STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1332-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AKIM A. BROWN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DANIEL L. KONKOL PRESIDING AT TRIAL, THE HONORABLE M. JOSEPH DONALD PRESIDING POSTCONVICTON

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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ISSUE PRESENTED

Did Defendant-Appellant Akim A. Brown prove that his trial counsel was ineffective in two respects?

The trial court held, after extensive postconviction evidentiary hearings, that Brown failed to prove deficient performance and prejudice resulting from counsel's failure (a) to ask Brown on the witness stand whether the victim masturbated during the alleged sexual assault, and (b) to object to arguably inadmissible prior consistent statements by the victim to a detective.

This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves review of a routine, fact-specific challenge to the effectiveness of trial counsel. The briefs should adequately address this straightforward issue.

INTRODUCTION

Brown failed to prove deficient performance and prejudice. Brown's trial counsel performed admirably with a difficult client on his hands.

1. Brown failed to prove deficient performance.

a. It was not counsel's fault that Brown failed to follow his directions to testify, as he had earlier told police, that the victim supposedly masturbated during the alleged sexual assault. Brown had every opportunity to so testify, counsel told him to so testify, and Brown indeed boasted in graphic detail on the witness stand how the victim actively participated in and seemed to thoroughly enjoy having consensual sexual intercourse with him.

b. Brown's trial counsel had no reason to object to a detective's testimony recounting the details of the victim's police interview two days after the assault that were consistent with the victim's trial testimony. These were admissible non-hearsay prior statements to rebut Brown's express charge that the victim was motivated to falsely accuse him of sexual assault at trial because she was ashamed and embarrassed about having been seduced by him. They were also admissible non-hearsay prior statements to rebut Brown's implied charge that, based on her supposedly inconsistent prior statements to a close friend and to a police officer, the victim recently fabricated her trial testimony that she did not invite Brown into her home; she only allowed him inside to use the bathroom.

2. Brown failed to prove prejudice.

a. Brown testified in graphic detail how the victim prepared herself for sex, actively participated in sexual intercourse with him in the "missionary" position with her hands and legs around him, and seemed to thoroughly enjoy it, even though he neglected to mention that she also masturbated.

b. If the victim's prior consistent statements to the detective were inadmissible hearsay, they were merely cumulative to her trial testimony and to other properly admitted evidence. Brown was also able to use portions of the victim's statements to the detective, and of her consistent trial testimony, to attack her credibility in support of his defense that she made this all up because she was ashamed about letting Brown seduce her. When one compares the victim's compelling testimony with the rambling, unfocused, and boastful testimony from Brown, it is easy to see why the jury chose to believe her and not him. The jury did not need the victim's prior consistent statements to arrive at that credibility determination.

STATEMENT OF THE CASE

On March 5, 2014, a Milwaukee County jury found Akim A. Brown guilty as charged of one count of second-degree sexual assault. (R. 43; 127:6.) Brown was sentenced to twelve years of initial confinement followed by eight years of extended supervision. (R. 131:20.) The judgment of conviction was entered on May 28, 2014. (R. 51.)

Nearly one-and-one-half years later, counsel for Brown filed a motion for direct postconviction relief (R. 69), and followed that up with a supplemental motion for postconviction relief (R. 80). The trial court held exhaustive *Machner*[1] hearings into the alleged ineffective assistance of trial counsel on August 5, 8, and 9, 2016. Nearly ten months later, on June 2, 2017, the court issued an oral ruling from the bench denying the ineffective assistance challenge. (R. 141.) The court issued a written order denying the motion on June 15, 2017. (R. 115.)

Brown appeals from the judgment of conviction and the order denying direct postconviction relief. (R. 117.)

