No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW MYKE,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

APPENDIX OF PETITIONER MATTHEW MYKE

COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2024

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

Appeal No. 2022AP1091-CR **Cir. Ct. No. 2016CF1728**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW JOSEPH MYKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN P. ZAKOWSKI, Judge. *Affirmed*.

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Matthew Myke appeals a judgment convicting him of repeated sexual assault of the same child. He also appeals an order denying his

Appendix A

motion for postconviction relief. Myke argues that his trial counsel were constitutionally ineffective by failing to advise Myke on his right to testify at trial and prepare him to testify, by failing to investigate and call certain witnesses, and by failing to object to the prosecutor's comments on Myke's silence during closing arguments. Myke also argues that the circuit court deprived him of his constitutional right to present a defense by excluding from evidence certain text messages between Myke and his ex-wife. We reject Myke's arguments and affirm.

BACKGROUND

¶2 According to the operative Information, the State charged Myke with repeatedly sexually assaulting Ann between October 2011 and March 2013,[1] when she was about fourteen years old. Ann reported the assaults in 2016, about two to three years after they occurred. The stated date range was consistent with Ann's allegations that the assaults occurred after the birth of Myke's daughter in October 2011 and during the course of his relationship and marriage to Melinda, which ended in March 2013.[2]

¶3 Before trial, the State sought to exclude from evidence text messages that Melinda sent to Myke after their marriage ended regarding child custody and placement issues. Myke's trial counsel sought to use the messages to attack Melinda's credibility by showing her bias against Myke and to note that the sexual

[1] Pursuant to the policy underlying WIS. STAT. RULE 809.86 (2021-22), we use a pseudonym when referring to the victim in this case. All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] Because Myke and Melinda share the same surname, we will refer to Melinda by her first name.

assault allegations were not made until after Myke had made attempts to see his daughter.[3] The circuit court excluded the messages because it was concerned with having a "trial within a trial," because the messages would open the door to prejudicial evidence against Myke, and because the messages did not include Myke's responses to them.

¶4 At trial, Ann testified that she was a close family friend of Melinda and would often babysit Melinda's children.[4] Ann also stated that Melinda was "like a mother figure" to her. She spent time with Myke, Melinda, and their children at their home at least twice a week. Ann then testified about the multiple instances when Myke sexually assaulted her. Ann did not immediately report the assaults because she believed that people would be angry with her and that it would destroy her relationship with Melinda or Ann's family. She did not tell Melinda about the assaults before reporting them to law enforcement with the assistance of her aunt. Ann also testified that she later met with the State's prosecutor and provided more details about two of the incidents.[5]

¶5 On cross-examination, Ann admitted that, on the morning before trial, she reviewed her written statement to law enforcement and the November 26, 2018 letter the State sent to Myke's counsel regarding the additional details. Ann further admitted that when she first reported the assaults, she had not provided law enforcement with some of the details to which she testified at trial, but she

[3] Myke was represented by two attorneys, Shane Brabazon and Quinn Jolly, before and during trial.

[4] Melinda had four children, one of whom she had in common with Myke.

[5] On November 26, 2018, the State sent a letter to Myke's counsel disclosing the additional details that Ann had provided.

explained that she later provided those details either to the prosecutor pretrial or during her trial testimony.

¶6 Melinda testified that she was still married to Myke but that they had been separated for several years. She married Myke in 2011, and their daughter was born that same year. Melinda also testified that Ann was like a sister to her kids and that Ann was always over at their house. She never saw Myke do anything inappropriate with Ann, and she denied ever having encouraged Ann to report that she was sexually assaulted by Myke. Melinda further testified that her relationship with Myke ended around April 2013 and that her custody dispute with Myke ended in June 2014. On cross-examination, Melinda admitted that she "had a really not that great [of a] relationship" with Myke after they separated.

¶7 Myke chose not to testify, and the circuit court conducted a colloquy on his decision. After the colloquy, the defense rested without having called any witnesses. During the State's rebuttal argument in closing, Myke's counsel requested a sidebar with the court and raised a concern that the prosecutor was improperly getting close to referring to Myke's decision not to testify. The prosecutor agreed to move his argument in a different direction, and the court therefore took no action on the defense's concern.

¶8 The jury found Myke guilty of the crime charged, and the circuit court subsequently imposed a twenty-year sentence consisting of ten years of initial confinement followed by ten years of extended supervision. Myke filed a postconviction motion seeking a new trial on the grounds that he received ineffective assistance of trial counsel and that the court deprived him of his right to

present a defense by excluding the text messages from evidence. The court held a ***Machner*** hearing at which Myke and his trial counsel testified.[6]

¶9 The circuit court denied Myke's postconviction motion in a written decision, concluding that Myke's trial counsel were not deficient in any of the alleged manners and that the court had appropriately excluded the text messages between Myke and Melinda. Myke now appeals. Additional facts will be provided as necessary below.

DISCUSSION

I. Ineffective assistance of trial counsel

¶10 An ineffective assistance of counsel claim requires the defendant to show both that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The claim presents a mixed question of law and fact. ***State v. Breitzman***, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93. The circuit court's findings regarding the factual circumstances of the case, trial counsel's conduct, and trial counsel's strategy are findings of fact that we do not overturn unless they are clearly erroneous. ***Id.*** Whether counsel's performance was deficient and whether the deficient performance prejudiced the defense are questions of law that we review de novo. ***Id.***, ¶¶38-39. We need not address both prongs if the defendant fails to make a showing on one. ***Id.***, ¶37.

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

¶11 In evaluating counsel's performance, we strongly presume that counsel's conduct fell "within the wide range of reasonable professional assistance," and we give counsel's strategic decisions great deference. ***Id.***, ¶38 (citation omitted). "In fact, where a lower court determines that counsel had a reasonable trial strategy, the strategy 'is virtually unassailable in an ineffective assistance of counsel analysis.'" ***Id.***, ¶65 (citation omitted). Prejudice requires the defendant to show that "but for his [or her] lawyer's error, there is a reasonable probability the jury would have had a reasonable doubt as to guilt." ***State v. Sholar***, 2018 WI 53, ¶45, 381 Wis. 2d 560, 912 N.W.2d 89. A reasonable probability means "a probability sufficient to undermine confidence in the outcome." ***Id.***, ¶33 (citation omitted).

A. Myke's decision whether to testify

¶12 Myke first argues that his counsel performed deficiently by failing to "meaningfully" advise him about whether he should testify at trial and by failing to advise him on the importance of being prepared to testify if he decided to testify. Myke contends that counsel must do more than tell a client that the decision whether to testify is entirely up to the client, which he insists is all that occurred in his case. Here, however, Myke made it clear to both of his counsel that he did not want to testify, and a defendant's decision whether to testify on his or her own behalf *is* the defendant's decision alone. *See* ***State v. Nelson***, 2014 WI 70, ¶24, 355 Wis. 2d 722, 849 N.W.2d 317. Moreover, and contrary to Myke's arguments, the circuit court found that both of Myke's counsel *did* advise him regarding his right to testify and the risks associated with testifying, and evidence supports that finding.

