COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3207-CR **Cir. Ct. No. 98-CF-79**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY L. HORSFALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Deininger and Lundsten, JJ.

¶1 DYKMAN, J. Cory Horsfall appeals from a judgment of conviction for second-degree sexual assault as a repeater and an order denying postconviction relief. He contends that he received ineffective assistance of counsel when his attorney at trial failed to: (1) present important evidence that Monica H., the

alleged victim, consented to sexual intercourse; (2) object to testimony by a State witness that only two percent of sexual assault reports are false; (3) object to character testimony by Monica's mother; (4) object to remarks made by the prosecutor in which he vouched for Monica's credibility. In addition, Horsfall contends that he is entitled to a new trial in the interests of justice.

¶2 We conclude that trial counsel for Horsfall was deficient in failing to make any investigation for evidence that would explain that Monica's injuries may not have been caused by sexual assault, and that Horsfall was prejudiced by counsel's deficient performance. Accordingly, we reverse and remand for a new trial.[1]

BACKGROUND

¶3 On the evening of October 2, 1998, eighteen-year-old Monica H. went with a friend to a party. While there, Monica H. met twenty-four-year-old Cory Horsfall. At some point in the evening, Monica went with Horsfall into the hallway and he began kissing her. She went with him to a neighboring apartment, they sat down on a couch and he held her hand. Later, Horsfall and Monica were back in the hallway kissing. Horsfall put his hands down Monica's pants, but stopped when Monica pushed him away. Horsfall took Monica's hand and led her into the bedroom. Ten minutes later, Monica walked out of the bedroom, spoke briefly with another friend, began crying, and then left to go home. At home, after

[1] Because we conclude that Horsfall received ineffective assistance when his trial counsel failed to investigate evidence showing that Monica's injuries may not have been caused by sexual assault, we do not determine whether counsel was ineffective for failing to object to improper witness testimony and prosecutor remarks. Further, we need not consider whether Horsfall is entitled to a new trial in the interests of justice.

they were awakened by a call from one of her friends, Monica told her parents that she had been sexually assaulted. Monica's father contacted the police after he saw blood on Monica's underwear.

¶4 The police took Monica to the hospital for a sexual assault examination. The examination revealed one bruise inside Monica's vagina, and two abrasions outside her vagina, both about the size of a quarter.

¶5 Two days later, the State charged Horsfall with attempted third-degree sexual assault as a repeater. The State later amended the charge to second-degree sexual assault as a repeater, contrary to WIS. STAT. §§ 939.62 and 940.225(2)(b) (1997-98).[2] Horsfall pleaded not guilty and a jury trial followed.

¶6 At trial, Monica testified that after she went into the bedroom with Horsfall, he began kissing her again and laid her down on the bed. Horsfall took off Monica's pants and underwear, but she was not yet afraid of what Horsfall was going to do. He took off his own pants, and attempted to perform oral sex on Monica, but she pulled his head away and told him no, that she did not want to do anything. Horsfall penetrated her, while she told him no, to leave her alone, that she was a virgin and did not want to get pregnant. Monica got away from him, put her clothes back on, and left the room.

¶7 Monica also testified that she and her family are very religious, and that her parents are strict and did not want her to date or engage in kissing or any sexual activity.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶8 Dr. Thomas Richardson, who performed the sexual assault examination, also testified. After explaining in detail Monica's bruise and abrasions, he concluded that they were consistent with a sexual assault. Horsfall did not testify.

¶9 During closing arguments, the prosecutor asked rhetorically, "Did she ever consent to having sex, sexual intercourse?" The prosecutor then summarized Richardson's testimony regarding the injuries that Monica sustained. He asked, "[I]s someone going to consent to injury to their private parts? Is that indicative of consensual sex, if that's what supposedly was happening here …?" Later, the prosecutor showed the jury the underwear covered with blood and stated:

> I have to show you this one more time. Is that consensual sex? Does that look like consensual? To me, I got to agree with [the victim's father], that looks like a crime. That's not an insignificant amount of blood. [Defense counsel] has said that several times. How often does a person bleed to that severe degree? Was there injury? Was there significant injury? I think those pants are very, very powerful strong damning evidence against Mr. Horsfall.

