STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1371-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICAH NATHANIEL RENO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A POSTCONVICTION MOTION FOR A NEW TRIAL, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE J. D. WATTS, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

Issue One

The Wisconsin Supreme Court has ruled that, during a pre-trial criminal investigation, defense counsel's decision not to contact a represented potential witness cannot constitute ineffective assistance of counsel, because it is unclear whether SCR 20:4.2, the no-contact rule, applies in that context. Here, during the pre-trial investigation, Reno's defense counsel did not contact a potential witness, Abby A., because her lawyer forbade the contact. Was Reno's counsel ineffective?

The circuit court held that Reno's counsel rendered ineffective assistance by not contacting the represented potential witness.

Issue Two

Under SCR 20:4.2, a lawyer cannot communicate with a represented person about "the subject of the representation." The no-contact rule seeks to prevent the disclosure of privileged information adverse to the represented person's interests. Here, Reno was charged with pimping and keeping a prostitution house, among other charges, and Abby prostituted herself alongside N.B., Reno's victim. At the time of Reno's trial, Abby was subject to a deferred prosecution agreement on her own prostitution charges. Did SCR 20:4.2 preclude Reno's counsel from communicating with Abby about the subject of the representation?

The circuit court held that Reno's counsel should have contacted Abby, because the two representations were for distinct and separate matters.

Issue Three

In Wisconsin, defense counsel does not render ineffective assistance when counsel gives a reasonable explanation for not calling an impeachment witness at trial. Here, Reno's counsel did not call Abby as an impeachment witness, because Abby's counsel forbade him from contacting her, and because he believed he had already adequately impeached the victim on cross-examination. Did Reno's counsel render ineffective assistance?

The circuit court held that Reno's counsel was ineffective for failing to call Abby as a trial witness to impeach N.B.'s credibility.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not warranted, because the briefs of the parties will adequately develop the law and facts necessary for the disposition of the appeal.

Publication, however, may be warranted. This Court could decide this case by applying well-established legal principles to the facts, but this case also presents issues of broad statewide importance. Publication would provide clarification about when defense counsel may, must, or cannot contact a represented witness, and about what constitutes "the subject matter of the representation," under SCR 20:4.2.

STATEMENT OF THE CASE

Pre-trial Proceedings

On July 11, 2013, Reno was charged with several felonies as a repeater: 1) forcible kidnapping; 2) human trafficking; 3) second-degree sexual assault; 4) pimping; and 5) keeping a prostitution house. (1:1-4, A-App. 101-04.) Reno was bound over for trial after his supervision was revoked. (46:3-7; 47:4-17; 48:7.)

Reno's defense witness list included Abby. (8:1-2.) At the January 30, 2014 final pretrial hearing, the State argued that Abby's statements were inadmissible, "irrelevant," or "had no real basis[] in fact," and the court agreed it would need offers of proof at trial. (50:5-7.)

Trial and sentencing

On February 5, 2014, after a three-day jury trial, Reno was convicted on all counts. (11.)

On March 14, 2014, the court sentenced Reno to 33 years of initial confinement and 12 years of extended supervision. (24:1-3, A-App. 105-07; 59:59-60).

Postconviction proceedings

On October 7, 2015, Reno filed a postconviction motion alleging ineffective assistance of trial counsel. (31:1-11.) Reno argued his counsel should have presented Abby's testimony because it allegedly contradicted the victim's testimony. (*Id.*)

On January 22, 2016, a *Machner*[1] hearing was held. (60:1-78, A-App. 108-85.)

On April 28, 2016, the circuit court issued an order reversing Reno's conviction and granting a new trial. (43:1-9, A-App. 186-94.)

The State appeals. (44:1-2.)

STATEMENT OF FACTS

Trial

N.B., a recovering heroin addict, had been sober for two weeks, but was homeless and living "[h]ouse to house, trying to get money for a hotel room." (52:30-35; 54:14-16.) She panhandled at intersections, holding up a "homeless and hungry" sign. (52:36-37.)

Near the end of May of 2013, N.B. was near the Wal-Mart on 27th when Reno and Abby pulled up in Reno's vehicle, although N.B. did not know them. (52:36-40.) Reno left after N.B.'s friend "clearly stated" they did not do drugs. (52:40-41.)

The next day, N.B. was panhandling in a different area, by 15th and Lincoln. (52:42, 48.) Reno, now alone, drove up, and told N.B. he could get her whatever she wanted, but N.B. denied she had a drug problem. (52:42-45; 54:18.) Reno said he could help her with food and a place to stay, but N.B. told him "no, thank you," and "continued to walk." (52:45.)

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Reno exited the vehicle, and grabbed N.B.'s upper left arm to pull her inside. (52:45-47, 128.) N.B. tried to fight back and pull away. (52:46.) She could not scream because she "was in such shock." (*Id.*) She could not get out because Reno restrained her. (52:47.) During the ride to the Roadway Inn, Reno told N.B., "[Y]ou don't know who you're dealing with. You don't want to run." (52:47-50.) At the hotel, Reno grabbed N.B. out of the vehicle, and Abby let them inside. (52:49.) Abby went into the bathroom to "finish getting ready." (52:49-51.)

Reno offered N.B. heroin "right away," within an hour. (52:49-53.) He said "it was okay because the other girl did it too." (52:50.) Reno blocked the door. (52:50-51.) N.B. declined the heroin because she had been clean for two weeks, but Reno told her "that's the only way I'm going to be able to deal with what was coming next." (52:51.)

Reno got "more aggressive in his voice" when she kept declining. (52:52, 129-30.) N.B. "gave in," because "I don't know what he is capable of." (52:52.) N.B. injected herself with the heroin and paraphernalia Reno provided. (52:52-53.) N.B. got "high." (52:53.) Reno gave her some food, and the three of them went to a park to take Abby's pictures. (52:53-55.) They met Reno's niece at the park. (54:19-20.)

Reno explained to N.B. "how things worked," telling her "he takes pictures and he writes stuff down on this website about you. And people call and they have you do sexual things with them for money." (52:53-54.) N.B. realized Reno wanted her to prostitute, but told him she did not want to. (52:54.)

After Reno took Abby's photos, they "drove around and we waited for phone calls. And [Abby] just explained to me how things worked." (52:55.) N.B. explained: "[Abby] said

that if I just listened it would be easier than fighting back with him. And then I would have his trust. That when I go to clients, I don't refuse what they want. What they pay for is what they get." (*Id.*)

Reno said it was N.B.'s turn, because she needed to make money. (52:56.) They went to the Harley Davidson museum, and Reno told N.B. to take off her shirt and pants so that N.B. was in her bra and panties. (*Id.*) Reno took pictures, posing N.B. and telling her to lie on the bench and smile for the camera. (*Id.*) N.B. did not recall telling Detective Linda Stott that Abby provided her with a bathing suit for that photo. (54:22.)

N.B. knew the photos would be used for prostitution advertisements. (52:56-57.) When asked why she did not run away, N.B. replied, "I was too [scared] to run. He told me you don't know who I'm dealing with. And I don't know what he's capable of. And if I ever tried to run, he would come after me and my family." (52:57.) She thought about running all the time. (*Id.*)

After Reno took N.B.'s photos, he posted them on Backpage for escorting advertisements. (52:57.) N.B. and Abby previewed the photos and ads before Reno "fully posted them." (52:58.) The jury saw various pictures that Reno took on his phone for the ads, including N.B.'s Harley Davidson photo and photos from the hotel. (52:102-105.)

That same day, N.B. got her first call on Reno's phone, and went on her first prostitution date. (52:58, 102-03.) Thereafter, N.B. and Abby engaged in prostitution "all day, every day." (52:58.) Reno pushed them to go to the client's houses, but sometimes they came to the hotel. (*Id.*) Reno's phone records contained thousands of text messages setting up dates. (54:58-59.)

Reno usually took N.B. and Abby to the dates. (52:59.) Both women rode along, and one woman would go in. (*Id.*) Reno and the other woman would wait in the car. (*Id.*) Sometimes N.B. would drive when Reno was gone, but she never went alone because she always went with Abby. (52:59-60.)

N.B. testified that others perceived Abby to be Reno's girlfriend, but "[i]t was never really ever like a boyfriend-girlfriend thing." (54:23.) It was just a story to tell if police ever got involved. (*Id.*) Reno never introduced Abby as his girlfriend, only as "Daisy." (54:23-24.) N.B. did not view them as boyfriend-girlfriend, because Abby was also prostituting herself. (54:55.) N.B. and Abby had to call Reno "daddy." (54:60.)

