STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2016AP2315-CR, 2016AP2316-CR,
& 2016AP2317-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANGUS MURRAY MCARTHUR,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court erroneously exercise its discretion when it admitted at trial K.W.'s testimony about the history of her roughly two month relationship with McArthur, and "other acts" evidence showing that McArthur had a pattern of beating, strangling, and terrorizing his girlfriends?

The circuit court determined the evidence about the history of K.W.'s relationship with McArthur was not other acts evidence because it was necessary for a full determination of the case. It found McArthur's treatment of other girlfriends was admissible pursuant to the *Sullivan* test to show McArthur's state of mind, escalation of behavior showing motive, context, and identity.

This Court should affirm the circuit court.

2. Did McArthur receive ineffective assistance of counsel when his trial counsel failed to continuously object to the prosecutor's cross-examination of defense witnesses regarding the other acts after the circuit court overruled his initial objection, or when counsel failed to object to Detective Roberson's reading to the jury the portion of her police report containing the victim's statement?

The circuit court answered no.

This Court should affirm the circuit court.

3. Did the circuit court erroneously deny McArthur a *Machner* hearing to prove his ineffective assistance of counsel claims?

The circuit court answered no.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. The briefs will adequately address the issues, which involve the application of well-established law to the facts.

INTRODUCTION

A jury found Angus Murray McArthur guilty of fifteen crimes related to a July 14, 2013, incident where for hours he terrorized, tortured, and strangled his girlfriend, forced her to drink his urine, and then for several weeks attempted to get her to recant her story and lie on the stand at his trial.[1] The State introduced evidence that McArthur had abused other women in similar extreme ways, which he claims was improper. He also alleges he received ineffective assistance of counsel.

McArthur is wrong. The evidence provided context for the crimes, showed McArthur's and the victim's states of mind, and was relevant to show identity by rebutting McArthur's alibi. His counsel was not ineffective because the objections he claims counsel should have made were meritless, and McArthur cannot show prejudice. There was also no need for a *Machner* hearing, as McArthur did not allege facts that, if true, would entitle him to relief.

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[1] This case consists of three records on appeal—2016AP2315-CR, 2016AP2316-CR, and 2016AP2317-CR—because three cases arose from McArthur's continuing conduct surrounding his attack on K.W. The three cases were consolidated for trial and on appeal. To avoid confusion, the State refer only to the record in 2016AP2315 unless otherwise indicated.

STATEMENT OF THE CASE

A. The incidents and charges.

On the morning of July 14, 2013, a crying K.W. showed up for her shift at Sonic Hamburgers and immediately asked to be taken to the hospital. (R.79:114.) Her manager took her to the emergency room, where K.W. reported that her ex-boyfriend had pulled her into his car, punched her repeatedly in her side, and threatened, choked, and sexually humiliated her. (R.79:35.)

K.W. had a severely lacerated spleen, causing life-threatening internal bleeding. (R.79:37; 80:12–13.) She required blood transfusions and emergency surgery. (*Id.*) K.W. required a five-day ICU stay. (R.1:3.)

On July 18, 2013, when K.W. had recovered enough to talk, Detective Paula Roberson took a statement from her. (R.98:1–6.) K.W. told Roberson that McArthur had previously given K.W. a list of "rules" he expected her to follow, and that he had "punished" her for perceived rule violations. (R.98:3.) On the day before the assault, McArthur confronted her about a text message and a voicemail she received and became enraged. (R.98:4.) McArthur drove K.W. home. He told her he did not want her to talk during the ride and punched her when she tried to speak. (*Id.*) K.W. agreed to meet him later at a nearby bar to talk. (*Id.*) McArthur never showed up, and K.W. had some drinks and smoked some marijuana with "an acquaintance" at the bar named Mike. (*Id.*) K.W. then went home and fell asleep sometime after 1:00 a.m. (*Id.*)

She woke up in McArthur's car and did not know how she got there. (*Id.*) McArthur told her he had been following her all night. (R.98:5.) He repeatedly asked K.W. what he could do differently so his next relationship would not fail. (*Id.*) When K.W. told him he did not need to change but she

just needed time to adjust to this new lifestyle, he began beating her in the ribs, either with his elbow or his fist. (*Id.*) When she would attempt to block his blows, he would hit her in the face near the left eye. (*Id.*) McArthur would ask K.W. if she wanted to get out of the car. (*Id.*) When she said yes and opened the door, he dragged her back in by her hair. (*Id.*) At one point McArthur put his arm around her throat and pulled her back into the car with such force that she could not breathe and lost consciousness. (*Id.*)

K.W. woke up to McArthur yelling to shut the door. (*Id.*) He told her he was driving her to Chicago where was selling her to a man for $1000 and she would be "drugged, fucked and left for dead." (*Id.*) He took a knife and cut the straps of her bra and her shirt. (*Id.*) On several occasions he grabbed her wrist and told her to choose between getting her wrist broken or being hit in the ribs again. (*Id.*) When K.W. "chose" being hit, McArthur would bend her wrist backwards and force her to say, "I want you to hit me in my ribs." (*Id.*) Sometimes McArthur made K.W. hold her left arm above her head so he would have unobstructed access to her ribs. (*Id.*) At one point he asked K.W. if she wanted to go the hospital; when she said yes, he said "wrong answer" and hit her in the ribs again. (*Id.*) McArthur drove around Milwaukee County hitting K.W. this way for two hours, causing her severe pain and the spleen laceration. (R.1:3.)

McArthur eventually drove K.W. to his house, where he jabbed her in the ribs to get her to go inside. (*Id.*) McArthur told K.W. not to make any loud noises unless she wanted to die. (*Id.*) He made her remove all her clothes and removed all of his clothing except his boxers. (*Id.*) He then made K.W. lie down on the side where he had been hitting her, which was extremely painful, and told her she would never forget this lesson. (R.98:5–6.) When K.W. could no longer breathe and sat up, McArthur pulled his penis out of his boxers. (R.98:6.) K.W.

said she was not going to perform oral sex on him, to which McArthur responded "Do I look like I'm hard? Do I look like I want a blow job?" (*Id.*) He then told her if she wanted to make amends, she would have to drink his urine. (*Id.*) K.W. refused, so McArthur grabbed her face and forced his penis into her mouth. (*Id.*) He urinated into her mouth, he put his hand around her neck, and threatened to choke her if she did not swallow his urine. (*Id.*) After she did, he allowed her to go to sleep. (*Id.*) The next morning he drove her to Sonic and asked her to light a cigarette for him. (*Id.*) When she winced as she reached for them, he called her a "pussy," struck her in the ribs again, and drove away. (*Id.*)

Police arrested McArthur on August 7, 2013. (R.3:1.) The court issued a no contact order prohibiting McArthur from contacting K.W. (R.4:1.) K.W. also obtained a temporary domestic abuse injunction against McArthur. (2016AP2316-CR R.1:2.) The State charged McArthur with seven charges relating to the assault. (R.1:1–4.) While in jail, McArthur called and sent letters to K.W., sometimes directly and sometimes through third parties; he tried to convince her to lie on the stand about having been slipped hallucinogens that combined with PTSD caused her to falsely accuse McArthur. (R.80:26–28, 40–49.) These actions spurred the rest of the charges.

