STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Dane County Case No. 16-CF-1268
Appeal No. 2019AP1578-CR

NATHAN J. FRIAR,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND ORDER DENYING MOTIONS FOR POST-CONVICTION RELIEF ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JOSANN M. REYNOLDS AND THE HONORABLE SUSAN M. CRAWFORD, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

COLE DANIEL RUBY
Attorney at Law
State Bar #1064819

JEREMIAH W. MEYER-O'DAY
Attorney at Law
State Bar #1091114

Martinez & Ruby, LLP
620 Eighth Avenue
Baraboo, WI 53913
(608) 355-2000

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes Cited

Wisconsin Statutes and other sources

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STATEMENT OF THE ISSUES

1. **Did the trial court erroneously exercise its discretion when it permitted the State to (1) bolster the testimony of the alleged victim through hearsay testimony of three other witnesses; (2) present graphic and overly prejudicial photographs of the complainant's vagina; and (3) present "demeanor" evidence designed to elicit sympathy?**

The trial court found the evidence admissible over the defendant's objections. The postconviction court concluded that the trial court did not erroneously exercise its discretion in admitting the evidence.

2. **Was Friar's trial attorney ineffective for (1) failing**

to object to the admission of the SANE nurse's testimony relating the complaining witness's hearsay statements describing the sexual assault, where at least some of those statements were not made for purposes of medical diagnosis or treatment; (2) failing to impeach the complaining witness with her prior statements denying any memory of sexual contact with Friar, and (3) failing to present expert testimony regarding the interaction of alcohol consumption and Type 1 diabetes, to impeach the complainant's ability to accurately perceive and recall events?

The postconviction court ruled that the trial attorney did not perform ineffectively.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appellant does not request oral argument, but is willing to provide oral argument if the court deems it helpful in addressing the merits of the appellant's claims.

The appellant requests publication. Two of the issues appear to lack published caselaw addressing the specific circumstances.

First, this case raises a question of whether it is reasonable for an attorney to maintain a strategy rendered invalid by the changing circumstances of trial. Prior to trial, attorney Brophy decided not to present evidence that MBK told her roommates that she had no recollection of any sexual activity—even though this completely contradicted MBK's testimony of remembering a violent sexual assault—because he wished to avoid opening the door to other damaging statements MBK had made to the roommates. However, at trial, the court admitted all of those damaging statements over attorney Brophy's hearsay objection as prior consistent statements. Despite these changing circumstances which invalidated his fear of opening the door, attorney Brophy failed to change his strategy and present the highly impeaching statements. The postconviction court found Brophy's pre-trial strategy was objectively reasonable, but completely failed to

address whether the changing circumstances of trial rendered that strategy obsolete and unreasonable. The defense could locate no published authority addressing this issue.

Second, this case raises a question regarding the admissibility of "demeanor" evidence for a sexual assault complainant, outside the context of expert testimony and ***Jensen*** evidence. *See* ***State v. Jensen,*** 147 Wis.2d 240, 432 N.W.2d 913 (1988). The trial court allowed the State to present evidence from the complainant and her parents about her demeanor, primarily sadness and crying, when discussing what happened with them afterward. The defense argued this was improper and inadmissible under 904.01 and 904.03 as it was designed to play on juror sympathy and had little to no probative value. The parties located no published cases on the issue, and the court admitted the testimony in reliance upon an unpublished decision silently extending ***Jensen's*** principles. The defense believes that ruling was improper, and this court should issue a published decision finding such evidence inadmissible.

STATEMENT OF THE CASE

A. Trial

1. Testimony Of MBK

Nathan Friar was charged with second degree sexual assault using force and strangulation of MBK for events that occurred in his Madison apartment in the early morning hours of 6/5/16 (R2:1-3). MBK testified that two days earlier, she met Friar at an after-party, where they flirted and exchanged contact information (R142:68-69). They exchanged "casual" text messages over the next two days (R142:70).

On 6/4/16, MBK worked until 11:30 pm, and exchanged messages with Friar about meeting (R142:70-71). After work, MBK went home briefly before meeting friends at the Vintage Bar (R142:71). MBK acknowledged consuming alcohol and having Type 1 diabetes, but insisted that neither her memory nor her judgment were impaired (R142:72-74). After leaving the Vintage, MBK went to the Red Rock Saloon and consumed more alcohol (R142:74-75). However, MBK

again insisted neither alcohol nor diabetes affected her "in any way" (R142:75-76).

MBK exchanged more text messages with Friar arranging to meet at the Red Rock (R142:76-81). When Friar arrived, they talked, flirted, danced, and possibly kissed (R142:82-83). Video footage showed them dancing and consuming alcoholic beverages before leaving the Red Rock together (R142:84-90).

When walking past Friar's apartment, Friar asked MBK if she wanted to come up because his roommates were having an after-party (R142:90). In preparation for trial, MBK reviewed a surveillance video of herself and Friar standing outside the Equinox (R142:92-93). MBK acknowledged they were flirting and kissing, having casual conversation (R142:91-92,105). Although she agreed to go up, MBK denied having discussed sex, and claimed she only wanted to "make out" (R142:91-92,108).

Video from inside the elevator showed them laughing, but MBK didn't recall why (R142:109). MBK testified they got off on the wrong floor (9th) initially, but she hadn't realized it (R142:109-10). When they arrived at the correct floor (12th), video showed them holding hands as Friar led MBK into the apartment (R142:110). MBK testified she discovered there was no after-bar inside, just two guys watching TV (R142:110-11). According to MBK, once inside, Friar had a "firm grip" on her hand and led her into his bedroom (R142:111).

MBK claimed Friar became aggressive as soon as he closed the door, kissing her forcefully (R142:112-14). MBK testified she "fell" on the bed because Friar pushed her back (R142:114-16). According to MBK, the "[n]ext thing I remember is he was on top of me and was taking my clothes off" (R142:116). MBK testified she told Friar to stop or "Be gentle" (R142:116-17).

MBK testified Friar then put his hands on her throat 3-4 times, causing her to gasp for air (R142:121-23). MBK claimed that while squeezing her neck, Friar put his other hand "forcefully" into her vagina without her consent, touching both her internal and external genitalia (R142:123-24). MBK

claimed she blacked out while Friar had one hand on her throat and the other touching her genitals (R142:124).

MBK recalled regaining consciousness and finding Friar passed out on top of her, so she located her clothes and insulin pump left Friar's room (R142:125-26). On the way out, MBK texted a message "OMG, please help" intended for a friend, but mistakenly sent it to Friar (R142:126-27). This occurred at 4:36 am (R142:126-28). After going home to sleep, MBK spoke to her roommates in the morning, and then contacted police and had a sexual assault examination at Meriter (R142:131-37).

2. Physical Evidence And Vaginal Photos

SANE nurse Maureen Hall observed bruises to the sides of MBK's neck, and redness to her neck and chest (R144:104-06; 111-12). No other injuries were documented to MBK's neck (R144:107). Further, most symptoms associated with strangulation were not present (R145:8-10). Nurse Hall agreed that hickeys can cause neck bruising, and she couldn't rule out whether hickeys caused MBK's neck bruises (R145:13).

Nurse Hall observed bruises near MBK's clavicle and lower back, but no injuries to the lower half of MBK's body (R144:107-08,112-13).

Testimony regarding vaginal injuries differed substantially between the testimony of MBK and Nurse Hall. MBK twice testified regarding "tearing" of her vagina (R142:137,146). Nurse Hall documented only two small vaginal injuries—a linear abrasion to the posterior fourchette, and an abrasion to the labia (R144:122). Hall testified those were both external injuries (R145:22,31). Since consensual sex can result in blunt force trauma, Hall couldn't opine on consent or lack thereof based on injuries (R145:21,31).

No one clarified with Nurse Hall the fact that there were no internal vaginal injuries or tears, contrary to MBK's testimony.

