STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1593-CR & 2018AP1594-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO L. BELL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Orders Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable David Borowski & Carolina Stark, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Antonio Bell's fourteen-year-old step-daughter, SE, accused him of sexually assaulting her. SE later tested positive for chlamydia. The State was unable to prove that Mr. Bell had chlamydia. Mr. Bell subsequently pled no contest to the assault, but told the court he was only doing so because his attorney was not pursuing a particular defense. Mr. Bell filed a postconviction motion, arguing that trial counsel was ineffective for failing to interview and subpoena SE's boyfriend, who also tested positive for chlamydia. The motion argued that trial counsel should have subpoenaed the boyfriend to prove that he was the person who infected SE, not Mr. Bell. The circuit court denied the motion without a hearing. Did the motion allege sufficient facts to entitle Mr. Bell to relief, thereby requiring an evidentiary hearing?

   The circuit court denied Mr. Bell's motion without a hearing.

2. Mr. Bell's nine-year-old daughter, CB, also accused him of assault, but recanted that accusation before Mr. Bell pled no contest. After Mr. Bell was sentenced, CB provided a second recantation, which included an accusation that SE's boyfriend assaulted her, and that he told her to accuse Mr. Bell. The

circuit court denied Mr. Bell's postconviction motion for plea withdrawal based on newly discovered evidence. Did the motion allege sufficient facts to entitle Mr. Bell to relief, thereby requiring an evidentiary hearing?

The circuit court denied Mr. Bell's motion without a hearing.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Bell does not request publication because this case can be decided by applying settled precedent to the facts of the case. The facts of this case are straightforward, but counsel welcomes oral argument if the court would find it helpful.

STATEMENT OF FACTS

On August 8, 2011, the State filed a complaint charging Antonio Bell with one count of first-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(1)(b). (1.)[1] The alleged victim was Mr. Bell's nine-year-old daughter, CB. (1.) CB alleged Mr. Bell had anal sex with her; CB tested positive for rectal chlamydia. (1.)

[1] All citations to the record in these consolidated cases are to the record in Case No. 2018AP1593-CR, unless otherwise indicated.

On August 22, 2011, the State filed a complaint in a second matter, charging Mr. Bell with one count of first-degree sexual assault of a child and one count of second-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(1)(e) and (2). (2018AP1594, 1.) The complaint alleged that Mr. Bell sexually assaulted his fourteen-year-old step-daughter, SE. (*Id.*) SE reported that Mr. Bell touched her vagina over her clothing when she was seven years old. (*Id.*) The complaint also alleged that Mr. Bell forced an act of vaginal intercourse approximately one month before the complaint was filed. (*Id.*) Finally, the complaint alleged that SE tested positive for chlamydia. (*Id.*)

The two cases were joined in the trial court on the State's motion. (5.) Mr. Bell's attorney challenged joinder, and pointed out that SE's boyfriend, AC, had chlamydia, and argued that he may have been guilty of the assaults, rather than Mr. Bell. (100:8-9; 102:8-10.)[2] The State's theory was that AC contracted chlamydia from SE, who got it from Mr. Bell, even though the State could not prove that Mr. Bell had the disease. (102:10-11.) The State insisted that chlamydia was easy to treat, but conceded it had no evidence that Mr. Bell ever tested positive. (102:11.)

[2] In the circuit court, the parties mistakenly use the wrong name when referring to the boyfriend. They refer to him by a name with initials PM. Discovery included in Mr. Bell's postconviction motion shows that the boyfriend's name should be abbreviated AC.

The court granted the State's motion to join the cases. (103:8.) Subsequently, trial counsel withdrew and a new attorney was appointed. Mr. Bell's new attorney informed the court that he was aware of the possible issue concerning AC, but was still investigating. (106:3-4.)

A jury trial was scheduled for April 29, 2013. (108:5.) The Friday before trial was set to begin, Mr. Bell entered into a plea agreement to resolve both cases. He pled no contest to second-degree sexual assault of a child as to CB, and third-degree sexual assault as to SE. In exchange for his pleas, the State agreed to make a global sentencing recommendation of 10-12 years of confinement, followed by 7-10 years of extended supervision. (109:3-4.) At the plea hearing, the court asked the prosecutor to explain the reasons for the charging amendments. (109:3, 11.) Although the State still believed it could prove its case, it acknowledged that CB had recanted, and conceded that it could not prove Mr. Bell ever had chlamydia. (109:10-11.)

