STATE OF WISCONSIN

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

DISTRICT I

Case No. 2020AP1750-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD HENRY GRIFFIN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVITION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 294-2907 (Fax)
remingtonca@doj.state.wi.us

TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

INTRODUCTION 1

STATEMENT OF THE CASE 2

ARGUMENT 9

I. The court properly denied Griffin's claims because he failed to raise sufficient facts to demonstrate that he was entitled to relief and the record conclusively demonstrates he is not entitled to relief. 9

A. Standard of review 9

B. To be entitled to a hearing on a postconviction motion, a defendant must allege sufficient facts to show that he is entitled to relief. 10

1. Due process and *Brady* require the State to turn over favorable and material evidence to the defendant. 10

2. A defendant has the burden to prove his attorney provided ineffective assistance. 11

C. Griffin failed to allege sufficient facts and the record conclusively demonstrates that he is not entitled to relief. 11

1. Griffin failed to allege sufficient facts to demonstrate a *Brady* violation. 12

Page

2. Griffin failed to allege facts to support his ineffective assistance of counsel claim. 15

II. The circuit court properly admitted the letters at trial. 17

A. Standard of review 17

B. Trial evidence must be relevant and authenticated. 18

C. The circuit court properly exercised its discretion when it allowed admission of the letters. 18

D. Any error admitting the evidence was harmless. 20

1. Legal principles 20

2. Any error was harmless 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Brady v. Maryland,
373 U.S. 83 (1963) 10

State v. Allen,
2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433 9

State v. Burton,
2013 WI 61, 349 Wis. 2d 1, 832 N.W.2d 611 11

State v. Garrity,
161 Wis. 2d 842, 469 N.W.2d 219 (Ct. App. 1991) 10, 14

State v. Giacomantonio,
2016 WI App 62, 371 Wis. 2d 452, 885 N.W.2d 394 19

State v. Harrell,
2008 WI App 37, 308 Wis. 2d 166, 747 N.W.2d 770 17

State v. Harvey,
2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189 ..... 20, 21

Page

State v. Manuel,
2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811 9

State v. Mayo,
2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115 17

State v. Sherman,
2008 WI App 57, 310 Wis. 2d 248, 750 N.W.2d 500 20

State v. Sullivan,
216 Wis. 2d 768, 576 N.W.2d 30 (1998) 17

State v. Wayerski,
2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468 10

Strickland v. Washington,
466 U.S. 668 (1984) 10, 11

Strickler v. Greene,
527 U.S. 263 (1999) 10

United States v. Bagley,
473 U.S. 667 (1985) 10

Statutes

Wis. Stat. § 805.18 20

Wis. Stat. § (Rule) 809.86(4) 1

Wis. Stat. § 904.01 18

Wis. Stat. § 909.01 18

Wis. Stat. § 909.015 18

Wis. Stat. § 909.015(1) 18

Wis. Stat. § 909.015(4) 18

Wis. Stat. § 972.11(1) 20

ISSUES PRESENTED

1. Did the circuit court properly deny Ronald Henry Griffin's discovery and ineffective assistance claims without an evidentiary hearing because he failed to allege sufficient facts to warrant a hearing?

The circuit court answered yes.

This Court should answer yes.

2. Did the circuit court properly exercise its discretion at trial when it allowed the State to introduce two letters Griffin handed to his co-defendant Ricky Taylor because the letters were relevant and authenticated?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

INTRODUCTION

In 2015, Ronald Henry Griffin and his co-defendant Ricky Taylor sexually assaulted a woman Taylor had met in a grocery store, Tina.[1] On October 30, 2015, Taylor invited Tina over to his home that he shared with Griffin. After she arrived, Taylor forced his penis into Tina's mouth while Griffin forced his penis into Tina's anus. Griffin also attempted to put his penis into Tina's vagina. A jury convicted Griffin of first-degree sexual assault for forcibly aiding and

[1] To comply with Wis. Stat. § (Rule) 809.86(4), the State uses a pseudonym in place of the victim's name.

abetting Taylor, attempted second-degree sexual assault, and second-degree sexual assault.

