STATE OF WISCONSIN

IN THE SUPREME COURT

Case No. 2019AP1578-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Respondent,

v.

NATHAN J. FRIAR,

Defendant-Appellant-Petitioner.

DEFENDANT-APPELLANT-PETITIONER'S PETITION FOR REVIEW AND APPENDIX

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[1] ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988).

ISSUES PRESENTED

1. Whether the circuit court's erroneous ruling allowing prior consistent statements into evidence to improperly bolster the alleged victim's testimony was harmless, whether the trial court improperly extended ***Jensen*** to allow into evidence prejudicial demeanor evidence from lay witnesses, and whether the circuit court's other evidentiary rulings denied Friar a fair trial?

The circuit court allowed the State to present prior consistent statements of the alleged victim into evidence without finding first that an allegation of recent fabrication occurred, and also allowed the State to present lay testimony of the alleged victim's post-incident demeanor, and graphic photos of her vagina to the jury. The court of appeals found that the prior consistent statements were erroneously admitted, but that the error was harmless. The court further found that the demeanor testimony and vaginal photos were properly admitted into evidence.

2. Whether a reasonable pretrial strategy can become unreasonable in light of changing circumstances at trial, whether trial counsel's performance was deficient in other respects, and whether any of those errors prejudiced Friar?

The circuit court and court of appeals both concluded that trial counsel did not perform deficiently, or that Friar was prejudiced. The circuit court did not address whether the changing circumstances of trial rendered counsel's pretrial strategy unreasonable. The court of appeals concluded that in spite of the changed circumstances at trial, trial counsel's failure to impeach the alleged victim's roommates with her statements denying any memory of sexual contact—contrary to her trial testimony—was a reasonable strategic decision.

CRITERIA FOR REVIEW

This petition asks this court first to clarify the law regarding prior consistent statements, including most importantly the requirement that to be admissible, the prior consistent statements must rebut an allegation of *recent* fabrication, or in other words, that such statements must predate the declarant's motive to lie. *See* Wis. Stat. § 908.01(4)(a)2. Although the court of appeals correctly held that the trial and postconviction courts erred in holding that the prior consistent statements of the alleged victim were admissible, the fact that both the trial and postconviction courts got this issue wrong in itself demonstrates that a decision by this court clarifying the circumstances under which a prior consistent statement is admissible is needed. In light of the frequency with which prosecutors attempt to bolster the testimony of sexual assault complainants with their prior statements, this is a question which will recur and thus benefit from resolution by this court. Wis. Stat. § 809.62(1r)(c)3.

Further, this petition asks this court to determine whether ***Jensen*** can properly be extended beyond expert witness testimony to allow admission of lay testimony regarding the alleged victim's post-incident demeanor, and to determine whether the court of appeals unpublished but citable decision in *State v. Lattimore*, 2014 WI App 110, 357 Wis. 2d 720, 855 N.W.2d 903 was wrongly decided. 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. *See* ***Robinson,*** 146 Wis.2d at 333; ***Jensen,*** 147 Wis.2d at 252. The court of appeals in *Lattimore* improperly extended this principle to encompass lay testimony regarding post-incident demeanor of an alleged

victim as compared to that person's pre-incident demeanor on the theory that this testimony is relevant to the issue of consent and that such testimony is not unfairly prejudicial in light of its allegedly high probative value. *Id.*, 357 Wis.2d 720, ¶¶30-31.

This court should accept review to clarify that such demeanor evidence is admissible only in the context of expert opinion testimony pursuant to ***Jensen***, and further, that even if *Lattimore* was correctly decided, it was inapplicable to the circumstances here, which did not involve any evidence of MBK's pre-incident demeanor. *See* (R142: 138-43; R144: 42-45, 51-52).

