STATE OF WISCONSIN

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

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Dane County Case No. 16-CF-1268
v. 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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE'S ARGUMENT FOR THE ADMISSIBILITY OF UNNECESSARY PHOTOGRAPHS, INADMISSIBLE HEARSAY, AND IMPROPER DEMEANOR EVIDENCE FAILS IN EACH CASE TO ENGAGE WITH MR. FRIAR'S ARGUMENTS, AND IN ANY EVENT ARE UNAVAILING.

A. The photographs were graphic, tended to evoke sympathy and indignation, and were not substantially necessary to the State's case, and as such, were inadmissible.

The State argues that the photographs of MBK's vagina were admitted properly, relying primarily on the assertion that even if a particular point is undisputed, the State is nonetheless entitled to put on evidence relating to that point. *See* ***State v. Lindvig***, 205 Wis.2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996) (holding that as a general matter, "[e]vidence is always admissible to prove an element of the charged crime even if the defendant does not dispute it at trial.") (brackets in original). The State also argues that the photographs were not unfairly prejudicial, relying on its conclusory assertion that nothing about the photographs would "tend to create sympathy or indignation or direct the jury's attention to improper considerations." *See* ***Ellsworth v. Schelbrock***, 229 Wis.2d 542, 559, 600 N.W.2d 247 (Ct. App. 1999). The State fails to engage with Friar's arguments at the necessary level of specificity, relying instead on generalities.

As was noted in Friar's opening brief, graphic photographs of MBK's vagina were not 'substantially necessary' to prove any material fact. Nurse Hall had already testified at length as to the location and character of MBK's vaginal abrasions, and had specifically testified that nothing about those abrasions could tell us anything about whether or not the sex between Friar and MBK was consensual or not. (R145:21, 31). Further, as was also noted in Friar's brief, Hall was allowed to use an anatomical diagram to describe the abrasions to MBK's vagina to the jury. (R144: 118-19).

The State fails to develop more than a conclusory assertion to counter Friar's argument that the photographs were graphic, embarrassing, and invasive, particularly in view of the fact that the photographs shown to the jury were blown up 8x10 inch images. (R144: 79-80). Thus, not only were the photographs not substantially necessary to the State's case, they also had a strong tendency to create sympathy and indignation beyond that associated with the charge itself, and to direct the jury's attention to those improper factors; as such the photographs were inadmissible under Wis. Stat. § 904.03,

and the circuit court's conclusion to the contrary was erroneous. *See* ***Sage v. State***, 87 Wis.2d 783, 788, 275 N.W.2d 705 (1979) ("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.").

B. The circuit court erred when it admitted evidence of MBK's post-incident demeanor, and the State's argument to the contrary relies, as did the circuit court's decision, on an unpublished and wrongly decided opinion of this court which should be disregarded here; moreover, the State fails to explain why this evidence was admissible when the defense did not open the door to it first.

The State argues (1) that the unpublished opinion in ***State v. Lattimore***, No. 2013AP911-CR (Ct. App. Sept. 11, 2014) was properly looked to by the circuit court for guidance as to the admissibility of the State's proposed demeanor evidence and (2) that because the circuit court looked to an appellate decision for guidance, it necessarily engaged in a proper exercise of discretion. State's Brief at 15-17. In so doing, the State fails to engage in any meaningful way with Friar's arguments to the effect that it was improper to allow this evidence without Friar having first opened the door by offering evidence that MBK's post-incident demeanor was inconsistent with having been the victim of sexual assault, and as such, has conceded those arguments. *See* ***State v. Anker***, 2014 WI App 107, ¶13, 357 Wis.2d 565, 855 N.W.2d 483 (holding that failure to directly respond to argument concedes the issue, and stating that "We will not abandon our neutrality to develop arguments for the parties, so we take the State's failure to brief the issue as a tacit admission.").

