STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP1347-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN TYRONE BRATCHETT,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE T. CHRISTOPHER DEE, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

1. Did the circuit court properly admit the victim's photo array identification of Steven Tyrone Bratchett as her assailant because it was sufficiently reliable?

The circuit court answered: Yes.

This Court should affirm.

2. Did the circuit court properly admit Bratchett's photo identification card that was found outside near the crime scene, next to the victim's stolen wallet and debit card, after redacting his address?

The circuit court answered: Yes.

This Court should affirm.

3. Did Bratchett's counsel provide effective assistance when he strategically decided not to impeach the victim's testimony about the attempted sexual assault with her prior statement in the police report?

The circuit court answered: Yes.

This Court should affirm.

4. Did Bratchett's counsel provide effective assistance when he strategically focused his cross-examination of the victim on her level of certainty of her identification of Bratchett in the photo array?

This circuit court answered: Yes.

This Court should affirm.

5. Did Bratchett's counsel provide effective assistance when he strategically decided, after one of his objections was sustained, not to further object to the State's closing rebuttal argument or request a mistrial?

The circuit court answered: Yes.

This Court should affirm.

6. Did the circuit court properly reject Bratchett's claim that cumulative prejudice related to his counsel's performance entitled him to a new trial?

The circuit court answered: Yes.

This Court should affirm.

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

The circuit court did not answer this question.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State disagrees with Bratchett's request for publication and oral argument. Neither are warranted because this case presents issues that can be decided by this Court based on well settled law, the record in this case, and the briefs of the parties.

INTRODUCTION

Bratchett forcibly entered S.D.'s apartment with his teenage brother, stole S.D.'s wallet and debit card while his brother held what S.D. believed was a gun to her head, forced S.D. onto her bed, threatened her with sexual violence, and tried to pull her shorts down while she resisted. After a pursuit, police found Bratchett's photo ID on the ground outside the apartment alongside S.D.'s stolen property, including her wallet. Investigators recovered Bratchett's fingerprint from the wallet and S.D. identified Bratchett in a photo array. A jury convicted Bratchett of armed robbery, burglary, and attempted third-degree sexual assault.

Bratchett seeks a new trial. He claims that the court improperly admitted S.D.'s testimony about her photo array identification of Bratchett a few hours after the crimes

because it was unreliable. Bratchett also claims that admission of his photo ID card was improper. Additionally, he claims that his counsel was ineffective for multiple reasons and alleges that cumulative prejudice entitles him to a new trial. Finally, Bratchett argues that the evidence was insufficient to convict him of attempted third-degree sexual assault. All of Bratchett's claims are meritless. He is not entitled to a new trial.

STATEMENT OF THE CASE

Criminal charges. On the night of November 15, 2015, police responded to an armed robbery of a 20-year old college student, S.D., at her apartment. (R. 1:2.) Marquette University police saw two men follow two women into the front door of S.D.'s apartment building, saw both men later flee out the rear door, and found S.D.'s stolen property on the ground outside of the apartment building. (R. 1:2–3.)

S.D. told police that after she answered a knock on her door, Bratchett, who she later identified through photos, forced his way inside along with a younger man, Bratchett's teenage brother, Robert Robinson. (R. 1:2–3.) Bratchett put S.D. in a chokehold and told her that if she moved, Robinson would shoot her; then, he took her purse and demanded her pin number for her debit card. (R. 1:3.) Bratchett forced S.D. into her bedroom, told her to sit on the bed and take off her clothes, and tugged on her shorts; after S.D. resisted and yelled, Bratchett and Robinson left her apartment. (R. 1:3.) As the two men fled, police apprehended Robinson, who admitted that he and Bratchett had entered S.D.'s apartment, robbed her, threatened to shoot her, and that Bratchett had told S.D. to go into her bedroom and undress. (R. 1:3.)

The State charged Bratchett with one count of burglary and one count of armed robbery, both as party to a crime and as a repeater. (R. 1; 4.) The State amended the information

before trial to add one count of attempted third-degree sexual assault as party to a crime. (R. 15.)

Pretrial evidentiary rulings. On the first day of trial, the court held a hearing on Bratchett's request to exclude S.D.'s photo array identification of him. (R. 149:2–10.) S.D. testified that on November 15, Bratchett was in her apartment for about 15 minutes, face-to-face with her and "[w]ithin a foot of [her] face," wearing a baggy sweatshirt with its hood up. (R. 151:5–6.) A few hours after the robbery, at about 1:00 a.m., S.D. identified Bratchett in a photo array, based on her "memory" of his appearance; although Bratchett put his hands up to cover his face at times, she had a "clear view of his face" when she was on the bed and Bratchett "was close to" her. (R. 151:8–10.)

Police showed S.D. six pictures one at a time, asked her "to study the picture and to pick which one best fits the description of what happened that night," and told her "that potentially one of the six pictures would not include the person that was in [her] apartment." (R. 151:12.) When S.D. chose Bratchett's photo, she was "sixty to seventy" percent sure it showed the man who entered her apartment, robbed her, and attempted to assault her. (R. 151:10–13.) A couple days later, the police detective called her and told her that she had picked Bratchett's photo. (R. 151:13.) When S.D. described Bratchett to police, she did not say that he had a neck tattoo and facial mole because while Bratchett was in her apartment, she did not notice these features. (R. 151:14.) S.D. based her identification of Bratchett on her observation that Bratchett's face was "wider" and "a little boxy," with a "square jaw." (R. 151:14–15.)

The court determined that the photo array was "impermissibly suggestive[]" because the photo of Bratchett showed his tattoo and mole with no effort to cover them with "Band-Aids, a scarf, anything like that." (R. 151:25.) However, the court concluded that S.D.'s identification of Bratchett was

"reliable under the totality of the circumstances" because there was no "continued improper suggestiveness," S.D. did not identify Bratchett by his "suggestive[]" tattoo and mole, but instead relied on her memory of his "square jaw or boxy face," and S.D. was shown the photos "hours after the incident." (R. 151:25–26, A-App. 108–09.) The court held that S.D. could testify about her identification of Bratchett and defense counsel could cross-examine her about the reliability of the identification. (R. 151:27, A-App. 110.)

The court also addressed Bratchett's objection to admission of his photo identification card found at the crime scene. (R. 151:35–36, A-App. 111–12.) Bratchett sought to exclude the ID from evidence because he was wearing an orange shirt in his photo and his Waupun address was on the ID. (R. 151:36, A-App. 112.) The court held that the ID was admissible because there was no "problem with the actual photo" of Bratchett wearing orange, but ordered the State to "[c]over up" the address because of the association of Waupun with "the main state prison." (R. 151:37, A-App. 113.)

S.D.'s testimony. S.D. was alone in her apartment on November 15 at around 7:20 p.m. when she heard a knock, opened the door, and saw a black male who she identified as Bratchett, wearing a hooded sweatshirt "inside out" with the hood "[u]p" covering his head. (R. 151:69–71.) While "holding his hand kind of over his mouth," Bratchett asked if this was "Allen's place?"; when S.D. responded, "No," and started closing the door, he said, "Don't close the door or I'm going to shoot you and people in here." (R. 151:72–74.) Bratchett put his arm in the door as S.D. tried to push it closed, entered her apartment, put S.D. "in a headlock," put his hand over her mouth and, in a deep, aggressive voice, demanded that she give him her "property." (R. 151:75–77.) When a younger man in his "late teens" came inside and stood behind S.D. with his hand in his sweatshirt, she felt something push on the corner of her head with a slight pressure; Bratchett said, "If you

move, he will shoot you." (R. 151:79–81.) Bratchett demanded S.D.'s money, found her wallet in her bedroom while the younger man was still holding something to her head that she thought was a gun, ordered her to take her debit card out of the wallet and give him her PIN number so he could take money out of her account, and threatened to shoot her if she was "lying." (R. 151:82–86.)

