STATE OF WISCONSIN

IN SUPREME COURT

No. 2007AP1849-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JORDAN L. GAJEWSKI,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MARATHON COUNTY CIRCUIT COURT, THE HONORABLE PATRICK BRADY PRESIDING

AMENDED BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

J.B. VAN HOLLEN
Attorney General

CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys for Plaintiff-Respondent-Petitioner
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081

TABLE OF CONTENTS

Page

CASES CITED

Page

STATUTES CITED

RULES

STATE OF WISCONSIN

IN SUPREME COURT

No. 2007AP1849-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JORDAN L. GAJEWSKI,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MARATHON COUNTY CIRCUIT COURT, THE HONORABLE PATRICK BRADY PRESIDING

AMENDED BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

QUESTIONS PRESENTED

1. Whether, in reversing defendant-appellant Jordan L. Gajewski's sexual-assault conviction, the court of appeals erred as a matter of law when it both failed to identify Gajewski's burden of proof for establishing his claim of ineffective assistance of counsel and failed to analyze Gajewski's postconviction proof according to that burden.

   - By deciding the appeal without identifying a defendant's burden of proof and without analyzing Gajewski's postconviction proof according to an identified bur-

den, the court of appeals implicitly held that it did not err.

- The Marathon County Circuit Court did not address this issue.

2. Whether, in reversing Gajewski's sexual-assault conviction, the court of appeals erred as a matter of law in applying ***Strickland***'s "objective standard of reasonableness"[1] when, despite clear evidence that Gajewski withheld critical evidence from his lawyer, the court relieved Gajewski of responsibility for withholding the evidence and thus functionally rejected ***Strickland***'s admonition that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."[2]

   - By deciding the appeal as it did, the court of appeals implicitly held that it did not err.
   - The Marathon County Circuit Court assigned responsibility to Gajewski for failing to disclose relevant information to his trial lawyer.

3. Whether, in reversing Gajewski's sexual-assault conviction, the court of appeals erred as a matter of law by failing to view the record in the light most favorable to the circuit

---

[1] ***Strickland v. Washington***, 466 U.S. 668, 688 (1984).

[2] ***Id.*** at 691.

court's decision rejecting Gajewski's ineffective-assistance claim.

- By deciding the appeal as it did, the court of appeals implicitly held that it did not err.
- The Marathon County Circuit Court did not make specific findings of fact.

SUMMARY OF THE CASE

Following a two-day trial, a Marathon County jury convicted Gajewski of one count of violating Wis. Stat. § 940.225(3), which establishes the Class G felony of third-degree sexual assault (6, Pet-Ap. 116; 31, Pet-Ap. 117).

Gajewski filed a postconviction motion alleging two bases for granting a new trial: ineffective assistance of trial counsel, and newly discovered evidence (41, Pet-Ap. 118-24). Following a ***Machner*** hearing[3] at which trial counsel and Gajewski testified (51, R-Ap. 130-206), the Marathon County Circuit Court denied Gajewski's motion (44, Pet-Ap. 107; 51:74, Pet-Ap. 203).

The Wisconsin Court of Appeals reversed both the circuit court's decision on the postconviction motion and the judgment of conviction. The court of appeals held that Gajewski's trial counsel performed deficiently by failing to conduct an adequate investigation and that Gajewski suffered

---

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

prejudice from counsel's failure. The court of appeals ordered the case remanded for a new trial.

This court granted the State's petition for review.

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The court's decision to grant the petition for review indicates that this case merits oral argument.

Publication. In accord with Wis. Stat. §§ 751.10[4] and 751.11(1)[5] and SCR 80.01(1),[6] this

---

[4] In relevant part, section 751.10 of the Wisconsin Statutes provides: "The supreme court shall decide all cases in writing. . . ." Wis. Stat. § 751.10.

Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2005-06 edition.

[5] Section 751.11(1) of the Wisconsin Statutes provides: "The supreme court may make such provisions for publication of its opinions as it deems appropriate." Wis. Stat. § 751.11(1).

[6] Supreme Court Rule 80.01(1) provides:

> The supreme court designates the Wisconsin Reports as published by Lawyers Cooperative Publishing and the Wisconsin Reporter edition of the North Western Reporter published by West Group as official publications of the opinions, rules, and orders of the court of appeals and the supreme court and other items designated by the supreme court. If any authorized agency of this state publishes the opinions, rules, orders, and other matters of the court of appeals and the supreme court in a format approved by the supreme court after January 1, 1979, that

(footnote continues on next page)

court must issue a written decision to include in the court's official publications.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

On July 1, 2005, the Marathon County district attorney filed a criminal complaint charging defendant-appellant Jordan L. Gajewski with one count of violating Wis. Stat. § 940.225(3), which establishes the Class G felony of third-degree sexual assault (1, Pet-Ap. 111-15).

On October 3, 2005, the district attorney filed an information charging Gajewski with the same crime (6, Pet-Ap. 116).

A. The Trial.

On August 17, 2006, a two-day jury trial began under the supervision of Marathon County Circuit Judge Dorothy Bain (47D:1). At the trial, the prosecutor called six witnesses:

- Rebecca Balz, the victim (47D:105-79)
- Mike Hoff (47D:181-93), a "good friend" of Gajewski (47D:181) and a "friend" of Balz (47D:182)

(footnote continues from previous page)

publication shall also be designated as an official publication.

SCR 80.01(1).

- Marathon County Deputy Sheriff Troy Bemke (47D:193-24)

- Marathon County Sheriff's Detective Kelly Hanousek (47D:225-58)

- Ashley Zinkowich (47D:259-85), a "good friend" of Balz (47D:260; *see also* 47D:106) and at whose house the sexual assault occurred in the early morning hours of May 8, 2005 (47D:125)

- Thomas Aschbrenner (47D:285-96), who graduated from Athens High School in May 2006 (47D:286) and who had known both Gajewski and Balz since Aschbrenner's freshman year in high school (47D:286-87)

Gajewski called one witness: Kori King (47D:302-12), a guest at Zinkowich's house the night the sexual assault occurred (47D:303).

1. Trial testimony.

a. Rebecca Balz.

Balz, a seventeen-year-old at the time of the offense (47D:105), testified that she had not known Gajewski before the night of May 7-8, 2005 (47D:110; *see also* 47D:169). She had never talked to him before and knew him only by his face and name (47D:110; *see also* 47D:169). She described Gajewski's assault (47D:115-19; *see also* 47D:171) and said she told him "no" several times (47D:118; *see also* 47D:157-59, 171). She testified that she did not consent at any time to have sexual intercourse with Gajewski (47D:119; *see also* 47D:174-75).

On cross-examination (47D:127-64) and re-cross-examination (47D:176-78), T. Christopher Kelly (Gajewski's trial lawyer) challenged Balz with inconsistencies between her statements to Detective Hanousek and her testimony at trial (*see, e.g.*, 47D:137-41). Kelly attacked Balz for not resisting and for not calling for assistance during the assault (47D:142-50, 156-57; *but see* 47:179). Kelly questioned Balz about the lack of any bruising, pain, or other injuries (47D:150-51, 156). Kelly inquired about Balz's examination by a doctor two weeks later, about Balz's delay in seeking medical assistance, and about Balz's failure to keep a follow-up appointment (47D:151-55). Kelly asked Balz whether she told anyone — her parents, police, friends — about the assault; Balz answered "no" (47D:160).

Kelley questioned Balz about a conversation she had with Gajewski the following Wednesday (May 11) during which Gajewski said he had told Mike Hoff about having sex with her (47D:160-61). Balz said she did not remember that conversation but did not deny that she might have told Detective Hanousek about the conversation (47D:161). In response to other questions, Balz said she became aware a few days later that others knew about Gajewski claiming he had sex with her at Zinkowich's house (47D:161-62). When defense counsel cross-examined her about related events she could not remember or about which she had a fuzzy memory, Balz replied, "It was over a year ago. Details get fuzzy. I've tried to forget about it" (47D:132).

On redirect examination, Balz explained her concern that people might not believe her: "Just

that he was a pretty popular guy when we were in high school, a big jock, good at wrestling and stuff like that and just that I don't think that people would have thought that he would have to do something like this to get with a girl" (47D:170). She also explained why she did not talk with anyone about the assault: "Because I figured if I didn't talk about it, that it would just go away" (47D:173).

b. Mike Hoff.

Hoff testified that he had known Gajewski "[s]ince middle school" (47D:181) and Balz since grade school (47D:182). Hoff confirmed that he had stayed at Zinkowich's house the night of the assault (47D:182). He described himself as "a pretty sound sleeper" who snores (47D:186). He said that after the police contacted Gajewski, he (Hoff) had heard rumors around school about Gajewski and Balz having sex (47D:188). On cross-examination, Hoff said he did not hear anything that disturbed his sleep (47:D190). He also said the police never contacted him about the case (47D:189).

c. Marathon County Deputy Sheriff Troy Bemke.

Deputy Bemke testified about his initial contact with Balz in response to a dispatch to Athens High School (47D:195-96). He summarized Balz's account of the assault (47D:197). He also reviewed the written statement he took from Balz at that time (47D:198-207).

d. Marathon County Sheriff's Detective Kelly Hanousek.

Detective Hanousek testified about meeting with Balz on May 18, 2005 (47D:228) and reviewed that meeting, during which Balz described the assault (47D:229-39).

e. Ashley Zinkowich.

Zinkowich testified that she had known Balz since kindergarten and considered herself "a good friend" of Balz (47D:259-60). Zinkowich described the events on the evening of May 7 and morning of May 8 (47D:260-68). She identified the people at her house that evening: herself, Gajewski, Balz, Hoff, Kori King, and Jenna Petrie (47D:264). Zinkowich testified that Balz, Gajewski, Hoff, and King stayed downstairs, while she and Petrie slept upstairs (47D:266). Zinkowich said she did not know about anything happening downstairs at the time (47D:268). Zinkowich said she first heard "a couple of days to a week" later from her boyfriend, Tom Aschbrenner, that Gajewski had sex with Balz (47D:268-69); Zinkowich had not previously heard anything about the matter (47D:284). Zinkowich "confronted [Balz] about it" (47D:269), and Balz told Zinkowich that she had not wanted to have sex with Gajewski (47D:270).

f. Thomas Aschbrenner.

Aschbrenner, who graduated in May 2006 (47D:286), testified that he had known both Gajewski and Balz "[s]ince I was about a freshman" (47D:286, 287). Aschbrenner said that at a party on May 14, 2005 (47D:289), Gajewski told him that he and Balz "had sex and she said, no, no

right in the middle and it — he just kept going" (47D:287). Aschbrenner confirmed that he eventually told Zinkowich about the conversation with Gajewski (47D:288). Aschbrenner said that everything he knew about what happened between Balz and Gajewski came from Gajewski (47D:288). On May 20, 2005, Aschbrenner gave a statement to the police recounting Gajewski's remarks to him (47D:288-89; *see also* 47D:296). Aschbrenner read the statement to the jury:

> I like it when your woman has friends over because then that is when I get laid. When Becky [Balz] was there, I fucked her and she was saying to me, I can't do this, I can't do this and when I would speed up, she would shut up and when I would slow down, she would say I can't do this, I can't do this.

(47D:290.) When questioned by defense counsel about a seeming discrepancy between his testimony at trial about Gajewski's remarks and the remarks as recounted in his police statement, Aschbrenner responded: "It says I can't do this, I can't do this. Anybody in their right mind would interpret that as no, no" (47D:293; *see also* 47D:295).

g. Kori King.

King testified as Gajewski's only witness. King described the layout of Zinkowich's house and the sleeping arrangements the night of May 7-8 (47D:303-08). He said he slept through the night and did not hear any sounds consistent with people having sex (47D:308). On cross-examination by the prosecutor, King acknowledged that he drank heavily that night (47D:310-11) and that by the time "[he] got back to [Zinkowich]'s house [he was] pretty drunk and pretty tired" (47D:311). When

asked his opinion about Balz's truthfulness, King replied, "She is honest, yes, truthful" (47D:312).

2. Defense counsel's closing argument.

In his closing argument, Kelly gave the jury a simple, straightforward theory of defense: Balz lied to a friend and "then it snowballed and then it snowballed and then the police were talking to her and then she is in court and what can she do? She can't say I lied about all of this because then she is going to be in trouble for lying to the police" (47D:358-59). Kelly identified several reasons he said the jury should doubt Balz's claim (47D:335-45). Kelly also highlighted inconsistencies between witnesses' out-of-court statements and the witnesses' testimony at trial, as well as inconsistencies within trial testimony (47D:345-55). Kelly remarked on the absence of physical evidence (47D:355) and "that there was no police investigation" (47D:355). In the end, Kelly contended that the evidence showed Gajewski and Balz never had sex on May 8, 2005 (47D:344 (Balz "not worried about having a sexually transmitted disease because she knows that nothing happened that would have given her a sexually transmitted disease"), 359).

3. The verdict.

On August 18, 2006, the jury found Gajewski "guilty of third-degree sexual assault, as charged in the information" (31, Pet-Ap. 117; *see also* 47D:380).

B. Postconviction Proceedings.

1. Gajewski's postconviction motion.

On June 1, 2007, Gajewski filed a motion for postconviction relief (41, Pet-Ap. 118-24) in which he alleged ineffective assistance by trial counsel Kelly (41:4-7, Pet-Ap. 121-24). Specifically, Gajewski asserted that Kelly did not adequately inquire about conversations between Gajewski and Balz in the period between May 8, 2005 (the date of the assault) and May 18, 2005 (the date Balz reported the assault to Detective Hanousek).

> Trial counsel was deficient in that he failed to develop evidence showing a credible motive for [Balz] to lie about whether she had sex without consent with [Gajewski]. In particular, that on May 13, 2005, subsequent to the alleged assault but prior to the allegation, Balz invited Gajewski to a musical concert, which he turned down; and further, that she gave him her cell phone number and asked him to call her, at which time he told her he did not like her "that way" and never would. She reacted by calling him an "asshole" and to go "fuck himself."
>
> . . . .
>
> Trial Counsel was deficit [*sic*]. Gajewski told trial counsel that he had several conversations with Balz after the alleged sexual assault but counsel never followed-up with him on the specifics of those conversations or whether there were any corroborating witnesses. Trial counsel did not inquire as to a possible jealousy/scorned lover motive. Further, he could have presented this evidence by: having Gajewski testify to the conversation; cross-examining Balz about the conversation; and calling [Casey] Conner to the stand to confirm that Balz and Gajewski were having a conversation when and where they did.

(41:5-6, Pet-Ap. 122-23.) Gajewski asserted that Kelly's alleged failings prejudiced him: "Trial counsel failed to show a credible motive for Balz to lie about what happened. . . . ; but Gajewski's ultimate rejection of Blaz's [*sic*] advances provide a powerful motive for her to punish him and lie about what happened" (41:6, Pet-Ap. 123).

2. *Machner* hearing.

On July 13, 2007, Marathon County Circuit Judge Patrick Brady presided over a ***Machner*** hearing[7] (51, Pet-Ap. 130-206). At the hearing, defense counsel Kelly testified (51:12-32, Pet-Ap. 141-61), as did Gajewski (51:43-57, Pet-Ap. 172-86), Casey Conner (51:5-12, Pet-Ap. 134-41), Fred Borntreger (51:32-43, Pet-Ap. 161-72), and Balz (51:57-59, Pet-Ap. 186-88).

a. Attorney Chris Kelly's testimony.

Kelly agreed with Gajewski's postconviction lawyer that Kelly's "notes [in Exhibit 4] reflect[ed] that Jordan [Gajewski] had several conversations with Rebecca Balz between May 7, 2005, and May 16, 2005, . . . the week after the alleged assaults" (51:15, Pet-Ap. 144). In the notes, Kelly wrote:

> Mon. following this, he talked to her — asked her if she told anyone, she sd "of course not"
>
> △ sd "I told @ least a dozen ppl" — he laughed, then sd "No, I just told Mike"
> — she didn't seem to react much

---

[7] ***Machner***, 92 Wis. 2d 797.

short conversations throughout the wk — only sig conversation on Fri, he told her what he ws doing on wknd, she sd maybe goig to concert — he said maybe party, she wrote cell phone # on his hand — △ tried calling her that nite or Sat nite, one other time tried to call but no answer

cuz of hers sd she told ppl he raped her —
cuz asked why goig thru w/ it, "I just am"

"I didn't want it to go this far" — Derrick Lavicka
Athens

(43:5, Pet-Ap. 129.)

Kelly agreed with postconviction counsel that he should have cross-examined Balz about one of the conversations (51:16, Pet-Ap. 145); that he did not establish a motive for Balz to lie (51:17, Pet-Ap. 146); and that if he had known about a witness named Casey Conner, he could have called Conner to corroborate the fact of a conversation between Gajewski and Balz (51:19, Pet-Ap. 148). In recommending that Gajewski not testify at trial, Kelly said the detailed information about the conversations with Balz, as set out in the postconviction motion, "would have been a factor in [his] decision-making process" in making a recommendation to Gajewski about whether he should testify (51:18, Pet-Ap. 147). Gajewski's postconviction lawyer did not ask, and Kelly did not say, whether he would have made a different recommendation in light of that information (51:18, Pet-Ap. 147).

On cross-examination, Kelly said that the notes in Exhibit 4 (43:5, Pet-Ap. 129) resulted from an interview lasting about two hours (51:20, Pet-Ap. 149). Kelly agreed with the prosecutor that during this interview, he "had open dialogue with [Ga-

jewski]" and "explored with [Gajewski] the conversations that may or may not have occurred between him and Rebecca Balz the week after the assault" (51:21, Pet-Ap. 150). Kelly acknowledged that the notes reflected "any contacts [Gajewski] would have had with [Balz] that following week" and that the notes did not "specifically" refer to a conversation in a parking lot or to "Casey Conner approaching Mr. Gajewski as he had a conversation with Miss Balz" (51:22, Pet-Ap. 151). Kelly said he "probably would have written down the name of a witness if [he]'d been aware of the witness" (51:22-23, Pet-Ap. 151-52). The prosecutor also asked Kelly a series of questions about the conversation in which Gajewski allegedly rejected Balz:

> Q You discussed on direct examination motive of Rebecca Balz to falsify —
>
> A Right.
>
> Q — correct?
>
> A Um-hum.
>
> Q And one of those motives would have been him rejecting her, correct?
>
> A That would be a motive, yes.
>
> Q Yes. Can you tell me in your notes where it says that he rejected her?
>
> A It does not say that.
>
> Q Can you tell me in your notes where it says that she told him to fuck off?
>
> A It does not say that.

Q Can you tell me in your notes where it says that he said he never wanted that kind of relationship with her?

A That's not in my notes.

Q In fact, what your note says is that he tried to call her several times, correct?

A He tried to call her at least twice, yes.

Q So, in fact, your client never disclosed those things to you if they occurred because you would have written them down as important facts to motive, correct?

A I don't have any recollection of Jordan telling me those things, and I think I would have written them down, yes.

(51:23-24, Pet-Ap. 152-53.) Later, Kelly and the prosecutor had this exchange:

Q He did not mention any other witnesses to this conversation regarding the cell phone number, correct?

A Not that it reflected in my notes.

Q And that would be something important that you would write down?

A I would think so.

Q He did not say that they actually had a conversation over the cell phone?

A No. At least that's not in my notes.

(51:25, Pet-Ap. 154.) The notes also do not refer to any witnesses to cellphone calls Gajewski said he made to Balz (43:5, Pet-Ap. 129). Kelly further acknowledged that "[his] advice [to Gajewski about

whether to testify] was based on a strategic decision" (51:25, Pet-Ap. 154).

b. Casey Conner's testimony.

Casey Conner testified that on Friday afternoon, May 13, 2005, as he walked toward Gajewski's car in the high school parking lot for a ride home (51:7, Pet-Ap. 136), he saw Gajewski and Balz having a conversation. By the time Conner arrived at Gajewski's location, however, Balz had "already walked away" (51:8, Pet-Ap. 137). Conner said that Gajewski and Balz "never really talked in high school" (51:8, Pet-Ap. 137). On cross-examination, Conner said he and Gajewski "[had] been friends throughout high school" and agreed with a description of Gajewski and him as "very good friends" (51:9, Pet-Ap. 138). Conner said he and Gajewski "ran into each other every day" (51:9, Pet-Ap. 138). He acknowledged that he had never seen "any kind of relationship between [Gajewski and Balz]" (51:9, Pet-Ap. 138). Conner said that from a distance of "[a]nywhere between 17 to 20 meters" in the parking lot (51:10, Pet-Ap. 139), "[y]ou could tell [Gajewski and Balz] were staring at each other and you could obviously tell they were talking" (51:10, Pet-Ap. 139). Conner said he did not know how long they had conversed before he arrived, nor did he hear them talking or what they talked about (51:11, Pet-Ap. 140).

c. Fred Borntreger's testimony.

In his postconviction motion, Gajewski declared that on May 25, 2007, he learned through a coworker that shortly after the trial ended in August 2006, Fred Borntreger had overheard the victim

deny that the rape had occurred (41:2, Pet-Ap. 119). According to the co-worker, Borntreger said

> he had attended the Athens town fair in late August, 2006, shortly after the Gajewski trial, and while in the beer tent he was standing next to the complainant in this case, Rebecca Balz (Balz), who was having a conversation with a woman in her late 20's to early 30's. Balz stated the rape never happened and that she just said it happened to get "him" in trouble because she was "pissed off" at him. Borntreger is an acquaintance of Balz and knows her family. . . .

(41:2, Pet-Ap. 119.) At the ***Machner*** hearing, Borntreger testified about the encounter at the town fair (51:34-35, Pet-Ap. 163-64.) The prosecutor's cross-examination of Borntreger, however, revealed that his view rested on an array of assumptions and guesses and that this encounter occurred while he walked though a noisy, crowded beer tent (51:37-40, Pet-Ap. 166-69). He conceded that the comment he overheard "could have been [Balz] talking about Jordan Gajewski's version of what happened with this allegation" (51:40, Pet-Ap. 169).[8]

---

[8] Gajewski had offered Borntreger's testimony as newly discovered evidence justifying a new trial (41:2, Pet Ap. 119). The circuit court denied this claim (51:73-74, Pet-Ap. 202-03). Because the court of appeals ordered a new trial based on ineffective assistance of counsel, the court did not address this claim. ***State v. Gajewski***, No. 2007AP1849-CR, slip op. ¶ 1 n.1 (Wis. Ct. App. Dist. III May 6, 2008) (*per curiam*), Pet-Ap. 102.

d. Jordan Gajewski's testimony.

Gajewski described the May 13 conversation in the parking lot (51:44-46, Pet-Ap. 173-75). He said Balz approached him and began the conversation. He said Balz invited him to a concert and that he "explained to her, well, I'm going to be at the prom Saturday, I'm not going to be able to come with you" (51:44, Pet-Ap. 173). He said she wanted to give him her cellphone number and

> said, well, if I get — don't have a chance to — if I don't end up going to the prom, here's my number, and she grabbed my hand and wrote the number on my hand.
>
> And at that point I just said, well, I don't really — not really interested, you know, I don't want to — you know, what happened, I'm not really interested in going any further as far as relationship-wise.
>
> . . . .
>
> At that point she got pretty upset about it. I mean she basically just said I'm just an asshole and pretty much told me to fuck off and kind of stormed off, walked off, whatever.

(51:45-46, Pet-Ap. 174-75.) Gajewski said Conner arrived a few seconds later (51:46, Pet-Ap. 175).

Gajewski also reviewed Exhibit 4 (43:5, Pet-Ap. 129) and said he did not have a detailed discussion with Kelly about the May 13 conversation (51:46-47, Pet-Ap. 175-76). Gajewski agreed that the notes "reflect[ed] everything [he] might have told [his] lawyer" (51:46, Pet-Ap. 175). He said he told Kelly "the gist of what, you know, the couple of conversations we had" (51:47, Pet-Ap. 176). On

cross-examination, the prosecutor had this exchange with Gajewski:

Q And you never told [Kelly] that she told you to fuck off and called you an asshole?

A No, I didn't.

Q And you never told him that you told her you weren't interested in her?

A No.

Q In fact, you told him that you called her that night and Saturday night, which would have been your prom night, but there was no answer?

A Correct.

Q And in fact, instead of telling her you weren't interested in her, you told him that you were calling her?

A I believe if I did call her, which to my memory I may have called her, I think it was more so that I did have remorse, I felt bad because I handled the situation kind of rudely, I think.

. . . .

Q And you said — you told your attorney that you told her what you were — what she was doing — basically, you had a conversation, you told her what you were going to do that weekend, and she told you about the concert; that's what you told your attorney, right?

A Basically, yeah.

Q And you didn't tell him anything about the prom?

A No.

Q And you were sitting next to him in the courtroom, right, during the trial?

A Correct.

(51:54-56, Pet-Ap. 183-85.)

e. Rebecca Balz's testimony.

When Balz testified, she unequivocally denied asking Gajewski to go out with her or to call her (51:58-59, Pet-Ap. 187-88). She denied "looking for a relationship with Jordan Gajewski" and could not recall whether she gave him her cellphone number (51:59, Pet-Ap. 188). She also unequivocally denied she said any of the things Borntreger attributed to her (51:58, Pet-Ap. 187). Gajewski's lawyer did not ask Balz any questions at the hearing (51:59, Pet-Ap. 188).

f. Circuit court's decision.

After hearing the witnesses' testimony and the attorneys' arguments (51:60-73, Pet-Ap. 189-202), the circuit court denied Gajewski's claim of ineffective assistance of counsel:

> With respect to the ineffective assistance of counsel, I have to agree with the state that it appears to me that the defendant is bringing up information now that was never conveyed to his attorney, and that it was a matter of very clear trial strategy that the defendant was not going to testify, so I do not find that Mr. Kelly's performance was outside the range of the professionally competent assistance or inefficient [*sic*], so I'm denying the motion for a new trial also on that ground.

(51:74, Pet-Ap. 203.)

C. Court Of Appeals' Decision.

On Gajewski's appeal, the court of appeals held that Kelly provided ineffective assistance. ***Gajewski***, No. 2007AP1849-CR, slip op. ¶ 9, Pet-Ap. 104. The court summarize the trial evidence in three brief paragraphs:

> Rebecca L.B. testified that after attending a party, she spent the night at a friend's house. Gajewski, who attended the same high school, also spent the night at that house. Rebecca recognized Gajewski from school but did not know him well. During the night, Rebecca woke up to find Gajewski kissing her and removing her clothing. He then had intercourse with her. She testified that she told Gajewski to stop. He eventually stopped and went back to sleep. As these events occurred, two other people were sleeping in the same room and two other friends of Rebecca were in the house. Rebecca's attempts to prevent the assault did not awaken the other people in the room and she did not yell for help from her friends sleeping nearby.
>
> On cross-examination, counsel asked Rebecca whether she had a conversation with Gajewski at school several days after the alleged assault. Rebecca responded that she did not remember whether she spoke with Gajewski following the assault. Counsel asked, "If you had been raped a few days earlier by [Gajewski], you wouldn't want to talk to him at all; would you?" Rebecca responded, "Right."
>
> Gajewski did not testify. The only defense witness, Kori King, testified he was sleeping three feet from Rebecca and heard nothing. He said the next morning Rebecca did not appear upset.

Id. ¶¶ 2-4, Pet-Ap. 102-03. The court also reviewed the postconviction hearing:

> At the postconviction hearing, Gajewski testified he gave his trial counsel a cursory description of an encounter with Rebecca that took place at school several days after the alleged assault. During that conversation, Rebecca invited Gajewski to a concert. He responded that he was attending the prom with another girl the night of the concert. Rebecca then grabbed his hand, wrote her telephone number on it and told Gajewski to call her later. When Gajewski told her he was not interested in her, she stormed off. Gajewski testified he told his trial counsel that Rebecca had given him her phone number and they had discussed their plans. Gajewski's friend, Casey Connor, testified at the postconviction hearing and confirmed seeing the end of the encounter, although he did not hear what was said.
>
> Rebecca testified at the postconviction hearing that she was not interested in Gajewski and had never asked him to go out with her. But when asked whether she had given Gajewski her cell phone number to call her following the prom, she answered, "I don't recall."
>
> Gajewski's trial counsel testified at the postconviction hearing that Gajewski had told him about the school encounter with Rebecca after the alleged assault, and counsel did not inquire further about it. Counsel acknowledged that a jury would probably have found Rebecca's behavior inconsistent with having been assaulted and he agreed that he should have cross-examined Rebecca about it at trial. He acknowledged that he had not offered any evidence of motive for Rebecca to fabricate the assault, and that Gajewski's rejection of Rebecca would have provided such a motive.

Id. ¶¶ 5-7, Pet-Ap.103-04. Based on this summary, the court held that Kelly conducted an inadequate investigation and therefore provided ineffective assistance:

Gajewski's trial counsel was ineffective in several ways. First, counsel should have asked for more information from Gajewski that would have revealed details of his after-school encounter with Rebecca. This additional information could have been used to cross-examine Rebecca as to motive for fabricating or exaggerating the assault. Counsel could also have offered Connor's testimony to prove that some encounter occurred after the assault. Second, on the information counsel had about the encounter, he could have and should have cross-examined Rebecca on whether she gave Gajewski her phone number. If Rebecca had responded that she did not recall giving Gajewski her phone number, as she did at the post-conviction hearing, the jury could reasonably doubt the victim would not recall this unusual behavior. The jury could reasonably doubt the assault occurred if the alleged victim gave the assailant her phone number after the assault.

Trial counsel should also have developed evidence regarding Rebecca's motive for falsely accusing Gajewski. While the trial court correctly noted that counsel did not possess all of this information, we fault counsel, not his client, for failing to develop it. A complainant's motive for falsely accusing a person of sexual assault is an obvious concern that should be investigated. Gajewski told his counsel about an encounter with Rebecca after the alleged assault and three days before she reported it. A reasonable attorney would have inquired further about that encounter to determine whether it provided a motive for false accusation. Counsel's failure to investigate facts that were readily available to him and his failure to employ those facts at trial to undermine Rebecca's credibility falls below an objective standard of reasonableness. . . .

Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. ***Strickland***, 466 U.S. at 690-91. However, strategic choices made after less than complete investigation and without full knowledge of the available facts cannot be described as a reason-

able strategic decision. *See* ***Wiggins v. Smith***, 539 U.S. 510, 528 (2003).

> Because the State's case depended on Rebecca's credibility and her account of an assault in the presence of others might be considered improbable, this was a close case. Counsel's failure to investigate the school encounter, his failure to present evidence of Rebecca's behavior that appears inconsistent with the alleged assault, and his failure to investigate and present evidence explaining her motive for false accusation undermine our confidence in the outcome.