Statement of Relevant Facts

The trial

Brown gave L.S. a ride home to Milwaukee on Sunday evening, November 24, 2013, after a weekend gathering with friends in Green Bay. According to L.S., when they arrived at her house, Brown asked for permission to use her bathroom, and she agreed. Once inside, Brown went into her bedroom, disrobed, and forced L.S. into an act of penis-vagina intercourse without her consent. (R. 125:81–89; 126:18–20.) According to Brown, L.S. invited him into her home to spend the night, they watched a movie together and had consensual

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

intercourse in her bedroom, after which they both showered and Brown went home around 2 a.m. (R. 126:84–102.)

Several hours later in the early morning of Monday, November 25, 2013, shortly before she went to work, L.S. both texted and called her friend in Green Bay, Elizabeth Simmons, and told her what happened. Simmons apologized profusely for letting L.S. ride home with Brown. (R. 125:76–79, 94.) Simmons confirmed this call at trial. (R. 126:66–69.) Simmons told L.S. to call the police and go to the hospital. (R. 126:73.)

L.S. told a co-worker what happened later that day. (R. 125:94.) L.S. also told the father of her children, who accompanied her to the police station to report the assault the following Wednesday, November 27, 2013. (R. 125:96.)

On cross-examination, L.S. denied that she told Milwaukee Police Officer Barbara Court that she had "invited" Brown into her home. (R. 126:9.) She also denied telling Officer Court that she laid at the foot of the bed while Brown laid at the head of the bed watching a movie. (R. 126:9–10.) According to Elizabeth Simmons, L.S. "invited" Brown into her home only in the sense that she allowed him to use the bathroom. (R. 126:73–74.)

Milwaukee Police Detective Joan Mueller, in Sensitive Crimes, interviewed L.S. on November 27, 2013, and arranged for a sexual assault examination at Sinai Hospital the same day. (R. 125:96–98; 126:14, 33–34, 39.) Detective Mueller summarized the content of L.S.'s November 27 statement describing the assault which was consistent with her trial testimony. (R. 126:33–38, 47–48.) Counsel for Brown did not object to Mueller's summary of L.S.'s statement. According to Mueller, L.S. also became emotional when they did a walk-through of her home after the interview, where L.S. gave a consistent account of what transpired there. (R. 126:40–41.)

Sexual Assault Nurse Examiner Shari Scott examined L.S. on November 27 and described her as scared, exhausted, tearful, and tense. (R. 126:57–59.) Scott said L.S. declined to provide much detail. (R. 126:61.) The parties stipulated that L.S. and Brown had sexual intercourse. (R. 126:49.)

Brown described how he made a pass at L.S. the previous weekend in Green Bay by brushing against her buttocks, and she supposedly told him, "all you got to do is ask for it." (R. 126:81–82.) Brown said they discussed his spending the night with her on the ride home. (R. 126:84–85.)

Brown described the sex act in rather graphic detail, indicating that L.S. took great pleasure in it. He testified that L.S. changed into more comfortable clothes, applied lotion to her body, she climbed into bed with him to watch a movie, and as they made out on the bed, L.S. caressed his body, then lifted her legs into the air and wrapped them around his torso while they were in the "missionary sex position." (R. 126:97.) She playfully told Brown after they were done that "my pussy is sore." (R. 126:98.)

Brown also claimed that L.S. "friend" requested him on Facebook later on. (R. 126:102.) Brown said he did not accept L.S.'s "friend" request because he was not attracted to her. (R. 126:103.) He was only attracted to her "big butt." (R. 126:107–08.)

Brown could not come up with a motive for L.S. to falsely accuse him. (R. 126:109.) Brown also admitted that he had five prior convictions. (R. 126:104.) Brown gave a similar account when interviewed by Milwaukee Police Officer Barbara Court. (R. 126:115–122.)

Brown's theory of defense was that he seduced L.S. and she regretted it the next morning. (R. 125:59–63; 128:14–19; 136:4.) In asking the jury to believe L.S. in this "he said/she said" credibility case, the prosecutor emphasized the lack of any motive for L.S. to falsely accuse Brown of sexual assault,

and L.S.'s consistent accounts in contrast with the inconsistent accounts provided by Brown before and at trial. (R. 128:5–12, 19–24.)