¶10 The jury found Horsfall guilty of second-degree sexual assault, and the trial court sentenced him to twenty years in prison.[3] Horsfall filed a motion for postconviction relief, arguing that his trial counsel was ineffective and seeking a new trial in the interests of justice. At the postconviction hearing, Horsfall presented the testimony of Dr. Jeffrey Patterson, who is a physician at the University of Wisconsin Medical School, is certified as a sex educator, and treats

[3] We note that while Horsfall was convicted of second-degree sexual assault, the judgment of conviction indicates incorrectly that he was convicted of attempted third-degree sexual assault.

patients for "various sexual problems," including injuries caused by sexual intercourse.

¶11 Patterson testified that he had reviewed the reports prepared by hospital staff after the sexual assault examination was conducted as well as the testimony of Dr. Thomas Richardson, the doctor who examined Monica. Based on this review, he concluded that Monica's injuries were consistent with consensual sex. Patterson explained that it is "not uncommon" for women to experience abrasions and lacerations the first time they have sexual intercourse because of the tightness of the vaginal opening. Further, he testified that there could also be tearing or abrasions "if people are in a hurry" and are not well-lubricated. When asked whether it was possible that a person would have pain during intercourse but not object, Patterson responded, "that also happens all the time." He stated a person may ignore pain "because they don't wish to upset their partner," because they "don't wish to stop what's going on," or because "they may be excited." He concluded that there would be no way to tell just by looking at the injuries whether they were caused by consensual or nonconsensual sex.

¶12 Horsfall's trial counsel also testified at the hearing. He stated that although consent was "exactly what our theory of the defense was," he failed to seek an expert witness who would testify that Monica's injuries could have occurred through consensual sex. Further, he had no strategical reason for choosing not to call an expert. After the hearing, the circuit denied Horsfall's motion, and Horsfall appeals.

DECISION

A. Standard of Review

¶13 The right of effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution and article I, § 7 of the Wisconsin Constitution. The Supreme Court set forth the guidelines for effective assistance in ***Strickland v. Washington***, 466 U.S. 668 (1984), which were later adopted by the Wisconsin Supreme Court in interpreting the state constitution. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). To prevail on a claim for ineffective assistance of counsel, the defendant has the burden to show both that counsel performed deficiently and that counsel's errors prejudiced the defense. ***Strickland***, 466 U.S. at 687. This analysis requires a mixed standard of review. We review the circuit court's findings of fact regarding counsel's conduct under a clearly erroneous standard. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Whether those facts constitute deficient performance and prejudice are questions of law that we review de novo. ***State v. Tulley***, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807.

B. Deficient Performance

¶14 To demonstrate deficient performance under ***Strickland***, the defendant must show that counsel's representation "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. In determining whether counsel acted reasonably, we make "every effort … to eliminate the distorting effects of hindsight" and "evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689. If counsel's conduct "'might be considered sound trial strategy,'" we must conclude that counsel has performed adequately. ***Id.*** at 689 (quoting ***Michel v. Louisiana***, 350 U.S. 91, 101 (1955).

¶15 Horsfall contends that evidence that Monica's injuries were consistent with consensual sex was crucial to his defense, and therefore trial counsel's failure to present such evidence constitutes deficient performance. Specifically, Horsfall contends that trial counsel should have presented expert testimony that Monica's bleeding and abrasions could have been caused by consensual sex. The State responds that defense counsel's decision not to seek expert testimony was reasonable because it would have been inconsistent with another theory of the defense, namely, that no intercourse occurred.

¶16 We agree with the State that the primary theory of the defense at trial, at least during closing arguments, was that Monica told Horsfall to stop and he did. However, trial counsel testified, and the circuit court found at the postconviction hearing, that another theory of the defense was that Monica consented to sexual intercourse, and that she lied about being sexually assaulted because she was a virgin, came from a very religious family and was afraid that her parents and church would disapprove of what she did. The State does not argue that the circuit court's finding is clearly erroneous and concedes later in its brief that trial counsel "pursued two lines of defense," one of which was "that whatever sexual activity took place was consensual."[4] We need not decide, however, whether the circuit court's finding was clearly erroneous because we conclude that regardless whether consent was a theory of the defense or not, trial counsel performed deficiently when he failed to at least *investigate* evidence that could suggest that Monica's injuries were the result of consensual sex.

