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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019AP1578-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NATHAN J. FRIAR,

Defendant-Appellant.

ON APPEAL FROM A JUDGEMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, EACH ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE JOSANN M. REYNOLDS AND THE HONORABLE SUSAN M. CRAWFORD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes

Other Authorities

ISSUES PRESENTED

1. Did the circuit court erroneously exercise its discretion when it allowed the State to introduce at trial (1) the testimony of three individuals that the victim, M.B.K., had made statements about a sexual assault consistent with her testimony in court; (2) photographs of M.B.K.'s genitalia showing injuries sustained during the assault; and (3) testimony from M.B.K.'s parents about her demeanor shortly after the assault?

The circuit court overruled Defendant-Appellant Nathan J. Friar's objections, concluding that (1) the State was entitled to introduce M.B.K.'s prior consistent statements in order to rehabilitate her after the defense suggested that she had embellished and fabricated portions of her testimony; (2) the photographs were not unduly prejudicial; and (3) the demeanor testimony from M.B.K.'s parents was relevant.

This Court should affirm.

2. Did Friar's trial counsel perform deficiently when he (1) failed to object to testimony recounting M.B.K.'s statements during the sexual assault examination about the assault; (2) elected not to impeach M.B.K. with certain inconsistencies in her testimony; and (3) failed to present expert testimony on the effects of alcohol and diabetes on memory?

After a *Machner* hearing, the circuit court denied Friar's motion for postconviction relief, concluding that counsel's representation was not deficient and that, in any event, counsel's performance did not prejudice Friar.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This Court can resolve this case by applying settled legal principles to the facts.

INTRODUCTION

This appeal stems from a sexual assault that took place near the University of Wisconsin campus in 2016. After an evening drinking at several bars, Friar walked M.B.K. to the Equinox apartments in Madison, where he lived. He persuaded her to come upstairs to his apartment by telling her there was an after-party going on. There was no after-party. Once upstairs, Friar took M.B.K. to his room and sexually assaulted her.

M.B.K. reported the assault to her friends and went to a hospital to have a forensic assault examination performed. She filed a police report, and police investigated. When questioned by detectives, Friar contended that the encounter was consensual and that M.B.K. had fabricated the assault because she was disappointed in his sexual performance. In time, police arrested Friar and the State charged him with second-degree sexual assault and strangulation.

At trial, Friar's attorney focused on the strangulation charge under the theory that without proving strangulation, the State could not prove that Friar used force when assaulting M.B.K., thus negating the second-degree sexual assault charge. Friar's attorney vigorously cross-examined M.B.K., suggesting that her memory was faulty and that she was embellishing parts of her story to fit the narrative that the encounter was not consensual. The jury convicted Friar of the sexual assault, but it acquitted him of the strangulation charge.

Friar now appeals. He claims that the circuit court improperly allowed the State to introduce evidence that was irrelevant, unduly prejudicial, and inadmissible hearsay. He also argues that his trial counsel was ineffective in multiple respects. However, all of his arguments fail.

The circuit court properly exercised its discretion when it admitted the evidence in question. And, to the extent that any of the court's evidentiary decisions were in error, those errors were harmless. Furthermore, Friar's trial counsel was not ineffective. As the *Machner* hearing revealed, counsel had strategic reasons for the actions he took or did not take. Moreover, even if counsel had performed as Friar argues he should have, the jury still would have convicted. Friar's conviction was the product of a fair, adversarial trial. This Court should affirm.

STATEMENT OF THE CASE

In June of 2016, the State charged Friar with one count of second-degree sexual assault and one count of strangulation and suffocation. (R. 2:1.) As described in the criminal complaint, Friar and M.B.K. left the Red Rock Bar together at bar time on June 5, 2016. (R. 2:2.) Friar told M.B.K. that his friends were having an "after bar" party in his apartment and persuaded M.B.K. to come upstairs with him. (R. 2:2.) Once upstairs, it became apparent that there was no after bar; instead, Friar led M.B.K. to his bedroom, where he ripped off her clothing, held her down by her neck, and sexually assaulted her. (R. 2:2.) This case arises out of the jury trial on those charges.

Pre-Trial

Before trial, Friar moved to exclude testimony related to M.B.K.'s demeanor in the days following the assault. (R. 30:1.) Friar argued that any such testimony would be both unduly prejudicial and improper character evidence. (R. 30:1.)

On the first day of trial, before opening arguments, the court addressed the motion. (R. 142:6–8.) It cited *State v. Lattimore*, No. 2013AP911-CR, 2014 WL 4450098 (Wis. Ct. App. Sept. 11, 2014) (unpublished), as being "highly relevant" and commented that although *Lattimore* was not controlling, it did offer "significant guidance on this issue." (R. 142:7.) Based largely on *Lattimore*, the court concluded that while the State would not have "carte blanche" to introduce demeanor evidence, they would be able to offer "some limited testimony." (R. 142:7.) Attorney Brophy agreed but argued that, "if the State wants to introduce that evidence, then I think that the defense has the ability to ask the victim about her behavior in the weeks following the allegations." (R. 142:7.) The court said it would rule on objections as they arose. (R. 142:7.)

Trial

Trial began on April 4, 2017, and lasted for three days. (R. 142:1.) Testimony relevant to this appeal came from six witnesses: M.B.K., Paige Hampton, Allyson Reeves, both of M.B.K.'s parents, and Maureen Hall, a physician assistant who performed a forensic examination on M.B.K. after she reported the assault. Important points of testimony and related objections and court rulings are discussed below. Additional facts, as relevant, are discussed in the State's Argument section.

M.B.K.

M.B.K.'s testimony took place over the first and second days of trial. (R. 142:66; 143:6; 145:94.) She testified about how she met Friar and the events leading up to and following the assault. She also described the assault in detail, stating that Friar "pushed" her onto his bed, removed her clothing "very fast and kind of reckless[ly]" without her permission, squeezed her throat to the point where she was "unable to breathe," and "forcefully put[ ] his hand in [her] vagina."

