STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP0297-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MYCHAEL R. HATCHER,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND ORDERS DENYING POSTCONVICTION RELIEF ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLES SUE BISCHEL AND TAMMY JO HOCK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication in this case.

STATEMENT OF THE CASE

As plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. The relevant facts and history will be presented where necessary in the Argument portion of this brief.

ARGUMENT

I. The trial court did not violate Hatcher's right to a fair trial.

A. Hatcher's change-of-plea request entitles him to no relief.

1. The facts.

The State charged Mychael Hatcher with five criminal counts: (1) second degree sexual assault of an intoxicated person in violation of Wis. Stat. § 940.225(2)(cm); (2) identity theft in violation of Wis. Stat. § 943.201(2)(b); (3) disorderly conduct in violation of Wis. Stat. § 947.01; (4) obstructing an officer in violation of Wis. Stat. § 946.41(1); and (5) misdemeanor bail jumping in violation of Wis. Stat. § 946.49(1)(a), all as a repeater (17).

At the final pre-trial conference, the court admonished Hatcher that the hearing would be his last opportunity to enter a plea rather than go to trial (141:2-6; 145:16). Hatcher rejected the State's existing offer and declined to plead (141:4; 145:16).

On the morning of trial, the State filed an amended information, dropping the identity theft and disorderly conduct charges (142:25-26; 145:16). Attorney Schenk then stated that Hatcher was prepared to enter pleas to the charges of obstructing and bail jumping and to proceed with a trial on sexual assault alone (142:26).

The court responded that the pre-trial conference would have been the time for Hatcher to admit guilt (142:27). The court noted that jurors were waiting, but asked for Hatcher's plea questionnaire form (142:27-28). Attorney Schenk had Hatcher sign a plea questionnaire, but the form was not completed (142:28). Then following discussion then occurred:

> THE COURT: Well, is the State prepared to accept pleas at this point? You don't have to.
>
> MS. LEMKUIL: Well, the issue is, Your Honor –
>
> THE COURT: I don't think that –
>
> MS. LEMKUIL: We still bring in the fact he was lying to the cops. That is part of the incident. So, if this was an intent to get rid of the lies to the cops, it still comes in. It's part and parcel.
>
> MR. SCHENK: It's not. He just doesn't want to get sentenced for not taking responsibility.
>
> THE COURT: Well, frankly, the plea form isn't completed. There is no boxes checked, there is no–nothing in the blank about how old he is, his years of schooling. None of the boxes are checked. I have no reason to think that the Defendant has even gone over this form.
>
> MR. SCHENK: Okay. That's fine. At least it's on the record that he was willing to take responsibility for this. I hope the Court takes that into consideration if and when he gets sentenced on these.

(142:28-29). The case proceeded to trial on the sexual assault, obstructing, and bail jumping charges (142; 143).

Postconviction, Hatcher filed a motion alleging that the trial court denied his right to a fair trial by rejecting

Hatcher's guilty pleas to the obstructing and bail jumping charges (103:7-12). The court denied the motion (122:7-11). The court found that the trial judge had the right to manage her calendar and require a guilty plea decision prior to trial (122:9). The court also found that if there was error, the error was harmless (122:9-11).

2. The court did not err by denying a change-of-plea request.

On appeal, Hatcher claims that the court erroneously exercised its discretion and deprived Hatcher of the right to a fair trial when it refused his change-of-plea request. Hatcher's brief at 10-14. According to Hatcher, the court acted arbitrarily by applying a blanket no-last-minute-plea policy to his request. Hatcher's brief at 11. Hatcher asks for a new trial. Hatcher's brief at 45.[1]

Hatcher is not entitled to relief. First, the court did not deny a change-of-plea request. Rather, Hatcher withdrew it (142:28-29). Because his counsel withdrew the request, the trial court did not preclude him from changing his plea. For that reason alone, this court should reject Hatcher's claim.

Even if the court in fact denied Hatcher's plea request, Hatcher is not entitled to relief. "It is a fundamental

[1] Hatcher requests the wrong relief. Where a court errs by denying a change-of-plea request, the remedy is not a new trial, but reversal for entry of a guilty plea and a resentencing. *United States v. Shepherd*, 102 F.3d 558, 564 (D.C. Cir. 1996).

principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 (plurality opinion) (holding that misdemeanant forfeited his state constitutional right to a twelve-person jury by failing to object to use of a six-person jury). *See also State v. Berggren*, 2009 WI App 82, ¶ 49 n.10, 320 Wis. 2d 209, 769 N.W.2d 110.

Attorney Schenk did not assert in the trial court that Hatcher would be deprived of the right to a fair trial unless he were allowed to change his plea (142:26-29). To the contrary, Attorney Schenk asserted that his concern was whether not taking responsibility might affect Hatcher's sentence (142:28-29). Thus, Attorney Schenk did not preserve a fair trial claim for appellate review. *Huebner*, 235 Wis. 2d 486, ¶ 10.

