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DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appellate Case Nos. 2016AP2315-CR,
2016AP2316-CR AND 2106AP2317-CR
Milwaukee County Case Nos. 13-CF-3481,
13-CF-5185 and 14-CM-108

ANGUS MURRAY McARTHUR,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A MILWAUKEE COUNTY
JUDGMENT OF CONVICTION,
ENTERED ON JULY 15, 2014,
AND THE POST-CONVICTION DECISION AND ORDER,
DATED NOVEMBER 1, 2016,
DENYING POST-CONVICTION RELIEF,
THE HONORABLE JEFFREY WAGNER, PRESIDING,
ALL IN MILWAUKEE COUNTY.

DEFENDANT-APPELLANT'S
BRIEF-IN-CHIEF AND APPENDIX

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ISSUES PRESENTED

1. Did the Circuit Court Erroneously Exercised its Discretion in Admitting "Other Acts" Evidence Against McArthur at Trial?

   The trial court answered no.

2. Did the Post-Conviction Court Exercise Erroneous Discretion in Denying an Evidentiary Hearing to Prove His Claims of Ineffective Assistance of Trial Counsel?

   The trial court answered no.

3. Was Trial Counsel Ineffective in Failing to Object to the Prosecutor Cross-Examining Defense Witnesses Regarding the "Other Acts" McArthur Allegedly Perpetrated Against His Former Girlfriends?

   The trial court answered no.

4. Was Trial Counsel Ineffective in Failing to Object to the Prosecutor Having Detective Roberson Read KMW's Entire Statement to the Jury?

   The trial court answered no.

STATEMENT OF CASE AND FACTS

Angus McArthur (McArthur) was first charged in a Criminal Complaint filed on August 3, 2013 (Milwaukee County Case No. 13-CF-3481), with Kidnapping, False Imprisonment, Aggravated Battery, two counts of misdemeanor Battery, Second Degree Sexual Assault and Strangulation and Suffocation, in violation of §§940.19(1), 940.19(4), 940.225(2)(a), 940.235(1), 940.30 and 940.31(1)(b), Stats. It was alleged McArthur committed all of these acts against KMW on July 14, 2013, in the cities of Milwaukee and Wauwatosa in Milwaukee County (R.3)[1].

McArthur made his initial appearance in court on August 8, 2013, at which time the court commissioner entered a No Contact Order with KMW (R.61, p. 12; R.4).

On August 15, 2013, KMW obtained a temporary domestic abuse injunction against McArthur in Milwaukee Case No. 13-FA-4490, which was served on McArthur on that same date (R.2, p. 2; Milwaukee County Case Number 13-CF-5185).

On August 16, 2013, the State filed an Information

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[1] All citations to the appellate record will be from the docket sheet in Milwaukee County Case Number 13-CF-3481, unless otherwise specified.

charging McArthur with the same offenses alleged in the Complaint (R.6). He entered not guilty pleas to all counts (R.62, p.4).

McArthur was subsequently charged in a Criminal Complaint filed on November 13, 2013, with two counts of Knowingly Violating a Domestic Abuse Order, two felony counts of Intimidating a Witness and Conspiracy to Commit Perjury, in violation of §§813.12(8)(a), 940.43(7) and 946.31(1)(a), Stats. It was alleged McArthur placed collect telephone calls to KMW on September 11, and 13, 2013, during which he attempted to dissuade her from cooperating in his prosecution and provide a false statement to authorities regarding the events of July 14th (R.3; Milwaukee County Case Number 13-CF-5185).

McArthur made his initial appearance in connection with the new case on November 14, 2013 (R.18; Id.) The State filed an Information (R.5; Id.) charging McArthur with the same offenses alleged in the Complaint, to which McArthur entered pleas of not guilty (R.19, p. 4; Id.).

On December 9, 2013, the trial court granted the State's motion to consolidate (R.12) the old and new cases for trial (R.68, p. 8).

On December 16, 2013, the State filed a motion to

introduce “other acts” evidence in its case-in-chief (R.13). In that motion, the State argued it sought this evidence to “demonstrate the defendant’s method of operation, and possibly to establish identity” (Id., p. 1). The State outlined the evidence it expected to elicit regarding the events leading up to the July 14th allegations made by KMW.

The State outlined the factual basis for the charges as follows:

1. McArthur believed KMW was communicating with another man, as he had seen a text message and heard a voice mail from a male on KMW’s phone, and became angry.

2. While driving KMW home, McArthur told her not to speak to him, but asked her to meet with him later at a bar.

3. KMW went to the bar, but McArthur never showed. KMW left the bar, went home, went to bed and woke up to find she was in McArthur’s car.

4. McArthur told KMW he had rented a car and had been following her throughout the night.

5. He began verbally taunting KMW and then beat her by twisting her wrist and punching her in the ribs and face, offering her “choices” of being struck in the ribs or face or breaking her wrist.

6. McArthur allowed KMW to leave the car a number of times but would drag her back in by her neck, causing her to lose consciousness on one occasion.

7. He repeatedly threatened to sell KMW for $1000 and, as a result, she would be “drugged, fucked

and left for dead."

8. He used a knife to cut her shirt and bra straps.

9. After driving around for two hours, McArthur took KMW to his house, where he made her strip, lie on her side and told her she "would never forget this lesson."

10. He put his penis in her mouth and then urinated, making her drink it while threatening to choke her.

11. While driving KMW to work the next morning, he made her light him a cigarette and called her a "pussy" when she winced in pain.

(Id., pp. 1-2).

In that same motion, the State outlined the types of "other acts" evidence it sought to introduce during its case-in-chief. This consisted of evidence relating to alleged, threats, violence (to person and property) and harassment perpetrated by McArthur against four women while they were involved in relationships with him.[2]

In 1994, McArthur was involved and living with MM. She alleged:

1. McArthur became angry when he heard a male voice on their answering machine and pushed her out of bed, stating "Don't come within three

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[2] The State's proffer anticipated four "other acts" witnesses testifying; however, only three appeared at trial. The trial court ruled pre-trial the State could offer the testimony of all four witnesses regarding the "other acts" McArthur allegedly committed against them.

feet of me tonight." Shortly thereafter, he shot her with his gun, which he claimed discharged accidentally.

In 1998, McArthur was involved with CC. She alleged:

1. On one occasion, when she told him she was planning to go out with friends, he became angry with her and (a) handcuffed her; (b) stuffed a sock in her mouth; (c) slapped and beat her in the head; (d) placed her on a bed, put a guitar wire around her neck and began strangling her wire while asking "Do you like this?"; (e) and placed a plastic bag over her head while threatening to kill her.

2. McArthur then began stalking and harassing her by telephone while threatening to harm or kill her and her family. During these threats, McArthur would give her "choices" about when or whom he would kill.

3. After reporting McArthur to police, she recanted her allegations at McArthur's request.

(Id., pp. 3-4).

