STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Nos. 2014AP2614-CR, 2014AP2615-CR
& 2014AP2616-CR
(Milwaukee County Circuit Court Case Nos.
2010CF707, 2010CF3272 & 2010CF4684)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY TYSON BELOW,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE KEVIN E. MARTENS AND JEFFREY A. WAGNER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

BRAD D. SCHIMEL
Attorney General

CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys For Plaintiff-
Respondent State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
v: (608) 266-7081
f: (608) 266-9594
e: wrencg@doj.state.wi.us

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BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN[2]

QUESTIONS PRESENTED

1. Did the circuit court properly exercise its discretion when, after granting the State's motion to consolidate three cases against defendant-

[1] Judge Martens presided over Below's jury trial, sentencing, and restitution hearing (2014AP2616:129 through 2014AP2616:164). Judge Wagner decided Below's postconviction motion (2014AP2616:119).

[2] To facilitate online reading, the electronically filed version of this brief includes hyperlinked bookmarks.

appellant Gregory Tyson Below, the court denied Below's motion to sever the charges?

- By its decision, the circuit court implicitly answered "Yes."
- This court should answer "Yes."

2. Did the circuit court properly deny Below's multiple claims of ineffective assistance of trial counsel?

   - By its decision, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

3. Did the circuit court properly exercise its discretion when the court denied Below's pretrial motion seeking to suppress evidence by challenging the sufficiency of an affidavit to establish probable cause for issuing the search warrant that authorized seizure of the evidence?

   - By its decision, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

4. Under ***Shiffra/Green***,[3] did the circuit court properly exercise its discretion when the court denied Below's pretrial motion for an *in camera* review of C.R.'s treatment records?

   - By its decision, the circuit court implicitly answered "Yes."
   - This court should answer "Yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the court's opinion.

STATUTES INVOLVED[4]

WIS. STAT. § 908.01 DEFINITIONS (2009-2010 ed.).

908.01 Definitions. The following definitions apply under this chapter:

(1) STATEMENT. A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion.

(2) DECLARANT. A "declarant" is a person who makes a statement.

(3) HEARSAY. "Hearsay" is a statement, other than one made by the declarant while testifying at

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[3] ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298; ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

[4] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(4) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:

(a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

1. Inconsistent with the declarant's testimony, or

2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

3. One of identification of a person made soon after perceiving the person; or

(b) *Admission by party opponent.* The statement is offered against a party and is:

1. The party's own statement, in either the party's individual or a representative capacity, or

2. A statement of which the party has manifested the party's adoption or belief in its truth, or

3. A statement by a person authorized by the party to make a statement concerning the subject, or

4. A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or

5. A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

WIS. STAT. § 908.03 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL (2009-2010 ed.).

908.03 Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) PRESENT SENSE IMPRESSION. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements 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.

. . . .

(6) RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02 (12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

. . . .

(21) REPUTATION AS TO CHARACTER. Reputation of a person's character among the person's associates or in the community.

. . . .

(24) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

WIS. STAT. § 971.12 JOINDER OF CRIMES AND OF DEFENDANTS (2009-2010 ed.).

971.12 Joinder of crimes and of defendants. (1) JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.

(2) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting one or more crimes. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(3) RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

> **(4)** TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes and the defendants, if there is more than one, could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will present additional facts, if necessary, in the "Argument" portion of its brief.[5]

STANDARDS OF REVIEW

A. Exercise Of Discretion.

When an appellate court reviews a circuit court's discretionary decision, the appellate court asks whether the circuit court exercised discretion, not whether another judge might have exercised discretion differently. ***State v. Prineas***, 2009 WI App 28, ¶ 34, 316 Wis. 2d 414, 766 N.W.2d 206.

> The term "discretion" contemplates a process of reasoning which depends on facts in the record or rea-

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[5] This appeal consists of three separate records consolidated for appeal. All citations to the record refer to documents in Case No. 2014AP2616-CR unless noted otherwise. Citations to documents in the other records will include a short-form appellate case number, the document number, and, when appropriate, the page number within the document (*e.g.*, "2615:25:1").

> sonably derived by inference from the record that yield a conclusion based on logic and founded on proper legal standards. The record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case.

State v. Delgado, 223 Wis. 2d 270, 280-81, 588 N.W.2d 1 (1999) (citations omitted).

> Under this standard, the circuit court's determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record. . . . While the basis for an exercise of discretion should be set forth in the record, it will be upheld if the appellate court can find facts of record which would support the circuit court's decision.

Peplinski v. Fobe's Roofing, Inc., 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995) (citations omitted).

> Evidentiary determinations are within the trial court's broad discretion and will be reversed only if the trial court's determination represents a prejudicial misuse of discretion. [An appellate court] will find an erroneous exercise of discretion where a trial court failed to exercise discretion, the facts fail to support the decision, or the trial court applied the wrong legal standard.

State v. Burton, 2007 WI App 237, ¶ 13, 306 Wis. 2d 403, 743 N.W.2d 152 (citations omitted).

B. Credibility.

> It is the function of the trier of fact, and not [an appellate] court, to resolve questions as to the weight of testimony and the credibility of witnesses. . . . [W]e . . . will uphold a trial court's determination of credibility unless that determination goes

> against the great weight and clear preponderance of the evidence.

State v. Hughes, 2000 WI 24, ¶ 2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621 (citations omitted). *See also* ***State v. Jenkins***, 2007 WI 96, ¶ 33, 303 Wis. 2d 157, 736 N.W.2d 24; ***State v. Herro***, 53 Wis. 2d 211, 215, 191 N.W.2d 889 (1971).

C. Joinder Of Charges.

> The joinder and severance of defendants in a criminal case is governed by sec. 971.12(2), (3), and (4), Stats.
>
> . . . Generally, questions of consolidation or severance are within the trial court's discretion. On review, the decision of the trial court will not be disturbed unless there has been an abuse of discretion. . . .
>
> > "Consolidation is a procedural mechanism which avoids repetitious litigation and facilitates the speedy administration of justice."

Haldane v. State, 85 Wis. 2d 182, 188-89, 270 N.W.2d 75 (1978) (footnote omitted) (citations omitted).

"'[J]oinder will be allowed in the interest of the public in promoting efficient judicial administration and court fiscal responsibility in conducting a trial on multiple counts in the absence of a showing of *substantial* prejudice.'" ***State v. Richer***, 174 Wis. 2d 231, 248 n.10, 496 N.W.2d 66 (1993) (emphasis added) (quoted source omitted). *See also* ***State v. Bellows***, 218 Wis. 2d 614, 622, 582 N.W.2d 53 (Ct. App. 1998) ("The joinder statute is to be broadly construed in favor of initial joinder.").

Wisconsin's joinder statute permits joinder when two or more crimes "are of the same or similar character or are based on the same act or transaction. . . ." Wis. Stat. § 971.12(1). "To be of the 'same or similar character' . . . crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap. It is not sufficient that the offenses involve merely the same type of criminal charge." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988). *See generally* ***Francis v. State***, 86 Wis. 2d 554, 273 N.W.2d 310 (1979). *See also* ***Holmes v. State***, 63 Wis. 2d 389, 397, 217 N.W.2d 657 (1974).

> Whether to sever otherwise properly joined charges on grounds of prejudice is within the trial court's discretion, and in making its decision the trial court must balance any potential prejudice to the defendant against the public's interest in avoiding unnecessary or duplicative trials. [An appellate court] will not interfere with that decision unless the [trial] court has abused its discretion, and [an appellate court] will uphold the trial court's ruling if there is any reasonable basis for it.

State v. Nelson, 146 Wis. 2d 442, 455-56, 432 N.W.2d 115 (Ct. App. 1988). *See also* ***State v. Linton***, 2010 WI App 129, ¶ 15, 329 Wis. 2d 687, 791 N.W.2d 222.

