STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP0633-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOEL MAURICE MCNEAL,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING MCNEAL'S POSTCONVICTION MOTION, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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QUESTIONS PRESENTED

1. **Ineffective assistance of counsel.** Under *Bentley*,[1] McNeal's postconviction motion must allege facts that, if true, would entitle him to an evidentiary hearing. McNeal's motion presented conclusory allegations attacking the victim's credibility but failed to challenge any of the overwhelming physical evidence confirming his guilt. Did McNeal's postconviction motion allege sufficient facts to warrant an evidentiary hearing?

The circuit court held that McNeal's ineffective assistance claims were meritless and denied his postconviction motion without a hearing.

2. **Sufficiency of the evidence**. McNeal choked and forcibly confined his victim while sexually assaulting her. He thereafter monitored and directed the fearful victim to their bedroom after she tried to seek help. Was this evidence sufficient to show that McNeal committed false imprisonment?

By sentencing McNeal and entering the judgment of conviction for false imprisonment, the circuit court implicitly found the evidence sufficient.

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[1] *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

3. **Circuit court's failure to strike testimony.** McNeal opened the door by asking about his prior abuse of the victim on cross-examination and did not object or move to strike this testimony until the State's redirect examination. Moreover, the prior abuse was admissible as a prior consistent statement after McNeal impeached the victim's testimony with a motive to fabricate. Did the circuit court err in failing to strike this testimony?

The circuit court overruled and denied McNeal's objection and motion to strike.

4. **Interest of justice**. This Court maintains discretion to reverse McNeal's conviction in the interest of justice if an issue is not fully tried. McNeal re-alleges his ineffective assistance claims as a basis for relief. Did counsel's alleged ineffective assistance warrant the reversal of McNeal's conviction in the interest of justice?

The circuit court denied McNeal's interest of justice claim.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the Court's opinion.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

Defendant-appellant, Joel McNeal, appeals from an order denying his Wis. Stat. § 809.30 postconviction motion. In June 2014, the State charged McNeal in Milwaukee County Case No. 14CF2569 with two counts of second-degree sexual assault, one count of strangulation and suffocation, and one count of false imprisonment, all as acts of domestic abuse. (2:1-2.) One count of sexual assault was related to a May 20, 2014 incident with the remaining charges occurring on June 16, 2014. (*Id.*) All of the charges were concerning McNeal's actions against his live-in girlfriend, M.H. (*Id.*)

While in jail pending trial, McNeal violated the court's no contact order and wrote multiple letters intended for M.H. in an attempt to thwart prosecution. (30:1-2.) Based on his communications, the State charged McNeal in Milwaukee County Case No. 14CF4618 with two counts of felony intimidation of a witness. (*Id.*)

In December 2014, McNeal proceeded to trial in both cases. A jury convicted McNeal of the June 16 second-degree sexual assault, strangulation and suffocation; false imprisonment; and two counts of victim intimidation. (16; 17; 18.) The jury acquitted McNeal of the May 20 sexual assault charge. (15.) Because resolution of McNeal's appellate claims require the examination of the evidence adduced at trial, the State presents the following summary

of trial testimony and admitted evidence to frame the issues on appeal.

1. Milwaukee police officers Matthew Nogalski and Steven Van Erden respond to a welfare complaint at M.H.'s home.

On June 16, 2014, Milwaukee police officers Matthew Nogalski and Steven Van Erden arrived at M.H.'s duplex home in Milwaukee in response to a welfare complaint. (62:51-52.) Nogalski testified that he knocked on the front door and M.H. answered the door after a few minutes. (62:66.) M.H. was dressed in a towel and whispered to the officers: "he's upstairs." (62:66.) As the officers walked up the stairs, they heard a door shut and lock. (*Id.*)

2. The officers arrest McNeal after M.H. reports that he choked and raped her and reveals the injuries on her neck.

Van Erden went to the upstairs bedroom while Nogalski interviewed M.H. Nogalski testified that M.H. appeared scared and fearful. (62:67.) M.H. explained that McNeal had first choked her and then forcibly had sexual intercourse with her. (62:69, 70.) While speaking with M.H., Nogalski could visibly identify physical injuries on M.H.'s body, including an abrasion on her neck and bruises on her right arm. (62:74.) Nogalski also took photographs of M.H.'s injuries that were introduced to the jury. (62:75-76.) Based on M.H.'s allegations, the officers arrested McNeal in the

upstairs bedroom and took M.H. to a sexual assault treatment center.

3. Forensic DNA analysis confirms that McNeal is the major contributor on the vaginal swabs and a possible contributor to the profile on M.H.'s neck.

Sexual Assault Nurse Examiner ("SANE"), Gina Kleist, examined M.H. and took DNA samples from M.H.'s genitals and neck area. (62:121, 165.) Kleist testified that during the examination, M.H. informed her that McNeal had pinned her down and choked her. (62:162.) Kleist also noted the following injuries that she observed on M.H.'s face and body:

- Abrasions and scratches on M.H.'s face. (62:158.)
- Abrasions and scratches on two sides of M.H.'s neck. (*Id.*)
- Two "suction" marks otherwise known as "hickeys" on two sides of M.H.'s neck. (*Id.*)
- Abrasions and two bruises on M.H.'s back that M.H. said were caused from McNeal ripping off her bra and grabbing her. (62:159-60.)
- Three bruises consistent with fingertips on M.H.'s right arm. (*Id.*)
- A bruise on M.H.'s leg that M.H. said was from McNeal using a knee to hold her down during the assault. (62:160-61.)

