COURT OF APPEALS OF WISCONSIN
DISTRICT ONE

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. Appeal No.: 2016AP000633-CR

JOEL MAURICE MCNEAL,
Defendant-Appellant.

On Appeal From the Circuit Court of Milwaukee County
The Honorable Stephanie Rothstein Presiding
Circuit Court Case Nos. 2014-CF-002569 and 2014-CF-004618

BRIEF OF DEFENDANT-APPELLANT JOEL MAURICE MCNEAL

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STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of record.

STATEMENT OF THE ISSUES

1. Is McNeal entitled to a ***Machner*** hearing based on his threshold showing—as shown by substantial cumulative effect—that he received ineffective assistance of trial counsel?

Circuit Court answered: No.

2. Was there sufficient evidence to support the jury's verdict that McNeal falsely imprisoned M.H.?

Circuit Court answered: Yes.

3. Did the trial court properly permit Hurst to testify regarding a past strangulation incident between McNeal and M.H.?

Circuit court answered: Yes.

4. Is McNeal entitled to a new trial because the real controversy was not fully tried and because a new trial is in the interests of justice?

Circuit Court answered: No.

STATEMENT OF THE FACTS

The Complaints

On June 16, 2014, City of Milwaukee Police Officers Matthew Nogalski and Steven Van Erden arrived at the home of M.H. in response to phone calls made to police that M.H. may be in danger. (R. 2). M.H. told Officer Nogalski that on

May 20, 2014, Joel McNeal, her live-in boyfriend, became upset when M.H. arrived home late, accused her of having sex with someone else, grabbed her by the throat, and forced her onto the couch. (R. 2). McNeal then dragged M.H. into the bedroom, forced her to remove her clothes, inserted his fingers into her vagina to check whether she just had sex, and thereafter forced her to have penis-to-vagina sex. (R. 2).

M.H. told Officer Nogalski that on June 15, 2014, she and McNeal had friends over wherein an argument about domestic violence took place. (R. 2). After M.H.'s friends left, McNeal got angry, grabbed M.H.'s hair and yelled at her. (R. 2). McNeal then fell asleep. (R. 2). M.H. stated that McNeal was still angry when he woke around three a.m., grabbed her by the neck, and forced her onto the couch. (R. 2). M.H. reported that she could not breathe and lost consciousness for a short period of time. (R. 2). McNeal then ripped off her dress and forced her to have penis-to-vagina sex. (R. 2) (collectively the "Incident").

M.H. reported that after the assault, McNeal stood outside the bathroom while she used it, making her feel like a prisoner in her own house. (R. 2). M.H. stated that she texted her sister and friend for help, but told them not to contact her because she feared McNeal might kill her. (R. 2).

McNeal was charged with two counts of second degree sexual assault, strangulation and suffocation, and false imprisonment, all with a domestic abuse enhancer. (R. 2).

While in prison McNeal sent M.H. four letters and addressed it to "Art Ruby"—mutual friends of McNeal and M.H. (R. 30). McNeal asked M.H. in two separate letters to go to the district attorney's office and drop the charges against him. (R. 30). The State charged McNeal with two counts of felony intimidation of a victim in furtherance of a conspiracy. (R. 30).

The Trial

M.H. testified that on June 15, 2014, she and McNeal had a party at her house, which included Ruby, Art, May and Debbie Hurst. (R. 61, p. 55:11-56:6). M.H. testified that she

consumed one shot at the party, but Nurse Gina Kleist, who examined M.H. the morning after the Incident, testified that M.H. told her she consumed two shots. (R. 61, p. 56:23-24; 12/17/14 p. 149:12-16). Art and McNeal testified that everyone got upset during the party because Hurst noticed bruises on Ruby's body and commented that all black men were bad and "do their women wrong." (R. 62, p. 185:9-21; R. 63, p. 42:13-18). M.H. and McNeal got into an argument about Hurst's comments. (R. 61, p. 57:9-18).

M.H. testified that she left the party shortly thereafter to take Ruby home. (R. 61, p. 58:22-23). Ruby contradicted this testimony, stating she drove herself home. (R. 62, p. 217:18-19). M.H. returned around midnight and McNeal came up to her "an hour or so" later angry about how Hurst ruined the night with her comments. (R. 61, p. 59:17-60:20). M.H. testified that McNeal told her to take off her clothes or he would rip them off. (R. 61, p. 62:3-6). M.H. stated she took her clothes off and then McNeal put her on the sofa and had sex with her. (R. 61, p. 62:16-18). M.H. testified that when McNeal was done having sex he got very angry, pinned her down, and strangled her with both hands. (R. 61, p. 66:1-9).

Officer Nogalski and Nurse Kliest, however contradicted M.H.'s testimony regarding the sequence and timing of the assault. Officer Nogalski testified that M.H. reported that McNeal woke up around three a.m., was still upset, and choked her. (R. 62, p. 70:5-9, 80:15-81:8). M.H. further reported that McNeal woke up around four a.m. and forced her to have sex. (R. 62, p. 81:9-82:6). Nurse Kleist similarly testified that M.H. told her that McNeal pinned her down with his legs and choked her and later forced her to have penis-vagina sex. (R. 62, p. 162:10-20).

The prosecutor attempted to rehabilitate M.H. by asking her whether she told police that McNeal put his hands around her neck and then forced her to have sex. (R. 61, p. 178:8-11). M.H. answered: "Yes. I don't remember in what sequence." (R. 61, p. 178:12).

M.H. testified that when she regained consciousness around three a.m., she found McNeal sleeping, grabbed her

phone, and rushed into the bathroom to text for help. (R. 61, p. 68:6-13, 18-19). M.H. stated that McNeal found her in the bathroom and they went to bed. (R. 61, p. 69:1-9).

Hurst also contradicted M.H.'s testimony regarding the timeline of events. Hurst testified that she received text messages from M.H. "around 4:19, 4:20 or 4:40" in the morning. (R. 62, p. 17:7-12). The timing of the texts further puts the veracity of M.H.'s testimony into question, because if McNeal assaulted her at four a.m., as M.H. initially told police, and this lasted for approximately an hour, as she testified, it would have been impossible for her to text Hurst and her sister Malia for help between 4:19 and 4:50 a.m. (R. 62, p. 81:9-82:6; R. 61, p. 157:7-8). The timing inaccuracies went unexplained and unquestioned by defense counsel.

M.H. testified that she had scratches on her neck from when McNeal choked her and a bruise on her arm from where McNeal grabbed her. (R. 61, p. 78:1-79:10). Nurse Kleist testified that M.H. reported that McNeal slapped and scratched her face and that she vomited after the assault. (R. 62, p. 152:11-153:9). M.H. did not report this information to the police and yet defense counsel did not question this discrepancy at trial.

M.H. testified that she received letters from McNeal (via Art and Ruby) which asked her to go to the district attorney and drop the charges. (R. 61, p. 90:20-102:6). M.H. confirmed that she went to the district attorney to drop the charges. (R. 61, p. 175:7-9).

M.H. admitted she wrote McNeal a letter and signed it from Art and Ruby, because Ruby wanted McNeal to write her but Ruby didn't know how to write her address in English. (R. 61, p. 168:8-14). Ruby, however, testified that M.H. asked Ruby if she could write McNeal a letter, sign it from Art and Ruby, and tell him to write M.H. at Ruby's address. (R. 62, p. 218:1-24).

