STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP001347-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN TYRONE BRATCHETT,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable T. Christopher Dee Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Police showed S.D., the alleged victim, a photo array that included Mr. Bratchett. He was the only person in the array with a neck tattoo, a conspicuous facial mole, and a "boxy" face. Police told S.D. to pick out the person who "best fit" the suspect. After several minutes of deliberation between up to three possible picks, she identified Mr. Bratchett as the person who had robbed her. She was "maybe" sixty or seventy percent confident in her identification.

Was S.D.'s identification of Mr. Bratchett admissible at trial?

The trial court held that the procedure was impermissibly suggestive, but that the overall identification was sufficiently reliable.

2. Mr. Bratchett's identification card, containing a photograph of him in prison garb, was discovered near S.D.'s discarded belongings.

Was admission of a photograph of the card proper under Wis. Stat. § 904.03?

The trial court allowed the photograph to be admitted into evidence and published to the jury.

3. Although S.D. testified that Mr. Bratchett had explicitly threatened to sexually assault her, her earlier statement to police contained a radically different account which did not contain those threats.

Was trial counsel ineffective for not impeaching S.D. with that prior inconsistent statement?

The trial court held that counsel's performance was neither deficient nor prejudicial.

4. Trial counsel never cross-examined S.D about either the "best fit" instructions or the confirmation she received after choosing Mr. Bratchett's photo in the array. Did this failure deprive Mr. Bratchett of his right to the effective assistance of counsel?

The trial court held that counsel's performance was neither deficient nor prejudicial.

5. During closing argument, the prosecutor made multiple references to a "hypothetical" confession made by Mr. Bratchett. Although counsel successfully objected to the first reference, he did not continue objecting to subsequent references, and never moved for a mistrial. Does this constitute ineffective assistance of counsel?

The trial court concluded that counsel's performance was neither deficient nor prejudicial.

6. Did counsel's errors cumulatively prejudice Mr. Bratchett?

Having rejected each of Mr. Bratchett's ineffectiveness claims, the trial court likewise rejected the cumulative prejudice claim.

7. Was the evidence sufficient to convict Mr. Bratchett of attempted third-degree sexual assault?

This issue is being raised for the first time on appeal. *See* Wis. Stat. § 809.30(2)(h).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Bratchett requests publication. The case involves several important legal issues and their resolution will assist future litigants. Due to the complex factual background and the number of issues on appeal, oral argument may assist the Court.

STATEMENT OF THE CASE

An information filed on December 8, 2015 charged Mr. Bratchett with:

- Burglary as a party to the crime and as a habitual criminal, contrary to Wis. Stats. §§ 943.10(1m)(a), 939.05 and 939.62(1)(c);
- Armed robbery as a party to the crime and as a habitual criminal, contrary to Wis. Stats. §§ 943.32(2), 939.05, and 939.62(1)(c).

(4:1-2).

The State subsequently filed an amended information adding a third charge of attempted third-degree sexual assault with use of a dangerous weapon as a party to the crime and as a habitual

criminal, contrary to Wis. Stats. §§ 940.225(3), 939.32, 939.05 and 939.62(1)(c). (15:2).

A jury trial was held in the Milwaukee County Circuit Court, the Honorable T. Christopher Dee presiding. (150:1). The jury returned guilty verdicts on all three counts. (47:1-3). Mr. Bratchett was then sentenced to a term of imprisonment. (52:1); (App. 101).

Mr. Bratchett filed a series of postconviction motions pursuant to Wis. Stat. § 809.30 seeking a new trial. (77; 83; 89; 95; 114).[1] Following further circuit court proceedings, the court, the Honorable T. Christopher Dee presiding, denied the motion in a written order. (134); (App. 114).

This appeal follows. (135).

STATEMENT OF RELEVANT FACTS

Underlying Allegations

According to the criminal complaint, a Marquette University police officer observed two men follow female students into off-campus housing on November 15, 2015. (1:2). Shortly thereafter, S.D. reported two men forced their way into her apartment, robbed her of her personal belongings, and at one point demanded she disrobe. (1:2-3). She refused their demand, after which both men fled. (1:3). She ultimately identified Mr. Bratchett as one

[1] The omnibus postconviction motion filed on January 14, 2020 is the governing motion for this appeal. (114).

of the robbers in a photo identification procedure. (1:2).

Motion to Exclude S.D.'s Identification

After being informed that Mr. Bratchett wished to fire his appointed lawyer, in part because he failed to move for exclusion of S.D.'s identification, (149:8), a hearing on the motion was held on the morning of trial and after jury selection. (151). Counsel eventually clarified he was challenging "any ID" by S.D. as well as any in-court identification. (151:22). He called S.D. as the only defense witness.[2] (151:4).

S.D. testified that the entire incident involving the individual she identified as Mr. Bratchett lasted 15 minutes. (151:5). The perpetrator had the hood of their sweatshirt up and she could not see his hair. (151:5). The person covered his face with his hand when talking, although there were apparently some brief moments when his face was uncovered. (151:5; 151:10). The light was on inside her apartment and the man came within a foot of her face. (151:6). She could tell he was "about the same height" as her, or roughly 5'10". (151:6). Shortly after the robbery,[3] S.D. gave the following description of the robber to police:

> I said he was about my height. He was wearing a big sweatshirt. He kept putting his hand over his

[2] While counsel apparently wanted to call the officers involved, he did not subpoena them or arrange for their appearance at the motion hearing. (151:21).

[3] S.D. did not utilize any concrete time markers in her testimony.

> mouth so I couldn't completely see his face. And that's about it.

(151:7).

She could not recall any specific facial features, like the robber's eyes or nose. (151:7). While she never saw a gun, she testified that she was led to believe the robber's accomplice was armed and, using his hand inside a sweatshirt, he acted like he was placing a gun against S.D.'s head during the robbery. (151:8). She described being "in shock" while the crime occurred. (151:9).

Later that evening—around 1 A.M.—S.D. participated in a photo identification procedure. (151:8). She gave the following answer as to why she picked Mr. Bratchett's photograph:

> I was -- it was not a clear decision at all. I -- I knew he was younger. He wasn't older, but I -- I don't know. He just fit the description best, I guess, from my memory of what it looked like.

(151:9).

S.D. testified she was actually "between a few" of the photographs, having eliminated those she did not think were the robber. (151:10). "[T]here were two, maybe three, that [S.D.] asked to see back." (151:10). After "[a] couple minutes" she "chose the one picture that [S.D.] thought it was." (151:10). S.D. was "maybe" sixty or seventy percent confident in her identification. (151:10). She claimed to have "compared" the photographs and told the court it was Mr. Bratchett's "boxy" face that led her to select him as the robber. (151:14).

She also confirmed that the photograph of Mr. Bratchett showed distinguishing facial characteristics, such as a mole and a neck tattoo, and that she did not include any such details in the description given to police. (151:11). She was explicit in her testimony that she did not see a neck tattoo on the suspect during the robbery. (151:14).

During cross-examination, the State elicited testimony from S.D. that while she was told the suspect may not be present in the photo array, she was also told by the officer conducting the array "to study the picture and to pick which one best fits the description of what happened that night." (151:12). A couple days after the array, the police called S.D. and told her she had picked out the correct person. (151:13). S.D. testified that she then went online and looked at pictures of Mr. Bratchett. (151:8).

Assistant District Attorney Daniel Gabler also informed the court that he directed one of the detectives to conduct a refresher identification procedure with S.D. shortly before her testimony, utilizing the same photographs as were used shortly after the crime, including a photograph of Mr. Bratchett, in order to "eliminate" the alleged taint caused by viewing Mr. Bratchett in the courtroom. (151:16). Defense counsel objected to admission of that follow-up identification and the court agreed it was not relevant to the motion. (151:18).

