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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 18-AP-001144-CR

v.

Circuit Court No. 13-CF-001753

KEVIN B. HUTCHINS

Defendant-Appellant.

APPEAL BRIEF OF DEFENDANT-APPELLANT KEVIN B. HUTCHINS

APPEAL OF THE JUDGMENT OF CONVICTION IN CIRCUIT COURT, MILWAUKEE COUNTY, THE HONORABLE DAVID BOROWSKI AND CAROLINA STARK PRESIDING

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Defendant-Appellant, Kevin B. Hutchins ("Hutchins"), submits that the issues for appeal are:

1. **Did the trial court err in admitting references to prior acts of alleged abuse over the objection of trial counsel?**

   ANSWERED BY THE CIRCUIT COURT: No. Denied the postconviction motion without a hearing.

2. **Did the trial court err in denying a *Machner*[1] hearing as requested in Hutchins's postconviction motion, when he alleged that he was denied his Constitutional Rights to Counsel when his attorney objected to, but failed to move for a mistrial when the State referenced prior acts of alleged abuse in their opening statement?**

   ANSWERED BY THE CIRCUIT COURT: No. Denied the postconviction motion without a *Machner* hearing.

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

POSITION ON ORAL ARGUMENT AND PUBLICATION

The issues presented by this appeal are controlled by well settled law and, therefore, the appellant does not recommend oral argument or publication.

STATEMENT OF THE CASE

On April 12, 2013, a criminal complaint was filed in the circuit court for Milwaukee County charging the Defendant-Appellant, Hutchins, with two counts, including: count 1, Second Degree Sexual Assault, Domestic Abuse, pursuant to Wis. Stat. § 940.225(2)(a) & 968.075(1)(a); count 2, Battery, Domestic Abuse, pursuant to Wis. Stat. § 940.19(1) & 968.075(1)(a). (R.1).

The complaint alleged that on April 2, 2013, West Allis Police Officers took a walk-in complaint from M.U. (R.1 at 2). M.U. reported that the father of her three children, Hutchins, came to her home at 2322 South 79th Street, in West Allis, Wisconsin on the night of April 2, 2013. (R.1 at 2). According to M.U., Hutchins was intoxicated. (R.1 at 2). On an earlier date she had informed Hutchins that she wanted to end their relationship. (R.1 at

2). Initially Hutchins wanted to resolve family issues related to their split, but at some point, he began going through M.U.'s cell phone. (R.1 at 2). After doing this they began arguing and Hutchins became more and more aggravated until he punched M.U. in the head. (R.1 at 2). He then retrieved a butcher knife from the kitchen and threatened to harm himself. (R.1 at 2). He momentarily calmed down, but then he indicated that M.U. and he were going to have sex one last time. (R.1 at 2). M.U. indicates that she said no, and Hutchins unsuccessfully attempted to have penis-to-vagina sex with her. (R.1 at 2). M.U. attempted to leave but was stopped by Hutchins. (R.1 at 2). Hutchins again initiated a sexual encounter and forced penis-to-mouth sex and then penis-to-vagina sex with M.U. (R.1 at 2). Hutchins then went to sleep and M.U. went to report the incident the next day. (R.1 at 2).

At his initial appearance on April 12, 2013, Hutchins waived his preliminary hearing. (R.87).

At a final pretrial on August 12, 2013, the State's offer to Hutchins was put on the record and he rejected it in open court. (R.90 at 4-5).

On the morning of trial on September 3, 2013, Attorney Ziemer ("Ziemer"), Hutchins's attorney, requested an adjournment of the trial. (R.91 at 3). In his reasoning for the request he indicated that he had just discovered that there was a transcript from an injunction hearing between Hutchins and M.U. that he needed to obtain. (R.91 at 3). Ziemer initially appeared to deny knowing about the hearing despite the fact that his co-counsel, Attorney Bobot, had represented Hutchins at the injunction hearing back on April 24, 2013. (R.91 at 3-5).