¶13 At the ***Machner*** hearing, both Attorney Brabazon and Attorney Jolly testified that they talked to Myke several times about his decision to testify. Brabazon testified that: he advised Myke about his right to testify; it was a "he said, she said" case; Myke had seen Ann testify; Myke would have to decide if he wanted to testify; and Myke would have a colloquy with the circuit court to ensure the decision was Myke's decision. Jolly was even more involved in discussions with Myke regarding whether he should testify at trial. In particular, Jolly testified that he helped prepare Myke to testify at trial by talking about potential witnesses and what they might say. When Myke adamantly expressed that he did not want to testify, Jolly recalled discussing that decision with Myke and telling him that "the only way his story is coming in is if he testifies."

¶14 Brabazon testified that, in general, he reminds clients during trial to think about whether they want to testify. According to Brabazon, he advises clients on their decision by explaining the benefits and consequences of testifying and by sharing his experiences with clients testifying or declining to do so. Similarly, Jolly testified that he advises clients that the decision to testify should be based on what occurs during the trial and that he always gives his opinion on whether a client should testify. Moreover, both Brabazon and Jolly testified that Myke never wavered on his decision not to testify. As Brabazon explained, Myke "was very adamant that he was not going to testify. He didn't need to because he was innocent. He was very short, very definitive in his response. He did nothing wrong. He was—didn't see any need—reason for him to testify." Similarly, Jolly testified that Myke did not express that he felt unprepared to testify because he had "never wanted to testify."

¶15 At the ***Machner*** hearing, Myke denied telling his counsel that he did not have to testify because he was innocent. Myke did, however, confirm that

Brabazon explained that he did not have to testify and that it might be better if Myke did not testify because there was no evidence against him. Myke also testified that Brabazon explained that if he did testify and he seemed nervous while testifying, then it could make him look guilty. Myke further testified that Brabazon talked to him about the consequences of testifying in general terms but insisted that he wanted advice on his specific case. All of the foregoing represents reasonable—and "meaningful"—advice on whether Myke should exercise his right to testify in this particular case.

¶16 In short, and as the circuit court expressly found in its written decision, Myke was reasonably advised of his right to testify "and the risks associated with testifying." Moreover, based on the foregoing, Myke's counsel did prepare him to testify, but Myke adamantly refused to do so and, ultimately, chose not to testify. There is no evidence that Myke's decision not to testify was based on a lack of preparation. That decision was his alone to make. *See* ***Nelson***, 355 Wis. 2d 722, ¶24. Accordingly, Myke's counsel did not perform deficiently in this regard.

B. Investigating and calling certain witnesses

¶17 Myke next argues that his counsel performed deficiently by not interviewing Andrew Thomas, a witness on Myke's witness list, who did not testify but whom Myke claims could have refuted one of Ann's multiple sexual assault allegations. At trial, Ann testified that, one night, Myke and Melinda had several friends over at their house after the Oneida Pow Wow. When Melinda left to drop off their friends, Ann testified that Myke sat next to her on the couch where she would be sleeping, asked her if she knew what a popsicle was, and placed her hand on his penis. She did not know what time of the night this

occurred, but she testified that it was "pretty late." At the ***Machner*** hearing, Myke testified that Thomas would have known that Myke was the first one to go to sleep on that particular night and that several guests remained at Myke's house after he went to sleep.

¶18 Thomas's testimony, however, would have addressed only one of the numerous sexual assaults about which Ann testified, and it would not have been inconsistent with Ann's testimony. As noted, Ann testified that Myke came out of his room at some point in the night and sexually assaulted her. Thomas's testimony about Myke being the first one to go to sleep is not inconsistent with Ann's testimony because, as the State notes, "there is no reason to believe Myke could not have simply gone into his bedroom early and then come back out later."

¶19 Additionally, Myke did not provide an affidavit or statement from Thomas about what he would have testified to at trial. Thomas did not even testify at the ***Machner*** hearing, including as to what his proposed trial testimony would have been. All that Myke provides is his own testimony about what he believes Thomas would have said.

¶20 Furthermore, Thomas's failure to testify at Myke's trial is attributable to Myke himself, given that he never provided his counsel with information demonstrating the importance of Thomas testifying. Counsel's actions are usually based on information supplied by the defendant, and the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***Strickland***, 466 U.S. at 691. At the ***Machner*** hearing, Brabazon testified that his investigator reached out to Myke to acquire information about possible witnesses for trial. He could not recall whether the investigator talked to Thomas, but he did recall that the phone

number that Myke provided for Thomas only received text messages but not phone calls. Brabazon also testified that he may have sent a text message to Thomas, but he never received a response. Both Brabazon and Jolly also testified that Myke told them that he would bring Thomas to court for trial, but Myke did not do so.

¶21 We also note that both Brabazon and Jolly testified that it was difficult to obtain information from Myke in general. Specifically, Brabazon testified that they had trouble getting Myke to respond to them, which hindered their ability to vigorously represent him. Jolly testified that he repeatedly asked Myke to provide him with a list of potential witnesses and their contact information, but Myke provided only one name.[7] Jolly noted that his requests reached a point where he wrote a letter to Myke "stating this is what we need and would you please contact us." Based on both Brabazon's and Jolly's testimony, the circuit court noted its impression that Myke "was a quiet individual who did not volunteer a lot of information to his attorneys."

¶22 Based on the foregoing, we conclude that Myke has failed to meet his burden to show that his counsel performed deficiently by failing to interview and call Thomas as a witness.

¶23 Myke also argues that his trial counsel performed deficiently by not locating and presenting any witnesses that could testify to Myke's good character.

[7] At the ***Machner*** hearing, Myke also testified that he told the investigator about Melinda's aunt as a potential witness. He stated that Melinda's aunt approached him the day before he was arrested and told him that she "didn't agree to what Melinda was trying to do" to Myke. On cross-examination, however, Myke admitted that he only knew the last name of Melinda's aunt and that he did not have her contact information.

Myke contends that counsel's failure to do so was not based on a reasonable strategy but on a mistake of law. At the ***Machner*** hearing, Brabazon testified that he did not develop character witnesses for Myke because he believed that he could not offer evidence of Myke's character unless the State first challenged Myke's character. Myke also testified that he asked Brabazon whether it would be beneficial to have people testify about his character, but Brabazon said it would not help. Myke believed that his current partner and the people who wrote character letters for his sentencing could have testified about his character at trial.