Counsel argued the identification procedure was "highly suggestive" because of the obvious physical dissimilarities between Mr. Bratchett and the fillers. (151:22). Counsel also argued S.D.'s

testimony proved that the resulting identification was unreliable and warranted exclusion. (151:22).

Assistant District Attorney Gabler "share[d] Mr. Hailstock's concern about that six-pack" and told the court that, on its face, the identification procedure was "troublesome." (151:23). However, he claimed that because neither the neck tattoo nor the mole were a factor in S.D.'s identification (based in part, on his off-the-record conversations with the witness), the defense clearly failed to meet its burden of proving an impermissibly suggestive procedure. (151:23). The prosecutor agreed, however, it was not a "great ID." (151:24).

The court concluded the defense had met its burden of proving impermissible suggestiveness, pointing out that Mr. Bratchett's prominent neck tattoo and mole made the array problematic. (151:25); (App. 108). As to the second step, reliability, the court made a finding there was not "continued improper suggestiveness." (151:26); (App. 109). The court agreed with the State that these distinguishing features did not play a role in S.D.'s identification. (151:26); (App. 109).

Motion to Exclude Prison Identification Card

The court also addressed counsel's motion to restrict the State from showing the jury Mr. Bratchett's identification card, which had been found in the vicinity of S.D.'s stolen property. (151:36); (App. 112). The identification card features a photograph of Mr. Bratchett in prison garb and lists his address as "Waupun," which both counsel for Mr. Bratchett and the court agreed was a reference to

Waupun Correctional Institution, where Mr. Bratchett was previously housed. (151:36); (App. 112). The court ruled the photograph was admissible, so long as the State covered up the address. (151:37); (App. 113).

Relevant Trial Testimony

S.D.

S.D., a student at Marquette University, testified she was living at an off-campus apartment building in November of 2015. (151:68). On November 15th, a Sunday, S.D. heard a knock on her door at around 7:20 p.m. (151:70). Although she lived with two roommates, S.D. was home alone at the time. (151:69-70). Thinking it might be friends who lived on another floor, S.D. opened the door. (151:71). A black man with a gray hooded sweatshirt up over his head was standing in the doorway. (151:71-73). He had his hand over his mouth. (151:73). S.D. could tell the man was approximately her height, 5'10". (151:72). Due to the baggy sweatshirt, she could not be certain of his build. (151:72). The man asked her "if this was Allen's apartment." (151:72). She answered no and began to shut the door. (151:74). The man told her, "Don't close the door or I'm going to shoot you and people in here." (151:74).

Although she continued to try and close the door, the man overpowered S.D., pushing the door open and knocking her back. (151:75). S.D. continued to yell at him to "get out" as the man entered her apartment. (151:75). He put S.D. in a "headlock" and demanded her property. (151:76-77). After releasing S.D., the man instructed her to sit on the floor.

(151:78). At that point, a second, "younger," man, who had followed the first suspect into the apartment, stood behind S.D. (151:79). She felt something brush against her head and the first man told her that if she moved, the second man would shoot her. (151:79). The two men demanded S.D.'s wallet and debit card. (151:81-82). After acquiring the card, they also demanded the personal identification number (PIN), which S.D. gave to them. (151:85-86).

Suspecting that S.D. had not given him the real PIN, the first man began demanding S.D. better not be "lying" to him. (151:86). After first extracting promises from S.D. that she was being truthful, the first man stated he would leave to go withdraw S.D.'s money from an ATM. (151:86-88). He told S.D. the second man would stay in the apartment with her. (151:88). The younger man balked at this plan, however, telling the first man it would take too much time for him to leave and come back. (151:88).

The first man began pacing the apartment as he formulated a new plan. (151:89). He then instructed S.D. to go into her bedroom, ultimately leading her into the room by placing his hand on her back. (151:89). S.D. told the jury she "didn't know if I was going to be raped."(151:90). The man told her to sit down on her bed and S.D. complied. (151:90). He repeatedly questioned her as to whether there was another phone in the apartment which she could use to call for help (having already taken her cell phone). (151:91). The man asked S.D. to disrobe and began

tugging at her shorts. (151:93-95).[4] She told the man "no" and held onto her shorts with both hands. (151:96). According to S.D., the man told her, "I will fuck you. You better not be lying to me." (151:96). He walked away and again told S.D. he would "come fuck" her if she called the police. (151:96-97). The man never made any attempt to unbuckle his pants or expose himself to her. (152:42).

"At some point" both men left the apartment. (152:5). "A couple minutes" later, S.D. also exited and went to her friend's apartment downstairs. (152:5-6). She was "hysterically crying" and "screaming" for help. (152:6). Someone called the police and, an unspecified amount of time later, S.D. told officers of both the Marquette and Milwaukee Police Departments what had happened. (152:7). She told the jury she was given a photo array and picked out a potential suspect. (152:9). She told the jury she was sixty to seventy percent sure that the photograph of Mr. Bratchett was the man who had first entered her apartment. (152:11). She testified she had gone through "a similar exercise" that morning and had picked out the same person, Mr. Bratchett. (152:12-13).

On cross-examination, S.D. apparently revised the estimated height of the first robber, the one she identified as Mr. Bratchett, to 5'8" or 5'9". (152:35). She was unable to state whether the robber was light or dark-skinned. (152:35). Defense counsel also used

[4] S.D. was clear that he was tugging the waistband "up" and away from her skin, rather than pulling the shorts down, toward her ankles. (151:95).

his cross-examination of S.D. to bring out Mr. Bratchett's physical dissimilarity to the other individuals in the photo lineup, based on his neck tattoo and prominent facial mole. (152:36). S.D. did not identify the robber as having any such features in her statement to police. (152:37).

Professional Witnesses

Officer Michael Gretenhardt of the Milwaukee Police Department testified that he participated in the initial investigation of the scene. (152:83). He testified there was no video evidence able to be recovered relevant to the investigation. (152:84). His canvass of the neighborhood likewise failed to produce any investigative leads. (152:85).

Officer Thomas Wichgers of the Marquette Police Department stated that on the evening of the robbery, at around 7:00 or 7:30 p.m., he was driving in the area where the robbery occurred in his squad car. (153:12). He witnessed a man in a hooded sweatshirt walking behind two college-age women in the general vicinity of S.D.'s apartment building. (153:12-13). He could not be certain of that man's race. (153:13).[5] He watched the two women enter the building and saw that the man appeared to hurry toward them. (153:13). He then lost track of the man, (153:13). Although he did not testify that he witnessed him enter the building, he was no longer

[5] The officer testified that the man had a "light" colored sweat suit. (153:13). In his questioning, Assistant District Attorney Gabler changed the coloration to gray and that change went unnoticed by Officer Wichgers. (153:13).

on the street when Officer Wichgers looked for him. (153:13-14). At around the same time, he also saw a black teenager, who waved to him. (153:14). He then lost track of the black teenager, as well. (153:15). Officer Wichgers assumed that the men had "perhaps piggy backed into a building." (153:15).

At this point, Officer Thomas Wichgers called his brother, and fellow Marquette Police Officer, Michael Wichgers, (who was also on duty in the neighborhood) and asked him to check out the rear alley of S.D.'s apartment building. (153:35-37). Meanwhile, Officer Thomas Wichgers went to check the lobby door of S.D.'s building. (153:16). Before he could reach the lobby door, however, Officer Michael Wichgers alerted him he had tried to stop and question a suspicious person and that this person had run off. (153:16).

