STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

No. 2015AP297-CR
(Brown County Case No. 2010CF770)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MYCHAEL R. HATCHER,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appeal from the Judgment of Conviction and the
Final Orders Entered in the Brown County Circuit Court,
the Hons. Sue Bischel and Tammy Jo Hock, Presiding

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Hatcher went out drinking with his girlfriend and two of her friends on July 2, 2011. One of those friends, Tara Thompson spent the night at the apartment Hatcher shared with his girlfriend. The next morning, Thompson said Hatcher raped her. At trial, there was no dispute the two had sexual intercourse. Hatcher argued it was consensual, and the state argued Thompson was too drunk to consent. This appeal asks several questions:

1. Did the trial court violate Hatcher's right to a fair trial when it

(a.) refused to accept his pleas to two of the three counts the state charged him with the morning of trial after learning the state was dismissing a fourth charge *and*

(b). permitted the state to call a "rebuttal" witness about sexual assault victims' propensity to call a friend or loved one before calling the police, even though Hatcher never offered any evidence in his case to dispute that?

The post-conviction court denied relief on these grounds. R122:7-11, 16-17, App.13-17, 22-23.

2. Was Hatcher's right to present a defense violated when the court limited his testimony at trial?

The post-conviction court denied relief on this ground. R122:11-5, App.17-21.

3. Was trial counsel ineffective when he failed to move to suppress Hatcher's statement to police and offered evidence at trial that directly undercut the defense?

The post-conviction court denied relief on this ground. R122:17-22, App.23-28.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under WIS. STAT. (RULE) 809.22. Appellant's arguments are substantial and oral argument would enhance this Court's understanding of the complex issues raised here.

Publication is warranted in this case. Both the trial court and the post-conviction court denied Hatcher relief on his rebuttal witness claim because it found that rebuttal witnesses were entitled to testify to contradict evidence the defendant elicited on cross-examination, not just during the defense's presentation of the case. This is a novel approach and there is no published decision in support of such reasoning.

Publication is also warranted because there are no cases in Wisconsin addressing directly whether evidence of flirting is admissible or inadmissible under rape shield. This issue arose in this case both between the complainant and the defendant and the complainant and others. Accordingly, publication is warranted.

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STATEMENT OF THE CASE

On July 2, 2010, Mychael Hatcher, his girlfriend Lisa Ewald and two of Ewald's friends, Erin Peterson and Tara Thompson went out for a night of drinking. R142:122-23. Hatcher, Ewald and Thompson ended up at the apartment Ewald and Hatcher shared. R142:124. The next morning, Thompson called Peterson, and then the police and claimed that Hatcher raped her. R142:125.

The police arrived within minutes. Three officers responded and each approached one of the occupants of the apartment and separated them. R142:126. Sgt. Jeremy

Schnurer took Hatcher outside and spoke with him. Thompson identified Hatcher as the assailant during her call. Police arrested Hatcher and took him to the police station. Once there, a detective informed Hatcher of his ***Miranda*** rights and interviewed him. The state later charged Hatcher with second-degree sexual assault, obstruction, bail jumping, disorderly conduct, and the fraudulent use of identifying information, each as a repeater. *See* R1.

The morning of trial, the state dropped the disorderly conduct and fraudulent ID charges. R142:25-26, App.106-107. Hatcher tried to enter pleas to the obstruction and bail jumping charges, but the court would not allow it. R142:26-27, App.107-108. The main focus of the trial was on the sexual assault allegation.

Much of the evidence at trial was undisputed. The group met at the Stadium View Bar in the early evening to drink and hang out. R142:162, 197-98. Hatcher and Thompson played a few games a pool, and towards the end of the night Hatcher got into a dispute with another guy there. R142:131, 177. He was thrown out around 10:30 or 11 p.m. and Ewald and Hatcher took Thompson to their place. R142:166. Peterson had already left. Ewald drove and Thompson fell asleep in the car. R142:282. Once there, Ewald helped Thompson into the apartment. R142:226, 287. Ewald escorted her to the guest bedroom, where she fell back asleep. R142:227.

Ewald went to sleep in her room, but Hatcher went to another nearby bar. R142:228. He returned home around 2

a.m., and got two glasses of water. R142:130. He took one to Ewald and put a movie on. *Id*. Ewald fell back asleep during the movie. *Id*. It is at this point that the testimony at trial differs.

Hatcher testified that he brought Thompson the second glass of water, woke her up, and had a brief conversation with her before the two engaged in consensual sex. R142:131; R143:360-61. He was positioned behind her and did not use a condom because Thompson said she was allergic to latex. R143:366. Thompson testified that she was asleep and woke up to Hatcher having sex with her. R142:171. She was so drunk that she could not move her limbs or form any words and could only groan. R142:172. Thompson said that Hatcher pulled her pants and underwear off and then replaced her pants. When she woke up, she was without her underwear and was sore. She called Peterson with her suspicions that Hatcher had raped her. R142:204. Peterson encouraged her to call the police, if what she said really happened. *Id*. Thompson called the police.

At trial, the state argued that Thompson was too intoxicated to consent. R142:119-28. Hatcher argued that she was not too drunk to consent and in fact did consent. R142:129-33. After a two-day trial, the jury found Hatcher guilty of all counts. The court sentenced Hatcher to 15 years initial confinement and 15 years extended supervision. R55. Hatcher timely filed a notice of intent to pursue post-conviction relief. R54. The state public defender's office

originally appointed counsel, who withdrew, and was reinstated. *See* R77. That attorney filed a no merit notice of appeal. R80. Hatcher hired private counsel and at his request, this Court dismissed his no merit appeal. R96.

Hatcher timely filed a post-conviction motion. R103. The circuit court, the Hon. Tammy Jo Hock presiding, held an evidentiary hearing and considered the parties' briefs before issuing a decision denying Hatcher's motion. R114, R116, R122, R145. Hatcher filed a motion to reconsider part of the decision, which the court also denied. R124, R128. Hatcher timely filed a Notice of Appeal and this brief follows. R129.

ARGUMENT

I. The Court Violated Hatcher's Constitutional Right to a Fair Trial

Hatcher's right to a fair trial was violated in two ways. First, right before the trial began, the state filed an amended information dismissing two of the charges. R33. In response, Hatcher attempted to enter guilty pleas to two other charges so that the trial would only be on the most serious count: second-degree sexual assault. R142:26, App.38. The court denied his request.

Second, after Hatcher rested his case, which involved only his testimony, the state called Samantha McKenzie, an expert, to testify that sexual assault victims often call a friend or loved one before calling the police. R143:419. This related to testimony the state elicited during *its* case, not Hatcher's. Counsel objected, but the court permitted it.

A. Background

1. Attempt to Plead

Hatcher was scheduled for trial on this case and "probably four other files pending [] have jury trial dates set on them." R141:2, App.31. Unable to reach a resolution on all of the pending charges, the trial was on as scheduled. R141:2-3, App.31-32. The court explained:

> Left on the calendar means it's going to trial. I am not available tomorrow or Monday for last minute, [']please, Judge, we got a deal worked out.['] I am simply not available. I am done doing that. I am done working through the noon hours and at 5 o'clock at night for that kind of stuff. Done. The calendar is booked solid. And I am simply not available anytime in the normal working hours.

Id. The state confirmed that the offer was "on all of the files," and was final. R141:3, App.32. The court again warned Hatcher that a failure to accept the deal on all of the cases meant a trial. R141:3-4, App.32-33.