CB's recantation took place on May 24, 2012, when she was ten years old. (79:13-14; App. 150-51.) Police interviewed CB at the urging of her mother, who was "concerned [CB] is going to completely recant." (*Id.*) During the interview, CB said that her aunt Tammy—whom she calls "tee tee"—told her to blame Mr. Bell. According to CB, her aunt believed Mr. Bell was responsible for the assault because CB "kept on crying when they were asking her who did it." (*Id.*) However, CB said that her previous

accusation that "her dad humped her body" was a lie. (*Id.*) CB did not provide a motive for her false accusation other than saying she "did not want her tee tee to be mad at her." (*Id.*)

In a presentence investigation report, Mr. Bell maintained that he had been falsely accused, and stated that he only pled no contest to spare his children from having to testify. (17:2-3.) He told the PSI author that SE's boyfriend was the actual perpetrator. (17:3.)

At sentencing, defense counsel indicated that in spite of his statements to the PSI author, Mr. Bell did not want to withdraw his plea, but had already asked that an appeal be initiated. (110:4.) Mr. Bell confirmed that he wanted to proceed to sentencing. (110:5-6.)

During his allocution, Mr. Bell maintained his innocence and complained that no one pursued SE's boyfriend as part of any investigation. (110:28, 31.) He also expressed dissatisfaction with his attorney, and explained that he did not request a new attorney because the court previously said it would not grant additional adjournments to the defense. (110:30.)[3]

[3] Two weeks before Mr. Bell pled no contest, the court advised the parties that it would not adjourn the case again: "Well, it stays on for trial. There was a prior attorney. There have been multiple delays, too many delays. This is one of the older cases on my calendar. I expect both sides to be prepared. I will not adjourn this. If it's going to resolve, it needs to resolve

(continued)

The court sentenced Mr. Bell to a total sentence of 12 years in confinement, followed by 8 years of extended supervision. (110:42-43.)

Following sentencing, Mr. Bell filed two postconviction motions to withdraw his pleas.[4] (42; 79; App. 119-53). The first motion argued that trial counsel was ineffective for failing to investigate AC as the source of the victims' chlamydia. (42:3-11; App. 121-29.) The motion alleged that postconviction counsel's investigator met with AC, and he admitted that: (1) he was dating SE, (2) they were having intercourse, and (3) he had chlamydia. (42:5; App. 123.) The motion argued that AC, not Mr. Bell, infected SE and CB. Mr. Bell argued that this evidence was admissible under Wisconsin's test to admit third-party-perpetrator evidence, as well as under the rape shield statute. *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984); Wis. Stat. § 972.11(2). Further, the motion alleged that Mr. Bell would have insisted on going to trial had trial counsel interviewed and subpoenaed AC (42:8; App. 126.) The motion argued that this allegation was corroborated by the late date of his plea, and his statements at sentencing and to the PSI author that

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before the trial date. I will not take a plea on the day of trial. Like I said there have been too many adjournments, too many delays, most of them related to the defense." (108:4.)

[4] The second motion was filed after Mr. Bell voluntarily dismissed his appeal, and this court granted leave to file a second postconviction motion.

his plea was motivated by trial counsel's failure to investigate AC. (42:8; App. 126.)

On July 23, 2015, the court entered an order denying Mr. Bell's postconviction motion without a hearing. (48; App. 107.) The court ruled that "a *Denny* motion based on the fact that SE's boyfriend, AC, tested positive for chlamydia would not have been successful." (48:5; App. 111.) Because the court ruled that the evidence would not have been admissible under *Denny*, it did not analyze the rape shield statute. Nevertheless, the court decided to reach the question of whether Mr. Bell would have pled no contest, and disbelieved his claim—without hearing testimony—that he would have gone to trial. (48:6; App. 112.) The court relied on (1) trial counsel's pretrial statement that he was aware of the potential *Denny* evidence, even though there was no evidence he actually pursued that lead, (2) Mr. Bell's statement to the PSI author that his plea was also induced, in part, by his desire to protect the victims from testifying, (3) Mr. Bell's knowledge that his daughter recanted, and (4) his decision at sentencing to not pursue plea withdrawal. (48:6-7; App. 112-13.)

Mr. Bell's second postconviction motion was based on a second, more complete, recantation provided by CB. (79; App. 138.) The motion alleged that Tammy Bell was present for the recantation. (79:3; App. 140.) Based on statements Tammy made to an investigator, the motion alleged that CB would testify that: (1) her father did not sexually assault her, (2) SE's boyfriend told her to blame her father,

and (3) SE's boyfriend was actually the person who had sexual contact with her. (79:3; App. 140.) The motion further alleged that Tammy would testify that she heard CB's recantation on numerous occasions. (79:3; App. 140.)