The court did not violate Hatcher's right to a fair trial in any event. Hatcher concedes the right to enter a guilty plea is not absolute. Hatcher's brief at 9. A court "may reject a plea in [the] exercise of sound judicial discretion." *Santobello v. New York*, 404 U.S. 257, 262 (1971). Lateness of a request to plead is a proper factor for the court to consider. *Shepherd*, 102 F.3d at 562.

The trial court did not arbitrarily reject Hatcher's tardy change-of-plea request. Hatcher proposed to plead

guilty on the morning of trial without any consideration from the State. As the court explained in its decision denying Hatcher's motion for postconviction relief, nothing at the final pre-trial conference prevented Hatcher from changing his plea then even without an agreement from the State:

> The Court finds that there was a proper exercise of discretion utilized in this case. The Court warned Hatcher that the final pre-trial conference was his last opportunity to plea. Hatcher's decision to plead the morning of trial, without an agreement from the State, highlights that nothing was stopping him from entering pleas to those counts on May 12, 2011. If he was guilty of those two charges, he should have entered pleas on May 12, 2011. Instead, Hatcher sought to pick-and-choose the counts the morning of trial, when the counts resulted from one course of conduct.

(122:9).

Postconviction, Attorney Schenk testified that Hatcher was "always comfortable" pleading to the obstructing and bail jumping counts (145:9). In that case, he could just as easily have pled guilty at the final pre-trial hearing without any agreement from the State. For this reason alone, the court could have denied his change-of-plea request in the proper exercise of its discretion and without depriving Hatcher of the right to a fair trial.

3. If the court erred, the error was harmless.

If error occurred, it was harmless. The test for harmless error is whether the beneficiary of the error proves beyond a reasonable doubt that the error did not contribute

to the verdict. *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434. It is clear beyond a reasonable doubt that a trial on sexual assault alone would not have changed the verdict or the sentenced imposed.

The obstructing charge was based on the fact that Hatcher gave police another person's name when he was first questioned about the sexual assault (1:3-7). Even if Hatcher pled guilty to obstructing, evidence that he lied to police would have been admitted at a trial on sexual assault alone. Acts taken to obstruct justice are probative of consciousness of guilt. *State v. Bettinger,* 100 Wis. 2d 691, 698, 303 N.W.2d 585 (1981) (evidence of acts taken to obstruct justice or avoid punishment is relevant and admissible to prove consciousness of guilt). Such evidence is admissible against the accused as circumstantial evidence of consciousness of guilt and thus of guilt itself. *Gauthier v. State*, 28 Wis. 2d 412, 420, 137 N.W.2d 101 (1965) (quoting 2 Wigmore, Evidence § 276, at 111 (3d ed. 1940)); *see also State v. Miller*, 231 Wis. 2d 447, 460, 605 N.W.2d 567 (Ct. App. 1999); *State v. Knighten*, 212 Wis. 2d 833, 839, 569 N.W.2d 770 (Ct. App. 1997). Because evidence that Hatcher lied to police would have been admitted at his trial even if he had pled guilty to obstructing, any error in refusing his change-of-plea request is harmless.

The factual basis for the bail jumping charge is that, at the time of the assault, Hatcher was on bond for a

misdemeanor (1:8). It is clear beyond a reasonable doubt that Hatcher would have been found guilty of sexual assault even if evidence that he was on bond for a misdemeanor were not introduced at trial. As the postconviction court found, that evidence would not have counteracted the victim's testimony that he sexually assaulted her because "[a] reasonable juror would not assume that someone charged with a misdemeanor is automatically capable of sexual assault" (122:10-11). Accordingly, even if the trial court should have allowed Hatcher to plead, it is clear beyond a reasonable doubt that Hatcher's failure to plead did not contribute to the verdict obtained.

The rejection of a guilty plea can cause prejudice if, by not accepting responsibility, the defendant loses the opportunity to qualify for more favorable sentencing treatment. *Shepherd*, 102 F.3d at 563-64. Here, it is clear beyond a reasonable doubt that Hatcher was not penalized at sentencing for not having pled to the obstructing and bail jumping charges.

Attorney Schenk asked the sentencing court to take into consideration that Hatcher tried to take responsibility for the obstructing and the bail jumping offenses (144:19-20). Attorney Schenk asked that the court impose concurrent time for the crimes that Hatcher did not deny (144:19-20). The court made the sentences imposed concurrent and treated Hatcher no less favorably for not having pled guilty

(144:25-49). Accordingly, it is clear beyond a reasonable doubt that Hatcher was not prejudiced by not having changed his plea.

B. Admission of the State's rebuttal evidence entitles Hatcher to no relief.

1. The facts.

The State introduced evidence that the sexual assault occurred when the victim stayed overnight at the apartment of Hatcher's girlfriend, Lisa Ewald (142:221-26). Lisa had driven Hatcher and the victim to the apartment after an evening of drinking together at a bar on July 2, 2010 (142:223-26). The victim was intoxicated and either fell asleep or passed out in the car (142:170, 225-27, 282; 143:398). Lisa physically carried her from the car to a spare bedroom (142:226-27, 283).

