

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP001764 - CR

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODELL THOMPSON,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR
POSTCONVICTION RELIEF ENTERED ON AUGUST
5, 2015, AND A JUDGMENT OF CONVICTION
ENTERED ON JUNE 30, 2014, HON. RAMONA A.
GONZALEZ PRESIDING IN THE CIRCUIT COURT
FOR LA CROSSE COUNTY.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Appeal No. 2014AP001764 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODELL THOMPSON,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR POSTCONVICTION RELIEF ENTERED ON AUGUST 5, 2015, AND A JUDGMENT OF CONVICTION ENTERED ON JUNE 30, 2014, HON. RAMONA A. GONZALEZ PRESIDING IN THE CIRCUIT COURT FOR LA CROSSE COUNTY.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES PRESENTED

1. Did the trial court err in allowing the jury to consider “other acts” evidence that, a year before the incident in the present case, Thompson had attempted to sexually assault a different woman, J.K.?

Trial court ruling: No. The court ruled that the jury was allowed the jury to hear the evidence of the other act.

2. At trial, S.S. testified that Thompson forced her to urinate on the floor before he then sexually assaulted her. Was counsel ineffective in failing to present evidence regarding the lack of urine residue on the floor that would have called into question S.S.'s credibility?

The trial court ruling: No.

3. Before trial, Thompson's counsel moved for *in camera* review of the S.S.'s mental health records to find exculpatory information related to her borderline personality disorder diagnosis. Counsel based this motion on the fact that people with this disorder may act impulsively. Counsel failed to present available evidence indicating that people with this disorder may suffer from hallucinations and unstable interpersonal relationships. Did counsel's failure deprive Thompson of his right to the effective assistance of counsel?

The trial court ruling: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Thompson welcomes oral argument to clarify any questions the court may have. Publication is not warranted because the issues raised on appeal are controlled by existing precedent.

STATEMENT OF THE CASE AND FACTS

On the evening of September 16, 2013, S.S. went to the Old Style Inn in downtown La Crosse with her boyfriend. (87:150). At the time, S.S. was struggling with alcohol addiction issues, and on the night of the incident, she had consumed about twenty drinks (87:151). At some point, she

was kicked out of the Inn (87:108). She then lingered outside of the bar and asked several people to use their cell phone so she could call her daughter for a ride home (87:109). Although she was able to call her daughter, S.S. was unsuccessful in getting her daughter to understand what she wanted (87:109).

While S.S. was sitting outside the bar, Rodell Thompson arrived, and the two conversed. It is undisputed that Thompson and S.S. spent the next several hours together, and ultimately engaged in sexual relations. According to Thompson, this sexual encounter was consensual. However, according to S.S., it was not consensual, and the next day, she went to a hospital where police were notified. This led to criminal charges against Thompson who was charged with one count of 2nd Degree Sexual Assault, one count of False Imprisonment, and one count of Misdemeanor Battery (4).

The case against Thompson was tried before a jury on April 14-15, 2014, Hon. Ramona Gonzalez, presiding. S.S. and Thompson each testified at trial, and gave differing versions as to what happened.

At trial, S.S. testified to the following: Upon seeing Thompson, she asked him if she could use his phone (87:151-53). Thompson told her that she could, but that his phone was back at his house, which was located “just down the street.” (87:111-112). The two then walked several blocks to a house that Thompson said he was working on remodeling (87:116). They then went down to the basement and sat on a couch (87:116, 118). Although S.S. asked Thompson for a phone, he did not give her one (87:119). At some point S.S. decided she wanted to leave, so she told Thompson she had to use the bathroom upstairs (87:121). She said that Thompson said that she could “go to the bathroom anywhere I wanted,” which she understood to mean that she should urinate on the floor

(87:121-22). She then did that, with Thompson standing over her (87:122).

S.S. said that Thompson then took a mattress that was propped up against a wall, and put it the floor, causing her to think that he was going to have sex with her (87:124). She said that she asked to leave, and indicated that she did not want to have sex, but he was “mad” and then forced her to have sex with him (87:124, 129). She also said that Thompson hit her on the head and that she later noticed pains on her neck and side she had not previously had (87:127-128, 132).

S.S. said that after a “long time,” Thompson escorted her out of the house (87:134). Once outside, S.S. told Thompson she needed to call her daughter or the police (87:137). Thompson then said he would go get a phone from some young men who were walking nearby, but he then walked away and never came back (87:138). S.S. then went to the young men who called a cab to take her home (87:139).

