STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case Nos. 2014AP002614-CR, 2014AP002615-CR,
2014AP002616-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY TYSON BELOW,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Kevin E. Martens, Presiding, and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. **Did the circuit court err in consolidating the charges and denying the motion for severance, such that Below had only one trial for over forty charges alleging assaults against nine different women for a span of over five years?**

The circuit court consolidated these matters for trial over defense objection and motion for severance. The circuit court denied Below's post-conviction motion for new, separate trials.

2. **Below's attorneys failed to object to: (A) hearsay statements which improperly bolstered the women's accounts of assault; (B) the admission of testimony about Below's rumored HIV status; and (C) repeated references to the women as "victims," while even making such references themselves. Was Below denied the effective assistance of counsel?**

The circuit court denied Below's post-conviction motion without a ***Machner*** hearing.

3. **Did the circuit court err in denying the motion to suppress evidence obtained from the search warrant for, among other things, Below's DNA?**

The circuit court denied the pre-trial motion to suppress evidence derived from the search warrant.

4. **Did the circuit court err in denying defense counsel's request for an *in camera* review of Cynthia R.'s treatment records from the date she**

first accused her live-in boyfriend, Below, of assaulting her?

The circuit court denied the defense request for an *in camera* review of these records, and denied Below's post-conviction motion for this *in camera* review.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Below believes oral argument will assist this Court in assessing the many issues presented in these cases, which involved a multiple-week trial. He does not seek publication.

STATEMENT OF FACTS AND CASE

The State charged Below with over fifty counts alleging acts against ten different women over a period of over five years. (2;14AP2614:2;14AP2615:4).[1] The majority charged First or Second Degree Sexual Assault, Strangulation/Suffocation, and Kidnapping. (2;14AP2614:2; 14AP2615:4). The State tried over forty counts for alleged acts against nine women. (59;App.177-86).[2] Over defense objection, the State tried all of these counts in one multiple-week trial. (122:56;129-162).

A. Pre-trial motions.

Below was arrested on February 10, 2010 for an unrelated child sexual assault. (14AP2615:11;122:57-53).

[1] Unless otherwise indicated, all cites reference the record in 2014AP2616-CR.

[2] Unless otherwise indicated, Below refers to the Second Consolidated Amended Information, included in the Appendix, when referencing specific counts.

Police soon determined that he was not a suspect in that case. (149:68). On the date of his arrest, his girlfriend, Cynthia R.[3], alleged that he had assaulted her and was taken to a mental health center. (*see* 14AP2614:117:55-66).

Police obtained a search warrant for, among other things, Below's DNA. (14AP2615:14-16). The defense filed a motion to suppress evidence obtained from the warrant on grounds that the warrant failed to sufficiently link Below to the suspected crimes. (14AP2615:14-16).[4] The court denied this motion, concluding that the affidavit established "fair linkages" to Below. (122:19-22;App.159-62).

Counsel moved for *in camera* review of Cynthia's treatment records from the date she first accused Below. (14AP2614:6-7).[5] The court denied the motion: "[T]he facts here are simply saying that because she must have discussed something that that something may be probative and that doesn't meet the ***Shiffra/Green*** standard." (14AP2614:117:66-68;App.164-66). Counsel filed a pre-trial motion to preclude reference to the women as "victims," which the court granted. (14AP2614:50;127:26).

B. The trial

The State called over forty witnesses, including all nine women. (129-162). Among those, the State called a "strangulation" expert, who testified that strangulation may affect the ability to recall events immediately afterwards. (150:74-129;151:4-18). The State called a "victimology"

[3] Below does not use the women's last names for privacy purposes.

[4] Two attorneys represented Below.

[5] Trial counsel also sought records from the timeframe of her alleged assaults. Below does not renew that request.

expert, who stated that certain victims may struggle to sequence events, and further explained why domestic abuse crimes may not be reported. (152:104-26;153:4-29).

Below testified that he did not have sex with Amanda V., but had consensual sex with the other women. (154:56-139;155:4-113; 156:4-23).

After resting, the State moved to dismiss four counts due to insufficient evidence. (153:48-57). The jury found Below guilty of twenty-nine counts and not guilty of twelve. (162;64). The jury found him not guilty of all counts related to Sherylyn M., five counts related to Janet O., two counts related to Cristina A., and one count related to Leeland R. (162:64).

C. Summary of the evidence presented concerning each woman's allegations.

i. Janet O.

The State tried ten charges involving Janet. (59;App.177-86). The State dismissed two after testimony.[6] (153:48-50). The jury found Below guilty of three charges and not guilty of the other five.[7] (64).

Janet testified that Below attacked her from 2004 to 2005, during which time she used crack cocaine and stayed in a drug house. (135:97-108;136:3-81). She testified that:

(1) In 2004, he punched her and she lost consciousness. She woke up naked and believed he had sex

[6] The State dismissed Counts 8 and 9.

[7] The jury found him guilty of Counts 1, 2, and 10 and not guilty of Counts 3-7.

with her; police were called, but they did not show up, and she did not call back. (135:100-106;136:46,69-70).

(2) The same month, someone approached her from behind in the basement and choked her until she lost consciousness. She woke up naked and bleeding, and believed her attacker, whom she did not see, had ejaculated inside of her. She called police again; they came but did not take her to the hospital or station and she did not contact them again about this. (136:4-10;49-50).

(3) The next day, Below attacked her in an alley and pulled her into the loft behind the house, where he kept her for three days, choking and raping her. She escaped when he fell asleep. (136:10-20).

(4) She returned to the house and smoked crack for days. Below came, and when she refused sex, he poured lighter fluid on her and threatened to light her on fire. This ended when her brother knocked on the door; she never told others at the house about this and did not go to the hospital. (136:20-24;32-33;60-64).

(5) In January 2005, she came back to smoke crack, and Below was there. He hit her with a piece of wood, injuring her head, and attacked her brother. He dug his fingers into her wound, and cut her hair with a knife. She identified pictures from this alleged incident. (136:24-29;57-60).

An officer testified that police responded on January 20th and saw pools of blood, a clump of hair, and knives; further, that Janet had a large laceration to her skull. (135:36-51). The homeowner testified that he saw Below hit Janet with a wood board, and denied that he told police that he had not seen this. (135:57-65;71-73). He testified that Below pulled and cut off pieces of her hair, and that her brother tried

to stop the attack. (135:57-65). Prior to this, Below was with Janet at his house about once a week. (135:69). He testified to other incidents in which Below choked and threatened Janet; however, he never called police before January 20th. (135:65-68). He acknowledged being convicted of a crime twice, and that he and others, including Janet, used crack. (135:66,70).

Another man who lived there testified that though he did not see Janet get hit on January 20th, Below was responsible. (135:83-86). He testified to other times where he saw Below assault and threaten Janet. (135:86-88,91-92,94-95). He acknowledged having been convicted of four crimes, having used drugs at the time, and having never called the police about any of this. (135:87-88). He stated that Janet was using drugs at the time. (135:87-90).

Janet's brother testified that Below attacked them during the January 2005 incident. (136:85-90). The State admitted medical records reflecting Janet's head injury from January of 2005. (136:91;142:4-5).

Though Janet denied it, a detective testified that when he responded in January 2005, Janet said that she would call Below whenever she needed sex. (136:56;147:162-72). Janet acknowledged that she got drugs from Below the "first time" she "had sex with him." (136:47).

She testified that she talked with a friend in May 2009, who contacted Detective Carloni. (136:43). Police noted that she years later, provided additional disclosures which she had not originally reported. (151:67). She had not before disclosed anything other than the January incident. (152:47-50). Janet acknowledged being convicted of one crime. (136:38).