Bratchett then led S.D. into her bedroom with his hand on her upper back and told her to sit on the edge of the bed. (R. 151:89–90.) When Bratchett again accused S.D. of "lying," S.D. put her hands up in front of her chest "to protect" herself because he "was so close" and she did not "know what he was going to do." (R. 151:91–93.) Bratchett ordered S.D. to "[t]ake off [her] clothes" and "move back on the bed" so that her "feet were no longer touching the floor." (R. 151:93–94.) As she moved to the middle to the bed, Bratchett grabbed her shorts by the waist and tugged them downward, but was unable to pull them down because S.D. was clutching her hands on her shorts and "not letting him." (R. 151:95.) S.D. told Bratchett, "No, you're not doing that. I'm not doing that" and Bratchett responded, "I will fuck you. You better not be lying to me." (R. 151:96.) Based on his words and actions, S.D. believed that Bratchett intended to "rape" her. (R: 151:96.)

After both men left her apartment, S.D went to her friend's apartment and her friend called the police, who responded, interviewed S.D. and, at around midnight, returned her wallet and phone to her. (R. 152:6–7.) An hour later, another officer came to her apartment and showed her six photographs "one at a time" in individual envelopes. (R. 152:7–8.) The officer instructed S.D. to look at each picture to see if she "recognized anyone that was the intruder that broke in, and he may or may not have been in the photo array." (R. 152:8–9.) After S.D. looked at each picture individually, she identified one as the older man who had been in her apartment, based not on any "distinct physical

features," but on his "square face or chin or jaw." (R. 152:9–11.) S.D. was "sixty to seventy percent" sure that the photo she picked was the older man. (R. 152:11.) S.D. identified Bratchett in the courtroom as the man she identified in the photo array. (R. 152:13.)

After viewing a photo, S.D. identified her stolen phone, wallet, and debit card under a photo ID that did not belong to her, lying in the grass next to a "smashed pumpkin." (R.152:26–29.)

On cross-examination, S.D. testified that she told police that both men who entered her apartment were black, but she did not describe if they were "light" or "dark complected." (R. 152:35.) S.D. did not tell police that Bratchett had facial moles or a tattoo on his neck. (R. 152:37.) S.D. admitted again that she was "only sixty to seventy percent sure" of her identification of Bratchett's photo. (R. 152:41.) She was not "100 percent sure" of her identification, but Bratchett's photo was the one she thought was "most similar." (R. 152:50.)

On re-direct, S.D. explained that although the photos showed men with "various hair styles," she did not identify Bratchett based on his hairstyle because his hood covered his head and she "couldn't see his hair." (R. 152:65–66.) Also, because he was wearing a sweatshirt, S.D. did not "recall seeing" a tattoo and did use it to identify Bratchett. (R. 152:66.) Although the photo of Bratchett showed his "mole on the right cheek," S.D. did not base her identification of Bratchett on his mole. (R. 152:66–67.) While the men were in her apartment, S.D. was "scared and didn't know what they were going to do to" her, so she was not "focused on memorizing" their faces. (R. 152:68.)

Police officer testimony. Two city of Milwaukee police officers responded to the crime scene. (R. 152:73–83.) When Detective Rudy Gudgeon interviewed Bratchett the day after the crimes, he read Bratchett his rights; Bratchett said he was

willing to answer questions, denied that he had been in the Marquette University area the night before, and claimed he had been at the Potawatomi Casino. (R. 154:54–56.) When Gudgeon told Bratchett that his photo ID had been found near the crime scene, Bratchett said he had given his ID to his brother. (R. 154:56–57.)

Shortly before these crimes, Marquette University Police Officer Thomas Wichgers saw a man wearing a light-colored sweatshirt with the hood up near S.D.'s apartment building following two college-age women. (R. 153:11–13.) He also saw a juvenile, black male walking on the same block, who he "got a good look at" when the juvenile waved at him. (R. 153:14.) After Wichgers circled the block, these individuals were no longer on the street, leading him to suspect that the men "piggy backed into [the] building" behind the women. (R. 153:15.)

At around 7:30 p.m., he called the other officer on duty, his brother Officer Michael Wichgers, told him that he had "observed two suspects" who were walking "closely behind a couple females," and asked him to go to the alley behind the buildings to investigate. (R. 153:35–36.) There, Michael Wichgers saw a young, black male walk down the rear steps S.D.'s apartment building and head northbound down the alley. (R. 153:38–39, 55.) About 30 seconds later, he saw an older, black man come out of the same door and run down the same steps. (R. 153:40, 56.) Michael Wichgers pursued the older man wearing a hooded sweatshirt running south down the alley. (R. 153:41–42, 44.) Thomas Wichgers pursued the younger man, apprehended him, and confirmed that he was the same juvenile black man who had waved at him. (R. 153:17–18.)

After seeing the older man run between two buildings, Michael Wichgers retraced his steps and found "the victim's property. Her wallet, ID." (R. 153:43–44.) In a photograph of the area where he found these items, about a half block from

S.D.'s apartment building, both Michael and Thomas Wichgers identified a "smashed pumpkin" next to a wallet, a phone, and identification cards. (R. 153:24–25, 32, 46.)

Photo and fingerprint evidence. Forensic investigator Alfonzo Lazo took pictures of the crime scene, including pictures outside the apartment in the grass, next to a pumpkin, of S.D.'s phone, blue and white wallet, identification card, debit card and, on top of the debit card, another ID with Bratchett's name and picture. (R. 153:67–78, 154:19.) Lazo retrieved a partial fingerprint from the wallet that he determined might be usable. (R. 153:80–85.) Lazo submitted the fingerprint to "the latent print examiners" to see if they would "be able to make an ID out of it." (R. 154:16.)

Richard Jacobs, a latent print examiner, processed the fingerprint collected by Lazo from S.D.'s wallet. (R. 154:22–23, 28–29.) After Jacobs determined that the latent print was "identifiable," he compared it "to the known fingerprints in this database." (R. 154:34–35.) He determined that Bratchett was one of two possible matches, compared Bratchett's fingerprints to the latent print, and "was able to identify this print as coming from Mr. Bratchett's right middle finger." (R. 154:37.) Jacobs concluded that the latent print matched Bratchett's print "to a reasonable degree of scientific certainty." (R. 154:40.)

Defense case-in-chief. After a colloquy, Bratchett elected not to testify on his own behalf. (R. 154:67–71.) The defense called one witness: Rick Fligor, a public safety officer at Marquette University, who testified that S.D. had initially told him she could not identify Bratchett in the photos, but the next day clarified that it was Robinson who she could not identify and "confirmed . . . that the person she identified in the photo was Mr. Bratchett." (R. 154:82–89.)