The postconviction proceedings

Postconviction, Brown challenged the effectiveness of his trial counsel, Attorney Douglas Batt, on a number of grounds. (R. 69.) On appeal, Brown challenges Batt's effectiveness on two grounds: (1) Batt failed to ask Brown on the witness stand whether the victim masturbated during the sex act (Brown's Br. 17–23); and (2) Batt failed to object when Detective Mueller summarized the contents of L.S.'s statement about the assault because it was an inadmissible prior consistent hearsay statement (Brown's Br. 23–27).

Attorney Batt testified at the *Machner* hearing that he was aware from discovery that Brown told police the victim held her legs in the air and stroked her clitoris during the sex act. Batt said he discussed this testimony with Brown the night before the trial. (R. 134:86–87.) According to Batt, Brown did not want to speak with him and insisted "that he knew what he had to do." (R. 134:87.) Batt maintained, however, that he discussed this testimony with Brown when they met on March 3rd before trial, and he told Brown to testify about the victim's "fingering herself." (R. 136:30.)

Batt testified that he "forgot" to ask Brown when he testified at trial about whether the victim masturbated. (R. 134:102.) Instead, after he testified that the victim lifted her legs in the air in preparation for sex, Brown then went off on a tangent talking about his own feet. (R. 136:34–35.) Batt testified that he decided not to ask the victim whether she masturbated for fear that she would deny it and the question would alienate the jury. (R. 134:111.)

Attorney Batt acknowledged that he did not object when both Simmons and Detective Mueller repeated the substance of L.S.'s prior consistent statements to them about

the assault. Batt claimed that he had no strategic reason for not objecting on the ground that these were inadmissible prior consistent hearsay statements. (R. 134:118–21.)

Attorney Batt described Brown as a difficult client who would not discuss details with him, tried to run the defense, disagreed over strategy, and would not stay focused. (R. 136:25, 43–44, 50–51.) Specifically with regard to Brown's trial testimony, Batt described how Brown provided minute, insignificant details about what happened before and after the sex act, but not about the act itself. (R. 136:28.) Brown was "difficult to control" on direct examination, veering off topic into "minute detail about every little thing." (R. 136:56.) Batt tried to get Brown to refocus and move on. (R. 136:56–57.) According to Batt, Brown changed and embellished his story at trial. (R. 136:64–65.) Brown's trial testimony supports Batt's assessment. (R. 126:80–110.)

Brown disputed everything Batt had to say when he testified at the *Machner* hearing. (R. 137:18, 26.) Brown denied that they ever discussed the victim's masturbating during the sex act. (R. 137:40, 49.) According to Brown, Batt told him he would ask general questions, and "I should just explain what really took place." (R. 137:28.) Brown insisted that he took the witness stand having "no idea what I needed to say at trial." (R. 137:39, 52.) Brown claimed that he would have testified the victim massaged her clitoris during the sex act, but he was not asked by Batt. (R. 137:64.) Brown acknowledged on cross-examination that he testified at trial that the victim had her legs around his torso and they were in the "missionary position." (R. 138:11–13.)

In its oral ruling denying the postconviction motion, the court determined that Brown failed to prove both deficient performance and prejudice. It adopted the findings of fact and conclusions of law provided by the State as support for its decision. (R. 108; 141:6, A-App. 107.) The court determined

that Brown received a fair trial on the issue whether the victim or Brown was credible. (R. 141:5, A-App. 106.)

STANDARD OF REVIEW

On review of an ineffective assistance of counsel challenge, this Court is presented with a mixed question of law and fact. The trial court's findings of historical fact and credibility determinations will not be disturbed unless they are clearly erroneous. *See* Wis. Stat. § 805.17(2). The ultimate determinations based upon those findings of fact and credibility determinations—whether counsel's performance was deficient and prejudicial—are questions of law subject to independent review in this Court. *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801; *State v. Johnson*, 153 Wis. 2d 121, 127–28, 449 N.W.2d 845 (1990).