(R. 142:115–23.) M.B.K. testified that she told Friar to "[s]top" and "[b]e gentle," but he did not respond. (R. 142:123.)

M.B.K. further testified that she was afraid that she would "pass out and . . . just not be able to breathe and die." (R. 142:124.) She said that "there came a point where [she did not] remember what happened" while one of Friar's hands was on her throat and the other "was touching [her] genitals." (R. 142:123–24.) Eventually, M.B.K. testified, she came to with Friar "passed out kind of on top of" her. (R. 142:125.) She collected her belongings while trying not to wake Friar and fled the apartment, texting a friend to request help. (R. 142:125–26.)

Friar's trial counsel, Attorney Brian Brophy, vigorously cross-examined M.B.K. Among the topics Attorney Brophy touched on were the gaps in M.B.K.'s memory, (R. 142:114–18, 173–82, 189–90), M.B.K.'s Type I diabetes and its effect on her memory, (R. 143:9–15; 145:98–99, 104–05), inconsistencies between M.B.K.'s testimony and statements she made to investigators and medical professionals shortly after the assault, (R. 142:123, 182–83; 143:6–7; 145:88), and M.B.K.'s interactions with Friar before entering his room, (R. 142:172–76).

Hampton and Reeves

Following M.B.K.'s testimony, the State called two of her friends—Paige Hampton and Allyson Reeves—to testify. (R. 143:31; 144:24, 30.) Reeves testified first and described text messages she received from M.B.K. shortly after the assault. (R. 143:34.) When the State asked Reeves why M.B.K. had texted her, Friar objected on hearsay grounds. (R. 143:35.) Outside of the presence of the jury, the State argued that M.B.K.'s statements to Reeves were admissible either as excited utterances or as prior consistent statements. (R. 143:37.) The State argued that Friar's cross-examination of M.B.K. had gone beyond identifying gaps in her memory.

Instead, the State argued, Friar had suggested that M.B.K. was "fabricating certain details to law enforcement and changing her story." (R. 143:39.)

The court ruled that the statements were not admissible as excited utterances, but noted that under Wis. Stat. § 908.01(4), a prior statement by a witness subject to cross-examination is not hearsay if the statement is "consistent with declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." (R. 143:45 (citing Wis. Stat. § 908.01(4)).) After further argument on this point, the court ruled that the statements were admissible as prior consistent statements: "I come back to [Wis. Stat. §] 908.01(4)(a).2 [sic] that it is not a hearsay statement when it's a consistent prior statement offered to rebut an express or implied charge that she . . . is fabricating or making up this story." (R. 143:49.) The court ruled, however, that the State would have to limit the number of witnesses it used to introduce prior consistent statements. (R. 143:49–52.) The State informed the court that Hampton and Reeves would be the only two who would testify about the prior consistent statements. (R. 143:50.)

The next day, Reeves continued her testimony and, over Friar's renewed objection, explained that M.B.K. had told her that "she got pushed into [Friar's] room and onto his bed, and then she was strangled." (R. 144:25.) After Reeves concluded her testimony, Hampton testified. (R. 144:30.) She said that M.B.K. told her that Friar "pulled her into his room and had shoved her to the bed; and then once she was on the bed, he was very aggressive and forceful, and she continually told him to stop." (R. 144:35.) Hampton further testified that M.B.K. told her that Friar had grabbed her throat, "which is why she said she had the bruises on her neck." (R. 144:35.) Neither Reeves nor Hampton testified that M.B.K. reported sexual contact between herself and Friar.

M.B.K.'s Parents

In addition to some limited discussion of M.B.K.'s demeanor following the assault by Hampton and Reeves, consistent with the court's pre-trial ruling, the State introduced evidence of M.B.K.'s demeanor through her parents. (R. 144:41, 49.) M.B.K.'s parents testified that M.B.K.'s demeanor on the day after the assault was very different than usual. M.B.K.'s mother said that M.B.K. was "usually very lively and chatty, and we joke back and forth a lot. But it was in contrast to seeing her very solemn and very just meek and hurt, just kind of not the usual confidence that she has." (R. 144:45.) M.B.K.'s father described talking to M.B.K. on the phone while she was at the hospital. (R. 144:50.) He said that M.B.K. was "usually upbeat and cheerful, wants to tell me about whatever is on her mind or how her day was." (R. 144:50–51.) But while they spoke on the phone that day she was upset and "a little bit incoherent." (R. 144:51.) He stated that M.B.K. was unable to articulate why she was at the hospital and eventually handed the phone to a nurse to explain it to him. (R. 144:52.)

Maureen Hall

The State called physician assistant Maureen Hall[1] to testify on the second day of trial. (R. 144:56.) After describing her education and training in forensic examination as well as the forensic examination program generally, PA Hall

[1] Throughout the record and Friar's brief, PA Hall is referred to as "Nurse Hall," likely because of her affiliation with what used to be called the "Sexual Assault Nurse Examiner Program." (R. 144:58.) However, the State refers to her as "PA Hall" to more accurately describe her position and training. *See generally* American Academy of PAs (AAPA), *A Guide for Writing and Talking About PAs*, December 2018, *available at* https://www.aapa.org/wp-content/uploads/2018/12/How_to_Talk_about_PAs_FINAL_December_2018.pdf.

described the forensic examination she performed on M.B.K. after the assault. (R. 144:75.)

During a break and in anticipation of the State asking about photographs taken during the forensic examination, Friar objected to the publication to the jury of certain photos of M.B.K.'s genitalia showing injuries she sustained during the assault. (R. 144:80.) Friar argued that the photos were "highly prejudicial and perhaps should be described rather than published to the jury." (R. 144:80.) The State contended that the photos were relevant because they showed the actual injuries M.B.K. sustained, and "viewing the injury is different than . . . having the witness describe those injuries." (R. 144:80.) The State continued, "if the injuries from her neck are appropriate for the jury to view and the other various parts of her body, then the injuries to her vagina, although graphic, are relevant." (R. 144:80.) The court determined it would allow the photos to be passed around to the jury, but not published on the overhead projector. (R. 144:81.)