After briefly passing the case, Ziemer maintained the motion to adjourn the trial indicating that he had requested the transcript "early last week." (R.91 at 9). Over the break the court had already become aware that Ziemer had actually requested the transcript on August 29, 2013 at 1:53 p.m.[2], thus attempting to mislead the court. (R.91 at 9).

The court passed its decision to the afternoon and both Ziemer and Attorney Bobot admitted error in not ordering the transcript sooner. (R.92 at 5).

[2] August 29, 2013 was the Thursday prior to the start of the Labor Day weekend.

The court reluctantly granted the motion to adjourn in part to avoid an ineffective assistance of counsel claim. (R.92 at 16-18).

On November 14, 2013, another final pretrial and trial date was scheduled due to new charges against Hutchins. (R.94).

The trial began on February 3, 2014, and the State was allowed to file an amended information over Ziemer's objection. (R. 96 at 2-4). The amended information included the following four charges: count 1, Second Degree Sexual Assault, Domestic Abuse, pursuant to Wis. Stat. § 940.225(2)(a) & 968.075(1)(a); count 2, Second Degree Sexual Assault, Domestic Abuse, pursuant to Wis. Stat. § 940.225(2)(a) & 968.075(1)(a); count 3, False Imprisonment, Domestic Abuse, pursuant to Wis. Stat. § 940.30 & 968.075(1)(a); and count 4, Battery, Domestic Abuse, pursuant to Wis. Stat. § 940.19(1) &968.075(1)(a). (R.11).

The State then put their last offer to resolve the matter on the record and Hutchins rejected the offer on the record. (R.96 at 4-6).

A verdict was received on February 5, 2014, and Hutchins was found guilty on all four counts. (R.100 at 4-6).

On February 10, 2014, a motion to withdraw as counsel was granted. (R.101).

New counsel was appointed and a sentencing hearing scheduled on March 13, 2014. (R.101).

On May 9, 2014, a sentencing was held, and Hutchins was sentenced to the following: count 1, a consecutive term of 7 years in prison (5 years initial confinement, 2 years extended supervision); count 2, a consecutive term of 7 years in prison (5 years initial confinement, 2 years extended supervision); count 3, a consecutive term of 4 years in prison (2 years initial confinement, 2 years extended supervision); and count 4, a concurrent term of 9 months incarceration. (R.103 at 40-41). That makes a total sentence of 18 years in prison (12 years initial confinement, 6 years extended supervision). (R.103 at 40-41).

A notice of intent to pursue postconviction relief was filed. (R.41; R.42; R.43).

A No-Merit Notice of Appeal was filed on September 2, 2015. (R.55).

The No-Merit Report was withdrawn, and the No-Merit Report was rejected and dismissed without prejudice on May 16, 2017. (R.63).

On August 31, 2017, a Postconviction Motion for a New Trial, and, in the Alternative, to Vacate the Unconstitutional *Ex Post Facto* DNA Surcharges was filed. (R.68).

On May 22, 2018, the Circuit Court denied the Postconviction Motion as related to the request for a new trial without granting a Postconviction Hearing. (R.80). On May 30, 2018, the Circuit Court denied the Motion to Vacate the DNA Surcharge. (R.81).

A Notice of Appeal was filed on June 18, 2018. (R.84).

STATEMENT OF FACTS

The Defendant, Hutchins, was charged in the information with two counts: Count 1, Second Degree Sexual Assault, Domestic Abuse, pursuant to Wis. Stat. § 940.225(2)(a) & 968.075(1)(a); Count 2, Battery, Domestic

Abuse, pursuant to Wis. Stat. § 940.19(1) & 968.075(1)(a). (R.3).

The trial began on February 3, 2014, and the State was allowed to file an amended information over Attorney Ziemer's objection. (R.11 at 2-4). The amended information included the following four charges: Count 1, Second Degree Sexual Assault, Domestic Abuse, pursuant to Wis. Stat. § 940.225(2)(a) & 968.075(1)(a); Count 2, Second Degree Sexual Assault, Domestic Abuse, pursuant to Wis. Stat. § 940.225(2)(a) & 968.075(1)(a); Count 3, False Imprisonment, Domestic Abuse, pursuant to Wis. Stat. § 940.30 & 968.075(1)(a); and Count 4, Battery, Domestic Abuse, pursuant to Wis. Stat. § 940.19(1) &968.075(1)(a). (R.11).

