**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 27, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP478-CR** **Cir. Ct. No. 2011CF977**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TERRENCE L. THOMAS,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Terrence Thomas appeals a judgment convicting him of repeated sexual assault of the same child and an order denying postconviction relief. Thomas argues his trial attorney was ineffective by failing to move to suppress DNA evidence obtained from warrantless swabs of Thomas's

genitals. He asserts the DNA evidence should have been suppressed because the genital swabs did not fall within any recognized exception to the warrant requirement. He also argues that, even if a warrant was not required, the swabs were nevertheless unreasonable because there was no clear indication they would produce evidence that he sexually assaulted the victim, and because they were not performed by a medical professional. Alternatively, Thomas argues the erroneous admission of the DNA evidence entitles him to a new trial in the interest of justice.

¶2 We conclude Thomas's trial attorney was not ineffective by failing to move to suppress the DNA evidence because any such motion would have been properly denied. Thomas voluntarily consented to the genital swabs, and it was therefore unnecessary for investigators to obtain a warrant. Moreover, the genital swabs were reasonable because there was a clear indication they would produce evidence that Thomas sexually assaulted the victim, and failure to have the swabs performed by a medical professional did not render them unreasonable. Finally, because the DNA evidence was properly admitted, Thomas is not entitled to a new trial in the interest of justice. We therefore affirm.

## BACKGROUND

¶3 On August 29, 2011, at approximately 7:00 p.m., police responded to a "large verbal disturbance" at a residence on Cherry Street in Green Bay. When police arrived at the residence, a woman reported that Thomas had sexually assaulted her twelve-year-old daughter. The victim gave a statement to police and went to the hospital for a sexual assault examination. In her statement, the victim indicated Thomas had penis-to-vagina intercourse with her sometime between 12:00 p.m. and 1:00 p.m. that day. The victim also reported that Thomas had

sexually assaulted her on three prior occasions during the months of July and August 2011.

¶4 Thomas was transported to the Green Bay Police Department. At approximately 9 p.m., Green Bay police detective David Graf met with Thomas in an interview room. Graf was aware that Thomas was suspected of sexually assaulting the victim. Because of the nature of the allegations, Graf decided to seek DNA evidence from Thomas by conducting buccal and genital swabs.

¶5 Graf's interview with Thomas was recorded and later transcribed. At the beginning of the interview, Graf stated that, because Thomas was accused of committing a sexual act, "[w]e're going to ask that you provide us with a sample of your DNA." Graf confirmed that Thomas understood the term DNA, and he then explained that he wanted to take a buccal swab from the inside of Thomas's cheek, as well as a penile swab, which "essentially is just the swabbing with a cotton swab of your genital areas." Graf further explained the DNA samples would help police determine "if, really, there was any contact or not." He stated, "[I]f [the victim's] DNA's not there, then it's possible that there was no contact. If her DNA is there, then it's possible that there was contact."

¶6 Graf then presented Thomas with a consent form for the buccal swab, and the following exchange took place:

> Graf: So I have a consent-to-obtain-DNA-sample form here. Is this something you're willing to help us out with as part of the investigation then?
>
> Thomas: I mean, what if I refuse to do it? Then what?
>
> Graf: Well, we're going to do the penile swab because of the allegations and also the fact that we could lose that evidence quickly; and so we're going to do that. And then I could obtain a search warrant to obtain your DNA, if I choose to do that.

> Thomas: Oh, okay; but if I give it to y'all willing, I mean, then what?
>
> Graf: Then we have it, and you cooperated fully, and the district attorney's office knows that you cooperated fully and that you have nothing to hide.

¶7 Thomas subsequently stated, "So you're saying that if I sign that, that gives y'all consent to give me a swab and swab my genital area." Graf clarified that the form only pertained to the buccal swab, but he was "explaining the—the penile swab also."[1] Thomas then asked, "And you said that's something y'all need me to do; but if I do it, then y'all will know I cooperated with y'all; but then if I don't do it, that's basically gonna make me look guilty?" Graf responded, "Well … I can't say either way. I'm not here to judge you; but it would certainly benefit you, I would think, personally, that you cooperated. But I'm not making decisions for you. I'm just telling you what's going on." Graf then explained that the swabs would take only "minutes," but the evidence would have to be sent to a lab for testing. Thomas responded, "So, basically, it's going to be a while. I'll do it."

