COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP518-CR **Cir. Ct. No. 2011CF68**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNARD IKECHUKWEL ONYEUKWU,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 LUNDSTEN, J. Bernard Onyeukwu appeals judgments convicting him of four counts of sexual assault, including two counts that required the prosecution to prove that the adult victim, T.L., suffered from a "mental deficiency" and that Onyeukwu knew of T.L.'s deficiency. *See* WIS. STAT.

§ 940.225(2)(c).[1] Onyeukwu also appeals the circuit court's order denying his motion for postconviction relief.

¶2 Onyeukwu challenges the sufficiency of the evidence on the topics of whether T.L. suffered from a mental deficiency and whether Onyeukwu knew of T.L.'s deficiency. In addition, Onyeukwu argues that trial counsel was ineffective by failing to do each of the following: (1) argue that certain counts were multiplicitous, (2) object to hearsay testimony by a nurse practitioner, (3) object when the prosecutor referred to the nurse practitioner as a "doctor" during closing arguments, (4) discuss with Onyeukwu the decision whether to testify, and (5) introduce phone records Onyeukwu claims would have corroborated Onyeukwu's testimony. Onyeukwu also makes two arguments relating to the risk reduction program that the legislature repealed between the date of Onyeukwu's alleged crimes and when Onyeukwu was sentenced. First, Onyeukwu argues that at sentencing the circuit court relied on inaccurate information relating to the program's availability. Second, Onyeukwu argues that repeal of the program violated the federal constitution's ex post facto clause.

¶3 We reject Onyeukwu's arguments and affirm.

Background

¶4 According to the criminal complaint, on the morning of April 8, 2011, Onyeukwu approached T.L., a 22-year-old woman, threatened her, and forced her into his vehicle. T.L. remained with Onyeukwu throughout the

[1] The version of the statutes in effect at the time of Onyeukwu's alleged crimes was the 2009-10 version. All references to the Wisconsin Statutes are to that version unless otherwise noted.

morning while Onyeukwu took his son to a medical appointment and to school. Onyeukwu then took T.L. to his home, where the alleged sexual assaults occurred. The assaults involved several different types of sexual contact, including Onyeukwu touching T.L.'s breasts and inserting his penis into her vagina. The complaint further alleged that T.L. suffered from "mild mental retardation" and functioned at the level of a six- to eight-year-old child.

¶5 The State charged Onyeukwu with kidnapping and ten counts of sexual assault, five of which required the prosecution to prove that T.L. suffered from a mental deficiency and that Onyeukwu knew of T.L.'s deficiency. *See* WIS. STAT. § 940.225(2)(c). The jury found Onyeukwu guilty on four sexual assault counts, including two counts requiring proof of mental deficiency. The jury acquitted Onyeukwu on the remaining counts.

¶6 We refer to additional facts as needed in our discussion of each issue below.

Discussion

A. Sufficiency Of The Evidence

¶7 As to the counts requiring proof that T.L. suffered from a mental deficiency, Onyeukwu argues that there was insufficient evidence that T.L. suffered from a mental deficiency rendering her incapable of appraising her own conduct. Onyeukwu also argues that there was insufficient evidence that Onyeukwu knew that T.L. suffered from such a mental deficiency.

¶8 We review these claims of insufficient evidence under a long-established test:

> "The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true …. The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted ...."

State v. Poellinger, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990) (quoted sources omitted).

1. Evidence That T.L. Suffered From A Mental Deficiency

¶9 Consistent with the statutory requirements, the jury was instructed that, in order to find Onyeukwu guilty on the counts requiring that T.L. suffered from a mental deficiency, the jury had to find

> that [T.L.] suffered from a mental deficiency at the time of the sexual contact or intercourse.

The jury was told that the "mental deficiency" needed to

> render[] [T.L.] temporarily or permanently incapable of appraising her own conduct. In other words, [T.L.] must have lacked the ability to evaluate the significance of her conduct … because of her mental deficiency.

See WIS JI—CRIMINAL 1211; *see also* WIS. STAT. § 940.225(2)(c).

¶10 In broad strokes, Onyeukwu's insufficiency argument hinges on his assertion that the sole witness who provided evidence of T.L.'s mental functioning was a nurse practitioner and that the nurse practitioner's testimony was insufficient. We disagree that this testimony was the sole evidence of mental

deficiency. Rather, we agree with the State that T.L.'s testimony provided compelling evidence of T.L.'s mental functioning and ability to appraise her own conduct. As the following summary of evidence demonstrates, T.L.'s testimony, in combination with the nurse practitioner's testimony, was sufficient evidence of mental deficiency.