The day of trial, the parties and the court addressed discovery and witness issues. Right before the court was ready to call in the jury, the state filed an Amended Information that no longer included disorderly conduct and the fraudulent use of identifying information. R142:26, App.38. Hatcher's attorney, Aaron Schenk, did not object. *Id.* "And to be honest, Your Honor, my client is prepared to enter a plea to obstructing and bail jumping. And to keep the trial confined to the sexual assault." *Id.*

The court reminded the parties that it specifically said there would be no last minute deals. R142:26-27, App.38-39. Hatcher explained that he thought that meant he could not

accept the deal the state previously offered him. R142:27, App.39.

Schenk hastily had Hatcher sign a plea questionnaire and submitted it, but nothing was filled out. R142:28-20, App.40-41. The case proceeded to trial on the three counts in the amended information: the sexual assault, obstruction and bail jumping.

When it amended the charges, the prosecutor told the court that she put Schenk "on notice yesterday that if we tried this case, I would be doing this." R142:26, App.38. But at the post-conviction motion hearing, Schenk testified that the state surprised him when it filed the amended information. "As I recall, it was not anything that had been disclosed to me even the day before trial." *Id. See also* R145:11. Because he didn't know the state would move to dismiss charges the day of trial, he didn't prepare a plea questionnaire in advance of trial. R145:11.

The two counts that were left in addition to the sexual assault count—obstruction and bail jumping—"were the sort of counts that [Hatcher] was comfortable pleading to, that he was always comfortable pleading to, and then to proceed directly to trial on just the sexual assault." R145:9. In Schenk's opinion, the fewer the charges, the better. R145:10. Had those charges been dropped Schenk would have tried to keep out information related to them, for example the fact that Hatcher was on bond at the time of the incident with Thompson. R145:11.

Schenk testified that the purpose of the final pre-trial was to tell the court whether the case had resolved or was going to trial. R145:8. "Resolved" meant a deal had been reached on all of Hatcher's pending cases,[1] eliminating the need for trial. This confirmed what Hatcher told the court the morning of trial: "But Your Honor, I took that as to them offering me a deal or me accepting what they had offered already." R142:27.

The post-conviction court found that the trial court's decision was a "proper exercise of discretion." R122:9, App.15. According to it, Hatcher should have plead earlier. "Instead, Hatcher sought to pick-and-choose the counts the morning of trial, when the counts resulted from one course of conduct." R122:9, App.15. In any event, the post-conviction court found, any error was harmless. R122:9-11, App.15-17.

2. The Rebuttal Witness

After Hatcher rested, the state called Samantha McKenzie to testify. After McKenzie recounted some of her qualifications, the court interrupted before McKenzie could render an opinion and asked for more foundation. R143:405-408. The state complied. R143:409-410. Schenk asked for a

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[1] In addition to this case, in which Hatcher faced five charges, he faced 10 more charges in three other cases. *See* Brown County Case Nos. 2009CM974 (one count each of misdemeanor battery and disorderly conduct); 2009CF577 (one count each of felony strangulation and suffocation, felony second-degree recklessly endangering safety, misdemeanor theft, misdemeanor criminal damage to property, misdemeanor disorderly conduct, and misdemeanor battery); 2009CM1829 (one count each of misdemeanor disorderly conduct and battery). After the trial, the state dismissed all of the pending cases. *Id.*

sidebar and a hearing was held outside the presence of the jury. R143:405-408. The court explained its concerns over the foundation for McKenzie's opinion and Schenk objected to all of McKenzie's testimony. "Your Honor, my understanding of rebuttal witnesses is that if they need to, if the State needs to rebut something that I put in my case in chief, they have an opportunity to do that. My case in chief consisted of my client testifying." R143:411-12, App.150-151. The court disagreed. "It isn't just what your client testified to. You can't say that. That if you cross-examine someone on something to try to impeach their credibility, it doesn't count, because your client didn't say it. It's—rebuttal is to everything you did in defense of your client." R143:412, App.151. Schenk maintained his objection, noting that the state could have elicited this type of testify in their case, but opted not to. *Id.*

The state explained that it viewed McKenzie's anticipated testimony as rebuttal because defense counsel "asked several witnesses about" Thompson's reporting of the incident. *Id.* The trial court permitted McKenzie's testimony:

> Okay. All right. Everyone agrees that Mr. Schenk made a point in cross-exam that [Thompson] did not call the police right away…But she called Erin Peterson, her friend and her co-worker, rather than calling the police. I do think this is appropriate rebuttal then. Because it is in response to the clear suggestion that this was not the way the victim described it. It happened in some other fashion. That it was consensual. Or she would have done something different other than call her friend first. So, it is appropriate rebuttal.

R143:414-415, App.153-154.

McKenzie testified that "in most cases, if [sexual assault victims] disclose to someone what happened to them, due to embarrassment or other reasons, they will talk to someone that they trust, being a friend or a family member, before they report to someone formally in the system." R143:419.

B. Legal Principles

1. Accepting a Guilty Plea

A defendant has "no absolute right to have a guilty plea accepted." ***Santobello v. New York***, 404 U.S. 257, 262 (1971). *See also* ***United States v. Lucas***, 429 F.3d 1154, 1157 (7th Cir. 2005). The court has considerable discretion in deciding whether to accept a guilty plea. ***North Carolina v. Alford***, 400 U.S. 24, 38, fn. 11 (1970). Although it has discretion, it "cannot act arbitrarily in rejecting a plea, and must articulate on the record a "sound reason" for the rejection." ***United State v. Kelly***, 312 F.3d 328, 330 (7th Cir. 2002) (citations omitted).

This Court will uphold the court's findings of fact unless they are clearly erroneous, but it will apply the facts to the law *de novo*. ***State v. Green***, 2002 WI 68, ¶20.

2. Rebuttal Witnesses

The purpose of rebuttal evidence is to "contradict, impeach or defuse the impact of the evidence offered by an adverse party." ***Peals v. Terre Haute Police Dept.***, 535 F.3d 621, 630 (7th Cir. 2008). Whether the trial court should admit rebuttal evidence is within the court's discretion. ***Rausch v. Buisse***, 33 Wis.2d 154, 167 (1996). The general rule is that rebuttal evidence "may only meet the new facts put in by the

defendant in his case in reply." ***Id.*** The court has discretion to admit or refuse to admit it. "An exception is generally made when the evidence is necessary to achieve justice." ***Id.***

A bona fide rebuttal witness is one who is not necessary for the state's case-in-chief and only becomes necessary after the defense presents its case-in-reply. *See* ***Lunde v. State***, 85 Wis. 2d 80, 91-92 (1978). *See also* ***State v. Konkol***, 2002 WI App 174, ¶18.

Admission of evidence is reviewed for misuse of discretion. ***State v. Givens***, 217 Wis.2d 180 (Ct. App. 1998). Whether the admission of McKenzie's testimony violated Hatcher's due process right to a fair trial is reviewed *de novo*. ***Green*** at ¶20.

C. Hatcher was Entitled to Enter Pleas in Response to the State's Amended Information

The trial court made it clear at the pre-trial hearing that Hatcher's options were to resolve *all* of the pending charges against him in five different cases that day, or have a jury trial. R141:3, App.32. He opted for trial. But everything changed when the state, moments before the court called the jury in, filed an Amended Information eliminating two of the charges Hatcher faced. It was then that Hatcher offered to plead guilty outright to the remaining two less serious charges. R142:26, App.38.