Postconviction, Griffin's appointed attorney filed a no-merit appeal. Griffin decided to proceed pro se and this Court dismissed the no-merit appeal.

Then, Griffin filed a pro se motion for an evidentiary hearing on the grounds that the State violated its discovery obligations, his trial attorney was ineffective, and the circuit court erroneously allowed the admission of two letters into evidence at trial. But Griffin failed to allege sufficient facts to entitle him to relief on the discovery or ineffective assistance claims. His allegations were conclusory and did not merit a hearing. The circuit court properly exercised its discretion in allowing the letters into evidence at trial because they were relevant and authenticated, and this alleged error was harmless. The circuit court properly denied the motion without a hearing. This Court should affirm.

STATEMENT OF THE CASE

The State charged Griffin with first-degree sexual assault for forcibly aiding and abetting his co-defendant Ricky Taylor, attempted second-degree sexual assault, and second-degree sexual assault. (R. 1:1–2.) A jury heard testimony of these charges. (R. 132–134.)

Tina testified that she met Taylor at a grocery store and exchanged phone numbers. (R. 132:172–73.) Two months later, on October 30, 2015, Taylor asked Tina to stop by his home. (R. 132:171–72.) Tina agreed to come by for 20 or 30 minutes because she had somewhere else to be soon. (R. 132:175.) Tina arrived and took off her boots at the door to avoid tracking in snow. (R. 132:176.)

Griffin, who Tina did not know, was also at the apartment. (R. 132:177.) Both men had been drinking dark liquor. (R. 132:177.) Taylor asked Tina if she wanted to see a photo of his stepchild that he had in his bedroom, and Tina agreed. (R. 132:180.)

She looked at the picture, and when she turned around, Taylor had stripped down to his boxers. (R. 132:181.) Tina said, "No. That's not all happening tonight." (R. 132:181.) But Taylor closed the door, turned out the light, forcibly grabbed Tina's head, and put his penis into her mouth. (R. 132:182–84.) This continued for three or four minutes, and Tina was unable to talk or to get Taylor to let her go. (R. 132:184.)

Griffin came into the room, and Taylor told Tina that Griffin was going to have anal sex with her. (R. 132:184–85.) Griffin took off Tina's pants and underwear, and he inserted his penis into her anus. (R. 132:188.) Tina was able to move enough to knock Griffin over and kick Taylor off of the bed. (R. 132:188–89.) Taylor left the room. (R. 132:189.)

Griffin was able to get back on top of Tina and forcibly held her down. (R. 132:189.) Griffin attempted to put his penis into Tina's vagina, but was not able to do so. (R. 132:194.) Griffin fondled her vagina. (R. 133:16.) Tina wrestled her hands free and began to punch Griffin in the head. (R. 132:189–90.) But Griffin put his penis into her anus so hard that Tina lost her breath. (R. 132:190.)

Tina continued to fight to get free, and eventually did. (R. 132:190.) She grabbed her clothes and ran out of the home. (R. 132:190.) Tina got into her car and drove to her cousin's house, but her cousin was not home. (R. 132:198–99.) In the car, Tina had a hard time driving because she was in shock. (R. 132:199–200.) Tina drove home and took a shower. (R. 132:199.)

Tina tried to contact her counselor, Patty Wagner, at a women's center. (R. 133:16–17.) Two days after the incident, Tina had a meeting with Wagner. (R. 133:17–18.) Wagner recommended Tina report the assault to the police. (R. 133:18.) Two days after the meeting and four days after the assault, Tina reported the assault to the police. (R. 133:20–21.) She waited to report it because she wanted her cousin to come along for support. (R. 133:21.)

Before Tina's cousin drove her to the police, Taylor called Tina. (R. 133:21–22.) Taylor asked Tina to bring him to the grocery store. (R. 133:22.) Tina said she was busy, but that she would get back to him. (R. 133:22.) At the police station, Officer Davis Kozlowski arranged for Tina to call Taylor and see whether he would confess to the sexual assault. (R. 133:23.)

