STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP786-CR, 2018AP787-CR, & 2018AP788-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HARVEY A. TALLEY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE M. JOSEPH DONALD AND THE HONORABLE CAROLINA STARK, PRESIDING.

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED

At Defendant-Appellant Harvey A. Talley's trial on several charges, including first-degree sexual assault resulting in pregnancy, the victim testified that she actually consented to sex with Talley and that her prior statement to the police that Talley raped her was a lie. Was Talley's trial counsel ineffective for failing to ask the victim why she initially lied to the police or to explain why she gave conflicting statements?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties have fully developed the arguments in their briefs, and the issue presented involves the application of well-settled legal principles to the facts.

INTRODUCTION

A jury found Harvey A. Talley guilty of eight crimes, including first-degree sexual assault, causing pregnancy, of AD, a 16-year-old girl, contrary to Wis. Stat. § 940.225(1)(a). At trial, AD testified that she got pregnant after she had consensual sex with Talley and that she initially lied to police by claiming that Talley raped her. The jury also heard testimony that AD had recanted her accusation in statements to her mother, police officers, the prosecutor, and a defense investigator.

Talley asks this Court to vacate his conviction for first-degree sexual assault causing pregnancy. He contends that his trial counsel was ineffective for failing to ask AD why she

initially lied to the police or the reasons for her conflicting statements. Like the circuit court, this Court should reject Talley's ineffective assistance of counsel claim because he did not prove that his trial counsel's performance was both deficient and prejudicial.

SUPPLEMENTAL STATEMENT OF THE CASE

I. Procedural background

The State charged Talley in three separate cases that the circuit court joined for trial. (R. 81:3.)[1]

In case number 2015CF1502, the State charged Talley with two crimes. In Count One, it charged him with first-degree sexual assault. It alleged that Talley had sexual intercourse with AD without her consent and that it caused her pregnancy, contrary to Wis. Stat. 940.225(1)(a). In Count Two, it charged Talley with sexual intercourse with a child,

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[1] This consolidated appeal involves three circuit court cases and three corresponding records. Appeal number 2018AP786 relates to Milwaukee County Circuit Court case number 2015CF1502. The State will refer to the record on appeal in this case as follows "(R. _:_.)" All references to the record are to the record in this case unless otherwise indicated.

Appeal number 2018AP787 relates to Milwaukee County Circuit Court case number 2015CM1221. When the State refers to the record in this case, it will do so as follows: "([2018AP787] R. _:_.)."

Appeal number 2018AP788 relates to Milwaukee County Circuit Court case number 2015CM1276. When the State refers to the record in this case, it will do so as follows: "([2018AP788] R. _:_.)."

AD, who was age 16 or older, contrary to Wis. Stat. § 948.09. (R. 1:1.)

In case number 2015CM1221, the State charged Talley with two crimes. In Count One, it charged him with battery with the domestic abuse enhancer, contrary to Wis. Stat. § 940.19(1). In Count Two, it charged Talley with disorderly conduct with the domestic abuse enhancer, contrary to Wis. Stat. § 947.01. ([2018AP787] R. 1:1.) The complaint alleged that TG, who is AD's mother, was the victim of both the battery and disorderly conduct. TG claimed that Talley threatened to kill her and her daughter and that he punched her without her consent. ([2018AP787] R. 1:1–2.)

In case number 2015CM1276, the State charged Talley with four counts of misdemeanor intimidation of a person acting on behalf of a victim, contrary to Wis. Stat. § 940.44(2). ([2018AP788] R. 1:1–2.) According to the complaint, after Talley was arrested for the offenses against AD and TG, he made four separate calls to TG from the jail. In the calls, Talley attempted to dissuade TG, who was acting on AD's behalf, from causing a complaint to be prosecuted. ([2018AP788] R. 1:2–8.)