Thompson’s testimony differed sharply from S.S.’s. He testified that when he arrived at the Old Style Inn, he saw S.S. sitting outside the bar and thought he recognized her from a previous encounter (88:60). The two conversed and S.S. told Thompson that “[s]he ran off with \$265 of her boyfriend’s money” and that she “wanted some meth.” (88:61, 72). Thompson then offered to give her the money to protect her from her boyfriend and they walked to the house he was helping remodel and was going to be sleeping at that night (88:61). Thompson was not asked whether he forced S.S. to urinate on the floor, but testified that when they arrived at the house, S.S. used a bathroom with a flush toilet (88:62, 74). They then went down to the basement where Thompson laid down on a mattress, after which time S.S came over to him, started kissing him, and putting her hands under his shirt (88:62) They then took their clothes off and had consensual

sex (88:62). After the sex, Thompson told S.S. to come back the next day and he would give her the money she needed (88:63). He then walked Thompson out of the house, where they hugged before going their separate ways (88:76).

S.S. testified that the day after the above incident, her boyfriend “made” her go to the hospital for a sexual assault examination (87:100). During the examination, hospital staff reported her allegations to police (88:100). At trial, the State elicited testimony from the SANE nurse who examined S.S., Natalie Ready, who said that S.S. had bruising in several areas, including her arm, wrist, chest, and thigh (87:195-201). Ready testified that the injuries were “consistent” with the account S.S. had given to her (87:211). However, Ready testified that she could not tell when the injuries occurred, or how they got there (87:202, 217). Ready also testified that she collected a vaginal swab for DNA analysis, which later matched DNA taken from Thompson (87:210; 88:53-54).

Detective Linnea Miller also testified at trial. She testified that S.S. was able to identify the location of the house where the incident occurred (88:3). She then contacted the owner of the house and learned that Thompson had permission to stay there in exchange for his help in remodeling the house (87:182; 88:11, 21).

Over the objection of the defense, the jury also heard evidence of an “other act” involving Thompson and another woman, J.K. J.K. did not testify at Thompson’s trial, but the jury heard a stipulation as to what J.K. would have testified had she been called. According to the stipulation, J.K. would have testified that on or about July 10, 2012, Thompson approached her near the Old Style Inn in La Crosse, and asked her if she wanted to smoke marijuana with him at his place (88:180). J.K. agreed and they walked to an abandoned house on 3rd Street, but she became apprehensive when she realized the

house was abandoned and had no furniture (88:180). Thompson got on top of her, put his hands over J.K.'s mouth, and a struggle ensued. J.K. managed to get Thompson off of her, but he blocked the door (88:181). J.K. was finally able to break free and ran out of the house where she reported the incident to police (88:181). Before Thompson's trial, the State asserted that charges had been dismissed when J.K. did not attend the preliminary hearing, and charges were never reinstated (33:1; 86:17). Thus, the jury heard no evidence that Thompson was convicted of any crimes surrounding this incident.

The jury convicted Thompson on all three charges. The court subsequently imposed prison terms totaling 40 years imprisonment (25 years initial confinement followed by 15 years extended supervision) (89:46-47).¹ (Attached as Appendix A).

Thompson subsequently filed a motion for postconviction relief (65). He claimed his right to effective assistance of counsel was violated in three ways: (1) counsel failed to elicit testimony indicating a lack of physical evidence of urine found at the scene of the incident; (2) counsel failed to impeach the stipulated anticipated testimony of J.K. with the fact that she had prior convictions; and (3) counsel failed to include material information about borderline personality disorder in Thompson's motion for *in camera* review of S.S.'s mental health records (65:2-7).

Following a postconviction hearing on August 5, 2015, the court denied all claims in the motion, ruling that trial

¹ This was the sentence on Count 1 (Second Degree Sexual Assault, Repeater). The sentence on Count 2 (Misdemeanor Battery, Repeater) was 1½ years IC, 6 months ES, and the sentence on Count 3 (False Imprisonment, Repeater) was 3 years IC 3 years ES. Counts 2 and 3 were ordered to run concurrently to the sentence in Count 1 (89:46).

counsel was not deficient, and there was no prejudice (90:47; 74) (Attached as Appendix B and C).

Additional facts will be presented in the argument section.

ARGUMENT

I. The court erroneously exercised its discretion in allowing the jury to hear the “other acts” evidence that Thompson had previously assaulted J.K.

A. Introduction and Legal Standards

Before trial, the State filed a motion to admit other acts evidence (32). Although it sought to introduce evidence of three alleged prior other acts of Thompson, only one of these was presented at trial—an alleged assault on a woman named J.K. in July, 2012.

Thompson objected to the introduction of this evidence in both a written response and at a pretrial hearing (36; 86:18). However, in a written decision, the court ruled that the evidence could be presented at trial (41) (Attached as Appendix D).