A DNA analyst for the State, Patricia Dobrowski, analyzed the recovered DNA samples from M.H. and

compared them to McNeal's DNA profile. Dobrowski testified that McNeal was a major contributor to the sperm found on the swabs taken from M.H.'s vagina and cervix. (62:128, 130.) She further testified that McNeal's DNA profile was included as a partial contributor with the male profile recovered from M.H.'s neck. (62:132.)

4. M.H. testifies that McNeal strangled her and then raped her before she was able to text her friends to help save her life.

M.H. testified that she met McNeal at a Milwaukee nightclub in April 2014 and invited him to live with her at her home shortly after they began dating. (61:47-48.) On June 15, M.H. and McNeal hosted a dinner party at M.H.'s home with several friends and acquaintances, including, Artimus "Art" Hudson, Mai Thong "Ruby" Chang, and Debbie Hurst. (61:55-56.)

At the party, M.H.'s friend, Hurst, started an argument because Chang arrived with her boyfriend, Hudson, and had injuries on her face consistent with physical abuse. (61:57.) McNeal was critical of Hurst and began to argue with M.H. about her. (*Id.*) Hurst testified that during the party, M.H. and McNeal were arguing in their bedroom and she reported hearing something sounding like "roughing around" in the room. (62:9-10.)

M.H. testified that she drove Chang home after the party. (61:58.) Hurst similarly testified that M.H. drove Chang home. (62:14.) When M.H. returned, McNeal began to follow her around the house and began an argument. (61:60.)

McNeal started to scream at M.H. and demanded that she take off her clothes. (61:61.) He then began to forcibly have sex with her and strangle her. (61:64.) M.H. lost consciousness and found McNeal asleep when she awoke. (61:68.) M.H. grabbed her phone and ran to the bathroom where she texted her sister, Malia,[2] and Hurst to call the police. (61:68.) As a precaution, she erased her texts in case McNeal searched her phone. (*Id.*) M.H. could not recall the exact timing of her text messages, stating "I don't know. I think it was three something in the morning. I didn't pay attention to time." (61:68.) Hurst testified that M.H. sent her a text message at approximately 4:19 or 4:20 a.m. while Hurst was asleep. (62:17.)

After sending the text messages, M.H. heard McNeal outside her bathroom door. (61:69.) He started to pound on the door, inquired what she was doing, and instructed her to return to their bed. (*Id.*) M.H. followed McNeal's instructions and the both of them fell asleep on the bed until police arrived. (*Id.*)

Hurst testified that she awoke around 6 a.m., saw M.H.'s text messages, and contacted police at approximately 6:20 a.m. (62:17-18.) At trial, Hurst identified the 911 call that she placed that morning. (62:18.) In the call, Hurst told police about M.H.'s text messages. (62:19-20.)

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[2] The State purposefully omit's Malia's full name to maintain M.H.'s privacy.

Malia also testified that M.H. sent her a text message. In the text, M.H. explained that McNeal was trying to kill her and told Malia to call the police. (61:187, 189.) Malia called police after receiving the text and reported M.H.'s text for help. (61:190.) The State also introduced Malia's 911 call that reported the incident. (*Id.*)

5. Hudson and Chang testify for the defense and deny that Chang's physical abuse started an argument between McNeal and M.H.

The defense called Hudson to testify. (62:179.) Hudson denied that he physically abused Chang and alleged that an argument broke out at the party due to a racist remark by Hurst. (62:183, 185.) Hudson left the party before Chang to go to work, but contrary to M.H.'s testimony, he testified that he believed Chang drove herself home. (62:186.)

Hudson also testified that following McNeal's arrest and the court issuing the no contact order, M.H. used Chang and himself to communicate with McNeal and support him in jail. (62:187.) Hudson also admitted that he would forward mail from McNeal to M.H. even though it was addressed to him and Chang. (62:190.)

Chang similarly testified that an argument started at the party regarding race. (62:217.) During the party, she noticed that M.H. and McNeal went into a back bedroom "to talk." (62:231-33.) She testified that she left the party around 10 p.m. and drove herself home. (62:217.) Chang later admitted, despite Hudson's coaching from the courtroom gallery, that Hudson physically abused her and

that she implied this to a friend at the party. (62:225-26, 227-28.)

Chang also testified that McNeal asked her from jail to send his letters to M.H. on his behalf and that she agreed. (62:229-230.) Chang recalled receiving letters from McNeal and giving them to M.H. (62:230.)

6. McNeal testifies that M.H. fabricated her allegations because he reunited with an ex-girlfriend and she was mad about his active arrest warrant.

McNeal testified that Hurst started an argument at the party by alleging that "black guys do their women wrong" because she observed bruises on Chang that she attributed to Hudson's abuse. (63:42). McNeal also testified that M.H. was intoxicated at the time and became angry with him. (63:43-44). McNeal attributed her anger to his seeing an ex-girlfriend a week previously and M.H. learning of his active arrest warrant. (63:44-45.) McNeal denied becoming physical with M.H. at the party. (63:43.)

After the party, McNeal recalled M.H. accompanying Chang home and returning to their house. (63:46-47.) McNeal denied sexually assaulting M.H. when she returned. Instead, he alleged they had consensual sex multiple times that night and that he never physically abused her or confined her in the home. (63:49-52, 53.)

Following his arrest, McNeal admitted to writing M.H., but indicated that M.H. recanted her allegations and sought him out first. (63:57-58, 60.) In his letters McNeal

repeatedly apologized to M.H. for hurting her and asked for forgiveness. (63:68-69.)

ARGUMENT

In his postconviction motion and on appeal, McNeal raises an array of claims that the State consolidates as four general arguments based on the substance of each claim.