¶11 T.L. testified that she had never held a job and still lived with her mother. Despite her adult age, T.L.'s testimony showed that she:

- referred to her mother as her "mommy";
- used the term "prosecutor" when she meant "prostitute"[2];
- referred to her breast as her "boob";
- referred to Onyeukwu's penis as his "wiener";
- indicated that she did not know another word for "wiener," and further appeared to indicate that she did not know what a "penis" was;
- stated initially that she did not know what a person would use a "wiener" for, and then stated in response to further questioning that a man uses his "private area" to go to the bathroom;
- understood male ejaculation in the way a young child would.

¶12 As to T.L.'s understanding of a man's anatomy and sexual functioning, the following testimony is representative:

> Q. And by his private area, I need you to be a little more specific. What do you mean?
>
> A. His wiener.

[2] T.L. testified that, when Onyeukwu initially approached her, he asked if she was a "prosecutor," but upon further questioning T.L. agreed that she meant "prostitute."

THE REPORTER: I'm sorry. I didn't hear you.

THE WITNESS: His wiener.

THE REPORTER: Thank you.

Q. Is there another term for that?

A. No.

Q. Not for you? Have you ever heard of a penis?

A. Uh-uh.

Q. No? What would you use a wiener for?

A. I don't know.

Q. If you would drink a two-liter bottle of pop, if a man would drink a two-liter bottle of pop, what would happen? What do you think would happen? Would he have to do anything, do you think? Um, what's your normal routine in the morning when you get up?

A. I get dressed. Sometimes I go down to my dad's house.

Q. Okay. Do you take a shower in the morning?

A. Uh-huh.

Q. Do you go to the bathroom?

A. Yeah.

Q. Okay. And when a man uses the bathroom—right, everybody goes to the bathroom?

A. (Laughter.) Yeah.

Q. What does he use to go to the bathroom?

A. His private area.

….

Q. Can you describe the defendant's wiener when he put it in your mouth?

A. Uh-uh.

Q. At any point did anything come out of the defendant's wiener?

A. Yeah.

Q. When was that?

A. When he—I can't tell.

¶13 Based on our review of all of T.L.'s testimony, we agree with the State's characterization: "Although [T.L.] was generally responsive to questions, specifics had to be drawn out from her, and her testimony generally demonstrated that she functioned and communicated at a lower developmental level."

¶14 We also agree with the State that, although the jury reasonably could have viewed some of the details of T.L.'s testimony as undercutting T.L.'s credibility, the jury reasonably could have viewed that same testimony as supporting a finding that T.L. suffered from a mental deficiency. For example, when T.L. testified that, at one point when she was left alone, she could not get out of Onyeukwu's car because the doors were locked, the jury could have inferred that T.L. should not be believed because that is not how car door locks work, or the jury could have inferred that T.L. did not understand how car door locks work.

¶15 In sum, T.L.'s testimony, by itself, lends considerable support to the jury's finding that T.L. had the mental deficiency described in the jury instructions. To this we now add the testimony of the nurse practitioner.

¶16 The nurse practitioner testified that she saw T.L. as a regular patient at a clinic and examined T.L. after the alleged assaults. According to the nurse practitioner, T.L.'s medical chart showed that T.L. was diagnosed with "mild mental retardation," attention deficit hyperactivity disorder, bipolar disorder, and anxiety-related issues. The nurse practitioner also testified that she had seen

"paperwork" showing that T.L. was probably functioning at a sixth-grade level and that T.L. cannot read.[3]

¶17 The nurse practitioner further testified that T.L.'s conditions caused T.L. to function differently from a normal 22-year-old, both emotionally and intellectually. For example, T.L. had difficulty making decisions and accomplishing tasks such as going to a store and making a purchase. In addition, T.L. struggled with "choosing what would be appropriate … as far as friendships and appropriate things to say sometimes." The nurse practitioner testified that T.L.'s mother petitioned the court for guardianship and became T.L.'s guardian when T.L. was 17 or 18 years old because of concerns that T.L. could not make appropriate decisions.

¶18 Considering all of the evidence before the jury, we conclude that it is easily sufficient to support the jury's finding that T.L. suffered from the requisite mental deficiency. Before moving on, however, we address arguments that Onyeukwu makes based on the statutory language and case law.

