COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP911-CR **Cir. Ct. No. 2010CF594**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN M. LATTIMORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed*.

Before Lundsten, Sherman, and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. John Lattimore was convicted on one count of second-degree sexual assault with the use of force, contrary to WIS. STAT. § 940.225(2)(a) (2011-12), and one count of false imprisonment, contrary to WIS.

STAT. § 940.30, both relating to one incident involving victim S.M.[1] Lattimore appeals, in five respects, the judgment of conviction and the order denying his postconviction motions. First, Lattimore argues that the circuit court erroneously admitted other acts evidence of an alleged second and separate sexual assault against M.H., and that the allegations of the two sexual assaults were improperly joined. Second, Lattimore argues that the circuit court erroneously excluded the text of a Facebook message that was sent to Lattimore by S.M.'s brother after the alleged assault against S.M. Third, Lattimore argues that the circuit court erroneously allowed evidence of changes in S.M.'s demeanor after the alleged assault. Fourth, Lattimore argues that his trial counsel was ineffective for failing to sufficiently object to evidence of changes in S.M.'s demeanor and for failing to introduce evidence that S.M. lied to the nurse examiner about whether the alleged assault was her first sexual encounter. Fifth, Lattimore argues that these errors resulted in the real controversy not being tried, and therefore entitle him to a new trial in the interest of justice. We reject all of Lattimore's arguments and affirm.

DISCUSSION

¶2 In the sections that follow, we address each of the five issues raised by Lattimore in turn, beginning each section with a review of the facts relevant to that issue, then stating the appropriate standard of review and governing law, and concluding with the application of the law to the facts.

[1] All references to the Wisconsin Statutes are to the 2011-12 version. We use the current version of the statutes for ease of reference. Lattimore does not contend that there have been any relevant changes in the statutes since the times his crimes were committed.

1. Joinder of Counts as to S.M. and M.H.

¶3 The State filed a complaint charging Lattimore with one count of second-degree sexual assault with the use of force against S.M. and one count of false imprisonment, relating to an incident that took place in Lattimore's college dormitory room on September 18, 2010. Both Lattimore and S.M. were students at the University of Wisconsin-La Crosse. The State subsequently filed an amended complaint adding a third count of third-degree sexual assault against M.H., also a student at UW-La Crosse, relating to an incident that took place in Lattimore's dormitory room on October 18, 2010. Lattimore moved to sever the M.H. count from the S.M. counts, arguing that they were improperly joined. The circuit court granted Lattimore's motion, finding that the evidence as to M.H. would not be admissible as other acts evidence, because it was offered for no acceptable purpose and any probative value was outweighed by prejudice.

¶4 After the M.H. count was severed from the S.M. counts, the State filed a motion for admission of other acts evidence relating to M.H. to show motive, purpose, and context.[2] The circuit court, noting the "specificity of the acts set forth in the other acts motion" as compared to the amended complaint, found that the other acts evidence relating to M.H. would be presented for an acceptable purpose to try to show Lattimore's motive, namely "to try to achieve these conquests," as well as to show opportunity, intent, plan, absence of mistake, and context. The court granted the State's motion as to the M.H. evidence.

[2] The State moved to admit other acts evidence as to three other women in addition to M.H. The circuit court denied the motion as to the three other women, and that decision is not relevant to the issues on appeal.

¶5 The court denied Lattimore's motion to reconsider its admission of other acts evidence relating to M.H. The court again noted that the amended complaint contained "sketchy" facts that did not meet the standard for joinder, and that the other acts motion was more detailed and did meet the standard for admission of other acts evidence. The court reaffirmed its finding that the other acts evidence as to M.H. would be admitted for an acceptable purpose and was relevant "to the use of force overcoming the consent." After the court issued its decision finding the evidence as to M.H. admissible, the parties agreed that the count relating to M.H. would be tried jointly with the counts relating to S.M.

¶6 All three counts were tried to a jury. The jury found Lattimore guilty on the two counts as to S.M. and not guilty on the one count as to M.H.

¶7 On appeal, Lattimore argues in his brief-in-chief that the circuit court erred when it admitted the other acts evidence as to M.H., because: (1) the evidence as to the alleged assault of M.H. served no purpose other than to improperly show propensity to commit sexual assault; (2) the evidence as to M.H. was irrelevant to the charge of assault against S.M., because the facts were dissimilar and "whether one victim consented was irrelevant to the consent of another;" and (3) the admission of the evidence of the alleged assault of M.H. "was unduly prejudicial because it suggested a pattern of predatory behavior."

