STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP921-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TONY PHILLIP ROGERS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND A DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY G. DUGAN PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Tony Phillip Rogers's statement of the case is sufficient to frame the issues on appeal. As Respondent, the State exercises its option not to present an additional statement, but will supplement facts as necessary in its argument. *See* Wis. Stat. § 809.19(3)(a)2.

ARGUMENT

I. Rogers has not shown that his trial counsel was ineffective.

A. Standard of review and relevant law.

"Appellate review of an ineffective assistance of counsel claim presents a mixed question of fact and law." *State v. Champlain*, 2008 WI App 5, ¶19, 307 Wis. 2d 232, 744 N.W. 2d 889. A trial court's findings of fact are reviewed for clear error, but whether counsel's performance is constitutionally infirm is a question of law, reviewed de novo. *Id.*

"Wisconsin applies the two-part test described in *Strickland* [*v. Washington*],[1] for evaluating claims of ineffective assistance of counsel." *State v. Roberson*, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W. 2d 111 (footnote added). A defendant claiming ineffective assistance of counsel must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant's claim of ineffective assistance of counsel fails when he has not satisfied either prong of the two-part test. *See Strickland*, 466 U.S. at 697.

With respect to the "prejudice" component of the test, the defendant must affirmatively prove that the alleged defects in counsel's performance "actually had an adverse effect on the defense." *Id.* at 693. The defendant cannot meet his burden by merely showing that the errors had "some conceivable effect on the outcome"; rather, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 693-94. A "reasonable probability" is a "probability sufficient to

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

undermine confidence in the outcome." *Id*. at 694. It is the defendant's burden to show harm. *State v. Anderson*, 2006 WI 77, ¶48, 291 Wis. 2d 673, 717 N.W. 2d 74 (overruled on other grounds).

A circuit court may deny a postconviction motion alleging ineffective assistance of counsel without a *Machner*[2] hearing if the record conclusively establishes that the defendant is not entitled to relief. *Roberson*, 292 Wis. 2d 280, ¶43.

B. Rogers has not shown that his counsel performed deficiently nor has he shown any prejudice from that performance.

Rogers complains that counsel should have moved for an *in camera* inspection of DR's mental health records.[3] He argues that access to DR's mental health records and the subsequent admission of the records at trial "would have cast serious doubt on the credibility of the victim."[4] Although his argument is not clear, it appears that Rogers faults counsel not for failing to obtain the *in camera* review of the records, but for counsel's failure "to try" to obtain *in camera* review.[5] He argues that counsel was deficient because he failed to "obtain and introduce evidence of the victim's mental health" and he suffered prejudice because introduction of that evidence "would have affected [the victim's] credibility as a witness."[6] Rogers is mistaken.

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

[3] Rogers's Br. at 7.

[4] Rogers's Br. at 10.

[5] Rogers's Br. at 10-11.

[6] Rogers's Br. at 11.

1. Relevant law on a defendant's right to access a victim's medical records.

In *State v. Shiffra*, 175 Wis. 2d 600, 608, 499 N.W. 2d 719 (Ct. App. 1993), this Court held that a defendant may obtain *in camera* inspection of a victim's privileged medical records by making a preliminary showing that the records are material to the defense.

In *State v. Green*, 2002 WI 68, 253 Wis.2d 356, 646 N.W.2d 298, the supreme court clarified what the preliminary showing of materiality requires. *Green* rejected language from *Shiffra* that *in camera* inspection is warranted any time evidence is "relevant and may be helpful to the defense." *Id.* ¶25. It held that, to obtain *in camera* inspection, "a defendant must show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." *Id.* ¶32.

The supreme court explained that "[a] motion for seeking discovery for such privileged documents should be the last step in a defendant's pretrial discovery." *Id.* ¶35. It further explained that "a defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense." *Id.* ¶33. The showing must be based on more than "mere speculation or conjecture as to what information is in the records" or a "mere contention that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault." *Id.*

The court summarized:

> [T]he preliminary showing for an in camera review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of

> guilt or innocence and is not merely cumulative to other evidence available to the defendant. We conclude that the information will be "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." . . . This test essentially requires the court to look at the existing evidence in light of the request and determine . . . whether the records will likely contain evidence that is independently probative to the defense.

Id. ¶34.

2. Rogers has not shown how his trial counsel could have made a credible *Shiffra*/*Green* motion or how he has been prejudiced by counsel's failure to make a *Shiffra*/*Green* motion.

Rogers faults his trial counsel for failing to move for an *in camera* inspection of the victim's mental health records, but he wholly fails to show how counsel should have made such a motion. As stated, to move for access to a victim's privileged medical records, a defendant must make a preliminary showing that there is something in the records that contains "relevant information necessary to a determination of guilt or innocence." *Id.*

Here, Rogers has fallen painfully short of that threshold. He has alleged only that the victim suffered "from a mental illness" and that this somehow made it "more likely that she had fabricated or misremembered the events" at issue.[7] A bare-bones allegation that a victim is mentally ill does not set forth "a specific factual basis" that demonstrates that her medical records will contain "relevant information necessary to a determination of guilt or innocence." *Id.*

[7] Rogers's Br. at 9.