Further, the State published large 8x10 photographs of MBK's vagina to the jury (R144:79-80). The defense objected

under sec. 904.03, arguing the large photographs of genitalia were highly prejudicial, and the injuries could be described through testimony (R144:80). The court, despite acknowledging the photos were "rather graphic," allowed the evidence (R144:79-81). The prosecution first had Nurse Hall describe the injuries using anatomical diagrams, and then displayed 4 large, blown-up photographs of MBK's genitalia (R144:118-24).

3. Challenges To MBK's Credibility

The defense impeached MBK's credibility with (a) text messages showing flirting and a desire to meet up, contrary to MBK's denials of interest in Friar to police; (b) video evidence demonstrating MBK's romantic interest in Friar; (c) memory gaps and inconsistent statements; and (d) MBK's alcohol consumption and diabetes.

a. Text messages

While MBK repeatedly testified she wasn't looking to meet up with Friar (R142:163-65), text messages between 6/2/16-6/3/16 showed them constantly flirting, agreeing to get together at Friar's place before going out Friday night, and then discussing a "rain check" (R142:156-57,161-66). These messages also completely refuted MBK's original statements to police denying any interest in Friar, saying he "creeped [her] out" and she hadn't wanted to give her phone number (R142:152,167). MBK also originally told police she hadn't wanted to meet Friar at the Red Rock (R142:167), despite the texts showing they arranged to meet.

b. Video evidence

Video evidence also contradicted MBK's statements to police denying interest in Friar. MBK originally told police she hadn't wanted Friar to walk her home from the Red Rock, but videos showed them holding hands while walking out together (R142:172). MBK also omitted any reference to standing outside Friar's building for 20 minutes, kissing and flirting (R142:173-74). Surveillance footage also showed MBK putting her hand on MBK's penis/groin area—another detail she hadn't told police (R142:176).

Nor had MBK told police about making out with Friar when they accidentally exited the elevator on the wrong floor (R142:178), though surveillance videos showed them making out in the elevator, including sucking on each other's necks (R143:7). MBK also told police she'd been dragged to Friar's apartment door, but video showed her walking in freely (R142:178).

c. Memory gaps and inconsistent statements

Testimony revealed substantial gaps in MBK's memory, including the following details she didn't recall, or had no independent recollection aside from seeing videos: (1) whether they kissed or held hands while walking home; (2) talking and making out with Friar outside the Equinox for 20 minutes, and grabbing his penis; (3) the substance of the conversation on the porch; (4) what made Friar fall backwards on the porch; (5) what MBK whispered in Friar's ear; (6) getting off the elevator with Friar on the wrong floor and making out with him there; (7) seeing three guys on the couch inside Friar's apartment eating sandwiches; (8) being introduced to Friar's roommates and getting a tour of the apartment; (9) Friar pointing out the view of University Avenue from inside his room, and Friar leaving the room at one point; (10) kissing Friar while standing against his dresser; (11) whether she got naked or touched Friar's penis; and (12) whether she said anything when Friar pushed her onto the bed, or whether the light was on. (R142:114-16,118,173-79,181-82,189-90; R143:6).

MBK was also impeached with inconsistencies between her trial testimony and statements to police regarding the sequences of events when she first entered Friar's room (R142:182-83); claimed memories regarding Friar supposedly inserting his hand into her vagina while strangling her (R142:123, R145:88); whether she waited for Friar to fall asleep or left after waking up to find him atop her (R143:6-7); and whether or not her insulin pump was damaged (R142:187).

d. Alcohol consumption and diabetes

MBK acknowledged consuming at least one alcoholic

drink before going to the Red Rock, and two drinks at Red Rock (R142:170-71). She also provided extensive testimony about the interaction of alcohol and Type 1 diabetes, including the following points: (1) while alcohol consumption can lead to hypoglycemia, that only occurs "several hours after you have your last drink;" (2) decreasing blood sugar only occurs after consuming a "significant" amount of alcohol; (3) memory is only impaired if blood sugar levels get "dangerously low;" (4) she can drink alcohol without any effect on her memory; (5) a blood sugar level of 22 had no effect on her memory or cognition; (6) consuming alcohol doesn't affect her ability to accurately determine her blood sugar levels; and (7) she wasn't experiencing any symptoms of low blood sugar with Friar (R143:9-10,13-15,23; R145:98-99).

MBK didn't check her blood sugars during the time she was with Friar (R143:9). However, she claimed to have checked her blood sugar 5-7 times/day (R143:11). During the first day of trial, MBK testified she "could get" her blood sugar levels from her endocrinologist for her time with Friar (R143:10). Once produced, however, those records provided no test results over a 21-hour period, including MBK's time with Friar (R145:105). MBK had a level of 196 mg/dL at 2:00 pm on 6/4/16, approximately 9½ hours before she began drinking that night, and 224 at 11:00 am on 6/5/16, about 9½ hours after her last drink (R145:104-05).

The defense presented no witnesses regarding the interaction between alcohol and diabetes, and didn't question the State's medical witnesses about diabetes, despite the court's indication that such questioning would be permitted if the nurses had foundation (R142:14-15). Thus MBK's claims regarding the science of alcohol and diabetes were uncontroverted to the jury.

4. Rehabilitation With Surrogate Witnesses

After MBK's testimony, the State attempted to rehabilitate her credibility, which consisted primarily of re-stating her version of events through three separate witnesses—Allyson Reeves, Paige Hampton, and Nurse Hall.

a. Arguments regarding hearsay

The defense objected to the State asking Reeves, one of MBK's college roommates, what MBK said during a phone call, arguing it was hearsay and cumulative (R143:34-35,37). Since the call occurred 9-10 hours after the incident, the court rejected the State's argument that the statements were excited utterances (R143:36-37, 43). However, the State argued the statements were admissible as prior consistent statements because MBK's credibility had been impeached (R143:39).

The court questioned whether the statements would be "a prior consistent statement offered for the purpose of rebutting an express or implied charge of fabrication?"[1] (R143:45-46). The defense argued MBK always said she was strangled, and never challenged whether she made those statements, so subsequent statements saying the same thing wouldn't be rebutting that (R143:46). The court concluded such testimony from Reeves and Hampton, another roommate, would qualify as prior consistent statements (R143:49,52).

b. Allyson Reeves

Over another hearsay objection, Reeves testified MBK made the following statements:

- MBK had been sexually assaulted
- MBK had gone out with her friends, met up with a guy, he asked her to come to an after-bar
- MBK went up to the guy's apartment, but there was no after-bar
- MBK got pushed into his room, onto the bed
- MBK was strangled or choked
- MBK blacked out, but wasn't sure if it was from biological response or being choked
- MBK regained consciousness, got out of there quickly, and went home

[1] As discussed *infra*, this omits a key requirement of sec. 908.01(4)(a)(2), that the statement be offered to rebut a "recent" fabrication.

(R144:25-26).

c. Paige Hampton

Paige Hampton provided similar testimony:

- MBK had been sexually assaulted
- MBK met Friar at a bar, afterward he led her to his apartment, saying there was an after-party
- When MBK got up to his apartment, there was no after-party, just two guys
- The previous night, MBK had mentioned meeting Friar
- After going into Friar's apartment, MBK recalled Friar making "very aggressive" movement, grabbing her forcefully, and then she blacked out and doesn't remember what happened
- MBK didn't know why she blacked out, but believed it was because she knew Friar was not stopping
- MBK wasn't wearing underwear when she woke up
- When MBK got up, Friar was laying across her asleep
- Upon waking up, MBK found her underwear and put them back on and then immediately left the room

(R144:33-36).

d. Nurse Hall

The court's ruling admitting MBK's "prior consistent statements" didn't specifically reference statements to Nurse Hall. Regardless, Hall testified that MBK stated she was assaulted the Equinox apartments by an acquaintance named "Nate" (R144:83). The prosecution then asked Hall to read MBK's entire "narrative" statement from her report (R144:85). Without objection, Hall related MBK's entire statement describing how she met Friar that night, where they were and who they were with, what MBK saw upon arriving at Friar's apartment, how he was kissing her "aggressively," the alleged strangulation and sexual assault, and MBK's conversations with friends the next day (R144:85-86).