Below testified that he met Janet in 2004; he gave her cocaine in exchange for sex. (155:40-50). People at the house would call police on him if he did not provide them with drugs. (155:48-50). He witnessed another person hit Janet with a railing. (155:50-55).

ii. Michele M.

The State tried twelve counts involving Michele. (59;App.177-86). The State dismissed two after testimony.[8] (153:50-57). The jury found Below guilty of all remaining counts. (64).[9] Post-conviction, the court agreed to vacate Count 15 (Substantial Battery from March 2007) on double jeopardy grounds. (119;App.116-20).

Michele testified that she and Below began a multiple-year relationship in 2006, which started with consensual sex and involved crack cocaine use. (136:94-99;137:29,69,71,97). She testified that:

(1) Below held her at Faye's bar and had vaginal and oral sex with her repeatedly without consent; at one point, he put his arm around her neck and choked her while trying to have sex. She eventually got away and went to her sister's house. He found her and she returned to the bar because she was afraid. Her family came to the bar at times, including once where her legs were bleeding because Below hit her with a pole. (137:37-46).

(2) Another time (three to four years before trial), he tied her to the bed and poured rubbing alcohol on her. He had a match, but did not use it. She went along with sex out of

[8] The State dismissed Counts 13 and 20.

[9] Counts 11-12, 14-19, and 44-45

fear, and did not call the police. (136:95-99;137:7-16,29-30,62-63,78-80).

(3) Below drove her to a friend's house. She asked him to leave, he said no, and dragged her through the hall while punching and strangling her in a chokehold, causing her to lose consciousness. That evening, he beat her up, hit her with a pole, had her take off her clothes and cut off her hair. The same day, he had anal sex with her and inserted a beer bottle in her anus without consent. (137;16-24,61-62,90-94).

(4) Days later, they took a bus to a neighborhood where he wanted her to engage in prostitution. She flagged down police to get away. She admitted using a fake name because she had an outstanding warrant. Below called and told police her real name. Police took her to the hospital. Photographs were admitted into evidence showing her at the hospital. (137:24-37;138:16-17,76-78).

(5) She ran into Below after she was released from prison in 2009. He grabbed her and took her to his van and forced vaginal and oral sex. (137:47-53).

Juan Trevino, convicted of a crime three times, testified that in 2009, he and Michele had an altercation with Below, but he did not call police. (139:25-81). He never before saw Below be violent. (139:32). He first gave a television interview and then, over six months after this incident, spoke with police. (139:59-60). He admitted that he falsely told detectives that he saw Below punch Michele in the face, and kick and drag her. (139:62-65;78-81).

Michele's sister, Shelley, testified that she picked up Michele from Faye's and saw Michelle's pants covered in blood and bruises around her neck. (139:82-88,91-92;102-09). She did not call police or seek medical attention because

Michele refused. (139:108-109). She did call police once in 2006 and police found Michele hiding under a bed at Faye's "because she had a warrant for her arrest." (139:119). Shelley testified that Michele expressed fear of Below and told her that he threatened to start her on fire. (139:88-89,92-93). Shelley testified that she saw Below punch and kick Michele at a hotel, and on other occasions she saw Below drag Michele. (139:89-90,94-95,100-01,111-18).

Glenn Steiner, who has a child with Michele, testified that in 2005 Michele told him that Below beat her and cut off her hair. He saw her with bruises, and Michele told him that Below would make her prostitute. Michele never told him that Below sexually assaulted her, and he never saw Below be violent with Michele. The first time he ever spoke to police about this was in August 2010. (140:19-34).

Michele acknowledged that she and Below wrote loving letters to each other while she was in prison, most of which were admitted into evidence. (138:17-61;165:16-40). These letters included her writing, "I miss you so much" and "I love you." (138:42,51). She said she did so because she was scared; however, she never applied for a restraining order against him. (138:17,45). She acknowledged being confused over the dates of when these alleged acts occurred. (138:13;64-65,83-85;139:13-19).

When asked when she first told anybody about the "sexual assault or the confinement by rope or being threatened with a flammable materials or a match," she answered that she briefly mentioned this to her family, but did not say that she had been sexually assaulted. (137:84-85). "The first time I ever told anybody about any of this that happened to me is when I talked to the detective," within the year before the trial. (137:84). She was on probation during

this timeframe, but never told her probation agent about this. (137:97). She admitted being convicted of eight crimes. (138:8).

Below stated that he and Michele had consensual sex during their relationship. (155:4-16). He did call the police on her in March of 2007. (155:16). He sold crack and she prostituted, and he was upset when she left with the police because she had the drugs. (155:16-21). Their sexual relationship continued through 2010. (155:21-23).

iii. Sherylyn M.

The State tried four charges involving Sherylyn, and the jury found Below not guilty on all counts. (59;64;App.177-86).[10]

Sherylyn testified that Below approached her in September 2006 and insisted she come in his blue van. (140:35-54;110-26). She knew him from the area and testified that everybody said he "beats up women." (140:36). She testified that he took her to an alley and threatened to hurt her if she did not undress. (140:36-40). He got out to urinate, and she ran away and up the stairs of a home. (140:40-45). He followed her and punched and kicked her repeatedly on the stairs, pulled her down the stairs by her pants, and she wet her pants. (140:44-54,92). She identified a picture of herself with bruises, which she said were caused by Below. (140:47-50).

She stated that the next day, he came to her friend's house and beat her again. (140:55-58,92-93;126-31). Two days later, he again confronted her. (140:58-63,93-94;131-40;141:23-26). She first testified that he jumped out only after she came out of a friend's house, but then testified that she

[10] Counts 21-24

saw him before entering the house. (140:58-63,93-94;131-40;141:24-25). She stated that he jumped out of a sedan with a gun and ordered her into the car. He took her to Faye's bar, locked her in a room for days, and sexually assaulted her repeatedly. (140:67-83,92-102;141:26-35). She stated that she was scared and went along with having sex, though she told him to stop. (140:67-74). At one point he asked if she wanted food, let her out, and she "believe[s] that she was dropped off by a friend named Superman" after she asked for a ride home (140:74-76;141:35-48). She later testified that Below drove her home with "Superman." (140:102).

She stated that she contacted police after the first incidents, but nothing happened, and she did not contact police after being held at Faye's. (140:102-06;*see also* 151:73 (reflecting two filed reports in 2006)). She stated she went to the hospital at one point but left because she was "tired of waiting." (140:107-108). With regards to the first instances, she said charges were brought but dismissed because she did not know when to come to court. (140:102-06). She did not do anything else until four years later when she saw allegations on television. (140:106-107;141:18-21). Prior to July 2010, she had not told anyone about him holding her captive in a room. (141:19-20).

Sherylyn acknowledged telling police that Below brandished a two-foot knife in the van, but testified it "could have been a gun" or "anything." (140:111-115). She previously testified that Below did not force her into the van, but befriended her. (141:14). She admitted to one prior conviction, but denied telling police that her bruising resulted from an unrelated incident or that she declined medical attention. (140:108;123). She admitted being a crack user in 2006, but stated that she did not use drugs with Below. (140:15-17;141:50-51,60-61).

The homeowner testified that in September 2006, she saw a man and woman argue in her driveway. The woman asked to use her phone and called someone (not the police), who did not answer. The woman came up the stairs; the man hit her, grabbed her hair, and said she stole money from him. The woman did not ask for help; however, the homeowner called the police as the man was beating her. (141:68-88).