[4] We note also that the Supreme Court has indicated great reluctance to question a trial court ruling accepting an attorney's explanation. *See* ***Burger v. Kemp***, 483 U.S. 776, 785 (1987).

¶17 Certainly, if trial counsel was pursuing a consent theory, it was necessary to present evidence which would suggest that Monica had given consent. This would be so even if counsel was pursuing an alternative theory—even an inconsistent one—at the same time. If we were to accept the State's argument—that there is no deficient performance because introducing an expert on consent would have been inconsistent with defense counsel's other theory—we would make it impossible for a defendant to demonstrate ineffective assistance of counsel for failing to investigate or present evidence when trial counsel pursues inconsistent theories.[5] Under the State's view, trial counsel pursuing a defense under two theories could simply present no evidence because whatever evidence he or she offered might be inconsistent with one theory or the other.

¶18 There can be no dispute that if defense counsel intended to pursue a consent theory, it was imperative to provide an explanation, other than sexual assault, to explain Monica's injuries. Regardless whether the State planned to emphasize the injuries or not, a reasonable attorney would anticipate that evidence of the injuries would be introduced at trial and that it could potentially have a powerful affect on the jury. *See* ***Dees v. Caspiri***, 904 F.2d 452, 454 (8th Cir. 1990) ("Considering the importance of the shoe print evidence in this case, counsel had a duty to make a diligent investigation of the forensic evidence and its potential weaknesses.").[6] Trial counsel admitted at the postconviction hearing,

[5] Courts have generally held that a decision to pursue two inconsistent theories of defense is not in itself ineffective assistance of counsel. *See* ***Amaechi v. State***, 564 S.E.2d 22, 25 (Ga. Ct. App. 2002); ***Clayton v. State***, 63 S.W.3d 201, 206-07 (Mo. 2001).

[6] *See also* ***United States v. Tarricone***, 996 F.2d 1414, 1418-19 (2nd Cir. 1993) (concluding that, due to the importance of a signature, trial counsel may have acted deficiently for failing to seek a handwriting expert regardless whether he had a basis for anticipating the government's use of testimony regarding handwriting).

however, that he never attempted to locate an expert who could testify that Monica's injuries may not have been caused by sexual assault.

¶19 We are instructed by ***Strickland*** to give great deference to counsel's "*strategic* choices made *after* thorough investigation of law and facts relevant to plausible options." ***Strickland***, 466 U.S. at 690 (emphasis added). Here counsel admits that his choice not to present evidence regarding Monica's injuries was neither a strategic decision nor was it made after a thorough investigation of the facts. The ***Strickland*** Court further instructed: "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Id.*** at 690-91; *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 638, 369 N.W.2d 711 (1985).[7] Again, counsel testified that he never had a strategic reason for failing to investigate and we cannot conclude that it was reasonable not to when a failure to explain Monica's injuries could potentially be fatal to a consent defense.

---

[7] The court in ***State v. Pitsch***, 124 Wis. 2d 628, 369 N.W.2d 716 (1985), quoted with approval the ABA Standards for Criminal Justice, which provide:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty."

Id. at 638 (quoting ABA Standards for Criminal Justice, The Defense Function, sec. 4-4.1 (2d ed. 1982)).

¶20 We note that this is *not* a situation in which counsel made an effort to find helpful expert testimony, but abandoned the attempt because he or she only found opinions detrimental to the defense. We have emphasized that in such a case, the Constitution does not require counsel to continue searching until the "right expert" is found. *See, e.g.,* ***State v. Oswald***, 2000 WI App 2, ¶77, 232 Wis. 2d 62, 606 N.W.2d 207; ***State v. Hubert***, 181 Wis. 2d 333, 343-44, 510 N.W.2d 799 (Ct. App. 1993); *see also* ***Burger v. Kemp***, 483 U.S. 776, 794 (1987) (noting that counsel "could well have made a more thorough investigation than he did" but concluding "we address not what is prudent or appropriate, but only what is constitutionally compelled.") (internal quotations omitted).

