COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP633-CR

Cir. Ct. Nos. 2014CF4618
2014CF2569

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOEL MAURICE MCNEAL,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan JJ.

¶1 DUGAN, J. Joel Maurice McNeal appeals the judgment convicting him of (1) second-degree sexual assault with use of force, (2) strangulation and suffocation, and (3) false imprisonment, with each crime being subject to the

domestic abuse enhancer.[1] He also appeals the order denying his motion for postconviction relief.

¶2 On appeal McNeal contends that the trial court erred by denying his postconviction motion without a hearing based on his claim of ineffective assistance of trial counsel. McNeal alleged counsel was ineffective because he did not (1) impeach the victim, M.H., regarding the timing and sequence of events during the sexual assault; (2) investigate William Norment, a source of exculpatory testimony; (3) request a pre-trial hearing to allow McNeal to introduce evidence of his prior sexual relationship with M.H.; and (4) expose M.H.'s motives to fabricate the charges. McNeal also contends that (5) there is insufficient evidence to support the guilty verdict for false imprisonment; (6) the trial court erred by denying McNeal's request to strike Debbie Hurst's testimony regarding a past incident of strangulation involving McNeal and M.H.; and (7) the trial court erred by denying his motion for a new trial. We disagree and affirm.

BACKGROUND

¶3 During the late morning of June 16, 2014, Officers Steven Van Erden and Matthew Nogalski were dispatched to M.H.'s residence based on 911 calls received earlier indicating that she might be in danger. After the officers' investigation, M.H.'s live-in-boyfriend, McNeal was arrested and charged with two counts of second-degree sexual assault with use of force, one count of

[1] McNeal also appeals a judgment convicting him of two counts of witness intimidation. McNeal has not presented any argument with respect to that conviction. Issues raised on appeal but not argued are deemed abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

strangulation and suffocation, and one count of false imprisonment, with the domestic abuse enhancer applying to all counts (the "domestic abuse case"). On June 19, the trial court entered a no-contact order forbidding McNeal from having any contact with M.H.

¶4 In a separate case filed in October 2014, the State charged McNeal with two counts of felony intimidation of a witness in furtherance of a conspiracy (the "witness intimidation case"). The new case alleged that, while in jail, McNeal sent two letters asking M.H. to go to the district attorney's office and request that the domestic abuse case against him be dropped. The no-contact order was in effect at the time. At a November 10, 2014 hearing, the court granted the State's motion to join the domestic abuse and the witness intimidation cases.

¶5 The jury heard the trial of the joined cases from December 15 to December 18, 2014. Van Erden and Nogalski testified that they went to M.H.'s duplex in response to a 911 call. When they arrived, the officers knocked on the door of the upper unit for about five minutes. M.H., wrapped in a towel, answered the door and whispered to the officers, "[h]e's upstairs." The officers asked, "[w]ho's upstairs?"; M.H. responded, "my boyfriend." When Van Erden asked her, "[w]hat happened," M.H. said, "[h]e struck me."

¶6 The officers started up the stairs and heard the upper door shut and lock. Van Erden continued up the stairs while Nogalski interviewed M.H. Nogalski testified that M.H. appeared "scared" and "fearful," and that he observed marks on her neck, which looked like an abrasion, and bruises on her right arm. She said that her boyfriend Joel was upstairs and he had choked her and forced her to have sexual intercourse. Nogalski also took photographs of M.H.'s injuries that

were introduced at trial. Based on M.H.'s allegations, the officers arrested McNeal, and Nogalski drove M.H. to a sexual assault treatment center.

¶7 Gina Kleist, the examining sexual assault nurse manager, examined M.H. and took DNA samples from M.H.'s genitals and neck area. Kleist testified that, during M.H.'s examination, M.H. informed her that McNeal had pinned her down and choked her, and that she blacked out while McNeal was choking her. M.H. said that McNeal sexually assaulted her between 3:00 a.m. and 4:00 a.m. on June 16, 2014. M.H. also informed Kleist that McNeal used the following methods to control her: "mere presence, coercion, intimidation, verbal threat, grasping/holding/grabbing, [using his] body as a restraint, and strangulation." M.H. also informed Kleist that McNeal slapped and scratched her face. M.H. described the symptoms from the choking and reported pain with swallowing, vomiting, nausea, neck swelling, difficulty breathing, loss of consciousness, sore throat, and vision changes. Kleist testified that M.H.'s abrasions and bruises were consistent with M.H.'s report of what happened during the June incident.

¶8 Kleist observed the following physical injuries on M.H.: abrasions on the right side of her face and facial scratches; a scratch, an abrasion, a fingernail mark, and two "suction" marks, commonly referred to as "hickeys," on M.H.'s neck; abrasions and two bruises on M.H.'s back that M.H. said McNeal caused by ripping off her bra and grabbing her on her back; three bruises on M.H.'s right arm that were consistent with fingertips; and a bruise on M.H.'s leg that M.H. said McNeal caused by using a knee to hold her down during the assault.

¶9 Patricia Dobrowski, a DNA analyst, testified that she tested DNA samples from M.H. and compared them to McNeal's DNA profile. Dobrowski

testified that McNeal was a major contributor to the sperm found on the samples taken from M.H.'s vagina and cervix. She further testified that McNeal's DNA profile was included as a partial contributor with the male profile recovered from M.H.'s neck.

¶10 M.H. testified that she met McNeal at a Milwaukee nightclub in April 2014 and shortly thereafter they began dating and he moved into her home. On June 15, M.H. and McNeal hosted a party at M.H.'s home. The guests included Art,[2] Ruby,[3] and Hurst. Ruby, Art's girlfriend, had facial injuries consistent with physical abuse. Hurst started an argument about not needing to be in situations involving physical abuse and M.H. agreed with Hurst. McNeal was critical of Hurst and began to argue about her with M.H.

