STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1332-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AKIM A. BROWN,

Defendant-Appellant.

On Notice of Appeal from the Judgment of Conviction and Order Denying Motion for Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable Daniel L. Konkol and the Honorable M. Joseph Donald, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

1. Whether Mr. Brown was deprived of his state and federal constitutional rights to the effective of counsel when trial counsel failed to: (a) elicit Mr. Brown's testimony that the alleged victim stimulated herself during their sexual intercourse, and to the intercourse act itself; and (b) object to a witness' testimony repeating the alleged victim's statements consistent with her testimony?

   The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are requested because the issues can be developed and resolved by the parties' briefs.

STATEMENT OF THE CASE

This case involves a sexual assault allegation by L.S. against an acquaintance, Akim Brown, following their sexual intercourse in her bed, just after 12:00 a.m. on Monday November 25, 2013.

Mr. Brown and L.S. met over the weekend at the Green Bay home of mutual friends, Tyler and Elizabeth Simmons. Mr. Brown drove L.S. back to Milwaukee on Sunday evening.

L.S. did not report the sexual assault allegation to the police until Wednesday November 27th.

During a videotaped police interrogation, Mr. Brown denied sexually assaulting L.S. and described their consensual sexual intercourse in the missionary position. (85:4-7,21;199[1]) Among other things, he stated twice that, during the intercourse, L.S. pulled her legs back and stimulated herself. (85:5,21)

Attorney Douglas Batt represented Mr. Brown at trial.

The central issue was whether L.S. consented to the sexual intercourse. She claimed that she did not, while Mr. Brown explained that she had consented. There was no physical evidence of an assaultive sexual intercourse nor any eyewitnesses to their intercourse. The jury's verdict rested on its credibility determination on consent.

Following a March 3-5, 2014 trial, after deliberating nearly four hours, a jury convicted Mr. Brown of second degree sexual assault, contrary to Wis. Stat. § 940.225(2)(a). (125;126;150;127:5-6;43).

Prior to sentencing, after Mr. Brown explained that he wanted new counsel, the court, the Honorable Daniel L. Konkol, granted Attorney Batt's motion to withdraw. (129:2-4;46) On May 27, 2014, Judge Konkol sentenced Mr. Brown to 20 years with 12 years confinement and eight years extended supervision. (131;51; App. 101-102) Mr. Brown timely filed a notice of intent to pursue postconviction relief on May 29, 2014. (52)

[1]Record Item 199 is a DVD containing Mr. Brown's videotaped interview. Record Item 85 is a transcript of this interview. Hereinafter, record citations to the videotaped interview will be to the transcript, Record Item 85.

Mr. Brown timely filed a Rule 809.30 postconviction motion for a new trial on the grounds that he was denied the effective assistance of counsel and in the interests of justice. (69) [2]

The circuit court, the Honorable M. Joseph Donald[3], conducted a *Machner*[4] evidentiary hearing over five days. (133;134;136;137,138) The parties submitted proposed findings of fact and conclusions of law. (99;108) Among other issues, the parties litigated whether Mr. Brown was entitled to a new trial because: (1) he was denied the effective assistance of counsel by trial counsel's failure to: (a) elicit Mr. Brown's testimony of the intercourse act itself, including L.S. stimulating herself during it; and (b) object to a police officer's testimony to L.S.'s prior out-of-court statements consistent with her testimony; and (2) in the interests of justice because the real controversy was not fully tried.[5]

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[2] Mr. Brown also filed a supplement to the motion alleging that he was denied due process when the State relied on false testimony to convict him. (80) This issue is not raised on appeal and the facts related to this issue is not discussed below.

[3] The postconviction motion was administratively assigned to Judge Donald.

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

[5] The postconviction motion also alleged that counsel's failure to interview Mr. Brown about the details of his interactions with L.S. over the weekend, during the car ride, and the sexual intercourse, to review Mr. Brown's recorded police statement, to review the recorded statement with Mr. Brown, to prepare Mr. Brown to testify, to impeach L.S.'s testimony regarding her urgent care visit, to impeach an officer's testimony regarding Mr. Brown's custodial statement, to interview Ms. Simmons prior to her trial testimony and to object to Ms. Simmons' testimony to L.S.'s prior consistent statements denied him the effective assistance of counsel. (69) These claims are not raised on appeal and the facts related to them are not discussed below.