During the trial, the State's case relied almost entirely on the testimony of the alleged victim, M.U. as it related to the charges stemming from an altercation on April 2, 2013. Along with M.U.'s testimony related to the charges, the State commented on and elicited testimony regarding other, unrelated bad acts over the course of Hutchins's and M.U.'s relationship.

As it relates to the improper admittance of "other acts" evidence, Hutchins's trial counsel objected during the State's opening statement in the following exchange:

> Ms. Williams (State): Now [M.U.] told police that a couple of days before, on March 31st, she had told the defendant that their 18-year relationship was over. She was worried about his use of alcohol and she also wanted to see someone else.
>
> So when he came over on April 2nd, visibly intoxicated, she was very concerned.
>
> The defendant started out by asking her about their relationship, what was going to happen to the children, what was going to happen with their relationship. He was voicing concerns about how this all would end.
>
> But the defendant also became very agitated, and at some point during this original discussion, he takes her phone away from her. He starts to go through the phone.
>
> He accuses her of infidelity, of seeing another man and he becomes very jealous.
>
> But [M.U.] knows the defendant very, very well and because, as I said, and she will testify, they have been in a relationship for 18 years, so she just doesn't respond.
>
> This makes the defendant even more angry and he punches her once in the side of the head and she reports to the police the next day that when he punched her, she experienced a great deal of pain.

> Unfortunately, this isn't the first time she has experienced something like this, so she makes certain decisions.
>
> Mr. Ziemer (Defense): I would object, Your Honor, there is something—
>
> The Court: Overruled, it is an opening statement, you will get your chance. Go ahead.
>
> She said she is expecting to prove the following, go ahead.

(R.97 at 31; Ap. D at 18).

The Defense never made a motion for a mistrial based on this objection, thus waiving the issue on direct appeal.

Later during the live testimony of the victim, the State again elicits testimony of prior bad acts of violence, as follows:

> Ms. Williams (State): Did you experience any pain, or dizziness or something else?
>
> M.U.: I had headaches the next couple of days after that just kind of out of sorts for, you know, for a few hours. Just, yeah, just like a migraine like a headache.
>
> Ms. Williams (State): Now you said that that was – I don't mean to twist your words so correct me if I am wrong, but you said it was fairly typical?
>
> M.U.: Uh-huh.
>
> Mr. Ziemer (Defense): I would object, Your Honor, there has been no prior motion to bring in any other acts evidence.
>
> The Court: Sustained without some foundation.

> Ms. Williams: You had mentioned that and I wanted – my ultimate question was actually, if this time you were afraid or you were just used to that.
>
> What was your emotional reaction to that particular punch by the defendant on that night?
>
> M.U.: That it was more rough than normal, something I was used to from him. It was –
>
> Mr. Ziemer: I would object again.
>
> Ms. Williams: Then I would like to be heard in chambers.
>
> The Court: Overruled. She answered, move on.

(R.97 at 54-55; Ap. D at 19-20).

Later during M.U.'s testimony, the State again attempts to elicit other bad acts testimony from the victim as such:

> Ms. Williams (State): It also sounds, from what you have been describing, that this is behavior that you have come to sort of put up with, can you describe that for me?
>
> M.U.: It has been --
>
> Mr. Ziemer (Defense): I would object, Your Honor, she is trying to put in other acts evidence again.

(R.97 at 74-75).

The court then removed the jury and had the following discussion on the record:

> Mr. Ziemer (Defense): Your Honor, she is, on several occasions, she is deliberately trying to lead the witness and to testifying about prior acts of abuse.

If the State wanted to do this, they had an obligation to provide notice beforehand if they were going into such things.

The Court: Where is this going, Counsel?

Mr. Ziemer: Are you talking to me or her?