¶8 The State responds that the evidence as to M.H. was not admitted as other acts evidence because the count relating to M.H. was tried together with the counts relating to S.M., that Lattimore does not argue on appeal that the counts were improperly joined, and that therefore Lattimore has "abandoned his claim that the cases were not properly joined." Lattimore replies that his argument against the admission of other acts evidence should be construed as an argument

against joinder, because in this case "[t]he factual considerations and legal analysis are exactly the same." Lattimore notes that he had initially opposed joinder and then acquiesced in joinder only after the circuit court granted the State's other acts evidence motion, and that the State acknowledges he should not be found to have forfeited the issue as a result.

¶9 We need not resolve the parties' dispute over the proper framework for analysis. Although courts engage in distinct but overlapping analyses in evaluating joinder and admission of other acts evidence, erroneous decisions as to both joinder and admission of other acts evidence are subject to the same harmless error analysis, namely, whether there is no reasonable possibility that the error contributed to the defendant's conviction. *See* ***State v. Leach***, 124 Wis. 2d 648, 674, 370 N.W.2d 240 (1985) (misjoinder is harmless if "there is no reasonable possibility that the error contributed to the conviction"); ***State v. Sullivan***, 216 Wis. 2d 768, 773, 792, 576 N.W.2d 30 (1998) (if it was error to admit other acts evidence, the question is whether the error was harmless, and "[t]he test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction"). The application of the harmless error test to a circuit court's joinder decision "is acceptable and even desirable when harmlessness is demonstrated by overwhelming evidence of guilt or when the court is convinced for other reasons that the error did not influence the jury or had but very slight effect." ***Leach***, 124 Wis. 2d at 671-72 (internal quotations and quoted source omitted).

¶10 Assuming without deciding that Lattimore has properly preserved and argued the issue of improper joinder on appeal, and that the circuit court erred in joining the S.M. counts with the M.H. count for trial, we conclude that the error was nonetheless harmless, as follows.

¶11 Here, the central issue as to S.M. and M.H. at trial was consent, and there were no third parties present to testify as to consent. Based on the testimony at trial, the jury convicted Lattimore of sexual assault against S.M., and acquitted him of sexual assault against M.H. Therefore, the most reasonable inference is that the jury did not find M.H.'s testimony on the issue of consent to be credible. And, we do not see how the jury's not according M.H.'s testimony credibility on the issue of consent, would have influenced the jury's weighing of Lattimore's credibility on the issue of consent as to S.M., except perhaps to Lattimore's benefit.

¶12 Nevertheless, Lattimore argues that "[a]dding M.H.'s allegations about Lattimore's aggressive behavior ... culminating in an assault, almost certainly undercut Lattimore's credibility with the jury." To the contrary, to the extent that the jury did accord M.H.'s testimony any credibility as to Lattimore's behavior while with her, it is not apparent how M.H.'s testimony could have undercut Lattimore's credibility as to the charges involving S.M. M.H. testified that several times over the course of three days when Lattimore tried to have sexual intercourse with her and she refused, Lattimore stopped. That testimony would have bolstered, rather than undercut, Lattimore's credibility.

¶13 In sum, we are convinced that in this case, where culpability turned on consent and no third party was present to testify as to consent, and where the jury acquitted Lattimore of the charges involving M.H., M.H.'s testimony did not influence the jury adversely to Lattimore in its consideration of the charges involving S.M. Accordingly, we conclude that any error in joining the S.M. counts with the M.H. count for trial was harmless.

2. S.M.'s Brother's Facebook Message

¶14 As noted above, the alleged assault against S.M. took place in Lattimore's college dormitory room on September 18. After the alleged assault, S.M. returned to her dormitory and called her parents. On September 19, her father called the University of Wisconsin – La Crosse Police Department, and a department officer spoke with S.M. later that night. S.M. did not report the alleged assault at that time.

¶15 Also on September 19, S.M.'s brother sent Lattimore a Facebook message. S.M. testified that approximately one week later, S.M.'s parents told her that her brother had sent Lattimore a message through Facebook "saying that it was not consensual and that, you know, if you [Lattimore] try to contact [S.M.], that like the police would get involved." S.M. never saw the actual Facebook message. On October 22, S.M.'s friend, Amber, told S.M. that Lattimore had talked to Amber about the Facebook message, and that Lattimore had said that S.M.'s brother may be banned from the university campus and that Lattimore had spoken with an attorney. On October 27, S.M. reported the alleged sexual assault to the campus police.