Id. ¶¶ 9-12, Pet-Ap. 104-05.

STANDARD OF REVIEW

> The standard of review for ineffective assistance of counsel's components of deficient performance and prejudice present mixed questions of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)). A circuit court's findings of historic fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Questions of whether counsel's performance was deficient and prejudicial are questions of law we review de novo. *Id.*

State v. Fonte, 2005 WI 77, ¶ 11, 281 Wis. 2d 654, 698 N.W.2d 594.

SUMMARY OF THE STATE'S POSITION

First, in reaching its decision, the court of appeals did not identify any burden of proof or analyze the postconviction record according to a burden. The court of appeals committed clear legal error when the court failed to determine whether Gajewski satisfied his obligation to prove, by clear

and convincing evidence, that his trial lawyer provided ineffective assistance. Had the court analyzed Gajewski's evidence under the "clear and convincing evidence" standard, the court could not have reversed the circuit court's postconviction decision or the judgment of conviction.

Second, in blaming defense counsel for not possessing all the information Gajewski later asserted counsel should have known, ***Gajewski***, No. 2007AP1849-CR, slip op. ¶ 10, Pet-Ap. 105, the court of appeals improperly allocated the relative responsibilities of a client and the client's lawyer. The court of appeals ignored ***Strickland***'s admonition that a client bears the responsibility of providing sufficient information to put defense counsel on notice that counsel should conduct further investigation.[9] The information provided by Gajewski that Kelly summarized (43:5, Pet-Ap. 129) — a summary Gajewski acknowledged as accurate — would not put a reasonable attorney on notice that the critical conversation actually amounted to a confrontation that could have proved useful to impeach the victim or that another witness could have provided information about the conversation.

Third, by analyzing the record in the light most favorable to Gajewski rather than in the light

---

[9] ***Strickland***, 466 U.S. at 691. *See also* ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985); ***State v. Nielsen***, 2001 WI App 192, ¶ 23, 247 Wis. 2d 466, 634 N.W.2d 325 ("This court will not find counsel deficient for failing to discover information that was available to the defendant but that defendant failed to share with counsel."); ***State v. Leighton***, 2000 WI App 156, ¶ 40, 237 Wis. 2d 709, 616 N.W.2d 126.

most favorable to the circuit court's ruling on the postconviction motion,[10] the court of appeals improperly relieved Gajewski of his obligation to prove by clear and convincing evidence that trial counsel provided ineffective assistance.

ARGUMENT

I. IN REVERSING THE SEXUAL-ASSAULT CONVICTION, THE COURT OF APPEALS COMMITTED A FUNDAMENTAL LEGAL ERROR BY FAILING TO IDENTIFY GAJEWSKI'S BURDEN OF PROOF AND BY FAILING TO ANALYZE THE POSTCONVICTION EVIDENCE UNDER THAT STANDARD.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" ***Id.*** at 689. "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all sig-

---

[10] *Cf.* ***State v. Hubanks***, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992) (in an appeal from a decision denying a claim of ineffective assistance of counsel, where circuit court did not make specific findings of fact, appellate court "may assume on appeal that such findings of fact were made implicitly in favor of its decision").

nificant decisions in the exercise of reasonable professional judgment." ***Id.*** at 690. In short,

> "[r]eview of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." "Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms."

Fonte, 281 Wis. 2d 654, ¶ 23 (quoted sources omitted). *See also* ***Strickland***, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.")

To prove ineffective assistance of counsel, a defendant must present clear and convincing evidence that counsel performed deficiently and that the deficient performance harmed the defendant. ***Pierce v. Colwell***, 209 Wis. 2d 355, 360, 563 N.W.2d 166 (Ct. App. 1997) (in a prior direct appeal from criminal conviction, where defendant alleged ineffective assistance of counsel, defendant's "burden of proof . . . was the clear and convincing standard"); ***State v. Flores***, 158 Wis. 2d 636, 645 n.5, 462 N.W.2d 899 (Ct. App. 1990) ("the burden is on [the defendant] to establish his [ineffective-assistance] claim by clear and convincing evidence"), *overruled on other grounds by State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992); *cf.* ***State v. Lukasik***, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983) ("clear and convincing evidence" as defendant's burden of proof for

"proving ineffective counsel when that counsel is unavailable for response").[11]

The court of appeals' clear legal error in failing to identify and apply the "clear and convincing evidence" standard to Gajewski's claim merits reversal of the court of appeals' decision.

At the postconviction hearing, Gajewski presented defense counsel's testimony, which established that counsel and Gajewski had an open-ended two-hour interview in which Gajewski identified and reviewed all his contacts with Balz in the period between the sexual assault and Balz's report to the police. Defense counsel said he wished he had asked more questions, but, notably, he did not indicate he had any reason to think at the time of the interview that the contacts had any more significance than Gajewski's explanations implied — in effect, nothing that would have suggested a "jealousy/scorned lover" explanation for Balz's sexual-assault claim.

---

[11] Other States also impose a "clear and convincing evidence" standard. ***Tall v. State***, 25 P.3d 704, 708 (Alaska Ct. App. 2001) ("The defendant has the burden of proving his counsel's lack of competence by clear and convincing evidence."); ***Huddleston v. State***, 5 S.W.3d 46, 50 (Ark. 1999) ("clear and convincing evidence" as defendant's burden of proof on a claim of ineffective assistance of counsel); ***Jones v. State***, 622 S.E.2d 1, 4 (Ga. 2005) (defendant "must rebut by clear and convincing evidence the strong presumption that his attorney was effective"); ***Thompson v. State***, 702 N.E.2d 1129, 1131 (Ind. Ct. App. 1998) (same); ***House v. State***, 44 S.W.3d 508, 515 (Tenn. 2001) ("The burden is on the petitioner to prove both prongs of the [*Strickland*] test by clear and convincing evidence.").

Moreover, Gajewski acknowledged the accuracy of defense counsel's notes about the interview and that he had not told defense counsel anything about the most incendiary aspects of the "only sig[nificant] conversation." Nor did Gajewski pipe up even during the trial, despite ample opportunity to supplement defense counsel's knowledge about the conversation.

Furthermore, although defense counsel asserted that, in recommending whether Gajewski should testify at trial, he would have factored in the additional information Gajewski withheld, counsel did not state whether he would have made a different recommendation. Gajewski thus failed to present any evidence that providing the additional information would have actually affected his original decision not to testify at trial.

In addition, Conner's testimony would have merely corroborated the fact of the "only sig[nificant] conversation," not its content: Conner did not know anything about the content of that conversation. Balz did not deny the conversation occurred, but did deny — vehemently and unequivocally — the notion that she had unsuccessfully sought a relationship with Gajewski. Thus, Conner could not have confirmed or refuted Balz's and Gajewski's conflicting versions of the May 13 conversation.

In short, Gajewski's evidence showed, clearly and convincingly, not that defense counsel provided ineffective assistance, but that Gajewski himself chose to provide his lawyer with information demonstrating the innocuousness of the "sig[nificant] conversation]" and to withhold precisely those aspects — and only those aspects — of

the conversation that would have put defense counsel on notice to investigate further.

Under ***Strickland***, 466 U.S. 668, the burden of proving an ineffective-assistance claim always rests with the defendant. If the defendant fails to present evidence necessary to prove the claim — here, for example, any evidence that the additional information would have led defense counsel to make a different testimonial recommendation, that Gajewski would have made a different decision if defense counsel had made a different recommendation, and that Conner could have buttressed Gajewski's testimony about the content of the May 13 conversation with Balz — the defendant loses. The State does not have any obligation to fill gaps left by the defendant, and a court does not have any right or power to do so, either. In filling those gaps and then deciding that Gajewski's evidence proved ineffective assistance, the court of appeals failed to properly apply the "clear and convincing evidence" standard to Gajewski's evidence.

Beyond resolving the specific issue in this case, this court should take the opportunity to do two other things. First, although Wisconsin trial and appellate courts routinely quote or summarize ***Strickland***'s two-prong test for determining ineffective assistance of counsel, Wisconsin courts almost never identify the defendant's burden of proof.[12] ***Strickland*** establishes "an objective

---

[12] In the court of appeals, the State specifically identified "clear and convincing evidence" as the defendant's proper burden of proof. State's Court of Appeals Brief at 4-5.

standard of reasonableness" for determining whether counsel provided ineffective assistance, but ***Strickland*** does not establish the defendant's burden or proof. Wisconsin cases, however, do establish that burden. This court should use this case to remind Wisconsin courts to explicitly identify and apply the "clear and convincing evidence" standard as the defendant's burden for proving ineffective assistance of counsel.

Second, this court should use this case to explain why "clear and convincing evidence" serves as the appropriate standard for proving an ineffective-assistance claim. ***Strickland*** requires courts considering ineffective-assistance claims to accord substantial deference to counsel's conduct and to indulge a strong presumption that counsel acted reasonably. A "clear and convincing evidence" standard best accords with ***Strickland***'s requirements, which the Court designed for the purpose of minimizing judicial second-guessing of counsel's actions.

In summary, because Gajewski's evidence at the ***Machner*** hearing did not satisfy a defendant's burden of proving by clear and convincing evidence a claim of ineffective assistance of counsel, this court should reverse the court of appeals' decision and should reinstate both the circuit court's decision denying Gajewski's postconviction motion and the judgment of conviction.

II. THE COURT OF APPEALS COMMITTED A FUNDAMENTAL ERROR OF LAW WHEN IT FAILED TO APPLY "AN OBJECTIVE STANDARD OF REASONABLENESS" TO DEFENSE COUNSEL'S CONDUCT.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. The reasonableness of counsel's representation depends, in large part, on a client's candor with counsel:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

Id. at 691.

Here, the court of appeals declared that "[c]ounsel's failure to investigate facts that were readily available to him and his failure to employ those facts at trial to undermine Rebecca's credibility falls below an objective standard of reasonableness." ***Gajewski***, No. 2007AP1849-CR, slip op. ¶ 10, Pet-Ap. 105. The court's conclusion, however, depended on rejecting ***Strickland***'s admonition that the defendant's "own statements or actions" establish the context for determining the reasonableness of counsel's representation. The court of appeals declared its anti-***Strickland*** doctrine in so many words:

> Trial counsel should also have developed evidence regarding Rebecca's motive for falsely accusing Gajewski. While the trial court correctly noted that counsel did not possess all of this information, *we fault counsel, not his client, for failing to develop it.* A complainant's motive for falsely accusing a person of sexual assault is an obvious concern that should be investigated. Gajewski told his counsel about an encounter with Rebecca after the alleged assault and three days before she reported it. A reasonable attorney would have inquired further about that encounter to determine whether it provided a motive for false accusation.

Id. (emphasis added).

The court of appeals ignored the salient fact: the client's statements here would not have put a reasonable attorney on notice that he could extract a motive from undisclosed information about the "sig[nificant] conversation." Despite two hours of open-ended conversation, nothing in Kelly's notes even hints at the possibility that a "jealousy/scorned lover motive" might lie buried in the encounters and might merit further investigation. Rather, Kelly's notes show that in the two-hour open-ended conversation:

- Gajewski essentially acknowledged that he had sex with Balz.
- Gajewski did not say anything to Kelly about Balz resisting.
- Gajewski joked to Balz about telling at least a dozen people about their sexual encounter, then saying he told one person.
- Gajewski described the "sig[nificant] conversation" in greatest detail, but the detail por-

> trayed an ordinary conversation between two teenagers telling each other about their weekend plans, not an angry confrontation between a sexual-assault victim and her assailant.

Under "an objective standard of reasonableness," an attorney confronted with that information from a client would not have any reason to suspect that the client had concealed important evidence. In reaching the opposite conclusion, however, the court of appeals ignored that contemporaneous evidence: the court's opinion does not refer to Kelly's contemporaneous notes and instead credits Gajewski's self-serving postconviction testimony about the conversation. ***Gajewski***, No. 2007AP1849-CR, slip op. ¶ 5, Pet-Ap. 103.

The court of appeals compounded its error by highlighting Kelly's postconviction testimony "that he had not offered any evidence of motive for [Balz] to fabricate the assault, and that Gajewski's rejection of Rebecca would have provided such a motive." ***Id.*** ¶ 7, Pet-Ap. 103-04. In fact, at trial, counsel vigorously pursued and developed a possible motive consistent with the notes from the two-hour conversation: in Kelly's theory of the case, Balz, concerned about her reputation if people believed she had sex with Gajewski, falsely alleged the sexual assault as a way of protecting her reputation (47D:160-62). During closing argument, Kelly told the jury that Balz, faced with the rumors at school, had to choose between "be[ing] known to her friends as the girl who got raped . . . or . . . as the girl who slept with a guy she hardly knew" (47D:358). As Kelly told the jury, "She pick[ed] the story that saves her reputation" (47D:358). In addition, Kelly complemented the

"reputation" motive with a broader contention: Gajewski and Balz never had sex at all (47D:344 ("she knows that nothing happened that would have given her a sexually transmitted disease")). The jury did not accept Kelly's theory, but failure of a defense does not equate with ineffective assistance.

Under "an objective standard of reasonableness," and contrary to the court of appeals' hindsight determination, Kelly provided constitutionally effective representation: he presented the jury with a motive for a false allegation, and he presented a motive consistent with everything Gajewski had told him before trial — information that Gajewski did not correct or amplify even as evidence came in at trial.

In summary, the court of appeals' opinion and decision do not merely ignore ***Strickland***'s standards. The opinion and decision affirmatively reject them. This court must reverse that decision. Moreover, beyond correcting a fundamental legal error that, if uncorrected, will also unnecessarily require the victim to endure a new trial, this court should remind Wisconsin courts of the need to hew to "an objective standard of reasonableness" and to forgo second-guessing, through hindsight, counsel's representation.

III. THE COURT OF APPEALS COMMITTED A FUNDAMENTAL ERROR OF LAW WHEN IT FAILED TO VIEW THE RECORD IN THE LIGHT MOST FAVORABLE TO THE CIRCUIT COURT'S DECISION THAT GAJEWSKI DID NOT RECEIVE INEFFECTIVE ASSISTANCE.

When the circuit court rejected Gajewski's ineffective-assistance claim, the court did not make specific findings of fact. Rather, the court declared that "I have to agree with the state that it appears to me that the defendant is bringing up information now that was never conveyed to his attorney, and that it was a matter of very clear trial strategy that the defendant was not going to testify" (51:74, Pet-Ap. 203).

Under ***State v. Hubanks***, 173 Wis. 2d 1, 496 N.W.2d 96 (Ct. App. 1992), when a circuit court denies a claim of ineffective assistance but does not make findings of fact, an appellate court "may assume on appeal that such findings of fact were made implicitly in favor of its decision." ***Id.*** at 27. To do so, an appellate court would necessarily view the record in the light most favorable to the circuit court's decision, just as an appellate court, when assessing a claim of insufficient evidence to support a verdict, must view the record in the light most favorable to a jury's verdict, *see, e.g.*, ***Fonte***, 281 Wis. 2d 654, ¶¶ 10, 19; ***State v. Watkins***, 2002 WI 101, ¶ 76, 255 Wis. 2d 265, 647 N.W.2d 244; ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

Here, the court of appeals committed a fundamental error of law by viewing the record in the light least favorable to the circuit court's decision. For example:

- In relieving Gajewski of his responsibility to provide sufficient information to his trial lawyer to put counsel on notice of a possible need for further investigation, ***Gajewski***, No. 2007AP1849-CR, slip op. ¶ 10, Pet-Ap. 105, the court of appeals ignored the undisputed and accurate notes of trial counsel that showed Gajewski withheld obviously incendiary information any reasonable client would have known his counsel would want to know about the client's contacts with the victim of the client's offense.

- In castigating defense counsel for not presenting evidence of a possible motive for Balz to lie, ***id.***, Pet-Ap. 105, the court of appeals ignored the trial record showing that defense counsel vigorously pursued a possible motive, just not the motive the court of appeals asserted, in hindsight, counsel could have presented if counsel had conducted further investigation, even though Gajewski, in the course of a two-hour interview, did not hint that counsel would need to conduct such an investigation.

- In holding defense counsel ineffective for not discovering Conner, ***id.*** ¶ 9, Pet-Ap. 104, the court of appeals ignored a simple fact: Conner could only have buttressed a claim that a conversation occurred between Gajewski and Balz — a conversation Balz never denied — but could not say anything about the content of the conversation. Because Conner's testimony would have added nothing to Gajewski's defense, Conner's absence did not cause Gajewski any prejudice, hence did not

provide a basis for holding defense counsel ineffective for not discovering Conner.

- The court of appeals ignored the salient point about the "sig[nificant] conversation": only Gajewski and Balz could testify about the content of that conversation. Adapting the court of appeals' assumption that Balz would testify about the conversation the same way at the trial as she did at the hearing, ***id.***, Pet-Ap. 104, her flat denial of Gajewski's assertions about the conversation (51:58-59, Pet-Ap. 187-88) would have compelled Gajewski to testify at trial to rebut Balz's testimony — testimony he so wanted to avoid that he did not take the stand even to refute Aschbrenner's damaging testimony about his statements that Balz had not wanted to have sex with Gajewski (47D:290, 293, 295) or even to counter his own witness's declaration that Balz "is honest, yes, truthful" (47D:312). In effect, examining Balz about the conversation would have undone Gajewski's "very clear trial strategy" not to testify (51:74, Pet-Ap. 203) and created a substantial potential for increasing rather than decreasing the likelihood of conviction.[13]

---

[13] By testifying, Gajewski would have necessarily acknowledged having sex with Balz and thus eliminated one facet of defense counsel's closing-argument attack on Balz's credibility. During closing argument, defense counsel contended that Balz fabricated the sexual-assault claim and that Gajewski and Balz never had sex at all (47D:344 ("she knows that nothing happened that would have given her a sexually transmitted disease")). Based on the notes of the two-hour interview (43:5, Pet-Ap. 129), defense counsel

(footnote continues on next page)

Thus, had the court of appeals taken a correct view of the record (*i.e.*, viewing the record in the light most favorable to the circuit court's decision), the court of appeals could not have reversed the circuit court's decision.

In summary, because of the court of appeals' fundamental legal error in viewing the record in the light least favorable to the circuit court's decision, this court must reverse the court of appeals' decision and must reinstate both the circuit court's decision and the judgment of conviction. In addition to reminding Wisconsin appellate courts that they must view the record in the light most favorable to the circuit court's decision following a ***Machner*** hearing, this court should also remind Wisconsin circuit courts of the importance of making specific findings of fact when deciding a claim of ineffective assistance of counsel.

(footnote continues from previous page)

knew the falsity of the "no sex" argument, but also knew he could ask the jury to draw the "no sex" inference because Gajewski had not testified.

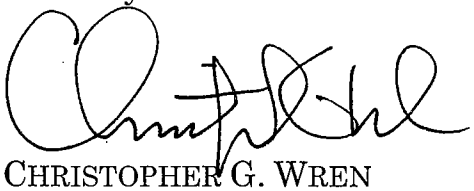
CONCLUSION

For the reasons offered in this brief, this court should reverse the decision of the court of appeals and should reinstate both the circuit court's decision and the judgment of conviction.

Date: October 30, 2008.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General



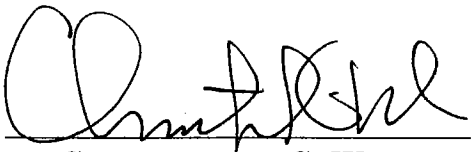
CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys for Plaintiff-
Respondent-Petitioner
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
wrencg@doj.state.wi.us

CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 8,840 words.



CHRISTOPHER G. WREN

APPENDIX

TABLE OF CONTENTS FOR APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

(*State of Wisconsin v. Jordan L. Gajewski*, No. 2007AP1849-CR)

COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1849-CR **Cir. Ct. No. 2005CF491**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JORDAN L. GAJEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jordan Gajewski appeals a judgment convicting him of third-degree sexual assault, and an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. Because we conclude

Gajewski's trial counsel was ineffective, we reverse the judgment and order and remand the matter for a new trial.[1]

BACKGROUND

¶2 Rebecca L.B. testified that after attending a party, she spent the night at a friend's house. Gajewski, who attended the same high school, also spent the night at that house. Rebecca recognized Gajewski from school but did not know him well. During the night, Rebecca woke up to find Gajewski kissing her and removing her clothing. He then had intercourse with her. She testified that she told Gajewski to stop. He eventually stopped and went back to sleep. As these events occurred, two other people were sleeping in the same room and two other friends of Rebecca were in the house. Rebecca's attempts to prevent the assault did not awaken the other people in the room and she did not yell for help from her friends sleeping nearby.

¶3 On cross-examination, counsel asked Rebecca whether she had a conversation with Gajewski at school several days after the alleged assault. Rebecca responded that she did not remember whether she spoke with Gajewski following the assault. Counsel asked, "If you had been raped a few days earlier by [Gajewski], you wouldn't want to talk to him at all; would you?" Rebecca responded, "Right."

[1] The postconviction motion also alleged newly discovered evidence that Rebecca L.B. admitted to having falsely accused Gajewski. Because we conclude the case must be retried due to ineffective assistance of counsel, we need not address that issue or Gajewski's request for reversal in the interest of justice.

¶4 Gajewski did not testify. The only defense witness, Kori King, testified he was sleeping three feet from Rebecca and heard nothing. He said the next morning Rebecca did not appear upset.

¶5 At the postconviction hearing, Gajewski testified he gave his trial counsel a cursory description of an encounter with Rebecca that took place at school several days after the alleged assault. During that conversation, Rebecca invited Gajewski to a concert. He responded that he was attending the prom with another girl the night of the concert. Rebecca then grabbed his hand, wrote her telephone number on it and told Gajewski to call her later. When Gajewski told her he was not interested in her, she stormed off. Gajewski testified he told his trial counsel that Rebecca had given him her phone number and they had discussed their plans. Gajewski's friend, Casey Connor, testified at the postconviction hearing and confirmed seeing the end of the encounter, although he did not hear what was said.

¶6 Rebecca testified at the postconviction hearing that she was not interested in Gajewski and had never asked him to go out with her. But when asked whether she had given Gajewski her cell phone number to call her following the prom, she answered, "I don't recall."

¶7 Gajewski's trial counsel testified at the postconviction hearing that Gajewski had told him about the school encounter with Rebecca after the alleged assault, and counsel did not inquire further about it. Counsel acknowledged that a jury would probably have found Rebecca's behavior inconsistent with having been assaulted and he agreed that he should have cross-examined Rebecca about it at trial. He acknowledged that he had not offered any evidence of motive for

Rebecca to fabricate the assault, and that Gajewski's rejection of Rebecca would have provided such a motive.

DISCUSSION

¶8 To establish ineffective assistance of counsel, Gajewski must show both that counsel's performance was deficient and that it was deficient in a manner that prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance is judged on an objective standard of reasonableness. ***Id.*** at 688. To establish prejudice, Gajewski must show 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 one that undermines this court's confidence in the outcome. ***Id.***

¶9 Gajewski's trial counsel was ineffective in several ways. First, counsel should have asked for more information from Gajewski that would have revealed details of his after-school encounter with Rebecca. This additional information could have been used to cross-examine Rebecca as to motive for fabricating or exaggerating the assault. Counsel could also have offered Connor's testimony to prove that some encounter occurred after the assault. Second, on the information counsel had about the encounter, he could have and should have cross-examined Rebecca on whether she gave Gajewski her phone number. If Rebecca had responded that she did not recall giving Gajewski her phone number, as she did at the postconviction hearing, the jury could reasonably doubt the victim would not recall this unusual behavior. The jury could reasonably doubt the assault occurred if the alleged victim gave the assailant her phone number after the assault.

¶10 Trial counsel should also have developed evidence regarding Rebecca's motive for falsely accusing Gajewski. While the trial court correctly noted that counsel did not possess all of this information, we fault counsel, not his client, for failing to develop it. A complainant's motive for falsely accusing a person of sexual assault is an obvious concern that should be investigated. Gajewski told his counsel about an encounter with Rebecca after the alleged assault and three days before she reported it. A reasonable attorney would have inquired further about that encounter to determine whether it provided a motive for false accusation. Counsel's failure to investigate facts that were readily available to him and his failure to employ those facts at trial to undermine Rebecca's credibility falls below an objective standard of reasonableness. *See* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶25, 286 Wis. 2d 721, 703 N.W.2d 694. When a case hinges on witness credibility, trial counsel has a duty to investigate and present impeaching evidence when counsel was or should have been aware of its existence. ***Id.***, ¶11.

¶11 Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. ***Strickland***, 466 U.S. at 690-91. However, strategic choices made after less than complete investigation and without full knowledge of the available facts cannot be described as a reasonable strategic decision. *See* ***Wiggins v. Smith***, 539 U.S. 510, 528 (2003).

¶12 Because the State's case depended on Rebecca's credibility and her account of an assault in the presence of others might be considered improbable, this was a close case. Counsel's failure to investigate the school encounter, his failure to present evidence of Rebecca's behavior that appears inconsistent with the alleged assault, and his failure to investigate and present evidence explaining her motive for false accusation undermine our confidence in the outcome.

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

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

STATE OF WISCONSIN CIRCUIT COURT MARATHON COUNTY

STATE OF WISCONSIN,

Plaintiff,

ORDER DENYING POSTCONVICTION RELIEF: WIS. STATS. § 809.30

v.

File Nos. 05 CF 491

JORDON L. GAJEWSKI,

Defendant,

ORDER

IT IS HEREBY ORDERED, for the reasons stated by the Court on the record on July 13, 2007, that defendant's motion for postconviction relief pursuant to Wis. Stats. § 809.30 in case number 05 CF 491 **is denied**.

Dated this 18 day of July, 2007.

BY ORDER OF THE COURT

Hon. Patrick Brady

44.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 5 MARATHON COUNTY *For Official Use Only*

State of Wisconsin vs. Jordan L Gajewski

Date of Birth: 09-17-1986

Judgment of Conviction

Corrected

Sentence Withheld, Probation Ordered

Case No.: 2005CF000491

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	3rd Degree Sexual Assault	940.225(3)	No Contest	Felony G	05-07-2005		12-21-2006

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	12-21-2006	Probation, Sent Withheld	5 YR	Concurrent to all other files.	Department of Corrections

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	216.40		TBD		70.00		

2007 JAN 15 AM 11 06

CLERK OF CIRCUIT COURTS MARATHON COUNTY, WI

Conditions:

Ct.	Condition	Length	Agency/Program	Begin Date	Begin Time	Comments
1	Jail Time	12 MO				Jail to begin at discretion of agent with huber. Imposed and stayed six months jail for rule violations.

Ct.	Condition	Agency/Program	Comments
1	Restitution		Dept. of Corrections to prepare restitution order within 60 days.
1	Costs		
1	Other fees		
1	Employment / School		No employment or volunteer work with agencies who work primarily or directly with children.
1	Other		Comply with conditions of supervision established by Dept. of corrections. Maximum level of supervision based on Dept. of Corrections. regular payments toward court obligations and supervision fees. Submission of DNA sample within 10 days of sentencing. Register with Sex Offender Registry Program within 10 days of sentencing. Comply with face to face registration with law enfrocement. successfully complete Sex offender Treatment as directed by his agent. Maintain a stable residence. Maintain stable employment/ Any treatment as directed by agent.
1	Prohibitions		No contact with victims. No employment or volunteer work with agencies who work primarily or directly with children.

37.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | MARATHON COUNTY | *For Official Use Only*

State of Wisconsin vs. Jordan L Gajewski

Date of Birth: 09-17-1986

Judgment of Conviction

Corrected

Sentence Withheld, Probation Ordered

Case No.: 2005CF000491

IT IS ADJUDGED that **0** days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff execute this sentence.

BY THE COURT:

Dorothy L. Bain, Judge
Theresa E Merriwether, District Attorney
T Christopher Kelly, Defense Attorney

Court Official

1-11-07

Date

CR-212C(CCAP) 1/00 Judgment of Conviction

§§ 939.50, 939.51, 972.13, Chapter 973, Wisconsin Statutes

This form may not be modified. It may be supplemented with additional material.

STATE OF WISCONSIN | CIRCUIT COURT | MARATHON COUNTY

State of Wisconsin vs. Jordan L Gajewski

Date of Birth: 09-17-1986

Assessment Reports

Case No.: 2005CF000491

Date: 01-11-2007
Time: 08:09 am

Count	Account	Total Assessed	Total Adjusted	Total Applied	DOC Balance Due	Clerk Balance Due
1	RHT	TBD				
	Subtotals					
1	CCFP	20.00	0.00	0.00	0.00	20.00
	VWA	50.00	0.00	0.00	50.00	0.00
	VWB	20.00	0.00	0.00	20.00	0.00
	Subtotals	90.00	0.00	0.00	70.00	20.00
1	WITN	112.40	0.00	0.00	0.00	112.40
	Subtotals	112.40	0.00	0.00	0.00	112.40
1	SHRF	84.00	0.00	0.00	0.00	84.00
	Subtotals	84.00	0.00	0.00	0.00	84.00
	Totals	**286.40**	**0.00**	**0.00**	**70.00**	**216.40**

STATE OF WISCONSIN CIRCUIT COURT COUNTY OF MARATHON

STATE OF WISCONSIN
Plaintiff,
-vs-

DA Case No: 2005MA002248
Court Case No:
[Defendant's ATN]

05CF491

Jordan L Gajewski
R908 Emerald Lane
Edgar, WI 54426
DOB: 09/17/1986

Defendant,

Criminal Complaint

STATE OF WISCONSIN)
)SS
COUNTY OF MARATHON)

FILED
SEP 13 2007
CLERK OF COURT OF APPEALS
OF WISCONSIN

Complainant, on information and belief, being first duly sworn on oath states that:

Count 1: THIRD DEGREE SEXUAL ASSAULT

The above-named defendant on or about Saturday, May 07, 2005, in the Town of Halsey, Marathon County, Wisconsin, did have sexual intercourse with RLB, without that person's consent, contrary to sec. 940.225(3), 939.50(3)(g) Wis. Stats., a Class G Felony, and upon conviction may be fined not more than Twenty Five Thousand Dollars ($25,000), or imprisoned not more than ten (10) years, or both.

05 JUL 14 PM 3:20
CLERK OF CIRCUIT COURTS
MARATHON COUNTY, WI

Complainant is a law enforcement officer in Marathon County and bases this complaint upon the attached law enforcement reports which your complainant believes are reliable in that they are made by the officer in the routine and ordinary course of the officer's official duties.