II. Talley's trial[2]

The opening statements. In the State's opening statement, the prosecutor told the jury about AD's initial report to the police that Talley forcibly assaulted her without consent and that the assault resulted in her pregnancy. (R. 86:126–28.) The prosecutor acknowledged that AD had

[2] Because Talley only asks this Court to vacate his conviction of first-degree sexual assault, the State focuses primarily on the trial testimony related to Talley's conviction for this offense. (Talley's Br. 18–19.)

provided the police with different versions of what happened and informed the jury "I'm not certain what she's going to say exactly on the witness stand." (R. 86:127.)

In Talley's opening statement, trial counsel told the jury about AD's different versions of what happened. AD first told the police that Talley came into her room and "raped" her without her consent. (R. 86:135.) Days later, AD told the police that what she said about Talley raping her was not "exactly true." (R. 86:136.) She told the police that Talley was high on substances and that she had sex with him when he was unconscious or sleeping. (R. 86:136.)

Trial counsel noted that AD made additional statements to others, including her mother, TG. AD later told TG that she lied when she said that Talley raped her or that he was unconscious when they had sex. AD told TG that she consented to sex with Talley and that her child belonged to him. (R. 86:136.) Trial counsel also told the jury that AD said that she "made up the rape story for fear of repercussions that would come from revealing." (R. 86:137.) Trial counsel also noted that AD later told the district attorney and a police officer that she had lied about the rape and that the act was consensual. (R. 86:137.) While trial counsel disputed the other charges, he emphasized that the trial's main focus "[w]as that act consensual that conceived this child? The truth is through these versions . . . is that it indeed was a consensual sex act." (R. 86:138.)

The trial testimony. AD testified that Talley is the father of her child. (R. 86:140–41.) Asked to explain how Talley impregnated her, AD responded, "We had sex. We agreed on it. He did not rape me." (R. 86:141.) AD said that they had sex several times on different days at her house when TG and AD's younger sister were not there. (R. 86:141–42.) She said that she was 16 years old when she and Talley had sex. (R. 86:143.)

AD admitted that she first told TG that a neighbor is the father of her child. (R. 86:146.) Shortly after TG and Talley got married, AD told TG that Talley raped her. (R. 86:147.)

AD testified that she told Officer Brown that Talley entered her bedroom and raped her. (R. 86:148.) AD admitted telling Brown that Talley tried to take her clothes off; that when AD asked Brown what he was doing, Talley did not respond; that she tried to push Talley away and get him to stop; that he pulled down his pants and underwear after he took off her clothes; that Talley got on top of her and put his penis in her vagina; that she did not consent; that it lasted five to ten minutes before Talley ejaculated inside of her; that when she told Talley to stop, he replied, "Be still"; after they finished, Talley told her, "You better not tell nobody, or I'm going to kill you"; and that she did not tell anyone the truth about what happened because she was afraid of Talley. (R. 86:148–151.) AD also acknowledged later receiving a call from Talley, who told her, "Me and my guys are going to be over there in the morning, and we are going to kill y'all." (R. 86:151–52.) Officer Brown confirmed the details that AD provided in her initial statement, including her claim that she did not consent and that Talley later threatened her and her family. (R. 87:24–28.)

AD testified that her statement to Officer Brown was a lie. (R. 86:152.) A couple days after she spoke to Brown, she gave a different statement to Officer Louise Bray. (R. 86:152–53.) AD told Bray that Talley was high on Xanax; that she got on top of him and had sex with him; and that he never woke up. (R. 86:153.) AD said that she told the officers this story after she found a text on her mother's phone in which her mother told Talley that she loved Talley more than she loved her kids. (R. 86:153–54.)

Officer Bray testified that she spoke to AD on April 7, 2015, because AD wanted to recant. (R. 87:92.) AD explained that she was angry with her mother because her mother told Talley that she loved Talley more than her children. (R. 87:93.) AD claimed that she wanted to get back at her mother. When Talley passed out on Xanax, AD says that she had sex with him until he ejaculated. (R. 87:93.) AD also told Bray that Talley was like a father figure before this sexual encounter. (R. 87:94.)

