STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP1764-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODELL THOMPSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
AND AN ORDER DENYING A MOTION FOR
POSTCONVICTION RELIEF ENTERED IN
THE CIRCUIT COURT FOR LA CROSSE COUNTY,
THE HONORABLE RAMONA A. GONZALEZ, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The issues may be decided on the briefs, which adequately set forth the factual and legal bases for Thompson's claims. The

State agrees with Thompson that this court's decision is unlikely to warrant publication. *See* Wis. Stat. Rule 809.23(1).

STATEMENT OF THE CASE

Thompson's statement of the case is adequate to frame the issues on appeal. As Respondent, the State exercises its option not to present a full statement of the case, Wis. Stat. Rule 809.19(3)(a)2., and provides facts as necessary in the Argument section.

ARGUMENT

On appeal, Thompson argues that the trial court misused its discretion in allowing certain other acts testimony because its probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues. Thompson also argues that trial counsel was ineffective for failing to (a) elicit testimony indicating that the State had no physical evidence confirming that the victim had urinated on the basement floor; and (b) note in his motion for an *in camera* review of the victim's mental health records that people (like the victim) with borderline personality disorder may suffer from hallucinations and unstable personal relationships. Each of these claims fail.

First, the trial court properly admitted the other act testimony because the other act was very similar in its details to the charged offense, and thus its probative value was high and not outweighed by the danger of unfair prejudice.

Second, trial counsel made a reasonable strategic decision not to question a detective about the lack of urine evidence where such questioning likely would have also elicited testimony about the decrepit scene, reminding the jury that this was not a place for consensual sex. Regardless, any deficiency was not prejudicial because the detective's testimony

would have, at worst, only indicated that the detective's investigation was not complete, and not challenged the victim's account or her credibility.

Third, for multiple reasons, Thompson fails to show either deficient performance or prejudice from trial counsel's failure to mention in his motion to access the victim's mental health records that some persons with borderline personality disorder suffer from hallucinations and have unstable personal relationships.

I. The Trial Court Acted Within Its Discretion In Admitting J.K.'s Testimony That Thompson Had Held Her Against Her Will and Attempted To Assault Her.

A. Other acts evidence and appellate review of a decision to admit such evidence.

Under Wis. Stat. § 904.04(2), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith," is admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Stated differently, the statute "favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W. 2d 429 (1993).

In *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W. 2d 30 (1998), the supreme court adopted a three-part test for courts to apply in determining whether to admit other-acts evidence. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W. 2d 399. Under this test, other-acts evidence is properly admissible: (1) if it is offered for a permissible purpose, such as one listed

under Wis. Stat. § 904.04(2); (2) if it is relevant; (3) if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, waste of time or needless presentation of cumulative evidence. *See Sullivan*, 216 Wis. 2d at 772-73.

The independent review doctrine applicable to appellate review of discretionary decisions applies to decisions to admit other acts evidence. *See Sullivan*, 216 Wis. 2d at 781. Thus, an appellate court must examine the record to determine whether a permissible purpose exists to admit the evidence. *State v. Hunt*, 2003 WI 81, ¶¶ 43-50, 263 Wis. 2d 1, 666 N.W. 2d 771.

The relevance of other act evidence—and thus its relative probative value—is determined by the similarity of the act to the charged offense. *Hunt*, 263 Wis. 2d 1, ¶ 64. "Similarity is demonstrated by showing the 'nearness of time, place, and circumstance' between the other act and the alleged crime." *Id.* (quoted source omitted). "The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." *Sullivan*, 216 Wis. 2d at 787 (footnote omitted).

The decision whether to admit or exclude other-acts evidence is addressed to the sound discretion of the trial court. If there is a reasonable basis for the trial court's ruling, an appellate court may not find an erroneous exercise of discretion. *Hunt*, 263 Wis. 2d 1, ¶¶ 34, 42 (citation omitted). A ruling to admit other acts evidence must be upheld on review if it "'was *not* a decision that no reasonable judge could make.'" *State v. Hurley*, 2015 WI 35, ¶54, 361 Wis. 2d 529, 861 N.W. 2d 174 (*quoting State v. Payano*, 2009 WI 86, ¶ 52, 320 Wis. 2d 348, 768 N.W. 2d 832 (emphasis in original).

B. The court properly determined within its discretion that the probative value of J.K.'s testimony was not substantially outweighed by the danger of unfair prejudice and confusion of the issues.

1. Background

The State charged Rodell Thompson in a criminal complaint with second-degree sexual assault, misdemeanor battery, and false imprisonment, all as a repeater for holding S.S. in a vacant house and sexually assaulting her in the overnight hours of September 16 to 17, 2013 (4:2-3).