Your complainant believes the statements contained within said reports are reliable for the following reasons: They are made by RLB and Thomas Aschbrenner, as a victim and/or witness to criminal activity, insofar as it is based upon personal observations and knowledge. They are made by the defendant contrary to penal interests.

and prays that the defendant be dealt with according to law.

Complainant

Subscribed and sworn to before me,
and approved for filing on this:
14th day of July, 2005.

District Attorney
State Bar No. 1012772
Marathon County, Wisconsin

6/30/2005

MARATHON COUNTY SHERIFF'S DEPARTMENT

2005-000418 Case Number

218 Badge Number

COPY

NARRATIVE REPORT

OFFENSE: **Sexual Assault**

CASE ASSIGNMENT:

On May 17, 2005 I was assigned this case for follow up by Lieutenant Lang (Badge #2119). The original complaint was taken on May 16, 2005 by Deputy Troy Bemke (Badge #2032).

On May 16, 2005, Deputy Bemke went to Athens High School and met with the victim, R L. B and her mother, Colleen. R reported that on May 7, 2005, Jordan Gajewski sexually assaulted her.

SYNOPSIS:

R B said Jordan Gajewski forced her to have sexual intercourse with him on May 7, 2005. B said this occurred at her friend, Ashley Zinkowich's residence. Jordan Gajewski said he did not have sexual intercourse with R B and said she tried to get him and his friend Mike Hoff to have sex with her, but they both told her no.

Detective Kelly J. Hanousek
Badge #2187

Signature

June 15, 2005
Page 1 of 9

Route To:	Routed By/Date	Route To:	Routed By/Date
X District Attorney		___Probate	
___Detective Bureau		___Probation & Parole	
___Juv/Sensitive Crime		___Social Service Access	
___SIU		Children's Court	
___Other		Attn:	

2

MARATHON COUNTY SHERIFF'S DEPARTMENT

2005-000418 — Case Number

218 — Badge Number

Interview of R L. B

On May 18, 2005, I met with R B at her residence. Her mother, Colleen, was also present. I told R I had reviewed Deputy Bemke's report and I wanted to talk to her about the sexual assault involving Jordan Gajewski.

I asked R if she could tell me about the events the evening of May 7, 2005. R said she went to Stephanie Schreiner's residence on State Highway 97. She said she arrived there with Ashley Zinkowich, Kori King, Robin Langhoff, Jenna Petrie and Sarah Barrett. R said she and her friends mentioned previously all arrived at Schreiner's residence about 8:00 P.M.

R said while she was at Schreiner's residence, she drank approximately five cans of beer. She estimated she consumed those five cans of beer between 8:00 P.M. and 1:30 A.M. R said she slept in Ashley's car from about 12:00 A.M. until 1:30 A.M. because she was tired. R said she, Jenna and Ashley left Schreiner's residence about 1:30 A.M. and went to Ashley's residence, where they were going to spend the night. R said Mike Hoff and Jordan Gajewski called Ashley on her cellular telephone and said they were coming over. R said Hoff and Gajewski ended up spending the night at Ashley's residence.

R said Jenna and Ashley slept in Ashley's room upstairs and Kori slept on the floor on the other side of the living room. R said she fell asleep on the couch at Ashley's residence. R said she somehow ended up on the floor in the same room where she was sleeping on the couch. She said she assumes that Hoff and Gajewski moved her from the couch to the floor. However, she said she did not wake up when they moved her.

R said she woke up between 2:00 and 2:30 A.M. R said when she woke up, she found Jordan Gajewski lying on top of her. She said she was lying on her back on the floor. She was wearing jeans, a tank top, underwear and a bra. R said Gajewski was kissing her and was trying to remove her pants. R said she asked Gajewski what he was doing. She said his response was "It's okay, I'll pull out." R said she could smell alcohol on Gajewski's breath when he was talking to her. R said she told Gajewski, "No. You can't do this", but she said he was persistent about wanting to have sexual intercourse with her.

R said Gajewski did eventually take her pants off and started to have sexual intercourse with her. She said she continued to tell Gajewski no and became more forceful about the no's by pushing on his hips and his stomach. R said she continued to tell him no and began pushing on his chest, saying no while he was having intercourse with her. R said eventually Gajewski stopped as she kept pushing on him and telling him no and told her that he did not understand her. R said she did not know what Gajewski

meant by that statement. R said that she did not think that Gajewski ejaculated. She said she also believed that he was not wearing a condom during the incident, because told her "It's okay, I'll pull out."

I asked R what she meant when she said Gajewski had sexual intercourse with her. R said Gajewski put his penis into her vagina. I asked R if she could recall what Jordan was wearing the night this occurred. She said he had on blue jeans and a white polo shirt with blue and tan stripes.

R said she was examined at Aspirus in Wausau on Sturgeon Eddy Road on Tuesday, May 17, 2005. She said she was examined Dr. Dinger. R mother signed medical release forms.

R said she talked to Jordan around Wednesday, May 11, 2005. She said he asked her whether she had told anyone. R said she told Jordan that she did not tell anyone. She said Jordan told her that he had told Mike Hoff.

I asked R if she had ever had sexual intercourse with anyone prior to this incident with Jordan. R said yes she has.

I asked R what she thought Jordan would tell me happened between him and R that night. R said she didn't know what Jordan would say, as she doesn't know him that well. I asked R what she thought should happen to Jordan for what she reported he did to her. R said she didn't know what should happen to him.

MARATHON COUNTY SHERIFF'S DEPARTMENT

2005-00041 / 218

Case Number / Badge Number

Interview of Thomas A. Aschbrenner

On May 20, 2005, I interviewed Thomas Aschbrenner at the Athens High School. I explained briefly to Aschbrenner that I was investigating a sexual assault involving R B I asked Aschbrenner if he was aware of the sexual assault to B and if he had any information regarding the assault.

Aschbrenner said Jordan told him at a party on May 14, 2005 that he (Jordan) liked it when Aschbrenner's woman (Ashley Zinkowich) has friends over because that is when he (Jordan) gets layed. Aschbrenner said Jordan told him "When B was there I fucked her and she was telling me I can't do this, I can't do this. And when I would speed up she would shut up and when I slowed down she would say I can't do this, I can't do this."

Aschbrenner said he had no idea Jordan was over at Ashley's house until he (Jordan) told him. Aschbrenner said B wouldn't make this up about Jordan and he believes her.

Detective Kelly J. Hanousek
Badge #2187

Kelly J Hanousek
Signature

June 15, 2005
Page 4 of 9

Route To:	Routed By/Date	Route To:	Routed By/Date
☒ District Attorney		___Probate	
___Detective Bureau		___Probation & Parole	
___Juv/Sensitive Crime		___Social Service Access	
___SIU		Children's Court	
___Other		Attn:	

STATE OF WISCONSIN **CIRCUIT COURT** **MARATHON COUNTY**

STATE OF WISCONSIN
Plaintiff,
-VS-

Jordan L Gajewski
R908 Emerald Lane
Edgar, WI 54426
DOB: 09/17/1986
Defendant.

D. A. Case # 2005MA002248
Court Case # **2005CF000491**

INFORMATION

FILED
OCT 03 2005
CLERK OF CIRCUIT COURTS

STATE OF WISCONSIN)
)SS
MARATHON COUNTY)

I, Theresa E. Merriwether, Assistant District Attorney in and for Marathon County, do hereby inform the court that the defendant did:

Count 1: THIRD DEGREE SEXUAL ASSAULT

The above-named defendant on or about Saturday, May 07, 2005, in the Town of Halsey, Marathon County, Wisconsin, did have sexual intercourse with RLB, without that person's consent, contrary to sec. 940.225(3), 939.50(3)(g) Wis. Stats., a Class G Felony, and upon conviction may be fined not more than Twenty Five Thousand Dollars ($25,000), or imprisoned not more than ten (10) years, or both.

Against the peace and dignity of the State of Wisconsin.

Dated October 03, 2005.

(Assistant) District Attorney
Marathon County, Wisconsin
State Bar No. 1031907

10/3/2005

6.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 MARATHON COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

JORDAN L. GAJEWSKI,

Defendant.

VERDICT

Case No. 05-CF-491

We, the jury, find the defendant, Jordan L. Gajewski, guilty of third degree sexual assault, as charged in the information.

Dated this 18th day of August, 2006.

Ruth B. Struck
Jury Foreperson

CLERK OF CIRCUIT COURTS
MARATHON COUNTY - 2
2006 AUG 18 PM 2:58

31.

STATE OF WISCONSIN CIRCUIT COURT #5 MARATHON COUNTY

STATE OF WISCONSIN,

Plaintiff,

NOTICE OF MOTION AND MOTION FOR POSTCONVICTION RELIEF: WIS. STATS. § 809.30.

v.

File No. 05 CF 491

JORDAN L. GAJEWSKI,

Defendant.

07 JUN -1 AM 9:21
CLERK OF CIRCUIT COURTS
MARATHON COUNTY - 8

To: Theresa Merriwether
District Attorney
500 Forest St.
Wausau, WI 54403-5568

PLEASE TAKE NOTICE that the defendant, Jordan L. Gajewski, by his attorney, Steven L. Miller, will move the Court before the Hon. Patrick Brady in his courtroom in the Marathon County Courthouse in Wausau, Wisconsin, at a date and time to be set by the Court, according to the motion below.

Jordan L. Gajewski, by his attorney, Steven L. Miller, of MILLER & MILLER, hereby moves the Trial Court for a new trial. The motion is based on the following grounds:

1. **New Evidence.**

A new trial is necessary due to new evidence which severely undermines the complaining witness' credibility.

41.

a. **Legal Standards**: A defendant seeking a new trial on the basis of newly discovered evidence must show by clear and convincing evidence that: (1) the evidence came to the party's notice after trial; (2) the moving party's failure to discover the evidence earlier did not arise from a lack diligence in seeking to discover it; (3) the evidence is material and not cumulative; and (4) the new evidence would probably change the result. Wis. Stat. § 805.15(3); *State v. Carnemolla*, 229 Wis.2d 648, 656, 600 N.W.2d 236, 240 (Ct. App. 1999).

b. **New Evidence:** On Friday, May 25, 2007, Jim Schug (Schug), a co-worker of the defendant, Jordan Gajewski (Gajewski), reported to Gajewski he had recently had a conversation with Fred Borntreger. Borntreger told Schug he had attended the Athens town fair in late August, 2006, shortly after the Gajewski trial, and while in the beer tent he was standing next to the complainant in this case, Rebecca Balz (Balz), who was having a conversation with a woman in her late 20's to early 30's. Balz stated the rape never happened and that she just said it happened to get "him" in trouble because she was "pissed off" at him. Borntreger is an acquaintance of Balz and knows her family. He is also a very close friend of Balz's cousin, Tyler Rowdeski. Borntreger only knows Gajewski by sight and name. He does not have any kind of relationship with him. Appellate counsel contacted Borntreger on May 29, 2007, and he personally confirmed the information he stated to Schug and further stated he believes an injustice has occurred and would be willing to testify in court if necessary. Borntreger remembers the conversation because he knew about the allegations against Gajewski and knew the statement by Balz in the beer tent was contrary to her claim of sexual assault. He did not come forward at the time because he wasn't sure it would matter and he was concerned about alienating the Balz family and his friend, Tyler Rowdeski.

The evidence meets the test for newly discovered evidence. The evidence came to the party's notice on May 25, 2007, which is after trial. The moving party's failure to discover the evidence earlier did not arise from a lack diligence in seeking to discover it as the discovery was purely happenstance, having come though a third party.

The evidence is material, as it is a party admission and an inconsistent statement which denies the sexual assault took place. Moreover, it is not cumulative as there was no such evidence at trial. Finally, the new evidence would probably change the result.

This was a very close case. The allegation of sexual assault was improbable given the circumstances. Balz claims Gajewski raped her on Sunday, May 8, 2005, on a couch in a small living room full of sleeping people. They were all within a few feet of her. She did nothing to try and wake them. According to Balz's trial testimony, she was awake when Gajewski approached her and started kissing her on her neck and her mouth; he then unbuckled her belt; unbuttoned her jeans and her fly (which were buttons rather than a zipper); "worked" her admittedly tight jeans down and finally pulled them all the way down or off; pulled off her underwear; undressed himself; and started having sexual intercourse with her. He did not threaten her in any way. She claimed she told Gajewski to "stop" when he was pulling down her jeans, but no one heard anything. She claims she said "no" "loud and clear" after the sexual intercourse had started, but no one heard anything. When she pushed him, he stopped. She then went to sleep. When everyone awoke in the morning no one noticed anything out of the ordinary with Balz. She did not seem angry or upset. She told no one about the alleged sexual assault. She did not go to the doctor. She showered and washed her clothes.

Balz didn't do anything until her best friend, Ashley Zinkowich, allegedly found out sometime during the week (a few "days" later) from her boyfriend, Tom Aschbrenner, that Gajewski was claiming he had sex with Balz. Balz then told Zinkowich she was raped, and Zinkowich told her she should tell someone. Balz waited through the weekend, however, and then spoke with a teacher on Monday morning, May 16, 2005. Only afterwards did she go and see a doctor, who did not find any evidence of trauma in or on her body. Tom Aschbrenner, on the other hand, claimed that he heard about the sex with Balz from Gajewski at a party on Saturday, May 14, 2005. Therefore, he could not have spoken to Zinkowich until late on Saturday or Sunday, May 15, at the earliest. Aschbrenner also had two versions of what Gajewski allegedly told him. He first testified

that Gajewski told him he and Balz had sex and she said "no, no, no" right in the middle of it and he just kept going. In his statement to the police he said Gajewski told him: "When Becky was there, I fucked her and she was saying to me, I can't do this and when I would speed up, she would shut up and when I would slow down, she would say I can't do this, I can't do this."

The fact that this occurred under circumstances where it could have easily been avoided; that Balz fell back to sleep with her clothes on; did not tell anyone; did not seem out of sorts; and did not make any accusations until days or a week after she was confronted by her best friend, raises many doubts. The lack of any vaginal trauma also corroborates consent. Standing alone, the evidence is weak. The statement by Fred Borntreger severely undermines Blaz's claim of nonconsensual intercourse. He is a credible witness with no bias for the defendant. The evidence would have had a dramatic impact at trial. As such, the defendant is entitled to a new trial.

2. Ineffective Assistance of Counsel.

A new trial is necessary as trial counsel rendered ineffective assistance of counsel.

a. **Legal Standards:** The defendant was denied his right to effective assistance of counsel under the 6th Amendment of the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution. *Strickland v. Washington*, 466 U.S. 688 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711 (1985). Wisconsin uses a two-prong test to determine whether trial counsel's actions constitute ineffective assistance of counsel. *State v. Littrup*, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct.App. 1991). The first half of the test considers whether trial counsel's performance was deficient. *Id.* Trial counsel's performance is deficient if it falls outside "prevailing professional norms" and is not the result of "reasonable professional judgment." *Strickland*, 466 U.S. at 690. Trial counsel, for example, has a duty to be fully informed on the law pertinent to the action. *State v. Felton*, 110 Wis.2d 485, 506-507, 329 N.W.2d 161, 171 (1983). If counsel's performance is found to be deficient, the second half of the test considers whether the deficient performance prejudiced the defense.

Id. The defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Harvey*, 139 Wis.2d 353, 375, 407 N.W.2d 235, 246 (1987). The *Strickland* test is not outcome determinative. The defendant need only demonstrate the outcome is suspect. He need not establish the final result of the proceeding would have been different. *State v. Smith*, 207 Wis.2d 258, 275-276, 558 N.W.2d 379, 386 (1997).

b. Deficient Performance: Trial counsel was deficient, alternatively, as follows:

> Trial counsel was deficient in that he failed to develop evidence showing a credible motive for the complainant to lie about whether she had sex without consent with the defendant. In particular, that on May 13, 2005, subsequent to the alleged assault but prior to the allegation, Balz invited Gajewski to a musical concert, which he turned down; and further, that she gave him her cell phone number and asked him to call her, at which time he told her he did not like her "that way" and never would. She reacted by calling him an "asshole" and to go "fuck himself."
>
> The alleged sexual assault occurred early Sunday morning, on May 8, 2005. On Monday, May 9, 2005, Gajewski spoke with Balz in the hallway at school. They both said "Hi" and had a "normal" conversation. Balz asked Jordan if he had told anyone they had sex that weekend. He answered, sarcastically, that he had told the whole school. She seemed mildly upset.
>
> They said "hi" and "bye" to each other when passing in the hallway during the rest of the week. On Friday, May 13, 2005, Balz met up with Gajewski in the parking lot as school was getting out. Balz asked Gajewski what his plans were for the weekend. He answered "nothing," and asked why she wanted to know. She then mentioned a musical concert, and asked if he wanted to go with her. Gajewski said "no," he was going to the prom in Edgar on Saturday with a friend. Balz asked who it was he was going with and Gajewski told her it was none of her business. Balz then handed Gajewski a

piece of paper with her cell phone number on it and told him he could call her over the weekend if he wanted to get together. Gajewski told her he wouldn't take the number, that he did not like her that way and wasn't really interested in her and never would be. Balz then told Gajewski to go "fuck himself" and called him an "asshole."

Casey Conner would also testify that he did not hear the conversation between Balz and Gajewski but did see them together talking in the parking lot on Friday, May 13, 2005. He usually gets a ride home with Gajewski and was walking towards the car when he saw them speaking to each other. Balz left before he got there. He remembers the date and time because the sexual assault allegation was made the following Monday morning and he thought it was odd, in retrospect, that they were speaking together.

Trial Counsel was deficit. Gajewski told trial counsel that he had several conversations with Balz after the alleged sexual assault but counsel never followed-up with him on the specifics of those conversations or whether there were any corroborating witnesses. Trial counsel did not inquire as to a possible jealousy/scorned lover motive. Further, he could have presented this evidence by: having Gajewski testify to the conversation; cross-examining Balz about the conversation; and calling Conner to the stand to confirm that Balz and Gajewski were having a conversation when and where they did.

c. Prejudice: Trial counsel's deficient performance prejudiced the defendant, as follows:

Trial Counsel's deficit performance prejudiced Gajewski. Trial counsel failed to show a credible motive for Balz to lie about what happened. The conversations between Balz and Gajewski not only corroborate consent, that is, that Blaz wanted to have a relationship with Gajewski after the alleged sexual assault; but Gajewski's ultimate rejection of Blaz's advances provide a powerful motive for her to punish him and lie about what happened. Conner's confirmation that Blaz and Gajewski were together and speaking to each other in the school parking lot after the alleged sexual assault took place but before it was reported corroborates Gajewski's

account.

This evidence, especially when considered along with the information provided by Fred Borntreger, is sufficient to undermine confidence in the outcome of the trial. As argued above, the evidence at trial supporting the charge was weak and equivocal. Trial counsel failed to provide a credible motive for Balz to lie. In fact, the prosecuting attorney made a point of arguing Balz's lack of any motive to lie. This evidence provides such a motive.

WHEREFORE, the court should order a new trial.

Dated this: May 29, 2007.

MILLER & MILLER
Attorneys for the Defendant

By _____
Steven L. Miller #1005582
P.O. Box 655
River Falls, WI 54022
(715) 425-9780

STATE OF WISCONSIN, CIRCUIT COURT, Marathon COUNTY

Caption:

State vs. Jordan L. Gajewski

Exhibit List
Stipulation and Order for Return of Exhibits

Case No. 05CF491

Page 1 of 1

Date of Hearing/Trial 7/13/07

Date Judgment Filed

Plaintiff's Attorney	Defendant's Attorney
Theresa Merriwether	Steven Miller

Exhibit Information							Exhibit Management			
Number	Description	Offered By	Received	Denied	Withdrawn	Original Substituted	Biological Material	Storage Location	Return Date / To Whom	Date Destroyed
1	Photo	D	X							
2	Post Prom Sign Ups	D	X							
3	pg. 5 Rpt of Hanousek	D	X							
4	Atty Kelly's Notes	D	X							

2007 JUL 16 AM 10:12
CLERK OF CIRCUIT COURT
MARATHON COUNTY, WI

☐ Continued on next page.

Stipulation and Order for Return of Exhibits

It is stipulated that exhibit no(s). _____

_____

be returned to the offering party(s)

☐ immediately after the trial.

☐ within one year after time for appeal has expired.

Remaining exhibits shall be disposed of without notice pursuant to the retention period for exhibits in SCR 72.02. **Biological material** collected in connection with the action shall be disposed of pursuant to the retention period for exhibits in § 757.54, Wis. Stats.

_____
Signature of Plaintiff's Attorney Date

_____
Signature of Defendant's Attorney Date

IT IS ORDERED THAT the stipulation is approved.

BY THE COURT:

_____
Circuit Court Judge

_____
Name Printed or Typed

_____
Date

GF-102, 04/06 Exhibit List - Stipulation and Order for Return of Exhibits SCR 72.01(45), (46), Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

43

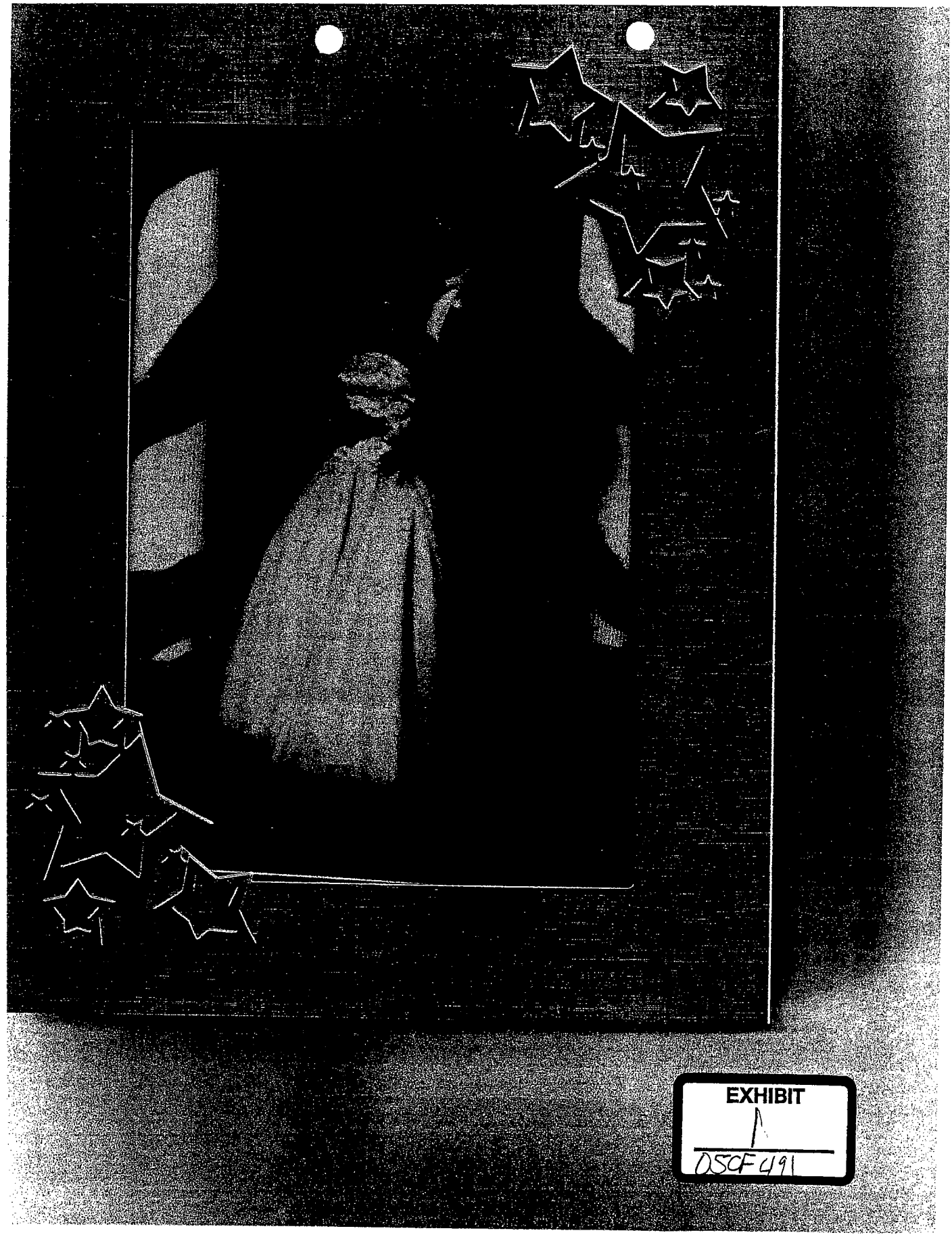


EXHIBIT
DSCF491

POST PROM SIGN-UPS - 2005

Paid	Last Name	First Name	Grade	Bus Ride Needed	Guest Name
X	SCHREIER	JEREMY	2008	X	
X	SCHUELLER	BRITTANY	2007		CASEY CONNER
X	SCHUELLER	NICOLE	2008	X	
X	SCHUELLER	RYAN	2006		
X	SCHUMACKER	JAMIE	2006		
X	SOCHA	JUSTIN	2005		
	SODKE	BRIAN	2007		
X	SONDERGARD	MARIAH	2008		
	STENCIL	JONATHON	2007		
X	STENCIL	STACEY	2008		
X	SWITLICK	MELANIE	2008		
X	SWITLICK	TIFFANY	2006		
X	SZYMANSKI	THOMAS	2007		
X	TARRAS	BRITTANY	2005		
X	TAYLOR	HEATHER	2007		
X	TOTZKE	TIFFANY	2005		
X	TRONSCOSO	SEBASTIAN	2006		
X	UMNUS	TREVOR	2005		
X	UNTIEDT	CHRISTIAN	2008		
X	UNTIEDT	COLIN	2006		
X	URMANSKI	AMANDA JAYNE	2006		
X	URMANSKI	AMANDA	2007		JORDAN GAJEWSKI
X	URMANSKI	ASHLEY	2006		NATHAN KNETTER
X	URMANSKI	DEREK	2007		
X	WALDRON	JORY	2005		
	WARD	MARK	2005		
X	WEINSCHENK	GUTHRIE	2007		
X	WERNER	BRITTANY	2007		
	WERNER	BRITTNI	2007		
X	WERNER	HANNAH	2007		
X	WERNER	RHYANNON	2008	X	
	WESOLOWSKI	SAMANTHA	2007		
X	WIESE	RACHEL	2005		
X	WIESE	SAMANTHA	2007		
X	WIRKUS	HEATHER	2007		
	WIRKUS	KATIE	2005		
	WIRKUS	KRAIG	2007		
	WIRKUS	TYRRELL	2008		
X	WISNEWSKI	KATHRYN	2006		
X	WITUCKI	JESSICA	2005		ALEX VROKIJK
X	WOLD	CHRISTINA	2006		MIKE LAPACZ
X	WOLD	NICHOLAS	2006		
X	WOLF	KESHIA	2008		
X	YESSA	BROOKE	2008		
X	YESSA	HOLLI	2006		
X	YUNK	JEFFREY	2006		
X	ZANK	AMBER	2005		
	ZELLNER	COREY	2005		
	ZELLNER	KEVIN	2008		
X	ZEMKE	AMANDA	2008		
X	ZIETLOW	KRISTIN	2005		
X	ZIETLOW	MICHELLE	2008		
X	ZIMMERMAN	JACOB	2006		KACI
X	ZIMMERMAN	JOSEPH	2006		
X	ZIMMERMAN	MELISSA	2005		DJ ADAMSKI

205A

2124

208A

Greg Fecteau 2:38

PRINCETON 9-8-06

LOCK-IN FROM 1:00AM 3:30AM

EXHIBIT 2 05CF491

MARATHON COUNTY SHERIFF'S DEPARTMENT

2005-0004182 (
Case Number

2187 (
Badge Number

Interview of Jordan Gajeweski

On 06-16-05 Detective Greg Bean and I met with Jordan Gajewski at his residence with his parents, Jacqueline and Jeff present, as they requested.

I explained to Jordan that he was not under arrest and that when the interview was completed or if Jordan decided not to answer any more questions, Detective Bean and I would leave.

I told Jordan I had several questions to ask him and started by asking Jordan if he knew a girl named Ashley Zinkowich. Jordan said he knew who Ashley was. I asked Jordan if he went to Ashley's house in May 2005 with a friend and stayed overnight. Jordan said wasn't sure of the date but did stay at Ashley's house. I asked Jordan if he knew Rebecca Balz. Jordan said he knew who Rebecca was. I asked Jordan if he remembered Rebecca being at Ashley's house the night he spent the night. Jordan did not answer either yes or no. I told Jordan that Rebecca said he forced her to have sex with him that night at Ashley's house. Jordan again did not say anything. I asked Jordan if he had sex with Rebecca Balz. Jordan's father, Jeff, said Jordan was not going to answer that question because it was a trick question. Jeff also said that no matter what Jordan told me, I would twist his words around and put something in my report that was not true. Jeff said he watched the show 20/20 and he knows how law enforcement operates. Detective Bean assured Jeff that Marathon County Sheriff's Department does not operate in that manner. Jeff also made the comment that Rebecca was making this up about the sexual assault because she was mad that Jordan wouldn't date her.

Since Jordan was not going to answer questions regarding the alleged sexual assault of Rebecca Balz, I asked Jordan if he could tell me who the naked female was on his phone. **(Case # 05-004208)** Jordan said he didn't have his phone for 3 days. Jordan said his friends didn't tell him who was on the phone. I asked Jordan if his phone was lost or stolen why he didn't report it to someone. Jordan said he thought a friend might have his phone and he didn't have the money to replace it so he didn't say anything about it being missing.

Next, I asked Jordan if he could recall going to a party with Luke Myszka, Brittany Sekorski, and Lindsey Myszka. I also asked Jordan if they all rode in Luke's truck. Jordan said he remembers going to a party with Luke, Lindsey and Brittany in Luke's truck, but he doesn't remember where everyone sat. I told Jordan I had information that he had sexual intercourse with Lindsey in the backseat of Luke's truck. I asked Jordan if he had sex with Lindsey. Jordan just sat there. I asked him if he was going to answer my question. Jordan said "No, I'm not going to answer."

