**COURT OF APPEALS DECISION DATED AND FILED**

**August 16, 2016**

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

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**Appeal No. 2015AP297-CR** | **Cir. Ct. No. 2010CF770**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MYCHAEL R. HATCHER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and orders of the circuit court for Brown County: SUE E. BISCHEL and TAMMY JO HOCK, Judges. *Affirmed*.

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

¶1 STARK, P.J. Mychael Hatcher appeals a judgment convicting him of three offenses, an order denying his motion for postconviction relief, and an

order denying his motion for reconsideration.[1] Hatcher argues the trial court violated his right to a fair trial by refusing to accept his guilty pleas to two of the three charges on the morning of the first day of trial and by permitting the State to call a particular witness in rebuttal. Hatcher also argues the trial court erroneously limited his trial testimony and, by doing so, violated his constitutional right to present a defense. In addition, Hatcher contends his trial attorney was ineffective in two respects. Finally, Hatcher argues he was prejudiced by the combined effect of these errors. We reject Hatcher's arguments and affirm.

## BACKGROUND

¶2 A criminal complaint charged Hatcher with five counts, each as a repeater: second-degree sexual assault of an intoxicated person;[2] identity theft; disorderly conduct (domestic abuse); obstructing an officer; and misdemeanor bail jumping. As relevant to this appeal, the complaint alleged that, on July 2, 2010, Hatcher went out drinking with his girlfriend, Smith, and two of Smith's friends,

[1] The Honorable Sue E. Bischel presided over Hatcher's trial and sentencing. The Honorable Tammy Jo Hock entered the orders denying Hatcher's postconviction motion and motion for reconsideration. In this opinion, we refer to Judge Bischel as the "trial court" and Judge Hock as the "postconviction court" in order to clearly distinguish their rulings and analyses.

[2] Hatcher was charged with second-degree sexual assault pursuant to WIS. STAT. § 940.225(2)(cm), which prohibits

> sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Williams and Johnson.[3] Hatcher, Smith, and Williams ended up at Smith's residence. The following morning, Williams called Johnson, and then called the police, reporting that Hatcher had raped her.

¶3 On the morning of the first day of trial, the State filed an amended Information omitting the disorderly conduct and identity theft charges. At that point, Hatcher attempted to plead guilty to the obstructing and bail jumping charges in order to "keep the trial confined to the sexual assault." However, the trial court would not permit Hatcher to do so, and the three remaining charges were tried.

¶4 At trial, it was undisputed that Johnson and Williams met up with Smith at the Stadium View bar at approximately 5:00 or 5:30 p.m. on July 2, 2010, and Hatcher joined them sometime before 7:00 p.m. The group was talking and drinking alcohol, and Hatcher and Williams played pool. Williams testified she consumed five or six beers and at least two shots. At some point during the evening, Hatcher and Williams drove to a gas station to buy cigarettes.

¶5 Johnson left the bar at around 10:00 p.m. Hatcher, Smith, and Williams left approximately thirty to sixty minutes later and drove together to Smith's residence. When they arrived, Smith helped Williams inside and carried her upstairs to a spare bedroom. Smith then went to sleep in her own bedroom, and Hatcher walked to a nearby bar. He returned to Smith's residence at around 2:30 a.m. He took a glass of water to Smith, who had awoken, and put on a movie. Smith then went back to sleep.

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[3] We use pseudonyms to refer to the victim, Hatcher's girlfriend, and the other friend who was present that night.

¶6 What happened next is disputed. Hatcher testified he brought Williams a glass of water, woke her up, and they had a brief conversation before engaging in consensual sex. Conversely, Williams testified she was asleep and woke to find Hatcher having sex with her. Williams testified she was too intoxicated to move or talk, and she passed out following the assault. When she woke again at around 6:00 or 6:30 a.m., she was wearing her tank top and pants from the night before, but her underwear were gone. Williams used her cell phone to call Johnson, who told her to call the police. Williams then called the police and reported that Hatcher had sexually assaulted her.

¶7 Following a two-day trial, the jury found Hatcher guilty of all three charges.[4] The trial court imposed concurrent sentences totaling fifteen years' initial confinement and fifteen years' extended supervision. Hatcher then moved for postconviction relief. Following an evidentiary hearing, the postconviction court issued a written decision denying Hatcher's postconviction motion. The court subsequently denied Hatcher's motion to reconsider a portion of that decision, and Hatcher now appeals. Additional facts are included in the discussion section as necessary.

[4] As we discuss below, the obstructing charge was based on the fact that Hatcher gave a false name when he was initially questioned by police. *See infra*, ¶20. The bail jumping charge was based on the fact that, by committing the obstructing offense, Hatcher had violated the conditions of his bond in another case, which required him to have no further law violations. *See infra*, ¶21. Hatcher's attorney conceded at trial that Hatcher was guilty of both obstructing and bail jumping.

## DISCUSSION

### I. Constitutional right to a fair trial

¶8 Hatcher's first argument on appeal is that the trial court violated his constitutional right to a fair trial in two ways. First, Hatcher argues the court should have accepted his guilty pleas to the obstructing and bail jumping charges. Second, Hatcher argues the court erred by allowing the State to present the expert testimony of Samantha McKenzie, a project manager for the Brown County Sexual Assault Response Team, in rebuttal. We address these arguments in turn.

#### *A. Refusal to accept Hatcher's guilty pleas*

i. Factual background

¶9 As noted above, the State initially charged Hatcher with five offenses. *See supra*, ¶2. At the final pretrial hearing on Thursday, May 12, 2011, Hatcher's attorney informed the trial court he had been negotiating with the State in attempt to "get this particular case resolved," but Hatcher was "not amenable to any of the offers that [had] been put forward." Counsel therefore requested that Hatcher's trial, which was scheduled to begin the following Tuesday, be "left on the calendar." The court responded:

> All right. Then it's going to trial. Left on the calendar means it's going to trial. I am not available tomorrow or Monday for last minute, please, Judge, we got a deal worked out. I am simply not available. I am done doing that. I am done working through the noon hours and at 5 o'clock at night for that kind of stuff. Done. The calendar is booked solid. And I am simply not available anytime in the normal working hours.

¶10 The trial court confirmed that the State had made its final offer with respect to a plea agreement. The court then addressed Hatcher personally, stating:

> Mr. Hatcher, then that means, and I think I have explained this to you in the past, this is the D-day deadline for you to decide if you want to take that offer or not. It is not a good idea for anybody—certainly, not for the 60 or some jurors that are putting their business on hold for next Tuesday. They have been summonsed to come in. You are the only jury trial on next Tuesday right now. The rest have been settled. For them, they have a right to know and I need to know today if you want to try to settle this and other cases or if you want a trial. I have no problem presiding over a trial for you. I am ready, willing, able, [and] pleased to do that. What I do not want is tomorrow and Monday phone calls saying, people are changing their mind, we've got this, we've got that, can you get us back on the calendar? The answer is no. No. So, it's today or not at all. So, Mr. Hatcher, are you sure you don't want to resolve this case and/or the other cases without a trial? Are you positive?