M.H. further testified that she never put money on McNeal's prison account, but lent Ruby twenty dollars to give McNeal. (R. 61, p. 169:21-24). Ruby contradicted this testimony, stating that M.H. put money on McNeal's account.

(R. 62, p. 220:24-221:5). Art similarly testified that M.H. asked him to visit McNeal in jail and gave him twenty dollars to put on McNeal's account because she loved him. (R. 62, p. 186:12-187:14).

M.H. testified that in June she investigated whether McNeal had a warrant. (R. 61, p. 54:8-15). The warrant upset M.H. because she felt McNeal was lying about the details of seeing his ex-girlfriend. (R. 61, p. 152:8-17).

Patricia Dobrowski, a DNA analyst, testified that she conducted YSTR testing on the neck swabs from M.H. and the standard swab from McNeal. (R. 62, p. 131:4-132:1). The YSTR tested positive for male DNA on the neck. (R. 62, p. 132:21-25). McNeal was included as a possible match where only 1/1757 males in the U.S. would match this YSTR profile. (R. 62, p. 133:5-8). The defense attorney chose not to cross-examine this expert.

At the close of the State's case, the defense moved to dismiss the false imprisonment count because the State failed to prove that McNeal restricted M.H.'s freedom of movement. (R. 63, p. 5:5-6:23). The trial court denied the motion, holding that there was sufficient evidence that McNeal "compelled her to remain where she did not wish to remain." (App. 1-111-112; R. 63, p. 9:2-23).

Lastly, McNeal testified in his own defense. McNeal testified that during the June 15, 2014, party, Hurst got upset about the bruises on Ruby, said that "black guys do their women wrong," and that Art and McNeal would do the same to Ruby and M.H. (R. 63, p. 42:1-18). M.H. became progressively upset as Debbie talked. (R. 63, p. 44:18-21). McNeal testified that M.H. was angry because McNeal confessed that he went to see his ex-girlfriend to tell her to stop calling, but they got into a fight and he ended up with a warrant for his arrest. (R. 63, p. 44:21-45:9).

McNeal testified that M.H. left to take Ruby home, even though Ruby drove herself to the party. (R. 63, 46:9-25). When M.H. got home, they spent a half-hour looking for her phone charger. (R. 63, p. 48:6-8). After finding the charger, McNeal apologized for going to see his ex and

promised to turn himself into the police. (R. 63, p. 48:17-49:2). Around one a.m. they had sex for approximately thirty to thirty-five minutes. (R. 63, p. 49:7-19). McNeal testified that they washed up for bed and then had sex in the bedroom for another thirty-five to forty minutes. (R. 63, p. 50:10-21). McNeal denied choking M.H. or forcing her to have sex. (R. 63, p. 49:23-50:8, 51:12-52:16).

McNeal testified that M.H. initiated sex the next morning. (R. 63, p. 55:10-13). McNeal stated that he was going to the police station, but M.H. initiated sex again. (R. 63, p.55:15-23). Afterwards, he showered and cleaned the kitchen while she showered. (R. 63, p.56:1-9). There was a knock at the door and M.H. gave him a hug. (R. 63, p. 56:10-18). The police arrived and McNeal was arrested.

McNeal testified that he wrote M.H. via Art and Ruby, because M.H. told him to write her at that address in her letter. (R. 63, p. 58:8-60:1). McNeal wrote to M.H. hoping that she would go to the district attorney and tell the truth about the Incident. (R. 63, p. 60:19-21).

The jury found McNeal guilty of second degree sexual assault in count two, strangulation and suffocation, false imprisonment, and both counts of intimidation of a victim in furtherance of a conspiracy. (R. 63, p. 171:22-173:2). The jury acquitted McNeal of count one, second degree sexual assault. (R. 63 p. 171:17-21).

The Sentencing

Defense counsel moved to adjourn the sentencing hearing for two reasons. (R. 64, p. 2:20-21). First, while in jail, McNeal met William Norment. Norment also had a relationship with M.H. and may have had a "similar situation." (R. 64, p. 2:22-3:8). Second, M.H. was writing a book called "Modern Hmong Women," which chronicled the problems Hmong women have with African-American men. (R. 64, p. 3: 17). Counsel requested time to investigate these two issues. (R. 64, p. 3:18-20).

The trial court denied the adjournment, finding it untimely because counsel knew about this information well

before the hearing. (R. 64, p. 9:17-18). McNeal was interviewed for the PSI on January 22, 2015, and it was filed on February 13, 2015. (R. 64, p. 4:16-19). Moreover, the trial court held that the book had no bearing on sentencing, because if it held exculpatory information that would be a basis for a post-conviction motion. (R. 64, p. 4:21-23, 10:2-16).

The trial court sentenced McNeal to seventeen years on count two, bifurcated as seven years incarceration and ten years extended supervision; four years on count three, bifurcated as two years incarceration and two years extended supervision; and four years on count four, bifurcated as two years incarceration and two years extended supervision. (App. 1-101-102; R. 64, p. 43:6-44:18) The sentences run concurrent to one another, but consecutive to the sentences in cases 2014-CF-4618 and 2014-CF-2456. (R. 64, p. 44;18-19). The court further sentenced McNeal to four years on each intimidation count, bifurcated as two years incarceration and two years extended supervision. (App. 1-103-104; R. 64, p. 45:3-9). The intimidation sentences run concurrent to one another, but consecutive to the sentences in 2014-CF-2456 an 2014-CF-2569. (R. 64, p. 45:12-16).

The Postconviction Motion

McNeal filed a postconviction motion and request for evidentiary hearing on January 5, 2016, stating that he was denied effective assistance of counsel and that the real controversy was not fully tried such that a new trial is in the interests of justice. (R. 43). McNeal's main arguments included that trial counsel was ineffective because he failed to impeach M.H.'s testimony with the police reports, medical documents, and Petition for a Temporary Restraining Order regarding the timing and sequences of events during the Incident; failed to investigate Norment, a potentially exculpatory witness; failed to request a pretrial hearing to introduce evidence of M.H.'s prior sexual relationship with McNeal; and failed to expose M.H.'s motives on cross-examination for fabricating the charges. (R. 43). McNeal argued that counsel's deficient performance ensured that the real controversy was not fully tried, such that he was entitled to a new trial. (R. 43).

The trial court denied the motion without a hearing for four reasons. First, the inconsistencies between M.H.'s testimony and the documents supporting the charge are peripheral to McNeal's actions. (App. 1-107; R. 46). The jury was only required to determine whether McNeal committed the alleged acts, not in what order and at what time. (App. 1-107; R. 46). Second, counsel was not ineffective for failing to investigate Norment, because his testimony was inadmissible hearsay. (App. 1-109; R. 46). Third, the prior sexual relationship between M.H. and McNeal had no bearing on whether he forced her to have sex during the Incident. (App. 1-109; R. 46). Finally, the jury received sufficient information regarding M.H.'s motives from McNeal's testimony. (App. 1-110; R. 46).

McNeal filed a Notice of Intent to Pursue Postconviction Relief on March 5, 2015. (R. 19). He filed a Notice of Appeal on March 25, 2016. (R. 47). McNeal now appeals the denial of his postconviction motion and the Judgment of Conviction.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MCNEAL'S POSTCONVICTION MOTION BECAUSE MCNEAL WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AND MET HIS THRESHOLD BURDEN NECESSITATING A *MACHNER* HEARING.