McNeal first argues that his trial counsel was ineffective in a multitude of ways. But, as *State v. Thiel*, 2003 WI 111, ¶ 61, 264 Wis. 2d 571, 665 N.W.2d 305, teaches, "a convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial." The circuit court correctly held that the record demonstrated that McNeal was not entitled to a hearing or relief on any of his claims. McNeal's ineffective claims utterly fail to prove that his counsel's performance fell below an objective standard of reasonableness in any way. Moreover, McNeal fails to prove that even the cumulative impact of his counsel's alleged errors created a reasonable probability that the result of his trial would have been different absent those errors. The evidence in this case was compelling and the victim gave details of the assault corroborated by other witnesses and significant physical evidence that included McNeal's own admissions of guilt in letters to M.H. McNeal's claims only speculate as to a different verdict at trial.

McNeal's second argument is that the evidence at trial was insufficient for the jury to convict him of false imprisonment. (McNeal's Br. 29-30.) McNeal's argument lacks any substantive merit. The State proved each element of false imprisonment based on McNeal's violent conduct during the sexual assault and his subsequent demands that M.H. stay inside their bedroom.

McNeal's third argument alleges that the circuit court failed to strike Hurst's testimony regarding McNeal's prior abuse toward M.H. (*Id.* at 32). McNeal's counsel opened the door to this testimony on cross-examination and did not object or move to strike this testimony until the State re-raised the issue on redirect examination. To the degree this Court addresses McNeal's forfeited claim, counsel was not ineffective for failing to object to admissible testimony of a prior consistent statement.

Lastly, McNeal argues he should receive a new trial in the interest of justice based on his counsel's ineffectiveness. (*Id.* at 35-36). McNeal has not established any justifiable reason for this Court to grant his request based on his unsubstantiated claims.

I. The circuit court correctly denied McNeal's various claims of ineffective assistance of counsel without a hearing.

A. Standard of review and legal principles.

To be entitled to a hearing on a postconviction motion, a defendant must allege "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 fails to raise sufficient facts for 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 a hearing. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 547 N.W.2d 50 (1996). On review, this Court grants a circuit court's discretionary decisions deference. *Allen*, 274 Wis. 2d 568, ¶ 9.

To prove ineffective assistance of counsel, a defendant bears the burden to prove that counsel's performance was both deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel's actions or omissions were "professionally unreasonable." *Id.* at 691. To prove prejudice, a defendant must show that but for counsel's alleged error, there is a reasonable probability of a different result. *Id.* at 694. "Speculation about what the result of the proceeding might have been is insufficient." *State v. Benson*, 2012 WI App 101, ¶ 19, 344 Wis. 2d 126, 822 N.W.2d 484. Instead, "[t]he defendant must affirmatively prove prejudice." *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Williams*, 2015 WI 75, ¶ 35, 364 Wis. 2d 126, 867 N.W.2d 736. A trial

court's findings of fact are upheld unless clearly erroneous. *Id*. Whether counsel's performance is constitutionally infirm is a question of law, reviewed *de novo*. *State v. Domke*, 2011 WI 95, ¶ 33, 337 Wis. 2d 268, 805 N.W.2d 364. If a court concludes that a defendant has not established either deficient performance or prejudice, the court need not address the other prong. *Strickland*, 466 U.S. at 697.

B. McNeal's ineffective claims lack merit.

1. Chronology, timing of the assault, and text messages.

McNeal contends that trial counsel should have impeached M.H.'s testimony about the chronology of the assault, the time that the assault occurred, and the timing of her text messages. (McNeal's Br. 15, 16.) McNeal argues that M.H.'s testimony about the order in which McNeal choked or raped her and the time it occurred was inconsistent with what she told police, her statement to the SANE, and as alleged in her petition for a temporary restraining order against McNeal. (*Id.* at 15-16.)

The circuit court correctly rejected McNeal's claims regarding the chronology and timing of the assault because he failed to demonstrate deficient performance. As a preliminary matter, McNeal's arguments challenge a peripheral point to the State's case. *See Jones v. Wallace*, 525 F.3d 500, 504 (7th Cir. 2008) (counsel's failure to elicit inconsistencies not touching on central facts in the case does not prejudice the defense.) The State carried its burden at

trial to prove that M.H.'s allegations occurred beyond a reasonable doubt; it was not required to establish the exact timing of the acts themselves to prove McNeal's guilt. *See State v. Fawcett*, 145 Wis. 2d 244, 250, 426 N.W. 2d 91 (Ct. App. 1988) ("Time is not of the essence in sexual assault cases.")

Moreover, a witness may be understandably mistaken about a peripheral fact without undermining her credibility about the substance of her testimony. This is especially true here, given M.H.'s testimony as to repeated bouts of unconsciousness due to McNeal strangling her and her testimony regarding the emotional toll of the assault. Counsel was not deficient in failing to further impeach M.H.'s version of events.

Contrary to McNeal's assertions, counsel did impeach M.H. regarding the timing of her text messages. Counsel effectively impeached M.H. and Malia regarding their failure to retain their text messages, (61:145, 160, 167, 192), and questioned Hurst about the timing of M.H.'s texts (62:31-32). Counsel also elicited M.H.'s inconsistent statement from Nogalski's police report that the assault happened around the same time Hurst stated she received M.H.'s text. (62:81.) Through the course of the trial, counsel established inconsistencies for the jury to consider and pursued a reasonable and effective defense regarding the timing of M.H.'s texts.