¶11 M.H. testified that she drove Ruby home after the party. M.H. returned home after midnight, and McNeal began to follow her around the unit. He backed off when he saw that M.H. was carrying her iPhone and iPad around together. M.H. believed that McNeal thought she was recording him.

¶12 According to M.H., about an hour later, McNeal started to scream at her about Hurst ruining the party and the situation at the party, and she told him that he needed to leave because she was not happy. The two started arguing and McNeal demanded that she take off her clothes. He told her if she did not take off her dress, he would rip it off. He tried to rip her dress off but she took it off before he could rip it—she did not want to take her dress off.

[2] Art's full name is Artemis Hudson.

[3] Ruby's full name is Mai Thong Chang.

¶13 M.H. testified that they were in the living room and McNeal put her on the sofa, told her to lie there, and forcibly had penis to vagina sex with her. Afterward, he got very angry, pinned M.H. down, and the next thing she knew his hands were on her neck and she was fighting for air. M.H. lost consciousness; she "woke up all dazed and fighting for [her] breath and [McNeal] was still on top of [her]." When M.H. regained consciousness, she found McNeal asleep. M.H. grabbed her phone and ran to the bathroom where she texted her sister Malia[4] and Hurst for help. As a precaution in case McNeal searched her phone, she erased her texts and hid her phone from McNeal. M.H. could not recall the exact timing of her text messages, stating "I don't know. I think it was three something in the morning. I didn't pay attention to time."

¶14 M.H. testified that, after she sent the text messages, she heard McNeal pounding on the bathroom door and asking what she was doing. Trying to "cooperate," M.H. said that she was just using the bathroom. McNeal said, "[l]et's go to bed"; they went to bed and fell asleep. M.H. testified that from the time she returned from dropping off Ruby until about 4:30 in the morning she did not feel free to leave.

¶15 M.H. testified variously that she did not really remember whether anyone knocked on the door; that maybe someone had knocked at 6:00 a.m.; and that she heard a knock at about 6:00 a.m. but it was not a loud knock and she did not answer the door. She further testified that, about 11:00 a.m., she heard a loud

[4] To protect M.H.'s anonymity the court uses her sister's given name, rather than her surname.

knock at the door and told McNeal that it might be the downstairs tenants and he let her go answer the door.

¶16 Hurst testified that, during the party, McNeal told M.H. to come into their bedroom and Hurst thought she heard "roughing around going on in there." She also testified that M.H. drove Ruby home. Hurst testified that M.H. sent her a text message at about 4:20 a.m.—Hurst said she knew "it was like in the middle of the night." Hurst awoke around 6:00 a.m., saw M.H.'s text messages, and contacted the police at about 6:20 a.m. At trial, Hurst identified the recording of her 911 call. In the call, Hurst read M.H.'s text messages to the police.

¶17 M.H.'s sister Malia testified that when she woke around 10:00 a.m. on June 16, she read M.H.'s text message stating "Call the police. Come over.… Don't call or don't text back or he will kill me[.]" At trial, Malia identified the recording of her 911 call reporting the incident.

¶18 The defense called Art to testify. Art testified that he lived with Ruby for six years and that the evening of June 14, Ruby was very drunk, and she fell and hurt herself. He testified that Ruby drove her car to the June 15 party. He said that the party took a bad turn when Ruby told her friends that Art was "bad," and Hurst made a racist remark that "black men weren't good." The remark angered Art so he left the party and went to work. Additionally, he testified that, based on information provided by the kids and Ruby, Ruby drove home arriving at about 10:00 p.m.

¶19 Art also testified that, while McNeal was in jail, M.H. asked him to go visit McNeal because she loved him and wanted Art to find out if McNeal was okay. M.H. accompanied Art, gave him money to put in McNeal's account, and waited in the lobby. Art also took a letter to McNeal that M.H. wrote and signed

"[a]lways your friends, Art and Ruby." Ruby also visited McNeal twice at the jail. Art further testified that he forwarded mail from McNeal to M.H. even though it was addressed to him and Ruby.

¶20 Ruby testified that she drove herself to the party and that an argument started at the party regarding race. During the party, she noticed that M.H. and McNeal went into a back bedroom "to talk." She testified that she left the party around 10:00 p.m. and drove herself home. Ruby indicated that Art had physically abused her on June 14, and that at the party she talked to a friend about not being happy. Ruby also testified that, while McNeal was jailed, he asked her whether he could send letters to her to give to M.H. and she agreed. Ruby recalled receiving three letters from McNeal and giving them to M.H.

¶21 McNeal testified at trial that Hurst started an argument at the party with Art by talking about how "black guys do their women wrong" because she observed bruises on Ruby that she attributed to Art's abuse. He said that Hurst said "she was dating six black guys and they all did her wrong and she was saying that [McNeal] and Art were going to do the same thing to the rest of the girls."

¶22 McNeal testified that he could not believe "what he was seeing" and he asked M.H. to come in the bedroom so they could have a conversation, and about five or ten minutes later M.H. came into the room to talk to him. He also testified that Hurst knocked on the door, opened it, and said, "I heard you guys arguing so I thought you were doing something to her."

¶23 McNeal testified that, after he and M.H. rejoined the party, the argument about black men continued. He said he could see M.H. getting increasingly angry. He also knew M.H. was angry because a week earlier he saw his ex-girlfriend, he fought with her, and a warrant was issued for his arrest. The

party lasted about an hour more, and McNeal recalled hearing conversation about taking Ruby home which he did not understand since he knew Ruby had driven there. McNeal testified that about 10:00 p.m., he saw Ruby, M.H., and Hurst leave in separate cars.