The motion argued that CB's decidedly more comprehensive recantation—which identified the actual perpetrator and explained the basis for her original false accusation—was newly discovered evidence. (79; App. 138.)

On July 31, 2018, the court entered an order denying Mr. Bell's motion, ruling that CB's "second recantation is not new." (92:4; App. 117.) The court found that Mr. Bell knew of the first recantation before pleading, and the second recantation provided no new exonerating information, it simply offered more details about why CB lied and who assaulted her. (*Id.*) The court further ruled that CB's inculpatory statements against AC were not new because Mr. Bell suspected he was the actual perpetrator before trial. (*Id.*)

Mr. Bell appeals.

ARGUMENT

I. Mr. Bell is entitled to an evidentiary hearing because his trial attorney was ineffective for failing to interview and subpoena a third-party perpetrator.

Mr. Bell seeks an evidentiary hearing on his first plea withdrawal motion because the motion alleged sufficient facts to require a *Machner*[5] hearing. The motion alleged that trial counsel was ineffective for failing to investigate evidence that SE's boyfriend, AC, had chlamydia. This evidence would have supported a defense that AC, not Mr. Bell, was responsible for assaulting and infecting SE and CB. Mr. Bell was prejudiced by trial counsel's failure to investigate AC because Mr. Bell would have gone to trial had counsel pursued this evidence, and been prepared to present it at trial.

A. Mr. Bell is entitled to an evidentiary hearing if his postconviction motion alleged facts that, if true, would entitle him to relief.

If a postconviction motion alleges material facts that, if true, would entitle the defendant to relief, "the circuit court *must* hold an evidentiary hearing." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (emphasis added). Even if the allegations

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

in the motion "seem to be questionable in their believability," the court must assume the facts as true. *Id.*, ¶ 12 n.6. Whether the motion alleged facts sufficient to warrant relief is a question of law, which this court reviews de novo. *Id.*, ¶ 12.

B. Mr. Bell is entitled to withdraw his plea as a matter of right to correct a manifest injustice.

In the present case, Mr. Bell is entitled to withdraw his pleas because he was denied the effective assistance of counsel. The only question on appeal is whether his postconviction motion alleged facts that would allow him to withdraw his plea.

After sentencing, a defendant is entitled to withdraw his guilty or no contest plea when doing so is necessary to correct a manifest injustice. *State v. Hoppe*, 2009 WI 41, ¶ 60, 317 Wis. 2d 161, 765 N.W.2d 794. "The manifest injustice test can be satisfied by a showing that the defendant received ineffective assistance of counsel." *State v. Wesley*, 2009 WI App 118, ¶ 22, 231 Wis. 2d 151, 772 N.W.2d 232. When a plea withdrawal motion and an ineffective assistance of counsel motion are intertwined, the defendant must allege a *prima facie* case of ineffective assistance of counsel. *Id.*, ¶ 23.

To establish deficient performance, the defendant must show "facts from which a court could conclude that counsel's representation was below the objective standard of reasonableness." *Id.*, ¶ 23. "To establish prejudice, the defendant must show facts

from which a court could conclude that its confidence in a fair result is undermined." *Id.* In plea withdrawal cases, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The "reasonable probability" standard does not even require a showing of a preponderance of the evidence. *State v. Dillard*, 2014 WI 123, ¶ 103, 358 Wis. 2d 543, 859 N.W.2d 44.

A deficiency affecting either of Mr. Bell's convictions requires plea withdrawal in both cases because they were entered pursuant to a global plea agreement. "Wisconsin case law clearly holds that a defendant's repudiation of a portion of the plea agreement constitutes a repudiation of the entire plea agreement." *State v. Lange*, 2003 WI App 2, ¶ 32, 259 Wis. 2d 774, 656 N.W.2d 480. Therefore, the court should vacate the entire plea agreement and reinstate the original charges against Mr. Bell. *Id.*

C. Mr. Bell's postconviction motion alleged sufficient facts to prove that his trial attorney was ineffective for failing to investigate evidence of a third-party perpetrator.

Trial counsel performed deficiently by failing to pursue a lead that a third party was responsible for assaulting SE and CB, and for giving them

chlamydia. Specifically, trial counsel failed to locate and interview AC, SE's boyfriend. AC, also identified in police reports as "Shay Shay," was dating SE and they were sexually active at the time of the alleged assault (they were 14-15 years old at the time). (42:12-13, 18; App. 130-31, 136.) Police reports reflect that AC tested positive for chlamydia, just as SE had. (42:18; App. 136.)

