STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2022AP1929 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

REYNALDO ROSALEZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY, THE HONORABLE JOSEPH R. WALL, PRESIDING, AND FROM AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, THE HONORABLE GLENN H. YAMAHIRO, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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INTRODUCTION

The postconviction court properly denied defendant-appellant Reynaldo Rosalez's motion to withdraw his plea of no contest because he failed to prove that his plea was elicited by ineffective assistance of counsel.

Rosalez claims that his attorney should have informed him of *State v. McIntosh*, 137 Wis. 2d 339, 404 N.W.2d 557 (Ct. App. 1987), which provides that an amnesiac defendant can claim that his or her amnesia rendered his or her trial unfair. Because Rosalez claims that he has no memory of sexually assaulting the victim, he asserts that he would have gone to trial and raised a *McIntosh* claim had he known of it.

The postconviction court reasonably rejected this claim. It found that Rosalez failed to prove his amnesia by clear and convincing evidence as required and that he therefore was not eligible to raise a *McIntosh* claim. Rosalez's self-reported lack of memory and evidence purporting to show that he truthfully represented his lack of memory failed to establish his amnesia as a medical fact as *McIntosh* requires.

Two other reasons not relied upon by the postconviction court also support affirmance. First, even if Rosalez proved his amnesia, he could not have shown that his amnesia deprived him of a fair trial. Due to the substantial evidence of Rosalez's guilt and Rosalez's very limited defense options, a trial would have unfolded in the same way regardless of whether he had amnesia. Second, the record reveals that Rosalez suffered no prejudice because he always intended to plead no contest in recognition of the strength of the State's case and to spare the victim from a trial.

ISSUE PRESENTED

Did Rosalez prove that his trial counsel was ineffective and, thus, that a manifest injustice occurred that would permit him to withdraw his plea of no contest?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the briefs "fully present and meet the issues on appeal" and "fully develop the theories and legal authorities on each side." Wis. Stat. § (Rule) 809.22(2)(b). If this Court resolves this case based on Rosalez's failure to satisfy the prejudice prong of the ineffectiveness inquiry, publication is not warranted because that would be an application of well-settled rules to a common factual pattern. Wis. Stat. § (Rule) 809.23(1)(b)1.

However, if this Court addresses the *McIntosh* issue, publication should be considered. Caselaw applying *McIntosh* and specifying how a defendant must prove his or her amnesia is limited. Publication could thus clarify an existing rule of law. Wis. Stat. § (Rule) 809.23(1)(a)1.

STATEMENT OF THE CASE

A. Factual background

Rosalez sexually assaulted the 11-year-old daughter of his then-girlfriend while he lived with them. (R. 1:1; 36:13–14.) Both he and his girlfriend worked as probation agents. (R. 49:17; 109:7.) Rosalez supervised sex offenders. (R. 49:17; 96:8; 109:7.)

On the evening of the sexual assault, Rosalez's girlfriend went to bed before Rosalez or her daughter. (R. 36:14.) Rosalez drank three alcoholic seltzers and took his prescribed dose of Ambien. (R. 36:3; 96:20–21.) At some point in the evening, Rosalez started massaging the back and buttocks of the victim. (R. 1:1.) He eventually placed his hands inside the victim's underwear, rubbing her pubic area and letting his hand rest near her vagina. (R. 1:1.) At this point he

asked, "[D]oes this feel good?" (R. 1:1.) He then kissed the victim on the mouth, inserting his tongue into her mouth. (R. 1:1.)

The victim escaped Rosalez's grasp and hid in the bathroom. (R. 1:1.) After a few minutes, she went to her bedroom and got into bed where she cried. (R. 1:1.) After a few minutes, Rosalez entered and approached the victim. (R. 1:1.) He pulled down the victim's pants and underwear and again rubbed her legs and buttocks. (R. 1:1.)

The victim reported the sexual assault to her mother the next morning. (R. 1:2; 109:9–10.) They went to the police and filed a report. (R. 109:10.) The victim then participated in a forensic interview in which she again recounted the sexual assault. (R. 36:14; 109:10.)

B. The no contest plea and sentencing

Rosalez pleaded no contest to second-degree sexual assault of a child in violation of Wis. Stat. § 948.02(2). (R. 36:12; 43:1.) As part of the agreement, the State made no sentencing recommendation. (R. 36:2.)