¶24 Myke is correct that Brabazon mistakenly believed he could not offer evidence of Myke's character unless it was first attacked by the State.[8] Nevertheless, Brabazon explained that the trial strategy was not about Myke's character but rather to focus on the significant inconsistencies in Ann's story. Jolly similarly testified that the theory of defense was that Myke was innocent and that there were issues with Ann's allegations. Likewise, the circuit court found that "the trial was about the victim's character, not [Myke's] character." It further found that even if Brabazon's view of the law was mistaken, "he would not have gone the route of presenting character witnesses" and "believed the focus was on the credibility of the complaining witness."

¶25 Despite Brabazon's mistaken view of the law, we agree with the circuit court that the decision not to call character witnesses was "a reasonable exercise in trial strategy," given that the trial strategy was to focus on Ann's inconsistencies. *See* ***Breitzman***, 378 Wis. 2d 431, ¶¶38, 65. Calling character

[8] WISCONSIN STAT. § 904.04(1)(a) allows a defendant to present evidence of a pertinent character trait. On appeal, the State concedes trial counsel's mistake of law in this regard.

witnesses for Myke would have taken the focus off Ann and the inconsistencies in her allegations.

¶26 And, as noted above, Myke failed to provide his counsel with information on potential character witnesses other than Thomas. Indeed, the circuit court expressly found that "the most significant reason there were not witnesses developed for trial testimony is because of lack of information from [Myke] himself." In short, we conclude that Myke's counsel did not perform deficiently by not locating and presenting character witnesses for Myke.

C. State's comments during closing arguments

¶27 Finally, Myke argues that his counsel performed deficiently by failing to object to the prosecutor's allegedly improper comments during the State's closing argument. Myke asserts that the prosecutor repeatedly referred to Myke's decision not to testify, accused Myke's counsel of misrepresenting evidence, and mischaracterized his counsel's argument "about [Ann] having access to written statements" to law enforcement and the State's November 26, 2018 letter to Myke's counsel "to review to prepare to testify as defense counsel accusing the prosecutor and [Ann] of engaging in a conspiracy to manufacture evidence."

¶28 During his closing argument, the prosecutor referred to the State's admitted lack of physical evidence, such as DNA or video evidence. The prosecutor then explained the evidence that the State did have:

> What we do have is sworn testimony of witnesses. The sworn testimony of the person who this happened to. Sexual assault happens in private. There are two people who know what happened in that incident. You heard testimony from one of them. The only person that shared any information with you about what happened in those

> intimate settings is [Ann]. Her testimony is uncontroverted.
>
> As you decide about [Ann]'s testimony you're obviously going to have to decide about her credibility. If you believe her, if you believe what [Ann] told you about the incidents that happened to her, that's it. This case is over.

Counsel did not object during the State's closing argument.

¶29 During his closing argument, Myke's counsel (Brabazon) made several remarks about Ann's testimony. Specifically, counsel commented on Ann reviewing her statement to law enforcement and the State's November 26, 2018 letter to Myke's counsel the morning before she testified at the trial: "It's studying for the test, and that's why it makes sense when she says I can't remember everything word for word." Counsel then argued that another problem with Ann's testimony was that the prosecutor prompted her into talking about an instance of sexual assault: "She says, oh, yeah, and it wasn't, the way I heard it was like she wasn't remembering it from what happened. It was remembering it like, oh, I read about that earlier today. Let me tell you about that, too." Counsel stated:

> The State is saying don't judge [Ann] on her recollection of the events, her lack of details, her lack of consistency, don't judge her credibility on the reasonableness of her testimony, don't judge the evidence on what actually happened. As long as she remembered what she wrote down in the report and study it a couple of hours before she got on the stand it must be true.

Counsel then commented on the State's failure to perform a full investigation of Ann's allegations: "[I]t's a little disingenuous of the State to say search for the truth when that's the last thing the State wanted for. The last thing the State wanted to do is fully investigate this case."

¶30 In rebuttal, the prosecutor responded to counsel's implication that "the only way that [the jury] can find this is a not guilty verdict is if [Ann] lied and [the prosecutor] conspired with her to make her lie" and that they "worked together to, for no reason whatsoever, find this man guilty of sexual assault." The prosecutor explained that "every witness that ever testifies on the stand is given the opportunity to review the information about their case before" testifying and that Ann was not "studying for an exam and failing it by not getting it word for word." The prosecutor then made the following comment, after which Myke's counsel requested a sidebar and the prosecutor agreed to move his argument in another direction:

> The evidence in this case tells you that [Ann] was sexually assaulted over the course of several different events that occurred within an 18-month time period. The only evidence in this case that was presented to you is that Matthew Myke engaged in these acts. That's it. That's the only person that was present during those incidents that talked about what happened is [Ann]. She's the one who gave you the evidence in this case.

¶31 At the ***Machner*** hearing, Brabazon testified that he makes strategic decisions as to objections during closing arguments because he does not want the jury to view him negatively. If the jury perceives him negatively, it does not help his client. The circuit court found that Brabazon's decision not to object was an appropriate trial strategy "to prevent him [from] appearing overly argumentative to the jury or to bring more attention to the prosecutor's statement." The court also found that the prosecutor's response to Brabazon's comment about the prosecutor's prompting of Ann and her "studying for the test" was a fair response. We agree with the court that Brabazon's decision not to object to these responses was a reasonable strategic decision and that the prosecutor's comments were a fair response to counsel's own comments. *See* ***Breitzman***, 378 Wis. 2d 431, ¶¶38, 65.

¶32 As for the prosecutor's comments in his initial closing and rebuttal that indirectly referred to Myke's decision not to testify, Myke argues that they "could only have been designed to equate [Myke's] silence with guilt."[9] A prosecutor may not adversely comment on a defendant's decision not to testify. *See* ***State v. Hoyle***, 2023 WI 24, ¶¶21, 24, 406 Wis. 2d 373, 987 N.W.2d 732.

¶33 In ***Hoyle***, our supreme court held that three elements must be present for a prosecutor's comment to constitute an adverse reference to the defendant's failure to testify. ***Id.***, ¶29. First, the comment "must have been 'manifestly intended to be' or was 'of such character that the jury would naturally and necessarily take it to be' a 'comment on the failure of the [defendant] to testify.'" ***Id.*** (alteration in original; citations omitted). Second, the comment "must also have been 'manifestly intended to be' or was 'of such character that the jury would naturally and necessarily take it to be' 'adverse,' meaning comment 'that such silence is evidence of guilt.'" ***Id.*** (citations omitted). Finally, the comment "must not have been 'a fair response to a claim made by defendant or his [or her]

[9] Myke also argues that we should apply our decision in ***State v. Hoyle***, No. 2020AP1876-CR, unpublished slip op. ¶¶1-2 (WI App Apr. 26, 2022), to this case. There, we concluded that a prosecutor's repeated argument that the State's evidence was "uncontroverted" was improper and violated Hoyle's right not to testify at trial. ***Id.*** The Wisconsin Supreme Court subsequently reversed and remanded our decision on this issue in ***State v. Hoyle***, 2023 WI 24, ¶¶1-3, 406 Wis. 2d 373, 987 N.W.2d 732.