Detective Kelly J. Hanousek
Badge #2187

Kelly J Hanousek
Signature

June 15, 2005
Page 5 of 9

Route To:	Routed By/Date	Route To:	Routed By/Date
X District Attorney		___ Probate	
___ Detective Bureau		___ Probation & Parole	
___ Juv/Sensitive Crime		___ Social Service Access	
___ SIU		Children's Court	
___ Other		Attn:	

EXHIBIT
3
05CF491
7-13-07

4

Mon. following this, he talked + her - asked her if she told anyone, she sd "of course not"

Δ sd "I told a least a dozen ppl" - he laughed, then sd "No, I just told Mike"
- she didn't seem to react much

short conversations throughout the wk - only sig convers on fri, he told her what he was doing on wknd, she'd maybe go to concert - he sd maybe party, she wrote cell phone # on his hand - Δ tried callg her that nite or Sat nite, one other time tried to call but no answer

coz of this sd she told ppl he raped her - coz asked why going thru w it, "I just am"

"I didn't want it + go this far" - Derick Lavicka
Attorney

EXHIBIT
4
05CF491
7-13-07

5

STATE OF WISCONSIN : CIRCUIT COURT : MARATHON COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

JORDAN L. GAJEWSKI,

Defendant.

ORIGINAL

Case No. 05-CF-491

TRANSCRIPT OF PROCEEDINGS

JULY 13, 2007

PROCEEDINGS HELD BEFORE THE
HONORABLE PATRICK BRADY
CIRCUIT JUDGE, PRESIDING, BR. 5

POSTCONVICTION MOTION

A P P E A R A N C E S:

THERESA E. MERRIWETHER,
Assistant District Attorney,
Appearing on behalf of the State.

STEVEN L. MILLER,
Attorney at Law,
Appearing on behalf of the Defendant.

Defendant present in person.

Jan M. Murray, CSR
Official Reporter

#51.

INDEX

* * * *

EXHIBITS

(Exhibits Marked by Clerk)

NUMBER	IDENTIFIED	OFFERED	RECEIVED
3	Hanousek's Report	20	20
4	Attorney Kelly's Notes	20	20
1	Prom Picture	52	52
2	Post-Prom Sign-up Sheet	52	52

* * * *

TRANSCRIPT OF PROCEEDINGS

THE COURT: State of Wisconsin versus Jordan Gajewski, 05-CF-491.

MS. MERRIWETHER: State appears by Attorney Theresa Merriwether.

The defendant appears with counsel, Steve Miller.

THE COURT: All right. This was a time set by the court for a hearing on motion for postconviction relief.

MR. MILLER: Your Honor, first of all, I did file a motion with regard to the testimony from Casey Connor. As I indicated in that motion, he is in the military at this time and is basically unavailable to appear in person.

Given that this is essentially, you know, an offer of proof on a postconviction motion, you know, I would ask that the court allow telephone testimony.

THE COURT: Is there any objection by the state?

MS. MERRIWETHER: I guess not. I didn't know that that was going to happen.

THE COURT: Well, I guess he just found out about it.

MS. MERRIWETHER: Okay.

MR. MILLER: You did get a copy of the motion, didn't you?

MS. MERRIWETHER: Of the postconviction?

THE COURT: No. There was a motion filed to permit

telephone testimony.

MS. MERRIWETHER: No, I'm sorry. I didn't see that.

THE COURT: Okay. That would explain it.

You just want to just take a look?

MS. MERRIWETHER: Thank you.

MR. MILLER: I did fax one to you as well as mail it.

MS. MERRIWETHER: July 6th. Thank you. I didn't see that.

THE COURT: All right. Your motion is granted. There's no objection by the state.

MR. MILLER: So I do have two numbers here.

(Witness Casey Conner appearing via telephone.)

CASEY CONNER, called as a witness on behalf of the Defense, having first been duly sworn on oath, testified.

THE CLERK: State your full name, first and last name, and spell each for the record.

THE WITNESS: Casey Conner. Casey, C-a-s-e-y. Conner, C-o-n-n-e-r.

DIRECT EXAMINATION

BY MR. MILLER:

Q Casey, this is Attorney Steve Miller. Could you tell the court where you're currently located?

A Right now I am currently located in Mississippi outside of Fort Shelby.

Q Okay. And what is your age?
A I am 20 years old.
Q Okay. And when did you graduate from high school?
A I graduated in 2005.
Q Okay. And which high school did you attend?
A Athens High School.
Q Did you know a Jordan Gajewski?
A Say again, please.
Q Did you know Jordan Gajewski?
A Yes, I know Jordan Gajewski.
Q Okay. And what was his nickname?
A Juice.
Q Okay. Were you often -- I'm sorry, were you often after school with him?
A During high school, yes, I was.
Q Okay. And did you often get a ride home with him from school?
A Yes, I did.
Q Now, I'm directing your attention to May -- Friday, May 13; were you at school that day?
A Friday; yes, I was.
Q Okay. And were you engaged in after-school activities?
THE COURT: What year are we talking about?
A Yes, I was.
THE COURT: What year are we talking about?

MR. MILLER: I'm sorry.

BY MR. MILLER:

Q That would have been May 13, 2005; is that correct?

A Yes, sir.

Q Okay. Essentially, it would have been the Friday after -- or the Friday before the allegation was made against my client; is that correct?

A Yes, sir.

Q Were you intending on that afternoon to get a ride home with my client, Jordan?

A Yes, sir.

Q And when you left school, where did you intend to meet him?

A We would meet out in the parking lot, sir. Out in the parking lot.

Q Okay. As you were walking in the parking lot, did you see Jordan's car?

A I saw Jordan and another person out first before I saw the car because the level of the cars and stuff, that's why I found where he was located and the vehicle was located.

Q So you were walking towards his vehicle?

A Yes, sir.

Q Okay. And then did you notice anything when you were walking towards his vehicle?

A Well, when I was walking out in the parking lot, I saw him and another individual; I couldn't really see the vehicle

first, and then when I was walking towards him I seen the vehicle because of the other vehicles in the way.

Q Okay. And who was that other person?

A Rebecca Balz.

Q And was she having a conversation with Jordan?

A Yes, they were standing outside having a conversation.

Q Okay. Did you hear any of that conversation?

A Before I got to his location, she already walked away.

Q Okay. Now, my next question, hopefully my last question, is how can you be sure about that May 13, 2005, Friday date that this happened?

A Because them two never really talked in high school, but walking out that day, I remember them two talking. I'm just thinking, oh, that's not really -- well, that was right before all of that stuff went down, and it brought me to shock, and just them two talking that day, and a few days later all this stuff came down and apparently he was he was getting charged.

Q All right. Thank you.

MR. MILLER: I have no further questions at this time.

CROSS-EXAMINATION

BY MS. MERRIWETHER:

Q Hello, sir. This is Theresa Merriwether. I'm from the Marathon County District Attorney's Office, and I'm going to ask you a few questions, okay?

A Yes, ma'am.
Q So what is your relationship with Mr. Gajewski?
A We have been friends throughout high school.
Q I'm sorry. You said we have been friends throughout high school. Did you say something after that? Hello?
A Hello.
Q I'm sorry, you're kind of cutting out.
A I'm sorry, ma'am. I was saying that we were friends through high school, freshman / sophomore year, we knew who each other were, talked, but mainly through junior year when we were captain of the wrestling team, that's when we really started hanging out, through sports.
Q In May of 2005, what year of high school would you have been in?
A That would be my senior year.
Q So by then you were very good friends with Mr. Gajewski?
A Yes, ma'am.
Q How often did you see him in school?
A It's a small town, we ran into each other every day.
Q And you said that him and Miss Balz never really talked; is that right?
A Yes, ma'am.
Q So there wasn't any kind of relationship between them that you ever saw?
A Yes, ma'am.

Q So being good friends, is it safe to say you were concerned about Mr. Gajewski and this allegation?
A How everything went through with all that happened, it came to a shock to me and I just couldn't believe it.
Q Okay. Because that's your good friend. When you observed this conversation -- or actually, you don't even know if there was a conversation, correct; they were just standing next to each other?
A You could tell they were staring at each other and you could obviously tell they were talking.
Q How far away were you when you see this?
A Anywhere between 17 to 20 meters, walking.
Q So you're walking out of school?
A Yes, ma'am.
Q And is this directly after school?
A After track.
Q Is everybody sort of coming out at the same time?
A Randomly. It depends on how quick you change and shower and get ready.
Q How about that day, were there a lot of people in the parking lot?
A There were still a number of cars. I couldn't tell you how many or estimate, there were still vehicles in the parking lot.
Q Okay. And other people are milling around that day?

A Yes. Yes, ma'am, there's still people stretching from after track and still walking up to their vehicles and preparing to head on home.
Q Okay. And you said, correct me if I'm wrong, you said that when you first walked out you didn't -- you weren't sure if it was Mr. Gajewski's vehicle; is that right?
A It was Jordan. It was Mr. Gajewski standing there by a vehicle, I just saw him standing 'cause how tall he is over the vehicles, I walked out and saw him start heading toward that direction, and I could easily see the vehicle and everything.
Q How far did you get before Miss Balz walked away? How close did you get to them?
A I would probably say within about 15, 20 meters, enough to say hi to her before she walked away.
Q You don't know how long they were talking before you got there?
A Negative, ma'am.
Q You don't know what they were talking about?
A Not totally. When we got in the vehicle --
Q Sir, firsthand, you don't know what they were talking about? You didn't hear what they were talking about?
A Them two individuals?
Q Yes.
A Negative, ma'am.

Q And just give me one second here. The first time you talked about your observations of that conversation was when someone contacted you about this hearing; isn't that right?

A The first time I talked to anyone else about that conversation?

Q Yes.

A Was the first time this was called for the hearing.

Q Okay. And this is about two years later, right?

A Yes, ma'am.

MS. MERRIWETHER: I don't have any further questions. Thank you very much, sir.

MR. MILLER: I have nothing further, Your Honor.

THE COURT: All right. We're going to hang up then, sir.

THE WITNESS: Yes, sir. Take care.

MR. MILLER: My next witness is Attorney Kelly. I have him outside.

CHRIS KELLY, called as a witness on behalf of the Defense, having first been duly sworn on oath, testified.

THE CLERK: Just walk around and have a seat up there, please.

DIRECT EXAMINATION

BY MR. MILLER:

Q Good morning.

A Good morning.

Q Now, you were Jordan Gajewski's trial counsel in this matter?
A That's correct.
THE COURT: Could you just state your name for the record?
A My name is Chris Kelly.
MR. MILLER: I'm sorry.
BY MR. MILLER:
Q Do you recall that after Jordan Gajewski retained me as appellate counsel that I requested a copy of your file?
A Yes.
Q And did you provide me with a copy of that file?
A I think I gave you pleadings and pretty much everything except my work product, yeah.
Q Okay. And did that include discovery materials?
A Yes.
Q Okay. And I presume that you did review those discovery materials prior to trial?
A Yes.
Q Okay. I'm -- okay. Now I'm directing your attention to Exhibit 3, which is page 5 of 9 of Detective Kelly Hanousek's report. Would you agree with me that you did review that prior to trial?
A Yes.
Q Okay. And then the other exhibit, Exhibit 4, do you recognize that as a portion of your notes that you took

of your conversation with Jordan Gajewski?

A I do.

Q Now, do those notes reflect the highlights of your discussion with Jordan concerning any contact he had with Rebecca Balz between May 7, 2005, and May 16, 2005?

A I don't have the dates in my head but these would reflect the information that he gave me about conversations with Rebecca, I think, during the week after his encounter with her.

Q Okay. And that conversation took place prior to trial; is that correct?

A Yes.

Q Do you have any other notes or recordings of any sort that would reflect any conversations you had with Jordan Gajewski during that -- concerning that period?

A No.

Q Okay. Do you have any independent recollection of your conversation or conversations with Jordan concerning what happened during that same week period?

A No, my notes would be -- would reflect the information that I have at this point about that conversation.

Q Okay. So in essence, any answers you would give me concerning those conversations would be essentially derived from those notes?

A That's correct.

Q And can I correctly assume that those notes probably don't reflect everything he told you about those -- that week period?
A Yeah, I don't take verbatim notes of what my clients are telling me. I try to write down the things that strike me as important during the interview.
Q And those notes don't reflect the questions that you asked Jordan?
A No, they don't.
Q Now, those notes reflect that Jordan had several conversations with Rebecca Balz between May 7, 2005, and May 16, 2005, that week we're referring to, the week after the alleged assault; is that correct?
A Yes.
Q And in particular, those notes do reflect that there was a conversation on -- between Jordan and Rebecca Balz on Friday of that week, which would have been May 13, 2005; is that correct?
A Correct.
Q Now, those notes do not reflect the time of the day or the location of that conversation, do they?
A No, they don't.
Q And those notes do not reflect whether anyone had witnessed that conversation; is that correct?
A No, they don't.

Q Now, your notes indicate that Rebecca Balz and Jordan Gajewski discussed what each was going to be doing that coming weekend; is that correct?
A Yes.
Q Your notes also indicate that Rebecca Balz -- excuse me -- wrote her cell phone number on Jordan's hand; is that correct?
A Yes.
Q Do you agree with me that a jury may have found such behavior by Rebecca Balz inconsistent with someone who had just been sexually assaulted by that person?
A Absolutely.
Q Do you also agree with me that, at a minimum, you should have cross-examined Balz on that conversation, and in particular the fact that she wrote her cell phone number on his hand?
A I should have, yes.
Q Would you agree with me in interviewing your client, or any witness for that matter, that you have a duty as trial counsel to ask follow-up questions in order to determine whether there are facts relevant to the case?
A Yes.
Q Now, you recommended to Jordan that he not testify in this case; is that correct?
A That's correct.

Q And he took your advice?
A Yes.
Q Okay. And the reason you did not want Jordan to testify was because he had lied to the police about whether he had had sex with Balz in the first place; is that correct?
A Yes.
Q And that is the sole reason?
A Yes.
Q And you would agree with me that the defense was therefore limited to establishing reasonable doubt as to whether the sexual intercourse occurred?
A That was the defense we presented, yes.
Q Now, would you also agree with me that consent would have been a viable defense in this case?
A If Jordan had testified, yes.
Q Okay. Would you also agree with me that you were effectively unable to establish a motive for Rebecca Balz to lie?
A Yeah. I don't think we dealt with the motive issue very well.
Q And in fact, you had tried to bring in evidence of a prior sexual encounter between Balz and another boy that day, that that occurred that same day as the sexual assault allegations, but were prevented from doing so; is that correct?
A Correct.

Q Would you agree with me that failing to demonstrate a motive to lie did hurt the defense?
A I assume it did, yes.
Q Would you agree with me that if what Jordan says is true about that conversation -- you've reviewed the motion in this case, haven't you, the postconviction motion?
A I did, yeah.
Q Would you agree with me that if what Jordan says is true that, you know, that Balz approached him at his car in the parking lot after the sexual assault had occurred and asked him to go out with her and offered him her phone number, that Jordan rejected Balz's overtures, told her that he did not want to be romantically involved with her, and that he was going to the prom with another girl that Saturday and that she was -- she reacted angrily, that this would have provided good motive evidence?
A Yes.
Q Would you also agree with me that it would have made a very different calculation concerning the decision as to whether Jordan should testify if in fact you knew that he could have provided a clear motive for her to lie?

I'm not asking you what the decision would have been but would it have been a factor?
A Right, it certainly would have been a factor in my decision-making process, yes.

Q You would have had to weigh that then against the -- having Jordan admit on the stand that he initially lied to the police, however, he had sexual intercourse?
A That's correct.
Q And even if you hadn't called Jordan to the stand, you still could have cross-examined Balz about the conversation; is that correct?
A That's correct.
Q And had you known about Casey Conner, you would have been able to call him to the stand to corroborate that Balz and Jordan had a conversation at Jordan's car on that same day?
A Correct.
Q Now, at some point you found out that Jordan had attended the prom on Saturday, May 14, with Amanda Urmanski; is that correct?
A Yes.
Q And when did you find that out?
A I think it was during the trial.
Q Would have been soon enough that you could have acted on that, if necessary?
A I could have, yeah.
Q Now, when this trial occurred Jordan was 19 years old; is that your -- the best you can --
A That's probably right. He was a young man. He still is a young man.

Q To your knowledge, he hasn't had any previous experience in the criminal justice system or hasn't -- does he have any level of sophistication in terms of law or the courts?
A He did not strike me as being a sophisticated defendant.
MR. MILLER: Your Honor, I would move Exhibits 3 and 4 into evidence subject to cross-examination.
THE COURT: Any objection?
MS. MERRIWETHER: No.
THE COURT: They're received.
MR. MILLER: I have no further questions at this time.

CROSS-EXAMINATION

BY MS. MERRIWETHER:
Q Mr. Kelly, how many times you think you met with the defendant prior to the trial, over the phone and in person?
A Several. I don't -- I couldn't tell you a number.
Q Can you say like five, six, more than that?
A Including telephone conversations, probably in that ballpark, yeah.
Q And how many hours you think?
A I think our interview during which I collected most of the information from Jordan, which is the one that produced the notes that are Exhibit 4, was probably a couple hours, and that was probably our longest. A lot of our meetings after that point were just reviewing the status of the case and

talking about the decision whether or not he wanted to testify so those were shorter conversations.

Q So in the scheme of things, this conversation that produced Exhibit 4 was one of your preliminary conversations early on?

A Yes.

Q And would you say, although the defendant is not sophisticated, that he's a bright young man?

A I would say he's probably average intelligence, yeah.

Q And he was cooperative?

A Yeah.

Q And he was very interested in the trial and the outcome of the trial? I mean --

A I'm sure he was concerned about it, yes.

Q Concerned is probably a better word. Okay. And you had open dialogue with him during that longer conversation; is that right?

A Yes.

Q And you were looking for any possible defenses, so on and so forth?

A Sure.

Q And you obviously explored with him the conversations that may or may not have occurred between him and Rebecca Balz the week after the assault?

A Yes. That's part of what we talked about.

Q Okay. And you said that you don't really have much of an

independent recollection of those conversations, but you do have your notes in Exhibit 4, correct?

A Right.

Q And I believe you said that in Exhibit 4 you had put down the important comments from the conversation; is that right?

A Right.

Q That's the purpose of your notes?

A Right.

Q Okay. And during this conversation, these notes on Exhibit 4 are all about the contacts, any contacts he would have had with her that following week; is that right?

A Right. This part -- or these lines in my notes reflect the portion of our conversation that was addressing his contact with Miss Balz during that week.

Q And anywhere on here does it talk about a conversation in the parking lot?

A Not specifically in a parking lot. It doesn't talk about location at all.

Q And it doesn't specifically talk about Casey Conner approaching Mr. Gajewski as he had a conversation with Miss Balz?

A It doesn't talk about who, if anybody else, was present.

Q And if that had been discussed, you would have written that down because that's an important fact, right?

A I probably would have written down the name of a witness if

I'd been aware of the witness.
Q And you rely on your client to tell you that because he's the only other person there, correct?
A I rely on my client to answer my questions, yeah.
Q Okay. I'm going to direct you to the third paragraph on Exhibit Number 4. This relates to the alleged conversation about going to a concert together, correct?
A Yeah -- well, that's part of what it relates to, yeah.
Q Okay. You discussed on direct examination how his rejection of her overtures might have been -- or his rejection of her advances might have been a possible motive, correct?
A I'm sorry, I don't really --
Q You discussed on direct examination motive of Rebecca Balz to falsify --
A Right.
Q -- correct?
A Um-hum.
Q And one of those motives would have been him rejecting her, correct?
A That would be a motive, yes.
Q Yes. Can you tell me in your notes where it says that he rejected her?
A It does not say that.
Q Can you tell me in your notes where it says that she told him to fuck off?

A It does not say that.
Q Can you tell me in your notes where it says that he said he never wanted that kind of relationship with her?
A That's not in my notes.
Q In fact, what your note says is that he tried to call her several times, correct?
A He tried to call her at least twice, yes.
Q So, in fact, your client never disclosed those things to you if they occurred because you would have written them down as important facts to motive, correct?
A I don't have any recollection of Jordan telling me those things, and I think I would have written them down, yes.
Q You said that you did file a motion trying to deal with what you had towards motive, correct?
A I did.
Q And that was a motion relating to some alleged sexual contact with someone else?
A Yeah, it was a basically a rape shield motion.
Q And that was denied by the court so you were not allowed to bring that in?
A Right.
Q You also said that several of your conversations dealt with the fact whether or not Mr. Gajewski was going to testify, correct?
A Yes.

Q And that was a strategic decision between you and your client to not have him testify, correct?
A My advice was based on a strategic decision, yes.
Q He did not mention any other witnesses to this conversation regarding the cell phone number, correct?
A Not that it reflected in my notes.
Q And that would be something important that you would write down?
A I would think so.
Q He did not say that they actually had a conversation over the cell phone?
A No. At least that's not in my notes.
Q Isn't it quite possible that if Rebecca Balz -- let me rephrase that. Isn't it quite possible that -- the overriding factor in this trial, do you agree, was Mr. Gajewski's statements to a Mr. -- I believe it was Ashen -- I'm trying to remember his last name -- he made a statement to another individual regarding his sexual contact with Rebecca Balz; do you recall that?
A I recall that testimony, yes.
Q Yes. And it was regarding her saying she couldn't do this and him continuing to have sex with her?
A Right.
Q And do you agree that that was likely a big factor in the jury's decision?

A I wasn't in the jury box. I wouldn't want to speculate about what the jury thought was important.
Q But that testimony did occur?
A It did.
Q Do you know -- did Mr. Gajewski -- according to these notes, it doesn't say when this conversation had occurred about the cell phone?
A Jordan's conversation with Miss Balz?
Q Yes.
A It indicates that it happened on Friday.
Q Okay. And that would be the Friday -- which Friday?
A The Friday following the encounter between the two of them.
Q Did you inquire of Miss Balz if they had contact at school during the trial?
A I haven't reviewed the trial transcript and I don't recall.

(Fire Alarm going off.)

THE COURT: I think we better go.

(Recess was taken.)

THE COURT: Please be seated. We have to wait for the clerk to get back here.

All right. Continue.

BY MS. MERRIWETHER:
Q So the only witness to the alleged conversation between the defendant and Rebecca Balz would be Mr. Gajewski himself, correct?

A I don't know. Apparently there was another witness that I didn't know about.
Q I'm sorry, with the cell phone; I should be more specific. The conversation involving the cell phone number exchange, as far as you know?
A Again, I just don't know.
Q As far as Mr. Gajewski told you and according to your notes, the only two witnesses would be Mr. Gajewski and Rebecca Balz, correct?
A I don't think that Mr. Gajewski told me that there was anyone present but I don't know that I asked him that.
Q Again, you were having open conversations with Mr. Gajewski about the conversations with Miss Balz, correct?
A Open, yeah, in the sense that I generally ask open-ended questions and try to elicit what information I can get.
Q And this was over a period of hours?
A A couple hours, yeah.
Q And Mr. Gajewski, you said you couldn't -- you made a decision not to call because he had lied to the police initially and they were serious issues with his credibility if he did take the stand, correct?
A That's right.
Q So the effect of testimony by Mr. Gajewski regarding the cell phone number that was allegedly exchanged was questionable, correct?

A That would be a judgment call a jury would have to make.
Q Would you agree that you vigorously cross-examined Miss Balz?
A I tried.
Q And Mr. Aschbrenner?
A Again, I tried, yeah.
Q And how long have you been practicing law?
A I've been in private practice since 1982.
Q And you've been doing criminal cases all of that time?
A I have.

MS. MERRIWETHER: I don't have any other questions.

MR. MILLER: Just a couple follow-up, Your Honor.

REDIRECT EXAMINATION

BY MR. MILLER:

Q Attorney Kelly, in response to one of the prosecutor's questions you indicated -- that would be concerning whether there was witnesses to this conversation, you indicated that it was possible that you didn't ask; is that correct?
A Yes.
Q Is it possible that with regard to these other facts as well, that, you know, it may be that you didn't ask?
A What other facts?
Q The other facts that were not in your notes that we had alleged in the postconviction motion?

A Yes, um-hum.
Q Okay. Also, the prosecutor mentioned that you had -- or I'm sorry, you answered one of her questions that you had spent a couple hours talking with my client, that would have been the -- that would have been everything concerning the case; is that correct?
A I don't know that it would have been everything; it would have been everything concerning the allegation of sexual assault, yes.
Q And in fact, that exhibit that you have in front of you was just a small portion of the notes that you took during your conversation with Jordan; is that correct?
A That's right.

MR. MILLER: I have nothing further.

MS. MERRIWETHER: I guess just a couple short follow-ups, Your Honor. I'm sorry.

RECROSS-EXAMINATION

BY MS. MERRIWETHER:
Q It's just as possible that you did ask and that he didn't provide any information as well, correct?
A I think it's more likely that I didn't ask. I think if I had specifically asked were there any witnesses, I would have written down the answer, so I probably didn't ask.
Q Or maybe there were no other witnesses and that's what he told you so you didn't write it down?

A I don't know. If I thought the question was important enough to ask it specifically, I probably would have written down the answer.

Q But you didn't write down any of the questions that you asked, correct?

A No, I didn't write down -- I never write down questions. I write down answers or information that I get from the client.

Q And if Mr. Conner -- you're aware of Mr. Casey Conner now, I believe?

A From reading the motion.

Q Yes. If Mr. Conner testified that Miss Balz and Mr. Gajewski never really spoke to each other, they weren't friends, they weren't in a relationship, that would corroborate what Miss Balz testified to at trial, wouldn't it, that they weren't friends, they weren't associates in school?

A I guess if you're asking me to assume that that would be his testimony, then yes.

MS. MERRIWETHER: I don't have any further questions.

THE COURT: I just want to understand.

EXAMINATION

BY THE COURT:

Q In terms of talking to your client about trial strategy, one strategy would have been, yes, we had intercourse but it was consensual?

A Right.
Q And the other was we didn't have intercourse at all?
A Right.
Q You chose the latter?
A Yes.
Q And that was a matter of strategy that you worked out with your client?
A It was in light of the fact that there were problems with putting him on the witness stand.

THE COURT: Thank you.

MR. MILLER: Can I just follow up one question on that?

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. MILLER:
Q Now, that strategy determination, of course, was based on the information you had at the time; is that correct?
A It was.

MR. MILLER: Okay. That's all.

THE COURT: All right. Thank you, sir. Could I have the exhibit, please?

THE WITNESS: Sure. Can I be excused?

THE COURT: Is he excused then?

MR. MILLER: Yes, he may be excused.

THE COURT: You're excused then.

THE WITNESS: Thank you.

MR. MILLER: Your Honor, I'd call Fred Borntreger. I'm going to have to get him.

FRED BORNTREGER, called as a witness on behalf of the Defense, having first been duly sworn on oath, testified.

THE CLERK: Walk around and have a seat up there, please.

DIRECT EXAMINATION

BY MR. MILLER:

Q Could you please state your name for the record and spell your last name?

A Fred Borntreger. B-o-r-n-t-r-e-g-e-r.

Q And how old are you, Mr. Borntreger?

A 22 years.

Q And do you know Rebecca Balz?

A Yes.

Q And how well do you know her?

A I actually, more pretty -- not awful good, but I, you know, I know who she is and talk to her now and then and stuff.

Q And how well do you know -- or how would you describe your relationship with her family?

A Very good. I'm really good friends with her uncles and like a lot of her family, her mom and dad I get along with, and I'm really good friends with almost all of her family.

Q Do you know her father?

A Yes, I do.
Q Did you attend Rebecca's graduation party?
A Yes, I did.
Q And you have an event you're going to attend this weekend, in fact; is that correct?
A Yes, I'm actually going to her grandparents' 50th anniversary.
Q And do you know Tyler Brodjieski?
A Yes. I think it's her first cousin, and I consider him as my best friend.
Q Now, how well do you know -- do you know Jordan Gajewski?
A Yes, I know Jordan Gajewski too.
Q How well do you know him?
A I guess probably just as -- you know, I know him not really that awful much, but I shoot pool with him now and then, you know, and hang out very seldom. Every time I see him I say hi and stuff.
Q Okay. Not a close relationship?
A Not -- no, not really, no.
Q I mean would it be fair to say that your relationship with the Balz family is much closer than it is with Gajewski?
A Yes.
Q Now, were you aware of the sexual assault allegations that Rebecca Balz made against Jordan Gajewski?
A I was aware of it a little bit. I didn't realize that

anything was becoming of it.
Q But you were aware that they were made?
A Yes.
Q Now, turning your attention to August of 2006, did you attend the Athens town fair?
A Yes, I believe it was 17th through the 20th of August.
Q And to the best of your recollection, which days of that fair did you attend?
THE COURT: This was 2005?
MR. MILLER: 2006.
THE COURT: 2006.
A I think it was like the 18th and 19th.
BY MR. MILLER:
Q So that would have been a Friday and a Saturday?
A Yeah, I believe so.
Q And either of those days did you run into Rebecca Balz at the fair?
A Yes, I ran into her, it was either Friday or Saturday night.
Q Okay. And approximately what time was that during the day?
A It was in the afternoon sometime, 4 till about -- 4 to 8, around there. I'm not too sure what time.
Q And where did you run into her?
A Right by the beer stands.
Q Okay. Now, can you tell the court what you remember about that encounter?

A I was walking up and I overheard someone say the word Juice, which is Jordan Gajewski's nickname, and it brought to my attention, and then I heard her say right next to me, she was talking to a girl that was probably like 30 years old or so, and I heard her say something about, oh, it never happened; I just did it to piss him off.

Q And her meaning Rebecca Balz saying that?

A Saying like that it never happened; I just did it to piss him off.

Q But Rebecca Balz said that?

A Right.

Q Now, has anyone threatened you in any way or made any promises to you in order to get you to testify here today?

A No, sir.

Q Is there any reason why you did not come forward earlier with this?

A I guess I didn't realize that anything was ever becoming of it.

Q And you had mentioned this to another person at some point this spring? You had mentioned that you overheard Rebecca say this to Jim Schug?

A Yes, I did. Well, he had told me that Jordan Gajewski was still -- that he had gotten this and that he had gotten whatever out of whatever, and then I -- I was like, well, I overheard what I did. I didn't realize that it was done

or whatever.

Q Okay. Was that a conversation that you had with Jim at your work place?

A Yes.

Q And you work at the sawmill?

A Yes.

Q And Jim does business with the sawmill?

A No.

MR. MILLER: I have no further questions at this time, Your Honor.

CROSS-EXAMINATION

BY MS. MERRIWETHER:

Q So you're in the beer tent?

A Yes.

Q Okay. And the beer tent at the Athens fair is the central attraction at the Athens fair, would you agree, that's where a lot of people go and hang out and --

A Yeah.

Q Yeah. And on a Friday or Saturday late afternoon, early evening, it's pretty crowded?

A It was pretty crowded, yeah.

Q Yeah. And there's music playing?

A Um-hum.