After an off-the-record discussion, Hatcher confirmed he was ready to go to trial.

¶11 The following Tuesday, just before the start of Hatcher's trial, the State filed an amended Information that omitted the identity theft and disorderly conduct charges. Hatcher's attorney then informed the trial court that Hatcher would be willing to plead guilty to two of the remaining counts—obstructing and bail jumping—in order to "keep the trial confined to the sexual assault." The court responded it had informed Hatcher during the final pretrial hearing that it would not accept any "last minute deals" and that, if Hatcher did not enter pleas during that hearing, the case would go to trial on all counts. After noting the jury was waiting, the court asked trial counsel for Hatcher's plea questionnaire form. Counsel then had Hatcher sign a blank plea questionnaire.

¶12 At that point, the trial court asked the State whether it was prepared to accept Hatcher's pleas to the obstructing and bail jumping charges, noting the State did not "have to" do so. The State responded that, even if Hatcher pled guilty to those counts, the State would "still bring in [at trial] the fact he was lying

to the cops. That is part of the incident. So, if this was an intent to get rid of the lies to the cops, it still comes in. It's part and parcel." Hatcher's attorney responded that was not Hatcher's intent, and Hatcher "just [didn't] want to get sentenced for not taking responsibility."

¶13 The trial court then noted the plea questionnaire was not completed, and there was "no reason to think [Hatcher had] even gone over [the] form." Hatcher's attorney stated, "Okay, That's fine. At least it's on the record that he was willing to take responsibility for this. I hope the Court takes that into consideration if and when he gets sentenced on these." The court responded, "I thought I made myself loud and clear last Thursday that if he wanted to take responsibility for anything, that was the day to do it .... I understand that his position changed over the weekend. I don't know why that happened. But it has obviously changed." The case then proceeded to trial.

¶14 In his postconviction motion, Hatcher alleged the trial court violated his right to a fair trial by rejecting his guilty pleas to the obstructing and bail jumping charges. The postconviction court disagreed, noting the trial court had warned Hatcher the final pretrial hearing was his last opportunity to plead. The postconviction court stated Hatcher's decision to plead on the first day of trial, without an agreement from the State, "highlights that nothing was stopping him from entering pleas to those counts" at the final pretrial hearing. The postconviction court further stated the trial court "had a right to manage [its] calendar and require a decision [to plead] prior to the trial." Finally, the court concluded any error in refusing to accept Hatcher's pleas was harmless.

ii. Analysis

¶15 Hatcher concedes on appeal that a defendant has "no absolute right to have a guilty plea accepted." *See* ***Santobello v. New York***, 404 U.S. 257, 262 (1971). Rather, a court "may reject a plea in [the] exercise of sound judicial discretion." ***Id.*** A court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and uses a demonstrably rational process to reach a reasonable conclusion. ***State v. Conger***, 2010 WI 56, ¶14, 325 Wis. 2d 664, 797 N.W.2d 341. In exercising its discretion to reject a plea, a court cannot act arbitrarily and must articulate on the record a "sound reason" for the rejection. ***United States v. Kelly***, 312 F.3d 328, 330 (7th Cir. 2002).

¶16 As a threshold matter, we observe the State contends Hatcher failed to argue below that the trial court violated his right to a fair trial by rejecting his pleas to the obstructing and bail jumping charges. The State therefore argues Hatcher forfeited his right to raise this argument on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal."). We disagree. Although Hatcher did not frame his argument in constitutional terms in the trial court, he clearly raised the underlying issue—i.e., whether the court should accept his guilty pleas to the obstructing and bail jumping charges—on the first day of trial. Moreover, Hatcher expressly asserted in his postconviction motion that the trial court's refusal to accept his

pleas violated his constitutional right to a fair trial. We therefore reject the State's forfeiture argument.[5]

¶17 We do agree with the State, however, that the trial court properly exercised its discretion by rejecting Hatcher's pleas.[6] During the final pretrial hearing, the court warned Hatcher—repeatedly, and in no uncertain terms—that that hearing was his last chance to plead to the charges against him. Nevertheless, the following week, on the morning of the first day of trial, Hatcher informed the court he wanted to plead guilty to two of the remaining counts, with no consideration from the State. The court denied that request, citing: (1) its prior warning that it would not accept a last-minute plea; (2) the fact that the jurors were waiting; and (3) the fact that the plea questionnaire form Hatcher signed was not completed, and there was no indication Hatcher had reviewed it. The court provided sound reasons for rejecting Hatcher's pleas, and its decision to do so was not arbitrary. *See* ***Kelly***, 312 F.3d at 330.

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[5] The State also argues Hatcher is not entitled to relief because the trial court did not actually reject his guilty pleas. Instead, the State argues Hatcher withdrew his request to plead guilty. However, the facts discussed above at ¶¶11-13 clearly indicate the court was unwilling to accept Hatcher's pleas.

[6] We observe that, although Hatcher asserts the trial court's rejection of his guilty pleas violated his constitutional right to a fair trial, he does not develop a constitutional argument regarding this issue on appeal. He merely argues the court erroneously exercised its discretion by rejecting his pleas. We therefore confine our analysis to whether the court erroneously exercised its discretion.

We also observe that the Wisconsin Supreme Court has set forth a number of factors a trial court may consider when determining whether to accept a plea agreement. *See* ***State v. Conger***, 2010 WI 56, ¶¶30-35, 325 Wis. 2d 664, 797 N.W.2d 341. However, this case does not involve a trial court's rejection of a plea agreement, and neither party argues the trial court erred by failing to consider the factors set forth in ***Conger***.

¶18 Hatcher nevertheless argues the trial court erroneously exercised its discretion because it failed to consider the change of circumstances that occurred on the first day of trial—namely, the State's decision to file an amended Information omitting the identity theft and disorderly conduct charges. However, we agree with the postconviction court that Hatcher's decision to plead to the obstructing and bail jumping charges on the morning of trial, without consideration from the State, "highlights that nothing was stopping him from entering pleas to those counts" during the pretrial hearing. Hatcher's attorney asserted Hatcher wanted to plead to the obstructing and bail jumping counts in order to narrow the issues for trial and receive credit at sentencing for accepting responsibility. Hatcher does not explain why those objectives would not have been equally served by pleading guilty to the obstructing and bail jumping counts during the final pretrial hearing. Moreover, at the postconviction hearing, Hatcher's trial attorney confirmed Hatcher was "always comfortable" with pleading to the obstructing and bail jumping counts. Again, if that was the case, nothing prevented Hatcher from pleading to those counts at the final pretrial hearing, regardless of the State's position on the other charges.