The jury heard the recording of the call. (R. 133:24.) On the call, Taylor admitted that Tina said no, but he ignored her request to stop. (R. 136:Ex. 1.) He said that he and Griffin were wrong to force Tina to have sex. (R. 136:Ex. 1.)

Before reporting the assaults, Tina found a photo of Griffin from a social media site. (R. 133:28.) She identified Griffin and Taylor in a photo array organized by Officer Kozlowski. (R. 133:29.)

After the police station, Tina went to the Sinai Sexual Assault Treatment Center for an examination. (R. 133:27.) The nurse Alison Lopez testified that Tina was very upset during the exam. (R. 134:36.) Lopez observed bruises on Tina's arm, thigh, hand, and buttocks. (R. 134:46–48.) Tina had petechiae in her mouth. (R. 134:49.) No DNA connected Griffin to the crime. (R. 41.)

Taylor testified and corroborated Tina's testimony. He told the jury that he brought Tina into his bedroom to see a photo of his stepchild and took his clothes off. (R. 133:68.) He put his penis into Tina's mouth. (R. 133:69.) Taylor testified that he initially thought it was consensual. (R. 133:69.) Taylor testified that Griffin came into the bedroom, removed Tina's jeans, and fondled her vagina and anus. (R. 133:71–72.) Taylor said that eventually Tina was able to get her mouth off of his penis and tell him to stop. (R. 133:74–75.) He left the room with Griffin and Tina still inside. (R. 133:75–76.) After approximately five minutes, Taylor went back to his bedroom and saw Griffin forcibly holding Tina on the bed. (R. 133:77.)

Taylor did not believe that Tina had consented to the sexual contact with Griffin. (R. 133:79.) Tina eventually ran out of the bedroom and left the home. (R. 133:80.) After Tina left, Griffin began drinking again and said that he hoped that he would not get charged with sexual assault. (R. 133:81.)

After Taylor was arrested, he received two letters from Griffin in jail. The first letter Griffin personally handed to Taylor. (R. 133:98.) Taylor read the letter to the jury. (R. 33; 133:98–99.) The letter stated, in part:

> Whats good, my nigga? What they tryin to do break us? haha they cant break no Real stand up niggas, feel me? this shit is peanuts to a elephant so fuck the Judge, fuck the d.A, And fuck any nigga that wanna Ride with 'em! we good my nigga we Just got t Ride it out And we need to get on that speedy trial ASAP! As soon As I see that lawyer Im tellin him to put in for a speedy trial–you do the same–I already Know you on top of it. We got this we just need to lean back and Ride it out–did you talk to your daughter?

(R. 31:4; 133:98–99.)

Taylor watched Griffin hand the second letter to another person who then handed it to Taylor. (R. 133:100.) Taylor read part of that letter to the jury as well:

> It says what's good. It ain't shit to us, and they just trying to keep a cool head. I talked to my lawyer the other day, and he let me listen to the recorded phone call. He said that there's a lot that I has got to play with, but he doesn't want the jury hearing it. He says he has a lot of positive shit to go on. He said there is no DNA. He also said it would be better to have separate trials, because that could mean that she would have to testify twice and it would be better if we withdrew the speedy trial because all this shit is still fresh in her mind.
>
> And the longer that passes the better, because she will forget key points in her testimony. Let me know what you think. We need to be on the same page, do you feel me. I'm just letting you know everything that I know, you feel me. The motion is called a severance motion or separate trials. Do you want to go to trial together or have separate ones? Think about it and let me know. My lawyer told me in his fourteen years as a lawyer he has never seen a co-defendant not telling on each other, and I said there ain't nothing to tell on.
>
> And if it was, it isn't in blood, do you feel me. He said us not saying shit will have a huge impact because the DA won't have much to go on with me and you not saying shit, do you feel me. All they have is her statement, which ain't shit because she will get chewed up on the stand.

(R. 133:100–01; *See also* R. 32.)

Officer David Stratton testified that he arrested both Taylor and Griffin at the home where the assault happened. (R. 134:13–19.)