AD testified about a second statement to Officer Brown on the Monday before trial. (R. 86:155.) AD testified, "I told him the truth—that I wasn't raped." (R. 86:154.) Brown confirmed that AD made a second statement to him before trial and that AD told him that what she first told him did not happen. (R. 87:30–31.) According to Brown, AD said that she willingly had sex with Talley and that this was the truth. (R. 87:31–32.)

On cross-examination, AD said that she told her mother that Talley did not rape her and that the sex was consensual. (R. 86:156.) AD also told a defense investigator that she made up the rape story; that she had unprotected sex with Talley two or three times; and that Talley did not initiate the sexual activity, but it just happened. (R. 86:157–58.) AD also told representatives from the district attorney's office and Officer Brown that the rape story was not true and that she then told the truth, i.e., that the sex was consensual. (R. 86:158–59.)

TG testified that Talley had a fatherly relationship with her daughters. (R. 86:163.) TG said that she married Talley several months after AD had her baby. (R. 86:164.) When AD got pregnant, she told TG that the father was a boy who had moved out of state. TG did not discover that Talley was the father until the DNA test came back. (R. 86:164.) Shortly after Talley and TG married, AD told TG that Talley raped her. (R. 86:166.) Talley told TG that he did

not rape AD, and TG continued to have contact with him. (R. 86:167.)

TG denied that Talley had ever threatened her when she confronted him about the rape allegation. But TG could not remember if Talley ever threatened AD. (R. 86:171–72, 174–75.) TG recalled that when AD told Talley that he raped her, Talley responded that she did not get raped. (R. 86:174.) TG also said that Talley did not want AD's baby to get swabbed for a DNA test. (R. 86:179.)

When the prosecutor asked TG about four telephone calls between her and Talley, TG could not remember what she said other than Talley asked her whether she would fix the situation for him. (R. 86:181.) The day after Talley and TG spoke, AD asked TG to take her to the district attorney's office. AD told TG that she had sex with Talley when he was unconscious because he had taken Xanax. (R. 86:182.)

On cross-examination, TG said that she did not believe AD's statement that she had sex with Talley when he was asleep. (R. 87:10.) AD later told TG that the sex was consensual. TG testified that AD "apologized to me . . . [f]or betraying me." (R. 87:11.)

Officer Brown testified to TG's April 4, 2015, statement about Talley impregnating AD. (R.87:15, 20.) TG told Brown that AD confronted Talley with the rape accusation in March, after TG and Talley got married. (R. 87:20.) TG told Brown that Talley denied raping AD and that Talley got upset when TG told him that her granddaughter looked like him. (R. 87:21.) Brown recalled TG telling him that Talley would "kill y'all" if the police got involved. (R. 87:22.)

Wauwatosa police officer Travis Machalk testified that while he was on patrol on April 4, 2015, he saw TG, seated in her car, arguing with Talley who was standing outside the car. (R. 87:42–43.) Talley told Machalk that he and TG were

arguing because TG accused him of sleeping with TG's daughter and having a child. (R. 87:44.) Talley denied having sex with AD and offered to take a DNA test. (R. 87:44–45.)

Officer Gary Post testified that when he arrested Talley on April 4, 2015, Talley told him that everyone was "lying on him." (R 87:35, 38.) Talley said that his wife's daughter had a child, that they were blaming him, and that he is willing to give his DNA. (R. 87:39.) Talley later said that if he had had sex with AD, then it was because he was "messed up on Xanax" and could not remember things. (R. 87:39.)

Milwaukee police detective Tim Behning testified that he interviewed Talley concerning AD's allegations that he assaulted her and impregnated her. (R. 87:62–63.) Talley told Behning that he did not remember having sexual intercourse with AD because he drinks alcohol and consumes drugs on a daily basis. Talley said that AD told him that the baby might be his and that when he saw the baby, he believed that it was his child. (R. 87:64.)