The court orally denied the motion (141:2-7; App. 103-108) for a new trial, and on June 15, 2017 entered a written order denying postconviction relief. (115; App. 118) In denying the postconviction motion, the circuit court adopted the State's proposed findings of fact and conclusions of law *in toto*. (141:6-7; App. 107-108)

A notice of appeal was timely filed on July 5, 2017. (117)

STATEMENT OF FACTS

L.S.'s Testimony

L.S. met Mr. Brown at the Simmons' home and had little interaction with him. (125:64-67) On Sunday evening, L.S. paid Mr. Brown for a ride to Milwaukee. (*Id*.:67-68) They engaged in small talk throughout the ride and L.S. did not consider this conversation romantic. (*Id*.:69)

Mr. Brown drove L.S. to her cousin's home to pick up her car. (*Id*.:69-70) Mr. Brown then followed L.S. to her residence, because he wanted to ensure her safety. (*Id*.:78)

After arriving at her building, Mr. Brown asked to use her bathroom. (125:78-79; 126:5) Once inside her apartment, Mr. Brown took off his coat and boots, immediately walked into her bedroom, took off all his clothes except his boxers, and sat on her bed. (125:81-84; 126:5-6,12-13)

As L.S. stood at the bedroom doorway, she told Mr. Brown that he needed to get dressed and leave. (125:82-83; 126:6,13) When Mr. Brown did not respond, she repeated herself. (125:83-84) In a text exchange between 12:11-12:15

a.m.[6], L.S. texted Ms. Simmons that Mr. Brown was still in her home. (125:76; 126:8; 17) L.S. admitted she did not text Ms. Simmons that Mr. Brown would not leave nor call her. (126:9)

Mr. Brown forcibly grabbed her by her shirt collar and pulled her onto the bed. (125:84-85; 126:17-18) L.S. admitted that Mr. Brown selected the DVD movie playing on the television. (126:7,17) She denied joining Mr. Brown in her bed, watching a movie with him or talking about anything else with him. (*Id*.)

Mr. Brown then pulled off her pants; she resisted and repeated stated "no", that she barely knew him and she was not the kind of a girl to have sex with people she just met. (125:85-86; 126:20) Mr. Brown said that everything will be okay and that he had been a "total gentleman." (125:85) She continued struggling and saying "no" as he pulled off her underwear and Mr. Brown became a little more aggressive. (125:86; 126:19)

Mr. Brown laid on top of her body, pressing her down, and had penis to vagina sexual intercourse with her. (125:85,87-88) L.S. unsuccessfully tried to push him off and keep her legs crossed. (*Id*.:87-88; 126:15-16) L.S. did not scratch him and did not think of hitting him. (126:16) Her body went numb; she blacked out during the sexual intercourse, which ended when Mr. Brown ejaculated inside of her. (125:88-89; 126:18,20) L.S. denied that Mr. Brown put his finger in her vagina. (126:12)

L.S. did not think of using her phone, located on her dresser, to call 911 because she feared Mr. Brown would do

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[6] L.S. and Ms. Simmons texted each other during the car ride and after L.S. and Mr. Brown arrived at L.S.'s apartment. (125:70,74-76; 18; 17)

something worse. (125:89-90) She did not leave her apartment because she did not want to leave her personal property with Mr. Brown. (*Id*.:90) L.S. did not scream because she did not know if her neighbor was home. (*Id*.:92-93)

After the sexual intercourse, L.S. took a shower. (125:89; 126:10) She told Mr. Brown several times that he needed to leave her apartment. (125:92-93)

Mr. Brown continued to watch the movie and took a shower after L.S. finished showering. (125:90; 126:10-11) L.S. did not think of leaving her apartment to call the police and, instead, laid down on the living room couch. (125:90; 126:11)

After Mr. Brown showered, he dressed, kissed her forehead, and left the apartment around 2:00 a.m. (125:90-91, 93; 126:12) L.S. locked her front door. (125:91) She did not call anyone and did not think to call the police. (*Id*.:93-94)

The following morning, before going to work, L.S. called Ms. Simmons and told her what happened. (*Id*.:94; 126:9) That same day, L.S. went to urgent care, but did not stay to receive medical treatment. (125:95) Two days later, L.S. went to the police station to report that Mr. Brown sexually assaulted her. (*Id*.:96; 126:13) Later that day, she received medical treatment at the Sexual Assault Treatment Center. (125:97-98; 126:14)

L.S. did not have any physical injuries or bruises from this incident, including no bruises from Mr. Brown forcing her legs open. (125:99; 126:16-17)

Mr. Brown's Testimony

On Friday night, at the Simmons' home, Mr. Brown, who had five criminal convictions, walked by L.S. and his arm "graced [sic]" L.S.'s buttocks and she stated to him "all you got to do is ask for it" which was based on a playful flirt earlier in the conversation. (126:81-82,104) On Sunday evening, he agreed to give L.S. a ride to Milwaukee on his way to his Kenosha home. (*Id.*:82-84) During the car ride, L.S. stated that she had checked him out on the internet, including his Facebook page. (*Id.*:84) They also discussed how the Simmons did not feel comfortable with Mr. Brown sleeping at their home because of the possibility that he and L.S. would have sex. (*Id.*:85)

He took L.S. to pick up her car and followed her home. (*Id.*:84-85) Mr. Brown and L.S. had previously made plans for him to come to her apartment. (*Id.*:84-85,89,105,107) Their idea was that he was going to spend the night. (*Id.*:84-85,89,107) He told the police L.S. wanted to show him her apartment and did not explain their agreement that he spend the night. (126:106) Mr. Brown denied asking to use her bathroom and explained that he had urinated outside when dropping L.S. off at her car. (*Id.*:86,105)

After entering the apartment, L.S. increased the heat, showed him her apartment, discussed the cold temperature and weather stripping, and showed him a window in her bedroom, which he taught her how to latch. (*Id.*:87-88,93) They discussed watching a movie; L.S. put a movie in the DVD player, made a phone call, changed her clothes, put lotion on her body, turned off the apartment lights, and eventually crawled into bed with him, leaving once again to go to her phone. (*Id.*:88-94) Mr. Brown denied pulling L.S. onto the bed. (*Id.*:95)

Mr. Brown's direct examination continued:

Q: What happened then at the time when you're watching TV? How did the sex start?