In closing, Attorney Andrew Meetz argued that Taylor was lying and framed Griffin to save himself. (R. 134:120–22.) He also claimed that Tina was either lying or misremembering the events. (R. 134:133.) He pointed to her delay in reporting the offense, her possible use of marijuana and alcohol that night, her use of prescription medications, and her prior mental health history to undermine her credibility. (R. 134:122–134.)

The jury convicted Griffin on all three counts. (R. 42; 134:147.) The court sentenced Griffin to a global sentence of 21 years of initial confinement followed by 15 years of extended supervision. (R. 55; 135:39–40.)

Postconviction, Griffin's attorney filed a no-merit notice of appeal. (R. 80.) Griffin filed a motion to proceed pro se. (R. 92:2.) This Court granted that motion and dismissed the no-merit appeal without prejudice. (R. 92:2.)

Acting pro se, Griffin filed a postconviction motion raising three claims: (1) the State violated its discovery obligations and violated Griffin's due process rights; (2) Griffin's attorney provided ineffective assistance in cross examining Tina; and (3) the circuit court abused its discretion by allowing the letters to be admitted at trial. (R. 97:1.)

Regarding the discovery claim, Griffin alleged that Tina found a photo of him by accessing the Wisconsin sex offender registry using "Ron" and the zip code of Taylor's home. (R. 97:2.) Griffin claimed that Tina then brought the photo to Office Kozlowski. (R. 97:2–3.) He argued that the photo made the identification procedure Officer Koslowski used unduly suggestive. (R. 97:3.) He argued that the State's failure to pursue, obtain, and disclose that photo violated his due process rights. (R. 97:4.)

For his ineffective assistance of counsel claim, Griffin alleged that his attorney failed to research the weather and that failure kept the attorney from impeaching Tina's testimony about taking off her boots because there was snow on the ground. (R. 97:13.) Griffin claims that when Tina testified that there was snow on the ground, he asked his attorney to investigate the weather because he did not remember there being snow on the ground. (R. 97:14.) His attorney did not investigate the issue. (R. 97:14.)

Finally, Griffin argued that the letters should not have been admitted because the letters were not authenticated through handwriting analysis. (R. 97:17.) Griffin sought an evidentiary hearing on his postconviction claims. (R. 97:19.)

The circuit court denied the motion without a hearing. (R. 114:7.) The court concluded that the photo was not material to the outcome of Griffin's case. (R. 114:4.) Additionally, the court concluded that the claim should have been raised as an ineffective assistance claim because there was no objection before the trial court. (R. 114:4.)

The court rejected Griffin's ineffective assistance claims because whether there was snow on the ground or not was not an error that would have caused Griffin prejudice. (R. 114:5.) The court concluded that the testimony was a minor point and would have no conceivable effect on the outcome of the proceedings. (R. 114:5.)

Finally, the court concluded that the trial court properly exercised its discretion in admitting the letters into evidence and that even if the admission was erroneous, it was clearly harmless. (R. 114:6–7.) The court denied all Griffin's claims. (R. 114:7.)

Griffin appeals. (R. 118.)

ARGUMENT

I. The court properly denied Griffin's claims because he failed to raise sufficient facts to demonstrate that he was entitled to relief and the record conclusively demonstrates he is not entitled to relief.

A. Standard of review

This Court reviews "[w]hether a defendant's postconviction motion alleges sufficient facts to entitle [him] to a hearing for the relief requested [under] a mixed standard of review." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. First, this Court "determines whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *Id.* This is a question of law reviewed de novo. *Id.*

But "if the motion does not raise [such] facts sufficient to entitle the movant to relief, or [if it] presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Allen*, 274 Wis. 2d 568, ¶ 9. This Court requires the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Id.* (citation omitted). And it "review[s] a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard." *Id.*

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Manuel*, 2005 WI 75, ¶ 26, 281 Wis. 2d 554, 697 N.W.2d 811. This Court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that this Court reviews without deference to the circuit court's conclusions. *Id.*

B. To be entitled to a hearing on a postconviction motion, a defendant must allege sufficient facts to show that he is entitled to relief.

Each of Griffin's claims had different required elements to meet his pleading requirement.