N.B. drove Reno to and from work, but only went to one social event with him. (52:115-16; 54:28; 57:54-60.) Reno's aunt saw N.B. there, and talked with her for about 45 minutes. (57:11-12.) N.B. never mentioned she had been kidnapped, but looked "very unhealthy," and had "herpetic sores" all over. (57:13, 16, 23.) Reno's aunt was concerned, knowing N.B. was homeless, but N.B. appeared to be having fun and talked on her cell phone. (57:13-18.) Another witness said she was "put off" by N.B.'s demeanor, but N.B. moved freely about. (57:27-28.)

N.B. drove to errands, Abby's grandmother's house, and Reno's sister Kelsey's house, but N.B. was still "terrified" of Reno. (54:29-31, 57.) N.B. drove Reno's brother and niece places, and visited Reno's friend at his house and at a restaurant. (57:33-34, 41-42.) Reno's brother and friend did not know Abby and N.B. were prostitutes. (57:35-39, 46.)

Eventually, Reno lost trust in N.B. because she and Abby used prostitution money to buy heroin, and Reno found out. (52:115-16.) As N.B. testified, Reno "hit us both. And he told me that he didn't trust me to drive the vehicle anymore. So I no longer had the vehicle privilege." (52:116.) Reno told them "people would be watching from a distance and would let him know what was going on." (52:117.) When Reno worked nights, someone came to sit in the hotel room to "make sure that we weren't doing something that he did not want us to not be doing." (*Id.*) After that, the dates came to the hotel. (*Id.*)

N.B. performed any sex acts that the prostitution dates wanted, including intercourse, fellatio, or anal sex, which cost more. (52:60-62.) They charged $100 for one-half hour, and $150 for one hour, and collected the money upfront. (*Id.*) They used text messages to communicate with each other while on dates. (52:60-62.)

N.B. prostituted herself twice per day, at minimum, but mostly five times per day, although some days she did not. (52:62-63; 54:25; 56:54.) On a typical day, they got "phone calls periodically," went on dates, and took pictures for new postings. (52:62.)

N.B.'s Backpage pseudonym was "Violet," but Reno's aunt and friend never heard N.B. called "Violet." (52:63; 57:12, 41.) Reno had "rule[s]" that the dates needed to wear condoms and pay before the sex acts. (52:64.) N.B. would hide the money in her purse, so clients would not steal it. (*Id.*) N.B. broke the condom "rule" once, because her client would not give her the money otherwise, and she was "too scared to go back to [Reno] without any money and not complete the date." (52:66-67.)

After the dates, they always gave the money to Reno. (52:64.) One time, Abby took the money, and when Reno found out:

> He said are you trying to steal my money? And he called her … the B word. And he proceeded to hit her. And I was sitting on the corner of the motel room. And he just said you two are now one. What she does, you do. What you do, she does. What she does wrong, you do wrong. You guys are together. So because she got hit, I got hit.

(52:65.) Reno hit N.B. in the face, and kicked her in the ribs while she was on the ground. (*Id.*) N.B. had bruises along her rib cage and a red hand print on her face from the beating. (52:66.)

After they got money from clients, they would buy "more green dot cards for more postings," which were prepaid Visa cards from Walgreens containing $14 each, to post two $7 Backpage ads. (52:64-67.) N.B. sometimes posted on Backpage herself, but Reno told her what to post, and when. (52:67-68.) Reno gave her credit card information, aliases, Social Security numbers, and birth dates to use for the prepaid cards. (*Id.*)

Three times daily throughout May and June of 2013, N.B. used heroin that Reno acquired and paid for. (52:68.) Reno's friend Casey also gave them crack. (52:69-71.) N.B. got syringes from the needle exchange. (52:74-75.)

Reno withheld drugs from N.B. until she prostituted herself. (52:70-71.) One time, N.B. was "sick" and had gotten a prostitution call, so she asked Reno if she could get her "afternoon dose before the date." (52:71.) Reno took her into Casey's room, and told her to hold her skirt and panties down. (*Id.*) N.B. said, "[N]o, can I do this first; I really don't feel good," and Reno flung the heroin onto the floor, telling

her, "there's your afternoon dose and you can stay sick." (*Id.*) After she went on the date, Reno gave N.B. her "afternoon dose." (*Id.*) "Sick" meant she needed heroin. (52:71-72.)

Another time, N.B. told Reno she would start feeling withdrawal symptoms halfway through the date without her "night dose," but Reno said she had to wait and come back with the money before she could have it. (52:72.)

Reno also forced N.B. to have sex with him. (52:72.) He would drop his pants, tell her to get down on her knees, and tell her he was teaching her how to "*perform better*." (52:72-73 (emphasis in original).) N.B. did not agree to having sex with Reno, and would "throw an attitude" and shake her head no. (52:73.) Reno would tell her, "You need to lose your attitude. And he would raise his hand at me. And I would get scared, so I would just do it." (*Id.*)

One time, Reno bent N.B. over the side of the bed, pulled down her sweatpants, and "stuck his dick in me from behind." (52:73.) Abby was in the shower. (52:74.) Reno put his hands on N.B.'s back so she could not stand up straight. (*Id.*)

N.B. disclosed that particular assault to Detective Stott as one example, but said it happened "multiple times." (54:32.) When Detective Stott asked if N.B. and Reno were sexually active, "[N.B.'s] response was only when he forced me, and then she began to cry." (56:55.) Detective Stott did not ask N.B. to recount every incident, knowing Reno had trafficked N.B. for one-and-one-half months, meaning that Reno committed "multiple crimes," including prostitution, batteries, and sexual assaults. (56:67-68.)

N.B. used Reno's phone to set up dates, because Reno had taken N.B.'s phone away. (52:75-76.) She could not use

her phone anyway, because Reno "watched my every move." (52:76.) If she was on the phone, Reno asked who it was and told her to get off. (*Id.*)

Reno used N.B.'s LG slider phone, and N.B. used Reno's Kyocera phone. (52:76-79.) Reno sometimes allowed N.B. to use her own phone when her mother, Therese, called, but limited N.B.'s contact with Therese because N.B. would cry every time, and then N.B. "wouldn't be able to go on a date and make his money." (52:80.) Reno told N.B. that Therese "needed to stop calling," because when Therese called, her "whole day is shot." (*Id.*)

N.B.'s mother, Therese, got concerned that N.B. would not return calls. (54:63-64.) Therese paid for N.B.'s phone and could see from phone records that N.B. had written very few texts, even though N.B. was a "big texter." (54:64-66.) N.B.'s brother, Ryan, testified that "all of a sudden there's no text messages and real short phone calls" from odd numbers from burner phones. (54:93-95.) N.B. usually sent about 2000 texts per month. (52:87.)

In June of 2013, N.B. called Therese at least three times to arrange to go home on Father's Day, but N.B. later cancelled. (54:25-26, 76, 83-84, 89-90.) N.B. testified that she texted her mom that a "pimp" had picked her up and she wanted to come home, but Therese testified that she only had telephone conversations with N.B., never texts. (54:27, 34-35, 67-68, 87-90.)

On June 25, 2013, N.B. posted on Backpage at 12:03 a.m. (54:35-37.) She also texted her brother at 1:15 a.m., saying, "I'm fine … kind of." (54:38.) After N.B. went with Reno to see his probation officer around 8:30 a.m., Therese kept calling N.B.'s phone. (52:80-82; 54:34-35.) When Reno went to a friend's house, N.B. called Therese

from Reno's phone, telling Therese "she needed to stop calling because I was getting in trouble and he wouldn't stop yelling at me." (52:80-81.) When Reno returned, N.B. hung up, but Therese kept calling back. (*Id.*)

Therese and Ryan had a series of short phone conversations with N.B. that morning, but N.B. kept hanging up. (54:68-77, 104-05.) Therese asked if N.B. was being held against her will. (52:81.) N.B. said, "please, I need your help. I need to come home. I don't want to be here anymore. I'm scared and you have to hurry." (*Id.*) Reno threatened to kill N.B.'s whole family. (52:81-82.) N.B. sounded afraid. (54:68-69.)

Therese told N.B. to get out and get home safe. (52:82.) Ryan asked N.B. where she was. (*Id.*) N.B. replied she was at the Roadway Inn, near 27th and Layton. (*Id.*) At 9:24 a.m., N.B. texted Ryan from Reno's phone, asking for help in getting home. (54:40-42.) Therese called the police. (54:69-70, 86-87.)