A. LEGAL STANDARDS.

To establish constitutionally deficient representation, a defendant must show: (1) deficient representation; and (2) resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by his or her lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a

defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. This is not, however, an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has re-affirmed that the touchstone of the prejudice component is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997) (citations omitted).

B. STANDARD OF REVIEW.

The issues of performance and prejudice present mixed questions of fact and law. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, but this Court reviews independently questions of whether counsel's performance was deficient and "whether it led to prejudice rising to a level undermining the reliability of the proceeding." ***State v. Thiel***, 2003 WI 111, ¶24, 264 Wis. 2d 571, 665 N.W.2d 305.

A defendant is entitled to an evidentiary hearing only if the defendant "alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the defendant's motion does not raise facts sufficient to entitle him to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has the discretion to grant or deny the hearing. ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62. On appeal, this Court reviews, *de novo*, the defendant's motion to determine "whether it alleges facts sufficient to raise a question of fact necessitating a Machner hearing." ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113 (Wis. App. 1994).

C. ARGUMENT.

The circuit court committed reversible error when it denied McNeal's request for an evidentiary hearing and when it concluded, without conducting an evidentiary hearing, that McNeal received effective representation even though counsel failed to impeach M.H. with the police reports, medical documents, Petition for a Temporary Restraining Order, and through Officer Nogalski and Nurse Kleist's testimony; failed to investigate Norment, a potentially exculpatory witness; failed to request a pretrial hearing to introduce evidence of McNeal's prior sexual relationship with M.H.; and failed to expose M.H.'s motives to fabricate the charges.

1. Defense Counsel was Ineffective Because He Failed to Adequately Cross-Examine and Impeach M.H. with the Police Reports, Medical Reports, and the Petition for a Temporary Restraining Order.

An attorney's failure to review the police reports for purposes of impeachment on cross-examination may constitute ineffective assistance of counsel. ***State v. Thiel***, 2003 WI 111, ¶37; *see also* ***State v. Coleman*** 2015 WI App 38, ¶¶36-39, 870 N.W.2d 463. Defense counsel did not cross-examine M.H. regarding several inconsistencies between what she reported to the police, Nurse Kleist, stated in her Petition for a Temporary Restraining Order, and what she testified to at trial.

In the original police report M.H. reported that McNeal forced her to have sex and then choked her until she lost consciousness, but the same report states that he choked her until she lost consciousness and then sexually assaulted her when she awoke. (R. 44, Ex. A). In Supplement Number Two to the police report, M.H. stated that McNeal choked her around three a.m. and then forced her to have sex around four a.m. (R. 44, Ex. B). On that same day M.H. told Nurse Kleist that McNeal choked her and later forced her to have sex. (R. 44, Ex. C; R. 62, p. 162:10-20). The next day, however, when filing her Petition for a Temporary Restraining Order, M.H. stated that McNeal forced her to

have sex and thereafter strangled her until she blacked out. (R. 44, Ex. D).

At trial, M.H. testified several times that McNeal forced her to have sex and choked her afterwards. (R. 61, pp. 64:18-20, 65:24-66:9, 87:18-23, 157:19-158:9). Only on redirect, after prompting from the State, M.H. stated that perhaps she was strangled first and then forced to have sex. (R. 61, p. 178:12). Defense counsel never cross-examined M.H. about how the order of events changed between the police reports, medical documents and Petition for a Temporary Restraining Order—even though she reported the Incident over a couple days—which likely would have caused the jury to question her credibility and wonder whether she was fabricating the charges. ***Raether v. Dittmann***, 40 F. Supp. at 1105 (E.D. Wis. 2014) (stating that counsel's failure to impeach the state's principal and corroborating witness with the police report was prejudicial).

Defense counsel also did not impeach M.H. with the police report regarding the timing inconsistencies between what she initially reported to the police and what she testified to at trial. M.H. testified that McNeal fell asleep after the assault around three a.m. and she ran to the bathroom to text for help. (R. 61, p. 68:6-19). But M.H. told Officer Nogalski that McNeal woke up around three a.m., choked her and then sexually assaulted her around four a.m. (R. 62, p. 81:5-82:6; R. 44, Ex. B). Counsel failure to impeach M.H. with the inconsistency between the time she reported the strangulation and assault occurred to the police and the time she testified to at trial rendered him ineffective. ***Thiel***, 2003 WI 111, ¶44 (failure to use evidence to impeach the State's main witness because of counsel's inadequate preparation for trial rendered him ineffective and undermined court's confidence in outcome). Failure to expose this discrepancy prejudiced McNeal's defense, because it would have led the jury to believe M.H. fabricated the charges because she could not keep her story straight.

Moreover, if M.H. was having sex at four a.m. for roughly an hour—the amount of time M.H. testified the assault lasted—it would have been impossible for her to have texted Hurst and Malia for help between 4:19 a.m. and 4:53

a.m. (R. 61, p. 157:5-8; R. 62, p. 17:10-12). Even the timeframe M.H. testified to at trial—she texted in the bathroom around 3 a.m.—is disproved by the time stamps of the text messages. (R. 61, p. 68:6-19). Impeaching M.H. with the police reports would have shown the jury that M.H. was lying, because it was impossible to send texts at the same time she reported the alleged assault occurred. Once again, counsel let another discrepancy in M.H.'s story slip the jury's attention.

Counsel failed to expose further inconsistencies between M.H.'s testimony and the Petition for a Temporary Restraining Order. M.H. testified that she went in and out of consciousness during the strangulation, but when she regained consciousness McNeal was sleeping and she ran into the bathroom and texted for help. (R. 61, p. 67:10-68:10). In the Petition for a Temporary Restraining Order, however, M.H. stated that McNeal was still screaming at her when she became conscious after the strangulation. She wrote, "I was not allowed to do anything around my own house. He had to go with me wherever I went (bathroom) and everything had to be approved by him." (R. 44, Ex. D). If McNeal followed her everywhere—specifically into the bathroom—it would have been impossible for her to text for help.[1] This was another inconsistency in M.H.'s story that the jury never heard, which, combined with the other evidence, likely would have convinced the jury that she was lying.

Defense counsel also did not impeach M.H.'s testimony when cross-examining Officer Nogalski. Officer Nogalski's supplemental report directly contradicted M.H.'s testimony regarding the order and timing of events, but counsel did not expose this inconsistency for the jury. (R. 62, p. 81:5-82:6). Counsel also did not ask Officer Nogalski to tell the jury the time stamps on the text messages that Hurst and Malia received, even though M.H. testified she sent the texts around three a.m. and the police report stated that Malia received the texts at 4:50 a.m. and 4:53 a.m. (R. 44, Ex. B; R. 61, p. 68:6-19). Reinforcing that the order of the assault and

[1] In fact, M.H. testified that she was in the bathroom for "less than a minute" when McNeal knocked on the door. (R. 61, p. 183:2-6). The time stamps of the text messages—roughly forty-three minutes—disprove this testimony, but counsel failed to expose this discrepancy.

time stamps of the text messages differed from M.H.'s testimony could have led a reasonable jury to believe M.H. was lying because she continually changed the details of the assault. Counsel's failure to expose another inconsistency in M.H.'s story rendered him ineffective and should cause this court to wonder whether the adversarial system has functioned properly. ***State v. Felton***, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983).