1. Due process and *Brady* require the State to turn over favorable and material evidence to the defendant.

Under the Fourteenth Amendment, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). A *Brady* challenge requires the defendant to establish three things: (1) evidence must be "favorable to the accused, either because it is exculpatory or because it is impeaching," (2) it "must have been suppressed by the State, either willfully or inadvertently," and (3) "prejudice must have ensued," (*Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)) that is, it "must be material" to the defendant's guilt or punishment. *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 922 N.W.2d 468.

Evidence is material for *Brady* purposes "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Garrity*, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). The test for materiality is the same as the test for prejudice in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wayerski*, 385 Wis. 2d 344, ¶ 36.

2. A defendant has the burden to prove his attorney provided ineffective assistance.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *State v. Burton*, 2013 WI 61, ¶ 47, 349 Wis. 2d 1, 832 N.W.2d 611 (citing *Strickland*, 466 U.S. 668 at 687). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Strickland*, 466 U.S. at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Courts strongly presume that counsel rendered adequate assistance to the defendant, and case law affords counsel the benefit of the doubt. *Id.*

To demonstrate prejudice, the defendant must show that there is "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." *Burton*, 349 Wis. 2d 1, ¶ 49 (quoting *Strickland*, 466 U.S. at 694).

C. Griffin failed to allege sufficient facts and the record conclusively demonstrates that he is not entitled to relief.

Griffin sought an evidentiary hearing on the grounds that the State violated its discovery obligations, his trial attorney provided ineffective assistance, and the circuit court erroneously admitted evidence at trial. Griffin failed to allege sufficient facts to demonstrate he was entitled to relief. The circuit court properly denied Griffin's claims without a hearing. This Court should affirm.

1. Griffin failed to allege sufficient facts to demonstrate a *Brady* violation.

Griffin challenged whether the State suppressed a photo of Griffin that Tina brought to police to help identify her attacker. (R. 97:5–12.) But in his postconviction motion, Griffin failed to allege sufficient facts to demonstrate that the evidence was favorable, suppressed, or material. The circuit court properly denied Griffin's challenge without a hearing.

As support for his challenge, Griffin provided the affidavit in support of the search warrant. (R. 98:2–4.) In that document, Officer Kozlowski swore that Tina determined Griffin's last name by looking him up on a Wisconsin Department of Corrections Sex Offender Registration website and obtaining a photo of Griffin. (R. 98:3–4.)

Griffin believed that the actual photo would be favorable evidence, but he failed to offer sufficient support for that conclusion. Griffin claims that the photo could be used to challenge the photo array procedures. (R. 97:7.)

But he does not explain how it could challenge the photo array. Before trial, Griffin did not challenge the photo array. At trial, Griffin explicitly waived any challenge to the array procedures. (R. 133:122.) The existence of another photo of Griffin does not undermine any of the photo array procedures. Griffin does not allege sufficient facts to show otherwise.

Griffin further argued that Tina could not have obtained the photo by searching the sex offender website, and therefore, the existence of the photo could have impeached her testimony. (R. 97:7–8.) On appeal, Griffin claims that the photo was necessary to undermine Tina's credibility. (Griffin's Br. 12.) At trial, Tina did not tell the jury that Griffin was a registered sex offender, but instead testified that she found the photo on a social media site. (R. 133:28.) After Tina testified about retrieving the photo, Griffin's attorney could have cross examined her about the methods she used to obtain

it. The photo itself was not necessary to use Tina's testimony against her. Griffin did not provide facts that demonstrated that the photo was favorable evidence.

Likewise, Griffin failed to demonstrate that the evidence was suppressed by the State. Tina brought the photo to the police. (R. 133:28.) But the police did not collect the photo as evidence. The photo was never suppressed by the State because it was never possessed by the State. The State did not have an obligation to collect the photo. The State did not suppress the evidence.