In his testimony, Officer Michael Wichgers clarified that he witnessed a seventeen or eighteen-year-old black male coming down the external rear stairs of S.D.'s apartment building. (153:38-39). The black teenager then began walking away, through the alley. (153:40). Before Officer Michael Wichgers could exit his car to speak to him, he witnessed a second man, also black, exit the apartment building. (153:40). He was wearing a white hooded sweatshirt. (153:42).[6] Officer Michael Wichgers testified he could not make an identification of that person. (153:51). The unidentified man saw Officer Michael Wichgers and began running in a separate direction. (153:40).

[6] The man who robbed S.D. was wearing a gray hooded sweatshirt. (151:71-73).

Officer Michael Wichgers followed the man in his squad car, while Officer Thomas Wichgers pursued the teenager on foot. (153:43; 153:18).

Officer Thomas Wichgers ultimately apprehended the same black teenager who had waved to him before. (153:18). Officer Michael Wichgers failed to catch the second suspect. (153:43). In retracing the man's flight, he observed S.D.'s property—her wallet and ID—lying on the ground. (153:44). S.D. identified the items recovered as the property taken during the robbery. (152:26). Mr. Bratchett's identification card was also located nearby. (152:26).

Officer Thomas Wichgers believed the two individuals entered S.D.'s apartment building around 7:35 p.m. (153:28). He recalled Officer Michael Wichgers alerting him that the men had exited the building roughly five to seven minutes later. (153:29). However, Officer Michael Wichgers testified it could have been only two or three minutes after he was alerted to the situation that he witnessed the men exit the apartment building. (153:54).

Forensic Investigator Alfonso Lazo testified that he was able to recover a fingerprint from S.D.'s wallet. (153:83; 41). Richard Jacobs, a "latent fingerprint examiner" for the Milwaukee Police Department, analyzed the fingerprint. (154:22; 154:28). Mr. Jacobs first submitted the print to the Automated Fingerprinting Identification System, or AFIS. (154:34). The AFIS system contains known fingerprints from prior arrestees. (154:35). It did not

produce a match.[7] (154:37). He was then asked to determine if the fingerprint was consistent with Mr. Bratchett. (154:37). It was his opinion the fingerprint was consistent with Mr. Bratchett's right middle finger. (154:40). Mr. Jacobs acknowledged the fingerprint was somewhat distorted and that he made the identification based on only 11, out of 300 possible, "points" of similarity. (154:42).

Detective Rudy Gudgeon testified that he conducted a custodial interrogation of Mr. Bratchett, during which time Mr. Bratchett asserted he was at the Potawatomi Casino at the time of the robbery. (154:56). He told the detective he had given his photo ID to his younger brother. (154:57).

Defense Case

Mr. Bratchett elected not to testify. (154:71). The only defense witness was Public Safety Officer Rick Fligor of the Marquette Police Department. (154:81). During his brief testimony, he told the jury S.D. told him "she did not believe the photo she identified was Bratchett." (154:84). Officer Fligor memorialized that conversation in a contemporaneous report. (154:83). On cross-examination, Assistant District Attorney Gabler produced a supplement report in which Officer Fligor recanted his own previous information, and clarified that the initial report—as to a non-identification—

[7] As Mr. Bratchett has a prior criminal record, presumably his fingerprint would have been in the AFIS database.

had been in error, confirming that S.D. did positively identify Mr. Bratchett as the robber. (154:89).

Closing Argument

The State argued in closing that the only disputed question was the identity of the perpetrator. (155:30). While the prosecutor believed S.D. was a credible and believable witness, he conceded that her testimony was insufficient to convict Mr. Bratchett beyond a reasonable doubt. (155:30; 155:36). In his view, other evidence, such as the recovery of Mr. Bratchett's fingerprint, was necessary to establish a guilty verdict. (155:39).

Defense counsel focused on the low confidence value for S.D.'s identification of Mr. Bratchett in the photo array, (155:42), as well as the distinguishing facial characteristics of Mr. Bratchett which were not observed on the robber. (155:44).

In rebuttal, the prosecutor informed the jury that to find a reasonable doubt, the defense would first have to persuade them there was an alternative explanation for the evidence against Mr. Bratchett. (155:48). He also told the jury 100 percent confidence in their verdict was not required and that "reasonable doubt" should be distinguished from freedom from "all doubt." (155:50). At that point, the prosecutor made the following remarks:

> Attorney Gabler: That's a common defense theme. What about this? What about that? It's like, oh, well, my client, he admitted to the crime in a Mirandized statement.

Defense Counsel:	Objection. That's a fact not in evidence.
Attorney Gabler:	Hypothetically.
The Court:	Sustained.
Attorney Gabler:	Hypothetically, the defense thought, well, he admitted to the crime. It's not audio recorded. Well, if it's audio recorded, well, then it's not videotaped. Well, if it's videotaped, well, then where's the written signed confession? See, it never ends. It's always something more. You're missing this. You're missing that.

(155:51). The prosecutor then concluded his remarks by telling the jury the "law required" a guilty verdict. (155:52).

Verdict and Sentence

The jury convicted Mr. Bratchett of all three charges in the information. (156:5). The court, the Honorable T. Christopher Dee presiding, sentenced Mr. Bratchett to a term of confinement in the Wisconsin State Prison System. (52:1); (App. 101).

Postconviction Proceedings

Postconviction Motion

Following his conviction and sentence, Mr. Bratchett filed a series of postconviction motions. Relevant to this appeal, Mr. Bratchett, by

undersigned counsel, filed a Rule 809.30 postconviction motion raising several issues. (114).

First, Mr. Bratchett asserted he was entitled to a new trial on the attempted sexual assault charge due to his lawyer's failure to effectively cross-examine S.D. about her prior inconsistent statements. (114:7). While she told the jury the first robber had explicitly threatened to "fuck" her, her more contemporaneous report to responding officers indicates the robber instead told her not to "fuck with" him. (114:8).

Second, Mr. Bratchett asserted he was entitled to a new trial on all counts due to his lawyer's failure to cross-examine S.D. as to obvious deficiencies with her identification of Mr. Bratchett, including that she was told to select the person who "best fit" her recollection and received biasing confirmation from law enforcement. (114:10).

Third, Mr. Bratchett asserted he was entitled to a new trial on all counts as a result of his lawyer's failure to object to improper closing argument—regarding a "hypothetical" confession—and to not move for a mistrial. (114:14).

Fourth,[8] Mr. Bratchett also argued these errors cumulatively prejudiced him. (114:18).

[8] Mr. Bratchett made several additional arguments, which are not being renewed on appeal and therefore will not be further discussed in this brief.

As a result of Mr. Bratchett's motion, the court, the Honorable Michelle Havas, held an evidentiary hearing, at which time Attorney Hailstock testified.

As to the first claim, regarding S.D.'s prior inconsistent statements, Attorney Hailstock confirmed he would have been in receipt of the police report which included those statements prior to trial. (160:8). He agreed the statements were inconsistent. (160:9). He was then asked if he had a strategic reason for not utilizing this material during his cross-examination. (160:9). He could not recall. (160:9). He eventually asserted he did not utilize the statement because he could not be sure if the police had recorded it accurately. (160:10).

Regarding the deficiencies in S.D.'s identification, Attorney Hailstock conceded that evidence S.D. was told to select the person who "best fit" her recollection was relevant to his overall defense strategy, attacking the identification's reliability. (160:13). He had no strategic reason for not alerting the jury she had received confirmation from the police she had picked out the right person. (160:14).

As to his decision not to continue objecting to improper closing argument, Attorney Hailstock agreed that his first objection to this line of argument had been successful. (160:20). When asked why he did not continue objecting, Attorney Hailstock stated he did not want to draw attention to the statement. (160:22). He did not consider asking to be heard outside the presence of the jury. (160:22). He did not

move for a mistrial because he "didn't think it was a mistrial at that point." (160:22).