B. The State's motions to introduce the evidence at issue.

On December 13, 2013, the State filed a motion to introduce "other acts" evidence to establish McArthur's method of operation, state of mind, motive, and identity. (R.13:1, 7.) The motion detailed the assault against K.W. (R.13:1–2.) It then outlined the other acts evidence the State wanted to introduce: evidence of McArthur's tormenting past girlfriends in very similar ways to his terrorization of K.W. (*Id.*)

The first was M.M. in 1994. (R.13:2.) McArthur heard a male voice on the answering machine and pushed M.M. out of bed. (*Id.*) He then shot her in the foot, though he claimed it was an accident. (*Id.*) McArthur put the gun in M.M.'s mouth and wondered out loud "what it would feel like to die." (R.13:2–3.) He forced her to handle his guns to get her fingerprints on them "so that, if he shot her, it would look like suicide." (*Id.* at 3.) He would also "play" with her by pinning her to the ground by the throat. (*Id.* at 3.)

The second was C.C. in 1998. (*Id.*) McArthur became angry with C.C. when she said she was going out with friends. (*Id.*) McArthur handcuffed her and stuffed a sock in her mouth. (*Id.*) He wrapped a guitar wire around C.C.'s neck and strangled her. (*Id.*) McArthur then put her head into a plastic bag and described how she was "going to try to find every air pocket before she would convulse" and that he "heard it was the worst way to die." (*Id.*) He began stalking and harassing C.C. and started giving her "choices," telling her he would kill her family and that she could "pick the next person [he] killed." (R.13:4.)

The third was J.D. in 2002. (*Id.*) McArthur punched her in the stomach. (*Id.*) When she tried to leave he grabbed her wrist and twisted it. (*Id.*) He then strangled her to the point she began to pass out, threatened to "bash her head in" with the iron he was using, and told her he would "gut her" after making her watch him hang her parents. (*Id.*) McArthur then tried threatening J.D. to get her to drop the charges against him.

The fourth was R.S. in 2003–04. (*Id.*) McArthur was angry with her and pulled her car into traffic, turned it off, and left it there. McArthur saw that R.S. had been in contact with an ex-boyfriend, and punched her in the face. (R.13:5.) He rammed his truck into her driver's side door. (R.13:6.) He then rear-ended her, got out, and keyed her car. (*Id.*) On yet

another day, McArthur became angry that the bartender where R.S. worked did not know that he was R.S.'s boyfriend. (*Id.*) McArthur again drove his truck into the driver's side of R.S.'s car. (*Id.*)

M.M., J.D., and R.S. all told the State that they did not want to continue with the prosecution of McArthur. (*Id.*)

The State argued that the other acts showed that McArthur had a particular method of controlling his girlfriends, including: exaggerated death threats to the victim and her family members; posing Hobbesian "choices" to the victims; extreme, cruel, and painful methods of physical control; and stalking. (R.13:8.) Once charged, he then would try to get them not to cooperate with the prosecution. (R.13:9.)

The State asserted that McArthur himself created the need for the other acts because he may have convinced K.W. to retract what she said to police and instead claim that her PTSD and someone providing her with hallucinogens led her to falsely accuse McArthur. (R.13:9–10.) Therefore, the evidence of McArthur's abusing other girlfriends in a strikingly similar way established McArthur's identity as K.W.'s attacker. (*Id.*) It also developed McArthur's mindset why he would engage in this extreme behavior with K.W. (*Id.*)

McArthur objected to the introduction of the other acts, claiming that they were not sufficiently similar to the charged conduct to establish identity, they were too remote in time, and that "the minimal probative value of the 'other acts' is substantially outweighed by the danger of unfair prejudice and confusion of the issues." (R.14:1.)

The court granted the State's motion. (R.73.) The court conducted the "other acts" test articulated in *State v. Sullivan*. It first found that the other acts were offered for a permissible purpose because it showed McArthur's state of

mind, developed his motive, and that the similarity between the current crimes and the past incidents "provides a basis of identification of the defendant as to he was the one who committed the crimes." (R.73:5.)

As to the second prong, the court found that the other acts were relevant and probative despite their remoteness because "it's basically telling a story of what has occurred over the years with the defendant's relationships with these women. And the Court believes that a jury would need to hear that in the proper context." (*Id.*) Finally, the court found that there was not "any legitimate danger of unfair prejudice. They're probative and because of their uniqueness. . . . The Court is going to allow the other acts evidence." (R.73:5–6.)

On April 25, 2014, McArthur submitted a notice of alibi listing witnesses who would testify that McArthur was with them on the night of July 14. (R.77:3.)

The morning of trial, the State sought an order permitting it to introduce testimony from K.W. about her life before and during her approximately two-month relationship with McArthur. (R.25:1.) This included the "rules" McArthur set for K.W. and his escalating domination of her, including threats to break her fingers and wrists and an incident where he lit her on fire. The State asserted this was background information necessary for a full and fair determination of the facts relating to the crimes, and not other acts evidence. (R.25:1–4.)

McArthur opposed the State's request. (R.79:5.) He argued that it was "other acts" evidence and that it was irrelevant. (R.79:6.) He also argued that the State requested to introduce the evidence too late, that it was cumulative, too remote, and unfairly prejudicial. (*See* R. 79:7–10.)

The court agreed with the State that this was not other acts evidence. (R.79:6–14.) It ruled that K.W.'s testimony about the history of the relationship was relevant for a full and fair determination of the facts, and was not cumulative. (R.79:7–8.) It also found that even if the evidence were characterized as other acts evidence, it was relevant and probative and would meet the requirements of *Sullivan*. (R.79:8.)

C. The evidence at trial.

1. K.W.'s testimony.

K.W. testified consistently with the State's motion about the events leading up to July 13, and consistently with what she told Detective Roberson that McArthur did to her the morning of the 14th. (R.79:57–115, 126–27.) She testified that she almost did not go to the hospital because McArthur "did not like girls who called the cops. That was a big thing." (R.79:122.)

K.W. also admitted that she continued texting McArthur while she was in the hospital, and that she went to visit McArthur in jail on her own volition after that. (R.80:3–19.) She admitted she started writing him letters and gave him her new phone number. (R.80:19–24.) K.W. testified that McArthur said that he wanted her to change her story and that they began using other people's phone numbers and addresses to circumvent the injunction. (R.80:25–34.)