Reno saw that N.B. had texted her brother, got really angry, and broke N.B.'s phone. (52:82-84.) Reno gave N.B. his phone, and forced her to lie to her brother that she "was just high and homesick." (52:83-86; 54:42-45.)

N.B. and Ryan then exchanged a series of text messages on Reno's phone. (52:95-102; 54:43-44.) When Ryan asked N.B. what room she was in, N.B. replied, "How's dad doing," because Reno had already found out that she was contacting Ryan, and she wanted to divert Reno's attention in order to get home safely. (52:97-99.) She told Ryan, "[t]here is no guy," that she was "just high" and did not know what she was saying. (52:98-99.) She texted, "I'm fine. Don't worry about it." (52:99.) N.B. wanted to convince Ryan she was fine, because Reno was still looking at every

message. (52:99-100.) Her last message said, "I got to get away from," but stopped. (52:101.)

Ryan knew something was wrong because they had exchanged thousands of texts before, and N.B.'s June 25 texts did not seem normal and were not "adding up." (54:100-02.) He received texts from a 414 number, but N.B.'s phone was a 262 number. (56:6.)

Ryan told N.B. it was too late, because the police had traced her phone and were already on their way. (52:83; 54:46-47, 96-98, 106-12.) Ryan had "two phones going," one to police and one to N.B. (54:105.) Around 10:30 a.m., both N.B.'s phone and Reno's phone "ping[ed]" at the hotel. (56:6-16.)

Reno left the hotel with N.B. and Abby in a hurry, saying he wanted to be gone if the police came. (52:85.) Reno instructed N.B. to "get the cops uninvolved and call him when they're gone." (52:86.) Reno dropped them off near the Grand Avenue Mall. (52:85.) Police logged a "ping" from Reno's phone near the mall around 11:32 a.m., although the ping itself could have occurred earlier. (56:16-17.)

While walking toward the mall, N.B. talked to Ryan, and pretended she was okay. (52:86.) When Reno was away, N.B. started crying, and Ryan knew something was wrong, because N.B. never cried that hard and had only sent him five texts that whole month. (52:87; 54:99.) N.B. was scared. (54:102.)

N.B. entered the mall and told Ryan, "I need you to come save me. I need your help. I am here. I don't want to be here. Please hurry. I'm scared and I don't know where he is." (52:87.) She said she did not have much time. (52:88.)

The police traced N.B.'s location at the mall, and told N.B. to run across the street to the Federal Building. (52:88; 54:70-71.) N.B. said she could not go outside alone, because "I don't know where [Reno] is and I don't want to die." (52:88.) Ryan heard someone in the background saying she could not go "because they'll hurt my kid," but the police told N.B. to leave her friend and find someone to walk her across the street. (52:88-89; 54:105-06, 116.)

N.B. was "crying hysterically," but a group of men helped her across when she told them, "[I]t's life or death. I'm going to die today if I don't get home." (52:88-89.) N.B. ran into the Federal Building around 12:02 p.m., and went to the security desk, hyperventilating. (52:89; 56:17.) The security officer called the Milwaukee police, and N.B. waited until police arrived. (52:89.)

On June 25, 2013, around 10:00 a.m., Officer Jerry Whiteley responded to a welfare check at the Roadway Motel on a "possible abduction, false imprisonment." (52:20-23.) He went to the Federal Building after later learning N.B. was there. (52:21-24.) N.B. was "[s]haken," "scared," and "concerned for her family." (52:24.) He searched N.B.'s purse and found "a green dot receipt," drug paraphernalia for heroin and crack cocaine, flavored lubricants, and four needles. (52:24-28.)

Detective Stott from sensitive crimes took over, and interviewed N.B. at the police station. (52:24; 56:25-26.) N.B. identified Reno in a photo array. (56:27-30.) Several Backpage postings between June 1 and June 25, 2013 corroborated N.B.'s allegations, including postings from Reno's phone number with N.B.'s and Abby's pseudonyms, descriptions, and photos, including the Harley Davidson museum photo. (56:30-43.)

The jury saw police photos of the day N.B. ran away from Reno, and photos from N.B.'s phone depicting items from the hotel room. (52:107-14; 54:12-13; 56:46-47.) N.B. testified she had multiple broken teeth, and one photo depicted her mouth after Reno struck her in the face. (52:107.) Detective Stott knew about only one broken tooth. (52:123-24; 56:47-50.) N.B. had also told Reno's probation officer that Reno used zip ties to bind her, but testified at trial that Reno never used them. (52:121-125; 54:9-12; 56:109-10.)

Police could not find Reno on June 25, 2013, but they found his unoccupied vehicle on June 28, 2013. (56:58-59, 81-82.) Reno absconded from his probation visits, and did not meet for a scheduled July 9, 2013 meeting with this probation agent. (57:113.)

On September 25, 2013, the Fugitive Apprehension Unit arrested Reno. (56:19-20.) Detective Thomas Dineen executed a search warrant at the hotel room, and found the room in "disarray"—with garbage, clothes, drug paraphernalia, and over one hundred hypodermic needles with syringes used for heroin injection. (56:94-97.) He found N.B.'s "homeless and hungry" sign, and a large number of condoms, lubricants, and women's clothing, consistent with N.B.'s accounting of the prostitution that occurred there. (56:98-100.) He found two cell phones—N.B.'s LG slider phone, intentionally broken in half, and Reno's Kyocera phone containing a large number of texts responding to Backpage ads for prostitution. (56:99-103.)

Detective Dineen also saw Reno's three text messages, sent to "Sister" on May 21, 2013. (57:69-74.) One said, "I getting rid of two of my three girls today." (57:72.) Another said, "Think I gonna cherry coke them in Madison," although Detective Dineen did not know what that meant. (57:72.)

The third said, "[Y]ou and I need to talk street business." (57:73.)

On September 27, 2013, Detective Dineen interviewed Reno. (56:91-93.)[2] Reno admitted staying in the hotel with Abby, but said, in a "very hesitating way," that Abby was his girlfriend, which was significant to the prosecutor, because it showed that Reno knew Abby was a "working girl" or prostitute in the hotel. (57:98-99.) Most of Reno's family and friends did not know he was staying in a hotel, although Reno's brother knew. (57:20, 37-38, 47, 99.)

Reno admitted picking N.B. up off the street, but said he was being a good Samaritan because he recognized her as a heroin addict. (57:99.) He took N.B. to the hotel room and was using drugs himself. (*Id.*) Reno admitted in his police statement that he advertised on Backpage using his own debit card, and took photographs of Abby and N.B. (57:99-100.)

Machner hearing

At the January 22, 2016 *Machner* hearing, the circuit court was concerned that Abby's potential testimony might be privileged, but agreed with the parties that Abby's testimony would not be self-incriminating. (60:5, A-App. 112.) The court also accepted the prosecutor's explanation that Abby had not been considered as a potential co-defendant in Reno's case, because it was "fairly rare for another prostitute to become involved as a codefendant." (60:6-8, A-App. 113-15.) The court ensured that Abby understood her Fifth Amendment privilege.

[2] The jury saw the videotaped interview, but it was not transcribed for the record. (56:91-93.)

(60:8-9, A-App. 115-16.) Abby did not believe she would need to invoke it, but understood she could. (60:9-10, A-App. 116-17.)

Abby testified she was living with Reno, her boyfriend, in a hotel when she met N.B. (60:10-11, A-App. 117-18.) Abby was with Reno both times they saw N.B. panhandling—on 27th by the Wal-Mart, and the next day on 16th and Lincoln. (60:11-12, A-App. 118-19.) Abby invited N.B. to get something to eat and to change clothes. (60:11-13, A-App. 118-20.) N.B. was not forced to come, and Abby never saw N.B. being dragged into the vehicle. (60:13, A-App. 120.)

N.B. began living with Abby and Reno, and N.B. and Abby started posting images to advertise on Backpage, a website for "escorting." (60:13-14, A-App. 120-21.) They became friends and started escorting the first day they met to finance their "expensive" heroin habit. (60:23-24, A-App. 130-31.)

Abby stayed with N.B. most of the time, and Reno never hit, kicked, or slapped N.B. (60:14, A-App. 121.) Abby never saw any injuries on N.B., like bruises or slap marks. (*Id.*) N.B. never acted like she did not want to be there, but one time wanted to reunite with her family. (60:27-28, A-App. 134-35.) N.B. was not forced into anything, because "she could have left at any time." (60:28, A-App. 135.) Abby never saw or heard any sexual assault, any sexual activity, or any sounds of struggle, but Abby was in the shower. (60:15, A-App. 122.)