In Wisconsin, the admissibility of other acts evidence is governed by Wis. Stat. §§ 904.04(2) and 904.03. Section 904.04(2) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Wisconsin Stat. § 904.03 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The three-part test for admitting other acts evidence under § 904.04(2) was outlined by the Wisconsin Supreme Court in *State v. Sullivan*:

1. Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
2. Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
3. Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? See Wis. Stat. § (Rule) 904.03.

216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

Courts have articulated several reasons that the law circumscribes the use of other acts evidence:

1. The tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts;
2. The tendency to condemn the defendant not because he may be guilty of the present charge but because he has escaped punishment from other offenses;
3. The injustice of attacking a defendant who is not prepared to demonstrate the attacking evidence is fabricated; and
4. The confusion of issues which might result from bringing in evidence of other crimes.

Id., at 782 (citing *State v. Whitty*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967)). Summarizing these points, the *Sullivan* court stated that “the exclusion of other acts evidence is based on the fear that an invitation to focus on an accused’s character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged.” *Id.* at 783.

The applicable standard for reviewing a circuit court’s admission of other acts evidence is whether the court exercised appropriate discretion. *Id.* at 780-81. An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *Id.*

B. Application

1. J.K.'s testimony was offered for an acceptable purpose and it is relevant with respect to the False Imprisonment charge.

The first step in the analysis is to determine whether the other acts evidence is offered for a permissible purpose under Wis. Stat. § (Rule) 904.04(2), such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The circuit court determined that the other acts evidence was offered for a permissible purpose (41:2-3). Thompson agrees with the court that an appropriate purpose for offering the evidence is to prove intent for the False Imprisonment charge (41:4).

However, that does not mean that the jury could properly use J.K.'s testimony as to the sexual assault charge. The circuit court agreed with the argument of defense counsel that J.K.'s proffered testimony could not be used by the jury to show whether S.S. consented to sexual contact or intercourse with Thompson (41:3-4). In support, the court cited to *State v. Alsteen*, 108 Wis. 2d 723, 730, 324 N.W.2d 426 (1982). In *Alsteen*, the defendant was charged with sexually assaulting a woman, and at trial, the State presented evidence that he had previously sexually assaulted another woman. The Supreme Court held that the evidence of the prior assault constituted reversible error, stating that "Consent is unique to the individual," and "the fact that one woman was raped . . . has no tendency to prove that another woman did not consent." (*citing Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948)). Thompson agrees with the circuit court that there is no proper purpose with respect to offering the evidence to prove the sexual assault charge.

The second prong of the “other acts” test set forth in *Sullivan* is whether the evidence is relevant. This first requires consideration of whether the evidence relates to a fact or proposition that is of consequence. As indicated above, J.K.’s proffered testimony is relevant to the issue of intent as it relates to the False Imprisonment charge. Further, if proven, the evidence has probative value towards the False Imprisonment charge as it makes it more likely that Thompson had the intent to falsely imprison S.S.

2. The probative value of J.K.’s testimony is substantially outweighed by the danger of unfair prejudice, and confusion of the issues.

The third prong of the *Sullivan* test includes whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues. It is here that the circuit court erred.

a. The J.K. incident carried minimal probative value

J.K.’s testimony has minimal probative value because there was inadequate proof that Thompson even assaulted J.K. J.K. did not testify at Thompson’s trial; rather, all evidence concerning the incident with J.K. came through a stipulation between the State and Thompson (87:180). It is important to note that in the stipulation, the defense did not agree that the event actually occurred, but only agreed to the content of what J.K. *would have testified* had she appeared at Thompson’s trial. Since J.K. was not present to testify at trial, there was no way the jury could assess her demeanor or credibility. She was not subjected to cross-examination.

In addition, had J.K. testified, it is likely the jury would have heard about the fact that she had several prior criminal

convictions, which would have further undercut her credibility.² It is also noteworthy that although J.K. reported the incident to police, and charges were brought against Thompson, they were dismissed when she did not show up for a Preliminary Hearing (33:1). Although the State could have reinstated the charges following the dismissal, according to trial counsel, the dismissed charged had not been refiled (36:3). No fact finder has ever determined that there was even probable cause that Thompson assaulted J.K.

On the other hand, in contrast to the stipulation as to what J.K. would have testified, the jury did hear the testimony of Thompson regarding the incident. He offered a sharply different version of what occurred. He stated that he met J.K. walking on a street, and J.K. took him to a house where her friend “used to stay.” (88:58, 84). He said that J.K. wanted to get some “weed,” so he left the house to try to find some “weed” and when he returned, J.K. was gone (88:59). He denied holding her against her will, or doing anything inappropriate with J.K. (88:58).