On cross-examination, K.W. testified that she suffered from PTSD and needed treatment for that and for her alcohol abuse. (R.80:54–55.) She testified that she asked McArthur to contact her, had agreed to recant her story for him, and had written him many sentimental letters while he was in jail. (R.80:58–62.) She also admitted lying to Roberson about knowing "Mike" and about how much she had to drink the night of the 14th, saying that she feared the police would not

take her seriously if she admitted to drinking, smoking, and getting into the car with a stranger. (R.80:63–67.)

2. McArthur's former girlfriends' and Roberson's testimony.

Three of McArthur's former girlfriends—C.C., J.D., and R.S.—testified to the events that the State had outlined in its other acts motion. (*See* R.81:9–33; 82:3–11.)

Roberson testified about her investigation, which included testimony about M.M.'s reporting to police that McArthur shot her, and about her interview of K.W. (R.81:127–42; 82:36–64.) On cross-examination, the defense brought out that Roberson did not record her interview with K.W. and had shredded her notes. (R.82:40–41.) The defense also asked if Roberson told K.W. that she needed to make a truthful statement, and she said she had. (*Id.*) The defense pointed out several instances where K.W.'s testimony did not match what was written in Roberson's report, things K.W. had admitted lying about, and about details K.W. had testified to but left out of her narrative to Roberson. (R.82:42–45.)

On redirect, the prosecutor asked Roberson if K.W. had given her a complete narrative history from the point of time when she left Wisconsin until the night of July 14, and Roberson said yes. (R.82:47.) The prosecutor then had Roberson read the portion of her report containing K.W.'s narrative history, which was consistent with K.W.'s testimony about McArthur's abuse. (R.82:47–61.)

3. McArthur's testimony.

McArthur testified in his own defense. (R.82:89–147.) He admitted that he fought with K.W. on July 13, but claimed that he dropped her off at home and went out with Steve Hughes and Amanda Buelow that night. (R.82:104–05.)

McArthur said he was out with them until about 3:30 in the morning, and spoke with them at 4:15 when they called him about a flat tire. (R.82:106–07.) McArthur claimed he came home and found K.W. intoxicated and helped her to bed. He said that he never did any of the things she testified about. (R.82:109–11.)

McArthur said K.W. was making up the abuse story because he had threatened to have her involuntarily committed to rehab. (R.82:97, 112–13.) He then claimed that K.W. came to visit him in jail and told him she had "mis-remembered" what happened, and that "Mike" had slipped her some type of drug. (R.82:114.) McArthur admitted that the abuse C.C., J.D., and R.S. had testified about was true, but claimed he did not hit women anymore. (R.82:121–22.)

On cross-examination the prosecutor confronted McArthur with text messages he had sent to K.W. apologizing when he found out she was in the hospital, and his communications with her about making up an exonerating story. (R.82:129–32.) McArthur claimed he was apologizing for calling K.W. names. (R.82:132.) When asked why K.W. would send him a message saying that physical violence and emotional torture was not the way to solve their problems, McArthur stated it was because "she's broken the cardinal rule . . . [s]he's gotten me locked up." (R.82:146–47.)

4. The defense witnesses' testimony.

The defense called three additional witnesses: McArthur's roommate George Bregar, and two alibi witnesses, Hughes and Buelow. (*See* R.83:2.)

Bregar testified that his bedroom was about ten feet from McArthur's. (R.83:6.) He testified that he went to bed about 1:00 a.m. on July 14, 2013, and heard McArthur come home sometime after that. (R.83:6–7.) Bregar testified that he

had sometimes heard K.W. and McArthur in McArthur's bedroom before, but he did not hear anything on the morning of July 14. (R.83:7.)

On cross-examination the prosecutor asked Bregar how well he knew McArthur, and Bregar responded, "I probably say very well. No. Pretty well." (R.83:10.) The prosecutor then asked whether McArthur had been honest with Bregar about his past relationships, and Bregar said they'd had "almost no discussions regarding that actually." (*Id.*) The prosecutor asked whether McArthur mentioned that he shot one of his girlfriends, and Bregar said no. (*Id.*) She then asked if he had mentioned handcuffing a girlfriend to a chair and suffocating her, and Bregar also said no. (*Id.*)

McArthur objected, asserting that this testimony was irrelevant and cumulative. The court overruled the objection. (R.83:10–11.) The prosecutor asked two more questions about whether Bregar knew McArthur had strangled an ex with a pair of pants or had bashed into one of his ex's cars, and Bregar replied that he did not know about these either. (R.83:11–12.)

Hughes confirmed McArthur's testimony that they had been out until about 3:30 a.m. and that he had contacted McArthur about a flat tire at roughly 4:15. After Hughes testified that he'd known McArthur for 20 years and felt that McArthur had been open about his life, the prosecutor asked if McArthur had mentioned any of the violent incidents with his prior girlfriends. (R.83:33–35.) Hughes said no. (*Id.*)

5. Closing instructions and arguments.

Before closing arguments, the judge instructed the jury about its role and the evidence it should consider when deliberating. The circuit court instructed the jury that it could

consider other acts evidence only to show state of mind, method of operation, motive, and identity. (R.83:54–55.)

The prosecutor argued that McArthur tortured and manipulated K.W. "for exactly the same reasons that he had tortured and abused his girlfriends in the past." (R.83:77.) She pointed out that McArthur had told several different stories about what happened in an effort to pin the blame elsewhere. (R.83:78–85.) She pointed out the "bizarre" and "sadistic" similarities between McArthur's abuse of his past girlfriends and what he did to K.W., that K.W. was obviously substantially physically abused by someone, and that McArthur's story did not make any sense. (R.83:91–95.) She concluded by arguing, "This wasn't some grave concern for [K.W.'s] health. This was about her defying him." (R.83:108.)

Defense counsel argued that K.W. was not credible and her story was inconsistent. (R.83:109–10.) He argued that "[y]ou 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. It's the evidence that counts. . . . and [K.W.]'s versions of events either defy common sense or they are flat out wrong." (R.83:111–12.) He detailed the inconsistencies in K.W.'s statements and the State's evidence, pointed out that McArthur's alibi was corroborated by two people, including one who had only met him twice. (R.83:115–38.)

The jury returned guilty verdicts on all counts except the kidnapping charge. (R.84:4–7.) The circuit court sentenced McArthur to a total of 47.5 years of initial confinement and 22 years of extended supervision. (R.85:2.)