The jury also viewed portions of Talley's interview. (R. 87:66–68.)[3] In the recording, Talley said that he did not remember having sex with AD, but that if they did, it was when he was taking Xanax. (R. 87:66; Ex. 3:15m:27s–15m:43s, 19m:46s–52s, 31m:08s–27s, 34m:24s–35s.) When asked if AD's baby was his, Talley replied, "not to my

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[3] The DVD of Talley's interview appears in the record as a non-electronic item marked as Exhibit 3. The prosecutor referenced portions of the transcripts played by the time appearing on the video player's counter and not the time stamp embedded on the video itself. (R. 87:66–67; Ex. 3.) The DVD includes two video files. Portions of both were played for the jury. The video clips referenced above appear in the first video file.

knowledge" but that the baby had the same characteristics as his other children. (R. 87:67; Ex. 3:28m24s–47s.)

Milwaukee County Sheriff's Deputy Dennis O'Donnell testified that he reviewed records that reflected that Talley was an inmate in the jail between April 4, 2015, and April 6, 2015. (R. 87:70.) O'Donnell described how inmates make phone calls from the jail using an assigned identification number and how the number is used to track an inmate's recorded calls. (R. 87:74–75.) The State introduced a CD containing recordings of four calls and transcripts of those four calls. (R. 23; 24; 25; 26).[4]

Milwaukee County District Attorney's Office investigator Thomas Boehlke reviewed the CD and the transcript of the four jail calls. (R. 87:80.) Based on his investigation, Boehlke believed that the four calls were between Talley and TG. (R. 87:81–82.)

The jury heard portions of Talley's phone calls. (R. 87:83–87.) In the portion of the first call, Talley asked TG whether the police took DNA from AD's child and repeatedly asked TG if she could "fix" it. (R. 23:1; 24:1; Ex. 1; 87:83–84.) Talley said "They cannot DNA test that baby . . . If you let them take DNA tests, I'm going to prison." (R. 23:2.) Talley suggested to TG that she should take a different baby for the DNA test. (R. 23:6.) In a second call, Talley told TG to "fix this lie" and asked her what time she would talk to the "DA." (R. 24:1–2; 87:84.) In the third call, Talley told TG to make sure that she talked to those "people" at "8:30" to "fix" this. (R. 25:1, 3; 87:85.) In the fourth call, Talley repeatedly asked

[4] The CD of the jail recordings appears in the record as a non-electronic item marked as Exhibit 1. The CD includes four mp3 files. (Ex. 1.) The jurors were provided with transcripts as each recording was played. (R. 87:83–86.)

TG to "fix" things and told TG that "they can't find the people. They subpoena." (R. 26:2–3.)

The parties stipulated that DNA samples were collected from Talley, AD, and AD's child and that the child's DNA profile is consistent with being the biological child of Talley and AD. (R. 22:2; 87:96–97.)

Trial counsel's closing argument. In his closing argument, trial counsel did not dispute that Talley was the father of AD's child. (R. 88:50, 59.) But trial counsel argued that Talley's paternity did not prove that AD did not consent. (R. 88:51, 59.) Trial counsel emphasized that everyone in the household knew that Talley was the father of AD's child for months and that it was not reported as a rape until Officer Machalk intervened in a dispute between Talley and TG. (R. 88:54.) Trial counsel argued that AD's story about having sex with Talley while he was on Xanax was not truthful and that even TG knew it was not truthful. (R. 88:56.) Trial counsel emphasized that AD was unable to tell the truth because of the difficulties in admitting to her mother that she betrayed her by sleeping with her boyfriend. (R. 88:56–57.)

Jury verdict. The jury found Talley guilty of first-degree sexual assault, sexual intercourse with a child age 16 or older, battery, disorderly conduct, and four counts of intimidation of a person acting on behalf of a victim. (R. 28:1–8; 88:71–73.)

With respect his conviction on the first-degree sexual assault charge, the circuit court sentenced Talley to a 16-year term of imprisonment consisting of an eight-year term of initial confinement and an eight-year term of extended supervision. (R. 37:1.) With respect to the seven other misdemeanor convictions, the circuit court ordered those sentences to be served concurrently with Talley's sentence on the first-degree sexual assault charge. (R. 37:1.)