Objection to State's rebuttal argument. In the defense closing argument, Hailstock challenged Jacob's

testimony identifying Bratchett's fingerprint on S.D.'s wallet with "a reasonable degree of scientific certainty" as not credible because Jacobs did not also process S.D.'s iPhone; the prosecutor responded in his rebuttal that this was "a common defense theme. What about this? What about that?" (R. 155:50–51.) The prosecutor continued: "It's like, oh, well, my client, he admitted to the crime in a Mirandized statement." (R. 155:51.) Hailstock immediately objected that this was "a fact not in evidence"; before the court sustained the objection, the prosecutor clarified that he made the statement "Hypothetically." (R. 155:51.) The prosecutor then "[h]ypothetically" argued that if a defendant admitted to a crime, defense counsel would argue that the confession was "not audio recorded," or was "not videotaped," or that there was no "written signed confession . . . . It's always something more. You're missing this. You're missing that." (R. 155:51.)

Verdict and Sentencing. The jury found Bratchett guilty of all three counts. (R. 156:5.) The court sentenced Bratchett to three consecutive sentences totaling 18 years and 6 months of initial confinement and 16 years of extended supervision and entered a judgment of conviction. (R. 52:1, A-App. 101; 157:23–24)

Postconviction motion,[1] Machner[2] hearing, and appeal. Bratchett's motion alleged that Hailstock was ineffective because he (1) did not impeach S.D.'s testimony that during the attempted assault, Bratchett said "I will fuck you," with her alleged prior inconsistent statement in the

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[1] Bratchett previously filed several § 809.30 postconviction motions (R. 77; 83; 89; 95) and a letter from his postconviction counsel seeking a hearing on additional issues. (R. 103.) The only motion relevant to this appeal is the 809.03 motion that Bratchett filed on January 14, 2020. (Bratchett's Br. 17–18.)

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

police report that Bratchett said "don't fuck with me" (R. 114:6–10); (2) did not adequately cross-examine S.D. about her photo identification of Bratchett (R. 114:10–12); and (3) did not further object to the State's closing rebuttal argument or move for a mistrial (R. 114:14–15). Bratchett also alleged that cumulative prejudice entitled him to a new trial. (R. 114:18–19.)

Attorney Hailstock testified that he did not impeach S.D.'s testimony that Bratchett said "I will fuck you" with the police report recounting that she told police that Bratchett said "Don't fuck with me," because he focused his cross-examination related to the attempted sexual assault on whether Bratchett was the perpetrator who was "aroused" or "expose[d] himself to [her]." (R. 160:9–10.) Hailstock also was unsure if the police were "wrong" or whether S.D.'s statement in the police report "was a mistake." (R. 160:10.) Hailstock did not cross-examine S.D.'s photo array identification testimony by challenging the police instructions to "pick the person who looked most like the suspect," because his strategy was to challenge the reliability of S.D.'s identification by "attacking the fact that she was 70 percent sure that this was the suspect, not 100 percent sure that it was the suspect." (R. 160:11–13.)

Hailstock explained that he did not lodge further objections to the State's "[h]ypothetical[]" rebuttal argument after his first objection was sustained because "the more you object, the more the jury is drawn to those statements." (R. 160:19–21.) Hailstock decided not to continue to object because that "draws attention" to the argument, "it gets highlighted more," and he did not "want to take the risk of it just being more and more imprinted into the jury." (R. 160:21–22.) Hailstock did not move for a mistrial because he "didn't think it was a mistrial." (R. 160:22.)

The circuit court denied Bratchett's motion for a new trial. (R. 134:5, A-App. 118.) The court held that Hailstock

was not deficient for his "legitimate strategy" at trial "to attack the sufficiency of the identification" of Bratchett as "the person who committed" the crimes. (R. 134:4–5, A-App. 117–18.) Bratchett was not prejudiced because of the "devastating" and "powerful" trial evidence identifying him, including his ID card and fingerprint. (R. 134:3, A-App. 116.) Based on all the evidence, none of the alleged deficiencies "undermin[ed] the confidence in the outcome." (R. 134:5, A-App. 118.)

Bratchett appeals. (R. 135.)

STANDARDS OF REVIEW

Admission of evidence. Whether to admit evidence is a discretionary decision of the circuit court that this Court reviews for an erroneous exercise of that discretion. *Weborg v. Jenny*, 2012 WI 67, ¶ 65, 341 Wis. 2d 668, 816 N.W.2d 191; *State v. Mayo*, 2007 WI 78, ¶ 31, 301 Wis. 2d 642, 734 N.W.2d 115. This Court will sustain a decision to admit evidence if the court "examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." *Mayo,* 301 Wis. 2d 642, ¶ 31. The question is not whether this Court "would have admitted" the evidence, "but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." *State v. Payano*, 2009 WI 86, ¶ 51, 320 Wis. 2d 348, 768 N.W.2d 832 (quoted source omitted). "The circuit court's decision will be upheld 'unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.'" *Id.* (quoted source omitted).

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

Ineffective assistance of counsel. Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). This Court upholds a circuit court's findings of fact unless they are clearly erroneous, but whether counsel's performance was deficient and prejudicial is a question of law reviewed de novo. *Id.*

Sufficiency of the evidence. Review of a "sufficiency" challenge is "very narrow." *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203. This Court must "give great deference to the determination of the trier of fact" and "must examine the record to find facts that support upholding the jury's decision to convict." *Id.* This Court will not substitute its judgment for that of the jury unless the jury relied on evidence that was "inherently or patently incredible." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

ARGUMENT

I. The circuit court properly exercised its discretion to admit S.D.'s identification of Bratchett and his photo ID card.

A. A court properly exercises its discretion to admit relevant evidence when its probative value outweighs any prejudice.

Relevant evidence that relates to a fact of consequence and tends to make that fact more or less probable is generally admissible at trial, except as otherwise provided by constitution or statute. *See* Wis. Stat. §§ 904.01, 904.02, 904.03. Even if 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." Wis. Stat. § 904.03. The party opposing admission of evidence has the

burden of showing that its probative value is substantially outweighed by its potential prejudice. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399. Once evidence such as eyewitness identification is admitted, the jury determines its credibility and weight. *State v. Hibl,* 2006 WI 52, ¶ ¶ 49, 53, 290 Wis. 2d 595, 714 N.W.2d 194.

"However, due process may also restrict admission of eyewitness testimony: 'identification [evidence] infected by improper police influence' may be excluded when 'there is "a very substantial likelihood of irreparable misidentification"' unless 'the indica of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances.'" *State v. Roberson,* 2019 WI 102, ¶ 26, 389 Wis. 2d 190, 935 N.W.2d 813 (quoted source omitted).

B. The reliability of S.D.'s identification of Bratchett outweighed any impermissible suggestiveness of the photo array.

Reliability is "the linchpin in determining the admissibility of identification testimony" and "[d]ue process does not require the suppression of evidence with sufficient 'indicia of reliability.'" *Roberson,* 389 Wis. 2d 190, ¶ 3 (quoted source omitted)."[D]ue process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Id.* ¶ 28 (quoted source omitted). The defendant bears the "burden of demonstrating that a showup was impermissibly suggestive." *Id.* ¶ 4 (quoted source omitted). While identification evidence may be excluded if it is "infected by improper police influence" and "there is 'a very substantial likelihood of irreparable misidentification,'" such evidence is still admissible where "the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances." *Id.* ¶ 26 (quoted source omitted).