Given that Rogers has not pointed to any facts from which his trial counsel could have made a good faith *Shiffra/Green* motion, Rogers has failed to show how counsel was deficient for failing to make such a motion. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W. 2d 113 (Ct. App. 1994) (stating that an attorney is not deficient for failing to pursue a meritless claim). Moreover, because Rogers has not set out any facts from which counsel could have successfully made a *Shiffra/Green* motion, Rogers has not shown that he was prejudiced by the lack of a motion. *See State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W. 2d 441 (stating that a defendant suffers no prejudice when counsel fails to pursue a meritless motion).

II. Rogers has not shown that the circuit court erroneously exercised its discretion.

A. Standard of review and relevant law.

Whether to admit evidence at trial is within the discretion of the circuit court. *State v. Warbelton*, 2009 WI 6, ¶17, 315 Wis. 2d 253, 759 N.W. 2d 557. A decision to admit or exclude evidence will be reversed only when the circuit court has erroneously exercised its discretion. *Id.*

"In Wisconsin the admissibility of other acts evidence is governed by Wis. Stat. §§ (Rules) 904.04(2) and 904.03." *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W. 2d 30 (1998). Other acts evidence "is not admissible to prove the character of a person in order to show that he acted in conformity" with that character. Wis. Stat. § 904.04(2)(a). But other acts evidence may be admitted to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Sullivan,* 216 Wis. 2d at 781. "This list is not exhaustive or exclusive." *Sullivan*, 216 Wis. 2d at 783.

To determine whether other acts evidence should be admitted, courts employ a three-step analysis. *Id.* Courts ask (1) whether the evidence is offered for a permissible purpose under § 904.04(2) and (2) whether the evidence is relevant under § 904.01. *See id*. at 783-90. The party seeking to admit the other acts evidence has the burden to establish that these first two prongs of the *Sullivan* test are met by a preponderance of the evidence. *See State v. Marinez*, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W. 2d 399. Once the moving party establishes the first two prongs, the burden shifts to the opposing party to establish that the probative value of the evidence is outweighed by prejudice or confusion. *See id.*

B. The circuit court's decision denying Rogers's motion to admit other acts evidence of the victim was a proper exercise of the court's discretion.

1. The proceedings below.

Before testimony began at trial, it appears that Rogers submitted an affidavit to the court from someone who may have alleged that DR told her that DR's mother had abused DR (57:4-5). This same affidavit might have also alleged that DR falsely told DR's principal that DR had seen someone sexually assault her friend (57:6).[8] Based on this affidavit, Rogers requested the court to allow him to produce these two pieces of other acts evidence involving DR: (1) that DR had scratched herself and then accused her mother of physical abuse and (2) that DR had reported that she had seen someone sexually assault her friend, but that the friend had denied that the assault had happened (57:5-6). The circuit court expressed its doubt that Rogers's evidence was truly other acts evidence and

[8] At trial, Rogers's attorney told the court that DR falsely reported that she had seen a sexual assault, but it's not entirely clear that this allegation is in the affidavit (57:6).

instead was an attempt to attack DR's credibility by the use of extrinsic evidence, as prohibited by Wis. Stat. § 906.08(2) (57:4,9). Rogers refuted the court's position, insisting that he sought to admit the prior conduct to show DR's modus operandi (57:15). Ultimately, the circuit court determined that Rogers had not satisfied the three-step *Sullivan* analysis and denied Rogers's motion (57:15, 25-31). The court allowed, though, that Rogers could cross-examine DR on the allegations, but that Rogers would be stuck with whatever answers DR gave (57:31).

2. Any claim of circuit court error is waived because Rogers failed to preserve it.

The affidavit that Rogers relied on at trial does not appear to be in the record. In addition, Rogers did not have the affiant appear at trial to make an offer of proof. In fact, the record is altogether murky as to how Rogers would have sought to present evidence of DR's alleged other acts. It is Rogers's duty to ensure a complete record. *See State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W. 2d. 774. Without a proper record, it is impossible for this Court to review the circuit court's ruling. Wis. Stat. § 901.03(1)(b); *See Milenkovic v. State*, 86 Wis. 2d 272, 284, 272 N.W.2d 320 (Ct. App. 1978). Moreover, "when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling." *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 36-27, 496 N.W. 2d 226 (Ct. App. 1993).

3. Rogers has not established that the circuit court erroneously exercised its discretion in prohibiting admission of the evidence.

Rogers argues that the circuit court should have allowed him to introduce evidence of DR's other acts, contending that

she had previously falsely accused others of abuse and that these accusations are evidence of her motive or modus operandi in accusing Rogers of assault.[9] Rogers is wrong.