The trial court rejected this, finding that Hatcher had missed his window to plead, later commenting that Hatcher's "position changed over the weekend. I don't know why that happened. But it has obviously changed." R142:29, App.110.

The court was wrong. It wasn't that Hatcher's position changed over the weekend—he still was not interested in pleading guilty to resolve all of the pending charges—it was that the *state's* position that changed. The state acknowledged, for the first time, that it could not prove the allegations against Hatcher in two of the charges. Specifically, the prosecutor said that her office "was not able to make contact with" the alleged victim of the fraudulent ID charge. R142:26, App.107. "Knowing that we are now proceeding today and the fact that he is unavailable, we are amending the Information to—we filed this to make the case cleaner and make it clear we're just proceeding on these three counts." *Id.*

With that change, counsel expressed Hatcher's willingness to plead to the remaining less-serious charges so that the trial could focus only on the sexual assault allegations. *See* R142:26-27, App.107-108.

The court's blanket no-last-minute-plea policy was itself arbitrary. Its purpose could be only to punish the defendant, and frankly everyone else involved in the trial, witnesses and jurors alike. Such a policy does not take into consideration a change of circumstances, like the one that occurred here. This was not a case of a defendant playing "chicken" and only opting for the deal when the state's witnesses showed up. Nor was it the case of a defendant who wanted to accept the same deal he had previously rejected. It was not, as the court put it, a "last minute deal." R142:27, App.108. Rather, Hatcher's offer to plead guilty to the bail jumping and obstruction was only

in response to the state's amendment of the information and *without* the benefit of a plea deal.

The court's basis for rejecting Hatcher's plea was only that it did not want to keep the jury waiting. R142:28, App.109. But the amount of time it would have taken to allow counsel to review the plea questionnaire form and for the court to conduct a hearing would have been minimal. The prejudice caused by the admission of evidence of the charges to Hatcher at trial far outweighed any minor inconvenience the panel would experience by waiting less than half an hour.

At the time, the state argued that Hatcher's plea would not avoid testimony that "he lied to the cops." R142:28, App.109. Maybe. Hatcher's plea would have eliminated any testimony about his statements to police regarding his name, which was the basis for both the obstruction and bail jumping charges. It would not have eliminated any evidence about Hatcher's change in explanation regarding his encounter with Thompson (assuming that his statements were otherwise admissible).

The minor inconvenience to the jury was not reason enough to prevent Hatcher from pleading, particularly given that his decision was prompted by the state's last-minute acknowledgment that it could not prove those counts. It stands to reason that five days before trial, the state *knew* it had witness problems on the fraudulent ID count. But if Hatcher accepted its offer on all of the charges, it would not have to reveal that. When Hatcher rejected the deal, the state

was forced to come clean and dismiss the charges the day of his jury trial. It was only then, that counsel saw the possibility that Hatcher could plead to the other two misdemeanor counts. *See* R142:26-27, App.107-108; R145:9, 11, App.38, 40.

The trial court erred when it concluded that Hatcher had a change of heart over the weekend; he did not. It also erred when it refused to allow Hatcher to plead to the misdemeanor charges because of a minor inconvenience to the jury.

The post-conviction court concluded that the trial court properly exercised its discretion.R122:9, App.15. It found that "Hatcher's decision to plead the morning of the trial, without an agreement from the State, highlights that nothing was stopping him from entering pleas to those counts on May 12, 2011. R122:9, App.15. Like the trial court, this overlooks what happened at the final pre-trial. Hatcher's options were to accept a deal on all of his cases or have a trial—it was all or none. *See* R142:27, App. 39; R145:8, App.37.

The post-conviction court put all of the onus on Hatcher, holding the state blameless for the changes the morning of trial. But if Hatcher was responsible for entering pleas on May 12, then so too was the state required to inform the court that it could not prove Hatcher's guilt on two other counts, especially when it had to know of its witness problems by the date of the final pre-trial.

The post-conviction court's error is compounded by its erroneous findings. It found that the state alerted Hatcher's

attorney to the change the day before the trial began. R122:8, App.28. On the day of trial, the prosecutor did say it told counsel, but it never said how. R142:26, App.108. Schenk uncontroverted testimony is that he had no notice. The post-conviction decision overlooking or ignoring Schenk's testimony is wrong.

The post-conviction court's reasoning for why the trial court's decision was a valid exercise of discretion were not the reasons the trial court gave. Yes, it told Hatcher that no deals were permitted after the final pre-trial. But no deal was reached. The state changed the landscape of the case when it dismissed two charges without notice. Hatcher's attempt to plead was merely a response to that.

By comparison, a defendant who was denied the chance to enter a plea that would have eliminated the need for a trial mid-way through the government's first witness, obtained relief. *See* ***United States v. Shepard***, 102 F.3d 558 (7th Cir. 1996). Here, as in ***Shepard***, there was no mid-trial attempt to plead. The trial had not yet started. As a result, any refusal to accept the plea based on timing or a blanket policy was error.

D. McKenzie was not a Bona Fide Rebuttal Witness and her Testimony was Inadmissible

Thompson testified on direct that she called Peterson before calling police. R142:172-174. On direct, Peterson testified to the same. R142:205. On Hatcher testified in his case. R143:343-403. He never mentioned Thompson calling Peterson before calling the police. *Id.*

The state need not provide the defense with the names and contact information of bona fide rebuttal witnesses. ***Hough v. State***, 70 Wis.2d 807, 816 (1975); ***Caccitolo v. State***, 69 Wis.2d 102, 115 (1975); ***Cheney v. State***, 44 Wis.2d 454 (1969). That makes sense—the purpose of a rebuttal witness is to directly respond to something a defense witness says. However, the ***Caccitolo*** Court has suggested "that it would be inappropriate to reserve a witness who would normally be used in the case-in-chief for rebuttal and that the use of such a witness for dramatic effect might make inapplicable the rule requiring disclosure of a rebuttal witness." ***Lunde***, 85 Wis.2d at 91.

It was the state—not the defense—that elicited testimony from both Thompson and Peterson about how and when Thompson notified the police. R142:172-74, 205. Hatcher then cross-examined them about this timing, which was unquestionably a valid line of questioning. If the state wanted the jury to hear expert testimony about when victims typically contact law enforcement, it should have called McKenzie during its case. By back-dooring McKenzie's testimony as a rebuttal witness, the state was able to keep her existence secret and ambush Hatcher. It used McKenzie to bolster Thompson's testimony and in the process violated Hatcher's right to a fair trial; Hatcher was entitled to notice of her existence and to a summary of her opinion in advance of trial. *See* WIS. STAT. §971.23.

The trial court's decision to allow McKenzie to testify was based on an error of law. As the court saw it, a rebuttal witness was permissible to rebut anything in the defense case, not just that directly advanced during the defense's case. R143:412, App.44. The post-conviction court continued this line of reasoning. "Hatcher does not present authority that establishes the case-in-reply excludes cross-examination testimony." R122:16, App.23. But Hatcher *did* offer authority—***Lunde***, 85 Wis.2d 80 and ***Konkol***, 2002 WI App 174. Both cases hold that a rebuttal witness is only permitted if such a witness is necessary to rebut something *advanced in the defense's case-in-chief*. Under this theory, there is nothing stopping the state from calling rebuttal witnesses after the defense resets without presenting any evidence.