The prosecutor then asked Nurse Hall about specific questions and answers MBK provided during the SANE checklist (R144:88,91). Hall again testified about MBK description of the strangulation, stating, "She said that she was held down all over, she was strangled, and that her lower back was sore" (R144:90-91). When asked about methods employed, Hall testified MBK stated "she was grabbed, she was strangled on her neck" (R144:91). The prosecutor then asked, "And did she also indicate anything about strangulation?" to which Nurse Hall replied, "Yes. She indicated that she was strangled" (R144:91). The State then asked Nurse Hall a series of questions about how MBK described the strangulation (R144:97-99).

5. "Demeanor" Evidence

The State also presented substantial "demeanor" evidence through MBK and her parents describing her emotions while calling her parents at the hospital. Prior to trial, the defense moved to exclude evidence that MBK "suffered any mental or emotional health problems" because such evidence would be irrelevant and any unduly prejudicial (R26:1-3). The State clarified its intent to present evidence of MBK's "demeanor, emotions, feelings and responses" to family and friends while describing what happened (R27). The defense objected that such testimony was (1) irrelevant character evidence, (2) subject to exclusion pursuant to sec. 904.03 because it was designed to manipulate juror sympathy, and (3) prejudice vastly outweighed probative value (R30). Further, the defense argued that admission of such evidence opened the door to rebuttal "demeanor" evidence, such as evidence that MBK went out partying with her friends a week later, and Friar's demeanor and emotions when discussing the allegations with his family (R140:18-19; R30).

The court concluded the State's proffered testimony regarding MBK's demeanor when speaking to her parents was admissible (R142:6-7,138-140). MBK testified she called her parents "because I was hurt," and described her parents as a "huge support system" (R142:138,141). MBK described her own demeanor while talking to her parents as crying, unable to form words, and breathing heavily (R142:142-43). MBK

described herself as sniffling and sobbing, "really, really sad," and had a floodgate of emotions (R142:142-43). Later, when the defense questioned her memory of events, MBK blurted out, "I've gone through therapy since June to try to deal with…" (R142:190). The defense objected, and the court sustained (R143:5).

MBK's mother, Jan, testified MBK sounded "shaky," it was hard to get words out, and it sounded like she was crying and upset (R144:42). Upon seeing MBK in person, Jan described MBK as "solemn, meek and hurt" (R144:45). MBK's father, Kent, testified MBK is normally "cheerful," but on the phone she was upset and crying (R144:51). Kent testified MBK wasn't able to articulate why she was at the hospital, and he drove to see her out of concern (R144:52).

6. Defense Witnesses

Friar's roommate, Seth Liegel testified that after drinking at bars that night, he returned to the Equinox with roommate Aaron Feiner and another friend, Gabe (R145:146-48). All three guys were awake, talking, and eating sandwiches on the couch when Friar and MBK entered the apartment (R145:149). Video footage showed two other friends (Derek and Blake) arrived at the apartment around 3:05 am (R145:153-54). Liegel and Gabe left shortly thereafter (R145:155-56). While he had still been in the apartment, Liegel observed that Friar did not "drag" MBK to his room, and did not push or pull her (R145:151). Liegel didn't see or hear anything about Friar and MBK that caused concern, such as anyone getting thrown around the room (R145:156,159).

Feiner, who accompanied Friar to the Red Rock, observed Friar and MBK dancing, and took a Snapchat video of them kissing (R146:19). Feiner subsequently returned to the apartment, and met up with Liegel and Gabe, who had bought sandwiches (R146:20). Video footage showed Feiner talking to Friar outside the Equinox and making teasing faces (R146:33-34). Feiner recalled that he "heckled" Friar when he and MBK entered the apartment (R146:21-22). At that time, Feiner was sitting on the couch with Liegel and Gabe (R146:20-22). Subsequently, Liegel and Gabe left, and Derek and Blake came over (R146:22). Feiner recalled spending

about 45-60 minutes in the living room after Friar and MBK went to Friar's room, and during that time Feiner heard nothing unusual (R146:22,38). Feiner testified he later brushed his teeth in the bathroom across from Friar's room, at which point he heard "sexual noises" such as moans and groans, and the bed creaking (R146:22-23,40-41).

Feiner acknowledged lying to detectives for the first several minutes they interviewed him, such as telling them he hadn't been home, saying he was too intoxicated to remember anything, and denying hearing Friar and MBK "hook up" (R146:41-42). Feiner indicated he lied because he was scared and initially didn't know what the interview was about (R146:54-56).

Nathan Friar testified to a completely consensual encounter with MBK, which ended badly because of performance anxiety. He described meeting MBK on 6/2/16, being very interested in her, obtaining her phone number, exchanging a quick first kiss, and texting her upon walking home (R146:81-86,143-44). They discussed going to his apartment on Friday night before going to bars, but that didn't work out so he asked for a rain check (R146:86-87). Friar and MBK texted again the night of 6/4/16, and agreed to meet at Red Rock (R146:91-94). They talked, danced, and were "making out" at Red Rock (R146:95-98).

Friar and MBK lived close by, so they walked out together holding hands, and continued talking on the way (R146:100-01). Friar viewed the Equinox surveillance footage, and testified they were making out and discussed going up to his place (R146:101). He denied telling MBK there was an after-bar (R146:101-02). Friar stated they decided to go upstairs after MBK leaned in, grabbed his penis, and whispered something about going upstairs (R146:102-03).

After more kissing and holding hands on the way up to the apartment, Friar introduced MBK to his roommates, who were eating sandwiches on the couch (R146:104-06). Friar led MBK into his room, showed her the view of University Ave, and they began kissing while standing up (R146:107-08). After exiting to tell his friends not to interrupt, Friar got a glass of water, rinsed his mouth with Listerine, returned to the room

and resumed kissing with MBK on the bed (R146:108-12).

Friar described removing his clothes, and needing help from MBK to remove her bra and jeans, because her jeans were too tight (R146:112-15). During this time, MBK was laughing and giggling, and had not said "no" to anything (R146:114-15). Friar described kissing MBK's body, and attempting to insert fingers into her vagina, at which point she said "Ow" and he stopped immediately (R146:116-17). Friar was worried he'd ruined things, and felt embarrassed, but MBK then grabbed his penis and helped guide him into her vagina (R146:117-18). They did not have sex for very long, however, because Friar felt like things weren't going well, and he had difficulty maintaining an erection (R146:118). Friar apologized and lay beside MBK until falling asleep (R146:119-20).

When Friar woke up and MBK was gone, he became worried—especially after seeing a text that said "Oh my God, please help" (R146:120). Friar tried texting her again, but she never responded (R146:121-22). Friar denied strangling or sexually assaulting MBK (R146:133).

Friar acknowledged drinking 2-3 beers at his apartment, 1 drink at the Double U bar, and 2 beers at the Red Rock (R146:91-92,145-49). He had noticed that he was "really drunk" when standing outside the Equinox with MBK, because his face felt flushed (R146:151). He agreed he'd felt drunk just before returning to his room and having sex with MBK (R146:155). However, Friar testified he had a clear memory of the events of that night, due to spending so much time thinking about it in the months leading up to trial (R146:124-25).

When questioned about texts suggesting he was so drunk he "blacked out," (R146:123-31;165-84), Friar testified he was exaggerating, that he wasn't that drunk, and that he didn't black out (R146:124-26). He also exchanged texts expressing concern that something went "awful" and he was worried about the "what-ifs"—specifically worried whether MBK regretted her decision, whether she'd had a bad time, or whether she'd ever speak to him again (R146:130-31,176). Friar was also worried because he hadn't worn a condom (R146:133).

7. Closing Arguments

Both sides addressed the significance of diabetes in closing arguments. The State referred to it as a mere "distraction," and argued that MBK went out and obtained the exact information the defense wanted regarding her blood sugar levels (R146:233). The defense countered that those records didn't contain results for the relevant time period (R146:249). Further, the defense attacked MBK's lack of memory and argued that the combination of alcohol and diabetes may have created false memories of what happened (R146:248). The prosecutor responded that the defense was merely trying to show MBK was "irresponsible" in her medical care, and that diabetes had no effect on MBK's memory:

> She is a young woman with a serious medical condition who articulated to you in every way that her medical condition was in no way impacting her ability to understand what she was doing or what happened that night.