A: With me knealt [sic] in front of her, pulling off her socks, talking about her feet, me leaning over the top of her with my hands on either side of her and her hands on my side of my torso.

Q: Was she ever saying no or stop, stop?

A: No, nothing—nothing of the sort. I was kissing on her neck and her ear at this moment, basically kissing on her neck and ear. I don't know what you would call it, wooing, physically wooing somebody into sex and –

Q: Did she ever at any time to you --- did she ever say or indicate to you that she did not want to have sex?

A: No.

Q: Did you—Did she ever---Did you force yourself on her?

A: No.

Q: Did you hold her down?

A: No. Not at all.

Q: Did you lay on her, on top of her, so like she said your breast plate was on her and she couldn't move?

A: No. I was using my open arms to hold my torso up off of her torso even with her laying down flat. I mean, without attempting to be rude, she's a thicker woman in her torso and body and I mean her torso and mine actually touched with her body.

Q: Did did [sic] she attempt in any way to struggle, you know, with her arms or—

A: No.

Q: Forearms or elbows?

A: No, not at all.

Q: Did she scratch at you?

A: No.

Q: And did she give you any resistance with her legs, trying to keep them from opening them, as she said?

A: No. Her legs were up around my side at this point so ---

Q. They were around—

A. We're all adults and everybody knows the missionary sex position. It was a missionary sex position at that moment. We weren't having sex at that moment and her legs were up on my side. She has large legs which were up on my hips at that moment with me and my hands down, leaning over, kissing her neck and ear, sucking on her ears, that –

Q: Did you ever put your finger up her vagina?

A: No.

Q: You said – can you tell us about how long this lasted?

A: Within a couple of minutes of that action and us basically making out which we started to kiss but I didn't like kissing her. I stopped kissing right away. My breath didn't taste good and I stopped kissing her immediately and went back to basically necking her as you might call it.

> Q: What happened then after the two of you had sex?
>
> A: I did roll over. I knelt back and she got up and she went to the bathroom and she did take a shower…

(*Id.*:95-98)

During L.S.'s shower, he watched the movie. (*Id.*:98) After taking his own shower, Mr. Brown joined L.S. in the bed. (*Id.*:98-100) She told him that he had made her vagina sore. (*Id.*:98-99)

L.S. never told him to leave her apartment or implied that he should. (*Id.*:99) She explained she would wake him up at 5:00 a.m. because she had to leave for work early. (*Id.*:100-101) L.S. fell asleep; he watched the rest of the movie and eventually left around 2:00 a.m. to avoid waking up early that same morning. (*Id.*:100-101)

Mr. Brown did not give L.S. his address or phone number, and lied to her about having a working phone. (*Id.*:102,109) He told the police he had no reason or motive for why L.S. was accusing him of a sexual assault. (126:109) L.S. said she sent him a Facebook request before the car ride, which he could not find several days later. (*Id.*:110). He would not have accepted her Facebook request because he was not attracted to her. (*Id.*:102-103) He believed he told the police that he was not attracted to all of L.S., just her large buttocks. (*Id.*:107-108)

Other Relevant Witness Testimony

Among other witnesses for the State, Police Officer Joan Mueller testified to L.S.'s November 27th statements to her relating a similar story about Mr. Brown sexually assaulting her. (126:33-40) L.S.'s account to Officer Mueller

differed from her testimony on two points -- Mr. Brown put a movie in the DVD player and said he was going to watch it and he placed his finger in her vagina. (126:47) Officer Mueller also testified that L.S. repeated a consistent version the next day when the police walked through her apartment. (126:41)

Ms. Simmons testified that first thing L.S. told her during their telephone call early the next morning (around 5:00 a.m. or 6:00 a.m.) was she thought she was "taken advantage of." (126:66) L.S.'s account to Ms. Simmons differed from her testimony on a several key points: she and Mr. Brown were laying on her bed watching TV before the sexual intercourse; she declined Mr. Brown's invitation to lay next to him; and she tried to get off the bed, but Mr. Brown pulled her down. (*Id*.:67-68) L.S.'s account to Ms. Simmons was similar to her testimony on several points including: Mr. Brown asking to use her bathroom, getting on top of her in her bed, forcing her legs open, forcing himself on her; she repeatedly said stop and that she did not want to have sex with him. (*Id*.:67-68)