¶19 We further agree with the State that, even if the trial court erred by rejecting Hatcher's guilty pleas, the error was harmless. To establish harmless error, the State must prove beyond a reasonable doubt that the error did not contribute to the verdict. *See* ***State v. Martin***, 2012 WI 96, ¶45, 343 Wis. 2d 278, 816 N.W.2d 270. Here, it is clear beyond a reasonable doubt that the trial court's rejection of Hatcher's pleas to the obstructing and bail jumping charges did not affect the verdict on the sexual assault charge or the sentences imposed.

¶20 The obstructing charge was based on the fact that Hatcher gave police another person's name when first questioned about the sexual assault.

However, even if the trial court had accepted Hatcher's guilty plea to the obstructing charge, the State indicated it intended to introduce evidence that Hatcher gave police a false name, and that evidence would have been admitted at Hatcher's trial on the sexual assault charge. *See* ***State v. Bettinger***, 100 Wis. 2d 691, 698, 303 N.W.2d 585 (1981) ("It is generally acknowledged that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge."). Because evidence that Hatcher lied to police would have been admitted at trial even if the court had accepted his guilty plea to the obstructing charge, it is clear beyond a reasonable doubt the court's rejection of that plea did not affect the jury's verdict on the sexual assault charge.

¶21 It is also clear beyond a reasonable doubt Hatcher would have been convicted of the sexual assault charge even if the trial court had accepted his guilty plea to the bail jumping charge. The factual basis for the bail jumping charge was that Hatcher was on bond for a misdemeanor at the time of the assault, and the bond conditions required him to refrain from committing additional crimes. Although the trial court's rejection of Hatcher's plea to the bail jumping charge resulted in the admission of evidence at trial that Hatcher was on bond for a misdemeanor, in light of the other evidence, we are confident that fact did not affect the jury's verdict on the sexual assault charge. As the postconviction court stated, "A reasonable juror would not assume that someone charged with a misdemeanor is automatically capable of a sexual assault."

¶22 Finally, it is clear beyond a reasonable doubt that the trial court's rejection of Hatcher's guilty pleas to the obstructing and bail jumping charges did not affect his sentences on those charges. During sentencing, Hatcher's trial attorney specifically asked the court to consider Hatcher's attempt to plead to the

obstructing and bail jumping charges when sentencing him on those counts. Both the State and the defense recommended making Hatcher's sentences on those counts concurrent to his sentence on the sexual assault count. Consistent with the parties' recommendations, the court imposed concurrent sentences on all three counts. Hatcher points to no evidence the court treated him less favorably at sentencing for not having pled guilty to the obstructing and bail jumping charges.

*B. McKenzie's rebuttal testimony*

¶23 We now turn to Hatcher's argument that the trial court violated his constitutional right to a fair trial by allowing the State to introduce Samantha McKenzie's expert testimony in rebuttal.

i. Factual background

¶24 At trial, Williams testified she passed out following the sexual assault. When she awoke at 6:00 or 6:30 a.m., she called Johnson, who told her to call the police.[7] On cross-examination, Hatcher's trial attorney emphasized the fact that Williams had chosen to call Johnson before calling the police:

> Q. … Did you call the police as soon as you woke up?
>
> A. After I called [Johnson].
>
> Q. Okay. Your first reaction was to call [Johnson]?
>
> A. Yes.
>
> Q. Not the cops?
>
> A. No.

[7] Johnson confirmed in her trial testimony that she received a call from Williams at about 6:30 a.m. on July 3, 2010, during which Williams reported Hatcher had raped her. Johnson testified she told Williams "if it actually did happen, … you need to call the cops."

> Q. Okay. Why was that?
>
> ….
>
> A. Why did I choose to call [Johnson] before I choose [sic]—because I was scared. And I had no clue what to do.
>
> Q. Okay. If for some reason [Johnson] didn't answer the phone, would your next move have been to call the cops?
>
> ….
>
> A. I don't know who I would have called if [Johnson] didn't answer.

¶25 After Hatcher testified and the defense rested, the State called McKenzie as an expert witness on the reactive behavior of sexual assault victims. McKenzie was not named on the State's witness list. Hatcher objected to McKenzie's testimony, arguing it was not bona fide rebuttal evidence because it was not offered to rebut anything Hatcher had introduced in his case-in-chief. The trial court overruled Hatcher's objection, stating:

> Everyone agrees that [defense counsel] made a point in cross-exam that [Williams] did not call the police right away. She called her best friend first. Or her friend first. … But she called [Johnson], her friend and her co-worker, rather than calling the police. I do think this is appropriate rebuttal then. Because it is in response to the clear suggestion that this was not the way the victim described it. It happened in some other fashion. That it was consensual. Or she would have done something different other than call her friend first. So, it is appropriate rebuttal.

¶26 McKenzie then testified she had worked with at least 1,000 adult victims of sexual assault since 2006. Based on that experience, as well as her education and training, McKenzie opined that

> a lot of victims are going through a lot of trauma initially after a personal violation. And it may take some time for them to process what has happened to them. So, in most cases, if they disclose to someone what happened to them, due to embarrassment or other reasons, they will talk to

> someone that they trust, being a friend or a family member, before they report to someone formally in the system.

¶27 In his postconviction motion, Hatcher alleged the trial court erred by allowing McKenzie to testify because she was not a bona fide rebuttal witness. The postconviction court disagreed, explaining:

> McKenzie's testimony was appropriate rebuttal evidence, because it directly answered an issue introduced by Hatcher: why [Williams did] not call the police first. The suggestion that [Williams] should have called the police was introduced on cross, and the State could not have anticipated that McKenzie's testimony would be necessary until that time. Because McKenzie was … not disclosed as a witness, the State had to bring her testimony in rebuttal.

ii. Analysis

¶28 WISCONSIN STAT. § 971.23(1)(d) requires the State to disclose to the defendant all of the witnesses it intends to call at trial, except for rebuttal and impeachment witnesses. Wisconsin courts have held that evidence qualifies as bona fide rebuttal evidence when: (1) the evidence was not necessary to the State's case-in-chief; and (2) it became necessary and appropriate "when the defense made its case." ***State v. Novy***, 2013 WI 23, ¶34, 346 Wis. 2d 289, 827 N.W.2d 610. "Bona fide rebuttal evidence is not determined by asking whether the evidence could have been admitted in the State's case-in-chief, but rather whether the evidence became necessary and appropriate because it controverts the defendant's case." ***Id.*** In addition, "rebuttal evidence is no less bona fide when the State is able to anticipate the defense's theory or particular pieces of evidence." ***Id.***, ¶35. The State "has no obligation under WIS. STAT. § 971.23(1)(d) to disclose rebuttal evidence, even when the State anticipates before trial that certain evidence may be used for rebuttal." ***Novy***, 346 Wis. 2d 289, ¶26. "Once the defendant raises a particular theory, the defendant's veracity

and the credibility of that theory become relevant issues in the case." ***Id.***, ¶35. Whether to admit or exclude rebuttal evidence lies within the trial court's discretion. ***Id.***, ¶¶21, 36.[8]

¶29 Applying these principles to the facts at hand, Hatcher argues McKenzie's testimony does not constitute bona fide rebuttal evidence because it was not offered to rebut any evidence or theory raised during Hatcher's case-in-chief. Instead, it was offered to rebut a theory advanced during Hatcher's cross-examination of Williams—namely, that Williams' decision to call Johnson before calling police cast doubt on whether she was, in fact, sexually assaulted.