In 2002, McArthur was involved with JD. She alleged:

1. During an argument in which McArthur called her names, he punched her in the stomach. When she attempted to get away, McArthur grabbed her and twisted her wrist. He told her she would "get a special treat today" and he was going to strangle her with the pants he had been ironing. He then took the pants and strangled her until she nearly passed out. During this same argument, he threatened to use the iron to "bash her head in" and told her he would "gut her" after he let her watch him hang her parents.

2. McArthur was criminally charged as a result of her allegations.

3. While that case was pending, McArthur

contacted her and requested she drop the charges and threatened her when she refused.

(Id., p. 4).

In 2004, McArthur was in a relationship with RS. She alleged:

1. Her neighbors contacted police, when they heard McArthur yelling at her and what sounded like a body being slammed into a wall. When police arrived, they arrested McArthur. A week before that arrest, police had been to the same address at which time they observed RS had a black eye.

2. In 2004, she was in downtown Milwaukee having her taxes prepared when McArthur, who had keys to her car, pulled her car into traffic and left it. When she got to her car and was headed home, she noticed McArthur was following her. When she pulled into and entered a gas station, McArthur called her on her cell phone to tell her it was illegal to drive without her registration. When she left the gas station and returned to her car, she discovered her book bag and the contents of her glove compartment were missing. McArthur called her again and told her, if she wanted her book bag returned, she should be at his house in two minutes. She went to his house and he grabbed her cell phone from her to check on her recent contacts. When he discovered she had been in contact with an ex-boyfriend, he started calling her names. When she tried to leave, McArthur punched her in the face, causing her glasses to fall off. She returned to McArthur's (waiting 20 minutes and after he left) to find her glasses in a bathroom drawer and her license and credit cards in the trash.

3. On a separate date, she was driving and noticed McArthur was following her in his truck. When she parked her car in a parking lot, McArthur drove his truck into her driver's side door, rear-

ended and then "keyed" her car.

4. On yet another date, McArthur came into the restaurant where she worked. After she got off work and was home, McArthur became angry with her because the bartender at the restaurant was not aware McArthur was her boyfriend. He then picked up a lamp and threw it to the ground and stomped on it. She fled in fear and McArthur followed her in his truck. While she was parked outside a store, McArthur drove his truck into her driver's side door. After leaving the store, McArthur was stopped by police in his damaged truck and told police he was angry with her because, when he confronted her about a phone call with her ex-boyfriend, she lied to him.

(Id., pp. 4-6).

In a document filed on January 6, 2014, McArthur objected to the introduction of the "other acts" evidence on various grounds which included:

1. Because the State was offering the "other acts" evidence to establish McArthur's identity as the perpetrator of the crimes committed against KMW by showing his "method of operation" it was necessary for the State to establish similarity between the prior "other acts" and the instant case. The threshold measure of similarity required the State establish the "other acts" were near in time, place and circumstances to the instant case. McArthur argued the "other acts" were not sufficiently similar to the instant case to warrant admission.[3]

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[3] Specifically, counsel argued the allegations made by MM were dissimilar because MM told police she "firmly believed" the shooting was accidental, giving it no probative value; that incident occurred in an apartment, rather than a car; there were no allegations of an intentional battery, kidnapping or sexual assault.

2. The "other acts" evidence was "extremely remote in time" and "too dissimilar" to the instant case to have more than minimal probative value (more than 19, 15, 12 and 10 years prior, respectively).

3. The "graphic" and "disturbing" nature of the "other acts" evidence was so highly prejudicial as to significantly outweigh its minimal probative value.

4. With the sheer number of accusers and numerous accusations (including more than one event by some of the "other acts" witnesses), the jury would have to sort through so much evidence it would lead to confusion of the issues.

(R.14, pp. 2-3, 6, 7).

The court conducted a hearing on the State's "other acts" evidence on January 8, 2014. At that hearing, the State argued it was proffering the evidence for more than

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As to CC, he argued the allegations of violence were dissimilar because they involved handcuffing her, putting a sock in her mouth and threatening to place a plastic bag over her head; all events occurred in an apartment, rather than a car; there was no allegation of sexual assault; and there was no evidence McArthur committed these acts, as noone corroborated them and McArthur was not convicted of any crimes.

As to JD, he argued the allegations were dissimilar because they did not involve acts of supposed jealousy; the alleged battery involved an act of strangulation involving a pair of pants, unlike punching or hitting; the incident, again, took place in an apartment, rather than a vehicle; there was no allegation of sexual assault; and, finally, any claim McArthur harassed or intimidated her to recant was unfounded, because she withdrew that portion of her complaint to police.

As to RS, counsel argued much of McArthur's alleged acts against her were related to property damage, unlike the instant case; the alleged battery to her occurred in an apartment, not a vehicle; there were no allegations of kidnapping or sexual assault.

establishing McArthur's identity as the perpetrator of the crimes committed against KMW. The State argued it was offering the evidence to (1) demonstrate McArthur's method of operation; (2) illuminate his state of mind; (3) demonstrate the escalation of his violent, controlling and humiliating behavior; (4) establish his identity as the perpetrator; and (5) establish why McArthur would commit the alleged acts against KMW (R.69, pp. 3; 9).

The State also argued the "other acts" were not so remote in time as to preclude admission because they presented "sufficiently unique facts" to "compress the time" between the other acts and the instant case and the defendant did not have an opportunity to repeat his acts of violence against others due to his incarceration at various points throughout the time elapsed (Id. pp. 5-7).

Finally, the State argued McArthur would not be unduly prejudiced by the admission of the evidence because the jury would be given a curative instruction about how it was to use the evidence (Id., p. 11).

At that same hearing, the State informed the court and defense counsel McArthur had been sending letters to KMW (through an intermediary) in violation of the no contact order. The State indicated it would be issuing new charges.

McArthur was subsequently charged in a Criminal

Complaint filed on January 9, 2014, with four counts of Knowingly Violating a Domestic Abuse Order, in violation of §813.12 (8)(a), Stats. He made his initial appearance relative to this case on January 27, 2014, and entered pleas of not guilty to the charged offenses (R.2; R.11, p. 3; Milwaukee County Case Number 14-CM-108).

When the parties returned to court on February 13, 2014, the court undertook a *Sullivan*[4] analysis in ruling on the State's "other acts" motion. The court found the "other acts" showed "an escalation of different methods of operation," demonstrated the "defendant's state of mind" and revealed a "striking pattern of controlling and violent behavior by the defendant of his girlfriends"; the "other acts" were similar and provided a basis for identification of McArthur; the "other acts" were relevant and probative and were not too remote in time; and allowing the "other acts" evidence would not present "any legitimate danger of unfair prejudice." Thus, the court granted the State's motion (R.72, pp. 3-7; A-101-05).

On March 28, 2014, the court granted the State's motion to consolidate the most recent case with the prior two cases for trial (R.73, p. 3).

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[4] State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (1998).

On April 25, 2014, the defense submitted a notice of alibi (R.75, pp. 8-9).