At the plea hearing, Rosalez represented that he had blacked out on the evening of the sexual assault and attributed it to the combination of Ambien and alcohol. (R. 36:3.) He claimed that he had no recollection of sexually assaulting the victim. (R. 36:3.) He had never blacked out on Ambien before. (R. 49:25–26.) Because of this claimed lack of memory, Rosalez asked to plead no contest. (R. 36:3.) The State consented, reasoning that a no contest plea was "appropriate if what the defense is proposing that he doesn't actually remember." (R. 36:4.) Rosalez did not contest the factual basis for his plea. (R. 36:14.)

Sentencing occurred two months later. Rosalez's trial counsel argued for leniency to recognize Rosalez's acceptance of responsibility. (R. 49:31–32.) Despite not recalling any of

the sexual assault, Rosalez did not deny it. (R. 49:26.) He told his attorney "from the very beginning" that "he wanted no part of an attack" on the credibility of the victim or the victim's mother. (R. 49:26.) He felt terrible about his conduct because he cared for the victim and the victim's mother. (R. 49:20–21.)

Rosalez exercised his right of allocution to personally apologize to the victim and her mother. (R. 49:32–33.) He concluded by stating, "I'm truly sorry for all the pain and suffering that I have caused to [the victim] and so many other people." (R. 49:33.)

The trial court found it "certainly clear" that Rosalez "[was] remorseful for his conduct." (R. 49:37.) According to the trial court, "this case was never in a trial posture" and Rosalez's "acceptance of responsibility really began immediately." (R. 49:38.) The trial court viewed Rosalez's remorse and acceptance of responsibility as "positive things to look at and consider" in imposing sentence. (R. 49:38.)

The trial court sentenced Rosalez to 10 years of initial confinement followed by 5 years of extended supervision. (R. 49:44.)

C. Postconviction proceedings

Rosalez filed a motion for postconviction relief, seeking to withdraw his no contest plea for being induced by ineffective assistance of counsel. (R. 61:1.) Rosalez claimed that trial counsel failed to inform him of *McIntosh* and that, had he known of it, he would have proceeded to trial so that he could raise a claim pursuant to *McIntosh* that his amnesia precluded him from having a fair trial. (R. 61:5, 12–17.)

Rosalez attached to his motion a report prepared by a psychologist. The psychologist had conducted tests designed to determine whether Rosalez was feigning—or "malingering"—his lack of memory of the sexual assault.

(R. 62:1.) Based on these tests, the psychologist concluded that Rosalez was not misrepresenting his reported lack of memory. (R. 62:11.)

The postconviction court—a different judge than the trial court—held a *Machner*[1] hearing at which three witnesses testified: trial counsel, Rosalez's psychologist, and Rosalez.

Trial counsel recalled that this case made Rosalez "extremely distraught." (R. 96:8.) As a probation agent for sex offenders, Rosalez knew what a trial would entail and he "did not want to put the child through any sort of trial." (R. 96:8.) Nevertheless, trial counsel explored a potential involuntary intoxication defense based on Rosalez's alleged blackout and his prescription for Ambien. (R. 96:9.) Trial counsel learned that such a defense would be unsuccessful because Rosalez had taken alcohol with the Ambien. (R. 96:9–10); *see State v. Gardner*, 230 Wis. 2d 32, 42, 601 N.W.2d 670 (Ct. App. 1999).

Trial counsel knew of *McIntosh* but did not discuss it with Rosalez or pursue a defense based upon amnesia. (R. 96:15–16, 25.) A *McIntosh* motion would have required a trial, which Rosalez never wanted. (R. 96:15, 20.)

The psychologist who tested Rosalez testified as an expert. (R. 96:27.) He relayed his conclusion that "[t]here was no evidence of malingering, or faking, or exaggerating symptoms" from Rosalez about his lack of memory. (R. 96:30.) However, the psychologist clarified that he was not affirmatively diagnosing Rosalez with amnesia and that no doctor had diagnosed Rosalez with amnesia. (R. 96:38.) The psychologist's tests measured whether Rosalez was lying about his lack of memory, not whether he suffered from amnesia. (R. 96:38.)

[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Rosalez testified that he blacked out and had no memory of the sexual assault to which he pleaded no contest. (R. 96:44–45.) He stated that he "originally was going to go to trial." (R. 96:45.) In his telling, he resigned himself to a plea only after trial counsel told him that he had no viable defenses. (R. 96:49.) Had he known of *McIntosh*, he would have seized upon it and gone to trial. (R. 96:46–48.) On cross-examination, Rosalez denied ever saying that he did not want to put the victim through a trial. (R. 96:53.)