Defense counsel was also deficient in failing to cross-examine M.H. about the inconsistencies between what she reported to the police and Nurse Kleist. Specifically, Nurse Kleist testified that M.H. said she vomited from the strangulation, but M.H. never reported this to the police. (R. 62, p. 153:6-9). Nurse Kleist testified that M.H. told her McNeal slapped and scratched her face, but M.H. did not report this to the police. (R. 44, Ex. C; R. 62, p. 152:11-14). Given that these interviews were close in time, defense counsel should have cross-examined M.H. about how she could leave out such vital information when talking to Officer Nogalski. His failure to do so was another missed opportunity to impeach her story and her truthfulness.

Defense counsel was ineffective in refusing to question M.H. regarding her eczema. McNeal believed eczema caused the scratches on M.H.'s neck because she often itched the area of the outbreak. (R. 44, McNeal Aff. ¶7). Counsel did not question M.H. on whether she had eczema, whether she had sought treatment, whether it made her skin itchy, and whether she scratched her neck in the shower shortly before the police arrived. Counsel did not request discovery of M.H.'s medical records, hire a doctor to testify about how eczema causes severe itching, or show the jury pictures of eczema outbreaks to compare with the injuries shown by the State. ***Thiel***, 2003 WI 111, ¶¶46, 50 (concluding that it was "objectively unreasonable for [defendant's] counsel not to pursue further evidence to impeach" the alleged victim). Counsel's decision not to investigate and pursue this line of questioning was unreasonable given that McNeal provided this information in advance of trial and it would have given the jury a valid reason for the scratches on M.H.'s neck. ***Strickland***, 466 U.S. at 691 (determining what the client told

the attorney is critical when assessing the reasonableness of the attorney's investigative decisions).

Counsel also did not impeach M.H.'s testimony that she only consumed one shot on the night of the Incident with the medical report wherein she told Nurse Kleist she had two. (R. 61, p. 56:23-24; R. 44, Ex. C). While it seems like a small matter, the amount of inconsistencies and flat out lies in M.H.'s testimony, had counsel impeached her, likely would've caused the jury to question the truthfulness of the charges and ultimately changed the verdict. ***Coleman***, 2015 WI App. 38, ¶39 (stating that a "minor detail" might not rise to deficient performance but in combination with the other deficiencies rendered counsel's performance ineffective).

Defense counsel ineffectively cross-examined M.H. regarding her decision to recant the charges. Counsel asked M.H. a single question: "And you did go to the DA's office and try to drop the charges, right?" (R. 61, p. 175:7-8). M.H. gave a vague answer in confirmation. (R. 61, p. 175:9). Counsel did not ask M.H. how many times she recanted the charges or her reasons for doing so. Art and Ruby told McNeal that M.H. recanted the charges two times because she felt guilty for lying to the police. (R. 44, McNeal Aff. ¶6). Counsel's decision not to thoroughly question M.H., Art, and Ruby prejudiced McNeal, because the fact that M.H. wanted the case dismissed, in combination with her other lies, likely would have led the jury to believe that M.H. had a guilty conscious and renders this verdict suspect. ***Smith***, 207 Wis. 2d 258, 275 ("The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different."). M.H.'s decision to recant the charges on two separate occasions supports McNeal's defense that she fabricated the charges because she was angry that he saw his ex-girlfriend.

Defense counsel was ineffective in choosing not to cross-examine M.H. regarding the discrepancy between the dates she reported to the police and Nurse Kleist that she last had consensual sex with McNeal. M.H. told Officer Nogalski she last had consensual sex with McNeal on June 12, 2014, but told Nurse Kleist that it was June 13, 2014. (R. 44, Exs.

B, C). Once again, counsel missed an opportunity to poke holes in M.H.'s story that may have raised questions in the jury's mind regarding her truthfulness.[2] ***Thiel***, 2003 WI 111, ¶46 (where accuser has shown a propensity to lie, counsel's failure to delve further into the charges and the background of the accuser was held objectively unreasonable).

Defense counsel also prejudiced McNeal's defense in choosing not to cross-examine Patricia Dobrowski, the DNA expert, regarding the YSTR profile. McNeal told counsel that he gave M.H. several hickeys during the Incident, thus giving the jury a reason other than strangulation that his DNA would be found on her neck. (R. 44, McNeal Aff. ¶7). But counsel refused to question the expert. There is simply no strategic reason to allow the jury to think that the YSTR evidence came solely from strangulation. ***Strickland***, 466 U.S. at 682 (relevant factor when deciding whether counsel's strategy was reasonable is the potential prejudice from taking an unpursued line of defense). The trial court concluded that McNeal was not prejudiced by counsel's failure to question Dobrowski because the jury heard testimony that M.H. had a hickey on her neck and "could have reached the same conclusion without expert testimony." (App. 1-108; R. 46). With due respect, that is a stretch. M.H. testified the day before Dobrowski. It is unlikely that the jury remembered a two-question snippet in M.H.'s day-long testimony wherein she admitted to having a hickey on her neck. (R. 61, p. 158:19-23). Counsel's decision to not cross-examine Dobrowski when she could have confirmed an alternative, non-violent basis for McNeal's DNA on M.H.'s neck rendered him ineffective and prejudiced McNeal because the jury assumed his DNA was there from the strangulation.

In denying McNeal's postconviction motion, the trial court agreed that M.H. had trouble remembering the timing and order of the assault, but concluded that it was peripheral to the main issue in the case: whether McNeal choked and sexually assaulted M.H. (App. 1-107; R. 46). The trial court held that additional cross-examination would not have

[2] Counsel was required, pursuant to Wis. Stat. § 971.31(11), to request a pretrial hearing to question M.H. on her past sexual relationship with McNeal. (*See infra* §3). The hearing requirement, however, did not prevent defense counsel from exposing the different dates M.H. reported to the police and Nurse Kleist.

changed the outcome because M.H. "exuded credibility" while McNeal "presented himself as an angel who could do no wrong, which neither the court—nor obviously the jury—bought for a minute." (App. 1-107; R. 46). But this is not a proper basis to deny the motion. When assessing whether defense counsel's performance prejudiced the defendant, "the trial court may not substitute its judgment for that of the jury in assessing which testimony would be more of less credible." ***State v. Jenkins***, 2014 WI 59, ¶64, 355 Wis. 2d 180, 848 N.W.2d 786. It was for the jury to decide the weight and credibility to give to M.H.'s story in light of all the inconsistencies. *Id*. at ¶65. The trial court's decision deprived the jury of their role as the sole judge of witnesses' credibility.

Essentially the trial court concluded that even though M.H. could not remember the order of the strangulation and assault, the timing of the assault, when she sent the text messages, the injuries she sustained, when they last had consensual intercourse, and how much she drank on the night of the Incident—none of which was exposed by trial counsel—that she was telling the truth that McNeal strangled and sexually assaulted her. At some point the amount of inconsistencies and lies would cause a jury to question her credibility and veracity for the truth. ***Thiel***, 2003 WI 111, ¶59 ("When a defendant alleges multiple deficiencies by trial counsel, prejudice should be assessed based on the cumulative effect of these deficiencies."). While the trial court evidently believed that M.H.'s credibility was strong with the jury, this was due in large part to counsel's failures to expose the inconsistencies between her testimony and the documents. The trial court's holding that additional cross-examination to impeach M.H.'s testimony would not have persuaded the jury to render a different verdict—or at the very least question the veracity of her testimony—belies human nature. Had the jury known about her propensity to lie it is likely the jury would've found McNeal innocent.