On rebuttal, among other things, Officer Barbara Court testified that during the interrogation, Mr. Brown said they had consensual sexual intercourse in her bed. (*Id*.:119) He explained that went to L.S.'s home because she wanted to show him her apartment and, by the way their conversation was going, he thought they might have sex. (*Id*.:117-18) Mr. Brown did not relate any specific comments were made about having sex, but they were making comments in that direction, including that L.S. mentioned him not contacting her again and, therefore, she would try to friend him on Facebook. (126:118) He also said that they had not disagreed and he did not know why she would say this was a non-consensual situation. (*Id.*:121)

Closing Arguments and Jury Deliberations

After noting that the jury's verdict rested on whether it found L.S. or Mr. Brown more credible, the prosecutor argued that L.S. was more credible. (150:4-12,20-23) In so arguing, the prosecutor emphasized that L.S. had not glossed over any part of the sexual assault and her testimony was consistent with what she told her friends and Officer Mueller:

> When [L.S.] took the witness stand, she had a lot of detail. She told you about what happened from beginning to end.
>
> She didn't have to gloss over any of the parts. She didn't not remember the act of sexual assault itself or the reason why the defendant was in her apartment. She was consistent with her friends, with Officer Mueller and the original interview, with the walk through at the scene later in the day and here on the witness stand.

(150:6)

In arguing that Mr. Brown was not credible, the prosecutor emphasized that, during his testimony, he provided little to no detail about the sexual intercourse:

> [A]ll of the detail the defendant had for you was about the things that happened around the actual crime. He had little to no detail. He glossed over the actual crime that occurred, the sexual intercourse that he forced on [L.S.]
>
> It's that kind of admit what you can't deny, deny what you can't admit phenomenon.

(150:22)

Attorney Batt argued that Mr. Brown was more credible and that he was maybe a "jerk" but not a rapist. (*Id*.) He argued that the sex was consensual; L.S. was seduced by

someone she did not really know, which she realized when she awoke the next morning and was ashamed and regretted it. (*Id.*:17-18) He noted that L.S.'s words to Ms. Simmons that morning were not that she had been raped, but rather "I may have been taken advantage of." (*Id.*:15) Counsel emphasized L.S.'s lack of injuries and her failure to yell for help, leave, or call the police. (*Id.*:14-16)

After deliberating for approximately 1½ hours[7], the jury requested Mr. Brown's testimony. (150:30; 42:1) After asked if there was a more specific area of concern regarding Mr. Brown's testimony, the jury requested both Mr. Brown's and L.S.'s testimony during the sex act. (150:33-34; 42:2-3,6) The jury deliberated for approximately 1½ hours[8] before returning to the courtroom where it was read both L.S.'s and Mr. Brown's direct testimony from the time they entered the apartment to L.S.'s shower. (127:4) Forty minutes later, the jury returned its guilty verdict.[9] (154:4-5)

Other facts will be discussed below as necessary.

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[7] Deliberations began at approximately 9:40 a.m. and, at 11:26 a.m., the case was recalled to address the jury's request for Mr. Brown's testimony. (154:4; 150:30)

[8] Just before the lunch break, the court ordered the jury to return to its deliberations at 1:15 p.m. (150:34-36). At 2:58 p.m., the jury returned to the courtroom. (154:4; 127:4)

[9] After the court reporter read the testimony, the jury left the courtroom at 3:26 p.m. (154:4) At 4:06 p.m., the case was recalled and the jury returned its guilty verdict (154:5)

ARGUMENT

I. Mr. Brown is Entitled to a New Trial Because He Was Denied His Constitutional Rights to the Effective Assistance of Counsel When Trial Counsel Failed to: (A) Elicit His Testimony that L.S. Stimulated Herself During Their Intercourse and to the Intercourse Act; and (B) Object to Officer Mueller's Testimony Repeating L.S.'s Prior Statements Consistent with Her Testimony that Mr. Brown had Sexually Assaulted Her.

According to Attorney Batt, he knew from the beginning that the issue would be whether L.S. consented to the sexual intercourse. (134:39) Mr. Brown consistently maintained that the sexual intercourse had been consensual. (134:25,29,71,79-80,93; 136:24) Counsel's theory of defense was that L.S. consented and lied because Mr. Brown seduced her; she regretted it in the morning and she was ashamed that she had sex with an unfamiliar person. (136:4-5) Given the lack of physical evidence and third-party eyewitness testimony, counsel knew the jury's credibility determination on consent would be crucial. (134:39-41)

This was an extremely close case. Deliberating nearly four hours, the jury carefully weighed L.S.'s and Mr. Brown's credibility. It requested both L.S.'s and Mr. Brown's testimony during the sex act. The jury then heard L.S.'s and Mr. Brown's direct testimony from their entry into the apartment to the end of their sexual intercourse. The jury returned its guilty verdict 40 minutes after hearing this testimony again.