The State may argue that Thompson’s version would not have been believed by the jury since it rejected his account of the incident with S.S., and, as with J.K., he also had prior criminal convictions. However, regardless of how a jury assessed Thompson’s credibility, that does not somehow make J.K.’s version more credible.

² In his postconviction motion, Thompson alleged that his attorney was ineffective in failing to include in the stipulation the fact that J.K. had previous criminal convictions (65:5). The circuit court ruled that Thompson’s attorney’s performance was not deficient, and there was no prejudice (90:46). On appeal, Thompson is not raising this issue as an independent ground, but he believes it is relevant to the discussion above regarding the minimal probative value of other acts evidence of the incident with J.K.

Therefore, regardless of how the jury assessed Thompson's credibility, the stipulation (of what J.K. would have testified) provided minimal probative value. The court recognized this when it ruled that the issue of admitting the evidence of J.K. was a "close call." (41:4).

b. The incident with J.K. was highly prejudicial and added unnecessary confusion to the jury.

The next step of the analysis involves the danger of unfair prejudice and confusion of the issues. Wis. Stat. § 904.03. Here there is great danger of both.

At its pretrial decision regarding other acts evidence, the court ruled that evidence of Thompson's alleged assault of J.K. evidence could not be used to show that S.S. did not consent to sexual contact with Thompson (41:4). However, it ruled that this evidence could be used as it relates the False Imprisonment charge. Accordingly, the court instructed the jury as follows:

You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.

The evidence you received on the issue of intent, whether the defendant acted with the state of mind that is for false imprisonment.

(88:121). This left jurors with the difficult task of attempting to understand that it could not use this evidence in any way as it relates to the Sexual Assault charge, but could only use it as it relates to the False Imprisonment charge. Then, even if jurors understood this, they then had the nearly impossible task

of trying to ignore this damaging evidence in deciding whether S.S. consented to Thompson's alleged sexual advances. It is difficult to image a juror being able to use the evidence in such an artificial manner.

Indeed, in his closing argument, the prosecutor showed that he was unable to make such a distinction. He told the jury:

In order to find the defendant not guilty of these counts you have to believe that the defendant on two different occasions went with two different women to an abandoned house by lying to them and physically attacked them; they both lied about it.

(88:150-51). This effectively told the jury that the evidence of the attack on J.K. could be used in deciding whether Thompson sexually assaulted S.S.

Thompson's trial should have been concerned with whether he committed various crimes against S.S., with by far the most serious crime being the sexual assault allegation. To allow the jury to hear evidence that he assaulted J.K. created an impermissible danger that the jury would use this evidence to show that Thompson had a propensity to attack women without their consent. Therefore, this evidence was highly prejudicial.

3. The court's error in allowing the other acts evidence was not harmless.

The court's decision to admit the other acts evidence of Thompson's earlier encounter with J.K. was not harmless. The result of the trial would have been different absent that evidence, at least as it pertains to the sexual assault charge.

The evidence against Thompson was far from overwhelming. There were no other witnesses to what

occurred, and the case was primarily a he-said she-said case. There was no dispute that Thompson had sexual intercourse with S.S.—both Thompson and S.S. testified to that. The only real question was whether S.S. consented.

By all accounts, S.S. willingly accompanied Thompson to the house. S.S. testified that she went with Thompson so she could use a phone to call her daughter for a ride (87:111-12). However, she had multiple opportunities to stop elsewhere to use a phone; she testified that they passed a fire station, two gas stations, and Pla-Mor Lanes on their walk to the house (87:170-71).

Further, by S.S.'s own admission, she had consumed approximately twenty drinks before the incident with Thompson began, inhibiting her ability to accurately perceive and recall events of the evening (87:151). This may explain why she could not provide an accurate timeline, or other details, such as why she initially felt uncomfortable, and how she ended up on the mattress during the alleged attack. Det. Miller testified that there was up to an eight hour difference in the timing of events in S.S.'s initial statement from her later account, but that she was "not surprised" that alcohol would have affected S.S.'s memory (88:35, 39).

It is true that there was medical evidence showing bruising on S.S.'s body. The SANE nurse, Natalie Ready, testified that some of the bruising was consistent with the version of events described by S.S., but she said that there was no way to age the bruises, which could have existed a week before the incident (87:207, 217-18). Ready also admitted that some of the bruises could have been the result of other causes, such as falling (87:220).

One of the State's witnesses, Nick Spinner, gave testimony that was favorable to the defense. Spinner, a twenty

year old man, was known to S.S. as the son of her friend (87:175). Spinner testified that he and his friend encountered S.S. twice that night. During the first encounter, S.S. was with a bald African-American man—presumably Thompson (87:176-77). This was *after* the alleged assault, according to S.S. (87:136). If S.S. had just been assaulted by Thompson, she could have asked for help from Spinner in either getting away from Thompson, or apprehending him as her attacker. However, S.S. did not ask for assistance, or show any sign that she was in any distress. Rather, Spinner merely testified that S.S. may have said “hello” to him (87:177).