Q Is that a --

A Not very loud, though, I mean it was in the back.

Q Okay. And to have a conversation with someone in the beer tent, you're going to have to stand pretty close to the other person to be engaged in that conversation, would you agree?
A I guess, sure, yeah. I mean I wasn't really that close but I was close enough that I was -- I was positive of what I heard.
Q And what were you doing there? Were you with your friends or --
A I was just walking to get a beer.
Q Okay. So you were just walking by?
A Yeah.
Q Okay. So you hear this as you're walking by to get a beer in the beer tent?
A Yes.
Q And you hear -- and this woman that Rebecca Balz is supposedly talking to, you never seen her before?
A No. I had no idea who she was.
Q Did you stop and listen to this conversation?
A No, I just -- I was walking by, and I had stopped with these people in front of me, and I just kept walking after I heard, you know, I just kept walking.
Q So you stopped long enough to let the people in front of you move and then you kept walking?
A Yes.

Q Okay. And you heard amongst these people in the beer tent someone say Juice?
A Yes.
Q And you don't know --
A I looked in the direction of it and it was where Becky Balz and whoever the other person was, they were talking right next to -- like next to --
Q But you can't attribute anybody to saying -- a particular person to saying Juice, it could have been them or the people next to them, they could have been talking about orange juice; I mean, you don't know, right?
A Well, I'm pretty positive, but I guess I can't promise nothing in that exactly, but I believe that that's what, you know --
Q You assumed that's who it was?
A I'm pretty positive, yes.
Q But you don't know?
A Not for fact but --
Q And you said you heard as you're walking by in the beer tent Rebecca Balz say, it never happened; I just did it to piss him off?
A Correct.
Q And you have no idea what she said before that, correct?
A No, not really. No.
Q And she didn't say, it never happened; I just did it to piss off Jordan Gajewski, right? She just said, I did it

to piss him off, right?
A Yeah.
Q So she could have been talking about her next-door neighbor for all you know?
A Could have been --
Q She might not have been talking about the rape at all, right?
A It could have been but I'm pretty sure it was that.
Q Because you knew that this allegation was out there and you assumed that's what it was about?
A I really did, yeah.
Q Yeah.
A I was pretty positive of it.
Q Because you knew of the allegation and you just put those two together, right? The conversation and the allegation, you just put those two thing together, right?
A More or less, and there might have been more stuff that I heard that might have brought me to believe that, but it just -- that I don't remember anything but I -- from what I remember of it yet, that's what I'm pretty sure of.
Q Okay. So everything that you're testifying here today is based on your assumption based on what you knew about the allegation?
A Say that again.
Q You just -- you didn't hear any context of this conversation

that's happening between Rebecca Balz and this unknown female; you just heard, it never happened; I just did it to piss him off?

A Yeah.

Q She could have been talking about Jordan Gajewski's version of what happened with this allegation, right?

A Could have been.

Q Yup.

MS. MERRIWETHER: I have no further questions.

REDIRECT EXAMINATION

BY MR. MILLER:

Q How soon did you hear Rebecca say, it never happened; I just did it to piss him off after you heard the word juice?

A It was pretty much right after I heard the word, and I looked over and it was right there.

Q Now, how common knowledge is it that Jordan Gajewski's nickname is Juice?

A I first knew him as Juice. I never -- I didn't even know his real name when I first met him. Everybody called him Juice.

Q Do other people refer to him as Juice that you know?

A Oh yes.

Q Just about everybody you know?

A Pretty much, yeah.

MR. MILLER: I have nothing further.

RECROSS-EXAMINATION

BY MS. MERRIWETHER:

Q How many people were in the direction of Rebecca Balz and this other woman? How many people were around her, by her?

MR. MILLER: Your Honor, I object. That's not follow-up.

THE COURT: Overruled.

A I -- I don't know. I don't how many people were there.

BY MS. MERRIWETHER:

Q It was so crowded that you had to wait for people in front of you to move so you could go get your beer, right?

A Right. They were right next -- like, I'd say maybe two people next to me, and I don't know for sure, you know, it was right there --

MS. MERRIWETHER: I don't have any other questions.

MR. MILLER: Nothing further.

THE COURT: Do you know of anyone else in the Athens area that has the same nickname?

THE WITNESS: No.

THE COURT: Thank you.

MS. MERRIWETHER: Can I follow up one question?

THE COURT: Sure.

RECROSS-EXAMINATION

BY MS. MERRIWETHER:

Q Do you know how many other people in that beer tent knew Jordan Gajewski?
A No. I'm sure a lot of them knew him.
Q And all those people call him Juice, too, don't they? Most people call him Juice?
A Probably, yeah, most people call him Juice, but I don't know, it was just right there, and I don't know.
Q Okay. Thank you.

MR. MILLER: Your Honor, just one more.

REDIRECT EXAMINATION

BY MR. MILLER:

Q Did you see anyone in the vicinity of Rebecca Balz or the person she was talking to that you recognized as an acquaintance or friend of Jordan Gajewski in her immediate vicinity?
A Say that again.
Q Did you see anybody in the vicinity, in the immediate vicinity of Rebecca Balz that would have been an acquaintance or a friend of Jordan Gajewski who may have said Juice other than Rebecca?
A No, I did not.

RECROSS-EXAMINATION

BY MS. MERRIWETHER:

Q Did you just focus on Rebecca because she was right next to you? I mean she's right next to you, right?

A Yeah, I heard a conversation and it brought to my attention right away.
Q Okay. And you just wanted to walk up and get a beer?
A Yes, I was not there to -- no, to overhear things at all, no.
Q And you weren't paying attention to who else is around or anything like that, right?
A Yeah, right. Exactly. But I didn't see any of Jordan's friends at all, no, I did not.

MS. MERRIWETHER: I don't have any further questions.

MR. MILLER: Nothing further.

THE COURT: All right. You're excused, sir.

MR. MILLER: Your Honor, I call Jordan Gajewski to the stand, please.

JORDAN GAJEWSKI, called as a witness on behalf of the Defense, having first been duly sworn on oath, testified.

DIRECT EXAMINATION

BY MR. MILLER:

Q Jordan, my first question is concerning Fred Borntreger; how did you first find out about him?
A I guess I first found out about him or heard of him is when he first moved to town years ago.
Q No, I'm sorry. Let me back up. When did you first find out that he had this information for you?
A It was maybe a few months ago. He -- I work with a man by

the name of Jim Schug, S-c-h-u-g, and being we work together, he brought it to my attention one day that he had been speaking with Freddy -- Fred at the lumber mill where he works, and at that point --

Q Okay. And that was in May of 2007?

A It would've been around May, yeah, a couple months ago.

Q Now, I want to direct your attention to the Friday, May 13, 2005, conversation you had with Rebecca Balz in the school parking lot; can you describe for the court what happened? Were you awaiting at your car at that time?

A Correct. I was waiting to give a friend, Casey Conner, a ride.

Q Okay. So you were waiting for him to get to the car?

A Correct.

Q Okay. And then Rebecca -- did Rebecca then approach you?

A Yeah, she approached me and began, you know, hi, began a conversation.

Q And what did she say?

A Well, she started the conversation. She asked me what I was doing for the weekend, basically wanted to know what I was doing. She had a concert of some sort she was attending, I believe, it was on Saturday. And I explained to her that, well, no -- well, she invited me to be at this concert, and then when I explained to her, well, I'm going to be at the prom Saturday, I'm not going to be able to come with you.

And --

Q Did she ask you then who you were going to the prom with?

A Yeah, she asked. Obviously, I'm going to the prom, I need a date. I kind of told her it wasn't any of her business, I guess.

Q So your answer to her request was?

A No.

Q What happened then?

A At that point I denied her, you know, she told me that -- at that point she wanted to give me her cell phone number, said, well, if I get -- don't have a chance to -- if I don't end up going to the prom, here's my number, and she grabbed my hand and wrote the number on my hand.

And at that point I just said, well, I don't really -- not really interested, you know, I don't want to -- you know, what happened, I'm not really interested in going any further as far as relationship-wise.

Q So did she -- when she grabbed your hand, what happened?

A She wrote her number -- her cell phone number on my hand.

Q Okay. And then you then told her that you weren't interested in her?

A Yeah.

Q Okay. And how did that go?

A At that point she got pretty upset about it. I mean she basically just said I'm just an asshole and pretty much told

me to fuck off and kind of stormed off, walked off, whatever.

Q Did you ever see her again until your trial?

A No. I believe it was the following Monday is when police officers were in school, and through knowledge of the school of what was happening, and like I say, I seen her in school and that was it.

Q Now, how soon after she left your car did Casey Conner arrive?

A It was seconds. I mean I seen him coming, and he was probably, I don't know, halfway across the parking lot yet, but I mean I could definitely -- I knew he was coming and he was gonna want to get going.

Q Okay. I'm going to now turn to the conversation you had with your lawyer. Now, you did tell your lawyer about this May 13, 2005, meeting that you had or a conversation you had with Rebecca; is that right?

A Yes.

Q All right. I'm going to show you what's been marked as Exhibit 4; have you previously reviewed that?

A Yes, I have.

Q Do you disagree with anything that is in those notes?

A No, I don't.

Q Now, do those notes reflect everything you might have told your lawyer?

A Yeah, that's pretty much the --

Q Now, there's a number of things you just testified about concerning the May 13th meeting or conversation you had with Rebecca that don't show up in those notes.

Why didn't you give that additional information to your lawyer when you were talking to him?

A Well, at the time his way of questioning -- he basically asked me what type -- what kind of contact I had with Rebecca that following week, and when I explained to him, I basically gave him this and told him what happened, and he wrote his notes and we basically moved on. We -- it was -- he acted almost as if it was -- that conversation wasn't really going to help the case, just --

Q So to your recollection, did he ask any follow-up questions?

A No, it was just a general question of what contact did you have with Rebecca, and I told him the gist of what, you know, the couple conversations we had, and he didn't seem overly interested in it so.

Q Now, in terms of your decision whether or not to testify, did your lawyer advise you not to testify?

A That would be correct.

Q And then you followed that advice?

A Yes.

Q I'm going to show you what's been marked as Exhibit 1 and Exhibit 2. Could you describe those exhibits for the court, please?

A Yes. Exhibit 1 is a prom picture from the actual prom, as I told Rebecca I had attended on Saturday night, May 14, 2005, with Amanda Urmanski.

And Exhibit 2 actually is a post-prom sign-up, which I also attended with Miss Urmanski following the prom, which, yeah, just a post-prom sign-up with my name on it so.

Q So did you attend the high school prom at Edgar High School on May 14, 2005?

A Yes, I did.

Q And that was with who?

A Amanda Urmanski.

Q And could you give me the time starting on May 14 that you were with her continuously?

A It was probably around -- it was around noon is when we first -- or mid-afternoon, I should say, 3, 4 o'clock is when we actually -- I met her at her house, and at that point we went to another friend's, we were kind of a double-date kind of deal.

Q Who was that?

A Aaron Myszka and which is currently Amanda Myszka.

Q Okay. Go on.

A And we met them for pictures, went to dinner. It was maybe a couple hours later, Applebee's, went out to eat. From there, by the time we got to eat and got our food and all that, we went straight to the prom. Prom, I think, starts around 9 or

9:30, but we showed up a little earlier for pictures, which obviously the picture, and it lasts till I think around midnight. And at that point we went back to Amanda's parents' house; we changed into more casual relaxed clothes, and went to this post-prom, which is up in Wausau at the Day's Bowl-A-Dome, or Dave's. It's actually a lock-in type deal from, I think, like 1:00 to 3:30.

Q That's at the high school?

A No, that's actually at Day's Bowl-A-Dome.

Q Are there school officials there?

A Yes, it's chaperoned by parents and also the principal and there could be other teachers, faculty.

Q And then once you're in, you're in until they let you out?

A Yeah, that's -- part of the reason is the dance gets over at midnight sharp, and we might have left just a little earlier, and give people time to change because you have to be there at one. And once you're there, I think mostly for parents' sake, once you're there, you're there until 3:30.

At 3:30 then you're allowed to leave, you can get a ride, or whatever, but they don't want anybody -- you can't leave once you're there.

MS. MERRIWETHER: May I ask what the relevance of this is?

MR. MILLER: I'm sorry?

MS. MERRIWETHER: What's the relevance of this?

MR. MILLER: Well, that's a matter of argument. While you yourself pointed out that Tom Aschbrenner's testimony was --

MS. MERRIWETHER: No, no, no --

MR. MILLER: -- created in this case, and Tom Aschbrenner allegedly had a conversation with my client on May 14 --

MS. MERRIWETHER: We're not supplementing the postconviction motion. The motion is what it is. If I may, Your Honor --

THE COURT: I'm having a little trouble following where you're going here.

MR. MILLER: Well, there's -- I'm done, but basically I'm trying to establish that on May 14, from approximately 3:30 p.m. until the wee hours of the morning he was at the prom with his girlfriend.

I think it's relevant on two counts. First of all, I think it's relevant in terms of his conversation with Rebecca on Friday, May 13, that in fact he was going to the prom with another girl, and that I think it increases the likelihood that he in fact told her that since they were discussing their weekend plans, and I think that also then provides a motive on her part, finding that he has plans with another girl.

And I think then the other issue is that, and this goes to harmless error, which the prosecutor raised with the

defense counsel in that the alleged statement that my client made to Tom Aschbrenner at a party on May 14 could not have happened as my client was not at a party on May 14, he was with his girlfriend at the prom.

MS. MERRIWETHER: That's not before the court today.

THE COURT: That wasn't --

MR. MILLER: That's not my motion --

MS. MERRIWETHER: That's not before the court here today. I do not feel comfortable litigating that issue when this court did not preside over the trial and it was not presented to the court as an issue.

THE COURT: I agree, that isn't part of your motion. This is something new.

MR. MILLER: Well, it's part of the harmless error analysis, which I'm sure I'm going to hear, you know, that is that it wouldn't -- and the prosecutor was already alluding to that issue with her questioning of the defense counsel.

MS. MERRIWETHER: It's not my burden.

MR. MILLER: But I think there's two reasons why it's relevant, and I think the first reason's enough, if nothing else.

THE COURT: You're done now?

MS. MERRIWETHER: You're done questioning?

MR. MILLER: I just have one question left.

BY MR. MILLER:

Q Did you ever see Tom Aschbrenner that day or evening?

A No, I didn't.

MR. MILLER: Okay. I would ask that these exhibits be admitted subject to cross-examination, Exhibits 1 and 2.

MS. MERRIWETHER: I don't know what the relevance is. I still don't know.

THE COURT: I'll receive them.

CROSS-EXAMINATION

BY MS. MERRIWETHER:

Q Mr. Gajewski, you sat down with your lawyer, Mr. Kelly, for several hours during which you discussed the subject of Exhibit 4, correct?

A Correct, among other --

Q Other things too?

A Yeah.

Q And you met with your lawyer several times?

A I actually met with him once, the rest were phone conversations.

Q He lived in -- or he works out of Madison?

A Madison, correct.

Q And would you agree he made himself pretty available to you?

A I wouldn't say as available as I would have liked just

because -- the reason I got him actually is because of his reputation, and I found out once I did retain him that he is a very busy lawyer, and phone calls were far and few between. And like I said, the one meeting is about the only chance I had to meet with him in person before our actual trial or pretrial, whatever.

Q But you did discuss at length the facts surrounding the incident, right?

A Yeah.

Q And you were very interested in the trial, obviously very concerned?

A Yeah.

Q And when you were talking -- do you have Exhibit 4 in front of you?

A Yes, I do.

Q You got pretty specific with your attorney, correct, about -- there are even some quotes in here from your conversations with Miss Balz; is that right?

A Yeah. Yeah, there's some in there.

Q For example, in the second paragraph it says, I told at least a dozen people -- or a dozen -- yeah, a dozen people, he laughed. And then you said -- then said, no, I just told Mike, right? I mean those are direct quotes?

A Yeah.

Q And on the bottom you actually talk about something that

must have been said to a Derek Lavicka, L-a-v-i-c-k-e; is that right?

A Lavicka.

Q Lavicka; is that right?

A Yeah.

Q And that was information provided by you, something you thought was important, correct?

A Yeah, that might have been something I added in after a while but --

Q And judging by Exhibit 4, you were talking about her motive to lie, right, Rebecca?

A Not -- he didn't really -- no, when he asked the questions he didn't bring up motive. He -- it was a general questioning of just what were your -- what was your conversations or what happened between you and Rebecca following that week. Is there any -- you know, it wasn't -- he didn't go into depth. I mean he didn't question, well, where was she and which conversation, what time did you talk to her, it was none of that. It was a general when did -- did you talk to her at all, more or less.

Q And you never told him that she told you to fuck off and called you an asshole?

A No, I didn't.

Q And you never told him that you told her you weren't interested in her?

A No.
Q In fact, you told him that you called her that night and Saturday night, which would have been your prom night, but there was no answer?
A Correct.
Q And in fact, instead of telling her you weren't interested in her, you told him that you were calling her?
A I believe if I did call her, which to my memory I may have called her, I think it was more so that I did have remorse, I felt bad because I handled the situation kind of rudely, I think.
Q And that's exactly how the jury could have interpreted it.
MR. MILLER: I object, if that's a question.
MS. MERRIWETHER: I'll withdraw it.
MR. MILLER: Don't answer it.
BY MS. MERRIWETHER:
Q And you said -- you told your attorney that you told her what you were -- what she was doing -- basically, you had a conversation, you told her what you were going to do that weekend, and she told you about the concert; that's what you told your attorney, right?
A Basically, yeah.
Q And you didn't tell him anything about the prom?
A No.
Q And you were sitting next to him in the courtroom, right,

during the trial?
A Correct.
Q And you talked to him before the trial?
A Some, yeah.
Q You talked with Jim Schug about the allegations or about being on probation or the sexual assault itself?
A Correct. I work with him on a regular basis and I guess we talked some about my situation and things that are going on, so he's aware.
Q And Freddy then is a mutual friend of you and Mr. Schug?
A I think he'd be more of an acquaintance of Mr. Schug. I think the only way he knows Jim, not to be certain, but I think he more generally knows him through working and through the sawmill, and working that way, I guess.
Q Okay. And did Mr. Schug know that you were trying to appeal the conviction?
A He was aware that my court was still going on, but as far as specifics, he didn't -- I don't think he knew.
Q And when you made this decision not to testify, did you discuss with your attorney why you weren't -- he was advising you not to testify?
A Yeah, we talked some about it. He basically -- I mean, which it's my right to testify, but he recommended that I didn't for a lot -- for the reasoning with the issue with my statement to the police, my initial statement.

Q And that issue being that you initially lied to the police?
A Correct.
MS. MERRIWETHER: I don't have any other questions.
THE COURT: Anything else?
MR. MILLER: Nothing further, Your Honor.
THE COURT: All right. You may step down.
Can I have the exhibits, please.
Any other witnesses?
MR. MILLER: Your Honor, I have no further evidence at this time.
THE COURT: Are you going to call anyone?
MS. MERRIWETHER: I'm going to call Rebecca Balz, Your Honor.
REBECCA BALZ, called as a witness on behalf of the State, having first been duly sworn on oath, testified.

DIRECT EXAMINATION

BY MS. MERRIWETHER:
Q Please state your full name.
A Rebecca Lee Balz.
Q And can you spell your first and last name for the court reporter, please?
A R-e-b-e-c-c-a. B-a-l-z.
Q And you went through a trial last year in which there was an allegation that Jordan Gajewski sexually assaulted you, right?

A Correct.
Q And I'm going to take you back to August of 2006. You live in Athens, right?
A Correct.
Q And did you attend the Athens fair that year?
A Yes.
Q And do you know what days you attended?
A I know that I attended Thursday and Saturday.
Q Okay. And do you know what time of the day you were there?
A Thursday, that Thursday we had the trial, so I didn't go there until maybe 7, 8 o'clock. And Saturday, my boyfriend and I met up with my parents, maybe 6:30, 7 o'clock.
Q Did you go to the beer tent?
A Yes.
Q At any time when you were at the Athens fair in the beer tent, did you say, referring to the sexual assault with Jordan Gajewski, that the sexual assault never happened?
A No.
Q Did you ever say you just did it to piss him off with regard to the sexual assault allegation?
A No.
Q Okay. And then I'm going to take you to the week after the actual assault.
A Okay.
Q During that time period did you ask Jordan Gajewski to go

out with you?
A No.
Q Did you ask him to call you?
A No.
Q Did you ask him your -- or give him your cell phone number to contact you when he was going to the prom?
A I don't recall.
Q Okay. And were you in any way looking for a relationship with Jordan Gajewski at that time?
A No.

MS. MERRIWETHER: I don't have any other questions.

MR. MILLER: No questions.

THE COURT: All right. You may step down.

MS. MERRIWETHER: I don't have any other witnesses, Your Honor.

THE COURT: All right. Do you want to do oral argument?

MR. MILLER: I'm sorry, Your Honor?

THE COURT: Did you want to make oral argument or do you want me to rule?

MR. MILLER: I'll proceed however the court would like, but my strong preference would be to brief it after getting a copy of the transcript.

MS. MERRIWETHER: I'm fine with oral argument but

it's up to the court.

MR. MILLER: I think it's easier to put the argument together with the -- you know what I'm saying.

THE COURT: I guess I have no problem with that. You know, again, we're holding up this case a terribly long time by doing this.

I want to make the ruling this morning so --

MR. MILLER: I'm sorry?

THE COURT: I want to rule today. This has gone on long enough, but you can -- you've already placed an argument in writing, but I'll permit you then to follow up now that we've heard the actual testimony with any argument you wish to make.

MR. MILLER: Well, Your Honor, I'm making a two-prong allegation here. One is a new evidence claim; the other one is ineffective assistance of counsel.

The new evidence is primarily, of course, the testimony by Freddy Borntreger that he overheard Rebecca Balz in the beer tent refer to my client saying -- or make the comment, it never happened; I just did it to piss him off.

And I would indicate that as far as I understand Rebecca Balz's testimony, she concedes that she was at the Athens fair on that Friday.

THE COURT: And would that have been right after the trial?

MR. MILLER: I'm sorry?

THE COURT: Did I understand her to say that? That would have been right after the trial?

MS. MERRIWETHER: I think she said --

MR. MILLER: It would've been the day after trial.

THE COURT: The day after trial. Okay.

MR. MILLER: So certainly the timing is, I think, relevant, very relevant, it was the day after my client was convicted.

I think Freddy Borntreger was quite convinced of what it meant, there was reference to my client. I believe that I've established that if there was any bias on his part, it would have been towards my client rather than the Balzes.

The issue before the court isn't whether or not -- it isn't to make a credibility determination per se. The issue is, you know, how would a hypothetical jury have responded to that information.

You know, unfortunately, the court did not hear the evidence in this trial, but I think it's fair to say that the evidence in this trial -- this was a very close case. The context of the assault was quite improbable. The -- I thought the -- I mean having read the transcript, of course, the complainant's testimony was improbable, and there was no smoking gun here. It was a very close case, and my argument would be that, you know, I would agree with the prosecutor

that probably the worst evidence for my client was the statement by Tom Aschbrenner, who said that my client told him that he had had intercourse with Rebecca Balz after she said no, or something to that effect.

Now, I believe that testimony was pretty well discredited to some degree at trial, and also, part of the reason I put in this prom evidence was because he claimed that that statement was made at the time that my client was at the prom.

But in any event, I think, you know, this was a -- I think Freddy Borntreger's testimony would have been a critical counter-weight to that testimony by Tom Aschbrenner because I really don't think the jury would -- I mean I'm speculating, of course, but based on what the evidence was in terms of the assault itself, I think was a very, very close case, and I think that kind of evidence would have been important. I think it would have been significant.

The other claim, of course, is the ineffective assistance of counsel claim based particularly on the question of the Friday conversation on May 13, 2005.

Just to outline for the court that the allegation -- or the alleged assault occurred on -- late on May 7th or early on May 8th, which would have been, I believe, a Saturday, Sunday. This conversation that we're talking about occurred the following Friday, and then it was the Monday following

that Friday that the allegations were made to the school principal. Okay. So this is a very critical period, it's a time between when the alleged assault occurred -- allegedly occurred and the time that it was reported.

What I think the -- I think the thing to remember here is even if we just assume that my client told Attorney Kelly what are in his notes, I think that alone is significant coupled with Casey Conner's testimony.

I mean here we have Jordan Gajewski standing by his car in the school parking lot who is approached by Rebecca Balz, according to what he told his lawyer, and that she -- they discussed what their plans are for the weekend, that she writes her cell phone number on his hand, and Casey Conner confirms that he saw them together next to Jordan's car.

In my view that is completely inconsistent with somebody who had been raped six days before. And in addition to that, it provides a motive to -- well, I don't know if that alone provides so much of a motive, but certainly then when we get into the additional information that my client has provided today as to what happened at that meeting, that she had requested that he accompany her to a music concert, that he rejected that, and further that he told her that he wasn't romantically interested in her and she had an angry reaction, you know, certainly that provides a motive where in this case there really was no motive established, and I think

that did hurt the case. There was really, you know, the prosecutor argued repeatedly, you know, where is the -- you know, where is the motive, why would she lie about this.

And then I mean we've all seen it, you know it's coming as a defense counsel, and there was -- it was a point that the prosecutor just made quite strongly and vociferously, and therefore, I think being able to provide that information, being able to provide a motive, especially given the timing, you know, only two days before the allegation was made but allegedly -- but after the alleged sexual assault, I think it's highly relevant and highly persuasive.

I would also add that I think even though these two issues are being raised separately, you know, the court does have the authority to do a discretionary reversal based on the combination of the two as does -- as the Court of Appeals would as well, and I would certainly ask the court, I think the two -- the new evidence and the ineffective assistance claim dovetail quite nicely, you know, if indeed -- I mean I really do think that the evidence does reaffirm -- they reaffirm each other.

Certainly, if Jordan's testimony is that she reacted angrily, and then what she told, you know, Freddy shortly after the trial was that she did it because, you know, because she was upset, I think that reinforces -- they reinforce each other to that degree.

You know, obviously, you know, part of the reason, you know, we got into the discussion about the prom evidence is, you know, I have to prove prejudice and then also I have to deal with harmless error.

I don't know if the prosecutor here is going to argue it, but certainly on appeal I'm going to be having to deal with it, and the reason I raise that evidence is because I think that, you know, I'm anticipating the argument about Tom Aschbrenner's testimony as to what my client told him, and I think the fact that, you know, there was evidence showing that indeed the conversation did not occur, could not have occurred when he says it did, I think is relevant, but I also think it's relevant to bolster, to corroborate my client's testimony that indeed he did tell Rebecca Balz on Friday that, you know, he was going to the prom with another girl. The fact that it happened, I think, corroborates that.

THE COURT: So they had no relationship. Why would she be upset that he was going to the prom with someone else? I don't understand that part.

MR. MILLER: Well, within this context -- well, that -- it's -- I guess it depends on how you view the evidence. If you view it as a consensual sexual encounter between him and Rebecca on Saturday night, then maybe she had ideas, and then she approaches him on a Friday saying, look, you want to go to this concert with me. I don't find that as --

THE COURT: I see. All right. I understand what you're saying.

MR. MILLER: You know, it's hard for me to further comment specifically on the evidence, you know, without having reviewed the testimony.

I don't think -- you know, certainly, we can argue about, you know, whether my client intentionally withheld information from his lawyer; I doubt that happened, or whether he's just making it up now and didn't have it then, but I think Attorney Kelly, you know, he made it clear that, you know, he may not have asked all of the questions on some of these things, and he admitted that.

Now, maybe I didn't ask him if there was a witness there, and maybe I didn't, you know, maybe I didn't ask some of the follow-up questions there, and you know -- and all of us who have done criminal practice know that, you know, your client's not just going to walk into your office and give you your defense.

I mean you have to work the case. You gotta ask questions, you bring them back in, you ask again, and you bring them back in and you ask again, and you talk to witnesses. I mean you gotta work the case, and that's how you develop defenses. And this idea that, you know, my client's, not only his duty but that his -- he has the knowledge to know what his lawyer wants to know, I mean I find that argument frankly somewhat laughable

based on my experience doing this, but I think that, you know, certainly he did tell him about it, and he did tell him important pieces of it, so this isn't something that's just coming completely out of the blue, and I think we've documented that.

And I think it's certainly, you know, certainly possible, and certainly, I think, believable that this additional information was in fact true, but it's just simply that, you know, Mr. Kelly had pages and pages of notes and most of it's on all kinds of other issues of course that aren't relevant to the case so -- so I would ask -- I would ask the court to -- I think my client should have a new trial.

I think this evidence that I presented today, you know, is something that a reasonable jury could see as significant and something that's, especially given how close this case was, and I think that my client should have the opportunity to present that. Thank you.

And, Your Honor, I would further ask that regardless of how the court rules today, that we -- that the court allow my client to remain free on bond pending appeal. Thank you.

THE COURT: Miss Merriwether.

MS. MERRIWETHER: Thank you, Your Honor. First of all, the new evidence finding, the standard is by clear and convincing evidence, and one of the threshold issues is is the evidence material to an issue in the case. What the

court heard today is a young man, although probably very-well intentioned, I don't know, walking through a beer tent at the Athens fair on a Friday or Saturday night, trying to get his beer, runs into someone in front of him, or someone's in the way, and he overhears Rebecca make a statement that was -- I have to find it here; I'm sure the court has it written down. It never happened; I just did it to piss him off. That's it. We don't know what she was talking about --

THE COURT: It is significant that it was the day after the trial.

MS. MERRIWETHER: Right. But the fact is that if that's his theory, she could very well have been talking about his theory. We don't know what she said before that conversation, after that conversation. She never mentioned him by name.

We don't know if she was talking about the rumors that were going around in this small community. And the standard is not whether it would have an impact or if it was significant. The standard is much higher than that.

We're talking about overturning a jury's decision based on this comment heard in a beer tent that isn't disclosed until two years later when he's talking to a co-worker of the defendant at work that this case is still going on and he puts these two things together; Rebecca Balz didn't. Freddy Borntreger put it together when discussing with Jordan Gajewski's co-worker. It

has to be whether there is a reasonable probability that a different result would be reached at trial. Reasonable probability of a different outcome exists if there's a reasonable probability that a jury looking at the old and new evidence would have a reasonable doubt as to guilt. What this man said on the stand does not rise to the level of reasonable doubt, and that is the standard, not dramatic impact.

Significant, maybe, you know, maybe it could have, possibly, that's not the standard. We're talking about overturning the verdict of 12 people and in a very significant case and that standard has not been met by this vague statement.