Here, the court determined that S.D.'s identification of Bratchett had strong and convincing indicia of reliability,

which outweighed any impermissible suggestiveness because of his neck tattoo and moles in his photo. (R. 151:25, A-App. 108.) The court held that under the "totality of the circumstances," the State had shown that S.D.'s identification of Bratchett was "reliable" because she did not rely on the tattoo and moles, but instead identified Bratchett based on his square jaw and boxy face, and because she made the identification mere "hours after the incident." (R. 151:25–26, A-App. 108–09.) As there was no "continued impermissi[ble] suggestiveness" and her identification was reliable, the court allowed S.D. to testify about her identification of Bratchett. (R. 151:26, A-App. 109.)

The court's ultimate conclusion to allow S.D.'s testimony about her photo array identification of Bratchett was correct, both because Bratchett failed to show that the photo array was impermissibly suggestive and, if it was, the State proved that S.D.'s identification had sufficient indicia of reliability.

1. The photo array was not impermissibly suggestive.

The circuit court's determination that the photo array was "impermissibl[y] suggestive[]" was supported by extremely limited factual findings: that Bratchett's photo was the only one depicting a mole and a neck tattoo and that police had not made an "effort" to cover them up. (R. 151:25.) It is unclear what police could have done to hide the mole and neck tattoo in his photo without drawing further attention to them. Without more support, the finding that the array was improperly suggestive is tenuous, at best.

There is no "per se rule" for when the photo array and resulting identification is impermissibly suggestive. *State v. Benton*, 2001 WI App 81, ¶ 9, 243 Wis. 2d 54, 625 N.W.2d 923. Even rather substantial differences in characteristics between the suspect and the other photos in the array, such

as marked differences in height and weight, "do not make a lineup impermissibly suggestive." *Id.* ¶ 10 (citation omitted). When conducting a photo array of suspects, police do not have to search for "identical twins" in terms of age, race, height, weight, or facial features to include in the lineup. *Powell v. State*, 86 Wis. 2d 51, 67, 271 N.W.2d 610 (1978). That police could have performed a less suggestive procedure does not automatically make the one they conducted suggestive. *See State v. Ledger*, 175 Wis. 2d 116, 131, 499 N.W.2d 198 (Ct. App. 1993).

Bratchett's photo did not impermissibly stand out from the other photos. S.D. was shown six photos of men, including Bratchett, who all had facial hair, were around the same age, and appeared to be the same race. (R. 21: A-App. 119–20.) Bratchett argues that the photo array was impermissibly suggestive because his photo was the only one with a mole and tattoo and was "problematic" because S.D. viewed photos of individuals with "varying skin tones, face shapes, and facial features," which were not "consistently similar options." (Bratchett's Br. 24–25.) But S.D. testified that she did not notice Bratchett's moles and tattoo and thus did not base her identification on those features. (R. 151:14–15; 152:65–67.) And S.D. did not tell police in her description whether the men in her apartment were "light" or "dark complected" (R. 152:35–36). Thus, her testimony does not support that she based her identification of Bratchett on his skin tone; instead she based it on his face shape, which she described as "wider" and "boxy," but she was only 60 to 70 percent sure that she had picked the right photo (R. 151:10, 14–15). S.D.'s level of confidence in her identification based on the face shape demonstrates that Bratchett's face in the photo she chose did not stand out from the other photos in such a way that it was impermissibly suggestive. Bratchett's skin tone and features, including his mole and tattoo, did not automatically make him

stand out from the group in a manner that violates due process.

Bratchett argues that the photo array was impermissibly suggestive because "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," which was "highly biasing and cannot reasonably be construed as an objective mechanism designed to elicit reliable evidence." (Bratchett's Br. 27–28.) Bratchett's argument goes to the weight the jury would give to S.D.'s identification of Bratchett, not to its constitutionality or admissibility at trial. *See Roberson,* 389 Wis. 2d 190, ¶ 74 (witness can be cross-examined on identification and jury can weigh conflicts in and credibility of testimony, but that "does not give the circuit court the ability to preclude its admission.") Hailstock thoroughly cross-examined S.D. on her identification of Bratchett, her level of certainty, her subsequent photo identification on the morning of trial, and her in-court identification of Bratchett. (R. 152: 31–41.)

Bratchett also claims that S.D.'s identification was improper because police instructed her to pick the photo that was the "best fit," which "undermine[s] the sequential nature of the lineup procedure and explicitly invited an impermissible relative judgment." (Bratchett's Br. 27.) This claim is meritless, because Bratchett cites no case that law that this instruction is constitutionally impermissible. He fails to adequately explain why the police improperly instructed S.D. on the photo array and how that made it impermissibly suggestive by making her more likely to pick his photo.

Bratchett next claims impropriety because S.D. received confirmation from police that "she had made the 'correct' choice." (Bratchett's Br. 27.) But police told S.D. that she had picked Bratchett's photo not at the same time as the

photo array, but a "couple days" later. (R. 151:13.) Thus, the record undermines Bratchett's claim that when police informed S.D. that she "selected the right person," this "dramatically, yet artificially, increase[d] the witness' confidence in the identification." (Bratchett's Br. 27.)

Bratchett has not shown that the police presented the photos "in a manner calculated to attract special attention and to make [Bratchett] stand out from other persons" in the photo array. *Jones v. State*, 47 Wis. 2d 642, 649–50, 178 N.W.2d 42 (1970). This photo array was not impermissibly suggestive.

2. S.D.'s identification of Bratchett was reliable.

Even if the photo array was improperly suggestive, this Court should affirm the circuit court's ultimate conclusion that S.D.'s identification of Bratchett was sufficiently reliable to be admitted at trial. *See Roberson,* 389 Wis. 2d 190, ¶ 35. To find sufficient indicia of reliability, the court examined the appropriate factors: S.D.'s opportunity to see Bratchett at the time of the crime; her degree of attention and the accuracy of her description; her level of certainty of her identification; and the time between the crimes and her identification of Bratchett. *See id.* Through S.D.'s testimony, the State satisfied its burden to show that her identification was reliable.

First, S.D.'s testimony established that she had ample opportunity to see Bratchett during the crime. S.D. testified that Bratchett was in her apartment for approximately 15 minutes, he was directly in front of her, about a "foot" away from her face, he "was close to [her]" giving her a "clear view of his face," and she identified Bratchett based on her "memory" of his appearance. (R.151:5–6, 8–10.)

Second, S.D. testified about her degree of attention to detail and the accuracy of her description. S.D. had a "clear

view" of his "boxy" facial structure, but did not notice Bratchett's tattoo or moles because he was wearing a sweatshirt with the hood up and "kept moving his hands over his face," presumably to cover his moles. (R. 151:8–10, 14–15.) Contrary to Bratchett's claim that S.D. lacked attention or accuracy because was "in shock" and under "stress" (Bratchett's Br. 30), S.D.'s attention to detail was sharpened as a victim. She was not a "casual observer, but rather the victim of one of the most personally humiliating of all crimes." *Neil v. Biggers,* 409 U.S. 188, 200 (1972.)