Mr. Brown's counsel committed errors at trial that undermine confidence in the outcome of this case. Counsel

was aware of compelling substantive evidence of L.S.'s consent from Mr. Brown's testimony, that she stimulated herself during their intercourse, and then inexplicably failed to elicit that testimony from Mr. Brown as well as his testimony to the intercourse act itself. In addition, counsel allowed the State to improperly introduce through L.S.'s out-of-court statements to a police officer consistent with her testimony that Mr. Brown sexually assaulted her. This testimony inappropriately bolstered L.S.'s credibility.

The State capitalized on both of counsel's errors in closing argument to emphasize that L.S. was more credible than Mr. Brown. Counsel's deficient conduct thus erroneously and prejudicially tipped the scales in favor of L.S.'s credibility and diminished Mr. Brown's credibility.

A. Standard of review and general principles of law.

The United States and Wisconsin constitutions guarantee a criminal defendant the right to the effective assistance of counsel. U.S. Const. Amend. VI, WI Const. art. I, § 7; ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. To establish the denial of the effective assistance of counsel, the defendant must prove first, that counsel's performance was deficient, and second, that counsel's deficiencies prejudiced his defense. ***Id***., (citing ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984)).

Deficient performance is shown where counsel's representation fell below "an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. While a court must assume that counsel acted reasonably within professional norms, a defendant overcomes this presumption by showing that counsel's actions were not a "sound trial strategy". ***Id***. at 688.

The reasonableness of counsel's strategic decisions is assessed in light of all the circumstances at the time of counsel's alleged errors. ***Strickland***, 466 U.S. at 689. Moreover, "'just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer.'" ***Davis v. Lambert***, 388 F.3d 1052, 1064 (7th Cir. 2004)(quoting ***Harris v. Reed***, 894 F.2d 871, 878 (7th Cir. 1990); *see also* ***State v. Jenkins***, 2014 WI 59, ¶36, 355 Wis. 2d 180, 848 N.W.2d 786.

The deficiency prong of the ***Strickland*** test is met when counsel's failures resulted from oversight rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Thiel***, 264 Wis. 2d 571, ¶51

Prejudice is proven where there is reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." ***Id***. Prejudice is assessed by the cumulative effect of all proven errors. ***Thiel***, 264 Wis. 2d 571, ¶¶59-60.

Ineffective assistance of counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The circuit court's factual findings must be upheld unless they are clearly erroneous, *see* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987), but whether counsel's performance was deficient and prejudiced the defendant is a question of law, which this Court reviews *de novo*, *see* ***Pitsch***, 124 Wis. 2d at 634.

B. Counsel's failure to elicit Mr. Brown's testimony that L.S. stimulated herself during the sexual intercourse, and to the intercourse act itself, was deficient and prejudicial.

1. Deficient Performance.

In the State's discovery materials, counsel received, and then reviewed, Mr. Brown's videotaped statement where he detailed an act of consensual sexual intercourse in the "missionary" position, during which L.S. held her legs back and stimulated her clitoris. (134:45-51; 85:4-6,19-21) Among other things, Mr. Brown stated he and L.S. were laying on her bed, he pulled off her socks and made fun of her feet, leading to him pulling off her pants and underwear, then the two started having sexual intercourse in the missionary position with him on top, during which L.S. held her legs back and stimulated her clitoris, and he sucked on her breasts, "nibbled" her on the neck and licked her ear. (85:4-6,21) They finished having sex and he ejaculated inside her. (*Id*.:5-6)

According to Attorney Batt, he knew from reviewing the taped statement that Mr. Brown twice mentioned that L.S. stimulated herself during their sexual intercourse. (134:85-87) Counsel then discussed with Mr. Brown his statement to the police that L.S. held her legs back and stimulated herself. (*Id*.)

Because these facts helped establish L.S.'s consent, counsel instructed Mr. Brown to testify that, during their sexual intercourse, L.S. held her legs back and stimulated her clitoris. (136:4-5,30-31,33) Counsel also emphasized to Mr. Brown that he especially needed to testify to the intercourse

act itself -- "what he had done and what she had done." (*Id.*:29-30,33-34)

Mr. Brown's testimony to these specific facts would have been compelling substantive evidence of L.S.'s consent. Her overt actions[10] tended to prove that she voluntarily engaged in consensual intercourse and tried to maximize her physical pleasure during it. In deciding whether L.S. consented, the jury was instructed to "consider what [L.S.] said and did, along with all the other facts and circumstances." (126:130; *See* WI-CRIM JI 1208)

However, having instructed Mr. Brown to testify specifically to these facts, counsel then inexplicably failed to elicit this testimony. Mr. Brown never testified to the penis to vagina sexual intercourse, let alone that L.S. held her legs back and stimulated herself during it. *See* 126:94-98.

Rather, his testimony describing their physical intimate contact was essentially limited to foreplay. Mr. Brown described kissing L.S.'s neck, kissing and sucking her ear, and "making out" with her while laying on top of her with her legs around his torso. (*Id.*:95-97) Although Mr. Brown stated that they were in the "missionary sex position at that moment", he explained that they were not "having sex at that moment…" (*Id.*:97) Further, while Mr. Brown testified that he did not force himself on L.S., *Id.* at 96, nor put his finger in her vagina, *Id.* at 97, he never testified specifically to the penis to vagina intercourse. *See* 126:94-98.