III. Talley's postconviction motion

Talley moved for postconviction relief on the ground of ineffective assistance of counsel. (R. 56.) He alleged that his trial counsel's cross-examination of AD was deficient and prejudicial because trial counsel did not elicit testimony favorable to his client's defense of consent to the charge of first-degree sexual assault. (R. 56:11–12.)[5]

At the postconviction hearing, trial counsel testified that he had practiced criminal law for 33 years. (R. 90:11.) He had extensive experience trying cases, including sexual assault cases. (R. 90:11–12.) He also had trial experience handling cases with recanting sexual assault victims. (R. 90:12.)

Trial counsel testified that he offered a consent defense to the first-degree sexual assault charge. (R. 90:4–5.) He recalled AD's three different pretrial statements about how she got pregnant: first, that Talley raped her; second, that she initiated sex with Talley when he was comatose; and third, that she and Talley had consensual sex. (R. 90:5, 13.)

Trial counsel had an investigator interview AD before trial. (R. 90:5.) AD told the investigator that she made up the rape story because TG would be angry about the sexual relationship that AD had with Talley. (R. 71:1; 90:6.) AD said that she told the truth because she wanted "to rid herself of guilt." (R. 71:1.)

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[5] Talley contended that he would have accepted the State's plea offer but declined to do so because his trial counsel was ineffective for misrepresenting Talley's chance of success at trial. (R. 56:15–20.) The circuit court rejected this claim. (R. 91:14–15.) Talley does not seek review of the circuit court's determination of this claim. (Talley's Br. 12 n.3.)

Trial counsel could not remember why he did not ask AD why she made up her original story. (R. 90:7.) He could also not recall why he did not ask AD about coming forward with "the truth" to "rid herself of guilt." (R. 90:7–8.) Trial counsel speculated that he "didn't know what was going to come out of her mouth at trial despite what I have in my investigator's report . . . I was not sure what [AD] was going to say and I didn't want to impeach her on that, if I had to." (R. 90:8.) He further explained, "I just wasn't sure what exactly, despite what she had told our investigator, what version would eventually come out." (R. 90:13.)

After making several factual findings (R. 91:2–10), the circuit court rejected Talley's ineffective assistance of counsel claim (R. 91:13). The circuit court did not decide whether trial counsel's failure to ask AD specific questions constituted deficient performance. (R. 91:10–11.) Instead, it rejected Talley's ineffective assistance claim because trial counsel's alleged errors did not prejudice Talley. (R. 91:11–12.) Based on its assessment of the trial evidence, the circuit court determined that there was no reasonable probability "that the jury's verdict would have been different if A.D. testified that she initially lied so that her mom wouldn't be mad at her [or] if A.D. testified that she finally told the truth to rid herself of guilt." (R. 91:13.)

Talley appeals.

ARGUMENT

Talley has not proven that his trial counsel was ineffective for failing to ask AD why she gave different statements about whether she consented to sex with Talley.

A. Standard of review

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Carter*, 2010 WI 40,

¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. "The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact" that this court will not overturn unless they are clearly erroneous. *State v. Breitzman*, 2017 WI 100, ¶ 37, 378 Wis. 2d 431, 904 N.W.2d 93 (citations omitted). Whether trial counsel was ineffective, including whether counsel's performance was deficient and whether any deficient performance prejudiced a defendant, presents a legal question that this Court independently reviews. *Id.* ¶¶ 37–39.

B. General legal principles

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee a criminal defendant the right to effective assistance of counsel. *State v. Lemberger*, 2017 WI 39, ¶ 16, 374 Wis. 2d 617, 893 N.W.2d 232.