The Court: No, I am asking the State this.

Ms. Williams (State): I am asking her very specific questions not to have her testify, and she hasn't, in fact, testified to any other acts by the defendant, but rather, her emotional reaction and state of mind based on the history of the relationship.

I think a quick Sullivan analysis is helpful, It is certainly relevant in the context of domestic violence.

It is somewhat prejudicial, but I am being very careful with the phrasing of my questions to avoid any specific other acts, injuries or actions, conduct by this particular defendant to come in, so I am aware of that.

And ultimately, I think that –

The Court: Let me ask: Are there any other acts that I don't know about?

Is he charged with a D.V. case, was he charged with a battery?

Was he arrested as relation to something related to this victim, to the witness, anything like that, that is obvious?

I mean a case, or a charge, or a referral to the D.A.'s office or the police were called?

Ms. Williams: I am not certain about police contacts and I have not recently checked on referrals in the past.

Mr. Ziemer: She shouldn't be allowed to do this. She keeps leading the witness down the same path.

The Court: She is not leading the witness, she asked questions.

Mr. Ziemer: Okay.

The Court: When she says, did this, that or something else happen, that is not leading, that is giving a witness who is emotional, who has been in tears on the stand multiple times, some questions and some options and when she said is it A, B or something else, the witness can answer A, B or something else or something completely different.

You know, I was a little concerned about the questions and answers about him not supporting the kids and him allegedly being what appear to be as a general louse in terms of his paychecks, and drinking, and booze and whatnot in the context of alleged domestic violence relationship allegedly sexual assault, alleged battery, an alleged penis-to-vagina intercourse with force or the threat of force, it provides some context, as the State alluded to earlier today, that would explain or give way, she didn't immediately go to the cops, why she immediately didn't call 911 and why she did go to work.

It is entirely plausible that anyone, victim of abuse, especially a female in this case being abused alleged by, in this case, by the defendant, would not want to disrupt or scare children, would want to go to work.

Sometimes someone is in shock, sometimes there is all kinds of reasons they might otherwise carry on about their business, not run to the police, or not run to a neighbor or not run to the sexual assault treatment center.

So, from that context, it might have been a bit close to the line, but I think it was relevant, it was appropriate, it was not unfairly prejudicial.

I do not want the State to lead and I do not want other acts evidence going in.

I don't think it has yet, so I am overruling the objection for now.

The defense will get their chance on cross examination

If there is something that is inaccurate or misleading that's what cross is for and I will ask the State to be careful, because it was not any other acts motion filed, there was not any overt action that are not aware of

> allegations that gave rise to a charge, or a D.V. case, or a battery or a referral to the D.A.'s office so we will leave it there.
>
> I don't want the questions and the statements about the defendant's overall behavior or alleged character or alleged behavior to get too unfairly prejudicial, at this point they're not, especially in light of the fact the defense will get a chance to cross and clarify some of these issues. So that is my ruling for right now.
>
> The objection is overruled, but I will ask the State to be careful with the questions after lunch.

(R.97 at 76-80; Ap. D at 21-25).

This objection was overruled, but with a limiting instruction to the State. (R.97 at 80; Ap. D at 25).

A verdict was received on February 5, 2014, and Hutchins was found guilty on all four counts. (R.100 at 4-6). On May 9, 2014, Hutchins was sentenced to a total sentence of 18 years in prison (12 years initial confinement, 6 years extended supervision). (R.103 at 40-41; R.51; Ap. C).

A postconviction motion was filed on August 31, 2017, requesting a new trial due to the trial court's error in allowing M.U. to testify about other acts of domestic abuse by Hutchins, and due to ineffective assistance of counsel for trial counsel's failure to move for a mistrial after the same

type of other acts were referenced in opening statements by the prosecutor. (R.68).