Rosalez also testified that he had a history of blacking out while on Ambien and that he mixed Ambien and alcohol about once a month. (R. 96:55–56, 57.) The State impeached both of those statements. At the time of sentencing, Rosalez said that he had never previously blacked out while on Ambien. (R. 49:25.) He also said that he drank two to three times per week. (R. 96:58.) Confronted with this fact, Rosalez conceded that he must mix alcohol and Ambien two to three times a week since he took Ambien nearly every night. (R. 96:58–59.)

At the end of the hearing, the parties stipulated to the admission of two documents from the Ambien manufacturer warning users that the drug could cause "anterograde amnesia" (R. 96:61), and result in users engaging in activities "while not fully awake" (R. 96:63).

After taking the motion under advisement, the postconviction court determined that Rosalez was not entitled to relief.

The court found that Rosalez did not prove that he had amnesia by a "clear preponderance of the evidence" as he was required to do. (R. 119:8.) It found that Rosalez could not satisfy that burden without any medical evidence like a medical diagnosis. (R. 119:4–6, 8.) It contrasted Rosalez's evidence with the evidence in *McIntosh* in which a psychiatrist formally diagnosed the defendant with amnesia.

(R. 119:5–6.) The postconviction court noted that a psychiatrist, unlike a psychologist, is a trained medical doctor. (R. 119:5.)

The postconviction court also found Rosalez not credible based on his inconsistencies about whether Ambien had caused him to black out before and how frequently he drank alcohol with Ambien. (R. 119:6–8.) Rosalez's lack of credibility cast further doubt on his claim of amnesia. (R. 119:8–9.)

Because the postconviction court had no "basis here to find that [Rosalez] suffers from amnesia," it concluded that it did not "have to indulge in the ineffective assistance analysis." (R. 119:9.) It denied Rosalez's motion to withdraw his plea because he failed to prove his amnesia. (R. 119:9.) Stated another way, Rosalez's failure to prove his amnesia meant he failed to prove his eligibility to raise a *McIntosh* claim. Trial counsel could not have been ineffective for failing to discuss a claim that was not available to Rosalez. This appeal followed.

STANDARD OF REVIEW

This Court reviews a circuit court's denial of a plea-withdrawal motion under the erroneous exercise of discretion standard. *State v. Savage*, 2020 WI 93, ¶ 24, 395 Wis. 2d 1, 951 N.W.2d 838. A plea-withdrawal motion predicated on an ineffective assistance of counsel claim raises a mixed question of fact and law. *Id.* ¶ 25. This Court upholds the circuit court's findings of fact and credibility determinations unless they are clearly erroneous. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. Whether the defendant carried his or her burden to establish deficient performance and prejudice presents a question of law reviewed *de novo*. *Id.*

ARGUMENT

The postconviction court properly denied Rosalez's motion to withdraw his plea because he did not establish that his trial counsel had been ineffective.

"A defendant seeking to withdraw a plea after sentencing must show by clear and convincing evidence that 'allowing the withdrawal of the plea "is necessary to correct a manifest injustice."'" *Savage*, 395 Wis. 2d 1, ¶ 24 (citations omitted). "One way to demonstrate manifest injustice is to establish that the defendant received ineffective assistance of counsel." *Id.* ¶ 25 (citation omitted).

To establish ineffectiveness of counsel, a defendant must prove both (1) "that counsel's performance was deficient" and (2) "that the deficiency prejudiced the defense." *Carter*, 324 Wis. 2d 640, ¶ 21 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The defendant's failure on one prong dooms the entire claim. *Savage*, 395 Wis. 2d 1, ¶ 25.

The postconviction court did not clearly err by finding that Rosalez failed to prove his amnesia. Although the postconviction court deemed that finding dispositive of Rosalez's claim without addressing the ineffectiveness inquiry, it compels the conclusion that Rosalez failed to prove deficient performance. His trial counsel could not have performed deficiently by declining to discuss *McIntosh* when Rosalez would not have been eligible to raise a *McIntosh* claim.

In addition, the postconviction court had two other grounds on which to reject Rosalez's ineffectiveness claim. A *McIntosh* claim would have failed on the merits, and Rosalez failed to prove prejudice.

A. Trial counsel did not perform deficiently by declining to discuss *McIntosh* with Rosalez because Rosalez did not prove his amnesia and the claim would have failed.

To prove deficient performance, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Savage*, 395 Wis. 2d 1, ¶ 28 (quoting *Strickland*, 466 U.S. at 687). Courts strongly presume that counsel acted within "the wide range of reasonable professional assistance." *Carter*, 324 Wis. 640, ¶ 22 (quoting *Strickland*, 466 U.S. at 689). Reviewing courts must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* (alteration in original) (quoting *Strickland*, 466 U.S. at 689). "Counsel does not render deficient performance for failing to bring a . . . motion that would have been denied." *State v. Maloney*, 2005 WI 74, ¶ 37, 281 Wis. 2d 595, 698 N.W.2d 583.