> When a motion for severance is made, the trial court must determine what, if any, prejudice would result from a trial on the joined offenses. The court must then weigh this potential prejudice against the interests of the public in conducting a trial on the multiple counts.
>
> An erroneous exercise of discretion, in the balancing of these competing interests, will not be

> found unless the defendant can establish that failure to sever the counts caused "substantial prejudice." In evaluating the potential for prejudice, courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant.

State v. Locke, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993) (citations omitted).

When contending that a circuit court erroneously denied severance, a defendant "bears a heavy burden of establishing compelling prejudice." ***United States v. Salomon***, 609 F.2d 1172, 1175 (5th Cir. 1980). "'[T]he defendant must be unable to obtain a fair trial without a severance and must demonstrate compelling prejudice against which the trial court will be unable to afford protection.'" ***Id.*** n.4 (quoted source omitted).

"The danger of prejudice arising from the jury's exposure to evidence that the defendant committed more than one crime is minimized when the evidence of both counts would be admissible in separate trials." ***State v. Hoffman***, 106 Wis. 2d 185, 210, 316 N.W.2d 143 (Ct. App. 1982). If the court could admit evidence of count 1 at a separate trial on count 2, the defendant suffers no substantial prejudice from the joinder of the two counts. ***Id.***; *accord* ***Locke***, 177 Wis. 2d at 597. If the court could admit the evidence under section 904.04(2), the court must additionally determine whether to exclude the evidence because unfair prejudice from admitting the evidence would substantially outweigh the probative value of the evidence. Wis. Stat. § 904.03.

D. Ineffective Assistance Of Counsel.

"The benchmark for judging any claim of ineffectiveness must be 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). To prove ineffective assistance of trial counsel, a defendant bears the burden of proving that trial counsel performed deficiently and that counsel's deficient performance caused impermissible prejudice to the defendant. ***State v. Domke***, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 805 N.W.2d 364 (citations omitted).[6]

"To prove deficient performance, a defendant must show *specific acts or omissions* of counsel that are 'outside the wide range of professionally competent assistance.'" ***State v. Arredondo***, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (emphasis added) (citation omitted). *See also, e.g.*, ***United States v. Trevino***, 60 F.3d 333, 338 (7th Cir. 1995); ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477.

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[6] The supreme court has rejected "any substantive difference" between "tactical" and "strategic" decisions. ***State v. Harbor***, 2011 WI 28, ¶ 71 n.14, 333 Wis. 2d 53, 797 N.W.2d 828.

An appellate court strongly presumes that counsel acts reasonably within professional norms. ***Arredondo***, 269 Wis. 2d 369, ¶ 24.

> The function of a court assessing a claim of deficient performance is to determine whether counsel's performance was objectively reasonable. In making this determination, the court may rely on reasoning which trial counsel overlooked or even disavowed. Courts "do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." Professionally competent assistance encompasses a "wide range" of behaviors.

State v. Koller, 2001 WI App 253, ¶ 8, 248 Wis. 2d 259, 635 N.W.2d 838 (citations omitted). *See also* ***State v. Kimbrough***, 2001 WI App 138, ¶ 31, 246 Wis. 2d 648, 630 N.W.2d 752. "When the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight." ***United States v. Taglia,*** 922 F.2d 413, 417-18 (7th Cir. 1992).

"Prejudice occurs where the attorney's error is 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). "A criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant's defense. The defendant must affirmatively prove prejudice." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317

(Ct. App. 1993). *See also* ***Erickson***, 227 Wis. 2d at 774 (speculation does not satisfy the prejudice prong of *Strickland*).

> Whether counsel was ineffective is a mixed question of fact and law. The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law.

State v. Balliette, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334 (citations omitted). *See also* ***id.*** ¶¶ 21-27; ***State v. Westmoreland***, 2008 WI App 15, ¶ 18, 307 Wis. 2d 429, 744 N.W.2d 919

If the defendant fails on either prong — deficient performance or prejudice — the ineffective-assistance-of-counsel claim fails. ***Strickland***, 466 U.S. at 697. Thus, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." ***Id.***

E. Challenge To Circuit Court's Finding Of Probable Cause Supporting Issuance Of Search Warrant.

> The duty of the court issuing the warrant is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before it, there is a fair probability that contraband or evidence of a crime will be found in a particular place. In addition, the warrant judge may draw reasonable inferences from the evidence presented in the affidavit.

State v. Multaler, 2002 WI 35, ¶ 8, 252 Wis. 2d 54, 643 N.W.2d 437 (citations omitted).

> We accord great deference to the warrant-issuing judge's determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause. Thus, "[t]he burden of proof in a challenge to the existence of probable cause for the issuance of a search warrant is clearly with the defendant."

Id. ¶ 7 (citations omitted).

F. Grant Or Denial Of Suppression Motion.

Whether to grant or deny a motion to suppress evidence lies within the discretion of the circuit court. ***State v. Keith***, 216 Wis. 2d 61, 68, 573 N.W.2d 888 (Ct. App. 1997). Therefore, an appellate court will overturn an evidentiary decision of the circuit court only if that court erroneously exercised its discretion. ***Id.*** at 69.

> When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. In considering whether the proper legal standard was applied, however, no deference is due. This court's function is to correct legal errors. Therefore, we review *de novo* whether the evidence before the circuit court was legally sufficient to support its rulings. Furthermore, if evidence has been erroneously admitted or excluded, we will independently determine whether that error was harmless or prejudicial.

Id. (citations omitted). *See also* ***State v. Eason***, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625.

> On review of a motion to suppress, [an appellate] court employs a two-step analysis. First, we review the circuit court's findings of fact. We will uphold these findings unless they are against the great weight and clear preponderance of the evidence. "In reviewing an order suppressing evidence, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous." Next, we must review independently the application of relevant constitutional principles to those facts. Such a review presents a question of law, which we review de novo, but with the benefit of analyses of the circuit court . . . .

State v. Dubose, 2005 WI 126, ¶ 16, 285 Wis. 2d 143, 699 N.W.2d 582 (citations omitted). *See also* ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990) ("[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law."); ***State v. Turner***, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987) (appellate court will sustain "the trial court's findings of historical or evidentiary fact unless they are contrary to the great weight and clear preponderance of the evidence. This is basically a 'clearly erroneous' standard of review.").

G. Denial Of A *Shiffra/Green* Motion.

> The defendant bears the burden of making a preliminary evidentiary showing before an in camera review is conducted by the court. Factual findings

> made by the court in its determination are reviewed under the clearly erroneous standard. Whether the defendant submitted a preliminary evidentiary showing sufficient for an in camera review implicates a defendant's constitutional right to a fair trial and raises a question of law that [an appellate court] review[s] de novo. If [the appellate court] determine[s] the requisite showing was made, the defendant is not automatically entitled to a remand for an in camera review. The defendant still must show the error was not harmless.

State v. Green, 2002 WI 68, ¶ 20, 253 Wis. 2d 356, 646 N.W.2d 298 (citations omitted) (footnote omitted).

H. Harmless Error.

> The harmless error rule . . . is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do. *See* Wis. Stat. § 805.18(2) (specifying that no judgment shall be reversed unless the court determines, after examining the entire record, that the error complained of has affected the substantial rights of a party).

State v. Harvey, 2002 WI 93, ¶ 47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189. "Wisconsin's harmless error rule is codified in WIS. STAT. § 805.18 and is made applicable to criminal proceedings by WIS. STAT. § 972.11(1)." ***State v. Sherman***, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500.