Even if counsel was deficient by failing to impeach M.H. as McNeal contends, McNeal does not prove that he was prejudiced. M.H.'s inconsistent recollection was already before the jury—M.H. testified on direct that McNeal first raped her before choking her and then testified that she gave a statement to police that McNeal choked her before raping her. (61:65-66, 71-72.) M.H. also admitted to the jury that she had trouble remembering the exact sequence of events and explained that it was emotionally traumatic for her to recount the events again in exact detail. (61:87-88.) On redirect examination, M.H. conceded again that she did not remember the chronology of events in the following exchange:

> Q. And when you talked to the police on June 16th, do you remember telling them that the defendant put his hands around your neck and then later put his penis in your vagina?
>
> A. Yes. I don't remember what sequence.
>
> Q. When you talked to the police, it was just hours after the defendant had hurt you; is that right?
>
> A. Yes.
>
> Q. And when you talked to them just hours afterwards, you told them that the sequence was that he choked you and then he had sexual intercourse with you. Do you recall that?
>
> A. Yes.
>
> Q. Were things clearer or fresher in your mind when you spoke to police?

A. I think it was much clearer back then.

(61:178.)

The jury could already infer from M.H.'s testimony that she was unsure of the chronology and timing of events. McNeal only offers more sources of impeachment on the same inconsistencies presented at trial. A failure to pummel a witness over the same inconsistent statements already before the jury hardly qualifies as ineffective assistance of counsel.

McNeal's defense was also not prejudiced by counsel's alleged failure to establish the timing of the text messages. In short, McNeal overstates the importance of further impeachment on the messages' timing given the testimony:

- M.H. stated: "I don't know. I think it was three something in the morning. I didn't pay attention to the time." (61:68.)
- Malia testified, "Um, I don't remember but it was early a.m." (61:187.)
- Hurst testified to a range of possible times, stating: "It was like 4:19 or 4:20 or 4:40, something like that. I know it was like in the middle of the night." (62:17.)

Given the range of times regarding the assault and the text messages, McNeal simply speculates his way to a favorable result. However, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). McNeal's claim is insufficient to establish prejudice.

McNeal incorrectly supports his claim of prejudice with *Raether v. Dittmann*, 40 F. Supp. 3d 1097 (E.D. Wis. 2014); (McNeal's Br. 16.) There, the district court held counsel's failure to impeach the state's witness with a police report was prejudicial. *Raether*, 40 F. Supp. 3d at 1104. This was because counsel failed to challenge the victim's vastly improved recollection at trial years after she reportedly remembered only "bits and pieces" in the days following the alleged assault. *Id.* Here, M.H. specifically recalled the assault itself and never showed a better ability to recall the assault over the passage of time. (61:171.) M.H.'s only blemish on her credibility was her understandable mistakes on peripheral facts caused by the violence of the assault. *Raether* is also distinguishable because it "turned on the [the alleged victim's] testimony" and unlike this case, had no scientific or physical evidence of sexual assault. *Raether*, 40 F. Supp. 3d at 1103-04. The photographs of M.H.'s injuries, the rape kit, and McNeal's letters all incriminate McNeal and lend credibility to M.H.'s account where *Raether* lacked similar evidence of guilt.

McNeal's reliance on *Thiel* is misplaced in several respects. (McNeal's Br. 16, 18, 21, 22.) In *Thiel*, a sexual assault by therapist case, the court regarded "the credibility of the complaining witness was central to the jury's verdict" and considered counsel's failure to pursue further evidence to impeach the victim's version of events. *Thiel*, 264 Wis. 2d 571, ¶¶ 4, 50. Counsel had police reports and medical notes

before trial and never read or did not adequately review the documents. *Id.* ¶ 26. These documents revealed that the complainant had falsely told a different therapist that she had a sample of Thiel's semen and that she threatened Thiel with the sample. *Id.* The court also concluded that a simple background check would have revealed that the complainant had no driver's license, even though she claimed to have driven to Thiel's house more than 100 times. *Id.* ¶¶ 39, 41. "Taking the time to visit Thiel's neighbors would likely have revealed to trial counsel that none of the neighbors recalled seeing [the complainant], even though her alleged visits occurred three or four times a week." *Id.* ¶ 47. The court cited numerous other deficiencies both in reviewing the discovery, failing to investigate, and misinterpreting the law. *Id.* ¶¶ 26-31. Suffice it to say, that the number of deficiencies attributed to trial counsel in *Thiel* and the effect of the omitted evidence was of far greater significance than in this case where there was compelling physical evidence of McNeal's guilt. *Thiel* is also distinguishable because the alleged inconsistent statements were largely before the jury in this case. Counsel's performance did not prejudice McNeal's defense.

2. M.H.'s alleged inconsistent statements during her SANE examination.

McNeal next argues that counsel failed to cross-examine M.H. regarding alleged discrepancies between her statements to Kleist and her statements to police. (McNeal's

Br. 18.) McNeal focuses on Kleist's testimony that M.H. reported that she vomited when this was not included in Nogalski's police report. (*Id.*) McNeal also notes alleged inconsistencies in the types of injuries noted in Kleist's testimony and Nogalski's police report. (*Id.*)

McNeal does not demonstrate prejudice. He fails to explain in his motion or on appeal why any of these so-called "inconsistencies" would have made any difference to the jury: he merely declares that counsel "should have cross-examined M.H. about how she could leave out such vital information when talking to Officer Nogalski." (McNeal's Br. 18.) This is an inadequate and conclusory claim of ineffective assistance. *See Allen*, 274 Wis. 2d 568, ¶ 24.