The complaint alleged that Thompson approached S.S. outside of the Old Style Inn in La Crosse (4:2-3). S.S., who had been drinking, was in need of phone to call her daughter for a ride home (4:2). Thompson told her that he had a phone she could use, but it was back at his house (4:2). S.S. followed Thompson to a house in the neighborhood that looked like it was being renovated (4:2). Thompson led S.S. down into the basement of the vacant house, and S.S. sat on a make-shift sofa that appeared to be a bench seat of a car (4:3). Thompson started to make advances on S.S., which she refused (4:2-3). S.S. said that she wanted to leave, and repeatedly asked to use the phone Thompson had promised her (4:3). Thompson became angry and struck S.S. on the head, and had forcible penis-to-vagina intercourse with her on a bare mattress on the floor (4:3). Twice, S.S. thought she heard muffled voices outside and tried to call out, but Thompson covered her mouth with his hands (4:3). More details about the assault taken from trial testimony are provided later in this brief.

Before trial, the State filed a motion to admit evidence of three alleged prior assaults committed by Thompson, including an attempted assault of J.K. in July 2012 (32). Following a

hearing and briefing, the court issued an April 11, 2014 decision and order admitting all three incidents (41:1-5; A-Ap. D).

Of these incidents, the State elected to introduce at trial only the evidence of the alleged sexual assault of J.K., which the circuit court had called in its April 2014 order "strikingly similar to the instant offense." (41:3).[1] The parties stipulated to what J.K.'s testimony would have been, and the judge read the stipulation to the jury (87:180-81). The stipulation, which was substantially similar to the State's proffer in the other acts motion (32:4-5), alleged that Thompson had approached J.K. near the Old Style Inn, made a false promise to induce her to come with him, took her to a vacant house in the neighborhood, held her there, and tried to assault her:

> On or about July 10th 2012, at approximately 11 a.m., a woman named [J.K.] had just left a friend's house when she was approached by the defendant, Rodell Thompson, as she was walking near the Old Style Inn in La Crosse, Wisconsin. She vaguely recognized him, but could not determine how she knew him. He began to converse with her, and asked her if she wanted to smoke marijuana with him at his place. She agreed, and they walked to an abandoned house at 1113 South 3rd Street in La Crosse, Wisconsin. [J.K.] became apprehensive when she realized

[1] This statement would seem to contradict the court's later statement that the issue of admitting the other acts evidence was a "close call," which Thompson highlights in his brief (Thompson's Br. at 13) ("The court … ruled that the issue of admitting the evidence of J.K. was a 'close call.'"). But this comment referred to the court's decision to admit *all three other acts incidents* (see 41:1-5; A-Ap. D). The State would agree that the other two incidents (32:3-4), which the State chose not to introduce at trial, were not as factually similar to the charged offense as J.K.'s allegations, and thus made the court's decision to admit all three incidents a "close call." (In the other two incidents, Thompson allegedly assaulted a woman in 1996 at his home after the woman had consensual sex there with Thompson's cousin, and Thompson allegedly assaulted an acquaintance in 2010 when she was helping him to move to a new apartment (32:3-4)).

> the house was abandoned and there was no furniture in it. They walked into a back room with a clothes washer and dryer. [J.K.] sat on the carpet, and the defendant sat next to her and stared at her for a period of time, which made her uncomfortable. [J.K.] said something to the defendant about how she was going to leave if they weren't going to smoke marijuana. At that time, [Thompson] got on top of her; and they struggled on the ground. At one point, he put both hands over her mouth and told her not to scream. She continued to struggle with him. When she was able to get him off of her, he blocked the door and would not allow her to leave. [J.K.] pleaded with him and told him that she needed to go to a hospital because she might be pregnant and had a bad stomachache. [J.K.] told [a police officer] that she was finally able to break free from him and took off running out of the house.

(87:180-81).

In its other acts decision, the court held that the evidence was admissible to prove that Thompson intended to confine S.S. without her consent on the false imprisonment charge (41:4; A-Ap. D). But the court disallowed J.K.'s testimony for the purpose of showing that Thompson intended to have sex with S.S. without her consent, citing *State v. Alsteen*, 108 Wis. 2d 723, 730, 324 N.W.2d 426 (1982) ("Consent is unique to the individual. 'The fact that one woman was raped … has no tendency to prove that another woman did not consent.'") (*quoting Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948)). Consistent with this ruling, the court instructed the jury that it could consider J.K.'s testimony only in determining whether Thompson intended to falsely imprison S.S. (88:121).[2]

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[2] This court has recognized that the *Lovely/Alsteen* rule prohibiting other acts evidence on the issue of consent in sexual assault cases "is not absolute. Where … the other-acts evidence of non-consent relates not only to sexual contact but also to a defendant's modus operandi encompassing conduct inextricably connected to the strikingly similar alleged criminal conduct at issue, the evidence of non-consent may be admissible to

2. J.K.'s allegation was very similar in its details to the charged offense, and thus its probative value was not substantially outweighed by the risk of unfair prejudice or confusion of the issues.