"[I]n order to conclude that an error 'did not contribute to the verdict' within the meaning of

Chapman,[7] a court must be able to conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Harvey***, 254 Wis. 2d 442, ¶ 48 n.14 (footnote added). *See also* ***State v. Martin***, 2012 WI 96, ¶¶ 42-46, 343 Wis. 2d 278, 816 N.W.2d 270 (reviewing harmless-error principles and factors); ***State v. Stuart***, 2005 WI 47, ¶ 40 n.10, 279 Wis. 2d 659, 695 N.W.2d 259 (various formulations of harmless-error test reflect "alternative wording"). "The standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise." ***Sherman***, 310 Wis. 2d 248, ¶ 8. "The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." ***Id.***

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN THE COURT DENIED BELOW'S MOTION TO SEVER CHARGES AFTER THE COURT GRANTED THE STATE'S MOTION TO CONSOLIDATE THREE CASES INVOLVING NINE VICTIMS OF SEXUAL-ASSAULT FELONIES ALLEGED AGAINST BELOW.

A. Supplemental Facts.

This appeal arises from Below's conviction of twenty-nine felonies by a Milwaukee County jury following a trial that ran from February 14, 2011 through March 9, 2011 (129:1; 162:1).

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7 ***Chapman v. California,*** 386 U.S. 18 (1967).

The Milwaukee County district attorney originally charged Below with sixty-one felonies in three separate cases:

- 2010CF707 (No. 2014AP2614-CR) — alleging six felonies committed against C.R. (2614CR:2);
- 2010CF3272 (No. 2014AP2615-CR) — alleging a total of forty felonies: thirteen felonies committed against or in relation to J.O., six felonies committed against or in relation to A.Z.,[8] three felonies against A.V.,[9] four felonies against C.A., three felonies against G.L., three felonies against L.R., four felonies against S.M., and four felonies against L.W. (2615CR:4); and
- 2010CF4684 (No. 2014AP2616-CR) — alleging fourteen felonies committed against M.M. and one felony of soliciting prostitution (2616CR:2).

On August 2, 2010, the prosecutor moved to consolidate 2010CF707 and 2010CF3272 (2615CR:8). Below opposed the motion (2614CR:16) and later sought to sever the charges in 2010CF3272 (2614CR:16; 2615CR:11).

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[8] *See* 122:36 (transcript of consolidation-motion hearing).

[9] "The charging documents (criminal complaints and information) erroneously refer to 'AV' as 'AF.' All references to 'AF' refer to 'AV'" (2615CR:23:7 n.3).

On October 5, 2010, the prosecutor moved to include 2010CF4684 in the consolidation (2614CR:24; 2615CR:17; 6). On the same day, the circuit court held a hearing on the prosecutor's consolidation motions and Below's motion to sever (122:33-73). The court granted consolidation and denied severance (122:73).

On January 13, 2011, the prosecutor filed a consolidated amended information (2614CR:29; 2615CR:22; 13) along with a motion to dismiss sixteen counts: three counts in 2010CF707, ten counts in 2010CF3272 (including all counts involving A.Z.), and three counts in 2010CF4684 (2614CR:34; 2615CR:27; 18).[10] At a hearing the same day, Below's lawyer equivocally opposed the dismissal motion (126:8). The court granted the dismissal motion (126:8), resting the decision on principles of judicial economy and prosecutorial discretion (126:8-9). In response to a request from Below's counsel, the court invited counsel to request reconsideration "on a future date" (126:10).

The consolidated amended information charged Below with forty-five felonies (2614CR:29; 2615CR:27; 13).

At trial, after the State rested (153:43), the prosecutor moved to dismiss Counts 8, 9, 13, and 20 as not proven beyond a reasonable doubt

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[10] The consolidated amended information also amended Count 29 from first-degree sexual assault (use of a dangerous weapon) to second-degree sexual assault (force or violence) (13:6; *see also* 153:62).

(153:49, 50, 52, 56). The prosecutor also filed a second consolidated amended information that conformed the charging document to the evidence (59; 153:45-67). As a result, the jury considered forty-one felony counts.

On March 9, 2011, the jury returned verdicts of "guilty" on twenty-nine counts (64:1-2, 10-12, 14-19, 25-30, 32-40, 42-45):

- J.O. (59:1-3; 64:1-10; 135:97-108; 136:3-81; 162:7-8) — Counts 1, 2, and 10
- M.M. (59:3-4, 9; 64:11-17, 19-20, 44-45; 136:92-100; 137:6-98; 138:7-86; 139:12-24; 162:9-11) — Counts 11, 12, 14, 15, 16, 17, 19, 44, 45
- L.W. (59:6; 64:25-27; 141:89-124; 142:9-47; 162:12-13) — Counts 25, 26, and 27
- A.V. (59:6-7; 64:28-30; 142:50-128; 162:13-14) — Counts 28, 29, and 30
- C.A. (59:7-8; 64:31-34; 143:77-128; 144:3-49; 162:14, 15) — Counts 32 and 34
- C.R. (59:8; 64:35-37; 146:42-125; 147:8-80; 162:15-16) — Counts 35, 36, and 37
- G.L. (59:8-9; 64:38-40; 147:194-244; 162:16) — Counts 38, 39, and 40
- L.R. (59:9; 64:42-45; 148:23-107; 162:17) — Counts 42 and 43

In addition, the jury convicted Below of one felony count of soliciting prostitutes (59:4; 64:18; 162:11 (Count 18)).

The jury also acquitted Below of twelve counts: five of eight counts concerning J.O. (64:3-7), all four counts concerning S.M. (64:21-24),[11] two of four counts concerning C.A. (64:31, 33), and one of three counts concerning L.R. (64:41).

B. Because The Crimes Alleged Against Below Satisfied The Criteria For Joinder And, After Joinder, Did Not Pose A Risk Of Substantial Prejudice To Below, The Circuit Court Did Not Erroneously Exercise Its Discretion By Denying Below's Motion To Sever.

In framing his argument on the circuit court's alleged error in denying his motion to sever, Below agrees with the circuit court that "'the core issue here is the issue of prejudice.'" Below's Brief at 27 (citing 122:70). Consequently, Below "focuses his challenge on the substantial prejudice of trying these charges together." *Id.* He seeks remand "for separate trials for each of the eight women whose charges resulted in guilty verdicts." *Id.* at 29.

As the Wisconsin Supreme Court wrote more than thirty-five years ago, "The joinder and severance of defendants in a criminal case is governed by sec. 971.12(2), (3), and (4), Stats.," with "questions of consolidation or severance [residing] within the trial court's discretion." ***Haldane***, 85 Wis. 2d at 188-89. Wisconsin's joinder statute does not identify prejudice as a factor in determining whether to allow joinder, *see* Wis. Stat.

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[11] *See also* (59:5-6; 140:34-144; 141:9-66).

§ 971.12(1); rather, prejudice arises as a factor in deciding whether to grant relief from joinder, *see* Wis. Stat. § 971.12(3).

In seeking consolidation, the prosecutor submitted a motion explaining in detail (both verbally and graphically) how consolidation satisfied joinder criteria:

- conduct reflecting a modus operandi "reveal[ing] the defendant's overarching plan and motive with respect to each course of assaultive conduct" (2615CR:8:11) — isolation and confinement for purposes of committing sexual assault (2615CR:8:11-12); strangulation, beating, and stalking of victims (2615CR:8:12-14)
- identity or similarity of the acts committed by Below (2615CR:8:16-17)
- conduct committed within a relatively short time frame (2615CR:8:17-18)
- conduct occurring within a relatively small geographic area (2615CR:8:18-19)
- in accord with ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), evidence in each case admissible in separate trials as other-acts evidence (2615CR:8:20-22)

The prosecutor also presented a pre-emptive argument that joinder would not cause impermissible prejudice (2615CR:8:20-23).

At the pretrial motion hearing (122), the circuit court acknowledged the parties' "extensive briefing" (122:33). After hearing argument from the

prosecutor (122:34-48) and defense counsel (122:48-75), the court granted the prosecutor's consolidation motion and denied Below's severance motion. The court identified the correct legal standards (122:57-59) and then engaged in a detailed analysis of the facts (necessarily derived from the criminal complaints) (122:59-64). Finally, the court evaluated those facts in terms of the standards for allowing joinder (122:64-70, 72-73). Based on its factual and legal analysis, the court granted the motion to consolidate (122:73). Under the standards for exercising discretion (pp. 7-8, above), the circuit court properly exercised its discretion when the court granted the consolidation motion.