Third, S.D. candidly testified about her degree of certainty: she was only "sixty to seventy" percent sure that the photo of Bratchett she chose out of the six in the array was the man who entered her apartment, robbed her, and attempted to assault her. (R. 151:10–11.) Although her level of certainty was not high, the court could properly balance this against the other strong indicators of reliability.

Fourth, and importantly, S.D.'s made her identification of Bratchett in the photo array just a few hours after the crime, based on her very recent memory, which gave it a very strong indicia of reliability. (R. 151:8–10.)

The linchpin of the court's determination that S.D.'s identification was sufficiently reliable was that S.D. did not base her identification on Bratchett's tattoo or moles, which Bratchett concedes. (Bratchett's Br. 25.) S.D. did not see these distinguishing features, which the court found were improperly suggestive, because Bratchett was wearing a hood and kept his hand over his face most of the time. (R.151:8–15.) Because S.D. did not notice Bratchett's moles or tattoo and did not base her identification on them, but instead on her recent memory mere hours after the incident of Bratchett's "boxy" facial structure (R. 151:14–15), the court found that under the "totality of the circumstances," her identification of Bratchett was reliable. (R. 151:25–26, A-App. 108–09.)

The circuit was correct. It observed S.D.'s testimony about her photo array identification of Bratchett, found her credible, and concluded that there were sufficient indicia of reliability to admit her testimony, which was subject to cross-examination. The court properly exercised its discretion to admit S.D.'s identification testimony.

C. The probative value of Bratchett's photo ID with his address redacted outweighed any prejudice.

Bratchett challenges the circuit court's decision to admit his photo identification card, claiming that the photo of him wearing an orange shirt was indicative of prison garb and was overly prejudicial. (Bratchett's Br. 33–34.) While Bratchett "concedes" that the discovery of his ID card next to the wallet, debit card and phone stolen from S.D. was "relevant" under Wis. Stat. § 904.01, Bratchett argues that the court erroneously determined under Wis. Stat. § 904.03 that the probative value of his photo ID was outweighed by "the highly prejudicial photograph." (Bratchett's Br. 34.) In other words, Bratchett claims that the relevance of his photo ID, found next to S.D.'s stolen debit card and wallet, was substantially outweighed by its inflammatory nature or prejudice to him. When a circuit court evaluates evidence under section 904.03, its decision is reviewed for an erroneous exercise of discretion. *See Jones v. State*, 70 Wis. 2d 41, 54, 233 N.W.2d 430 (1975).

As Bratchett concedes, the photo identification card is relevant and probative to show that Bratchett committed these crimes. (Bratchett's Br. 34.) On the other hand, Bratchett has offered little proof that the photo identification card was unduly prejudicial. The ID with a headshot of Bratchett, wearing a light-colored shirt underneath an orange shirt, does not overtly identify Bratchett as a prisoner. (R. 42, A-App. 121.) While Bratchett claims the jury would

necessarily associate an orange overshirt with prison-garb, he offers no proof beyond reference to Wikipedia and Google. (Bratchett's Br. 34, n.14.) His citation to a Seventh Circuit case determining that it was error to admit photos that "on their face disclose past incarceration" is inapposite. (Bratchett's Br. 34–35, citation omitted). Other than the color of his shirt, nothing indicated that it was a prison uniform. As the circuit court found, there was no "problem with the actual photo" or anything that "jumps out" about the orange shirt. (R. 151:37, A-App. 112.) This was a proper exercise of the court's discretion.

Moreover, the court ordered the State to "[c]over up the 'Waupun'" address (R. 151:37, A-App. 113), mitigating any prejudice because Waupun might be associated with a prison, which was also a proper exercise of its discretion. The probative value of the jury seeing Bratchett's photo on an ID found discarded near S.D.'s apartment, on the path that the suspect matching Bratchett's description had run away from police, next to S.D.'s stolen property, far outweighed any potential prejudice based on the color of Bratchett's shirt in his photograph. The court's decision to admit the photo ID into evidence with the Waupun address redacted was sound and a proper exercise of its discretion. This Court should leave that ruling undisturbed.

D. Any error in admitting S.D.'s testimony about the photo array identification or showing Bratchett's photo ID to the jury was harmless.

Even if this Court concludes that the circuit court erroneously admitted S.D.'s identification of Bratchett or allowed the jury to see Bratchett's photo ID, Bratchett is not entitled to a new trial because any error was harmless. Neither S.D.'s photo array identification nor his photo ID were, by themselves, critical to the jury's verdict. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

S.D.'s identification of Bratchett was not crucial to his conviction. The key piece of evidence identifying Bratchett as the individual who committed these crimes was his fingerprint on S.D.'s stolen wallet. (R:153:12–46; 154:22–40, 82–89.) The latent print examiner testified that "level two" and "level three details" led him to conclude that the fingerprint was a match to Bratchett's middle right finger "to a reasonable degree of scientific certainty." (R. 154:40.) This testimony was unrefuted and was crucial to confirm Bratchett's identity as the individual who committed these crimes. There is no other reasonable explanation why Bratchett's fingerprint was on S.D.'s stolen wallet, and Bratchett offers none.

Likewise, even if the jury did not see the photograph on Bratchett's ID, it still would have heard testimony that police found his ID next to S.D.'s stolen belongings. Coupled with his fingerprint on S.D.'s wallet and the police officers' visual observation of a suspect matching Bratchett's description entering and fleeing S.D.'s apartment at the time of the crimes, no reasonable jury would have found Bratchett's alibi to police that he was at the casino credible. (R. 154:54–56.) Accordingly, Bratchett would have been convicted without S.D.'s photo array identification or the jury seeing his photo ID based on all of the other evidence of his guilt.

Because there was no reasonable probability that the jury would have reached different verdicts without hearing S.D.'s identification testimony or seeing Bratchett's photo ID, any error in admitting this testimony and evidence was harmless. Bratchett is not entitled to reversal based on the court's exercise of its discretion to admit this testimony and evidence.

II. Bratchett is not entitled to a new trial on the attempted third-degree sexual assault charge because his counsel was not ineffective when cross-examining S.D.

A. To show that counsel was ineffective, a defendant must prove that counsel's performance was deficient, with deference to counsel's strategic choices, and that those deficiencies prejudiced the defendant.

To establish ineffective assistance of counsel, a defendant must prove the familiar two-pronged test: both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland* 466 U.S. at 687. With respect to the "performance" prong of the test, a strong presumption exists that counsel acted properly within professional norms. *Id.* at 689–91. The defendant must demonstrate that his attorney made serious mistakes that were not justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *Id.* To show "prejudice," the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

"Counsel's decisions in choosing a trial strategy are to be given great deference." *State v. Balliette*, 2011 WI 79, ¶ 26, 336 Wis. 2d 358, 805 N.W.2d 334. A reviewing court can determine that defense counsel's performance was objectively reasonable, even if trial counsel offers no sound strategic reasons for decisions made. *See State v. Koller*, 2001 WI App 253, ¶ 53, 248 Wis. 2d 259, 635 N.W.2d 838. This Court will sustain counsel's strategic decisions as long as they were reasonable under the circumstances. *See Balliette*, 336 Wis. 2d 358, ¶ 26.

Because the defendant must show both deficient performance and prejudice to establish ineffective assistance, this Court may "avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). Similarly, reviewing courts need not consider the prejudice prong if no deficient performance is shown. *State v. Brewer*, 195 Wis. 2d 295, 300, 536 N.W.2d 406 (Ct. App. 1995).