The victim testified that she awoke during the night to discover that Hatcher was having sexual intercourse with her from behind (142:167-84). She testified that she was unable to move or speak and that at some point she passed out (142:171-72). When the victim woke up at 6:00 or 6:30 a.m. on July 3, 2010, she used her cell phone to call Erin Peterson (142:172-74, 183-84). Peterson was a friend and co-worker of Lisa and the victim and was with Hatcher, Lisa, and the victim at the bar the night before (142:197-204).

Peterson testified that she received a call from the victim at about 6:30 a.m. (142:204). According to Peterson,

the victim said that Hatcher had raped her, or at least that the victim thought it was Hatcher (142:204). Peterson told the victim to call the police (142:173-74, 205). After having talked to Peterson, the victim then called the police (142:174).

Attorney Schenk cross-examined the victim about not calling the police first:

> Q. . . . Did you call the police as soon as you woke up?
>
> A. After I called Erin Peterson.
>
> Q. Okay. Your first reaction was to call Erin Peterson?
>
> A. Yes.
>
> Q. Not the cops?
>
> A. No.
>
> Q. Okay. Why was that?
>
> MS. LEMKUIL: Objection to relevancy, Your Honor.
>
> THE COURT: Overruled. You may answer the question.
>
> [THE VICTIM]: Why did I choose to call Erin before I choose – because I was scared. And I had no clue what to do.
>
> BY MR. SCHENK:
>
> Q. Okay. If for some reason Erin didn't answer the phone, would your next move have been to call the cops?
>
> MS. LEMKUIL: Object to relevance.
>
> THE COURT: Overruled. You may answer the question.

> [THE VICTIM]: I don't know who I would have called if Erin didn't answer.

(142:183-84).

After Hatcher testified and the defense rested, the State called Samantha McKenzie as an expert witness on the reactive behavior of sexual assault victims (143:405-22). McKenzie was not named on the State's witness list (28). The State called her to testify that many adult victims of sexual assault call a trusted friend or family member before calling the police (143:414).

Attorney Schenk objected (143:411-12). He argued that McKenzie's testimony was not rebuttal evidence because it was not offered to rebut anything that Hatcher introduced in his case-in-chief (143:410-12). The court concluded that McKenzie was a proper rebuttal witness because the State called her to testify in response to the clear suggestion from the defense that the victim was not telling the truth because, if she were, she would not have called a friend before calling the police:

> Everyone agrees that Mr. Schenk made appoint in cross-exam that she did not call the police right away. She called her best friend first. Or her friend first. I shouldn't say best friend. 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.

(143:414-15).

McKenzie then testified that, in most sexual assault cases, if the victim discloses what happened, she will talk to someone she trusts first before formally reporting the assault (143:419).

Postconviction, Hatcher alleged that the court erroneously exercised its discretion when it allowed the State to call McKenzie as a rebuttal witness (103:20-23). The court denied the motion. It concluded that McKenzie's testimony was appropriate rebuttal evidence "because it directly answered an issue introduced by Hatcher: why [the victim did] not call the police first" (122:16-17).

> The suggestion that [the victim] should have called the police was introduced on cross, and the State could not have anticipated that McKenzie's testimony would be necessary until that time. Because McKenzie was presumably not disclosed as a witness, the State had to bring her testimony in rebuttal.

(122:17). The court also concluded that, if the admission was error, it was harmless error (122:17).

> Even without McKenzie's testimony, the jury verdict would have been the same. McKenzie's testimony only minimally added to the State's case. With all the other evidence the State presented, whether [the victim] called Peterson before the police were called does not establish that [the victim] was lying about the assault. [The victim] and Peterson consistently testified about the phone call, such that a jury was not likely to believe that the two created a story about the assault while on the phone. This is especially true, as no evidence was introduced that Peterson had any vendetta against Hatcher. Accordingly, the Court finds that the jury verdict would have been the same beyond a reasonable doubt.

(122:17).

2. The court did not err by admitting the State's rebuttal evidence.

On appeal, Hatcher argues that the trial court erred when it permitted the State to call McKenzie as a rebuttal witness. According to Hatcher, McKenzie was not a bona fide rebuttal witness because her testimony was offered not to rebut Hatcher's testimony, but to rebut a defense theory implied by cross-examination of the State's complaining witness. Hatcher's brief at 14-17.

The State disagrees. Wis. Stat. § 971.23(1)(d) requires the disclosure of the State's intended witnesses, with the exception of rebuttal and impeachment witnesses. *See State v. Novy*, 2013 WI 23, ¶¶ 23-25, 346 Wis. 2d 289, 827 N.W.2d 610. A court's decision whether to admit evidence as bona fide rebuttal evidence will be upheld if the trial court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process. *Id.* ¶ 36.