¶30 Hatcher cites two cases in support of his argument that testimony is not bona fide rebuttal evidence when it is offered to rebut a theory advanced by the defense during cross-examination of the State's witness. *See* ***Lunde v. State***, 85 Wis. 2d 80, 270 N.W.2d 180 (1978); ***State v. Konkol***, 2002 WI App 174, 256 Wis. 2d 725, 649 N.W.2d 300. However, both cases are distinguishable.

¶31 In ***Lunde***, our supreme court held the trial court properly admitted an informant's testimony as bona fide rebuttal evidence because the informant's testimony was not necessary for the State's case-in-chief and "was only necessary and appropriate when defendant took the stand and denied that he knew" the informant. ***Lunde***, 85 Wis. 2d at 91-92. Unlike this case, ***Lunde*** did not involve a situation in which the defense raised a theory on cross-examination during the

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[8] As with his previous argument, Hatcher asserts the improper admission of McKenzie's testimony violated his constitutional right to a fair trial. However, he does not develop a constitutional argument; he simply argues the trial court erroneously exercised its discretion by admitting the evidence. As above, we therefore confine our analysis to whether the trial court erroneously exercised its discretion.

State's case-in-chief. The ***Lunde*** court's statement that the proffered testimony in that case was bona fide rebuttal evidence because it only became necessary after the defendant testified therefore was based on the specific facts of that case and does not control the operative issue here.

¶32 In ***Konkol***, an operating-while-intoxicated case, the State introduced evidence during its case-in-chief that the defendant had a post-arrest blood alcohol concentration (BAC) of 0.12%. ***Konkol***, 256 Wis. 2d 725, ¶2. In response, the defendant introduced evidence during his case that he had only consumed one drink before driving. ***Id.***, ¶3. On appeal, we held the trial court should have permitted an expert to testify in rebuttal that it was impossible the defendant's 0.12% BAC had been caused by a single drink. ***Id.***, ¶¶4, 19. We held the expert's testimony was bona fide rebuttal evidence because it directly answered the theory raised during Konkol's case-in-chief that he had only consumed one drink. ***Id.***, ¶¶3, 19.

¶33 As in ***Lunde***, and unlike this case, ***Konkol*** did not involve a situation in which the State sought to introduce rebuttal evidence to counter a theory that was raised by the defense on cross-examination during the State's case-in-chief. Thus, while the ***Konkol*** court did state the "proper test" for the admission of the disputed evidence was "whether the expert's testimony only became necessary and appropriate *when Konkol presented his case-in-reply*," ***id.***, ¶18 (emphasis added), we do not read that statement as prohibiting the introduction of rebuttal evidence

in cases where a defense theory is raised on cross-examination during the State's case-in-chief. As in ***Lunde***, that issue simply was not raised in ***Konkol***.[9]

¶34 Hatcher argues that, "if the [S]tate wanted the jury to hear expert testimony about when victims typically contact law enforcement, it should have called McKenzie during its case." However, it is undisputed that McKenzie's testimony was not necessary to the State's case-in-chief. Moreover, prior to defense counsel's cross-examination of Williams, the State had no way of knowing whether the defense would suggest Williams' account of the assault was not credible because she called Johnson before calling police. Although the State theoretically could have anticipated that line of cross-examination, the State is not "barred from putting on legitimate rebuttal evidence simply because it correctly anticipated the defense." ***Konkol***, 256 Wis. 2d 725, ¶16. A contrary rule would "require a prosecutor to assemble and list all possible rebuttal witnesses in

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[9] The State cites ***State v. Gershon***, 114 Wis. 2d 8, 337 N.W.2d 460 (Ct. App. 1983), in support of its argument that the trial court properly admitted McKenzie's testimony. In ***Gershon***, the State charged the defendant with first-degree sexual assault of a child. ***Id.*** at 9-10. During the State's case-in-chief, the child testified the defendant had sexually assaulted him. ***Id.*** at 10. On cross-examination, the defense asked questions that implied the child's testimony was "prompted by an attempt to avoid parental discipline and was extensively prepared by the prosecution." ***Id.*** The State was later permitted to call three witnesses in rebuttal who testified regarding consistent statements the child had made about the sexual assaults. ***Id.***

We concluded on appeal that the trial court properly admitted the rebuttal testimony. ***Id.*** at 13-14. However, our analysis focused on: (1) whether the testimony was inadmissible hearsay; (2) whether it was relevant; and (3) whether its probative value was substantially outweighed by the danger of unfair prejudice. ***Id.*** at 11-13. In the final paragraph of our opinion, we stated the challenged testimony was "admissible rebuttal evidence." ***Id.*** at 14. Our only explanation for that conclusion, however, was that "[e]vidence which tends to contradict a witness'[s] testimony and which is otherwise proper, is admissible on rebuttal." ***Id.*** at 13. Our supreme court has since held that evidence qualifies as bona fide rebuttal evidence when: (1) it was not necessary to the State's case-in-chief; and (2) it became necessary and appropriate "when the defense made its case." ***Novy***, 346 Wis. 2d 289, ¶34. Given ***Gershon***'s limited analysis of the rebuttal-evidence issue, and its failure to apply the standard set forth in ***Novy***, we reject the State's assertion that it controls the outcome of this case.

anticipation of defense strategies that may or may not be presented at trial," which would "needlessly protract the entire trial process." ***Id.*** Further, as we explained in ***Konkol***:

> Our discovery statute does not require a defendant to divulge the details of his or her own case. Once a defendant presents a theory of defense, however, the credibility of that theory becomes an issue in the case. The defendant runs the risk that the State will rebut the defense theory with evidence of its own.

***Id.***, ¶17 (footnote omitted).

¶35 We therefore reject Hatcher's argument that the trial court erred by admitting McKenzie's testimony. The testimony was bona fide rebuttal evidence because it was not necessary to the State's case-in-chief, and it was necessary and appropriate to rebut a theory raised by the defense. That the defense theory was raised on cross-examination during the State's case-in-chief, as opposed to during Hatcher's case-in-chief, does not preclude a conclusion that McKenzie's testimony qualified as bona fide rebuttal evidence.

## II. Limitation of Hatcher's trial testimony

¶36 Hatcher next argues the trial court erred by preventing him from testifying about statements Williams made to him while they were at the Stadium View bar and about her behavior toward other men that night. He further contends the court's limitation of his testimony violated his constitutional right to present a defense.