Judge Stark denied the motion for a new trial without a hearing, indicating:

> The State's questions and the victim's answers to those questions did not cross the line into offering other acts evidence. The victim did not describe any specific prior act on the part of the defendant, and while she alluded to some history with the defendant and what she was used to during the course of their relationship, this was being offered – as Judge Borowski explained in his ruling – to explain her mental state as to why she reacted the way she did to the assault and waited to report it.
>
> Moreover, even assuming the evidence presented by the State did qualify as other acts evidence, the evidence was admissible.
> …
>
> The evidence objected to in this case was not offered to prove the character of the defendant or show conformity therewith but to add context to the victim's mental state, explain why she reacted they way she did, and explain why she delayed reporting the assault until after she went to work the next day. The evidence was relevant to the victim's credibility, and the probative value was not overweighed by the danger of unfair prejudice. The references to the victim's history with the defendant were brief, vague and nonspecific, and therefore, there was little danger that they would have caused the jury to find the defendant guilty irrespective of the merits of the evidence offered at trial. In sum, this court fails to perceive any error in Judge Borowski's rulings on the defendant's other acts objections.

(R.80 at 7-8; Ap. A at 8-9).

Further, Judge Stark denied the claim of ineffective assistance of counsel for failing to move for a mistrial, stating:

> Moreover, even assuming it was deficient performance for counsel to fail to preserve a mistrial motion for appellate purposes, the court finds that there is not a reasonable probability of success on appeal. Again, the purported other acts evidence was brief, vague and non-specific, and under ***Sullivan*** analysis, was not unduly prejudicial to the defendant. Any impact of the prosecutor's comment during opening statements was effectively mollified by the court's instruction to the jurors that "opening statements are not evidence." [citation omitted]. The State did not make any similar remarks during its closing arguments, and instead, focused on the disputed issues of consent and the victim's credibility.
>
> Even if other acts evidence had been improperly admitted at trial, there is no reasonable probability that it impacted the outcome of the trial, and therefore, the error was harmless.

(R.80 at 8-9; Ap. A at 9-10).

This appeal now follows the final order of the circuit court.

ARGUMENT

I. HUTCHINS SHOULD BE GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED OTHER ACTS OF ABUSE TO THE ALLEGED VICTIM.

A. General Principles of Law

Evidence of a defendant's other "crimes, wrongs, or acts" is not admissible to prove the defendant's character in

order to show he acted in conformity therewith. *State v. Marinez*, 2011 WI 12, ¶ 18, 331 Wis. 2d 568, 584, 797 N.W.2d 399; *State v. Sullivan*, 216 Wis. 2d 768, 782, 576 N.W.2d 30 (1998) (the rule "forbids a chain of inferences running from act to character to conduct in conformity with the character"). The governing provision, Wis. Stat. § 904.04(2)(a), states:

> (2) OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b)2, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rule "prohibits the admission of evidence of a defendant's other bad acts to show that the defendant has a propensity to commit crimes." *Marinez*, 331 Wis. 2d at 584, ¶ 18.

The admissibility of other acts evidence is subject to the following three-step analytical framework outlined in *Sullivan*.

> 1) Whether the other acts evidence is offered for an acceptable purpose under section 904.04(2);
>
> 2) Whether the other acts evidence is relevant (that is, does it relate to a fact or

> proposition that is of consequence, and does it have probative value); and
>
> 3) Whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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

A ruling admitting other acts evidence is reviewed for an erroneous exercise of discretion and will be upheld if the trial court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Sullivan*, 216 Wis. 2d at 780-81; *Marinez*, 331 Wis. 2d at 575, 583.

B. The State Has Not Identified A Permissible Purpose For Offering The Other Acts Evidence.

The party seeking to introduce other acts evidence bears the burden of establishing by a preponderance of the evidence the testimony is offered for a permissible purpose. *Marinez*, 331 Wis. 2d at 585-86. To satisfy this first step in the *Sullivan* analysis, "[t]he proponent need only identify a relevant proposition that does not depend upon the

forbidden inference of character as circumstantial evidence of conduct." *Id.* at 590.

Here, the State purported to offer the other acts evidence for the purpose of adding context to the victim's mental state, explain her reactions at the time of the event, and explain her delay in reporting the allegations.