(R146:267) (emphasis added).

The prosecutor then pointed to the lack of evidence challenging MBK's testimony regarding diabetes:

> [MBK] is a normal, maturing 21-year-old, and there is nothing in the evidence to support that this notion that Mikayla or any other person with diabetes can't have a drink or can't drink alcohol responsibly. There's nothing to support that getting a little tipsy has any sort of different effect on [MBK]. To make that sort of leap is pure speculation, and that's not reasonable doubt.

(R146:268) (emphasis added).

The prosecutor emphasized the importance of credibility, concluding Friar was "wasted," in contrast to MBK, who "was responsible that night. She had her wits about her. She knew what was going on" (R146:268).

8. Jury Deliberations

The jury requested to see photos and videos of MBK's bruises from the elevator (R146:289-90). After reviewing the

videos again, the jury ultimately finding Friar guilty of sexual assault with use of force, but not guilty of strangulation (R146:293-94). The court denied the defendant's motion for judgment notwithstanding the verdict based on the inconsistent verdicts (R146:296).

B. Sentencing

The court commented extensively upon the evidence during sentencing, expressing concerns regarding use of force element in Count 1:

> In this case the two counts appear to have been in tandem with each other; that is strangulation as alleged was the force or threat of force allegedly applied by Mr. Friar. However, the jury rejected the evidence of strangulation and acquitted Mr. Friar of the strangulation charge believing the marks on her neck were hickeys and not evidence of force or strangulation. This is born out by the fact that the jury during its deliberations requested to come back into the courtroom to view the video evidence of the images from the elevator and in particular the State's comparative blowup of MBKs neck when she went up the elevator with the blown up images showing no marks on her neck compared to those when she came down the elevator less than two hours layer.
>
> My notes reflect she testified that they sucked on each other's necks while making out. Mr. Friar testified he was sucking on her neck and trying to give her a hickey. And finally, the forensic nurse examiner testified she could not say the marks were not hickeys.
>
> Assuming, as I must, that the jury followed the jury instructions, it does cause one to ponder, pause and ponder what evidence sustained the finding of the forced element of this second degree sexual assault.
>
> The video evidence showed nothing but consensual actions by both Mr. Friar and MBK. The jury heard her description of what happened in the bedroom. She described Mr. Friar's actions as being aggressive and causing her to say, stop, slow down, be gentle. In reviewing the nature of the conduct alleged here, the Court is left uncertain as to the exact evidence of force the jury relied upon in reaching its verdict.

(R148:3-4).

Finally, when discussing the level of "force" used in the context of the severity of the offense, the court concluded:

> In this case we have two 21-year-old college students with a significant amount of alcohol and spotty memories. However, there was, as Mr. Brophy recited, extensive video footage of the couple and it showed them on the porch of Mr. Friar's apartment building beginning at 1:26 a.m. They were mutually making out, flirting. They went up the elevator at 1:47 a.m., and she left alone at 3:37 with the marks on her neck.
>
> The testimony was uncontroverted that there were at all times at least two other males in the apartment watching TV and eating and that Mr. Friar left her in the bedroom and went out to clean his mouth and use mouthwash.
>
> The testimony from MBK was that Mr. Friar removed her pants fast and recklessly and she was saying, "stop, slow down, be gentle". She testified he was too aggressive and that when he forcefully tried to put his hand in her vagina, she said it hurt and to stop and be gentle, which according to her own testimony he did stop.
>
> I do not intend to diminish her perception of the harm that has resulted from this offense. She provided -- I have no reason to doubt her at this time. However, I cannot ignore my own observations of the evidence and my dissonance with the jury's verdict. The Court is bound by the jury's verdict and I do not make the laws. I apply them as enacted by our legislature. I must in determining the appropriate disposition take into account that there is very little evidence in this record based on the jury's acquittal of the strangulation charge as to the use or level of any purported force.

(R148:6-7).

C. Post-Conviction Litigation

Friar filed a motion for postconviction relief on May 21, 2018 requesting a new trial based upon (I) the trial court's erroneous admission of hearsay evidence, photographic evidence, and demonstrative evidence; and (II) ineffective assistance of trial counsel for failing to impeach MBK in

various respects, and failing to retain an expert and present expert opinion testimony at trial[2] (R108:1-37).

After an evidentiary hearing followed by briefing from the parties, the postconviction court denied all of Friar's motions in a written order, holding that the hearsay, photos, and demeanor evidence Friar complained of in his motion were properly admitted into evidence for the reasons summarized above, that Friar had waived any error in admitting the SANE nurse's relation of MBK's statements to her by failing to object to said testimony, that such failure was neither deficient nor prejudicial, that Dr. Tovar's opinion was insufficiently material to warrant reversal, that Friar did not receive ineffective assistance of counsel, and that the jury's verdict was not inconsistent, but even if it was, this fact did not entitle Friar to a new trial in the interest of justice, and that there was sufficient admissible evidence to support Friar's conviction for second degree sexual assault with use of force. (R137:1-29).

Friar filed a timely notice of appeal (R138). Additional facts will be presented where appropriate.

ARGUMENT

I. THE STATE IMPROPERLY BOLSTERED THE CREDIBILITY OF MBK BY RE-STATING HER VERSION OF EVENTS THROUGH HEARSAY TESTIMONY OF THREE SURROGATE WITNESSES, AND ELICITED SYMPATHY BY PRESENTING GRAPHIC PHOTOGRAPHS AND PREJUDICIAL "DEMEANOR" EVIDENCE

A. Standard Of Review

Evidentiary rulings are reviewed for an erroneous exercise of discretion. ***State v. Echols***, 2013 WI App 58, ¶14, 348 Wis.2d 81, 831 N.W.2d 768. The question is whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. ***Id.*** Evidentiary decisions will be upheld if the trial court examined

[2] Additional motions pertaining to newly-discovered evidence and a request for a new trial in the interest of justice based on inconsistent verdicts are not being raised on appeal.

the relevant facts, applied the proper standard of law, and reached a reasonable conclusion. ***Id.*** The same discretionary standard applies to the determination of whether hearsay is admissible pursuant to an exception to the general rule prohibiting hearsay, ***State v. Manuel,*** 2005 WI 75, ¶24, 281 Wis.2d 554, 697 N.W.2d 811, and admissibility of photographs. ***State v. Lindvig***, 205 Wis.2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996). "Photographs should be admitted if they help the jury gain a better understanding of material facts and should be excluded if they are not 'substantially necessary' to show material facts and will tend to create sympathy or indignation or direct the jury's attention to improper considerations." ***Sage v. State***, 87 Wis.2d 783, 788, 275 N.W.2d 705 (1979).

B. Statements To MBK's Roommates And Nurse Hall Were Not Admissible As Prior Consistent Statements, And Many Of MBK's Statements To Nurse Hall Were Not For Medical Purposes

1. Allyson Reeves and Paige Hampton

The trial court admitted MBK's statements to roommates Reeves and Hampton as prior consistent statements pursuant to Wis. Stat. sec. 908.01(4)(a)2. However, prior consistent statements are only admissible if the witness testifies at the hearing, is subject to cross-examination, and "the statement is . . . [c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Wis. Stat. sec. 908.01(4)(a)2.

When applying this exception to the proffered testimony, the court omitted the "recency" requirement (R143:45-46) (asking whether it is "a prior consistent statement offered for the purpose of rebutting an express or implied charge of fabrication"). The post-conviction court's conclusion that the trial court "stated the law correctly" on prior consistent statements is therefore erroneous (R169:7-8).

While the defense certainly alleged MBK's version of events was fabricated, there was no claim that the fabrication was "recent." Instead, the defense argued MBK's claims were

fabricated from the very beginning. General attacks on credibility do not render prior consistent statements admissible. *See* ***State v. Peters,*** 166 Wis.2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991) ("an allegation that a person is lying, standing alone, is not sufficient to render admissible the prior consistent statements. The allegation must be that the fabrication is recent").