D. Postconviction proceedings.

McArthur petitioned for a new trial, alleging that his trial counsel was ineffective for two reasons.[2] (R.113:1.) The first was for failing to continuously object to the State's questioning Bregar and Hughes about their awareness of McArthur's abuse of his girlfriends. (R.114:12.) McArthur claimed that *State v. Meehan* established that this questioning was improper, and required defense counsel to immediately and continuously object to it. (*Id.*) Second, McArthur claimed that counsel should have objected to Roberson's reading her report containing K.W.'s statement. (R.114:13.) McArthur implied that allowing the jury to hear "[K.W.]'s testimony twice: once through her live testimony and again through the reading by the police detective," was prejudicial. (R.114:14.)

The State distinguished *Meehan* primarily on the grounds that, unlike here, the other acts evidence in *Meehan* was not similar to the crime and the appellate court determined it was erroneously admitted. Therefore, in *Meehan*, the prosecutor's continued questioning about it compounded the error. (R.121:7.) The State also pointed out that McArthur's trial counsel did object to the prosecutor's questioning, which the trial court overruled. (R.121:7–8.) Additionally, the State argued that McArthur failed to show a reasonable probability that the jury would have reached a different verdict without the prosecutor's questions. (R.121:9.) Regarding Roberson's reading of K.W.'s statement, the State argued that Wis. Stat. § (Rule) 908.01(4)'s exception to the hearsay rules allowed Roberson to read the statement, that the rule of completeness allowed admission of the entire

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[2] McArthur also raised a third claim that he does not pursue on appeal.

statement, and McArthur again failed to show prejudice. (R.121:10, 13.)

The circuit court denied McArthur's motion. It agreed with the State's analysis of *Meehan*. (R.125:5.) The court also found that even if it was error for the prosecutor to ask Bregar and Hughes if they knew about McArthur's past abuse, there was no prejudice to McArthur because he had admitted those acts on the stand. (R.125:7.) The court similarly rejected McArthur's challenge to Roberson reading K.W.'s statement. (R.125:8.) The court "agree[d] with the State's assessment of the issue" and again found no prejudice to McArthur given the purpose for having the statement read, the defendant's admissions of his violent acts against former girlfriends, his six prior convictions, and his demeanor at trial. (*Id.*)

McArthur appeals.

ARGUMENT

I. The trial court properly admitted K.W.'s testimony about her two-month relationship with McArthur and the other acts testimony from his former girlfriends.

A. Standard of review.

"The trial court may admit or exclude evidence within its discretion." *State v. Bauer*, 2000 WI App 206, ¶ 5, 238 Wis. 2d 687, 617 N.W.2d 902. If the trial court "examined the relevant facts; applied a proper standard of law; used a demonstrated rational process and reached a conclusion that a reasonable judge could reach," the reviewing court will affirm its decision. *State v. Marinez*, 2011 WI 12, ¶ 17, 331 Wis. 2d 568, 797 N.W.2d 399 (citation omitted). If a circuit court fails to set forth the basis for its ruling, a reviewing court will independently review the record to determine whether it provides an appropriate basis for the circuit court's

decision. *Id.* "Even if the trial court applies a mistaken view of the law, we will not reverse if a proper legal analysis supports the trial court's conclusion." *Bauer*, 238 Wis. 2d 687, ¶ 5.

B. Relevant law.

When evidence is properly characterized as other acts evidence, its admissibility is governed by Wis. Stat. § (Rule) 904.04(2). Section 904.04(2)(a), provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." However, such evidence may be offered for other purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § (Rule) 904.04(2)(a). The list of allowable purposes in section 904.04(2) is merely illustrative, not exclusive. *See State v. Payano*, 2009 WI 86, ¶ 63 n.12, 320 Wis. 2d 348, 768 N.W.2d 832; *State v. Sullivan,* 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998).

In *Sullivan*, the supreme court adopted a three-part test for courts to apply in determining whether to admit other acts evidence. *Marinez*, 331 Wis. 2d 568, ¶ 19. Under this test, other acts evidence is properly admissible: (1) if it is offered for a permissible purpose, such as one listed under Wis. Stat. § (Rule) 904.04(2); (2) if it is relevant, i.e., does it relate to a fact of consequence in the case, and does it make that fact more or less probable than it would otherwise be without the evidence; and (3) if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. *Sullivan*, 216 Wis. 2d at 772–73.

But "simply because an act can be factually classified as 'different'—in time, place and, perhaps, manner than the act complained of—that different act is not necessarily 'other acts' evidence in the eyes of the law." *Bauer*, 238 Wis. 2d 687, ¶ 7 n.2 (citation omitted). "A criminal act cannot be viewed frame-by-frame if the finder of fact is to arrive at the truth." *State v. Johnson*, 184 Wis. 2d 324, 350, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, P.J., concurring). Accordingly, "[e]vidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515. "[I]f evidence is part of the 'panorama' of evidence surrounding the offense, it is not other acts evidence and need not be analyzed as such." *State v. Jensen*, 2011 WI App 3, ¶ 81, 331 Wis. 2d 440, 794 N.W.2d 482.

C. The trial court properly determined that K.W.'s testimony about her relationship with McArthur was panorama evidence, but would also meet the *Sullivan* test.

The record shows that the court correctly analyzed the evidence of K.W.'s relationship with McArthur as panorama evidence, and also correctly determined it was admissible even if characterized as "other acts" evidence. This Court should affirm that decision.

The trial court correctly admitted this testimony as panorama evidence. K.W.'s testimony about her ten-weeks with McArthur leading up to July 14, including how they met and his escalating abuse, was necessary to completely describe the crime and for the jury to understand the offense. As in *Jensen*, "The evidence involved the relationship between the principal actors . . . and traveled directly to the State's theory as to why" K.W. would agree to recant her statements

and why McArthur's version of events was not credible. *Jensen*, 331 Wis. 2d 440, ¶ 85.

And indeed, the court properly found that this was not other acts evidence. It also found that if it were, the court would admit it under *Sullivan*:

> If you believe other than in the context that it's being used for a full and fair determination of the facts relating, I'm talking about the history of the relationship, the court is going to allow that.
>
> If you believe it's other acts evidence, the court believes that it's relevant and probative and it would meet the requirements of *Sullivan*.

(R.79:7–8.) After defense counsel argued otherwise, the court reiterated that it did not believe this was other acts evidence:

> [STATE]: On the history of the relationship here, I indicated -- I don't know if I put this on the record yesterday.
>
> In my motion itself, I believe that this -- that the course of their relationship which lasted about eight to ten weeks is part of the corpus delecti of this case as I indicated in the motion, and it is not other acts in the way that the defense is arguing that it is. The court has already indicated that to the extent that it is other acts --
>
> THE COURT: No. I said if it was other acts, the court would allow it.