Police noted that Sherylyn did not report being driven home from Faye's nor talking with others in the bar, and that the homeowner never reported that Sherylyn's pants were down or that she urinated. (152:59-62).

Below testified that he and Sherylyn had consensual sex regularly for a few months in exchange for drugs. (155:56-77). He saw another friend physically assault Sherylyn. (155:65).

iv. Lisa W.

The State tried three counts related to Lisa, and the jury found Below guilty of all three. (59;64;App.177-86).[11]

Lisa testified that in June 2009, Below, a stranger, offered her money to perform a sex act. (141:90-116). She agreed, but he grabbed her throat and took her to an abandoned building, where he choked her and caused her to lose consciousness repeatedly. (141:91-116;142:12-18). She stated that he had oral and vaginal sex with her. (141:97-116;121-22). Months later, she confronted Below and he denied assaulting her. (142:26-29). She explained that a year after her alleged assault, a woman named Amanda, whom she sold drugs to, said that Below also raped her. (141:119-20;142:35-37).

[11] Counts 25-27

She testified that she reported the assault the same day it occurred; however, she lied and said she was not involved with prostitution. (141:116;142:19-25). She also did not originally tell police that he choked her repeatedly. (142:24). Nothing happened after her initial report until she again contacted police after her boyfriend, who was facing prison time, saw information about Below on the news in 2010. (141:120-21;142:9-12). She too was facing a charge, but was not given consideration for testifying. (142:33,40-41). She acknowledged being convicted of one crime and that she was selling crack at the time, including to Below. (141:118;142:30-31,35).

Below testified that he met Lisa in 2009, and that she had consensual sex with him in exchange for money. (155:78-84).

v. Amanda V.

The State tried three charges involving Amanda[12], and the jury found Below guilty of all three. (59;64;App.177-86).[13]

Amanda testified that in October 2008, she went to Club 24 and was drinking and using crack cocaine. (142:51-52,87-88). She saw Below, whom she knew casually, and he asked if she could get him crack. (142:51-52,88-89). After failing to find drugs, he took her to an apartment. (142:52,90). She stated that he locked the door and demanded she undress. (142:52-53,90-93). She testified that he hit her, ripped her pants off, threatened to kill her, put her in a chokehold and

[12] The charging documents erroneously referred to Amanda V. as AF. (*See* 2014AP2615: 8:6). At times during trial she was referred to as Amanda L. (*See, e.g.,*143:3).

[13] Counts 28-30

punched her, though she did not lose consciousness. (142:52-73,82,93-104). She stated that she fought back, and he was only able to get his finger inside her vagina. (142:61). Police arrived and asked her whether this was a "dope date." (142:74,106-20). An officer told her that Below said he might be HIV-positive. (142:113). Police asked if she wanted to go to the hospital but she refused. (142:118-19). She did not speak with police again until 2010, and police treated it "like it was nothing." (142:119-20). In 2010, police asked her questions about her alleged assault. (142:121-22).

She acknowledged having been convicted of a crime once, to prostituting at the time, and to having crack on her at the time. (142:84-89). She testified that she saw Below later and that he was apologetic; however she did not report this. (142:120).

She stated that she had lived with Cristina A., and told Cristina what happened to her. (142:104, 120-21).

The owner of Club 24 testified that Amanda became upset and said that Below sexually assaulted her. (143:51-74). He testified that Below said that he "took the pussy" because she stole his ring. (143:54). He knew that Amanda and Cristina were friends and crack users, and that Amanda was a prostitute. (143:63-67). He never saw problems between Below and other women, and never himself had a problem with Below. (143:57,64-67).

Officer Anderer testified that he arrived at an apartment in October 2008 and saw a woman naked from the waist down, a man, jeans on the floor, and a closet rod. (142:129-38;143:16-51). The woman was hysterical, appeared intoxicated, and had a knot on her forehead. (142:129-38;143:24-25). Though he identified the CAD report, a written report was not prepared. (142:138-

145;143:7-8). Police did not take photographs, and the woman did not want medical attention. (143:23,26,38-39;151:82). Detective Charles testified that AV was "uncooperative." (149:90-97).

Below testified that he did not have sex with Amanda. (155:84-85). One night they were in an apartment and he became upset because he believed she stole his ring. (155:85-89). They argued and he apologized; he heard the police coming and offered her his drugs if she could hide them from the police. (155:89-90).

vi. Cristina A.

The State tried four counts involving Christina A. (59;App.177-86). The jury found Below guilty of two and not guilty of two. (64).[14]

Cristina testified that in November 2008, she saw Below at Club 24. (143:79). They went to her house, drank alcohol and smoked cocaine-laced marijuana. (143:79-81;144:9-10). He tried touching her breasts; she said no and he grabbed her in a chokehold from behind and punched her. (143:81-82,87;144:10-13). He got on top of her and choked her. (143:82-84,98-102;144:10-22). She lost consciousness; when she woke up, her pants were off, she was bleeding, there was a cord around her feet and Below was gone. (143:82-84,88,98-102;144:22-). When she tried to leave, he ran from another room and chased her down the stairs. (143:82-83). She ran out her door by the alley, and he grabbed her. (143:90-96). Her neighbors came outside and he ran away down the alley. (143:95). She ran to her neighbor Yvonne's apartment; Yvonne called police and she went to

[14] The jury found him guilty of Counts 32 and 34, and not guilty of Counts 31 and 33.

the hospital. (143:96-97). Her neck was bruised and she had staples in her head wound. (143:104-06). She did not know until being told about DNA evidence that Below sexually assaulted her. (143:108-09,120;144:43).

The State admitted pictures of the blood in Yvonne's apartment and on Cristina's shirt; no blood was found in Cristina's apartment. (143:88-89;145:32-41;145:62-70). Cristina testified that Amanda V. came to the hospital, and said that Below also attacked her. (143:109-11).

A nurse testified to Cristina's medical records, which showed head and neck injuries. (144:50-72). A treatment nurse also testified to Cristina's medical records and care. (144:80-146;145:5-24). Detective Simmert testified that he responded in November of 2008 and saw a large amount of blood in the alley. (145:24). Cristina stated that she did not go into the alley with Below. (143:119-20;145:61).

No semen was found on swabs taken from Cristina; however, an analyst obtained a partial DNA profile from this evidence consistent with Below. This match, however, would also apply to anyone in his "paternal male line and other unknown random individuals." (150:49-64).

Cristina acknowledged that her testimony was different than what she initially told police—that she said that "they jumped her" and assaulted her. (144:23-46). Detective Simmert testified that her story at the hospital was "implausible"—something out of a "movie," reporting that multiple people abducted her in her home, kept her for days and assaulted her. (145:42-45,59,69). He interviewed her days later, and she said "Jeff" attacked her. (145:45-46;63). Cristina stated she was frustrated with police. (144:39). Cristina admitted to having been convicted of one crime. (143:118).

Yvonne Finch testified that Cristina came to her apartment and said "*they*" attacked her. Cristina told Yvonne that she was held for three days; however, Yvonne had heard Cristina and her son moving around. (153:79-89).

Below testified that he met Cristina in 2008. (154:117-18). Once, he and Cristina left a bar and went to her house to use drugs; another time, Cristina asked him for drugs and they had sex in a bar bathroom and outside the bar. (154:118-38).

vii. Cynthia R.