¶8 Graf then began filling out the consent form for the buccal swab. As he was doing so, Thomas asked, "So, basically, when y'all do this, does this mean I'm guilty or anything?" Graf responded:

> No. Absolutely not. This says that you consent that a buccal swab be obtained by me, Detective Graf, for the Green Bay Police Department and that all those samples be analyzed by any authorized representative of a Wisconsin Crime lab or any (inaudible) laboratory deemed necessary and you've had the procedure explained to you by me at the Green Bay Police Department and that you're providing a

[1] At the postconviction hearing, Graf explained the Green Bay Police Department did not have a standard consent form for genital swabs as of August 29, 2011.

> sample freely and voluntarily. It doesn't say anything about admission, guilt, or evidence or anything. It's just saying, "Yeah. Go ahead."

¶9 Thomas then asked, "[B]ut even if I did do this, and say it did come back, that's still not going to prove me guilty 'cause I gave y'all consent to the evidence from me, right?" Graf replied that, if the tests did not find any of the victim's DNA on Thomas, "that would … lean more towards that, you know, potentially nothing happened." Graf explained, "DNA is not a, you know—it's going to say 'Yes,' or it's going to say 'No.' It's not going to say if that really happened or not. Okay? It's just a tool that we investigators use." Thomas again stated, "So it's not just saying I'm guilty." Graf replied that the DNA evidence would be used to "[i]nvestigate the crime … and hopefully determine if something really happened or not." Thomas then said, "Okay[,]" and signed the consent form.

¶10 Graf subsequently took Thomas into another room in the police station and performed a buccal swab, two penile swabs, and two scrotal swabs. Testing of the penile and scrotal swabs revealed a mixture of DNA from two or more individuals, including at least one male contributor. For three of those swabs, an analyst from the Wisconsin State Crime Laboratory opined it was "at least 18 quadrillion times more likely to observe this DNA mixture if it is a mixture of DNA from [Thomas] and [the victim] than if it is a mixture of DNA from [Thomas] and a random, unrelated individual."

¶11 Thomas was ultimately tried to a jury, which found him guilty of repeated sexual assault of the victim. He subsequently moved for postconviction relief, asserting his trial attorney was ineffective by failing to move to suppress the

DNA evidence obtained from the genital swabs. The circuit court denied Thomas's motion, following a ***Machner***[2] hearing, and this appeal follows.

## DISCUSSION

### I. Ineffective assistance

¶12 To prevail on an ineffective assistance of counsel claim, a defendant must show both that his or her attorney performed deficiently and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697. Here, we need not address prejudice because Thomas has failed to establish that his trial attorney performed deficiently.

¶13 To prove deficient performance, a defendant must identify specific acts or omissions by his or her attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** at 690. Thomas argues his trial attorney performed deficiently by failing to move to suppress the DNA evidence obtained from the warrantless genital swabs. However, "[i]t is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance." ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). For the reasons explained below, we conclude a motion to suppress the DNA evidence would have been properly denied, and, accordingly, Thomas's trial attorney did not perform deficiently by failing to file a suppression motion.

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

¶14 "The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures." ***State v. Artic***, 2010 WI 83, ¶28, 327 Wis. 2d 392, 786 N.W.2d 430. A warrantless search is per se unreasonable, unless one of several clearly delineated exceptions to the warrant requirement applies. ***Id.***, ¶29. The State argues, and the circuit court agreed, that the warrantless swabs of Thomas's genitals fell within two exceptions to the warrant requirement—the consent exception and the exigent circumstances exception. We conclude the consent exception applies, and we therefore decline to address exigent circumstances. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").[3]

¶15 "To determine if the consent exception is satisfied, we review, first, whether consent was given in fact by words, gestures, or conduct; and, second, whether the consent given was voluntary." ***Artic***, 327 Wis. 2d 392, ¶30. On appeal, Thomas concedes he consented to the genital swabs. He argues, however, that his consent was not voluntary because he "merely acquiesced to the search; he did not voluntarily agree to it."