Whether M.H. described her vomiting and injuries consistently to the police and medical staff does not cast doubt on M.H.'s credibility when taking into account the totality of the evidence before the jury. *See Strickland*, 466 U.S. at 695. The State introduced photographs of M.H.'s injuries and DNA evidence that supported M.H.'s testimony. Also, McNeal's jailhouse letters intended for M.H. in which he asked M.H. for forgiveness, apologized for "the pain that I caused you," and stated that "I never meant to hurt you" further proved his guilt. (63:68-69.) McNeal cannot demonstrate a reasonable probability of a different result in light of this evidence.

3. M.H.'s alleged eczema as an alternative cause for her injuries.

McNeal contends that his counsel was ineffective for failing to investigate M.H.'s apparent eczema and suggesting that her injuries could have been alternatively caused from her scratching her skin. (McNeal's Br. 18.) Even assuming, *arguendo*, that counsel was deficient, McNeal cannot demonstrate prejudice.

"Not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceedings." *State v. Elm*, 201 Wis. 2d 452, 462, 549 N.W.2d 471 (Ct. App. 1996). McNeal's evidence does not change the evidentiary picture at trial. Even if the jury believed that eczema caused M.H. to scratch her neck, it would not provide an alternative cause for all of M.H.'s injuries. In addition to the scratches on M.H.'s body, she also had extensive bruising on her arms, legs, shoulders, and back. (62:159-160.) McNeal was also a possible contributor to the male DNA profile recovered from M.H.'s neck. Additionally, McNeal's jailhouse letters further corroborated M.H.'s account that she was physically abused. (63:68-69.) Given the multitude of evidence unaffected by his new eczema defense, McNeal fails to show prejudice.

4. Cross-examination regarding M.H.'s alcohol consumption.

McNeal argues that counsel should have impeached M.H.'s testimony that she had one shot to drink the night of the assault with Kleist's medical report that included M.H.'s

prior inconsistent statement that she had two drinks the night of the assault. (McNeal's Br. 19.)

Counsel need not raise every conceivable issue at trial. *See Thiel*, 264 Wis. 2d 571, ¶ 61 ("A criminal defense attorney's performance is not expected to be flawless.") Simply asserting the existence of a material inconsistency does not make it so. McNeal greatly overstates the value of the inconsistency in M.H.'s testimony about the number of drinks she consumed. M.H. only estimated her alcohol consumption that night:

> Q. You may have done at least one shot, right?
>
> A. Yes. I limit my shots. So probably one shot.

(61:135.)

M.H. also admitted to the jury that it was difficult to remember the events in question that night. (61:87-88.) M.H.'s prior statement to Kleist that she had two shots hardly constitutes a matter for further impeachment and counsel was not deficient by failing to impeach on a peripheral point.

The failure to impeach M.H. on her alcohol consumption was also not prejudicial. Prejudice requires more than just a showing of a conceivable effect on the outcome of the trial. *Strickland*, 466 U.S. at 693. The unlikely possibility that the jury would have concluded M.H. was lying about the assault due to her prior statement that she had two shots of alcohol is insufficient to undermine

confidence in the outcome of the trial. McNeal only speculates his way to a favorable outcome.

5. Cross-examination regarding M.H.'s prior recantations.

McNeal contends that his counsel failed to properly impeach M.H. with her prior recantation. (McNeal's Br. 19.) Although McNeal concedes that counsel did impeach M.H. regarding her prior recantation, he claims that he failed to do it effectively. (*Id.*) McNeal also argues his counsel should have elicited Chang's and Hudson's testimony that M.H. wanted to recant her statements to police because she was "lying." (*Id.*)

McNeal again speculates that further impeachment would have lead to a favorable result, but in reality his preferred method of impeachment would have harmed his defense. M.H.'s recantations followed McNeal's letters to M.H. asking her to drop the charges. (61:175.) Further impeachment of M.H. regarding her recantations would have bolstered the State's witness intimidation case against McNeal.

McNeal also fails to establish prejudice from counsel's failure to elicit Chang's and Hudson's testimony. The correct test for prejudice is not whether the witness could hypothetically support his defense, but whether this testimony creates a reasonable probability of a different outcome in light of the totality of the evidence. Here, McNeal's counsel already effectively implied that M.H.

recanted because she lied to police. Counsel summarized this theory at closing:

> [T]he police came and arrested Mr. McNeal. They took him away and he made no contact with [M.H.] until [M.H.] decided: Maybe what I did there wasn't fair and she knew exactly what to do about it. She wrote a letter. She encouraged Mr. McNeal to get in contact with her. He writes her the letters and doesn't tell her to thwart the administration of justice. He tells her to come clean: Go down to the DA's office and drop these charges that I think we all know in our hearts and in our minds are not true. That's not thwarting justice. That's seeking justice.

(63:148-149.) In closing, counsel's argument was clear: M.H. initially lied and later came clean in her recantation. The jury could have reached the same conclusion without Chang's and Hudson's allegations.

6. Evidence of prior consensual sex.

McNeal argues his counsel was ineffective for failing to request a pretrial hearing to seek to introduce evidence of his prior sexual relationship with M.H. (McNeal's Br. 25.) McNeal also believes his counsel was ineffective in failing to impeach M.H. regarding her inconsistent statements to Kleist about when she last had consensual sex with him. (McNeal's Br. 19.)

Under Wisconsin's rape shield statute, a defendant "may not offer evidence relating to a victim's past sexual history or reputation absent application of a statutory or judicially created exception." *State v. Jackson*, 216 Wis. 2d 646, 657, 575 N.W.2d 475 (1998). While a prior consensual sexual relationship may be relevant to the issue of consent,

see State v. Neumann, 179 Wis. 2d 687, 701 n.5, 508 N.W.2d 54 (Ct. App. 1993), there is a strong presumption that the evidence of consensual sex is prejudicial, *State v. Sarfaz*, 2014 WI 78, ¶ 55, 356 Wis. 2d 460, 851 N.W.2d 235. Accordingly, a defendant "must make a three-part showing that: (i) the proffered evidence relates to sexual activities between the complainant and the defendant; (ii) the evidence is material to a fact at issue; and (iii) the evidence of sexual contact with the complainant is of "sufficient probative value to outweigh its inflammatory and prejudicial nature." *Jackson*, 216 Wis. 2d at 659.