The State tried two charges involving Cynthia R, and the jury found him guilty of both. (59;64;App.177-86).[15]

Cynthia testified that she began dating Below in July 2009, and he moved in with her. (146:42,110-14). He slapped her that August. (146:47-48). Between August and October, he approached her in the garage and she ended up on the ground with him pushing his hand on her head. (146:48-53). He punched her in the stomach. (146:51). She had a concussion. (146:54-57). Within weeks, he put his hands around her neck, dug his fingers into her neck and punched her on the top of the head in the area where it had been hurt. (146:58-65). She did not lose consciousness. (148:64). She stated that Below beat her on other occasions. (147:16-18).

Cynthia testified that he sexually assaulted her around December 2009. (146:66-97). He ordered her on her knees and had sex with her. (146:68-81,84-86). He shoved a lotion bottle inside her vagina, and tried putting a toothbrush holder in her anus. (146:66-97;147:50-55,75-80). It did not fit, so he removed it and put the toothbrush holder in her vagina. (146:66-97;147:50-55,75-80). She told him this hurt. He had

[15] Counts 35 and 36

anal sex with her, though she said it hurt, causing bleeding and pain. (146:66-97;147:50-55,75-80). She acknowledged that at first she did not say no. (146:73).

Though she never called police, her family at one point did. (146:88;147:22-23). She never filed for a restraining order. (147:27). Police later came to her house and said they were investigating robberies and searched her van; she then told police what Below did. (146:90-92). She stated Below drove her van frequently. (146:93). Detective Carloni confirmed that police falsely told her that they were investigating a robbery. (151:102).

Detectives testified that Cynthia seemed reluctant to speak with them. (145:85-88,101-05;151:57). Officer Court testified that Cynthia said she was scared of Below. (146:29-41;147:87-94).

Detective Carloni testified that Cynthia stated that she knew Janet O. and spoke with her about Below. Cynthia denied talking with Janet about what Below did. (152:46;147:45-47).

Cynthia's daughter testified that she became concerned when her mother asked her to take her to the hospital. She said she noticed what appeared to be strangle marks on her mother. She also testified to getting into a physical fight with Below. (147:100-18).

Marcus Cargile testified that he was in Below's jail unit, and that Below admitted hitting and choking his girlfriend. He stated that Below said that he would go on "dope dates" with women, and if they did not want to engage in acts with him, he would do so anyway. (147:121-58). Below stated that he never talked about his case with Cargile. (155:93).

The parties stipulated that the admitted hospital records established that Cynthia was examined and diagnosed with a concussion in August 2009. (146:3-4). Cynthia's DNA was found on the lotion bottle, along with the DNA of one other who was "one quadrillion times more likely" to be Below than an unrelated person. (150:11,18,22-26). Their DNA was also found on the toothbrush holder. (150:26). The analyst acknowledged that DNA is found in many places, including skin. (150:38).

Below testified that he lived with and had consensual sex with Cynthia, including anal sex. (155:24-40). He was not present in August 2009 when Cynthia was hurt, and did not place any foreign objects inside of her. (155:33-25). He admitted that he had sexual relationships with many other women while in a relationship with Cynthia. (155:35-36).

viii. Gina L.

The State tried four charges involving GL, and the jury found him guilty of all four.[16] (59;64;App.177-86).

Gina testified that in September 2009, Below, a stranger, approached her in a white van as she walked down the street. (147:195-96,203). He placed his hand on her arm and his arm around her throat and she blacked out. (147:196-99,236). When she woke up, he wanted to have sex; she pleaded no and said she had her period and had a tampon in. (147:199,237-39). He pulled down her pants, ripped the tampon out and threw it into the street. (147:199,214-22). He pushed her into the van and forced oral sex and vaginal sex. (147:199-222). Afterwards, he went through her backpack, offered to pay her, and let her go. (147:207-10). She remembered the license plate, ran to a friend's house and told

[16] Counts 37-40

her friend to call police. (147:210-12,239-40). She went to two hospitals after this occurred. (147:223-25).

Gina's sister, Toni Pena, testified that Gina told her that she had been attacked and that Gina's neck was red. Pena stated that she provided Gina's medical records to police. (148:7-15).

Gina's friend, Vallie Prince, testified that he saw Gina in September 2009 and that she was hysterical and said she had been sexually assaulted. He called police; however, he became aggravated because police appeared to believe Gina was lying. He testified to having been convicted of a crime five times. (148:16-22).

Nurse Kollatz testified to treating Gina at the hospital. (149:49-59). A DNA sample taken from Gina matched Below's DNA. (150:13-14;18-19,27-31).

Gina, however, admitted that she lied and told police that she took a bus that evening, and did so because she had been with a married man. (147:224-33). Detective Charles testified that Gina told police bus routes she took, which police determined to be untrue after obtaining bus videos. (149:99-106).

Further, Dellaine Shimek testified that her son Michael, (Vallie Prince's brother), dated Gina. Gina told her son that she was raped; however, after Gina returned from the hospital, she heard Gina tell her son that she was not raped. Gina said that she did not want Michael to think poorly of her because it had been a "dope date." Shimek testified that her son Val pressured her not to come to court. Shimek acknowledged being bipolar, manic depressive, and borderline schizophrenic. (154:8-30). Gina denied stating that this was a "dope date." (147:235).

A detective testified that Below in interrogation "did not give any indication that he knew" Gina; however, he acknowledged that his report from this interview did not include reference to Gina. (149:64-68).

Below testified that he met Gina in September of 2009, and offered her drugs in exchange for sex. (154:58-63). He smoked a cocaine-laced cigarette; she smoked crack. (154:63-72). They had sex; she asked to use his phone to call her boyfriend Michael, and then she started giving him oral sex, but stopped. (154:72-83). They sat and talked for a few hours. (154:83-87).

ix. Leeland R.

The State tried three counts involving Leeland R. (59;App.177-86). The jury found him guilty of two and not guilty of one.[17]

Leeland testified that in November 2009, Below, a stranger, pulled her into a van as she walked to a gas station. (148:25-27,67-73). He put one hand around her throat, pulled her pants down and forced vaginal sex. (148:27-31;39-42,75-78). She lost consciousness several times. (148:31-32,94-96). Afterwards, he drove around erratically and referred to her as "Brittany." (148:32-34,80-85). When she tried to leave, he got upset and raped her again. (148:34-37,85-90). She eventually got out of the van and he drove away. (148:37-38,97-101). She used a napkin on her vagina, which was eventually turned over to the police. (148:39). She went to the hospital, and contacted police two days after this occurred. (148:38). She identified pictures showing bruises on her body and marks on her face and neck. (148:42-47,64-65).

[17] The jury found him guilty of Counts 42 and 43 and not guilty of Count 41.

Nurse Shutkin testified to having examined Leeland at the hospital. (149:4-49). A DNA sample taken matched Below's DNA. (150:14-16,19,31-37).

Leeland admitted to being convicted of a crime six times. (148:53). She acknowledged that she did not report this immediately because she was on probation. (148:54-5). She denied using drugs around the time of the alleged assault; however, her probation officer testified that she used many drugs and tested positive for cocaine in November 2009. (154:31-37).

Detective Wallich testified that Leeland did not want police involvement; however, he tracked her down again in March 2010. Though she made a "soft id," she could not conclusively identify Below. (149:75-86).

Below testified that he met Leeland at a gas station. He, Leeland, and another woman drove to a house to get drugs. (154:87-95). The other woman left, and he and Leeland used drugs and had sex. (154:94-107). She asked for money; he did not give her any; she became agitated and left. (154:109-117). Police testified that Below said he did not know or have sex with her when they showed a picture and gave her name during interrogation. (149:64-65). Below testified that he recognized her in court. (154:87).