In ***Lunde***, the Court found that James Anderson was a bona fide rebuttal witness because his testimony was "only necessary and appropriate when the defendant took the stand and denied that he knew James Anderson and attempted to create a doubt in respect to his whereabouts on May 9, 1975." 85 Wis.2d at 92. *See also* ***Konkol*** at ¶17 (rebuttal only necessary when defendant presents case).

McKenzie's testimony did not become necessary when Hatcher testified—he never commented on Thompson's phone call. He wasn't present for that call and he never disputed that she made it. Instead, the State laid in the weeds, knowing from the defense's opening statement that Hatcher would testify and thus it would have the opportunity to offer

rebuttal evidence, and sprung McKenzie on the defense. R142:130-131.

Under ***Konkol*** and ***Lunde***, McKenzie was *not* a rebuttal witness and she should never have testified. The post-conviction court never mentioned either case in its decision. Instead it relied on the court's discretion to permit evidence to achieve justice "because it directly answered an issue introduced by Hatcher: why Thompson [did] not call the police first." R122:16-17, App.22-23. But Hatcher never introduced this issue, the state did, and the court never explains why justice could only be served through McKenzie's testimony.

Because the court relied on an incorrect view of the law, it erroneously exercised its discretion. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66 (1981). As a result, Hatcher is entitled to a new trial. *See also* Section VI (prejudice).

II. The Court's Decision to Limit Hatcher's Testimony Violated his Constitutional Right to Present a Defense.

Thompson, Peterson, and Detective Schrank testified about statements Thompson made about wanting some male company that night. During a discussion outside the presence of the jury, the court found that evidence regarding statements Thompson made about looking for sex were admissible because they were not "conduct" under the rape shield law and because it went to Hatcher's defense. R142:316-17, App. 137-38. The next day during Hatcher's testimony, in another conference outside the jury's presence, the court ruled

that such testimony *was* barred by rape shield and was inadmissible. R143:352, App.146. The court's decision on the second day was wrong. Rape shield does not apply and even if it did, the evidence was necessary for Hatcher's defense.

A. Background

1. Trial Court

During cross-examination, Thompson testified that her recent breakup with her boyfriend had been a topic of conversation with the group. R142:179. *Id.* She admitted that she might have had a conversation with Hatcher about wanting to find some male company that night, but didn't specifically recall one. She denied telling Hatcher she wanted sex that night. "It was a topic of conversation between four people at a table." R142:180.

Peterson testified on direct that she did not see anything sexually inappropriate between Hatcher and Thompson. R142:203. Thompson made a comment about finding some male company that night. R142:208. "Um, she broke up with her boyfriend over the phone. And she—I don't want to be rude—she's like, I'm finding some black dick here. That is what she said to me." *Id*. On re-direct, Peterson testified that she had never known Thompson to be in a relationship with anyone who was black. *Id.*

Schenk pursued this same line of questioning with Ewald. For the first time, the state objected on hearsay grounds. R142:233. Schenk noted that "the questioning of the

last two witnesses revolved around the recollection of the events of the evening." *Id.*

Outside the jury's presence, Ewald testified in an offer of proof that Thompson never expressed her desire to find male company to her, but that she could see Thompson flirting with a couple of guys. R142:239-240. Based on Ewald's answer, the court found no hearsay issue. R142:240. The prosecutor said that the state would not have an objection to Ewald's statement that Thompson was flirting with a couple of guys. *Id.* The jury returned and the court informed them that Ewald "observed things, but didn't hear anything." R142:241. Schenk ended his examination of Ewald without eliciting testimony about the "things" she saw.

Later that day, Detective Schrank testified. On cross, counsel tried to elicit his testimony about what Thompson told him she said at the bar. R142:297. The state objected. *Id.* Outside the jury's presence, Schrank said Thompson made comments about having sex with Hispanics or Mexicans and that she would have sex with Hatcher's friend, K.O., before Hatcher. She said "she doesn't do black guys." R142:298, App.119.

The state objected on hearsay and relevancy grounds. "This isn't a case of consent. It's whether she's incapacitated to consent. And she's basically saying she is not going to sleep with the Defendant." R142:299, App.120. The state had attempted to keep all of her racial comments out so as to not muddy the waters.

Schenk wanted the statements admitted to show "that she was looking for sex that night." R142:300, App.121. The court found that would be offering the statements to prove the truth of the matter asserted. *Id.* Schenk raised the possibility that it was admissible as a prior inconsistent statement. *Id.*

The court concluded the detective's report said "that Ms. Thompson told this Detective that she had told the Defendant, who was hitting on her, that the Defendant should call K.O., who was a black friend of his, and she would have sex with him. She denied that. She was specifically asked about that and denied it. That is a prior inconsistent, a prior inconsistent statement. It is admissible." R142:309, App.130.

Schenk also wanted to admit Thompson's statement that she told Hatcher "she would even have sex with a Hispanic tonight, as she was so wasted." R142:310, App.131. The state objected and Schenk argued it was relevant "[b]ecause our whole defense here is that she did consent to this sex. And these particular statements show that she was looking to have sex that night." R142:311, App.132. The court found it was "material in view of the defense in this case." *Id.*

The court next turned to whether this testimony was barred under rape shield, WIS. STAT. §972.11. It focused on whether those statements were the type of conduct the statute bars. R142:312, App.133. The state argued that the testimony did not fall under any exceptions to rape shield. R142:313, App.134.

The court highlighted ***State v. Vonesh***, 135 Wis.2d 477 (1986), which held that the victim's notes expressing sexual desires and fantasies were admissible. R142:315, App.136. "That's fairly close to what we have here." *Id*. The court ruled it was not conduct, it was words. It was probative and that value was not substantially outweighed by the danger of unfair prejudice. It also acknowledged Hatcher's defense: "That she is claiming she was too drunk, it's not the truth. And in fact, she did consent." *Id.* The court ruled it couldn't "limit that defense" and it was up to the jury to decide if, as the defense claimed, Thompson was "ready, willing, and able." *Id.* "I think this is relevant and material and probative." R142:316-317, App.137-138.

Once the jury returned to the courtroom, Schenk continued his cross-examination of Schrank. Schrank testified that Thompson said that Hatcher should call his black friend, K.O., "and that she would have sex with him. That, um, she was so wasted that she would even have sex with a Hispanic, because the whites were gay. And she also said, though, that was drunk bar talk. And that she really wouldn't have sex with anyone who wasn't white." R142:318-319, App.139-140.

The next day, Hatcher testified. *See* R143:343-404. Schenk asked Hatcher about Thompson's demeanor towards men in the bar while they were playing pool. R143:347-348. The court called a sidebar, and sent the jury out. It was concerned about a possible rape shield violation. R143:348, App.142. Schenk explained the purpose of this line of

questioning: "I am going along the same lines that I went along yesterday, trying to elicit that she was looking to have sex with somebody that night, which goes to the issue of consent. It was allowed in yesterday. And I am trying to get Mr. Hatcher to verify that that was also said to him." R143:350-51, App. 144-145.

The court distinguished the admissibility of similar testimony from the day before:

> Well, it was allowed in under very cumbersome circumstances. It came out and wasn't objected to. Then she was asked about it and it wasn't objected to. Then you wanted to impeach her with a prior inconsistent statement. That doesn't mean that I am going to continue to violate the rules of evidence if you try again.