¶24 McNeal also testified that when M.H. returned to the house about midnight, she was carrying her cell phone and her iPad, and she was still angry. McNeal told M.H. that he knew she was angry because of his visit to his ex-girlfriend and he helped her look for her charger for about a half hour after the battery in M.H.'s cell phone died. Next, he and M.H. talked in the living room for about thirty minutes; he apologized and told M.H. that he was going to turn himself in to the police in the morning. He testified that from about 1:00 a.m. to 1:30 a.m. he and M.H. had consensual sex on the couch, and that after she used the bathroom and went to bed, he used the bathroom and went to their bed where they had consensual sex again. McNeal testified that he did not choke or strangle M.H., and he never physically abused her or confined her in the home.

¶25 McNeal testified that after he was arrested, he did not try to contact M.H., but Ruby visited him in the jail and told him that M.H. said she was very sorry for what she did, she loved him, and the trial was not going to occur because M.H. had recanted her allegations. Ruby also said that the district attorney did not believe M.H. when she recanted and was going to continue the prosecution. McNeal testified that he wrote the letters from the jail to apologize to M.H. for visiting his ex-girlfriend and that he wanted her to tell the district attorney the truth about what happened.

¶26 The jury heard the following excerpts from letters intended for M.H. that McNeal admitted he wrote: "I want to say I'm so sorry for everything I put

you through"; "I never meant to hurt you, baby"; "I promise I would never hurt you or break your heart"; "[o]ne stupid decision I made when I left that night. I wish I could have that night back"; "I would be in your arms right now if I could have that night back. But since I can't have it back, I have to ask you if you can forgive me for everything"; "[a]nd the pain I caused you"; and "I've been asking God for forgiveness ever since I hurt you."

¶27 On the afternoon of December 18, 2014, the jury returned verdicts finding McNeal guilty of the charges except the second-degree sexual assault charge arising from a May 20, 2014 incident. On February 26, 2015, McNeal was sentenced. The trial court entered separate judgments in the domestic abuse and the witness intimidation cases.

¶28 On January 5, 2016, McNeal filed a postconviction motion for a new trial and for an evidentiary hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), asserting that trial counsel was ineffective and that a new trial must be ordered in the interest of justice because the real controversy was not fully tried.

¶29 In its March 9, 2016, decision, the trial court denied the postconviction motion. This appeal followed.

DISCUSSION

False Imprisonment: Sufficiency of the Evidence

¶30 We first address McNeal's contention that there is insufficient evidence to sustain his conviction for false imprisonment. McNeal claims that there was no evidence that he confined M.H. during the crime because she was

free to leave the apartment. In making this argument, McNeal ignores M.H.'s testimony and focuses on contrary testimony.

¶31 "When a defendant challenges a verdict based on sufficiency of the evidence, we give deference to the jury's determination and view the evidence in the light most favorable to the State." ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. Furthermore, "[w]e will not substitute our own judgment for that of the jury unless the evidence is so lacking in probative value and force that no reasonable jury could have concluded, beyond a reasonable doubt, that the defendant was guilty." ***Id.*** A defendant seeking to overturn a verdict on the basis of insufficient evidence bears a heavy burden to show the evidence could not reasonably support his guilt. ***State v. Beamon***, 2013 WI 47, ¶21, 347 Wis. 2d 559, 830 N.W.2d 681.

¶32 On review, this court "must examine the record to find facts that support upholding the jury's decision to convict." ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. When the evidence supports more than one inference, this court must accept the inference drawn by the factfinder, or in other words, the inference that supports the jury's verdict. ***State v. Smith***, 2012 WI 91, ¶¶30-31, 342 Wis. 2d 710, 817 N.W.2d 410.

¶33 The jury convicted McNeal of false imprisonment pursuant to WIS. STAT. § 940.30.[5] The State was required to prove five elements:

> (1) [McNeal] confined or restrained [M.H.];
>
> (2) [McNeal] confined or restrained [M.H.] intentionally;

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

> (3) [M.H.] was confined or restrained without [her] consent;
>
> (4) [McNeal] had no lawful authority to confine or restrain [M.H.];
>
> (5) [McNeal] knew that [M.H.] did not consent and knew that [he] did not have lawful authority to confine or restrain [M.H.].

See WIS JI—CRIMINAL 1275 (2015); WIS. STAT. § 940.30. WISCONSIN JI—CRIMINAL 1275 explains the meaning of confined or restrained as follows:

> Although this requires genuine restraint or confinement, it does not require that it be in a jail or prison. If the defendant deprived (name of victim) of freedom of movement, or compelled (him) (her) to remain where (he) (she) did not wish to remain, then (name of victim) was confined or restrained. The use of physical force is not required. *One may be confined or restrained by acts or words or both.*

(Footnote omitted; emphasis added.) "[C]onfinement is the 'restraint by one person of the physical liberty of another.'" ***Long***, 317 Wis. 2d 92, ¶28 (citing ***Herbst v. Wuennenberg***, 83 Wis. 2d 768, 774, 266 N.W.2d 391 (1978)). ***Long*** states "[n]othing in the statute or our case law limits confinement to situations where the defendant locks another person in some sort of structure." ***Id.***

¶34 Viewed in the light most favorable to the State, the jury's guilty verdict against McNeal for false imprisonment is supported by M.H.'s testimony as follows: after pushing M.H. onto the couch, pinning her down, strangling her and sexually assaulting her, McNeal fell asleep and M.H. was able to get up from the couch, quickly grab her cell phone and run into the bathroom, lock the door, text for help, delete those text messages, and hide her phone from McNeal. Less than a minute after M.H. had texted Malia, McNeal was pounding on the door,

saying "[w]hat are you doing in there? Come out. Come out." M.H. felt she "didn't have a choice. It was whatever he said, I had to do."

¶35 Based on the foregoing evidence, a reasonable jury could have found that the State had established beyond a reasonable doubt that McNeal restrained or confined M.H. on June 16. The record demonstrates that McNeal's false imprisonment conviction is supported by sufficient evidence.