¶16 Lattimore sought admission of the Facebook message that was sent by S.M.'s brother to Lattimore the day after the alleged assault, because the message "was a link in the chain of events that resulted in S.M.'s delayed reporting of the alleged assault." Specifically, Lattimore argued that the message was relevant to S.M.'s late reporting of the alleged assault to the police and to her motive to lie at that time, because S.M. did not immediately confirm to police that she was assaulted but instead reported the alleged assault almost six weeks later, just five days after learning from Amber that Lattimore may have gotten S.M.'s

brother banned from campus and may have retained an attorney. The court allowed counsel to ask witnesses, including S.M., about their knowledge of the message and of Lattimore hiring an attorney and getting S.M.'s brother banned from campus, and about whether S.M. retaliated by reporting the incident to the police. However, the circuit court ruled that the actual message could not be introduced at trial, because it was not relevant.

¶17 Lattimore renews his argument on appeal. Specifically, he argues that the actual Facebook message is relevant because

> it provided a reason for S.M. to be concerned that legal action would be taken against [her brother]. This, in turn, provided S.M. motive to falsely tell police Lattimore raped her, which she did five days after learning Lattimore was supposedly getting [her brother] banned from campus. Since S.M.'s motive to lie is clearly a fact "of consequence to the determination of the action," the Facebook [message] was relevant.

Lattimore argues that the exclusion of the Facebook message denied him his right to present his defense: (1) that, "out of shame and embarrassment," S.M. initially lied to her parents when she told them she had not consented, and (2) that S.M. only "spread the lie" to the police after she learned that Lattimore claimed to have gotten her brother banned from campus due to the Facebook message.

¶18 We review a circuit court's decision to admit or exclude evidence, including a court's determination of whether evidence is relevant, with deference, and we reverse only if there was an erroneous exercise of discretion. ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). As explained below, we conclude that the circuit court properly determined that the text of the Facebook message was not relevant.

¶19 The flaw in Lattimore's argument is that S.M. never saw the actual Facebook message, and Lattimore fails to explain how the actual language of the message could or did have any effect on S.M.'s conduct absent her having seen the message. On that basis alone, the actual message was not relevant. The actual contents of the message may have been relevant to how Lattimore reacted (as Amber related, by getting S.M.'s brother banned from campus and hiring an attorney), but the text of the message was not relevant to what S.M. did upon learning of Lattimore's reaction. It is the latter that Lattimore argued mattered at trial, and it is the latter that Lattimore was permitted to question S.M. about. S.M. testified as to what she was told concerning Lattimore's response to the Facebook message that her brother had sent Lattimore, and Lattimore could and did develop his retaliation and motivation-to-lie arguments based on S.M.'s understanding that Lattimore had gotten her brother banned from campus due to the Facebook message.

¶20 In other words, it was S.M.'s knowledge of Lattimore's response to the Facebook message, and not the message itself, that was the link in the retaliation or motivation-to-lie defense argued by Lattimore at trial. The court allowed counsel to question the witnesses, including S.M., as to what S.M. was told concerning Lattimore's response to the Facebook message, and it was up to the jury to determine whether her knowledge of Lattimore's response motivated her to report the alleged assault. The jury did not need to see the actual message, which S.M. never saw, to assess how S.M. acted after learning of Lattimore's response.

¶21 Nevertheless, Lattimore argues that the circuit court should have admitted the text of the Facebook message because S.M.'s mother, who did see the Facebook message, testified inaccurately as to its contents in such a way as to

downplay its threatening content. However, as explained above, the actual message is not relevant to Lattimore's defense, which was that S.M. was motivated to lie by what she had learned about Lattimore's *response* to the Facebook message. Because Lattimore fails to demonstrate that the actual Facebook message was relevant, we conclude that the circuit court properly exercised its discretion in excluding it.

3. Evidence Regarding Changes in S.M.'s Demeanor

¶22 At the trial, S.M. testified about her goals in school, and that since the alleged assault she missed school, was being treated for anxiety and depression, did not trust people, was never by herself and could not sleep by herself, and had night terrors consisting of a nightmare about the end of the assault with her saying, "no, John, stop" and crying hysterically. When asked to describe the night terrors, defense counsel objected based on relevance but the objection was overruled.