¶16 The State bears the burden of proving, by clear and convincing evidence, that Thomas voluntarily consented to the genital swabs. *See* ***id.***, ¶32. Voluntariness of consent is a question of constitutional fact. ***State v. Phillips***, 218

[3] In addition, we observe that the genital swabs could fall under a third exception to the warrant requirement—the exception for searches incident to lawful arrests. *See* ***State v. Foster***, 2014 WI 131, ¶33, __Wis. 2d __, __ N.W.2d __. However, we choose not to address that exception because the parties failed to raise it in their appellate briefs, and because we agree with the State that the genital swabs were constitutional pursuant to the consent exception. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (we will not abandon our neutrality to develop arguments for the parties).

Wis. 2d 180, 195, 577 N.W.2d 794 (1998). As such, we accept the circuit court's findings of fact unless they are contrary to the great weight and clear preponderance of the evidence, but we independently apply the constitutional principles to those facts to determine whether Thomas's consent was voluntary. *See* ***id.***

¶17 We evaluate the voluntariness of a defendant's consent to a search based on "'the totality of all the surrounding circumstances.'" ***Artic***, 327 Wis. 2d 392, ¶32 (quoting ***Schneckloth v. Bustamonte***, 412 U.S. 218, 226 (1973)). To qualify as voluntary, the defendant's consent "must be 'an essentially free and unconstrained choice,' … not 'the product of duress or coercion, express or implied[.]'" ***Id.*** (quoting ***Schneckloth***, 412 U.S. at 227). Mere acquiescence to a claim of lawful authority is insufficient to establish that consent was voluntary. ***Id.*** The following nonexclusive factors are relevant to the voluntariness inquiry:

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent.

***Id.***, ¶33.

¶18 Thomas argues the second and sixth ***Artic*** factors weigh in favor of a conclusion that his consent to the genital swabs was not voluntary. Regarding the second factor, Thomas does not suggest that police physically intimidated him or punished him in any way. *See* ***id.*** However, he asserts Graf threatened him by

stating he would perform the genital swabs without Thomas's consent and by stating he "could obtain a search warrant … if [he chose] to do that." Thomas argues these statements "conveyed to Thomas [that Graf] had the lawful authority" to perform the swabs and that "refusal to consent to the search was futile."

¶19 We disagree for three reasons. First, a threat by police to obtain a search warrant does not render a defendant's consent to a search involuntary if "'the expressed intention to obtain a warrant is genuine … and not merely a pretext to induce submission.'" ***Id.***, ¶41 (quoting ***United States v. White***, 979 F.2d 539, 542 (7th Cir. 1992)). Thomas does not develop any argument on appeal that Graf's intent to obtain a warrant was not genuine, and the record is devoid of facts indicating that Graf's reference to obtaining a warrant was merely a pretext to induce submission.

¶20 Second, a threat to obtain a search warrant is "'likely not to affect the validity of consent if the police then had probable cause upon which a warrant could issue.'" ***Id.***, ¶42 n.7 (quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.2(c), 73-74 (4th ed. 2004)). At the time Graf interviewed Thomas, there was probable cause to obtain a warrant for the genital swabs. In particular, the victim had told police that Thomas engaged in penis-to-vagina intercourse with her between eight and nine hours earlier. Based on this information, there was a fair probability that swabs of Thomas's genitals would produce evidence of a crime. *See* ***State v. Carroll***, 2010 WI 8, ¶28, 322 Wis. 2d 299, 778 N.W.2d 1 (standard for probable cause to search is whether there is a fair probability evidence of a crime will be found in a particular place).

¶21 Third, while Thomas asserts Graf's statements conveyed the message that refusing to consent to the swabs was futile, the record shows that

after Graf made the statements, Thomas continued asking questions about the implications of his consent. For instance, Thomas asked, "[B]ut if I do it, then y'all will know I cooperated with y'all; but then if I don't do it, that's basically gonna make me look guilty?" This shows that, even after Graf made the statements about obtaining a warrant and performing the swabs without Thomas's consent, Thomas continued to believe he had a choice whether to consent to the swabs.

¶22 Regarding the sixth ***Artic*** factor, Thomas notes that Graf never informed him he could refuse to consent to the genital swabs. *See* ***Artic***, 327 Wis. 2d 392, ¶33. Failure to inform a defendant that he or she may refuse to consent to a search weighs against a conclusion that the defendant's consent was voluntary, but it does not necessarily render the defendant's consent involuntary. ***Id.***, ¶60. There is no requirement that police advise a defendant of the right to refuse consent, and the State is not required to demonstrate that the defendant was aware of that right in order to meet its burden to show voluntary consent. ***Id.*** Whether police advised a defendant that he or she could refuse to consent is simply one factor to be considered in assessing the totality of the circumstances. *See* ***id.***, ¶61.