Trial Court Decision and Order

The circuit court, the Honorable T. Christopher Dee presiding, issued a written order denying Mr. Bratchett's motion. (134); (App. 114).

With respect to the first claim, failure to impeach S.D. with her prior inconsistent statements, the court concluded that because Attorney Hailstock's focus was on the integrity of S.D.'s identification, "it makes sense that trial counsel did not cross-examine on what exactly was said or how what was said was recorded." (134:5); (App. 118). Moreover, the court concluded any deficient performance would not have prejudiced Mr. Bratchett because there was other sufficient evidence to convict him of the attempted sexual assault charge. (134:5); (App. 118).

Second, the court found that trial counsel was not ineffective for failing to cross-examine S.D. about the integrity of her identification. (134:2-3); (App. 115-116). The court concluded that Attorney Hailstock's decision to focus solely on S.D.'s low level of confidence in the identification was a "legitimate strategy." (134:2); (App. 115). Questioning intended to reveal S.D. was told to select the person who "best fit" her recollection would "have bogged down into an argument about semantics and likely would have left little impression on the jury." (134:3); (App. 116). The court also made a finding that this instruction "would not have lead [sic] S.D. to pick out anyone in particular." (134:3); (App. 116). As to the effect of confirmation from law enforcement, the court

likewise concluded it "could have had no influence on S.D.'s choice of photograph." (134:3); (App. 116). In any case, the court also found Mr. Bratchett could not have been prejudiced because: (1) the discovery of Mr. Bratchett's identification card under S.D.'s wallet was "devastating," (2) Mr. Bratchett's fingerprint was found on the wallet, (3) "S.D. had an extended period in which to see and interact with Mr. Bratchett," and (4), "individuals fitting the description supplied by S.D. were found in the vicinity near the time the crimes were committed." (134:3); (App. 116).

Third, the court rejected Mr. Bratchett's reading of the prosecutor's remarks during closing argument and concluded "there is ample reason to believe that a reasonable juror would have understood those comments to be a hypothetical demonstration of the prosecutor's point." (134:4); (App. 117). Given that reading, Attorney Hailstock's "thought process appears solidly based." (134:4); (App. 117).

Finally, the court, having rejected his individual claims, concluded Mr. Bratchett was not cumulatively prejudiced by his lawyer's errors. (134:5); (App. 118).

This appeal follows. (135).

ARGUMENT

I. S.D.'s identification of Mr. Bratchett was unreliable and should have been excluded.

A. Legal principles and standard of review.

While the admission of identification evidence is ordinarily governed by the evidence code—in particular, Wis. Stat. § 904.03—the United States Supreme Court "has recognized, in addition, a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012). "Under its due process analysis, the United States Supreme Court places the burden first on the defendant to show that the method law enforcement chose to employ to identify a suspect as the perpetrator was 'an unnecessarily suggestive identification procedure,' such that there was a very substantial likelihood of misidentification." *State v. Roberson*, 2019 WI 102, ¶ 27, 389 Wis. 2d 190, 935 N.W.2d 813 (*quoting Perry*, 565 U.S. at 235). Wisconsin's constitution requires an identical analysis. *Id*.

If a court concludes the defendant has satisfied their burden of proving law enforcement used an "identification procedure that is both suggestive and unnecessary," *Perry*, 565 U.S. at 228, "the State bears the burden to provide a factual foundation that supports the reliability of the evidence." *Roberson*, 2019 WI 102, ¶ 29.

In assessing whether identification evidence was admissible below, this Court employs a two-step standard of review. *Roberson*, 2019 WI 102, ¶ 66. The circuit court's findings of fact are upheld unless clearly erroneous. *Id.* Whether a constitutional violation has occurred, however, is a question of law reviewed *de novo*. *Id.*

B. The circuit court correctly concluded S.D.'s identification of Mr. Bratchett was improperly suggestive.

Here, both the State and the defense agreed there were some weaknesses in S.D.'s identification. Both parties agreed the composition of the lineup was flawed, with the State explicitly asserting it "share[d] Mr. Hailstock's concern about that six-pack," calling it "troublesome" and not a "great ID." (151:23-24). The prosecutor even went so far as to inform the court he felt the need to share his "frustrations" with the officers who arranged the array. (151:24).

The court agreed, finding the composition of the photo array to be problematic. (151:25); (App. 108). The circuit court's conclusion is solidly grounded in a broad body of social science and evolving jurisprudence which seeks to identify and eliminate suggestive procedures. For example, decades of research into the flaws of improperly conducted eyewitness identification procedures have taught police and legal professionals that, in arranging a lineup, "the suspect should not stand out." *See* Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377,

389 (2016). Wisconsin is one such jurisdiction that has embraced several of the "lessons" learned from wrongful convictions obtained via problematic eyewitness procedures and, as a result, the Wisconsin Department of Justice's Model Policy for Eyewitness Identification tells the reader "[p]hoto arrays and lineups should be constructed with non-suspect fillers chosen to minimize any suggestiveness that might point toward the suspect." Model Policy at 3. (App. 124).

As the Model Policy notes:

> Unintentional suggestion can lead an eyewitness to identify a particular individual in a photo array or lineup. This can occur if one individual stands out from the others due to the composition of the array or lineup. For instance, if one of the individuals in the array or lineup has unique facial hair or is photographed with a different background, that person may stand out from the others and may be identified or excluded due to that distinguishing characteristic.

Model Policy at 3. (App. 124) This common-sense observation is in line with long-settled Wisconsin Supreme Court precedent making clear that, "The police authorities are required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification." *Wright v. State*, 46 Wis. 2d 75, 86, 175 N.W.2d 646 (1970).

In this case, the composition of the array is problematic due to an overall failure to arrange consistently similar options for the witness' viewing.

The individuals have varying skin tones, face shapes, and facial features (including some with facial hair and some without). (21:1). (App. 119) While the overall lack of similarity is itself a problem, more troubling is that Mr. Bratchett is the only person with a prominent neck tattoo, a prominent facial mole, and a boxy, almost rectangular face. (21:1). (App. 119).

Mr. Bratchett concedes S.D. claims to have not relied on either the neck tattoo or the mole in choosing Mr. Bratchett's photo in the photo array procedure. (151:11). As the Model Policy recognizes, however, the things that make a person stand out in an array—including the use of a different background—need not be directly linked to the witness' explanation as to why they picked out a particular person in order to produce a skewed and potentially inaccurate result. Model Policy at 3. (App. 124). It is the very act of making the person stand out, in general, that distorts the witness' ability to impartially assess the proffered alternatives. As research now makes clear, "When the suspect stands out in the lineup relative to the other lineup members, uncertain eyewitnesses may be cued to identify the suspect based simply on his distinctiveness rather than a true match between their memory of the culprit and that lineup member."[9] Thus, the circuit court was correct to focus on Mr. Bratchett's distinguishing characteristics,

[9] Roy S. Malpass et al., *Lineup Construction and Lineup Fairness, in* HANDBOOK OF EYEWITNESS PSYCHOLOGY (VOL. 2): MEMORY FOR PEOPLE 155, 157 (R. Lindsay et al., ed. 2007).

even when those distinguishing characteristics did not provide the *conscious* basis for S.D.'s identification.

Notably, however, S.D. also testified she picked out Mr. Bratchett because, based on her comparison against some of the other photographs, he had a distinctively "boxy" face. (151:14). Reviewing the array, Mr. Bratchett's face is arguably the "boxiest" out of all six individuals shown. In fact, his face appears almost rectangular, with a distinctively squared off jaw. (21). (App. 119). The texture and styling of the hair on top of his head completes the boxy silhouette. (21). (App. 119). None of the fillers come close to approximating this unique face shape. As the Wisconsin Supreme Court has held, "a photo which is unique in a manner directly related to an important identification factor" can render the array impermissibly suggestive. *Powell v. State*, 86 Wis. 2d 51, 66, 271 N.W. 2d 610 (1978). Here, S.D. (despite never previously describing the suspect as having a boxy face) apparently cued in on this feature as being the essential piece of evidence in making her identification of Mr. Bratchett as the perpetrator. Because Mr. Bratchett was the only individual possessing a "boxy" face among the possible suspects, the photo array was unnecessarily suggestive.