Mr. Bell's first attorney was allegedly investigating AC's involvement before suddenly withdrawing from the case. Mr. Bell's second attorney advised the court that he was aware of a potential issue involving AC, but no pretrial motion was filed, no witness list included AC, and there was no further discussion of the issue on the record.

Trial counsel had a duty to investigate AC. Trial counsel is constitutionally required to "conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits." *State v. Mayo*, 2007 WI 78, ¶ 59, 301 Wis. 2d 642, 734 N.W.2d 115 (internal quotations omitted).

Trial counsel's failure to interview AC cannot be attributed to any reasonable trial strategy. "Adequate preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom. The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of

which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge." *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970). Although the court presumes counsel's decisions to be reasonable, the court will find deficiency where decisions are "based upon caprice rather than upon judgment." *State v. Domke*, 2011 WI 95, ¶ 45,337 Wis. 2d 268, 805 N.W.2d 364.

Counsel's duty to investigate extended to interviewing AC as a potential third-party perpetrator. Trial counsel had no basis to dispute that SE and CB had chlamydia. A jury would reasonably conclude that they would not have been infected without some type of sexual assault. Thus, the fact that they tested positive for chlamydia corroborated their allegations against Mr. Bell, particularly when coupled with the prosecutor's claim that chlamydia was easily treatable in order to justify its inability to prove that Mr. Bell had chlamydia. Mr. Bell's defense *needed* to rebut the State's claim that he was the source of the infection. The State's hypothesis was weakened by the lack of evidence that Mr. Bell ever had chlamydia, but that hypothesis would have shattered if the jury were presented with an alternate source for the disease. AC would have supplied that alternate source.

Trial counsel needed to pursue the evidence of a third-party perpetrator as an alternate source in order to rebut the State's assertion that Mr. Bell gave them chlamydia. Evidence that AC had sex with SE,

and that he had chlamydia, would have supplied that rebuttal, and offered a strong defense that needed to be pursued. Thus, trial counsel's failure to interview and subpoena AC cannot be attributed to any reasonable trial strategy.

1. Evidence that AC had sexual intercourse with SE would have been admissible third-party perpetrator evidence.

Evidence that AC had sex with SE, coupled with evidence that he tested positive for chlamydia, would have significantly damaged the State's case against Mr. Bell. The State's case rested, in significant part, on the fact that SE and CB tested positive for chlamydia. (109:7-8.) The State was unable to prove that Mr. Bell had, or was treated for chlamydia, but it theorized that there would be no other explanation for the young victims to contract the disease. (102:10-11; 109:11.)

Mr. Bell's constitutional right to present a defense includes the right to present evidence that a third party was responsible for the charged conduct. *Denny*, 120 Wis. 2d 614. Wisconsin courts employ a three-part balancing test when deciding whether a defendant's constitutional right to present a defense requires admission of third-party perpetrator evidence. Under that test, the defendant must show that the third party had: (1) motive to commit the charged crime, (2) an opportunity to commit the charged crime, and (3) a direct connection to the

crime. *State v. Scheidell*, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999). Although a defendant must provide at least minimal evidence satisfying each prong, the court still balances each prong. Evidence supporting one prong may be "so strong that it will affect the evaluation of the other prongs." *State v. Wilson*, 2015 WI 48, ¶ 64, 362 Wis. 2d 193, 864 N.W.2d 52.

Here, evidence that AC tested positive for chlamydia satisfies each of *Denny*'s prongs. First, AC had a clear motive to have sexual intercourse with SE: sexual gratification. They were, by their own admission, two teenagers having sex. (42:15; App. 133.) Although they never stated the specific reasons for their relationship, *Denny* does not require evidence of a specific or personal motive; even a general motive is sufficient. *State v. Vollbrecht*, 2012 WI App 90, ¶ 27, 344 Wis. 2d 69, 820 N.W.2d 443. This application of *Denny* is consistent with the reality that motive is often best revealed by a criminal act itself, and is not necessarily articulated by the perpetrator through words or documents. A bank robber is generally motivated by a desire for money or to steal; that motive does not need to be spoken to be apparent. The motive here is equally clear: sexual arousal and gratification.

Second, the fact that AC and SE were actually having intercourse necessarily proves that he had an opportunity to have sex with her. It would only take one act of intercourse for AC to transmit chlamydia to either SE or CB. Thus, this prong is satisfied.