¶23 Here, Graf's failure to inform Thomas he could refuse to consent to the genital swabs does weigh against a finding of voluntariness, but not particularly heavily. Even though Graf did not specifically inform Thomas he could refuse to consent, he and Thomas engaged in an extended discussion about the genital swabs. During that discussion, Thomas asked several questions about the implications of giving or refusing consent. As discussed above, this creates a reasonable inference that Thomas was aware refusing to consent was an option, despite Graf's failure to advise him of that right. Moreover, the circuit court

specifically found that Thomas's consent was motivated by "self-service or self-preservation." The court explained, "I think Mr. Thomas thought if I give this consent, I might get a better deal, it may exonerate me, it may give me something to work with." This finding, which is not against the great weight and clear preponderance of the evidence, further suggests Thomas was aware he could refuse to consent.

¶24 Thomas does not discuss any of the other ***Artic*** factors in his appellate briefs. However, based on our review of the record and the totality of the surrounding circumstances, we observe none of these factors suggests Thomas's consent to the genital swabs was involuntary. For instance, nothing in the record suggests that Graf used deception, trickery, or misrepresentation to persuade Thomas to consent to the swabs. *See* ***id.***, ¶33. In addition, the conditions attending the request to search were nonthreatening and cooperative. *See* ***id.*** Although confined in an interview room, Thomas was not restrained, and the tone of his discussion with Graf was congenial. Further, Thomas responded to Graf's request to perform the genital swabs by asking a number of questions about the swabs and the implications of his consent. *See* ***id.*** Graf answered Thomas's questions reasonably and cooperatively.

¶25 Finally, Thomas's personal characteristics do not convince us his consent to the genital swabs was involuntary. *See* ***id.*** Although Thomas's trial attorney expressed some doubt that Thomas understood Graf's explanation of the buccal and genital swabs, other evidence shows that Thomas was twenty-nine years old at the time of the swabs and had received his GED. He had prior experience with police, as evidenced by his five previous criminal convictions. Although Thomas may not initially have understood the implications of the tests, he continued to ask questions, and Graf answered them. Graf's answers were

appropriate. Graf explained that the test results could be used as evidence to show whether Thomas assaulted the victim, but the results would not conclusively establish his guilt. Thomas's ultimate consent was unequivocal. On this record, we agree with the circuit court that, "assessing the totality of the circumstances, [including Thomas's] strengths and weaknesses, his abilities and inabilities," Thomas voluntarily consented to the genital swabs.[4]

¶26 Thomas cites two cases in support of his argument that his consent to the genital swabs was not voluntary. However, both cases are distinguishable. In the first case, ***State v. Johnson***, 2007 WI 32, ¶3, 299 Wis. 2d 675, 729 N.W.2d 182, officers conducting a traffic stop saw the driver, later identified as Johnson, leaning forward and appearing to reach underneath his seat. Based on the officers' training and experience, they believed Johnson's movement was consistent with an attempt to conceal contraband or a weapon. ***Id.*** The officers therefore asked Johnson to exit the vehicle and subsequently advised him they intended to search the vehicle. ***Id.***, ¶¶5, 7. Johnson responded, "I don't have a problem with that." ***Id.***, ¶7.

¶27 On appeal, our supreme court concluded Johnson "merely acquiesced to the search" and did not "freely and voluntarily give his consent." ***Id.***, ¶17. The court emphasized that the officers never actually asked Johnson for his consent—they simply told him they were going to search his vehicle. ***Id.***, ¶19.

[4] The State argues another factor supports a conclusion that Thomas's consent was voluntary: both Graf and Thomas's trial attorney believed Thomas voluntarily consented. However, to determine whether consent was voluntary, we independently assess whether the historical facts fulfill the legal standard for voluntariness. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). Witnesses' opinions about whether this legal standard was met are not relevant to our analysis.

In contrast, Graf asked Thomas whether he would consent to the genital swabs. In addition, unlike Johnson, who agreed to the search of his vehicle as soon as the officers mentioned it, Thomas asked Graf a number of questions about the genital swabs before giving his consent. These facts support a conclusion that, unlike Johnson, Thomas did not merely acquiesce in the challenged search.