N.B. used Reno's cell phone to set up the prostitution dates, because neither Abby's nor N.B.'s phone had Internet access. (60:21, A-App. 128.) N.B. posted the ads on Backpage, and "[i]n the beginning," Reno did not know they

used his phone for setting up prostitution dates, because "he wasn't informed of it." (60:21, A-App. 128.) After a few weeks he knew, because Abby told him. (60:24-26, A-App. 131-33.) Reno was "very understanding, but he didn't approve," because Abby was his girlfriend. (60:21, A-App. 128.) Reno had no "input" and did not help them, "[b]esides using the telephone to get on the Internet." (60:26, A-App. 133.)

Reno took "personal revealing pictures" of Abby, and one time, took the Backpage photos. (60:26, A-App. 133.) Abby gave Reno money for the debit card, but denied that Reno used the card to pay for the ads. (60:26-27, A-App. 133-34.) Reno later found out that the card was used for the ads. (60:28, A-App. 135.)

Abby was arrested on June 29, 2013, and charged with prostitution based on a June 28, 2013 incident. (43:3, A-App. 188; 60:16, A-App. 123.) Abby was later charged with cocaine possession. (43:4, A-App. 189.) In jail, Abby refused to talk with a detective about Reno and N.B., because "she came to me like I was a victim." (60:16, A-App. 123.)

In July of 2013, Abby was released, and Attorney Jeff Schwartz began representing her. (60:17, A-App. 124.) Attorney Schwarz later withdrew, telling Abby that Reno's attorney was "in the same office as he is, and *it would be a conflict of interest for me to be involved with … the Reno case*." (*Id.* (emphasis added).)

Attorney Ramon Valdez was then appointed. (60:17, A-App. 124.) He did "[n]ot really" talk with Abby about testifying in Reno's case, because he wanted to defend her in her case, and told her not to speak with anyone without him. (60:18, A-App. 125.) But Abby believed Attorney Valdez was appointed so she could participate in Reno's case. (*Id.*) Abby came to Reno's sentencing because she wanted to be heard,

and would have testified at his trial, had she been subpoenaed. (60:19, A-App. 126.)

On December 6, 2013, Abby pled guilty to both charges, and entered into a deferred prosecution agreement ("DPA"), wherein the State agreed to defer Abby's conviction in exchange for her guilty plea and other conditions. (41:9-12; 60:18, A-App. 125.)

On February 10, 2014, the State revoked the DPA. Attorney Valdez still represented Abby at this time. (60:29, 69-70, 73-74, A-App. 136, 176-77, 180-81.) On February 13, 2014, Abby was re-arrested, and on March 11, 2014, was sentenced on both charges. (60:18, A-App. 125.)

Attorney Christian Eichenlaub testified that he began representing Reno in September of 2013, and asked his investigator to contact Abby to see if she would be a good trial witness. (60:41-42, A-App. 148-49.) He could not interview Abby, because he learned that another public defender represented her on a pending case. (60:43, A-App. 150.) His office's protocol was to "immediately" stop communication between the two conflicted lawyers, and appoint out the less serious case. (*Id.*)

On November 21, 2013, Attorney Eichenlaub emailed Attorney Schwarz "saying there was a conflict, you need to get off this case." (60:43-44, A-App. 150-51.) He told Attorney Schwarz, "we desperately need Abby as one of our witnesses to testify," but recognized in retrospect that he violated his office policy by communicating that. (60:44, A-App. 151.)

"[V]ery quickly" thereafter, Attorney Eichenlaub discovered Attorney Valdez was representing Abby. (60:44-45, A-App. 151-52.) Attorney Eichenlaub twice

requested permission from Attorney Valdez about speaking with Abby. (60:45, 61-62, A-App. 152, 168-69.) First, when passing outside a courtroom, Attorney Eichenlaub told Attorney Valdez, "I need to talk to one of your clients. Can I get permission? And he said, let me look into it." (60:45, A-App. 152.)

Second, in December of 2013, at the public defender Christmas party, Attorney Eichenlaub "communicate[d] formally" with him, and "Attorney Valdez said in a … manner that is very distinct to Attorney Valdez that I would not have access to his client." (60:45, A-App. 152.) Attorney Valdez told him "[i]n colorful language" that he could not speak with Abby, so Attorney Eichenlaub did not inquire further. (60:45, 62, A-App. 152, 169.)

Throughout January and February of 2014, Attorney Eichenlaub verified that Attorney Valdez continued to represent Abby. (60:45-46, 62, A-App. 152-53, 169.) He knew Abby had pled guilty in early December 2013, and would be sentenced on the revoked DPA in March 2014. (60:45-46, 62, A-App. 152-53, 169.) He did not attempt to discuss anything else with Abby or Attorney Valdez. (60:46, A-App. 153.)

Reno wanted Abby to testify. (60:46-47, A-App. 153-54.) Attorney Eichenlaub did not consider having Abby subpoenaed, but it raised a red flag that she was not on the State's witness list. (*Id.*)

After hearing Abby's testimony at the *Machner* hearing, Attorney Eichenlaub testified he "[a]bsolutely" would have wanted her to testify at trial. (60:48-49, A-App. 155-56.) He had no reason for not calling her at trial except that she was represented. (60:49, A-App. 156.) He did not consider making a record outside of the jury's presence about asking Abby to waive her Fifth Amendment privilege.

(60:52-53, A-App. 159-60.) He did not consider requesting an adjournment, believing the request would be unsuccessful. (60:67-69, A-App. 174-76.)

For Reno's theory of defense, Attorney Eichenlaub wanted to show N.B. was "provably lying" by demonstrating the many times she could have sought help or acted inconsistently with her accusations. (60:47-48, A-App. 154-55.) N.B. also had "none of the characteristics that one would associate with the dire situations that she had alleged." (*Id.*) The trial hinged "entirely" on N.B.'s credibility. (60:66, A-App. 173.)

Although Attorney Eichenlaub ended up being "wrong," at the time of trial he believed his strategy was going well, because he had made a "really strong record that there could be no way that N.B.[]'s allegations stood up in front of a jury." (60:52, A-App. 159.) He called other defense witnesses to show N.B.'s allegations were false. (60:56-57, A-App. 163-64.) He focused on the "improbability" of N.B.'s accusations being true, given her "social involvements," her "relative freedom" while Reno was working, the times people saw her driving alone, and the fact she failed to tell Reno's probation officer anything. (*Id.*) He focused on "creating an environment where the jury could see this simply didn't make sense." (60:57, A-App. 164.)

Attorney Eichenlaub acknowledged the inconsistencies between Abby's *Machner* testimony and Reno's statement, but believed more inconsistencies existed between Abby's testimony and N.B.'s testimony. (60:62, A-App. 169.) He believed Abby's testimony would have "[s]ubstantially" impacted N.B.'s credibility. (60:66, A-App. 173.)

Attorney Eichenlaub acknowledged that Reno admitted to taking the Harley Davidson photos, but said

Reno did not admit to taking them the day N.B. was kidnapped. (60:63-64, A-App. 170-71.) Reno admitted to police that he let Abby use his debit card to pay for the Backpage ads. (*Id.*) Attorney Eichenlaub's closing statement emphasized the disconnect between the photos and N.B.'s claim that she was forcibly kidnapped and drugged that same day. (*Id.*)

Postconviction decision and order

The circuit court's order granting Reno's postconviction motion acknowledged that Attorney Eichenlaub's decision not to call Abby was "reasonable at first" because Abby's DPA had not concluded and Attorney Valdez still represented her. (43:2-3, A-App. 187-88.) But the court found that Abby's case and Reno's case were two separate matters, because Abby was not a co-defendant in Reno's case, and the charges were factually different, even if Abby was "arguably a victim" of Reno's crimes,. (43:3-7, A-App. 188-92.)