A defendant alleging ineffective assistance of trial counsel has the burden of proving both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the defendant fails to establish one prong of the test, the court need not address the other. *Id.* at 697.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Strickland*, 466 U.S. at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id.* at 690. In assessing the reasonableness of counsel's performance, a reviewing court should be "highly deferential," making "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Strickland*, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the defendant must demonstrate "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. "'Reasonable probability' is tied to confidence in the outcome." *State v. Sholar*, 2018 WI 53, ¶ 45, 381 Wis. 2d 560, 912 N.W.2d 89. Thus, when a court assesses prejudice, it is concerned with "whether the error rendered the trial unfair and unreliable." *Id.* ¶ 33.

C. Talley did not prove that his trial counsel's performance was deficient.

Over two years passed between Talley's jury trial and his postconviction hearing. (R. 85–88; 90.) Trial counsel did not independently recall why he did not ask AD why she first told the police that she was raped and later said that she and Talley had consensual sex. (R. 90:6–7.) But trial counsel's failure to recall why he did not cross-examine AD about why she first claimed that Talley forced himself on her or why AD later said it was consensual does not preclude this Court from deciding that trial counsel's performance was not deficient.

As this Court has explained, its "function on appeal is to determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms." *State v. Kimbrough*, 2001 WI App 138, ¶ 31, 246 Wis. 2d 648, 630 N.W.2d 752. This Court can determine whether "defense counsel's performance was objectively reasonable, even if trial counsel offers no sound strategic reasons for decisions made." *State v. Honig*, 2016 WI App 10, ¶ 24, 366 Wis. 2d 681, 874 N.W.2d 589 (citing *State v. Koller*, 2001 WI App 253, ¶ 53, 248 Wis. 2d 259, 635 N.W.2d 838). Thus, even when trial counsel cannot articulate "a factual basis for a reasonable strategic decision" due to a "failure of memory," this Court may still determine whether trial counsel was deficient "based on all of the information available to counsel at the time." *Id.* ¶ 28.

Talley's trial counsel candidly acknowledged that he could not recall why he did not ask AD questions related to why she lied when she said that she was raped, i.e., to avoid angering her mother, or why she later claimed that the sex was consensual, i.e., to rid herself of the guilt. (R. 90:7–8.) But counsel speculated that he did not ask AD these questions because he was not sure what AD would say and did not want to impeach her. (R. 90:8, 13.) The record supports trial counsel's decision to limit his questioning of AD.

Before trial counsel cross-examined AD, the jury knew that AD gave three remarkably different stories about what happened. First, AD told her mother and then the police that Talley raped her. (R. 86:147–48.) Second, just days later, she said that she had sex with Talley when Talley's use of Xanax rendered him unconscious. (R. 86:152–53.) AD claimed that she made this second statement after she found a text message in which her mother said that she loved Talley

more than her children. (R. 86:153–54.) Third, months later, AD told an officer that the sex was consensual. (R. 86:154–55.)

At trial, AD insisted that Talley did not rape her and that the sex was consensual. (R. 86:141.) On cross-examination, AD reiterated Talley did not rape her and that the sex was consensual. (R. 86:156.) AD also told her mother, a defense investigator, the prosecutor, and a police officer before trial that she made up the rape story and that she consented to sex with Talley. (R. 86:156–59.)

Trial counsel acted in an objectively reasonable manner by limiting his examination of AD after she testified unequivocally that Talley did not rape her and that she consented to sex with him. Questioning an unpredictable witness like AD about her motives for her different statements was potentially risky and an unanticipated answer could have undermined AD's trial testimony that reinforced Talley's consent theory of defense.

Rather than eliciting testimony about AD's motives from AD, trial counsel used other witnesses to explain why the jury should believe AD's most recent statements that she consented. TG testified that she did not believe AD's statement about having sex when Talley when he was asleep. (R. 87:10.) According to TG, she told AD that she would listen to AD when AD is ready to tell the truth about everything. (R. 87:10.) TG testified that months later, AD came forward and told her that the sex was consensual. TG also said that AG apologized for betraying her for having sex with Talley behind her back. (R. 87:11.)