In denying Below's motion to sever, the court assessed potential prejudice from consolidation and did not find any undue (*i.e.*, substantial) prejudice:

> I think really ultimately the core issue here is the issue of prejudice, whether there is prejudicial affect on the defendant or whether it jeopardizes the right to a fair trial under 904.03 or for other reasons recognized in the case law as precluding joinder.
>
> Under 904.03, I don't find there to be undue prejudice. At least on some issues identification as I understand from what I already heard there are obviously identifications made by victims. So it's not necessarily linking the sort of the MO or the method of assault as using as a sole basis to identify Mr. Below as the assailant with respect to any particular alleged victim.
>
> I guess what the defense argues is the accumulation of cases; that is, multiple alleged victims' reports and the affect that that might have on a jury that is perhaps if believing not any one alleged vic-

> tim sort of in the totality of hearing multiple reports perhaps than giving more credence.
>
> I'm not satisfied that that is problematic certainly at this point. The court certainly will give appropriate instructions if requested as relates to the limits of other acts evidence and what the purpose of that might be, number one.
>
> Number two, obviously there's some lesser concerns given that the other acts that are really also separately charged incidents as well or separately charged counts.
>
> There's no arguments or other indications to the court that there are issues involving the need to present a defense to any particular count and how that need may then unduly restrain the defense from providing a full and accurate defense or full and complete defense of each alleged count; that is, again issues involving the defendant testifying as to perhaps some allegations but not others. Those haven't been raised at this point.
>
> Indeed even if so, they still would need to be balanced against the other reasons that why consolidation again is to be
> viewed more broadly.

(122:70-72.) Again, under the standards for exercising discretion (pp. 7-8, above), the circuit court properly exercised its discretion when the court denied Below's severance motion.

On appeal, Below offers only a perfunctory argument that the court erred *at the time* the court decided the motions: "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." Below's Brief at 27. Instead, his argument about prejudice relies on his as-

sessment of prejudice flowing from the purported strength or weakness of evidence produced at trial. *See id.* at 27-29.

But a circuit court cannot decide a pretrial motion by speculating or attempting to foresee the quantity or quality of evidence the parties will introduce at trial. The court can only rely on the nature of the charges and the factual allegations in the criminal complaints. Here, Below has not offered this court any significant argument that the circuit court — at the time of deciding the pretrial consolidation and severance motions — erroneously exercised discretion in light of the available record.

In any event, Below's argument suffers from a fatal flaw: ignoring the use of other-acts evidence in eight individual trials. Although Below cites ***Sullivan***, 216 Wis. 2d 768, for the three-part analysis a circuit court uses to decide whether to admit other-acts evidence, *see* Below's Brief at 26, he does not offer any argument rebutting the prosecutor's contention in the circuit court that "evidence from each incident would be admissible at separate trial of every other, so there can clearly be no prejudice to a joint trial" (2615CR:8:23; *see also* 122:43). The Wisconsin Supreme Court has made this point clear:

> [W]e have consistently recognized that when evidence of both counts would be admissible in separate trials, the risk of prejudice arising due to a joinder of offenses is generally not significant. The simple logic behind this rule is that when evidence of one crime is relevant and material to the proof of a second crime, virtually identical evidence will be submitted

> to the jury whether or not one crime or both crimes are being tried.

State v. Bettinger, 100 Wis. 2d 691, 697, 303 N.W.2d 585 (1981) (citations omitted). *See also* ***Peters v. State,*** 70 Wis. 2d 22, 29-32, 233 N.W.2d 420 (1975).

Below's examples of purported prejudice fail to prove the joinder caused him substantial prejudice. *See* Below's Brief at 27-29. Essentially, Below speculates rather than proves. He asserts that hospital records of three victims "*could have easily affected* the jury's consideration of the allegations involving the others." *Id.* at 27 (emphasis added).[12] Moreover, the jury's acquittal of Below of twelve counts affecting four victims — including acquittals relating to two of the victims whose medical records he highlights (J.O. and C.A.) — shows that medical records did not impermissibly prejudice the jury: where the jury acquitted Below of offenses concerning victims to whom the medical records directly related, Below cannot sensibly contend that those records would have contributed to convictions for offenses against victims to whom those records did not relate at all.[13]

Below also points to "real credibility problems" of many of the victims. Below's Brief at 27. His

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[12] He fails to note that he stipulated to the admission of the medical records of two of the three victims (142:4-6 (J.O.); 146:3-5 (C.R.); 156:127-29 (jury instructions)).

[13] Below fails to note — or to object — that the State presented medical records for other victims as well (165:Ex. 76 (G.L.); 165:Ex. 79 (L.R.)).

claim amounts to asking this court to re-assess the credibility of witnesses even though the jury had full awareness of credibility issues. For instance, M.M. testified on direct examination that "I'm not good with remembering a lot of dates or when it happened" (137:46). On cross-examination, defense counsel had her reiterate that testimony (137:65 ("I don't have a good memory when it comes to dates.")). In closing argument, defense counsel called the jury's attention to credibility issues regarding the State's witnesses (158:11, 12, 13, 14, 15, 56, 64, 71, 77). The jury's acquittal of Below on twelve of forty-one counts shows that the jurors carefully assessed the evidence — including witnesses' credibility — in reaching the verdicts.

Below's example of purported prejudice — "damning photographs" of a black eye and bruising on M.M. that supposedly infected the jury's verdict convicting Below of one of three charges of substantial battery against J.O., *see* Below's Brief at 28 — omits a significant point: the jury also saw far more "damning photographs" (162:Ex. 2, at 9-11) showing J.O.'s bloody scalp (136:27-30 (J.O. testifying about Exhibit 2)). Despite those photos, the jury acquitted Below of five of eight counts involving J.O. The notion that the photos of a bruised M.M. led to a substantial-battery conviction relating to J.O. when far more "damning photographs" of J.O. herself did not prevent the jury from acquitting Below of two charges of substantial battery against J.O. highlights the meritlessness of Below's prejudice assertions.

The jury did its job: the jurors carefully evaluated the evidence bearing on each charge and did

not allow evidence bearing on any given charge to contaminate the decisions on other charges, as the jury's numerous acquittals show (highlighted by the acquittals on charges concerning J.O. despite the literally bloody photos of her head wounds).

In short, the circuit court's decision to deny Below's severance motion did not result in any discernible prejudice — much less "substantial prejudice" — to Below.

II. THE CIRCUIT COURT CORRECTLY DENIED BELOW'S MULTIPLE CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A. Below's Two Defense Lawyers Did Not Provide Ineffective Assistance By Refraining From Objecting To The Instances Of Alleged Hearsay Identified By Below.

In his postconviction motion, Below alleged that defense counsel provided ineffective assistance by failing to object to an array of hearsay statements (106:4-8). The circuit court denied this ineffective-assistance claim:

> The defendant contends that trial counsel failed to object to multiple hearsay statements which he claims bolstered the women's accounts. Several examples are set forth in the defendant's motion at pages 4-7.
>
> . . . .
>
> The defendant sets forth approximately eighteen instances of hearsay statements that he claims counsel should have objected to. The State responds that the statements made by the witnesses constituted exceptions to the hearsay rule. The court is in general agreement with the State's analysis of the issues presented, and to the extent that counsel

> probably should have objected on hearsay grounds, the court finds that the defendant's case was not prejudiced based on the other evidence elicited corroborating what had occurred, including the victims' testimony and the defendant's own testimony.

(119:2-3.) On appeal, he reasserts this ineffective-assistance claim. Below's Brief at 30-35.

Under ***Strickland***'s two-part test for assessing counsel's constitutional effectiveness (pp. 12-14, above), defense counsel provided constitutionally effective assistance. Because the statements qualified either as nonhearsay[14] or as hearsay exceptions,[15] counsel did not perform deficiently by not objecting. But even if counsel should have objected, Below did not incur any prejudice from the deficiency.