Rosalez alleges that trial counsel performed deficiently by not informing him of *McIntosh*. In *McIntosh*, this Court addressed a defendant's claim that his amnesia regarding the fatal car crash for which he was being tried denied him a fair trial because he could not offer his own recollection of the crash. 137 Wis. 2d at 346–47. *McIntosh* held that "where it is established that an otherwise competent defendant is suffering from amnesia or other memory disorder that might implicate his or her right to a fair trial, the court may, in its discretion, permit the trial to continue." *Id.* at 351. "At the trial's conclusion and on motion of the defendant, the [circuit] court should then . . . determine whether, in light of the defendant's disability, he or she nonetheless received a fair trial." *Id.* at 347.

Rosalez contends that *McIntosh* presented him with a viable defense and that trial counsel's failure to address it with him lacked a reasonable basis. (Rosalez's Br. 17–19.) Had Rosalez known of it, he would have gone to trial, raised the defense prior to trial, and then moved to have a guilty verdict set aside as the product of a trial that his amnesia rendered unfair. (Rosalez's Br. 19–22.)

Rosalez failed to prove deficient performance for two reasons. First, the postconviction court did not clearly err by finding that Rosalez failed to prove that he suffers from amnesia. Therefore, trial counsel's decision not to discuss *McIntosh* with Rosalez was not deficient because Rosalez could not have raised a *McIntosh* claim. Second, even assuming Rosalez proved his amnesia, a *McIntosh* claim would have failed on the merits.

1. Because Rosalez failed to prove his amnesia, he could not raise a *McIntosh* claim.

A defendant can raise a *McIntosh* claim only if the defendant's "permanent amnesia has been medically established." *McIntosh*, 137 Wis. 2d at 348. A defendant bears the burden of establishing amnesia "by a clear preponderance of the credible evidence." *Muench v. State*, 60 Wis. 2d 386, 392–93, 210 N.W.2d 716 (1973), *overruled on other grounds by Schimmel v. State*, 84 Wis. 2d 287, 267 N.W.2d 271 (1978), *overruled by Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980).[2]

[2] In an unrelated issue, *Muench* applied the rule that a defendant could submit psychiatric evidence purporting to show he lacked the mental ability to form the requisite *mens rea* only if he pleaded not guilty by reason of insanity. *Muench*, 60 Wis. 2d at 395–96. The Wisconsin Supreme Court dissolved that restriction in *Schimmel*, 84 Wis. 2d at 298, 302. However, the Court overruled *Schimmel* and restored the original *Muench* rule in *Steele*, 97

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To begin, Rosalez misunderstands what a "clear preponderance" of the evidence requires. He asserts that he had to show only "that it is more likely than not that he is amnestic." (Rosalez's Br. 12.) In other words, he contends that the ordinary preponderance of the evidence standard of proof applies to his claim of amnesia. *See Matter of R.I.B.*, 2023 WI App 9, ¶ 25, 406 Wis. 2d 170, 986 N.W.2d 325 (alteration in original) (citation omitted) ("'[P]reponderance of the evidence' means 'more likely than not.'").

Rosalez understates his burden. A "clear preponderance" refers to the "middle burden of proof" that is more stringent than the preponderance of the evidence standard but less demanding than the criminal beyond a reasonable doubt standard. *Kruse v. Horlamus Indus., Inc.*, 130 Wis. 2d 357, 363, 387 N.W.2d 64 (1986). Today, courts call this "middle" standard the "clear and convincing evidence" standard of proof. *See Matter of Visitation of A. A. L.*, 2019 WI 57, ¶ 34, 387 Wis. 2d 1, 927 N.W.2d 486. The elevated standard of proof reflects the fact that "[t]he claim of amnesia is one easily fabricated after the event by one seeking to avoid responsibility for his acts." *Muench*, 60 Wis. 2d at 392. Thus, Rosalez had to prove his amnesia by clear and convincing evidence.