D. Post-conviction litigation.

Below filed a post-conviction motion, asserting that he was denied the effective assistance of counsel as his attorneys failed to: (1) move to dismiss Count 15 (Substantial Battery against Michelle M.) as a double jeopardy violation; (2) object to hearsay; (3) object to the admission of testimony concerning Below's HIV status; and (4) object to references to the women as "victims" while making such references

themselves. (106;107;App.121-40).[18] He argued that the court erred in not severing the charges and denying the request for *in camera* review of Cynthia R.'s treatment records from the date she first accused Below. (106;107;App.121-40). He asked the court to vacate his convictions and enter an order for separate trials. (106;App.121-40). He sought a ***Machner***[19] hearing and an *in camera* review of Cynthia's treatment records. (106;App.121-40).

Following briefing, the circuit court issued a written order vacating Count 15 on double jeopardy grounds and denying Below's other requests without a hearing. (108;112;118;119;App.116-20). The court concluded that it did not err in consolidating the charges and denying the request for an *in camera* review of Cynthia's treatment records. (119;App.116-20). With regard to counsel's failures to object to hearsay, the court found "in general" that the statements satisfied exceptions, but noted that "to the extent that counsel probably should have objected on hearsay grounds," "the defendant's case was not prejudiced based on other corroborating evidence, including the victims' testimony and the defendant's own testimony." (119:3;App.118).

The court concluded that Below was not prejudiced by counsel's failure to object to testimony concerning his HIV status, as the "the jury acquitted the defendant of twelve counts despite such testimony," and "the defendant's horrific treatment of the victims in and of itself reflected a callous disregard for their lives." (119:4;App.119). The court concluded that Below was not prejudiced by counsel's failure

[18] Below filed all post-conviction motion exhibits in a sealed envelope due to the sensitive nature the materials. (107).

[19] ***State v. Machner***, 92 Wis. 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

to object to use of the word "victims" given the strength of the State's case and court's instruction that Below was presumed innocent. (119:5;App.120).

Below filed timely notices of appeal. (120;14AP2614:111;14AP2615:101). This Court consolidated these cases, and this appeal follows.

ARGUMENT

I. The Circuit Court Erred in Denying the Request for Severance, Resulting in Only One Trial for Over Forty Charges Alleged Against Nine Different Women.

A. Additional relevant facts.

The State filed a motion to consolidate the charges in Case Numbers 10-CF-707 and 10-CF-3272 for trial. (14AP2615:8). Counsel filed a response, arguing that the charges were not of the similar character, and that joinder would make it "impossible for him to receive a fair trial." (14AP2615:11). The State filed the complaint in 10-CF-4684, and moved to include those counts in its previous consolidation request. (2;6). Counsel sought severance of the charges "to deal with each of the alleged victims on their own terms." (122:56). Alternatively, counsel asked for severance with consolidation where "incidents with the most factual similarities are joined." (122:56-57).

The court granted the consolidation motion and denied the severance motion. (122:57-73;App.142-58). The court recognized that the charges involved over twenty "separate instances" involving ten women. (122:59;App.144). It noted that while only some allegations involved a van, the charges for all but one woman involved "confinement and restraint." (122:64-68;App.149-53). It noted that each involved sexual

assault by force, and most involved strangulation. (122:64-68;App.149-53). The court found that most were "grouped very closely" in time, and that even though some occurred years apart, the timeframe was not "so extensive that they would violate the legal principles underlying consolidation." (122:68;App.153).

The court found arguable relevance with respect to the charges in relation to each other as to identity, motive and modus operandi. (122:70;App.155). The court found that the allegations involving Cynthia R. and Below's access to the van were "significant" and related to other charges. (122:73;App.158). It did not find undue prejudice under Wisconsin Statute § 904.03, or that hearing multiple reports would give each woman's account "more credence." (122:71;App.156). It explained that it would give other acts instructions if requested, and noted that Below did assert that his defense to any particular count would be unduly restrained by joinder. (122:72;App.157).

In denying the post-conviction motion, the court stated that it "stands by Judge Martens' decision allowing joinder and consolidation." (119:5;App.120).

B. The circuit court erred in denying the severance motion.

A court may order that multiple complaints be tried together if the crimes "could have been joined in a single complaint."[20] Wis. Stat. § 971.12(4). Even if charges would satisfy joinder requirements, a court may order separate trials "[i]f it appears that a defendant or the state is prejudiced by a joinder of crimes." Wis. Stat. § 971.12. When a severance

[20] All references are to the 2009-10 Wisconsin Statutes unless otherwise noted.

motion is made, the court must determine whether prejudice would result from joinder, and weigh this potential prejudice against the public interest of having one trial. ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993).

Review of joinder is a two-step process. ***Id.*** at 596. First, this Court reviews de novo whether initial joinder was proper, construing the joinder statute broadly. ***Id.*** Whether severance is appropriate is a question left to the circuit court's discretion. ***Id.*** at 597. "An erroneous exercise of discretion…will not be found unless the defendant can establish that failure to sever the counts caused substantial prejudice." (***Id.***)(internal citation omitted).

If the evidence of the counts severed would be admissible in separate trials, "the risk of prejudice arising because of joinder is generally not significant." (***Id.***). The "test for failure to sever thus turns to an analysis of other crimes evidence under ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967)." (***Id.***). This asks: (1) Does the evidence fit within an exception set forth in Wis. Stat. § 904.04(2)?; (2) Is the evidence relevant under Wis. Stat. §904.01?; and (3) Is the evidence's probative value substantially outweighed by the danger of unfair prejudice under Wis. Stat. § 904.03? ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Though most lenient in child sex assault cases, courts generally allow a "greater latitude of proof as to other like occurrences" in sexual assault cases. ***State v. Davidson***, 2000 WI 91, ¶ 36, 236 Wis. 2d 537, 613 N.W.2d 606.[21]

Trying charges together creates the risk "that the jury will cumulate the evidence of the crimes charged and find guilt when it otherwise would not if the crimes were tried

[21] This latitude was expanded in 2013 Wisconsin Act 362, effective in 2014.

separately." ***State v. Bettinger***, 100 Wis. 2d 691, 697-98, 303 N.W.2d 585 (1981). "[A]lthough a single trial may be desirable from the standpoint of economical or efficient criminal procedure, the right of a defendant to a fair trial must be the overriding consideration." ***State v. Brown***, 114 Wis. 2d 554, 559, 338 N.W.2d 857 (Ct. App. 1993).[22]

As the circuit court acknowledged, "the core issue here is the issue of prejudice." (122:70;App.155). Below agrees and focuses his challenge on the substantial prejudice of trying these charges together.

Simply put, these charges were exceptional—exceptional in the number of counts, the number of alleged victims, and the over five-year time frame of events. These factors alone created the unreasonable risk that the jury would convict Below for counts it would not have in separate trials.

Beyond that, significant disparities existed in the quality of the State's evidence. For example, the State had hospital records demonstrating head injuries for Janet, Cynthia, and Cristina. (136:91;142:45;146:3-4;144:50-72). But all of the women alleged that Below was physically violent. That the jury would be presented with medical records showing physical injury to some women could have easily affected the jury's consideration of the allegations involving the others.