### *A. Factual background*

¶37 During the first day of trial, Williams testified on cross-examination that on the night of the assault she, Johnson, Smith, and Hatcher discussed

problems she was having with her boyfriend. Williams also admitted she might have had a conversation with Hatcher at the bar that night about her desire to "find some male company." She denied telling Hatcher she wanted to have sex with someone that night, but she conceded it was a "topic of conversation between four people at a table." She denied asking Hatcher to call his friend Davis[10] for her.

¶38 Johnson testified on direct examination that she did not see anything sexually inappropriate occurring between Hatcher and Williams that night at the bar. When asked on cross-examination whether Williams expressed any desire to "find a guy to give her some company," Johnson responded, "She did make a comment. Um, she broke up with her boyfriend over the phone. And she—I don't want to be rude—she's like, I'm finding some black dick here. That is what she said to me."[11]

¶39 Detective Thomas Schrank, one of the officers who investigated Williams' sexual assault allegation, also testified for the State. On cross-examination, Hatcher's trial counsel asked Schrank whether Williams told him about any statements she made while at the Stadium View bar. The State objected on hearsay and relevancy grounds. Outside the jury's presence, Schrank testified Williams

> talked about making a comment that she would do some Hispanics or Mexicans. Um, she said she would do [Davis] before she would do Hatcher. Um, she doesn't do black guys. … I think there was some conversation that she talked about where there was some white guys that she was

[10] Like Smith, Williams, and Johnson, we also use a pseudonym to refer to Hatcher's friend.

[11] The record reflects that Hatcher is black.

> interested in. And they weren't flirting back with her. They were pretty much ignoring her.

Using his report to refresh his recollection, Schrank further testified Williams stated "she told [Hatcher] at one point when he was hitting on her that he should call [Davis], who was a black friend of [Hatcher], as she would have sex with him."

¶40 The trial court concluded Williams' statement to Schrank about asking Hatcher to call Davis was admissible as a prior inconsistent statement. The court further concluded Williams' statement about having sex with "Hispanics or Mexicans" was "material in view of the defense in this case." However, the court questioned whether Schrank's testimony was barred by the rape shield statute, WIS. STAT. § 972.11(2).[12] The court ultimately concluded the rape shield statute did not bar the testimony, based on ***State v. Vonesh***, 135 Wis. 2d 477, 490, 401 N.W.2d 170 (Ct. App. 1986), which held that a victim's notes about sexual desires

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[12] WISCONSIN STAT. § 972.11(2) provides, in relevant part:

> (b) If the defendant is accused of a crime under s. 940.225, … any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31(11):
>
> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

and fantasies were admissible because the act of writing the notes was not prior sexual conduct.

¶41 After the jury returned to the courtroom, Hatcher's trial attorney asked Schrank whether Williams ever "express[ed] to you any statements that she made in regards to wanting to have sex with somebody that night?" Schrank responded:

> She said that [Hatcher] should call [Davis], who was a black friend of his, and that she would have sex with him. That, um, she was so wasted that she would even have sex with a Hispanic, because the whites were gay. And she also said, though, that was drunk bar talk. And that she really wouldn't have sex with anyone who wasn't white.

¶42 On the second day of trial, Hatcher testified in his own defense. On direct examination, counsel asked Hatcher about Williams' demeanor toward certain men in the bar while she and Hatcher were playing pool. Hatcher testified Williams "went to the table trying to hit on them and kind of got turned down." At that point, the trial court called a sidebar and subsequently sent the jury out. Outside the jury's presence, the court explained it was concerned about a possible rape shield violation because testimony about Williams' behavior toward other men in the bar was evidence of prior sexual conduct. The court therefore stated it would not allow "any questions about her flirting with other men in the bar" or "hitting on other men in the bar."

¶43 The trial court then ruled that Hatcher could not testify regarding any statements Williams made about wanting to have sex with other men because those statements constituted "sexual conduct" and were therefore barred by the rape shield statute. However, the court stated it would allow Hatcher to testify about "what [Williams] may have said to him about wanting to have sex with

him." The jury then returned, and defense counsel continued his questioning of Hatcher. The trial court did not strike Hatcher's previous testimony that Williams unsuccessfully "hit on" other men at the bar. Hatcher's trial attorney did not ask Hatcher about any statements Williams made indicating she wanted to have sex with Hatcher.

¶44 The postconviction court ruled the trial court did not err by limiting Hatcher's testimony, reasoning, "Even if the [c]ourt did change its stance on what was barred under rape shield law, there is no restriction on the [c]ourt determining there was an incorrect ruling and barring similar testimony." With respect to Hatcher's argument that flirting and statements about wanting to have sex with other men were not "conduct" under the rape shield statute, the postconviction court stated, "Frankly, without knowledge of what Hatcher was going to testify to, the [c]ourt cannot rule in his favor. Hatcher fails to provide any evidence concerning what he would have said at trial so the [c]ourt is not able to properly classify whether it was barred by the rape shield" statute. The postconviction court further concluded any error in limiting Hatcher's testimony was harmless, and the ruling did not violate Hatcher's constitutional right to present a defense.

¶45 Hatcher moved for reconsideration, to the extent the postconviction court based its decision on his failure to present evidence as to how he would have testified at trial. Hatcher asked the court to consider the transcript of his custodial interview as evidence of what his trial testimony would have been. During his custodial interview, Hatcher stated Williams asked him to play pool with her so that she could flirt with a table of men. However, the more she talked to them, the more she realized they "weren't into" her. After that, Williams started flirting with Hatcher. She was holding his hand, which later proceeded to "caressing."

¶46 Hatcher further stated during his custodial interview that Williams asked him to call Davis so she could have sex with him. Hatcher stated that was when he knew he was going to have sex with Williams. He explained, "[Williams] was always big into white guys. Always. But [that night], she said she'd fuck a black dude. I mean this is after we, ah, this is after our little … bar episode."

¶47 The postconviction court denied Hatcher's motion for reconsideration, stating it was "still unclear what Hatcher would have actually testified to at trial." The court explained, "Hatcher, himself, has not made any representation that he would have testified consistent with his custodial interview." The court further concluded that, even considering the statements in Hatcher's custodial interview, any error in limiting Hatcher's trial testimony was harmless.

*B. Analysis*

¶48 Hatcher argues the trial court erred by concluding his testimony was barred by the rape shield statute. However, we need not determine whether the trial court properly applied the rape shield statute because the evidence Hatcher now complains he was prohibited from presenting was either admitted, was not excluded by the trial court, or was properly excluded on other grounds. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (court of appeals "may affirm on grounds different than those relied on by the trial court").[13]

[13] Notably, the State does not argue on appeal that the circuit court properly excluded Hatcher's testimony pursuant to the rape shield statute.

¶49 Hatcher first asserts he would have testified about Williams flirting with other men at the bar. However, the record shows Hatcher *did* testify at trial that Williams was "trying to hit on" a table of men while she and Hatcher were playing pool. After Hatcher so testified, the trial court ruled, outside the jury's presence, that testimony about Williams flirting with other men was inadmissible under the rape shield statute. Nevertheless, the court never struck Hatcher's testimony about Williams "trying to hit on" a table of men, nor did the court instruct the jury to disregard that testimony. Hatcher's assertion that the court erred by prohibiting him from testifying about Williams flirting with other men therefore has no merit. Although Hatcher now asserts he wanted to provide additional detail about Williams' behavior toward other men in the bar, he never provided the trial court with an offer of proof describing the proffered testimony.