The circuit court's decision to admit the demeanor evidence without Friar having first introduced evidence that MBK's post-incident demeanor was contrary to the requirements of Wis. Stat. § 904.04(1)(b), which only allows the State to introduce character evidence in order to rebut the defense's evidence of a pertinent trait of the victim. ***Lattimore*** was wrongly decided on this point precisely because at no

point did Lattimore, the defendant there, argue that the alleged victim's post-incident demeanor in that matter was inconsistent with having been the victim of a sexual assault. It was for this reason that Friar also argued that ***Lattimore*** represents an improper extension of the decisions in ***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), as in each of those cases, the evidence was relevant to rebut defense arguments regarding the significance of the alleged victim's post-incident conduct. *See* ***Jensen***, 147 Wis.2d at 252; *see also* ***Robinson***, 146 Wis.2d at 333.

To Friar's contention that in each of those cases, the evidence was admissible to rebut defense contentions that the alleged victim's post-incident conduct was inconsistent with having been the victim of a sexual assault, the State does not respond other than to state that it disagrees with Friar's contention that ***Lattimore*** was wrongly decided, thus conceding the issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

The defense here at no point argued that MBK's post-incident conduct was inconsistent with having been the victim of a sexual assault, as the defendant in ***Robinson*** did, nor did the defense allege that MBK was fabricating her allegations in an attempt to distract from her own misconduct elsewhere, as the defendant in ***Jensen*** did. Accordingly, the circuit court failed to apply the correct legal principles to this issue, and as such, its decision admitting the demeanor evidence was an erroneous exercise of discretion. *See* ***State v. Echols***, 2013 WI App 58, ¶14, 348 Wis.2d 81, 831 N.W.2d 768 (exercise of discretion is erroneous if circuit court fails to apply proper standard of law).

C. The State's argument that the circuit court properly admitted hearsay as prior consistent statements fails to engage with Friar's arguments regarding the recency requirement, and as such, the State concedes Friar's argument that the hearsay was not properly admitted as prior consistent statements.

The State contends that under ***State v. Miller***, 231

Wis.2d 447, 471, 605 N.W.2d 567 (Ct. App. 1999), whenever the defense vigorously cross-examines the alleged victim and generally suggested that the alleged victim was lying or otherwise untruthful, the alleged victim's hearsay statements to others are always admissible as prior consistent statements. State's brief at 18-19. In so doing, however, the State fails utterly to engage with Friar's arguments relying upon ***State v. Peters***, 166 Wis.2d 168, 479 N.W.2d 198 (Ct. App. 1991) and ***State v. Meehan,*** 2001 WI App 119, 244 Wis.2d 121, 630 N.W.2d 722. Friar's opening brief points out that "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." ***Peters***, 166 Wis.2d at 177.

Further, neither the state, the trial court, nor the postconviction court applied the proper analysis by examining whether each individual statement was offered to rebut an allegation of recent fabrication, but instead allowed in all of MBK's statements to other parties, contrary to law. *See* ***Meehan***, 244 Wis.2d 121, ¶¶25-26. Finally, the State conclusorily states that the recency requirement is satisfied so long as the defense has attacked the alleged victim's credibility, without regard to the point at which the defense alleges that the fabrication occurred, here, from the outset. Accordingly, the State has conceded Friar's argument. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at109.

Finally, the State does not respond at all to Friar's argument that Nurse Hall's testimony was inadmissible not only because the hearsay statements of MBK which she relayed were not prior consistent statements, but also because they did not qualify as statements made for the purpose of medical diagnosis or treatment under Wis. Stat. § 908.03(4) and ***State v. Nelson,*** 138 Wis.2d 418, 430-34, 406 N.W.2d 385 (1987), nor does the State argue that Friar waived any objection to Nurse Hall's testimony by failing to object to it after having previously but unsuccessfully objected to similar hearsay from two other witnesses. Accordingly, the State concedes Friar's argument on these points. ***Anker***, 357 Wis.2d 565, ¶13 (unrefuted arguments deemed conceded).

D. The State's argument that the errors asserted by

Friar were harmless beyond a reasonable doubt is undeveloped and conclusory, and fails to acknowledge that all of the complained-of errors served to impermissibly bolster MBK's credibility, which issue was essentially the sole issue in the case, and accordingly, the State has failed to carry its burden of proving the errors harmless beyond a reasonable doubt.