ARGUMENT

Brown failed to prove counsel was ineffective because nothing prevented him from testifying that the victim masturbated during the sex act; and Detective Mueller's summary of L.S.'s prior consistent statement to police was admissible or, if not, was non-prejudicial.

A. The applicable law regarding a challenge to the effectiveness of trial counsel

Brown bore the burden of proving that the performance of his trial counsel was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Johnson*, 153 Wis. 2d at 127.

To prove deficient performance, Brown had to overcome a strong presumption that counsel acted reasonably within professional norms. *Strickland*, 466 U.S. at 690; *Trawitzki*, 244 Wis. 2d 523, ¶ 40; *Johnson*, 153 Wis. 2d at 127. There is a strong presumption that counsel exercised reasonable professional judgment, and that counsel's decisions were

based on sound trial strategy. *State v. Maloney*, 2005 WI 74, ¶ 43, 281 Wis. 2d 595, 698 N.W.2d 583. *See Eckstein v. Kingston*, 460 F.3d 844, 848–49 (7th Cir. 2006) (same). Decisions that fall squarely within the realm of strategic choice are not reviewable under *Strickland. United States v. Cieslowski*, 410 F.3d 353, 361 (7th Cir. 2005). *See Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009). "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer*, 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland*, 466 U.S. at 690).

The reviewing court is not to evaluate counsel's conduct in hindsight, but must make every effort to evaluate counsel's conduct from counsel's perspective at the time. *McAfee*, 589 F.3d at 356. Brown was not entitled to error-free representation. Trial counsel need not even be very good to be deemed constitutionally adequate. *Id.* at 355–56. *See State v. Wright*, 2003 WI 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386. Ordinarily, a defendant does not prevail unless he proves that counsel's performance sunk to the level of professional malpractice. *Maloney*, 281 Wis. 2d 595, ¶ 23 n.11.

Regarding prejudice, Brown bore the burden of proving that counsel's errors were so serious they deprived him of a fair trial, a trial whose result is reliable. *Johnson*, 153 Wis. 2d at 127. He had to prove a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *McAfee*, 589 F.3d at 357. *See Trawitzki*, 244 Wis. 2d 523, ¶ 40; *Johnson*, 153 Wis. 2d at 129. Brown could not speculate. He had to affirmatively prove prejudice. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. "The likelihood of a different outcome 'must be substantial, not just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

Trial counsel is not ineffective for failing to interpose meritless objections at trial. *E.g., State v. Harvey*, 139 Wis. 2d

353, 380, 407 N.W.2d 235 (1987); *State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110; *State v. Swinson*, 2003 WI App 45, ¶ 59, 261 Wis. 2d 633, 660 N.W.2d 12.

The reviewing court need not address both the deficient performance and prejudice components if Brown failed to make a sufficient showing as to either one of them. *State v. Mayo*, 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115.

B. Brown failed to prove deficient performance and prejudice in how counsel handled his testimony about the sex act.

1. Brown failed to prove deficient performance.

As discussed above, Brown told police that the victim masturbated during this supposedly consensual sexual encounter. Attorney Batt told Brown on the eve of trial to testify about her masturbating. (R. 136:30.) Brown concedes that Batt told him to testify that the victim masturbated. (Brown's Br. 17.) Brown had every opportunity to do so, but did not mention her masturbating in his testimony. Instead, he went off on tangents and got hung up on insignificant details. He did not focus on what mattered. Brown has no one to blame for that but himself.

Only Brown and L.S. knew what happened in her bedroom that night. Attorney Batt was not there. Attorney Batt told Brown to tell the jury what happened. Batt specifically told Brown to tell the jury about her supposedly masturbating just as he told the police after his arrest. In Brown's own words, Batt said to him, "I should just explain what really took place." (R. 137:28.) In short, based on his discussions with Batt, Brown knew when he took the stand exactly what he was supposed to say. This included telling the jury, as he told police, that the victim masturbated. For

reasons known only to him, Brown left out what he now believes was an outcome-determinative detail. He did not, as directed by Batt, "explain what really took place."