And, while the circuit court focused on the biasing nature of the photo array composition, there were other grounds on which to find this lineup suggestive. First, S.D. was explicitly told to make a "relative judgment"—to pick out the person who "best fit" her recollection of the suspect. (151:12). As the Model Policy asserts, this is one of the primary

causes of eyewitness error, and the safeguards set forth in the Model Policy are entirely designed to avoid reliance on such "relative" judgments. By telling S.D. to pick out the person in the lineup who "best fit," police contradicted their instructions that the perpetrator may not be included in the lineup, undermining the integrity of the overall procedure.

Second, S.D.'s testimony reveals she actually employed a "best fit" strategy in reviewing the photographs, and was allowed to deliberate over, and compare, multiple photographs before selecting Mr. Bratchett. (151:10-14). After first excluding those whom she did not believe to be the suspect, she then chose between two or three remaining candidates, selecting Mr. Bratchett apparently because he had the "boxiest" face. (151:14). This undermined the sequential nature of the lineup procedure and explicitly invited an impermissible relative judgment.

Third, S.D. then received confirmation from law enforcement she had made the "correct" choice. (151:13). While that confirmation did not occur simultaneously with her identification, the Model Policy does not include any temporal limits when cautioning the reader that "research shows that information provided to a witness after an identification suggesting that the witness selected the right person can dramatically, yet artificially, increase the witness' confidence in the identification." Model Policy at 5. (App. 126).

Fourth, the State attempted to artificially bolster S.D.'s testimony in support of the identification by conducting an identical lineup on

the morning of the motion hearing. (151:16). According to the prosecutor, that procedure was conducted "informal[ly]," meaning it likely lacked the safeguards set forth in the Model Policy. (151:16). In addition, the Model Policy explicitly cautions against using multiple procedures with the same witness. (Model Policy at 3). (App. 124). Here, the second identification was highly biasing and cannot reasonably be construed as an objective mechanism designed to elicit reliable evidence. If anything, it contributes more confirmation bias and therefore solidifies and entrenches the biasing effect of the earlier, improperly conducted lineup.[10]

Accordingly, the procedures utilized to obtain S.D.'s identification "were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification under a totality of the circumstances." *Powell*, 86 Wis. 2d at 62. The circuit court therefore correctly concluded the identification procedure was impermissibly

[10] It would also merely repeat all of the same flaws as to distinctiveness, as the lineup's composition was the same.

suggestive, thus failing the first step of the analysis.[11]

C. The State failed to prove the resulting identification was sufficiently reliable.

If the identification procedure is unnecessarily suggestive, the State must then prove, under the totality of the circumstances, that the resulting identification was nonetheless reliable. *Roberson*, 2019 WI 102, ¶ 35.[12] "A nonexclusive list of reliability factors includes: (1) the opportunity of the witness to

[11] While the court did not address "necessity" in its oral ruling, a review of the overall record shows the State was not challenging that aspect of identification and the record impliedly supports a finding of "unnecessary" suggestiveness. As the Wisconsin Supreme Court recently held, "*Perry's* discussion of 'unnecessarily' is focused on police conduct that is claimed to have 'manufactured' a challenged identification procedure when identification may have been obtained by a less suggestive means." *Roberson*, 2019 WI 102, ¶ 28. Here, the alternative would have been to follow the policies and procedures set forth by the DOJ in its Model Policy and it is not clear why the egregious departures from that policy were in any way "necessary."

[12] Notably, the two-step process mandated by both the Wisconsin Supreme Court and the United States Supreme Court is itself scientifically questionable, as emerging social science research proves that the very factors utilized to determine reliability are themselves impacted by the suggestiveness of an identification procedure. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1 (2009).

view the suspect at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his prior description of the suspect, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation." *Id*. These factors are derived from *Neil v. Biggers*, 409 U.S. 188, 198 (1972) and are therefore often denoted as the "*Biggers* factors."

Here, the State failed to meet its burden. As to the first *Biggers* factor, opportunity to view, the evidence is clear that the suspect had a hood which obscured his hairstyle and that he kept his hand over his face for much of the interaction. (151:5). As to the witness' degree of attention, no testimony was elicited on this point. Instead, the available evidence shows that S.D. was "in shock" during the robbery. (151:9). Stress can disrupt the witness' ability to focus in on facial features while a crime is being committed. *See State v. Cromedy*, 727 A.2d 457, 463 (N.J. 1999) ("'There is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation was made at a time of stress or excitement.'"); *see also State v. Henderson*, 27 A. 3d 872, 894 (N.J. 2011) ("[S]tudies have shown consistently that high degrees of stress actually impair the ability to remember.") In this case, S.D. was also robbed by two men, and her already weakened focus would therefore have necessarily been divided between these two strangers, one of whom she believed to be in possession of a gun.

With respect to the accuracy of the prior description, this criterion is self-evidently problematic because there was not much of a description given. S.D. did not recall any facial features, the suspect's hairstyle, or his clothing with a great degree of detail. While she utilized Mr. Bratchett's "boxy" face to infer that he was the perpetrator, she never described him as such until after she was forced to justify her choice at the motion hearing. She did not know whether the man was light or dark-skinned and, most importantly, never observed a neck tattoo despite Mr. Bratchett having a prominent one. (151:14). And, while she would have presumably been able to determine whether the robber had a large mole on their face, she never included that detail in her description, either.

While the fifth factor—the timing of the identification procedure—favors the first identification procedure (but thoroughly disfavors the confirming identification procedure conducted the morning of trial), the most important factor is number four, the witness' degree of confidence. Here, the witness' degree of confidence is appallingly low—"maybe" sixty or seventy percent. S.D. also had to "guess" at why she identified Mr. Bratchett and struggled, in her testimony, to articulate why her identification should have been credited by the court.

Finally, this Court should also keep in mind that the party with the burden of proving reliability—the State—made no effort to call any of the professional witnesses involved in the administration of the lineup to establish any other

basis for crediting S.D.'s identification of Mr. Bratchett as the perpetrator.

Accordingly, this Court should reverse the ruling of the circuit court and remand for a new trial.[13]

II. The circuit court erred in allowing the State to introduce a photographic identification card which signaled to the jury that Mr. Bratchett had recently served time in prison.

A. Legal standard and standard of review.

In assessing the circuit court's denial of an evidentiary objection, "trial courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial; [this Court] will upset their decisions only where they have erroneously exercised that discretion." *State v. James*, 2005 WI App 188, ¶ 8, 285 Wis.2d 783, 703

[13] Mr. Bratchett acknowledges the State may argue harmlessness in their response; as they are the party with the burden of proving harmlessness (if they elect to attempt to do so) he reserves the right to reply to those arguments in his reply.

Mr. Bratchett also notes trial counsel objected to the admissibility of S.D.'s in-court identification. Because the circuit court had already ruled that the out-of-court identification was admissible, any ruling on whether the in-court identification was free from the taint of the earlier biasing procedure would have been superfluous. Accordingly, if this Court remands, this issue can be appropriately considered by the circuit court, if the State wishes to move for admission of S.D.'s in-court identification at that time.

N.W.2d 727. However, for discretion to be properly exercised, the circuit court's ruling must reflect that "the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *Martindale v. Ripp*, 2001 WI 113, ¶ 29, 246 Wis.2d 67, 629 N.W.2d 698 (quoting *State v. Wollman*, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979)).