Finally, evidence that AC and SE had chlamydia, especially in light of evidence that Mr. Bell did not, supplies a direct connection. The strength of this prong should be weighed heavily in the *Denny* analysis. Although the State intended to argue at trial that AC got chlamydia from SE, there is simply no support for this argument. The State conceded that it could not directly link the chlamydia to Mr. Bell. (109:10-11.) If the victims' chlamydia was going to be admissible evidence of Mr. Bell's guilt, it was even more probative of AC's guilt.

Trial counsel should have pursued AC in order to present evidence linking him to SE, and to prove that he was actually the source of the sexually transmitted disease. This Court should remand for a *Machner* hearing to determine whether trial counsel possessed any strategic reason for failing to pursue this evidence.

2. Evidence that A.C. had sexual intercourse with S.E. would be admissible pursuant to Mr. Bell's constitutional right to present a defense.

Evidence that AC had sex with, and infected SE implicates Wisconsin's rape shield statute, which generally excludes evidence of "the complaining witness's prior sexual conduct[.]" Wis. Stat. § 972.11(2)(b).

Evidence that AC had chlamydia would not be excluded under the rape shield law because the law

only excludes evidence of the sexual conduct of the "complaining witness." *Id.* AC is not a complaining witness in this case, so evidence of his sexual conduct is admissible. The only question is whether SE's conduct with AC can be admitted, because SE is a complaining witness.

The rape shield law itself recognizes three narrow exceptions to its rule of exclusion, but none of those exceptions apply in this case. Wis. Stat. § 972.11(2)(b)1-3.[6]

However, in some instances, the rape shield law's broad scope must be narrowed to comply with a defendant's constitutional rights to confrontation and compulsory process. *State v. Pulizzano*, 155 Wis. 2d 633, 647-48, 456 N.W.2d 325 (1990). When the rape shield law interferes with those constitutional rights, the rape shield law must yield, and the evidence must be admitted. *Id.*

Wisconsin courts have employed a two-part test when deciding whether a defendant's constitutional right to present a defense overcomes the rape shield

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[6] "1. Evidence of the complaining witness's past conduct with the defendant. 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered. 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witnesses." Wis. Stat. § 972.11(2)(b)1-3.

statute. *Id.* at 656-57.[7] First, the defendant must show that the evidence satisfies the following five factors: "(1) The prior act clearly occurred. (2) The act closely resembles that in the present case. (3) The prior act is clearly relevant to a material issue. (4) The evidence is necessary to the defendant's case. (5) The probative value outweighs the prejudicial effect." *State v. St. George*, 2002 WI 50, ¶ 19, 252 Wis. 2d 499, 643 N.W.2d 777. If those factors can be proven, the court considers "whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence." *Id.*, ¶ 20.

Here, each of the five factors can be satisfied. When considering those factors, the defendant's offer of proof "need not be stated with complete precision or in unnecessary detail but it should state an evidentiary hypothesis underpinned by a sufficient

[7] This test has been most frequently applied in cases where the defendant accused of sexual assault of a child attempts to show an alternate source of the child's sexual knowledge. *E.g. Pulizzano*, 155 Wis. 2d at 638-39; *State v. St. George*, 2002 WI 50, ¶ 17, 252 Wis. 2d 499, 643 N.W.2d 777; *State v. Carter*, 2010 WI 40, ¶ 42, 324 Wis. 2d 640, 782 N.W.2d 695. But the test originated in a case where a defendant sought to introduce evidence of the complaining witness' history of arrests for prostitution in order to show that she consented to intercourse. *State v. Herndon*, 145 Wis. 2d 91, 426 N.W.2d 347 (Ct. App. 1988). Thus, the test applies to all instances where a defendant's right to present a defense conflicts with the rape shield statute.

statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt." *Pulizzano*, 155 Wis. 2d at 652 (internal quotations omitted).

First, AC and SE have both admitted to sexual intercourse with each other, so the first prong is easily proven. Second, the sexual acts are identical. SE accused Mr. Bell of sexual intercourse, and she admitted to engaging in sexual intercourse with AC. Courts have found sexual intercourse and sexual contact sufficiently dissimilar to fail this test, but the allegation of intercourse here is identical. *State v. Carter*, 2010 WI 40, ¶ 52, 324 Wis. 2d 640, 782 N.W.2d 695.

Third, as discussed above, evidence that SE and AC had intercourse was highly relevant to Mr. Bell's defense that AC was the person who gave SE chlamydia. The case against Mr. Bell was based, in part, on his giving SE chlamydia. (102:10-11.) Evidence that Mr. Bell did not have chlamydia, and evidence that a known sexual partner of SE's had chlamydia would distance Mr. Bell from the assault, and support a strong defense that AC was the actual source of the sexually transmitted disease.