B. Hailstock's focus on S.D.'s low level of certainty of her identification of Bratchett, rather than the precise words she used during the attempted sexual assault, was a reasonable strategy and not prejudicial.

Bratchett seeks a new trial on the attempted third-degree sexual assault charge, arguing that Hailstock was deficient for not impeaching S.D. on a the exact phrase Bratchett said during the attempted sexual assault: whether, as she testified, Bratchett said "I will fuck you" (R. 151:96), or whether, as described in the police report, he said, "don't fuck with me." (Bratchett's Br. 39–41.) Bratchett claims that a "[r]easonably competent counsel would have alerted the jury to this discrepancy" because S.D.'s statement in the police report "supported a reasonable doubt defense" and that not impeaching S.D. on the alleged discrepancy "undermines confidence in the verdict." (Bratchett's Br. 41–42.) Bratchett's arguments are meritless. His ineffective assistance claim that Hailstock did not sufficiently impeach S.D. related to the attempted third-degree sexual assault charge fails both prongs of the ineffective assistance analysis.

Hailstock's performance comported with his trial strategy and was not deficient. Consistent with his strategy that Bratchett was not involved in these crimes, Hailstock focused his impeachment of S.D. on her level of her certainty of her identification of Bratchett as her assailant, and not on what Bratchett said to her during the attempted third-degree

sexual assault. Hailstock testified that he did not impeach S.D.'s trial testimony that Bratchett told her during the attempted sexual assault, "I will fuck you" with the police report both because he was unsure whether the police report was accurate and because he focused his cross-examination on challenging S.D.'s identification of Bratchett as her assailant who was "aroused" or "expose[d] himself to [her]." (R. 160:9–10.) Hailstock's explanation of his strategy is imminently reasonable and subject to deference. Indisputably, both versions of what Bratchett said to S.D. during the attempted assault contain the profanity that relates to sexual contact. Impeaching S.D., a victim of attempted sexual assault, on the exact wording of Bratchett's threats would have had little effect on the jury's perception of the credibility of S.D.'s testimony. Further, Hailstock's decision made sense because if Bratchett wasn't present (as was the defense theory), then the precise wording of what the assailant said would not have mattered. Hailstock also ran the risk of upsetting the jury by quibbling over phrases used during an attempted sexual assault.

The circuit court agreed that Hailstock's decision not to impeach S.D. with her prior statement related to the attempted sexual assault charge was based on legitimate trial strategy that Bratchett was not the person who committed these crimes and to "attack the sufficiency of the identification" of Bratchett by S.D. (R. 134:5, A-App. 118.) Hailstock's strategy not to impeach S.D. on "what exactly was said or how it was said" by Bratchett was consistent with that strategy and was not deficient performance. (R. 134:5, A-App.118.) The circuit court was correct. Hailstock's strategy to focus his cross-examination on discrediting S.D.'s identification of Bratchett, and not on Bratchett's threats during the attempted assault, was not deficient.

Even if Hailstock performed deficiently, Bratchett was not prejudiced. Bratchett argues that Hailstock's decision not

to impeach S.D. with her statement in the police report "undermines confidence in the verdict for the sexual assault charge." (Bratchett's Br. 42–43.) But Bratchett fails to show that the jury would not have convicted him of attempted sexual assault if Hailstock had impeached S.D. in this manner. Bratchett would have been convicted based on all the evidence; in particular, S.D.'s compelling testimony about the attempted assault, describing that Bratchett forced her onto the bed, yelled "[t]ake off your clothes," and tugged on her shorts while S.D. resisted and told him "you're not doing that. I'm not doing that." (R. 151:93–96.) The court concluded that her testimony "could have been enough for a reasonable juror to believe that there was intent to commit a sexual assault." (R. 134:5, A-App. 118.)

In sum, Hailstock's trial strategy and decision not to impeach S.D. at trial with her statement contained in the police report was not deficient. Even if Hailstock had impeached S.D. in this manner, it would not have changed the outcome of the jury's guilty verdict based on the all the evidence. Bratchett is not entitled to a new trial on the attempted third-degree sexual assault charge.

III. Hailstock was not ineffective in cross-examining S.D. about her identification of Bratchett and for not further objecting to the State's closing rebuttal argument or requesting a mistrial.

A. The circuit court's determination that counsel employed a reasonable strategy is virtually unassailable on appeal.

To reiterate, in order to prove that Hailstock was ineffective as trial counsel, Bratchett must establish that his performance was deficient: that he "made errors so serious that counsel was not functioning as counsel guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The strong presumption that Hailstock acted within "professional

norms" and had a reasonable strategy is "virtually unassailable in an ineffective assistance of counsel analysis." *Id.* at 688; *State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620. To show prejudice, Bratchett must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" that is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

B. Hailstock's strategy to focus on S.D.'s level of certainty of her identification of Bratchett, rather than the police instructions related to the photo array, was sound and did not undermine confidence in the outcome.

Bratchett fails to show that Hailstock's trial strategy to focus his cross-examination of S.D. on her level of certainty of her identification of Bratchett, rather than cross-examine her on police instructions, was deficient performance. Bratchett argues that police telling S.D. to pick out the individual who "best fit" the suspect and police confirmation that she picked the right person were both "red flags" and that Hailstock's decision not to cross-examine S.D. on these issues but rather to focus on her level of confidence was "an unreasonable trial strategy." (Bratchett's Br. 43–44.) Bratchett's conclusory statement that Hailstock's strategy was unreasonable fails to meet his burden to show that this trial strategy, which is "virtually unassailable," was deficient performance. *Maloney*, 275 Wis. 2d 557, ¶ 23.

In its decision denying Bratchett's ineffective assistance claim, the court found that Hailstock's strategic choice "to focus on the 60-70% reliability" or "confidence level" of S.D. in her identification was "a legitimate strategy." (R. 134:2, A-App 115.) The court concluded that Hailstock's decision not to cross-examine S.D. on her testimony that police told her to pick the photo that was the "best fit" was

reasonable because this "line of questioning on that topic likely would have bogged down into an argument about semantics" and "left little impression on the jury"; moreover, the instruction to pick the "best fit" did not lead S.D. to choose "any particular photograph in the array." (R. 134:2–3, A-App. 115–16.) Hailstock's decision not to question S.D. about police "confirmation" of her identification of Bratchett also "made sense" because this "confirmation" happened "well after the photo array was conducted . . . and would have had no influence on S.D.'s choice of photograph." (R. 134:3, A-App. 116.)

Even if Hailstock's cross-examination of S.D. on her identification of Bratchett was deficient and he made "unprofessional errors," Bratchett has not shown that this undermines confidence in the verdict. Bratchett argues that he was prejudiced because "the strongest and most direct evidence of guilt was S.D.'s identification of Mr. Bratchett" and that "no other direct witnesses or physical evidence from the scene" supported his conviction. (Bratchett's Br. 44–45.) But contrary to Bratchett's assertion that there were no other witnesses or physical evidence of his guilt, there was a plethora of evidence identifying Bratchett, including police testimony about the suspects matching Bratchett and his brother's description entering and leaving S.D.'s apartment, S.D.'s stolen items with Bratchett's ID card found near the crime scene, and the critical and unrefuted evidence of his fingerprint on S.D.'s stolen wallet.