Because the court reasonably concluded that McKenzie was a bona fide rebuttal witness, the State was not obliged by Wis. Stat. § 971.23(1)(d) to have listed her as a witness. The State is not required to disclose the names of rebuttal witnesses "even when the State knows the defense strategy in advance and anticipates using the witness at trial." *State v. Sandoval*, 2009 WI App 61, ¶ 30, 318 Wis. 2d 126, 767 N.W.2d 291. "The test of admissibility of rebuttal evidence is whether it only became necessary and appropriate when the defendant presented his or her case-in-reply." *Id.* However, "[o]nce a defendant presents a theory of defense, . . . the credibility of that theory becomes an issue in the case," and "[t]he defendant runs the risk that the State will rebut the defense theory with evidence of its own." *Id.* ¶ 31.

The court reasonably allowed McKenzie to testify as a rebuttal witness for the State. Rebuttal evidence is admissible where, as here, it rebuts a theory of defense elicited on cross-examination of the State's complaining witness. *See State v. Gershon*, 114 Wis. 2d 8, 10-14, 337 N.W.2d 460 (Ct. App. 1983) (upholding introduction on testimony relevant to the child victim's credibility). In *Gershon*, the State charged the defendant with first-degree sexual assault of a nine-year-old male child. *Id.* at 9-10. The child testified that the defendant sexually assaulted him. On cross-examination, "the defense implied that his testimony was prompted by an attempt to avoid parental discipline and

was extensively prepared by the prosecution." *Id.* at 10. On rebuttal, the State was permitted to call three witnesses to whom the child had given consistent statements. *Id.*

Like in *Gershon*, Hatcher implied a theory of defense on cross-examination of the State's complaining witness. Hatcher implied that the victim was not telling the truth because, if she were in fact raped, she would have called the police first (142:183-84). The State was entitled to call a witness to rebut the defense theory implied on cross-examination of the complaining witness. *Gershon*, 114 Wis. 2d at 10.

Even if *Gershon* does not control, the court reasonably admitted McKenzie's testimony as bona fide rebuttal evidence. The testimony was necessary and appropriate to rebut a theory implied by Hatcher's case-in-chief. Hatcher testified that, while his girlfriend Lisa was asleep in another bedroom, he woke the victim up to see if she would have sex with him (143:361). He testified that the victim's first response was to ask where Lisa was (143:362). Hatcher testified that he responded that Lisa was asleep (143:362).

Hatcher testified that, while he and the victim were making out, the victim again asked where Lisa was (143:365; 143:400). According to Hatcher, he told her that Lisa was asleep and was not going to wake up, at which point the victim took off her pants (143:365). Hatcher

testified that the victim said she would kill him if he told Lisa what happened (143:400).

Hatcher's testimony implied that the victim wanted to conceal what happened from Lisa. The implication is that, if the victim had nothing to conceal, she would have called the police first. Hatcher's testimony thus fed a theory of the defense that, because the victim did not call the police first, she was not telling the truth. It was necessary and appropriate for the State to rebut that implication with McKenzie's testimony that sexual assault victims often call a trusted friend or family member before formally reporting the assault to authorities.

Because McKenzie was a bona fide rebuttal witness, the State was not obliged by Wis. Stat. § 971.23(1)(d) to list her as a witness before she testified.

3. If the court erred, the error was harmless.

If the trial court erroneously admitted McKenzie's testimony, the error was harmless. "[E]rror is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434 (quoted source omitted).

It is clear beyond a reasonable doubt that the jury would have found Hatcher guilty without the rebuttal

evidence. *See id*. As the trial court found, McKenzie's testimony added only marginally to the State's case against Hatcher (122:17). The victim and Peterson consistently testified about the phone call and its content. There was no evidence that Peterson lied or had a motive to lie. Thus, whether the victim called Peterson before calling the police does not establish that the victim was not telling the truth.

The victim's testimony at trial was consistent with what she said right after the incident: that Hatcher raped her. The victim's testimony also was supported by strong corroborating evidence. The victim testified that she was on her stomach with her head turned to the side when Hatcher had sex with her from behind (142:171). She testified that his hand was on the back of her neck area (142:171). Hatcher denied at trial that he held her down (143:403). The State introduced evidence of bruises on the back of the victim's right shoulder, behind her right ear, and on her neck (142:278-81). The physical evidence thus corroborated the victim's testimony and contradicted Hatcher's version of events.

Importantly, Hatcher gave inconsistent statements about the assault (142:252; 143:396). At first Hatcher told police that he did not touch the victim (142:250-52). He later admitted that he lied and that he had sexual intercourse with the victim (143:398). Hatcher's undisputed actions strongly imply consciousness of guilt and, thus, guilt itself.

Bettinger, 100 Wis. 2d at 698 (evidence of acts taken to obstruct justice or avoid punishment is relevant and admissible to prove consciousness of guilt). Given how badly Hatcher damaged his own credibility, it is clear beyond a reasonable doubt that the admission of McKenzie's testimony did not contribute to the jury's verdict. *Hunt*, 360 Wis. 2d 576, ¶ 26.

II. The trial court's exclusion of Hatcher's testimony does not entitle him to a new trial.

A. Introduction.

Hatcher argues that the trial court erroneously applied Wisconsin's rape shield statute and violated his constitutional right to present a defense by excluding portions of his testimony. Hatcher's brief at 17-31. According to Hatcher, the court excluded testimony that the victim talked at the bar about wanting to have sex and that the victim flirted with Hatcher and other men at the bar. Hatcher's brief at 26.