Further, many of the women had real credibility problems. Cristina, Gina, and Lisa acknowledged providing inconsistent accounts; Cynthia and Michele testified that they never reported these allegations until well after they occurred; and Janet, Amanda, Cristina, Sherylyn, and Michele admitted

[22] ***Brown*** involved a question of consolidation of co-defendants' trials, but this rationale applies equally here.

to being crack cocaine or cocaine users.[23],[24] Before trial, Milwaukee County District Attorney John Chisholm even acknowledged that each case, taken alone, would be much weaker. Chisolm told local news: "If you took each individual case by itself, you would find potentially numerous problems with the strength of the case." With regard to weaknesses of the cases taken alone, he stated: "Sometimes it would be an issue of credibility of the witness. Sometimes it would be an issue of consent. Sometimes it would be an issue of identity."[25]

With so many women and charges, with disparities in the quality of the State's evidence, and with credibility a central issue, the real risk existed that the jury—hearing woman after woman testify that Below assaulted her—would unfairly cumulate the evidence.

As an example of resulting prejudice, the circuit court acknowledged post-conviction that a battery charge against Michele violated double jeopardy. (119;App.116-20). The State at trial introduced photographs from this incident showing Michele with a black eye and bruising around her neck—damning photographs which the jury should never have seen. (137:25-36;165:Exh.10;107:PCM Exh.D). The only other battery offense for which the jury found Below

[23] Additionally, Leeland's probation officer testified that she had an alcohol and drug problem. (154:35-36).

[24](144:23-46;147:224-33;141:116;142:19-25;146:88;147:22-23;137:84-97;135:97-108;136:3-81;143:79-81;144:9-10;140:15-17;141:50-51,60-61;137:69).

[25] These quotes are from excerpts of television news interviews, included in trial counsel's subsequently withdrawn change of venue motion. (14AP2614:17:Exh.35). The two cited clips are in the record as post-conviction motion Exhibit E. (107:5). Undersigned counsel does not know the precise dates of these interviews.

guilty was Count 2, Substantial Battery to Janet. (59;64;App.177-86). Importantly, the jury found Below *not* guilty of two other charged batteries against Janet. (59;64;App.177-86). Had the jury evaluating the charges involving Janet not seen photographs of Michele's bruises, there is a reasonable likelihood that the jury would not have found Below guilty of that battery against Janet.

The court erred in denying the motion to sever.[26] Below moves this Court to vacate his convictions and remand these cases for separate trials for each of the eight women whose charges resulted in guilty verdicts.

II. Below Was Denied the Effective Assistance of Counsel Where His Attorneys Failed to Object to (A) Hearsay Statements Which Improperly Bolstered the Women's Accounts; (B) the Admission of Testimony about Below's Rumored HIV Status; and (C) Repeated References to the Women as "Victims," While Even Making Such References Themselves.

A criminal defendant has the right to the effective assistance of counsel. U.S. Const. amends. VI, XIV; Wis. Const. art. 1, § 7; ***State v. Roberson***, 2006 WI 80, ¶ 23, 292 Wis. 2d 280, 717 N.W.2d 111. To prove deficient performance, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v.***

[26] As Below argued post-conviction, insofar as this Court concludes that trial counsel failed to develop these arguments, then trial counsel was ineffective for failing to do so. (*See* 106:17;App.137).

Smith, 207 Wis. 2d 258, 276, 558 N.W. 2d 379 (1997). This Court assesses prejudice "based on the cumulative effect of counsel's deficiencies." ***State v. Thiel***, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305.

A trial court must hold a ***Machner*** hearing if the defendant alleges facts which, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996)(internal quotation omitted).

Appellate courts "grant deference only to the circuit court's findings of historical fact." ***Roberson***, 2006 WI 80, ¶ 24 (quoting ***Thiel***, 2003 WI 111, ¶ 24). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we [appellate courts] review de novo." ***Bentley***, 201 Wis. 2d at 310. Courts review de novo "the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding." ***Id.***

A. Defense counsel performed deficiently by failing to object to multiple hearsay statements which improperly bolstered the women's accounts of assault.

Defense counsel failed to object to, and at times sought out, the following hearsay statements:

- Michele's sister, Shelley, testified that she picked up Michele from a bar, and Michele disclosed that "[s]he felt she was scared, that if she didn't go back that he was going to come get her, or he would come find her." (139:83-89).

- Shelley testified that Michele told her "that he threatened to start her on fire, and she was—had—she had ran from the police to get help." (139:92).

- Glenn Steiner testified that in 2005, Michele said that "he was beating her and hitting her and made her cut her hair off." (140:21).[27]

- The State asked if Michele ever "disclosed any other information regarding her interactions with Below" and Steiner testified that Michele said that Below "would threaten her and make her do stuff, and if she didn't do it she would get beat up." (140:22). "Do stuff" meant to "[g]o out on the streets and sell her body, and if she didn't listen he would whoop her if she didn't bring money back." (140:22).

- The State asked Detective Carloni whether Steiner made any "specific disclosures" to him about Michele being assaulted by Below. (151:76). Carloni stated: "Steiner had said some things that indicated that—I believe about her hair being cut off and some other things." (151:76).

- Sherylyn testified that "everybody around the neighborhood said he was bad business, he was just an all around bad person, he beats up women, he stalks women." (140:36).[28]

- Lisa testified that she told a "girl named Amanda" about her assault because Amanda said that "[t]he same thing happened to her." (141:119).

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[27] Counsel objected on relevance grounds to Steiner being called as a witness. The State responded that his testimony would establish earlier disclosures by Michele. The court allowed the testimony, but noted that it would consider any defense objections made during the testimony. (140:9-12).

[28] This statement should have also been objected to as inadmissible other acts evidence. *See* Wis. Stat. § 904.04(2).

- Counsel asked Lisa what else Amanda told her, and she said "that Jeff beat her and raped her."[29] Counsel asked: "Then you told her he had done that to you, too?" Lisa stated: "I told her he raped me." (142:35-39).

- Mark Ceplina testified that Below came in his bar and Amanda appeared upset. "She said that Jeff had attacked her. She was afraid of him. And he attacked her and, apparently, sexually assaulted her." (143:53-62). Below said he "took the pussy because she stole a $3,000 ring from him." (143:53-62). Amanda said "[k]eep him away," and specifically told him that Below had "beat her and raped her." (143:59).

- The State asked Ceplina whether he remembered telling the detective that "a lot of girls [were] coming in and being afraid of Below over the last year;" Ceplina testified that he "heard just offhand of girls saying, [y]eah, I know somebody. I know somebody, you know, that was assaulted or not having a good time with him." (143:69).[30]

- Cristina testified that Amanda visited her after her attack. (143:109). "She was there because she heard what happened. And the same thing that had happened to me happened to her, and she tried to tell me and I didn't believe her. She tried to tell me at the hospital. She said, 'See, Cristina, I told you and you didn't believe me.'" (143:109).

- The State asked Cristina: "Did you say just a few moments ago that she [Amanda] had told you that something like

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[29] Multiple witnesses testified that they knew Below by "Jeff" and/or "Tyson." (*See, e.g.,*135:107;136:43,94;140:96;143:79).

[30] This statement should have also been objected to as inadmissible other acts evidence. *See* Wis. Stat. § 904.04(2).

this happened to her?" (143:110). Cristina answered yes and testified that Amanda told her this before, but she had not believed Amanda. (143:110).

- Detective Court testified that Cynthia "did not want [her] to write anything down in my memo book. She didn't want any part of being a victim, a complainant in this matter. She was very afraid of him. She told me numerous times that she was very afraid of Below." (146:33-34).

- Gina's sister, Toni, testified that around September 5, 2009, Gina said that "she was attacked." (148:9).

- Gina's friend, Vallie, testified that around September 4, 2009, Gina said that "she had been sexually assaulted" and that her identification card was taken. (148:17-19).