The consolidated cases proceeded to a jury trial, commencing on May 27, 2014.

On the first morning of trial, the State filed a motion seeking to introduce instances of threats and violence by McArthur against KMW prior to the charged offenses. Specifically, the State sought to introduce evidence, through KMW's testimony:

1. McArthur laid down a set of rules for KMW and their relationship for the purpose of helping her overcome her alcohol and drug abuse.

2. Early in their relationship, when KMW broke one of McArthur's rules, he "punished" her by sitting on her abdomen. When she told him she could not breath, he replied "I know."

3. McArthur occasionally made threats to break her fingers, if she drank alcohol

4. He told her he had hurt his past girlfriends and made reference to shooting one of them in the foot.

5. He told her he received "tactical training" so he could hit her without leaving marks.

6. He began physically abusing her in mid-June of 2013, after he learned she drank alcohol while employed as an exotic dancer. She claimed he kicked her out of his house, so she went to a motel. However, before she could check in, McArthur pulled up in his vehicle, pointed a gun at her and demanded she get inside the vehicle. He then drove around for a long time, yelling at

her and threatening to shoot her, if she attempted to run away. He would occasionally pull his vehicle over and push her fingers back toward her wrist and threaten he would break her fingers. He poured lighter fluid on her pants and then lit them on fire. He threatened to "tie her up and let the hood rats have their way with her." He then took her to a friend's house and had his friend describe to her what McArthur had done to girlfriends who defied his rules in the past. Finally, he placed his hands around her throat but did not apply any pressure.

7. On a separate occasion, McArthur shoved an eyeglass case into her mouth and said he should have shoved it into her vagina.

8. McArthur continued to monitor her behavior by following her, calling and texting her repeatedly, checking her phone and driving by her home and work place. He would also make verbal threats.

(R.25).

The State also filed a trial Information (R.24), which included all 16 counts previously charged in three separate complaints (13-CF-3481, 13-CF-5185 and 14-CM-102), and moved to amend Count Ten of the trial Information from Knowingly Violating a Domestic Abuse Temporary Restraining Order to Violating a Domestic Injunction, to which the defense did not object (R.77, pp. 5-6). The parties also agreed they would select a jury and return the next morning to commence the trial (Id., pp. 3-4).

When the parties returned to court the next morning, defense counsel objected to the introduction of evidence

regarding “other acts” committed by McArthur against KMW prior to the charged offenses. Counsel noted the late notice of the State’s plan to use the evidence, its lack of probative value, remoteness of McArthur allegedly shooting his former girlfriend in the foot (almost 20 years prior), its cumulative nature and the unduly prejudicial nature of the litany of bad acts KMW alleged (R.78, pp. 5-10).

The State argued the history of KMW and McArthur’s relationship was not truly “other acts” evidence; but rather evidence of KMW’s and McArthur’s “state of mind” and it was relevant based upon its recency and constituted a continuing course of conduct (Id., pp. 13-14).

In granting the State’s request, the court found all of the proffered “other acts” evidence was “relevant and “probative”, not cumulative and “would meet the requirements of *Sullivan*” (Id., pp. 7-8; A-108-07). However, the court did not state why the acts were relevant and probative or undertake a *Sullivan* analysis.

During her opening statement, the prosecutor outlined all of the “rules” imposed by McArthur on KMW and what he did in response to her breaking the rules (i.e., sitting on her until she could not breath, verbal threats, lighting her pants on fire, calling her names, hitting her) (Id., pp. 24-26).

She also outlined the testimony the jury would hear from McArthur's former girlfriends about threats he made against them and their families and acts of violence against them or their property when he believed they were cheating on him or not "following the rules he set for them" (Id., pp. 43-44).

In his opening statement to the jury, defense counsel told the jury the evidence would establish KMW was lying about who was responsible for her injuries because McArthur had an alibi for the time period during which KMW was injured and McArthur's roommate was home during the time frame when KMW claimed McArthur physically abused and sexually assaulted her and the roommate did not hear anything, despite having a bedroom adjacent to McArthur's (Id., pp. 45-48).

KMW was the State's first witness. At the outset of her testimony, she identified McArthur as her former boyfriend and stated she first met him in April of 2013 (Id., pp. 57-58).

KMW told the jury about her relationship with McArthur and testified consistent with the facts outlined in the State's motion regarding the "other acts" McArthur committed against her prior to the charged offenses (Id., pp. 75-77, 81, 87-88).

She testified about the events of July 13, 2013, the day prior to the charged offenses, and said they had an argument about her receiving a text message when he "snapped" and

abandoned her while shopping. She said McArthur did return to pick her up and punched her in the face while driving her home (R.78, pp. 89-91).

She testified, after McArthur dropped her at home, she wanted a drink so she went to a bar, where she drank shots and met "Mike" who was very understanding and nice. She spent the evening with Mike, during which they continued to drink at another bar, smoke marijuana and drive around town. The evening ended with Mike driving her home and him coming inside to smoke another marijuana cigarette. She recalled feeling very tired and starting to fall asleep and Mike trying to kiss her. When she told him "no," he left her on the couch where she fell asleep (Id., pp. 92-96).

She awakened "really out of it" to see McArthur standing over her. Her next waking memory was being inside McArthur's car and seeing the dashboard clock, which she believed read "2:58" (Id., p. 97).

Her testimony regarding what happened in McArthur's car after she awoke was consistent with the factual proffer outlined in the State's motion to introduce the "other acts" McArthur allegedly committed against prior girlfriends (Id., pp. 98-99, 101-02, 107, 125-27).

Subsequently, KMW got a restraining order against

McArthur with law enforcement assistance. However, on her own volition, she went to the jail to visit him after he was arrested in connection with the instant case. During that visit, she gave him her new telephone number and took collect calls from him on September 11 and 13, 2013 (Id., pp. 19-23).

She testified about letters she received from McArthur in which he attempted to dissuade her from cooperating with the prosecution, change her account of what happened on July 14th and tell authorities she had been confused about who assaulted her because she suffered from PTSD and had taken a hallucinogenic (Id., pp. 26-28).

On cross-examination, KMW acknowledged suffering from PTSD and needing treatment for that and her alcohol abuse (Id., pp. 55-56).

She admitted sending McArthur a text message on July 11, 2013, (2 days prior to the charged offenses) in which she told him "You will regret pushing me away. I promise you that" (Id., p. 88).

She admitted writing to McArthur after he was arrested and wanting him to contact her, despite the restraining order. She also admitted visiting McArthur six to eight times while he was in jail awaiting trial and putting money into his inmate account (Id., pp. 58, 60-61).

Regarding the events starting on July 13th, she denied telling the police she went to the tavern to meet McArthur at his request; but rather, told police she went there to drink. She admitted lying to police when she told them she knew Mike prior to that evening and she did so because she thought it sounded bad she agreed to drive around, drink and smoke weed with a stranger (Id., pp. 63-65).