He doesn't even -- he says he knows Rebecca Balz so well. He doesn't even know who she's talking to. He didn't even pay attention to what she looks like. He's so close to them, he never bothers to ask her about it, her family or her father who he's close to.

MR. MILLER: Your Honor, I don't believe that ever came up. I mean she's --

MS. MERRIWETHER: There's testimony that he did --

MR. MILLER: You never asked --

MS. MERRIWETHER: Certainly, that would have been something that would have been brought out had that occurred, I would argue, but there's no testimony that that occurred.

It's two years later and we have this statement with no context, and we don't even know that it relates to the defendant.

Then we have the issue of ineffective assistance. First of all, the court is to be highly differential to trial counsel and their performance.

The court is to avoid determinations of ineffectiveness based on exactly what Attorney Miller was just discussing. There are so many things you do for trial; you have to work the case up, so on and so forth.

Mr. Kelly's been an attorney for many, many years. Mr. Miller referenced the pages and pages of notes he had. In this case the standard is, first of all, that there must be a significant omission and that it was outside the range of professionally competent assistance; that's the threshold issue.

And in this case what we have is a conversation with the defendant in preparation for the case where they discuss specifics. In Exhibit Number 4, they talk about -- there are specific quotes in there, they're talking for hours, the defendant finds significance in some of the statements that were made -- I don't have Exhibit 4 in all of this. Can I have Exhibit 4, please?

THE COURT: Yes.

MS. MERRIWETHER: Thank you. He finds direct

quotes between himself and Rebecca Balz in his conversations he had with her. Those aren't written down in quotes. He talks about this conversation that he had with her on this Friday.

He does not mention one thing about her being upset with him, her telling him to fuck off, her calling him an asshole. He doesn't mention anything about writing her cell phone number on his hand, and then what he does mention, though, is that he tried to call her.

Well, if she was so upset that he was rejecting her advances, then she would have been ecstatic that he called her on that weekend before it was reported.

I mean what we have here is not the omission. What we have here is the defendant adding facts after this whole case is over and trying to fit it into this motive theory when he had a -- he's entitled to effective assistance of his attorney.

If he is deficient with his attorney, that's a different issue. His attorney sat down, spent the time with him, went through all of these, gave him an opportunity to have this open dialogue, kept in contact with him, and this is -- this coming up here is not new evidence because it was known to the defendant at the time and it certainly isn't deficient performance on Mr. Kelly's part. Then the standard becomes, is there prejudice to deprive the defendant of a fair trial and

the result is not reliable, so basically, but for Mr. Kelly's actions the result would have been different.

And in this case we have a defendant who lied to law enforcement, which there was a strategic decision not to put him on the stand.

The evidence that he's expecting to be presented doesn't make -- it's totally contradictory as to his theories about what happened on this Friday.

He never told his attorney apparently that there was someone else in the parking lot who saw this conversation, but in fact the witness who testified by phone never heard what happened in the conversation, wasn't there, just saw them talking and they parted ways, that was it.

There are going to be errors in trials. There are going to be things that are missed. The issue is would it undermine the reliability of the result of the proceedings. It's not about a perfect trial, it's about a fair trial.

And what the defendant has brought forward as a result of either it's just being said now apparently, it's just being said now for the first time because neither Mr. Kelly nor the defendant told him, he stated that, and then even if it had been said at the time, given the credibility issues with the defendant, the fact that it's illogical what's being said about this conversation, Mr. Conner's testimony corroborates the victim's version that her and the defendant didn't have a

relationship; they weren't friends, they weren't associates, they didn't hang out together. It just corroborates what she testified to, and it would not have impacted the case so significantly if you found that Mr. Kelly was in fact even deficient, that the reliability of the outcome should be questioned, and I think he has not met his burden both on the facts presented here today.

THE COURT: First I want to address the new evidence allegation because I think that's all the things that were raised when I read this motion that got my attention.

In the motion the court is told that testimony would be presented today that the defendant -- or the complaining witness was overheard making the statement that the rape never happened and that she just said it happened to get him in trouble because she was pissed off.

Then the testimony that's presented today, however, is far different that it isn't clear that the complaining witness was necessarily talking about the rape. The word rape wasn't used. The witness didn't even hear her use the name Juice or the defendant's actual name, and the statement was it never happened; I just did it to piss him off, and that is a lot less strong to me.

I just don't -- and I've also had a chance to judge the demeanor of the complaining victim at this hearing where she denies that she ever made that statement.

It's a very difficult issue to address, but I find that it is so vague that it is not -- just not clear that that's what she was referring to, if she made the statement at all. I'm not convinced that she did.

I find it incredible that the day after trial in a public setting that the victim would be telling people that she basically committed perjury. I just don't find that a reasonable probability exists that a different result would be reached at trial given the vagueness of the Borntreger testimony, so I'm denying the motion for a new trial based upon evidence -- the alleged new and discovered evidence.

With respect to the ineffective assistance of counsel, I have to agree with the state that it appears to me that the defendant is bringing up information now that was never conveyed to his attorney, and that it was a matter of very clear trial strategy that the defendant was not going to testify, so I do not find that Mr. Kelly's performance was outside the range of the professionally competent assistance or inefficient, so I'm denying the motion for a new trial also on that ground.

That gets us to then the request to continue the stay of the probation -- jail sentence as a condition of probation.

What is the state's position in that regard?

MS. MERRIWETHER: I believe we've been staying this since February of this year to give the defense an opportunity

to file the postconviction motion. It's now July. I think probation should have an opportunity to, you know, deal with Mr. Gajewski as they see fit to impose the sentence, the jail sentence conditional time.

I think the court has provided an opportunity for the appeal, so I am -- I think the probation, if they see fit, should be able to impose the conditional time.

THE COURT: How long is the probation period?

MR. MILLER: Five years.

MS. MERRIWETHER: Five years. It's only six months jail and six months imposed but stayed.

THE COURT: I will continue the stay to allow you to pursue appeal to the Court of Appeals.

MR. MILLER: Okay. Thank you, Your Honor.

THE COURT: I recognize this was a very -- I didn't preside over it, it was a very close case, I understand.

MS. MERRIWETHER: Is there a timeline for that that I can tell probation and parole as far as what that means until the judgment comes down?

MR. MILLER: It would be until remittitur. That's when the appeal ends.

MS. MERRIWETHER: Okay.

THE COURT: So he's still on probation. It's just the jail sentence that we're staying?

MR. MILLER: Correct. Thank you, judge.

Would you like me to prepare a written order? Can I do that?

THE COURT: Please.

MR. MILLER: Thank you.

THE COURT: Okay.

(Proceedings concluded.)

STATE OF WISCONSIN)
) SS.
COUNTY OF MARATHON)

I, Jan M. Murray, CSR, Official Reporter in and for the State of Wisconsin, do hereby certify that I reported the foregoing proceedings and that the foregoing transcript, consisting of 77 pages is a true and correct transcript of my original stenographic notes transcribed to the best of my ability at said time and place.

Dated at Wausau, Wisconsin, this 19th day of July, 2007.

Jan M. Murray, CSR
Official Reporter

CERTIFICATION FOR APPENDIX OF
PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN
(*State of Wisconsin v. Jordan L. Gajewski*, No. 2007AP1849-CR)

CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.19(2)(b), I certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a). The appendix contains:

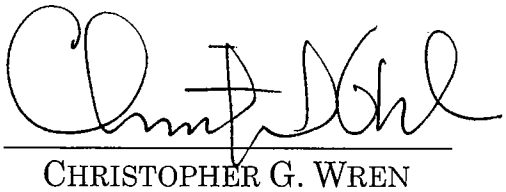
(1) a table of contents;

(2) the findings or opinion of the trial court; and

(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the supplemental appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.



CHRISTOPHER G. WREN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2007AP1849 CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JORDAN L. GAJEWSKI,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

MILLER & MILLER
Attorneys for the Defendant-Appellant
By Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022
(715) 425-9780

On appeal from the Circuit Court
of Marathon County, Hon. Patrick Brady,
Circuit Judge, presiding; and the Court of
Appeals, District III.

TABLE OF CONTENTS

CASES CITED

Wisconsin Cases

United States Cases

WISCONSIN STATUTES CITED

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2007AP1849 CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JORDAN L. GAJEWSKI,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

ISSUES FOR REVIEW

1. Must a reviewing court apply a burden of proof to the defendant's postconviction evidence in addition to the standard of review and if so, did the Court of Appeals fail to do so?

The State raises this issue for the first time on appeal to this Court. The Court of Appeals correctly applied legal standards de novo to undisputed facts and correctly analyzed defendant's proffered evidence according to its probable impact on the verdict.

2. Did the Court of Appeals fail to apply an "objective standard of reasonableness" to trial counsel's actions when it determined trial counsel was deficient?

The trial court found trial counsel's actions were reasonable because the defendant failed to provide counsel with all the evidence he proffered at the postconviction hearing, and further, trial counsel's strategy to not have defendant testify presumably would have prevented defendant from introducing his proffered evidence.

The Court of Appeals found trial counsel was deficient because he should have used the information defendant provided him and investigated further. Had he investigated further, he would have found evidence highly relevant to the complaining witness' credibility. Trial counsel's strategic decision to not have defendant testify was based upon incomplete information. In the alternative, trial counsel could have used the exculpatory evidence defendant provided to him originally or the additional information he should have obtained through reasonable investigation without having defendant testify. The application of constitutional standards to undisputed facts is a question of law reviewed de novo.

3. Must a reviewing court view all facts in a light most favorable to the state when a defendant's postconviction motion is denied, even if the facts were neither expressly nor implicitly found against the defendant and were largely undisputed?

The State raises this issue for the first time on appeal to this Court. The Court of Appeals correctly applied legal standards de novo to undisputed facts and correctly analyzed defendant's proffered evidence according to its probable impact on the verdict.[1]

1 Defendant also made a "new evidence" claim and asked the court of appeals to reverse pursuant to Wis. Stat. § 752.35. As the court of appeals reversed on the ineffective assistance of counsel claim it did not address these issues. Defendant does not waive these issues.

STATEMENT OF FACTS

1. Trial Evidence.

RLB had nearly finished her Junior year in high school. On May 8, 2005, after a night of parties and drinking, she ended up at her friend, Ashley Zinkowich's, house sometime after midnight. (47D: 106-107, 111, 164, 230, 261). She arrived with Zinkowich and two other friends, Kori and Jenna. (47D:109, 114). Gajewski and his friend, Mike, also arrived at Zinkowich's house in a separate car. (47D:110, 113, 263-64, 275). RLB knew Gajewski, who was a year ahead of her at the same high school. (47D:110). Upon arriving, RLB testified she walked through the house and went to sleep on the couch in the small living room downstairs. (47D:111, 135).

According to RLB, she awoke in the early morning daylight. (47D:113, 115). Mike was sleeping on the couch and she was on the floor. (47D:113). She didn't know how she got from the couch to the floor. (47D:114). Gajewski and Kori were also on the floor. (47D:113). Gajewski was somewhere between "three and ten feet" away from her. (47D:136). She believed Zinkowich and Jenna were upstairs. (47D:114, 147).

Gajewski come over to RLB and started kissing her. (47D: 115). She asked him what he was doing. He told her not to worry and that it was OK. (47D:171). He unhooked her belt buckle. (47D:143). He unbuttoned her top pants button. (47D:144). He unbuttoned each button on her fly. (47D:144). RLB agreed her pants were "snug" and it took some time and effort to "work" them off. (47D:115, 117, 145, 156, 177-178). RLB did not remember if she tried to keep her jeans from coming off or tried to pull them back on. (47D:148, 150). She conceded the only reason a guy

would come over to her and take her pants off was to try and have sex with her. (47D:145). She also agreed there were two other people in the room she knew well who would have helped her had she yelled and woken them up. (47D:145, 146, 148). Gajewski did not threaten her in any way, and she had no reason to fear that crying out for help would put her in danger. (47D:149-150). When asked why she didn't scream out, she answered: "Because it happened so fast and before I knew it – I don't know, I thought I could just deal with it myself." (47D:127).

Gajewski took off his pants and began having sexual intercourse with her. It was then she told him "no," she didn't want to. (47D:169). She said "no" loud enough for him to hear but not loud enough to wake anyone up. (47D:157-158). Nonetheless, he "continued to have sex" with her until she said no a second time and started to push on his chest and hips. (47D:115, 117, 179).[2] He then stopped, rolled over, and told her he didn't understand her. (47D:115). Mike and Kori were still both sleeping. (47D:119). She "laid there for a little while" and then got up and drove herself home. (47D:199-120, 160). No one was awake at the time and she did not believe anyone saw her leave. (47D:120, 160).

The following week RLB saw Gajewski at school. At trial she testified she did not "remember" if she had a conversation with him. (47D:160). When asked by defense counsel "[i]f you had been raped a few days earlier by [Gajewski], you wouldn't want to talk to him at all; would you?"; she responded: "Right." (47D: 161). She told Det. Hanousek, however, that she spoke with Gajewski sometime around Wednesday, May 11, 2005, and that Gajewski said he

2 In her direct testimony, she stated she kept telling him "no." (47D:115, 117). On redirect, however, she stated Gajewski stopped the second time she said "no" when she also pushed against him. (47D:179).

told Mike they had sex. (47D:160-161). A "few days" after her conversation with Gajewski she learned from her friend Zinkowich that Zinkowich's boyfriend, Tom Aschbrenner, had heard Gajewski talking about having sex with RLB. (47D:121, 161). RLB then told Zinkowich that Gajewski had raped her. (47D:121). Zinkowich "advised" RLB to talk to someone and a few days later on Monday, May 16, 2005, Zinkowich and RLB met with one of their teachers at school. (47D:122). The teacher advised them to see the principal. (47D:122). The principal called RLB's mother and the police. (47D:123). RLB wrote out a statement for Det. Bemke on May 16, 2005. (47D:123-124). She gave another statement to Det. Hanousek a few days later. (47D:125, 131).

RLB had a medical examination after she spoke with the police. The examination did not uncover any evidence of non-consensual intercourse. There were no bruises to RLB's body, no injuries or bruises to her groin or pelvic area, and no cuts or scrapes inside her vagina. (47D:150-152, 156). No physical evidence was collected. (47D:152-153).

The State also had Tom Aschbrenner testify to a conversation he allegedly had with Gajewski. Aschbrenner was Zinkowich's boyfriend at the time. He first testified that sometime in May of 2005—he could not remember the date or place—he and Gajewski were at a party. Gajewski allegedly told Aschbrenner that he and RLB had sex, and that RLB "said no, no right in the middle of it – [but that Gajewski] just kept going." (47D:287). In his statement to the police, however, Aschbrenner was sure the party occurred on Saturday, May 14, 2005. Although he spoke to the police on May 20, 2005—only 6 days after the party—he still could not identify where the party took place. What Gajewski allegedly told him also differed. In this original version, Gajewski allegedly said: "When Becky was there, I fucked her and she was saying to me, I can't do this and

when I would speed up, she would shut up and when I would slow down, she would say I can't do this, I can't do this." (47D:291). When confronted with his May 20th statement, Aschbrenner agreed May 14th must have been the date he talked to Gajewski. (47D:291-292). The State referred to Aschbrenner's testimony some 12 times in its closing argument. (47D:317, 318, 321, 323, 329, 330, 332-333, 333, 363, 364, 365, 367).

Zinkowich also testified, confirming she confronted RLB after her boyfriend, Tom Aschbrenner, told her what Gajewski had "said" about RLB. Zinkowich never testified, however, as to what, precisely, Aschbrenner told her Gajewski had "said." (47D:269, 282-284).

The only witness called by the defense was Kori King. He testified he was sleeping three feet away from RLB and did not hear anything. (47D:188, 190). He also testified he saw RLB the next morning and did not recall she was upset, distressed or acting unusual in any way. (47D:309, 310). Gajewski did not testify. (47D:302).

2. Postconviction Evidence.

a. Ineffective Assistance of Counsel Claim.

At the postconviction hearing, Gajewski testified he had a conversation with RLB on May 13, 2005, which was five days after the alleged sexual assault but three days before RLB reported it to the authorities. The conversation occurred while Gajewski was waiting by his car in the high school parking lot for Casey Conner, a high school friend he was giving a ride. RLB approached Gajewski and started speaking to him. She said "Hi," and asked what he was doing over the weekend. She told him she was attending a music concert on Saturday, and asked if he wanted to go with her. Gajewski explained that he was going to the prom on Saturday night and wouldn't be able to go. (R 51:44).

RLB asked who he was going to the prom with and Gajewski told her it was none of her business. RLB responded that she wanted him to call her in the event he didn't go. RLB grabbed his hand and wrote her cell phone number on it. At that point, Gajewski told her he just wasn't interested in her. RLB then got very upset and told Gajewski he was an "asshole" and he should just "fuck off." (51:45-46). She then "stormed off." Gajewski never saw her again until the trial. (51:46). Casey Conner arrived at the car just seconds after RLB left. (51:46). Gajewski acknowledged that he probably tried to call her that weekend because he was remorseful about how he had handled the situation. (R 51:55).

Gajewski also identified a sign-up sheet and a prom picture showing he had attended the prom at another high school with Amanda Urmanski on Saturday, May 14, 2005. (51:48; Exhibits 1 and 2; Appendix (A:) pp. 5, 6).

Casey Conner corroborated the meeting between RLB and Gajewski. He testified that as he was walking across the parking lot, he saw Gajewski and RLB having a conversation next to Gajewski's car. (51:7-8, 10). He did not hear any of the conversation because RLB left before he arrived. (51:8). He remembered the date because RLB made her allegations against Gajewski the following Monday, and Conner thought it was unusual they would have been speaking together only the Friday before. (51:8).

Trial counsel testified he did not have any independent recollection of his discussion with Gajewski concerning the Friday, May 13,th meeting between Gajewski and RLB, but did have notes showing Gajewski had raised the issue. (51:14-15; 43: Exhibit 4; A:7). These notes reflected one of their "preliminary" conversations about the case. (51:21). According to these notes, Gajewski told trial counsel he had talked to RLB on the Monday after the alleged rape, and had other short conversations with her

during the week. (43:Exhibit 4). The most significant conversation was on Friday, May 13th. (51:1). The notes reflect the following: Gajewski and RLB discussed what each other was doing over the weekend: Gajewski maybe going to a "party," and RLB was going to a music concert; RLB wrote her cell phone number on Gajewski's hand; and Gajewski tried calling RLB that night or Saturday night, and one other time, but there was no answer. (51:16; 43:Exhibit 4).

What the notes don't reflect is: the time or location of the conversation; that Casey Conner witnessed the conversation; that RLB invited Gajewski to go with her to the music concert and that he told her no; that Gajewski told RLB he was going to the prom that Saturday with another girl and when RLB asked with whom, Gajewski told her it was none of her business; that Gajewski told RLB he did not want any kind of relationship with her; and finally, that RLB got upset, called Gajewski an "asshole," and told him to "fuck off." (51:15, 23-24). Trial counsel would have written these additional facts down had he heard them. He conceded, however, that he probably didn't hear them because he didn't ask. (51:27, 28-29). When pressed by the State as to whether it was possible he had asked and Gajewski just hadn't provided him with helpful answers, trial counsel responded:

> I think it's more likely that I didn't ask. I think if I had specifically asked were there any witnesses, I would have written down the answer, so I probably didn't ask. .... If I thought the question was important enough to ask it specifically, I probably would have written down the answer.

(51:29-30).

Gajewski agreed his lawyer's notes probably reflected what he told him. (51:46). This was their one and only face-to-face conversation until just prior to trial. (51:52). It

was a small part of a long conversation they had concerning the case. (51:20, 29). Gajewski did not give any more details on the May 13th encounter because trial counsel had asked him a general question about whether he talked with RLB the week following the alleged assault, and after he told him the gist of it, trial counsel moved on. (51:47, 54). Trial counsel did not seem overly interested and did not ask any follow-up questions. (51:47, 54). Trial counsel did not ask whether Gajewski knew of a motive for RLB to lie. (51:54).

Trial counsel agreed it was his duty to ask questions in order to determine whether there were facts relevant to the case. Gajewski's job was to answer them. (51:16). Gajewski, in particular, was a young man and unsophisticated in the legal process. (51:20).

Trial counsel agreed Gajewski's allegations about the May 13th meeting would have provided good motive evidence. (51:18). He agreed that a jury would have found such behavior inconsistent with someone who had just been sexually assaulted by that person. (51:16). Trial counsel also agreed he was unable to establish a plausible motive for RLB to lie and assumed this did hurt the defense. (51:17, 18).

Trial counsel advised Gajewski not to testify at trial and Gajewski followed that advice. (51:16, 47). The sole reason for this recommendation was because Gajewski had lied to the police in his initial statement about whether he had sex with RLB, and this would have created a credibility issue since he subsequently admitted he had. (51:17, 27). Trial counsel acknowledged that any decision concerning whether the defendant would testify or not required balancing the potential benefit against the potential cost. (51:19). Because Gajewski's allegations about the May 13th meeting would have provided good motive evidence, however, trial counsel conceded it "certainly would have

been a factor in my decision-making process." (51:18, 31). Trial counsel also agreed that consent would have been a viable defense. (51:17).

Trial counsel also conceded that even had Gajewski not testified, he still could have cross-examined RLB about the May 13, 2005, meeting, and still could have called Casey Conner to the stand to corroborate that the meeting took place. (51:19). He could have also put on proof that Gajewski attended the prom on May 14, 2005, with Amanda Urmanski. (51:19, 47-49, 52). Trial counsel admitted that even if all he had was the information in his notes, he should have at least cross-examined RLB on the May 13th conversation—especially the fact that she wrote her cell phone number on his hand. (51:16).

The last person to testify at the postconviction hearing was RLB, who was called by the State. Referring to the week after the alleged assault, RLB denied asking Gajewski to go out with her. (51:59). She also denied asking him to call her. (51:59). When asked if she gave him her cell phone number, however, she responded "I don't recall." (51:59). RLB has never denied that the May 13, 2005, meeting occurred.

b. New Evidence Claim.

Fred Borntreger testified that he was well-acquainted with RLB's family and that her cousin was one of his best friends. He also knew her uncles, her mom and dad, as well as other members of the family. He had even attended RLB's graduation party, and had been invited to her grandparent's 50th anniversary party. (51:32-33). He knew Gajewski well enough to say "Hi" when he saw him, but that was it. He agreed his relationship with RLB's family was much closer. (51:33). He was aware of the allegations against Gajewski, but did not know anything had come of them. (51:33-34).

On either August 18 or 19, 2006, Borntreger attended the Athens town fair. (51:34). When he was walking up to the beer tent he heard someone say "Juice," which was Gajewski's nickname. This caught his attention. He stopped and looked in the direction it came from and then saw RLB, who said right afterwards: "oh, it never happened; I just did it to piss him off." (51:35, 37, 38, 40). RLB was right next to him when she said this. (51:35). Borntreger was "pretty positive" she was referring to the sexual assault allegation. (51:39). RLB may have also said some other things he could not specifically remember which may have brought him to that conclusion. (51:39).

In her postconviction testimony, RLB denied she said anything about the sexual assault never happening, but did admit she attended the Athens Town fair on August 19th, 2006. (51:58). This was the day after Gajewski was convicted.

3. Trial Court Ruling.

The trial court's decision on Gajewski's ineffective assistance of counsel claim, in its entirety, is as follows:

> THE COURT: ....
>
> With respect to the ineffective assistance of counsel, I have to agree with the state that it appears to me that the defendant is bringing up information now that was never conveyed to his attorney, and that it was a matter of very clear trial strategy that the defendant was not going to testify, so I do not find that Mr. Kelly's performance was outside the range of the professionally competent assistance or inefficient (sic), so I'm denying the motion for a new trial also on that ground.

(51:73-74; A:2). While the trial court had not presided over the trial, it did recognize "it was a very close case." (51:75; A:3).

4. Court of Appeals Decision.

In an unpublished, per curiam decision, the court of appeals reversed. The court of appeals agreed with Gajewski that his trial counsel was ineffective, and did not address his allegation of newly discovered evidence or his request for reversal in the interest of justice.

The court of appeals opened its discussion by citing the two prong test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). (C.A. Decision, p. 4; A:11). It specifically noted "[d]eficient performance *is judged on an objective standard of reasonableness.*" *Id.* (emphasis added). It also described the prejudice prong, although this was not a contested issue in the appeal.[3]

The court of appeals agreed with Gajewski that trial counsel was ineffective "in several ways":

> First, counsel should have asked for more information from Gajewski that would have revealed details of his after-school encounter with Rebecca. This additional information could have been used to cross-examine Rebecca as to motive for fabricating or exaggerating the assault. Counsel could also have offered Connor's testimony to prove that some encounter occurred after the assault. Second, on the information counsel had about the encounter, he could have and should have cross-examined Rebecca on whether she gave Gajewski her phone number.

---

3 The state did not contest the prejudice prong in its court of appeals brief. Therefore, it conceded there is a reasonable probability the result of the proceeding would have been different had the jury heard the proffered evidence. See e.g. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) ("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute."). Therefore, the only issue on appeal is whether trial counsel's performance was deficient.

If Rebecca had responded that she did not recall giving Gajewski her phone number, as she did at the postconviction hearing, the jury could reasonably doubt the victim would not recall this unusual behavior. The jury could reasonably doubt the assault occurred if the alleged victim gave the assailant her phone number after the assault.

¶10 Trial counsel should also have developed evidence regarding Rebecca's motive for falsely accusing Gajewski. While the trial court correctly noted that counsel did not possess all of this information, we fault counsel, not his client, for failing to develop it. A complainant's motive for falsely accusing a person of sexual assault is an obvious concern that should be investigated. Gajewski told his counsel about an encounter with Rebecca after the alleged assault and three days before she reported it. A reasonable attorney would have inquired further about that encounter to determine whether it provided a motive for false accusation. Counsel's failure to investigate facts that were readily available to him and his failure to employ those facts at trial to undermine Rebecca's credibility falls below an objective standard of reasonableness. *See* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶25, 286 Wis. 2d 721, 703 N.W.2d 694. When a case hinges on witness credibility, trial counsel has a duty to investigate and present impeaching evidence when counsel was or should have been aware of its existence. ***Id.***, ¶11.

¶11 Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. ***Strickland***, 466 U.S. at 690-91. However, strategic choices made after less than complete investigation and without full knowledge of the available facts cannot be described as a reasonable strategic decision. *See* ***Wiggins v. Smith***, 539 U.S. 510, 528 (2003).

¶12 Because the State's case depended on Rebecca's credibility and her account of an assault in the presence of others might be considered improbable, this was a close case. Counsel's failure to investigate the school encounter, his failure to present evidence of Rebecca's behavior that appears inconsistent with the alleged assault, and his failure to investigate and present evidence explaining her motive

for false accusation undermine our confidence in the outcome.

(CA Decision, pp. 4-5; A:11-12).

ARGUMENT

I. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN HE FAILED TO USE ALL AVAILABLE EVIDENCE SURROUNDING THE POST-ASSAULT CONVERSATION BETWEEN RLB AND GAJEWSKI.

A. Legal Standards: Ineffective Assistance of Counsel claim.

Defendant was denied his right to effective assistance of counsel under the 6th Amendment of the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution. *Strickland v. Washington*, 466 U.S. 688 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711 (1985). Wisconsin uses a two-prong test to determine whether trial counsel's actions constitute ineffective assistance of counsel. *State v. Littrup*, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct.App. 1991). The first half of the test considers whether trial counsel's performance was deficient. *Id.* Trial counsel's performance is deficient if it falls outside "prevailing professional norms" and is not the result of "reasonable professional judgment." *Strickland*, 466 U.S. at 690. Trial counsel, for example, has a duty to be fully informed on the law pertinent to the action. *State v. Felton*, 110 Wis.2d 485, 506-507, 329 N.W.2d 161, 171 (1983). If counsel's performance is found to be deficient, the second half of the test considers whether the deficient performance prejudiced the defense. *Id.* The defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *State v. Harvey*, 139 Wis.2d 353, 375, 407 N.W.2d 235, 246 (1987). The *Strickland* test is not outcome determinative. The defendant need only demonstrate the outcome is suspect. He need not establish the final result of the proceeding would have been different. *State v. Smith*, 207 Wis.2d 258, 275-276, 558 N.W.2d 379, 386 (1997).

B. The Court of Appeals applied the correct legal standards.

1. Defendant's evidentiary burden at the postconviction hearing has no bearing on the standard of review.

The state first argues the court of appeals "committed clear legal error when it failed to determine whether Gajewski satisfied his obligation to prove, by clear and convincing *evidence*, that his trial lawyer provided ineffective assistance." (Emphasis added) (State's Brief p. 25-26). The state further argues that had it applied the "clear and convincing evidence standard," the court of appeals "could not have reversed...." *Id.*

As a threshold matter, this issue was not argued to the Court of Appeals and is therefore waived. At no time did the state argue in its brief to the Court of Appeals that *the appellate court* must review the trial court's decision by applying a clear and convincing burden of proof. The state simply argued the deficiency prong of the ineffective claim was not proven because Gajewski failed to give his counsel enough information about the May 13th meeting to warrant its use or further investigation. There was no dispute, however, as to what information Gajewski gave to counsel. The issue, therefore, both in the trial court and the court of appeals, was one of applying undisputed facts to a legal standard.

Alternatively, the state's argument is fundamentally flawed in that it confuses an evidentiary burden at the fact-finding level with the standard of review on appeal. The state refers to Wisconsin case law suggesting a defendant must prove his ineffective claim by clear and convincing evidence. (State's Brief pp. 28-29). As the state acknowledges in its brief, however, *Strickland* does not require a defendant to meet a particular burden of proof. (State's Brief p. 32). Rather, it states defendant must "show" that counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-688. Even if a defendant must prove ineffective assistance of counsel by clear and convincing evidence, the state cites no authority for the proposition that on appeal, *an appellate court* must also apply a burden of proof to evidence proffered at a postconviction hearing. Indeed, the burden of proof at an evidentiary proceeding does not ever, to defendant's knowledge, equate to a standard of review. Requiring an appellate court to apply a clear and convincing burden of proof—i.e. weighing evidence, drawing inferences, and making credibility determinations—would place it squarely in the role of fact-finder. Not only does the state's argument fail to make any sense, it completely undermines the separation between factfinder and reviewing court.