"A circuit court's erroneous exercise of discretion in admitting or excluding evidence does not necessarily constitute reversible error." *Weborg v. Jenny*, 2012 WI 67, ¶ 68, 341 Wis. 2d 668, 816 N.W.2d 191. Instead, reversal is warranted when the wrongly admitted evidence "affected the substantial rights" of the party seeking reversal. *Id*., Wis. Stat. § 805.18(2); Wis. Stat. § 901.03(1).

B. The circuit court erred when it allowed the jury to view a photograph of Mr. Bratchett in prison garb.

Exhibit 21 is a photograph of Mr. Bratchett's identification card, which was recovered near S.D.'s stolen property. (42). (App. 121). The identification card includes a photograph of Mr. Bratchett wearing a bright orange shirt which is instantly recognizable

as part of a prison uniform.[14] For that reason, counsel objected, and asked that the jury not be shown the photograph. (151:36). The circuit court denied the motion but instructed the State to black out the address portion of the card, which listed "Waupun" as Mr. Bratchett's address. (151:36). (App. 112).

While Mr. Bratchett concedes that evidence relating to the *discovery* of his identification card was relevant for the purposes of Wis. Stat. § 904.01, the court erroneously applied Wis. Stat. § 904.03 in allowing the jury to view the highly prejudicial photograph of Mr. Bratchett in prison clothing. As the Seventh Circuit has persuasively held:

> [T]he general rule of course is that evidence that an accused has committed another crime is inadmissible, and that any error in admitting such evidence cannot always be cured by sustaining objections or by instructions. *United States v. Magee*, 261 F.2d 609, 611, 612-613 (7th Cir. 1958); *United States v. Reed*, 376 F.2d 226 (7th Cir. 1967). Similarly, it is error to admit photographs that on their face disclose past

[14] The link between clothing of this style and prisoner status cannot be overstated. According to Wikipedia, "Prison uniforms in the United States often consist of a distinctive orange jumpsuit or scrubs with a white T-shirt underneath […]." https://en.wikipedia.org/wiki/Prison_uniform. This is what Mr. Bratchett is wearing in the photo and a simple Google search reveals thousands of results displaying prisoners in substantially identical outfits. Moreover, the association between orange clothing of this nature and prison status has arguably been reinforced even further by the hit show "Orange is the New Black," the title of which is an explicit reference to the color of a prison uniform like that worn by Mr. Bratchett.

> incarceration. *United States v. Harman*, 349 F.2d 316, 320 (4th Cir. 1965); *Barnes v. United States*, 365 F.2d 509 (D.C. Cir. 1966).

United States v. Silvers, 374 F.2d 828, 830 (7th Cir. 1967).

Here, the State was already able to offer testimony that Mr. Bratchett's identification card was discovered near S.D.'s belongings. Thus, the further display of the identification card, with its highly biasing prison photograph, contravenes the rule that relevant "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, waste of time, or needless presentation of cumulative evidence." Wis. Stat. § 904.03. Not only was physical display of the identification card cumulative given the undisputed testimony regarding its discovery, but its admission and publication to the jury also grossly prejudiced Mr. Bratchett.

It is axiomatic that forcing the defendant to attend trial in prison garb can fundamentally deform the fairness of the proceedings. *Estelle v. Williams*, 425 U.S. 501, 504 (1976). Here, while Mr. Bratchett was not paraded in front of the jury in his bright orange prison jumpsuit, a photograph to that effect was nonetheless displayed to the jury. Meanwhile, evidence that suggests prior criminality is a well-known influence on the fairness of a trial, s*ee Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967), and for that reason, a set of procedural safeguards exists to curb the influence of such "other-acts" evidence. *See* Wis. Stat. § 904.04.

Here, the circuit court's order disregarded these safeguards, resulting in prejudice to Mr. Bratchett. Allowing the jury to receive evidence that Mr. Bratchett—who was on trial for a violent crime—had been previously incarcerated in the Wisconsin State Prison system grossly impacted his substantial right to a fair trial in which guilt is decided by an impartial jury.

Accordingly, reversal is warranted.

III. Mr. Bratchett is entitled to a new trial with respect to Count Three, attempted sexual assault, due to trial counsel's failure to impeach S.D. with her materially inconsistent prior statements.

A. Legal rubric for evaluating claims of ineffective assistance.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, sec. 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 259, 272, 558 N.W.2d 379 (1997).

Wisconsin courts apply the two-prong test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 273. The defendant must establish: (1) trial counsel's performance was deficient; and (2) he was prejudiced by the deficiency. *Id.*

To prove deficient performance, a defendant must establish that his counsel "made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth

Amendment." *Id*. (citations omitted). The prejudice prong requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 276 (citing *Strickland*, 466 U.S. at 694). Importantly, the ineffective assistance of counsel analysis is not outcome-determinative, such as a sufficiency analysis. *State v. Pitsch*, 124 Wis. 2d 628, 645, 369 N.W.2d 711 (1985). According to the Wisconsin Supreme Court, "[t]he focus of this inquiry is not on the outcome of the trial, but on the 'reliability of the proceedings.'" *State v. Thiel*, 2003 WI 111, 20, 267 Wis.2d 571, 665 N.W.2d 305 (quoting *Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985)).

In assessing whether trial counsel was ineffective, this Court applies *de novo* review. *Id*., ¶ 21.

B. Reasonably competent counsel would have wanted the jury to know that S.D.'s original statement did not attribute a threat to commit sexual assault to Mr. Bratchett.

In this case, Mr. Bratchett was charged with attempted third-degree sexual assault of S.D. (15). In order to convict him, the State needed to convince the jury that Mr. Bratchett "formed [the] intent" to have sexual intercourse with S.D. and that he "did acts towards the commission of the crime...which demonstrate[d] unequivocally, under all of the circumstances, that [he] intended to and would have

committed the crime…except for the intervention of another person[.]" (155:19-21).

At trial, the State presented the testimony of S.D., who described the following chain of events. First, she was robbed inside her apartment by two men. (151:82-86). After taking her personal property and demanding the PIN number for her debit card, the first robber—whom she identified as Mr. Bratchett—became increasingly agitated as he repeatedly demanded assurances that she was not lying to him about the PIN number. (151:86). Next, the first robber verified that he and his accomplice were in possession of S.D.'s phone. (151:88). The first robber then told S.D. that he was going to leave to withdraw the money from S.D.'s account and the second robber would stay behind to watch over S.D. (151:88).

At this point, the second robber objected to this plan, telling the first robber that it would take too long for him to get the money and come back. (151:88). The first robber became agitated, pacing S.D.'s apartment while he formulated a new plan. (151:89). He then asked S.D. to go into her bedroom and instructed her to sit on the bed. (151:89-90). The first robber became increasingly paranoid that S.D. was concealing a second phone which she could use to call for help:

> He told me, "Are you lying? Is there another land line? Do you guys have a land line? Do you have another phone?" And then he kept saying, "Is there anyone else in here?" And I kept telling him, "No, we don't have a land land [sic] line. I

> don't have another phone. There's no one else in here. My roommates aren't here."
>
> And then he said — or he thought I was looking for something under the bed or looking at something, because I had my hands up because I didn't know what he was going to do. And he said, "What are you trying to look for? What are you looking for?" And I said, "No, nothing, just sitting here."

(151:91). The first robber then demanded that S.D. disrobe and tugged at her shorts. (151:93-95). She refused, and held onto her shorts, preventing them from moving. (151:95). At this point, S.D. told the jury that Mr. Bratchett stated, "I will fuck you. You better not be lying to me." (151:96). She told the jury that he made a similar threat as he was leaving the apartment. (151:97). These threats were important to the State's case as the prosecutor argued in closing that they helped to "unequivocally" prove Mr. Bratchett's intent to commit sexual assault. (155:29).

