks to relitigate these issues of fact and credibility. Because his argument does nothing to call into question the circuit court's well-supported findings, those findings should be sustained, and Onyeukwu's claim rejected.

Even more persuasive on this point, though, is the total inability to show prejudice, even assuming that counsel erred in failing to properly inform Onyeukwu on his right not to testify. Most importantly, the DNA evidence presented at trial showed that it was 46,000,000,000,000,000 (forty-six quadrillion) times more likely that the sperm inside TRL was from Onyeukwu than it was from anyone else (50:155-56). Moreover, as the circuit court aptly noted, the jury had heard a taped interview in which Onyeukwu told the same story as in his trial testimony, so that Onyeukwu's "absurd" denial would have nonetheless been before the jury, even without his testimony (*see* 52:88, 114-15). With these considerations in mind, the circuit court correctly concluded that Onyeukwu suffered no prejudice based on his decision to testify (*see* 52:114-15).

F. Admission of Onyeukwu's phone records would not have discredited the DNA evidence that confirmed that he had engaged in sexual contact with TRL, and therefore counsel's decision not to seek admission of the records was not deficient performance and did not prejudice Onyeukwu.

This argument merits little attention, in light of the uncontroverted DNA evidence showing that it was Onyeukwu's semen found in TRL's vagina and on her rectum (*see* 50:155-56). For one, Onyeukwu fails to show why counsel would have been deficient for failing to introduce cell phone records that would have showed that, during the period in which the assault occurred, Onyeukwu received two phone calls. He asserts that the records would have established a "timeline" (*see* 52:95-97), but makes no showing why trial counsel was wholly unreasonable for declining to establish such a timeline, given the other evidence presented.

But if there is any doubt regarding deficient performance, there can be none regarding the complete lack of prejudice. Regardless of whether counsel should have sought to discredit TRL on her recollection of the timing of the assaults (and thus how the two phone calls fit into her recollection of that timing), the timing issue becomes a moot point when one considers the DNA evidence. Whether the assaults took place over the course of two hours (as TRL's testimony seemed to suggest), or between two phone calls (as the purported timeline would seem to require), the

assaults occurred. No "timeline" would have changed the result of the DNA evidence, and Onyeukwu thus cannot show that, had the phone records been introduced, a different result would have been reasonably likely. He suffered no prejudice, and is entitled to no relief.

III. THE CIRCUIT COURT PROPERLY DENIED ONYEUKWU'S MOTION FOR RESENTENCING BASED ON ALLEGED INACCURATE INFORMATION.

Onyeukwu next argues that the circuit court erred in denying his postconviction motion for resentencing (Onyeukwu's brief at 42-46). He claims that the circuit court relied on inaccurate information by making Onyeukwu eligible for a risk reduction sentence when such sentences had been eliminated shortly before Onyeukwu's sentencing hearing (*see id.* at 44). He is not entitled to resentencing, for the reasons provided below.

A. Governing legal standards.

When reviewing a circuit court's sentencing decision, this court presumes that the circuit court acted reasonably, and will not interfere with the decision unless the circuit court erroneously exercised its discretion. *State v. Lechner*, 217 Wis. 2d 392, 418-19, 576 N.W.2d 912 (1998).

A defendant has a due process right to be sentenced upon materially accurate information. *Id.* at 419. Whether the court has denied a

defendant that right is a question of law subject to de novo review. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

A defendant seeking resentencing on the grounds that the circuit court used inaccurate information must show, first, that the information was inaccurate, and second, that the court actually relied on that inaccurate information in forming its sentence. *Id.* ¶ 26 (citing *Lechner*, 217 Wis. 2d at 419). If the defendant satisfies those requirements, the burden shifts to the State to prove that the error was harmless. *Id.*

B. Onyeukwu failed to demonstrate either inaccurate information or actual reliance.

At sentencing, the State recommended a sentence of twenty-seven years, made up of twelve years' incarceration and fifteen years' extended supervision (51:4). As noted above, the court sentenced Onyeukwu to concurrent sentences totaling a significantly shorter term: fifteen years' imprisonment, with eight years of confinement and seven years of extended supervision (51:21). Then after the court had announced Onyeukwu's term of imprisonment, the issue of risk reduction sentences came up; the court remarked that it believed that a risk reduction sentence was no longer available, but that it was unsure whether the availability of risk reduction was based on the date of sentencing or the date of the offense (*see* 51:22-23). The court stated that if its availability was based on the date of the offense, it did not have a problem with designating the sentence as a risk-reduction one (51:23).

The department of corrections later informed the court that because risk reduction sentences were repealed effective August 3, 2011—several weeks before Onyeukwu's sentencing date—a risk-reduction sentence in Onyeukwu's case was not appropriate (54; A-Ap. 118). The court responded by amending the judgment of conviction to eliminate the designation of the sentence as risk-reduction (29:1-2).