¶21 But that is not what happened here. Counsel made no effort to find an expert who could rebut the inference that Monica's injuries were caused by sexual assault. In addition, when the State's expert testified that the injuries were "consistent with sexual assault," defense counsel did not challenge this conclusion on cross-examination or ask if the injuries were also consistent with consensual sex. Finally, even at closing argument, when the State suggested that no one would "consent to injury to their private parts" and that the underwear was "very, very powerful strong damning evidence against Mr. Horsfall," defense counsel still did not argue that the injuries could have been caused by consensual sex. Similar to counsel in ***Pitsch***, Horsfall's attorney at trial had several opportunities to make up for his earlier failure to investigate but did not do so. *See* ***Pitsch***, 124 Wis. 2d at 638-39. We conclude that this constitutes deficient performance under the Sixth Amendment and art. I, § 7. *See* ***Sims v. Livesay***, 970 F.2d 1575, 1580-81 (6th Cir. 1992) (holding that counsel performed deficiently when he failed to seek an expert or otherwise challenge the government's theory regarding physical evidence).

¶22 Even if we concluded that trial counsel was mistaken in his belief that a consent theory was presented at trial, we would nonetheless conclude that Horsfall's trial counsel had performed deficiently. Considering the facts of this case, it would not be reasonable to pursue the sole defense of "I never had intercourse with her" without at least investigating other possibilities, absent urgings by Horsfall that such pursuits would be fruitless.

¶23 Counsel's decision not to pursue a particular defense is reasonable where the evidence would conflict with another theory of the defense. *See* ***State v. Teynor***, 141 Wis. 2d 187, 211-12, 414 N.W.2d 76 (Ct. App. 1987); *see also* ***Nelson v. Nagle***, 995 F.2d 1549, 1553-54 (11th Cir. 1993). Further, a decision to pursue one defense rather than another is not unreasonable simply because the defense ultimately proved unsuccessful. ***Strickland***, 466 U.S. at 699.

¶24 In this case, however, counsel's "no intercourse occurred" defense was effectively no defense at all. Although Horsfall's trial counsel argued that evidence from the crime lab did not indicate that he had sexual contact with Monica, counsel never offered any evidence or provided an explanation for why, if Horsfall did not have sexual contact with Monica, Monica had multiple abrasions on her vagina and blood on her underwear.[8] Without such evidence, a defense that Horsfall stopped when Monica told him to stop was likely doomed to failure from the start.

¶25 In its brief the State suggests an explanation for Horsfall's trial counsel, writing that counsel meant to argue that "Monica had injured herself to

[8] Dr. Richardson testified that based on his examination, Monica was not menstruating at the time of the alleged sexual assault and defense counsel did not challenge this testimony.

make it look like she had been sexually assaulted." But this explanation, if it was in fact what counsel wanted the jury to infer, is fanciful. Although evidence at trial established that Monica was religious, there was no evidence that she would have been inclined to injure herself in order to avoid disapproval from her parents and church. Nor was there any evidence or argument as to *how* Monica would have injured herself, if she was inclined to do so. The jury therefore had no plausible explanation from the defense for why Monica was injured and was left with only the argument of the State that the injuries were the result of nonconsensual sexual intercourse with Horsfall.

¶26 Counsel is required to make a reasonable investigation of the facts to determine which defenses, if any, may be available. When a strategic decision is based upon a factual assumption that was not adequately investigated, counsel has not satisfied the requirements of ***Strickland***. *See, e.g,* ***Horton v. Zant***, 941 F.2d 1449, 1462-63 (11th Cir. 1991); ***Harris v. Reed***, 894 F.2d 871, 878-79 (7th Cir. 1990); ***Lewis v. Lane***, 832 F.2d 1446, 1458 (7th Cir. 1987); *see also* ***Couch v. Trickey***, 892 F.2d 1338, 1345 (8th Cir. 1989) (Lay, C.J., dissenting) ("A strategic choice is a decision between reasonably investigated alternatives, not an uninformed decision to push ahead blindly with a defense of unknown merit."). To the extent that Horsfall's trial counsel assumed that he would be unable to locate evidence supporting a consent theory, this assumption was made without an adequate investigation. Monica's injuries were not so extreme that a reasonable attorney would conclude that there was no possible cause of the injuries other than sexual assault and therefore that there was no need to pursue a consent defense.