¶23 S.M.'s father testified that when he and his wife met S.M. after she called them, "She was a mess. Her hair was all over ... she looked like a victim ...." He testified that since the assault, she was lifeless, fearful, reserved, and untrustworthy of others, and that Lattimore took away her laughter. When S.M.'s father started to testify that she had helped little kids at school, defense counsel objected based on relevance, the objection was sustained, and the prosecutor asked no further questions.

¶24 Before the mother's testimony, defense counsel made an "anticipatory" objection and was instructed by the circuit court to object with the basis for the objection as the need arose. The court also stated that the mother's observations of changes in her daughter were relevant. S.M.'s mother testified

that after the alleged assault, S.M. seemed lifeless and traumatized, and that since the assault S.M. was more needy, wanted to sleep with her mother, and had bad dreams, shaking her head going, "no, no, no," and crying upon being woken up.

¶25 S.M.'s friend, who knew S.M. for fifteen to sixteen years, testified that, she's "[d]efinitely not" the same after this incident. "[S.M.] was the most independent person I ever met. She was very strong willed, she's very outgoing, and ... [a]fter this has happened, she hates being alone ... she will just go quiet. She's not herself anymore." S.M.'s friend also testified that when she slept over at S.M.'s house, S.M. was saying "no, no" in her sleep, started crying upon being woken up, and went to sleep with her mother. Defense counsel objected based on relevance, but the objection was overruled. When the prosecutor asked about S.M.'s reputation in school and in the community, defense counsel objected and the objection was sustained.

¶26 Lattimore argues on appeal that the circuit court erroneously exercised its discretion when it admitted testimony about changes in S.M.'s demeanor after the alleged assault, because the testimony was irrelevant and designed only to elicit sympathy for S.M.

¶27 To be relevant, evidence must "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. The circuit court found that evidence of changes in S.M.'s demeanor following the alleged assault was "directly relevant to the central issue in the case, consent." The court, relying on the definition of "[d]id not consent" in WIS JI—CRIMINAL 1208, Second Degree Sexual Assault, determined that "consent is viewed under the totality of the circumstances" and reasoned:

> Since there were no direct witnesses to the issue of consent, other than Lattimore and the victim, any extrinsic evidence on this issue is relevant and highly probative. Evidence of a significant change in the victim's demeanor—from "high spirited" and "fun loving" (JT1: 193) to "scared" and "untrustworthy [sic] of others" (JT1: 183)—would tend to support the victim's claim that she was raped and would undermine the defense theory that she merely regretted her decision to have consensual intercourse.
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> ….
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> ... Testimony regarding a victim's change in demeanor after an alleged assault is highly relevant, because the issue of consent must be determined, in part, upon the totality of the circumstances presented to the trier of fact. This demeanor evidence, if believed by the jury, corroborates her testimony that she suffered a traumatic event, just as would medical evidence of a physical injury, and therefore it is probative of the issue of consent.

¶28 Lattimore does not address the issue of consent. Instead, Lattimore argues generally that the evidence of S.M.'s changes in demeanor "did not make any facts of consequence more or less probable" based on this court's conclusion as to relevance in ***State v. Jacobs***, 2012 WI App 104, 344 Wis. 2d 142, 822 N.W.2d 885, and that, even if relevant, the evidence in that case "was unduly prejudicial and outweighed any possible probative value."

¶29 Our conclusion as to relevance in ***Jacobs*** does not help Lattimore. In ***Jacobs***, Jacobs was charged with homicide by use of a vehicle while operating with a prohibited blood alcohol concentration and with a detectable amount of a restricted controlled substance in his blood. ***Id.***, ¶11. The victim's mother, who was not present at the scene of the accident, testified at length as to the victim's childhood, employment, history of helping out on the family farm, and relationship with his wife, his high school sweetheart, whom he had married a month before his death. ***Id.***, ¶12. This court concluded that the mother's

testimony was not admissible, because it was not relevant to Jacobs' guilt, in that the testimony about the victim's life did not make more or less probable the facts needed to prove that Jacobs killed the victim by use of a vehicle when operating while impaired. ***Id.***, ¶26.