This was not deficient performance. Attorney Batt discussed this with Brown on the eve of trial. (R. 108:3 ¶ 29, A-App. 112 ¶ 29.) Counsel went over Brown's testimony with him before trial and told Brown to tell the jury about the victim's masturbating, just as he had told police. Brown's failure to "just explain what really took place" as he was directed to do by Batt is his own fault. Brown's postconviction claim that he "had no idea what I needed to say at trial" (R. 137:39, 52), is patently incredible especially given his extensive criminal justice experience as reflected in his five prior convictions and a prior sexual assault charge (R. 108:1 ¶ 4, A-App. 110 ¶ 4; 126:104). Brown fails to explain why he knew what to tell the police about the sex act before trial but had no idea what to tell the jury about the sex act at trial. He knew exactly what to tell the jury but chose, against counsel's advice, to veer off on tangents instead.

2. Brown failed to prove prejudice.

In essence, "these facts came out anyway." (R. 108:5 ¶ 4, A-App. 114 ¶ 4.) While he failed to testify that the victim supposedly massaged her clitoris during the sex act, Brown graphically and boastfully described how L.S. changed into more comfortable clothes, applied lotion to her body, and as they made out on the bed, she lifted her legs into the air and wrapped them around his torso while they were in the "missionary sex position." (R. 126:97.) She then, according to Brown, playfully told him after they were done that "my pussy

is sore." (R. 126:98.) Brown also claimed that L.S. "friend" requested him on Facebook thereafter. (R. 126:102.)[2]

This testimony more than adequately got Brown's point across to the jury: L.S. not only consented to sex with him, she thoroughly enjoyed it and actively participated. The fact that L.S. may have also stroked her clitoris as she lifted her legs and wrapped them around his torso in the "missionary sex position" does not add much. It would not create a reasonable probability of an acquittal. It may have, indeed, provoked the prosecutor to call L.S. back to the stand in rebuttal to steadfastly deny that she masturbated or in any way enjoyed this forced and non-consensual intercourse. L.S. specifically testified in the State's case-in-chief that she tried to cross her legs to prevent Brown from having intercourse, but he overpowered her and forced her legs apart before forcing his penis inside her vagina. (R. 126:16.) Had counsel asked Brown whether L.S. massaged her clitoris, it would have only alienated the jury in all reasonable probability.

The jury disbelieved everything else Brown testified to about the victim's consent to and enjoyment of sex with him. His adding that she also masturbated would not have changed the jury's credibility assessment in all reasonable probability. The jury would have found this additional detail every bit as offensive and fabricated by a desperate perpetrator as were all of the other lurid details he provided. That additional self-serving detail, intended by Brown to further besmirch the victim's character, would not have changed the undeniable fact that, as the trial court found, "[t]he credible testimony of the victim in this case is what convicted" Brown. (R. 108:7, A-App. 116.)

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[2] In light of this testimony, Brown's assertion at page 22 of his brief that "the jury did not hear any evidence from Mr. Brown about his and L.S.'s physical actions during their consensual sexual intercourse," is patently false.

C. Brown failed to prove deficient performance and prejudice caused by counsel's failure to object to Detective Mueller's testimony summarizing L.S.'s prior consistent statements.

Brown complains that Attorney Batt should have objected when Detective Mueller summarized L.S.'s statements during her police interview describing the events of that fateful evening. (Brown's Br. 23.) L.S.'s trial testimony was consistent with those statements. The trial court held that Brown failed to prove deficient performance. L.S.'s prior statements to Mueller were admissible "to rebut the defense's theory that the victim was lying." (R. 108:5 ¶ 7, A-App. 114 ¶ 7.)