Thompson concedes that the trial court correctly determined that under *Sullivan* that J.K.'s testimony (1) was admitted for an appropriate purpose—to prove intent on the false imprisonment charge—and (2) was relevant (Thompson's Br. at 10-11).

The State agrees, and submits that the evidence was also admissible on the false imprisonment charge under the related permissible purpose of common plan or scheme, or modus operandi. *See Hurley*, 361 Wis. 2d 529, ¶¶ 70-74 (applying independent review doctrine to find alternative permissible purposes for admitting other acts evidence). Here, the commonalities between J.K.'s allegations and the charged offense—including the places (Old Style Inn and nearby vacant homes) and circumstances (use of false promises to lure victim to the vacant home) associated with the two incidents—demonstrated that Thompson used a common scheme in the two incidents, and acted with the intent to confine his victims.

Thompson contends that the court misused its discretion in admitting J.K.'s testimony because the testimony's probative

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establish motive, intent, preparation, plan, and absence of mistake or accident under Wis. Stat. § 904.04(2)." *State v. Ziebart*, 2003 WI App 258, ¶ 20, 268 Wis. 2d 468, 673 N.W. 2d 369. Thus, the trial court could well have admitted J.K's testimony on the issue of intent on the sexual assault charge under *Ziebart*; J.K.'s allegation and the charged offense are "strikingly similar" in their particulars. But the State does not (and need not) argue that the trial court erred in limiting J.K.'s testimony to the false imprisonment charge in asking this court to uphold the trial court's decision to admit the evidence.

value was minimal, and was outweighed by the danger of unfair prejudice and confusion of the issues (Thompson's Br. at 11-14).[3]

Other acts evidence is not unfairly prejudicial just because it may harm the opposing party's case; nearly all evidence operates to the harm of the party against whom it is offered. Rather, the test is whether the prejudice is unfair. *State v. Johnson*, 184 Wis. 2d 324, 340, 516 N.W. 2d 463 (Ct. App. 1994).

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Sullivan, 216 Wis. 2d at 789-90. The party opposing the admission of evidence bears the burden of showing that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Marinez*, 331 Wis. 2d 568, ¶ 41. The term "substantially" is critical. "[I]f the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted." *Speer*, 176 Wis. 2d at 1115.

Addressing first the evidence's probative value, Thompson appears to argue that it was limited because: (1) it was presented in the form of a stipulation, and thus J.K. was

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[3] Thompson also argues that the court's admission of J.K.'s testimony was not harmless. The State does not advance a harmless error argument because despite problems with Thompson's testimony and the nurse examiner's testimony that S.S.'s injuries were consistent with her report of an assault, the State cannot argue that there is no reasonable doubt that the jury would have found Thompson guilty absent J.K' s testimony. *State v. Harvey*, 2002 WI 93, ¶¶ 44-45, 254 Wis. 2d 442, 647 N.W. 2d 189.

not subject to cross-examination; (2) J.K. had prior criminal convictions; (3) J.K. did not show up on the preliminary hearing when the State charged Thompson with her allegations, which led the State to dismiss the case, and thus no fact finder ever determined that probable cause existed; and (4) Thompson disputed J.K.'s allegations (Thompson's Br. at 11-13).

None of Thompson's attacks show that J.K.'s testimony had limited probative value. First, the suggestion that stipulated-to evidence is somehow less probative than live testimony is a novel one; at any rate, Thompson himself elected to forgo the opportunity to cross-examine J.K. by agreeing to the stipulation. Second, the fact that the criminal case charging Thompson with assaulting J.K. was dismissed without the court making a probable cause determination has little relevance. Courts routinely admit other acts evidence arising from allegations that are never charged or set for trial. Third, in retrospect, it is hard to argue that these facts would have undermined the evidence's probative value where these facts were never presented to the jury—just as J.K.'s prior criminal convictions were never presented to the jury.[4]

More importantly, Thompson fails to address the focus of the probative value inquiry: the similarity of the other act and the charged offense. J.K.'s allegations and the charged offense were remarkably near in place and circumstances. *Hunt*, 263 Wis. 2d 1, ¶ 64. In both cases, Thompson:

- approached the victims near the Old Style Inn in La Crosse;

- promised something that the victim wanted (a phone in S.S.'s case, marijuana in J.K.'s case) that Thompson did

[4] Thompson also failed to present J.K.'s criminal charges to the trial court in his response to the other acts motion (see 36; 38; 40; 86:18-33).

not have or would not give to induce the victim to come with him;

- used a vacant house within walking distance of the Old Style Inn as the place to confine his victim; and

- kept the victim there against her will and physically attacked her, and placed a hand over the victim's mouth when she attempted to call out.