In this regard, we also note that to prove that counsel was ineffective for not objecting to the prosecutor's comments at issue, Myke must show that it was settled law that those comments were improper. *See* ***State v. Breitzman***, 2017 WI 100, ¶49, 378 Wis. 2d 431, 904 N.W.2d 93. "[F]ailure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." ***Id.*** (alteration in original; citation omitted). Given that the closing arguments in this case occurred in early 2020—i.e., well before our April 2022 decision in ***Hoyle***—and our supreme court reversed our application of applicable law in this particular context, the relevant law that Myke faults his counsel for not applying was decidedly unsettled at the time.

counsel.'" ***Id.*** (citation omitted). Applying the foregoing test, our supreme court concluded that a prosecutor's comments repeatedly referring to the State's evidence as "uncontroverted" were, when taken in context, "neither 'manifestly intended to be' nor 'of such character that the jury would naturally and necessarily take [them] to be' a comment on [the defendant]'s silence." ***Id.***, ¶39 (first alteration in original; citation omitted).

¶34 Similarly here, we conclude that the prosecutor's comments—that Ann was the only person who shared any information with the jury about what happened, that Ann's testimony was uncontroverted, and that the only person who talked about the incidents and gave the jury the evidence in the case was Ann—when taken in context, were not comments on Myke's decision not to testify. Rather, the prosecutor was explaining the evidence the State did not have—DNA evidence and physical evidence—and the evidence it did have—witness testimony. He further explained that the State only had witness testimony because "[s]exual assault happens in private." The prosecutor then stated that, in order to convict Myke, the jury had to decide on Ann's credibility and whether it believed Ann.

¶35 When taken in context, the prosecutor's comments were neither manifestly intended to be, nor were they, of a character that the jury naturally and necessarily took them to be a comment on Myke's decision not to testify. Instead, the prosecutor was explaining why the only evidence of the assaults that the State had was Ann's testimony and that her testimony was enough to convict Myke, if the jury found her credible. Therefore, the prosecutor's comments were not an

improper reference to Myke's decision not to testify. Accordingly, counsel was not deficient by failing to object to the comments on this basis.[10]

II. Myke's right to present a defense

¶36 Myke also argues that the circuit court denied him the right to present a defense by excluding from evidence text messages between himself and Melinda regarding their child custody dispute. He asserts that the court committed error when it "essentially ruled that the messages could not be used at trial because the complete conversation was not depicted in the messages." He further asserts that the messages established Melinda's motive to harm Myke and that motivation "was the only hypothesis approaching a theory of defense that trial counsel presented at any point in the trial."

¶37 We uphold a circuit court's evidentiary rulings if the court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***State v. Munford***, 2010 WI App 168, ¶27, 330 Wis. 2d 575, 794 N.W.2d 264 (citation omitted). "Although a [circuit] court's admission or exclusion of evidence is within its reasoned discretion," we review de novo whether the court's "exclusion of evidence deprived a defendant in a criminal case of his or her right to present a defense." ***State v. Ward***, 2011 WI App 151, ¶15, 337 Wis. 2d 655, 807 N.W.2d 23. The exclusion of evidence violates a defendant's right to present a defense only when the proffered evidence is

[10] Myke also argues that his counsel's cumulative errors affected the reliability of the proceedings. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. Because we conclude that counsel did not perform deficiently in any of the ways that Myke alleges, he was not prejudiced by the cumulative effect of these errors.

essential to the defense and the defendant has "no reasonable means of defending his [or her] case" without the proffered evidence. ***State v. Williams***, 2002 WI 58, ¶70, 253 Wis. 2d 99, 644 N.W.2d 919 (citation omitted).

¶38 Here, the circuit court did not erroneously exercise its discretion by excluding the text messages between Myke and Melinda because the messages contained information that was actually prejudicial to Myke and created the potential for jury confusion. The fact that the messages were incomplete—insomuch as they did not include Myke's responses to them—was not the only reason the court excluded the messages. The court was also concerned with the messages' limited relevance because the custody dispute ended in 2014, well before Ann made the sexual assault allegations.

¶39 The circuit court was further concerned with the prejudicial information against Myke that the text messages could reveal. Specifically, the court was troubled with messages that referred to Myke "sleeping with" a different fourteen-year-old girl and messages that would open the door to the State referencing a domestic violence incident between Myke and Melinda. Finally, the court was concerned with having a "trial within a trial" regarding the custody dispute between Myke and Melinda and "get[ting] away from the issue at hand." The court reiterated these concerns in its decision denying Myke's postconviction motion.

¶40 In short, the circuit court properly excluded the text messages between Myke and Melinda because, in addition to them being incomplete, the messages would likely be prejudicial to Myke in several ways and created the potential for jury confusion by distracting the jury over a custody dispute that

ended well before any sexual assault allegations were made. *See* WIS. STAT. § 904.03.

¶41 The exclusion of the text messages also did not violate Myke's right to present a defense because the messages were not essential to his defense—i.e., that Ann was fabricating the sexual assault allegations—and their exclusion did not leave Myke without reasonable means of defending his case. The messages were not essential because they had limited relevance, given that they referenced a custody dispute between Myke and Melinda that ended well before Ann made any sexual assault allegations. Furthermore, none of the text messages referred to Ann. The messages, at most, show that Melinda was upset with Myke, but they do not support Myke's preferred theory of defense that Melinda conspired with Ann to make sexual assault allegations against him.[11] Accordingly, the messages were not essential to Myke's defense.

¶42 Myke also had other reasonable means of defending his case. As noted, his counsel's strategy was to focus on Ann's inconsistencies and credibility. Brabazon extensively cross-examined Ann, focusing on the inconsistencies between what she reported to law enforcement, what she reported to the prosecutor, and what she testified to at trial. Moreover, Myke's counsel utilized other means of demonstrating Melinda's bias, as she testified about the custody and placement issue and admitted that she did not have a great relationship with

[11] At the ***Machner*** hearing, Myke testified that he wanted his defense to be that Melinda and Ann agreed to make the sexual assault allegations against Myke. Brabazon testified that Myke provided him with the text messages regarding child custody, including the payment of child support, and that Myke believed the allegations were fabricated because of the child custody issues. Brabazon added that he wanted to pursue the child custody issue as a theory of defense, but he could not do so because the circuit court excluded the messages from evidence.

Myke after they separated. In short, the exclusion of the text messages between Myke and Melinda did not leave Myke without any other reasonable means of defending his case. Therefore, the exclusion of the messages did not violate Myke's right to present a defense.

By the Court.—Judgment and order affirmed.

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

FILED
06-13-2022
Clerk of Circuit Court
Brown County, WI
2016CF001728

BY THE COURT:

DATE SIGNED: June 9, 2022

Electronically signed by John P. Zakowski
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT Br. 6 BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

Case Number 2016 CF 1728

v.