Fourth, evidence of SE's relationship with AC was necessary to Mr. Bell's defense. This was a he-said, she-said credibility case. The State intended to bolster its case by asserting SE got chlamydia from Mr. Bell. Under these circumstances, it was necessary that Mr. Bell be allowed to present a

defense that he did not give her chlamydia. It was necessarily to his defense that he introduce evidence of an alternate source for the infection. The State sought to use the chlamydia against Mr. Bell; therefore, it was necessary that he be provided an opportunity to rebut that evidence, especially where the State had no actual evidence that Mr. Bell had chlamydia.

Finally, the probative value of this evidence would vastly outweigh its prejudicial effect. Again, this evidence had great probative value because it would have been the only way for Mr. Bell to rebut the State's allegation that he gave SE chlamydia. And the prejudicial effect would be minimal. Although private information would obviously be made public, this evidence would not have required an invasive exploration of the witness' sexual past. Only a brief line of questioning would be necessary to inform the jury that AC was SE's sexual partner, and he tested positive for the same infection.

In *Pulizzano*, the minor victim accused the defendant of sexually assaulting a number of children by "fondling, fellatio, anal penetration with an object, and digital vaginal penetration." 155 Wis. 2d at 641. The defendant sought to introduce evidence that the victim's prior sexual knowledge could have come from a prior assault. *Id.* at 642-43. The Wisconsin Supreme Court held that the evidence should have been admitted over the rape shield statute. While discussing the fifth factor, the court pointed out that any prejudice was minimal because the victim would

not have to actually discuss the prior sexual acts, since another witness was available to disclose the prior assault, and because limiting instructions could be utilized to prevent misuse of the evidence by the jury. *Id.* at 652-53.

The same is true here. AC, not SE, could be the sole witness addressing their relationship and the sexually transmitted disease. Thus, SE would not have to be asked any questions about her relationship with AC. Similarly, the jury could be instructed to draw no other conclusions about her sexual past, and to use the evidence solely for the purposes of evaluating the source of the chlamydia.

With those five factors satisfied, the Court must consider whether Mr. Bell's right to present this evidence is "nonetheless outweighed by the State's compelling interest to exclude the evidence." *St. George*, 252 Wis. 2d 499, ¶ 20. The State's only interest in suppressing this evidence is limiting Mr. Bell's defense to the charges against him. This interest is hardly compelling, and cannot justify excluding highly relevant evidence. As discussed above, this evidence is necessary to Mr. Bell's defense in order to rebut the allegation that SE could not have gotten chlamydia from any other person. Therefore, this Court should find that evidence from AC would have been admissible under the rape shield law.

3. Mr. Bell would have gone to trial had trial counsel investigated AC.

Mr. Bell alleged in his postconviction motion that he would not have pled no contest had his trial attorney interviewed AC and been prepared to call him as a witness at trial. (42:8; App. 126.) This allegation was supported by evidence in the record surrounding Mr. Bell's plea and sentencing.

First, Mr. Bell's claim is corroborated by the late timing of his plea. He pled no contest only three days before the scheduled trial date, suggesting a hesitance to waive his trial.

Second, Mr. Bell maintained his innocence, even when doing so was detrimental to him. Mr. Bell proclaimed his innocence during his interview with the PSI author and his allocution. Ordinarily, these are opportunities to demonstrate an acceptance of responsibility, not to persist in claims of innocence. Nevertheless, Mr. Bell told the court that the reason he was pleading no contest was because his trial attorney was unprepared for trial: "I would also like to state for the record the only reason I took the plea is because my lawyer—you know, he could have done more things I asked him than what he did." (110:29-30.)

Third, Mr. Bell's allegation is supported by the strengths of his defense. CB had already recanted her claims that Mr. Bell assaulted her (and she has now provided significant new information in a second recantation). (109:7, 10-11.) Thus, he had a strong

defense in that case. Had trial counsel pursued AC, that reasonably would have been a tipping point for Mr. Bell to go to trial.

The circuit court erred in finding that Mr. Bell still would have pled no contest, without the benefit of testimony. The court failed to take into account evidence, contemporaneous with the plea, that his decision to plead was based significantly on counsel's failure to pursue AC. Moreover, the court wrote, "His attorney stated on the record that he was investigating a possible third-party defense, and therefore, the defendant knew that this was a possible defense at trial." (48:6; App. 112.) But this ignores Mr. Bell's repeated post-plea allegations that trial counsel did not, in fact, pursue this defense, and was unprepared to present it at trial.