She admitted she had one shot and three Long Island Iced Teas (not just the one drink she told police she had) while at the first bar and acknowledged these were strong drinks. She admitted smoking two marijuana cigarettes (which looked like they contained "very strong marijuana") with Mike over the course of the evening, drinking another drink at a second bar, which they left at about 1:30 a.m., and she was "in like my drunk state" when they were at her home together (Id., pp. 69-74).

CC testified and identified McArthur as someone she dated in 1997 and 1998. She recounted the "other acts" McArthur allegedly committed against her during the course of their relationship, consistent with the State's factual proffer in its motion to admit those "other acts" (R.81, pp. 3-11).

JD testified and identified McArthur as her former boyfriend and said they dated from November of 2001 through

May of 2002. She, too, recounted the "other acts" McArthur allegedly committed against her during the course of their relationship, consistent with the State's factual proffer in its motion to admit those "other acts" (R.80, pp. 9-15).

RS identified McArthur as someone she dated for two years in "2003-ish" (Id., pp. 20-21). She testified somewhat consistently with the State's "other acts" factual proffer. However, she made additional allegations which had not been outlined in the proffer. For instance, she claimed, during the course of their relationship:

1. McArthur was frequently verbally abusive and called her a "bitch," "stupid," "dumb" and "naive."

2. He checked her telephone activity "on a regular basis," which would lead to arguments and physical violence, if he thought she was cheating.

3. He punched her, burned her with cigarettes and choked her numerous times and his violence could "erupt over anything."

4. McArthur threatened to harm her, her family and her cats, if she ever left him and would go to her mother's house, bang on the windows and doors and, on one occasion, flattened the tires on her mother's car.

5. There were times when he was driving his truck and she was a passenger when he would ask her if she wanted to get out and, when she said "yes," he would slow down as if to let her out but would then speed up or swerve when she attempted to do so.

6. On five occasions, when she attempted to leave the apartment they shared, McArthur either blocked the door to prevent her from leaving or took off her clothes and pushed her out the door.

7. She left McArthur after his probation officer sent him to jail.

(Id., pp. 20-28, 32).

Peter Strauss, the bartender who served KMW and Mike the night of July 13, 2013, testified. Strauss believed KMW consumed one Long Island Iced Tea and four or five shots of Jameson's while at the bar for over one to two hours. Strauss said Mike paid for all of KMW's drinks before they left the bar together (R.81, pp. 30, 33-35).

Wauwatosa Police Detective Paula Roberson testified about her initial interview of KMW. She said KMW intially told her she had not had any alcohol since April of 2013, but later admitted consuming alcohol in June and July of 2013. KMW also told the detective she went to the bar to meet McArthur and, while there, ran into an old friend (Mike). KMW told the detective she waited at the bar until 1:00 a.m. and, when McArthur did not show, she left. KMW told the detective she only had one Long Island Iced Tea while at the bar and claimed she went home alone (R.81, pp. 42-44).

While examining Detective Roberson, the prosecutor elicited testimony regarding the detective's investigation of

McArthur's past and the detective's discovery MM, McArthur's former girlfriend, reported to police McArthur shot her (Id., p. 50). The prosecution did not elicit this report was made to police in 1994 or that MM acknowledged it was an accident (R.13).

The prosecutor had the detective read her report of KMW's account of her history with McArthur, which included KMW's allegations of McArthur's threats and verbal and physical abuse prior to the events serving as the basis for the charged offenses. This included the litany of KMW's allegations about McArthur's "rules," controlling behavior, verbal and physical punishment of KMW when she broke McArthur's rules and McArthur's references to "hurting" other girlfriends, all of which KMW had already testified to earlier in the State's case-in-chief (Id., pp. 47-53, 58-59).

After the State rested its case, the defense indicated McArthur would testify (Id., pp. 87-88).

He testified he began dating KMW in mid-May of 2013 and was aware of her past drug and alcohol issues. He admitted one of the conditions of their continuing to date was she not use alcohol (Id., pp. 91-92, 94).

He discussed an incident on July 2nd when he had reason to believe KMW was using drugs or alcohol, which

prompted him to contact KMW's sister to discuss KMW's substance abuse and the possibility of an involuntary admission into rehab (Id., pp. 96-97).

He testified on July 13th, he dropped KMW off at a McDonald's restaurant near her place of employment at approximately 10 a.m. and next saw her when he picked her up a little after 6 p.m.. Shortly after, they got into an argument about her possibly "partying" with a man she met earlier that day and he dropped her off at her house. He denied hitting KMW at any point (Id., pp. 99-102).

He next went to KMW's home at approximately 10:30 that night with a cup of coffee and found she was not home. He had planned to ask her to go with him to meet some friends later. Instead, he left the coffee with a note and asked her to give him a call when she got home (Id., pp. 103-04).

He then went to meet some friends, Steve and Amanda, at a bar in Bay View and arrived at about 11:00 p.m.. He stayed at the bar with them until closing time around "two-ish." He and his friends then went to another friend's house, where they stayed for approximately an hour to two hours and left there at 3:30 or 3:45 a.m. (Id., pp. 104-06).

After leaving his friend's house and while on his way home at about 4:15 a.m., he received a text from Steve and

learned Steve and Amanda had car trouble. He then called Steve and they spoke on the phone (Id., pp. 106-07).

When he got home, he found KMW passed out outside his house. He got her up, brought her inside and they went to bed. He admitted he may have called KMW "stupid or something," but denied assaulting her. The next thing he remembered was KMW waking him at 10:30 a.m. and telling him she needed to get to work. When he dropped KMW at work, he told her he was going to tell her sister she had been drinking and they needed to get her into rehab, against her will, if necessary (Id., pp. 109, 112).

When he learned of KMW's accusations, he contacted an attorney and ultimately turned himself into the sheriff. Once he was at the jail, KMW came to visit him and told him what she told authorities about the events of July 14th was wrong and she now believed Mike drugged her. She told him she made the allegations about him because she was trying to get his attention so he would stop being mean to her about her drinking (Id., p. 113-15).

He testified KMW began writing letters to him and, in a letter dated September 30th, KMW asked him to write to her. Therefore, he believed the restraining order she obtained earlier was no longer valid (Id., pp. 117-18).

He acknowledged sending letters to KMW through a third party after KMW was in custody at the jail and said he did so because the jail has a policy against inmates writing to one another (Id., pp. 144-45).

He admitted he told KMW to contact his attorney and the district attorney; but it was because he wanted her to clear up the misconception he was responsible for her injuries (Id., pp. 119-20).

McArthur testified the accusations made about him by his former girlfriends were "mostly true" but he had reformed (Id., pp. 121-22).

George Bregar testified he was McArthur's roommate on July 14th and he heard McArthur and KMW enter between 3:00 and 4:00 a.m.. He testified his bedroom window and door were both open that night and he did not hear any arguing between McArthur and KMW, which he had heard in the past. He said his bedroom was only ten feet from McArthur's (R.82, pp. 5-7, 16).