(4:2-3; 87:180-81). Based on the foregoing, the probative value of J.K.'s other act evidence was high, and Thompson fails to show otherwise.

Thompson argues that J.K.'s testimony would have greatly confused the jurors because it was allowed only as to the false imprisonment charge. Thompson argues that jurors would not have understood this, or, at least, would have been unable to ignore the testimony when evaluating the sexual assault charge (Thompson's Br. at 13-14). The State disagrees.

While J.K.'s testimony was plainly relevant to the sexual assault charge,[5] the jury was instructed, consistently with the trial court's other acts ruling, that the evidence could be considered only on the false imprisonment charge (88:121). Courts necessarily presume that the jury follows the instructions given to it. *See, e.g. State v. LaCount*, 2008 WI 59, ¶ 23, 310 Wis. 2d 85, 750 N.W.2d 780; *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). "A reviewing court 'presume[s] that juries comply with properly given limiting and cautionary instructions, and thus consider this an effective means to reduce the risk of unfair prejudice to the party opposing admission of other acts evidence.'" *Hurley*, 361 Wis.

[5] And could have been admitted by the circuit court on the issue of intent on that charge under *Ziebart*, see note 2 above.

2d 529, ¶ 90 (citation omitted). Thompson's assertions that the jury would not have understood the instructions and could not have properly followed them in this case are purely speculative; he provides no evidence (i.e., questions submitted during jury deliberations, juror interviews) to defeat the presumption that the jury understood and followed the court's instructions.

The State also disputes Thompson's suggestion that the prosecutor encouraged the jury to consider J.K.'s testimony on the sexual assault charge by his closing argument remarks. As the Thompson notes, the prosecutor said:

> 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).

Thompson does not explain what, exactly, is wrong with these remarks (Thompson's Br. at 14). Neither these remarks nor any other portion of the closing argument specifically links the other act evidence to the sexual assault charge (88:125-138; 149-52). The remarks reference "physical assault," not sexual assault, and Thompson was alleged to have used physical violence in confining both victims (87:132, 180-81). The record shows that the prosecutor took great care to link J.K.'s testimony to the false imprisonment count only (See, e.g. 88:125) ("I'm gonna start by talking about what we proved the defendant's intent was here in terms of falsely imprisoning women …").

The only arguably questionable part of the above remarks and the entire closing argument is the reference to "counts" instead of "count." (88:150-51). The State submits that

this one isolated verbal slip would not have so misled the jury as to require a new trial. *See Thomas v. Gilmore*, 144 F.3d 513, 518-19 (7th Cir. 1998).

Regardless, any danger of issue confusion that may have remained despite the court's instructions to the jury did not substantially outweigh the significant probative value of J.K.'s testimony. Accordingly, this court should uphold the decision to admit this evidence as an appropriate exercise of the trial court's discretion.[6]

II. Thompson Fails To Prove Ineffective Assistance In Asserting That Trial Counsel Should Have Elicited Testimony About The State's Lack Of Physical Evidence Of Urine On The Basement Floor.

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[6] Finally, if this court views this to be a close case, it should take into account the "greater latitude rule" in assessing whether the court properly exercised its discretion in admitting J.K.'s testimony. *State v. Davidson*, 2000 WI 91, ¶ 36, 236 Wis. 2d 537, 613 N.W.2d 606 ("[I]n sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'") (quoted source omitted, listing cases); *State v. Friedrich*, 135 Wis.2d 1, 19-20, 398 N.W.2d 763 (1987) (noting that a greater latitude of proof "is evidenced in Wisconsin cases dealing with sex crimes, especially those dealing with incest and indecent liberties with a child"). This rule has most commonly been applied in child sexual assault cases, but, as *Davidson* and *Friedrich* plainly state, has application in all sex crime cases. As this court recently explained: "Though most lenient in child sex assault cases, courts generally allow a '"greater latitude of proof as to other like occurrences"' in sexual assault cases. *State v. Below*, No. 2014AP2614-CR, slip op. not recommended for publication (Wis. Ct. App. Jan. 12, 2016) (citing *Davidson*) (R-Ap. 101-26). In 2004, the greater latitude rule was codified, and the statute provides, consistent with *Davidson* and *Friedrich,* that the rule applies in all cases involving, among other specified offenses, any "serious sex offense" as defined in Wis. Stat. § 939.615(1)(b). Wis. Stat. 904.04(2)(b)1.; 2013 Wis. Act 362.