- Nurse Meyer testified to what Cristina told her about the alleged attack well beyond its physical nature, including that her assailant "kept saying shut the fuck up, if you make any noise I'll fucking kill you.; " and that "the assailant ran out the back door and down the alley." (144:88-89). Medical records containing these statements were entered into evidence. (144:85; 145:23;165:Exh.57).

- Nurse Meyer testified that Cristina reported that her "[a]ssailant has strangled patient's friends in prior assaults." (144:114). This statement was included in the admitted medical records. (*See* 165:Exh. 57).

- Nurse Schutkin testified to statements Leeland made which went beyond statements relevant medical treatment or diagnosis, including that her attacker "told her to shut up, relax. 'You know what you did to me, Brittany.' And he kept referring to her as Brittany.'" (140:9-16). Medical

records containing these statements were admitted into evidence. (149:9,48;165:Exh.79).

These statements did not fall within any hearsay exceptions, and were thus inadmissible. Wis. Stat. § 908.02. Statements that alleged victims purportedly made to others about what happened were out of court statements presented their truth. Nor did these statements fall within the prior consistent statements hearsay exception set forth in Wis. Stat. § 908.01(4)(a)(2). To fall under that exception, the statements must have been offered to "rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." "[A]n allegation that a person is lying, standing alone, is not sufficient to render admissible the prior consistent statements. The allegation must be that the fabrication is recent or based upon an improper influence or motive." ***State v. Peters***, 166 Wis. 2d 168, 479 N.W.2d 198 (Ct. App. 1991).

Additionally, the nurses' testimony and statements in their reports exceeded the limitations of statements made for diagnosis or treatment. That rule provides a hearsay exception for "[s]tatements 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)(emphasis added). That Cristina, for example, reported that her assailant said "shut the fuck up" and had strangled her friends in the past, was not reasonably pertinent to diagnosis or treatment.

No apparent strategic reason exists for counsel's failure to object to this hearsay evidence. The defense asserted that Below did not have sex with Amanda, but had

consensual sex with the other women. (154:56-139;155:4-113;156:8-23). DNA evidence linking him to Cristina, Leeland, Gina, and Cynthia was consistent with this position. As such, credibility was central to many of the charges. The admission of this hearsay testimony improperly bolstered the credibility of the women's accounts, and counsel should have objected.

B. Defense counsel performed deficiently by failing to object to prejudicial testimony about Below's rumored HIV status.

Defense counsel should have objected to, and not elicited, testimony concerning Below's HIV status. Counsel asked Amanda about an officer questioning her "about a dope date." (142:113). She responded that police told her that Below thought he was HIV-positive. (142:113). "He asked me, I need to know if you had intercourse with him. He just told us he might be HIV-positive, I said he didn't have sex with me." (142:113).

When questioning Nurse Meyer about Cristina, counsel asked: "Now, did the patient also report that the assailant has quote, told everyone that he is HIV positive, end quote?" (144:135). She answered yes. (144:135). Counsel *repeated* this question. (145:14). This information was also contained in the nurse's report. (165:57).

Below admitted to having sex with a number of women including prostitutes. (156:16). The State asked why he did not use protection, and he responded: "Well I mean it is no excuse. Like they say, get high, get stupid, get AIDS. It is no excuse." (156:16).

Insofar as evidence concerning Below's rumored HIV status had any relevance, that relevance was substantially

outweighed by the danger of unfair prejudice. *See* Wis. Stat. § 904.03. This evidence made even Below's account of consensual, unprotected sex reflective of callous disregard of the women's lives. While having unprotected sex with many other consenting adults is perhaps inadvisable, it is generally not criminal. But over thirty states have criminal statutes or sentencing enhancements for HIV transmission, exposure, or nondisclosure. *See* Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1405 (2013). Below's flippant comment about the *risk* of contracting HIV did not negate the severity of multiple witnesses testifying that he believed he *was* HIV-positive while having unprotected sex. No apparent strategic reason existed for counsel failing to object to, and instead eliciting, this testimony.

C. Defense counsel performed deficiently by failing to object to repeated references to the women as "victims," and even making such references themselves.

Defense counsel filed a motion—which the court granted—to preclude reference to the women as "victims," as to do so would violate the presumption of innocence, and (if said by the court or State) would suggest a personal belief of guilt. (34;127:26). Nevertheless, the State and State's witnesses called the women "victims" throughout the trial.[31] Absent an early objection to an officer's use of the word, and a later objection to the "victimology" expert referring to the witnesses as "victims," (135:39,52;152:13), counsel

[31](*See*135:12,37,38,46;140:119,124;141:40;142:23;143:34,38,48;144:53,113,114;145:27,30,37,39;146:31,34,39;147:70,73,84,184,187;148:24,37,79,94,95;151:47,71,76,90,93,116;152:35,37,45,75,76,77,78,79,83,91,93).

otherwise did not object. (*See generally* 129-162). Instead, counsel themselves referred to these women as victims throughout the trial.[32] No apparent strategic reasons exists for why counsel would fail to object, and instead repeatedly use, this term.

D. There is a reasonable likelihood that, but for the cumulative weight of counsel's errors, the jury would not have convicted Below of every one of the twenty-nine counts for which it found him guilty.

Below has to show a probability of a different result "sufficient to undermine confidence in the outcome." ***Smith***, 207 Wis. 2d at 276. This was a discerning jury—a jury that found Below guilty of certain acts but not others. In this context, the cumulative weight of counsel's errors was particularly heavy. In denying his post-conviction motion for a new trial based on ineffective assistance of counsel, the circuit court pointed in part to the "strength of the State's case." (119:5;App.120). But—as the verdicts show—the State's case was not so overwhelming for at least the twelve counts for which the jury acquitted Below. That the jury was not wholly convinced by the charges instead suggests that, had the jury not been inundated with hearsay statements bolstering the women's credibility, repeated references to the women involved as "victims," and testimony suggesting that Below believed he was HIV-positive, there is a reasonable likelihood that the jury would have acquitted Below on at least some of the other charges.

Consider, as an example, the charges involving Gina. Below was tried for sexually assaulting, kidnapping, and strangling her, all of which she testified occurred. (147:195-

[32] (*See* 144:143;147:188;148:28;150:100;152:49,83).

225). The State introduced records which showed that she reported a sexual assault, and reflected swelling of her tongue and neck. (148:7-15;165:Exhs.67,76). Without objection, Gina's sister and friend testified that Gina told them that she had been attacked. (148:7-22).

Police, however, testified that their investigation revealed that Gina lied about her whereabouts that evening. (147:224-33;149:99-106). Shimek testified that Gina admitted lying about being assaulted, and that instead she had a "dope date" with Below. (154:8-30). Below testified that he had consensual sex with Gina in exchange for cocaine. (154:58-87).

If counsel objected and moved to exclude the hearsay testimony of Gina's sister and friend, there is a reasonable likelihood that the jury would not have found beyond a reasonable doubt that Below had indeed assaulted Gina.

Below's post-conviction motion alleged facts which, if true, would entitle him to relief. The circuit court erred in denying his motion without a hearing, and this Court should reverse and remand this matter for a ***Machner*** hearing.

III. The Circuit Court Erred in Denying the Defense Motion to Suppress Evidence Obtained From the Search Warrant, Including Below's DNA Sample.

On February 10, 2010, police executed a search warrant to obtain, among other things, Below's DNA. (14AP2615:15:Exh.A;App.169-76). The supporting affidavit alleged that:

- Police investigated a child sexual assault occurring on January 21, 2010. Child JD told police that a black man put her in a grey van and had a white rag covering his face.

DNA did not match anyone in the database, but did match DNA retrieved from an adult assault from 2008. The woman (Cynthia S.)[33] involved in that assault reported that a man approached her from behind, got her purse, hit and sexually assaulted her. (14AP2615:15:Exh.A;App.173-74).