(R.79:13–14.) The prosecutor then restated the court's *Sullivan* analysis and the court affirmed that was what it would find if this *were* other acts evidence:

> [STATE]: If it was. Right. I believe that the court is saying it's relevant to the victim's state of mind as well as the defendant's state of mind and that would be the permissible purpose; that is, very probative of those issues, continuing toward the issues of the

> defendant's guilt or innocence in this case which is the ultimate issue and that the probative value given its recency and the fact that it's the same victim and the fact it's a continuing course of conduct is not -- the probative value is not substantially outweighed by the danger of unfair prejudice.
>
> I just wanted to make sure that I understood that the court said both of those things. Did I hear you right?
>
> THE COURT: That's correct. That's what the court did. I did say.

(*Id.* at 14)

And even if the court was wrong and this should be characterized as "other acts" evidence, this Court must still affirm because the court's *Sullivan* analysis was correct. *Marinez*, 331 Wis. 2d 568, ¶ 17. Background information necessary for a full presentation of the case is a permissible purpose for introducing other acts evidence, as is showing state of mind. *Jensen*, 331 Wis. 2d 440, ¶ 77 (citation omitted). It was also relevant and probative: without the background information on how K.W. met McArthur and the history of their relationship, the jury would have no understanding of how or why K.W. behaved the way she did. It was recent conduct stretching up to the day before the crime and it involved the same victim. *See id.* ¶ 80.

As the transcript shows, McArthur's statement that "the circuit court . . . found the proffered testimony was 'other acts' evidence" and "ruled without explanation or analysis it was admissible pursuant to *Sullivan*," is indisputably false. (McArthur's Br. 42.)

And McArthur's own other acts analysis of this evidence is conclusory, unsupported in law, and ignores the record. McArthur says the court should have found the testimony inadmissible because there were no eyewitnesses to the acts

other than K.W. but cites no law—and the State is unable to find any—stating that eyewitness testimony is required to corroborate a witness's testimony about other acts evidence or relevant background information. (McArthur's Br. 43.) He then erroneously evaluates this evidence as if it had been introduced to prove identity, when the court and the State clearly stated that the purpose was to show relevant background and the victim's and the defendant's state of mind. (*Id.*) He does not address the nearness in time, place, and circumstances of these acts and summarily proclaims it irrelevant. (*Id.*) Finally, he claims that the court should have found this testimony unduly prejudicial but gives no analysis explaining why its prejudicial effect substantially outweighed its probative value, particularly given the court's limiting instruction to the jury on other acts evidence. (*Id.*) McArthur has alleged nothing showing that this cannot be characterized as relevant background evidence or cannot meet the prongs of *Sullivan*.

D. The trial court properly admitted McArthur's former girlfriends' testimony because it was admissible under *Sullivan*, but even if it was not, the error was harmless.

1. There is no presumption against other acts evidence.

Preliminarily, there is no "presumption against admission of 'other acts' evidence" established in *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967) or "reaffirmed" by the supreme court in *Sullivan* as McArthur claims. (*See* McArthur's Br. 31–32). To the contrary, "[t]he admission of other crimes evidence is not controlled by presumptions or predispositions, but rather it is controlled by the Wisconsin Rules of Evidence." *State v. Speer*, 176 Wis. 2d 1101, 1114–15, 501 N.W.2d 429 (1993).

Whitty established a balancing test for the admissibility of other acts evidence, not a "presumption against admission." *See Whitty*, 34 Wis. 2d at 295. And the principle from *Whitty* that the supreme court revitalized in *Sullivan* is that other acts evidence cannot be used "to show the defendant's propensity to commit the charged offenses." *Sullivan*, 216 Wis. 2d at 774–75.

McArthur cites *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999), for the proposition that "[t]he general rule is one of exclusion," but takes the passage out of context. (McArthur's Br. 31.) *State v. Rutchik,* 116 Wis. 2d 61, 341 N.W.2d 639 (1984), on which *Scheidell* relied, shows that the rule is *exclusion of character evidence to show propensity*, not exclusion of other acts altogether. "The general rule is one of exclusion: the jury is not permitted to convict someone based on the inference that if he broke the law once he is likely to do so again." *Rutchik*, 116 Wis. 2d at 67–68; *see also Speer*, 176 Wis. 2d at 1113–14.

Whitty did not establish a presumption against admission of other acts evidence, and neither *Sullivan* nor *Scheidell* "reaffirmed" one. "Rather, the admissibility of other crimes evidence is controlled by the circuit court's neutral application within its discretion of the[se] well-established rules of evidence . . . ." *Speer*, 176 Wis. 2d at 1116. The court properly neutrally applied the three prongs of the *Sullivan* analysis.

2. The testimony was offered for several permissible purposes.

The first prong of the *Sullivan* test is met because both the State and the circuit court articulated several permissible purposes for admission of the evidence. The State asserted that the evidence was permissible to establish McArthur's identity as the perpetrator, to establish his method of

operation, to illuminate his state of mind, and to show the escalation of McArthur's behavior that gives context to the charges and explains his motive.

And the circuit court accepted the evidence for all of those purposes:

> It shows basically an escalation of different methods of operation by the defendant. Which does, in fact, develop the defendant's state of mind, which is connected to his motive based upon my reading of the information that's been provided. And all these other acts reveal a striking pattern of controlling and violent behavior by the defendant of his girlfriends.
>
> And there's similarity. And it serves and provides a basis of identification of the defendant as to he was the one who committed the crimes. And basically a signature and a footprint of those tactics by the defendant.

(R. 73:5.) All of these have been recognized as acceptable purposes for the admission of other acts evidence. *See* Wis. Stat. § (Rule) 904.04(2) (motive, identity, and method of operation); *Payano*, 320 Wis. 2d 348, ¶ 105 (state of mind). Identifying an acceptable purpose is all the first prong of *Sullivan* requires. *Marinez*, 331 Wis. 2d 568, ¶ 25.

3. The other acts evidence was relevant to show McArthur's state of mind, motive, and identity.

The second prong of the *Sullivan* test is relevance. Wisconsin Stat. § (Rule) 904.01 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *State v. Hunt*, 2003 WI 81, ¶ 63, 263 Wis. 2d 1, 666 N.W.2d 771.

"The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." *Id.* ¶ 64 (citations omitted). "Similarity is demonstrated by showing the 'nearness of time, place, and circumstance' between the other act and the alleged crime. It is within a circuit court's discretion to determine whether other-acts evidence is too remote." *Id.* When identity is at issue, the other acts evidence should have "such a concurrence of common features and so many points of similarity with the crime charged that it 'can reasonably be said that the other acts and the present act constitute the imprint of the defendant.'" *State v. Gray*, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999) (citation omitted). However, "other acts evidence need not be identical to the charged conduct. Rather, the probative value lies in the *similarity* between the other acts and the charged crime." *State v. DeRango*, 229 Wis. 2d 1, 21, 559 N.W.2d 27 (Ct. App. 1999).