A. Claims of Ineffective Assistance

To prove a claim of ineffective assistance, a defendant must show that counsel's performance was deficient, and that the deficient performance was prejudicial. *Id.* ¶ 26. Counsel renders deficient performance only by committing errors so serious that he or she ceases to function as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

"Because of the difficulties inherent" in evaluating the reasonableness of counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoted source omitted).

To show prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 693).

B. Background

At trial, S.S. testified that, once Thompson's intentions became clear to her in the basement, she came up with a plan (87:121). She would ask to use the bathroom (87:121). Seeing none in the basement, S.S. thought Thompson might allow her to use an upstairs bathroom (87:121). Once upstairs, she would run (87:121).

S.S. testified that Thompson responded to her bathroom request by telling her that she could "go anywhere … [she] wanted to," indicating the floor (87:121). S.S. said she walked into an adjacent room where the laundry was located, and Thompson followed her (87:122). S.S. then relieved herself in front of the washer and dryer while Thompson stood about a foot away from her (87:122). S.S. and Thompson returned to the other room, and, at some point thereafter, Thompson pulled the mattress that was propped up against the wall down onto the floor, and sexually assaulted S.S. (87:123-135).

Thompson testified at trial, and disputed S.S.'s version of events (88:62). Thompson said S.S. used a bathroom with a working toilet when they first arrived at the house (88:62, 74). Thompson testified that the sex was consensual (88:62, 75-76). Thompson testified that he became tired and lay down on the mattress, and that she joined him and initiated the sex (88:62).

When asked on direct why he "goes to the Old Style Inn as opposed to like a different bar," Thompson said he "usually go there to drink or to meet up with a … woman or something" and that there "would be a lot of … womens [sic] there" (88:59). Later, on cross, Thompson insisted that the thought of sex with S.S. never crossed his mind until the moment S.S. initiated the sex (88:73-74).

Thompson admitted on cross that he had no phone, and that the vacant house did not have a landline (88:74-75).

At the preliminary hearing, defense counsel Bernardo Cueto asked a detective who investigated the scene, Detective Linnea Miller of the La Crosse Police Department, whether she saw or smelled the scent of urine on the basement floor (82:14). She said that she did not see any, but "[t]here was distinct odors in this house, so it was very difficult to discern if the odors I was smelling was urine or numerous other things in

this house" (82:14). Miller also agreed that the landlord did not mention finding urine in the basement or smelling the "strong smell" of urine there (82:14).

At trial, Attorney Cueto did not ask Detective Miller about whether she saw or smelled urine, or whether the State tested for the presence of urine (88:25-37; 40-44).

After trial, Thompson alleged in a postconviction motion that defense counsel was ineffective for not eliciting testimony from Detective Miller about her not seeing any urine, and about the State not obtaining physical evidence of urine (65:2-3). Thompson further alleged counsel was ineffective for not pointing out in closing argument that the State did not present such physical evidence (65:3).

Following a postconviction hearing, the trial court denied Thompson's claim upon concluding that counsel made a reasonable strategic decision not to ask Detective Miller about the presence of urine (90:45-46; A-Ap. B). The trial court concluded that such inquiry might well have placed the fact that the crime scene was "a disgusting, nasty place … uppermost on the minds of the jury," and, regardless, any error by counsel was not prejudicial:

> With regard to the urine, um, I rarely have seen a crime scene that was probably more not conducive to the kind of romantic interlude that was presented to the jury based upon your client's testimony than this particular place….. This was a disgusting, nasty place; and Mr. Cueto made the decision not to have that be uppermost on the minds of the jury; and you can second-guess him now; but at the point in time where he was I think that was the right decision to make. His client's testimony [about the sex being consensual] would have been undermined to say the least by just the disgusting nature of where this supposed sexual consensual interlude would have taken place…. [G]iven the other, um, evidence in this case, I do not believe that

> [counsel's alleged error] would be prejudicial to [Thompson] and his case.

(90:45-46; A-Ap. B).

C. Thompson cannot prove deficient performance or prejudice for counsel not questioning Detective Linnea about evidence of urine.

On appeal, Thompson renews his argument that counsel was ineffective for failing to elicit from Detective Miller the testimony that she provided at the preliminary hearing about not seeing urine or discerning the smell of urine separate from other "distinct odors" of the house (Thompson's Br. at 19-20). Thompson also argues that counsel was ineffective for not pointing out in closing that the State did not present physical evidence to confirm S.S.'s account of having to urinate on the floor (Thompson's Br. at 20). As developed below, Thompson fails to show that counsel performed deficiently, or that prejudice resulted from his alleged error.