In the circuit court, the prosecutor offered a comprehensive response to the hearsay claim:

> Shelly M.'s testimony that MM was scared [139:88] was admissible under both § 908.03(2) and (3), given that it was a statement about MM's state of mind and MM was still bloody and "in shock." [139:86][16]

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[14] WIS. STAT. § 908.01(3).

[15] WIS. STAT. § 908.03.

[16] In other references to M.M. as "scared," Shelly M. testified to her personal observation of M.M.'s condition, not to statements by M.M. (139:86, 88).

Before Shelly M. testified, M.M. testified that Below "poured rubbing alcohol on me and he threatened to set me on fire" (137:8; *see also* 137:10, 62) and that she later managed to flag down a police car "because [she] was trying to

(footnote continues on next page)

> Also, the Defendant was not prejudiced by her testimony regarding the Defendant beating and cutting MM's as Shelly M. testified to multiple instances when she observed the Defendant assault MM [139:89-91]. Glen Steiner's testimony [140:21-22] was admissible under § 908.03(2) and as non-hearsay, as it was offered to show how it initiated the investigation regarding MM. Similarly, Detective Carloni's testimony [151:76] was non-hearsay, as it was offered to show how law enforcement investigated and linked all of the cases together.
>
> Additionally, SM's testimony [140:36], although not directly elicited, was non-hearsay as the State's follow-up question shows that the statement was used to show its effect on SM [140:36-37]. Moreover, as with all of the statements, the testimony was not prejudicial inasmuch SM testified to the Defendant's brutal physical and sexual assault [*e.g.*, 140:40-41, 44-45]. Further, the jury acquitted the Defendant of the counts pertaining to SM [64:21-24; 162:11-12], thus her statements did not prejudice the Defendant.
>
> Also, LW's, Mark Ceplina's, and CA's testimonies were not hearsay by definition. The record shows that LW's testimony was offered to explain why she disclosed to A[ ] [141:119; 142:37].[17] The record also

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(footnote continues from previous page)

get away from [Below]" (137:32). Thus, Shelly's testimony about the threat and the police, *see* Below's Brief at 30, merely repeated testimony by M.M. and concerned an event about which defense counsel cross-examined her (137:79).

[17] In addition, defense counsel — not the prosecutor — specifically asked L.W. what else A.V. told her (142:37). Below cannot properly complain about alleged hearsay his lawyer deliberately and explicitly elicited in seeking information about how L.W. came to disclose to A.V. that Below raped her. *Cf.* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) ("We will not review invited error.").

shows that Mr. Ceplina's testimony was offered to explain why he approached the Defendant, and explain the effect on the Defendant, who made a party-opponent statement admissible under § 908.01(4)(b)(l).[18] CA's testimony was not offered to prove that the Defendant assaulted AV, but was offered to explain AV's conduct (visiting CA in the hospital) [143:109-10]. Further, the testimony was not so prejudicial where CA stated that she did not believe AV's allegations [143:109].

Officer Court's testimony [146:33-34] was admissible under § 908.03(3). *See Jackson*, 187 Wis.2d at 435-36.[19] Furthermore, it was not so prejudicial

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[18] A.V.'s statement recited by Ceplina — "She said that Jeff had attacked her. She was afraid of him. . . ." — also showed the effect on A.V. of Below's presence at the bar (143:53) and thus fit within the hearsay exception for "then existing state of mind, emotion, sensation, or physical condition." Wis. Stat. § 908.03(3). Ceplina's testimony about A.V.'s statements "[k]eep him away" (143:58) and "he beat her and raped her" (143:59), *see* Below's Brief at 32, occurred as responsive answers to questions by defense counsel during cross-examination. Below cannot properly complain about alleged hearsay explicitly and deliberately elicited by his lawyer for tactical purposes evident from the record. ***Shawn B.N.***, 173 Wis. 2d at 372. Further, Ceplina's testimony about having "heard just offhand of girls saying . . . ." (143:69), *see* Below's Brief at 32, qualified as nonhearsay because the out-of-court statement did not come in as evidence "to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Ceplina followed up by declaring that he could not "believe a word that they say" (143:69) and had already described Below as "a nice guy" (143:57). So, even if Ceplina's testimony qualified as hearsay, the testimony did not cause Below any damage; if anything, the testimony helped him.

[19] ***State v. Jackson***, 187 Wis. 2d 431, 523 N.W.2d 126 (Ct. App. 1994) (state-of-mind exception).

where Officer Court testified to CR's demeanor [146:33], CR so testified [146:88], and the Defendant admitted to Marcus Cargile that [CR] was afraid [147:127]. Additionally, Toni Pena's and Vallie Prince's testimonies were admissible. Ms. Pena's testimony [148:9] was offered to explain how the incident initiated investigated [*sic*] (how and why she gave GL's medical records to police) [148:10-12]. Mr. Prince's testimony [148:17-19] was admissible as non-hearsay to explain why he called police, and was also admissible under § 908.03(2).

Finally, Eve Meyer's and Rhonda Schutkin's testimonies [144:80-146; 145:5-24; 149:4-45] were admissible under § 908.03(4), and were not prejudicial. They both testified that they were nurses providing treatment [144:80-81], and both explained that the assault history, including methods of control, is necessary to locate injuries and provide options for different treatment and services [144:86-89]. Thus, the information contained in their testimonies was related to the proper physical *and psychological* treatment. Furthermore, the statements were not prejudicial in light of the victims' testimonies [143:77-128; 144:3-49; 148:23-107]. Moreover, the information was not so prejudicial where defense counsel highlighted that the type of information was self-reported and "subjectively from the patient," [144:62] where Ms. Meyer noted that CA never named the perpetrator [144:126], and where there was substantial corroborating evidence documenting the injuries.[20]

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[20] In noting that allegedly prejudicial hearsay appeared in C.A.'s medical records (165:Ex. 57), *see* Below's Brief at 33, Below omits the fact that defense counsel did not object to the admission of those records (145:24) and that defense counsel previously offered to stipulate to the records (144:75-76).

(112:18-20 (footnotes omitted) (footnotes added) (record cites added).) As shown by the record, the prosecutor's recitation confirms that defense counsel provided constitutionally effective assistance in relation to Below's hearsay claim and that the circuit court properly denied this claim.

B. Below's Two Defense Lawyers Did Not Provide Ineffective Assistance When They Did Not Object To Brief References, Elicited On Their Cross-Examination Of Two State's Witnesses, To Below's Possible HIV Status.

Below contends that defense counsel provided ineffective assistance not just by failing to object to references to Below's self-proclaimed HIV status (144:135) but by eliciting those references during cross-examination of victim A.V. (142:113-14)[21] and Sexual Assault Nurse Examiner (SANE) Eve Meyer (144:135-36; 145:14).[22] *See* Below's Brief at 35-36.

A.V.'s reference to HIV occurred in a relevant context on cross-examination: in response to a defense counsel's question about a police officer "talking to [A.V.] about a dope date" with Below (142:113), A.V. summarized the officer's statements, including that Below "had stated to [the officers] he thought he was HIV positive"

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[21] Defense counsel Dan Meylink cross-examined A.V. (142:3, 84).

[22] Defense counsel Donald Hahnfeld cross-examined Meyer (144:117; 145:5).

(142:113). A.V. testified that the officer said to her that "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). In response to defense counsel's follow-up question, A.V. denied concern about HIV because "[Below] didn't have sex with me. Why would I – Didn't bother me" (142:114).

Meyer's references to HIV occurred during detailed questioning about Meyer's report of C.A.'s injuries from the assault (144:120-46; 145:6-15; 165:Ex. 57:unnumbered pp. 6-18, 26-28). Defense counsel asked, "Now, did that patient also report that the assailant has quote, told everyone he is HIV positive, end quote?" (144:135). Meyer answered, "Yes" (144:135). Her response led to a series of questions concerning whether C.A. requested testing or testing for HIV or a sexually transmitted disease (144:135-37). Meyer's other reference occurred when she confirmed a statement in the report that "'Patient's friend [A.V.] also reports that the assailant has told everyone he's HIV positive,' end quote?" (145:14; 165:Ex. 57:unnumbered p. 11).