Moreover, the trial court's agreement with the State that the order and timing of events related peripherally to the assault is a misguided interpretation of ***Jones v. Wallace***, 525 F.3d 500 (7th Cir. 2008). (App. 1-107; R. 46). In ***Jones***, the victim's testimony regarding the assault "was vivid and

consistent at all times." *Id*. at 502. The victim became confused about minor details "too far away from the central facts of the assault." *Id*. at 503. Here, M.H. gave inconsistent reports on details that related directly to the Incident: whether she was choked before or after the sexual assault; the timing of the assault; when she sent text messages for help; and the injuries she sustained. (*See supra* pp. 16-19). Counsel's failure to impeach M.H. on these vital details prejudiced McNeal because they supported his defense that she fabricated the charges. ***Raether***, 40 F. Supp. 3d at 1104 (stating that in a credibility contest, it was prejudicial of counsel to not impeach the State's principal and corroborating witnesses with the police reports). The jury rendered a guilty verdict without hearing about the inconsistencies in M.H.'s story, which should undermine this Court's confidence in the outcome. ***Strickland***, 466 U.S. at 687; *see also* ***McFowler v. Jaimet***, 349 F.3d 436, 454 (7th Cir. 2003) (stating that jury should decide the weight of inconsistencies in a witness' testimony). M.H.'s inability to report the Incident consistently to the police, Nurse Kleist and in court documents in the immediate aftermath makes the timing and order of events a substantive, not peripheral, issue in this case.

Counsel was ineffective in failing to impeach M.H.'s testimony with the police reports, medical documents and Petition for a Temporary Restraining Order, as well as through Officer Nogalski and Nurse Kleist's testimony. Cross-examining M.H. regarding the inconsistencies discussed in this section, in combination with the other lies the jury knew about[3], would have demonstrated her propensity to lie and made the jury question her overall truthfulness. McNeal is entitled to a new trial because the aggregate effect of counsel's errors kept the jury from hearing important evidence that would have impeached M.H.'s credibility and consequently undermines the verdict. ***Thiel***, 2003 WI 111, ¶ 59; *see also* ***Coleman***, 2015 WI App 38, ¶ 40.

[3] M.H. lied about driving Ruby home on the night of the Incident, sending McNeal a letter and signing it from "Art and Ruby" purportedly upon Ruby's request, and putting money on McNeal's prison account. (R. 62, p. 186:2-189:21, 217:18-221:5).

2. Defense Counsel was Ineffective Because He Failed to Investigate A Potentially Exculpatory Witness.

The Wisconsin Supreme Court has held that a failure to investigate can constitute ineffective assistance of counsel. ***Thiel***, 2003 WI 111, ¶50. Under ***Strickland***, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.

Defense counsel did not investigate Norment to determine whether he held any exculpatory information. Norment told McNeal that M.H. said McNeal did not do the crimes she reported to the police. (R. 44, McNeal Aff. ¶8). McNeal asked counsel several times, through letters and in person, to interview Norment. Counsel had a duty to determine whether Norment's information was credible. Instead, he did nothing, thereby sabotaging McNeal's defense. ***State v. Guerard***, 2004 WI 85, ¶¶46, 49, 273 Wis. 2d 250, 682 N.W.2d 12 (counsel's performance prejudicial where he failed to call a witness who had information that went to the core of the defense because of credibility concerns). There was no strategic reason not to interview Norment, because the testimony was relevant and readily available upon a reasonable investigation. ***Wiggins v. Smith***, 539 U.S. 510, 528 (2003) (strategic choices made after less than complete investigation and without full knowledge of the available facts cannot be a reasonable strategic decision); *see also* ***Casey v. Frank***, 346 F. Supp. 2d 1000, 1014 (E.D. Wis. 2004) ("Duty to investigate includes the duty to locate exculpatory witnesses and it is well-established that failure to do so can amount to ineffective assistance of counsel.").

Had counsel interviewed Norment, he could have served as a material witness at trial and supported McNeal's theory that M.H. lied to the police. Norment was willing to testify that M.H. told him McNeal was not guilty of the charges. (R. 44, Petersdorff Aff. ¶8); ***State v. Wilson***, 2012 WI App 73, ¶12, 342 Wis.2d 250, 816 N.W.2d 351 (To show ineffective assistance of counsel for a failure to investigate, the defendant must "allege with specificity what the investigation would have revealed."). The trial court's

Decision and Order denying McNeal's postconviction motion states that Norment's testimony would not have been allowed because it was inadmissible hearsay. (App. 1-109; R. 46). Under Wis. Stat. § 908.01(4)(a)(1), the statement should have been permitted because it was a statement by a declarant—M.H.—that was inconsistent with her previous testimony. M.H. testified at trial that McNeal strangled and sexually assaulted her, but her statement to Norment was that McNeal did not commit these acts. The jury was entitled to hear Norment's testimony to determine whether it was more or less credible than M.H.'s account.

Defense counsel's failure to investigate and produce Norment as a witness when his testimony could've impeached M.H.'s account of the Incident was unreasonable, deprived McNeal of a fair trial, and should undermine this Court's confidence in the verdict. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶¶25, 27, 286 Wis. 2d 721, 703 N.W.2d 694 (failure to investigate and present evidence to undermine the credibility of the State's two key witnesses constituted ineffective assistance of counsel).

3. Defense Counsel was Ineffective Because He Failed to Request a Pretrial Hearing to Introduce Evidence of M.H.'s Prior Sexual Relationship with McNeal.

Pursuant to Wis. Stat. § 971.31(11), defense counsel was required to request a pretrial hearing if he wanted to introduce "evidence of the complaining witness's past sexual conduct with the defendant." Evidence of prior sexual conduct between the alleged victim and the defendant can be admissible at trial as an exception to the rape shield law to prove consent, but the trial court must undergo a three-prong test first. ***State v. Sarfraz***, 2014 WI 78, ¶40, ___ Wis. 2d ___, 851 N.W.2d 235; *see also* Wis. Stat. § 972.11(2)(b)(1). A hearing was necessary because McNeal and M.H's sexual relationship bore directly on the issue of consent. Counsel's decision to not request a hearing rendered him ineffective and prejudiced McNeal's defense.

McNeal testified that he and M.H. had sex twice after the party and two more times the next morning. (R. 63, p.

49:7-50:21; 55:10-23). In contrast, M.H. told police that she stopped having consensual sex with McNeal on June 12, 2014, while she told Nurse Kleist it was June 13, 2014. (R. 44, Exs. B, C). M.H. was never asked at trial when they stopped having sex, whether she had sex twice the night of the Incident and two times the morning after, or whether they had sex four to six times per day leading up to the Incident. (R. 44, McNeal Aff. ¶9). Counsel's failure to request a hearing deprived the jury of the chance to judge the credibility of M.H.'s answer and compare her testimony with McNeal's.