Finally, this petition asks this court to clarify that while trial counsel's reasonable pretrial strategy is entitled to deference, developments at trial can render continued reliance on said pretrial strategy unreasonable. The defense could locate no published authority addressing the question 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 failed to address whether the changing circumstances of trial rendered that strategy obsolete and unreasonable. The court of appeals found that maintaining this strategy was reasonable, but only after completely minimizing the impeachment value of the alleged victim's contradictory prior statements.

The remaining issues are fact-specific and controlled by existing precedent and thus do not independently meet the criteria for review listed in Wis. Stat. § 809.62(1r), but Friar must nonetheless raise these issues here to preserve them for potential federal habeas review. *See* ***O'Sullivan v. Boerchel***, 526 U.S. 838 (1999).

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).

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).

2. Challenges To MBK's Credibility and the State's Attempts at Rehabilitation

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.

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.

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?"[2] (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). Both Reeves and Hampton were thus allowed over the defense's objections to testify as to MBK's prior consistent statements to them following the incident. (R144:25-26; 33-36).

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).

[2] As discussed *infra*, this discussion omits a key requirement of sec. 908.01(4)(a)(2), that the statement be offered to rebut a "recent" fabrication. The circuit court omitted this a second time at R143:49.

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).

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 also permitted MBK to provide substantial testimony regarding her emotions when she spoke to her parents (R142:138-140). 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).

3. Defendant's Testimony

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).

The jury ultimately convicted Friar of sexual assault with use of force, but acquitted him of the strangulation charge. (R146: 293-94).

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.[3] (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

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

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. (R137:1-29).

The court of appeals affirmed, rejecting almost all of Friar's arguments; while it did hold that the trial court erred in admitting the prior consistent statements, it held that the error was nonetheless harmless. *State v. Nathan J. Friar*, No. 2019AP001578-CR, unpublished slip op., ¶2 (October 22, 2020).

ARGUMENT

I. This Court Should Accept Review To Clarify The Law On Prior Inconsistent Statements, To Prevent The Improper Extension Of *Jensen* To Prejudicial "Demeanor" Evidence From Non-Expert Witnesses, And Because The Court's Evidentiary Rulings Denied Friar A Fair Trial.

A. The Misapplication Of The Prior Consistent Statement Rule--A Recurrent Problem In Sexual Assault Cases--Allowed the State To Improperly Bolster MBK's Credibility By Re-stating Her Version Of Events Through Hearsay Testimony Of Surrogate Witnesses

Prosecutors in sexual assault trials frequently attempt to present an alleged victim's statements to surrogate witnesses to bolster the credibility of the victim's testimony on the theory that, after the defense challenges the victim's credibility, such statements are admissible as prior consistent statements pursuant to Wis. Stat. § 908.01(4)(a)2. But this rule is often misapplied by courts omitting a key requirement—that the statements are offered to rebut an allegation of recent

fabrication. *Id.* "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." ***State v. Peters,*** 166 Wis.2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991).

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. The court of appeals properly agreed with Friar as to the erroneous nature of the trial and postconviction courts' determinations on this issue. *Friar*, unpublished slip op., ¶¶43-44.

That said, the confusion exhibited by both the trial court and the postconviction court illustrates the need for clarification from this court as to the proper scope and application of the hearsay exemption regarding prior consistent statements located at Wis. Stat. § 908.01(4)(a)2. While the court of appeals took issue with Friar's characterization of the error made by the trial and postconviction courts, stating that the problem was not that the courts below ignored the recency requirement, but rather misunderstood its application, this merely highlights the fact that the circuit courts of this state are in need of guidance from this court which firmly establishes that in order to qualify as a prior consistent statement, the statement must be prior to an allegation of recent fabrication, in the sense that it must have been made *prior to* the existence of a motive to lie.

B. Improper Extension Of The *Jensen* Decision To Non-Expert Witnesses Allowed the State To Present Prejudicial "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 circuit court permitted this evidence as relevant to MBK's credibility, pursuant to the persuasive authority of the *Lattimore* decision (R142:139). The court of appeals concluded this was not an erroneous exercise of discretion, because it found the circuit court "reasonably determined that her demeanor shortly after the assault was highly probative as to consent." *Friar*, unpublished slip op., ¶30.