¶27 As ***Strickland*** discusses, what constitutes a "reasonable investigation" may depend on what the client has told counsel. ***Strickland***, 466 U.S. at 691; *see also* ***State v. Pitsch***, 124 Wis. 2d at 637. If the reason counsel

chooses not to pursue a potential line of defense is that the defendant warned that an investigation would be fruitless, this decision cannot be considered unreasonable. *See* ***State v. Leighton***, 2000 WI App 156, ¶¶40-41, 237 Wis. 2d 709, 616 N.W.2d 126; *but see* ***United States v. Friel***, 588 F. Supp. 1173, 1182-83 (E.D. Penn. 1984) (concluding that defense counsel acted deficiently when failing to make an investigation into confession made by third party even assuming that the client indicated that he "did not take [the purported confession] seriously"). Horsfall's trial counsel did not testify that his reason for not seeking evidence explaining Monica's injuries was based upon information provided by Horsfall and the State points to no other evidence that would contradict this. We therefore conclude that even if Horsfall's trial counsel made a strategic decision to focus on a "no intercourse occurred" defense, this decision was unreasonable insofar as it was made without investigating other defenses that were potentially stronger. *See* ***Profitt v. Waldron***, 831 F.2d 1245, 1248 (5th Cir. 1987) (holding that counsel acts deficiently when he or she (1) "fails to take an obvious and readily available investigatory step which would have made the defense viable, (2) does not produce reasonable tactical reasons for not pursuing further investigation, and (3) raises no other plausible defense …."). Accordingly, we conclude that trial counsel's failure to investigate evidence that would provide an alternative explanation for Monica's injuries constitutes deficient performance.

C. Prejudice

¶28 In addition to deficient performance, Horsfall must also show prejudice to prevail on a claim for ineffective assistance of counsel. To make this showing, Horsfall must do more than demonstrate that the errors had "some conceivable effect" on the trial. ***Strickland***, 466 U.S. at 693. On the other hand, the defendant is not required to show the counsel's deficient performance "more

likely than not altered the outcome of the case." ***Id.*** at 693. Rather, the test is "whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt." ***Id.*** at 695. A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." ***Id.*** at 694. The ultimate focus is on fundamental fairness. ***Id.*** at 696. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." ***Id.***

¶29 The circuit court concluded that expert testimony "would have added little" to Horsfall's defense because "[i]t is well within the life experience and knowledge of most jurors that such injuries might occur when a young woman has sexual intercourse for the first time, even consensually." Horsfall disagrees, arguing that the "natural inference" is that the injuries were caused by sexual assault, and "had the jury known that there were several common manners, applicable to the situation between Mr. Horsfall and [Monica], in which such injuries could occur during consensual sex, there is a reasonable probability that the outcome of the trial would have been different." The State offers no argument in its brief regarding prejudice except to agree in a footnote with the circuit court's rationale. Because we conclude that defense counsel's failure to present any evidence or argument regarding alternative explanations for Monica's injuries undermines confidence in the outcome of the trial, we agree with Horsfall that he was prejudiced by trial counsel's deficient performance.

¶30 To show prejudice from a failure to investigate, the defendant "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***Leighton***, 2000 WI App 156 at ¶38;

see also ***State v. Street***, 202 Wis. 2d 533, 549, 551 N.W.2d 830 (Ct. App. 1996). In addition, the defendant must establish the factual basis for the allegations at the postconviction hearing. *See, e.g.,* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). Horsfall has satisfied these requirements.

¶31 Horsfall is alleging that trial counsel would have found, had he looked, an opinion similar to the one given by Dr. Patterson at the postconviction hearing, and that such testimony would help demonstrate that Monica had consented to sex. Patterson testified that Monica's injuries were consistent with consensual sex, particularly if Monica was a virgin at the time, as she testified she was. Further, an examining doctor would not be able to tell whether the injuries were caused by consensual or nonconsensual sex. No one disputes that Patterson's testimony would have been admissible at trial. The question therefore is whether the absence of this testimony, or at least of *some* evidence or argument from the defense that Monica's injuries could have been caused by consensual sex, is enough to undermine confidence in the outcome of the trial.