The trial court's denial of McNeal's postconviction motion concluded that whether M.H. and McNeal previously had consensual sex had no bearing on whether she consented on the night of the Incident. (App. 1-109; R. 46). On the contrary, the issue of when M.H. and McNeal stopped having consensual sex is a material issue in this case. ***Safaraz***, 2014 WI 78, ¶24 (evidence of prior consensual contacts is often used to show that the accuser consented at the time of the assault). Had the jury known that M.H. gave different dates to the police and Nurse Kleist as to when they stopped having sex, had sex with McNeal four to six times a day, and initiated sex two times the morning after the Incident they would have doubted her version of events. The probative value of this testimony outweighs its prejudicial nature, because the consensual sex was near in time and similar in nature to the Incident. *Id*. at ¶52. Moreover, the jury would not be unfairly swayed by this testimony, because M.H. admitted that they were having consensual sex until a couple days before the Incident. ***State v. DeSantis***, 155 Wis. 2d 774, 791-92, 456 N.W.2d 600 (1990) ("Evidence is unduly prejudicial when it threatens the fundamental goals of accuracy and fairness of the trial by misleading the jury or by influencing the jury to decide the case on an improper basis."). These issues should have been decided in a pretrial hearing.

Counsel's decision to not request a pretrial hearing deprived McNeal of his right to confront M.H. about their past sexual relationship to prove that she consented to having sex during the Incident. Consequently, McNeal was unable to mount a full defense to the charges, which should cause this

court to question the reliability of the adversarial process. ***Strickland***, 466 U.S. at 686.

4. Defense Counsel was Ineffective in Failing to Expose M.H.'s Motives to Fabricate the Charges.

Pursuant to Wis. Stat. § 906.11(2), "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." The defendant has "the right to explore fully each potential motive or source of bias." ***Sussman v. Jenkins***, 636 F.3d 329, 355 (7th Cir. 2011). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to access all evidence which might bear on the accuracy and truth of a witness' testimony." ***State v. Herndon***, 145 Wis. 2d 91, 104, 426 N.W.2d 347 (Ct. App. 1988)(*quoting* ***U.S. v. Abel***, 469 U.S. 45, 52 (1984)). Counsel was ineffective because he did not cross-examine M.H. regarding several facts that could lead a jury to believe that she fabricated the charges for purposes of revenge and/or because of McNeal's race.

The issue of race weaved its way throughout the trial and yet defense counsel did not question M.H. on her past experiences with African-American men. McNeal told his attorney that M.H.'s family hated him and her children refused to speak to her because McNeal was African-American. (R. 44, McNeal Aff. ¶10). M.H.'s last boyfriend, an African-American, cheated on her and she made McNeal promise that he would not hurt her like that. (R. 44, McNeal Aff. ¶10). These were some of the reasons M.H. was so upset that he was potentially cheating on her with his ex-girlfriend.

Counsel was ineffective in failing to spell out for the jury that M.H.'s anger derived from the cheating issue—not the warrant itself. The fact that M.H.'s previous boyfriend cheated on her, she warned McNeal not to do the same and yet he still saw his ex-girlfriend, in combination with how upset M.H. was by Hurst's remarks on the night of the Incident that all black men "do their women wrong," may have given the jury cause to believe she had a motive for revenge. (R. 62, p. 185:14-19; R. 63, p. 42:4-22, 44:18-21).

State v. Vonesh, 135 Wis. 2d 477, 494, 401 N.W.2d 170 (Wis. App. 1986) (Gartzke, *concurring*) ("Evidence tending to show a complaining witness has a motive to falsify a charge of sexual assault is relevant."). Counsel told McNeal that the trial strategy was "Hell hath no fury like a woman scorned," but never pursued this theory by exposing M.H.'s anger after finding out McNeal saw his ex-girlfriend. (R. 44, McNeal Aff. ¶10).

Moreover, McNeal told counsel that M.H. was writing a book called "Modern Hmong Women," which describes the problems Hmong women have encountered while dating African-American men. (R. 44, McNeal Aff. ¶11). M.H. often called McNeal her "guinea pig," leading him to believe that she was using him as a subject in her book and had a vendetta against African-American men. (R. 44, McNeal Aff. ¶11). This book may have also contained exculpatory information. Defense counsel did not question M.H. about either her book or her nickname for McNeal, both of which highlight a racial bias and may have caused the jury to question her motive in bringing these charges. ***Brinson v. Walker*** 547 F.3d 387, 393 (W.D. N.Y 2008) (Racial bias, "can lead people to lie or distort their testimony, and therefore might bear on the accuracy and truth of a witness' testimony."). Defense counsel's decision to not investigate and cross-examine M.H. on its contents constituted ineffective assistance of counsel because it may have led the jury to believe that M.H. had a racial bias and financial motive to fabricate the charges. ***Jeannie M.P.***, 2005 WI App 183, ¶25 (failure to investigate facts that show a motive to fabricate the charge constituted ineffective assistance of counsel).

The trial court denied this portion of McNeal's postconviction motion because McNeal testified as to M.H.'s motives to fabricate the charges and any additional testimony would have been cumulative.[4] (App. 1-109-110; R. 46).

[4] The trial court's ruling that more testimony would have been cumulative ignores the fact that motive and bias should be brought out on cross-examination. *See* ***Sussman***, 636 F.3d at 351 (citations excluded)("the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.") Exposing M.H.'s motives to fabricate through McNeal's testimony does not hold the same potency with the jury.

Additional testimony from McNeal may have been cumulative, but testimony from M.H. on these topics would have been probative on the issue of her truthfulness. ***Vonesh***, 135 Wis. 2d at 494. The jury had no reason to believe McNeal's testimony, because counsel failed to impeach M.H.'s testimony with the inconsistencies and cross-examine M.H. regarding her motives. Had counsel done so, McNeal's testimony would have further corroborated her untruthfulness and motive for revenge. Counsel's failure to delve further into the circumstances of the charges and the background of M.H. to discredit her version of events prejudiced McNeal's defense and entitles him to a new trial.

McNeal satisfied his threshold burden proving that he is entitled to an evidentiary hearing. The circuit court committed reversible error by not granting his request for a ***Machner*** hearing. Trial counsel's cumulative deficiencies led to an incomplete defense and prejudiced McNeal. McNeal's moving papers provided much more than merely conclusory allegations. Specifically, McNeal provided several specific examples of trial counsel's deficiencies and supported the allegations with affidavit evidence and substantial references to the record. McNeal has alleged specific instances of his trial counsel's performance which were outside the range of professionally competent assistance. He has provided offers of proof which clearly articulate to the court the instances of deficient performance. McNeal has further described the prejudice which resulted from his attorney's deficient performance and specifically showed how the theory of defense was not presented to the jury. McNeal has articulated how the outcome of the proceedings would have been different. Whether McNeal will be successful at a *Machner* hearing remains to be seen, but he has met the threshold for a hearing to be scheduled. The court needs to conduct an evidentiary hearing to hear testimony regarding the deficient performance and McNeal's prejudice.

II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE FALSE IMPRISONMENT CONVICTION.

A. LEGAL STANDARDS.

Whether the evidence is sufficient to sustain a jury's verdict is a question of law. ***State v. Tolliver***, 149 Wis. 2d 166, 174, 440 N.W.2d 571 (Ct. App. 1989). The test is whether the evidence adduced, believed and rationally considered by the jury was sufficient to prove his or her guilt beyond a reasonable doubt. ***State v. Von Loh***, 157 Wis. 2d 91, 101, 458 N.W.2d 556 (Ct. App. 1990).