Attorney Batt had a duty to help Mr. Brown with effective questioning to elicit this testimony and his failure to

[10] Wisconsin Statutes define consent as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." Wis. Stat. § 940.225(4).

do so was objectively unreasonable and deficient. "[D]efense counsel must protect the defendant's right to testify and, when the defendant decides to testify, assist the defendant with effective questioning to facilitate the presentation of the defendant's account." *See* ***State v. McDowell***, 2003 WI App 168, ¶52, 266 Wis. 2d 599, 669 N.W.2d 204, *aff'd*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500.

Attorney Batt, whose typical practice is to present his client's direct examination in chronological order without preparing written questions, did not have a written list of questions to ask Mr. Brown or points he wanted Mr. Brown to make. (136:29,34,57)

Counsel admitted he lacked a strategic reason for not eliciting Mr. Brown's testimony that L.S. held her legs back and stimulated herself during the sexual intercourse. (136:36) Deficient performance is shown, where, as here, counsel's failure results from oversight rather than a reasoned defense strategy. *See* ***Wiggins***, 539 U.S. at 534; *see also* ***Thiel***, 264 Wis. 2d 571, ¶51.

Counsel suggested several reasons for his failure to ask sufficient questions eliciting Mr. Brown's testimony to the intercourse act itself: a tangent in Mr. Brown's testimony confused him and he found Mr. Brown difficult to control on direct examination, as he provided too many details on tangential subjects. (136:34-36,56-57) Nevertheless, counsel felt he provided Mr. Brown opportunities to explain the sexual encounter. (*Id.*:56) Attorney Batt also suggested that Mr. Brown's refusal to discuss his testimony and disclose everything he intended to say impacted his (Attorney Batt's) failure to elicit his testimony to the sexual intercourse act itself. (*Id.*:36)

Attorney Batt's suggested reasons for his failure to elicit Mr. Brown's testimony are not strategic nor objectively reasonable. Advising Mr. Brown to testify to certain facts is not sufficient, nor is giving him opportunities to so testify. Rather, it was counsel's duty to guide Mr. Brown, by asking focused and directed questions, to elicit his detailed account of the consensual intercourse act. Counsel needed to guide Mr. Brown back to testify to any missing facts, including if he proceeded to unanticipated tangents or unnecessary topics. Moreover, preparing a list of topics and/or necessary facts is fundamental to effective questioning, but counsel failed to do so.

Additionally, Attorney Batt already had the necessary information to elicit the specific facts during Mr. Brown's testimony, even though, as the court found, 108:3-4; App. 112-13[11], Mr. Brown was uncooperative, and refused to discuss his testimony with him. From his discovery review and prior discussions with Mr. Brown, counsel knew which facts he (Attorney Batt) needed to elicit during Mr. Brown's testimony. Moreover, despite Mr. Brown's less than ideal cooperation, counsel was still able to give him instructions about certain details to include in his testimony. Asking Mr. Brown to describe "what she had done" and "he had done" during their intercourse, would have elicited his testimony to the intercourse act.

Nor can courts, as the circuit court did here, make up strategies that counsel does not offer. The circuit court found that counsel discussed with Mr. Brown his statement that L.S. held her legs back and stimulated her clitoris during their intercourse. (108:3; App. 112) The circuit court then held it

[11] The State's proposed findings of fact and conclusions of law is located in the appendix (App. 110-117) because the postconviction court adopted it *in toto* as its reasoning for denying the motion.

was a reasonable strategy for Attorney Batt to avoid Mr. Brown testifying that L.S. held her legs back and stimulated herself during the sexual intercourse because these facts might be offensive to a juror, 108:5; App. 114, and thus implicitly held that counsel's conduct was not deficient.

The circuit court then held Mr. Brown was not prejudiced because these facts "came out anyway." 108:5; App. 114. This holding is confusing, given its "strategy" holding and because Mr. Brown never testified to L.S. stimulating herself during the intercourse act, nor to the penis to vagina intercourse itself. In any event, the strategic reason the circuit court constructed is not a strategy that Attorney Batt himself offered. *See* ***Jenkins***, 355 Wis. 2d 180, ¶36 (quoted sources omitted) (noting that a reviewing court, with the benefit of hindsight, cannot "construct [a] strategic defense which counsel does not offer.")