Mr. Bell's defense would have been strengthened considerably by evidence that AC had sex with SE, and that he also had chlamydia. Coupled with the State's inability to prove that Mr. Bell had chlamydia, this evidence would have supplied a strong defense. As Mr. Bell's postconviction motion argued, this evidence would have been admissible, and he would not have entered his plea. Because the allegations in the postconviction motion were sufficient to warrant relief, this Court should reverse the decision of the circuit court and remand for a *Machner* hearing.

II. Mr. Bell is entitled to an evidentiary hearing because CB's recantation is newly discovered evidence warranting plea withdrawal.

Mr. Bell also seeks an evidentiary hearing concerning CB's new, detailed recantation. Despite his no contest plea, Mr. Bell continued to assert his innocence and told the PSI writer that he was only entering a plea to spare his children from having to testify. Now that CB has recanted the allegations against Mr. Bell, explained why she made her false accusation, and identified the real perpetrator, it is evident that plea withdrawal is warranted to correct a manifest injustice.

A. Mr. Bell is entitled to plea withdrawal based on newly discovered evidence that the allegations against him were untrue.

As discussed above, a defendant is entitled to plea withdrawal as a matter of right when necessary to correct a manifest injustice. *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906. The discovery of new evidence satisfies this standard. *State v. Krieger*, 163 Wis. 2d 241, 255, 471 N.W.2d 599 (Ct. App. 1991).

For newly discovered evidence to constitute a manifest injustice, the defendant must show: (1) the evidence was discovered after conviction, (2) the defendant was not negligent in seeking the evidence, (3) the evidence is material to an issue, and (4) the evidence is not merely cumulative. *State v.*

McCallum, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

When the newly discovered evidence is a recantation, the recantation must be corroborated by other newly discovered evidence. *Id.* at 473-74. The corroboration requirement can be met by showing: (1) a feasible motive for the initial false accusation, and (2) circumstantial guarantees of trustworthiness for the recantation. *Id.* at 477-78.

If the defendant proves these criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would have been reached in a trial. *Id.* 473-74. To do so, the court must determine "whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." *Id.* at 474.

The issue in this case is whether Mr. Bell's motion alleged sufficient facts to warrant an evidentiary hearing on his newly discovered evidence claim. This court decides that question de novo. *State v. McAlister*, 2018 WI 34, ¶ 25, 380 Wis. 2d 684, 911 N.W.2d 77.

B. Mr. Bell's postconviction motion alleged sufficient facts to prove that he was entitled to plea withdrawal based on newly discovered evidence.

This case satisfies all four criteria of the newly discovered evidence test. Although she previously recanted in May 2012, CB's more exhaustive recantation was discovered after the conviction. CB was only 10 years old at the time of her initial recantation. She told police that her original allegation that Mr. Bell humped her body was a lie. (79:13; App. 150.) CB said her aunt told her to blame Mr. Bell and that Mr. Bell told her to say it was SE's boyfriend. (*Id.*) She did not accuse an alternate perpetrator; she said she blamed Mr. Bell because she did not want her aunt to be mad at her. (*Id.*) The police officer characterized CB's answers as rehearsed. (*Id.*)

CB is now 15 years old, and her new recantation is markedly different from the first. Her current recantation includes two specific accusations against SE: she accused him of both assaulting her, and telling her to blame her father. (79:3; App. 140.) The ostensible motive for her false accusation was fear of her abuser. This new, detailed recantation satisfies the requirement that the new evidence be discovered after the conviction.

The second and third criteria are even more straightforward. Mr. Bell was not negligent in seeking the evidence because he was ordered to have

no contact with CB and she did not make her recantation to her aunt until well after the conviction. (96:4-5.) The third criterion is also easily satisfied: the evidence is material to an issue in the case because it involves the identity of the perpetrator and it comes from the State's only witness in the case. In fact, the State's only evidence against Mr. Bell was CB's original accusation. The fact that she tested positive for chlamydia was proof she had been assaulted, but it did not incriminate Mr. Bell because there was no proof he had the disease.

The recantation also satisfies the fourth criterion because CB's new recantation is not merely cumulative. CB is considerably older and better able to explain the motivation for her false accusation. In addition, this new recantation adds a relevant data point for the jury to consider. CB accused Mr. Bell of sexual assault, but recanted her accusation approximately nine months later. Mr. Bell was convicted more than a year later. CB's current recantation has great probative value because it occurred nearly five years after the original recantation, yet remains consistent in demonstrating Mr. Bell's innocence.