Rosalez next unreasonably reads *McIntosh* as identifying three highly specific conditions that are both necessary and sufficient to prove amnesia. (Rosalez's Br. 12, 14.) But the paragraph Rosalez cites merely highlighted the three most salient conclusions from McIntosh's psychiatrist. *McIntosh*, 137 Wis. 2d at 346. *McIntosh* did not purport to create a test for proving amnesia, let alone one reduced to three criteria. Indeed, it had no need to formulate a test because it was *undisputed* that the defendant in that case had

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Wis. 2d at 76. These cases did not affect the standard of proof that applies to claims of amnesia.

amnesia. *Id.* at 347. And *McIntosh* simply cited *Muench* as an example of a case in which the parties disputed amnesia—and the court found the defense evidence insufficient. *Id. Muench* reveals that the question of amnesia presents a fact-intensive, case-specific inquiry that cannot be distilled into three conditions. *Muench*, 60 Wis. 2d at 392–93 (reviewing the evidence of amnesia in its totality without referring to a formalized inquiry).

McIntosh, drawing from *Muench*, does make clear that a defendant's amnesia must be "medically established." 137 Wis. 2d at 348; *see Muench*, 60 Wis. 2d at 392 (rejecting defendant's claim of amnesia because "[t]here [was] no medical evidence" supporting it). In *McIntosh*, a psychiatrist had concluded that the defendant's amnesia "was consistent with his injuries" to his head that he sustained in the car crash and that "there was 'no reason to doubt the permanence of a significant part of [his] memory loss.'" 137 Wis. 2d at 346. Similarly in another case arising from a fatal car crash, a psychiatrist testified that the defendant "did suffer from amnesia probably due to the concussion caused by the accident." *State v. King*, 187 Wis. 2d 548, 556, 523 N.W.2d 159 (Ct. App. 1994).

Rosalez attempted to prove his amnesia by demonstrating that he was truthfully self-reporting his lack of memory. He testified that he had no memory of the sexual assault. (R. 96:44–45.) His psychologist concluded that he was not misrepresenting his lack of memory. (R. 96:30.) Rosalez cited the manufacturer warnings from Ambien to show that his testimony was consistent with the drug's listed side effects. (R. 96:61–63.)

Yet none of this evidence constituted medical evidence. Unlike the defendants in *McIntosh* and *King*, no doctor ever diagnosed Rosalez with amnesia. (R. 96:38.) The psychologist specifically denied making an amnesia diagnosis (R. 96:38), and the postconviction court correctly noted that a

psychologist was not a trained doctor like a psychiatrist. (R. 119:5.) The only direct evidence of Rosalez's amnesia came from Rosalez himself, and he had a motive to "fabricat[e]" his amnesia "to avoid responsibility for his acts." *Muench*, 60 Wis. 2d at 392. The postconviction court reasonably found that Rosalez's self-serving testimony, even when supported by extrinsic markers of its truthfulness, did not "medically establish" his amnesia by clear and convincing evidence. *See id.* ("There is no medical evidence of anything else in the record, except the subjective statements of the defendant and the observations and hearsay testimony of his associate . . . to indicate any loss of memory.").

Although unpublished, this Court's opinion in *State v. Herling*, No. 2014AP565-CR, 2014 WL 7178355 (Wis. Ct. App. Dec. 18, 2014) (unpublished) (R-App. 3–5) provides persuasive support[3] for the circuit court's finding because of its factual similarities. There, the defendant claimed amnesia and attributed it to the alcohol and Xanax he consumed shortly before blacking out. *Id.* ¶ 3. A psychologist testified that he found the defendant's reported lack of memory credible. *Id.* ¶ 5. The circuit court deemed this evidence insufficient of proving amnesia because the psychologist was "not qualified to provide the necessary medical testimony." *Id.* The defendant did not even argue that this evidence satisfied the clear and convincing standard. *Id.* ¶ 6. He contended only that the preponderance of the evidence standard applied, which failed in light of *Muench*. *Id.* ¶¶ 6, 9. It was thus undisputed that the defendant's self-reported testimony combined with a psychologist's conclusion of no malingering did not present clear and convincing evidence of amnesia.

[3] Unpublished opinions issued on or after July 1, 2009, that are authored by a member of a three-judge panel may be cited for their persuasive value. Wis. Stat. § (Rule) 809.23(3)(b).

On appeal, Rosalez mischaracterizes the postconviction court's finding as being predicated on the fact that his expert witness was a psychologist instead of a psychiatrist. (Rosalez's Br. 14–15.) True, the postconviction court contrasted Rosalez's evidence with the psychiatrist's formal diagnosis of amnesia in *McIntosh* to illustrate Rosalez's lack of medical evidence. (R. 119:5–6.). But its finding rested on that dearth of medical evidence, not the credentials of Rosalez's expert. On that basis alone, the postconviction court reasonably found that Rosalez failed to prove his amnesia.