R143:351, App.145. The court also distinguished between Thompson's conduct in the bar and her statements to Hatcher. Her conduct, the court ruled, was inadmissible. "I think this is precisely what the Rape Shield Law is designed to prevent and prohibit, which is going after an alleged victim, basically saying, you're just looking to get laid." R143:352, App.146. The court turned to whether the defense could admit conversations between Hatcher and Thompson:

> It depends. What are the conversations? If it's the same thing, that she is wanting to have sex with someone that night, I think we have the same problem. That's her prior – it's sexual conduct that is prohibited under the Rape Shield Law. If it's a question of what she said to him about wanting to be with him that night or trying to pick him up, that may be a separate issue.

Id. This ruling directly contradicted the court's ruling from the day before. *See* R142:316-17, App.137-138. As a result of this

ruling, Hatcher did not testify about any statements Thompson made to him in the bar.

2. The Post-Conviction Court

The court concluded that "[e]ven if the [trial] Court did change its stance on what was barred under rape shield law, there is no restriction on the Court determining there was an incorrect ruling and barring similar testimony, so this Court will not entertain such an argument." R122:13, App.19.

Relating to Hatcher's argument that flirting and conversations are not "conduct" under Rape Shield, the post-conviction court ruled that "[h]ow Thompson acted at the bar hours before the assault towards other people does not establish consent for Hatcher." *Id.* The court found it could not "rule in his favor" because he did not testify about what he would have said at trial. R122:14, App.20. "Although Thompson's desire to have sex that night may have not been sexual conduct, it entirely depends on what Hatcher asserts Thompson said." *Id.*

In any event, the court found, it was harmless because the jury heard testimony that Thompson had a fight with her boyfriend and was seeking male company. *Id.* For similar reasons, the court concluded that Hatcher's right to present a defense was not violated. R122:15, App.21. "Even if what Hatcher would have testified to did occur, flirting with someone at a bar or making comments about sex does not closely resemble consent to sex with another person later that night." *Id.*

3. Hatcher's Motion to Reconsider and the Post-Conviction Court's Decision

Hatcher filed a motion to reconsider the part of the decision that relied on Hatcher's failure to present any evidence on how he would have testified at trial. R124. Noting that it was counsel's oversight not Hatcher's, the motion asked the court to consider Hatcher's custodial interview as evidence of how he would have testified. *Id. See also* R125.

The motion confirmed that "[h]ad Hatcher been permitted to testify at trial, he would [have] testified in line with his statement to Detective [Schrank]." R124:4. The court found that it was "still unclear what Hatcher would have actually testified to at trial. Hatcher, himself, has not made any representations that he would have testified consistent with his custodial interview." R128:4, App.4. The court declined to reconsider its original decision, but even assuming Hatcher would have testified consistent with his custodial interview, the court concluded it "would still deny Hatcher's motion." *Id.*

B. Legal Principles

A defendant has a state and federal constitutional right to present a defense. *See* ***Pennsylvania v. Ritchie***, 480 U.S. 39, 40 (1987) (defendants have a "right to put before the jury evidence that might influence the determination of guilt"); ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986).

The circuit court largely controls the admission of evidence through its exercise of discretion and can reasonably restrict it. ***United States v. Scheffer***, 523 U.S. 303, 308 (1998);

Delaware v. Van Arsdall, 475 U.S. 673 (1986). Jurors are "entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on [a witness's] testimony which provided 'a crucial link in the proof.'" ***Davis v. Alaska***, 415 U.S. 308, 317 (1974) *quoting* ***Douglas v. Alabama***, 380 U.S. 415, 419 (1965).

The right to present a defense is not limitless. ***Chambers v. Mississippi***, 410 U.S. 284, 295 (1973); ***Rock v. Arkansas***, 482 U.S. 44, 55 (1987). While state and federal legislators can create rules to exclude evidence from trials, such rules "applied mechanistically to defeat the ends of justice" are disfavored. ***Rock***, 483 U.S. at 55. Those rules violate a defendant's right to present a defense if arbitrarily applied or applied "disproportionate to the purposes they are designed to serve." ***Id***. at 56.

Wisconsin's rape shield law, WIS. STAT. §972.11 generally prohibits evidence of the complainant's prior sexual conduct. ***State v. Ringer***, 2010 WI 69, ¶25. Under certain circumstances, the refusal to admit otherwise barred rape shield evidence may violate a defendant's constitutional right to present a defense. ***State v. Pulizzano***, 155 Wis.2d 633, 647 (1990). In order to admit evidence under this constitutional exception, the defendant must show: (1) the prior acts clearly occurred, (2) the acts closely resembled those in the present case, (3) the acts are relevant to a material issue, (4) the evidence is necessary to the defense, and (5) the probative value outweighs the prejudicial effect. ***Id***. at 656. If the

defendant makes a sufficient showing, the court must determine whether the defendant's rights to present the evidence are outweighed by the state's compelling interest in excluding it. *See* ***id***. at 656-57.

Whether the application of §972.11 deprives the defendant of his constitutional rights is a question of constitutional fact this Court reviews independently. ***State v. St. George***, 2002 WI 50 ¶16.

C. The Evidence was not Barred by Rape Shield

The protections of the rape shield law exist to protect against an improper focus on the complainant's "character and past actions, rather than on the circumstances of the alleged assault." ***State v. Dunlap***, 2002 WI 19, ¶19. Evidence that Thompson was interested in sex that night, either through her actions by flirting with Hatcher and other men in the bar, or through her statements to Hatcher, Peterson and Ewald, are not covered by rape shield.

Counsel explained: "I am not going into her history of sexual aptitude. I am just going into what happened that night." R142:301, App.122. The post-conviction court held that the first—Thompson flirting with Hatcher—was not an issue because the trial court found that evidence admissible. R122:14, App.20; R128:5, App.5. But that finding is clearly erroneous. Atty. Schenk specifically said, "And I am trying to get Mr. Hatcher to verify that *that was also said to him*[,]" referring to Thompson's flirtations. R143:350-351, App.144-145 (emphasis added).

Just as he had the day before, counsel wanted to elicit testimony from Hatcher that Thompson "was looking to have sex with somebody that night, which goes to the issue of consent." R143:350, App.144. The court, confused over how the evidence was admitted the day before, found that testimony from Hatcher about Thompson flirting with others and her statements about looking for sex *were* bared by rape shield. R143:351-352, App.145-146. But Thompson's statements were not solely admitted because it was a prior inconsistent statement, as the court thought the next day. Rather, the court specifically addressed rape shield and found that such evidence was *not* rape shield because it was not conduct—it involved statements. R142:312-317, App.133-138.

Like the trial court, the post-conviction court ignored the rape shield analysis done on the first day of trial. It concluded that the trial court didn't reverse course, rather it corrected it. R122:13, App.19. But that conclusion is contradicted by the record and thus is clearly erroneous. *See* R142:312-317, App.133-138.

The evidence was no less vital to Hatcher's defense the next day when Hatcher sought to testify—perhaps, even more so because only Hatcher could testify to his own interactions and observations of Thompson.

Hatcher would have testified that Thompson asked him to play pool with him so she could flirt with a table of guys. R125:Attach.17. But it wasn't going well and the more they talked, the more Thompson realized they weren't into her.