The State argues that none of the evidence Friar asserts was erroneously admitted directly concerned elements of the offenses charged, and that as a result, any error in admitting that evidence could not have influenced the result of the trial and was therefore harmless beyond a reasonable doubt. State's brief at 20. This argument misses the point entirely; all of the complained of errors either impermissibly bolstered MBK's credibility or encouraged the jury to decide the case based on sympathy or indignation for MBK. The central issue in this case was the issue of consent, and the only evidence presented on that issue consisted of MBK's testimony and that of others bolstering MBK's credibility.

When, as here, the central issue turns entirely on a credibility determination, improperly admitted evidence that tends to bolster the alleged victim's credibility carries a great likelihood of prejudice. ***State v. O'Brien***, 223 Wis.2d 303, 326, 588 N.W.2d 8 (1999) (when a sexual assault case comes down to which person the jury believes, the defendant or the complainant, errors bearing on credibility carry a high likelihood of prejudice). Further, the State fails to engage with Friar's comparison of this case to ***Meehan***, wherein prejudice was found in part because the case was a credibility contest during which the jury improperly heard the alleged victim's statements three times and in addition was presented with improperly admitted other-acts evidence. *See* ***id.***, 244 Wis.2d 121, ¶¶27-28. Accordingly, the State's argument that none of the errors identified by Friar were prejudicial fails.

II. THE STATE'S ARGUMENT THAT TRIAL COUNSEL WAS NOT DEFICIENT FAILS, AND THE DEFICIENCIES CERTAINLY PREJUDICED FRIAR'S DEFENSE IN LIGHT OF THE FACT THAT THE CASE WAS

CLOSE AND TURNED ON A CREDIBILITY CONTEST BETWEEN FRIAR AND MBK.

A. Trial counsel performed deficiently, and contrary to the State's argument, trial counsel's alleged strategic choices were unreasonable for the reasons identified in Friar's opening brief.

The State argues that Attorney Brophy's stated reasons for failing to impeach MBK's testimony with her prior statements to Hampton and Reeves were reasonable strategic choices and cannot be deficient performance. State's brief at 24-25. This argument fails to acknowledge that while Attorney Brophy's strategy of avoiding opening the door to testimony from either Reeves or Hampton regarding MBK's statements about being strangled may have been reasonable at the outset of trial, that strategy's reasonableness evaporated completely once the court allowed Reeves and Hamilton to testify to everything MBK had told them, including being strangled.

Once circumstances changed, and Attorney Brophy's strategy to restrict the testimony of Reeves and Hampton was no longer possible, it became unreasonable to avoid impeaching them with MBK's prior statements denying any memory of sexual contact or intercourse. Those statements directly contradicted testimony of Reeves and Hampton that MBK told them she'd been sexually assaulted, suggesting they lied to bolster MBK's claims. Those statements further contradicted MBK's supposed memories of a graphic sexual assault, demonstrating those memories were manufactured and false. Attorney Brophy's failure to impeach with those statements was therefore deficient.

Further, the State does not in any meaningful way respond to Friar's argument that Attorney Brophy should have impeached MBK further with her statements to Officer Franklin, and that his only proffered reason for failing to do so was that he forgot to do so. As was noted in Friar's opening brief, a failure of memory cannot constitute a reasonable strategic decision. *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"). This failure was clearly deficient performance.

In addition, the State does not seriously argue that Attorney Brophy's failure to argue in closing that MBK's statements to Nurse Hall regarding her alcohol consumption impeached her trial testimony on the same subject was a reasonable strategic decision; this is so because the State cannot so argue. Attorney Brophy acknowledged at the postconviction motion hearing that his failure to do so was not a strategic omission, but rather an unintentional omission. (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). The State argues conclusorily that Brophy's focus on some inconsistencies but not others in MBK's testimony was reasonable falls flat where, as here, credibility was the critical issue, and given that this is the State's sole argument as to the reasonableness of Attorney Brophy's failure to raise the alcohol consumption issue in closing, the State has effectively not responded to Friar's argument to the contrary. The State's failure to respond to these arguments concedes their validity. ***Anker***, 357 Wis.2d 565, ¶13.