McArthur's acts against K.W. were extremely similar to the circumstances of and McArthur's actions in the other cases. McArthur's bizarre and extreme acts against prior girlfriends and his becoming enraged if they had contact with other men or "forbidden" friends makes these acts highly probative evidence showing his identity as the perpetrator of the assault on K.W. The assaults were very similar: over-the-top death threats, strangulation, punching and beating the victims, giving them perverse "choices," and then attempting to dissuade them from cooperating with the prosecution. The circumstances were also nearly identical: each assault was spurred by the girlfriend's defying McArthur in some way, which McArthur found threatening. These same factors make this evidence relevant to his motive—keeping K.W. from contact with other men—and his state of mind: he was filled with an abnormal amount of rage when these women broke his rules. The other acts also give some corroborative effect to K.W.'s testimony and to the statement she gave Roberson

shortly after the assault. All of these things make it more likely that McArthur can be "identified" as the person who assaulted K.W. They also make it less likely that his claims that he was concerned for her health and that K.W. made up the allegations were true. These are all facts of consequence.

The other incidents did take place over a wide time span of 10 to 20 years before the assault on K.W. But "[e]ven when evidence may be considered too remote, the evidence is not necessarily rendered irrelevant if the remoteness is balanced by the similarity of the two incidents." *Hunt*, 263 Wis. 2d 1, ¶ 64. And these incidents were strikingly similar; as the circuit court noted, they were "basically a signature and a footprint of those tactics by the defendant." (R. 73:4.) The circuit court properly determined that they were relevant.

4. The court correctly determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

The third prong of the *Sullivan* test is whether the probative value of the other acts evidence is substantially outweighed—not minimally outweighed or possibly outweighed—but *substantially* outweighed by the danger of unfair prejudice. The circuit court appropriately determined that the probative value of the other acts introduced here was not substantially outweighed by the danger of unfair prejudice.

"Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." *DeRango*, 229 Wis. 2d at 23. "By delivering a cautionary instruction, the trial court can minimize or eliminate the risk of unfair prejudice." *Id.*

It is undisputed that the things McArthur did to M.M., C.C., J.D., and R.S. are horrible, and they likely aroused a sense of disgust in the jury. However, as the State pointed out in its other acts motion, the nature of the crimes themselves were highly sensitive and horror-provoking. McArthur himself made the other acts testimony necessary. When the State moved to admit this testimony, it appeared from the confiscated letters and recorded jail calls that McArthur had convinced K.W. to lie on the stand for him and recant her story. *See Hunt*, 263 Wis. 2d 1, ¶ 16. He also put his identity at issue by entering an alibi defense and by trying to imply that "Mike" was the one who hurt K.W.

And the court gave the entire comprehensive jury instruction on the proper consideration of other acts evidence and tailored it to the case, telling the jury:

> Evidence has been presented regarding other conduct of the defendant from 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.83:54–55.) The circuit court tailored the instruction to the case, and explained the reasons that the State had identified in its motion that it was seeking to introduce the evidence. It also explained what each purpose meant and told the jury that it could not use this evidence to conclude McArthur was a bad person and convict him for that. *Cf. Sullivan*, 216 Wis. 2d at 780.

The court gave a tailored limiting instruction. McArthur's prior assaults and his current assault were very similar. K.W. also told her story about McArthur's threats and escalating violence. McArthur attempted to paint K.W. as a liar and addict who could not remember what happened to her, and told a story about threatening her with rehab. He also attempted to claim that some unidentified third party committed the assaults. The evidence was necessary and there was no danger of unfair prejudice.

And indeed, the jury acquitted McArthur of the kidnapping charge, and it asked the court to send the injunction to the deliberation room. It was considering the evidence presented to it when making its decision, and not simply convicting McArthur because it thought he was a bad person. The evidence was properly admitted and properly considered by the jury.

5. McArthur has ignored most of the circuit court's findings on all parts of the *Sullivan* test, does not support his argument with any facts, and has failed to meet his burden that these acts were improperly admitted.

McArthur concedes that the State met the first prong because "identity" is a permissible purpose. (*See* McArthur's Br. 36.) But, in an attempt to focus the analysis solely on identity, McArthur argues that the State did not "need" the other acts evidence to establish anything other than identity, and claims that State "disingenuously" added all the other permissible purposes at the hearing. (McArthur's Br. 35–36.) His only factual support for this argument is that he entered a notice of alibi, and the State in closing argument equated the other acts evidence to a "fingerprint." (McArthur's Br. 36.) He then apparently concludes that because he believes the only "legitimate" purpose for the other acts evidence was to prove identity, he need only address whether the court properly admitted the evidence for that purpose. (*See* McArthur's Br. 36–42.)

McArthur's argument has no basis in law and is conclusively refuted by the record. The State's other acts motion lists the purposes as: method of operation (R.13:1); identity (R.13:1); state of mind (R.13:7); and motive (R.13:7). McArthur fails to explain what is "disingenuous" about the State arguing the propositions in its motion at the motion hearing. He also fails to explain why the State or the circuit court should be required to frame the other acts analysis around the notice of alibi McArthur submitted months after the motion hearing.

Further, McArthur's argument that the State did not "need" the other acts evidence to establish state of mind, motive, or context says nothing about whether those were

permissible purposes or relevant to an issue of consequence. It also says nothing about whether the circuit court properly analyzed the evidence for those purposes. Nor does McArthur acknowledge that this Court assesses the correctness of the trial court's decision, not its reasoning.

But even on the single issue he's chosen to address—whether this evidence was properly admitted to establish identity—McArthur has not met his burden.

McArthur concludes that the evidence was not "relevant and probative" to show identity because the acts were insufficiently similar and too remote in time to identify McArthur as the perpetrator. He is wrong.

McArthur claims that his shooting of M.M. was accidental; he says nothing about his emotional torture of her. (McArthur's Br. 37.) He claims his assault of C.C. was insufficiently similar because "he was [not] jealous of a potential male suitor" when he strangled her, beat her, and threatened her family. (*Id.*) He similarly claims his assault of J.D. was insufficiently similar because it was not due to jealousy, and that because J.D. withdrew her complaint against McArthur "there was no basis to argue he was contacting her after the incident." (McArthur's Br. 37–38.) Finally, he claims that his assaults on R.S. were insufficiently similar because they involved him damaging and interfering with her car, which he did not do to K.W. He omits his rage when he went through R.S.'s phone, found out she contacted an ex-boyfriend, and punched her in the face. He also claims none of the past acts were sufficiently similar because they did not involve kidnapping and sexual assault. (McArthur's Br. 38.)