The state's proposed clear and convincing "burden of proof" likewise has no place in determining the impact Gajewski's proffered evidence would have on a jury. While the state did not contest prejudice in its brief to the court of appeals and, as far as Gajewski can tell, does not do so here, the state's proposed standard of review makes no distinction between historical facts (e.g. what trial counsel knew or did, and what Gajewski did or did not tell him) and prejudice (whether the evidence Gajewski provided his lawyer or his lawyer should have uncovered would undermine confidence

in the outcome). The state's argument ignores the fact that prejudice contains its own analytical standards.

Prejudice exists when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Harvey*, 139 Wis.2d at 375; *Smith*, 207 Wis.2d at 275-276. The test, then, is an objective one which considers the impact the proffered evidence would have on a hypothetical jury, taking into account the evidence at trial.

The prejudice test is nearly identical to that involving a new evidence claim, where the defendant must show "a reasonable probability exists that a different result would be reached in a trial." *State v. Edmunds*, 2008 WI App 33, ¶13, 308 Wis.2d 374, 746 N.W.2d 590. The important point for present purposes is not whether the ineffective assistance of counsel and new evidence prejudice tests are precisely the same, but how proffered evidence is analyzed for prejudice.[4] The *Edmunds* court expressly rejects a clear and convincing burden of proof, even at the trial level: "[t]he reasonable probability factor need not be established by clear and

---

4 Gajewski is not trying to open a debate as to whether prejudice is easier or harder to prove with new evidence than it is with an ineffective assistance of counsel claim. *Strickland* took the position that the "appropriate standard of prejudice should be somewhat lower" in an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 693-694. *Edmunds* notes, however, that under the new evidence test articulated by this Court in *State v. McCallum*, 208 Wis.2d 463, 561 N.W.2d 707 (1997), "the dispute as to whether a defendant needs to show that confidence in the outcome of the trial is undermined or make an outcome determinative showing becomes a very fine distinction." *Edmunds*, at ¶13. The point Gajewski is trying to make is that the methodology in assessing postconviction evidence not previously heard by the jury is similar in both instances, and therefore *Edmunds* and *McCallum* illustrate an appropriate framework for this case as well.

convincing evidence, as it contains its own burden of proof." *Id. Edmunds* then cites *State v. McCallum,* 208 Wis.2d 463, 468, 561 N.W.2d 707 (1997), for guidance on how the proffered evidence should be analyzed.

In *McCallum,* the trial court denied the defendant's motion because it found the complainant's recantation "less credible" than the original accusation. The trial court erred, this Court held, because the question was not whether one version was more credible than the other, but because there was a "reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." *Id.*, at 474. As the court noted, a reasonable jury could find the recantation "less credible" than the original accusation, and may not even believe it, but "nonetheless, have a reasonable doubt as to a defendant's guilt or innocence." Only a finding that the recantation was "incredible" as a matter of law would necessarily cause the motion to fail. *Id.* at 475.

The proffered evidence here is analogous to the "new evidence" in *Edmunds* and *McCallum*, and should be similarly treated. The question, therefore, is not whether Gajewski's postconviction testimony about the May 13th, 2005, encounter meets some appellate burden of proof or should be viewed more favorably to one side or the other, but whether, if heard by a jury (and not incredible as a matter of law), it would undermine confidence in the outcome of the trial. In other words, the state's arguments are simply inapplicable as the probative value of proffered evidence is determined by using a distinct set of analytical principles.

The standard of review on an ineffective assistance of counsel claim is a mixed question of law and fact. On appeal, a circuit court's findings of historic fact—i.e. what happened—will not be overturned unless clearly erroneous. Whether those facts amount to deficient performance or

prejudice, however, are questions of law reviewed de novo. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis.2d 571, 665 N.W.2d 305; *State v. Johnson*, 153 Wis.2d 121, 127-128, 449 N.W.2d 845 (1990). The state gives lip service to the standard of review and cites it in its brief, but, as its argument shows, fails to apply it. (State's Brief p. 25).

2. The reviewing court cannot assume facts were implicitly found unless they are necessary to support the trial court's holding.[5]

The state also argues the court of appeals erred "when it failed to view the record in the light most favorable to the circuit court's decision." (State's Brief, p. 37). The state cites *State v. Hubanks,* 173 Wis.2d 1, 496 N.W.2d 96 (Ct. App. 1992) in support of this proposition. *Hubanks* does not come any where near supporting the state's argument. In *Hubanks*, the defendant alleged his counsel was ineffective for failing to call two witnesses he claims would have corroborated his defense and provided character evidence. Trial counsel, however, flatly denied defendant told him of these potential witnesses or any other such witnesses. The trial court found Hubanks was not denied effective assistance of counsel, but failed to make any specific findings of fact. On review, the appellate court concluded the trial court implicitly made a credibility determination contrary to Hubanks, because, given the outcome, this was a "required" finding of fact. *Id.* at 27.

Hubanks does not, as the state contends, require *or allow* the assumption that all facts potentially beneficial to the defendant were implicitly resolved against him when his postconviction motion was denied. A reviewing court may

---

5 While this is the third of the state's three issues, it appears to defendant to more logically follow the first and will be argued in that order here.

assume facts were implicitly found only to the extent they are logically necessary to support the trial court's decision. See e.g *In re Estate of Persha*, 2002 WI App 113, ¶49, 255 Wis.2d 767, 649 N.W.2d 661 ("When a court does not expressly make a finding that is *necessary* to its decision, we may assume it made that finding,...."); *State v. Long*, 190 Wis.2d 386, 398, 526 N.W.2d 826, 831 (Ct.App. 1994) ("Even when a trial court fails to make express findings of fact *necessary* to support its legal conclusions, we assume that the trial court made such findings in the way that supports its decision. [cites omitted]. The trial court could only have denied the suppression motion if it believed the police officer's version of the interrogation was more credible than [the defendant's]."); *State v. Echols*, 175 Wis.2d 653, 672-673, 499 N.W.2d 631 (1993) ("Where it is clear under applicable law that the trial court *would have granted the relief* sought by the defendant had it believed the defendant's testimony, its failure to grant relief is tantamount to an express finding against the credibility of the defendant." "Implicit in the finding that the statement was freely made is the finding that promises were not made to coerce the defendant into making the statement."); *State v. Wilks*, 117 Wis.2d 495, 503, 345 N.W.2d 498 (Ct. App. 1984) ("...where a trial court does not expressly make a finding *necessary* to support its legal conclusion, an appellate court can assume that the trial court made the finding in a way that supports its decision.") (Emphasis added). The State cites no authority for the sweeping proposition that all facts are implicitly found against the defendant when his postconviction motion is denied.

The state's argument is further undermined by its attempt to compare a postconviction motion with a sufficiency of the evidence claim. Gajewski is not challenging sufficiency of the evidence to support the verdict. None of the cases cited by the state (State's Brief, p. 37) apply a sufficiency of the evidence analysis to an ineffective assistance of counsel claim, and therefore do not

provide any authority for such a radical change in the standard of review. Applying a sufficiency of the evidence analysis to a postconviction claim, moreover, would undermine the court's constitutional duty to determine whether the historical facts constitute a constitutional violation.

More importantly, the state's argument is ultimately irrelevant because none of the historical facts directly pertaining to trial counsel's actions and decisions are disputed. Neither the state nor Gajewski have ever disputed that trial counsel's notes are anything other than an accurate reflection of what Gajewski told trial counsel prior to trial. RLB, moreover, never denied the May 13th meeting took place. (State's Brief. P. 38). Nor did she deny giving Gajewski her phone number. (51:59). The trial court's decision does not change this. The trial court denied Gajewski's claim for two reasons: (1) trial counsel's strategic decision to keep Gajewski off the stand and, (2) the fact that Gajewski was "bringing up information now that was never conveyed to his attorney." (51:74). In other words, the trial court's decision was premised on two legal conclusions. First, that a strategic decision made by counsel to keep Gajewski from testifying prevented him from presenting any evidence of the May 13th meeting; and second, that trial counsel was not deficient for failing to present evidence of the May 13th meeting because Gajewski had a legal duty to inform trial counsel of all the available evidence. The trial court did not expressly find, nor would it be necessary to its holding to implicitly find, that both Gajewski and his trial counsel were lying about what was contained in trial counsel's notes or that, presumably, the notes were fabricated.

A reviewing court is free to draw legal conclusions from trial counsel's notes and the surrounding undisputed testimony without deference to the trial court. *State v. Foust*, 214 Wis.2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997)

(The application of constitutional standards to undisputed facts is a question of law decided de novo). Indeed, as trial counsel's notes constitute documentary evidence, the reviewing court may draw it own factual inferences as well. *Cohn v. Town of Randall*, 2001 WI App. 176, ¶7, 247 Wis.2d 118, 633 N.W.2d 674 (Appellate court is not bound by the inferences that the circuit court has drawn from documentary evidence); *Frito-Lay, Inc. v. So Good Potato Chip Co.*, 540 F.2d 927, 930 (8th Cir. 1976) ("[W]here the evidence is documentary...the Court of Appeals has the right to interpret such evidence for itself and is equally competent as the trial court to do so.") In short, there is no authority supporting, nor logic to, the state's argument that undisputed historical facts must meet some kind of appellate evidentiary burden of proof, or must be viewed most favorably to the state, when no such findings of fact were expressly nor implicitly made by the trial court.

3. The court of appeals both noted and correctly applied an "objective standard of reasonableness" to trial counsel's actions.

The state next argues the court of appeals must have failed to apply an "objective standard of reasonableness" to trial counsel's actions. This is because, in essence, the information Gajewski provided trial counsel, which was contained in his notes, "would not have put a reasonable attorney on notice that he could extract a motive from undisclosed information about the 'sig[nificant] conversation'" of May 13th, 2005. (State's Brief p. 34). This is the crux of all the state's arguments.

The court of appeals acknowledged its duty to apply an "objective standard of reasonableness" to trial counsel's actions at the outset of its analysis. (CA Decision, p. 4; A:11). In its discussion, it referred to what a "reasonable attorney" would do and ultimately made the express finding

that trial counsel's failure to investigate fell "below an objective standard of reasonableness." (CA Decision, p. 5; A:12). In short, there can be no dispute the court of appeals was aware of the proper standard and applied it.

The state's argument is based on nothing more than disagreement with the result. Searching for an argument, the state reasons that the only way it could have lost is if the court of appeals failed to apply the proper standard. The state then attempts to apply its version of an "objective standard" in the most restrictive possible way, by largely ignoring or, if necessary, "reinterpreting" both the legal duties of counsel and any fact beneficial to Gajewski.

The state criticizes the court of appeals for "rejecting *Strickland's* admonition that a defendant's "own actions and statements" establish the context for determining the reasonableness of counsel's representation...." According to the state, the court of appeals "ignored the salient fact" that Gajewski's statements to trial counsel "would not have put a reasonable attorney on notice" to investigate further. (State's Brief p. 33-34). Gajewski's description of the May 13th meeting merely "portrayed an ordinary conversation between two teenagers telling each other about their weekend plans, not an angry confrontation between a sexual-assault victim and her assailant." (State's Brief, p. 34). The state also criticizes the court of appeals for not referring to trial counsel's contemporaneous notes, but instead "credits Gajewski's self-serving postconviction testimony..." The state also complains the court of appeals should not have agreed with trial counsel's testimony that he failed to offer any evidence of motive for RLB to fabricate. The state concludes by claiming the court of appeals "did not merely ignore *Strickland's* standards. The opinion and decision affirmatively reject them." (State's Brief p. 36). Nothing could be further from the truth.

The state's argument lacks any persuasive value because it persistently ignores two fundamental and undeniable truths. First, the state fails to acknowledge or consider any duty on trial counsel's part to investigate. Second, the state refuses to acknowledge the obvious significance of a "victim" writing her cell phone number on the alleged rapist's hand at a meeting *she* initiated five days after the alleged assault.

There is no doubt trial counsel's primary source of information is the client, and this provides the context for subsequent action. *Strickland* is also clear, however, that trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Counsel's job is to "make the adversarial testing process work in the particular case." *Id.* at 690.

When, as in this case, the theory of defense is one of witness credibility, "it [becomes] incumbent on counsel to present evidence to the jury tending to show that the State's...key witness[] is not to be believed." *State v. Jeannie M.P.*, 2005 WI App 183, ¶10, 286 Wis.2d 721, 703 N.W.2d 694. That duty includes following up on the "potential existence" of information relevant to credibility. *Jeannie*, at ¶23; *Thiel*, 2003 WI 111 at ¶38 (Unread discovery provided insight into other facets of the case relating to witness credibility that deserved more thorough investigation); *Felton*, 110 Wis.2d. at 501. (Lawyer has duty "to investigate adequately the circumstances of the case and to explore all avenues which could lead to facts that are relevant to either guilt or innocence,....").

In *Jeannie*, the defendant allegedly assaulted her estranged husband when she broke into his home, crawled into his bed naked, and got on top of him. This was witnessed at least in part by the estranged husband's girlfriend. *Jeannie*, at ¶3. Defendant's defense was that the

sex was consensual and, in fact, at his bequest, in exchange for consideration from him in their very bitter divorce and child custody dispute. *Id.* at ¶10. Defendant told her lawyer about the acrimonious divorce proceedings, but he did no real investigation. Had he done so, he would have uncovered extensive evidence of a bitter dispute over the children and child support, and the husband's desire to gain an advantage in the divorce case. Evidence of his controlling nature would have also corroborated defendant's contention that he was using the divorce as leverage to obtain sexual favors from her. *Id.* at ¶15. There was also evidence of extreme animosity between the defendant and her husband's girlfriend, who had threatened to make the defendant's life a "living hell." *Id.* at ¶17. Because the case involved a credibility contest and the lawyer failed to investigate or produce evidence at trial that would have provided motives for the State's witnesses to lie, the Court of Appeals reversed. *Id.* at ¶2. When the whole case hinges on witness credibility, trial counsel has a duty to investigate and present impeaching evidence when "counsel was or should have been aware of its existence." *Id.* at ¶11. Trial counsel has a duty to investigate even where, as in this case, the additional evidence was largely known by the defendant. *Id.* at ¶23.

In this case, trial counsel's duty to investigate was further enhanced by Gajewski's youth and inexperience. Gajewski was barely out of high school and had no experience with the criminal justice system. As trial counsel acknowledged, Gajewski was unsophisticated in the legal process. (51:20).

Gajewski told trial counsel prior to trial that he spoke with RLB several times after the alleged sexual assault, the most significant conversation taking place on Friday, May 13, 2005. (51:1; 43:Exhibit 4). According to those notes: (1) Gajewski and RLB each discussed what they were going to do over the weekend: Gajewski was "maybe" going to a "party," and RLB was going to a music concert; (2) RLB

wrote her cell phone number on Gajewski's hand; and, (3) Gajewski tried calling RLB either that night or Saturday night, and one other time, but there was no answer. (51:16; 43:Exhibit 4).

The state has never disputed that Gajewski spoke with trial counsel about the May 13th encounter, nor has it ever disputed the accuracy of trial counsel's notes. Casey Conner, moreover, would have corroborated the place, time, and voluntary nature of the meeting between RLB and Gajewski. (51:7-8, 10). The meeting is also partially corroborated by RLB herself in that she has never denied it took place when she had every opportunity to do so at the postconviction hearing. (State's Brief, p. 38). RLB's testimony that she did not "recall" giving Gajewski her phone number also suggests Gajewski is telling the truth about her doing so at that meeting. (51:59). For someone who allegedly did not know Gajewski very well and had no romantic interest in him, her inability to recall is an odd answer. Gajewski also provided documentation at the postconviction hearing showing he attended the prom at another high school on Saturday, May 14, 2005, with Amanda Urmanski, and that this consumed his entire evening from about 3:00 p.m. onward. (51:48; Exhibits 1 and 2). Not only does this bolster his claim that he told RLB he was going to the prom with another girl that weekend, it undercuts Tom Aschbrenner's testimony that Gajewski spoke to him about having sex with RLB at some unknown party that same night.

Standing alone, the evidence in trial counsel's notes not only suggests a motive to lie, but undermines RLB's credibility. The fact that Gajewski and RLB were even having this conversation and discussing weekend plans five days after the alleged assault but 3 days before it was reported is highly suggestive of actions inconsistent with being a rape victim. It also contradicts RLB's testimony at trial that had she been raped by Gajewski, she would not

have wanted to talk to him at all. (47D: 161). Particularly relevant, however, is the statement that RLB wrote her phone number on Gajewski's hand. Not only is this inconsistent with her claim she was raped—rape victims don't typically give out a personal phone number to their rapist five days after the assault—but clearly suggests a possible romantic interest (and thus a possible motive). Trial counsel conceded that even if this was all he had, he was remiss for failing to use it. (51:16). The state's characterization of this information as suggesting nothing more than "an ordinary conversation between two teenagers telling each other about their weekend plans" simply ignores reality. By any objective standard, this is bombshell evidence.

What's more, these facts are clearly the tip of the iceberg. Why did RLB and Gajewski discuss their weekend plans? Why did RLB write her phone number on Gajewski's hand? Where, when and how did this meeting occur? Was anything else discussed? Were there any witnesses? Was there any connection between what happened at this Friday afternoon conversation and the Monday morning sexual assault report? Why did RLB not answer or return Gajewski's calls after she gave him her number? Did something happen that upset her? Not only were the facts in trial counsel's notes, standing alone, good evidence of motive and credibility, they clearly signaled the possibility of more. The state completely ignores this.

Instead, the state tries to pin the blame on Gajewski by claiming he "concealed" information from his lawyer. (State's Brief, p. 35, 38). There is nothing in the record to even remotely suggest Gajewski—indisputably young, naïve and unsophisticated in the legal process—intentionally withheld evidence from his lawyer. The trial court made no such finding and the state does not even try to suggest a reason or motive for him to do so. With his future at stake, Gajewski had every incentive to tell his lawyer everything

he knew. It was trial counsel, not Gajewski, who failed.

As Gajewski explained, the discussion concerning his post-sexual assault contacts with RLB came near the end of an hours-long conversation covering nearly all aspects of the case. (51:20, 29). This was their only face-to-face conversation until just prior to trial. (51:52). Gajewski mentioned at least three encounters in response to trial counsel's general question about whether he talked to RLB the week following the alleged assault. (43:Exhibit 4). Gajewski did not give more details than he did because trial counsel did not seem overly interested and did not ask any follow-up questions. (51:47, 54). Trial counsel never specifically asked Gajewski about a motive for RLB to lie. (51:54). As trial counsel conceded, his duty was to ask questions and Gajewski's duty was to answer them. (51:16). He conceded the reason additional facts were not in his notes was because he didn't ask. (51:29-30). The state can hardly blame Gajewski for not expanding on the May 13th conversation when trial counsel himself failed to ask the obvious follow-up questions. There could hardly be a more basic investigative duty than to fully interview the client, which includes asking follow-up questions on potentially beneficial evidence. Under any objective standard, Gajewski provided trial counsel with more than sufficient information to warrant further investigation.

C. The Court of Appeals correctly found trial counsel rendered ineffective assistance of counsel.

1. Trial counsel was deficient when he failed to investigate or introduce at trial all available information concerning the post-assault but pre-reporting May 13th conversation between RLB and Gajewski.

Trial counsel was deficient for failing to investigate and use all the available facts surrounding the May 13, 2005, meeting. (*Jeannie*, at ¶23; *Thiel*, at ¶38; *Felton,* at 501; See also argument, pp. 29-35, *supra.*) Had trial counsel investigated as he should have he would have uncovered compelling evidence undermining RLB's credibility. Evidence of what occurred at the May 13th meeting provided a clear and solid motive for RLB to lie. Gajewski rejected her invitation to go with her to the music concert. He told her he was going to the prom with another girl, and refused to tell her who the girl was. More importantly, he told her he did not have any romantic interest in her. Her reaction was one of anger. She told Gajewski he was an "asshole" and he should just "fuck off." She then "stormed off." (51:45-46). This conversation occurred after school was out on a Friday afternoon. The following Monday morning, RLB reported that Gajewski raped her.[6]

The meeting also corroborates consent because it demonstrates that RLB wanted to have a relationship with Gajewski even after he allegedly raped her. The meeting occurred only five days after the alleged assault. RLB deliberately approached Gajewski, who was standing by his car, and initiated the conversation. She inquired as to what he was doing over the weekend and asked him to go out with her. Even when he told her he had other plans she asked him to call her and wrote her phone number on his hand. These are not the actions of a typical rape victim.

Alternatively, trial counsel was also deficient for failing to use the evidence contained in his notes. Trial counsel admitted that even if limited to the information he had in his notes, he was deficient for failing to use it.

---

6 "Hell hath no fury like a woman scorned." Attributed to William Congreve, in "The Mourning Bride" (1697). While perhaps a sexist comment to modern ears, it nonetheless reflects an age-old motive a jury would not have any trouble appreciating or understanding.

(51:16). The simple fact that RLB initiated a conversation with Gajewski after the alleged rape, and wrote her cell phone number on his hand, is inconsistent with being a rape victim. It also suggests a romantic interest in Gajewski even without the additional evidence Gajewski could have provided. (51:16).

The trial court's denial of Gajewski's postconviction motion is wrong for both legal and factual reasons. The trial court rejected Gajewski's ineffective assistance of counsel claim on two grounds: (1) Gajewski was bringing up information now that was never conveyed to his attorney; and (2) It was a matter of very clear trial strategy that Gajewski was not going to testify. (51:74).

The trial court's decision is wrong for several alternative reasons: (1) Gajewski provided more than sufficient information to his trial counsel to trigger a duty to investigate further; (2) The decision to not have Gajewski testify was based upon incomplete information and would have been revisited had the additional information been known; and, (3) Alternatively, trial counsel could have effectively undermined RLB's credibility without Gajewski testifying by cross-examining RLB, and calling Conner and Urmanski as witnesses. Each of these will be addressed in turn.

The trial court made no analysis of whether Gajewski provided sufficient information to his lawyer to trigger a duty to investigate further. Instead, it appears to have decided, as a matter of law, that Gajewski was under a duty to provide trial counsel with all the evidence he testified to at the postconviction hearing in order to make a successful claim. The trial court applied the wrong legal standard (see *Jeannie*, at ¶23; *Thiel*, at ¶38; *Felton,* at 501). If it had applied the correct one, it would have had to conclude Gajewski provided more than sufficient information to his trial counsel to trigger a duty to investigate further. As in

Jeannie, Gajewski had a right to rely on his lawyer to recognize potentially relevant evidence and pursue promising lines of inquiry. The trial court erred when it placed the entire burden on Gajewski to provide all relevant defense evidence to his lawyer, relieving trial counsel of any duty to investigate. *Jeannie*, at ¶23. As this case hinged on witness credibility, trial counsel was deficient when he failed to follow-up on the information Gajewski provided him. (See also argument, pp. 29-35, *supra*).

The trial court also erred in denying the motion based upon strategy. While a strategic decision by trial counsel will normally not be second-guessed, "it must be based upon knowledge of all the facts and all the law that may be available." *Felton*, at 502; *Wiggins v. Smith,* 539 U.S. 510, 528 (2003). An uninformed tactical decision cannot, by definition, be a reasonable one. *Thiel*, at 504.

The sole reason trial counsel advised Gajewski not to testify was because Gajewski initially lied to the police about whether he had sex with RLB, then later admitted it.[7] (51:16, 17, 27, 47). Trial counsel acknowledged, however, that any decision concerning whether the defendant would testify or not required balancing the potential benefit against the potential cost. (R 51:19). Because Gajewski's allegations about the May 13th meeting would have provided good motive evidence, trial counsel conceded it "certainly would have been a factor in my decision-making process [concerning whether Gajewski should testify or not]." (51:18, 31). Trial counsel also agreed that consent alone would have been a viable defense. (51:17).

In short, the decision to withhold Gajewski's testimony was flawed because it was based on less than full information. Without knowing the potential benefit, trial

7 The later "admission" was privileged and therefore could only be brought out to impeach Gajewski if he testified. (49:23).

counsel could not balance it against the potential cost. A claim of ineffective assistance of counsel cannot be rejected based on strategy when the strategy itself is not fully informed. *Thiel*, at ¶40. Trial counsel agreed that Gajewski's allegations about the May 13th meeting would have provided good motive evidence. (51:18). He also agreed that a jury would have found such behavior inconsistent with someone who had just been sexually assaulted by that person. (51:16). He admitted he was unable to establish a motive for RLB to lie at trial and assumed this hurt the defense. (51:17, 18).

Had trial counsel been able to attack RLB's credibility *and* provide a clear motive for her to lie through the use of Gajewski's testimony about the May 13th encounter, he may very well have been willing to risk the rather minor credibility problem created by Gajewski's inconsistent statements. This is especially true when he had *no other* motive evidence to speak of. He would have also had a corroborating witness.

The state complains, nonetheless, that trial counsel was never asked if he would have, in fact, changed his mind about having Gajewski testify, and therefore Gajewski has failed to prove his claim. (State's Brief, p. 30). As a threshold matter, Gajewski's claim does not turn on this question as there were means other than Gajewski by which the evidence could have been introduced. The more direct answer, as the state repeatedly observes elsewhere in its brief, is that the test of deficient performance is an objective one. Ultimately, it does not matter what this particular trial counsel might have done—although he concedes it would have been a very different calculation—but what an attorney would have done under an objective standard of reasonableness with full knowledge of the facts and law. Given the value of this evidence, there is every reason to believe the strategy of keeping Gajewski off the stand would have been abandoned.

The state also argues at various points in its brief that trial counsel "vigorously pursued a possible motive" and therefore, apparently, had no reason to seek other motive evidence and therefore should not have been found deficient. Further, the court of appeals incorrectly based its decision on the premise that no motive evidence was presented. (State's Brief, 35, 36, 38, 39).

The motive argument the state refers to was the last resort motive of reputation. Based upon an unproven suggestion, trial counsel cross-examined RLB about rumors going around the high school that RLB had sex with Gajewski. On that basis trial counsel pressed RLB on whether she would lie to protect her reputation. (47D:161-162). RLB denied both the rumors and the motive, of course, as there was no evidence to support either. (47D:162). In his closing, trial counsel argued that RLB had decided it was better to be a rape victim than sleep with someone she barely knew, thus protecting her reputation. (47D:358). The state responded, first, that there was no evidence of rumors (47D:364); and, second, if RLB were going to lie to protect her reputation, why not just deny she had sex? (47D:323-324). There were no witnesses, so it would be her word against Gajewski's. As the state aptly remarked in closing: "He [trial counsel] has got to figure out a reason why [RLB] would make this up. He doesn't have one. He's got to come up with something." (47D:364).

Perhaps, in its pseudo-defense counsel role, the state would be satisfied with a reputation argument based upon nothing but innuendo, but the fact is it truly amounted to nothing. Trial counsel agreed he was "effectively unable to establish a motive for RLB to lie" and did not "deal[] with the motive issue very well." (47D: 17) Further, that it did hurt the defense. (47D:18). Contrary to the state's unfounded assertions, the court of appeals correctly concluded Gajewski's proffered evidence provided the only

real evidence of motive.

Finally, the trial court also erred in that it did not consider trial counsel's failure to present evidence by means other than Gajewski's testimony. Trial counsel conceded that had Gajewski not testified, he still could have cross-examined RLB about the May 13, 2005, meeting, and could have called Casey Conner to the stand to corroborate that the meeting took place. (51:19). He could have also put on proof that Gajewski indeed attended the prom on Saturday, May 14, 2005, with Amanda Urmanski. (51:19, 47-49, 52).

The state takes issue with this by arguing that without taking the stand, Gajewski could not have refuted RLB's postconviction testimony that she never sought a relationship with Gajewski. Further, that Conner had nothing of significance to add, since he did not hear the conversation. (State's Brief, p. 30). Again, the state deliberately ignores the significance of this meeting occurring at all, much less under the circumstances it did. As the state notes in its brief, RLB never denied the conversation occurred, and more importantly, never denied she gave Gajewski her phone number. When specifically asked whether she gave Gajewski her phone number, she stated: "I don't recall." As the court of appeals correctly notes in its decision, a reasonable jury could conclude from RLB's own postconviction testimony that RLB would not forget such a thing, and if she did give Gajewski her phone number five days after the alleged assault, the jury "could reasonably doubt the assault occurred...." (CA Decision, p. 4). RLB's failure to deny the conversation occurred also contradicts her trial testimony she would not want to talk to Gajewski at all if he had raped her. (47D:161).

Conner's testimony, moreover, would have added significant exculpatory value. He would have provided direct evidence the May 13th conversation occurred, thus putting in context RLB's failure to deny the meeting took

place; her inability to recall if she gave Gajewski her phone number; and her trial testimony that she would not have wanted to speak to Gajewski *at all.* Conner would have also provided important logistical information from which several inferences could be drawn. The conversation occurred in a large parking lot right next to Gajewski's vehicle. A reasonable jury could conclude that RLB deliberately approached Gajewski and initiated the conversation. It was not, in other words, a chance encounter in the school hallway. Further, the fact that RLB left just before Conner arrived would have also suggested the conversation ended on a less than pleasant note. The timing of the conversation is also important in that Conner would confirm it occurred after school was closed on Friday. Because the alleged rape was reported to school authorities at the first opportunity on Monday morning, an inference could also be drawn that whatever happened at that meeting is what caused the report to be made.

In short, even a strategic decision to keep Gajewski off the stand would not have prevented the introduction of significant evidence directly impacting RLB's credibility and motive.

2. Trial counsel's deficient performance prejudiced the defendant.[8]

This was, by all accounts, a very close case. The allegation of sexual assault in a room full of sleeping people, all within a few feet of RLB, was improbable. There was no physical evidence of non-consensual intercourse and no eye-witnesses. The prosecutor relied heavily on the argument that RLB had no motive to lie and indeed, there was no evidence of motive. (47D: 321-324; 364).

---

8 Again, the state did not argue a lack of prejudice to the court of appeals and has presumably waived that argument. Defendant, therefore, will only address prejudice in summary fashion.

The jury had no knowledge of the May 13, 2005 meeting between RLB and Gajewski; had no idea that after the alleged rape, but prior to reporting it, RLB initiated a conversation with Gajewski at his car in the school parking lot; inquired about his plans for the weekend; wrote her cell phone number on his hand; asked him on a date; was turned down and informed he was attending the prom with another girl; was told he was not interested in her; that she responded by directing profanity at him and stormed off; and at the next available opportunity, reported a rape to the school authorities. Had the jury known of the May 13, 2005, meeting, it would have had compelling evidence of motive and actions by RLB that were entirely inconsistent with those of a rape victim. Without having heard this evidence, the jury did not have the information it needed to make a fair and reliable decision.

CONCLUSION

Based upon the alternative grounds argued herein, the Court should affirm the court of appeals' decision reversing the conviction, and remand the case for a new trial.