¶28 ***State v. Giebel***, 2006 WI App 239, 297 Wis. 2d 446, 724 N.W.2d 402, the second case cited by Thomas, is also distinguishable. In ***Giebel***, police were investigating what appeared to be an image of child pornography posted in an online chat room. ***Id.***, ¶2. Police executed a subpoena for the Yahoo account associated with the image and learned the account was registered to Giebel. ***Id.*** Two detectives subsequently interviewed Giebel at his home. ***Id.***, ¶3. Giebel testified one of the detectives "opened his folder and said I have a subpoena from Judge Carver." ***Id.***, ¶7. Giebel could only see the top half of the subpoena, and when he attempted to look at it more closely, the detective closed his folder. ***Id.*** The detective then immediately asked Giebel whether he had a computer, and when Giebel stated he did, the detective said, "[L]et's see it." ***Id.*** Giebel responded, "I assume I have no choice." ***Id.*** The detective then stated he was "going to take the computer." ***Id.***, ¶9. Giebel responded, "I assume I have no choice again," and the detective replied, "No." ***Id.***

¶29 We concluded Giebel's consent to the search and seizure of his computer was not voluntary, but instead was mere acquiescence to the detective's suggestion of authority. ***Id.***, ¶21. Our conclusion was based on three considerations: (1) Giebel was unlikely to know that the subpoena the detective referenced was not tantamount to a warrant to search and seize his computer; (2) the detective lent legal significance to the subpoena by telling Giebel it was "from Judge Carver[;]" and (3) Giebel's response to seeing the subpoena indicated

he believed resistance was futile. ***Id.***, ¶17. None of these considerations are present in the instant case.

¶30 Based on the totality of the circumstances, we therefore conclude Thomas voluntarily consented to the genital swabs. Accordingly, Graf was not required to obtain a warrant before performing the swabs.

¶31 Nevertheless, even where a warrant is not required, the "scope and nature" of a search must "meet the reasonableness requirements of the Fourth Amendment." ***State v. Payano-Roman***, 2006 WI 47, ¶34, 290 Wis. 2d 380, 714 N.W.2d 548. Thomas argues that, even if the genital swabs fell within the consent exception to the warrant requirement, the nature of the swabs was unreasonable.

¶32 In support of his argument that the genital swabs were unreasonable, Thomas cites ***Schmerber v. California***, 384 U.S. 757 (1966), and ***Winston v. Lee***, 470 U.S. 753 (1985). In ***Schmerber***, the defendant was arrested for operating while intoxicated, and a sample of his blood was drawn without a warrant. ***Schmerber***, 384 U.S. at 758. On appeal, the defendant argued the warrantless blood draw violated the Fourth Amendment. ***Id.*** at 759. The United States Supreme Court rejected the defendant's argument. ***Id.*** at 772. However, in so doing, the Court noted:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions [beyond the surface of the defendant's body] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

***Id.*** at 769-70.

¶33 The Court also observed that the blood draw at issue in ***Schmerber*** was performed "in a reasonable manner[,]" in that the defendant's blood was taken "by a physician in a hospital environment according to accepted medical practices." ***Id.*** at 771. The Court explained:

> We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

***Id.*** at 771-72.

¶34 In ***Winston***, the Commonwealth of Virginia sought an order requiring a defendant in an armed robbery case to undergo surgery to remove a bullet lodged under his left collarbone. ***Winston***, 470 U.S. at 756. The Commonwealth asserted the bullet would provide evidence of the defendant's guilt or innocence by showing whether the defendant was the robber shot by the victim during the crime. ***Id.*** at 755.

¶35 On appeal, the Supreme Court concluded compelling the defendant to undergo the surgery would violate the Fourth Amendment. ***Id.*** at 766. Drawing on ***Schmerber***, the Court applied a three-factor balancing test to determine the reasonableness of an intrusion into an individual's body. ***Winston***, 470 U.S. at 761-62; *see also* ***Payano-Roman***, 290 Wis. 2d 380, ¶37. Specifically, the Court considered: (1) the extent to which a procedure may threaten the individual's safety or health; (2) the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity; and (3) the community's interest

in fairly and accurately determining guilt or innocence. ***Winston***, 470 U.S. at 761-62; ***Payano-Roman***, 290 Wis. 2d 380, ¶37.