In his closing statement, trial counsel emphasized that AD was unable to tell the truth because of the difficulties in admitting to her mother that she betrayed her by sleeping with her boyfriend. (R. 88:56–57.) Trial counsel's

development of AD's motives for her initial statements through TG's trial testimony rather than AD's constituted an objectively reasonable trial strategy entitled to deference.

Based on this record, Talley has failed to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness; therefore, it did not constitute deficient performance.

D. Talley did not prove that his trial counsel's performance prejudiced his defense.

Talley contends that his trial counsel's failure to adequately cross-examine AD prejudiced his defense that AD engaged in consensual sex with Talley. (Talley's Br. 17.) Based on its assessment of the trial evidence, the circuit court determined that there was no reasonable probability "that the jury's verdict would have been different if A.D. testified that she initially lied so that her mom wouldn't be mad at her [or] if A.D. testified that she finally told the truth to rid herself of guilt." (R. 91:13.) The record supports the circuit court's determination that trial counsel's alleged errors did not prejudice Talley. (R. 91:11–12.)

The record unequivocally demonstrates that Talley had sex with AD. In her testimony and her different statements to authorities, AD said that she had sex with Talley. (R. 86:141, 148, 153–54.) The undisputed DNA results confirmed that Talley was the biological father of AD's child. (R. 22:2; 87:97.) While he did not recall having sex with AD, Talley told a detective that he believed that the child was his when he saw it. (R. 87:64.) Given that Talley had sex with AD, trial counsel appropriately focused Talley's defense on the element of consent.

The jury had good reason to carefully assess AD's credibility. It knew that its decision on the first-degree sexual assault charge turned on the credibility of AD's first

statement to authorities that she did not consent to sex. In the State's opening statement, the prosecutor acknowledged AD's recantation and conceded that did not know "what she's going to say exactly on the witness stand." (R. 86:127.)

Similarly, Talley's trial counsel went through AD's different recantation statements that followed her initial statement that Talley raped her. (R. 86:135–36.) Trial counsel noted that AD was motivated to "[make] up the rape story for fear of repercussions that would come from revealing." (R. 86:137.) While trial counsel did not concede Talley's guilt on the other charges, he emphasized Talley's theory of defense that AD's child was conceived through a consensual sex act. (R. 86:138.)

AD placed her credibility at issue when she told the jury that she and Talley "had sex. We agreed on it. He did not rape me." (R. 86:141.) AD admitted initially telling her mother and Officer Brown, who first interviewed her, that Talley raped her. (R. 86:147–48.) AD also admitted that just days after she spoke to Officer Brown, she told Officer Bray that she willingly had sex with Talley after he passed out from using Xanax. (R. 86:153.) AD claimed that she had sex with Talley because she was angry with her mother because her mother said that she loved Talley more than her children. (R. 86:153–54; 87:93.) Finally, days before Talley's trial, AD told Officer Brown "the truth—that I wasn't raped." (R. 86:154; 87:31–32.) AD confirmed on cross-examination that she lied about being raped, that the sex was consensual, and that she told this to her mother, a defense investigator, staff from the prosecutor's office, and Officer Brown. (R. 86:156–58.) Officer Brown and Officer Bray confirmed AD's testimony that AD had recanted the rape allegations before trial. (R. 87:30–31, 93–94.)

In assessing the credibility of AD's initial complaint that she did not consent to sex, the jury could certainly

consider the detail that she provided in her statement to Officer Brown. On direct examination, AD acknowledged the details that she provided to Officer Brown in her first statement, which she later claimed was not true. (R. 86:148–51.) Officer Brown confirmed those details when he testified to AD's prior inconsistent statement. (R. 87:24–28.)

In contrast, AD's subsequent statement to Officer Bray about initiating sex with Talley when he was high on Xanax was so far-fetched that even her mother, TG, did not believe it. (R. 87:10.) Similarly, when AD testified that she agreed to have sex with Talley and that he did not "rape" her, AD was unable to provide details about the frequency of the sexual activity or the circumstances. (R. 86:141–42.) For example, when AD described the first time that it happened, she said that "we started kissing and it just happened." (R. 86:144.)