The State's argument that it was not deficient for Attorney Brophy to fail to retain an expert on diabetes is also unavailing. While it may be true that Attorney Brophy reasonably concluded that MBK's precise blood glucose levels at the time of the incident could not be obtained via a ***Shiffra-Green*** motion regarding her medical records, it was unreasonable not to retain an expert who could testify as to the general effects of alcohol consumption and Type I diabetes on memory and recall, given that Attorney Brophy was aware (1) that alcohol consumption on MBK's part, to the point of intoxication, was involved; (2) that MBK suffered from Type I diabetes; and (3) that the memory-impairing effects of alcohol are enhanced in a diabetic, particularly when the person's blood sugar is low. (R149: 54-60).

The background information Dr. Tovar could have provided at trial would clearly have been admissible and helpful to the jury in understanding the flaws and inaccuracies in MBK's testimony asserting her opinions regarding how her Type I diabetes affected her memory, and would also have been admissible to show that MBK's memory would likely have been to some extent more impaired than an average

person as a result of consuming a given amount of alcohol.[1] *See, e.g.*, ***State v. Johnson***, 118 Wis. 2d 472, 476, 348 N.W.2d 196 (Ct. App. 1984) ("[Wis. Stat. § 907.02] accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts") (quoting ***Hampton v. State***, 92 Wis.2d 450, 459, 285 N.W.2d 868 (1979)). Contrary to the postconviction court's conclusion, it was unreasonable for Attorney Brophy to fail to retain and call an expert such as Dr. Tovar at trial. (R137: 21-23).

Finally, and relatedly, Dr. Tovar also testified that the difference between vaginal "tearing" and vaginal "abrasions" was in fact significant, as "tearing" would certainly be characterizable as an 'injury', whereas "abrasions" are not necessarily so characterizable. (R149: 131-32). Had Attorney Brophy consulted with an expert such as Dr. Tovar prior to trial, he would have been aware that the difference between vaginal "tearing" and vaginal "abrasions" was significant, and certainly not mere "semantics" or "hair-splitting" as claimed by the State in its brief at page 30. Regardless, the significance of the difference reinforces the fact that it was deficient performance for Attorney Brophy to fail to elicit the significance of that difference via at least cross-examination of Nurse Hall.

B. Trial Counsel's deficiencies in performance all related to failures to take advantage of additional opportunities to attack MBK's credibility, and as such, were prejudicial.

The State's harmless error argument fails to acknowledge the crucial fact here that the outcome of this case turned entirely on whom the jury believed: MBK or Friar. As such, evidence and argument tending to impugn MBK's credibility were not just "tangential issues" as claimed by the State, but rather went to the heart of the issue. *See* ***State v. Thiel***, 2003 WI 111, ¶74-80, 264 Wis.2d 571, 665 N.W.2d 305 (finding that cumulative impact of failures to impeach was

[1] The inaccuracies in MBK's testimony in this regard and Dr. Tovar's expert opinions on the same subjects are adequately explained in Friar's opening brief and will therefore not be repeated here.

prejudicial, and that in a credibility contest, and reversing court of appeals determination that there was no prejudice in failing to pursue additional attacks on credibility when there were already some attacks successfully mounted at trial).

As such, the State's contention explicated on pages 28 to 30 of its brief that Attorney Brophy's failures weren't prejudicial because he had already to some extent impugned MBK's credibility fails as it is contrary to established law. *See, e.g.*, ***Thiel***, 264 Wis.2d 571, ¶¶78-79 (finding that in a pure credibility contest, failure to take advantage of all opportunities to impugn alleged victim's credibility was prejudicial). Friar is accordingly entitled to a new trial.

III. CONCLUSION

For the reasons stated in Friar's opening brief and above, both the trial court and Friar's trial attorney committed numerous prejudicial errors, and as a result, Friar respectfully requests that he be granted a new trial.

Respectfully submitted 4/6/2020:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,991 words.

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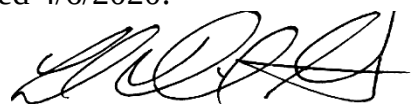

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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 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.

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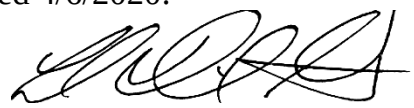

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