Hurst's Testimony Regarding Prior Strangulation

¶36 We next address McNeal's contention that the trial court erroneously allowed Hurst to testify regarding a prior strangulation incident. McNeal argues that Hurst's testimony about M.H.'s account of McNeal's past abuse was inadmissible because it was not relevant, non-responsive, and unduly prejudicial to McNeal. He contends that the trial court erred in failing to strike this testimony.

¶37 The State contends that McNeal's counsel opened the door to such testimony when he asked Hurst whether M.H. had ever told her of past abuse by McNeal. It also contends that counsel did not make a timely objection to that testimony and, therefore, McNeal has forfeited the issue and that, even if counsel had objected, the testimony was admissible as a prior consistent statement.

¶38 The "standard of review on the admission and exclusion of evidence is limited to whether the [trial] court erroneously exercised its discretion." ***Sielaff v. Milwaukee Cnty.***, 200 Wis. 2d 105, 109, 546 N.W.2d 173 (Ct. App. 1996). If a trial court "applies the proper law to the established facts, we will not find an erroneous exercise of discretion if there is any reasonable basis for the trial court's ruling." ***Id.***

¶39 "In reviewing the [trial] court's evidentiary rulings, this court concentrates on the correctness of the decisions, not the expressed rationale of the [trial] court, and it upholds rulings supported by the record." ***State v. Hammer***, 2000 WI 92, ¶44, 236 Wis. 2d 686, 613 N.W.2d 629 (citations omitted). If the trial court does not give reasons for its discretion, this court will independently review the record to determine if there is a basis for the trial court's decision. ***Id.***

¶40 At trial, during cross-examination, McNeal's attorney engaged in the following colloquy with Hurst:

> Q. [...] So according to you [M.H.] said that Mr. McNeal has abused her in the past, right?
>
> A. Yes.
>
> Q. Like how many times?
>
> A. I'm not sure. But she did tell me one night—I don't know if they were having sex but he started choking her and—
>
> Q. Some other night he choked her?
>
> A. And she seen an angel on the wall and she said it was me and that everything she touched that night glowed and that she couldn't see it.
>
> Q. Okay. Did she tell you when that happened?
>
> A. About three weeks before that.
>
> Q. Okay. So she told you that he choked her to the point where she started having dreams or hallucinations?
>
> A. She seen on the wall an angel and then she seen me.

Counsel asked another question and concluded cross-examination. He did not object to or move to strike Hurst's testimony.

¶41 On redirect examination, Hurst testified about M.H. telling her of McNeal's prior abuse of her, and the State's tenth question asked Hurst to clarify the timing of M.H.'s statement.

> Q. And [M.H.] had told you about some abuse that had happened about three weeks before June 16th?
>
> A. Approximately around that time but I don't know approximately when it was. But I remember her telling me that when this happened that there was like writing on the wall about an angel and she said it was me and that everything she touched glowed.

The State's eleventh question on redirect examination was, "[a]nd what did [M.H.] tell you as to how the defendant had hurt her [those] couple weeks before?" McNeal's attorney objected on hearsay grounds. The State responded that McNeal's attorney had opened the door. The trial court requested a sidebar conference with counsel.

¶42 When the trial court went back on the record outside the presence of the jury, McNeal's attorney continued to object to the question as seeking hearsay and also moved to strike Hurst's answer as non-responsive and not relevant because it was prohibited under WIS. STAT. § 904.04.

¶43 The trial court stated:

> I'm going to deny your motion to strike that.... It is relevant [as character evidence under § 904.04] in that it pertains to the allegation that the victim either lost consciousness or was beginning to lose consciousness while she was being choked by Mr. McNeal. That's commonly an experienced phenomenon when someone is losing oxygen to their brain and tends to support the victim's testimony. So it's relevant, although it has not been clarified for the record the time frame.

The trial court also said that it would

> permit [the State] to lead [Hurst] on direct examination specifically with regard to time frame, if she [knew]. One, when did the victim tell her these things and did the victim tell her when these things allegedly occurred? And the question should be framed with the specific time frame in mind, that's your charging period here.

Thus, in effect, the trial court sustained McNeal's objection by limiting the scope of the State's redirect.

¶44 First, we find that McNeal's attorney opened the door to Hurst's testimony and failed to timely object to her response or move to strike her testimony. Where defense counsel "opened the door" to a line of questioning on cross-examination, the trial court may properly permit the State "to ask limited follow-up questions." *See* ***State v. Mares***, 149 Wis. 2d 519, 531, 439 N.W.2d 146 (1989). McNeal's counsel specifically asked Hurst the following question: "So according to you [M.H.] said that Mr. McNeal has abused her in the past, right?" He then went on to ask additional questions about the prior strangulation. When McNeal's attorney objected to the State's follow-up questions the trial court properly allowed the State to ask questions, but limited it to asking Hurst about when the conversation with M.H. took place and the time frame that M.H. said the prior abuse had occurred. *See* ***id.***

¶45 Secondly, because McNeal failed to object to Hurst's answers to his questions and did not object to the State's questions until after its re-direct examination, we find the issue of whether the trial court properly exercised its discretion in admitting the evidence has not been preserved for appeal. ***State v. Johnson***, 2004 WI 94, ¶25, 273 Wis. 2d 626, 681 N.W.2d 901. "In order to preserve an issue for appeal as a matter of right, a party must object to the error at trial, stating the proper ground for the objection." ***State v. Romero***, 147 Wis. 2d 264, 274, 432 N.W.2d 899 (1988).

¶46 This court also notes that, after the sidebar, the trial court effectively sustained McNeal's objection by ruling that any additional questions regarding Hurst's conversation with M.H. about McNeal's past abuse were limited to questions about when the conversation occurred and whether M.H. told Hurst about when these things occurred. The trial court also told the State to frame the questions so that Hurst limited her answer to the time period of the charged conduct—on or around May 20, 2014. The record further discloses that, during the State's re-examination of Hurst, the trial court asked questions regarding the issue to keep the questioning within the confines of its ruling.

