STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2015AP001764 - 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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

In his appeal, Thompson argued that the trial court erroneously exercised its discretion in allowing the jury to hear the "other acts" evidence that Thompson had assaulted a woman, J.K., in July, 2012, approximately one year before the alleged assault on S.S. He conceded that J.K.'s testimony, which was admitted through a stipulation with the defense, was offered for an acceptable purpose. That acceptable purpose was to prove Thompson's intent on the False Imprisonment charge. However, Thompson argued that the probative value of J.K.'s testimony was substantially outweighed by the danger of unfair prejudice and confusion of the issues.

The State disagrees. First, the State asserts that the probative value of the J.K. evidence is high due to the similarity of that act and the offense against S.S. (State's brief at 10-11). The State lists several facts shared by the two cases, including that Thompson approached both victims near the Old Style Inn, that Thompson promised each victim something she wanted, that he took each victim to a nearby vacant house, and that he physically attacked each woman when she attempted to call out.

Thompson acknowledges these similarities, but submits that none are so unusual or improbable that they should be accorded undue weight. It is not uncommon for two people to meet near a neighborhood bar and then walk to an unoccupied house. In addition, there are also differences between the charged act and the other act that dilute the probative value of the J.K. incident. S.S. testified that she had never seen

Thompson before (87:111), whereas J.K. "vaguely recognized him" but was unable to determine how she knew him (87:180). The enticement for J.K. to go to his "place" was to go and smoke marijuana (87:180), but with S.S it was to get a phone, and she gave no indication that she intended to stay there (87:111). S.S. was highly intoxicated (87:151), whereas there was no indication that J.K. had been drinking, or even that she had been in the Old Style Inn (87:180).

In response to Thompson's point that jurors could easily use the J.K. incident as evidence of the sexual assault on S.S., the State points out that the jury was instructed that the evidence could be considered only on the False Imprisonment charge. (State's brief at 11). However, the fact that the jurors were given this instruction does not necessarily mean that they followed it. *See Leviton v. United States*, 343 U.S. 946, 948 (1952) (mem of Frankfurter, J.) ("jury admonitions are like telling a little boy to stand in a corner and not think of a white elephant, and "the naive assumption that prejudicial effects can be overcome by instructions to the jury … all practicing lawyers know to be unmitigated fiction").

The State also disputes Thompson's point that the probative value of the J.K. incident was limited since it was presented to the jury as a *stipulation* rather than live testimony. (State's brief at 10). The State suggests that Thompson himself elected to forgo the opportunity to cross-examine J.K. by agreeing to the stipulation. Of course, this ignores the fact that it was the State's obligation to present evidence proving Thompson's guilt. In addition, under the State's apparent view, there would be no difference between a stipulation setting forth what actually happened, and what J.K. would testify what happened. But there is a very real difference. The stipulation only stated that the events described by J.K. represent what J.K. *would have testified* to had she appeared at Thompson's trial. That in itself carried with it inherent seeds

of doubt as to what actually occurred. Indeed, Thompson testified to a completely different version than that offered in the stipulation. It is only fair to conclude that the J.K. stipulation had the effect of reducing her credibility as compared to the level it could have achieved through live testimony because the jury could not directly assess her credibility. Therefore, the fact that the J.K. incident was introduced through a stipulation effectively reduced the probative value of that evidence.

Finally, the State disputes Thompson's argument that the prosecutor encouraged the jury to consider J.K.'s testimony on the sexual assault charge in his closing arguments when 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). According to the State, the "only arguably questionable part of the above remarks and the entire closing argument is the reference to "counts" instead of "count." (State's brief at 12). But that is a bigger problem than acknowledged by the State. By using the term "counts," the prosecutor effectively told the jury that it could use the J.K. evidence in determining whether Thompson was guilty of *both* the sexual assault charge and the false imprisonment charge. That is precisely the problem because the J.K. incident was only supposed to be applied to the false imprisonment charge.

In sum, the State overrates the probative value of the incident with J.K., and underrates the dangers of the jury deciding that the attempted assault of J.K. provided evidence that Thompson also assaulted S.S. The court erroneously

exercised its discretion in allowing the jury to consider such evidence.

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.

The State disputes Thompson's claim that trial counsel was ineffective in failing to elicit testimony about the lack of urine on the basement floor. If S.S.'s testimony about Thompson forcing her to urinate on the floor is accurate, there should be evidence of the urine left on the floor, but the jury heard nothing about the urine except through S.S.'s testimony. According to the State, trial counsel's performance was neither deficient nor prejudicial.

First, the State submits that trial counsel made a reasonable strategic decision not to question the detective about whether she detected urine in the apartment. That decision was based on counsel's belief that evidence of urine in the basement would have reminded jurors of the unkempt state of the apartment. The State also points out that reviewing courts should be "highly deferential" to counsel's strategic decisions.

However, that does not mean that counsel's decisions are necessarily reasonable, even if labeled as "strategic." As pointed out in his initial brief, reviewing courts "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." *State v. Felton*, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983). Here, counsel's "strategic" decision was unreasonable. The jury heard plenty of evidence about the unkempt condition of the house, and a simple question about the lack of urine would

not have somehow magically alerted jurors to the realization that the basement was not exactly a romantic venue.