At the postconviction hearing, Attorney Cueto testified that he chose not to elicit testimony from Detective Miller about evidence of urine in the basement because her testimony would have also reminded jurors that this was not a place for consensual sex (90:10-12). Attorney Cueto said that he concluded that his questions about whether she detected urine there would have led to additional testimony, on direct or redirect, about the "horrible state that that apartment was in" and the "other strong odors in the house" that may have "masked" the urine smell (82:14; 90:11). This testimony would have reminded the jury that this was not a place that "a person who was not being held there by force" would choose to be (90:11).

As the trial court correctly concluded, trial counsel's strategic decision not to question the detective about whether

she detected urine in the apartment was reasonable under the circumstances.

Thompson argues that trial council's decision, while strategic, was not reasonable because the jury already heard substantial evidence that the basement was dirty and disheveled (Thompson's Br. at 21). This fact does not demonstrate that council's decision not to draw additional attention to the condition of the basement was unreasonable in light of the deference owed counsel's choices at trial. *State v. Domke*, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 805 N.W. 2d 364 ("Reviewing courts should be 'highly deferential' to counsel's strategic decisions and make 'every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'") (citations omitted). And Thompson points to nothing showing that the jury had previously heard evidence about *odors* in the house. Had Detective Miller been questioned about whether she detected urine, she would have likely testified about "distinct odors" in the basement that were strong enough that "it was … difficult to discern if the odors … [were] urine or numerous other things in this house" (82:14).

Trial counsel acknowledged at the postconviction hearing that there would have been no reason not to have pointed out to the jury in closing that the State did not present physical evidence of urine at trial (90:10). To the extent this constituted deficient performance, and to the extent counsel was deficient in not eliciting testimony about the absence of physical evidence of urine, counsel's omissions were not prejudicial.

Thompson suggests that testimony about the lack of physical evidence of urine would have challenged S.S.'s account, and harmed her credibility in the eyes of the jury. But

such testimony would have, at most, merely shown that the State's investigation of the scene was incomplete. At the evidentiary hearing, Attorney Cueto agreed with the district attorney that, from the police report, it was apparent that the investigators did not look for urine (90:20-21). Thus, the absence of physical evidence of urine was not surprising—the State didn't look or test for it—and would not have seriously called into question the truthfulness of S.S.'s account.

Accordingly, testimony about the absence of physical evidence of urine would have had limited exculpatory value, and there is no reasonable probability that such testimony or comment in closing argument about it would have changed the outcome in light of the evidence as a whole.

That evidence included testimony from sexual assault nurse examiner (SANE) Natalie Ready about her examination of S.S. the night after the assault (87:183-84; 186-87). Ready testified about bruising on S.S.'s arms, thigh, hand and wrist, and the left side of the torso; some "abnormal redness" of vaginal tissues; and some bloody mucous on the cervical os (87:194-206). Although Ready said she had no way of determining the exact cause or date of S.S.'s injuries, she said, based in part on having conducted over 100 previous SANE examinations, that these injuries were consistent with the version of events that S.S. had provided. (87:206-07, 213, 217). Ready also took a swab from S.S. vaginal area, which the state crime lab tested and determined contained Thompson's DNA (87:210; 88:53-54).

To the extent that this case turned on the jury's assessment of the relative credibility of S.S. and Thompson, Thompson's testimony had serious problems. Under the circumstances, Thompson's insistence that he did not even consider the possibility of sex with S.S. until the moment she had initiated sexual contact with him was incredible,

particularly in light of (1) his testimony that the Old Style Inn is where he would go to "meet up with a … woman or something" because there "would be a lot of … womens [sic] there"; and (2) his admission that he had no phone for S.S. to use at the vacant house (88:59, 73-75). And, though Thompson disputed that S.S. ever asked him for a phone, Thompson's own version of why he picked S.S. up outside of the bar and brought her back to the vacant house—because he wanted to help her come up with $265 to pay back her boyfriend for drugs (88:61)—would have required the jury to believe not only that Thompson did not take S.S. to the basement of the vacant house to have sex, consensual or not, but that he had taken her there for altruistic reasons.

Finally, as to the false imprisonment charge, J.K.'s testimony bolstered S.S.'s version of events leading up to the assault. As explained, the similarity between J.K.'s testimony and the facts of the charged offense was persuasive evidence that Thompson intended to falsely imprison S.S., and that he was employing a previously formulated plan or scheme in luring S.S. from the Old Style Inn to the nearby vacant house.