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

Hatcher's brief at 31 (citation omitted).

Hatcher is not entitled to a new trial. First, the trial court excluded only testimony that the victim talked at the bar about wanting to have sex. The exclusion of this evidence is not reversible error because the testimony was cumulative and not vital to Hatcher's defense. If the court erred, the error was harmless. The testimony was repetitive of otherwise undisputed evidence and would not have changed the outcome of trial.

Hatcher's remaining arguments fail. The court either admitted Hatcher's proffered testimony or said it would not bar the admission. For these reasons, Hatcher's evidentiary claims do not warrant a new trial.

B. The court did not err when it precluded Hatcher from testifying that the victim talked about wanting to have sex with other men.

On the first day of trial, three witnesses testified that the victim made statements among friends at the bar indicating that she wanted to have sex that night (142:179-80, 208, 318-19). Attorney Schenk argued that the evidence was not barred by the rape shield statute (142:313-14).

On the second day of trial, Hatcher sought to testify that the victim talked about wanting to have sex. Attorney Schenk explained:

> ATTORNEY SCHENK: 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.

(143:350-51).

The court precluded Hatcher from testifying to the victim's statements about wanting to have sex with men other than him on the ground that the evidence is barred by the rape shield statute (143:352). *See* Wis. Stat. § 972.11.

On appeal, Hatcher argues that the trial court erroneously applied the rape shield statute and violated Hatcher's right to present a defense when it precluded him from testifying that the victim talked about wanting to have sex. Hatcher's brief at 17-31.

Hatcher is not entitled to relief. A trial court's decision to admit or exclude evidence is within that court's broad discretion over evidentiary matters. *See State v. Wagner*, 191 Wis. 2d 322, 330, 528 N.W.2d 85 (Ct. App. 1995). A trial court properly exercises its discretion when it examines relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. *State v. Marinez*, 2011 WI 12, ¶ 17, 331 Wis. 2d 568, 797 N.W.2d 399.

Even if the record does not demonstrate a proper exercise of discretion by the trial court, reviewing courts "'independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion.'"

State v. Gray, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999) (quoting *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998)). Thus, a trial court's evidentiary decision generally will be upheld "'unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.'" *State v. Payano*, 2009 WI 86, ¶ 51, 320 Wis. 2d 348, 768 N.W.2d 832 (quoting *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

A trial court may exclude relevant evidence if it is needlessly cumulative. *See* Wis. Stat. § 904.03 (although relevant, evidence may be excluded if it needlessly presents cumulative evidence); *State v. Leighton*, 2000 WI App 156, ¶ 49, 237 Wis. 2d 709, 616 N.W.2d 126 (trial court properly exercises its discretion by excluding cumulative evidence).

Here, there is no dispute that Hatcher's proffered testimony was cumulative of testimony already introduced through Erin Peterson, Detective Shrank, and the victim herself. In his offer of proof, Attorney Schenk said that he was seeking to elicit testimony from Hatcher like that allowed the day before (143:350-51). Indeed, Hatcher concedes on appeal that the ruling's effect was to prevent Hatcher from testifying, "just as [the victim], Peterson and Schrank did." Hatcher's brief at 31.

Because the excluded evidence was cumulative, it cannot be said that the trial court's decision was one that no

reasonable judge could have reached under these facts and controlling law. *Cf. Payano*, 320 Wis. 2d 348, ¶ 51. Although the court did not exclude the evidence on that ground, it easily could have. Consequently, this court can and should affirm the court's exclusion of evidence. *See Milton v. Washburn Cnty.*, 2011 WI App 48, ¶ 8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924 ("if a circuit court reaches the right result for the wrong reason, we will nevertheless affirm"); *see also State v. Bustamante*, 201 Wis. 2d 562, 577 n.9, 549 N.W.2d 746 (Ct. App. 1996) (appellate court is "free to examine a ground other than that relied on by the trial court if the alternate ground results in an affirmance").

Hatcher argues that the court violated his right to present a defense. Hatcher's brief at 27-28. Hatcher's defense theory was that the victim was capable of consent and gave her consent to sexual intercourse (142:300; 143:350). Hatcher argues that the victim's interest in having sex shows that she consented when he had intercourse with her. Hatcher's brief at 31.

As a threshold matter, the constitutional argument Hatcher makes on appeal was forfeited when Attorney Schenk failed to raise it at trial (143:348-357). *See State v. Jenkins*, 168 Wis. 2d 175, 187-88, 483 N.W.2d 262 (Ct. App. 1992) (the proponent has the burden to show why evidence is admissible); *see also State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first

time on appeal are generally deemed waived); *see also State v. Ndina*, 2009 WI 21, ¶¶ 28-30, 315 Wis. 2d 653, 761 N.W.2d 612.