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. Expert testimony on an accuser's post-incident conduct and demeanor is permitted in certain cases to explain the meaning of that behavior, in order to rebut defense arguments regarding the complainant's post-incident conduct. For example, 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 the lower court opinions 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.

This court should grant review to curtail the improper expansion of admissible "demeanor" testimony beyond the parameters established in ***Jensen*** and ***Robinson.***

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 circuit court and court of appeals concluded those photos "showed injuries probative of whether Friar had sexual contact" with MBK. *Friar*, unpublished slip op., ¶24. This is erroneous for two obvious reasons; (a) Friar acknowledged having consensual sexual contact with MBK, so this wasn't contested; and (b) the SANE nurse testified the existence of those injuries told us nothing about whether the sex was consensual—which was the whole controversy at issue (R145:21,31). Thus, seeing photographs of the injuries did not aid the jury whatsoever.

By contrast, the danger of prejudice was substantial. The circuit 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 v. State***, 87 Wis. 2d 783, 788, 275 N.W.2d 705 (1979). 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.

D. The Errors Were 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.

The court of appeals, after conducting an extensive review of the State's evidence, found the error of admitting MBK's prior statements to her roommates harmless. *Friar*, unpublished slip op., ¶¶46-51. However, the court of appeals unreasonably failed to assess the contrary evidence offered by the defense. For example, in ***Jensen v. Clements,*** the 7th Circuit affirmed an order granting the defendant's habeas petition to overturn his murder conviction based on improperly admitted hearsay, and concluded that the state court's analysis finding the error harmless was unreasonable for this precise reason:

> The state appellate court decision contains a very detailed discussion of the State's evidence. But its discussion does not engage with the defense evidence that goes against the evidence discussed by the court. The Supreme Court has said, however, that when a court "evaluat[es] the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."

Jensen v. Clements, 800 F.3d 892, 904 (7th Cir. 2015), *citing* ***Holmes v. South Carolina***, 547 U.S. 319, 331 (2006).

This was a close case with numerous limitations in the State's evidence, as the circuit 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. This jury heard MBK's story over and over and over before it heard anything from Friar**.** 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. This Court Should Accept Review To Clarify That Counsel May Be Ineffective For Failing To Alter Strategy Based On Changing Circumstances At Trial, And Because Trial Counsel's Errors Violated Friar's Rights To Effective Assistance Of Counsel.

A. Reasonable Strategic Decisions Made Pretrial Can Become Unreasonable Based On Evidence Presented At Trial, Such As Failure To Impeach MBK's Roommates With Her Prior Statements Denying Any Memory Of Sexual Contact

Counsel's decisions in forming a trial strategy are afforded great deference. ***State v. Balliette***, 2011 WI 79, ¶26, 336 Wis. 2d 358, 805 N.W.2d 334. "[S]trategic choices made after thorough investigation of law and facts relevant to

plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690. "Even decisions made with less than a thorough investigation may be sustained if reasonable, given the strong presumption of effective assistance and deference to strategic decisions." ***Balliette***, 336 Wis. 2d 358, ¶26.

Where a circuit court has identified a reasonable trial strategy, that strategy is virtually unassailable in an ineffective assistance of counsel analysis, unless it "was based on an irrational trial tactic or [was] based upon caprice rather than upon judgment." ***State v. Breitzman***, 2017 WI 100, ¶65, 378. Wis. 2d 431, 904 N.W.2d 93. Counsel's decisions are evaluated from counsel's perspective at the time of the decision identified as problematic. ***Id.*** However, counsel's mere assertion that a decision was strategic will not insulate it from the deficient performance analysis. This standard "'implies deliberateness, caution, and circumspection' and the decision 'must evince reasonableness under the circumstances.'" ***State v. Honig***, 2016 WI App 10, ¶30, 366 Wis. 2d 681, 874 N.W.2d 589 (quoted source omitted).