After she struck out with them, Hatcher said, "[s]he really started flirting with me." *Id*. Hatcher wasn't "taking it all the wrong way." *Id*. It went from "holding on" to caressing. *Id*. They went from playing pool to her holding his hand. R125:Attach.17. And it went from "holding on" to caressing. R125:Attach.21. "She was flirting with me; I was flirting back with her." *Id*.

At the bar, Thompson asked him about possible friends she could meet for the night. R125:Attach.20. During the course of the conversation, she said she would have sex with one of Hatcher's friends, K.O., an African-American. R125:Attach.20-21. Hatcher told Schrank that that's when he knew he was going to have sex with her. R125:Attach.21. "Tara was always big into white guys. Always. But tonight, I mean last night, she said she'd fuck a black dude. I mean this was after we ah, this is after our little, our whole little, ah, bar episode." *Id*.

This evidence was crucial because it was directly related to Thompson's testimony, as well as to the testimony of the state's other witnesses. Had he been permitted to testify, Hatcher's testimony would have been in line with Ewald and Peterson, and contradicted Thompson. It also would lend support to his explanation of the conversation he said he had with Thompson in he bedroom, in which she consented to the intercourse. *See* R143:360-361.

Testimony about flirting is not barred by rape shield. Flirting is not strictly "conduct," but rather a combination of

body language and spoken words, making the two components inextricable. *See* http://en.wikipedia.org/wiki/Flirting[2] First, it was not being offered to prove that she was inclined to have sex because of past behavior. R142:301, App.122. Second, her conduct that night goes directly to the elements of the offense: did Hatcher *know* she was too drunk to consent. The state argued that he did. And his observations of her conduct in the bar go directly to that issue. It also goes to Hatcher's conclusion that the sex was consensual. Second, "[b]ooks, movies, conversations, or observing others engaged in sexual activity are said to be sources of information as to sexual matters 'other than person experience,' and not sexual conduct." ***Vonesh***, 135 Wis.2d at 490. *See* ***id.*** at 489 (describing other how other jurisdictions have construed "conduct" or "behavior").

This type of flirting evidence has been admissible in other sexual assault cases. In ***State v. Robertson***, 2003 WI App 84, the trial included testimony that, "[a]t the party, the two talked and flirted until E.B. suggested that they proceed outside to a van that Robertson had borrowed." ***Id.*** at ¶2. The jury convicted Robertson of sexually assaulting E.B. in that van later that night, but what happened between the two earlier that night—including their flirtations—was admitted into evidence. Similarly, in ***State v. Armstrong***, 2005 WI 119, the jury heard evidence from two witnesses about their

[2] Counsel recognizes that Wikipedia is a free-content, online encyclopedia. Based on a Lexis search, the Seventh Circuit has cited it in more than 75 cases, 38 of which are criminal cases. For that reason, Hatcher relies on Wikipedia here to define "flirting."

observations of Armstrong and the deceased, Christine Kamps, flirting, "specifically that he sat on her lap and tried to kiss her." ***Id.*** at ¶12. Another witness testified that it was Kamps who sat in Armstrong's lap and that the two seemed friendly toward each other. ***Id.***

While neither ***Robertson*** nor ***Armstrong*** are directly on point, they demonstrate that such flirting evidence has been admitted in sexual assault cases in which the flirtations occurred the night of the assault. The post-conviction court disagreed, finding these cases inapplicable because they were about flirting between the victim and the defendant. R122:14, App.20. But that *was* at issue here and there's no reason why observations of flirting on the night in question would be inadmissible because they involved other people.

D. The Refusal to Admit the Evidence Violated Hatcher's Right to Present a Defense

Evidence that Thompson was flirting that night was as admissible as her statements. But even if it was barred by rape shield, the court's failure to admit it violated Hatcher's right to present a defense. Ewald testified, outside the presence of the jury, that she saw Thompson flirt. The state would not have objected had defense counsel elicited that testimony in front of the jury, *id.*, so the flirting "clearly occurred." On this point, the post-conviction court disagreed because Hatcher never testified. But his custodial statement was that she did flirt with him. It also is in line with the statements from several witnesses that Thompson was looking for male company that night to get over her ex-boyfriend.

Second, Thompson's flirting goes directly to Hatcher's perception about Thompson's ability to consent, the main issue at trial. Thus, it was relevant to a material issue. The evidence was necessary to the defense. Counsel explained several times the nature of the defense: "[o]ur whole focus of our case is that she was looking for sex that night. And my client had consensual sex with her." R142:300, App.121. *See also* R142:311, App.132.

Hatcher should have been permitted to testify, just as Thompson, Peterson and Schrank did, that Thompson made comments to him that night about finding male company. He also should have been permitted to testify about Thompson flirting with him and other men at the bar especially because Thompson began flirting with Hatcher when her flirtations with the other men didn't go very well. R125:Attach.17-21. The Court's decision to allow other witnesses to testify to it, but not Hatcher, violated his right to fully present a defense.

V. Trial Counsel Rendered the Ineffective Assistance of Counsel

Schenk made two mistakes that amounted to the ineffective assistance of counsel. First, he failed to move to suppress Hatcher's statements to Schnurer during a custodial interrogation before anyone informed Hatcher of his ***Miranda*** rights. Second, counsel's decision to admit a blood alcohol report concluding that Thompson's BAC was two or more times the legal limit at the time of the alleged assault undercut the defense. There can be no tactical basis for these decisions,

such failures were unreasonable under prevailing professional norms, and they prejudiced Hatcher.

A. Standard

The test for ineffective assistance of counsel is two-pronged. A defendant first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 217 (1986), *quoting* ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. The question on review is whether there is a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. In addressing this issue, the court normally must consider the totality of the circumstances. ***Strickland***, 466 U.S. at 695.

B. Trial Counsel was Ineffective

1. Failure to Seek Suppression of Hatcher's Pre-Mirandized Statements

Police arrived at the residence Ewald shared with Hatcher at 6:42 a.m. on July 3, 2010 after receiving a call from Thompson. R142:134. Officer Anthony Phelps escorted Thompson out of the house, while Sgt. Jeremy Schnurer was assigned to Hatcher.

At trial, Schnurer testified that he "asked [Hatcher] to come outside and talk to me. R142:249. Hatcher gave a different name when asked and denied knowing what was

going on. *Id.* Schnurer "explained to him we were there to discuss, to investigate a sexual assault. And from our information, he was the possible suspect in, in that case." *Id.*

Hatcher denied "doing anything at all" with Thompson. *Id.* Specifically, Schnurer "asked him if he had any consensual sexual contact with the victim. And he stated, no, she was way too drunk." R142:251. He repeated it when asked again: "I believe it was, she was way too — no, I did not have any contact with her, she was way too drunk. I believe that's what it was." *Id.* Before answering the same question for the third time, Schnurer used his report to refresh his recollection. He testified Hatcher said, "I never touched her, she was so drunk." R142:252. Schnurer went on, "I gave him several opportunities to tell us what happened. And he still denied that he had any sexual contact, consensual or not consensual, with her." *Id.*

Schnurer denied Hatcher's requests to go to the bathroom or have a cigarette. R145:32, App.61. When Thompson was escorted out, Schnurer made Hatcher walk away from the front door and stand facing the neighbor's fence, with his back to Thompson. R145:30-31, App.60-61. The officer never left Hatcher's side. R145:30, App. 60. Schnurer and another officer "detained" Hatcher while waiting for Detective Schrank to arrive. *Id.*

On post-conviction, Hatcher testified in line with Schnurer. Hatcher said Schnurer told him to wait outside, and asked him if he knew what was going on. Hatcher denied that

he did and Schnurer told him they were there investigating a sexual assault and he was the suspect. R145:29, App.58. However, Hatcher testified that he said he did not touch Thompson because he "was too drunk. Because I was intoxicated myself," not that *she* was too drunk. R145:30, App.59. He testified that he admitted that he had sex with Thompson when Det. Schrank interviewed him at the station. The reason he denied it when Schnurer asked was because his "girlfriend was standing in earshot." R145:30, App.59.