The court in ***Peters*** reversed a defendant's sexual assault conviction based on the improper admission of a victim's prior consistent statements which did not predate the alleged fabrication. ***Id.,*** 166 Wis.2d at 177. The court explained, "The rationale underlying the prior consistent statement exception to the hearsay rule is that if a witness can demonstrate that she had related a version of the events consistent with her courtroom testimony before the recent fabrication, improper influence or motive arose, the existence of a prior consistent statement rebuts the charge of recent fabrication or improper influence or motive. However, absent a charge of recent fabrication or improper influence or motive, evidence of a prior consistent statement does not make courtroom testimony more credible." ***Id.*** (internal citation omitted).

Both the trial court and post-conviction court (*see* R169:7-8) applied the prior consistent statement rule erroneously, essentially creating a blanket exception allowing all of MBK's statements to Reeves and Hampton, rather than analyzing whether individual statements were admissible to rebut claims of recent fabrication. *See* ***State v. Meehan,*** 2001 WI App 119, ¶¶25-26, 244 Wis.2d 121, 630 N.W.2d 722. Since MBK's statements to Reeves and Hampton didn't predate the alleged fabrication, testimony from Reeves and Hampton repeating MBK's same allegations to which she testified at trial constituted inadmissible hearsay. ***Id.,*** ¶¶25-26.

2. Nurse Hall

MBK's statements to Nurse Hall also constituted inadmissible hearsay, because they occurred after the original false claim, and did not rebut a claimed "recent" fabrication. 908.01(4)(a)2.

Defense counsel did not specifically object to hearsay during Nurse Hall's testimony, so the post-conviction court ruled the objection waived (R169:8-9). However, attorney Brophy's hearsay objection during the testimony of Reeves should have preserved the issue, because he articulated the specific reasons why MBK's prior statements to a witness about the offense constituted hearsay, and the court overruled. A general objection to a category of evidence may be sufficient to preserve specific objection for review. *See* ***Peters***, 166 Wis.2d at 175 (hearsay objections to two witnesses testifying about victim's prior statements sufficiently preserved hearsay challenge to third witness's testimony). The same reasoning applies here, because the trial court's denial of the hearsay objection with Reeves rendered similar objections fruitless.

Further, while some of MBK's statements to Nurse Hall may have been admissible as hearsay exceptions under sec. 908.03(4) as statements made for the purpose of a medical diagnosis, many of the statements do not. Sec. 908.03(4) does not provide a hearsay exception for all statements to a medical provider; instead, the statements must describe medical history, past or present symptoms, pain or sensations, or the inception or cause of those symptoms or sensations. ***Id.*** In other words, the statements must have a direct relevance to medical treatment. By contrast, statements which describe events that don't affect medical treatment are not included. ***State v. Nelson,*** 138 Wis.2d 418, 430-34, 406 N.W.2d 385 (1987) (statement identifying an assailant inadmissible because they are "seldom are made to promote effective treatment").

Accordingly, statements MBK made which described events but did not affect her medical diagnosis or treatment were inadmissible hearsay, including the following:

- MBK identified her assailant as an acquaintance named "Nate";
- MBK met a few friends at Vintage Bar after work;
- Then they went to Red Rock bar to meet other friends;
- While MBK was at the Red Rock, "this guy Nate texted. I met him on Thursday. He asked where I was, and he said

> he would meet me there. I went over to talk to him in the bar about 1:30 to 1:45 p.m";
>
> - At bar time MBK couldn't find her friends, and "Nate" said he would walk MBK home;
> - "When we got to Equinox, he asked if I wanted to come up with other people hanging out. We went up, and there were a couple guys, but they were going to bed";
> - "He took me to his room and then immediately started aggressively kissing me";
> - "Multiple times I said, 'Stop. Stop. No. I don't want to do this.' He wouldn't stop.";
> - MBK waited until he fell asleep and then searched for her stuff;
> - MBK texted her roommates and walked two blocks home;
> - MBK told her roommates what happened in the morning, and her roommates told her she should call the police;

(R108:22).

None of these statements affected MBK's medical diagnosis or treatment. And since they were consistent with the testimony MBK already provided, they were inadmissible hearsay, presented merely to re-state MBK's version of events.

C. Graphic Photographs Of MBK's Vagina Were Unduly Prejudicial

The State presented four large, glossy photographs of MBK's vagina and published them to the jury, ostensibly on the theory that it was necessary to see the "actual injuries" (R144:79). However, the presentation of these photos was completely unnecessary and highly prejudicial. The probative value was minimal at best. The existence of minor abrasions to MBK's external genitalia was not contested. Vaginal injuries were not an element of either offense. The SANE nurse testified the existence of those injuries told us nothing about whether the sex was consensual (R145:21,31). Thus, seeing photographs of the injuries did not aid the jury whatsoever regarding the issues in controversy.

By contrast, the danger of prejudice was substantial. The court acknowledged the photographs were "rather graphic" (R144:79). They were, after all, blown-up photographs of MBK's genitalia. Presenting embarrassing, invasive photographs in that format was only likely to engender more sympathy for MBK.

Further, the State presented testimony from Nurse Hall using anatomical diagrams demonstrating the location and size of the abrasions (R144:118-19). Accordingly, the photos were not "substantially necessary" to show material facts. ***Sage,*** 87 Wis.2d 788. Instead, those photos would only "tend to create sympathy or indignation," and should have been excluded under sec. 904.03. ***Id.***

Considering the photographs had only marginal probative value and substantial danger of prejudice, they were inadmissible and constitute reversible error. *See, e.g.*, ***United States v. Hitt,*** 981 F.2d 422, 424 (9th Cir. 1992) (reversing defendant's conviction for possession of unregistered machine gun based on erroneous presentation of photograph of numerous weapons which did not depict anything impacting jury's consideration, and instead was highly prejudicial).

D. Improper "Demeanor" Evidence

Over numerous defense objections, the court permitted the State to present so-called "demeanor" evidence from MBK, her mother, and her father. As discussed *supra,* this resulted in a substantial amount of evidence from MBK describing her own feelings when talking to her parents, and her parents describing their interpretation of MBK's feelings. The court permitted this evidence as relevant to MBK's credibility, pursuant to the persuasive authority of the *Lattimore* decision (R142:139).

Lattimore is unpublished, and therefore is not controlling precedent. Further, *Lattimore* was wrongly-decided, citing no authority whatsoever for the proposition that an accuser's subsequent conduct and changes in demeanor are relevant or admissible.

Published authority in Wisconsin permits expert

testimony on an accuser's post-incident conduct and demeanor in certain cases to explain the meaning of that behavior. *See* ***State v. Jensen,*** 147 Wis.2d 240, 432 N.W.2d 913 (1988); and ***State v. Robinson,*** 146 Wis.2d 315, 431 N.W.2d 165 (1988). However, the reasoning behind allowing testimony in certain cases is to rebut defense arguments regarding the complainant's post-incident conduct. In ***Robinson***, the defense argued to the jury that the complainant's being "emotionally flat" was inconsistent with her claim of sexual assault. ***Id.,*** 146 Wis.2d at 333. In ***Jensen,*** the defense argued the complainant fabricated the sexual assault allegations to distract from her own misbehavior at school. ***Id.,*** 147 Wis.2d at 252.

By contrast, the defense did not make MBK's post-incident behavior an issue. The defense theory was essentially that a combination of alcohol and diabetes led MBK to misremember the sexual encounter and misinterpret what had occurred once she saw the bruising from the hickeys. The defense did not argue MBK's conduct upon leaving Friar's apartment or subsequent demeanor was inconsistent with a sexual assault victim. Thus, unlike in ***Jensen*** and ***Robinson***, such testimony had no rebuttal effect.