McArthur mistakes "similar" for "identical." *See DeRango*, 229 Wis. 2d at 21. Simply because McArthur tortured K.W. in his car rather than at her house, and it

apparently did not occur to him to urinate down the throats of the girlfriends he previously assaulted, it does not make these incidents insufficiently similar or too remote in time to identify McArthur as the perpetrator of the assault on K.W. The State introduced the other acts evidence to show McArthur commits assault in a specific way, usually when he feels he has insufficient control over his girlfriend. He reasserts that control in a singular fashion unique to McArthur: battering the victims in ways that cause pain but leave few marks, psychological torture suggesting that he controls whether they live or die, that he is watching the victims, and is minutes away from hurting them or their loved ones, offering perverse "choices," and strangulation. The other acts show that McArthur has a method of operation when committing an assault designed to cow and completely dominate the victim, a method that is particular to him. The chances that someone else would have tormented K.W. in the exact same way are extremely remote. The other acts were relevant and probative to identify him as the perpetrator and McArthur has not shown otherwise.

McArthur similarly has not shown a substantial likelihood of unfair prejudice. Though it is indisputable that McArthur's treatment of his former girlfriends is despicable, he has not shown that the jury was more likely to punish him for those acts than to consider the evidence in the case, particularly given the limiting instruction. McArthur makes the conclusory claim that the instruction was overbroad and "garbled." But he points to nothing that was incorrect about it or shows that it was not tailored to the facts of this case, other than noting that the circuit court told the jury it could consider it for things other than identity. (McArthur's Br. 40.) Again, simply because McArthur would like to focus solely on identity does not mean the circuit court improperly analyzed the evidence or improperly admitted it for the other purposes in the State's motion. Because the court correctly admitted

the evidence for all of those purposes, there was nothing improper about the instruction. This Court should affirm the circuit court's decision to admit the evidence of McArthur's past acts with his girlfriends.

E. Any error in admitting the other acts evidence was harmless.

A court's misuse of discretion in admitting other acts evidence is subject to harmless error review. *Hunt*, 263 Wis. 2d 1, ¶¶ 76–82. "The test for harmless error is if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* ¶ 77 (citations omitted).

The evidence of McArthur's guilt was overwhelming even without the other acts evidence. The jury would have heard from the victim her candid and emotional testimony about her troubled past, her whirlwind relationship with McArthur, and her terrifying account of the attack. They would have heard her admit that she had lied to the police about how much she had to drink and about knowing "Mike" before that night. Roberson's testimony and report would still have been admitted, which corroborated K.W.'s testimony. There is no evidence that "Mike" had anything to do with the assault or had the slightest reason to assault K.W. The pages of incriminating text messages and letters from McArthur in which he tried to get K.W. to change her story still would have been admitted. The jury would have heard the testimony of the medical providers about K.W.'s injuries and what she told them while in the hospital. The jury would have seen of all of K.W.'s hospital records.

There was no question that someone beat K.W. within inches of her life. McArthur's attempts to get K.W. to lie about being slipped hallucinogens is strong evidence of guilt. His shifting story about K.W.'s making up the abuse to get out of

involuntary rehab is not credible in light of her testimony, the medical reports, the texts and letters, and the police testimony. Even had the jury believed McArthur's alibi witnesses, their timeline does not make the attack on K.W. impossible; it only means it may have lasted for a shorter time than she thought. A rational jury would have found McArthur guilty even without the other acts evidence. If it was erroneously admitted, the error was harmless.

II. McArthur did not receive ineffective assistance of counsel.

A. Standard of review.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law." *State v. Franklin*, 2001 WI 104, ¶ 12, 245 Wis. 2d 582, 629 N.W.2d 289 (citation omitted). The circuit court's findings of fact are upheld unless they are clearly erroneous. *Id.* Whether counsel's performance was deficient and whether it prejudiced the defendant are questions of law reviewed de novo. *Id.*

B. Relevant law.

Defendants have a constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant who asserts ineffective assistance must demonstrate: (1) counsel performed deficiently, and (2) the deficient performance prejudiced the defendant. *Id.* at 687. "The defendant has the burden of proof on both components" of the *Strickland* test. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted).

To prove deficient performance, McArthur "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "Counsel need not be perfect, indeed not even very

good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted).

To prove prejudice, McArthur "must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. McArthur "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62.

C. McArthur's counsel was not ineffective for "failing to object" to the prosecutor's questions to defense witnesses about the other acts evidence.

1. Counsel's failure to make a series of meritless objections is not deficient performance.

This Court should conclude that counsel did not perform deficiently by failing to continuously object to the prosecutor's questioning of McArthur's witnesses if they knew about his past acts of violence. The questions were short, succinct, and undermined the witnesses' testimony that they knew McArthur well.

McArthur claims that this line of questioning was "an inappropriate attack on McArthur's character" and improper pursuant to *State v. Meehan*, 2001 WI App 119, ¶¶ 20–22, 244 Wis. 2d 121, 630 N.W.2d 722. (McArthur's Br. 46.) He claims that counsel's failure to "immediately and continuously object to its admission" was deficient performance. (McArthur's Br. 46.) He is wrong.

First, this line of questioning was not improper. As the circuit court correctly noted, the holding in *Meehan* was

driven by the fact that the evidence was erroneously admitted in the first place. Meehan's assault of a 23-year-old man years before the case was too remote and dissimilar to his instant charge of sexual assault of a 14-year-old boy, and the prosecutor's questioning compounded the error. *Meehan*, 244 Wis. 2d 121, ¶ 20. Further, the prosecutor's questions that this Court found improper in *Meehan* were much more extensive and the prosecutor pointedly and repeatedly asked Meehan's boyfriend whether Meehan had lied to him about having previously committed sexual assault. *Id.* ¶¶ 19 n.5, 21. This Court found that the questioning was an improper use of the evidence to attack Meehan's character and show he intentionally lied to his boyfriend, and "forced the defense to address the reason why Meehan did not disclose the 1992 conviction to [his boyfriend], and forced the defense to defend Meehan's character." *Id.* ¶ 22. That is not the case here.

Here, the court properly admitted the other acts evidence, as shown above. The structure of the prosecutor's cross-examination shows that the questions were meant to attack Bregar's and Hughes' credibility rather than to attack McArthur's character: after they testified that they knew McArthur "pretty well," these questions showed that they did not know McArthur at all. And unlike in *Meehan*, the questions were quick, fairly vague, did not ask the witnesses if McArthur had lied to them, and did not reveal that McArthur had been convicted of crimes for the conduct. *See id.* ¶ 19 n.5.