Under *In re New York v. Simels*, 48 F.3d 640 (2nd Circuit 1995), the postconviction court found it was an unreasonable decision—and deficient performance—for Reno's counsel not to contact Abby, because her Fifth Amendment privilege "arguably" did not apply, and Attorney Eichenlaub was not seeking privileged information from her. (43:6-7, A-App. 191-92.) The "overriding concern" of Reno's Sixth Amendment right to effective counsel "outweigh[ed]" the disciplinary rule. (*Id.*)

As the court reasoned, "The fact that SCR 20:4.2 did not apply was clear; Attorney Eichenlaub mistakenly applied it." (43:7, A-App. 192.) The analysis of "whether the subject matters of the representations were the same" had not "evolved or changed." (*Id.*) If Attorney Eichenlaub were

uncertain about whether the communication was permissible, he should have requested a court order under ABA Comment 6 to Rule 4.2. (*Id.*)

The postconviction court concluded that Attorney Eichenlaub's decision not to call Abby was not strategic because he unreasonably misunderstood the law, nor was it a decision at all because he did not attempt to subpoena Abby or ask her to waive her Fifth Amendment privilege. (43:7-8, A-App. 192-93.) Citing *State v. Jenkins*, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786, the postconviction court also concluded that Attorney Eichenlaub's performance prejudiced Reno, because Abby witnessed many of the allegations, and would have exposed vulnerabilities at the center of the State's case, had she been subpoenaed to testify. (43:8-9, A-App. 193-94.)

ARGUMENT

I. The circuit court erred because Attorney Eichenlaub's decision not to contact Abby was not deficient performance.

A. Relevant legal principles.

To establish ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The claim fails if the defendant fails to prove either requirement. *State v. Williams*, 2006 WI App 212, ¶¶ 18-19, 296 Wis. 2d 834, 723 N.W.2d 719.

1. To establish deficient performance, a defendant must overcome the strong presumption that his counsel acted properly.

A strong presumption exists that counsel acted properly within professional norms, and the defendant must demonstrate that his attorney made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *Strickland,* 466 U.S. at 689-91.

2. Defense counsel cannot render deficient performance in failing to argue an unclear legal point.

As a matter of law, defense counsel cannot be ineffective in failing to argue an unsettled or unclear legal point. *State v. Van Buren*, 2008 WI App 26, ¶¶ 18-19, 307 Wis. 2d 447, 746 N.W.2d 545. If the cases on the issue can reasonably be analyzed two different ways, then the law is unclear, and counsel is not required to argue that legal point. *State v. Thayer,* 2001 WI App 51, ¶ 14, 241 Wis. 2d 417, 626 N.W.2d 811.

The issue in a deficient performance claim is not the correctness of counsel's decision on an unclear legal point, but whether counsel's decision not to make the argument fell below an objective standard of reasonableness, as measured against the prevailing professional norms. *Van Buren*, 307 Wis. 2d 447, ¶¶ 18-19.

3. The law in Wisconsin is unsettled whether the no-contact rule applies during the pre-trial investigative phase of a criminal case.

Under SCR 20:4.2, the no-contact rule, a lawyer "shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

In *State v. Maloney*, 2005 WI 74, ¶¶ 19-30, 281 Wis. 2d 595, 698 N.W.2d 583, the Wisconsin Supreme Court specifically analyzed whether SCR 20:4.2 should apply in the pre-trial investigative phase, and determined that the issue was a matter of first impression in Wisconsin.[3]

The *Maloney* court recognized some authority in other jurisdictions—including *Simels*—holding that a prosecutor's pre-charging contact with a represented person during a criminal investigation is *permitted* under applicable ethics rules. *Maloney*, 281 Wis. 2d 595, ¶¶ 19-20.

But the Wisconsin Supreme Court also recognized countervailing authority—including *United States v. Hammad*, 858 F.2d 834, 839-41 (2d Cir. 1988)—*prohibiting* the prosecutor's contact with a represented person in that same circumstance, noting that such contacts may lead prosecutors and other lawyers to overstep their authority and violate the ethical precepts of the no-contact rule. *Maloney*, 281 Wis. 2d 595, ¶¶ 21-22.

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[3] Since 2005, the Wisconsin courts have not addressed this exact issue, but analogous cases exist. *See* Section C below.

The *Maloney* court reasoned that "the split of authorities … is important in considering whether Maloney's trial counsel was ineffective in failing to challenge the admissibility of the videotape evidence based on an alleged violation of SCR 20:4.2." *Maloney*, 281 Wis. 2d 595, ¶ 23. The court expressly declined to "determine which line of cases Wisconsin will ultimately follow regarding the applicability of SCR 20:4.2 to the pre-charging criminal investigative setting." *Id.* ¶ 24. The issue was not whether SCR 20:4.2 prohibited or permitted the prosecutor to contact the witness, but whether defense counsel was ineffective for failing to challenge the video based on the prosecutor's contact with the witness—a contact that was permissible in some jurisdictions but prohibited in others. *Id.*

Maloney concluded that defense counsel was not required to argue an unclear point of law. *Maloney*, 281 Wis. 2d 595, ¶¶ 26-28. As *Maloney* further explained:

> Given the *unclear and unsettled nature* of SCR 20:4.2's applicability in Wisconsin to the pre-charging criminal investigative setting, we conclude that trial counsel's failure to challenge the admissibility of the videotape evidence on this ground *did not constitute deficient performance*. Although it might have been preferred for Maloney's counsel to advance the *Hammad* position in his motion to suppress, basing an ineffective assistance of counsel claim on his failure to do so would be to engage in the kind of hindsight examination expressly disavowed by the Supreme Court in *Strickland*.

Maloney, 281 Wis. 2d 595, ¶ 30 (emphasis added).

4. This Court independently reviews ineffective assistance of counsel claims.

This Court independently reviews the legal questions of whether counsel acted deficiently and whether counsel's acts prejudiced the defendant, but upholds the circuit court's factual findings unless clearly erroneous. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115.

B. As a matter of law, Attorney Eichenlaub's decision not to contact a represented potential witness cannot be deficient performance, because it is unclear in Wisconsin whether the no-contact rule applies during a pre-trial investigation.

As *Maloney* instructs, the issue here is not whether Attorney Eichenlaub's contact with Abby was permissible under *Simels* or impermissible under *Hammad*. *Maloney*, 281 Wis. 2d 595, ¶ 23. *Maloney* expressly declined to decide which line of cases applied, or whether the no-contact rule applies at all in the pre-trial investigative context. *Id.* ¶ 24.

Thus, as a matter of law, Attorney Eichenlaub did not render deficient performance by not contacting Abby, because the law in Wisconsin is unclear, and cases in other jurisdictions come to opposite conclusions. *Van Buren*, 307 Wis. 2d 447, ¶¶ 18-19; *Thayer,* 241 Wis. 2d 417, ¶ 14. Under *Maloney*, Attorney Eichenlaub was not required to contact Abby, even though such contact may have been permitted under *Simels*, because other countervailing authority, including *Hammad*, existed and would have prohibited the contact. *Maloney*, 281 Wis. 2d 595, ¶¶ 19-22.

Consequently, the issue in Reno's ineffective assistance claim is whether it was reasonable or

unreasonable under prevailing professional norms, including the ethics rule, when Attorney Eichenlaub decided not to contact Abby—a represented witness whose lawyer expressly forbade the contact. *Maloney*, 281 Wis. 2d 595, ¶¶ 23-24.

C. Under prevailing professional norms, Attorney Eichenlaub reasonably concluded that the no-contact rule applied and precluded him from contacting Abby.

The circuit court correctly found that Attorney Valdez still represented Abby at the time of Reno's trial in February 2014, because Abby was still subject to the DPA in her own prostitution case until her sentencing on March 11, 2014. (43:2-3, A-App. 187-88.) The circuit court also correctly found that Attorney Eichenlaub's decision not to call Abby was "reasonable at first," because Attorney Valdez forbade Attorney Eichenlaub from contacting Abby. (*Id.*)

But the circuit court erred in finding that Attorney Eichenlaub should have contacted Abby later, over her lawyer's express objection. (43:3-7, A-App. 188-92.) In coming to the conclusion that the no-contact rule did not apply, the circuit court misapplied the prevailing professional norms in Wisconsin.

1. In Wisconsin, the no-contact rule applies to any represented "person," not just to a represented "party."

Under SCR 20:4.2, a lawyer cannot communicate with a represented "person" about "the subject of the representation." Wisconsin case law has not yet specifically defined that phrase, but under ABA Comment 2, the no-contact rule applies to contact "concerning the matter to which the communication relates." Conversely, under

ABA Comment 4, the no-contact does not apply to contact "concerning matters outside the representation."