2. Prejudice.

Mr. Brown was prejudiced by counsel's deficient conduct. According to Mr. Brown's postconviction hearing testimony, had defense counsel asked him to describe the intercourse act, among other things, he would have testified that: he leaned over L.S. and kissed her breasts, nipples, mouth, and neck; he removed her pants and underwear and his own clothing; he inserted his penis in her vagina and moved it back and forth, while her legs were around his sides; L.S. pushed herself up and removed her shirt and bra; Mr. Brown reinserted his penis into L.S.'s vagina, leaned back on his knees, and continued to move his penis back and forth, during which L.S.'s legs were up in the air and she massaged her clitoris with her hand until he ejaculated. (137:60-64)

Mr. Brown's testimony to these facts were crucial to his theory of defense – that L.S. consented to their sexual

intercourse and then fabricated that she has not consented when she woke up the next morning and realized what she had done. The jury heard from L.S. about Mr. Brown's actions in physically forcing her into sexual intercourse. However, the jury did not hear any evidence from Mr. Brown about his and L.S.'s physical actions during their consensual sexual intercourse. His testimony about her overt actions during the intercourse, including that she stimulated herself, which demonstrated that she consented to it was missing from his defense. There is a reasonable probability that the jury would have reached a different verdict had it heard and considered Mr. Brown's testimony about their sexual intercourse.

Further, had the jury been presented with this testimony, the jury would have seen Mr. Brown's testimony regarding L.S.'s consent in a different light. This is because the State utilized Mr. Brown's failure to testify to the intercourse act to deride his credibility. In arguing that Mr. Brown was not credible, prosecutor strongly emphasized that Mr. Brown provided little to no detail about, and glossed over, the actual sexual intercourse. (150:22) She argued that he did so because, in essence, he was just denying what he could not admit. (*Id.*)

This jury compared L.S.'s and Mr. Brown's contrasting testimony specifically on the "sex act" to reach its verdict. L.S. had provided details about the sexual act, while Mr. Brown had not. The jury could have believed that his failure to testify to the intercourse act was because he had non-consensual sexual intercourse with L.S. but could not admit it. Had Mr. Brown testified to their sexual intercourse the jury would have viewed his credibility differently.

This was a close case. L.S. did not have any physical injuries, did not yell out, call for help or leave her apartment,

despite opportunities to do so. She delayed reporting this incident and her words the next morning were that she thought that she had been "taken advantage of." Given that the jury reached its guilty verdict 40 minutes after hearing each of their direct testimony about the "sex act" again, there is a significant probability that Mr. Brown's failure to testify to the details of the sexual intercourse impacted the jury's credibility determination and its guilty verdict.

C. Counsel's failure to object to Officer Mueller's testimony to L.S.'s prior statements consistent with her testimony was deficient and prejudicial.

Without any defense objection, Mueller testified to L.S.'s out-of-court statements regarding specific details of Mr. Brown allegedly sexually assaulted her consistent with L.S.'s trial testimony. However, prior consistent statements, as a general rule, constitute inadmissible hearsay. ***State v. Meehan***, 2001 WI App 119, ¶25, 244 Wis. 2d 121, 139, 630 N.W.2d 722. In some circumstances, prior consistent statements are admissible under a limited exception to the hearsay rules. A witness' prior consistent statement is not hearsay and is admissible if it is "offered to rebut an express or implied claim of recent fabrication or improper influence or motive." Wis. Stat. (Rule) 908.01(4)(a)2 (2013-2014).

To use prior consistent statements, the proponent of the statements must also show that the statements predate the alleged recent fabrication and that there was an express or implied charge of fabrication at trial. ***State v. Peters***, 166 Wis. 2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991); *see also* ***State v. Mares***, 149 Wis. 2d 519, 527, 439 N.W.2d 146 (Ct. App. 1989). An allegation that a witness is lying, standing alone, is insufficient to render the prior consistent statements admissible. ***Peters***, 166 Wis. 2d at 177.

Mueller testified that, on November 27th, L.S. told her: 1) After picking up her car, Mr. Brown followed her home because he said he wanted to make sure she got home safely; 2) He asked to use her bathroom; 3) He took off his coat and shoes and almost immediately went into her bedroom; 4) As she stood in her bedroom doorway, L.S. told him that he needed to leave; 5) Mr. Brown took off his pants and shirt; 6) L.S. continued telling him that he needed to leave; 7) Mr. Brown got up, grabbed her by her shirt collar, and pulled her onto the bed; 8) Mr. Brown pulled down her pants and underwear, eventually overpowering her and had penis to vagina sexual intercourse with her; and 9) that she continually told him to stop. (126:33-38)

Mueller also testified that L.S. repeated a consistent sequence of events during the walk-through of her apartment on November 28th. (*Id.*:41)

Mueller's testimony to L.S.'s prior out-of-court statements above is consistent with L.S.'s testimony to the details of the alleged sexual assault. *Compare* 126:33-38 with 125:78, 81-88. Counsel's failure to object to the admission of this testimony on hearsay grounds was deficient performance. This portion of Mueller's testimony is not admissible pursuant to the Wis. Stat. (Rule) 908.01(4)(a)2 exception. The defense had not expressly nor impliedly claimed that L.S.'s allegations against Mr. Brown were the result of recent fabrication or improper influence or motive. Mr. Brown's claim that L.S. was lying about having consented to their sexual intercourse was insufficient to render her prior consistent statements admissible. *See* ***Peters***, 166 Wis. 2d at 177.