The *Lattimore* decision, without citing ***Jensen,*** constituted a completely improper extension of the ***Jensen*** principle. *Lattimore,* and this court's decision following *Lattimore,* would open the door to a massive amount of post-incident conduct under the heading "demeanor"—a problem correctly pointed out by attorney Brophy. If a complainant's "demeanor" of being sad during a phone call with her parents the next day is admissible, a defendant's demeanor while denying the allegation to his parents would also be admissible. And so would "rebuttal" demeanor of the complainant's lack of sadness while partying with friends only days later. Frankly, none of this is admissible, or relevant.

This case also differs from *Lattimore* in one respect—most of the testimony about MBK's "demeanor" while talking with her parents came from MBK herself. Even assuming testimony from witnesses describing a complainant's subsequent demeanor is admissible and corroborative, testimony from the complainant describing her own behavior and feelings is not.

Finally, the State had already presented demeanor evidence through numerous other witnesses who'd spoken to MBK before her parents—Paige Hampton, Allyson Reeves, Officer Franklin, and Nurse Hall. Evidence of MBK's feelings and demeanor during her subsequent conversations with her parents was excludable under sec. 904.03 as cumulative, unnecessary, and designed to elicit sympathy.

E. Erroneous Admission Of This Evidence Was Not Harmless

When a court finds evidence was improperly admitted, the court must then determine whether the error was harmless. ***State v. McGowan,*** 2006 WI App 80, ¶25, 291 Wis.2d 212, 715 N.W.2d 631 (reversing child sexual assault conviction based on erroneous admission of other acts evidence, error not harmless due to importance of character evidence and witness credibility). An error is harmless only if the beneficiary of the error—in this case, the State—proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *See* ***McGowan, id.*** A key consideration is the overall strength of the State's case. ***Id.,*** ¶25. Where the government's case is of marginal sufficiency, even otherwise minor errors can have a great impact on the jury. ***United States v. Agurs***, 427 U.S. 97, 113 (1976).

This was a credibility contest, since only MBK and Friar were present in the room when the allegedly criminal acts occurred. In a sexual assault case where the only witnesses to the alleged crime are the complainant and defendant, "the jury's verdict is often a matter of which person the jury finds more credible." ***State v. O'Brien***, 223 Wis.2d 303, 326, 588 N.W.2d 8 (1999). Errors that impact credibility are much more likely to prejudice a defense in a credibility contest.

This was a close case with numerous limitations in the State's evidence, as the court acknowledged at sentencing. MBK and Friar both had "a significant amount of alcohol and spotty memories" (R148:6). There was also a substantial amount of video evidence, and as the court correctly stated, "[t]he video evidence showed nothing but consensual actions by both Mr. Friar and MBK" (R148:4). Specifically, the court

noted the video outside the Equinox showed them "mutually making out, flirting" (R148:6). The same video showed MBK grabbing Friar's penis and whispering into his ear right before they went upstairs to his apartment (See R142:176; R146:102-03; 226, 253). The video evidence substantially supported the consent defense.

Further, the jury acquitted Friar of strangulation. Split verdict cases indicate the jury did not fully believe the allegations. *See, e.g.*, ***State v. Yang***, 2006 WI App 48, ¶17, 290 Wis.2d 235, 712 N.W.2d 400 ("This was a close case, as evidenced not only by the split verdict, but also by the State's acknowledgment during its opening statement that the case against Yang rested on the "credibility" of the various witnesses"). As the court noted, the strangulation was the force or threat of force allegedly applied to commit the sexual assault (R148:3). As a result, the court questioned what evidence sustained the use of force element (R148:4).

Given the closeness of the evidence in this case, the potential prejudice of the hearsay evidence presented by the State was substantially magnified. Instead of a he-said-she-said case, the jury heard MBK's version of events no less than 4 times, first through MBK, then Reeves, then Hampton, and again through Nurse Hall, who read the entire narrative portion of MBK's statements during the SANE exam, before answering additional questions regarding specific portions of MBK's statements. This evidence was not presented for a legitimate purpose; instead it artificially bolstered MBK's credibility through repetition of her story.

The State also artificially enhanced MBK's credibility by presenting extensive testimony focused on her own purported observations of her feelings when talking to her parents, describing herself as sniffling, sobbing, breathing heavily, unable to form words. By contrast, the jury did not hear Friar's "demeanor" evidence of how emotional he was discussing these false allegations to his family. Nor did the jury hear how, less than a week after this incident, MBK was out partying and drinking with her friends.

Finally, the unnecessary presentation of four blown-up photographs of MBK's vagina accomplished nothing besides

creating more sympathy for MBK. Those minor abrasions were uncontested by the defense, and per the State's own expert, not indicative regarding the primary issues in the case.

The combined impact of these errors makes this case comparable to ***State v. Meehan,*** 2001 WI App 119, where the court reversed sexual assault convictions based on improperly admitted other-acts evidence, and on the State presenting a victim's prior statements through multiple witnesses. ***Id.,*** ¶¶27-28. The court concluded as follows:

> the admission of the prior testimony, which was read dramatically to the jury, constituted reversible error. In essence, the jury heard Nickolas's testimony multiple times: once through Nickolas's live testimony, and twice more, through the dramatic reading of the prior testimony.

Id. ¶28.

This jury heard MBK's story over and over and over before it heard anything from Friar, including Nurse Hall's full narrative reading of MBK's statements, which is comparable to the dramatic reading of prior testimony in ***Meehan.*** The jury also heard substantial evidence designed only to elicit sympathy for MBK. Considering how important credibility was, the substantial evidence supporting the consent defense, and the split verdict, this was highly prejudicial. These errors warrant reversal for a new trial.

II. TRIAL COUNSEL FAILED TO IMPEACH THE COMPLAINANT'S TESTIMONY ON KEY POINTS AND FAILED TO PRESENT AN EXPERT WITNESS REGARDING AN IMPORTANT CREDIBILITY ISSUE, VIOLATING FRIAR'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard Of Review

In order to find counsel rendered ineffective assistance, the defendant must show trial counsel's representation was deficient and that he was prejudiced by counsel's errors. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's conduct is constitutionally deficient if it falls below

an objective standard of reasonableness. ***Id.*** at 688. In order to prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

B. Deficient Performance

1. Failure To Object To Hearsay And Cumulative Testimony

Attorney Brophy performed deficiently by not objecting to Nurse Hall's hearsay testimony presenting the narrative portion of MBK's prior statements, or alternatively by not objecting to cumulative testimony when the prosecutor repeated the same information with specific questions.

Attorney Brophy's strategy was to limit any prior statements consistent with MBK's testimony designed to elicit sympathy (R149:48). With regards to MBK's narrative statement to the SANE nurse, Brophy agreed it included portions that were damaging to the defense (R149:51). However, Brophy didn't object to narrative testimony because he didn't want the State to go through it line-by-line, assuming it would be admitted as excited utterances or statements to a medical provider (R149:50-52).

However, the court had already ruled MBK's statements to her roommates were not "excited utterances" due to the passage of 9-10 hours since the event (R143:37,43). Accordingly, statements given several hours later would not have been deemed excited utterances. And, as discussed *supra*, several of MBK's statements admitted through Nurse Hall which were clearly not for medical purposes.

Further, after admitting the narrative portion in its entirety, the prosecutor was still questioned Nurse Hall line-by-line with specific answers, duplicating information from the narrative statement. Attorney Brophy offered no strategic reason for his failure to object to cumulative testimony, and instead stated he "should have" objected (R149:52-53). Accordingly, the post-conviction court's finding that Brophy's failure to object was based on reasonable strategy is incorrect (R169:15). This non-strategic failure was deficient.

2. Failure To Impeach/Argue To The Jury

a. MBK's statements denying memory of sexual contact

Attorney Brophy failed to present MBK's prior statements to Paige Hampton, Allyson Reeves, and Officer Franklin demonstrating her lack of memory of any sexual activity, which directly contradicted MBK's graphic testimony describing memories of being forcefully digitally penetrated while simultaneously being strangled.

Brophy acknowledged possessing these statements in discovery (R149:33,41,44). Brophy agreed the statements directly contradicted "her specific memory of Mr. Friar forcefully inserting his hand into her vagina" (R149:39). Brophy further acknowledged that how the sexual incident occurred was the "main issue" in the case (R149:95).