Circumstantial evidence is as good as direct evidence, but it must "be sufficiently strong to exclude every reasonable theory of innocence, that is, the evidence must be inconsistent with any reasonable hypothesis of innocence. This is a question of probability, not possibility." ***Stewart v. State***, 83 Wis. 2d 185, 192, 265 N.W.2d 489 (1978) (quotations omitted).

Moreover, a criminal conviction must be reversed if no rational trier of fact could have found guilt beyond a reasonable doubt on the trial record. ***Jackson v. Virginia***, 443 U.S. 307, 318-320, 324 (1979).

B. STANDARD OF REVIEW.

On appeal, this Court must approve a jury's verdict if it is supported by credible evidence. ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 408, 331 N.W.2d 585 (1983). Additionally, the evidence must be viewed in a light most favorable to sustain the verdict. ***York v. National Continental Ins. Co.***, 158 Wis. 2d 486, 493, 463 N.W.2d 364 (1990).

C. ARGUMENT.

1. The Evidence Failed to Prove that McNeal Falsely Imprisoned M.H.

Pursuant to Wis. Stat. § 940.30, "whoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class E felony." The State failed to prove

that McNeal confined M.H. during the Incident, because she was free to leave and move about the apartment.

McNeal never confined M.H.'s movements. M.H. left the house to drive Ruby home. (R. 61, p. 58:22-23). M.H. fixed herself a meal upon returning home. (R. 61, p. 148:6-24). M.H. texted her friends for help while McNeal was sleeping. (R. 61, p. 68:6-13; 160:1-8). M.H. answered the door when the police knocked, with McNeal's blessing. (R. 61, p. 162:3-8, 163:8-11). M.H. claimed that McNeal would not allow her to go to work, but gave no details as to how he prevented that. (R. 61, p. 71:1-2). M.H. was able to freely undertake these activities despite telling police that she felt like a prisoner. (R. 2). While M.H. testified that McNeal followed her around the house, following does not restrain her movements. (R. 61, p. 71:5-6). M.H.'s voluntary movements show that the jury was unreasonable to convict McNeal of false imprisonment. ***State v. Burroughs***, 2002 WI App 18, ¶18, 250 Wis. 2d 180, 640 N.W.2d 190 (Wis. App., 2001)(Confinement is the "unconsented restraint by one person of the physical liberty of another.").

Moreover, M.H. consistently had reasonable means to escape McNeal's presence, thus proving that there was legally no confinement. A person is not required to take "steps dangerous to herself or offensive to a reasonable sense of decency," but where there exists a reasonable means of escape, there is no confinement. ***State v. C.V.C.***, 153 Wis. 2d 145, 150, 450 N.W.2d 463 (Ct. App. 1989); *see also* Wis JI—Criminal 1275 ("A person is not confined or restrained if she knew she could have avoided it by taking reasonable action.").[5] M.H. admitted she could have stayed at Ruby's house that night or gone to her children's house instead of going home. (R. 61, p. 141:14-16, 144:10-12). M.H. texted her friends while McNeal was sleeping, which means she also had an opportunity to call the police herself or leave the

[5] The trial court instructed the jury: "A reasonable opportunity to escape does not change confinement or restraint that has occurred." (R. 63, p. 112:24-113:1). Counsel was once again ineffective in failing to object to this part of the jury instruction given the language in JI-1275 and *C.V.C.* directed otherwise.

house.[6] Legal confinement does not occur where a person can undertake a reasonable means of escape.

In *C.V.C.*, the court concluded that the victim did not have a reasonable opportunity to escape because there was a loaded gun in the house, the defendant threatened to kill her, her children were inside and he threatened to hurt them, and her prior experiences with the defendant. 153 Wis. 2d at 156-57. But here, the defendant was sleeping, and there was no gun or children in the house. If M.H. was able and willing to text her friend and sister for help over a period of a half-hour, it is reasonable to assume that she could have called the police or left the house. *Id* at 156. While an "opportunity to escape does not require the victim to take that risk," see *Burroughs*, 2002 WI App 18, ¶20, the circumstances here show that nothing prevented M.H. from seeking help from the police or leaving while McNeal slept. She did neither. Given the numerous opportunities she had to leave or obtain help, M.H. was not legally confined.

Due to the lack of credible evidence proving that McNeal legally confined M.H.'s movement, the jury was unreasonable in convicting McNeal of false imprisonment. ***State v. Hamilton***, 120 Wis. 2d 532, 540, 356 N.W.2d 169 (1984)(State must prove "every essential element of the crime charged beyond a reasonable doubt.").

III. THE TRIAL COURT ERRED IN FAILING TO STRIKE HURST'S TESTIMONY REGARDING A PRIOR STRANGULATION INCIDENT BETWEEN MCNEAL AND M.H.

A. LEGAL STANDARDS.

An evidentiary error is subject to a harmless error analysis and requires reversal or a new trial only if the improper decision "has affected the substantial rights of the party seeking relief." ***Nischke v. Farmers & Merchants***

[6] The text messages were time stamped between 4:19a.m. and 4:50a.m., giving M.H. over a half-hour to call the police or leave while McNeal was sleeping. (R. 44, Ex. B).

Bank & Trust, 187 Wis. 2d 96, 108, 522 N.W.2d 542 (Ct. App.1994); *see also* Wis. Stat. § 805.18(2).

Under this test, an appeals court "will reverse only where there is a reasonable possibility that the error contributed to the final result." ***Nischke***, 187 Wis.2d at 108 (citations omitted). "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. In making this determination, the reviewing court weighs the effect of the inadmissible evidence against the totality of the credible evidence supporting the verdict. ***Tim Torres Enters. v. Linscott***, 142 Wis. 2d 56, 78, 416 N.W.2d 670 (Ct. App. 1987). Error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citations excluded).

B. STANDARD OF REVIEW.

The decision to admit or exclude evidence is within the discretion of the trial court. ***State v. Martinez***, 150 Wis. 2d 62, 71, 440 N.W.2d 783 (1989). "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." ***State v. Beauchamp***, 2010 WI App. 42, ¶7, 324 Wis. 2d 162, 781 N.W.2d 254.

C. ARGUMENT.

1. The Trial Court Erred when it Allowed Hurst to Testify that McNeal Previously Choked M.H.

The trial court erred in admitting the portion of Hurst's testimony into evidence wherein she discussed what M.H. told her regarding a prior choking incident involving McNeal. The testimony was irrelevant, non-responsive, and unduly prejudiced McNeal.

The following exchange took place between defense counsel and Hurst on cross-examination.

> Q. So according to you M.H. said that Mr. McNeal has abused her in the past right?
> A. Yes.
> Q. Like how many times?
> A. I'm not sure. But she did tell me one night – I don't know if they were having sex but he started choking her and –
> Q. Some other night he choked her?
> A. And she seen an angel on the wall and she said it was me and that everything she touched that night glowed and that he couldn't see it.

(R. 62, p. 33:24-34:9).

On redirect, defense objected on the basis of hearsay when the State asked whether M.H. told Hurst how McNeal hurt M.H. (R. 62, p. 36:6-16). Defense counsel also objected that Hurst's answer regarding the angels, which she repeated for a second time on redirect, was non-responsive because he only asked her how many times the abuse occurred. (R. 62, p. 39:17-20, p. 40:21-24). He moved to strike that part of her testimony. (R. 62, p. 40:25-41:1).