Over defense objection as cumulative, the court allowed the prosecutor to question Bregar whether he was aware of McArthur's past and questioned him as follows:

Q: So he didn't mention about how he shot one of his girlfriends?

A: He did not.

Q: He didn't mention how he had put a plastic bag over the head of a girl, a different girlfriend, that he handcuffed to a chair and shoved a sock in her mouth and told her that he was going to suffocate her that way? He didn't mention that to you?

A: Not at all.

Q: And he didn't mention to you how he had strangled a third girlfriend with a pair of pants and threatened to bash her head in with the iron he was using? He didn't mention that either?

A: No.

Q: And he didn't mention to you a fourth girlfriend that he had stalked and threatened and strangled repeatedly and bashed his car into?

A: No.

(Id., pp. 10-11).

Stephen Hughes identified McArthur as a friend of 20 years and testified he and his girlfriend, Amanda, met up with McArthur at a bar between 11:15 and 11:30 on July 13th. He said McArthur was in a good mood that night and told them he had been working prior to meeting them. He said they remained at the bar into the next morning and left between 1:45 and 2:00 a.m. They all then went to a mutual friend's house, where they stayed until 3:30 a.m. He confirmed he texted McArthur at 4:00 a.m. to report car trouble and McArthur called him back at 4:15 a.m. (Id., pp. 19-23, 27).

As she did with Breger, the prosecutor questioned Hughes whether McArthur had ever discussed his "other acts" with prior girlfriends (i.e., shooting, strangling with pants, threatening with an iron, threatening to "gut" parents in front of her, handcuffing, placing a bag over her head and threatening to suffocate her, stalking, smashing a car, punching) (Id., pp. 33-35).

Amanda Buelow testified she and Hughes met McArthur at a bar on July 13th. Her timeline was consistent with the testimony offered by McArthur and Hughes (Id., pp. 40-41).

In her closing argument, the prosecutor devoted a great deal of time talking about McArthur's past relationships and how his prior actions established "his signature way of dealing with women;" "how he did exactly what he had done in the past" to KMW; "he likes to strangle women;" "he likes to threaten people in these extreme over the top ways;" "Mr. McArthur understands what his history tells us about *who* committed these offenses;" and "Mr. McArthur tormented this woman because he felt all righteous about it just as he did in the past" (Id., pp. 77, 91-92, 108).

In his closing argument, defense counsel said "You may not like Mr. McArthur. You may not like what he did in the past, but what you think of him as a person doesn't count" (Id.,

p. 111). He argued there were problems with the State's case and KMW's credibility, which is why the State was "dredging up things that happened 10 years ago, 15 years ago to try and distract you from weaknesses" in its case (Id., p. 112).

In her rebuttal argument, the prosecutor again argued the testimony about McArthur's past "idiosyncratic" behavior established his "fingerprint" as the perpetrator of "this crime" against KMW (Id., p. 143).

The court instructed the jury about how it was to consider the "other acts" evidence in reaching its verdicts. Specifically, the court instructed the jury as follows:

> Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial. Specifically, the evidence has been presented that the defendant was verbally and physically abusive to prior girlfriends.
>
> If you find that this conduct did occur, you should consider it only on the issues or issue of Mr. McArthur's state of mind to show his method of operation, plan to show on the escalation of his behavior, to show motive, and to establish his identity as a person who committed the crime.
>
> You may not consider this evidence and conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.
>
> The evidence was received on the issue or issues of motive; that is, whether the

> defendant has a reason to desire the result of the offense charged; method of operation or plan; that is, whether other conduct of the defendant was part of a repeated design or scheme that led to the commission of the offense charged; state of mind; that is, showing how the defendant was thinking, escalation of behavior over time, and identity; that is, whether the prior conduct of the defendant is so similar to the offense charged that it does tend to identify the defendant as the one who committed the offense charged.
>
> You may consider this evidence only for the purpose or purposes I described giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged.

(R.82, pp. 54-55; A-114-15)

At the conclusion of his 4-day trial, McArthur's jury returned with verdicts finding him guilty of False Imprisonment, Aggravated Battery, two counts of misdemeanor Battery, Second Degree Sexual Assault, Strangulation and Suffocation, six counts of Knowingly Violating a Domestic Abuse Order, two felony counts of Intimidating a Witness and Conspiracy to Commit Perjury. The jury found McArthur not guilty of Kidnapping (R.28-43).

The parties returned to court on July 14, 2014, for sentencing, at which time the court trial court sentenced McArthur to serve a total of 47.5 years of initial confinement and 22 years of extended supervision, pay $68,766.58 in

restitution, have no contact with KMW and participate in "any other type of programs" (R.84, pp. 32-35; R.50-51; A-116-19) (R.13-14; 13-CF-5185; A-1120-23) (R.7; 14-CM-108; A-124-26).

On July 24, 2014, McArthur timely filed his Notices of Intent to Pursue Post-Conviction Relief (R.52) (R.15) (R.8).

By extension and on July 11, 2016, McArthur filed an 809.30 Petition requesting a hearing to present evidence establishing his trial counsel was ineffective (1) in failing to object to the prosecutor cross-examining Bregar and Hughes regarding the "other acts" McArthur allegedly perpetrated against his former girlfriends; and (2) in failing to object to the prosecutor having Detective Roberson read KMW's entire statement to the jury when there was no evidentiary basis for doing so (i.e., to rebut a claim of recent fabrication or the "rule of completeness")[5] (R.112, 113).

In a decision and order dated November 1, 2016, the post-conviction court denied McArthur's request for a *Machner*[6] hearing and petition for a new trial finding McArthur

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[5] McArthur raised a third claim in the petition, which he is not raising on appeal.

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

(1) was not prejudiced by the State cross-examining defense witnesses about McArthur's "other acts" against prior girlfriends; and (2) was not prejudiced by the State introducing the entirety of KMW's statement to Detective Roberson. The court did not address whether trial counsel performed deficiently. (R.125, pp. 7-9; A- 133-35).

McArthur timely filed a Notice of Appeal with the Milwaukee County Clerk of Courts on December 2, 2016 (R.126).

He subsequently moved and this Court, on December 6, 2016, granted his request to consolidate his three Milwaukee County cases on appeal (R.128, 129).

The Milwaukee County Clerk of Courts compiled the trial court records for the three Milwaukee County cases and transmitted them electronically to this Court on January 24, 2017. Thus, McArthur's brief-in-chief and appendix were due for filing with this Court on March 6, 2017. However, McArthur moved and this Court granted extensions to file his brief-in-chief and appendix until April 12, 2017.

ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN ADMITTING "OTHER ACTS" EVIDENCE AGAINST McARTHUR AT TRIAL.