As the State continued its questioning of PA Hall, it asked her to read a paragraph she wrote for the forensic examination report recounting M.B.K.'s description of "[w]hat happened." (R. 144:85.) PA Hall read the paragraph in its entirety, which included an explanation of how M.B.K. and Friar came to be at the same bar that evening and described the events leading up to the attack as well as the attack itself. (R. 144:85–87.) PA Hall also read M.B.K.'s responses to more specific questions, saying that M.B.K. reported that Friar's penis contacted her outer genitals, and Friar's fingers contacted her external genitals and entered her vagina. (R. 144:88.) M.B.K. also reported to PA Hall that Friar had strangled her, which had caused her to become "dizzy, lightheaded and faint and [unable to] remember exactly or understand exactly what was occurring." (R. 144:89.) Friar did not object to this line of questioning.

The State then addressed the photographs PA Hall took during the forensic examination and offered them into evidence. (R. 144:99, 109–20.) The photographs included four close-ups showing the injuries to M.B.K.'s vaginal area as well as multiple shots of M.B.K.'s bruising and M.B.K. using a mannequin to demonstrate how Friar choked her.

Closing

Friar's closing argued that the encounter between M.B.K. and Friar was consensual and that the marks on M.B.K.'s neck were hickies, not bruises from Friar choking her. (R. 146:252.) Friar did not raise statements Hampton and Reeves made to police indicating that M.B.K. did not remember the assault, (R. 121:1–2, 122:1), nor did he raise a police report by Officer Michael Franklin stating that M.B.K. "did not know if there was sexual intercourse or if [Friar] had digitally penetrated her." (R. 123:1.) Instead, he focused on other inconsistencies between M.B.K.'s testimony and other evidence and argued that the State had introduced extraneous information merely to "emotionally manipulate" the jury. (R. 146:253–54.)

Verdict and Sentencing

After deliberations, the jury found Friar guilty of second-degree sexual assault and not guilty of strangulation. (R. 146:293.) The court placed Friar on probation for eight years, noting that as a registered sex offender, he would be subject to "rigorous supervision." (R. 148:11.)

Postconviction Proceedings

Friar sought postconviction relief. In a motion to the circuit court through new counsel, he claimed several errors affected the outcome of the trial. (R. 108.) First, he renewed his objections to what he claimed were improper hearsay testimony, improper demeanor testimony, and unduly prejudicial photographs. (R. 108:19–26.) Second, he argued that his trial counsel made multiple errors while representing

him. (R. 108:26–35.) These putative errors included failing to impeach M.B.K.'s testimony on certain "key points" and failing to retain an expert on the issue of alcohol use in Type I diabetics. (R. 108:26–35.)

The court held a hearing on October 17, 2018. (R. 149.) At the hearing, Attorney Brophy testified about his representation of Friar. (R. 149:27.) He explained his strategic choices where applicable and commented that he would have done certain things differently with the benefit of hindsight.

Friar also presented testimony from Dr. Richard Tovar, an emergency medicine and medical toxicologist physician. (R. 149:96.) Dr. Tovar discussed the potential effects of alcohol use on Type I diabetics, included the symptoms of hypoglycemia and hyperglycemia. Under questioning by the State, he acknowledged that he was unable to know what M.B.K.'s blood glucose level was at the time of the assault and could not say with certainty what symptoms a particular individual would experience at any given blood glucose level.

The court denied Friar's request for postconviction relief in a written order. (R. 137.) Friar now appeals.

STANDARD OF REVIEW

Whether to admit evidence is a discretionary decision of the circuit court. *Weborg v. Jenny*, 2012 WI 67, ¶ 65, 341 Wis. 2d 668, 816 N.W.2d 191. An appellate court reviews that decision for an erroneous exercise of discretion. *State v. Franklin*, 2004 WI 38, ¶ 6, 270 Wis. 2d 271, 677 N.W.2d 276. The question is not whether a reviewing court "would have admitted" the evidence, "but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *State v. Payano*, 2009 WI 86, ¶ 51, 320 Wis. 2d 348, 768 N.W.2d 832. "The circuit court's decision will be upheld 'unless it can be said that no reasonable judge, acting on the same facts and underlying

law, could reach the same conclusion.'" *Id.* (quoting *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995)). However, "[w]hile the admissibility of evidence is generally a question addressed to the trial court's discretion," the "application of the hearsay rules embodied in secs. 908.01 and 908.03, Stats., to the undisputed facts" presents "a question of law." *State v. Peters*, 166 Wis. 2d 168, 175, 479 N.W.2d 198 (Ct. App. 1991).

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). A trial court's findings of fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The ultimate determination of whether counsel's performance was deficient and prejudicial are questions of law which this Court reviews independently. *Id.*

ARGUMENT

I. The circuit court properly admitted certain testimony and photographs, and any erroneously admitted evidence was harmless.

A. Legal principles

"The admissibility of evidence rests within the sound discretion of the trial court." *State v. Bellows*, 218 Wis. 2d 614, 627, 582 N.W.2d 53 (Ct. App. 1998). "Whether that discretion was properly exercised depends upon whether the trial court examined the relevant facts, applied a proper standard of law and used a demonstrated rational process in reaching its conclusion." *Id.* If it did, this Court will affirm its decision. *Id.* The trial court should set forth its reasoning on the record, but if it did not, this Court will independently review the record to determine if there was a proper exercise of

discretion. *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

Relevant evidence is generally admissible except as otherwise provided by constitution or statute. Wis. Stat. § 904.02. Relevant evidence is any evidence that has "any tendency to make the existence of any fact that is of consequence" more or less probable. Wis. Stat. § 904.01. Even if relevant, however, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay." Wis. Stat. § 904.03.

"'Hearsay' is defined by the rules of evidence as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *Gehin v. Wis. Group Ins. Bd.*, 2005 WI 16, ¶ 132, 278 Wis. 2d 111, 692 N.W.2d 572 (quoting Wis. Stat. § 908.01(3)). Although hearsay evidence is generally inadmissible, the rules of evidence label a number of statements non-hearsay and contain a number of exceptions to the rule against hearsay. *See* Wis. Stat. §§ 908.02, 908.03, and 908.045.