¶30 In this case, in contrast, evidence of significant changes in S.M.'s demeanor after the alleged assault did make more or less probable the central fact needed to convict Lattimore of sexual assault—whether S.M. consented to sexual intercourse with Lattimore. As already noted, the jury's finding as to that fact, consent, depended on the relative credibility of S.M. and Lattimore; and in that context, evidence that there were identifiable, fundamental changes in S.M.'s demeanor immediately following the alleged assault was probative of whether she was telling the truth on the issue of consent. Such basic changes in S.M.'s demeanor made more probable the fact that she did not consent, but was assaulted. In sum, evidence of such identifiable, fundamental changes in S.M.'s demeanor immediately after the alleged assault was highly probative of whether S.M. was telling the truth on the issue of consent.[3]

¶31 Lattimore argues that, even if evidence of changes in S.M.'s demeanor was relevant, "it should not have been admissible due to undue prejudice and improperly playing on jury sympathy." Under WIS. STAT. § 904.03, relevant evidence "may be excluded if its probative value is substantially

[3] Lattimore argues that even if evidence of significant changes in S.M.'s demeanor was relevant, specific bits of testimony "about S.M.'s 'contagious laughter,' evidence that S.M. was away from home for the first time, or that S.M. intended to be an adolescent physical therapist ... [were] flatly irrelevant." To the contrary, these snippets of information about S.M. were included within the relatively brief descriptions by S.M., her parents, and her friend of how she changed before and after the alleged assault, and helped show the context for and nature of those changes.

outweighed by the danger of unfair prejudice." Lattimore bases his argument on the proposition that the probative value of the evidence "is extremely low." As we have seen, the probative value of the evidence as to the key issue for trial, consent, was extremely high. The circuit court acknowledged this high probative value. The court also acknowledged that, while the evidence regarding changes in S.M.'s demeanor may have made her more sympathetic, the evidence was limited in scope and tone.

¶32 "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Sullivan***, 216 Wis. 2d at 780-81. Here, the court reviewed the relevant facts and provided a reasoned explanation for why the probative value of the demeanor evidence was not substantially outweighed by the danger of unfair prejudice. Lattimore's arguments to the contrary do not persuade us that the circuit court erroneously exercised its discretion in admitting the evidence of changes in S.M.'s demeanor after the alleged assault.

4. Ineffectiveness of Counsel

¶33 Lattimore claims that his trial counsel was ineffective in two respects: (1) by failing sufficiently to object to evidence of changes in S.M.'s demeanor; and (2) by failing to present evidence that S.M. lied to the nurse examiner about whether she had previous consensual sexual encounters. The facts relevant to Lattimore's first claim were stated in the preceding section; the facts relevant to Lattimore's second claim are as follows.

¶34 The day after the alleged assault, S.M. was examined by a Sexual Assault Nurse Examiner (SANE nurse). S.M.'s mother was present during the

examination. According to the SANE report completed by the nurse, S.M. stated that the incident with Lattimore was her first sexual experience, and that she had had no consensual sexual intercourse in the last 120 hours. When S.M. reported to the police that Lattimore had sexually assaulted her, she told the police that it was not her first sexual encounter. In fact, S.M. had consensual sexual intercourse with a young man she was dating in high school on one summer night in 2008.

¶35 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation was deficient and that the deficiency prejudiced him. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. However, we review de novo whether counsel's performance was deficient or prejudicial. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶36 To prove deficient performance, Lattimore must show that, under all of the circumstances, counsel's specific acts or omissions fell "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). We review counsel's strategic decisions with great deference, because a strong presumption exists that counsel was reasonable in his or her performance. ***Id.*** at 689.

¶37 To prove prejudice, Lattimore must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶38 If we conclude that Lattimore has not proved one prong, we need not address the other. ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325.

¶39 As noted above, Lattimore first claims that his trial counsel was ineffective for not sufficiently objecting to evidence regarding changes in S.M.'s demeanor after the alleged assault. As to this evidence, Lattimore notes, and the record confirms, that counsel objected during the State's opening argument and was overruled; objected during S.M.'s testimony and was overruled; objected during S.M.'s father's testimony and was sustained; expressed concerns about testimony relating to changes in S.M.'s demeanor during a sidebar before S.M.'s mother's testimony; objected during S.M.'s friend's testimony and was both overruled and sustained. The circuit court found that counsel did not perform deficiently, because counsel "made it clear to the Court that he objected to the demeanor evidence in its entirety;" and that as a matter of strategy counsel reasonably did not more frequently object "in fear of alienating the jury." Lattimore does not persuade us that the circuit court's characterization is incorrect, and we affirm the circuit court's conclusion that Lattimore's trial counsel did not perform deficiently on that basis.

¶40 In addition, we have already concluded that the evidence regarding S.M.'s changes in demeanor was relevant and admissible, and therefore, had trial counsel objected to such evidence more "sufficiently," the circuit court would have properly overruled such objections. Trial counsel does not perform deficiently by failing to make a losing argument. ***State v. Jacobsen***, 2014 WI App 13, ¶49, 352 Wis. 2d 409, 842 N.W.2d 365 (WI App 2013).