Schenk testified that he did not consider filing a motion to challenge the statement Schnurer attributed to Hatcher that he didn't touch Thompson because she was too drunk. R145:5, App.34. "But in looking back on it to answer your question, I did not think it was the sort of a statement that I needed to have a motion filed on that." R145:6, App.35.

Whether a suspect is in custody for purposes of ***Miranda*** turns on how a reasonable person in the suspect's situation would perceive his circumstances. *See* ***Berkemer v. McCarty***, 468 U.S. 420 (1984). Officers need not put a suspect in handcuffs to take someone in custody. The question is "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." ***Stansbury v. California***, 511 U.S. 318, 322, 325 (1994); *see also* ***Thompson***, 516 U.S. at 112. "Custody for Miranda purposes is a state of mind." ***United States v. Slaight***, 620 F.3d 816, 820 (7th Cir. 2010).

Here, Officer Schnurer's report, trial testimony, and Hatcher's post-conviction hearing testimony demonstrate that Hatcher was in custody. While the officers' decision to immediately restrict Hatcher's movements makes sense, it amounted to custody and required officers to inform Hatcher of his ***Miranda*** rights before questioning him. Schnurer was in full uniform, armed, and was acting in his official capacity. R142:250. Under the objective test, no reasonable person in Hatcher's position would believe he was free to leave.

Schnurer's questions amounted to an interrogation, which encompasses "not only express questioning, but also any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." ***Rhode Island v. Innis***, 446 U.S. 291, 300-301 (1980). The "test is whether a reasonable objective observer would have believed that the law enforcement officer's statements to the defendant were reasonably likely to elicit an incriminating response." ***United States v. Hendrix***, 509 F.3d 362, 374 (7th Cir. 2007).

Schnurer testified that he asked Hatcher over and over again what had happened. R142:252. Thus, there can be little question that Schnurer interrogated Hatcher. The questions were designed to elicit an incriminating response no matter what he said. If Hatcher said it was consensual, but Thompson

said it was not, then it was a he said/she said situation. If Hatcher denied he had sex at all, then the state would later argue that Hatcher was incredible. Of course, if Hatcher had admitted that he had non-consensual sex, he certainly would have been admitting a crime. Hatcher made the first two types of statements—first, denying any contact at all with Thompson and then later admitting he had consensual sex with her. At trial, the state used the statements to paint Hatcher as a liar, and argued that Thompson's account was the accurate one. Thus, Schnurer's questions could have been nothing but designed to elicit an incriminating response, amounting to an interrogation.

Schenk's conclusion that a motion to suppress wasn't warranted was unreasonable under prevailing professional norms. The state highlighted Hatcher's statement that he never touched Thompson because was too drunk through its case. R142:126, 459, 468, 469. It was a key piece of the state's case, second only to Thompson's testimony.

The post-conviction court denied relief on this claim. R122:6, App. 12. In doing so, it criticized Hatcher for not presenting testimony from Sgt. Schnurer. R122:7, App.13. But Hatcher didn't need to offer Schnurer's testimony for the court to have the whole story. Schnurer testified at trial and his report was admitted into evidence. There was nothing new to get from Schnurer. In any event, the question isn't whether Schnurer thought Hatcher was free to leave, it's whether Hatcher thought he was. There can be no question that if

Hatcher had just walked off the porch, he would have been stopped. He *was* in custody. Schnurer's questions were designed to elicit an incriminating response. And counsel was ineffective for not challenging the second most important piece of evidence against Hatcher.

2. Counsel's Decision to Admit the Blood Alcohol Report of Thompson

The day before trial was set to begin, Schenk requested an adjournment mainly because he was unaware of a blood alcohol report for Thompson until the day he sent the letter. "Before, I was proceeding on the notion that there was no blood-alcohol level acquired, which helps my case. However, now that there is a blood-alcohol level, I need to figure out whether the story makes sense." R34:1. In a handwritten note on the letter, the court said that it could not grant the request without more information, told counsel to "[g]et ready for the trial at 8:00" at which time he could renew his request. *Id.*

The next day, the court gave counsel the chance to further explain. R142:4, App.93. Schenk said that as he was preparing for trial over the weekend, he didn't think there was any blood alcohol level for Thompson. "And to be honest, that was actually one of the things that I was going to use to the Defense's advantage at trial, was that blood alcohol level was not taken." R142:5, App.94. He double-checked with one of the prosecutors about the lack of a BAC the day before and they faxed it over. "And it was the first time I had had a chance to see it." *Id.*

When the prosecutor told Schenk she had previously provided the information, Schenk did another search of his Hatcher files, of which there were five or six, and found it. "So I had received it. That's my fault. And I understand that." R142:5-6, App.94-95.

Having now seen the BAC report, Schenk argued that it was hard to believe that that particular BAC "would cause someone to lose all voice and motor function" and he sought the adjournment to "get an expert, whether it be a toxicologist or an old police officer who has pulled people over at the level, to make a determination of whether or not its likely that somebody would lose their motor skills or speaking skills at that point." R142:6, App.95.

The report opined that Thompson's BAC on July 2, 2010 at 10:30 p.m would have been between .183 and .33, through a process of retrograde extrapolation. R142:8, App.97. Between the hours of 2 and 3 a.m. the next morning, it was between .143 and .233 R142:8-9, App.97-98.

Schenk explained that the report was important because "she says she couldn't talk or move. And at that blood alcohol level, I find that hard to believe." R142:12, App.101. The prosecutor somewhat agreed. "I think the Court needs to be aware, that if that were all the State were hanging its hat on, I—you know, we would have some issues." *Id.* But, the state explained, it has direct evidence of Thompson's intoxication as well as Hatcher's pre-***Mirandized*** statement that he never touched Thompson because she was so drunk. *Id.* "That was

why we made the decision not to get—mess around with toxicology and do reports if we didn't have someone here to explain it to a jury." *Id.*

The court expressed its confusion about the importance of the report. R142:13, App.102. It did not see how it was relevant, probative or material or what an expert could testify to that would assist the jury given the wide range. R142:13-14, App.102-103. The state echoed the court's concern. "It's a very wide range. Of course, on one end, he could argue it in his favor, one for us in our favor. But it's just not clear." *Id.*

The court rejected Schenk's claim that an expert would help. "It all depends on your tolerance. It all depends on your experience with alcohol. It all depends on how much food you've had to eat. It depends on this, depends on that, depends on this." R142:15, App.104. An expert would basically be giving an opinion about Thompson's credibility. R142:16, App.105. Because an expert would be inadmissible anyway, it denied Schenk's adjournment request. *Id.*

The state's first witness at trial was Officer Phelps, who interviewed Thompson, escorted her to the hospital, and at Schrank's request, asked hospital personnel to draw Thompson's blood. R142:153.