¶50 Hatcher also asserts the trial court erroneously prohibited him from testifying that Williams flirted with him at the bar. To the contrary, the court never ruled Hatcher could not testify Williams flirted with him. After ruling that Hatcher could not testify about Williams flirting with other men, the court stated, "If it's a question of what she said to him about wanting to be with him that night or trying to pick him up, that may be a separate issue." Thereafter, the court expressly stated Hatcher could testify regarding "what [Williams] may have said to him about wanting to have sex with him." Hatcher's trial attorney was free to pursue that line of questioning at trial, but he did not do so.

¶51 Lastly, Hatcher argues the trial court erred by prohibiting him from testifying that Williams made comments about wanting to have sex with other men— including black men, and particularly Hatcher's friend Davis. A trial court's decision to exclude evidence is discretionary and will be upheld "unless it can be said that no reasonable judge, acting on the same facts and underlying law,

could reach the same conclusion." ***State v. Payano***, 2009 WI 86, ¶51, 320 Wis. 2d 348, 768 N.W.2d 832 (quoting ***State v. Jeske***, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995)).

¶52 A trial court may exclude relevant evidence if its probative value is substantially outweighed by the needless presentation of cumulative evidence. *See* WIS. STAT. § 904.03. Hatcher's testimony that Williams made comments about wanting to have sex with other men was cumulative of other testimony already introduced through Johnson, detective Schrank, and Williams herself. Because three witnesses had already provided essentially the same testimony, the trial court could have reasonably concluded the cumulative nature of Hatcher's proffered testimony substantially outweighed its probative value. Accordingly, we cannot say the court's decision to exclude the testimony was one that no reasonable judge could have reached under the circumstances. *See* ***Payano***, 320 Wis. 2d 348, ¶51.

¶53 Alternatively, Hatcher argues the trial court's limitation of his testimony violated his constitutional right to present a defense.[14] The confrontation and compulsory process clauses of Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution grant criminal defendants a constitutional right to present evidence. ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). However, a criminal defendant does not have a constitutional right to present any and all

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[14] The State argues Hatcher forfeited this argument by failing to raise it in the trial court. Again, while Hatcher did not frame his argument in constitutional terms in the trial court, he clearly raised the underlying issue—whether the court could properly limit his trial testimony. Hatcher also expressly asserted in his postconviction motion that the trial court's limitation of his testimony violated his constitutional right to present a defense. We therefore reject the State's forfeiture argument.

evidence in support of his or her claim. *See, e.g.*, ***Chambers v. Mississippi***, 410 U.S. 284, 302 (1973). The test for whether the exclusion of evidence violated a defendant's right to present a defense is "whether the proffered evidence was 'essential to' the defense, and whether without the proffered evidence, the defendant had 'no reasonable means of defending his [or her] case.'" ***State v. Williams***, 2002 WI 58, ¶70, 253 Wis. 2d 99, 644 N.W.2d 919 (quoting ***State v. Johnson***, 118 Wis. 2d 472, 480, 348 N.W.2d 196 (Ct. App. 1984)). Whether a defendant's constitutional right to present a defense was violated is a question of constitutional fact that we review independently. ***Id.***, ¶69.

¶54 Hatcher's theory at trial was that Williams was capable of consenting to sex on the night in question and did, in fact, consent to sex with him. Hatcher contends his testimony that Williams expressed interest in having sex that night "goes directly to Hatcher's perception about [Williams'] ability to consent." Assuming without deciding that Hatcher's testimony would have been relevant for that purpose, Hatcher cannot show that any testimony excluded by the trial court was "essential to" his defense. *See* ***id.***, ¶70. Hatcher testified Williams flirted with other men while playing pool with him. Three other witnesses, including Williams, testified Williams made comments about wanting to have sex that night. In addition, the trial court did not prevent Hatcher from testifying that Williams made comments about wanting to have sex with him. Accordingly, it cannot be said that the trial court's limitation of Hatcher's testimony left him with no reasonable means of defending his case. ***Id.*** We therefore reject Hatcher's argument that the trial court violated his constitutional right to present a defense.

## III. Ineffective assistance of trial counsel

¶55 Hatcher next argues his trial attorney was ineffective in two ways: (1) by failing to move to suppress a statement Hatcher made to a police officer before receiving the warnings required by ***Miranda v. Arizona***, 384 U.S. 436 (1966); and (2) by introducing evidence regarding Williams' BAC.

¶56 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. The reasonableness of counsel's conduct is evaluated "on the facts of the particular case, viewed as of the time of counsel's conduct." ***Id.*** Counsel's "strategic choices made after thorough investigation of [the] law and facts relevant to plausible options are virtually unchallengeable[.]" ***Id.***

¶57 To demonstrate prejudice, a defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. A reasonable probability is a probability sufficient to undermine our confidence in the outcome. ***Id.*** 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.

¶58 Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the defendant's proof is

sufficient to establish ineffective assistance is a question of law that we review independently. ***Id.***

*A. Failure to file a suppression motion*

i. Factual background

¶59 At trial, sergeant Jeremy Schnurer testified he was one of the officers who responded to Smith's residence on the morning of July 3, 2010. After entering the residence, Schnurer observed Hatcher "walking down the stairs from upstairs in the apartment." Schnurer asked Hatcher to come outside and talk to him. Hatcher gave Schnurer a false name and stated he did not know "what was going on." Schnurer then informed Hatcher the police were there to investigate a sexual assault and believed Hatcher was a possible suspect. Hatcher responded he "did not do anything." Schnurer then asked whether Hatcher had consensual sex with Williams, and Hatcher "stated, no, she was way too drunk." After refreshing his recollection using his report, Schnurer testified Hatcher stated, "I never touched her, she was so drunk." Schnurer further testified he "gave [Hatcher] several opportunities to tell [police] what had happened," but Hatcher "still denied that he had any sexual contact, consensual or not consensual, with [Williams]."

¶60 In his postconviction motion, Hatcher asserted his trial attorney was ineffective by failing to move to suppress Hatcher's statement, made before he received ***Miranda*** warnings, that he did not have sexual contact with Williams because she was too drunk. Hatcher contended ***Miranda*** warnings were required because that statement was the product of a custodial interrogation.

¶61 At the postconviction hearing, Hatcher testified he was asleep in Smith's apartment on the morning of July 3, 2010, when he was awoken by officer

Brian Arkens, who "called out" to him, "[H]ey buddy, get up, come down and talk to me." Hatcher was wearing only a pair of shorts. Arkens did not allow Hatcher to get dressed or use the bathroom but did allow him to put on shoes.