Finally, Griffin did not allege sufficient facts to demonstrate that the photo was material. He alleged that the photo undermined Tina's identification in the photo array and in court. (R. 97:9.) He asserts that because Officer Stratton testified that he did not know whether the photo Tina brought to the station was the same photo used in the photo array, that the photo array identification was tainted. (R. 97:9; Griffin's Br. 13.) But Officer Stratton did not conduct the photo array—Officer Kozlowski did. (R. 133:123.) There is no reason for Officer Stratton to know what procedure Officer Kozlowski used to complete the photo array. Griffin points to no facts that support his argument that the same photo was used and therefore the photo array was tainted. His claim does not require an evidentiary hearing.

Additionally, Griffin was repeatedly identified at trial as the perpetrator of the crime. Tina identified Griffin in person at trial. (R. 133:30.) She identified him in the photo array. (R. 133:29.) Taylor identified Griffin as the perpetrator. (R. 133:62–63.) Officer Kozlowski testified about Tina's identification during the photo array. (R. 133:123.) Officer Stratton testified that he arrested Griffin at the scene of the crime. (R. 134:14–15.) Lopez testified that Tina reported that she was assaulted by someone named Ronald and whose last name she thought was Griffin. (R. 134:29–30.)

Given all the evidence presented at trial, the photo was not material. There was no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Garrity*, 161 Wis. 2d at 850.

Additionally, Griffin's trial defense was not that he was not present at the assault. He argued that Taylor lied about the assault to get a better plea deal. (R. 134:120.) Griffin argued that Tina was either lying about the assault or misremembered the events of the evening. (R. 134:133.) Griffin never argued that he was not there.

On appeal, Griffin argues that the State had an obligation to obtain the photo from the police department. (Griffin's Br. 11.) But he provides no evidence that the photo was ever in the possession of the police department. Without possession of the photo, there is no obligation to provide it. Additionally, the photo was not favorable or material.

Griffin asserts that the sex offender registry did not allow a search with only a first name and zip code. (Griffin's Br. 14–16.) But that is not relevant. First, Tina never told the jury that she searched the sex offender registry. And even if Griffin is right about the search, her search only led Tina to find Griffin's last name. The search was independent of her identification at the police station and at trial. Griffin's allegations do not make the photo material evidence.

Next, Griffin claims that the photo is evidence that the photo array was unduly suggestive. (Griffin's Br. 17–18.) Griffin expressly waived this claim at trial. (R. 133:122.) He does not raise this claim within the framework of ineffective assistance. There is no reason to believe that the photo array was unduly suggestive. Griffin's claim fails.

Griffin failed to allege sufficient facts to demonstrate that the State violated its discovery obligations. The State was never in possession of the photo in question and it was not favorable or material. The circuit court properly denied this claim without a hearing. This Court should affirm.

2. Griffin failed to allege facts to support his ineffective assistance of counsel claim.

Next, Griffin alleged that Attorney Meetz provided ineffective assistance when he failed to properly obtain impeachment evidence about whether it had snowed on the night of the assault. Griffin alleged failed to allege sufficient facts to support his claim. His allegations do not amount to deficient performance. And his prejudice claims are conclusory. The circuit court properly denied his claim without a hearing. This Court should affirm.

Griffin fails to identify any deficient performance by Attorney Meetz. Griffin claims that Attorney Meetz should have cross examined Tina about her testimony that she took off her boots because it had been snowing. (R. 97:13.) He alleged that it had not been snowing. (R. 97:13.) Attorney Meetz did question Tina about whether it was snowing, and she testified that there was snow on the ground. (R. 133:34.) She also repeated that she took off her boots when she came into the apartment. (R. 133:34.)

Griffin fails to demonstrate how Attorney Meetz could have further cross-examined Tina. He seemed to believe that Attorney Meetz could have printed off a weather report and handed it to Tina. But that would not have been admissible because it was hearsay. Attorney Meetz would have needed to find a witness to authenticate any weather report.

Griffin argued that if it had not been snowing, then Tina would not have taken off her boots. (R. 97:14–15.) But there is no evidence to support that assertion. Tina could have still taken off her boots even without snow on the ground. And even if she had not taken off her boots, Griffin could have done so when he removed her pants. Griffin's claim fails.