¶19 Onyeukwu seems to argue that T.L.'s diagnosed conditions are not severe enough to satisfy the statutory definition of a mental deficiency: a "mental illness or deficiency" that "renders [the victim] … incapable of appraising [the victim]'s conduct." *See* WIS. STAT. § 940.225(2)(c). He asserts that the only diagnosis evidence that is arguably relevant is testimony informing the jury that

[3] Onyeukwu argues that counsel was ineffective for failing to object to these parts of the nurse practitioner's testimony as hearsay. We address that argument in a separate section below. When addressing sufficiency of the evidence, we consider "all of the evidence that was submitted at trial, including any evidence that was erroneously admitted." ***State v. LaCount***, 2008 WI 59, ¶25, 310 Wis. 2d 85, 750 N.W.2d 780.

T.L. has "mild mental retardation." Focusing on what Onyeukwu deems to be the only relevant diagnosis evidence, "mild mental retardation," Onyeukwu asserts that this evidence is insufficient because the characteristics associated with that diagnosis are "at odds with the level of dysfunction contemplated by the statute."

¶20 To the extent we understand Onyeukwu's not-severe-enough-diagnosis argument, we reject it. First, Onyeukwu supplies no support for his assumption that, regardless how compelling the victim's testimony or other evidence is, a medical diagnosis with a condition of a particular severity is needed. Second, Onyeukwu fails to explain or support what he has in mind when he speaks of the "level of dysfunction contemplated by the statute." So far as we can tell, this argument amounts to nothing more than a vague assertion that the statute requires something more than the evidence in this case. We therefore reject it.

¶21 If Onyeukwu means to suggest that ***State v. Perkins***, 2004 WI App 213, 277 Wis. 2d 243, 689 N.W.2d 684, supports his vague, not-severe-enough-diagnosis argument, he is wrong. Onyeukwu points out that evidence in ***Perkins*** indicates that the victim in that case had, in Onyeukwu's words, "a far more advanced deficiency" than T.L. does here. In ***Perkins***, the victim suffered from severe Alzheimer's and dementia, could not converse coherently, had extremely poor memory, and required 24-hour supervision. *See* ***id.***, ¶¶2-3, 22-23. Onyeukwu seems to suggest that comparable evidence is always required. However, ***Perkins*** does not remotely purport to set a minimum standard for what is sufficient evidence of the required mental deficiency.

¶22 Indeed, rather than help Onyeukwu, if anything ***Perkins*** undercuts his insufficient evidence argument. The ***Perkins*** court was concerned with whether expert testimony was necessary. *See* ***id.***, ¶¶18-23. The court concluded

that expert testimony was not required, citing approvingly to a comment to the pattern jury instruction, which stated that "the term 'mental illness or deficiency' [in this context, unlike some others] has a meaning within the common understanding of the jury." *See* ***id.***, ¶19. Thus, ***Perkins*** supports the view that, based on its "common understanding," a reasonable jury could find that the evidence here was sufficient to show that T.L. suffered from a mental deficiency.

¶23 Onyeukwu devotes significant briefing space to summarizing and discussing an Oregon case, ***State v. Reed***, 118 P.3d 791 (Or. 2005). In ***Reed***, the reviewing court concluded that, under a mental deficiency standard that is similar to the Wisconsin standard, the evidence before it was insufficient. *See* ***id.*** at 792-95. Onyeukwu appears to view the facts in ***Reed*** as almost the same as those here. We do not. It is true that the victim in ***Reed***, much like T.L., was diagnosed with "mild to moderate mental retardation." *See* ***id.*** at 795. However, the victim's testimony, as described in ***Reed***, was significantly different from T.L.'s testimony here. So far as the ***Reed*** opinion reveals, the victim's testimony there provided no evidence of a mental deficiency. *See* ***id.*** at 794. That stands in stark contrast to T.L.'s testimony here.

¶24 Onyeukwu may also be arguing that ***Reed*** supports the legal proposition that a victim's objection or resistance to sexual advances indicates a capacity to appreciate the nature of sexual conduct and, therefore, evidence of objection or resistance undercuts a finding of mental deficiency. If Onyeukwu means to argue that ***Reed*** supports the view that such evidence must weigh against a mental deficiency finding, Onyeukwu's argument goes nowhere because such evidence would then simply be contrary evidence that we would ignore under Wisconsin's sufficiency of the evidence test. If Onyeukwu instead means to argue that ***Reed*** supports the view that such evidence is necessarily inconsistent with a

mental deficiency finding, we are not persuaded. This second view of ***Reed*** is both unpersuasive as a matter of logic and contrary to our ***Perkins*** decision. In ***Perkins***, we concluded that the evidence supported a mental deficiency finding when a victim told the perpetrator "no, no" and tried to push away from him. *See* ***Perkins***, 277 Wis. 2d 243, ¶¶1, 3, 6, 23.