Rogers cannot attack DR's credibility using extrinsic evidence of specific conduct. *See* Wis. Stat. § 906.08(2); *State v. Barreau*, 2002 WI App 198, ¶33, 257 Wis. 2d 203, 651 N.W. 2d 12. In order to circumvent this barrier, Rogers attempts to cast his credibility evidence as evidence of other acts. To present other acts evidence, he must satisfy the three-part *Sullivan* analysis. *See Barreau*, 257 Wis. 2d 203, ¶¶33-41. Assuming that he satisfied the first part of the test – showing that the evidence was presented for an acceptable purpose, like motive or modus operandi – he failed to demonstrate that the evidence was relevant. Also, any probative value of the evidence would have been outweighed by prejudice and confusion.

"The test for relevancy is divided into two inquiries." *Id.* ¶35. "The first question is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action." *Id.* "The second question is whether the evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." *Id.*

Here, the question is whether Rogers sexually assaulted DR. Whether DR told someone that her mom had physically hurt her, and whether that allegation was false, is not relevant to whether Rogers sexually assaulted her. Similarly, whether DR told someone that she had witnessed a sexual assault, and whether that allegation was false, is not relevant to Rogers's conduct.

[9] Rogers's Br. at 11-17.

Further, the probative value of these alleged other acts would have been outweighed by potential prejudice and confusion. Here, producing witnesses to testify regarding these other acts, and witnesses to rebut them, would have, as the circuit court speculated, devolved the trial into mini trials (57:14). It was a proper exercise of the circuit court's discretion to deem the evidence inadmissible.

Moreover, Rogers's attempt to admit what he deems other acts evidence was truly an attempt to circumvent Wis. Stat. § 906.08(2) to attack DR's credibility with extrinsic evidence. The circuit court properly exercised its discretion in prohibiting him from doing so. The circuit court expressly permitted Rogers to cross-examine DR regarding her alleged false accusations, but he declined to do so.

III. Rogers has not shown that the circuit court erroneously exercised its discretion in denying his motion for a mistrial.

A. Standard of review and relevant law.

"The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court." *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W. 2d 923 (Ct. App. 1995). "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." *Id.* at 506-07.

B. The circuit court properly exercised its discretion in denying Rogers's motion for a mistrial.

Rogers argues that the circuit court should have granted his motion for a mistrial when he noticed that he was wearing his jail-issued wristband at trial.[10] Without citation, Rogers states that "[i]t is well established that any indication that a defendant is in custody is prejudicial to the defense."[11] Rogers's argument neglects to point out that, in denying the motion for a mistrial, the circuit court found that "no particular attention was drawn to the jury" to the wristband and that, even if the jury did notice the wristband, it was because of Rogers's "decision and intentional conduct" in highlighting the wristband (57:34).

During the first morning of trial, Rogers was wearing a jail-issued wristband (57:33-34). When Rogers alerted the court to the wristband, the jury was excused from the courtroom and the wristband was removed (57:34). The court found that it was unlikely that the jury saw the wristband, and the court itself had not observed it, but if the jury did see it, it was because Rogers drew unnecessary attention to it (57:34). The court stated,

> [The wristband is] not obvious; I didn't observe it. He's got a shirt, he's got a jacket on. [Rogers's attorney] was hoping to have it brought to the Court's attention without anything occurring.
>
> The bailiff went over, they spoke. Mr. Rogers decided to volunteer and shove his wrist up at the bailiff and say, cut this wristband off. And we're certainly removing that at this point. I don't believe any particular attention was drawn to the jury, but if it was, it was because of Mr. Rogers' decision

[10] Rogers's Br. at 17-19.

[11] Rogers's Br. at 18.

> and intentional conduct. So we'll have it removed, and the jury will come back in.

(57:34). Rogers then moved for a mistrial, which the court denied (57:35).[12]

"Central to a defendant's Fourteenth Amendment right to a fair trial is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)). Wearing prison clothing is at odds with this principle. *Estelle v. Williams*, 425 U.S. 501, 503-04 (1976). But a defendant is not automatically prejudiced when a jury inadvertently sees him in handcuffs or custodial attire. *See United States v. Rutledge*, 40 F.3d 879, 884 (7th Cir. 1994) (reversed on other grounds).

Here, when the circuit court learned that Rogers still was wearing a jail wristband, the court arranged for it to be removed (57:34). The court noted that the wristband was not obviously visible (57:34). The court found that if the jury had seen the wristband, it was because of Rogers's actions (57:34). The circuit court's decision to deny the motion for mistrial was a proper exercise of the court's discretion. Rogers was not prejudiced by such a short, inadvertent view of his wristband and any view of the wristband by the jury was due to his own actions.

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[12] At a later point on the same day of trial, Rogers revealed that he was wearing a second wristband and drew attention to this wristband as well (57:102-03). This wristband was also removed (57:103). Rogers did not move for a mistrial based on this wristband (57:102-03).

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the judgment of conviction and the decision and order denying postconviction relief.

Dated this 9th day of October, 2015.

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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 3,134 words.

_____

Katherine D. Lloyd
Assistant Attorney General

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 9th day of October, 2015.

_____

Katherine D. Lloyd
Assistant Attorney General