Brophy offered no strategic reason for failing to impeach MBK with her statement to Officer Franklin, indicating he expected he would have done that, and didn't recall why he didn't (R149:45). Counsel's lack of recollection cannot qualify as a strategic reason. *See* ***State v. Honig,*** 2016 WI App 10, ¶28, 366 Wis.2d 681, 874 N.W.2d 589 ("This failure of memory does not articulate a factual basis for a reasonable strategic decision").

Attorney Brophy articulated two strategic reasons for not impeaching MBK with her statements to Hampton and Reeves, or questioning the roommates about those statements—(1) a general desire to limit questioning of these witnesses, and (2) a specific goal to avoid opening the door to Hampton and Reeves discussing MBK's claims about being strangled (R149:35-38,42-43).

Those may have been objectively reasonable strategy before trial. However, once the court admitted MBK's prior statements to Hampton and Reeves (R143:49-52), the concern about opening the door was no longer valid. The roommates testified to all of MBK's damaging statements about strangulation that Brophy hoped to avoid (R144:25-26;

R144:35-36). Further, both Reeves and Hampton testified MBK specifically told them she'd been sexually assaulted (R144:25,33). Once those witnesses testified to all of that damaging information, it was incumbent upon attorney Brophy to impeach with MBK's statements denying any memory of sexual contact or sexual intercourse. The post-conviction court found Brophy's strategy reasonable (R169:19), but completely failed to address why the strategy remained reasonable after circumstances rendered it obsolete.

Additionally, there was no reason to not impeach Reeves with the fact that, contrary to her testimony, MBK did not state she'd been sexually assaulted, and Reeves only "put it together" when she learned that MBK had a SANE exam.

Further, Brophy did impeach both witnesses with MBK's prior inconsistent statements regarding the circumstances leading to the alleged assault (*see* R144:28,38). This undermines any claimed strategy of choosing to minimize the testimony of those witnesses, considering he impeached them about some prior statements, but not the ones pertinent to the "main issue"—how the sexual encounter unfolded (R149:95).

Brophy further acknowledged that, in conjunction with the MBK's statement to Officer Franklin denying recollection of sexual contact or intercourse, these three statements would have corroborated each other and supported argument that MBK didn't actually remember how the sexual encounter occurred (R149:45-46). Given the importance of this issue to the entire case, failure to adapt to the changing circumstances of trial and present these crucial statements was deficient.

b. MBK's admission of additional alcohol consumption

After MBK testified she only remembered consuming two alcoholic drinks, attorney Brophy did not impeach her with her statements to the SANE nurse that she consumed three drinks plus an additional shot of alcohol. Attorney Brophy testified he didn't impeach MBK on this because he knew the evidence was coming in through the SANE nurse (R149:47).

The problem is, that testimony was entered in a vacuum, disconnected from MBK's earlier testimony. Without contrasting it to MBK's testimony through direct impeachment, the only way to draw that contrast was in closing arguments. Attorney Brophy failed to make any reference to this in closing arguments either.

The right to effective assistance extends to closing arguments. ***Yarborough v. Gentry***, 540 US 1, 5 (2003). And as attorney Brophy admitted, the failure to point out MBK consumed more alcohol than she acknowledged in her testimony was not a tactical decision. When asked if the failure to make that argument was a strategic choice, Brophy answered, "No – that is not a choice. I read your motion, and I should have hit on that in my closing" (R149:47-48). Non-tactical omissions are not entitled to deference. *See, e.g.*, ***Carter v. Duncan***, 819 F.3d 931, 942 (7th Cir. 2016).

Alcohol consumption was a crucial issue to the case. Brophy acknowledged that part of his strategy involved attempting to show MBK didn't accurately perceive or recall events, and the accuracy of MBK's memory was "significant" to the defense (R149:29,57). Further, the more alcohol she'd consumed, the more relevant the impeachment regarding diabetes became. As Dr. Tovar's testimony demonstrates, the more alcohol she'd consumed, the greater drop in blood glucose, and the stronger the synergistic effect (R149:108-09). Logically, the more alcohol she'd consumed and didn't remember, the less reliable MBK's account of events became.

c. False claims about vaginal "tearing"

When asked why he didn't clarify with the SANE nurse that MBK didn't experience any vaginal tearing, contrary to her testimony, attorney Brophy characterized that as splitting hairs (R149:53). However, there is a significant difference between "tears" inside the vagina and external abrasions or scratches. This was evident from the testimony of Dr. Tovar, who didn't even characterize abrasions as "injuries" necessarily because abrasions are merely alterations of tissue (R149:131-32). Dr. Tovar specifically testified he didn't see any "tears" (R149:132). Attorney Brophy never requested the same clarification with Nurse Hall at trial, and therefore the

jury was never informed of the difference. Failure to do so was deficient.

3. Failure To Consult With Expert And Present Expert Testimony

Attorney Brophy acknowledged that he knew "very early on" during the case that MBK was a Type-1 diabetic (R149:65). Based on personal experience, Brophy understood that the combination of diabetes and alcohol consumption can cause cognitive impairment and could have affected MBK's memory (R149:55-56). Accordingly, impeaching MBK about her diabetes in conjunction with alcohol consumption became a "substrategy" within his larger strategy of challenging MBK's ability to accurately perceive and recall events (R149:56-57).

Despite this strategy, attorney Brophy did not "consult with any experts on toxicology or endocrinology" before trial (R149:57). Brophy testified he anticipated being able to present the necessary information through cross-examination of MBK because, although she was a lay person, she was also a nurse (R149:59). He didn't realize he'd need an expert until the State raised an objection to such evidence without an expert (R149:61). And Brophy didn't have an expert in reserve because he didn't anticipate the possibility that she would give inaccurate medical testimony (R149:59). Essentially, he was caught flat-footed by the false testimony because he didn't have an expert to rebut MBK's testimony (R149:65).

The defense submits that this approach was not a reasonable strategy, particularly in light of Dr. Tovar's testimony summarized below. Under ***Strickland***, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Id.***, 466 U.S. at 691. Decisions based on inadequate investigation cannot be objectively reasonable decisions because they are not informed decisions. *See* ***State v. Thiel***, 2003 WI 111, ¶40, 264 Wis.2d 571, 665 N.W.2d 305.

Brophy's approach essentially relied on MBK—the alleged victim, who had every incentive to minimize the effects of alcohol and diabetes—to supply the scientific foundation for

his challenge to the reliability of her own memory. His personal expertise on the subject was no use at trial, because he couldn't act as a witness—a problem he should have foreseen. These oversights led the defense to be inadequately prepared, and are therefore not afforded any presumption of reasonableness. *See* ***Carter v. Duncan, supra,*** at 942.

Post-conviction, the defense consulted with Dr. Richard Tovar, an expert in toxicology, to review the discovery materials and excerpts from the trial transcripts pertaining to alcohol and diabetes. Dr. Tovar compiled his analysis into a report (R108:45-48). The conclusions from this report, and Dr. Tovar's testimony regarding those conclusions, would have strengthened attorney Brophy's argument in several ways.

First, in contradiction to MBK's generalized claims suggesting blood sugar had little impact on memory, and only in extreme circumstances, Dr. Tovar explained that hypoglycemia mimics intoxication and produces strikingly similar effects:

> [A]n individual may exhibit central nervous system effects similar to ethanol. Specifically slurred speech, confusion, poor recent and remote memory, poor multitasking, and poor balance. Individuals have been mistaken for intoxicated via ethanol, when in reality they were hypoglycemic.

(R108:46).

Dr. Tovar also opined that the combination of alcohol and hypoglycemia, which both independently impair the central nervous system, exacerbate the effects of one another: "the combination of a subject who has hypoglycemia and is drinking ethanol may result in a synergistic effect of the above negative central nervous system effects" (R108:47).