¶47 Additionally, because McNeal forfeited his right to appeal this issue as a matter of right, the only issue we could consider is whether his counsel was ineffective in failing to object to Hurst's testimony that M.H. told her that McNeal had choked her several weeks prior to the June 16 strangling incident. However, on appeal, McNeal has not raised a proper ineffective assistance of counsel claim on *this* issue.

Ineffective Assistance of Counsel

¶48 McNeal presents numerous arguments in contending that trial counsel provided ineffective assistance. We do not review the arguments in isolation but instead make our determination based on whether "the cumulative effect undermines our confidence in the outcome of the trial." ***State v. Thiel***, 2003 WI 111, ¶63, 264 Wis. 2d 571, 665 N.W.2d 305.

¶49 "Wisconsin has adopted the United States Supreme Court's two-pronged ***Strickland*** test to analyze claims of ineffective assistance of counsel." ***State v. Williams***, 364 Wis. 2d 126, 159-60, 867 N.W.2d 736, 751 (2015), *cert. denied,* 136 S. Ct. 1451 (2016) (citing ***Strickland v. Washington***, 466 U.S. 668

(1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990)). "To prevail under ***Strickland***, a defendant must prove that counsel's representation was both deficient and prejudicial." ***Id.*** at 160 (citing ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999)). "Deficient performance means that defendant's counsel's conduct 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" ***Id.*** (citing ***Strickland***, 466 U.S. at 686). "Prejudice means that, but for counsel's unprofessional errors, there is a reasonable probability that the trial's outcome would have been different." ***Id.*** (citing ***Strickland***, 466 U.S. at 694). "A reasonable probability is 'a probability sufficient to undermine confidence in the outcome.'" ***Id.*** "Courts may apply the deficient performance and prejudice tests in either order, and may forgo the deficient performance analysis altogether if the defendant has not shown prejudice." ***Id.*** (citing ***Johnson***, 153 Wis. 2d at 128).

Cross-Examination of M.H.

¶50 McNeal maintains that trial counsel failed to adequately cross-examine M.H. with police and medical reports and with her petition for a temporary restraining order to demonstrate the inconsistencies in M.H.'s testimony. McNeal contends that trial counsel should have impeached M.H.'s testimony about the chronology of the assault and the time that the assault occurred, asserting that M.H.'s testimony about the order in which he choked and sexually assaulted her and the time it occurred was inconsistent with what she told the police, Kleist, and alleged in her temporary restraining order petition against him. He also contends that counsel should have impeached M.H. about the timing of her text messages.

¶51 The trial court rejected McNeal's claims regarding the alleged inadequacy of trial counsel's cross-examination of M.H. regarding the chronology and timing of the assault because he failed to demonstrate deficient performance, holding that the jury was only required to determine whether McNeal committed the alleged acts, not in what order and at what time. The trial court also found that M.H. "exuded credibility and presented extremely well on the stand" and that McNeal "presented himself as an angel who could do no wrong, which neither the court—nor obviously the jury—bought for a minute."

¶52 "WIS[CONSIN] JI—CRIMINAL 1208 sets forth the elements for second-degree sexual assault: (1) the defendant had sexual contact with the victim, (2) the victim did not consent to the sexual contact, [and] (3) the defendant had sexual contact with the victim by use or threat of force or violence." ***State v. Hayes***, 2003 WI App 99, ¶14, 264 Wis. 2d 377, 663 N.W.2d 351, *aff'd*, 2004 WI 80, 273 Wis. 2d 1, 681 N.W.2d 203. McNeal's arguments challenge a peripheral point to the State's case. *See* ***Jones v. Wallace***, 525 F.3d 500, 504 (7th Cir. 2008) (stating counsel's failure to elicit inconsistencies not touching on central facts in the case does not prejudice the defense.) A sexual assault conviction will not be reversed solely because "a witness fails to describe an event in exact chronological fashion." *See* ***Hayes***, 264 Wis. 2d at 377, ¶17.

¶53 Moreover, even if counsel was deficient for failing to impeach M.H. as McNeal contends, McNeal has not shown prejudice. M.H.'s inconsistent recollection was already before the jury—M.H. testified on direct that McNeal first sexually assaulted her before choking her and then testified that she gave a statement to police that McNeal choked her before he sexually assaulted her. M.H. also testified that she had trouble remembering the exact sequence of events

and explained that it was emotionally traumatic for her to recount the events again in exact detail.

¶54 On redirect examination, M.H. conceded again that she did not remember the chronology of events in the following exchange:

> Q. And when you talked to the police on June 16th, do you remember telling them that the defendant put his hands around your neck and then later put his penis in your vagina?
>
> A. Yes. I don't remember what sequence.
>
> Q. When you talked to the police, it was just hours after the defendant had hurt you; is that right?
>
> A. Yes.
>
> Q. And when you talked to them just hours afterwards, you told them that the sequence was that he choked you and then he had sexual intercourse with you. Do you recall that?
>
> A. Yes.
>
> Q. Were things clearer or fresher in your mind when you spoke to police?
>
> A. I think it was much clearer back then.

The jury heard M.H. testify that she was unsure of the chronology and timing of events. McNeal offers additional sources of impeachment on those inconsistencies. However, counsel's failure to repeatedly question a witness about inconsistent statements already before the jury does not constitute ineffective assistance. *See* WIS. STAT. § 904.03 (stating relevant evidence "may be excluded if its probative value is substantially outweighed … by considerations of … waste of time, or needless presentation of cumulative evidence.).

¶55 McNeal also asserts that trial counsel did not impeach M.H. regarding the timing of her text messages. However, review of the record establishes that McNeal's counsel effectively impeached M.H. and Malia regarding their failure to retain their text messages, and questioned Hurst about the timing of M.H.'s texts. Trial counsel also elicited M.H.'s inconsistent statement from Nogalski's police report that the assault happened around the same time Hurst stated she received M.H.'s text. Through the course of the trial, McNeal's counsel established inconsistencies for the jury to consider and pursued a reasonable and effective defense regarding the timing of M.H.'s text messages.