¶41 Lattimore also claims that his trial counsel was ineffective by failing to present evidence that S.M. lied to the SANE nurse, in her mother's presence, when she said that the incident with Lattimore was her first sexual experience. Lattimore argues that evidence of this lie would have undermined S.M.'s credibility and supported S.M.'s motive to lie "out of shame and embarrassment." Lattimore asserts that the defense theory at trial was that S.M. first lied to her parents that she had been assaulted because she was ashamed, and "that this little lie snowballed out of control ... into a lie she could not take back." Lattimore argues that this evidence would have buttressed his defense by showing that "S.M. lied to the SANE nurse and her mother about her prior consensual sex, just like she lied to the SANE nurse and her mother about her consensual sex with Lattimore."

¶42 Lattimore acknowledges that evidence of S.M.'s prior sexual conduct is barred by Wisconsin's rape shield law, WIS. STAT. § 972.11(2), and does not meet the constitutionally based exception to that bar set out in ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990). Nevertheless, Lattimore argues that his trial counsel should have argued for a constitutionally-based exception in reliance on two United States Supreme Court cases decided before ***Pulizzano***.

¶43 Lattimore's trial counsel testified at the ***Machner***[4] hearing that he was familiar with the constitutionally-based exception, but that he did not believe that the criteria for the exception would be met. We note that while evidence of S.M.'s past sexual conduct is barred by the rape shield statute, evidence of her

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

lying to the SANE nurse about her past sexual conduct is not. On that topic, Lattimore's trial counsel testified that he would have "lost credibility in front of the jury trying to make a strong parallel between accusing somebody of raping her almost immediately after a sexual encounter and simply not disclosing the sexual encounter that happened a long time ago." The circuit court found that,

> counsel made the strategic decision to not alienate the jury by trying to make a strained parallel between not disclosing a prior sexual encounter to the SANE nurse and accusing Lattimore of rape immediately after the incident.... Lattimore's trial counsel considered impeaching the victim with the prior inconsistent statement but determined that it was not necessary for the defense and could have instead been potentially harmful to the defense by alienating the jury—if it was even admissible.

¶44 The circuit court concluded that "counsel's strategic decision was objectively very reasonable," and we agree. While S.M. lied to the extent that she engaged once in sexual intercourse while in high school, a substantial time before the incident in this case, pursuing that line of questioning carried the danger of emphasizing that S.M. was embarrassed to let her mother know about that one consensual sexual encounter, and that she was sexually inexperienced. It was objectively reasonable for trial counsel to conclude that this information would not have benefitted Lattimore. Presented with the evidence of the prior sexual experience and S.M. initially lying about that, the jury might believe that S.M. had a very limited sexual experience and was embarrassed about that experience to the point where she did not tell her parents about it and lied about it to the nurse while in her mother's presence, but told the truth to the police officer. The evidence would highlight that S.M. was sexually very inexperienced. The risks attendant to attempting to portray S.M. as a liar on this topic persuade us that it was a reasonable trial strategy to stay away from the topic.

¶45 Moreover, Lattimore's defense theory that S.M. lied from the start about the incident with Lattimore being non-consensual does not make sense. Had S.M. wanted to hide her consensual sexual activity from her parents "out of shame and embarrassment," she would not have told them, or the police, about the sexual contact in this case at all. They would not have known had she not told them.

¶46 In sum, we conclude that Lattimore's trial counsel made a reasonable strategic decision not to try to present evidence that S.M. lied to the SANE nurse, in her mother's presence, by not disclosing to the nurse that she had a consensual sexual encounter one night more than two years prior.

5. New Trial in Interest of Justice

¶47 Lattimore argues that he is entitled to a new trial because all of the errors asserted above prevented the jury from hearing crucial evidence as to the text of the Facebook message and S.M.'s lie to the SANE nurse in support of the defense, and because the jury heard irrelevant and prejudicial other acts and demeanor evidence. For the reasons stated above, we have rejected Lattimore's assertions as to each of these errors, and we therefore decline to exercise our discretionary authority to grant Lattimore a new trial in the interest of justice. *See* ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App 1989) (basing a request for a new trial "with arguments that have already been rejected adds nothing; '[z]ero plus zero equals zero'" (quoted source omitted)).

CONCLUSION

¶48 For the reasons stated above, we reject all of Lattimore's arguments and affirm the judgment of conviction.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.