¶36 Based on ***Schmerber*** and ***Winston***, Thomas argues the genital swabs at issue in this case were unreasonable for two reasons: (1) there was no "clear indication" the swabs would produce evidence that Thomas sexually assaulted the victim, *see* ***Schmerber***, 384 U.S. at 770; and (2) the swabs were not performed in a reasonable manner because they were not done by a medical professional. We question whether the heightened requirements from ***Schmerber*** and ***Winston*** that Thomas relies upon actually apply in this case. In ***Schmerber***, the Court noted that, generally, a warrant is not needed to conduct a search incident to a lawful arrest. ***Id.*** at 769. However, the Court went on to state that more than a lawful arrest is required when the search involves an intrusion "beyond the body's surface." ***Id.*** at 769-70. Similarly, in ***Winston***, the Court set forth heightened requirements to determine the reasonableness of searches involving "surgical intrusions beneath the skin[.]" ***Winston***, 470 U.S. at 760. Unlike the searches in ***Schmerber*** and ***Winston***, the genital swabs in this case did not intrude beneath the surface of Thomas's body.

¶37 However, despite this important difference, the State does not dispute Thomas's assertion that the legal principles outlined in ***Schmerber*** and ***Winston*** apply in this case. In light of the State's apparent concession, we therefore address Thomas's arguments based on ***Schmerber*** and ***Winston***, even though we are not convinced the heightened requirements Thomas draws from those cases apply here. In any event, Thomas's arguments based on ***Schmerber*** and ***Winston*** fail on the merits.

¶38 First, Thomas argues there was no "clear indication" the genital swabs would produce evidence that he sexually assaulted the victim because at least eight hours elapsed between the last alleged sexual contact and the time the swabs were performed. *See* ***Schmerber***, 384 U.S. at 770. Thomas asserts it is almost certain he urinated during that time, and he could have showered or changed his clothes, all of which would have disturbed any DNA evidence on his genitals. Thomas also notes that the victim told a sexual assault nurse examiner that Thomas wore a condom during the assault, which he suggests made it less likely the victim's DNA would be found on him.

¶39 In response, the State asserts that, while the facts cited by Thomas may have made it less likely the swabs would produce evidence of a sexual assault, the "clear indication" language from ***Schmerber*** "does not mean that it must be certain or even extremely likely that evidence will be discovered in a search." We agree. "'Clear indication' is the legal equivalent of 'reasonable suspicion.'" ***State v. Foster***, 2014 WI 131, ¶34 n.9, __ Wis. 2d __, __ N.W.2d __ (citing ***State v. Seibel***, 163 Wis. 2d 164, 173, 471 N.W.2d 226 (1991)). Reasonable suspicion is "less than probable cause, but more than a hunch[.]" ***State v. Guy***, 172 Wis. 2d 86, 95, 492 N.W.2d 311 (1992). "[W]hat constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶40 Thus, the operative question in this case is whether, based on the totality of the circumstances, Graf could reasonably suspect the swabs of Thomas's genitals would produce evidence of a crime. *Cf.* ***State v. Krause***, 168 Wis. 2d 578, 587, 484 N.W.2d 347 (Ct. App. 1992) (for a warrantless blood draw

incident to a lawful arrest, officers must reasonably suspect the defendant's blood contains evidence of a crime). We conclude he could. At the time Graf performed the genital swabs, police had evidence that Thomas had engaged in penis-to-vagina intercourse with the victim between eight and nine hours earlier. This information was more than sufficient to create a reasonable suspicion the swabs would produce evidence of the sexual assault—specifically, the victim's DNA.

¶41 Although the victim reported that Thomas wore a condom during the assault, this fact, without any additional evidence, is insufficient to show that the presence of a condom made it so unlikely the victim's DNA would be found on Thomas's genitals that police could not reasonably suspect the swabs would produce evidence of a sexual assault. In addition, while Thomas asserts he may have urinated, showered, or changed his clothes in the eight or nine hours before the swabs were performed, he does not cite any evidence that he actually did so. Moreover, he does not cite any evidence supporting his claim that urinating, showering, or changing his clothes would have made it so unlikely the victim's DNA would be found on his genitals that police could not reasonably suspect the swabs would produce evidence of a crime. We therefore reject Thomas's argument that there was no clear indication the genital swabs would produce evidence that he sexually assaulted the victim.