¶62 When Hatcher went downstairs, Smith was in the living room. Schnurer called Hatcher out onto the porch, frisked him, and told him to sit down. Schnurer asked Hatcher "if [he] knew what was going on," and Hatcher responded he did not know why the officers were there. Schnurer then told Hatcher the police were investigating a sexual assault, and he was "the suspect." Schnurer asked Hatcher "if [he] knew what was going on now," and Hatcher "told him no."

¶63 Hatcher testified he was on the porch for thirty to forty minutes, during which time Schnurer never left his side. Schnurer "kept asking" if Hatcher had sex with Williams. Hatcher testified, "At first I denied it. And then—I told him, I didn't touch her, I was too drunk. Because I was intoxicated myself." Hatcher testified Schnurer was armed during the questioning but never drew his weapon. Schnurer denied Hatcher's request to use the bathroom and also denied his request to get a cigarette from the kitchen, which was located on the first floor of the residence.

¶64 Hatcher testified Williams was in the upper floor of Smith's residence while he was being questioned on the porch. When Williams was escorted from the residence, Schnurer "made [Hatcher] stand up, come down the stairs, walked [him] to the neighbor's picket fence, [and] told [him] to … stare at the wall and don't move." Schnurer told Hatcher this was so he could not look at Williams. After a few minutes, Schnurer directed Hatcher back to the porch. Schnurer again denied Hatcher's request to use the bathroom. Ten to twenty minutes after Williams left, Hatcher was handcuffed and transported to the police

station. At the station, he was given ***Miranda*** warnings before being questioned by another officer. Hatcher admitted to that officer that he had sex with Williams. He testified at the postconviction hearing that he had denied having sex with Williams when questioned by Schnurer because Smith, his girlfriend, was standing "in earshot" in the living room.

¶65 Hatcher's trial attorney testified at the postconviction hearing that he never considered filing a motion to suppress Hatcher's statement that he did not have sex with Williams because she was too drunk. Counsel stated he did not think Hatcher's statement to that effect was "all that big of a deal." Counsel later clarified:

> My recollection is that it wasn't the sort of issue that … warranted a suppression motion. Obviously, my common practice is to look at all of those particular issues and determine whether or not there is anything that is worthy of challenging when it comes to Constitutional rights. And my recollection would be that that—it didn't rise to the level where I thought a motion should be filed.

¶66 The postconviction court rejected Hatcher's claim that trial counsel was ineffective by failing to file a suppression motion. The court first ruled that, because Hatcher did not call Schnurer to testify at the postconviction hearing, he had not "presented enough evidence to support a finding of a ***Miranda*** violation." The court explained Hatcher had presented only "half the story, which is something the [c]ourt generally would not find sufficient in suppression motions prior to trial."[15] Alternatively, the court stated that, even if it "evaluate[d] the

[15] This statement is perplexing, given that, if a suppression motion had been filed prior to trial, it would have been the State's burden to prove Hatcher was not in custody. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 345, 588 N.W.2d 606 (1999).

evidence available," Hatcher's ***Miranda*** argument failed because he was not in custody at the time he made the challenged statement.

ii. Analysis

¶67 The State may not use at trial statements a defendant made during a custodial interrogation unless the defendant was first given ***Miranda*** warnings. *See* ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. In ***Miranda***, the United States Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." ***Miranda***, 384 U.S. at 444.

¶68 "The test to determine custody is an objective one." ***State v. Lonkoski***, 2013 WI 30, ¶27, 346 Wis. 2d 523, 828 N.W.2d 552.

> The inquiry is "whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." Stated another way, if "a reasonable person would not feel free to terminate the interview and leave the scene," then that person is in custody for ***Miranda*** purposes. Courts also formulate the test as "whether a reasonable person in the suspect's position would have considered himself or herself to be in custody."

***Id.*** (quoted sources omitted). Factors relevant to the custody analysis include the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint. ***Id.***, ¶28. When assessing the degree of restraint, we consider: whether the defendant was handcuffed; whether a weapon was drawn; whether a frisk was performed; the manner in which the defendant was restrained; whether the defendant was moved to another location; whether questioning took place in a police vehicle; and the number of officers involved. ***Id.***

¶69 When asked to determine whether ***Miranda*** warnings were required, we accept the circuit court's findings of historical fact unless they are clearly erroneous. *See* ***Morgan***, 254 Wis. 2d 602, ¶11. However, the ultimate determination of whether the defendant was "in custody" is a question of law that we review independently. ***Id.***

¶70 At first blush, the circumstances surrounding Schnurer's questioning of Hatcher appear to support Hatcher's argument that he was in custody. Hatcher was awoken from sleep to find a police officer (Arkens) in the room.[16] Hatcher was wearing only a pair of shorts, and Arkens did not allow him to get dressed, other than putting on shoes, or use the bathroom. Arkens directed Hatcher to go downstairs. Once downstairs, a second officer (Schnurer), directed Hatcher onto the porch, where he frisked Hatcher and told him to sit down. Schnurer then questioned Hatcher regarding the sexual assault of Williams for about thirty to forty minutes, during which time Schnurer did not leave Hatcher's side. While they were on the porch, Schnurer denied Hatcher's requests to use the bathroom and get a cigarette from the kitchen. When Williams was escorted out of the residence, Schnurer directed Hatcher to walk toward a neighbor's fence and stand facing it until Williams had gone. After that, Schnurer directed Hatcher back to the porch and again denied his request to use the restroom. On these facts, we question whether a reasonable person in Hatcher's position would have felt free to terminate the interview and leave the scene. *See* ***Lonkoski***, 346 Wis. 2d 523, ¶27.

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[16] As discussed above, Hatcher testified at the postconviction hearing that Arkens woke him. Conversely, Hatcher testified at trial that he woke because he was "being slapped" by Smith. He then clarified, "First person I remember seeing when I woke up was the police. But [Smith] was trying to wake me up. She was slapping me up." Like the circuit court, we note this discrepancy regarding who woke Hatcher, but we do not deem it particularly significant. Under either scenario, Hatcher was awoken abruptly from sleep to find a police officer in the room.

We find it particularly significant that, beyond simply telling Hatcher where to go, Schnurer and Arkens repeatedly denied Hatcher's requests to do things like get dressed, use the bathroom, and get a cigarette.

¶71 The problem with Hatcher's argument regarding custody, however, is that the operative inquiry is whether Hatcher was in custody *at the time he made the statement he now seeks to suppress*—namely, that he did not have sex with Williams because she was too drunk. Thus, we may not consider any evidence regarding events that are alleged to have occurred after Hatcher made that statement. Unfortunately, the record is not clear as to when during the questioning Hatcher made the challenged statement. Nevertheless, it is apparent from Hatcher's testimony at the postconviction hearing that he made the statement before Williams was escorted from the residence. Accordingly, in determining whether Hatcher was in custody for ***Miranda*** purposes, we may not consider evidence that Schnurer: directed Hatcher to walk toward and stand facing a neighbor's fence until Williams had gone; directed Hatcher back to the porch after Williams left; and denied Hatcher's request to use the restroom once he was back on the porch.