Moreover, McArthur's counsel *did* object to the questioning, and the trial court overruled the objection. There is no reason to believe that a series of objections would have fared any differently. McArthur backs up his statement that counsel was "required . . . to immediately and continuously object" with no law (McArthur's Br. 46), and it is well-established that "[o]nce an objection appears on the record,

the objecting party is not required to object further after the ruling is made." 3B Wis. Prac., Civil Rules Handbook § 805.11:2 (2016 ed.). Trial counsel's failure to make a series of meritless objections is not deficient performance. *State v. Wheat*, 2002 WI App 153, ¶ 23, 256 Wis. 2d 270, 647 N.W.2d 441.

2. McArthur was not prejudiced by counsel's failure to object.

As the circuit court also noted, McArthur admitted to the other acts on the stand. And even if the other acts evidence was improperly admitted, the jury still would have heard from K.W. about McArthur's escalating abuse and sadistic torture of her, which paints a far worse picture of McArthur than these brief questions. His claim that the cross-examination somehow "taint[ed] [the] jury against him" (McArthur's Br. 47) is conclusory and unsupported, and is nonsensical considering his admission and the other evidence in the case. He has not shown prejudice.

D. McArthur's counsel was not ineffective for failing to object to Roberson's reading of K.W.'s statement.

1. K.W.'s entire statement to Roberson was admissible.

Wisconsin Stat. § (Rule) 908.01(4)(a)2. provides that a prior consistent statement of a witness who testifies at trial is admissible if it "is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." When such a statement is offered, the rule of completeness "require[s] that a statement be admitted in its entirety when this is 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." *State v. Sharp*, 180 Wis. 2d 640, 653–54, 511 N.W.2d 316 (Ct. App 1993).

McArthur's entire defense was that K.W. made up the abuse charges against him due to an improper motive. Defense counsel's cross-examination of Roberson cherry-picked sections out of her report that made it appear that Roberson or K.W. or both were lying: he asked whether Roberson knew the report could be used at trial, asked if she told K.W. to be truthful, asked if she thought it was important to be objective, and then pointed out several inconsistencies between K.W.'s testimony and the report. (*See* R.82:40–41.) In particular, defense counsel and McArthur's testimony heavily implied that K.W. had fabricated her testimony implicating McArthur and that "Mike" was a more likely perpetrator, that K.W. had misled police about Mike, and that K.W.'s testimony was not credible. (*See* R.82:43–44.) K.W.'s prior consistent statement to Roberson was therefore admissible to rebut the defense's express and implied charges of K.W.'s recent fabrication and improper influence or motive. And the entire statement was indeed admissible under the rule of completeness, because it was necessary to avoid misleading the trier of fact into believing that nothing K.W. told Roberson was consistent with K.W.'s trial testimony and to place the admittedly fabricated portions in context to the rest of the statement.

McArthur ignores defense counsel's cross-examination of Roberson entirely to support his claim that the State had no evidentiary basis to introduce the statement, and then makes the conclusory proclamation that the entire statement was not necessary for any of the reasons listed in *Sharp*. (McArthur's Br. 48.) "[I]t is not the duty of this court to sift and glean the record in *extenso* to find facts which will support an [argument]." *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶ 6, 239 Wis. 2d 406, 620 N.W.2d 463. McArthur does not

explain why or how counsel's questioning of Roberson did not open the door to the statement or why it was not needed to put the portions the defense focused on in context. Nor does he relate his contention to any facts in the record. Accordingly, this Court need not address it. *Id.*

2. Counsel's failure to object to the statement was not deficient performance.

Because the statement was admissible, McArthur's complaint that defense counsel was deficient for not objecting to it is meritless. As explained above, trial counsel is not deficient for failing to make meritless objections. *Wheat*, 256 Wis. 2d 270, ¶ 23.

3. Counsel's failure to object to the statement did not prejudice McArthur.

Again, the evidence against McArthur was overwhelming. *See supra* I.E. Had Roberson never read K.W.'s statement, the jury still would have heard compelling testimony about those events from K.W., and all the medical staff and police officers who testified to the events of July 14 and K.W.'s ordeal afterward. All of the text messages and letters still would have been before the jury. And McArthur's own testimony was less than favorable to him. His statement that K.W. "broke[ ] the cardinal rule" and "gotten [him] locked up," was particularly damning. (R.82:146.) There is no probability that hearing Roberson read K.W.'s statement swayed the jury into convicting McArthur.

And McArthur has not shown otherwise. McArthur again relies only on conclusory statements that the State was allowed "to present [K.W.]'s testimony twice in order to taint the jury against him" and alleges that the postconviction court's finding that McArthur was not prejudiced by it was "clearly erroneous." (McArthur's Br. 48–49.) But he asserts no

facts showing that this testimony actually had any effect on the jury at all, or why it is probable that the outcome of his trial would have been different if Roberson had not read K.W.'s statement. Without some facts showing a probability that Roberson reading K.W.'s statement had some effect on the jury, McArthur's prejudice argument must fail.

III. The circuit court properly denied McArthur's motion without a *Machner*[3] hearing.

A. Standard of review.

The sufficiency of a postconviction motion is a question of law this Court reviews de novo. *State v. Tucker*, 2012 WI App 67, ¶ 6, 342 Wis. 2d 224, 816 N.W.2d 325.

B. Relevant law.

"Under *Machner*, 'a hearing may be held when a criminal defendant's trial counsel is challenged for allegedly providing ineffective assistance.'" *State v. Roberson*, 2006 WI 80, ¶ 42, 292 Wis. 2d 280, 717 N.W.2d 111 (citation omitted). "However, the circuit court has the discretion to deny the postconviction motion without a *Machner* hearing 'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, *or if the record conclusively demonstrates that the defendant is not entitled to relief*.'" *Id.* ¶ 43 (citation omitted).

C. McArthur made only conclusory allegations and the record demonstrates he is not entitled to relief.

As explained, McArthur alleged no facts that would entitle him to relief, because the objections he claims counsel should have made were meritless. Therefore, even if his

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[3] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

allegations are true, they do not establish deficient performance.

He also has alleged no facts showing a probability that the outcome of his trial would have been different if his trial counsel had made the objections McArthur claims. He has made only conclusory statements that the jury was somehow "tainted" by counsel's failure to make a series of meritless objections. But he has pointed to no facts and makes no argument explaining why, without the prosecutor asking Bregar and Hughes whether McArthur told them about his prior girlfriends, and without Roberson reading her police report, he was likely to be acquitted despite all of the other evidence against him. Ergo, because McArthur relied on conclusory allegations and the record conclusively demonstrates that McArthur did not receive ineffective assistance of counsel, the circuit court properly exercised its discretion to deny his petition without holding a *Machner* hearing. *See id.* ¶ 44.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 9th day of June, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,730 words.

_____
LISA E. F. KUMFER
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 9th day of June, 2017.

_____
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