1. Brown failed to prove deficient performance.

Prior consistent statements are not hearsay and are admissible if they rebut an express or implied charge of recent fabrication or improper influence or motive. Wis. Stat. § 908.01(4)(a)2. The prior consistent statements must predate the alleged recent fabrication or improper influence or motive before they have probative value. *State v. Mainiero*, 189 Wis. 2d 80, 103, 525 N.W.2d 304 (Ct. App. 1994); *State v. Peters*, 166 Wis. 2d 168, 176, 479 N.W.2d 198 (Ct. App. 1991). It is not enough for admissibility that the defendant alleges the victim is lying. "The allegation must be that the fabrication is recent *or based upon an improper influence or motive*." *Peters*, 166 Wis. 2d at 177 (emphasis added).

The defense theory was that L.S.'s accusation of rape was based upon an "improper . . . motive." Detective Mueller's account rebutted the express charge by Brown at trial that L.S. had an improper motive for falsely accusing him: she was seduced by him, she agreed to sex, and she regretted being used by him. L.S. was ashamed and embarrassed, so she

falsely accused Brown of rape. (R. 128:14–19.) L.S.'s prior consistent statements to Detective Mueller two days after the assault that the sex with Brown was forced and without consent made it less likely that she was improperly motivated to falsify her testimony at trial more than five months later.

L.S.'s statements to Mueller also rebutted the implied charge by Brown that L.S. fabricated her trial testimony that she only allowed Brown into her home to use the bathroom. This was implied by Brown from what he claimed were L.S.'s prior inconsistent statements to Elizabeth Simmons on the telephone during the early morning of November 25, and a few days later to Police Officer Barbara Court, that she had "invited" Brown into her home for sex. (R. 126:9, 73–74.) L.S. testified at trial, just as she consistently told Simmons a few hours after the assault (R. 126:73–74), and consistently told Detective Mueller two days after the assault, that she did not "invite" Brown into her home; she only allowed him inside to use the bathroom as he had asked (R. 126:34–35). Attorney Batt was not, therefore, ineffective for failing to object to the unobjectionable. *Harvey*, 139 Wis. 2d at 380; *Berggren*, 320 Wis. 2d 209, ¶ 21.[3]

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[3] Brown's failure to object did not allow the parties and the trial court to ferret out a proper evidentiary theory for admissibility at trial. His failure to object also did not allow the parties and the trial court to determine whether defense counsel wanted some or all of the prior consistent statements to Mueller to come in as support for his theory that L.S. made this all up because, as she admitted to Mueller, she failed to scream, call "911," leave, or resist more robustly. This Court may, however, affirm on any evidentiary or strategic theory that would support the trial court's decision. *E.g., State v. Alles*, 106 Wis. 2d 368, 391, 316 N.W.2d 378 (1982); *Int'l Flavors & Fragrances, Inc. v. Valley Forge Ins. Co.*, 2007 WI App 187, ¶ 23, 304 Wis. 2d 732, 738 N.W.2d 159; *State v. Holt*, 128 Wis. 2d 110, 123–26, 382 N.W.2d 679 (Ct. App. 1985) (the state may argue on appeal any valid ground supported by the record and the law to affirm the trial court's ruling). *See also State*

2. Brown failed to prove prejudice.

Even assuming that counsel should have objected to Mueller's testimony relating L.S.'s prior consistent statements, Brown failed below and fails here to adequately explain why this matters. He barely even tries. (Brown's Br. 25–26.)

Given that her statements to Detective Mueller were consistent with L.S.'s trial testimony, they were merely cumulative to it and to other admissible testimony. The jury properly learned that L.S. reported the sexual assault to police when she was interviewed by Detective Mueller on November 27, who described L.S. as very emotional, crying, and embarrassed. (R. 126:36.) Mueller also properly testified that L.S. was very emotional when she gave a consistent account of what happened to her as they did a walk-through of her home the same day after the interview. (R. 126:40–41.)

Mueller arranged to have L.S. examined at the hospital. This alone supports a strong inference that L.S. gave Mueller a credible account of sexual assault by Brown that was at least similar to her trial testimony, otherwise Mueller would not have arranged for her to have a sexual assault examination. When she went in for the examination, the nurse (Scott) observed L.S. to be scared, exhausted, tearful, and tense. (R. 126:57–59.). This also supports a reasonable inference that L.S. was sexually assaulted by Brown, as she would later testify at trial.