The circuit court was correct that "in light of the totality of the evidence," any alleged deficiencies or "omissions do not rise to the level of reasonable probability that the outcome would be different" because of all this "devastating" evidence identifying Bratchett. (R. 134:2–3, A-App. 115–16.) Bratchett failed to show that Hailstock performed deficiently when he cross-examined S.D. about the photo identification or that

Bratchett was prejudiced because the alleged deficiencies undermined confidence in the outcome.

C. Hailstock's strategic decision to neither repeat his objection to the State's hypothetical nor to request a mistrial was not deficient or prejudicial.

Bratchett's claim that Hailstock was ineffective for strategically deciding not to emphasize the prosecutor's hypothetical in his closing rebuttal argument by repeating his objection and asking for a mistrial fails for similar reasons. Again, Bratchett has not shown that Hailstock performed deficiently because his strategy was subject to deference and did not undermine confidence in the outcome of the trial.

Bratchett argues that Hailstock's "strategy was unreasonable" because a continued objection was "clearly meritorious," that Hailstock's explanation that continuing to object would have "drawn[] attention to the remark" was "unreasonable," that "reasonably competent counsel should not stand idly by while improper argument occurs," and that Hailstock should have requested a mistrial as a result of the prosecutor's comments about a hypothetical confession. (Bratchett's Br. 47–48.) Bratchett claims that the prosecutor's statement was "uniquely prejudicial, because it invited the jury to imagine the existence of powerful inculpatory evidence where none existed" and that if the court had granted a mistrial it would have created a "different result", thereby "undermin[ing] confidence in the ensuing verdict." (Bratchett's Br. 48–49.) Bratchett's arguments are unpersuasive.

Hailstock's strategy to not continue to object, after his objection was sustained and the prosecutor cured by clarifying his argument was hypothetical (R. 155:51), was not deficient performance for several reasons. First, Bratchett ignores the context of the challenged argument. The prosecutor argued

the hypothetical in response to Hailstock's closing argument attempting to undermine police testimony about the critical evidence of Bratchett's fingerprint on S.D.'s wallet by arguing that police did not also dust S.D.'s iPhone for fingerprints. (R. 155:45–46.) The prosecutor countered that this challenge to the "positive identification" of Bratchett's fingerprint was "a common defense theme" of questioning evidence, "like, oh, well, my client, he admitted to the crime in a Mirandized statement," to which Hailstock immediately objected. (R. 155:51.) Second, the prosecutor quickly cured his comment, even before the court sustained the objection, by clarifying that it was a hypothetical statement, and continued his illustration that "[h]ypothetically," if a defendant admitted to a crime, defense counsel would then argue that the confession was "not audio recorded," or was "not videotaped," or that there was no "written signed confession," asserting that "it never ends. It's always something more. You're missing this. You're missing that." (R. 155:51.) Third, contrary to what Bratchett argues, at no point did the prosecutor suggest that Bratchett had confessed; the prosecutor's line of argument was that of an analogy.

At the *Machner* hearing, Hailstock thoroughly explained why he did not repeat his objection to the prosecutor's remark or ask for a mistrial. After the court sustained his first objection, Hailstock did not continue to object to the prosecutor's hypothetical argument because "the more you object, the more the jury is drawn to those statements" and a continuing objection "draws attention" and "highlight[s]" the argument. (R. 160:19–22.) Hailstock cogently described that he did not "want to take the risk of it just being more and more imprinted into the jury." (R. 160:21–22.) Hailstock succinctly explained that he did not move for a mistrial because he "didn't think it was a mistrial." (R. 160:21–22.) The circuit court correctly concluded that Hailstock was not deficient because his explanation for not

continuing to object or request mistrial was "solidly based given the totality of the circumstances." (R. 134:4, A-App. 117.) Hailstock's strategy and explanation for not harping on his objection and highlighting the hypothetical confession is reasonable and "virtually unassailable." *Maloney*, 275 Wis. 2d 557, ¶ 23.

Moreover, Hailstock's strategy not to make a continued objection or request a mistrial did not prejudice Bratchett. The court determined that these were not "errors that resulted in a lack of confidence in the outcome" because "the prosecutor quickly corrected his statement to indicate that he was speaking hypothetically" before the objection was sustained and his argument "was part of a string of hypotheticals to demonstrate that defense strategies often focus on what was not done in the investigation of crimes." (R. 134:4, A-App. 117.) The court concluded that Bratchett was not prejudiced because "a reasonable juror would have understood" that Bratchett did not confess to the crimes, particularly because there was evidence presented at trial that in a Mirandized statement, Bratchett had denied his involvement. (R. 134:4, A-App. 117.)

The circuit court was correct. Bratchett failed to prove that Hailstock performed deficiently or that the outcome of the trial would have been different had Hailstock continued to object or asked for a mistrial. Bratchett is not entitled to a new trial.

IV. There was no cumulative prejudice to Bratchett that entitled him to a new trial.

A. Cumulative prejudice only results where a defendant proves actual deficiencies by counsel.

This Court may consider whether the aggregate effects of counsel's deficiencies establish cumulative prejudice. *State*

v. Thiel, 2003 WI 111, ¶ 60, 264 Wis. 2d 571, 665 N.W.2d 305. That said, "a convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial." *Id.* ¶ 61. "[I]n most cases errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." *Id.* In addition, only actual deficient errors are "included in the calculus for prejudice." *Id.*

B. None of Bratchett's claims that Bratchett was deficient had merit and, if even he made errors, they did not undermine confidence in the outcome.

As shown, Attorney Hailstock made no actual deficient errors. There is therefore nothing to be included in the calculus for prejudice and adding the errors together yields nothing. "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

Even assuming that everything on Bratchett's list of Hailstock's mistakes was a constitutionally deficient error, he still cannot not show prejudice. Nothing that Bratchett has presented has undermined the plethora of evidence presented at trial. Bratchett still would have been convicted based on all the testimony and evidence linking Bratchett to the crime, including the unrefuted evidence that his fingerprint was on S.D.'s stolen wallet.

After noting that counsel's representation did not need to be "perfect" and that, in order to be ineffective, any "errors must not only have no valid explanation, they must also be sufficient to undermine confidence in the outcome," the court held that there were no "cumulative errors" or deficiencies that gave rise to "a reasonable probability that the result would have been different." (R. 134:5. A-App. 118.) The circuit court was correct. The trial evidence supporting Bratchett's

guilt, including all the testimony identifying Bratchett and his fingerprint on S.D.'s wallet, was "devastating" and "powerful." (R. 134:3, A-App. 116.) None of Hailstock's purported "errors, singularly or cumulatively" resulted in prejudice to Bratchett. (R. 134:5, A-App. 118.) Thus, there was no cumulative prejudice entitling Bratchett to a new trial.

V. The State presented sufficient evidence for the jury to convict Bratchett of attempted third-degree sexual assault.

A. Sufficient evidence supports the conviction if the jury reasonably found that Bratchett intended to assault S.D. and would have if she had not resisted.