McNeal argues that M.H. should have been cross-examined about prior sexual events that McNeal alleges had occurred in the days leading up to the assault. (McNeal's Br. 25.) This, McNeal contends, would bolster his assertion that he had sex with the M.H. more frequently than she testified to and allow the jury to infer that the assault was instead consensual sex. (*Id.*)

McNeal's argument fails. This evidence is not relevant and does not bear on any fact that is of consequence. Appellate courts recognize that "a defendant has no right, constitutional or otherwise, to present evidence on cross-examination that is not relevant." *State v. Rhodes*, 336 Wis. 2d 64, ¶ 38, 799 N.W.2d 850 (2011) (quotations omitted).

McNeal's previous sexual relationship is dissimilar to the charge and facts of the June 16 assault. Here, the fact that M.H. previously consented to non-violent sexual

conduct has no probative value regarding whether she consented to sexual intercourse where she was strangled. McNeal cannot argue that because she consented previously, she also consents when he uses violence. Counsel was not ineffective for failing to raise a losing argument and request a hearing on the matter. Similarly, counsel was not deficient for failing to cross-examine M.H. on her last consensual contact with McNeal since it is irrelevant to whether McNeal committed the sexual assault in question.

Even if relevant, McNeal was not prejudiced because evidence of his prior consensual history with M.H. was already before the jury. McNeal repeatedly brought up his sexual history with M.H. (63:33, 38, 73, 78.) The jury could also infer a sexual relationship based on testimony that he lived with M.H and had a romantic relationship. (61:47.)

7. Alternative causes for McNeal's DNA profile on M.H.'s neck.

McNeal alleges that his counsel was ineffective in failing to cross-examine the State's DNA expert as to alternative non-violent causes for his possible YSTR profile located on the M.H.'s neck. (McNeal's Br. 20.) McNeal cannot prove that his counsel was deficient. The State's DNA expert did not offer an opinion as to the cause of the profile on M.H.'s neck. McNeal only speculates that the expert could somehow testify favorably for the defense.

Both parties were free to argue the cause of this YSTR profile. Through other witnesses, McNeal advanced a

defense that the observed injuries and profile could be from hickeys he left on M.H.'s neck during a consensual encounter. McNeal's counsel cross-examined M.H. on the hickeys observed on her neck the day of the assault. (61:158-159.) McNeal also testified on the causes of her injuries. (63:73.) Counsel was not deficient in advancing an alternative cause theory.

8. Failure to investigate a jailhouse witness.

McNeal also alleges his counsel was ineffective in failing to investigate an exculpatory witness he met in jail, William Norment, and present him at trial. (McNeal's Br. 23.) McNeal alleges that he notified counsel before trial that Norment told him that M.H. lied about the sexual assault. (*Id.*)

In determining prejudice, the court must consider the totality of the evidence and find a reasonable likelihood that absent the errors, the jury would have reached a different decision. *Strickland*, 466 U.S. at 695-96. Assuming Norment would actually testify, McNeal cannot demonstrate that Norment's testimony would have created a reasonable probability of a different result in light of all the evidence adduced at trial.

Norment did not witness the assault and only offers testimony regarding M.H.'s already impeached credibility. The jury had sufficient information to assess M.H.'s credibility including her recantation and inconsistent

statements. But given the physical evidence in the case—McNeal's DNA, a corroborating YSTR profile, M.H.'s documented injuries, and McNeal's own admissions in his jailhouse letters—this was never a case about M.H.'s credibility. Moreover, McNeal's testimony was effectively discredited upon cross-examination. The State cross-examined McNeal's inability to explain M.H.'s injuries and his failure to account for her injuries in police interviews. (63:80-82.) The State also confronted McNeal with his letters where he apologized for hurting M.H. (63:68.) As such, Norment's credibility attack does not create the likelihood of a different result given the totality of the evidence presented against McNeal.

9. M.H.'s alleged motive to lie because of race.

McNeal alleges his counsel was ineffective for failing to cross-examine M.H. regarding her biases against McNeal for being black. (McNeal's Br. 26.) McNeal is arguing that his counsel should have pursued a defense based on M.H.'s racism rather than his reasonable trial strategy to make the case about spurned love.

"Trial counsel is not ineffective simply because an otherwise reasonable . . . strategy was unsuccessful." *State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620. A claim of ineffective assistance of counsel does not provide McNeal with the legal means in which to second-

guess his counsel's strategic and professional judgment; instead it forecloses it. *See Elm*, 201 Wis. 2d at 464.

At trial, counsel argued that M.H. fabricated her allegations because she discovered McNeal was also seeing an ex-girlfriend and advanced a strategy based on the theme that "hell hath no fury like a woman scorned." (63:147.) McNeal does not show that his trial attorney's strategy was unreasonable. Rather he now speculates that a theme about race would have been more successful. Even if it appears in hindsight that another defense would have been more effective, this Court will uphold counsel's strategic decision as long as it is founded on rationality of fact and law. *See State v. Wright,* 2003 WI App. 252, ¶ 35, 268 Wis. 2d 694, 673 N.W.2d 386. McNeal cannot meet his burden to show that his counsel was ineffective.