Rather than address the merits of Hatcher's belated argument, this court should hold that he has forfeited it by failing to present it at trial. As this court declared in *Jenkins*, 168 Wis. 2d at 187-88:

> A party objecting to the admission of evidence need not specify the rule into which the evidence does *not* fit. *See State v. Peters*, 166 Wis. 2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991). Rather, the proponent has the burden to show why the evidence is admissible.

The foregoing rationale applies here. If the refusal to admit the victim's statements violates Hatcher's right to present a defense, defense counsel had the burden to raise the argument at the time of trial. It was not the trial court's responsibility to raise the issue. Because Hatcher did not do so, he may not make the constitutional argument for the first time on appeal. *Bustamante*, 201 Wis. 2d at 572.

In any event, the trial court did not violate Hatcher's right to present a defense. The rights bestowed by the confrontation and compulsory process clauses of the Sixth Amendment grant the defendant a constitutional right to present a defense. *See State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). However, a criminal defendant does not have the constitutional right to present any and all evidence in support of his claim. *Chambers v. Mississippi*,

410 U.S. 284, 302 (1973); *State v. Hammer*, 2000 WI 92, ¶¶ 42-43, 236 Wis. 2d 686, 613 N.W.2d 629. Rather, the accused's right to present evidence "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295.

To establish a Sixth Amendment violation, the defendant must prove that the excluded testimony would have been relevant, material and vital to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Stated another way, the test for whether the exclusion of evidence violates the right to present a defense asks "whether the proffered evidence was 'essential to' the defense, and whether without the proffered evidence, the defendant had 'no reasonable means of defending his case.'" *State v. Williams*, 2002 WI 58, ¶ 70, 253 Wis. 2d 99, 644 N.W.2d 919 (citation omitted). Whether the exclusion of evidence violated a defendant's constitutional right to present a defense is a question of law. *State v. Dodson*, 219 Wis. 2d 65, 69-70, 580 N.W.2d 181 (1998).

Hatcher's testimony was cumulative and, thus, not vital to his defense as a matter of law. Three witnesses other than Hatcher, including the victim herself, testified that the victim talked about wanting to have sex that night (142:179-80, 208, 318-19). Hatcher thus had a reasonable means of asserting his consent defense. Because additional testimony would have been repetitious, Hatcher cannot show that the

excluded evidence was "vital" to his defense or that its exclusion violated his constitutional right to present a defense. *See Valenzuela-Bernal*, 458 U.S. at 867.

C. If the court erred, the error was harmless.

The court's exclusion of evidence, if error, was harmless error. *See Hunt*, 360 Wis. 2d 576, ¶ 26. It is clear beyond a reasonable doubt that the exclusion of evidence did not contribute to the verdict in this case. The testimony was cumulative and, thus, had minimal if any value to Hatcher's defense. Indeed, the victim herself admitted that her recent breakup with a boyfriend and wanting to have sex had been a subject of conversation among friends at the bar (142:179-80). Because Hatcher's proffered testimony would only have been cumulative of otherwise undisputed evidence, it would not have changed the outcome of trial. *Id.*

Even apart from the cumulative nature of the excluded evidence, it is clear beyond a reasonable doubt that its exclusion did not contribute to the verdict obtained. The State charged Hatcher with second degree sexual assault of an intoxicated person in violation of Wis. Stat. § 940.225(2)(cm). The elements of the offense are: (1) that the defendant had sexual intercourse with the victim; (2) that the victim was under the influence of an intoxicant at the time of the sexual intercourse; (3) that the victim was under the influence of an intoxicant to a degree which rendered her incapable of giving consent; (4) that the

defendant had actual knowledge that the victim was incapable of giving consent; and (5) that the defendant had the purpose to have sexual intercourse with the victim when she was incapable of giving consent (143:442-43). *See also* Wis. State. § 940.225(2)(cm).

"Consent is not an issue" where, as here, the State charges a violation of Wis. Stat § 940.225(2)(cm). *See* Wis. Stat. § 940.225(4).

Hatcher offered the excluded evidence to show that the victim consented to sexual intercourse (142:300; 143:350). By finding him guilty of the offense charged, however, the jury determined that the victim was incapable of consent at the time the intercourse occurred. Thus, consent was not an issue that the jury was required to decide. *See* Wis. Stat. § 940.225(4). Because the jury's verdict did not turn on consent, but on whether intoxication rendered the victim incapable of consent, it is clear beyond a reasonable doubt that the excluded evidence would not have affected the verdict.

D. The court either admitted or said it would not exclude evidence that the victim flirted with Hatcher and other men.

Hatcher argues that he "should have been permitted to testify about [the victim] flirting with him and other men at the bar." Hatcher's brief at 31. He argues that the evidence that the victim flirted is not barred by the rape shield

statute and that the court's failure to admit it violated his right to present a defense. Hatcher's brief at 28-30.

Hatcher's arguments are misplaced. Hatcher testified on direct examination that the victim flirted with other men at the bar (143:347-48). Outside the jury's presence, the court then concluded that the rape shield statute applies to evidence that the victim flirted with men other than Hatcher (143:348, 352). The court did not strike Hatcher's testimony, however (143:356-57). Nor was the jury instructed to disregard it (143:356-57). Thus, notwithstanding its ruling, the court did not prevent the jury from considering Hatcher's testimony that the victim flirted with other men.