Mueller's account of what L.S. told her was also cumulative to the testimony of Elizabeth Simmons describing

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v. Mares, 149 Wis. 2d 519, 527 n.2, 439 N.W.2d 146 (Ct. App. 1989) ("We are not bound by the trial court's determination that the [prior consistent] statements were admissible to rebut motive to falsify. If the trial court reached the correct result for the wrong reason, we may affirm.").

L.S.'s text messages and telephone call to her reporting the sexual assault early on November 25, a few hours after Brown left and just before L.S. went to work. Brown no longer objects to the admission of Simmons's prior consistent account of what L.S. told her.

More important, Brown was able to use much of what L.S. told Detective Mueller, and consistently testified to at trial, to his advantage. Both in her trial testimony, and in her earlier statement to Detective Mueller, L.S. admitted that she did not scream out, call "911," try to flee, hit Brown, leave, or seek help while Brown was taking a shower after the assault, or go to the police until two days later. She suffered no physical injuries. ((L.S.'s trial testimony) R. 25:88, 92–94, 99; 126:11, 17; (Mueller's trial testimony) R. 126:37–38, 40.) According to Mueller, L.S. told her that she resisted Brown, "but in a sense cooperated." (R. 126:40.) Attorney Batt pointed this all out in closing argument to the jury (R. 128:14), to support his theory that L.S. was seduced by Brown and was ashamed of herself when she woke up the next day. This, counsel argued, is what motivated her to falsely accuse Brown at trial. (R. 128:18–19.)[4]

There is no reasonable probability of a different outcome if Mueller were allowed only to testify that L.S. reported being sexually assaulted by Brown, Mueller took a statement from her without going into detail about what she said, L.S. was crying and embarrassed, Mueller arranged for

[4] Brown, indeed, relies on these very same points in his brief to support his argument that this was not "an open and shut case." (Brown's Br. 27.) Detective Mueller's prior consistent testimony on those very points was, therefore, beneficial to his defense. That is likely why counsel did not object.

her to have a sexual assault examination, and L.S. was very emotional during the walk-through at her home later on.

When one compares the quality of L.S.'s trial testimony with that of the unfocused and boastful Brown, it becomes quite clear why the jury chose to believe her and not him. It did not need L.S.'s consistent statements to Detective Brown to make that determination.[5] Brown failed to prove a reasonable probability of an acquittal without L.S.'s consistent statements to Mueller. *See Mainiero*, 189 Wis. 2d at 103–04 (erroneous admission of the victim's prior consistent statement in a sexual assault case, where the outcome "hinged on who the jury ultimately believed," was harmless).

Finally, Brown's tag-end argument that the cumulative effect of counsel's two errors requires reversal is specious. (Brown's Br. 26–27.) Most errors by counsel will not have a cumulative effect sufficient to undermine confidence in the outcome. *State v. Thiel*, 2003 WI 111, ¶ 61, 264 Wis. 2d 571, 665 N.W.2d 305. Each alleged error must fall below the objective standard of reasonableness to be included in the cumulative prejudice calculus. *Id.* Brown failed to prove that either of counsel's alleged two errors fell below the objective standard of reasonableness or that they had a cumulative effect sufficient to undermine confidence in the outcome. "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

[5] The jury asked during deliberations that the direct testimony of L.S. and Brown describing the sex act be re-read. The court did so. (R. 128:34–35; 127:3–4.) The jury also asked for and received a copy of the text messages sent between L.S. and Elizabeth Simmons. (R. 128:31.) The jury did not ask that Detective Mueller's testimony summarizing L.S.'s consistent statements also be re-read.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 27th day of April, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,063 words.

Dated this 27th day of April, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

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

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

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

Dated this 27th day of April, 2018.

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DANIEL J. O'BRIEN
Assistant Attorney General