In determining "the subject of the representation" under *In re New York v. Simels*, 48 F.3d 640, 646-51 (2nd Cir. 1995), the circuit court found that the subjects of the representations were different, because Attorney Valdez did not represent Abby as a co-defendant in Reno's case. (43:2-7, A-App. 187-92.) Thus, Reno's matter was not the subject of Abby's representation, and Abby could be contacted. (*Id.*)

The circuit court, however, erred in finding deficient performance, because *Simels* is not the prevailing professional norm in Wisconsin. *See Maloney*, 281 Wis. 2d 595, ¶¶ 23-24 (issue is not correctness of counsel's decision not to contact witness, but reasonableness of decision under prevailing profession norms).

The ethics rule at issue in *Simels* was based on a previous version of ABA Model Rule 4.2 that forbade contact with a represented "party." *Simels*, 48 F.2d at 646-51. But the no-contact rule in Wisconsin, SCR 20:4.2, prohibits contact with any represented "person," not just a represented "party." Under the professional prevailing norms in Wisconsin, the no-contact rule applied to Abby as a represented "person," and she did not need to be a "party" in Reno's case to receive the no-contact rule's protection.

Moreover, in 1995, an ABA formal ethics opinion found that *Simels* had taken an "unduly narrow view of the anti-contact rule," and reasoned that the no-contact rule should have "broad coverage" in order to protect any represented person "whose interests are *potentially distinct* from those of the client on whose behalf the communicating lawyer is acting." *See* ABA Formal Ethics Op. 95-396, 7 (1995).

Other jurisdictions rejected *Simels* after the ABA replaced "party" with "person" in Model Rule 4.2, thereby severing the link that arguably tied the rule's application to the filing of an indictment against the unrepresented person. *See, e.g., United States v. Koerber*, 966 F. Supp. 2d 1207, 1225-33 (D. Utah 2013) (pre-indictment noncustodial contacts no longer authorized).

Simels is an outlier and certainly does not constitute the prevailing professional norm in Wisconsin. Under SCR 20:4.2 and *Maloney*, Attorney Eichenlaub reasonably concluded that he could not contact Abby, a represented "person," even though she was not a "party" in Reno's case. *Maloney*, 281 Wis. 2d 595, ¶¶ 23-24 (recognizing authority preventing lawyers from contacting represented witnesses in pre-trial investigative context).

2. In Wisconsin, the no-contact rule applies whenever vulnerable witnesses need to be protected from disclosing privileged information adverse to their interests, not just when the subject matters of the representations are the "same."

Two other Wisconsin ethics cases discuss the policies and purposes behind SCR 20:4.2—*In re Disciplinary Proceedings Against Kinast*, 192 Wis. 2d 36, 44, 530 N.W.2d 387 (1995), and *In re Guardianship of Jennifer M.*, 2010 WI App 8, 323 Wis. 2d 126, 779 N.W.2d 436.

a. *Kinast*.

Kinast involved a custody dispute where the wife's lawyer contacted the divorcing couple's minor children directly without the husband's lawyer's consent, instead of contacting their guardian *ad litem* ("GAL"). *Kinast*,

192 Wis. 2d at 40-41. Kinast argued he had not violated SCR 20:4.2 in interviewing the children without their GAL, because the GAL only represented "the children's interests," not the children themselves. *Id.*

The disciplinary referee agreed, because the interview was "innocuous," and Kinast had not attempted to influence the children to his client's advantage. *Kinast*, 192 Wis. 2d at 42-43. Moreover, it was "common practice" in that county for divorce attorneys not to seek the GAL's permission before interviewing the parties' children. *Id.*

The Wisconsin Supreme Court, however, reversed, because the children were represented parties, and were entitled to be protected "from being intimidated, confused or otherwise imposed upon by counsel for an adverse party." *Kinast*, 192 Wis. 2d at 43-44. Although no discipline was imposed, the court was clear that Kinast had violated the no-contact rule. *Id.*

b. Jennifer M.

In *Jennifer M.*, another case construing SCR 20:4.2, two attorneys represented an adult ward under guardianship: a GAL, who advocated for the ward's best interests, and an "adversary attorney," who advocated for the ward's expressed wishes. *Jennifer M.*, 323 Wis. 2d 126, ¶¶ 6-8. By statute, the GAL was required to interview the ward, and determine her best interests. *Id.* ¶ 12.

This Court held that both attorneys needed to be present when the GAL interviewed the ward, because the ward's "best interests" and the ward's expressed wishes were not necessarily coextensive. *Jennifer M.*, 323 Wis. 2d 126, ¶¶ 8-12. Although the GAL had no malicious intent in interviewing the ward without her attorney present, this

Court found that the attorney-client relationship existed to protect a vulnerable client from being taken advantage of, especially when the client's best interests were different than the client's expressly stated interest. *Id.* ¶¶ 10-11. As this Court explained:

> The proscription against a lawyer communicating directly with an opposing party ... is based on a variety of rationales. First, [i]t prevents unprincipled attorneys from exploiting the disparity in legal skills between attorney and lay people. Thus, the rule prevents a lawyer from circumventing opposing counsel to obtain unwise statements from the adversary party. Second, [the rule] preserves the integrity of the attorney-client relationship. That is, counsel is precluded from driving a wedge between the opposing attorney and that attorney's client. Third, the rule helps prevent the inadvertent disclosure of privileged information. And, finally, it may facilitate settlement by channeling disputes through lawyers accustomed to the negotiation process.

Jennifer M., 323 Wis. 2d 126, ¶ 10 (internal citations and quotations omitted).

3. The circuit court erred in failing to apply the prevailing professional norms in Wisconsin.

The circuit court failed to apply *Maloney*, citing it only in passing. (43:7, A-App. 192.) Yet *Maloney* supports the application of the no-contact rule here. *Maloney*, 281 Wis. 2d 595, ¶¶ 23-24. The court also failed to properly apply *Kinast* and *Jennifer M.*, yet those cases represent the prevailing professional norms in Wisconsin, and also support the no-contact rule's application here.

a. *Kinast*.

For example, the postconviction court did not discuss *Kinast*. Instead, it concluded that Attorney Valdez's representation of Abby was not about the "same" subject matter as Attorney Eichenlaub's representation of Reno, based on a factual comparison of the cases. (43:3-7, A-App. 188-92.) In the court's estimation, Attorney Eichenlaub could not ask any questions about Reno's case that would incriminate Abby or "upset or revoke" Abby's DPA, because time and circumstance separated her prostitution conduct from Reno's criminal conduct. (43:6-7, A-App. 191-92.)

Thus, as the court concluded, Attorney Eichenlaub, had "no interest" in Abby's charges, and his questioning about Reno's crimes would have been innocuous, because Attorney Valdez did not actually represent Abby in Reno's case, only in Abby's own pending misdemeanors. (43:5-6, A-App. 190-91.)

Under *Kinast*, the circuit court's conclusions are both legally and factually untenable. Legally, the no-contact rule does not require that the matters be the "same" for the rule's protection to apply to the represented person, only that the communication relate to the "subject matter of the representation." *See* SCR 20:4.2.

Moreover, in *Kinast*, the Wisconsin Supreme Court rejected an analogous argument. It did not matter that the GAL's interview of the children was "innocuous" or that Attorney Kinast had not attempted to influence them to his client's advantage. *Kinast*, 192 Wis. 2d at 42-43. What mattered was that the *potential* existed for him to "intimidate[], confuse[], or otherwise impose[] upon" them. *Id.* at 44.

Likewise here, Reno's interests were potentially adverse to Abby's, even though the representations were not for the "same" matter, and the exact charges against each were technically unrelated. Like the children in *Kinast*, Abby was still vulnerable to pressure or intimidation by Reno's counsel without her counsel present. By her own admission, she prostituted herself along with N.B., Reno's victim.

Indeed, the postconviction court even recognized that Abby was "arguably" either a victim of Reno's crimes, or a party to them. (43:6, A-App. 191.) Either way, Abby was vulnerable to Attorney Eichenlaub's potential pressures.

Attorney Eichenlaub may not have had malicious intent, or any interest in seeking privileged information about Abby's misdemeanors. But any communications with Abby about Reno's pimping and human trafficking—namely, the subject matter of Reno's representation—could have easily seeped into the subject matter of Abby's prostitution representation, and were, therefore, prohibited communications under *Kinast*.

As a factual matter, the postconviction court also erred. Without contacting Abby, Attorney Eichenlaub had no way of knowing exactly what the subject of her representation was, because his office walled him off from her representation. But Attorney Valdez expressly forbade Attorney Eichenlaub, in no uncertain terms, from contacting her. (60:45, 62, A-App. 152, 169.)