Onyeukwu filed a motion for resentencing, arguing that the court's sentence violated his due process right to be sentenced based on accurate information under *Tiepelman* (34; A-Ap. 113-14). The circuit court denied the motion, stating that in imposing sentence, it did not rely on the assumption that Onyeukwu would successfully satisfy risk-reduction criteria and be released early (37:2-3; A-Ap. 116-17).

As an initial matter, the court's uncertainty whether risk reduction was available does not appear to qualify as "inaccurate information." When the court reached the topic of risk reduction after having announced Onyeukwu's term of incarceration, it stated that such sentences were no longer available (51:22-23). However, it explained that it was uncertain whether the effective date of the repeal of the risk reduction statute went to the sentencing date or the date of the offense (*id.*). Moreover, in the original judgment of conviction the court provided that risk reduction may be appropriate "if applicable" (25:2; A-Ap. 108). Based on the change in the law, risk reduction was not "applicable."

The court's designation of risk reduction was conditional, not "inaccurate." The court stated that

if the triggering date was the date of the offense, making risk reduction available to Onyeukwu, it would designate him as eligible for it. The opposing inference is that if risk reduction was actually triggered by the sentencing date, risk reduction was not available to Onyeukwu and he would have to serve out his full term of confinement in confinement. In sum, the court's remarks about risk reduction were not inaccurate, simply conditional.

That said, even assuming that the court's conditional application of risk reduction was "inaccurate," Onyeukwu cannot demonstrate that the court actually relied on the availability of risk reduction in imposing the sentence. A review of the sentencing transcript demonstrates that the court discussed the seriousness of the offense, noted the aggravating and mitigating factors, applied those factors to sentencing guidelines, and determined that Onyeukwu should serve between five and fourteen years of confinement (51:10-16). After the court announced the sentence—eight years of confinement and seven years of extended supervision—it observed that that period was "basically in the middle of what used to be the sentencing guidelines . . . [and] takes into account . . . the aggravated nature of this offense, as well as the rather low risk assessment that you possess" (51:21). In sum, the court gave full and detailed reasoning to support its sentence, explaining that the crime and other factors placed Onyeukwu in the middle of the range suggested by the sentencing guidelines. Risk reduction was not part of that calculus, and the court therefore cannot be said to have "actually relied" on the availability of risk reduction in determining Onyeukwu's sentence.

C. Onyeukwu's arguments to the contrary are not persuasive.

Onyeukwu argues that it is logically presumable that the court, had it known that risk reduction was not available, would have set a twenty-five percent shorter term of confinement (Onyeukwu's brief at 44-45). As an initial matter, there's no need to presume anything: The circuit court had an opportunity to consider whether it would have given Onyeukwu a reduced term of confinement when it denied Onyeukwu's postconviction motion (37:1-3). It stated definitively on the record that the sentence would have been the same—even if it knew that risk reduction was not available—based on its detailed sentencing remarks and the fact that it announced the sentence *before* considering risk reduction (37:2-3; A-Ap. 116-17). *Compare Lechner*, 217 Wis. 2d at 422 (noting with approval that the sentencing court clarified at a postconviction hearing its focus on factors other than the erroneous information presented to it) *with State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (remanding for resentencing where (1) the circuit court had a postconviction opportunity to clarify its sentencing remarks but did not do so and (2) the record otherwise contained no evidence that the court did not rely on improper factors).

Moreover, any presumption that the court intended Onyeukwu to serve a shorter term of confinement than the one it imposed is not a logical one. At sentencing, the circuit court clearly stated that it was not sure whether risk reduction was applicable in Onyeukwu's case and was thus aware that he might serve his full term of

confinement *in confinement*. If the court had intended at all costs that Onyeukwu serve less time in confinement, it could have amended the sentence then and there (or for that matter, when it learned that risk reduction was not available) rather than hazard the possibility that risk reduction was not available.

Further, risk reduction is not a guarantee that an inmate will be released from confinement early. Wisconsin Stat. § 302.042(4) (2009-10) provided that the department of corrections "shall release an inmate who is serving a risk reduction sentence to extended supervision" after the inmate has served at least seventy-five percent of the confinement portion of the sentence *and* successfully completed programming or treatment *and* maintained a good conduct record during confinement. Nothing about risk reduction guarantees that an inmate will serve a shorter term of confinement, or that a court imposing sentence would justifiably rely on the possibility that a defendant will satisfy all of the requirements.

Finally, Onyeukwu's invocation of *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491, is unavailing (Onyeukwu's brief at 45). In *Travis*, 347 Wis. 2d 142, ¶¶ 26, 49, the defendant successfully demonstrated that there was inaccurate information before the sentencing court regarding a mandatory minimum, and that the sentencing court relied on it. The supreme court ultimately affirmed the court of appeals' order remanding for resentencing because it concluded that the State failed to satisfy its burden on harmless error. *Id.* ¶ 87. *Travis* offers nothing to Onyeukwu because, as the circuit court correctly found, Onyeukwu failed to demonstrate that the

court relied on inaccurate information regarding risk reduction. Accordingly, the burden has not shifted to the State to prove harmless error.