A. Standard of Review.

The applicable standard for reviewing a circuit court's admission of "other acts" evidence is whether the court exercised proper discretion. State v. Pharr, 115 Wis.2d 334, 342, 349 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion a reasonable judge could reach. State v. Sullivan, 216 Wis.2d 768, 780-81, 576 N.W.2d 30 (1998). In reviewing the circuit court's ruling, the appellate court must look only at the facts proffered to the court at the time of its ruling, rather than the facts elicited at trial. State v. Marinez, 2011 WI 12, ¶28, 331 Wis.2d 568, 707 N.W.2d 399.

Evidence in the trial court record should demonstrate "discretion was in fact exercised and the basis of that exercise of discretion should be set forth." State v. Payano, 2009 WI 86, ¶51, 320 Wis.2d 348, 768 N.W.2d 832. A circuit court's failure to delineate the factors which influenced its decision constitutes an erroneous exercise of discretion. Id., ¶41. However, when the circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's ruling. State

v. Normington, 2008 WI App 8, ¶16, 306 Wis.2d 72, 744 N.W.2d 867.

B. Law Regarding Admission of "Other Acts" Evidence.

In Wisconsin, the admissibility of "other acts" evidence is governed by Rule 904.04(2), Stats., which precludes proof an accused committed some other act for purposes of showing a corresponding character trait and the accused acted in conformity with that trait. Sullivan, ¶41.

One of the reasons for this rule is the "fear that an invitation to focus on an accused's character magnifies the risk jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." Id., ¶42. Additionally, there are concerns the jury will (1) condemn not because of the defendant's actual guilt in the instant case but because he may have escaped punishment for previous acts and (2) the confusion of issues which may result from the introduction of other crimes evidence. Whitty v. State, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967). Thus, the general policy trial courts should take in assessing the admissibility of "other acts" evidence is one of exclusion. State v. Scheidell, 227 Wis.2d 285, 294, 595 N.W.2d 661 (1999) (long-standing policy such evidence should be allowed "sparingly").

In *Sullivan*, the Wisconsin Supreme Court took the opportunity to address concerns the *Whitty* presumption against admission of "other acts" evidence in criminal prosecutions had been "chipped away" over the years and reaffirmed its *vitality*. Sullivan, ¶¶17-18.

In addressing these concerns, the Court established a three-step analytical framework trial courts must follow in assessing and ruling on the admissibility of "other acts" evidence. That framework is as follows:

1. Is the other acts evidence offered for an acceptable purpose under Rule 904.04(2), Stats.?

2. Is the other acts evidence relevant, considering two facets of relevance set forth in Rule 904.02, Stats.? First, does the other acts evidence relate to a fact or proposition that is of consequence to the determination of the action? Second, does the evidence have probative value so as to make the consequential fact or proposition more probable than it would be without the evidence?

3. Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* Rule 904.03, Stats.

Sullivan, ¶¶5-8.

The Court also required the proponent of the "other acts" evidence to clearly articulate its reason for seeking admission of the evidence and found the proponent had the

burden of persuading the circuit court the three-step inquiry was satisfied. Id., ¶16. However, this requirement was later modified to shift the burden of establishing the third prong to the opponent of the "other acts" evidence. Marinez, ¶19.

In addressing the first prong for admissibility of "other acts" evidence, the proponent of the evidence and the court must articulate at least one permissible purpose for admission of the evidence. Marinez, ¶25.

In addressing the second prong regarding the relevance and probative value of the "other acts" evidence, the proponent of the evidence must articulate the fact or proposition the evidence is offered to prove and, in assessing the probative value of that evidence, the court must address and consider the "nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." Sullivan, ¶53. This is especially true when the proponent of the "other acts" evidence is offering it to establish the defendant's identity as the perpetrator of the crime charged. State v. Kuntz, 160 Wis.2d 722, 749, 467 N.W.2d 531 (1991); State v. Fishnick, 127 Wis.2d 247, 262, 378 N.W.2d 272 (1985) (to prove identity "there should be such a concurrence of common features and so many points of similarity between the other acts and the crime charged that it

can reasonably be said that the other acts and present act constitute the imprint of the defendant"). *See also* Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence, pp. 211-12 (3d Edition, 2008) (if other acts used to identify defendant as perpetrator, there must be a signature-like quality to other acts and instant case).

Even if proponent of the "other acts" evidence meets the first two requirements of the *Sullivan* test, the trial court must exercise reasonable discretion in weighing the probative value of the "other acts" evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury, or consideration of undue delay, waste of time or needless presentation of cumulative evidence. Sullivan, ¶59. Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes the jury to base its decision on something other than the established propositions in the case. Sullivan, pp. 789-90; Payano, ¶89.

C. The Circuit Court Erroneously Exercised Its Discretion in Admitting the Testimony of McArthur's Prior Girlfriends Regarding Other Acts He Allegedly Committed Against Them.

Despite what was claimed at the pre-trial hearing, the

only genuine basis articulated by the State for admitting the testimony of McArthur's four prior girlfriends was to establish his identity as the person who caused KMW's injuries. From the outset of the prosecution, it was clear KMW suffered injuries and the only question of fact to be determined by a jury was whether McArthur was the person responsible.

In fact, the State recognized this early in the prosecution when it stated in its motion to introduce the "other acts" evidence it was seeking to do so in order to demonstrate the "defendant's method of operation, and possibly to establish identity." For purposes of a Rule 904.04(2) and *Sullivan* analysis, method of operation and identity are one in the same. Marinez, ¶19, n. 13.

It was only after the defense objected to the "other acts" evidence as insufficiently similar and too remote in time from the instant case, the State disingenuously claimed it was also offering the evidence to establish his state of mind; the escalation of his violent, controlling and humiliating behavior (which sounds a great deal like his propensity to commit violent, controlling and humiliating acts against women with whom he is romantically involved); and motive. These newly-stated bases for admission should have alerted the circuit court the State was improperly grasping at straws to introduce

"other acts" evidence when the State recognized the other acts were insufficiently similar to the charged offense and too remote in time to identify McArthur as the perpetrator of the crime. Blinka, p. 180 (3d Edition, 2008) ("If the proponent . . . recites Wis. Stat. §904.04(2) like a grocery list, the trial judge should greet the proffer with considerable and deserved skepticism.").

The disingenuousness of the State's claim and need for the "other acts" evidence to establish anything other than identity became even more apparent when McArthur filed a Notice of Alibi. Thus, the State knew McArthur would not be asserting an accident, mistake or consent defense, which could place his state of mind, intent or motive at issue.

Finally, the disingenuousness of the State's pre-trial claim it needed to introduce the "other acts" to establish McArthur's state of mind, intent or motive became absolutely apparent when, in closing argument, the prosecutor argued the jury should use the "other acts" to establish his "fingerprint" as the perpetrator of the crimes against KMW.

In assessing the "other acts" evidence proffered, the State did present pre-trial one legitimate basis to admit that evidence–to identify McArthur as the perpetrator of the crimes–and, thus it met its burden as to the first prong of the *Sullivan*

test.

However, it did not establish pre-trial the evidence was both relevant and probative in establishing identity to meet its burden as to the second prong of the *Sullivan* test. This is so because the other acts were insufficiently similar to and very remote in time to the charged offenses against KMW.