II. The State presented sufficient evidence to convict McNeal of false imprisonment.

A. Standard of review and legal principles.

Appellate courts "may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). A defendant seeking to overturn a verdict on the basis of insufficient evidence bears a heavy burden to show

the evidence could not reasonably support his guilt. *State v. Beamon*, 2013 WI 47, ¶ 21, 347 Wis. 2d 559, 830 N.W.2d 681.

On review, this Court "must examine the record to find facts that support upholding the jury's decision to convict." *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203. When the evidence supports more than one inference, this Court must accept the inference drawn by the factfinder, or in other words, the inference that supports the jury's verdict. *State v. Smith,* 2012 WI 91, ¶¶ 30-31, 342 Wis. 2d 710, 817 N.W.2d 410.

B. There was sufficient evidence to sustain the jury's verdict on the false imprisonment charge.

The jury convicted McNeal of false imprisonment pursuant to Wis. Stat. § 940.30. The State was required to prove five elements:

> 1. [McNeal] confined or restrained [M.H.]
>
> 2. [McNeal] confined or restrained [M.H.] intentionally.
>
> 3. [M.H.] was confined or restrained without [her] consent.
>
> 4. [McNeal] had no lawful authority to confine or restrain [M.H.]
>
> 5. [McNeal] knew that [M.H.] did not consent and knew that [he] did not have lawful authority to confine or restrain [M.H.]

See Wis. JI-Criminal 1275 (2015); Wis. Stat. § 940.30.

McNeal claims that there was no evidence that he confined M.H. during the crime because she was free to leave the apartment. (McNeal's Br. 30.) M.H. testified that

an enraged McNeal pushed her onto the couch, pinned her on her back, choked her, and began to have sexual intercourse with her. (61:65-66.) M.H. testified that she was able to get off of the couch only after McNeal fell asleep. (61:68.) After running into the bathroom and locking the door, M.H. texted her friends for help. (61:68.) Less than a minute after M.H. entered the bathroom, McNeal was knocking at the bathroom door telling her to come out and go back to bed. (61:183.) M.H. testified that she "didn't have a choice" and that "whatever he said, I had to do." (*Id.*)

Based on that evidence, a reasonable jury could have found that McNeal confined or restrained M.H. when he pinned her against the couch, held her down and choked her, forcibly had sex with her without her consent, and then demanded that she come out of the bathroom and go back to bed with him. This Court should conclude, therefore, that there was sufficient evidence to sustain McNeal's guilty verdict on false imprisonment.

III. The circuit court did not erroneously fail to strike Hurst's testimony.

A. Standard of review and legal principles.

Evidentiary rulings are a matter of trial court discretion, and will be affirmed on appeal unless the lower court exercised its discretion erroneously. *See State v. Peters*, 192 Wis. 2d 674, 685, 534 N.W.2d 867 (Ct. App. 1995). Even an erroneous exercise of evidentiary discretion does not

warrant a new trial if the error was harmless. *See* Wis. Stat. § 805.18; *State v. Weber*, 174 Wis. 2d 98, 109, 496 N.W.2d 762 (Ct. App. 1993). Error is harmless "if it is clear beyond a reasonable doubt" that the error did not affect the jury's verdict. *See State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189.

However, before a court can exercise its discretion in excluding evidence, an objection must be made to the admission of the evidence. *State v. Johnson*, 2004 WI 94, ¶ 25, 273 Wis. 2d 626, 681 N.W.2d 901. "The circuit court has no duty to independently strike testimony that is inadmissible." *Id.* "Without an objection, the issue of whether the circuit court properly exercised its discretion has not been preserved for appeal." *Id.*

B. McNeal opened the door to the prior consistent statement of past abuse and failed to object or move to strike this testimony.

McNeal argues that Hurst's testimony about M.H.'s account of McNeal's past abuse was inadmissible because it was not relevant, non-responsive, and unduly prejudicial. (McNeal's Br. 32.) He alleges the circuit court erred in failing to strike this testimony. (*Id.*)

At trial, McNeal's counsel opened the door to Hurst's testimony and failed to timely object to her response or move to strike the testimony that McNeal now argues is

inadmissible. Counsel specifically asked Hurst whether M.H. had ever told her of past abuse:

> 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 she couldn't see it.
>
> Q. Okay. Did she tell you when that happened?
>
> A. About three weeks before that.
>
> Q. Okay. So she told you that he choked her to the point where she started having dreams or hallucinations?
>
> A. She seen on the wall an angel and then she seen me.

(62:33-34.) Counsel concluded cross-examination without any objection or motion to strike Hurst's testimony. (*Id.*)

On redirect examination Hurst repeated her testimony regarding M.H.'s prior abuse and the State had Hurst clarify the timing of the M.H.'s statement.

> Q. And [M.H.] had told you about some abuse that had happened about three weeks before June 16th?
>
> A. Approximately around that time but I don't know approximately when it was. But I remember her telling me that when this happened that there was like writing on the

> wall about an angel and she said it was me and that everything she touched glowed.

(62:36.) Only after Hurst's testimony on redirect examination did counsel object on the basis of hearsay. (*Id.*) At a later sidebar, counsel additionally moved to strike Hurst's testimony on redirect as non-responsive and inadmissible character evidence under Wis. Stat. § 904.04. (62:40.)

Counsel opened the door to rebuttal regarding M.H.'s statement of prior abuse during cross-examination and also failed to preserve McNeal's claim with a proper objection. "[O]ne of the most elementary rules of evidence (is) that an objection must be made as soon as the opponent might reasonably be aware of the objectionable nature of the testimony." *Coleman v. State*, 64 Wis. 2d 124, 129, 218 N.W.2d 744 (1974) (citations omitted). Because of this, McNeal forfeited his claim on appeal and this Court should limit its consideration of the issue to whether counsel was ineffective. However, McNeal fails to raise a proper ineffective assistance claim on appeal. This Court lacks authority to develop a party's arguments and may decline to review issues inadequately briefed. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). This Court should thus decline to address any claim that trial counsel was ineffective with respect to the evidence.