Moreover, even if Rosalez's own testimony constituted medical evidence, it would still be insufficient because the postconviction court found that his inconsistencies made him not credible. Rosalez testified at the hearing that Ambien had previously caused him to black out, but that testimony contradicted his representation at sentencing that he had never before blacked out while on Ambien. (R. 49:25–26; 96:55–56.) Rosalez also initially testified that he only combined Ambien and alcohol once per month. (R. 96:57.) When confronted with his twin claims that he took Ambien nearly every night and drank two to three times per week, he admitted that he must combine the two substances two to three times per week—far more frequently than once per month. (R. 96:57–59; 119:7–8.)

A circuit court's credibility determination applies on appeal unless it is clearly erroneous. *Carter*, 324 Wis. 2d 640, ¶ 19. The postconviction court did not clearly err by finding Rosalez not credible due to material inconsistencies in his testimony about his history of blackouts and drinking while on Ambien. The psychologist's conclusion that Rosalez did not malinger in tests did not preclude the postconviction court from finding Rosalez not credible based on his inconsistencies and after observing his demeanor in court. *See State v. Perkins*, 2004 WI App 213, ¶ 15, 277 Wis. 2d 243, 689 N.W.2d

684. Absent his own testimony, Rosalez produced *no* evidence with which to prove his own amnesia.

Rosalez faults the postconviction court for basing its dispositive finding on its statement that "there have been numerous self-reports here that this was not a permanent condition of any sort." (Rosalez's Br. 15 (quoting R. 119:6).) That passage constitutes one part of a larger statement reproduced below:

> Based upon the fact that there is, number one, no medical diagnosis for amnesia and also there have been numerous self-reports here that this was not a permanent condition of any sort, the Court believes it is necessary to look at the defendant, his testimony, his credibility, and any inconsistencies that have been made over the course of this case with regard to drug use, alcohol use, and the mixing thereof.

(R. 119:6.)

Admittedly, it is not entirely clear to what the "numerous self-reports" refers.[4] However, that single clause had no bearing on the postconviction court's finding of no amnesia, so it cannot render that finding clearly erroneous. The postconviction court found that Rosalez failed to prove his amnesia due to his lack of medical evidence and lack of credibility. Even if the postconviction court believed in numerous self-reports not supported by the record, that belief did not remedy Rosalez's lack of medical evidence or undermine the basis of the court's credibility determination.

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[4] The postconviction court could be referring to the blackouts that Rosalez claimed to have suffered when he began taking Ambien several years before the sexual assault in this case. (R. 62:5.) Rosalez told the psychologist that, following these initial blackouts, he "had not experienced any blackouts or lapses in memory for many years." (R. 62:5.) The postconviction court could have been referring to these "self-reported" blackouts at the beginning of Rosalez's Ambien prescription that did not prove to be a "permanent condition."

At times Rosalez suggests that, when he entered his plea, the parties agreed that he had amnesia—although he does not actually argue that his amnesia was undisputed. (Rosalez's Br. 13, 14.) This suggestion arises from Rosalez's erroneous belief that the State's lack of opposition to him pleading no contest amounted to an admission that he has amnesia. The State did not admit that Rosalez has amnesia. The State carefully explained that it agreed to a no contest plea "*if* what the defense is proposing that he doesn't actually remember." (R. 36:3–4 (emphasis added).) The State assumed, without admitting, that Rosalez truthfully represented his lack of memory. That assumption adopted for the purpose of pleading did not amount to a concession that Rosalez's amnesia was a medical fact established by clear and convincing evidence.

At the close of his argument on this issue, Rosalez improperly flips the burden of proof by claiming that the absence of evidence contradicting his claim of amnesia establishes his amnesia as fact. (Rosalez's Br. 15–16.) However, he bore the burden of proving his amnesia by clear and convincing evidence. *See Muench*, 60 Wis. 2d at 392–93. The State's decision not to present an affirmative case in rebuttal did not constitute a concession. Like in *Muench*, the postconviction court was free to conclude that Rosalez's evidence was insufficient. *See id.* at 393.

Tasked with proving his amnesia as a medical fact by clear and convincing evidence, Rosalez offered only self-serving testimony that was not tied to any medical evidence and that the postconviction court deemed not credible. The postconviction court did not clearly err in finding that Rosalez failed to prove his amnesia. Since Rosalez was not eligible to raise a *McIntosh* claim, trial counsel did not perform deficiently by failing to discuss what would have been a futile defense with him. *See Maloney*, 281 Wis. 2d 595, ¶ 37.