An hour later, Spinner and his friend saw S.S. again, this time alone (87:177). Although Spinner testified that she “seemed, um, kind of distraught,” and that she was “asking for help,” he did not testify as to what kind of “help” she sought and did not report that she made any mention to him about being assaulted (87:177-78). This is especially significant since she had seen Spinner during the first encounter. Since S.S. presumably knew that Spinner had seen her “attacker” and could help identify him, she had even more reason to call Spinner’s attention to what had occurred. The fact that she knew Spinner as her friend’s son would have made her more comfortable in reporting the incident to him (87:136-37).³

Based on the above weaknesses of the State’s case, and the highly prejudicial nature of the other acts evidence regarding J.K., the court’s error in allowing this evidence cannot be deemed harmless.

³ In her testimony, S.S. was asked “Who was the first person you told about what happened?” She replied “Nick Spinner.” (87:98). However she did not specify that she told him she had been assaulted.

II. Trial counsel was ineffective in failing to elicit testimony from Detective Miller indicating a lack of evidence of urine on the floor of the basement where the incident occurred.

A. Introduction

At trial, S.S. testified that at some point after she was in the house with Thompson, she decided that she wanted to leave, so she asked Thompson to use the bathroom which she thought to be upstairs (87:121). S.S. testified that in response, Thompson somehow implied that she should relieve herself on the floor, and that he stood about one foot away from her as she urinated on the basement floor (87:121-122). This testimony was critical evidence against Thompson because it strongly indicated that, by not letting her out of his sight, he was holding S.S. against her will.

As it turns out, there were readily available ways for Thompson's attorney to shed doubt on S.S.'s testimony. This, in turn, could have called into question the entirety of her testimony. Counsel could have presented evidence that, despite the fact that police knew about S.S.'s urine allegation, the State failed to present physical evidence of urine residue on the floor. However, counsel failed to present any evidence to dispute this aspect of S.S.'s testimony, except through Thompson's own testimony. Because of this, Thompson was deprived of his right to the effective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel performed deficiently, and that counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). To demonstrate deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness considering all the circumstances. *Id.* at 688.

To demonstrate prejudice, a defendant must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The prejudicial effect of each deficiency should not be evaluated by itself, but rather prejudice “should be assessed based on the cumulative effect of counsel's deficiencies.” *State v. Thiel*, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. Thompson can meet both prongs of this test.

Ineffective assistance of counsel claims present mixed questions of fact and law. *State v. Maloney*, 2005 WI 74, ¶15, 281 Wis. 2d 595, 698 N.W.2d 583; *State v. McDowell*, 2004 WI 70, ¶ 31, 272 Wis. 2d 488, 681 N.W.2d 500. The trial court's findings of fact shall not be disturbed unless they are clearly erroneous. *McDowell*, 2004 WI 70, ¶ 31, . Whether counsel's performance is constitutionally insufficient is a question of law to be reviewed *de novo*. *Id.*

B. Counsel's performance was deficient and Thompson was prejudiced as a result.

It is safe to say that nearly everyone has had the unfortunate experience of walking through a stairwell or parking lot where someone has urinated. This is immediately discernable by the stench, and by sight—either of a liquid or crystal residue. It is also well known that until the urine is cleaned up, the odor and the residue persist for a considerable length of time.

Applying such widely known knowledge to Thompson's case, it could be fairly expected that any urine on the basement floor from S.S. should have been easily detected, even a week after the incident, which is when Det. Miller inspected the house (82:17). It also could be expected that Det.

Miller would have been on the lookout for this type of evidence since S.S. had told her that Thompson forced her to urinate on the floor (82:14). She also specified where this occurred—“directly” in front of the washer and dryer (87:122). There was no evidence of a drain in the area. Discovering any trace of S.S.’s urine would obviously have provided extremely strong evidence supporting her story because no one would urinate on a floor unless forced.

At Thompson’s preliminary hearing, Det. Miller testified that during her investigation, she saw no urine in the basement (82:13). She did state that there were “distinct odors” in the house but added that it was “very difficult to discern if the odors I was smelling was urine or numerous other things in this house.” (82:14). Det. Miller further testified that Michael Connor, the landlord of the house, did not mention finding or smelling urine in the basement (82:13).