2. Evidence That Onyeukwu Knew Of T.L.'s Deficiency

¶25 Onyeukwu argues that the evidence was insufficient to support a finding that he *knew* T.L. had the required mental deficiency. In this respect, the jury was instructed that the State was required to prove

> that the defendant knew that [T.L.] was suffering from a mental deficiency and knew that the mental condition rendered [T.L.] temporarily or permanently incapable of appraising her conduct.

See WIS JI—CRIMINAL 1211; *see also* WIS. STAT. § 940.225(2)(c).

¶26 Onyeukwu's approach to this topic is flawed because he focuses on the evidence that supports his position and ignores the evidence that cuts against him. Thus, he fails to discuss the topic in terms of our standard of review, which requires viewing the evidence in a light most favorable to the verdict. We could reject Onyeukwu's argument on this basis alone. However, we choose instead to discuss the topic, albeit briefly.

¶27 Onyeukwu points out that he and T.L. had first met on the day of the assaults, that T.L. testified that she and Onyeukwu hardly talked that day, and that Onyeukwu testified that he noticed nothing unusual about T.L. when he talked with her. However, the evidence supports a finding that Onyeukwu and T.L. were together for at least a couple of hours before the assaults occurred. In addition, the

jury heard Onyeukwu acknowledge during his testimony that he had four separate verbal exchanges with T.L. before the alleged sexual conduct. Those exchanges, according to Onyeukwu's own testimony, included at least one lengthy exchange at Onyeukwu's home about romantic and sexual matters. Thus, the evidence supports a finding that there was ample time for Onyeukwu to observe and assess T.L.'s level of mental functioning. We note that Onyeukwu gives us no reason to think that there was anything about the circumstances here that would have impaired his ability to appreciate T.L.'s level of mental functioning.

¶28 In this context, Onyeukwu again relies on ***Perkins***, this time arguing that "there was far more evidence to establish that Perkins was aware of his victim's mental condition." And, again, Onyeukwu's reliance on ***Perkins*** is not persuasive. In ***Perkins***, we did not purport to set a floor for what is sufficient evidence of a defendant's knowledge of a victim's mental deficiency.

¶29 In sum, we conclude that Onyeukwu's sufficiency of the evidence challenge fails. We turn to Onyeukwu's ineffective assistance of counsel claims.

B. Ineffective Assistance Of Counsel

¶30 Onyeukwu argues that trial counsel was ineffective in five respects. To demonstrate ineffective assistance of counsel, Onyeukwu must show both that counsel's performance was deficient and that counsel's performance was prejudicial. ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854. "A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one." ***Id.*** With respect to the prejudice component, Onyeukwu "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding[s] would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome.'" ***Id.***, ¶16 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

1. Multiplicity

¶31 Onyeukwu's first ineffective assistance argument relates to multiplicity. As we indicated above, the State charged Onyeukwu with ten counts of sexual assault. The ten charges consisted of five counts of sexual assault of a mentally deficient person, based on five different types of sexual contact or intercourse, and five additional counts of sexual assault/lack of consent based on the same five acts. The five acts were breast contact, mouth-to-vagina contact, penis-to-mouth contact, fingers-to-vagina contact, and penis-to-vagina contact.

¶32 Onyeukwu argues, as we understand it, that each set of five counts is internally multiplicitous because the five different types of sexual contact all occurred close in time and were all part of the same transaction or episode. That is, Onyeukwu argues that each set of five counts should have been a single count to avoid multiplicity. Onyeukwu argues that trial counsel was ineffective for failing to raise this multiplicity argument. Onyeukwu does *not* argue that the five mental deficiency counts are multiplicitous with the other five counts.

¶33 The State responds that there is no multiplicity problem because of the distinct acts involved. In addition, the State argues that Onyeukwu is limited to challenging his sentence based on whether the four counts for which he was *convicted* are multiplicitous.

¶34 While the State's second argument is not well developed, it brings to the fore a failing in Onyeukwu's appellate argument. Onyeukwu fails to make clear when he thinks counsel should have first been alerted to a viable multiplicity

challenge, and fails to provide any explanation as to how he might have been prejudiced by the separate charging of counts for which he was acquitted. The few facts that Onyeukwu cites in support of his multiplicity argument come from T.L.'s trial testimony, which could at most support a conclusion that counsel should have raised a multiplicity challenge at trial after the prosecution rested its case.