Based on the foregoing, Thompson has failed to meet his burden to show both deficient performance and prejudice resulting from counsel's strategic choice not to elicit testimony about the absence of physical evidence of urine.

III. Thompson Fails To Prove Ineffective Assistance For Not Stating In His Motion For A Review of S.S.'s Mental Health Records That Persons With Borderline Personality Disorder May Suffer From Hallucinations and Unstable Relationships.

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. *State v. Shiffra*, 175

Wis.2d 600, 608, 499 N.W. 2d 719 (Ct. App. 1993). In *State v. Green*, 2002 WI 68, ¶ 25, 253 Wis. 2d 356, 646 N.W. 2d 298, the Wisconsin Supreme Court clarified a record is material if it is "relevant and may be helpful to the defense."

To obtain an *in camera* inspection of privileged medical records, the 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." *Green*, 253 Wis. 2d 356, ¶ 34. "[I]nformation will be necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." *Id.* (citations omitted). In making this determination, courts "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.*

The *Green* court explained that a defendant seeking an *in camera* review "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." *Id.* "A motion for seeking discovery for such privileged documents should be the last step in a defendant's pretrial discovery." *Id.*, ¶ 35.

Here, Thompson filed a pretrial *Shiffra*/*Green* motion requesting *in camera* inspection of S.S.'s mental health records based on S.S.'s statement at a 2012 sentencing hearing that she had borderline personality disorder, and a half-page description of the disorder and its features taken from the website of the National Institute of Mental Health (NIMH) (14:4-8).

At a hearing on the request, Thompson noted that impulsiveness is characteristic of borderline personality disorder, citing NIMH's description (85:2). Thompson also asserted that engaging in unsafe sex was also symptomatic of the disorder (85:2). Thompson appeared to argue that *in camera* inspection of S.S.'s mental health records was necessary to determine whether she, in fact, had a history of impulsive sexual behavior, which, he argued, would have supported Thompson's defense that she consented to the sex (85:2-7).

The court rejected Thompson's motion on grounds that he failed to make an adequate showing under *Shiffra/Green,* and the requested information was not necessary to Thompson's defense of consent (85:10-15).

Thompson does not directly challenge the court's ruling on his *Shiffra/Green* motion. Rather, he argues that trial counsel was ineffective for not calling to the court's attention that, according to the Diagnostic and Statistics Manual, Fifth Edition (DSM-V): (1) some persons with borderline personality disorder may develop psychotic-like symptoms, including hallucinations, in times of stress; and (2) the disorder is marked by unstable personal relationships (Thompson's Br. at 23-24).

In so arguing, Thompson selectively quotes a statement by the court at the motion hearing indicating that, if S.S. had a disorder that "changes her reality or causes her to hallucinate," that would be a different matter (Thompson's Br. at 23). The court's full statement indicates that the situation would have been different if the disorder had reality-altering effects *and* Thompson had a different defense—namely, that "he was never there … or she assumed the wrong thing":

> THE COURT: Now, if [S.S.'s] mental illness was one that—that changes her reality or causes her to hallucinate… and he was never there, okay, he was never there; and that's

> his defense; she's hallucinating, Judge; or she assumed the wrong thing, then that's a different situation; but the—they theory that you're giving me for your defense [that she consented] is not enhanced in any way by this woman's mental illness….

(85:12-13).

Thompson argues, as he must, that trial counsel performed deficiently in failing to cite to the above-discussed portions of the DSM-V in his motion to seek inspection of S.S.'s mental health records, and that this deficiency was prejudicial because it is reasonably likely that the court would have granted his motion under *Shiffra*/*Green* but for counsel's omission. Thompson fails to prove either deficient performance or prejudice.

Addressing prejudice first, Thompson cannot meet his burden to show that a motion asserting that psychotic-like symptoms, including hallucinations, would have been sufficient to obtain an *in camera* review under the standards set forth in *Shiffra*/*Green*.

First, Thompson provided no evidence in his postconviction motion that S.S. had ever suffered psychotic-like symptoms, and any suggestion that she had would be speculative. All Thompson offers in support of his request for S.S.'s privileged records is her statement at the 2012 sentencing that she suffered from borderline personality disorder, and the DSM-V's reference to hallucinations and other psychotic-like symptoms as an "associated feature supporting a diagnosis" of the disorder (65:16; A-Ap. E). This showing is insufficient to demonstrate that there is a reasonable likelihood that the records do, in fact, contain evidence that S.S. suffered from hallucinations.