In the case of MM, McArthur's shooting of her was accidental (by both his and her accounts), rather than intentional; did not involve "giving her choices" regarding how to harm her; and most importantly, did not involve kidnapping or sexual assault. Additionally, MM's allegations took place 19 years prior to the instant offense.

In the case of CC, McArthur's anger at her was not because he was jealous of a potential male suitor, but rather regarding her perceived treatment of his property; involved threats to damage her property or harm her family, which KMW did not allege; and, most importantly, did not involve kidnapping or a sexual assault. Finally, CC's allegations against McArthur dated back 15 years prior to the instant offense.

With JD, there were no allegations of jealousy; she ultimately withdrew her complaint McArthur was harassing her to "drop the charges" against him and, accordingly, there was

no basis to argue he was contacting her after the incident in an attempt to dissuade her from cooperating with the prosecution; did not involve "giving her choices" regarding how to harm her; and did not involve kidnapping or a sexual assault. The allegations made by JD date back 13 years prior to the instant offense.

In the case of RS, there were allegations McArthur damaged and interfered with her use of her car, while there was no allegation he threatened to or damaged KMW's property; RS alleged he took her property (i.e., book bag, vehicle registration, driver's license and credit cards), which was not a part of KMW's complaint; and there was no allegation of kidnapping or sexual assault. The incidents with RS dated back 9 years and were remote in time.

While all of the "other acts" witnesses, like KMW, were former girlfriends and alleged McArthur was threatening and violent toward them, sometimes when he was jealous and sometimes when he was angry for another reason, the similarities ended there. Being angry with, threatening, and acting violently toward his former girlfriends can hardly qualify as a signature-like quality to establish McArthur's "fingerprint" as the perpetrator of the crimes against KMW, especially when those prior incidents were separated by 19, 15, 12 and 9 years

in time from the instant case.

Just as the "other acts" evidence was insufficiently similar and too remote in time to the instant case to make it either relevant or probative, those same factors determine McArthur met his burden in establishing the probative value of that evidence was substantially outweighed by the danger of unfair prejudice. *See* Blinka, p. 184 (in assessing prejudice, court must look at similarity of evidence to event at issue and must require more similarity the greater the time period separating the prior act or acts with each other and instant offense).

As warned against in *Sullivan*, the proffered evidence had a tendency to influence the outcome of McArthur's trial by improper means because it had a great likelihood to appeal to his jury's sympathies, arouse its sense of horror and provoke its instinct to punish him for the "parade of horribles" presented by the "other acts" witnesses. Sullivan, ¶62 (*citing* State v. Mordica, 168 Wis.2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992)).

A cautionary instruction to the jury regarding how it might consider the "other acts" evidence, if tailored to the facts of the case, can go a long way "to cure any adverse effect" on the jury. State v. Mink, 146 Wis.2d 1, 17, 429 N.W.2d 99 (Ct.

App. 1988). However, when that instruction is broadly worded or inadequately describes the limited and proper purpose for which the evidence is to be used, it is nothing more than a hollow gesture and provides no protection against the jury's misuse of that evidence. Sullivan, ¶¶66-67.

Such was the jury instruction given to McArthur's jury. The circuit court gave an overbroad and "garbled" instruction telling the jury it could consider the "other acts" evidence on the issue or issues of "McArthur's state of mind to show his method of operation, plan to show on the escalation of his behavior, to show motive and to, and to show his identity as a person who committed the crime." A bit later, it also instructed the jury it could consider the evidence to determine whether it was part of a "plan; that is, whether other conduct of the defendant was part of a repeated design or scheme that led to the commission of the offense charged." This, despite the State never asserting McArthur's "other acts" established a plan to commit the instant offense against KMW.[7]

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[7] Of course, there was no factual or legal basis to argue the "other acts" evidence constituted a plan or scheme because there was nothing about the long-ago instances which led to the assault on KMW. State v. Dekeyser, 221 Wis.2d 435, 448, 585 N.W.2d 668 (Ct. App. 1998) (plan or scheme requires more than similarity between prior act and charged offense and there must be link between the two acts which permits conclusion prior act led to commission of charged offense).

Finally, the "other acts" evidence permeated the trial. The State elicited evidence from McArthur's former girlfriend, KMW, Detective Roberson and two defense witnesses about these acts. The prosecutor referenced it in her opening statement and at length in closing arguments. Her statement McArthur "did exactly what he had done in the past" in perpetrating the assault was nothing more than claiming his propensity to "strangle women" and "threaten women in these extreme over the top ways."

The "other acts" evidence was key to the State's case because all the other evidence of McArthur's guilt was not overwhelming. There were no eyewitnesses to McArthur's alleged abuse of KMW, either prior to or the night of the alleged incident; KMW's credibility was suspect (i.e., she admitted lying to the police about events of the evening she sustained her injuries and she admitted she was drunk and high that same evening); there was a plausible alternative perpetrator (i.e., Mike, the man with whom KMW admitted to drinking and smoking marijuana and allowing into her home); McArthur had two alibi witnesses who gave consistent and detailed accounts of their encounter with McArthur at the time KMW alleged she was assaulted by him; and McArthur's roommate testified he heard McArthur and KMW enter the

home he shared with McAthur and heard nothing untoward, despite being only feet away at the time KMW claimed she was sexually assaulted.

For the same reason, it cannot be said the improperly admitted "other acts" evidence constituted harmless error. There is a reasonable probability the "other acts" evidence contributed to McArthur's conviction. State v. Dyess, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985).

D. The Circuit Court Erroneously Exercise Its Discretion in Admitting the Testimony of KMW Regarding Other Acts McArthur Allegedly Committed Against Her Prior to the Charged Offenses.

Despite the State's claim to the contrary, KMW's proffered testimony regarding McArthur's alleged violent and abusive acts against her prior to July 13, 2013, did constitute "other acts" evidence. *See* Blinka, p. 175 ("other act" connotes occurrences that are separated in time place or manner from the event alleged in the pleadings). In fact, the circuit court recognized them as such when it found the proffered testimony was "other acts" evidence and ruled without explanation or analysis it was admissible pursuant to *Sullivan*.

Had the court undertaken any analysis, it would have had to find (1) there was some proof the acts alleged by KMW

actually occurred, State v.Schindler, 146 Wis.2d 47, 429 N.W.2d 10 (Ct. App. 1988) (by a preponderance of the evidence). Because there were no witnesses to any of the prior acts of violence alleged by KMW, the court should have rightly found them inadmissible.

Had the trial court truly undertaken a *Sulivan* analysis, for the reasons set forth in the prior argument, the court should have found the evidence was not admissible or relevant in identifying McArthur as the source of KMW's injuries on July 13th and 14th. Finally, had the court assessed the highly prejudicial nature of the evidence, for the reasons set forth in the prior argument, it should have found the evidence of McArthur's prior alleged abuse of KMW was unduly prejudicial.