¶35 The upshot is that Onyeukwu's appellate multiplicity argument is insufficiently developed and fails to show deficient performance or prejudice, at least with respect to the six sexual assault counts on which he was acquitted. That leaves the four counts on which Onyeukwu was convicted, which we address next.

¶36 The four convictions were for: (1) sexual contact or intercourse with a mentally deficient person, for breast contact; (2) sexual contact or intercourse with a mentally deficient person, for penis-to-vagina intercourse; (3) sexual contact without consent, for breast contact; and (4) sexual intercourse without consent, for penis-to-vagina intercourse.

¶37 Looking at these four convictions, we have little trouble rejecting what remains of Onyeukwu's multiplicity argument which, boiled down, is simply that, given T.L.'s testimony, a conviction for breast contact is multiplicitous with a conviction for penis-to-vagina intercourse. That is, Onyeukwu contends that these four convictions should be just two: a conviction based on the victim being mentally deficient and a conviction based on lack of consent. We disagree.

¶38 This court in ***Harrell v. State***, 88 Wis. 2d 546, 277 N.W.2d 462 (Ct. App. 1979), reached the common-sense conclusion that, for purposes of a multiplicity analysis, "[i]nvasion of different intimate parts of the victim's body demonstrates kinds and means of sexual abuse or gratification and therefore

different acts." ***Id.*** at 573. In an effort to defeat this common-sense approach, Onyeukwu relies on ***State v. Hirsch***, 140 Wis. 2d 468, 410 N.W.2d 638 (Ct. App. 1987), as support for the proposition that different types of sexual contact might not always support separate charges.

¶39 The State fails to address ***Hirsch***. Nonetheless, when we compare the facts in ***Hirsch*** to T.L.'s testimony here we can quickly see that ***Hirsch*** does not support a conclusion that Onyeukwu's convictions are multiplicitous.

¶40 In ***Hirsch***, the defendant was charged with three counts of sexual assault based on allegations that he moved his hand from a five-year-old girl's "vagina [count 1] to her anus [count 2] and back again [count 3]," turning her over in the process, during an unspecified amount of time that lasted "no more than a few minutes." ***Id.*** at 470, 474-75. Thus, the allegations in ***Hirsch*** suggested one very brief and continuous act in which the defendant rubbed or otherwise touched a small child's vaginal and anal areas with his hand. As Onyeukwu's argument suggests, the court in ***Hirsch*** appeared to reason that the allegations were insufficient to survive a multiplicity challenge because the allegations did not show a sufficient "change in activity" and did not show that the defendant had time to reflect and recommit himself to criminal conduct. *See* ***id.*** at 475. Rather, so far as the ***Hirsch*** court could tell, the three touchings were part of the same "general transaction or episode." ***Id.***

¶41 Turning to the facts here, T.L. testified that, while she and Onyeukwu sat on the couch in Onyeukwu's home, Onyeukwu touched her breast and that, during the time they were on the couch, Onyeukwu did not touch her anywhere else. Onyeukwu then told T.L. to stand up and go over by a beanbag. T.L. complied, and Onyeukwu removed T.L.'s pants and underwear before telling

T.L. to lie down. T.L. again complied, and Onyeukwu got on top of her and put his penis into her vagina. Thus, T.L.'s testimony shows that the breast contact and the penis-to-vagina intercourse involved a change in location and activity that gave Onyeukwu time to reflect and recommit himself to additional criminal conduct, and that the two acts were not part of the same "general transaction or episode" as we used that phrase in ***Hirsch***.

¶42 For the reasons stated above, we reject Onyeukwu's argument that trial counsel was ineffective in failing to make the multiplicity argument that Onyeukwu makes on appeal.

2. Hearsay Testimony By The Nurse Practitioner

¶43 Onyeukwu argues that trial counsel was ineffective in failing to object to parts of the nurse practitioner's testimony that Onyeukwu asserts are hearsay. In particular, Onyeukwu points to the nurse practitioner's testimony that T.L.'s medical chart showed diagnoses of "mild mental retardation" and other disorders, and to the nurse practitioner's testimony that she saw "paperwork" showing that T.L. functioned at a sixth-grade level and cannot read.[4]

[4] The entirety of the testimony that Onyeukwu asserts was hearsay is as follows:

> Her diagnosis that I'm familiar with on the chart, she has mild mental retardation. She has attention deficit hyperactivity disorder. She has bipolar disorder and anxiety-related issues. Oh, and did I—I'm not sure if I said mild mental retardation or not, but yeah.
>
> ….
>
> ... I believe she was—and this was not through me, this was through her paperwork that came to our clinic—she's probably functioning at about a sixth grade level. She cannot read.