¶56 McNeal's defense was also not prejudiced by his attorney's alleged failure to establish the timing of the text messages. The record establishes that the messages' timing was explored through the following testimony:

> M.H. stated: "I don't know. I think it was three something in the morning. I didn't pay attention to the time."
>
> Malia testified: "Um, I don't remember but it was early a.m."
>
> Hurst testified to a range of possible times, stating: "It was like 4:19 or 4:20 or 4:40, something like that. I know it was like in the middle of the night."

¶57 McNeal overemphasizes the importance of additional impeachment about the text message timing, speculating as to a favorable result. However, "[t]he likelihood of a different result must be substantial, not just conceivable." ***Harrington v. Richter***, 562 U.S. 86, 112 (2011). McNeal's claim is insufficient to establish prejudice.

¶58 In support of his argument that trial counsel was ineffective because counsel failed to adequately cross-examine M.H. with police reports McNeal relies on ***Raether v. Dittmann***, 40 F. Supp. 3d 1097, 1104 (E.D. Wis. 2014), which held

counsel's failure to impeach the state's witness with a police report was prejudicial. The finding of prejudice was based on defense counsel's failure to challenge the child victim's "amplified recollection" at the trial conducted two years after the assault, as compared to the victim's remembering only "bits and pieces" within days of the alleged assault. ***Id.*** The facts in ***Raether*** are distinguishable from this case. M.H. never demonstrated a subsequent enhanced ability to recall the assault and, although she had difficulty with the precise timing, she had no difficulty remembering the act of sexual assault. Furthermore, the charges in ***Raether*** "turned on the [the alleged victim's] testimony" and there was no scientific or physical evidence of sexual assault. ***Id.*** at 1103-04. M.H.'s testimony is corroborated by photographs and descriptions of her injuries, the DNA evidence, and McNeal's letters apologizing for hurting her.

¶59 McNeal also relies on ***State v. Thiel***, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 571. ***Thiel*** involved alleged sexual exploitation by a therapist in which "the credibility of the [victim] was central to the jury's verdict." ***Id.***, ¶4, Although Thiel's defense counsel had police reports and medical notes before trial, either he did not read or did not adequately review the documents. ***Id.***, ¶¶26, 27. Those documents revealed that the alleged victim had falsely told a different therapist that she had a sample of Thiel's semen and had threatened Thiel with the sample. ***Id.***, ¶27. The supreme court also found trial counsel did not conduct a thorough investigation, citing as examples that an easy background check would have revealed the victim lacked a driver's license, despite her claim that she drove to Thiel's house more than 100 times, and that "[t]aking the time to visit Thiel's neighbors would likely have revealed to trial counsel that none of the neighbors recalled seeing [the victim], even though her alleged visits occurred three or four times a week." ***Id.***, ¶¶39, 41, 47. The court cited numerous other deficiencies in

reviewing the discovery, failing to investigate, and misinterpreting the law. ***Id.***, ¶¶26-32. ***Thiel*** involved multiple omissions and neglect by counsel of great import to the defendant. This case is not analogous; the alleged inconsistent statements were largely before the jury. Counsel's performance did not prejudice McNeal's defense.

¶60 McNeal also argues that counsel failed to cross-examine M.H. regarding alleged discrepancies between her statements to Kleist and to police. McNeal focuses on Kleist's testimony that M.H. reported that she vomited, as compared to Nogalski's police report which does not include any such report, and inconsistencies in the types of injuries Kleist noted, compared to Nogalski's police report.

¶61 McNeal asserts that his attorney "should have cross-examined M.H. about how she could leave out such vital information [that McNeal slapped and scratched her face and that she vomited from the strangulation] when talking to Officer Nogalski" and that this is another "missed opportunity to impeach her story and her truthfulness." Whether M.H. described her vomiting and injuries consistently to the police and medical staff is of questionable significance. Nogalski was trying to determine whether criminal conduct had occurred. Kleist was trying to assess M.H.'s medical condition. McNeal cannot demonstrate a reasonable probability of a different result at trial in light of this evidence.

¶62 McNeal also contends that his counsel was ineffective for failing to investigate M.H.'s apparent eczema and suggests that she could have caused her injuries by scratching her skin. Even assuming arguendo that counsel was deficient, McNeal cannot demonstrate prejudice.

¶63 "Not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceedings." ***State v. Elm***, 201 Wis. 2d 452, 462, 549 N.W.2d 471 (Ct. App. 1996). Even if the jury believed that eczema caused M.H. to scratch her neck, that would not provide an alternative cause for all of M.H.'s injuries. In addition to the scratches on M.H.'s body, she also had bruising on her back, arm, leg, and shoulder. McNeal was also a possible contributor to the male DNA profile recovered from M.H.'s neck. Given the evidence unaffected by his new eczema defense, McNeal fails to show prejudice.

¶64 McNeal argues that counsel should have impeached M.H.'s testimony that she had one shot to drink the night of the assault with Kleist's medical report that included M.H.'s prior inconsistent statement that she had two drinks the night of the assault.

¶65 Counsel need not raise every conceivable issue at trial. *See* ***Thiel***, 264 Wis. 2d 571, ¶61 ("A criminal defense attorney's performance is not expected to be flawless."). Simply asserting the existence of a material inconsistency does not make it so. McNeal overstates the value of the inconsistency in M.H.'s testimony about the number of drinks she consumed. M.H. only estimated her alcohol consumption that night:

> Q. You may have done at least one shot, right?
>
> A. Yes. I limit my shots. So probably one shot.

M.H. also admitted that it was difficult to remember the events in question that night. M.H.'s prior statement to Kleist that she had two shots is of marginal significance. Counsel was not deficient by failing to impeach on the peripheral point.