For the same reasons, Dr. Tovar explained that diabetics are more susceptible to blackouts than non-diabetics (10/17: 111-12). People experiencing blackouts usually don't lose motor function (10/17: 110-11). Though they can function normally, they don't store memories, and therefore cannot remember large portions of events during that blackout period (10/17: 112). This testimony was significant because MBK

could have been in a blackout state, completely conscious and able to make decisions, but not remembering what happened.

Dr. Tovar's testimony also exposed MBK's claims about diabetes and alcohol consumption for exactly what they were: minimization and false claims:

- ***MBK's testimony that consumption of alcohol "normally" only leads to a drop in blood sugar several hours after the last drink is false.*** The drop in blood sugar happens throughout the consumption of alcohol, and can happen immediately (R149:114-15);

- ***MBK's claim that alcohol consumption doesn't make it more difficult to monitor blood sugar is erroneous***. Consumption of alcohol masks the patient's ability to accurately self-detect their glucose levels, which is why many diabetics end up in the emergency room after consuming alcohol (R149:115-16).

- ***MBK's claim that a drop in blood sugar only affects memory when at a "dangerously low" level, such as 22 mg/dL, is false.*** First, most people at a level of 22 are not just memory-impaired, but unconscious or comatose (R149:116-17). Second, memory can be impaired at a wide range of levels (R149:114-15); and

- ***Blood sugar level is not the only factor in whether a person's memory is impaired by hypoglycemia, contrary to MBK's testimony.*** The rate at which glucose drops can also impair memory. For example, cognitive impairment can occur with a sudden drop from 200 to 100 mg/dL (R149:116-18).

Dr. Tovar acknowledged that the absence of records regarding MBK's blood glucose levels at the time of her contact with Friar preclude an opinion to any degree of certainty whether MBK was hypoglycemic that night (R108:48). However, certainty is not a requirement for admissibility of expert testimony. *See* ***Daubert v. Merrell Dow Pharmaceuticals, Inc***., 509 U.S. 579, 590 (1993).

In this case, it is undisputed that MBK had Type 1

diabetes, and that she consumed alcohol during the early morning of 6/5/16. Biologically, consumption of alcohol would have caused a drop in blood glucose. Dr. Tovar's testimony would have educated the jury on the effects of alcohol consumption, the effects of hypoglycemia, the synergistic effect of the combination, and to rebut MBK's erroneous and misleading testimony on those subjects.

Considering attorney Brophy intended to attack MBK's credibility and memory as part of his defense strategy, the failure to consult with an expert and have one available to present such testimony to support that strategy was deficient.

C. Prejudice

In assessing prejudice, the court must take into account the totality of the evidence before the trier of fact. ***Strickland,*** 466 U.S. at 695. A single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding. ***Thiel***, 2003 WI 111, ¶60. Likewise, the cumulative effect of several deficient acts or omissions may also undermine a reviewing court's confidence in the outcome of a proceeding. ***Id.*** "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." ***Strickland***, 466 U.S. at 695-96.

As discussed *supra*, the evidence was not strong. To summarize the previous points, this assertion is supported by the facts that:

- This case was primarily a credibility determination between MBK and Friar;

- Friar testified all sexual contact was consensual, and numerous videos depicted "nothing but consensual actions" between Friar and MBK, (R148:3-4), including dancing, holding hands, kissing, and MBK grabbing Friar's penis right before going up to his apartment;

- The SANE nurse testified the physical evidence was consistent with consensual sex;

- MBK had consumed alcohol and demonstrated substantial memory problems;

- The jury obviously had some difficulty believing MBK's testimony, as she claimed Friar strangled her while sexually assaulting her, but the jury acquitted on strangulation; and

- The State was required to prove use or threat of force beyond a reasonable doubt to convict Friary of 2nd degree sexual assault, and the court acknowledged "there is very little evidence in this record based on the jury's acquittal of the strangulation charge as to the use or level of any purported force" (R148:6-7).

The prejudice from counsel's errors and omissions was substantial. MBK's credibility and the reliability of her memory were crucial to the theory of defense, considering the defense argued the encounter was entirely consensual and MBK's memory was distorted by alcohol and diabetes, and that she overreacted after seeing the neck bruises from the hickeys. The omitted evidence would have strengthened that defense substantially.

The jury heard Reeves and Hampton Reeves testify that MBK reported being "sexually assaulted" to them, but did not hear that MBK completely denied any recollection of sexual contact to both of them. This could have greatly undermined MBK's testimony claiming she specifically recalled Friar "forcefully" inserting his fingers into her vagina, and supported the defense that she didn't actually remember what happened.

The jury heard MBK's testimony indicating alcohol had no impact on her memory that night. However, MBK was never impeached with the fact that on top of the alcohol she remembered consuming, she also drank an additional shot at the Red Rock before leaving with Friar. While the SANE nurse mentioned the shot in passing, this discrepancy with MBK's testimony was never mentioned to the jury. The fact of an additional shot of alcohol makes her memory less reliable, and also makes it more likely she experienced hypoglycemia, as the consumption of additional ethanol biologically leads to a greater drop in blood glucose.

The jury heard MBK falsely claim she suffered "tearing in [her] vagina." While the SANE nurse described minor abrasions to the external vaginal area, no one questioned her about MBK's false claim, which implied a greater degree of force than actually occurred. Nor was the jury told in closing arguments about MBK's exaggeration. This was a significant point, considering how much the State emphasized MBK's vaginal injuries by displaying the blown-up vaginal photographs.

The SANE nurse's testimony reading the entirety of MBK's narrative account only served to bolster MBK's credibility artificially. While there were helpful inconsistencies in that account (such as the shot of alcohol), the defense could have obtained those concessions through impeachment with prior inconsistent statements, rather than letting MBK's entire narrative get entered into evidence.

Finally, the jury heard plenty of testimony from MBK insisting her diabetes had no impact on anything, that it did not impair her memory in any way, and that the combination of alcohol and diabetes would only impair memory "several hours after the last drink," and only when the person's blood glucose reached "dangerously low" levels. This testimony was false and misleading. An expert could have rebutted that with truthful information, which would have further undermined MBK's credibility and the reliability of her memory on crucial issues. But without an expert witness for the defense, the jury heard only MBK's uncontroverted claims. As a result, the prosecutor in closing was able to argue her condition was "in no way impacting" MBK's recollection, and to write off the defense arguments about diabetes as "pure speculation" (R146:267-68).

All of the errors identified above go directly to the key issue in the case—MBK's credibility. Had the jury known MBK was lying about remembering the sexual encounter, misremembering how much alcohol she had to drink, exaggerating the degree of vaginal injury, and misleading the jury about the effects of alcohol and diabetes, there is a substantial probability the jury would have found her less credible. This is particularly true regarding MBK's denials of

recollection regarding the sex—if the jury accepted her statements denying memory as true, it could reject entirely her testimony regarding how the sexual encounter occurred, whether it was consensual, and whether force was used.

The post-conviction court found Friar wasn't prejudiced by any of the claimed errors, focusing on the fact that Brophy's cross-examination of MBK was lengthy and effective in some areas, and his strategy focused on MBK's memory and alcohol consumption (R137:19-20). However, the court never addressed the impact of key errors—such as not presenting MBK's denials of remembering any sexual activity—and how those errors prejudiced Friar's defense.

This was already a weak case for the reasons discussed *supra.* Due to the combined prejudice that resulted from counsel's errors, and the close nature of the evidence in this case, Friar is entitled to a new trial.

III. CONCLUSION

Based on the reasons stated above, Friar moves the court to vacate the judgment of guilt and order a new trial, and grant him such further relief as the court may find to be appropriate.

Respectfully submitted: 11/18/2019:

Cole Daniel Ruby
State Bar No. 1064819

Jeremiah Meyer-O'Day
State Bar #1091114

Martinez & Ruby, LLP
620 8th Avenue
Baraboo, WI 53913
Telephone: (608) 355-2000
Fax: (608) 355-2009

CERTIFICATION

I hereby certify that this brief 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 10,860 words.

Signed 11/18/2019:

COLE DANIEL RUBY
Attorney at Law
State Bar #1064819

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed 11/18/2019:

COLE DANIEL RUBY
Attorney at Law
State Bar #1064819