The brief references to HIV in a three-week trial do not show ineffective assistance of trial counsel. The HIV references by A.V. occurred while defense counsel sought to challenge A.V.'s memory of her report of her assault — a valid, even essential, task of defense counsel. Meyer's references occurred while defense counsel sought to poke holes in Meyer's medical report — again, a valid, even essential, task of defense counsel. Under the standards for assessing ineffective assistance (pp.

12-14, above), defense counsel's inquiries resulting in those references do not qualify as deficient performance.

Nor did the references cause Below any impermissible prejudice. Other than *ipse dixit*, Below has not established any prejudice from the references. Indeed, A.V.'s reference to HIV led defense counsel to elicit testimony about A.V.'s lack of concern about contracting HIV because "[Below] didn't have sex with me" (142:113).

Because the HIV references neither resulted from deficient performance nor caused impermissible prejudice, defense counsel did not provide ineffective assistance.

C. Below's Two Defense Lawyers Did Not Provide Ineffective Assistance When They Refrained From Objecting During Trial To References To The Victims As "Victims."

Before trial, Below moved the circuit court for an order "to preclude references to the alleged victims as the 'victims'" (34:1). The court granted the motion (127:26-27). Below asserts that defense counsel provided ineffective assistance by failing to object to witnesses' use of the term "victim" during the trial. *See* Below's Brief at 36-37. From transcripts of the three-week trial, he lists 45 pages recording purported violations. *Id.* at 36 n.31.

Below's listing has several problems:

- Five pages do not contain the term "victim" or "victims" (148:24, 37, 79, 94, 95).

- Four pages record the references as coming from witnesses self-describing themselves as the victims of Below's predations (140:119, 124; 141:40; 142:23) — hardly objectionable references even under the court's order.
- Ten pages record the references as occurring in a generic sense rather than as descriptions of the victims in this case (143:34, 38, 48; 146:31; 151:116; 152:76, 77, 78, 83, 91). For example, Milwaukee Police Officer Douglas Anderer used the term while describing typical police procedures when investigating cases of this sort (*e.g.*, "sometimes you bring the victim down to the car or you -- or the detectives will come up and talk" (143:34)).
- Three pages record the references as a description of or a recitation of text preprinted on a medical form (144:53, 113, 114) — *e.g.*, "I was given a chart for an assault victim" (144:53), "Was the victim smothered, is marked as no" (144:113; 165:Ex. 57:unnumbered p. 20), "Was the victim's head pounded against the floor or ground, that's marked as unknown." (144:114; 165:Ex. 57:unnumbered p. 20).
- Four pages record the witnesses spontaneously self-correcting "victim" to "complainant" (146:34; 151:47, 71, 76).
- One page records a police officer testifying, in response to a question on cross-examination, about her impression "that [C.R.]'s been a victim of a domestic violence situation, the way she was acting" (146:39).
- One page records C.R. as using the term generically when describing Below's tactics: in

response to a question from defense counsel about whether she said "nice things about Gregory Below to *Fox News, Fox-6 News*," C.R. said "that he can be nice at times, and I believe that that's how he attracted some of the victims and victimized them, yes" (147:70).

- One page records the term as used in a question about whether "[J.O.] *may* have been a victim of sexual assault" (147:73 (emphasis added)).
- One page records the witness using the term in response to a cross-examination question about what someone else "precisely told to look for with regard to the toothbrush holder" (147:84): "It was used to sexually assault the victim" (147:84).
- One page records the witness using the term "victim" and the prosecutor instructing him to use the term "female suspect" [*sic*] instead (147:184).
- One page records defense counsel remonstrating to a witness's use of "victims" with the phrase "alleged victims" (151:93).
- One page records the witness using "victim" in, essentially, a generic sense when explaining the meaning of a "closed" response in a computer-aided dispatch (C.A.D.) record (152:37).
- One page records the witness using "victim" when explaining what the district attorney's office had told him, testifying that "I was advised through the District Attorney's Office that I needed to speak with [J.O.], that another victim had come forward" (152:45).

- One page records a Milwaukee police detective using "victim" when describing defects in the investigation of the assault on A.V.:

> [Y]ou have an officer who articulates that he sees a head injury, sees that the victim's pants had been torn, a zipper, button removed, that she's naked from the waist down and claiming that she had been sexually assaulted. Even if the victim at some point became uncooperative, that's not uncommon in sexual assault investigations.

(152:75.)

None of the foregoing instances reflects an objectionable use of the word "victim," even under the order granting Below's motion. Lack of objection by defense counsel did not amount to deficient performance, and those uses did not result in prejudice to Below.

Even assuming the lack of objection to the term "victim" recorded on the remaining thirteen pages (135:12, 37, 38, 46; 145:27, 30, 37, 39; 147:187; 151:90; 152:35, 79, 93) amounted to deficient performance, Below has not affirmatively proved prejudice. ***Wirts***, 176 Wis. 2d at 187 ("The defendant must affirmatively prove prejudice."). In a jury trial that lasted three weeks and yielded acquittals on numerous charges, Below has not shown — and cannot show — that the lack of objections to the handful of arguably objectionable uses of "victim" amounted to error "of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.'" ***Erickson***, 227 Wis. 2d at 769 (citations omitted).

D. The Alleged Instances Of Ineffective Assistance Of Trial Counsel Did Not Cause Impermissible Prejudice.

As shown in the preceding sections, Below's claims of ineffective assistance of trial counsel lack merit. Moreover, even if Below's two lawyers performed deficiently, Below did not suffer any impermissible prejudice. The most salient evidence for lack of prejudice comes from the jury itself: multiple acquittals even in cases where, if the ineffective-assistance claims had merit, the purportedly deficient performance should have resulted in convictions (*e.g.*, the allegedly "damning photos" of M.M.'s black eye and bruising (p. 28, above)).

Below bears the burden of proving the prejudice component of the ***Strickland*** two-part test for ineffective assistance of trial counsel. He has not done so. This court should affirm the circuit court's decision denying Below's ineffective-assistance claims.

III. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN THE COURT DENIED BELOW'S MOTION TO SUPPRESS EVIDENCE (INCLUDING BELOW'S DNA) OBTAINED VIA A SEARCH WARRANT.

In a pretrial motion (2614:21; 2615:14) and supporting brief (2614:22; 2615:15), Below sought suppression of physical evidence (including Below's DNA) seized under the authority of a search warrant and supporting affidavit (2614:22:5-12; 2615:15:5-12). In the motion, Below contended

that "the search warrant was issued upon an insufficient affidavit" (2614:21; 2615:14).

Based on the standards for reviewing a challenge to a circuit court's finding of probable cause for issuing a search warrant (p. 14, above), this court should affirm the circuit court's decision.

Milwaukee Police Detective Phil Simmert executed the supporting affidavit in connection with his investigation of several felonies (2614:22:8, ¶ 2; 2615:15:8, ¶ 2). The affidavit (dated February 10, 2010) lays out a sequence that easily satisfied the standard that "the circumstances set forth in the affidavit" establish "a fair probability that contraband or evidence of a crime will be found in a particular place." ***Multaler***, 252 Wis. 2d 54, ¶ 8.

- A Milwaukee police officer "took a complaint from [J.D.]" (2614:22:9, ¶ 5; 2615:15:9, ¶ 5).
- J.D. reported that around 10:00 p.m. on January 21, 2010, "an unknown black male" awoke her in her bedroom and "forcibly removed [her] from her residence" (2614:22:9, ¶ 6; 2615:15:9, ¶ 6).
- J.D. reported "that during the commission of the crime, the suspect had a white rag similar to a kitchen rag covering his face from the nose down, and had a deep voice" (2614:22:9, ¶ 6; 2615:15:9, ¶ 6).
- J.D. reported that the suspect "placed her into the back seat of a grey van" with a grey interior and "windows all of the way around it" (2614:22:9, ¶ 7; 2615:15:9, ¶ 7).