¶66 The failure to impeach M.H. on her alcohol consumption was also not prejudicial. Prejudice requires more than just a showing of a conceivable effect on the outcome of the trial. ***Strickland***, 466 U.S. at 693. The unlikely possibility that the jury would have concluded M.H. was lying about the assault due to her prior statement that she had two shots of alcohol is insufficient to undermine confidence in the outcome of the trial.

¶67 McNeal contends that his counsel failed to properly impeach M.H. with her prior recantation. McNeal concedes that counsel impeached M.H. regarding her prior recantation; however, he claims that counsel failed to do it effectively. McNeal also argues his counsel should have elicited Ruby and Art's testimony that M.H. wanted to recant her statements to police because she was "lying."

¶68 McNeal speculates that further impeachment would have led to a favorable result. However, M.H.'s recantations were preceded by McNeal's letters asking M.H. to drop the charges. Thus, further impeaching M.H. regarding her recantation could have harmed McNeal by reinforcing evidence of the witness intimidation charges against him.

¶69 McNeal also contends that trial counsel was ineffective because he did not question Art and Ruby about what M.H. told them regarding her reasons for recanting. However, the test for prejudice is not whether testimony could hypothetically support the defense, but whether that testimony creates a reasonable probability of a different outcome at trial in light of the totality of the evidence. Here, McNeal's counsel already effectively argued that M.H. recanted because she lied to police. Counsel summarized this theory at closing:

> [T]he police came and arrested Mr. McNeal. They took him away and he made no contact with [M.H.] until [M.H.] decided: [m]aybe what I did there wasn't fair and she knew exactly what to do about it. She wrote a letter. She encouraged Mr. McNeal to get in contact with her. He writes her the letters and doesn't tell her to thwart the administration of justice. He tells her to come clean: [g]o down to the DA's office and drop these charges that I think we all know in our hearts and in our minds are not true. That's not thwarting justice. That's seeking justice.

In closing, counsel's argument was clear: M.H. initially lied and later came clean in her recantation. The jury could have reached the same conclusion without Ruby and Art's testimony.

¶70 McNeal contends that his counsel was ineffective in failing to cross-examine the State's DNA expert as to alternative non-violent causes for his possible male DNA profile on M.H.'s neck. McNeal cannot prove that his counsel was deficient. The State's DNA expert did not offer an opinion as to the cause of the profile on M.H.'s neck. McNeal only speculates that the expert would testify favorably for the defense.

¶71 Both parties were free to argue the cause of the male DNA profile on M.H.'s neck. Through other witnesses, McNeal advanced a defense that the observed injuries and profile could be from hickeys he left on M.H.'s neck during a consensual encounter. McNeal's counsel cross-examined M.H. regarding the hickeys on her neck on June 16. McNeal also testified on the causes of her injuries. Counsel was not deficient for failing to advance an alternative cause theory.

Investigation of Norment

¶72 McNeal also contends that trial counsel was ineffective for failing to investigate Norment, an exculpatory witness he met in jail, and call him as a trial

witness. McNeal states that he was introduced to Norment by a mutual acquaintance and Norment told him that "he had a prior relationship with M.H." McNeal states that Norment told him that while he was staying with M.H., she told him that McNeal was innocent of the charges, and she had lied to the police because she was upset that McNeal cheated on her. She also told Norment that she was planning on going to the district attorney to tell the truth.

¶73 McNeal further states that, three weeks prior to trial, he wrote his attorney regarding his conversation with Norment. He hoped that, before the trial, his attorney would send his investigator to interview Norment.

¶74 McNeal also states that, during the pretrial meeting with trial counsel, he reiterated his request that counsel investigate Norment and trial counsel "said that he would send his investigator to interview him and that … Norment would serve as a witness at trial if his information was as [McNeal] reported."

¶75 However, at trial, McNeal asked trial counsel whether his investigator had spoken with Norment, trial counsel said no, Norment would not be a witness at trial, and they didn't need him to win. McNeal also states that, after trial and prior to sentencing, he again asked trial counsel to investigate Norment.

¶76 On May 22, 2015 (after McNeal had been sentenced), post-conviction counsel's investigator interviewed Norment, who indicated that after being introduced to McNeal by a mutual acquaintance he and McNeal discussed M.H.'s involvement in both of their cases. Norment told the investigator that he dated M.H. and stayed at her home after McNeal went to jail, and that M.H. told him that McNeal had not committed the crimes of which she accused him.

Norment also told the investigator that M.H. also lied to the police in his case when she said that he had possession of a firearm that was actually hers. The investigator also states that the case against Norment was dismissed.

¶77 Norment also indicated that M.H. required that he leave the house claiming that her "husband" was upset she was dating an African-American and would not allow her to see the kids if she was dating Norment. However, he had learned that M.H. wanted him to leave because she anticipated that McNeal would be "coming home from jail." Norment also stated that no one from McNeal's defense team interviewed him or asked him to testify and that he was willing to testify because M.H. told him that McNeal was not guilty of the charges.

¶78 There is nothing in Norment's statement to the investigator about what Norment told him about the sexual assault. The statements are clearly unsupported and are contradicted by McNeal's admissions in his jailhouse letters, M.H.'s documented injuries, and by the two witnesses who received texts in the middle of the night stating that McNeal was sexually assaulting M.H. The jury had sufficient information to assess M.H.'s credibility including her recantation and inconsistent statements.

¶79 Additionally, McNeal's testimony was effectively discredited upon cross-examination. The State cross-examined McNeal about his inability to explain M.H.'s injuries and his failure to account for her injuries in police interviews. The State also confronted McNeal with his letters apologizing for hurting M.H.