Despite this assertion, these unsupported statements alleging past instances of punching M.U. were done to attack Hutchins's character and show that he acted in conformity with it in violation of the prohibitions under Wis. Stat. § 904.04(2).

For this reason, under the first prong of the Sullivan analysis the evidence was not offered for a permissible purpose.

C. The Other Acts Evidence Is Not Relevant.

The test for relevance is divided into two inquiries. The first question is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. *Sullivan*, 216 Wis. 2d at 772.

The second question is whether the evidence has a tendency to make a consequential fact more or less probable

than it would be without the evidence. *Id.* at 786-87. This depends on the other incidents' nearness in time, place and circumstances to the alleged crime or to the fact or proposition to be proved. *Id.*

The court's analysis on the relevance of the other acts was that it was relevant to M.U.'s credibility.

Here, the allegation was that Hutchins had physically abused M.U. at undisclosed and unreported times in the past. This allegation, if true, is not of particular consequence to the determination of the charges before the court. It is not of consequence because the details of the conduct were vague in timing and nature. The testimony was generally that M.U. was used to getting punched by Hutchins without any context.

Arguably, if true, past domestic abuse by the Hutchins may have been relevant if investigated and disclosed by the prosecution prior to trial. It was not disclosed despite being a key part of the State's opening argument and further keyed on in questioning of the victim. In this matter even if the alleged abuse was a consequential , fact it cannot be determined if the other acts evidence would

make it more or less probable since the information was so vague as to time, place, and circumstances.

Thus, the other acts information presented to the jury was not relevant.

D. Any Arguable Probative Value Of The Other Acts Evidence Is Substantially Outweighed By The Danger Of Unfair Prejudice.

If the court agrees the other acts evidence was irrelevant it need not go further in the three-step analysis. Here, even if the court concludes the evidence was relevant to show M.U.'s credibility, it should still hold the evidence was improperly admitted because it does not pass under the third prong.

Under Wis. Stat. § 904.03, evidence must be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Probative value reflects the evidence's degree of relevance. *State v. Payano*, 2009 WI 86, ¶ 81, 768 N.W.2d

832. Any arguable probative value regarding the allegations of domestic abuse were minimal as the circuit court argues that the references to the abusive history were "brief, vague and nonspecific." (R.80 at 7; Ap. A at 8). But unlike the postconviction court's finding, the matter was unfairly prejudicial since according to the State's opening statement the victim had specifically been punched by Hutchins during at least one prior incident and later the victim's testimony suggests that there were multiple times that she was beat by Hutchins. There is no question that these statements were prejudicial to Hutchins. The jury was clearly going to be more apt to believe that Hutchins would commit such a heinous crime if he had previously exhibited similar, violent conduct towards the victim. It is well understood that individual jurors will latch on to negative information when making character decisions.

Further, by waiting until trial was underway to disclose the other acts the State did not provide the defense an opportunity to defend the allegations, thus making the disclosures even more prejudicial. While arguably probative the other acts evidence is clearly substantially

outweighed by the unfair prejudice of admitting last minute, unsubstantiated allegations of domestic abuse, confusion of the issues to the jury (convicting him because of these prior bad acts), and by misleading the jury into believing that Hutchins had a bad and abusive character.

For the same reasons this evidence should have been excluded under Wis. Stat. §904.03, as unfairly prejudicial.

It is clear that any reasonable juror would have considered past abusive acts of Hutchins when coming to a decision in the case before it. Thus, the error in admitting the "other acts" evidence of past domestic abuse affected Hutchins substantial right to a fair trial by contributing to the juries view of Hutchins as a dangerous and violent individual that was capable of committing the charged crime. *See C.R. v. Tykila S.*, 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768 (finding that "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome.")

To be clear, the danger of unfair prejudice is the potential harm in concluding that because the defendant committed one bad act, he necessarily committed the crime

with which he is now charged. *State v. Fishnick*, 127 Wis. 2d 247, 261-62, 378 N.W.2d 272 (1985); *Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967). It results when the proffered evidence has the tendency to influence the outcome by improper means, such as distracting the jury, subtly encouraging the jury to infer that the defendant has a propensity to commit such wrongs, or inviting punishment of the defendant because he is a bad person. *State v. Harris*, 123 Wis. 2d 231, 233-34, 365 N.W.2d 922 (1984).