At trial, the jury heard S.S. testify that Thompson had forced her to urinate on the basement floor (87:121-22). But the jury never heard what Det. Miller had testified to at the preliminary hearing—that neither she nor the landlord had seen or smelled urine in the house. This testimony would have been easy to elicit at trial. Det. Miller testified at the trial, but was never asked about urine. Connor did not testify in person, although a stipulation was entered concerning his arrangement with Thompson allowing him to use the house, but there was nothing in the stipulation concerning urine in the basement (87:181-82).

Thompson’s trial attorney had heard Det. Miller’s testimony at the preliminary hearing, and was aware of the fact that at trial, the State had failed to offer any physical evidence supporting S.S.’s allegation regarding urinating on the floor (90: 12). Despite this, counsel did nothing to bring up this

weakness in the State's case, and failed to exploit it in any way. He could have done this in at least two ways.

First, counsel could have simply pointed out to the jury in his closing argument that the State had failed to present any physical evidence S.S.'s urination claim. At the postconviction hearing, trial counsel confirmed that the theory of defense was that S.S. was not credible, and that the sexual contact with Thompson was consensual (90:6). Counsel testified that he was unsure as to whether any urine would have been "left over" since investigators did not inspect the house for a period of time after the incident (90:9). However, he admitted that there was no "downside" to making such an argument at closing and that he had no reason to not make it (90:9-10).

Second, during his cross examination of Det. Miller, trial counsel could have elicited the same testimony that had been presented at the preliminary hearing—that no one had noticed urine in the basement. At the postconviction hearing, trial counsel testified that he had no reason for not asking Miller whether she had observed urine residue on the floor (90:11). But as for asking Miller about the odor, counsel testified that he decided against this option because the jury would hear that there "was really bad smells in the house that might have drawn away...a person who was not being held there by force." (90:11).

In denying the postconviction motion, the court apparently agreed with counsel's decision to not cross examine Det. Miller about the odors, stating that Thompson's own testimony "would have been undermined to say the least by just the disgusting nature of where this supposed sexual consensual interlude would have taken place." (90:45-46) (Appendix B).

However, although counsel's decision might be seen as a strategic decision, it is not reasonable. *See State v. Felton*, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983) ("We will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment"). Counsel's "strategic" decision makes no sense because the jury had heard plenty of evidence about the unkempt condition of the house. The jury viewed at least five photographs of the basement, and both S.S. and Det. Miller testified about the basement's condition (88:14-17; 87:115-19). There was no doubt or dispute about the fact that the basement was dirty and disheveled.

Therefore, counsel's decision to not pursue the urine issue on cross examination was not reasonable when weighed against the benefits of the jury hearing that the State's investigation failed to find evidence of urine. This constitutes deficient performance.

Counsel's deficient performance also prejudiced Thompson. In its ruling denying the postconviction motion, the court held that in view of the "other evidence in this case," there was no prejudice to Thompson (90:46). But the court is wrong because it undervalued both the highly damaging nature of S.S.'s allegations and the ease of mitigating that damage, and overvalued the strength of the other evidence against Thompson. S.S.'s allegations of being forced to urinate on the floor, if believed, constitutes extremely strong evidence that she was forced to remain in the house, and that the sexual contact was non-consensual. There was readily available evidence that there was no urine residue on the floor—the fact that neither Det. Miller nor the landlord had noted anything—but the jury heard none of this evidence. Given the overall weakness of the State's case—as set forth in the previous

section—counsel’s failures to exploit this evidence was prejudicial.

III. Trial counsel was ineffective in failing to include in his motion for *in camera* review of S.S.’s mental health records information that people with borderline personality disorder may suffer from hallucinations and unstable interpersonal relationships.

Before trial, Thompson’s attorney filed a *Shiffra-Green*⁴ motion requesting *in camera* review of S.S.’s mental health records (14).

To prevail on a motion for *in camera* review of confidential records, a defendant must “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.” *State v. Green*, 2002 WI 68, ¶ 34, 253 Wis. 2d 356, 646 N.W.2d 298. Information is “necessary to a determination of guilt or innocence” if it “tends to create a reasonable doubt that might not otherwise exist.” *Id.* Essentially, the test “requires the court to look at the existing evidence in light of the request” to determine “whether the records will likely contain evidence that is independently probative to the defense.” *Id.* In cases presenting close calls, “the circuit court should generally provide an *in camera* review.” *Id.* ¶ 35; *State v. Walther*, 2001 WI App 23, ¶ 14, 240 Wis. 2d 619, 623 N.W.2d 205.

Thompson’s pretrial motion provided evidence that S.S., through her own admission in a prior court appearance,

⁴ *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

suffers from borderline personality disorder (14:4). The motion then alleged that S.S.'s mental health records may contain relevant exculpatory information (14:4). The motion also indicated that, according to the National Institute of Mental Health, one symptom of borderline personality disorder is impulsive behavior (14:5).