¶80 In determining prejudice, this court must consider the totality of the evidence and find a reasonable likelihood that absent the errors, the jury would have reached a different decision. ***Strickland***, 466 U.S. at 695-96. McNeal cannot

demonstrate that Norment's testimony would have created a reasonable probability of a different result in light of all the evidence adduced at trial.

Evidence of M.H. and McNeal's Prior Sexual Relationship

¶81 McNeal also contends that counsel was ineffective because he did not present evidence about the prior sexual relationship between M.H. and McNeal, and did not impeach M.H. regarding her inconsistent statements to Kleist about when she last had consensual sex with McNeal. He states that M.H. never was asked at trial when she stopped having sex with McNeal, whether they had sex twice the night of the incident and twice the morning after, or whether they had sex four to six times per day in the days leading up to the incident.

¶82 The trial court ruled that the prior sexual relationship between M.H. and McNeal had no bearing on whether he forced her to have sex during the charged incidents. The trial court also noted that based on McNeal's testimony that he met M.H. in April 2014, began a romantic relationship with her in early May 2014, and moved into her home, "the jury could have easily surmised that the two had a prior sexual relationship."

¶83 Under Wisconsin's rape shield statute, a defendant "may not offer evidence relating to a victim's past sexual history or reputation absent application of a statutory or judicially created exception." ***State v. Jackson***, 216 Wis. 2d 646, 657, 575 N.W.2d 475 (1998). While a prior consensual sexual relationship may be relevant to the issue of consent, *see* ***State v. Neumann***, 179 Wis. 2d 687, 701 n.5, 508 N.W.2d 54 (Ct. App. 1993), there is a strong presumption that the evidence of consensual sex is prejudicial, ***State v. Sarfaz***, 2014 WI 78, ¶55, 356 Wis. 2d 460, 851 N.W.2d 235. Accordingly, a defendant

> must make a three-part showing that: (i) the proffered evidence relates to sexual activities between the complainant and the defendant; (ii) the evidence is material to a fact at issue; and (iii) the evidence of sexual contact with the complainant is of "sufficient probative value to outweigh its inflammatory and prejudicial nature."

Jackson, 216 Wis. 2d at 658-59 (citation omitted).

¶84 McNeal argues that counsel should have cross-examined M.H. about her prior sexual conduct with McNeal, which he contends would bolster his assertion that he had sex with M.H. more frequently than she testified to and allow the jury to infer that the alleged assault was consensual sex. McNeal's sexual relationship with M.H. is dissimilar to the charge and facts of the June 16 assault. However, even if it were deemed material to a fact at issue; e.g., consent, it does not have sufficient probative value to outweigh its inflammatory and prejudicial nature. Counsel was not ineffective for not raising a meritless argument and not requesting a hearing on the matter. Moreover, even if it was relevant, McNeal was not prejudiced because evidence of his prior consensual history with M.H. was already before the jury. McNeal testified multiple times about his sexual history with M.H. The jury could also infer a sexual relationship based on the testimony that he lived with M.H and they had a romantic relationship.

¶85 Similarly, counsel was not deficient for not cross-examining M.H. on her last consensual contact with McNeal because it was not relevant to whether McNeal committed the June 16 sexual assault.

M.H.'s Motives to Falsify

¶86 McNeal also contends that counsel was ineffective because he did not adequately explore M.H.'s alleged motive to lie. McNeal claims his counsel was ineffective because he did not cross-examine M.H. regarding her biases

against McNeal because he is black. McNeal contends that his counsel should have pursued a defense based on M.H.'s racism rather than a defense based on spurned love.

¶87 "Trial counsel is not ineffective simply because an otherwise reasonable ... strategy was unsuccessful." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. A claim of ineffective assistance of counsel does not provide McNeal with the legal means in which to second-guess his counsel's strategic and professional judgment; instead it forecloses it. *See* ***Elm***, 201 Wis. 2d at 464. Even if it appears in hindsight that another defense would have been more effective, this court will uphold counsel's strategic decision as long as it is founded on rationality of fact and law. *See* ***State v. Wright***, 2003 WI App. 252, ¶35, 268 Wis. 2d 694, 673 N.W.2d 386.

¶88 The trial court ruled that McNeal did a "good job of [exploring M.H.'s racial bias and motive for revenge because he cheated on her] himself when he testified." It noted that McNeal testified that M.H. may have been biased against him because of the argument at the party about how black men treat Asian women, and that additional testimony would have been cumulative.

¶89 At trial, defense counsel argued that M.H. fabricated her allegations because she discovered McNeal had seen an ex-girlfriend and advanced a strategy based on the theme that "hell hath no fury like a woman scorned." McNeal does not show that his trial counsel's strategy was unreasonable. Instead, McNeal speculates that a racism theme would have been more successful. McNeal has not met his burden of showing that his counsel was ineffective.

¶90 In sum, having reviewed McNeal's postconviction motion, we conclude even if counsel had acted as McNeal suggests, the record conclusively

demonstrates that it would not have changed the outcome at trial. *See* ***Thiel***, 264 Wis. 2d 571, ¶61. Therefore, it was within the trial court's discretion to deny the motion without a hearing. *See* ***State v. Sulla***, 2016 WI 46, ¶30, 369 Wis. 2d 225, 880 N.W.2d 659.

New Trial in the Interest of Justice

¶91 McNeal also maintains that this is an exceptional case warranting a new trial in the interest of justice because the real controversy was not fully tried. He argues that his counsel's ineffective assistance kept the real controversy from being tried because relevant impeachment evidence from M.H.'s statements to police, Kleist, and the temporary restraining order were not presented to the jury.

¶92 Where a defendant argues under WIS. STAT. § 752.35 that he "is entitled to a new trial because counsel's deficiencies prevented the real controversy from being fully tried," the appropriate analytical framework is provided by ***Strickland***. ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. We have already conducted the ***Strickland*** analysis and need not repeat it here.

¶93 For these reasons, we affirm the judgments of conviction and the order denying postconviction relief.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.