- Detective Carloni "did establish a possible link between at least three previously reported sexual assaults," which were "particularly violent in nature" and all involved a van. One of the alleged victims gave a license plate number of 926-NEA, registered to Cynthia R. "Another possible linked assault listed a known suspect as Gregory Below." (14AP2615:15:Exh.A;App.174-75).

- Police spoke with Cynthia R. and Below and established that he drove the van. Following a consent search of the van, police found a "white rag with what appeared to be blood stains on it" and "possible blood stains in the van." Cynthia told police that Below, who lived with her, had "raped her with a bottle in the past causing bleeding," and been "very violent" with her. (14AP2615:15:Exh.A; App.174-75).

The circuit court denied the defense motion to quash the warrant and suppress all derivative evidence, noting that there were "fair linkages" made in the affidavit to support probable cause. (122:19-22; 14AP2614:21,22;App.159-62).

"The Fourth Amendment guarantees the right to be secured against unreasonable searches and seizures." ***State v. Banks***, 2010 WI App 107, ¶ 18, 328 Wis. 2d 766, 790 N.W.2d 526. Courts reviewing the sufficiency of a warrant "must consider whether, objectively viewed, the record before the judge provided sufficient facts to excite an honest belief

[33] Cynthia S. is not an alleged victim in these cases.

in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched." ***State v. Marquadt***, 2001 WI App 219, ¶ 13, 247 Wis. 2d 765, 635 N.W.2d 188. The warrant-issuing "judge's determination will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding." ***Id.***

The circuit court erred when it denied counsel's suppression motion, particularly with regard to Below's DNA. The core question was whether the warrant provided a sufficient link between Below's DNA and the child assault. It alleged that his name and the van license plate came up as "possibly" being linked to other sexual assaults involving a van, but provided no other information about those allegations or whether DNA was involved. (14AP2615:15:Exh.A;App.169-76). The warrant further failed to establish why his DNA was relevant to his girlfriend Cynthia R.'s allegations, as she identified him and said that he assaulted her "in the past." The only established connection in the warrant between the 2008 Cynthia S. assault and the other allegations in the warrant was the DNA match to the child assault.

The warrant also failed to provide sufficient facts linking Below to the child assault. It asserted that a black man used a gray van in the assault, and that Below is a black man who drove a gray van. It established that the perpetrator used a white rag, and caused heavy bleeding to the child, and that a white rag with what appeared to be blood on it was found in the van Below drove, with other "[p]ossible blood stains" in the van. (14AP2615:15:Exh.A;App.169-76). While these facts created a *possible* link to Below, objectively viewed, the facts failed to amount to probable cause.

Below recognizes that a conclusion that a warrant for a buccal swab was invalid "does not end [the Court's] analysis," where the State could have "cured the matter" by submitting a valid warrant prior to trial. ***State v. Ward***, 2011 WI App 151, 337 Wis. 2d 655, 807 N.W.2d 23. Here, however, the record does not establish that the State would have been able to do so. Below therefore asks that this Court order suppression of evidence obtained from the unlawful warrant. Alternatively, he asks this Court to remand these matters for a fact-finding hearing to determine whether the State otherwise had sufficient facts to obtain a warrant for his DNA.[34]

IV. The Circuit Court Erred in Denying the Defense Motion for an *In Camera* Review of Cynthia R.'s Treatment Records From the Date She First Accused Her Live-In Boyfriend, Below, of Assaulting Her.

The standard for *in camera* review of treatment records "requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the record contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298. Information is necessary to the determination of guilt or innocence if it "tends to create a reasonable doubt that might not otherwise exist." ***Id.*** While the defense has to "reasonably

[34] When Below's DNA was taken in 2010, Wisconsin law allowed for warrantless DNA extraction only from "persons *convicted* of any felony," "a limited number of misdemeanors" or "juvenile offenses;" "persons found not guilty by reason of mental disease or defect of certain crimes; and persons found to be sexually violent." Laurence J. Dupuis, *DNA Extraction on Arrest: Maryland v. King and Wisconsin's New Extraction Law*, Wis. Law. Sept. 2013. ***Id.***

investigate information" before filing such a motion, "a defendant, of course, will most often be unable to determine the specific information in the records." ***Id.*** "[I]n cases where it is a close call, the circuit court should generally provide an in camera review." ***Id.***

"A defendant has a right to postconviction discovery if the desired evidence is relevant to an issue of consequence," and the defendant must "establish that the evidence probably would have changed the outcome of the trial." ***State v. Ziebart***, 2003 WI App 258, 268 Wis. 2d 468, 673 N.W.2d 369. A post-conviction discovery motion must be included with a post-conviction motion. ***State v. Kleitzien***, 2011 WI App 22, 331 Wis. 2d 640, 794 N.W.2d 920.

In ***Green***, the alleged victim and her mother spoke with authorities about a sexual assault. ***Id.***, ¶ 4. Her mother told police that she was seeing a counselor about the assault. ***Id.*** Over a year later, the girl again talked with police and this time said that penetration (and not just touching) occurred. ***Id.***, ¶¶ 4-5. The defense moved for *in camera* review of the counseling records, arguing that they "may contain inconsistent statements." ***Id.***, ¶¶ 6,9. The Wisconsin Supreme Court held that this "mere assertion" was insufficient to warrant *in camera* review. ***Id.***, ¶ 37. The Court noted that the defendant "had access to other reports" which showed that the alleged victim's story changed over time. ***Id.***

Here, counsel explained that according to the report, after accusing Below, CR was "distraught, was nervous, shaking," asked that police not do anything further with her report, made threats of self-harm, and was taken to the Mental Health Complex. (14AP2614:6,117:56-67;*see also* 106:18,n.30;App.138). The defense argued that any mental health issues affecting memory or the ability to control

behavior would be potentially exculpatory. (14AP2614:6,117:56-67).

In denying the request, the circuit court concluded that the facts were "similar to, quite frankly, in ***Green***"—that like the defendant in ***Green***, Below asserted that "she must have said something and it could be exculpatory." (14AP2614: 117:67-68;App.165-66). But unlike in ***Green***, this was not a search for *additional* potential inconsistent statements; here, counsel sought records to provide the *exclusive* evidence of Cynthia's psychological condition on the date she first accused him. (14AP2614:117:64). Whether she had any psychological issues would be relevant to the veracity of her accusations, and the court erred in denying the request for *in camera* review and post-conviction discovery.

CONCLUSION

For these reasons, Below requests that this Court vacate his convictions and remand these matters for new trials, separated to address the charges against each of the eight women for which the jury returned guilty verdicts. He asks that this Court suppress the evidence derived from the search warrant, or, alternatively, that this Court remand this matter for a fact-finding hearing to determine whether the State would have had probable cause to obtain Below's DNA sample. Should this Court deny his request for new trials, he asks that this Court reverse and remand this matter for a ***Machner*** hearing and for an *in camera* review of Cynthia R.'s treatment records.

Dated this 11th day of February, 2015.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,932 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 11th day of February, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 11th day of February, 2015.

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*The post-conviction motion exhibits are not included in the Appendix, but are in the record as Record Number 107.

**The women's last names, including the last name of the woman involved in the unrelated assault discussed in the warrant affidavit, have been redacted from the Appendix documents. The first and last name of the child involved in the unrelated child assault discussed in the warrant has been redacted to initials. Counsel has also redacted the birthdates of the woman and child involved in the unrelated assaults discussed in the warrant.