A prior consistent statement of a testifying witness who is subject to cross examination is not hearsay if the prior 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. § 908.01(4)(a)2. The rationale underlying the exemption of such statements is that if a witness relayed an earlier version of the events that was consistent with her courtroom testimony, the existence of the prior consistent statement rebuts the suggestion that the courtroom testimony is not trustworthy. *Peters*, 166 Wis. 2d at 177. To fit under that rationale, the prior consistent statement generally must predate the alleged recent fabrication, improper influence, or motive. *See State v. Mainiero*, 189

Wis. 2d 80, 104, 525 N.W.2d 304 (Ct. App. 1994). In some cases, however, courts "need not decide whether prior consistent statements that postdate an alleged motive to falsify fall outside the exception of sec. 908.01(4)(a), Stats., and are thus excludible." *State v. Gershon*, 114 Wis. 2d 8, 11, 337 N.W.2d 460 (Ct. App. 1983). This is because testimony related only to the credibility of a witness is not "offered in evidence to prove the truth of the matter asserted" and therefore is not hearsay. *Id.* (quoting Wis. Stat. § 908.01(3)).

Even if a circuit court erroneously admits hearsay evidence, however, the defendant is not automatically entitled to reversal. "Wisconsin's harmless error rule is codified in Wis. Stat. § 805.18 and is made applicable to criminal proceedings by [Wis. Stat.] § 972.11(1)." *State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500. "[I]n order to conclude that an error 'did not contribute to the verdict' within the meaning of *Chapman*,[2] a court must be able to conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Harvey*, 2002 WI 93, ¶ 48 n.14, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted). "The standard for evaluating harmless error is the same whether the error is constitutional, statutory, or otherwise." *Sherman*, 310 Wis. 2d 248, ¶ 8. "The defendant has the initial burden of proving an error occurred, after which the State must prove the error was harmless." *Id.*

B. The circuit court properly exercised its discretion when it admitted photographs of M.B.K.'s injuries.

Friar challenges the circuit court's decision to admit the forensic examination photographs under Wis. Stat. § 904.03. (R. 144:80.) In other words, the question is whether their

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[2] *Chapman v. California*, 386 U.S. 18 (1967).

relevance was substantially outweighed by their inflammatory nature. When a circuit court answers this question, it exercises its discretion. *See Jones v. State*, 70 Wis. 2d 41, 54, 233 N.W.2d 430 (1975).

To prove the charge of second-degree sexual assault, the State had to establish three elements: that Friar had sexual contact with M.B.K., that M.B.K. did not consent to the sexual contact, and that Friar used or threatened to use force to have the sexual contact. (R. 37:4.) *See also* Wis. Stat. § 940.225(2)(a). The photographs in question showed wounds to M.B.K.'s genitalia and thus offered proof of the sexual contact and, arguably, proof that Friar used force while assaulting M.B.K. The photographs were therefore relevant to the State's case. Friar argues that this is not so because the State was able to establish M.B.K.'s injuries through PA Hall's testimony and a diagram of M.B.K.'s body, and because "[t]he existence of minor abrasions to [M.B.K.]'s external genitalia was not contested." (Friar's Br. 26.) But "[e]vidence is always admissible to prove an element of the charged crime even if the defendant does not dispute it at trial." *State v. Lindvig*, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996) (alteration in original) (citation omitted).

On the other hand, Friar has offered little proof that the photographs were unduly prejudicial. He relies chiefly on the court's comment that the photographs were "rather graphic." (Friar's Br. 27.) It is, unfortunately, unsurprising that evidence in a sexual assault case might be graphic. That will often be the case when violent crimes are at issue. But the question is not whether the evidence is graphic, it is whether the evidence is unduly prejudicial. *State v. Veach*, 255 Wis. 2d 390, 426, 648 N.W.2d 447 (2002). "[G]raphic, disturbing and extremely prejudicial" evidence is still admissible unless the defense can demonstrate that the evidence is unfairly prejudicial. *Id.* at 427–28. *See also State v. DeRango*, 229 Wis. 2d 1, 24, 599 N.W.2d 27 (Ct. App. 1999) (When "the

nature of the crimes was highly sensitive to begin with," the danger of unfair prejudice is dramatically reduced because the charged crime itself will "provoke[ ] a strong reaction from the jury.").

The photographs were taken during the course of a standard sexual assault examination for the purpose of documenting M.B.K.'s injuries. (R. 144:63.) They were published to the jury to show those injuries. (R. 144:80–81.) Nothing suggested that the photographs would "tend to create sympathy or indignation or direct the jury's attention to improper considerations." *Ellsworth v. Schelbrock*, 229 Wis. 2d 542, 559, 600 N.W.2d 247 (Ct. App. 1999). Friar's argument that they did is based on nothing more than pure speculation.

As the State explained when seeking to introduce the photographs, "viewing the injury is different than . . . having the witness describe those injuries. And if the injuries from her neck are appropriate for the jury to view and the other various parts of her body, then the injuries to her vagina, although graphic, are relevant." (R. 144:80.) The court apparently adopted this reasoning—made in response to Friar's objection to the photographs under Wis. Stat. § 904.03—and thus exercised its discretion in admitting the photographs. (R. 144:81.) This Court should leave that ruling undisturbed.

C. The circuit court properly exercised its discretion when it admitted testimony about M.B.K.'s demeanor after the assault.

Likewise, the question of whether the admission of testimony about M.B.K.'s demeanor after the assault was proper is also a question of whether that evidence was unnecessarily cumulative or unduly prejudicial under Wis. Stat. § 904.03. Once again, this is a discretionary decision for

the circuit court to make. *See Jones*, 70 Wis. 2d at 54. And once again, the circuit court properly exercised its discretion when it admitted the evidence.

The circuit court's decision with respect to the evidence of M.B.K.'s demeanor following the assault relied heavily on this Court's unpublished decision in *Lattimore*, 2014 WL 4450098. (R. 142:7.) The court noted that the *Lattimore* decision, although not binding, provided "significant guidance on this issue." (R. 142:7.) The court therefore concluded that it would allow "some limited testimony" about M.B.K.'s demeanor following the assault. (R. 142:7.)