¶32 We conclude that expert testimony that Monica's injuries could be caused by consensual sex would have been helpful to the jury. The State expressed surprise in its post-trial brief "that any doctor could be found that would testify as Dr. Patterson's affidavit indicated he would opine." We cannot say that the State's surprise would not also be shared by members of the jury.[9]

[9] The State does not argue on appeal that Horsfall failed to meet his burden of showing prejudice because he failed to show how easy it would have been for trial counsel, had he made the attempt, to locate an expert who would have given an opinion similar to Patterson's. We therefore do not consider whether or to what extent the defendant may be required to demonstrate at the postconviction hearing that an expert's opinion is held by others in the field.

¶33 As the State pointed out in its closing argument, the abrasions and blood were strong evidence that Horsfall had sexually assaulted Monica. Testimony from Patterson or another doctor with a similar opinion would have undercut this argument and provided Horsfall with at least a plausible defense. Further, the prejudice to Horsfall's defense was not caused only by trial counsel's failure to obtain an expert who would testify that Monica's injuries were consistent with consensual sex. Rather, it was counsel's complete failure to rebut the State's argument that the abrasions and blood must have been caused by Horsfall's sexual assault. The jury was provided with *no* explanation from the defense as to why Monica may have been injured the way she was. Even after Dr. Richardson testified that Monica's injuries were consistent with sexual assault, trial counsel did not challenge Richardson's conclusion through cross-examination or seek to qualify it. After the State suggested in its closing argument that the injuries could not have been caused by anything except nonconsensual sex, trial counsel did not refute that conclusion. The jury had only the State's theory to rely on and rendered a verdict accordingly.

¶34 We view ***State v. Glass***, 170 Wis. 2d 146, 488 N.W.2d 432 (Ct. App. 1992), as instructive. In ***Glass***, the defendant was charged with second-degree sexual assault of a child. ***Id.*** at 148. At trial, the alleged victim testified that Glass, who was her mother's boyfriend, came into her room at night, climbed on top of her, and raped her. ***Id.*** at 149. She could not recall whether Glass had ejaculated. ***Id.*** Although crime lab tests conducted after the alleged sexual assault were "negative" for the presence of the semen, defense counsel stipulated that the tests were "inconclusive" because he did not want to encourage testimony "as to why or why not there was nothing found." ***Id.*** at 149-50.

¶35 We concluded that trial counsel's performance was constitutionally ineffective. ***Id.*** at 152. We wrote that the negative test results were "critically important" to Glass's defense and that "[w]hether or not the strength of that evidence later might have been diminished, Glass was entitled to have the jury hear it." ***Id.*** We reasoned that the crucial issue was whether the alleged victim was credible. ***Id.*** at 154. We stated: "A potentially weighty means of impugning Natasha's credibility would have been to show that, while she alleged an act … normally resulting in physical evidence, none was found." ***Id.*** at 154.

¶36 Although there are a number of differences between ***Glass*** and this case, ***Glass*** teaches the importance of fully explaining the physical evidence in a sexual assault case. Like the test results in ***Glass***, evidence that Monica's injuries were consistent with consensual sex would not prove that no assault occurred, but such evidence would have provided an explanation for the injuries and a reason to question Monica's credibility. We conclude, as we did in ***Glass***, that Horsfall was entitled to have the jury hear evidence that Monica's injuries were not caused by sexual assault.

¶37 By failing to investigate evidence of a consent, trial counsel deprived Horsfall of a meaningful defense. Further, had trial counsel challenged the State's characterization of Monica's injuries, the jury might have viewed that evidence much differently. In our judgment, Horsfall's trial counsel did not serve his function "to make the adversary testing process succeed in the particular case." ***State v. Schultz***, 148 Wis. 2d 370, 378, 435 N.W.2d 305 (Ct. App. 1988) He performed deficiently when he failed to investigate evidence that could suggest that Monica's injuries were not caused by sexual assault, and his deficiency prejudiced Horsfall's defense. We therefore conclude that Horsfall received ineffective assistance at trial, and we remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.