However, these threats were not included in S.D.'s original statement to police. A comparison of a more contemporaneous report with her trial testimony shows stark differences. According to that report:

> At this time, Bratchett instructed [S.D.] to get up and told her, "Now go in your bedroom." As she was walking towards her bedroom, she felt his hand on her left shoulder guiding her into the room. Once into the room, Bratchett told her to sit down on the bed. Bratchett then stated, "Are you lying to me, you better not be lying to me. Don't fuck with me." [He] then stated, "You have another phone, don't fuck with me. You have

> another phone or a house phone?" [S.D.] stated that Bratchett seemed like he was in an agitated state so she put her hands up in a defensive position in front of her face. Bratchett then stated, "What are you reaching for?" and Robinson [the alleged accomplice] stated "C'mon we gotta go." At this time, Bratchett told [S.D.], "Take off your clothes" and [S.D.] replied, "no your [sic] not going to do that." Bratchett stated, "I don't believe you, and your [sic] going to do it before I leave. Now move back on the bed. [S.D.] stated that she backed up on the bed with her back against the wall. It was now that Bratchett grabbed onto the bottom of her gym shorts and began tugging on them. [S.D.] then yelled at Bratchett, "I don't have any money or another phone."

(114:31).

Failure to present this contradictory version of events—which radically changes the words and removes any explicit threats of rape—was an unreasonable strategic decision on trial counsel's part. Here, intent to commit sexual assault was a required element that needed to be proven beyond a reasonable doubt. The words attributed to the suspect in this context are therefore vitally important. However, the words that S.D. originally attributed to the robber—"don't fuck with me"—have a radically different connotation in context. Based on the overall reading—a dispute over whether S.D. was continuing to conceal a second phone with which she could use to call the police—there is no longer an "unequivocal" intent to commit sexual assault. Mr. Bratchett's actions—grabbing at S.D.'s shorts—are ambiguous, as S.D. herself believed, based on her

original statement, that he was reaching for money or a hidden phone.[15]

Reasonably competent counsel would have alerted the jury to this discrepancy. Counsel's proffered excuse for not doing so—that he could not be certain whether the words attributed to S.D. in the police report were really spoken by her—makes little sense. (160:10). First, there is absolutely nothing in this record that would support counsel's fear that the police report was somehow inaccurate. This appears to be a post hoc justification for an obvious misstep, and not a preconceived strategic justification.

Second, the entire point of using a prior inconsistent statement to impeach a witness is to undermine that witness' credibility. Thus, even if S.D. disclaimed the original statement and somehow averred that she did not speak those words, counsel would still have succeeded in creating a genuine issue of disputed credibility that could have supported a reasonable doubt defense with respect to the attempted sexual assault charge. In other words, while it would be ideal for the jury to concretely accept that the first statement was true and the trial testimony false, that outcome need not occur for the impeachment to be effective. So long as doubt could be created as to what the robber said, counsel would have achieved his purpose.

[15] The robbers may have also wanted her to disrobe so as to delay her from speedily running out the door and reporting the crime.

Third, even if S.D. asserted that the police report was inaccurate, trial counsel would have not "lost" anything. S.D. would merely be repeating testimony she already gave and trial counsel would now be allowed to argue that the initial investigation was flawed because the police materially misrepresented facts in their reports.

Accordingly, trial counsel had nothing to lose and much to gain by cross-examining S.D. on this point. It was therefore deficient performance to completely omit this line of attack from his cross-examination of S.D.

C. Failure to expose this inconsistency undermines confidence in the jury verdict with respect to the sexual assault allegation.

As set forth above, the State needed to prove an "unequivocal" intent to commit sexual assault. (155:21). Here, both S.D. and the robber remained clothed for the duration of the robbery. While the attempt to tug at her shorts is relevant evidence of intent, that action is ambiguous in light of the other testimony showing that this occurred in context of a dispute as to whether S.D. was concealing a second phone which she could use to call police. The explicit threats of rape therefore do much of the heavy lifting in the State's case. Successful cross-examination would reveal that those statements may not have ever been made or that context radically changes their meaning. Accordingly, failure to present this contradiction to the jury undermines confidence in

the verdict for the sexual assault charge and this Court should remand for a new trial on that count.

IV. Trial counsel was ineffective for failing to impeach the integrity of S.D.'s identification.

A. Reasonably competent counsel would have alerted the jury to the fact that S.D. had been instructed to pick out the person who "best fit" her recollection of the robber—and not necessarily the actual suspect—and that she had received a biasing confirmation from law enforcement after doing so.

S.D.'s testimony at the motion hearing regarding the admissibility of the identification evidence raises at least two "red flags." First, that S.D. was told to pick out the individual who "best fit" the suspect. (151:12). Second, that S.D. had received confirmation from law enforcement that she had picked out the correct person. (151:13). Both these statements are concerning, as they violate the Wisconsin Department of Justice's Model Policy, which is designed to ensure fundamentally reliable identification procedures. (114:11).

Trial counsel testified that S.D.'s identification of Mr. Bratchett was "an issue" at the trial. (160:11). Counsel was present during the motion hearing where S.D. made the statements quoted above. (160:11). Counsel also testified that he reviewed the DOJ Model Policy in preparation for that hearing. (160:12). Counsel testified that his goal during the trial was to attack the reliability of S.D.'s

identification. (160:13). While he agreed that S.D. being told that she was supposed to pick out the person who "best fit" was relevant to the reliability of her identification, he asserted that he did not bring this out in cross-examination because he chose to focus on the confidence level instead. (160:13). He testified that he had no strategic reason for not bringing up the issue of law enforcement confirmation. (160:14).

This is an unreasonable trial strategy. Here, S.D. made two statements during the motion hearing which called the reliability of her identification into question, as set forth in Section I, B, above. Because identification was a central issue in this case, counsel should have attacked these two facets of S.D.'s identification. Both areas of cross-examination provided an opportunity for counsel to have created reasonable doubt as to S.D.'s identification of Mr. Bratchett.

B. Because trial counsel's deficient performance deprived the jury of critical evidence needed to evaluate the believability of S.D.'s account, confidence in the outcome is undermined.

In this case, the State needed to prove, beyond a reasonable doubt, that Mr. Bratchett was the perpetrator. While other circumstantial evidence existed—like the presence of his identification card near the victim's discarded belongings—the strongest and most direct evidence of guilt was S.D.'s identification of Mr. Bratchett as she was the only person capable of placing him inside the apartment.

As most criminal practitioners know, identification evidence is uniquely persuasive, especially in a case like this, where no other direct witnesses or physical evidence from the scene are in existence.[16] A reasonable jury who doubted S.D.'s identification of Mr. Bratchett would therefore have a reasonable doubt entitling them to acquit him of all charges. Accordingly, utilizing S.D.'s own sworn testimony to bring out defects in the identification would have further undermined a belief that Mr. Bratchett was the robber, especially because she was the only person claiming to identify him as such. This is constitutionally cognizable prejudice that entitles Mr. Bratchett to a new trial on all counts.

[16] *See also* Jennifer L. Overbeck, Note, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Testimony in the Federal Courts,* 80 N.Y.U. L. REV. 1895, 1897 (summarizing research showing impact of eyewitness testimony on conviction rates).

V. Trial counsel was ineffective for not objecting to improper closing argument and for not moving for a mistrial after the prosecutor falsely insinuated that Mr. Bratchett had confessed.

A. Reasonably competent counsel, having had one objection sustained, would have continued to object and would have moved for a mistrial after the prosecutor's highly improper closing argument.