The facts in *Lattimore* were very similar to the facts here. Lattimore appealed his conviction for second-degree sexual assault with the use of force. *Lattimore*, 2014 WL 4450098, ¶ 1. He argued that the circuit court improperly admitted evidence related to the victim's demeanor in the months following the assault. *Id.* This Court affirmed, quoting the circuit court's reasoning at length: "Since there were no direct witnesses to the issue of consent, other than Lattimore and the victim, any extrinsic evidence on this issue is relevant and highly probative." *Id.* ¶ 27. The court continued, "[e]vidence of a significant change in the victim's demeanor—from 'high spirited' and 'fun loving' . . . to 'scared' and 'untrustworthy [sic] of others' . . . —would tend to support the victim's claim that she was raped and would undermine the defense theory that she merely regretted her decision to have consensual intercourse." *Id.*

Lattimore might not be binding precedent, but the circuit court's invocation of *Lattimore* nevertheless evinces the court's exercise of discretion. The court considered the facts of this case and how the law applied to them—the analysis in *Lattimore* offered "significant guidance" in that regard. (R. 142:7.) The court then arrived at a decision on the admissibility of the evidence. That is a proper exercise of

discretion. *See, e.g.*, *State v. Sullivan*, 216 Wis. 2d 768, 780–81, 576 N.W.2d 30 (1998).

Friar contends that *Lattimore* "constituted a completely improper extension of the *Jensen*[3] principle." (Friar's Br. 28.) He asserts that sanctioning the circuit court's reliance on *Lattimore* "would open the door to a massive amount of post-incident conduct under the heading 'demeanor.'" (Friar's Br. 28.) This misses the point. As discussed above, the circuit court did not treat *Lattimore* as binding its decision. Rather, it looked to *Lattimore* for guidance, and in doing so, properly exercised its discretion. Any problems with the *Lattimore* decision are irrelevant here.[4]

D. The circuit court properly admitted M.B.K.'s prior consistent statements.

The question of whether the admission of M.B.K.'s statements to Hampton, Reeves, and PA Hall was proper is a question of whether those statements were hearsay under Wis. Stat. § 908.01. As discussed, statements are not hearsay when they are offered to rebut an assertion that the declarant's testimony is a recent fabrication or the result of

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[3] *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988). *Jensen* concerned whether expert testimony about the behavior of child victims of sexual assault offered at trial constituted either improper vouching that the assault actually occurred or improper vouching that the victim was telling the truth. *Id.* at 249. By contrast, the demeanor witnesses in this case—and in *Lattimore*—testified only to the victim's demeanor, not to the demeanor of other sexual assault victims. It was left to the jury to determine the significance of the victim's demeanor, if any.

[4] The State disagrees that *Lattimore* was wrongly decided but, as stated, the merits of that decision are unimportant to the disposition of this case. The evidentiary decision here was discretionary, and the settled law with respect to judicial discretion controls in this case.

improper motive or influence. Wis. Stat. § 908.01(4)(a)2. Moreover, statements are not hearsay when they are not offered for "the truth of the matter asserted." Wis. Stat. § 908.01(3).

The circuit court concluded during trial that M.B.K.'s prior consistent statements were admissible in response to the "express or implied charge that she . . . is fabricating or making up this story." (R. 143:49.) The postconviction court agreed: "The trial court stated the law correctly, considered the relevant facts, and articulated a reasonable basis for its decision. The court acted within its reasonable discretion in admitting the testimony regarding M.B.K.'s prior statements."[5] (R. 137:7.) Friar contends that this decision was a legal error because he did not allege that M.B.K.'s fabrication was recent. (Friar's Br. 23.)

Friar argues that the trial court misstated the legal standard and that the postconviction court's conclusion that the trial court used the correct legal standard was therefore wrong. (Friar's Br. 23.) As support, he quotes language from the transcript where the trial court referred to "a prior consistent statement offered for the purpose of rebutting an express or implied charge of fabrication," claiming that the court "omitted the 'recency' requirement." (Friar's Br. 23 (quoting R. 143:45–46).) But one paragraph before Friar's quoted language in the transcript, the court explicitly mentioned the recency requirement when it stated the legal

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[5] Friar's argument, as does the postconviction court's ruling, suggests he is analyzing this issue under an erroneous exercise of discretion standard. Whether a particular statement is hearsay is a question of law, however, which this Court reviews de novo. *State v. Peters*, 166 Wis. 2d 168, 175, 479 N.W.2d 198 (Ct. App. 1991). To the extent the postconviction court used the wrong standard of review, this Court can still affirm on independent grounds, i.e., that M.B.K.'s statements admitted through Hampton, Reeves, and PA Hall were not hearsay under Wis. Stat. § 908.01(4)(a)2.

standard more fully, citing Wis. Stat. § 908.01(4) and saying that a statement is not hearsay when it is a prior consistent statement by a testifying declarant subject to cross-examination "and the statement is (2) [referring to Wis. Stat. § 908.01(4)(a)2.] consistent with declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." (R. 143:45.) It is clear that the trial court was referring to the correct statute and had the correct legal standard in mind when it overruled Friar's objection.

More to the point, the circuit court's analysis was correct. As the court pointed out in denying Friar's postconviction motion, "[a] charge of recent fabrication is implied . . . where the cross-examining counsel 'repeatedly asked' the declarant about prior statements, suggested untruthful testimony, and 'called [the declarant's] credibility into question.'" (R. 137:6–7 (alteration in original) (quoting *State v. Miller*, 231 Wis. 2d 447, 471, 605 N.W.2d 567 (Ct. App. 1999)[6]).) Friar's cross-examination of M.B.K. carried the strong implication that she was embellishing her testimony and manufacturing facts to fill gaps in her memory despite earlier statements to police and to PA Hall that she could not remember certain things. By implying that M.B.K.'s trial testimony was fabricated or embellished for trial, Friar opened the door to M.B.K.'s rehabilitation through prior consistent statements under Wis. Stat. § 908.01(4)(a)2. *See*

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[6] In *Miller*, this Court affirmed a circuit court decision to admit testimony that might have otherwise been considered hearsay after the defense vigorously cross-examined a witness in a manner that implied his testimony was false. *State v. Miller*, 231 Wis. 2d 447, 467–69, 605 N.W.2d 567 (Ct. App. 1999). This Court said that "persistent questioning implied that [the witness] testified untruthfully" and "called [his] credibility into question." *Id.* at 471. "Consequently," this Court held, "the State was entitled to introduce [the witness's] prior consistent statements to rebut the implied charge that [his] testimony was fabricated." *Id.* at 471–72.