Likewise, Griffin's allegations of prejudice are conclusory. Even if Attorney Meetz had gotten the historical weather data, found an expert to testify about it, and impeached Tina's statement that it was snowing, the result of the trial would not have changed. Even if Attorney Meetz was deficient, Griffin fails to make sufficient allegations of prejudice.

At trial, the State presented overwhelming evidence of Griffin's guilt. Tina identified Griffin in the photo array and in court. (R. 133:29–30.) Taylor, Officer Kozlowski, Officer Stratton, and Lopez also identified Griffin as the perpetrator Tina identified. (R. 133:62–63, 123; 134:15, 29–30.) Tina's testimony provided evidence of the elements of the crimes. She testified that Griffin took off Tina's pants and underwear, and he inserted his penis into her anus. (R. 132:188.) Tina was able to move enough to knock Griffin over. (R. 132:188–89.) Griffin got back on top of Tina and forcibly held her down. (R. 132:189.) Griffin attempted to put his penis into Tina's vagina but was not able to do so. (R. 132:194.) Griffin fondled her vagina. (R. 133:16.) Tina wrestled her hands free and began to punch Griffin in the head. (R. 132:189–90.) But Griffin put his penis into her anus so hard that Tina lost her breath. (R. 132:190.)

And the bruises on Tina's body and injuries in her mouth corroborated her testimony about the assault. Lopez observed bruises on Tina's arm, thigh, hand, and buttocks. (R. 134:46–48.) Tina had petechiae in her mouth. (R. 134:49.)

Griffin claims that the court could have taken judicial notice of the historical weather data without requiring Attorney Meetz to locate a witness to testify about the weather. (Griffin's Br. 30.) That would have been a decision for the circuit court if Attorney Meetz had chosen to pursue this line of impeachment. But any failure to impeach Tina about whether it had been snowing was not deficient. And Griffin did not suffer prejudice.

The evidence supporting Tina's testimony was overwhelming. Griffin cannot demonstrate any error occurred and likewise, cannot show that he suffered prejudice. The circuit court properly denied Griffin's motion without an evidentiary hearing. This Court should affirm.

II. The circuit court properly admitted the letters at trial.

A. Standard of review

This Court reviews a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *State v. Mayo*, 2007 WI 78, ¶ 31, 301 Wis. 2d 642, 734 N.W.2d 115. Reviewing courts will sustain a circuit court's decision as long as it "examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." *Id.*; *see also State v. Sullivan*, 216 Wis. 2d 768, 780–81, 576 N.W.2d 30 (1998). Further, if a circuit court failed to articulate its reasoning, reviewing courts "independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." *Sullivan*, 216 Wis. 2d at 781.

Whether a trial error is harmless is a question of law reviewed *de novo*. *State v. Harrell*, 2008 WI App 37, ¶ 37, 308 Wis. 2d 166, 747 N.W.2d 770.

B. Trial evidence must be relevant and authenticated.

Relevancy is the tendency to make a fact of consequence more probable than without the evidence. Wis. Stat. § 904.01. A party authenticates evidence by demonstrating that the "matter in question is what its proponent claims." Wis. Stat. § 909.01.

There are many examples given for what constitutes satisfactory authentication, including "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" as well as with the "[t]estimony of a witness with knowledge that a matter is what it is claimed to be," Wis. Stat. § 909.015(1) and (4). The authentication methods in section 909.015 are illustrative, not requirements or limitations. Wis. Stat. § 909.015.

C. The circuit court properly exercised its discretion when it allowed admission of the letters.

Finally, Griffin argues that the circuit court erroneously exercised its discretion when it allowed the State to introduce two letters into evidence. The letters were relevant evidence to Griffin's guilt. Taylor was able to authenticate the letters as letters he received directly or indirectly from Griffin. The circuit court properly exercised its discretion. This Court should affirm.

At trial, Griffin objected to the introduction of two handwritten letters and argued that their origin was impossible to know. (R. 133:57.) The court overruled the objection as untimely because the letters had been disclosed. (R. 133:57.) Additionally, the court concluded that Taylor would be able to testify as the recipient of the letters and also that he was not present when the letters were written. (R. 133:57.) The court also ruled that the State and Taylor

could not tell the jury that Griffin was in jail when he wrote and exchanged the letters. (R. 133:58.)