Wis. Stat. § 904.04(2)(a) specifically precludes the admission of other acts evidence "to prove the character of a person in order to show that the person acted in conformity therewith." Yet despite having no probative value regarding Hutchins's intent on April 2, 2013, the prior acts painted Hutchins as a bad person – the type of person who would hurt his wife. No human mind has the capacity to set aside the inference that Hutchins must have violently assaulted M.U. because he has an abusive character trait. The other acts were unfairly prejudicial for precisely the reasons that *Whitty* and *Sullivan* identified, including the "overstrong tendency to believe the defendant guilty of the

charge merely because he is a person to do such acts." *Whitty*, 34 Wis. 2d at 292. That unfair prejudice substantially outweighed the minimal probative value.

Therefore, Hutchins should be granted a new trial.

II. THE MATTER MUST BE REMANDED FOR A *MACHNER* HEARING BECAUSE HUTCHINS SUFFICIENTLY ALLEGED FACTS, THAT IF TRUE, WOULD ENTITLE HIM TO THE RELIEF HE HAS REQUESTED.

A. Standard of Review For Denial Of A Request For A Machner Hearing.

In this case, a postconviction hearing was requested, and the standard for reviewing the denial of a request for a *Machner* hearing is set forth and applied in *State v. Roberson*, 2006 WI 80, ¶¶ 43-44, 292 Wis. 2d 280, 717 N.W.2d 111. In *Roberson*, the court indicated that a circuit court may deny a postconviction motion for a *Machner* hearing "if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." *Id.*, *citing State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996).

B. A *Machner* Hearing Is Necessary For The Court To Reverse On A Claim Of Ineffective Assistance Of Counsel.

Before a conviction may be reversed for ineffective representation, trial counsel must be examined in an evidentiary hearing regarding the reasons for the actions or omissions in his representation cited by the defendant. *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

A *Machner* hearing ***must*** be held if the postconviction motion "alleges sufficient facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

C. Hutchins Alleged Sufficient Facts That, If True, Would Have Entitled Him To Relief, Thus The Circuit Court Erred In Denying His Request For A Machner Hearing.

The postconviction motion alleged that trial counsel was deficient in failing to move for a mistrial after initially objecting to the State's comments during opening argument about prior domestic abuse by Hutchins.

In ruling on the postconviction motion the circuit court indicated that even if trial counsel's performance was

deficient, there was not a reasonable probability of success on appeal. (R.80 at 8; Ap. A at 9). The decision of the postconviction court is not clear as to the reasons for denying the requested *Machner* hearing. It appears to deny the request by alleging that there was a lack of prejudice and puts forth that if counsel was deficient that the other acts evidence was brief, vague, non-specific, and not unduly prejudicial to Hutchins. (R.80 at 8; Ap. A at 9). Hutchins disagrees.

Counsel was deficient in failing to preserve Hutchins's appellate rights by asking for a mistrial after properly identifying and objecting to other acts evidence during the State's opening argument. To obtain a *Machner* hearing, Hutchins must merely allege facts that if true would entitle him to relief. Hutchins made such a showing of both deficient performance and prejudice, and the court erred in denying him a *Machner* hearing.

i. A Defendant Has A Constitutional Right To Counsel, And Counsel Must Be Effective To Satisfy Those Constitutional Rights.

The right to effective assistance of counsel in a criminal prosecution is guaranteed by the United States and Wisconsin Constitutions. U.S. Const. Amends. VI and XIV; Wis. Const. art. I, § 7. The right to counsel is the right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). Assistance of counsel must be "effective" to satisfy the Sixth Amendment. *State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161, 167 (1983); *see also State ex.rel. Seibert v. Macht*, 2001 WI 67, ¶12, 244 Wis. 2d 378, 389, 627 N.W.2d 881, 886.

ii. To Prove A Denial Of The Constitutional Right To Counsel, A Defendant Must Show That Counsel's Performance Was Deficient And Such Performance Prejudiced The Defendant.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *Strickland v.*

Washington, 466 U.S. at 687; *see also State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711, 714 (1985).