Thus, Attorney Eichenlaub reasonably concluded that the subject of Abby's representation was sufficiently similar to the subject of Reno's representation to trigger the no-contact rule, and that his questioning might have delved into non-innocuous or incriminating subject matter. At the

very least, given Attorney Valdez's refusals, Attorney Eichenlaub reasonably believed that the subject matter of Abby's representation was *not* a "matter[] outside" Reno's representation which exempted the contact under ABA Comment 4.

Indeed, Abby's own testimony at the *Machner* hearing shows that Attorney Eichenlaub might have treaded into the prohibited subject matter of Abby's representation, had he contacted Abby about Reno's case. She admitted to escorting with N.B. to finance their "expensive" heroin habits, and advertised on Backpage using at least one "revealing" photo that Reno took. (60:13-14, 23-26, A-App. 120-21, 130-33.)

Further, Abby was charged in her own case only four days after N.B.'s rescue, based on prostitution Abby had committed the day before. (43:3, A-App. 188.) While in jail, Abby refused to talk about Reno's case. (60:16, A-App. 123.)

Indeed, Abby admitted that Attorney Schwarz withdrew from representing her because it was a conflict of interest for her to be involved with Reno's case. (60:17, A-App. 124.) Attorney Valdez also prohibited her from talking to anyone about Reno's case. (60:18, A-App. 125.) Abby even believed Attorney Valdez was appointed so she could participate in Reno's case. (*Id.*)

b. Jennifer M.

The postconviction court cited *Jennifer M.*, 323 Wis. 2d 126, ¶ 9, in concluding that SCR 20:4.2 "generally prohibits a lawyer from communicating with another represented in the same matter." (43:3-4, A-App. 188-89.) The court, however, misapplied *Jennifer M.'s* holding and rationale.

That the no-contact rule "generally" applies to communications regarding the "same matter" does not mean the matters *must* be the same in order for the no-contact rule to apply. Under *Jennifer M.*, Attorney Eichenlaub should not have contacted Abby without her lawyer present, because it would have "enhance[d] the disparity in legal skill" between a vulnerable lay victim/witness and Reno's defense counsel who could have easily manipulated Abby for Reno's gain. *Jennifer M.*, 323 Wis. 2d 126, ¶ 11.

Moreover, although Abby claimed she would have testified in Reno's favor, Abby's expressly stated interest in helping Reno was not necessarily in Abby's best interest. *Jennifer M.*, 323 Wis. 2d 126, ¶¶ 10-11. Abby, a vulnerable client, needed her lawyer present during all communications with Reno's lawyer to protect her from being intimidated by Reno's lawyer, and to prevent the inadvertent disclosure of privileged information that might have been harmful to her interests. *Id.*

The circuit court faulted Attorney Eichenlaub's decision as a non-strategic, non-decision, because he had no valid reason not to contact Abby "*other than* SCR 20:4.2." (43:8, A-App. 193 (emphasis added).) But the no-contact rule was reason enough. That Attorney Eichenlaub "felt constrained by Attorney Valdez's denial of access" was not a "mistaken application" of the rule or an unreasonable "misunderstanding of the law." (43:8, A-App. 193.)

Rather, under the prevailing professional norms in Wisconsin, it was perfectly reasonable—and therefore, not ineffective assistance—for Attorney Eichenlaub not to contact Abby when her lawyer expressly forbade it. *Maloney*, 281 Wis. 2d 595, ¶¶ 23-24 (issue is correctness of counsel's decision on unclear legal point, but whether decision was reasonable under prevailing professional norms).

The postconviction court clearly erred in granting Reno a new trial. This Court should reverse on the deficient performance prong alone. *Williams*, 296 Wis. 2d 834, ¶¶ 18-19.

II. The circuit court erred because Attorney Eichenlaub's decision not to call Abby as a trial witness did not prejudice Reno.

Reno has also failed to show prejudice, because Reno has not shown a "reasonable probability" that, but for his counsel's alleged errors, the result of his trial would have been different. *Strickland*, 466 U.S. at 694.

A. Relevant legal principles.

1. To establish prejudice, a defendant must show that counsel's alleged errors actually had some adverse effect on the defense.

Prejudice means that counsel's alleged errors *actually* had some adverse effect on the defense, not just some conceivable effect on the outcome. *State v. Koller*, 2001 WI App 253, ¶ 9, 248 Wis. 2d 259, 635 N.W.2d 838.

2. Trial counsel does not render ineffective assistance by failing to further impeach an already-impeached witness.

Trial counsel's failure to call a potential witness may prejudice the defendant if the testimony would have been central to the theory of defense, such as when the witness would have enhanced the defendant's credibility while simultaneously casting doubt on the State's witnesses. *State v. Jenkins*, 2014 WI 59, ¶ 41, 355 Wis. 2d 180, 848 N.W.2d 786; *State v. Honig*, 2016 WI App 10, ¶¶ 27-33, 366 Wis. 2d

681, 874 N.W.2d 589. But such evidence must be an independent source of non-cumulative information that, if believed, would be "damning" to the State's case. *Id*.

In contrast, trial counsel is *not* ineffective for failing to bring forth evidence that would have merely incrementally weakened the credibility of an already-impeached witness. *State v. Tkacz*, 2002 WI App 281, ¶¶ 20-22, 258 Wis. 2d 611, 654 N.W.2d 37. Such cumulative evidence does not establish a reasonable probability of a different verdict, because the jury already has reason to question the credibility of the witness. *Id.*

Moreover, if defense counsel provides a reasonable explanation, consistent with the defense theory, why he chose to forgo further impeachment of a prosecution witness, then this Court should "make every effort" to avoid making determinations based on hindsight, and "give great deference" to counsel's strategic choices. *State v. Cooper*, 2003 WI App 227, ¶ 21, 267 Wis. 2d 886, 672 N.W.2d 118.

B. Under prevailing professional norms, Attorney Eichenlaub had no obligation to subpoena Abby for trial, or to litigate the issue of her Fifth Amendment privilege.

The postconviction court found that, "*[i]f* Attorney Eichenlaub's decision [not to contact Abby] was correct in the first place, it was correct during the Reno trial." (43:3, A-App. 188 (emphasis in original).) Attorney Eichenlaub's decision not to contact Abby *was* correct and reasonable in the first place. Under the circuit court's own reasoning, therefore, he reasonably did not subpoena her for trial.

But the circuit court found Attorney Eichenlaub's decision unreasonable in both the investigation and trial

stages. (43:6-8, A-App. 191-93.) The court faulted Reno's counsel for not "attempt[ing] to resolve the impasse," because he had an affirmative obligation to seek a court order to "sort out" whether Abby would waive her Fifth Amendment privilege. (43:8, A-App. 193.)

Under the prevailing professional norms in Wisconsin, however, Attorney Eichenlaub's obligation to zealously defend Reno did not obligate him to litigate Abby's Fifth Amendment privilege. Comment 6 to Rule 4.2 states that a lawyer who is "uncertain whether a communication with a represented person is permissible *may* seek a court order." But no affirmative obligation exists; "may" is not "must" or "shall."

Indeed, Comment 6 makes clear that, when a lawyer seeks a court order to authorize an otherwise prohibited communication, the court should only grant the request in "*exceptional* circumstances," such as when communication with the represented person "is necessary to avoid *reasonably certain injury*."

The postconviction court found that Reno's Sixth Amendment right to counsel was an "overriding concern" that "outweigh[ed] the disciplinary rule" (43:7, A-App. 159). But Abby's testimony was clearly not necessary for Reno to "avoid *reasonably certain injury*."

Attorney Eichenlaub believed his trial strategy was going well, even without Abby's testimony, because he had made a "really strong record" and there was "no way" that N.B.'s allegations "stood up in front of a jury." (60:52, A-App. 159.) He called other defense witnesses to show N.B.'s allegations were false and focused on the "improbability" of her accusations. (60:56-57, A-App. 163-64.) That Attorney Eichenlaub was wrong in his trial assessment

does not render his representation ineffective. *State v. Arredondo*, 2004 WI App 7, ¶¶ 31-32, 269 Wis. 2d 369, 674 N.W.2d 647.

C. There is no reasonable probability that Abby would have waived her Fifth Amendment privilege at trial.

The circuit court also concluded that Abby would not have incriminated herself or invoked her Fifth Amendment privilege at trial, because she did not invoke the privilege at the *Machner* hearing. (43:5-8, A-App. 190-93.) These conclusions are illogical.