Miller, 231 Wis. 2d at 471. The trial court's decision was correct. This Court should affirm.

E. Any evidentiary errors were harmless.

Even if the trial court made any errors in admitting the evidence Friar argues should not have been admitted, it is clear beyond a reasonable doubt that the outcome of the jury trial would have been the same. *See Harvey*, 254 Wis. 2d 442, ¶ 48 n.14. None of the complained-of evidence directly concerned the elements of the offense, and it formed a very small part of the State's case overall. This case was ultimately about M.B.K.'s testimony. Either the jury would believe her testimony and convict Friar, or the jury would disbelieve her and acquit. It did the former, despite questions Friar raised about her credibility.[7]

II. Friar's trial counsel provided effective assistance.

A. Legal principles

To establish ineffective assistance of counsel, a defendant must prove the familiar two-pronged test: both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

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[7] The jury's acquittal of Friar on the strangulation charge probably was a result of the State failing to establish Friar's intent to "impede normal breathing or circulation of blood or [his awareness] that his conduct was practically certain to cause that result." (R. 137:28 (citation omitted).) As the postconviction court noted, "[t]he jury could consistently have found that Friar forcefully held M.B.K. by the neck as a means to sexually assault her, but did not do so for the purpose of impeding her breathing or circulation." (R. 137:28.)

With respect to the "performance" prong of the test, a strong presumption exists that counsel acted properly within professional norms. *Strickland*, 466 U.S. at 689–91. To establish deficient performance, the defendant must demonstrate that his attorney made serious mistakes which could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *Id.* To show "prejudice," the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *Smith*, 207 Wis. 2d at 275–76.

"Counsel's decisions in choosing a trial strategy are to be given great deference." *State v. Balliette*, 2011 WI 79, ¶ 26, 336 Wis. 2d 358, 805 N.W.2d 334. A reviewing court can determine that defense counsel's performance was objectively reasonable, even if trial counsel offers no sound strategic reasons for decisions made. *See State v. Koller*, 2001 WI App 253, ¶ 53, 248 Wis. 2d 259, 635 N.W.2d 838. This Court will sustain counsel's strategic decisions as long as they were reasonable under the circumstances. *See Balliette*, 336 Wis. 2d 358, ¶ 26.

Because the defendant must show both deficient performance and prejudice to succeed in establishing ineffective assistance, reviewing courts may "avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). Similarly, reviewing courts need not consider the prejudice prong if no deficient performance is shown. *State v. Brewer*, 195 Wis. 2d 295, 300, 536 N.W.2d 406 (Ct. App. 1995).

B. Trial counsel's performance was not deficient.

Friar points to three alleged deficiencies in his trial counsel's performance that, he claims, affected the outcome of his case. First, he argues that Attorney Brophy should have objected to the admission of "[h]earsay [a]nd [c]umulative [t]estimony" by PA Hall. (Friar's Br. 32.) Second, he argues that Attorney Brophy should have further impeached M.B.K.'s testimony on certain points. (Friar's Br. 33.) And third, he argues that Attorney Brophy should have retained a medical expert to testify about how alcohol affects memory in individuals with Type I diabetes. (Friar's Br. 36.) All of Friar's arguments fail, however, because Attorney Brophy's actions were either the result of strategic decision making or were not so far outside of the bounds of professional norms as to constitute deficient performance. *See Strickland*, 466 U.S. at 689–91.

1. Counsel's decision not to object to testimony from the forensic examiner was strategic and reasonable.

At trial, PA Hall's testimony included reading a narrative portion of her report recounting M.B.K.'s explanation of the events that led to M.B.K. seeking treatment at the emergency room. (R. 144:85–86.) PA Hall testified that forensic examiners generally collect this information for two related purposes: to "medically [be] able to know what has occurred and what I need to look for and take care of and if there is going to be forensic evidence" and "to have information about where I would most want to examine or look for medically and also forensically." (R. 144:84.)

Attorney Brophy did not object to this portion of PA Hall's testimony. As he testified at the *Machner* hearing, he

had a strategic reason for not objecting: rather than having PA Hall "break [the narrative] down and go through it sentence by sentence," he wanted to "get through that and get [PA Hall] to the points I wanted to hit with her." (R. 149:51–52.) This strategic decision is entitled to great deference. *Balliette*, 336 Wis. 2d 358, ¶ 26.

It is of no consequence that the strategy ultimately did not work. The question in any ineffective assistance of counsel case is not whether counsel's strategy was successful or, in hindsight, could have been better. *Balliette*, 336 Wis. 2d 358, ¶ 25. Rather, the inquiry is whether counsel's actions were objectively reasonable under the circumstances, and Attorney Brophy's decision not to object to PA Hall's reading of the narrative was reasonable for at least two reasons. First, in light of the court's previous ruling with respect to testimony by Ms. Reeves and Ms. Hampton, it was reasonable for Attorney Brophy to believe that an objection to PA Hall's testimony would be futile. (R. 149:52.) *Cf. State v. Carter*, 2010 WI App 37, ¶ 39, 324 Wis. 2d 208, 781 N.W.2d 527 ("[B]ecause any objections by trial counsel would have been futile, Carter's claim of ineffective assistance fails.").