During closing arguments, the State made an improper argument insinuating that a confession was being kept from the jury. (155:51). While counsel for the State tried to couch this argument in "hypothetical" terms, the argument is clearly improper as it is based on facts not in evidence. (114:14). The argument could also confuse the jury into thinking that a confession did exist, and that they just did not get to see it due to Mr. Bratchett's exploitation of a "technicality."[17] Accordingly, the trial court correctly sustained a defense objection to that line of argument. (155:51). However, the prosecutor kept going and continued to make the same argument. (155:51). There was no continuing objection and no request for a mistrial.

[17] In this reading, the prosecutor's usage of the phrase "hypothetically" could be seen as a winking hint that additional evidence of criminality existed that the tricky defense lawyer had somehow hidden from the jury's view.

Trial counsel testified that he did not object because he did not want to draw attention to the remark. (160:21). He did not consider asking to be heard outside the presence of the jury on the issue, either. (160:22). He did not move for a mistrial because he did not think the motion would be meritorious. (160:22).

Counsel's choice of strategy was unreasonable for several reasons. First, the objection is clearly meritorious. The line of argument is self-evidently problematic, as it appears to comment on facts not in evidence and is reasonably likely to confuse or mislead the jury. Moreover, counsel had already prevailed on the merits when his first objection was sustained by the court. Having succeeded once, it is unlikely that the circuit court would have reversed the ruling it made only seconds before. And, while counsel's concern about drawing attention to the remark is not absurd, it is still unreasonable. Having objected once, any concerns about drawing attention had already been forfeited.

More to the point, reasonably competent counsel should not stand idly by while improper argument occurs—thereby abandoning any ability to make a direct challenge to conduct which threatens their client's ability to have a fair trial—just so they can avoid highlighting information which has already been improperly disseminated to the jury.

As to the request for a mistrial, one clearly should have been made—after all, one would be necessary to preserve any claim of error as to the impropriety of the closing argument. *State v. Bell*,

2018 WI 28, ¶ 11, 380 Wis. 2d 616, 909 N.W.2d 750. It simply makes no sense to conclude that there was good cause to object, but not to move for a mistrial, thereby failing to effectively preserve the issue for appellate review. If that motion had been made, the court should have granted it as "the basis for the mistrial request [was] sufficiently prejudicial to warrant a new trial." *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 932 (Ct. App. 1995). As outlined in the postconviction motion, a confession is uniquely strong evidence of guilt. Lacking any actual confession, a jury that imagines one is in existence has clearly been tainted. A reasonable judge would have therefore granted a mistrial, had counsel made a request for one.

B. By allowing the jury to believe that Mr. Bratchett may have confessed to the crime, trial counsel's performance prejudiced Mr. Bratchett.

As set forth above, the statement was uniquely prejudicial, because it invited the jury to imagine the existence of powerful inculpatory evidence where none existed. Here, the State's case was not so strong that this kind of suggestion would not have had an impact—the case relied on shaky eyewitness testimony, buttressed by purely circumstantial evidence. In this context, an imagined confession goes a long way in removing any doubt. And, as to the mistrial, there is a reasonable probability that the court would have granted that motion, thereby obviously creating a different result. A winking reference to an imagined confession is a highly prejudicial suggestion to make in any criminal trial

and clearly threatened to unfairly distract the jury from the evidence properly before them in this case.

Accordingly, by failing to object and to move for a mistrial, defense counsel failed to adequately protect his client's interest in a fair trial. In doing so, his conduct undermines confidence in the ensuing verdict and entitles Mr. Bratchett to a new trial on all counts.

VI. Cumulative prejudice.

Finally, this Court must consider the cumulative impact of counsel's errors on the validity of the jury verdict. *Thiel*, ¶ 63. Here, competent counsel could have radically shifted the way in which this trial was conducted. Competent counsel would have exposed prior inconsistent statements of S.D. pertaining to an essential element, shown that her identification was inherently problematic (or, in the alternative, kept that identification out completely), and protected that jury from improper closing argument suggesting that Mr. Brachett confessed (or, in the alternative, would have obtained a mistrial). Taken together, counsel's errors had a prejudicial impact on this trial and relate to central disputed issues, like S.D.'s identification.

Setting aside trial counsel's errors, the remaining evidentiary picture fails to conclusively establish Mr. Bratchett's guilt. Neither Officer Thomas Wichgers nor Officer Michael Wichgers could testify that the suspicious man they saw on the evening of the robbery was Mr. Bratchett. While S.D. said the robber's sweatshirt was gray, the man observed by Officer Michael Wichgers had on a white

sweatshirt. (151:71-73; 153:42). Aside from S.D., no other citizen witnesses existed, the State was unable to obtain relevant surveillance footage, and did not possess a confession. Mr. Bratchett's codefendant did not testify against him and the State never bothered to inform the jury whether they had investigated and disproved the alibi given to law enforcement—that he was at the casino at the time of the robbery. No forensic evidence from inside the apartment—such as fingerprints or touch DNA—was presented.

The only evidence tending to suggest guilt—the identification card and the fingerprint—is simply too weak to overcome the reasonable doubt created by the deficient identification and the other holes in the State's case. After all, the State presented testimony that Mr. Bratchett's brother, and not Mr. Bratchett, was in possession of the ID on the night of the robbery. And as for the fingerprint, there are grounds for skepticism, such as the non-result in AFIS and the examiner's highly subjective conclusion that Mr. Bratchett was a "match."

Accordingly, had Mr. Bratchett gone to trial with reasonably competent counsel, there is a reasonable probability of an acquittal. Accordingly, he is entitled to a new trial.

VII. The evidence was insufficient to convict Mr. Bratchett of attempted third-degree sexual assault.

A. Legal standard and standard of review.

A challenge to the sufficiency of the evidence is evaluated via the "reasonable doubt standard of

review." *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). This Court must evaluate the available evidence in the light most favorable to the finding of guilt and ask whether "the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." *Id.* (citing *Johnson v. State*, 55 Wis.2d 144, 148, 197 N.W.2d 760 (1972)). A conviction obtained absent sufficient evidence is a violation of Mr. Bratchett's right to due process of law. U.S. Const. XIV; Wis. Const. Art. I. § 1.

B. The evidence does not unequivocally demonstrate an intent to have sexual intercourse with S.D. without her consent.

In this case, the State needed to prove that Mr. Bratchett's actions "unequivocally" showed an intent to sexually assault S.D. Wis. JI-Criminal 580. However, as set forth above, the trial testimony is inherently ambiguous. It is clear, for example, that the command that S.D. enter the bedroom and sit on the bed occurred after the first exit strategy—that the first robber would leave to get money using S.D.'s debit card—fell through. Thereafter, a lengthy back-and-forth ensued as to whether S.D. was continuing to conceal another phone on her person. It was during this back and forth that the robber grabbed at her clothing. True, the robber did threaten to "fuck" her (at least in the version of events presented to the jury), but he made clear that he was threatening to do so *if* she was "lying" to him or if she called the police after he left. The robber never exposed himself or otherwise made an affirmative attempt at sexual

intercourse with S.D. His profane threats—which appear to have been made in order to frighten her into compliance during the robbery—do not establish that any actual assault was imminent.

In light of the trial testimony, the actions of the robber do not unequivocally demonstrate an intent to sexually assault S.D. Accordingly, the evidence was insufficient to convict.

CONCLUSION

Mr. Bratchett respectfully requests that, for the reasons outlined herein, this Court reverse the circuit court and grant the relief requested herein.

Dated this 22nd day of October, 2020.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 11,409 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 22nd day of October, 2020.

Signed:

CHRISTOPHER P. AUGUST
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of October, 2020.

Signed:

CHRISTOPHER P. AUGUST
Assistant State Public Defender

APPENDIX

INDEX TO APPENDIX