As part of its assessment of AD's credibility, the jury evaluated the detail that she provided in each statement. Her initial statement to the police was far more detailed than the information that she provided in her subsequent statements or her trial testimony. It is unlikely that the jury would have reached a different conclusion regarding the truthfulness of AD's first statement had trial counsel asked her why she gave different statements.

In advancing his prejudice claim, Talley focuses almost exclusively on the inconsistencies in AD's statements without addressing the other substantial evidence that contributed to his conviction. (Talley's Br. 17.) The evidence included Talley's post-arrest statement to the police and his jail calls to TG.

For example, AD's April 7, 2015, statement about having sex with Talley when he was under the influence of Xanax was consistent with Talley's post-arrest statements to the police. Talley told the arresting officer that he did not

"remember things," but if he had sex with AD it was because "he was messed up on Xanax." (R. 87:39.) After Talley was arrested on April 4, 2015, he told a detective that he did not remember having sex with AD because he drinks and consumes drugs on a daily basis. (R. 87:61, 64.)

Further, AD relayed her Xanax version of events to investigators just days after Talley made a series of jail calls to TG imploring her to "fix" things. (R. 23; 24; 25; 26.) In the first call, Talley wanted to know whether DNA had been taken from AD's child, and he told TG to take a different baby "if they want some DNA." (R. 23:1, 6.) These jail calls formed the basis for Talley's four guilty verdicts for intimidation of person who was acting on behalf of a victim. (R. 28:5–8.) Based on the sequence of events, including AD's initial report that Talley threatened to kill her (R. 86:150–51), the jury could reasonably determine that AD's recantation of the rape allegation just days after her original statement was the product of the pressure that Talley placed on AD through TG.

While Talley insisted at trial that AD's third version of what happened was the truth, i.e., the sex was consensual, it was inconsistent with Talley's post-arrest version of events. Talley insisted that if he had sex with AD, he does not remember because he was taking Xanax. (R. 87:39, 66; Ex. 3:15m:27s–15m:43s, 19m:46s–52s, 31m:08s–27s, 34m:24s–35s.) This inconsistency between his post-arrest statements and AD's third version of events undermined the credibility of Talley's trial defense that AD consented to sex with Talley.

In asserting that his trial counsel's performance prejudiced him, Talley also highlights a jury question that arose during deliberations. (Talley's Br. 18.) The jury asked whether a 16 year old could "consent to a sexual affair with an adult." (R. 27:2.) The jury did nothing more than ask a

legal question that clarified one of the differences between the two charged sex offenses: first-degree sexual assault and sexual intercourse with a child age 16 or older. The circuit court answered this question, directing the jury to "[r]eview the elements of Count 1, and review the elements of Count 2. Consent is not an element of Count 2." (R. 27:2.) On this record, it is speculative at best to suggest that the jurors asked this question because they were struggling over whether AD consented in fact. Instead, based on the juxtaposition of the first-degree sexual assault charge that is not age dependent but focuses on consent against the charge of sexual intercourse with a child 16 years or older, the jury was likely wondering whether there were any circumstances in which a 16-year-old could consent to sexual intercourse with an adult.

Talley has not proved prejudice because there is no reasonable probability that he would have been acquitted of the first-degree sexual assault charge had his trial counsel asked the cross-examination questions he, in hindsight, thought he should have asked. Trial counsel's failure to ask AD why she lied and why she later told the truth simply did not prejudice Talley's defense at trial. Even if AD had answered these questions at trial, her answers would not have been adequate to overcome other damning evidence including the DNA test results, Talley's own preposterous statements during his interrogation, and his emotional pleas to TG during the jail calls. On this record, the circuit court correctly decided that trial counsel's allegedly deficient performance did not prejudice Talley.

CONCLUSION

This Court should affirm Talley's judgment of conviction on the first-degree sexual assault charge and the circuit court's order denying postconviction relief.

Dated this 26th day of September, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,222 words.

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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. § 809.19(12).

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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 26th day of September, 2018.

_____
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