Respectfully submitted this 23rd day of October, 2008.

MILLER & MILLER
Attorneys for the Defendant-Appellant

By _____
Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022

CERTIFICATION
As to Form and Length

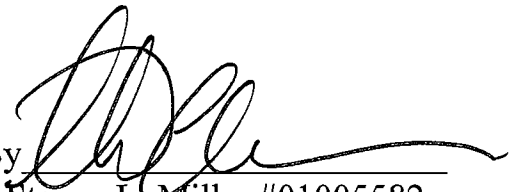
I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), and that the text is:

> Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This Issues for Review; Statement of Facts; Argument and Conclusion sections of this brief contain 10,388 words.

Dated this 23rd day of October, 2008.

MILLER & MILLER
Attorneys for the Defendant-Appellant



By _____
Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022

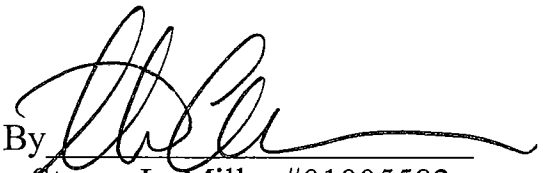
CERTIFICATION

As to Compliance with Rule 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of October, 2008.

MILLER & MILLER
Attorneys for the Defendant-Appellant



By _____
Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022

APPENDIX OF DEFENDANT-APPELLANT

INDEX TO APPENDIX

relationship; they weren't friends, they weren't associates, they didn't hang out together. It just corroborates what she testified to, and it would not have impacted the case so significantly if you found that Mr. Kelly was in fact even deficient, that the reliability of the outcome should be questioned, and I think he has not met his burden both on the facts presented here today.

THE COURT: First I want to address the new evidence allegation because I think that's all the things that were raised when I read this motion that got my attention.

In the motion the court is told that testimony would be presented today that the defendant -- or the complaining witness was overheard making the statement that the rape never happened and that she just said it happened to get him in trouble because she was pissed off.

Then the testimony that's presented today, however, is far different that it isn't clear that the complaining witness was necessarily talking about the rape. The word rape wasn't used. The witness didn't even hear her use the name Juice or the defendant's actual name, and the statement was it never happened; I just did it to piss him off, and that is a lot less strong to me.

I just don't -- and I've also had a chance to judge the demeanor of the complaining victim at this hearing where she denies that she ever made that statement.

(1)

It's a very difficult issue to address, but I find that it is so vague that it is not -- just not clear that that's what she was referring to, if she made the statement at all. I'm not convinced that she did.

I find it incredible that the day after trial in a public setting that the victim would be telling people that she basically committed perjury. I just don't find that a reasonable probability exists that a different result would be reached at trial given the vagueness of the Borntreger testimony, so I'm denying the motion for a new trial based upon evidence -- the alleged new and discovered evidence.

With respect to the ineffective assistance of counsel, I have to agree with the state that it appears to me that the defendant is bringing up information now that was never conveyed to his attorney, and that it was a matter of very clear trial strategy that the defendant was not going to testify, so I do not find that Mr. Kelly's performance was outside the range of the professionally competent assistance or inefficient, so I'm denying the motion for a new trial also on that ground.

That gets us to then the request to continue the stay of the probation -- jail sentence as a condition of probation.

What is the state's position in that regard?

MS. MERRIWETHER: I believe we've been staying this since February of this year to give the defense an opportunity

(2)

to file the postconviction motion. It's now July. I think probation should have an opportunity to, you know, deal with Mr. Gajewski as they see fit to impose the sentence, the jail sentence conditional time.

I think the court has provided an opportunity for the appeal, so I am -- I think the probation, if they see fit, should be able to impose the conditional time.

THE COURT: How long is the probation period?

MR. MILLER: Five years.

MS. MERRIWETHER: Five years. It's only six months jail and six months imposed but stayed.

THE COURT: I will continue the stay to allow you to pursue appeal to the Court of Appeals.

MR. MILLER: Okay. Thank you, Your Honor.

THE COURT: I recognize this was a very -- I didn't preside over it, it was a very close case, I understand.

MS. MERRIWETHER: Is there a timeline for that that I can tell probation and parole as far as what that means until the judgment comes down?

MR. MILLER: It would be until remittitur. That's when the appeal ends.

MS. MERRIWETHER: Okay.

THE COURT: So he's still on probation. It's just the jail sentence that we're staying?

MR. MILLER: Correct. Thank you, judge.

(3)

Would you like me to prepare a written order? Can I do that?

THE COURT: Please.

MR. MILLER: Thank you.

THE COURT: Okay.

(Proceedings concluded.)

(4)

These Moments Shared Together
Edgar High School Prom
May 14, 2005

POST PROM SIGN-UPS - 2005

Paid	Last Name	First Name	Grade	Bus Ride Needed	Guest Name
X	SCHREIER	JEREMY	2008	X	
X	SCHUELLER	BRITTANY	2007		CASEY CONNER
X	SCHUELLER	NICOLE	2008	X	
X	SCHUELLER	RYAN	2006		
X	SCHUMACKER	JAMIE	2006		
X	SOCHA	JUSTIN	2005		
	SODKE	BRIAN	2007		
X	SONDERGARD	MARIAH	2008		
	STENCIL	JONATHON	2007		
X	STENCIL	STACEY	2008		
X	SWITLICK	MELANIE	2008		
X	SWITLICK	TIFFANY	2006		
X	SZYMANSKI	THOMAS	2007		
X	TARRAS	BRITTANY	2005		
X	TAYLOR	HEATHER	2007		
X	TOTZKE	TIFFANY	2005		
X	TRONSCOSO	SEBASTIAN	2006		
X	UMNUS	TREVOR	2005		
X	UNTIEDT	CHRISTIAN	2008		
X	UNTIEDT	COLIN	2006		
X	URMANSKI	AMANDA JAYNE	2006		
X	URMANSKI	AMANDA	2007		JORDAN GAJEWSKI
X	URMANSKI	ASHLEY	2006		NATHAN KNETTER
X	URMANSKI	DEREK	2007		
X	WALDRON	JORY	2005		
	WARD	MARK	2005		
X	WEINSCHENK	GUTHRIE	2007		
X	WERNER	BRITTANY	2007		
	WERNER	BRITTNI	2007		
X	WERNER	HANNAH	2007		
X	WERNER	RHYANNON	2008	X	
	WESOLOWSKI	SAMANTHA	2007		
X	WIESE	RACHEL	2005		
X	WIESE	SAMANTHA	2007		
X	WIRKUS	HEATHER	2007		
	WIRKUS	KATIE	2005		
	WIRKUS	KRAIG	2007		
	WIRKUS	TYRRELL	2008		
X	WISNEWSKI	KATHRYN	2006		
X	WITUCKI	JESSICA	2005		ALEX VROKIJK
X	WOLD	CHRISTINA	2006	X	MIKE LAPACZ
X	WOLD	NICHOLAS	2006		
X	WOLF	KESHIA	2008		
X	YESSA	BROOKE	2008		
X	YESSA	HOLLI	2006		
X	YUNK	JEFFREY	2006		
X	ZANK	AMBER	2005		
	ZELLNER	COREY	2005		
	ZELLNER	KEVIN	2008		
X	ZEMKE	AMANDA	2008		
X	ZIETLOW	KRISTIN	2005		
X	ZIETLOW	MICHELLE	2008		
X	ZIMMERMAN	JACOB	2006		KACI
X	ZIMMERMAN	JOSEPH	2006		
X	ZIMMERMAN	MELISSA	2005		DJ ADAMSKI

205A

212A

208A

Greg Fecteau 2:38

PH Principal 9-8-06

Lock-In From 1:00AM 3:30AM

6

Mon. following this, he talked to her - asked her if she told anyone, she sd "of course not"

Δ sd "I told at least a dozen ppl" - he laughed, they sd "No, I just told Mike"
- she didn't seem to react much

short conversations throughout the wk - only sig. conversation on Fri, he told her what he was doing on wknd, she sd maybe going to concert - he sd maybe party, she wrote cell phone # on his hand - Δ tried calling her that nite or Sat nite, one other time tried to call but no answer

Coz of this sd she told ppl he raped her - coz of why going thru w it, "I just am"

"I didn't want it to go this far" - Derrick Lavicka
Athens

COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1849-CR Cir. Ct. No. 2005CF491

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JORDAN L. GAJEWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jordan Gajewski appeals a judgment convicting him of third-degree sexual assault, and an order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. Because we conclude

Gajewski's trial counsel was ineffective, we reverse the judgment and order and remand the matter for a new trial.[1]

BACKGROUND

¶2 Rebecca L.B. testified that after attending a party, she spent the night at a friend's house. Gajewski, who attended the same high school, also spent the night at that house. Rebecca recognized Gajewski from school but did not know him well. During the night, Rebecca woke up to find Gajewski kissing her and removing her clothing. He then had intercourse with her. She testified that she told Gajewski to stop. He eventually stopped and went back to sleep. As these events occurred, two other people were sleeping in the same room and two other friends of Rebecca were in the house. Rebecca's attempts to prevent the assault did not awaken the other people in the room and she did not yell for help from her friends sleeping nearby.

¶3 On cross-examination, counsel asked Rebecca whether she had a conversation with Gajewski at school several days after the alleged assault. Rebecca responded that she did not remember whether she spoke with Gajewski following the assault. Counsel asked, "If you had been raped a few days earlier by [Gajewski], you wouldn't want to talk to him at all; would you?" Rebecca responded, "Right."

[1] The postconviction motion also alleged newly discovered evidence that Rebecca L.B. admitted to having falsely accused Gajewski. Because we conclude the case must be retried due to ineffective assistance of counsel, we need not address that issue or Gajewski's request for reversal in the interest of justice.

A:9

¶4 Gajewski did not testify. The only defense witness, Kori King, testified he was sleeping three feet from Rebecca and heard nothing. He said the next morning Rebecca did not appear upset.

¶5 At the postconviction hearing, Gajewski testified he gave his trial counsel a cursory description of an encounter with Rebecca that took place at school several days after the alleged assault. During that conversation, Rebecca invited Gajewski to a concert. He responded that he was attending the prom with another girl the night of the concert. Rebecca then grabbed his hand, wrote her telephone number on it and told Gajewski to call her later. When Gajewski told her he was not interested in her, she stormed off. Gajewski testified he told his trial counsel that Rebecca had given him her phone number and they had discussed their plans. Gajewski's friend, Casey Connor, testified at the postconviction hearing and confirmed seeing the end of the encounter, although he did not hear what was said.

¶6 Rebecca testified at the postconviction hearing that she was not interested in Gajewski and had never asked him to go out with her. But when asked whether she had given Gajewski her cell phone number to call her following the prom, she answered, "I don't recall."

¶7 Gajewski's trial counsel testified at the postconviction hearing that Gajewski had told him about the school encounter with Rebecca after the alleged assault, and counsel did not inquire further about it. Counsel acknowledged that a jury would probably have found Rebecca's behavior inconsistent with having been assaulted and he agreed that he should have cross-examined Rebecca about it at trial. He acknowledged that he had not offered any evidence of motive for

A:10

Rebecca to fabricate the assault, and that Gajewski's rejection of Rebecca would have provided such a motive.

DISCUSSION

¶8 To establish ineffective assistance of counsel, Gajewski must show both that counsel's performance was deficient and that it was deficient in a manner that prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance is judged on an objective standard of reasonableness. ***Id.*** at 688. To establish prejudice, Gajewski must show 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 one that undermines this court's confidence in the outcome. ***Id.***

¶9 Gajewski's trial counsel was ineffective in several ways. First, counsel should have asked for more information from Gajewski that would have revealed details of his after-school encounter with Rebecca. This additional information could have been used to cross-examine Rebecca as to motive for fabricating or exaggerating the assault. Counsel could also have offered Connor's testimony to prove that some encounter occurred after the assault. Second, on the information counsel had about the encounter, he could have and should have cross-examined Rebecca on whether she gave Gajewski her phone number. If Rebecca had responded that she did not recall giving Gajewski her phone number, as she did at the postconviction hearing, the jury could reasonably doubt the victim would not recall this unusual behavior. The jury could reasonably doubt the assault occurred if the alleged victim gave the assailant her phone number after the assault.

A:11

¶10 Trial counsel should also have developed evidence regarding Rebecca's motive for falsely accusing Gajewski. While the trial court correctly noted that counsel did not possess all of this information, we fault counsel, not his client, for failing to develop it. A complainant's motive for falsely accusing a person of sexual assault is an obvious concern that should be investigated. Gajewski told his counsel about an encounter with Rebecca after the alleged assault and three days before she reported it. A reasonable attorney would have inquired further about that encounter to determine whether it provided a motive for false accusation. Counsel's failure to investigate facts that were readily available to him and his failure to employ those facts at trial to undermine Rebecca's credibility falls below an objective standard of reasonableness. *See* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶25, 286 Wis. 2d 721, 703 N.W.2d 694. When a case hinges on witness credibility, trial counsel has a duty to investigate and present impeaching evidence when counsel was or should have been aware of its existence. ***Id.***, ¶11.

¶11 Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. ***Strickland***, 466 U.S. at 690-91. However, strategic choices made after less than complete investigation and without full knowledge of the available facts cannot be described as a reasonable strategic decision. *See* ***Wiggins v. Smith***, 539 U.S. 510, 528 (2003).

¶12 Because the State's case depended on Rebecca's credibility and her account of an assault in the presence of others might be considered improbable, this was a close case. Counsel's failure to investigate the school encounter, his failure to present evidence of Rebecca's behavior that appears inconsistent with the alleged assault, and his failure to investigate and present evidence explaining her motive for false accusation undermine our confidence in the outcome.

A:12

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

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

A:13

STATE OF WISCONSIN

IN SUPREME COURT

No. 2007AP1849-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JORDAN L. GAJEWSKI,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MARATHON COUNTY CIRCUIT COURT, THE HONORABLE PATRICK BRADY PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

J.B. VAN HOLLEN
Attorney General

CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys for Plaintiff-Respondent-Petitioner
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITY

STATE OF WISCONSIN

IN SUPREME COURT

No. 2007AP1849-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JORDAN L. GAJEWSKI,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MARATHON COUNTY CIRCUIT COURT, THE HONORABLE PATRICK BRADY PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

The State affirms the facts and arguments set out in its amended brief.

While conceptually distinct, the three issues raised by the State in its petition for review and its principal brief necessarily interlock. An appellate court cannot properly review a circuit court's decision following an evidentiary hearing unless the appellate court knows what view it may take of the record in light of the circuit court's decision (Question Three in the petition for review). When viewing the appellate record, the appellate court must also know the defendant's burden of proof so the court can determine whether the defendant's evidence has reached the requisite evidentiary

threshold (Question One in the petition) and whether, for an ineffective-assistance claim, whatever evidence the appellate court may consider also shows that counsel's representation fell below "an objective standard of reasonableness" (Question Two in the petition).

I. AN APPELLATE COURT THAT DOES NOT IDENTIFY OR UNDERSTAND A PARTY'S BURDEN OF PROOF IN THE CIRCUIT COURT CANNOT PROPERLY DECIDE WHETHER THE PARTY SATISFIED THAT BURDEN IN THE CIRCUIT COURT AND, THEREFORE, WHETHER THE PARTY CAN PREVAIL ON APPEAL.

Gajewski mischaracterizes the State's claim. He erroneously asserts that the State waived this issue because "[a]t no time did the state argue in its brief to the Court of Appeals that *the appellate court* must review the trial court's decision by applying a clear and convincing burden of proof." Gajewski's Brief at 22 (emphasis in original).[1]

In the court of appeals, the State set out *both* the defendant's burden of proof in the circuit court *and* the appellate court's standard of review. *See* State's Court of Appeals Brief at 3-6. The State argued that the evidence showed not that defense

---

[1] Gajewski also errs by asserting the State waived this issued because "the issue was not argued to the Court of Appeals." Gajewski's Brief at 22. Gajewski misses the obvious point: the error raised by the State did not exist until the court of appeals issued its decision. Like any party, the State cannot waive argument on an issue before the issue exists.

counsel performed deficiently, but that Gajewski affirmatively withheld critical information from his lawyer. *Id.* at 18-23. At the ***Machner*** hearing,[2] the prosecutor argued that "[w]hat we have here is the defendant adding facts after this whole case is over and trying to fit it into this motive theory" (51:71, Pet-Ap. 200). In rejecting Gajewski's ineffective-assistance claim, the circuit court remarked that "I have to agree with the state that it appears to me that the defendant is bringing up information now that was never conveyed to his attorney" (51:74, Pet-Ap. 203). In effect, Gajewski's evidence (including testimony the court had to assess for credibility) did not show, clearly and convincingly, that counsel performed deficiently.

The standard of appellate review plays off the burden Gajewski bore in the circuit court. To decide the appeal, the court of appeals had to determine, at least implicitly, whether Gajewski satisfied his burden of proof in the circuit court: if Gajewski failed to present "clear and convincing evidence" of ineffective assistance of counsel, the court of appeals could not properly overturn the circuit court's decision.[3] By failing to identify Ga-

---

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

[3] The issue of the burden of proof ties into the issue of an appellate court's obligation to view the record in the light most favorable to the circuit court's decision. If an appellate court can pick and choose which portions of the evidentiary record to rely on, the appellate court becomes, in effect, the fact-finder in the case, and appellate review becomes *de novo* review as to both facts and law. Wisconsin law does not permit this usurpation of the circuit court's

(footnote continues on next page)

jewski's burden, the court of appeals left the parties and this court unable to determine whether the court properly addressed the threshold question.

For example, the court of appeals might have applied a "preponderance of the evidence" standard for Gajewski's burden and then concluded that Gajewski's evidence, if believed and accepted by the circuit court, satisfied that standard.[4] But the court might have reached a different conclusion if it had applied a "clear and convincing evidence" standard for Gajewski's burden, in which case the court of appeals would have affirmed the circuit court's decision, not reversed it.

If the court of appeals had concluded that the evidence believed and accepted by the circuit court satisfied the appropriate burden, then the appellate court could have properly moved on to deciding whether the facts the circuit court believed and accepted showed that counsel's conduct satisfied ***Strickland***'s legal test for deficient performance and, if so, whether the deficiency caused Gajewski any harm. The court of appeals, however, did not take the first step and, therefore, fatally tainted its decision reversing the circuit court.

(footnote continues from previous page)

fact-finding role in an evidentiary hearing on a postconviction motion alleging ineffective assistance of trial counsel. *Cf.* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶ 2 n.2, 290 Wis. 2d 352, 714 N.W.2d 900 ("The court of appeals is without jurisdiction to make factual findings.").

[4] The State does not concede that Gajewski's evidence satisfied even this lower standard.

II. EVEN UNDER GAJEWSKI'S VIEW THAT THE COURT OF APPEALS COULD INDEPENDENTLY DRAW LEGAL CONCLUSIONS FROM COUNSEL'S NOTES AND THE "SURROUNDING UNDISPUTED TESTIMONY" PRESENTED AT THE *MACHNER* HEARING, THE COURT OF APPEALS COULD NOT PROPERLY CONCLUDE THAT DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

Gajewski's remonstrance to the State's argument that the court of appeals had an obligation to view the record in the light most favorable to the circuit court's decision[5] both lacks merit and buttresses the State's argument. Gajewski's Brief at 26-29. The key to this meritlessness lies in this sentence: "A reviewing court is free to draw legal conclusions from trial counsel's notes and the surrounding undisputed testimony without deference to the trial court." *Id.* at 28 (citations omitted).

The State does not dispute that an appellate court can independently draw legal conclusions from notes or testimony when the parties do not dispute the meaning of the notes and testimony.[6] But a reviewing cannot do so when the meaning of

---

[5] State's Amended Brief at 37-40.

[6] *Cf., e.g.*, ***State v. Olson***, 2001 WI App 284, ¶ 6, 249 Wis. 2d 391, 639 N.W.2d 207 (in assessing Fourth Amendment reasonableness of a seizure, appellate court declaring that "[s]ince the facts here are undisputed, we have only to review those facts to decide whether the constitutional requirement of reasonableness has been satisfied. The question is one of law and 'therefore we are not bound by the trial court's decision on that issue.'"(citations omitted)).

the notes depends on testimony subject to the circuit court's credibility assessment or when the true meaning of the testimony rests on an assessment of intangibles (*e.g.*, physical demeanor, tone of voice) available to the circuit court but not to the appellate court.[7] Moreover, the legal conclusions an appellate may draw remain constrained by (a) which party bears the burden of proof, and (b) what burden the party must bear.

Here, assuming the court of appeals could draw independent legal conclusions based on defense counsel's notes and "surrounding undisputed testimony," the court of appeals could have reversed the circuit court's decision if (and only if), as a matter of law, the notes and testimony provided clear and convincing evidence "that counsel's representation fell below an objective standard of reasonableness." ***Strickland v. Washington***, 466 U.S. 668, 688 (1984).

Even when viewed as undisputed, the notes and testimony cannot satisfy that standard. Unadorned, defense counsel's notes (43:5, Pet-Ap. 129) reflect counsel's summary of a conversation between client and counsel in which they reviewed

---

[7] By arguing that the court of appeals can independently assess the legal significance of the evidence in this case, Gajewski undermines his contention that the court of appeals did not have to consider his burden of proof: the court of appeals cannot properly assess the legal significance of evidence that does not satisfy the requisite burden of proof. He also ignores a conflict between his testimony and Balz's as to what happened during the May 13 conversation, a dispute taking the "surrounding . . . testimony" out of the realm of "undisputed."

events and contacts between Gajewski and Balz from shortly before the sexual assault occurred until shortly before Balz reported the assault to the police. The summary does not indicate anything unusual about the events or contacts, and certainly does not indicate anything that would lead a reasonable attorney to conduct an investigation of the sort Gajewski now claims his lawyer should have conducted.

Consequently, unless extrinsic evidence (*e.g.*, parol evidence) called into question the accuracy, completeness, or facial meaning of counsel's notes, this documentary evidence could not satisfy even a "preponderance of the evidence" burden for showing "that counsel's representation fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. If anything, the notes support only one legal conclusion: that in light of the information Gajewski made available to his lawyer, defense counsel did not have any reason to conduct a further investigation of the May 13 encounter, and defense counsel's representation therefore easily satisfied "an objective standard of reasonableness." In short, the notes unequivocally refuted the court of appeals' legal conclusion that defense counsel provided ineffective assistance.

Extrinsic evidence neither changed the import of counsel's notes nor (whether considered separately or in conjunction with counsel's notes) satisfied Gajewski's burden for proving ineffective assistance. At the ***Machner*** hearing, Gajewski testified, as did his defense lawyer (T. Christopher Kelly). The uncontradicted testimony showed that the notes reflected an interview lasting about two hours (51:20, Pet-Ap. 149) during which Kelly "had open dialogue with [Gajewski]" and "explored

with [Gajewski] the conversations that may or may not have occurred between him and Rebecca Balz the week after the assault" (51:21, Pet-Ap. 150). Gajewski acknowledged that the notes "reflect[ed] everything [he] might have told [his] lawyer" (51:46, Pet-Ap. 175), and he did not dispute the accuracy of the notes. Gajewski testified that he did not tell Kelly numerous items of information at the time of the interview or even as late as during the trial (51:54-56, Pet-Ap. 183-85).[8]

Thus, the testimony of Gajewski and Kelly confirmed rather than refuted the accuracy and completeness of counsel's notes. And on its face, without consideration of intangibles like the witnesses' demeanor or tone of voice, the testimony itself did not even hint at a need for additional investigation. As with counsel's notes, the testimony of both Gajewski and Kelly supports only one legal conclusion: that in light of the information Gajewski made available to his lawyer, defense counsel did not have any reason to conduct a further investigation, and defense counsel's representation therefore easily satisfied "an objective standard of reasonableness." In short, the testimony unequivocally refuted the court of appeals' legal conclusion that defense counsel provided ineffective assistance.

Moreover, problematically for Gajewski, his version of the May 13 conversation did not go undisputed. Gajewski contended that during the conversation, Balz "invited me to be at this concert" (51:44, Pet-Ap. 173). He asserted that Balz "got

---

[8] *See also* State's Amended Brief at 19-20.

pretty upset" (51:45, Pet-Ap. 174) when he said he did not want a relationship with her.[9] By contrast, Balz unequivocally denied that she asked Gajewski to go out with her, that she asked him to call her, and that she "in any way" sought a relationship with him (51:58-59, Pet-Ap. 187-88).[10] Balz's testimony thus challenged the truthfulness of Gajewski's testimony about the May 13 conversation and set up a credibility dispute in the testimony "surrounding" defense counsel's notes. Consequently, the only arguably undisputed evidence about counsel's notes consists of the notes themselves and counsel's testimony about the information provided at the time of the two-hour, open-ended interview. The notes and counsel's testimony, whether viewed separately or in combination, do not come close to showing "that counsel's representation fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688.

In any event, to the extent the circuit court's belief in a witness's credibility could lead to a finding of fact yielding one legal conclusion while a contrary view of the witness's credibility could lead a finding of fact yielding a different legal conclusion, the testimony could not qualify as "undis-

---

[9] The transcript of Gajewski's testimony about this conversation reflects testimonial hesitancy and backing-and-filling (51:44-45, Pet-Ap. 173-74) that bear on a fact-finder's credibility assessment, thus reinforcing the need for an appellate court to view the record in the light most favorable to the circuit court's decision.

[10] Gajewski's postconviction lawyer did not ask Balz any questions and therefore did not challenge her assertions.

puted," thus highlighting the absurdity of Gajewski's contention that an appellate court does not have to view the record in the light most favorable to the circuit court's decision.

In the end, even under the standard Gajewski presents to this court, the court of appeals could not properly hold, consistent with ***Strickland***'s standards, that Kelly provided ineffective assistance of counsel.

III. THE COURT OF APPEALS ERRONEOUSLY APPLIED *STRICKLAND*'S "OBJECTIVE STANDARD OF REASONABLENESS."

Gajewski contends that the State's argument about "objective standard of reasonableness" means the State contends that "the court of appeals failed to apply the proper standard." Gajewski's Brief at 30.

Almost right, but (to paraphrase Mark Twain) "[t]he difference between the almost right [contention] and the right [contention] is really a large matter — 'tis the difference between the lightning-bug and the lightning."[11]

The State contends that the court of appeals identified the proper standard, but did not properly apply that standard. Here, although the court of appeals referred to ***Strickland***'s "objective standard of reasonableness" for determining

---

[11] LIBRARY OF CONGRESS, RESPECTFULLY QUOTED 106 (Suzy Platt ed., 1989) (Quotation No. 540), *available at* http://www.bartleby.com/73/540.html.

whether counsel provided constitutionally effective assistance of counsel, ***State v. Gajewski***, No. 2007AP1849-CR, slip op. ¶ 10 (Wis. Ct. App. Dist. III May 6, 2008) (*per curiam*), Pet-Ap. 105, the court failed to apply that standard properly.

In holding that Kelly's representation fell below an objective standard of reasonableness, the court of appeals cited one case: ***State v. Jeannie M.P.***, 2005 WI App 183, 286 Wis. 2d 721, 703 N.W.2d 694. Gajewski relies on the same case. Gajewski's Brief at 31-32.

Again, lightning-bug and lightning. In ***Jeannie M.P.***, trial counsel knew before trial about the bitter animosity between (on one hand) the defendant and (on the other hand) her ex-husband and his girlfriend. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶¶ 13, 18. Moreover, defense counsel conceded he could not explain why he failed to follow up on the information provided by the defendant or to "cross-examin[e] [the girlfriend] regarding her attitude about the defendant or their past confrontations." ***Id.*** ¶ 24. The court of appeals held that defense counsel's failures on this front amounted to deficient performance that caused prejudice to the defendant. ***Id.*** ¶ 35.

Here, by contrast, Gajewski did not even hint at any animosity between him and Balz that would have led a reasonable attorney to further investigate the May 13 conversation as a basis for constructing a defense. Moreover, Gajewski did not hint to his lawyer at the time of trial, even after defense counsel cross-examined Balz, that "um, you know, um, there's some more stuff I didn't tell you about her and me you might want to know." Instead, defense counsel constructed a defense

fully consistent with the information Gajewski provided him: Balz fabricated the assault lie so she could preserve her reputation (47D:358).[12] In the end, Gajewski did not provide defense counsel — even one as experienced as Kelly — with even a hint that the May 13 conversation had any more significance than the inconsequentiality the notes themselves suggested.

Invoking his youth, alleged naïveté, and purported lack of sophistication about the legal system, *see* Gajewski's Brief at 34, Gajewski continues his evasion of responsibility under ***Strickland*** to alert his lawyer with sufficient information of odd, puzzling, strange, unusual (choose a comparable adjective) circumstances that would lead the lawyer to further investigate those circumstances. Under ***Strickland***, 466 U.S. at 691, that minimal responsibility belonged to Gajewski, not defense counsel.

Here, Gajewski knew he faced a felony charge of sexual assault. Even a high-school student with little contact with the criminal justice system would know that a lawyer would want to know about a nasty confrontation between the defendant and the accuser. Even a high-school student would not describe such a conversation in the innocuous, vapid, even boring terms Gajewski described it to Kelly. And an experienced lawyer like Kelly, when dealing with a client like Gajewski, would certainly remain especially alert for anything — demeanor, tone of voice, choice of words — suggesting any hesitancy to disclose something

---

[12] *See also* State's Amended Brief at 39 n.13.

significant lurking beneath the surface. The fact that Kelly did not sense *anything* out of the ordinary in Gajewski's account of the May 13 conversation, and the fact that even as late as the trial, Gajewski did not offer Kelly any information suggesting Kelly needed a more complete understanding of the May 13 encounter, provide telling evidence — akin to the evidence of the dog that did not bark — both that Gajewski did not adequately alert Kelly (and perhaps did not intend to alert Kelly) and that Kelly's response never "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688.

CONCLUSION

For the reasons offered in this reply brief and in the State's principal brief, this court should reverse the court of appeals' decision and should reinstate Gajewski's judgment of conviction.

Date: October 6, 2008.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

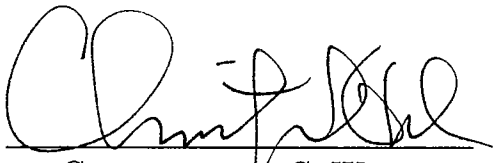
CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys for Plaintiff-
Respondent-Petitioner
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
wrencg@doj.state.wi.us

CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a reply brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 2,922 words.



CHRISTOPHER G. WREN