MATTHEW JOSEPH MYKE,

Defendant.

DECISION

Defendant, Matthew Myke, ("Myke") represented by Attorney Mark Maciolek filed a post conviction motion which was heard before the court on January 4, 2022. The State was represented by Assistant District Attorney Kim Hardtke. The defense is claiming a number of grounds for a new trial.

1. Defense counsel failed to properly advise defendant about his right to testify at trial. Furthermore, counsel failed to prepare him for even the possibility of testifying at trial.
2. Defense counsel failed to interview witnesses including a potential alibi witness, Andrew Thomas.
3. Defense counsel failed to call character witnesses.
4. Defense counsel failed to object to the State's closing argument.

Appendix B

5. The court erred in ruling that the text messages sought to be introduced by the defense were inadmissible.

Case law: The seminal case on ineffective assistance of counsel is Strickland v. Washington, 466 U.S. 668 (1984). One of the Wisconsin cases concerning the issue is State v. Smith, 207 Wis. 2d 258 (1997) which described the two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components. The court is to make findings after a Machner hearing has been conducted. Another Wisconsin case involving ineffective assistance is State v. Theil, 264 Wis.2d 571 (2003) which stated that in evaluating an ineffective assistance of counsel claim, the court must conduct a two prong analysis: 1) was there deficient performance, i.e. did counsel's standard of performance fall below an objective standard of reasonableness, and 2) did the attorney's conduct likely alter the outcome of the case. The Theil court explained,

> "a defendant must show that 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."

In Theil, the court found trial counsel's performance deficient. He did not read police reports nor any medical notes. The attorney did not adequately review documents. There was no significant independent investigation. Defense counsel failed to file a §972.11(3) motion which would have addressed the victim's credibility. He also failed to object to inadmissible testimony of a doctor.

The Theil court found there was deficient performance. The attorney's failure to investigate was closely tied to his failure to simply read discovery, obviously falling below objective reasonable standards. However, the court also stated,

> "A criminal defense attorney's performances is not expected to be flawless. There is a strong presumption that counsel's conduct falls within the wide range of professional assistance."

When assessing if counsel was "deficient" the court must ascertain if counsel's conduct or performance fell below "objective standards." The findings of fact made by the trial court should include the circumstances of the case and counsel's conduct and strategy. Therefore, the court reviewed the activities and involvement of defense counsel in representing Myke. The court is to look to the totality of circumstances at trial, not just to the totality of representation provided to the defendant.

Defense counsel formulated a theory of defense assisted by limited information provided by the defendant. Part of Attorney Brabazon's strategy was to focus on the inconsistencies in the victim's testimony. He believed it was not necessary to present witnesses for the defendant's truthfulness unless his character was attacked. (transcript 12/3/21, p. 18, lines 23-24).

Attorney Brabazon did not ask for a written narrative from the defendant because he denied any physical contact with victim. He explained an alibi defense was difficult because the crime (repeated acts) was alleged to have taken place over a period of time.

Defense counsel's performance was not reactive. He did attempt to pursue a reason for fabrication by attempting to admit the text messages authored by the defendant's ex-wife. Counsel proactively attempted to impugn the credibility of the victim by introducing said text messages.

Attorney Brabazon filed a Daubert motion to exclude the testimony of the State's expert Susan Lockwood at trial.

Myke testified he met with Attorney Brabazon twice, and with Attorney Jolly once. (transcript 1/4/22, p. 52, line 24). When he did meet with Attorneys Brabazon and Jolly, the meeting lasted between 1 and 1 ½ hours. (transcript 1/4/22, p. 61, lines 9-13). Attorney Brabazon admitted he met with the defendant once or twice besides court appearances. (transcript 12/3/21, p. 26, lines 14-15). Whenever the defendant was in town for a hearing, Attorney Jolly would meet with him at the office. (transcript 12/3/21, p. 109, lines 6-7). The defendant said he usually communicated with Attorney Brabazon through phone calls, texts and emails. The defendant stated he would come to their office after a hearing when he was in Green Bay and Attorney Brabazon would inform him of what would happen at the next court hearing.

Myke claimed he never met with Attorney Brabazon to prepare for trial (transcript 1/4/22, p. 33, lines 2-4). The defendant also testified his attorneys did not meet with him the night before trial.

As to making a "reasonable investigation" under Strickland, defense counsel utilized a private investigator. Counsel also asked the defendant for potential witnesses. The defendant mentioned an Aunt, but failed to produce her name. The defendant promised a Mr. Thomas who failed to appear at trial.

Attorney Brabazon indicated he put a lot of trial preparation because the trial was scheduled to go forward on multiple occasions.

Attorney Brabazon testified he engaged in vigorous cross-examination of the State's witnesses. (transcript, p. 71, lines 14-17). The court concurs and the record indicates there was extensive cross-examination of the victim.

The court will address each argument with testimony adduced at our motion hearing on January 4, 2022.

I. Defense counsel failed to properly advise the defendant about his right to testify at trial.

The defendant did not testify at trial. The court conducted a complete colloquy with the defendant, and found the defendant's decision not to testify was knowingly, intelligently, and voluntarily made.

Attorney Brabazon: Attorney Brabazon spoke with defendant about the possibility of testifying on a number of occasions. (transcript 12/3/2021, p. 40, line 10, p. 46, lines 3-5)). He explained that contained within the client's representation agreement it is specifically noted the client will have the decision whether or not to testify. (transcript 12/3/2021, p. 40, lines 17-20).

Attorney Brabazon went over the risks of testifying with Myke. He explained his approach was similar to going over the pro and cons of having a preliminary hearing. He explained:

> "I'm not going to be twisting anybody's arm to get on the stand and push them one way or another on whether or not to take a plea bargain, whether or not to take the stand at trial." (transcript 12/3/21, p. 70, lines 11-14.)

Counsel questioned Attorney Brabazon concerning his decision-making on the issue of whether or not the defendant should have testified by posing different scenarios, such as, "did you ever approach him with..." Brabazon said he had not because he knew the defendant would not testify. He claimed the defendant from the onset did not want to testify.

> "If Mr. Myke in any way suggested that he was indifferent or contemplating [testifying at trial], we probably would have had a lot more thorough discussions and perhaps even done some question and answer period and how are you going to answer in these situations and these specific questions that might be posed to

> you. But it was never thought of that he would – that he was going to testify at all." (transcript 12/3/21, p. 78, lines 9-16).
>
> "My recollection is, he was very adamant that he was not going to testify. He didn't need to because he was innocent…He was very short, very definitive in his response. He did nothing wrong. He was-didn't see any need-reason for him to testify." (transcript 12/3/21, p. 40-41, lines 21-2).

Attorney Brabazon admitted he did not do a "question and answer" type of preparation for potential testimony. He reiterated that the defendant was adamant about not testifying.