Taylor testified that Griffin personally handed him the first letter. (R. 133:98.) He testified that he watched Griffin hand the second letter to a person who then handed the letter to Taylor. (R. 133:100.)

The circuit court properly exercised its discretion when it allowed the State to introduce the letters though Taylor. The letters were relevant and properly authenticated. This Court should affirm.

Griffin argues that since Taylor did not recognize Griffin's handwriting and the letters were not signed, the letters might not have been written by Griffin. (Griffin's Br. 34.) But handwriting recognition is not the only method for authentication. Here, Taylor explained that he got the letters from Griffin. That is strong circumstantial evidence that Griffin also wrote the letters. *See State v. Giacomantonio*, 2016 WI App 62, ¶ 21, 371 Wis. 2d 452, 885 N.W.2d 394 (authentication can be established through circumstantial evidence).

Griffin also claims that the letters were prejudicial because they were passed inside of the jail. (Griffin's Br. 37.) But the jury never heard that Griffin and Taylor were in jail when the letter exchange happened. The circuit court ruled that Taylor could not testify that the men were in jail. (R. 133:58–59.) Griffin's claim fails.

The circuit court properly exercised its discretion when it allowed the State to introduce the letters though Taylor. The letters were relevant and properly authenticated. This Court should affirm.

D. Any error admitting the evidence was harmless.

The circuit court allowed the testimony because it was relevant evidence and properly authenticated. Even if this Court concludes that the circuit court improperly allowed admission of the letters, any error was harmless and does not warrant a new trial.

1. Legal principles

"Wisconsin's harmless error rule is codified in Wis. Stat. § 805.18 and is made applicable to criminal proceedings by Wis. Stat. § 972.11(1)." *State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing *State v. Harvey*, 2002 WI 93, ¶ 39, 254 Wis. 2d 442, 647 N.W.2d 189).

The question is whether "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Harvey*, 254 Wis. 2d 442, ¶ 49 (citation omitted).

2. Any error was harmless.

First, the evidence against Griffin was overwhelming, and, importantly, established through Tina's and Taylor's testimony. As discussed previously, multiple witnesses identified Griffin as the perpetrator of the crimes, including his roommate Taylor. Tina's injuries were consistent with her description of the assault. Tina's testimony about Griffin's actions was strong evidence for the jury to convict Griffin. Given that other evidence—both testimonial and physical evidence—corroborated Tina's account, it is clear that the outcome would have been the same had the jury not heard Taylor read the letters.

Griffin does not confess to sexually assaulting Tina in the letters. Instead, he discusses the charges he faces and trial strategy. The letters discuss delaying the trial and having two trials to undermine Tina's testimony. But Griffin never admits to committing any crime. There is an allusion to criminal activity in the letters, but it did not have an impact on the outcome of the trial. The letters were insufficient to change the trial outcome.

Griffin claims that the letters made Taylor's testimony more credible and therefore were not harmless. (Griffin's Br. 38.) But the letters did not make his testimony more credible and Griffin fails to explain any such link. In light of all the trial evidence, the letters did not have an impact on the outcome. Taylor's testimony was credible because he implicated himself and he was roommates with Griffin.

Therefore, even if the circuit court erred in allowing the evidence, that error was harmless. It is clear that a rational jury would have found Griffin guilty absent the error. *See Harvey*, 254 Wis. 2d 442, ¶ 49. This Court should affirm.

CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying Griffin's postconviction motion.

Dated this 6th day of April 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Christine A. Remington
CHRISTINE A. REMINGTON
Assistant Attorney General
State Bar #1046171

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8943
(608) 294-2907 (Fax)
remingtonca@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5772 words.

Dated this 6th day of April 2021.

Electronically signed by:

s/ Christine A. Remington
CHRISTINE A. REMINGTON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 6th day of April 2021.

Electronically signed by:

s/ Christine A. Remington
CHRISTINE A. REMINGTON
Assistant Attorney General