- J.D. reported that the suspect "began continuously striking [her] in the face with closed fists . . . and forced penis to vaginal sexual intercourse against her will" (2614:22:9, ¶ 8; 2615:15:9, ¶ 8).
- J.D. reported that after the suspect dumped her in an alley, "bleeding heavily from her vagina" (2614:22:9, ¶ 9; 2615:15:9, ¶ 9). She "sustained severe internal injuries requiring surgery to repair" and "had a laceration from her vagina to her anus as a result of this assault" (2614:22:9, ¶ 9; 2615:15:9, ¶ 9).
- "[A] sexual assault evidence kit was done" at a hospital (2614:22:9-10, ¶ 10; 2615:15:9-10, ¶ 10).
- "A DNA profile foreign to [J.D.] was developed" and compared with other profiles in the DNA database (2614:22:9-10, ¶ 10; 2615:15:9-10, ¶ 10). The profile did not match any offender profiles in the database but did match a profile from a sexual assault on C.S. on August 20, 2008 (2614:22:9-10, ¶ 10; 2615:15:9-10, ¶ 10).
- The assault on C.S. occurred around 1:00 a.m. (2614:22:10, ¶ 11; 2615:15:10, ¶ 11), when "an unknown person came from behind her," demanded her purse (which she surrendered), "turned her around and struck her numerous times to the face with a closed fist," "then forced [her] to the ground where he forced penis to vagina sexual intercourse against her will" (2614:22:10, ¶ 12; 2615:15:10, ¶ 12). C.S. "sustained a fractured orbital socket and a laceration which

required sutures to close" (2614:22:10, ¶ 13; 2615:15:10, ¶ 13).

- "[A] male STR DNA profile was developed" from a DNA sample obtained by a hospital from C.R. (2614:22:10, ¶ 14; 2615:15:10, ¶ 14). "The DNA profile was entered into CODIS with no matches revealed" (2614:22:10, ¶ 14; 2615:15:10, ¶ 14).[23]
- The DNA linkage between the J.D. and C.S. assaults "and [the] level of violence used" led Milwaukee Police Detective Justin Carloni to search departmental databases on sexual assaults (2614:22:10, ¶ 15; 2615:15:10, ¶ 15).[24] The searches included "looking for vans described as being involved in prior reported sexual assaults" (2614:22:10, ¶ 15; 2615:15:10, ¶ 15).
- The sexual-assault databases searches established "a possible link between at least three previously reported sexual assaults," each "particularly violent in nature, and all mentioned a conversion van as being in-

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[23] "CODIS" refers to the Combined DNA Index System. See the explanation of CODIS at https://www.fbi.gov/about-us/lab/biometric-analysis/codis (last visited June 14, 2015). Wisconsin's DNA database links to the national DNA database component of CODIS. *See* https://wilenet.org/html/crime-lab/analysis/dna-databank.html (last visited June 14, 2015). *See also* 151:25-26 (trial testimony of Detective Justin Carloni).

[24] *See also* 151:27-28 (trial testimony of Detective Carloni).

volved" (2614:22:10-11, ¶ 15; 2615:15:10-11, ¶ 15). [25]

- "[T]he alleged victim of one such assault had given a license plate number of 926-NEA as being on the van of the person who assaulted her. This registration plate listed to: [C.R.]" (2614:22:11, ¶ 16; 2615:15:11, ¶ 16).
- "Another possible linked assault listed a known suspect as Gregory Below" (2614:22:11, ¶ 16; 2615:15:11, ¶ 16).
- Milwaukee Police Detectives Gregory Jackson and Carloni went to the address listed on the van's registration and "observed a grey conversion [van] parked out front" (2614:22:11, ¶ 17; 2615:15:11, ¶ 17). They "spoke with both [C.R.] and Below" and "established that [C.R.] is the registered owner of the van, but Below is essentially the only individual who drives the vehicle per his own admission" (2614:22:11, ¶ 17; 2615:15:11, ¶ 17).
- C.R. and Below gave "oral permission" to search the van (2614:22:11, ¶ 18; 2615:15:11, ¶ 18).
- "In a cursory search, they found a white rag with what appeared to be blood stains on it. This rag[,] similar to that described by the victim [J.D.], was located in a pocket behind the rear passenger seat. Possible blood

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[25] *See also* 151:43-65 (trial testimony of Detective Carloni).

stains were further observed on the rear seat of the van" (2614:22:11, ¶ 18; 2615:15:11, ¶ 18).

- In addition, C.R. "stated that Below has raped her with a bottle in the past causing bleeding, and has been very violent toward her" (2614:22:11, ¶ 19; 2615:15:11, ¶ 19).

The circuit court correctly recognized that the foregoing facts (and reasonable inferences from those facts established probable cause for the search warrant. The DNA evidence from the sexual assaults of J.D. and C.S. linked a single perpetrator to both assaults.[26] The similarity of the violent conduct in both assaults established a similar *modus operandi*. The database searches for similar characteristics of previously reported sexual assaults, further narrowed to sexual assaults involving vans, yielded possible links to three previously reported, including one in which the victim provided a license-plate number for a van. The license-plate number led directly to C.R. and Below and the admission by Below that he "[was] essentially the only individual who drives the vehicle." A consent search of the van turned up a blood-stained white rag like the one J.D. had described her assailant as wearing. The search also turned up other "[p]ossible blood stains." In addition, C.R. told the detectives that Below has raped her and "has been very violent toward her."

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[26] DNA eventually linked Below to assaults on C.R., G.L., and L.R. (150:17, 22-34; 151:64-65).

The foregoing facts, along with any reasonable inferences, would have satisfied a standard even greater than probable cause, much less the "fair probability" test. This court should affirm the circuit court's rejection of Below's challenge to the validity of the search warrant.

IV. UNDER THE *SHIFFRA/GREEN* STANDARDS, THE CIRCUIT COURT CORRECTLY DENIED BELOW'S MOTION FOR AN *IN CAMERA* REVIEW OF C.R.'S TREATMENT RECORDS.

Nearly eleven months before trial, Below filed a motion (2614:6) and affidavit (2614:7) seeking *in camera* review of C.R.'s treatment records. The circuit court held a nonevidentiary hearing (2614:117:55-70) at which the court heard argument by Below's lawyer (2614:117:55-57, 62-66) and the prosecutor (2614:117:57-62). After hearing argument and explaining the reasons for its decision (2614:117:66-70), the court denied the motion (2614:117:70). The court also allowed defense counsel to revisit the issue if his investigator "obtain[ed] additional information relevant to the Shiffra motion" (2614:117:70).

Under the standards set forth in ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, and ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), the circuit court correctly denied Below's motion. This court should affirm that decision.

In ***Shiffra***, 175 Wis. 2d 600, this court held that when a defendant seeks an *in camera* review of a victim's counseling records, "the defendant's

burden should be to make a preliminary showing that the sought-after evidence is relevant and may be helpful to the defense or is necessary to a fair determination of guilt or innocence." ***Id.*** at 608. Elsewhere in the opinion, however, this court stated the burden as "may be necessary to a fair determination of guilt or innocence." ***Id.*** at 610. *See* ***State v. Munoz***, 200 Wis. 2d 391, 397-98, 546 N.W.2d 570 (Ct. App. 1996) (noting inconsistency of statements of defendant's burden).

In ***Green***, 253 Wis. 2d 356, the supreme court modified the ***Shiffra*** burden: "a defendant must show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." ***Id.*** ¶ 32. The court set out a defendant's obligations for obtaining an *in camera* review of a victim's counseling records:

> [T]he preliminary showing for an in camera review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant. We conclude that the information will be "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." This test essentially requires the court to look at the existing evidence in light of the request and determine, as the *Shiffra* court did, whether the records will likely contain evidence that is independently probative to the defense.