¶44 We will assume, without deciding, that the testimony was hearsay and should have been excluded, and we will refer to it from now on as the "hearsay evidence." Further, we will assume without deciding that Onyeukwu has shown deficient performance.[5] Nonetheless, we conclude that Onyeukwu fails to show prejudice.

¶45 In arguing that the hearsay evidence was prejudicial, Onyeukwu asserts that the testimony was "compelling" evidence that T.L. suffered from a mental deficiency. We observe that this argument is at odds with Onyeukwu's prior argument that the nurse practitioner's testimony was insufficient to support a finding of mental deficiency. Regardless, although we agree that the hearsay evidence was damaging, we conclude that Onyeukwu does not show a reasonable likelihood of a different result absent that evidence.

¶46 First, as we have already explained in addressing the sufficiency of the evidence, *T.L.'s* testimony was compelling evidence that T.L. suffered from a mental deficiency. Onyeukwu fails to address the likely effect of T.L.'s testimony on the jury.

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[5] Regarding the deficient performance prong, we make two observations.

First, the State contends that the disputed testimony was admissible under the hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment" in WIS. STAT. § 908.03(4). We disagree. As Onyeukwu points out, this exception applies to statements the *patient* makes for the purpose of medical diagnosis or treatment. *See* ***State v. Nelson***, 138 Wis. 2d 418, 430, 406 N.W.2d 385 (1987) ("Under sec. 908.03(4), Stats., a doctor may relate *a 'patient's statements* of past or present symptoms or history … insofar as reasonably pertinent to diagnosis or treatment.'" (emphasis added)).

Second, the proposition that trial counsel performed deficiently in failing to object to the hearsay evidence is far from clear. We do not delve into the topic, but, in situations like the one here, counsel often make a reasonable choice not to object. For example, counsel might reasonably choose not to object when the underlying evidence is otherwise admissible and would have greater effect coming from a source with personal knowledge.

¶47 Second, the nurse practitioner provided other testimony that Onyeukwu does not challenge and that provided additional evidence that T.L. suffered from a mental deficiency. In particular, as we have already described, the nurse practitioner testified that T.L.'s conditions caused her to function differently from a normal 22-year-old, both emotionally and intellectually; that T.L. had difficulty making decisions and accomplishing tasks such as going to a store and making a purchase; and that T.L. struggled with "choosing what would be appropriate … as far as friendships and appropriate things to say sometimes." The obvious inference is that this testimony was based on the nurse practitioner's firsthand experience with T.L. as a regular patient. This also means that a successful hearsay objection likely would have led the prosecutor to elicit additional damaging information from the nurse practitioner based on the nurse practitioner's firsthand experience.

¶48 Onyeukwu argues that the hearsay evidence formed the "centerpiece" of the prosecutor's closing argument. We disagree. It is true that the prosecutor highlighted the hearsay evidence, but the prosecutor also downplayed its overall significance and emphasized T.L.'s testimony instead. Specifically, the prosecutor argued:

> You saw the way [T.L.] testified. You heard her speak. You saw her mannerisms. And it's for you to determine if you all believe that she has this mental deficiency and how well known it is. Is it something that you see right away? Is it something that you needed the doctor [meaning the nurse practitioner] to tell you about before you realized it?

¶49 In sum, although the hearsay evidence was damaging, we are confident that it did not affect the result of the trial.

3. Prosecutor's References To The Nurse Practitioner As A "Doctor"

¶50 Onyeukwu argues that trial counsel was ineffective in failing to object when the prosecutor during closing arguments repeatedly referred to the nurse practitioner as a "doctor." Onyeukwu asserts that it is "well-understood that doctors have superior education and training than nurses." Taking Onyeukwu's assertion as true, neither this assertion nor anything else in Onyeukwu's briefing persuades us that there was deficient performance or prejudice. There is no reason to suppose that the jury mistook the nurse practitioner for a doctor. When the nurse practitioner testified, she plainly identified herself as a nurse practitioner and she summarized her education and training.