That Abby waived her privilege at the postconviction hearing has no bearing on whether the privilege applied, or whether she would have waived it, at trial. When Abby testified at the *Machner* hearing in January 2016, she was no longer subject to the DPA, and had already served both of her sentences. (43:3, A-App. 188.)[4] Abby no longer had any reason to invoke the privilege at Reno's *Machner* hearing.

In contrast, at Reno's trial in February 2014, Abby was still subject to the DPA, and subject to criminal liability in her own case. (11; 60:29, 69-70, 73-74, A-App. 136, 176-77, 180-81.) Abby had every reason to invoke the privilege at Reno's trial, had she been called to testify about her own incriminating behavior.

Moreover, even if Attorney Eichenlaub had subpoenaed Abby for trial and litigated her Fifth

[4] In March of 2014, Abby was sentenced to 60 days in jail on each count, including 52 days' time served. (41:9-12.)

Amendment privilege, there is no reasonable probability she would have waived it. Attorney Valdez forbade Attorney Eichenlaub from even contacting Abby. (60:45, 62, A-App. 152, 169.) It is not reasonably probable that Attorney Valdez would have allowed Abby to testify at Reno's trial. It is much more likely he would have advised her to invoke her Fifth Amendment privilege.

D. There is no reasonable probability that Abby's testimony would have changed the result of Reno's trial.

Even assuming Attorney Eichenlaub somehow had an obligation to subpoena Abby, and had somehow persuaded Abby to waive her Fifth Amendment privilege over Attorney Valdez's objection, there is no reasonable probability that Abby's testimony would have changed the result of Reno's trial. *Strickland*, 466 U.S. at 694.

Relying on *Jenkins*, 355 Wis. 2d 180, ¶¶ 49-64, the postconviction court found that counsel's failure to call Abby prejudiced Reno, because Abby's testimony would have contradicted N.B.'s testimony. (43:8-9, A-App. 193-94.)

The court's reliance on *Jenkins* is misplaced. Counsel's failure to call a defense witness to impeach another witness's credibility might prejudice the defense, but only if she was the only person contradicting the other witness' credibility, or was central to the defense. *Jenkins*, 355 Wis. 2d 180, ¶ 41; *Honig*, 366 Wis. 2d 681, ¶¶ 27-33.

Attorney Eichenlaub believed Abby's testimony would have "[s]ubstantially" impacted N.B.'s credibility. (60:66, A-App. 173.) But he also believed he had proffered an adequate defense without her, because he called other

witnesses and had already impeached N.B. herself to show the "improbability" of her allegations. (60:56-57, A-App. 163-64.)

For example, Abby testified that Reno did not hold N.B. against her will, never forced N.B. to do anything, and was not violent with N.B. (60:14-15, 27-28, A-App. 121-22, 134-35.) But other witnesses, including N.B., proffered similar testimony.

N.B. and others testified that she could drive around alone, doing errands and visiting Reno's friends. (54:29-34, 57.) Reno's aunt, brother, and a witness at the fundraiser all testified that N.B. had no injuries, bruises, or slap marks, and appeared to be having fun. (57:13-18, 33-34, 41-42.)

The photos did not show any injuries, besides the broken tooth. (52:107-108; 54:12-13; 56:46-47.) And N.B. herself testified inconsistently about her broken teeth and the zip ties. (52:121-125; 54:9-12; 56:30-43, 47-50, 109-10.)

Abby also testified that Reno did not force N.B. into the vehicle. (60:13, A-App. 120.) But the jury also heard Reno's own statement that he was trying to be a good Samaritan, because he recognized N.B. as a heroin addict. (57:99.) The jury also saw the Harley Davidson photographs which appeared to undercut N.B.'s claim that she was forcibly kidnapped and drugged. (60:63-64, A-App. 170-71.)

Thus, Abby's testimony was not central to the theory of defense, nor would Abby's impeachment of N.B. have been particularly "damning," because Abby was not an independent source covering information that was different than what the jury already knew. *Jenkins*, 355 Wis. 2d 180, ¶¶ 41-44; *Honig*, 366 Wis. 2d 681, ¶ 33. Abby was not a

crucial alibi witness, and did not possess exculpatory information that was not already available through others. *Id.*

Instead, Abby would have only incrementally weakened the credibility of an already-impeached witness. *Tkacz*, 258 Wis. 2d 611, ¶¶ 20-22. Therefore, Abby's testimony was insufficient to establish a reasonable probability of a different verdict, because the jury already had reason to question N.B.'s credibility, yet still convicted Reno. *Id.*

The circuit court also erred in finding that the State relied on N.B.'s testimony "almost completely." (43:8-9, A-App. 193-94.) The State proffered more than just N.B.'s testimony to prove its case.

As to the sexual assault, Detective Stott compellingly testified that N.B. cried when disclosing the multiple assaults, and that Reno likely committed multiple sexual assaults and other crimes against N.B. during the six-week-long trafficking. (54:32; 56:55, 67-68.) Abby's testimony that she did not hear the sexual assault would not have changed the result at trial, because N.B. already testified that Abby was in the shower when it happened. (52:72-74.)

Overwhelming evidence also existed to prove that Reno had pimped and trafficked N.B., and kept her against her will in his prostitution house. To corroborate N.B.'s testimony, the State proffered:

- Backpage ads and photos that Reno took on his phone (52:102-105);
- large numbers of texts on Reno's phone responding to ads for prostitution (56:99-103);

- green dot cards, drug paraphernalia, and sexual aids found in N.B.'s purse (52:24-28);
- search warrant evidence from Reno's hotel room (56:94-97);
- police photos (52:107-13; 54:12-13; 56:46-47);
- text messages to Ryan (52:95-102);
- Ryan's testimony that something was wrong based on the phone conversations and phone records (54:43-44, 93-95);
- N.B.'s phone conversations with Therese (54:63-77, 104-05);
- phone pings showing N.B.'s locations and movements (56:6-17); and
- circumstantial evidence of Reno's guilt, including his absconding, abandoned vehicle, and arrest by the Fugitive Apprehension Unit (56:58-59, 81-82; 57:113).

And, of course, the jury also heard Reno's own admissions that he knew that Abby prostituted herself in the hotel, that he used his own debit card for the Backpage ads, and that he took photographs of Abby and N.B. using his phone. (57:99-100.)

In finding that Reno was prejudiced, the postconviction court said it could not "discount or disbelieve" Abby's proposed testimony, because "that is the jury's job." (43:9, A-App. 194.) That conclusion is legally and factually erroneous.

Legally, at this procedural posture, it was the *court's* job, not the jury's, to weigh Abby's testimony. In a postconviction ineffective assistance claim, the court determines whether a reasonably probability of a different result exists. *Mayo*, 301 Wis. 2d 642, ¶ 32.

Factually, the court failed to consider that the prosecutor would have impeached Abby about her own prostitution charges, her DPA, and the inconsistencies within her own testimony.

For example, Abby testified that Reno did not know about the ads and had no input into the prostitution scheme, but the prosecutor would have impeached her based on her later admission that Reno knew about the ads and even used his phone. (60:21-26, A-App. 128-33.) Abby testified that Reno did not abduct N.B., but the prosecutor would have impeached her with the reasonable inference that Abby was not in the vehicle, and was already at the hotel, when Reno abducted N.B. (52:42; 54:18; 60:11-12, A-App. 118-19.)

The prosecutor would have also impeached Abby's testimony that she was Reno's girlfriend. (52:72-74; 60:10-11, A-App. 117-18.) N.B. testified that Abby was also prostituting, and that Abby had only said she was Reno's girlfriend to avoid police detection. (54:23-24, 55.) Had Abby gotten on the stand, it is highly likely that the prosecutor would have sought Abby's admission that Reno was prostituting and trafficking *both* women.

Attorney Eichenlaub's failure to call Abby as a witness did not prejudice Reno, because there is no likely possibility that Abby's testimony would have changed the result. Not only was Abby's testimony *not* crucial to the defense, but overwhelming evidence of Reno's guilt existed.

CONCLUSION

This Court should REVERSE the circuit court's order granting Reno's postconviction motion for a new trial.

Dated this 2nd day of November, 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 10,977 words.

Dated this 2nd day of November, 2016.

_____
SARAH K. LARSON
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.

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Dated this 2nd day of November, 2016.

_____
SARAH K. LARSON
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Micah Nathaniel Reno
Case No. 2016AP1371-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 one or more initials or other appropriate pseudonym or designation, 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.

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SARAH K. LARSON
Assistant Attorney General

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