Id. ¶ 34 (citation omitted).

> In particular, a defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records

> and how it is relevant to and supports his or her particular defense. The mere contention that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault is insufficient. Further, a defendant must undertake a reasonable investigation into the victim's background and counseling through other means first before the records will be made available. From this investigation, the defendant, when seeking an in camera review, must then make a sufficient evidentiary showing that is not based on mere speculation or conjecture as to what information is in the records. In addition, the evidence sought from the records must not be merely cumulative to evidence already available to the defendant. A defendant must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense.

Id. ¶ 33 (citations omitted).

> In creating this standard, we intend to place the burden on the defendant to reasonably investigate information related to the victim before setting forth an offer of proof and to clearly articulate how the information sought corresponds to his or her theory of defense. A good faith request will often require support through motion and affidavit from the defendant. Our standard is not intended, however, to be unduly high for the defendant before an in camera review is ordered by the circuit court. The defendant, of course, will most often be unable to determine the specific information in the records. Therefore, in cases where it is a close call, the circuit court should generally provide an in camera review. . . . A circuit court may always defer ruling on such a request or require a defendant to bring a subsequent motion if the record has not had time to develop. A motion for seeking discovery for such privileged documents should be the last step in a defendant's pretrial discovery.

Id. ¶ 35 (citations omitted).

Here, Below failed to satisfy the ***Shiffra/Green*** standards. The affidavit merely asserted that C.R.'s counseling records "*may* . . . contain information which is exculpatory to the Defendant" (2614:7, ¶ 11 (emphasis added)). The affidavit did not indicate that Below had satisfied his ***Green*** obligation "to reasonably investigate information related to the victim before setting forth an offer of proof" in a pretrial motion. At the hearing, defense counsel asserted that "we have employed an investigator," but acknowledged that "[a]s of right now, there isn't anything" (2614:117:65). As to records for C.R.'s treatment

> prior to and during the time that she's claiming these alleged incidents occurred, the state's essentially correct. We don't have anything more other than our knowledge of [C.R.]'s mental health condition and the fact that she was seeking treatment. I don't know what she said to her doctors. I don't know what was covered.

(2614:117:62-63.) As to other records, the request rested on nothing more that the chronological fact that C.R. entered a mental-health facility "immediately after making the[ ] allegations" triggering the charges against Below (2614:117:57; *see also* 2614:117:63). At the hearing, defense counsel offered the conclusory declaration that "I think just given the timing here, the only inference can be that these records do contain information that's essential to Mr. Below's defense. It's the only objective information that we have that indicates whether or not C.R.'s statements on that date are believable or not" (2614:117:64-65).

But nothing in the motion or defense counsel's argument indicates that C.R.'s treatment concerned any mental condition bearing on C.R.'s truthfulness or perception. Rather than only one inference (as asserted by defense counsel), the fact that C.R. "was taken to the Milwaukee County Mental Health Complex" right after "she made some threats of self-harm" (2614:117:57) creates a stronger alternative inference that her treatment concerned suicidal tendencies rather than any condition related to truthfulness or perception.

The circuit court's explanation of its reasons for denying the motion correctly summarize and apply the ***Shiffra/Green*** standards:

> THE COURT: The case law as stated accurately by the state and appears, I think, summarized quite succinctly in State vs. Green, 253 Wis.2d, 356. "The defendant bears the burden of making a preliminary evidentiary showing before an *in-camera* review is conducted." In doing so, the defendant must set forth in good faith what's described as a specific factual basis demonstrating a reasonable likelihood. . . .
>
> Information will be necessary to a determination of guilt or innocence if it tends to create a reasonable doubt that might not otherwise exist. The test essentially requires the Court to look at the existing evidence in light of the request, determine as the Shiffra Court did whether the records will likely contain evidence that is independently probative to the defense.
>
> This is a credibility case. So obviously matters relating to credibility would be, I think, important and certainly critical on issues relating to guilt or innocence.
>
> With that being said though, the preliminary showing, that is, the defense's requirement and bur-

den to show a reasonable likelihood that the records would contain relevant information necessary if that determination has not been met.

The facts here in this case are, I think, quite similar to, quite frankly, in Green. . . .

The Supreme Court in Green notes that mere assertion that the sexual assault was discussed during counseling and that counseling records may contain statements that are inconsistent with other reports is insufficient to compel an *in-camera* review. It's required by the defense to show that the evidence was independently probative. And again, that's not -- that standard has not been met. Essentially and the 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.

As to the prior counseling records, again, I think our circumstances are similar to that in Green. In Green, and in our case as well, there's no showing that there is -- or that the alleged victim in our case, or for that matter in Green, suffered from any psychological disorder that hindered her ability to relay truthful information. That's important.

Obviously the case law makes clear that simply because somebody is receiving counseling or mental health treatment, that by itself doesn't open up the door to review their records. There has to be some basis, some showing, some ability to show to a reasonable likelihood here that the records would contain something relevant, specifically regarding truthfulness and perception. That is perhaps a condition that affects the ability to be truthful or to perceive events. And again, that showing has not been met here other than relaying that the alleged victim has received treatment and at its mental health face, there's no basis to conclude that the treatment she received would bear any relevance to perception or truthfulness.

Because the defense has again not met the burden . . . , the Court denies the defense motion

> seeking an *in-camera* review of counseling and mental health records.

(2614:117:66-70.)

In summary, under the standards set out in ***Shiffra*** and ***Green***, the circuit court correctly denied Below's pretrial motion for an *in camera* inspection of C.R.'s purported counseling records. Below did not present, either in his motion or during the motion hearing, any information satisfying those standards. Moreover, despite nearly a year in which to satisfy those standards before trial began, Below did not return to the court with any information that would have justified revisiting the circuit court's decision denying *in camera* review.[27]

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[27] Below filed his motion and affidavit on March 18, 2010. Trial began on February 14, 2011. On January 6, 2011, defense counsel filed a motion to compel discovery of C.R.'s mental-health records (2614:28). The court addressed the motion in a nonevidentiary hearing (126:67-71) and denied the motion, "rely[ing] on the same findings of the denial of the motion back in May of last year" (126:71). In his appellate brief, Below does not address either the January 2011 motion or the later decision by the circuit court.

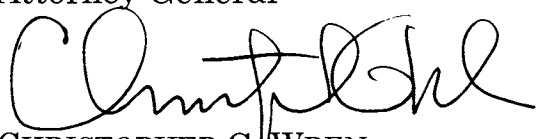
CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court's decision denying Below's motion for postconviction relief and should affirm the judgment of conviction. The circuit court also correctly denied Below's pretrial motion to sever the charges. The court correctly denied Below's multiple claims of ineffective assistance of trial counsel. In addition, the court correctly denied Below's motion to suppress evidence by invalidating the search warrant that authorized seizure of the evidence. Finally, the circuit court correctly denied Below's motion for an *in camera* review of C.R.'s treatment records.

Date: June 22, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General



CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys For Plaintiff-
Respondent State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
v: (608) 266-7081
f: (608) 266-9594
e: wrencg@doj.state.wi.us

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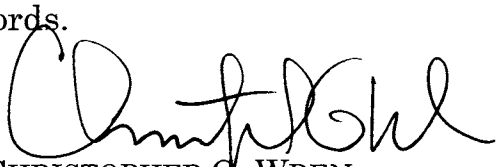
In accord with Wis. Stat. § (Rule) 809.19(8)(d), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 10,970 words.



CHRISTOPHER G. WREN

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

In accord with Wis. Stat. § (Rule) 809.19(12)(f), I certify that I have submitted an electronic copy of this brief (excluding the appendix, if any) via the Wisconsin Appellate Courts' eFiling System and that the electronic copy complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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.

CHRISTOPHER G. WREN