4. Decision Whether To Testify

¶51 Onyeukwu argues that trial counsel was ineffective in failing to discuss with Onyeukwu the decision about whether to testify. Onyeukwu points to postconviction hearing testimony in which Onyeukwu claimed that counsel never discussed the right not to testify with him. However, the circuit court made clear that the court did not believe Onyeukwu's postconviction testimony in this regard and, as we read the circuit court's decision, the court made implicit fact findings that counsel discussed the decision whether to testify with Onyeukwu and that Onyeukwu understood his right not to testify. The State points to ample record evidence supporting those findings. This evidence includes counsel's postconviction testimony that counsel remembered talking to Onyeukwu about the

decision to testify in light of damaging DNA evidence and that counsel "always" talked to defense clients about the benefits and detriments of testifying.[6]

5. Phone Records

¶52 Onyeukwu argues that trial counsel was ineffective in failing to introduce phone record evidence showing the precise time and duration of two phone calls Onyeukwu made or received around the time of the alleged assaults. We agree with the State that Onyeukwu fails to show prejudice based on the phone records.

¶53 T.L.'s testimony suggested that the assaults took place over a period of at least one hour and as much as two hours. Onyeukwu asserts that the phone records would have discredited this testimony and would have corroborated his testimony that he and T.L. were together at Onyeukwu's house for a very short time period. According to Onyeukwu's cursory explanation of the phone records in his briefing, the records show that the assaults must have occurred in about 35 minutes or less, between two phone calls shown on the phone records.[7]

[6] It is undisputed that, at trial, the circuit court did not conduct a colloquy to determine whether Onyeukwu knowingly, voluntarily, and intelligently waived his right not to testify. *See* ***State v. Denson***, 2011 WI 70, ¶8, 335 Wis. 2d 681, 799 N.W.2d 831 (recommending but not requiring a colloquy). We are uncertain whether Onyeukwu means to assert that the absence of a colloquy here, by itself, is reversible error. Regardless, we conclude that any issue as to the absence of a colloquy is resolved against Onyeukwu because the circuit court held a postconviction evidentiary hearing at which the State effectively showed that Onyeukwu knowingly, voluntarily, and intelligently waived his right not to testify. *See* ***id.***, ¶¶68, 70 (explaining the procedure when the circuit court does not conduct a colloquy).

[7] Onyeukwu's theory assumes that the jury could not have reasonably found that he interrupted the alleged assaults to make or receive a brief call. For the sake of argument, we accept this questionable assumption.

¶54 Even accepting Onyeukwu's explanation of the phone records, it is not reasonable to think that the records might have changed the jury's assessment of Onyeukwu's and T.L.'s credibility. Onyeukwu ignores the fact that other, more important parts of his testimony were obviously not credible. In particular, Onyeukwu claimed that he did not have intercourse with T.L. or ejaculate in her presence even though the State presented DNA evidence showing that sperm found inside T.L.'s vagina was virtually certain to belong to Onyeukwu. Assuming the phone records had been introduced and supported Onyeukwu's 35-minute theory, this still left sufficient time for the assaults, and the jury would have likely concluded that T.L. simply overestimated the time period.

C. Risk Reduction Program

¶55 Having rejected all of Onyeukwu's arguments relating to his trial, we turn to arguments he makes relating to sentencing. Both involve the risk reduction program.

¶56 In his briefing, Onyeukwu describes the risk reduction program as follows:

> Risk reduction sentences were a short-lived effort to better protect the public through inducing inmates to undertake rehabilitative efforts while reducing prison overcrowding and saving taxpayer money. They became effective on June 30, 2009. Specifically, a risk reduction sentence enabled a defendant to be released to extended supervision early, with up [to] 25 percent of the confinement portion of the sentence remaining, provided they had completed Department of Corrections-provided risk reduction programming and treatment.

The legislature repealed the program effective between the date of Onyeukwu's crimes and when Onyeukwu was sentenced. *See* 2011 Wis. Act 38, § 13 (effective

Aug. 3, 2011). The parties' arguments show agreement that this repeal made Onyeukwu ineligible for the program.

¶57 Onyeukwu makes two arguments relating to the program. First, Onyeukwu argues that at sentencing the circuit court relied on inaccurate information relating to the program. Second, Onyeukwu argues that repeal of the program in a situation like his violates the ex post facto clause. We reject both arguments.

1. Sentencing Based On Inaccurate Information

¶58 At Onyeukwu's sentencing, after the circuit court pronounced sentence, the court made the following comment regarding the risk reduction program:

> There is no more risk reduction sentence, I don't believe. Even if there would be—well, I guess I just don't know. My recollection is there is no more risk reduction sentence. If that goes by the date of the offense versus the date of the sentencing, I don't have a problem with you doing that. It lets you out a little early if you come up with a plan to show that you won't be subject to a higher risk of re-offending.