At a pretrial hearing on the *Shiffra-Green* motion, Thompson's attorney argued that if S.S. was "reckless" or "impulsive" as a result of her mental illness, she was "not like a typical person; and a psychologist could look through her records and say, look, this is the type of person who engages in this frequently." (85:6-7). However, the court denied Thompson's motion, stating counsel had not "given me the level of proof that I need that this information is necessary to your defense" and that the defense "stands on its own without this information." (85:12). The court then stated that if S.S.'s mental illness was one that "changes her reality or causes her to hallucinate," this would be a different matter (85:12-13).

Unfortunately for Thompson, his attorney did not recognize that, besides impulsivity or recklessness, *other* characteristics may be associated with borderline personality disorder (65:7). According to the Diagnostic and Statistical Manual, Fifth Edition (DSM-V)⁵, "some individuals [with borderline personality disorder] develop psychotic-like symptoms (e.g., hallucinations, body-image distortions, ideas of reference, hypnagogic phenomena) during times of stress." (73:2) (Attached as Appendix E). DSM-V also states that borderline personality disorder is marked by "a pervasive pattern of instability of interpersonal relationships, self-image,

⁵ The Diagnostic and Statistical Manual of Mental Disorders (DSM) has been recognized as "the primary tool of clinical diagnosis in the psychiatric field." *State v. Robertson*, 2003 WI App 84, ¶ 27, fn. 6, 263 Wis. 2d 349, 661 N.W.2d 105; *State v. Post*, 197 Wis. 2d 279, 305, 541 N.W.2d 115 (1995).

and affects, and marked impulsivity, beginning by early adulthood and present in a variety of contexts” (73:1).

Although not alluded to in Thompson’s pretrial *Shiffra-Green* motion, these characteristics are highly relevant to his defense. It was apparent that S.S. was enduring significant stress at the time she met Thompson. S.S. testified at trial that on that evening, she was having a fight with her on-again, off-again boyfriend after having consumed about twenty drinks (87:150-51). Shortly before meeting Thompson, S.S. had been ejected from the bar for fighting with her boyfriend (87:151). These stresses made it more likely that S.S. could have experienced psychotic-like symptoms on the night in question.

Counsel’s failure to include any reference to the psychotic-like symptoms of borderline personality disorder in his *Shiffra-Green* motion constitutes ineffective assistance of counsel.

Clearly, by filing a *Shiffra-Green* motion, counsel recognized the value of inspecting the mental health records of S.S.—that is why he filed the motion in the first place. So the question then becomes why counsel did not include these additional grounds in his motion. At the postconviction hearing, trial counsel agreed that these could have provided additional bases supporting his *Shiffra-Green* motion, and admitted that he had no strategic reasons for failing to do so (90:17-18). However, he testified that he had not reviewed the DSM-V entry for borderline personality that included the reference to psychotic-like symptoms (90:20).

In denying Thompson’s postconviction motion, the circuit court stated that Thompson’s reference to additional symptoms of S.S.’s disorder from DSM-V was insufficient since there was “no indication of her mental illness problems are anything different” than what was included in trial

counsel's pretrial motion (90:41) (Appendix B). But this is wrong. As indicated above, trial counsel's pretrial motion included no reference to the possibility that S.S.'s mental health records would contain information concerning hallucinations and her unstable interpersonal relationships. In contrast, Thompson alleged in his postconviction motion that trial counsel was ineffective for failing to include in his *Shiffra-Green* motion the fact that individuals with borderline personality disorder may also experience hallucinations, and may have unstable interpersonal relationships marked by sudden shifts in behavior and mood (65:8-9).

Given S.S.'s diagnosis of borderline personality disorder, and the possibility that she suffered from hallucinations and unstable interpersonal relationships, there was an increased likelihood that her mental health records contain information that would be helpful to Thompson's defense. Specifically, her records could contain evidence that, on the night of her encounter with Thompson, she was significantly impaired in her ability to accurately perceive or recall events. It is true that Thompson has no specific evidence that S.S. was hallucinating, as pointed out by the court in its denial of the postconviction motion (90:41). However, there was sufficient evidence that S.S. had mental disorders, and that she was under a great deal of stress, conditions which can cause hallucinations, according to DSM-V. Obviously, Thompson cannot predict what specific material would be in S.S.'s mental health records—he could not know because he had no access to these records. That is why an *in camera* inspection is necessary. But he has alleged sufficient information to justify such an inspection.