Phelps finished testifying at lunchtime. R142:154, App.111. The court excused the jury and had a discussion with the parties about the lab report. *Id.* Schenk told the court that he still wanted to introduce evidence of the blood test results. *Id.* Because the state was not planning to have the

results admitted, it did not have the analyst available as a witness. *Id.* To avoid an adjournment, the state stipulated to the contents of the report. R142:155, App.112. The state suggested admitting the report during Det. Schrank's testimony. *Id.* The court confirmed that the defense wanted the report in. R142:156, App.113. "If you want it in, then it will come in. If you change your mind after lunch, let me know…That was my understanding that that was why you wanted an adjournment, to get that report in." *Id.*

Schenk introduced the report through Schrank on cross-examination. Schrank identified the report and testified to its contents. R142:293-294, App.114-115. Schrank acknowledged that he has encountered people at those blood alcohol levels who were able to move and speak. R142:295-96, App.116-117.

On post-conviction, Schenk testified that the benefit of the report was that the BAC at the high level "doesn't typically result in the sort of mental impairment that was alleged in this particular, particular matter." R145:14, App.43. He hoped the jury would understand the BAC numbers without an expert explanation. R145:15, App.44.

The post-conviction court found that Schenk's decision to use the report was a strategic one and it would not "employ hindsight and determined Attorney Schenk's decision was unreasonable." R122:21, App.27.

Schenk's decision to admit the blood alcohol report was unreasonable, even if it was strategic. He admitted before trial began that the lack of blood alcohol evidence was a positive

aspect of the defense case. R34:1. Yet, he fought to have the report admitted. By seeking to have the report admitting, counsel undercut the entire defense.

The court pointed out the dangers of the report: jurors do not understand what the numbers mean; they simply know that .08 and above means someone is impaired. The court also pointed out that how alcohol affects a person is very individualized, and no expert would be able to opine about whether Thompson's BAC meant that she could talk and move, as the defense argued, or would be unable to speak and move, as Thompson testified. The court and the state also noted that the ranges of BAC were too large to be meaningful.

The only way Schenk's decision to admit the report makes sense is if he provides context to the report. For example, according to one chart, a BAC of .143 to .233 suggests that Thompson would have suffered from "gross motor impairment and lack of physical control" to someone who needs help walking and has "total mental confusion." *See* http://ntrda.me/1E2GLWM. Both reveal a person who could have walked and talked, which was the point Schenk was trying to make. But Schenk never got that type of information to the jury—only the number, which was meaningless. Unlike Attorney Schenk, jurors are not confronted with BAC numbers on a regular basis and have no understanding of what a particular BAC means. By giving the jury this information, Schenk, at best confused them. At worst, he helped prove the state's case against Hatcher.

VI. Combined, the Identified Errors Prejudiced Hatcher

In order for an error to be harmless, the beneficiary of the error (the state) must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Chapman v. California***, 386 U.S. 18, 24 (1967); ***State v. Dyess***, 124 Wis.2d 525 (1995). This Court must consider the combined impact of all of the errors. *See* ***Washington v. Smith***, 219 F.3d 620, 634-35 (7th Cir. 2000); ***State v. Thiel***, 2003 WI 111, ¶¶59-60. The post-conviction court failed to do this, opting instead to consider the errors individually. R122, App.7-29. Because the state cannot meet its burden that the errors were harmless beyond a reasonable doubt, Hatcher is entitled to a new trial.

This case wasn't about whether Thompson and Hatcher had sex—the DNA proved as much and Hatcher admitted it. The question was whether Thompson was too drunk to consent. Hatcher argued that she was not too drunk and that she consented. Part of his defense related to comments Thompson made to the group about her boyfriend problems and her desire for male company that night, and her flirtatious behavior.

The state argued that Thompson was too drunk to consent and focused on Thompson's account of the night that she woke up to Hatcher having sex with her, but was too drunk to move her limbs in any way or to utter a word. To shore up its case, the state relied heavily on a statement it said

Hatcher made to Sgt. Schnurer the morning police arrived that he never touched Thompson because she was too drunk.

In fact, distilled down, the state's entire case was Thompson and that statement. Every other witness it called was used to prop up those two things and to discredit Hatcher. The state was candid about how valuable Hatcher's pre-***Mirandized*** statement was to them, noting that if it was relying simply on a toxicology report to prove her intoxication, it "would have some issues." R142:12, App.101. But that's not all it had: "there is evidence that will come in as a party opponent admission that this Defendant told officers, I never touched her, she was so drunk. So, he says it." *Id.* The state highlighted this comment during its opening, through several witnesses, and again at closing. R142:126, 459, 468, 469. Second only to Thompson, it was the state's most damning piece of evidence. It went directly to one of the elements it had to prove to win a conviction: that Hatcher *knew* Thompson was too drunk.

The trial court's refusal to permit Hatcher to plead guilty after the *state* dropped two other charges the morning of trial permitted the state to have its cake and eat it, too: it didn't have to admit to a jury that it couldn't prove two of the charges against Hatcher *and* it got to attack Hatcher's credibility by repeatedly pointing out that he lied about his identity, the implication being, if he lied about that, what else did he lie about? The state had Hatcher cornered—he had four other cases pending and the court made it clear at the final

pre-trial that he had to resolve them all or go to trial. He opted for trial and then at the last minute, the state admitted it couldn't prove two of the charges and had to drop them. Even if the prosecutor told Schenk she was going to do that, it still had a detrimental impact on Hatcher because the court mistakenly held him responsible for what it termed a change of heart. By forbidding the pleas, the jury heard prejudicial evidence that Hatcher was a liar and that he was on bond in a pending case at the time of the alleged crime.

The court's flip-flop on Thompson's statements about looking for sex that night further damaged Hatcher's credibility while shoring up Thompson's. Hatcher was not permitted to testify about his observations in the bar and comments she made about Thompson wanting him to call his friend K.O. for her. And while the jury heard from Erin Peterson and Det. Schrank about those comments, it should have also heard them from Hatcher. As Schenk explained, Thompson's desire for male company that evening was critical to the defense that she consented to sex with Hatcher.

In another attempt to shore up Thompson's testimony, the state called a rebuttal witness, who was not a rebuttal witness at all. Although Hatcher never challenged Thompson's claim that she called Peterson and then the police, the jury heard testimony that calling a friend first is behavior consistent with being a victim of a sexual assault.

But perhaps the most damaging thing at trial was something admitted through the defense: the blood alcohol

report opining that Thompson's BAC was two to four times the legal limit through the course of the evening. Before the admission of that report, the only evidence of Thompson's intoxication was from the witnesses. Peterson said she was tipsy. Ewald said she was drunk, but not obliterated. Thompson herself admitted that she had been drunker than that before and that on those occasions she maintained motor control and verbal skills. But the report, without an expert, provided the jury with numbers that had no meaning except to provide proof that she was drunk. As the court said pre-trial, a person's BAC is just a number without more. One person, with little experience with alcohol, could be unconscious, while another, seasoned drinker, unfazed. Giving the jurors those BAC levels without some context completely undercut the defense that Thompson was *not* too drunk to consent.

CONCLUSION

Alone each of these errors warrants relief, but combined they served to deny Hatcher his right to a fair trial. Accordingly, Hatcher is entitled to a new trial.

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Respectfully submitted,

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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 10,951 words.

Amelia L. Bizzaro

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I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

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