2. Even if Rosalez had proven his amnesia, a *McIntosh* claim would have failed.

Although not addressed by the postconviction court, the record also showed that even if Rosalez had proven his amnesia and gone to trial, a *McIntosh* claim would have failed. For that additional reason, trial counsel's decision not to discuss *McIntosh* with Rosalez was not deficient.[5]

Rosalez contends that he would have used *McIntosh* after a trial to invalidate a guilty verdict. (Rosalez's Br. 20–22.) *McIntosh* provides for this procedure. It allows a circuit court to defer ruling on whether a defendant's amnesia deprives him or her of a fair trial until after the trial occurs. *McIntosh*, 137 Wis. 2d at 351. This way, the circuit court can better evaluate how the amnesia impacts the case, if at all. *Id.* at 348.

To make this post-trial assessment, *McIntosh* directed circuit courts to six factors identified by the D.C. Circuit. *Id.* at 349 (citing *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968)). Those six factors are:

> (1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
>
> (2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
>
> (3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi.
>
> (4) The extent to which the Government assisted the defendant and his counsel in that reconstruction.

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[5] This Court may affirm the order of a circuit court for reasons not cited by or presented to the circuit court. *See State v. Smith*, 2009 WI App 104, ¶ 7, 320 Wis. 2d 563, 770 N.W.2d 779.

> (5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.
>
> (6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

McIntosh, 137 Wis. 2d at 349–50 (quoting *Wilson*, 391 F.2d at 463–64).

Had Rosalez raised a *McIntosh* claim following a guilty verdict, he would not have succeeded in showing that his amnesia deprived him of a fair trial.

At first glance, some of these factors would weigh in Rosalez's favor. Rosalez's lack of memory impeded his ability to consult with his lawyer and testify on his own behalf to some extent. In addition, the sexual assault likely could not be reconstructed because it was not recorded in any way and took place in a private residence at night.

However, the weight of these factors would ultimately be negligible in assessing the fairness of Rosalez's trial. For one, Rosalez was not entirely deprived of his ability to consult with his lawyer or testify. He still recalled the events preceding and following the sexual assault—including his consumption of Ambien and alcohol prior to the blackout. *See King*, 187 Wis. 2d at 559 ("[The defendant's] two or so minutes of amnesia did not irreparably damage his ability to consult and assist his attorney with the preparation of his case.").

More fundamentally, despite these superficial limitations, Rosalez's alleged amnesia during the assault would not have deprived him of a fair trial. The State's case was strong independent of Rosalez's amnesia, and his amnesia did not deprive him of any possible defense.

Had Rosalez gone to trial—amnesia or not—he would almost certainly have been convicted. The victim immediately reported the sexual assault to her mother the morning after the assault. (R. 1:1, 2; 36:14.) She and her mother went straight to the police. (R. 1:1; 109:10.) The victim recounted the sexual assault both to the police and in a forensic interview. (R. 36:14; 109:10.) The victim would presumably have once again recounted the sexual assault at trial. Her mother's corroborating testimony and her prompt report would have bolstered her credibility. Rosalez's amnesia would not affect any of this compelling evidence, and a guilty verdict would have been the likely result regardless of whether he had amnesia. Indeed, this evidence effectively "negate[s] all reasonable hypotheses of innocence." *McIntosh*, 137 Wis. 2d at 350 (citation omitted).

Rosalez's only possible defense at trial would have been to sow reasonable doubt by assailing the credibility of the victim. It is undisputed that he was in the house right before the sexual assault took place so he could not present an alibi defense. (R. 61:3.) As trial counsel discovered, he could not avail himself of the involuntary intoxication defense either. (R. 96:9–10.) Thus, Rosalez's only path to acquittal required cross-examining and impeaching the victim—a strategy to which his amnesia did not relate. Regardless of his alleged amnesia, the challenge to the victim's credibility would have been the same.

Even if Rosalez's alleged amnesia affected his decision to testify (Rosalez's Br. 5), it would not have meaningfully altered the course of his trial. His testimony would be only as effective as his efforts to discredit the victim. If he were unable to discredit the victim, then the factfinder would invariably find him not credible by comparison—regardless of how he testified. Since the victim would likely present as credible and since Rosalez's testimony would have no bearing on whether he could discredit the victim, whether he testified

would ultimately be immaterial. The factfinder would either find the victim credible or find that Rosalez effectively discredited her. Because Rosalez's decision to testify would have been an ancillary trial issue, any effect that his amnesia had on that decision would not rise to the level of depriving him of a fair trial.

In short, Rosalez's amnesia would not have deprived him of a fair trial because it would not have altered how his trial proceeded. The State would still present the compelling testimony of the victim. Rosalez would still try to discredit her. Accordingly, a *McIntosh* motion following a guilty verdict would have been denied. Trial counsel did not perform deficiently by not discussing what would have been a meritless claim. *See Maloney*, 281 Wis. 2d 595, ¶ 37.