Second, it was reasonable for Attorney Brophy to move past that portion of PA Hall's testimony and on to areas where he thought the defense would be better served, such as inconsistencies between M.B.K.'s testimony about her injuries and PA Hall's observations about them. As the circuit court stated when it denied Friar's postconviction motion, Attorney Brophy "took steps to minimize the impact of the testimony by allowing [PA Hall] to read the narrative statement into the record without interruption and by conducting cross examination that showed the nurse was not vouching for M.B.K.'s version of events." (R. 137:15.)

Friar argues that this portion of PA Hall's testimony was not admissible, and that it was therefore deficient performance for Attorney Brophy not to object to it. (Friar's

Br. 32.) Friar also argues that Attorney Brophy performed deficiently because PA Hall ended up reading the narrative line-by-line anyways. (Friar's Br. 32.) Those arguments misunderstand the standard for deficient performance. The question is not whether the evidence was admissible or whether the strategy was successful, but whether Attorney Brophy acted reasonably. *Strickland*, 466 U.S. at 689–91; *Balliette*, 336 Wis. 2d 358, ¶ 25. Attorney Brophy based his strategy on what he reasonably believed the court would do if he objected to the testimony and what his overall goals were. (R. 149:51–52.) The decisions he made in line with that strategy were not deficient performance.

2. Counsel's decision not to further impeach M.B.K. was strategic and reasonable.

During Attorney Brophy's cross-examination of M.B.K., he focused on inconsistencies in her story and strongly suggested that she was embellishing details and could not remember events as clearly as she claimed. (R. 142:114–18, 173–83, 189–90; 143:6–7, 9–15; 145:88, 98–99, 104–05.) Nevertheless, Friar now claims that Attorney Brophy should have further impeached M.B.K. on certain specific topics, including statements she made to Hampton, Reeves, and Officer Franklin, admissions about alcohol consumption, and claims about vaginal tearing. However, as was revealed at the *Machner* hearing, Attorney Brophy had specific, strategic reasons for limiting his cross-examination of M.B.K. as he did.

With respect to M.B.K.'s statements to Hampton, Reeves, and Officer Franklin, Friar's main complaint is that M.B.K. supposedly said that she did not remember any actual sexual contact. (Friar's Br. 33.) When asked to address this, Attorney Brophy stated; "I did consider questioning [M.B.K.] about that, and ultimately I decided not to. It was the follow-up sentence to [M.B.K.] telling All[y]son [Reeves] she didn't

remember, which frightened me." (R. 149:42.) That follow-up sentence, as documented in Officer Franklin's report, was that M.B.K. "thought she may have blacked out from stress or did not remember because . . . 'of the way [Friar] choked her.'" (R. 149:43.) Attorney Brophy's strategy was to create doubt that Friar had choked M.B.K. (R. 149:28); inviting testimony that Friar had choked M.B.K. as a direct explanation for M.B.K.'s supposed gaps in memory would have run contrary to that strategy. Moreover, Attorney Brophy "thought that the cross examination of [M.B.K.] had been very effective in showing that she had made several material misstatements." (R. 149:36.) It was therefore reasonable for him to end cross examination without going further into this specific point.

Likewise, on the matter of M.B.K.'s alcohol consumption, Attorney Brophy elected not to get into discrepancies between M.B.K.'s testimony and the statements she made during the forensic examination, opting instead to have that information be introduced through PA Hall's testimony. (R. 149:47.) Friar argues that the "testimony was entered in a vacuum" and that Attorney Brophy should have raised it again during closing arguments. (Friar's Br. 35.) Attorney Brophy conceded that ideally, he would have raised the discrepancy again in his closing. (R. 149:48.) But ineffective assistance of counsel is not a "Monday morning quarterbacking" standard, even when it is counsel second-guessing his own actions. *See Weatherall v. State*, 73 Wis. 2d 22, 26, 242 N.W.2d 220 (1976). Rather, the analysis looks at the reasonableness of counsel's actions at the time they took place. *See id.* It was reasonable for Attorney Brophy to raise discrepancies in how much M.B.K. reported drinking through PA Hall's testimony. And it was reasonable for him to focus on certain inconsistencies but not others during his closing.

Finally, with respect to Friar's allegation that M.B.K. made "[f]alse claims about vaginal 'tearing,'" Attorney Brophy again made a strategic decision to establish through PA Hall's

testimony that regardless of whether M.B.K.'s injuries were considered "tears" or "abrasions," they were consistent with consensual sex as well as non-consensual sex. (R. 149:53–54.) Friar nevertheless argues that the "jury was never informed of the difference" between tears and abrasions. (Friar's Br. 36.) But the difference between tears and abrasions made no difference to the argument that the encounter was consensual. Friar's bald assertion that failure to make that argument was deficient is meritless.

3. Counsel's decision not to retain an expert on diabetes was reasonable.

Attorney Brophy also made much of M.B.K.'s status as a Type I diabetic at trial. For purposes of Friar's ineffective assistance of counsel claim, the question is whether Attorney Brophy's failure to retain an expert to discuss the effects of alcohol on memory in Type I diabetics was a blunder that fell short of the constitutional standard of performance required of defense counsel. It was not.

Here again, Attorney Brophy's testimony during the *Machner* hearing is key to understanding his strategy and whether it was so unreasonable as to constitute deficient performance. Attorney Brophy testified that while he considered bringing in a toxicologist or endocrinologist to testify about the effects of alcohol on blood sugar and memory, he decided not to and instead "focused on the facts that we had." (R. 149:57.) This decision was based, in part, on the belief that "there wouldn't be any specific information as to what [M.B.K.'s] specific blood glucose levels were that evening." (R. 149:58.) Attorney Brophy admitted to being surprised that M.B.K. presented records of her blood glucose readings from her meter, but he noted that those readings would not have been part of her medical records and therefore

not available via a *Shiffra/Green*[8] motion. (R. 149:58.) He was also surprised that M.B.K. testified that she would still be "thinking and acting fine" with a blood glucose level of 22. (R. 149:59.)