1. Prong one of an ineffective assistance of counsel claim: deficient performance.

"To prove deficient performance a defendant must establish that counsel 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the Defendant by the Sixth Amendment.'" *State v. Smith*, 207 Wis. 2d 258, 274, 558 N.W.2d 379, 386 (1997) (citation omitted). The standard for deficient performance is if "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *State v. Ambuehl*, 145 Wis. 2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988).

Further, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

Wisconsin's Supreme Court cases establish that failure to move for a mistrial waives any argument concerning opposing counsel's conduct during opening or

closing statements. *See, e.g., Peot v. Ferraro*, 83 Wis. 2d 727, 741-42, 266 N.W.2d 586 (1978) ("[T]his court ... will not review as a matter of right an allegedly improper closing argument where the objecting party did not move for a mistrial ... before the jury returned its verdict."); *Zweifel v. Milwaukee Auto. Mut. Ins. Co.*, 28 Wis. 2d 249, 256, 137 N.W.2d 6 (1965); *Kink v. Combs*, 28 Wis. 2d 65, 72, 135 N.W.2d 789 (1965) (failure to move for a mistrial waives any argument concerning opposing counsel's conduct during opening statement). The rationale for this rule is laid out in *Kink* where the Wisconsin Supreme Court stated: "[f]ailure to make a timely motion [for mistrial] can only be construed as an election to rely on the possibility of a favorable jury verdict." *Id.*

Here, trial counsel was deficient in failing to move for a mistrial after objecting to the State's use of other acts evidence in their opening statement which was compounded by the State later eliciting similar "other acts" testimony.

Finally, the violation was clear at the time of trial (trial counsel objected to the "other acts" statement during the opening argument), but counsel was deficient in failing

to move for a mistrial and preserve the rights of Hutchins on appeal.

It is well understood that counsel should preserve any identified issues for appeal by properly objecting and moving for a mistrial where necessary. The other acts statement was clearly prejudicial to Hutchins as was the related testimony of M.U. as argued in section I. above.

This deficient performance prejudiced Hutchins by 1) ensuring that he would not be granted a mistrial, and 2) giving him no outlet to challenge the court's error in allowing the State's impermissible statements. Hutchins is now serving a lengthy sentence as a result.

Thus, a *Machner* hearing must be granted.

2. Prong two of an ineffective assistance of counsel claim: prejudice to the defense.

In order to show that counsel's deficient performance has prejudiced the defendant, it must be shown 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." *State v. Thiel*, 264 Wis. 2d 571, 665 N.W.2d 305 (2003) (*quoting Strickland*, 466 U.S. at 694). "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" *Thiel*, 264 Wis. 2d at 587 (*quoting Pitsch*, 124 Wis. 2d at 642).

Hutchins clearly alleged that not only was trial counsel deficient, but he was prejudiced by counsel's error in having other acts of abuse referenced during the opening argument. This set up the testimony of M.U. which negatively impacted the reliability of the proceedings.

Thus, the court erred in determining that Hutchins had not alleged sufficient facts to obtain relief and in failing to grant a *Machner* hearing.

CONCLUSION

For the reasons indicated above, the circuit court erred in denying Hutchins's motion for a new trial based on improperly admitting other acts evidence and it erred in denying his request for a *Machner* hearing, thus he requests that a new trial be granted, or, in the alternative, that the matter be remanded for a *Machner* hearing.

Dated: November 16, 2018

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FORM AND LENGTH CERTIFICATION

I hereby certify that this report conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,217 words.

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

I hereby certify that:

I have submitted an electronic copy of this appeal brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic appeal 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.

_____

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CERTIFICATION OF COMPLIANCE WITH REGARD TO THE APPENDIX

I, Kevin M. Gaertner, 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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record

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