The State also undervalues the potential benefits of the jury learning that there was no urine on the basement floor. According to the State, such testimony would have, at most, merely shown that the State's investigation of the scene was incomplete." (State's brief at 19). The State is correct that the testimony would have shown the investigation of the crime was incomplete, but that is no small matter. S.S.'s allegation of being forced to urinate on the floor constituted strong evidence that she was forced to remain in the house, and that the sexual contact was non-consensual. In a case that is primarily a he-said she-said case, any physical evidence is extremely important. Similarly, the lack of physical evidence about a key trial issue is potentially critical to the defense. It was the State's burden to show Thompson guilty beyond a reasonable doubt, and in meeting that burden, physical evidence that should have existed if Thompson was guilty was not properly investigated. The absence of that evidence could have been an important point for the defense, but counsel failed to appreciate the opportunity that existed.

Finally, in arguing that Thompson was not prejudiced by his attorney's performance, the State disputes Thompson's contention that this was a "close" case. The State points out the bruising on S.S.'s body, but acknowledges that the SANE nurse, Natalie Ready, could not determine the exact cause or date of her injuries. (State's brief at 19). The State also points out that Thompson's DNA was taken from a vaginal swab, but of course, that has no probative weight, given the fact that Thompson agreed that he engaged in sexual intercourse with S.S. The only issue on the sexual assault charge was whether the sexual contact was consensual.

The State also opines that Thompson's own testimony had "serious problems." It points out that Thompson testified that he did not consider the possibility of sex with S.S. until she initiated contact with him, and that this is inconsistent with his testimony that he went to the Old Style Inn to meet up with a woman and that he had no phone for S.S. (State's brief at 19). The State fails to answer *why* such testimony is so problematic, and is largely based on the point of view S.S.

Furthermore, the State does not respond to a number of points in Thompson's initial brief, including (1) the fact that S.S. willingly accompanied Thompson to the house and had other opportunities to use a phone on their walk; (2) the fact that S.S. 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); (3) the fact that S.S. could not provide an accurate timeline, or other details of the evening; and (4) the fact that S.S. said nothing to Nick Spinner alerting him to the assault shortly after it allegedly occurred.

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 ineffective assistance of counsel.

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.

The State disputes Thompson's claim that his trial attorney was ineffective in failing to base his *Shiffra-Green*

motion on the DSM-V which allows that persons with borderline personality disorder may develop psychotic-like symptoms, including hallucinations in times of stress. (State's brief at 22-26).

The State first addresses the prejudice prong, and states that Thompson provided no evidence that S.S. had ever suffered psychotic-like symptoms. It claims that the showing that S.S. suffered from borderline personality disorder, along with the DSM-V's references are insufficient to show that there is a reasonable likelihood that the records contain evidence that S.S. suffered from hallucinations. (State's brief at 23).

Thompson disagrees. Although Thompson has no specific evidence that S.S. was hallucinating, there was strong 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. The State demands too much. Necessarily, no one can know precisely what is in one's medical records—indeed, that is why an *in camera* inspection is necessary. And it is why courts "should generally provide an *in camera* review" in "close cases." *State v. Green*, 2002 WI 68, ¶ 35, 253 Wis. 2d 356, 646 N.W.2d 298*; State v. Walther*, 2001 WI App 23, ¶ 14, 240 Wis. 2d 619, 623 N.W.2d 205. Here, Thompson has alleged sufficient information to justify such an inspection.

The State next argues that Thompson fails to offer a plausible explanation for how such evidence would be necessary to a determination of guilt or innocence. (State's brief at 24). But Thompson has offered an explanation. As stated in his initial brief, S.S.'s 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. She may have been significantly impaired because of her diagnosis of borderline personality disorder,

coupled with the fact that she was under a great deal of stress. According to DSM-V, these condition can create hallucinations. When a person is impaired, there obviously is a possibility that he or she will not be able to accurately perceive events. Here, S.S. could have perceived events in a way that did not fully comport with reality.

The State also argues that Thompson's attorney was not deficient because he did locate another source recognized in the mental health field, the NIMH, and consulted with a psychologist. (State's brief at 24-25). But despite counsel's efforts, his failure to consult with the DSM is problematic because courts have recognized that the DSM has been "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).

Finally, the State argues that Thompson is overly speculative in his claim that S.S. may have been motivated to falsely accuse him on the fact that some persons with borderline personality disorder "spontaneously idealize potential caregivers and lovers" and may suffer from "real or imagined" fears of abandonment. (State's brief at 25-26). Again, some speculation is necessary, and allowed by courts. Thompson has met his burden by showing that S.S. suffered from personality disorder, that she was in a stressful situation, and that the DSM addresses those situations by pointing out possible symptoms that could be present in Thompson's case. Obviously, if an *in camera* inspection of the records reveals that none of these possible symptoms were present with S.S., then Thompson's claim will evaporate. But it is also possible that an *in camera* inspection will reveal important information that bears on the credibility of S.S. and her account of what happened on the night of the incident.

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.

CONCLUSION

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

Respectfully submitted this 11th day of February, 2016.

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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 2,462 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