This would seem to imply that when circumstances change at trial, counsel's decisions must continue to be reasonable <u>in light of such changed circumstances</u>. As noted above, the defense has been unable to locate any authority, published or otherwise, addressing the issue of whether counsel's reasonable pretrial strategic decisions can, in light of changed circumstances at trial, become unreasonable. Accordingly, this court should accept review to resolve this question and provide important guidance to the bench and bar regarding this issue, as it is one that occurs commonly in criminal cases.

Here, 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* ***Honig,*** 2016 WI App 10, ¶28 ("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.

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.

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. The court of appeals concluded "it was still reasonable for counsel to decide that it was best not to draw attention to M's prior statements specifically about lack of memory, given that M's prior statements indicated that her lack of memory was caused by losing consciousness as she was strangled." *Friar*, unpublished slip op., ¶71. The problem with this is the State presented—and therefore the jury already heard—the damaging portions (referencing strangulation), but the defense didn't present the portions denying any memory of sexual contact, which completely contradicted MBK's graphic testimony about digital penetration.

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).

The court of appeals further found this reasonable by noting that MBK subsequently described the digital penetration to the SANE nurse, which was consistent with her testimony. *Friar*, unpublished slip op., ¶72. But that's the whole reason these previous statements are probative—they came first, and MBK had no memory of sex. This would have created a compelling argument that she only invented those details about the digital penetration in subsequent statements,

including the statement to the SANE nurse, despite having no actual memory of what happened.

Attorney Brophy acknowledged that, in conjunction with the MBK's statement to Officer Franklin denying recollection of sex, 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 and present these crucial statements was deficient.

B. Trial Counsel Committed Several Other Errors That Were Deficient Under the Circumstances

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, he didn't object to narrative testimony, or to these statements as hearsay because they were consistent with MBK's 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).

This was unreasonable because after admitting the narrative portion in its entirety, the prosecutor was still allowed to question 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 and the court of appeals' finding that Brophy's failure to object was based on reasonable strategy is incorrect (R169:15). This non-strategic failure was deficient.

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). But 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, but Brophy failed to make any such argument. The right to effective assistance extends to closing arguments. ***Yarborough v. Gentry***, 540 US 1, 5 (2003). Attorney Brophy admitted that the failure to point out MBK consumed more alcohol than she acknowledged in her testimony was not a tactical decision, and he should have made the argument (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 failure to impeach MBK's false claims about vaginal "tearing" was also deficient. When asked why he didn't clarify with the SANE nurse that MBK didn't experience any vaginal tearing, 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.

Finally, 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).

Counsel's failure to consult with an expert was deficient. 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. 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, toxicologist Dr. Richard Tovar reviewed the relevant case materials a pertaining to alcohol and diabetes, and compiled his analysis into a report (R108:45-48). 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 (R149:111-12). People experiencing blackouts usually don't lose motor function (R149:110-11). Though they can function normally, they don't store memories, and therefore cannot remember large portions of events during that blackout period (R149:112). 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.

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 was deficient.

C. Counsel's Errors Prejudiced Friar's Defense

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.

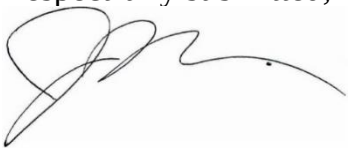
This was already a weak case for the reasons discussed *supra.* Due to the combined prejudice that resulted from counsel's errors, and the close nature of the evidence in this case, Friar is entitled to a new trial.

CONCLUSION

For the reasons stated above, the petitioner believes this case is appropriate for review, and respectfully requests that review be granted and that the Supreme Court reverse the decision of the Court of Appeals affirming the trial court's decision denying his post-conviction motions.

Dated this 18th day of November, 2020.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (d) as well as Rule 806.62(4)(a) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,999 words.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12) and Rule 809.62(2)(f). I further certify that:

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

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

Dated this 18th day of November, 2020.

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Appendix

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