Attorney Brophy's decision to forego expert testimony on the topic of alcohol and Type I diabetes was made in advance of trial, and it was reasonable when he made it. Potential memory problems from blood glucose swings were only a part of Friar's defense. Given Attorney Brophy's expectation that specific glucose levels at the time of the attack would be unavailable for trial, it was perfectly understandable for him to focus the defense's efforts elsewhere. Attorney Brophy's hindsight that it would have been helpful to the defense to have retained an expert does not meet the standard for ineffective assistance of counsel. The question is not whether, with the benefit of hindsight, Attorney Brophy would have done things differently. The question is whether his decisions were reasonable at the time they were made. *See Balliette*, 336 Wis. 2d 358, ¶ 25 ("A court must be vigilant against the skewed perspective that may result from hindsight, and it may not second-guess counsel's performance solely because the defense proved unsuccessful.").

Friar argues that Attorney Brophy was "caught flat-footed" by M.B.K.'s testimony because he did not have an expert retained and noticed to appear in response to her statements about blood glucose. (Friar's Br. 36.) The circuit court hit the nail on the head, however, when it noted that "the potential expert had little to offer by way of probative evidence." (R. 137:23.) As the court stated, "Dr. Tovar acknowledged that he could form no opinion on what M.B.K.'s

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[8] *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) *modified by State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

glucose levels might have been at the time of the assault, what effect her consumption of alcohol would have had on her glucose levels, or what effect a particular blood sugar level might have had on M.B.K.'s perception." (R. 137:23.) Attorney Brophy recognized this significant limitation, which is why he opted not to retain an expert for trial. (R. 149:57–58.) That decision was reasonable and did not constitute deficient performance.

C. Any deficiency in trial counsel's performance did not prejudice Friar.

Finally, even if any of Attorney Brophy's actions constituted deficient performance, Friar still is not entitled to relief because Attorney Brophy's performance did not prejudice him. The putative errors all either related to tangential issues or were compensated for by other testimony or questioning during trial. It is clear beyond a reasonable doubt that the jury would have convicted Friar even if Attorney Brophy had acted as Friar says he should have. *See Harvey*, 254 Wis. 2d 442, ¶ 48 n.14.

Friar claims Attorney Brophy made five errors: (1) failing to object to PA Hall's reading of the narrative description of the assault recorded during the forensic examination; (2) failing to impeach M.B.K. with her statements to Hampton, Reeves, and Franklin that she did not remember being assaulted; (3) failing to impeach M.B.K. with statements disputing how much she had to drink the night of the assault; (4) failing to dispute M.B.K.'s claim that she had suffered vaginal "tearing" during the assault; and (5) failing to retain an expert to testify about the effects of alcohol on memory in Type I diabetics. The State discusses in turn why each of these alleged errors was harmless.

First, PA Hall's reading of the narrative describing the assault did not introduce any new information. M.B.K. had already testified to the details contained in the narrative.

Friar acknowledges this in his brief when he calls the testimony "cumulative." (Friar's Br. 32.) Friar complains that this testimony "only served to bolster [M.B.K.]'s credibility artificially." (Friar's Br. 41.) He does not explain what he means by that, however. Establishing a victim's credibility is not improper; indeed, it is often a key part of criminal prosecutions, especially where a complaining witness's credibility is at issue. *See, e.g., State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). And it often takes place through the testimony of individuals other than the victim. Nothing about that is artificial.

Second, Attorney Brophy's extensive cross-examination of M.B.K., which the circuit court described as "lengthy and vigorous," highlighted inconsistencies in her testimony. (R. 137:19.) The cross-examination also revealed several gaps in M.B.K.'s memory from the evening of the assault. Attorney Brophy returned to the theme of inconsistencies between M.B.K.'s testimony and the other evidence repeatedly during his closing argument. (R. 146:246–48, 251, 257.) Despite all of this, the jury still concluded that M.B.K. was telling the truth when she described the assault. There is no reason to think these additional inconsistencies, which would have been presented as individuals' recollections of M.B.K.'s recollection, would have changed the outcome of the trial.

Third, inconsistencies in M.B.K.'s testimony about how much she had to drink the evening of the assault similarly would not have changed the outcome of the trial. The jury received the information that M.B.K. admitted to drinking a shot to PA Hall. At best, Attorney Brophy could have circled back to that point during closing. But the jury knew M.B.K. was drinking the evening of the assault. The jury heard argument that certain aspects of M.B.K.'s testimony were inconsistent with other evidence. Focusing on a discrepancy in M.B.K.'s memory of how many drinks she had the night of

the assault would have been superfluous, and it would not have changed the jury's verdict.

Fourth, Friar makes far too much of Attorney Brophy's refusal to "split . . . hairs" over whether the assault caused vaginal "tearing" or vaginal "abrasions." (R. 149:53.) Contrary to Friar's contention, the language used did not bear on M.B.K.'s credibility. It is highly unlikely that the jury would have responded well to such a semantic argument, especially given that making the argument would have focused the jury on the fact that M.B.K. sustained injuries—whether they were "tears" or "abrasions"—when Friar assaulted her.

Finally, it would have made no difference if Attorney Brophy had retained an endocrinologist or toxicologist to testify about the effects of alcohol in Type I diabetics. Any testimony by such an expert would have been lacking direct relevance to this case. As the circuit court noted, "given the 20-hour gap in blood sugar level readings for M.B.K., there was no way to ascertain her blood sugar levels between the two recorded times [during the assault]. . . . [Dr. Tovar] could not opine whether M.B.K.'s consumption of alcohol caused her blood sugar levels to drop that evening." (R. 137:22.) Moreover, Dr. Tovar "testified that what is a 'problematic' blood sugar level depends on the person: 'One patient's 50 could be terrible for them. The next patient, 50 could be just fine.'" (R. 137:22–23 (citation omitted).) At best, an expert could have testified at trial that he had no idea what M.B.K.'s blood sugar was at the time of the assault and no idea how low M.B.K.'s blood sugar would have had to have been for her to have memory problems. That testimony would not have led to an acquittal.

CONCLUSION

For the reasons discussed, this Court should affirm.

Dated this 21st day of February 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8680 words.

Dated this 21st day of February 2020.

_____
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Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 21st day of February 2020.

_____
JOHN A. BLIMLING
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