B. Rosalez was not prejudiced by trial counsel's failure to discuss *McIntosh* with him because the evidence against him was strong and he intended to plead no contest to spare the victim from a trial.

This Court could also affirm because Rosalez failed to prove that counsel's alleged deficiency prejudiced him.

To prove 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." *Carter*, 324 Wis. 2d 640, ¶ 37 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 693. This inquiry turns on the totality of the circumstances. *State v. Johnson*, 153 Wis. 2d 121, 130, 449 N.W.2d 845 (1990).

Because he claims that ineffective assistance of counsel induced his plea, Rosalez "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded [no contest] and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *accord State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996). "[A] defendant must do more than merely allege that he would have" refused to plead and gone to trial. *State v. Hampton*, 2004 WI 107, ¶ 60, 274 Wis. 2d 379, 683 N.W.2d 14. He must support that claim with objective evidence. *Id.*

"As a general matter, . . . a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017). However, it is possible that the defendant's decision turns on a factor other than his prospects at trial. *Id.* In those situations, "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Id.* at 1967. Courts should look for "contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

The record establishes two facts that motivated Rosalez to plead no contest. The evidence against him was strong and he wanted to spare the victim from trial.

As discussed in the previous section, Rosalez would have been found guilty at a trial. The victim's clear account of the sexual assault would be corroborated by her prompt reporting and her mother. Rosalez, on the other hand, had no defense other than to attack the victim's credibility, and he lacked any ready means to discredit her. Based on this strong evidence of guilt and lack of a "realistic defense," Rosalez cannot "carry his burden of showing prejudice from accepting [his] plea." *Lee*, 137 S. Ct. at 1966.

Rosalez also pleaded no contest so that the victim would not be put through a trial. Whether motivated by genuine affection for the victim, a self-interested desire for leniency in sentencing, or a combination of both, the plea and sentencing hearings reflect that intent.

The trial court observed that "this case was never in a trial posture." (R. 49:38.) Rosalez represented through counsel that "he wanted no part of an attack" on the credibility of the victim or the victim's mother. (R. 49:26.) He informed trial counsel of this desire "from the very beginning." (R. 49:26.) Trial counsel told the court that Rosalez felt terrible about his conduct because he genuinely cared about the victim and her mother. (R. 49:20–21.) Rosalez also personally apologized, stating, "I'm truly sorry for all the pain and suffering that I have caused to [the victim] and so many other people." (R. 49:33.)

Rosalez's plea and these statements ultimately benefited him. The trial court found Rosalez's remorse to be "certainly clear." (R. 49:37.) It credited Rosalez for his remorse and responsibility, viewing both as both as "positive things to look at and consider." (R. 49:38.) Had Rosalez proceeded to trial, he would still have been convicted of second-degree sexual assault of a child and sentenced without these "positive things."

At the *Machner* hearing, trial counsel's testimony revealed that the plea and sentencing hearings accurately reflected Rosalez's intent to plead no contest for the sake of the victim. He recalled that Rosalez was "distraught" by his conduct and did not want to make the victim testify at a trial, which he knew from his experience as a probation agent would be difficult for her. (R. 96:8.) Rosalez "had a very difficult and emotional time" with this case so this case was always projected to be resolved by a plea. (R. 96:18.)

In seeking to prove prejudice, Rosalez offered only his own testimony that he always wanted a trial, did not care about putting the victim through a trial, and only agreed to plead because trial counsel told him that he had no defenses. (R. 96:45, 49–50, 53.)

Having already found Rosalez not credible due to inconsistencies in his testimony about his history with Ambien (R. 119:6–8), the postconviction court could have rejected this testimony.

Moreover, this testimony was unsupported by any extrinsic evidence and roundly contradicted by the record. Both the trial court and trial counsel believed that this case was never in a trial posture. Trial counsel recalled that this case caused Rosalez anguish. At sentencing, trial counsel and Rosalez emphasized his remorse and his genuine care for the victim and her mother. In short, Rosalez's "*post hoc* assertions" about wanting a trial do not withstand scrutiny when juxtaposed with the "contemporaneous evidence" of his plea. *Lee*, 137 S.Ct. at 1967.

Because the evidence against him was strong and because the record establishes that he always intended to plead no contest, Rosalez failed to prove prejudice. Accordingly, the claim of ineffectiveness on which he predicated his motion to withdraw his plea failed.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated: May 2, 2023

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6653 words.

Dated: May 2, 2023.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated: May 2, 2023.

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