If this Court addresses McNeal's claim, McNeal cannot show ineffective assistance. Counsel was not deficient

because he reasonably chose to confront M.H.'s allegations of past abuse that Hurst testified about.

Before Hurst's testimony at issue, she had already testified about M.H.'s state of mind before the assault and her negative feelings for McNeal. Hurst stated that M.H. told her that she wanted McNeal out of her house and that M.H. told her about abuse on a prior occasion. (62:33.) In response, McNeal's counsel made the reasonable strategic decision to confront Hurst about M.H.'s statements of prior abuse. Counsel was not deficient in confronting Hurst. Nor were Hurst's later statements at issue prejudicial to McNeal due to her similar testimony elicited by defense counsel on cross-examination. In any event, counsel could not successfully object to Hurst's testimony because it was admissible, as discussed below, as a prior consistent statement.

Alternatively, if this Court deems that counsel properly lodged his objection to Hurst's testimony, the circuit court did not err in admitting the evidence of prior abuse. Hurst's testimony was admissible as a prior consistent statement. *See* Wis. Stat. § 908.01(4)(a)(2).

Hurst's testimony of past abuse pre-dated McNeal's charge of fabrication, therefore corroborating M.H.'s account of abuse. McNeal first testified and later argued in closing that M.H. was motivated to lie in retaliation for him seeing an ex-girlfriend a week prior to the June 16 assault. (63:44, 147.) Hurst later testified that M.H. testified of past abuse

approximately three weeks before the June 16 assault. (62:36.) This corroborated M.H.'s testimony at trial of past abuse and substantiated her alleged fear of him. (61:130, 154, 177-178.) M.H. testified and was available for cross-examination. *See* Wis. Stat. § 908.01(4)(a)(2). The State could therefore introduce extrinsic evidence pre-dating the alleged motive to lie through other witnesses and rebut McNeal's charge of fabrication. *See State v. Miller*, 231 Wis. 2d 447, 470-71, 605 N.W.2d 567 (Ct. App. 1999).

As a prior consistent statement, Hurst's testimony was relevant to M.H.'s credibility and not unduly prejudicial since it followed McNeal's cross-examination of M.H. regarding her motive to lie. Moreover, Hurst's testimony regarding M.H.'s observed apparitions was not non-responsive, but instead displayed knowledge and awareness of M.H.'s prior abuse to the jury.

IV. This is not an exceptional case warranting a new trial in the interest of justice as the real controversy was fully tried.

A. Standard of review and legal principles.

Wisconsin Stat. § 752.35 confers discretionary authority upon the court of appeals to reverse a judgment and order a new trial in the interest of justice. *Vollmer v. Luety*, 156 Wis. 2d 1, 17-19, 456 N.W.2d 797 (1990). But a court should exercise this discretionary authority "infrequently and judiciously," only in "exceptional cases." *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted).

Wisconsin Stat. § 752.35, in relevant part, allows this Court to reverse judgment by the circuit court "if it appears from the record that the real controversy has not been fully tried." The real controversy has not been tried when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case, or when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

B. This Court should refuse to reverse McNeal's conviction in the interest of justice.

McNeal asserts that the real controversy was not fully tried and that he is entitled to a new trial. (McNeal's Br. 35.) He argues that his counsel's ineffective assistance kept the real controversy from being tried because relevant impeachment evidence from M.H.'s statements to police and the SANE and the temporary restraining order were not presented to the jury. (McNeal's Br. 36.) The rarely used exceptional discretionary power to grant a new trial in the interest of justice is not warranted.

As argued above, counsel was not ineffective. The real controversy was tried. McNeal attempts to turn a case supported by significant physical evidence into a case about M.H.'s credibility. The State proved beyond a reasonable doubt McNeal's convictions for sexual assault, false imprisonment and intimidation of a victim. In addition to

M.H.'s testimony, the State presented evidence of M.H.'s injuries consistent with strangulation, DNA evidence that corroborated M.H.'s allegation of assault and 911 calls where friends detail M.H.'s text messages seeking help after the assault. The jury also saw McNeal's letters intended for M.H. in which McNeal admitted that he wrote to M.H.:

- "I want to say I'm so sorry for everything I put you through." (63:68).
- "I never meant to hurt you, baby." (*Id.*)
- "I promise I would never hurt you or break your heart." (63:69.)
- "One stupid decision I made when I left that night. I wish I could have that night back." (*Id.*)
- "I would be in your arms right now if I could have that night back. But since I can't have it back, I have to ask you if you can forgive me for everything." (*Id.*)
- "And the pain I caused you." (*Id.*)
- "I've been asking God for forgiveness ever since I hurt you." (*Id.*)

On top of constituting McNeal's admissions for his offenses, these letters impeached McNeal's testimony and put his manipulative character on full display to the jury. McNeal cannot meet his burden of proving that this is one of the rare, exceptional cases that requires reversal in the interest of justice.

CONCLUSION

For the foregoing reasons, the State requests that this Court affirm McNeal's judgment of conviction and the circuit court's denial of McNeal's postconviction motion.

Dated this 8th day of September, 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), (c) for a brief produced with a proportional serif font. The length of this brief is 8,014 words.

_____
JASON A. GORN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of September, 2016.

_____
JASON A. GORN
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