That said, even if this court were to conclude that Onyeukwu satisfied his burden, any error was harmless. Sentencing errors are harmless when they do not affect the substantial rights of the defendant. *State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500. An error is harmless if there is no reasonable probability that it contributed to the sentence imposed. *State v. Payette*, 2008 WI App 106, ¶ 46, 313 Wis. 2d 39, 756 N.W.2d 423. There is no contribution when the result would have been the same if the error had not occurred. *State v. Weed*, 2003 WI 85, ¶¶ 29, 32, 263 Wis. 2d 434, 666 N.W.2d 485 (citation omitted).

Here, the result—i.e., Onyeukwu's sentence of fifteen years' imprisonment—would have been the same with or without risk reduction. Onyeukwu did not have a substantial right to a reduced term of confinement or the risk reduction program. Moreover, the reasons set forth above supporting the conclusion that the court did not rely on inaccurate information in imposing Onyeukwu's sentence support the conclusion that there is no reasonable probability that any error in considering risk reduction contributed to the sentence imposed.

IV. NO EX POST FACTO VIOLATION OCCURRED BY THE REPEAL OF RISK REDUCTION.

Onyeukwu finally argues that depriving him of the ability to serve a risk reduction sentence

available at the time of his offense was an ex post facto violation (Onyeukwu's brief at 46-49). The repeal of risk reduction, however, did not increase the penalty applicable to Onyeukwu, and therefore does not constitute an ex post facto violation.

An ex post facto law includes any law that "was passed after the commission of the offense for which the party is being tried." *State v. Thiel*, 188 Wis. 2d 695, 701, 524 N.W.2d 641 (1994) (citations and internal quotation marks omitted). When determining whether an ex post facto violation occurred, courts consider whether the application of the new law violates one of the Ex Post Facto Clause's recognized protections. *State ex rel. Britt v. Gamble*, 2002 WI App 238, ¶ 23, 257 Wis. 2d 689, 653 N.W.2d 143 (citation omitted). Here, the protection at issue involves whether the application of the new law "increases the penalty for conduct after its commission." *Id.* (citation omitted); *accord California Dep't of Corr. v. Morales*, 514 U.S. 499, 505 (1995) (noting that "the Ex Post Facto Clause forbids the States to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range").

Onyeukwu appears to claim that his measure of punishment was increased by twenty-five percent either by the legislature, when it repealed Wis. Stat. § 302.042 (2009-10), or by the sentencing court, when it refused to resentence him (*see* Onyeukwu's brief at 48-49). But Onyeukwu confuses his period of confinement with his "measure of punishment." His measure of punishment in this case was fifteen years' imprisonment, which was based on the court's

consideration of relevant sentencing factors in light of the possible maximums for each count. Neither the legislature's repeal of risk reduction nor the court's refusal to change his sentence increased the fifteen-year penalty imposed. Accordingly, there was no ex post facto violation. *Cf. Britt*, 257 Wis. 2d 689, ¶ 24 (no increase in term of incarceration by repeal of provision that allowed parole board to consider offender's obtaining high school equivalency diploma when evaluating propriety of early release).

Furthermore, *Peugh v. United States*, 133 S. Ct. 2072 (2013), which Onyeukwu invokes for support, is simply not on point (Onyeukwu's brief at 46-48). *See Peugh*, 133 S. Ct. at 2088 (holding that amended sentencing guidelines, which increased range of punishment for Peugh's crime from a range of 30 to 37 months at the time of commission to a range of 70 to 80 months at the time of sentencing, created a "significant risk" of a higher overall sentence for Peugh). Onyeukwu's reliance on *State ex rel. Singh v. Kemper*, 2014 WI App 43, 353 Wis. 2d 520, 846 N.W.2d 820, is equally unavailing, as that case involved a different statutory provision that *required* that positive adjustment time be credited to sentences for certain non-violent crimes. *See Singh*, 353 Wis. 2d 520, ¶¶ 6, 18. The rationale in *Singh* regarding the repeal of a mandatory provision is thus inapplicable to Onyeukwu's sentence. His sentence was not controlled by the speculative possibilities under risk reduction, but by the fifteen year period of confinement imposed by the sentencing court.

CONCLUSION

For the foregoing reasons, Onyeukwu is not entitled to relief on any of his claims. The State therefore asks that this court affirm the judgment of conviction and the orders denying post-conviction relief.

Dated this 21st day of October, 2014.

Respectfully submitted,

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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 8,453 words.

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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 21st day of October, 2014.

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