The trial court overruled the defense's objection, refused to strike the testimony and gave the State the opportunity on redirect to establish the timeframe wherein the abuse occurred. (App. 1-114; R. 62, p. 41:2-17). The court held that the testimony was not unduly prejudicial because "it bears directly on the circumstances that are alleged about the strangulation and suffocation." (App. 1-115; R. 62, p. 42:10-13). It also held that the testimony was not hearsay under 908.01(4), because it is a statement to rebut an implied allegation that M.H. has fabricated the charges. (App. 1-115; R. 62, p. 42:17-43:6).

First, this testimony should have been stricken, because it was not relevant. Hurst could not give the jury a specific time frame for when the alleged strangulation happened. Hurst testified: "I don't know if it happened three weeks before. I don't know if roughly our phone call was

about three weeks before. She didn't tell me exactly when it happened but she did tell me it happened." (R. 62, p. 47:7-11). Section 904.01 of the Wisconsin Statutes defines relevant evidence as "Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The State was unable to tie this alleged event to the May 20, 2014, or June 15, 2014 Incident. Consequently, the testimony was not relevant, because it did not help the jury decide any of the issues of consequence and should have been stricken by the trial court.

Second, the court erred in refusing to strike Hurst's testimony because it was non-responsive. Defense counsel asked Hurst how many times McNeal abused M.H. Hurst began discussing a separate strangulation event, which was not charged against McNeal, as well as M.H.'s experience of blacking out and seeing an angel. (R. 62, p. 33:24-34:9). This testimony was non-responsive and should have been struck by the trial court because it prejudiced the jury against McNeal.

Finally, even if this Court concludes that the testimony was relevant, a new trial is necessary because it was unduly prejudicial to McNeal's defense. Section 904.03 of the Wisconsin Statutes states that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The trial court's decision to allow the jury to hear and synthesize this testimony affected McNeal's substantial rights because the strangulation conviction was likely based on impermissible and irrelevant evidence. ***Evelyn. C.R.***, 2001 WI 110, ¶28 (error not harmless if it undermines reviewing court's confidence in outcome). This testimony gave veracity to the June 15, 2014 strangulation and suffocation charge—i.e. if he strangled her once, he likely did it again. This error is not harmless because it is unlikely the jury would have convicted McNeal of the strangulation count without hearing this prejudicial third-party testimony. ***Harvey***, 2002 WI 93, ¶49.

The trial court erred in allowing the jury to hear Hurst's second-hand testimony regarding an alleged strangulation incident between McNeal and M.H., because it

wasn't relevant, the answer was non-responsive, and it unduly prejudiced McNeal's defense. A new trial is necessary.

IV. THIS COURT SHOULD USE ITS DISCRETIONARY REVERSAL POWER AND ORDER A NEW TRIAL BECAUSE THE CONTROVERSY WAS NOT FULLY TRIED.

A. LEGAL STANDARDS.

In order to show the controversy has not been fully tried, the defendant must show "the jury was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case." ***State v. Cleveland***, 2001 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543 (internal quotations omitted). There must be "a substantial degree of probability that a new trial would produce a different result." *Id*. This discretionary reversal is powerful and therefore the court exercises it "sparingly and with great caution." ***State v. Watkins***, 2002 WI 101, ¶79, 255 Wis. 2d 265, 647 N.W.2d 244.

B. STANDARD OF REVIEW.

This Court has the authority to reverse a conviction in the interest of justice only "if it appears from the record that the real controversy has not been fully tried," or if there has been a miscarriage of justice for any reason. WIS. STAT. § 752.35; ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990).

C. ARGUMENT.

1. The Court Should Order a New Trial Because Trial Counsel's Ineffective Representation Prevented the Jury From Deciding the Case Based on All the Admissible Evidence.

While discussing its discretionary reversal powers in ***State v. Jeffrey A.W.***, the Court of Appeals stated "We

reverse to maintain the integrity of our system of criminal justice and so that we can say with confidence that justice has prevailed." 2010 WI App 29, ¶14, 780 N.W.2d 231. Justice has not prevailed here because, as argued in Section one, the real controversy was not fully tried due to the ineffective assistance of trial counsel. Counsel's failure to impeach M.H.'s testimony with the police reports, medical documents, and temporary restraining order, as well as through Officer's Nogalski and Nurse Kleist's testimony, rendered him ineffective and makes the result of the trial unreliable and fundamentally unfair. The jury never heard important testimony that went to the crux of this case—M.H. fabricated the charges. ***State v. Garcia***, 73 Wis. 2d 651, 655, 245 N.W.2d 654 (Wis. 1976) (holding that a new trial was necessary where jury did not have an opportunity to hear testimony that could challenge the credibility of the defendant and principal witnesses).

"The administration of justice is and should be a search for the truth." ***State v. Hicks***, 202 Wis. 2d 150, 163, 549 N.W.2d 435 (1996). Counsel's failure to put forth a reasonable effort and investigate Norment prevented the jury from hearing important testimony and entitles McNeal to a new trial. Norment was willing to testify that M.H. told him that McNeal did not do the crimes she reported to the police. (R. 44, Petersdorff Aff. ¶8). The jury could have relied on this testimony when evaluating M.H.'s credibility and rendering a verdict. *See* ***State v. Smith***, 2003 WI App 234, 268 Wis. 2d 138, 671 N.W.2d 854 (discussing that credibility hung in the balance and that the slightest wisp of influence could have directed the course of the jury's determination);

Wisconsin courts have held that where the defendant makes counsel aware of the existence of evidence that could impeach the credibility of the victim, and counsel failed to investigate this information, the representation fell below the objective standard of reasonableness. ***Jeannie M.P.***, 2005 WI App 183, ¶25. McNeal told counsel about the discrepancies between the police reports, medical documents and temporary restraining order, as well as the information Norment held, in advance of trial. (R. 44, McNeal Aff. ¶8). Had counsel investigated and used this information at trial, a

jury likely would have found McNeal innocent. Justice requires a new trial.

CONCLUSION

Based on the argument and authorities presented herein, McNeal respectfully requests this Court to vacate the conviction for false imprisonment due to a lack of sufficient evidence and direct the trial court to dismiss these charges with prejudice. McNeal further requests this court reverse the circuit court's judgment and remand the case with directions to the circuit court to enter an order vacating the judgment of conviction and ordering a new trial in the interests of justice. Alternatively, McNeal respectfully requests this court remand the matter to the circuit court and direct the circuit court to schedule a ***Machner*** hearing in order to allow the circuit court to listen to testimony and properly evaluate McNeal's ineffective assistance of counsel claim.

Dated this 20th day of June, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,902 words.

I hereby further certify that filed with this brief, as part of this brief, is an appendix that complies with Wis. Stat. § 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 this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 been so reproduced to preserve confidentiality and with appropriate references to the record.

I hereby further certify that an electronic copy of this Brief was submitted pursuant to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the Brief is identical to the text of the paper copy of the Brief.

Dated this 20th day of June, 2016.

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/s/ Marisa R. Dondlinger
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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Brief of Defendant-Appellant Joel Maurice McNeal and corresponding appendix have been served via U.S. mail to the following on June 20, 2016:

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