Second, Thompson fails to offer a plausible explanation for how such evidence, even if it did exist, would be necessary to a determination of guilt or innocence in light of the evidence in the case. Thompson is vague about how evidence that S.S. suffered from hallucinations and other psychotic-like symptoms might have helped his defense,[7] and it is very difficult to see how such evidence would have done so. The physical evidence in the case established that Thompson had intercourse with S.S.; Thompson's defense obviously could not have been that S.S. hallucinated the encounter. And a defense that she hallucinated—or somehow misperceived—the consensual sexual encounter to be a rape would be difficult to imagine.[8] At any rate, Thompson has the burden under *Shiffra*/*Green* to explain with some particularity how the evidence sought would aid his defense, and he fails to provide a reasonable theory under which the evidence would have tended to create a reasonable doubt that might not otherwise exist.

Thompson also fails to demonstrate that trial counsel's performance in preparing his request for an *in camera* inspection was deficient. Thompson suggests that counsel rendered substandard assistance by not consulting the DSM-V in preparing his motion. But counsel did consult another recognized authority in the mental health field, the NIMH.[9]

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[7] He speculates only that the records might show that S.S. "was significantly impaired in her ability to accurately perceive or recall events" on the night of the incident (Thompson's Br. at 25).

[8] If she perceived the encounter to be a rape, she presumably would have responded as though she were being raped.

[9] "The National Institute of Mental Health (NIMH) is the lead federal agency for research on mental disorders. NIMH is one of the 27 Institutes and Centers that make up the National Institutes of Health (NIH), the nation's medical research agency. NIH is part of the U.S. Department of Health and Human Services (HHS)." See https://www.nimh.nih.gov/about/index.shtml (last accessed Jan. 26, 2016).

(14:8). The NIMH's webpage about borderline personality disorder,[10] which trial counsel referenced and included a portion of in the motion, provides a definition of the disorder, and signs and symptoms of the disorder. Additionally, counsel consulted with a psychologist, Dr. Brian Stress, in preparing the motion (90:23).

Thompson's work on the motion was well within the range of competent assistance, and Thompson fails to show otherwise. The fact that the NIHM's description of borderline personality disorder does not state that some persons with borderline personality disorder may experience psychotic-like symptoms (and the psychologist did not tell Attorney Cueto this) does not demonstrate that counsel's performance in preparing the motion was deficient.

Finally, as to Thompson's claim that counsel failed to include in his motion information that persons with borderline personality disorder may suffer from unstable personal relationships, Thompson is mistaken. The NIMH's description of the disorder that trial counsel provided with his motion included this information (14:8). To the extent Thompson means to argue that trial counsel was ineffective for not focusing his motion on this information, Thompson fails to show that it is reasonably likely that such an argument would have caused the trial court to grant the motion under *Shiffra/Green*.

Thompson spins a very detailed theory about how S.S. might have been motivated to falsely accuse Thompson based on the DSM-V's notation that some persons with borderline personality disorder "spontaneously idealize potential caregivers and lovers" and may suffer from "real or imagined

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[10] http://www.nimh.nih.gov/health/topics/borderline-personality-disorder/index.shtml (last accessed Jan. 27, 2016).

fears of abandonment, which can lead to anger and enduring bitterness."(Thompson's Br. at 25-26). This is a far more specific symptom than the general symptom of having "unstable interpersonal relationships." The claim that S.S. has this particular symptom is, once again, wholly speculative, and Thompson fails to show that there is a reasonable likelihood that the records will demonstrate that she suffers from this particular symptom. And Thompson fails to show that his theory—that S.S. idealized Thompson as a caregiver or lover, and that she became embittered when she perceived that he had abandoned her and concocted a rape story to seek revenge, all within the course of a day at most—is sufficiently plausible to justify an *in camera* review of S.S.'s privileged records.

Further, the elaborate nature of this theory, and its heavy reliance on one of the many potential symptoms of borderline personality disorder listed in the DSM-V, argues against a deficient performance determination. Trial counsel did not render assistance below the standard of competent representation by not presenting this particular, highly specific argument in support of his motion. *See State v. Felton*, 110 Wis. 2d 485, 501-02, 329 N.W. 2d 161 (1983) (counsel's performance not deficient when he or she selects a particular argument from among the available alternatives even if, in hindsight, counsel's choice was not the "best").

Based on the foregoing, Thompson fails to prove his claim that trial counsel was ineffective for failing to include in his motion for *in camera* inspection of S.S.'s mental health records certain information about borderline personality disorder from the DSM-V.

CONCLUSION

For the reasons set forth above, this court should affirm the judgment of conviction and the circuit court's order denying Thompson's motion for postconviction relief.

Dated this 29th day of January, 2016.

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 7,489 words.

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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 29th day of January, 2016.

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