> "When he said he was not planning on testifying. I took that as his decision. Again, it wasn't a question. It was never, "I'll think about it." It was never, "let me contemplate that." It was I – I'm not testifying. I didn't do this. There's no reason for me to have to testify." (transcript 12/3/21, p. 46, lines10-15).

Attorney Brabazon did not recall if he advised the defendant whether or not to testify. He knows he informed him it was his decision and that he talked to him about his right to testify at the conclusion of the State's case.

Attorney Jolly: Attorney Jolly also spoke with the defendant about his right to testify numerous times. (transcript 12/3/21, p. 95, lines 15-17).

Attorney Jolly felt he helped Myke prepare to testify at trial by going over with him what potential witnesses would say and talked about general topics. (transcript 12/3/21, p. 96, lines 11-18). However, Attorney Jolly stated, "The defendant never wanted to testify." (transcript 12/3/21, p. 99, line 10).

Defendant Matthew Myke: The defendant testified he never told Attorney Brabazon he did not want to testify at trial. (transcript 1/4/22, p. 34, lines 11-13). "I never once said I'm not going to testify. I was never adamant about not testifying." (transcript 1/4/22, p. 65, lines 12-14). However, he did verify that Attorney Brabazon informed him he did not have to testify and that

Attorney Brabazon explained the risks of testifying. (transcript 1/4/22, p. 34-35, lines 18 – 2). Myke testified that Attorney Brabazon on numerous occasions prior to trial "kept asking me whether I was going to or not" testify. He said he asked Attorney Brabazon during the trial what he should do and what Attorney Brabazon told him was that it was up to him.

Myke stated he never went over any testimony preparation with Attorney Brabazon prior to trial. The defendant admitted he spoke with Attorney Jolly about testifying during trial (transcript, p. 48, lines 3-7). Attorney Jolly told him it was up to him if he wanted to testify.

Despite the numerous discussions with both attorneys concerning whether he was going to testify the defendant stated he did not know he had a Fifth Amendment right until the court's colloquy with him during trial.

The court questioned Myke during the trial at the conclusion of the State's case. It was clear to the court the defendant was aware of his constitutional right to testify and that it was his decision not to testify. The defendant now says he wanted to testify. The court cannot help but feel there is a certain buyer's remorse present in his argument.

The court allowed considerable latitude on direct examination of Myke at our January 4, 2022 hearing to allow the defendant to make his case that much of his testimony would have been heard by the jury had he testified. He argues such testimony would have bolstered his credibility and that with his testimony there is a reasonable probability the outcome of the trial would have been different.

During his testimony Myke explained his involvement as a leader in his tribe. He discussed his family and the history with his first wife Melinda. He described Melinda as "very possessive, very angry, and really money orientated, very spiteful and bitter." (transcript 1/4/22, p. 17, line

10 and p. 9, lines 9-10). He described having his vehicle vandalized, his tires slashed, and threats from her family. He described how he first met the victim, that she started to "come around" after his child, Jossani, was born, and that she eventually babysat Jossani.

He denied the allegations the victim testified to at trial, including:

- Touching her buttocks while at the movies
- Lying on the couch with her while she was babysitting
- Kissing her and exposing himself at the Pow Wow in July
- He pushed her down and laid on her in Jossani's bedroom
- Inserting his fingers in her vagina while they were in New York
- Using a condom and having sexual intercourse downstairs while in Green Bay.

Some of the testimony of the defendant is at odds with that of defense counsel. The court has to make credibility determinations of the witnesses during our motion hearing and has considered the totality of the defendant's testimony. The court notes the defendant told Attorney Jolly he would present employment records, but never did. He said a witness (presumably Thomas) would show up to testify, but he never did. Now during our motion hearing Myke testified he has no idea why Thomas did not testify. The defendant testified the first time he met with Attorney Brabazon he never discussed a fee structure.

- The court finds counsel apprised the defendant of his right to testify, and the risks associated with testifying. The court finds the defendant chose not to testify and defense counsel respected his decision. The court does not find deficient performance concerning this issue.

II. The court failed to contact witnesses for the defendant.

The court was left with the impression the defendant was a quiet individual who did not volunteer a lot of information to his attorneys. Attorney Brabazon testified, "literally getting information from Matthew was difficult." (transcript 12/3/21, p. 46, lines 18-19). Attorney Jolly also stated it was hard to get information from the defendant.

> "It got to the point where I even had to write him a letter stating this is what we need and would you please contact us." (transcript 12/3/21, p. 93, lines 4-6)

Attorney Jolly went over the rules of evidence with the defendant prior to trial and asked the defendant to produce witnesses.

The defendant claims he told his attorneys about an Aunt who spoke to him about "what Melinda was trying to do to me" prior to the allegations but never gave them her name. The defendant said Andrew Thomas would have testified that during one of the alleged incidents he went to sleep early and others stayed up beyond 3 a.m., contradicting the testimony of the victim. Attorney Brabazon put Andrew Thomas on the witness list, but did not recall talking to him. Brabazon claimed he has no idea why Thomas did not testify. Attorney Jolly explained that at one point the defendant was going to bring a witness (Thomas) with him to trial. However, when Myke showed up for trial, he did not bring him because the friend "was busy." (transcript 12/3/21, p. 100, lines 11-15) No other witnesses were found. (transcript 12/3/21, p. 17, line 14).

The court finds the most significant reason there were not witnesses developed for trial testimony is because of lack of information from the defendant himself. Other than Thomas, who apparently would have been able to address only one of the incidents, the defendant has still not identified other potential witnesses, the content of their testimony, and how the testimony would be relevant in making any difference in the outcome of the trial. The court finds no deficient performance.

III. Failure to call character witnesses.

The defendant testified at our motion hearing he told his attorneys that he had character witnesses. (transcript 1/4/22, p. 38, lines 9-11). Attorney Brabazon' s trial strategy was to focus on the inconsistencies in the complaining witness' testimony. He believed the trial was about the victim's character, not his client's character. Counsel believed it "came down" to whether the jury believed the victim. (transcript 12/3/21, p. 43, lines 19-21.)

This court believes the decision not to put forth character witnesses was a strategic decision to have the focus on the victim and not his client. Even if Attorney Brabazon's view of the law had been corrected, he would not have gone the route of presenting character witnesses. He believed the focus was on the credibility of the complaining witness.

- The court finds the decision not to call character witnesses a reasonable exercise in trial strategy. The court agrees with defense counsel that the case turned on the testimony of the victim as it does in most sexual assault cases. The court found the complaining witness' demeanor at trial most appropriate which added to her credibility in the eyes of the jury. Furthermore, the court believes the testimony of those potential character witnesses who wrote character letters on behalf of the defendant would have had limited impact on the jury's decision.