Nor did the court exclude evidence that the victim flirted with Hatcher or made comments about wanting to have sex with him (143:353-54). To the contrary, the court expressly said that it would not preclude testimony that the victim flirted with or talked about wanting to have sex with Hatcher (143:353-54). Defense counsel was free to pursue that line of questioning at trial. The trial court plainly did not err.

III. Hatcher was not denied his constitutional right to effective assistance of counsel.

A. Attorney Schenk was not ineffective for failing to file a *Miranda*-based suppression motion.

Hatcher contends that Attorney Schenk was ineffective for failing to file a motion to suppress Hatcher's statements during on-the-scene questioning by police before any *Miranda*[2] warnings were given. Hatcher's brief at 32-37. According to Hatcher, the officer's questions amounted to custodial interrogation for purposes of *Miranda*. Hatcher's brief at 34-35.

The trial court rejected the claim after an evidentiary hearing (122:3-7). The court found that Hatcher failed to demonstrate that he would have prevailed on a *Miranda* motion (122:7).

The trial court correctly rejected Hatcher's claim. A criminal defendant alleging ineffective assistance of trial counsel must prove that his trial counsel's performance was deficient and that he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." *Id.* at 690. The

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

failure to pursue an unmeritorious motion, or one that would not have been successful, cannot constitute deficient performance. *See State v. Cooks*, 2006 WI App 262, ¶ 39, 297 Wis. 2d 633, 726 N.W.2d 322. To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 694.

Hatcher did not meet his burden to prove prejudicially deficient performance because he did not demonstrate that Attorney Schenk would have prevailed on a *Miranda*-based suppression motion (122:7). The warnings prescribed by *Miranda* are required only when a suspect is "in custody." *See State v. Morgan*, 2002 WI App 124, ¶¶ 9-11, 254 Wis. 2d 602, 648 N.W.2d 23. A person is "in custody" for *Miranda* purposes when his "freedom of action is curtailed to a 'degree associated with formal arrest.'" *Berkemer v. McCarty,* 468 U.S. 420, 440 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)); *see also Morgan*, 254 Wis. 2d 602, ¶ 10.

The Supreme Court has described the "in custody" determination as follows:

> "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a

> formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."

Yarborough v. Alvarado, 541 U.S. 652, 663 (2004) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)); *see also State v. Goetz*, 2001 WI App 294, ¶ 11, 249 Wis. 2d 380, 638 N.W.2d 386 ("A person is in custody for purposes of *Miranda* if the person is either formally arrested or has suffered a restraint on freedom of movement of the degree associated with a formal arrest.").

Under *Miranda* and its progeny, custody was absent here. Hatcher testified at the postconviction hearing that he was awakened by an officer telling him to come downstairs (145:27). Hatcher was wearing shorts and was allowed to put on his shoes (145:27). He was not allowed to dress or go to the bathroom (145:27). After Hatcher came downstairs, the officer asked him to come outside (145:27). There, the officer frisked Hatcher (145:28-29).

The officer asked Hatcher whether he knew what was going on (145:29). The officer said that police were there to investigate a sexual assault and that Hatcher was the suspect (145:29). The officer kept asking Hatcher if he had sex with the complainant (145:30).

Hatcher testified that he asked to use the washroom and to get a cigarette out of the kitchen, but that he was told he could not (145:30-31). At one point, the victim was escorted out, at which time the officer made Hatcher walk

toward a fence and face the wall so that he could not look at the victim (145:31). Afterwards Hatcher was instructed to return to the porch (145:31-32). Within ten minutes, officers placed Hatcher under arrest and transported him to the police station (145:32).

Hatcher was not placed under arrest until after the officer completed his initial questioning (145:32). The relevant inquiry, then is whether Hatcher "suffered a restraint on freedom of movement of the degree associated with a formal arrest" when he was questioned. *Goetz*, 249 Wis. 2d 380, ¶ 11. He did not (122:3-7).

Hatcher was not under arrest or subject to a restraint on his freedom of movement of the degree associated with a formal arrest when he was questioned. *See Goetz*, 249 Wis. 2d 380, ¶ 11. Hatcher was not questioned at a police station or in a squad car. At no time during the questioning on the porch of his girlfriend's residence was Hatcher told that he was not free to leave. *See State v. Leprich*, 160 Wis. 2d 472, 479, 465 N.W.2d 844 (Ct. App. 1991). Nothing in the record suggests that the police restricted Hatcher's movement other than to separate him from the victim while she was inside the apartment and when she was escorted out. *See id*. As the trial court found, Hatcher did not demonstrate that he was "in custody" for purposes of *Miranda* (122:3-7).

Attorney Schenk could not have brought a successful motion to suppress. Thus, his failure to bring the motion was

neither deficient performance nor prejudicial. *Cooks*, 297 Wis. 2d 633, ¶ 39; *Strickland*, 466 U.S. at 687.