¶72 It is also clear from Hatcher's postconviction testimony and Schnurer's trial testimony that the following events occurred before Hatcher made the challenged statement: Hatcher was awoken from sleep to find Arkens, a police officer, in the room; Hatcher was wearing only shorts, and Arkens refused to let him get dressed or use the bathroom; Arkens did allow Hatcher to put on shoes; Arkens directed Hatcher downstairs; and, once downstairs, Schnurer directed Hatcher onto the porch and frisked him. Although it is a close case, on these facts alone, we cannot conclude Hatcher was in custody.

¶73 That Hatcher was questioned soon after waking to find a police officer in his room weighs in favor of custody because it shows Hatcher was in a relatively vulnerable position. The same is true of the fact that Hatcher was not fully dressed. In addition, Hatcher's movements were controlled by the officers, and Arkens refused to let him get dressed or use the bathroom. These facts further weigh in favor of custody, as does the fact that Hatcher was frisked when he stepped onto the porch. *See* ***Lonkoski***, 346 Wis. 2d 523, ¶28.

¶74 On the other hand, however, Hatcher was not handcuffed or physically restrained in any manner. *See* ***id.*** Although the officers were armed, they did not draw their weapons. *See* ***id.*** The questioning took place on the porch of Hatcher's girlfriend's residence—a location familiar to Hatcher—rather than in a police vehicle or at the police station. *See* ***id.*** The record reflects that at least three officers were present at the residence, but Schnurer appears to have been the only officer present when Hatcher made the challenged statement. *See* ***id.*** The questioning on the porch lasted only thirty to forty minutes, which is not particularly lengthy. *See* ***id.***, ¶31 (referring to a thirty-minute interrogation as "relatively short"). We do not know precisely when Hatcher made the challenged statement. However, the record strongly suggests it was made near the beginning of the questioning. *See supra*, ¶¶59, 63. Further, while Hatcher was not specifically told he was free to leave, he also was not specifically told he could not leave. All of these facts weigh against a conclusion that Hatcher was in custody, and, in our opinion, are sufficient to outweigh the facts supporting a contrary conclusion that are discussed in the preceding paragraph. *See supra*, ¶73.

¶75 In addition to the above evidence, Hatcher testified at the postconviction hearing that, while on the porch, he asked Schnurer for permission to use the bathroom and go inside to get a cigarette, but Schnurer denied those

requests. These additional facts, when combined with the facts discussed above at ¶72, would likely be enough to tip the balance in favor of custody. However, we cannot discern from the record whether Hatcher's requests to use the bathroom and get a cigarette were made before or after his statement that he did not have sex with Williams because she was too drunk.[17]

¶76 It was Hatcher's burden at the postconviction hearing to establish that his trial attorney performed deficiently by failing to file a suppression motion. *See* ***Strickland***, 466 U.S. at 687. Thus, it was Hatcher's burden to show when his requests to use the bathroom and get a cigarette were made, in relation to the challenged statement. Because Hatcher failed to meet that burden, and for the reasons discussed above at ¶74, we cannot conclude Hatcher was in custody at the time he made the challenged statement, such that ***Miranda*** warnings were required. Accordingly, Hatcher has not shown that his attorney performed deficiently by failing to file a suppression motion. *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (defendant cannot establish attorney who failed to pursue a suppression motion was ineffective without showing the motion would have succeeded).

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[17] Moreover, although Hatcher testified Schnurer did not leave his side for the entire thirty to forty minutes he spent on the porch, the significance of that fact for purposes of the custody determination hinges on when Hatcher made the challenged statement. If Hatcher made the statement one minute after coming onto the porch, the fact that Schnurer had not left his side would be less suggestive of custody than if Hatcher made the statement forty minutes after coming onto the porch.

*B. Decision to admit evidence regarding Williams' BAC*

i. Factual background

¶77 Hatcher also claims his trial attorney was ineffective by introducing a report regarding Williams' BAC at trial. According to the report, Williams' BAC would have been between 0.183% and 0.33% at 10:30 p.m. on July 2, 2010—around the time Williams, Smith, and Hatcher left the Stadium View bar—and would have been between 0.143% and 0.233% around the time of the alleged assault.

¶78 At the postconviction hearing, Hatcher's trial attorney testified he believed admitting the BAC report would help the defense because BACs in the reported ranges do not "typically result in the sort of mental impairment that was alleged in this particular … matter." The postconviction court concluded counsel's strategic decision to admit the report was reasonable, and, accordingly, counsel did not perform deficiently. The court further concluded the report's admission did not prejudice Hatcher.

ii. Analysis

¶79 On appeal, Hatcher claims admission of Williams' BAC report "undercut the entire defense" because it suggested to the jury that Williams was too intoxicated to consent to sex. He contends the only way his trial attorney could have reasonably admitted the BAC report would have been in conjunction with expert testimony or other evidence explaining that a person with a BAC in the reported ranges would have been capable of walking and talking. Hatcher argues jurors have "no understanding" of blood alcohol levels, and, as a result,

admission of the report at best confused the jury and at worst helped to prove the State's case.

¶80 We disagree. Hatcher overlooks the fact that counsel introduced the BAC report during his cross-examination of detective Schrank. Schrank testified he had encountered individuals with BACs between 0.14% and 0.233% who were able to move and speak. Thus, the report, coupled with Schrank's testimony, undercut Williams' testimony that she was so intoxicated at the time of the sexual assault that she could not move or speak. The evidence therefore supported the defense theory that Williams was not too intoxicated to consent to sex. As the postconviction court aptly stated:

> It is not unreasonable to expect a jury to extrapolate common knowledge and determine that based on her BAC numbers, combined with other testimony, … [Williams] was not so drunk as to prohibit her from talking or moving. In fact, [trial counsel] was even able to extrapolate that testimony from a police officer. Hatcher now requests that the [c]ourt employ hindsight and determine [trial counsel's] decision was unreasonable. The court will not do so.

We agree with the postconviction court that counsel did not perform deficiently by introducing the BAC report. As a result, Hatcher has failed to establish counsel was ineffective in that respect.

**IV. Cumulative prejudice**

¶81 Finally, Hatcher argues he is entitled to a new trial based on the combined prejudicial effect of both his trial attorney's and the trial court's errors. However, we have already concluded the trial court did not err, and trial counsel did not perform deficiently. Because we have rejected each of Hatcher's claims of error, there is no prejudice to accumulate. *See* ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2006 WI App 248, ¶248, 297 Wis. 2d 70, 727 N.W.2d 857 (When

the trial court did not err, "it follows that [a party's] claim of a cumulative error is without merit."); *see also* ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305 ("[E]ach alleged error [by trial counsel] must be deficient in law—that is, each act or omission must fall below an objective standard of reasonableness—in order to be included in the calculus for [cumulative] prejudice.").

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

Not recommended for publication in the official reports.