IV. Counsel failed to object to State's closing argument.

The defendant argues Attorney Brabazon's performance was deficient because he failed to object to improper closing arguments made by the prosecutor. Attorney Brabazon admitted he makes strategic decisions, "judgment calls" on whether to object during a prosecutor's closing arguments; for example, he must decide if objecting would leave a negative connotation in the

minds of the jury. It is a strategy to prevent him appearing overly argumentative to the jury or to bring more attention to the prosecutor's statement. This is an appropriate exercise of discretion. State v. Adams, 221 Wis. 2d 1, 11 (Ct. App. 1998)

At the beginning of his rebuttal argument District Attorney Lasse told the jury,

> "I'm not trying to be offended but that's going to be pretty hard because essentially, Attorney Brabazon said that the only way that you can find this is a not guilty verdict is if Aksha Berg lied and I conspired with her to make her lie. That's certainly the implication. It's absolutely the implication in this case that the two of us worked together to, for no reason whatsoever, find this man guilty of sexual assault." (transcript 1/22/20, p. 22, lines 10-18).

There was no objection from defense counsel. The argument was made in response to defense counsel's argument that the victim's testimony was influenced by the prosecutor.

The court finds the prosecutor's argument a fair response to defense counsel's argument about the victim simply regurgitating information from written statements and the inference that the victim was being couched by the district attorney. The court does not find the defendant's failure to object unreasonable.

Defense counsel also argues defense counsel was deficient for failing to object to the prosecutor's improper references during closing arguments concerning the defendant's failure to testify. A prosecutor cannot suggest to the jury that a defendant's choice not to testify indicates guilt.

The defense has filed a supplemental brief in which it references the recently unpublished District III court of appeals decision in State v. Hoyle, 20 AP 1876-CR (on appeal to the Wisconsin Supreme Court) in which the court reversed a sexual assault conviction based on arguments by the State relating to the defendant's silence at trial. It is noteworthy the defendant notes in Hoyle the prosecutor *repeatedly* argued the testimony was uncontroverted and that there

was "absolutely no evidence" disputing her account. The prosecutor continually argued the lack of evidence disputing her testimony could have only come from Hoyle and was "not heard from because of Hoyle's guilt." (¶ 19).

Defense counsel cites State v. Jaimes, 292 Wis. 2d 656 (Ct. App. 2006) which sets forth a three prong test to determine if a prosecutor makes an improper reference to the defendant's failure to testify.

1) The comment must constitute a reference to the defendant's failure to testify.

2) The comment must propose that the failure to testify constitutes guilt.

3) The comment must not be a fair response to a defense argument.

The Jaimes case involved co-defendants and a reference to the right against self-incrimination. The Jaimes court quoted the U.S. Supreme Court in its decision in Donnelly v. DeChristoforo, 416 U.S. 637 at 647 (1974):

> "A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation will draw that meaning from the plethora of less damaging interpretations."

Whether a prosecutor's conduct during closing arguments affects the fairness of the trial is determined by viewing the statements in the context of the total trial. State v. Wolff, 171 Wis.2d 161 (Ct. App. 1992)

In Scheiss v. State, 71, Wis. 2d 733 (1976), the defendant alleged the prosecutor made an improper comment in closing arguments relating to the fact that the defendant failed to testify. At that time, because neither counsel made a motion that closing arguments be recorded, they were not in the record, and the improper comment had to be "reconstructed." The motion for mistrial was made because the prosecutor commented "something to the effect that the defense has not brought any evidence to prove, to negate the proof that …the State had put in." (P. 749)

The Scheiss trial court found a finding of prejudice under these circumstances would be speculative. The Wisconsin Supreme Court in its decision opined that the prejudicial effect of a comment which does not specifically refer to the defendant's failure to testify depends to a great extent on its exact nature and content.

While there are some similarities between the arguments made in Hoyle and the arguments made here, the court does not find them one in the same. There are specific differences which must be examined within their respective contexts. The court believes the Myke case is much more nuanced than in Hoyle where there was only one sexual assault. Here there was a pattern of grooming and a series of assaults.

The State in its brief argues that a distinction between Hoyle and our case is that the Hoyle comments were made during closing arguments, while the passages quoted by the defense in its supplemental brief were made by the prosecutor in rebuttal. The court finds there was such a passage made by the prosecutor in his closing argument and then again in rebuttal.

During closing argument District Attorney Lasee argued to the jury,

> "There are two people who know what happened in that incident, you heard testimony from one of them. The only person that shared any information with you about what happened in those intimate settings is Akasha. Her testimony is uncontroverted. As you decide about Akaska's testimony, you're obviously going to have to decide about her credibility. If you believe her, if you believe what Akasha told you about the incidents that happened to her, that's it. The case is over." (transcript 1/22/20, p. 175, lines 18 and p. 176, line 2).

This statement made during the State's closing argument is coming close to directly commenting on the defendant's right to remain silent. To decide if the argument is improper and a basis for reversible error, the court looks to the three prong analysis of Jaimes.

The court finds the first prong is met: a juror could infer that the comment constitutes a reference to the defendant's failure to testify. Because it was not made during rebuttal, it was not

"a fair response to a defense argument" and so the third prong is met. Therefore, the court focuses on the second factor: did the comment propose that the defendant's failure to testify demonstrates guilt?

The court has re-reviewed the entire closing argument and does not believe that the comment connotates the failure to testify with guilt. The court looks at the context in which it was given. The court looks to the points the State made leading up to the specific comments.

- Innocuous touching progressed into sexualized touching, sexual comments and then blatant sexual contact.
- The defendant would ask if the victim was "ok" and ask her not to tell anyone.
- There was no DNA evidence due to delayed reporting, but convictions are still possible without DNA evidence.
- The police did not interview other small children.

The prosecutor continued that while there was no evidence from the other sources, there was the victim's testimony. The jury must decide if the victim's testimony was credible and then the prosecutor went into a lengthy explanation of how to gauge the credibility of a sexual assault victim.

The court, both at trial and in reviewing the written transcript, sees the prosecution argument focusing on the evidence presented to the jury from which they were to reach their decision. Both sides agreed the trial rested upon the credibility of the victim's testimony. The prosecutor talked about uncontroverted testimony but then told the jury they "obviously" had to decide the victim's credibility. He was discussing what evidence was present, and that "evidence" includes testimony from witnesses, including the victim. The prosecutor never stated words to the effect

that "because the defendant did not testify, he is guilty" or "because hers is the only testimony concerning the incidents that she should automatically to be believed."

The second reference, (also noted in the defense brief) was at a later point in rebuttal when District Attorney Lasee argued:

> "The only evidence in this case that was presented to you is that Matthew Myke engaged in these acts, that's it. That's the only person that was present during those incidents that talked about what happened is Akasha. She's the one who gave you the evidence in this case." (transcript 1/22/20, p. 227, lines 4-8)

At this point Attorney Brabazon asked for a sidebar conference. The sidebar was conducted and the court informed the jury it had to do with a "point of order to discuss about….closing arguments." The prosecutor moved on from this argument and his rebuttal presentation continued.