¶42 We also reject Thomas's argument that the swabs were not performed in a reasonable manner because they were not done by a medical professional. During trial, Graf testified he swabbed "the tip of [Thomas's] penis in the shaft as well as the scrotum and testis behind the penis." Graf explained:

> The specimens are taken with a Q-tip essentially. It's very similar but they're much longer. And what you do is a dry sample is just take the Q-tip and you rub it on the area that you're collecting a sample from, and a wet sample would

> be that you dip the Q-tip before rubbing it, you dip [it] into a solution, that's called a preserve solution. Essentially, it's distilled water type of solution. Dip that into the solution, then you rub it on the area where you're collecting the evidence from.

Thomas argues this process is "akin to a medical examination[,]" and, as such, the person performing the swabs should be "someone with medical training such as a nurse."

¶43 Thomas cites no authority for the proposition that a genital swab performed by someone other than a medical professional is per se unreasonable. In ***Schmerber***, the Supreme Court emphasized that the challenged blood draw was a medical technique performed by a physician in a hospital environment. ***Schmerber***, 384 U.S. at 771. The Court strongly suggested its decision might have been different had the blood draw been performed "by police in the privacy of the stationhouse." ***Id.*** at 772. However, the blood draw in ***Schmerber*** was more invasive than the genital swabs at issue in this case. As the ***Schmerber*** Court noted, allowing police to conduct blood draws in stationhouses would "invite an unjustified element of personal risk of infection and pain." ***Id.*** at 772. The same risk is not present for genital swabs, which merely involve rubbing an individual's skin with a Q-tip.

¶44 Moreover, Thomas's arguments do not convince us that a medical professional was required to perform the genital swabs under the specific facts of this case. Thomas asserts that a person performing a genital swab should have "sufficient training to properly collect the evidence." However, Graf testified at the postconviction hearing that he had been trained in gathering DNA evidence in sexual assault cases. Thomas does not assert that Graf's training was inadequate

or that the procedure Graf used to perform the swabs was in any way inappropriate.

¶45 Thomas also contends that people are generally not embarrassed or uncomfortable when touched by medical professionals in clinical settings, but the same is not true when a person is touched by a police officer during a stationhouse investigation. We are not necessarily convinced that this is universally true. More importantly, though, Thomas does not assert that he, personally, suffered any discomfort or embarrassment as a result of Graf performing the genital swabs instead of a medical professional. In addition, while the swabs were not performed in a clinical setting, they were performed in a private room in the police station, thus minimizing the potential for embarrassment. Accordingly, Thomas's assertion that having genital swabs performed by medical professionals would decrease embarrassment and discomfort, as a general matter, does not convince us the swabs at issue in this case were unreasonable.

¶46 Finally, Thomas asserts the genital swabs were unreasonable because Graf's testimony at the postconviction hearing suggested he would perform warrantless genital swabs in any sexual assault investigation. However, Thomas overstates Graf's testimony. Graf testified he made the decision to seek DNA evidence from Thomas "as soon as [he] was informed of the type of allegation." The "type of allegation" was that Thomas had penis-to-vagina intercourse with the victim eight or nine hours earlier. These were the specific circumstances that led Graf to perform the genital swabs. Graf never stated he performed genital swabs in all sexual assault cases. In fact, Graf specifically testified that, during his twenty-one years in law enforcement, he had performed only three or four penile swabs.

¶47 Because the genital swabs fell within the consent exception to the warrant requirement and were otherwise reasonable, a motion to suppress evidence obtained from the swabs would have been properly denied. Consequently, Thomas's trial attorney did not perform deficiently by failing to file a suppression motion, and we therefore reject Thomas's ineffective assistance claim.

**II. New trial in the interest of justice**

¶48 Alternatively, Thomas seeks a new trial in the interest of justice. *See* WIS. STAT. § 752.35 (2011-12). We may grant a new trial in the interest of justice "when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). Thomas argues this standard was met in his case because the DNA evidence was improperly admitted and provided powerful corroboration for the victim's claim that Thomas assaulted her. However, as explained above, a motion to suppress the DNA evidence would have been properly denied. Thus, the DNA evidence was properly admitted, and Thomas is not entitled to a new trial in the interest of justice.

*By the Court*.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).