Moreover, L.S.'s statements to Mueller do not predate the defense theory of when L.S. fabricated her sexual assault allegations. The defense theory was L.S. fabricated her lack

of consent when she awoke the next morning and realized what she had done. *See* 150:17-18. L.S.'s statements to Mueller occurred two and three days later.

Counsel's failure to object to the admission of this testimony on hearsay grounds was not a strategic decision. When asked if he had a strategic reason for his failure to so object, Attorney Batt admitted that he "probably should have objected." (134:119-120) Therefore, counsel's failure here resulted from oversight, rather than a reasoned defense strategy, and was deficient performance. *See* ***Wiggins***, 539 U.S. at 534.

The circuit court implicitly held that Attorney Batt's performance was not deficient. *See* 108:5; App. 114. The circuit court held that counsel's failure to object was a strategic decision because this testimony was admissible to rebut the defense theory that L.S. was lying and because the objection would have drawn the jury's attention to bad facts. (*Id.*)

The circuit court's holding is in error. First, as explained above, Mr. Brown's claim that L.S. was lying about having consented to their sexual intercourse was insufficient to render her prior consistent statements admissible under the Rule 908.01(4)(a)2 exception. *See* ***Peters***, 166 Wis. 2d at 177. Second, the court again constructed a strategy, not wanting to draw attention to bad facts, that Attorney Batt had not offered himself. *See* ***Jenkins***, 355 Wis. 2d 180, ¶36 (quoted sources omitted) (noting that a reviewing court, with the benefit of hindsight, cannot "construct [a] strategic defense which counsel does not offer.") In any event, a proper objection on hearsay grounds would have been made *before* Mueller repeated L.S.'s prior statements. An objection, therefore, would have prevented the jury from hearing those facts again, rather than drawing any attention to them.

Counsel's failure to object to Mueller's testimony prejudiced Mr. Brown. The erroneous admission of Mueller's testimony improperly bolstered L.S.'s credibility about whether or not she consented to the sexual intercourse. Indeed, the prosecutor specifically relied on the fact that L.S. had told consistent statements regarding her sexual assault allegations to Mueller *two times* to bolster her credibility. The prosecutor argued that L.S. was more credible because, among other things, L.S.'s trial testimony "was consistent with her friends, with Officer Mueller and the original interview, with the walk thorough at the scene later..." (128:5-6) This testimony thus inappropriately tipped the scales in favor of L.S.'s credibility and undercut Mr. Brown's credibility and fabrication defense.

D. The cumulative effective of counsel's deficient conduct prejudiced Mr. Brown.

The cumulative effect of the deficiencies in counsel's performance undermines confidence in the outcome of the trial. *See* ***Thiel***, 264 Wis. 2d 571, ¶¶59-61. (prejudice is to be assessed by the cumulative effect of counsel's deficiencies).

Counsel's deficient conduct impacted the crucial issue at trial – whether Mr. Brown or L.S. was telling the truth about L.S.'s consent to their intercourse. The defense theory was that she fabricated having consented the next morning. However, Mr. Brown's testimony to both "what he had done" and "she had done" during their sexual intercourse was missing from the trial. Without this evidence, this jury, who compared L.S.'s and Mr. Brown's contrasting testimony specifically on the "sex act" to reach its verdict, was left to believe that L.S. had not engaged in any overt actions demonstrating her consent. The jury also believed that, because Mr. Brown glossed over the facts of the intercourse act, his claim that L.S. had consented was not credible.

In addition, counsel allowed the State to improperly introduce L.S.'s out-of-court statements to Mueller consistent with her testimony that Mr. Brown sexually assaulted her. This testimony bolstered L.S.'s credibility and, in effect, diminished Mr. Brown's credibility.

Taken together counsel's conduct erroneously and prejudicially tipped the scales in favor of L.S.'s credibility while diminishing Mr. Brown's credibility on the critical issue of consent. The State capitalized specifically on both of counsel's errors in closing argument to emphasize that L.S. was more credible than Mr. Brown. Counsel's deficient conduct unnecessarily damaged Mr. Brown's credibility and allowed the prosecutor to argue that L.S. was more credible than Mr. Brown for reasons that she should not have been able to argue.

This was not an open and shut case for the State. L.S. did not have any physical injuries, did not yell out, call for help or leave her apartment, despite opportunities to do so. She delayed reporting this incident and her words the next morning were that she thought that she had been "taken advantage of." Given that the jury reached its guilty verdict 40 minutes after hearing each of their direct testimony about the "sex act" again, there is a reasonable probability that, but for counsel's deficient conduct, the results of the trial would have been different.

CONCLUSION

For all of the reasons set forth above, Mr. Brown respectfully requests that this Court enter an order reversing the circuit court's order denial of his motion for postconviction relief and granting him a new trial.

Dated this 9th day of February, 2018.

Respectfully submitted,

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WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) The length of the brief is 7,215 words.

WIS. STAT. (RULE) 809.19(12)(f) CERTIFICATION

I certify that the text of the electronic brief is identical to the text of the paper copy of the brief.

Dated this 9th day of February, 2018.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b) and 4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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.

Dated this 9th day of February, 2018.

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