¶59 Onyeukwu argues, as we understand it, that this comment shows that the circuit court relied on the inaccurate belief that the risk reduction program might be available to Onyeukwu. We disagree, and instead agree with the State that the comment contains no inaccurate information, let alone shows reliance on inaccurate information.

¶60 On the contrary, the circuit court's comment shows that the court acknowledged the court's uncertainty as to Onyeukwu's eligibility for the program

and decided that the availability of the program did not matter because the court would have imposed the same sentence either way.

¶61 Contrary to Onyeukwu's apparent assertion, his case is nothing like ***State v. Travis***, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491. In ***Travis***, the circuit court based a sentence on inaccurate information that the defendant was subject to a mandatory minimum five-year confinement term. *See* ***id.***, ¶¶9-10, 26, 49. Onyeukwu appears to believe that the circuit court here might have given him a lighter sentence if the court had been certain that the risk reduction program was no longer available, but Onyeukwu points to nothing in the court's sentencing decision to support this belief.

2. Ex Post Facto Clause

¶62 Onyeukwu argues that depriving him of the benefit of the risk reduction program, which was in effect at the time he committed his crimes, violates the federal constitution's ex post facto clause. We must presume that the repeal was a constitutional legislative act; Onyeukwu bears the burden of showing otherwise. *See* ***State ex rel. Singh v. Kemper***, 2014 WI App 43, ¶9, 353 Wis. 2d 520, 846 N.W.2d 820 (applying the presumption of constitutionality in an ex post facto challenge to repeal of early release programs).

¶63 The "touchstone" of our ex post facto inquiry, as pertinent here, is "whether a given change in law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes." ***Peugh v. United States***, 133 S. Ct. 2072, 2082 (2013) (quoted sources and internal quotation marks omitted). "[M]ere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish [an ex post facto]

violation ....” ***Id.*** The inquiry is “‘a matter of degree’” and “cannot be reduced to a ‘single formula.’” ***Id.*** (quoted source omitted).

¶64 As we understand it, Onyeukwu’s main ex post facto argument is based on the proposition that the risk reduction program is comparable to particular programs addressed in our ***Singh*** decision. In ***Singh***, we addressed an ex post facto challenge to the repeal of other early release programs, programs that the legislature repealed along with the risk reduction program at issue here. *See* ***Singh***, 353 Wis. 2d 520, ¶¶3, 6. Those programs involved earned early release days (“positive adjustment time”) at a rate of one day per every two or three days of compliance with prison regulations and performance of assigned duties. *See* ***id.***, ¶¶1, 6 (citing WIS. STAT. §§ 302.113(2)(b) and 304.06(1)(bg)). We concluded that elimination of those programs resulted in a significant risk of increasing the ***Singh*** defendant’s incarceration time, thus violating the ex post facto clause. *See* ***id.***, ¶¶1, 10, 19.

¶65 Onyeukwu seems to think it is obvious that, for purposes of ex post facto analysis, the risk reduction program is indistinguishable from the early release programs in ***Singh***. We disagree. We conclude that Onyeukwu’s briefing is inadequate to the task of persuading us that ***Singh*** is controlling. We observe that the now-repealed risk reduction statute does not appear to contemplate any means for calculating a specific number of days for early release. Instead, the statute gives the state department of corrections discretion to develop and amend an inmate’s “programming and treatment” “plan,” and to determine whether an inmate satisfactorily complied with the plan. *See* WIS. STAT. § 302.042(1), (2)(b), and (3). Only after the department of corrections determines compliance does the inmate become eligible for release under the program. *See* § 302.042(4).

Onyeukwu does not address these apparent differences between the early release programs in ***Singh*** and the risk reduction program.

¶66 Accordingly, Onyeukwu fails to persuade us that repeal of the risk reduction program created a "sufficient risk of increasing the measure of punishment." *See* ***Peugh***, 133 S. Ct. at 2082 (quoted source and internal quotation marks omitted). Rather, his limited arguments leave us in the realm of "speculation or conjecture." *See* ***id.*** Onyeukwu does not overcome our presumption that the repeal is constitutional.

Conclusion

¶67 For all of the reasons stated above, we affirm the judgments of conviction against Onyeukwu and the order denying his motion for postconviction relief.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.