B. Attorney Schenk was not constitutionally ineffective for admitting evidence of the victim's blood alcohol content.

Hatcher claims that Attorney Schenk was ineffective for introducing the victim's blood alcohol report. Hatcher's brief at 37-41. According to the report, the victim's blood alcohol level would have been in the range of .183 to .33 at 10:30 p.m. on July 2, 2010, and in the range of .143 to .233 in the early morning hours of July 3, 2010 (142:8-9). Hatcher argues that Attorney Schenk performed deficiently when he introduced the report because it "undercut the entire defense." Hatcher's brief at 41.

Hatcher did not demonstrate that Attorney Schenk's admission of the report was prejudicially deficient performance. "An appellate court will not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" *State v. Elm*, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (quoting *State v. Felton,* 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983)). "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *Id*. at 464-65.

Attorney Schenk made the strategic decision to admit the report because the reported blood alcohol content, even at its highest level, "doesn't typically result in the sort of mental impairment that was alleged in this particular, particular matter" (145:14). Attorney Schenk had a reasonable objective. His choice of trial strategy is thus virtually unassailable. *See Strickland,* 466 U.S. at 690-91.

Hatcher argues that Attorney Schenk's decision, even if it was strategic, was unreasonable because jurors would not understand the meaning of the blood alcohol ranges unless Attorney Schenk retained an expert to testify that a person with those blood alcohol ranges could have walked and talked. Hatcher's brief at 41. He argues that jurors have "no understanding" of blood alcohol levels and, thus, the information at best confused the jury and at worst helped to prove the State's case. Hatcher's brief at 41.

Hatcher ignores the complete record in this case. Attorney Schenk coupled introduction of the report with testimony from Detective Schrank that that he had encountered people who were able to move and speak with the blood alcohol levels indicated in the report (142:295-96). Thus, Attorney Schenk's introduction of the report, coupled with Detective Schrank's testimony, undercut the victim's claim that she could not move or speak and supported the defense theory that the victim was not so intoxicated that she was incapable of consent.

The trial court correctly declined to find in hindsight that Attorney Schenk's strategic decision was unreasonable (122:20-22).

> It is not unreasonable to expect a jury to extrapolate common knowledge and determine that based on her BAC numbers, combined with other testimony, that [the victim] was not so drunk as to prohibit her from talking or moving. In fact, Attorney Schenk was even able to extrapolate that testimony from a police officer. Hatcher now requests that the Court employ hindsight and determine Attorney Schenk's decision was unreasonable. The court will not do so. Attorney Schenk made a strategic decision on the BAC report, and did the best he could with what he had available. By using the report, Attorney Schenk was able to demonstrate that there was a chance [the victim] was not as drunk as she claimed.

(122:21). This court should affirm the trial court's rejection of Hatcher's claim.

IV. Hatcher is not entitled to a new trial based on cumulative harm.

Hatcher is not entitled to a new trial on the basis of the cumulative effect of Attorney Schenk's alleged errors before and during trial. Hatcher fails to establish that counsel's alleged deficient performance resulted in prejudice in even one respect. *See* Section III. Merely multiplying the number of allegations of prejudice does not make up for a lack of prejudice in any of the individual claims. *See State v. Thiel*, 2003 WI 111, ¶ 61, 264 Wis. 2d 571, 665 N.W.2d 305. There could not be any cumulative prejudice when there are no individual instances of prejudice to accumulate. *Estate of Hegarty v. Beauchaine*, 2006 WI App 248, ¶ 248, 297 Wis. 2d

70, 727 N.W.2d 857; *State v. Williams*, 2006 WI App 212, ¶ 34, 296 Wis. 2d 834, 723 N.W.2d 719. *See Thiel*, 264 Wis. 2d 571, ¶¶ 59, 62. "'Zero plus zero equals zero.'" *Hegarty*, 297 Wis. 2d 70, ¶ 248 (quoting *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976)).

Defense counsel "is not expected to be flawless," and, indeed, is "strong[ly] presum[ed]" to have performed reasonably. *Thiel*, 264 Wis. 2d 571, ¶ 61. "[I]n most cases[,] errors, even unreasonable errors, will **not** have a cumulative impact sufficient to undermine confidence in the outcome of the trial[.]" *Id.* (emphasis added). The alleged errors in this case do not undermine confidence in the outcome and do not warrant a new trial.

Hatcher argues that this court must consider the combined impact of not only counsel's alleged ineffectiveness, but also the alleged errors by the trial court. Hatcher's brief at 42-45. Hatcher cites no authority for the proposition, and the State is aware of none. In any event, for the reasons explained in Sections I and II of this brief, any error by the trial court was harmless error. Thus, there is no cumulative harm, and the alleged errors in this case do not warrant a new trial.

CONCLUSION

For the above reasons, the State respectfully requests that this court affirm the judgment of conviction and the orders denying postconviction relief.

Dated this 11th day of August, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,900 words.

Dated this 11th day of August, 2015.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of August, 2015.

_____
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