This rebuttal argument was made, in part, in response to the defense summation that there was not evidence of any assault in this case while calling into question the credibility of the victim. The prosecution is again pointing out that the evidence concerning the assaults came from the testimony of the victim. The argument does not claim that because the defendant did not testify or give evidence that he is guilty. The inference is not, "He is guilty because she testified and he did not, and he did not testify because he knows what he did." The more logical inference from the argument is, "He is guilty because the victim testified and she is credible." Perhaps in a vacuum the comment stands out, but not as part of the whole. The court finds the second and third prongs of Jaimes are not met to render this argument reversible error.

The Scheiss court noted in that trial the jury instructions specifically told the jury that no adverse inference should be drawn from the fact that the defendant did not testify. Here, as in Jaimes, the trial court specifically included in its instructions to the jurors Jury Instruction 315:

> "A defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision to testify must not be considered by you in any way and must not influence your verdict in any manner."

Case law holds that it is proper to assume jurors follow explicit jury instructions. State v. Truax, 151 Wis. 2d 354. (Ct. App. 1989).

Furthermore, the court addressed the fact the defendant might not testify in his voir dire remarks to the jury:

> "Defendants also have a constitutional right to remain silent. Mr. Myke does not have to prove anything and he does not have to testify. Does anyone, have a problem with that concept against the right of self-incrimination?" (no responses) (trial transcript, day one, p. 45, lines 20-24).

The jury was aware he did not have to testify, and was aware he did not testify. Any comments that may have even indirectly referenced his not testifying did not inform the jury of something they did not already know and had been instructed on.

- The court finds the decision by counsel to refrain from objecting at certain points during the State's closing argument to be strategically made and that such objections would not have affected the jury verdict.
- The court does not find that the arguments made by the prosecutor indirectly referencing the defendant's decision not to testify satisfy the Jaimes test. They do not violate due process and constitute reversible error.

V. The court was wrong to deny text messages.

The defendant claims he was unable to present a defense because the court ruled certain text messages inadmissible. The court has reviewed the discussion the State's Motion in Limine number 7 which was to exclude "certain evidence allegedly from the defendant's cellphone."

The text messages were provided by Myke. They were from his cellphone and were texts from 2013 and 2014 from Melinda, his ex-wife. They were to be offered to show bias; that Myke was trying to see their daughter Jossani and Melinda was not letting him visit her until he had paid his child support. Myke testified she was spiteful, hateful, and was trying to destroy his life, insinuating the allegations were fabricated with their former babysitter at her direction as a result of the custody/child support issue.

The State argued there had been a family action in Oneida family court in June 2014 dealing with the placement dispute. The State argued the allegations were made by the victim, not Melinda, the ex-wife, and were reported roughly a year and one-half AFTER the family court case was closed out.

The State expressed its concern if this information was admitted it would be forced to go back and present a complete picture of the custody dispute to provide context, in effect producing a trial within a trial.

The State further explained that if the defense brought up Melinda's text where she stated she wants to hurt him like he made her feel, it would open the door for an explanation of what she meant by hurting him. This could lead to the introduction of an earlier domestic violence incident between the two which would be highly prejudicial to the defendant. In addition, one of the emails dealt with the defendant's sleeping with a 14-year-old girl, and the State had concerns as to what "Pandora's Box" would be opened by having to explain the circumstances surrounding that particular email.

The State alleged some emails were only Melinda's and did not include Myke's responses, thereby painting an incomplete picture. Apparently there were two different sets of texts taken from different phones. The texts presented to the court prior to trial were apparently from the

defendant's flip phone. The defendant explained the texts the court denied must have come from his flip phone, and were incomplete because they were "one-sided." The defense acknowledged that with some of her texts, "we do not have his responses." (trial transcript 12/3/21, p. 17, line 7.) There was another set of texts taken off a different phone. (transcript 12/3/21, p. 54, lines 10-24).

The State also complained about the blurry quality of the emails.

Examples of the text messages include the following:

> Text: "Told you when u left you can see her when u do ur child support, shit, not that hard. But you'd rather spend your money on kids that aren't ours, fine by me!: 2:58 p.m. March 11, 2014
>
> Response: Bullshit, wow, you are still living in the world of lies."
> 2:59 p.m. March 11, 2014
>
> and from December 15, 2013
>
> Defendant: "So when can I spend time with my daughter?"
> Melinda; "When?"
> Defendant: "Yea, when?"
> Melinda: "When u go get ur child support shit taken care of we can se something up!"
> Defendant: "What child support?"

The court ruled the messages inadmissible, in part because the complete conversations between the two as shown above were not included in all the emails presented to the court. More importantly, the court found the messages had limited relevance because the family court file was closed out and concluded long before these allegations surfaced. Melinda was not the complaining witness. The court was also concerned about the possibility of a "trial within a trial," of disputes concerning the veracity of the texts, and other issues which could potentially distract and confuse a jury.

"The circuit court has broad discretion in determining the relevance and admissibility of evidence and its decision will not be reversed absent an erroneous exercise of discretion." State v. Weed, 263 Wis. 2d 434 (2003). The court actually allowed counsel to question Melinda on her bias concerning their past marital difficulties. However, based on the rule of completeness, the problematic situation of incomplete text messages, the possible prejudicial effect to the defendant in having the witness testify as to context of some of the text content, and the potential confusion to the jury of relitigating a custody dispute that was completed prior to any allegation of sexual misconduct, the court finds its decision to grant the Motion in Limine to keep out the text messages from 2013 and 2014 to be appropriate.

Conclusion: Was the evidence addressed at the Myke motion hearing of sufficient quantity and persuasiveness to put into question the reliability of the proceedings? The court does not believe the evidence, in particular the defendant's own testimony, is of such a nature.

During the hearing Attorney Brabazon stated, "I always walk out of trial wondering, gosh, I wish I would have asked this question or, you know, that's the nature of trials." We all engage in Monday morning quarterbacking and the court feels that phenomenon is behind some of the defendant's post conviction arguments. As the court in Strickland stated, "judicial scrutiny of counsel's performance must be highly deferential. A fair assessment of attorney performance requires that every effort be made to eliminate the disturbing effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." (p. 689).

The court does not find counsel's representation to be deficient. Even if found deficient, the court does not believe there is a reasonable probability of a different result at trial. The motion for a new trial is DENIED.

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August 2, 2024

To:

Hon. John P. Zakowski
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Nicholas DeSantis
Electronic Notice

Mark Maciolek
Electronic Notice

You are hereby notified that the Court has entered the following order:

No. 2022AP1091-CR State v. Myke, L.C.#2016CF1728

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Matthew Joseph Myke, and considered by this court;

IT IS ORDERED that the petition for review is denied, with $50 costs.

Samuel A. Christensen
Clerk of Supreme Court

Appendix C