Additionally, DSM-V indicates that people with borderline personality disorder experience unstable interpersonal relationships. Specifically, individuals with borderline personality disorder have a “tendency to

spontaneously idealize potential caregivers or lovers, and special sensitivity to interpersonal stresses, real or imagined fears of abandonment, which can lead to anger and enduring bitterness.” (73:1-2). If S.S. suffers this symptom, it would explain Thompson’s testimony at trial. As Thompson testified, he offered to give S.S. money so she could repay her boyfriend (88:57, 63). This suggests that S.S. could have viewed Thompson as a caretaker. Furthermore, Thompson testified that S.S. initiated intimacy with him, suggesting the possibility that she viewed him as a lover (88:62). If so, S.S. may have become bitter towards Thompson once she perceived impending abandonment. Given that people with borderline personality disorder “may switch quickly from idealizing other people to devaluing them,” S.S. may have consented to sex with Thompson, then devalued him once she perceived that he was going to abandon her, thereby causing her to become bitter towards him.

Because these circumstances align with behavior exhibited by some with borderline personality disorder, S.S.’s behavior toward Thompson may have been the product of borderline personality disorder. Therefore, *in camera* review is warranted because there is a reasonable likelihood that S.S.’s records contain information confirming that S.S.’s behavior was the product of her diagnosis.

Assuming an *in camera* inspection of the records revealed information about S.S.’s mental health symptoms, counsel could have decided whether to present it to the jury after determining its evidentiary value. Ultimately, counsel performed deficiently because he had no strategic reason to omit this information, and no valid excuse for overlooking this information.

Thompson was prejudiced by counsel’s failure to include relevant diagnostic information from DSM-V in his

Shiffra-Green motion because it is reasonably likely that he would have prevailed if he had included it. To be sure, since the circuit court denied the postconviction motion on this issue, it likely would have denied the motion had it been presented at the pre-trial stage. However, as urged on appeal, the reviewing court could reverse the circuit court's holding and remand for an *in camera* inspection of the records, much as the court of appeals did in *Robertson*.

In *Robertson*, the court of appeals ordered post-trial *in camera* review of a sexual assault victim's mental health records after the defendant produced evidence of the victim's psychiatric difficulties. Specifically, the defendant offered a letter from the victim's doctor, which indicated that the victim was diagnosed with depression one year before the alleged assault, and that the victim suffered from psychotic episodes. *Robertson*, 2003 WI App 84, ¶ 27. In the letter, the victim's doctor further indicated that the victim suffered an exacerbation of her affliction shortly before the alleged assault. *Id.* Although the doctor's letter did not explain how the victim was affected by psychotic episodes, the court relied on relevant portions of DSM-V to ascertain the effects of such episodes. *Id.* In reaching its conclusion that the defendant was entitled to *in camera* inspection of the victim's psychiatric records, the court suggested that "information in the records concerning [the victim's] psychiatric treatment and the nature of the psychotic features presented by her depression could explain her behavior in a way that was not possible to do during trial." *Id.* ¶ 28.

Although the facts in *Robertson* differ from the facts in the present case, the basis of the ruling in *Robertson* supports ruling in favor of Thompson's motion for *in camera* review of S.S.'s mental health records. In both cases the victims suffered from diagnosed mental illnesses. Furthermore, in both cases the symptoms of the mental illnesses suffered by the victims

could be ascertained and understood by reviewing DSM-V. Finally, the symptoms of the mental illnesses suffered by the victims explained why they may have been unable to accurately testify to the events that led to their respective sexual assault allegations. Although S.S. had not been diagnosed with psychotic episodes, according to trial counsel's *Shiffra-Green* motion, there was evidence that she admitted that she qualified for disability status based on her mental illnesses (14:4). This increases the probability that S.S.'s mental illness had significant effects on her behavior and perception around the time she encountered Thompson.

Consequently, Thompson is entitled to an *in camera* review of S.S.'s mental health records to determine whether her mental illness affected her ability to perceive and report the facts on which she based her sexual assault allegation against Thompson. Upon the *in camera* review, the circuit court must apply the "consequential evidence" test to determine whether the material it reviews should be disclosed to the defendant, including material related to the credibility of S.S. See *Robertson*, 2003 WI App. 84, ¶22.

CONCLUSION

For the reasons explained in Point Headings I, II, and III, Thompson is entitled to a new trial. Furthermore, for the reasons explained in Issue IV, Thompson is entitled to an *in camera* review of S.S.'s mental health records.

Respectfully submitted this 30th day of October, 2015.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 7,443 words.

John A. Pray

ELECTRONIC CERTIFICATION

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

John A. Pray

CERTIFICATION AS TO APPENDICES

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

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

John A. Pray

TABLE OF APPENDICES

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App. E	Diagnostic and Statistical Manual of Mental Disorders (5 th Ed), entry for Borderline Personality Disorder