CB's recantation also satisfies the requirement that a recantation be accompanied by other newly discovered evidence. *McCallum*, 208 Wis. 2d at 476-78. CB's recantation provided a feasible motive for her initial false accusation, and there are

circumstantial guarantees of its trustworthiness. *Id.* at 477.

In *McCallum*, the court found that the requirement that corroborating evidence be "new" was satisfied "inasmuch as the motives for [the victim's] initial accusation were unknown until she revealed them when she recanted." *Id.* at 478. The victim was McCallum's step-daughter, who accused him of sexual assault, and her motive was that she wanted her divorcing parents to reconcile, she resented him for replacing her father, and she was angry he disciplined her. *Id.*

Just as in *McCallum*, the motives for CB's false accusations are new because they were unknown until she recanted to her aunt. CB told her aunt that SE's boyfriend was the person who sexually assaulted her, and was also the person who compelled her to accuse Mr. Bell. If her claim is accepted as true—which it must be at this stage—then it is plain that her motive for accusing Mr. Bell was fear of the person assaulting her. CB's recantation to her aunt did not include this specific motive, but a postconviction hearing with CB's testimony is necessary to develop this matter further.

Testimony from CB's mother would also be useful at a postconviction hearing. She is the person who first brought CB to the police station to record the recantation in May 2012. However, she has refused Mr. Bell's postconviction counsel an opportunity to speak with CB. (79:7-8.)

While CB's recantation bears some guarantees of trustworthiness, a hearing is appropriate to determine whether the recantation is trustworthy. In *McCallum*, the trial court held an evidentiary hearing where the alleged victim and her mother testified. 208 Wis. 2d at 471-72. The Wisconsin Supreme Court held that the recantation contained sufficient guarantees of trustworthiness to satisfy the corroboration requirement. The court based that holding on findings that: (1) the recantation was internally consistent and given under oath, (2) it was consistent with circumstances existing at the time of the initial accusation, and (3) the victim was advised at the time of her recantation that she faced criminal consequences if her initial accusation was false. *Id.* at 477-78.

Based on CB's assertions—made through her aunt—the court may find that the recantation is consistent with circumstances existing at the time of the initial accusation. CB tested positive for chlamydia. In the recantation, CB accused SE's boyfriend of the assault, and he was already known to have tested positive for chlamydia.

The other two factors bearing on trustworthiness in *McCallum* could only be assessed after an evidentiary hearing. There, CB could reiterate her recantation under oath, and reaffirm the recantation, knowing of any potential penalties for her initial false accusation. Therefore, Mr. Bell's postconviction motion alleged facts necessary to hold

an evidentiary hearing where CB could testify to her recantation.

There is also a reasonable probability that a jury, looking at both the initial accusation and the recantation, would have a reasonable doubt as to Mr. Bell's guilt. When evaluating the probability of a different result, the question is not whether "the recantation [is] less credible than her accusation." *McCallum*, 208 Wis. 2d at 474. The question is simply whether a jury—hearing both stories—would reasonably have a reasonable doubt as to the defendant's guilt. *Id.* This does not even require a finding that the recantation is the most believable story; the question is simply whether the jury would have a reasonable doubt. "A reasonable jury finding the recantation less credible than the original accusation could, nonetheless, have a reasonable doubt as to the defendant's guilt or innocence. It does not necessarily follow that a finding of 'less credible' must lead to a conclusion of 'no reasonable probability of a different outcome.' Less credible is far from incredible." *Id.* at 474-75.

CB's recantation involves not only a nullification of the original accusation, but also a motive for the original false accusation, and an alternative perpetrator that explains the physical evidence. As a nine year old, CB tested positive for chlamydia. The State was unable to prove that Mr. Bell ever had chlamydia, even after effectuating a subpoena of his medical records. (109:10-11.) Although the physical evidence supports an assault,

it does not connect Mr. Bell to that assault. CB's recantation, combined with her alternate explanation for the physical evidence, establishes a reasonable probability of an acquittal at trial.

CONCLUSION

For the reasons stated above, Mr. Bell asks that this court reverse the decision of the circuit court and remand for an evidentiary hearing on his postconviction motions.

Dated this 28th day of January, 2019

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,637 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 28th day of January, 2019

Signed:

_____

DUSTIN C. HASKELL
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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.

Dated this 28th day of January, 2019.

Signed:

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APPENDIX

INDE X
TO
APPENDIX

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