For a criminal conviction to satisfy due process, the State must prove each essential element of a charged crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 324 (1979); *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). On review of a "sufficiency" challenge, the "appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 507. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt." *Id.*

Although the trier of fact must be convinced that the evidence is sufficiently strong to exclude every reasonable hypothesis of the defendant's innocence, this is *not* the test on appeal. *Poellinger*, 153 Wis. 2d at 503. This Court "need not concern itself in any way with evidence which might support other theories of the crime," but "need only decide whether the

theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." *Id.* at 507–08.

In this case, the jury instructions the parties agreed to set forth the elements required for finding Bratchett guilty of attempted third-degree sexual assault as defined in Wis. Stat. §§ 939.32 and 940.225(3). (R. 155:19.) In order to convict Bratchett of this crime, the jury had to find beyond the reasonable doubt that Bratchett "intended to commit the crime of third degree sexual assault" of S.D., that he took actions towards the commission of that crime demonstrating "unequivocally" that he "had formed that intent," and would have committed the crime "except for the intervention of another person or some other extraneous factor." (R. 155:19–21.) *See also* Wis. Stat. §§ 939.32 and 940.225(3).

The court instructed the jury on the first element—that "Bratchett intended to commit the crime of third degree sexual assault" by "any intrusion, however slight, of any part of a person's body or any object into the genital or anal opening of another" with S.D. without her consent. (R. 155:20.) Third-degree sexual assault is statutorily defined as "sexual intercourse" or "sexual contact" "with a person without the consent of that person." Wis. Stat. § 940.224(3)(a)-(b). "Sexual contact" includes intentional touching of "intimate parts" for "the purpose of sexually degrading" or "sexually humiliating" the victim or "sexually arousing or gratifying the defendant." Wis. Stat. §940.225(5)(b). The court instructed the jury that "'[d]id not consent' means that [S.D.] did not freely agree to have sexual intercourse with Mr. Bratchett," considering "what she said and did, along with all other facts and circumstances." (R. 155:20.)

The court further instructed the jury that "[t]he second element of attempted third degree sexual assault require[d] that Mr. Bratchett did acts towards the commission of the crime... which demonstrate unequivocally, under all of the

circumstances, that Mr. Bratchett intended to and would have committed the crime of third degree sexual assault except for the intervention of another person" or "some other extraneous factor." (R. 155:21.) The court told the jury that "'[u]nequivocally' means that no other . . . conclusion can reasonably and fairly be drawn from Mr. Bratchett's acts under the circumstances. 'Another person' means anyone but Mr. Bratchett and may include the intended victim. An 'extraneous factor' is something outside the knowledge of Mr. Bratchett or outside Mr. Bratchett's control." (R. 155:21); *See* Wis. Stat. § 939.32. To determine intent, the court told the jury that it "cannot look into" Bratchett's mind, but must find it, if it all, "from Mr. Bratchett's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent." (R. 155:21.)

B. The evidence supported the guilty verdict for attempted third-degree sexual assault because the jury reasonably inferred that Bratchett intended to sexually assault S.D. and would have but for her resistance.

S.D.'s powerful testimony at trial provided sufficient evidence for the jury to convict Bratchett of attempted third-degree sexual assault. Her testimony supporting the first element—that Bratchett intended to assault her using a deadly weapon—included that Bratchett threatened to shoot her multiple times with what she believed was a gun held to her head (R. 151:79–86.) She vividly described her terror when Bratchett forcefully led her into her bedroom, ordered her to sit on the bed, accused her of lying, yelled at her while standing in front of her "so close" that she felt she needed to put her hands up in front of her chest "to protect" herself, and that she believed that he intended "to rape" her and "have sex without [her] consent." (R. 151:89–94; 96.)

S.D.'s testimony also supports the second element: that Bratchett took acts towards committing the assault,

demonstrating that he would have committed the crime but for S.D.'s intervention. Bratchett forced S.D. to move back onto her bed, so her "feet were no longer touching the floor," presumably to prevent her from escaping, and ordered her to "[t]ake off [her] clothes." (R. 151:89–94.) S.D. described that while she was trapped on her bed, Bratchett accused her of lying, threatened her with the profanity referring to sexual contact or intercourse, grabbed her shorts in his fist and tugged them as she clutched them in her hand, and did not pull them down only because she fought back, "not letting him" take off her shorts. (R. 151:94–96.) Based on Bratchett's actions and words, S.D. thought he intended to force her to "have sex without [her] consent," but she resisted and yelled at him that he was not "doing that" to her and she was not "doing that." (R. 151:96.)

All of this evidence supports the jury's reasonable conclusion that Bratchett intended to sexually assault S.D. and took acts towards committing that crime. Although Bratchett left her apartment without completing the sexual assault, the jury reasonably concluded that Bratchett intended to sexually assault S.D. through sexual contact to humiliate or degrade her, and would have but for the intervention of S.D.

Bratchett argues that the State did not "unequivocally" prove that Bratchett's actions "showed an intent to sexually assault S.D.," because "the trial testimony is inherently ambiguous" and, although "the robber did threaten to 'fuck' her," it was "clear that he was threatening to do so if she was 'lying' to him or if she called the police after he left." (Bratchett's Br. 51.) Despite Bratchett's assertion that it was "clear" that Bratchett's threats were related to his accusations that S.D. was lying or that she would call the police, Bratchett's own interpretation of the events are inferences the jury *could* have drawn from the testimony, but did not. The inference that the profane threats did not relate to

Bratchett's intent to sexually assault S.D. is immaterial to the jury's reasonable conclusion that S.D.'s testimony established Bratchett's intent to sexually assault her. Moreover, her testimony supports the jury's finding that if she had not resisted, he would have removed her shorts and carried out the threats to force her to have sexual intercourse or contact without her consent.

The jury drew "the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *Poellinger,* 153 Wis. 2d at 507. On appeal, the test is not whether the jury could have drawn another inference or even whether the jury drew the best inference; this Court will uphold a jury's verdict unless it drew unreasonable inferences or "the evidence on which that inference is based is incredible as a matter of law." *Id.* Here, the jury's inference that Bratchett's words and actions supported a finding that he intended to sexually assault S.D. were neither inappropriate nor relied on incredible evidence.

Bratchett also argues that the robber "never exposed himself or otherwise made an affirmative attempt at sexual intercourse with S.D." and that the "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." (Bratchett's Br. 51–52.) Bratchett's argument misses the point. The State charged Bratchett with attempted sexual assault, which does not require that the actual assault is imminent or completed to establish guilt. *See* Wis. Stat. § 939.32(3). Moreover, whether Bratchett "exposed himself" or made an "affirmative attempt at sexual intercourse" is immaterial. The statute does not require that Bratchett intended to have sexual intercourse with S.D. for his own arousal or gratification, but rather that the sexual contact could be for the purpose of sexually degrading or humiliating S.D. *See* Wis. Stat. § 940.225(5)(b)1.

Here, the jury reasonably concluded that Bratchett's actions and words demonstrated that he intended to rape S.D. to humiliate her and frighten her into submission. Bratchett's conduct as testified to by S.D. supports the jury's reasonable conclusion that he was guilty of attempted third-degree sexual assault, which was thwarted by S.D.'s resistance. This Court should affirm.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court affirm the order denying Bratchett's postconviction motion for a new trial and the judgment of conviction.

Dated this 21st day of December 2020.

Respectfully submitted,

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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 10951 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

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

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 21st day of December 2020.

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