Like the testimony of McArthur's former girlfriends, the evidence of McArthur's alleged violence against KMW prior to July 13, 2013, was proffered to establish McArthur's character as an abuser of women and he acted in conformity with that character trait when committing the charged crime.

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

The Wisconsin Supreme Court has outlined the standard of reviewing ineffective assistance of counsel claims

as follows:

> The issue of whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. The circuit court's findings of fact, that is, the underlying findings of what happened, will be upheld unless they are clearly erroneous. Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law that we review de novo.

State v. Mayo, 2007 WI 78, ¶32, 301 Wis.2d 642, 734 N.W.2d 115 (citations omitted).

B. Applicable Law.

In order to establish trial counsel provided ineffective assistance of counsel, the defendant must satisfy a two-part test. First, he must show his counsel's performance was deficient. Second, he must prove the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Pitsch, 124 Wis.2d 628, 369 N.W.2d 711 (1985).

The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. Strickland, at 688. Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable judgment. Id., at 690.

However, the Wisconsin Supreme Court, in State v.

Felton, 110 Wis.2d 485, 502-03, 329 N.W.2d 161 (1983), instructed post-conviction and appellate courts to examine a "lawyer's conduct and measure it against [the] court's standard to determine effectiveness," and cautioned that a court "cannot ratify a lawyer's decision merely by labeling it . . . a matter of choice and trial strategy." Id.

With respect to prejudice, the defendant must demonstrate there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, at 687.

C. The Post-Conviction Court Exercised Erroneous Discretion in Denying an Evidentiary Hearing to Prove the Claims in McArthur's Petition for New Trial.

An evidentiary hearing was required because the petition alleged on its face facts, if true, which entitled McArthur to relief. State v. Bentley, 201 Wis.2d 303, 310-11, 548 N.W.2d 50 (1996). Whether McArthur alleged sufficient facts entitling him to a hearing is a question of law this Court reviews *de novo*. Id., p. 310.

D. Trial Counsel Was Ineffective in Failing to Object to the Prosecutor Cross-Examining Defense Witnesses Regarding the "Other

Acts" McArthur Allegedly Perpetrated Against His Former Girlfriends.

In the instant case, three of the four prior girlfriends testified about McArthur's conduct toward them and both KMW and the police detective testified they had information McArthur shot the fourth prior girlfriend who did not testify.

Trial counsel did not immediately object when the State began questioning McArthur's roommate about those allegations and did not continue to object even after the court overruled his initial objection that the testimony was both irrelevant and cumulative. Nor did he object when the State used the same tactic in cross-examining the alibi witness.

The holding of *State v. Meehan* makes it clear this line of questioning was improper as irrelevant and an inappropriate attack on McArthur's character (i.e., he was withholding information from his roommate and friend regarding his sordid past) and required defense counsel immediately and continuously object to its admission. State v. Meehan, 2001 WI App 119, ¶¶20-22, 244 Wis.2d 121, 630 N.W.2d 722. *Meehan* also makes it clear this line of questioning is inappropriate, even if the admission of the "other acts" evidence was proper. Id., ¶21.

The post-conviction court exercised erroneous

discretion in finding McArthur was not prejudiced by his counsel's inaction and denying him a hearing to elicit evidence in support of his claim because the trial was permeated with testimony and references to his abuse of former girlfriends and allowing the State yet another opportunity to taint McArthur's jury against him had to have had an impact on the trial's outcome. Id., ¶20.

E. Trial Counsel Was Ineffective in Failing to Object to the Prosecutor Having Detective Roberson Read KMW's Entire Statement to the Jury.

In the instant case, KMW testified at length about allegations of verbal and physical abuse which pre-dated the charged offenses and charged offenses themselves. During her testimony, she admitted having lied to the police about some details of the offense and why she did so but, for the most part, testified consistent with her prior statement to the detective. She also admitted lying to a defense investigator so that McArthur's prior counsel would have to withdraw from further representation, but that incident was not something she discussed in her statement to the detective. However, there was no intimation on the part of the defense during its cross-examination of KMW that she had recently fabricated any part of her trial testimony or had been improperly influenced to

change her testimony at trial. Thus, the State had no evidentiary basis to introduce KMW's lengthy statement to the detective as a prior consistent statement and defense counsel performed deficiently in failing to object to it admission. §908.01(4)(a)(2), Stats.; Meehan, ¶25; *See also* State v. Peters, 166 Wis.2d 168, 176, 479 N.W.2d 198 (Ct. App. 1991).

Additionally, it was not necessary to introduce the entire statement under the rule of completeness as it was not "necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact, or to ensure a fair and impartial understanding of the admitted portion. Meehan, ¶26; State v. Sharp, 180 Wis.2d 640, 653-54, 511 N.W.2d 316 (Ct. App. 1993); *See also* U.S. v. Wright, 826 F.2d 938, 946 (10th Cir. 1987) ("It would be puerile to suggest that if any part of a statement is [to] be admitted the entire statement must be admitted.")

In the instant case, defense counsel did not object to the State eliciting KMW's statement through the police detective; thus, the State was not required to justify why introduction of the entire statement was necessary in order to avoid misleading the jury. Had counsel done so, the State would have been unable to meet such a burden. Sharp, p. 653.

The post-conviction court's finding that McArthur was

not prejudiced by the introduction of KMW's otherwise inadmissible statement to the detective, which spanned 15 pages of trial transcript, and was merely a re-hash of KMW's trial testimony about not only what McArthur did to her before and during the charged offenses, but also included KMW's claims about McArthur's past transgressions against others, was clearly erroneous because it allowed the State to present KMW's testimony twice in order to taint the jury against him. Meehan, ¶28.

CONCLUSION

For all of the reasons set forth above, McArthur would ask this Court to vacate his convictions and remand the matter to the circuit court for a new trial or, in the alternative, remand the matter to the post-conviction court to conduct an evidentiary hearing in support of his post-conviction claims.

Dated at Wauwatosa, Wisconsin, this 11th day of April, 2017.

Respectfully submitted,

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CERTIFICATION

I certify this brief conforms to the rules contained in §§809.19(8)(b) and (c), Wis. Stats., for a brief prepared using the following font:

> Proportional sans serif font: 12 characters per inch, double spaced, 2 inch margins on the left and right sides and 1 inch margins on the top and bottom. The length of this brief is 10,938 words.

Dated: April 11, 2017

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ANN AUBERRY

E-FILING CERTIFICATION

Pursuant to §§809.19(12)(f) and 809.32(fm), Stats., I hereby certify the text of the electronic copy of the Brief-in-Chief is identical to the text of the paper copy of the Brief-in-Chief filed.

Dated at Wauwatosa, Wisconsin, this 11th day of April, 2017.

____
ANN AUBERRY

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix which complies with §809.19(2)(a) of the Wisconsin Statutes, and contains:

(1) a table of contents;

(2) the findings or opinion of the trial and post-conviction court; and

(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed: ________________________
ANN AUBERRY

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