COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP929-CR **Cir. Ct. No. 2006CF921**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HERBERT M. HALDEMANN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 SNYDER, J. Herbert M. Haldemann, Jr. appeals from a judgment of conviction for second-degree sexual assault with use of force, a class C felony,

contrary to WIS. STAT. § 940.225(2)(a) (2007-08),[1] and from an order denying postconviction relief. He contends that he is entitled to a new trial because his defense counsel was ineffective and because the court improperly allowed the State to introduce evidence it had failed to produce during discovery. As a result, Haldemann argues his trial was unfair. We conclude that Haldemann received effective assistance of trial counsel. However, we agree with Haldemann that the State failed to meet its discovery obligations under WIS. STAT. § 971.23. Nonetheless, we conclude that any error caused by those violations was harmless. We affirm the judgment of conviction and the order denying postconviction relief.

BACKGROUND

¶2 Haldemann and Dana P. met in August 2003. They began living together and, in the summer of 2004, they moved to an apartment in Menomonee Falls. They had a son together, who was born that September. Haldemann and Dana continued to live together until October 2005, when Dana moved back to the Green Bay area. Dana took their son with her when she left. Both Haldemann and Dana participated in court proceedings to establish custody and placement of their son. The court ordered placement with Haldemann every other weekend, Thursday through Sunday.

¶3 Over the next several months, Dana received "harassing phone calls nonstop every single day" from Haldemann. During these calls, Haldemann would try to convince Dana to return, to allow him additional placement time, and to tell him whom she was seeing and what she was doing. In response to these

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

phone calls, Dana obtained a restraining order against Haldemann. The court ordered Haldemann to stop the harassing phone calls, but did not prohibit contact between Haldemann and Dana for purposes of arranging drop off or pick up of their son. Haldemann did not stop calling and Dana reported violations of the restraining order many times.

¶4 Haldemann had placement of his son the weekend of July 29, 2006, and normally placement would have ended that Sunday evening. However, Dana and Haldemann agreed that Dana would pick up their son on Monday morning. Around 4:30 a.m. on Monday, Dana called Haldemann twice, stating she could not sleep and would come down early. Haldemann agreed to leave the door open for her so she could enter the apartment when she arrived.

¶5 From this point forward, the parties presented very different stories at trial. Dana testified that when she arrived at Haldemann's, she went into the bedroom and sat next to her son, who was in the bed with Haldemann. Haldemann attempted some physical contact with Dana, but she rebuffed him. Haldemann stated that he needed to bathe and feed the boy before they could leave. Dana went to sit on the couch and wait. Eventually, she told Haldemann that she would not wait any longer and she wanted to leave. Haldemann blocked the door and would not let her go. Dana attempted to leave, but Haldemann grabbed her wrists and threw her backwards onto the couch. Dana fought back, but Haldemann told her he would not let her go unless she had sex with him or gave him "100 percent custody" of their son. Dana continued to fight, but Haldemann held her down, removed her jogging pants, and forced her to have sexual intercourse.

¶6 Haldemann then carried Dana into the bedroom, threw her on the bed and told her to remove her shirt. She refused and Haldemann told her that if she would not take off her shirt, he would "cut it off for [her]." Haldemann then produced a knife, with the blade open, from the side table. Dana testified that when she saw the knife, she "didn't know if he was going to kill [her] or what he was going to do," so she stopped resisting. Haldemann had sexual intercourse with Dana again. Afterward, he noticed she was bleeding and gave her a towel. Dana dressed, but Haldemann would not let her leave because he feared she would go to the police. After about two hours, Dana convinced Haldemann that she would not go to the police, and Haldemann let her leave with their son.

¶7 Dana called her mother on the way back to the Green Bay area. They arranged to meet in Green Bay and Dana's mother accompanied her to the hospital. While she was driving, Dana received numerous calls from Haldemann. She estimated that he called as many as fifty times, but she did not pick up the phone. Haldemann left several voice mail messages for Dana. Dana explained that she dialed Haldemann's number once by accident during the drive, but ended the call as soon as she realized her mistake.

¶8 In Green Bay, Dana met with a Menonomee Falls detective who had come to speak with her at the hospital. She was then examined by a Sexual Assault Nurse Examiner (SANE), Susan Robertson. Robertson took a statement from Dana and performed a physical exam. She observed two sets of recent scratches on Dana, one on her back and one on her right breast. She also observed signs of "blunt force or squeezing" on Dana's left breast, in the pattern of fingerprints. Robertson opined that "in a day or two this would be a very bruised area." Robertson performed a pelvic exam, which revealed redness and swelling of the hymen, and blood from the cervix and vagina. At trial, Robertson testified

that her findings regarding Dana's physical injuries were consistent with nonconsensual sexual intercourse.

¶9 Haldemann's version of the events of July 31, 2006, is quite different. He recalls the 4:30 a.m. phone call from Dana saying that she would be at his apartment early that morning. She arrived about two hours later and came into the apartment bedroom. Haldemann remembers Dana getting into the bed and cuddling before he rose to bathe and feed his son. Afterward, Haldemann asked Dana if she would like to have sex and she said yes. Haldemann denies that Dana resisted in any way, and denies having threatened her with a knife.

¶10 After sex, Haldemann made a comment about Dana's current boyfriend that he believes prompted a violent response from Dana: "[S]he didn't like what I had to say, and she jumped up and hit me in my crotch. And I shoved her with both hands, the palms of my hand back onto the couch." Haldemann forbid Dana to leave because he believed her car was not safe for his son to ride in, so he attempted to keep her there until he could fix it. Dana eventually left without having the car fixed.

¶11 At trial, there was no dispute that sexual intercourse occurred; rather, the sole issue was consent. The jury determined that Dana had not consented to sexual intercourse and found Haldemann guilty of second-degree sexual assault. The court sentenced him to twenty years of initial confinement and seven years of extended supervision. Haldemann moved for postconviction relief, arguing that he had not received effective assistance of counsel and that the State had violated its duty to provide discovery of materials it planned to present as evidence against

him. The court held a ***Machner***[2] hearing and denied Haldemann's motion. Haldemann appeals.

DISCUSSION

Ineffective assistance of counsel

¶12 Haldemann renews his postconviction arguments on appeal. He first contends that his trial counsel was ineffective for failing to hire an expert to counter the SANE witness's testimony and for failing to seek admission of an alternative explanation for Dana's injuries. He argues that such evidence was consistent with and necessary to the theory of the consent defense.

¶13 As a matter of constitutional right, Haldemann is entitled to effective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 684-86 (1984). To prove ineffective assistance of counsel, a defendant must show: (1) deficient performance by his or her lawyer and (2) prejudice. ***Id.*** at 687. To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶14 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious to deprive him or her of a fair proceeding and a reliable outcome. ***Strickland***, 466 U.S. at 687, 694

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

("The 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."). Conclusions by the circuit court as to whether a lawyer's performance was deficient and, if so, prejudicial, present questions of law that we review de novo. ***Johnson***, 153 Wis. 2d at 128.

¶15 We may begin our analysis with either the deficient performance or the prejudice prong. Because both elements are required to establish ineffective assistance of counsel, failure to prove one of them necessarily defeats the claim and permits us to end our review. *See* ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11.

¶16 Haldemann contends that his trial counsel should have hired an expert to rebut the testimony of Robertson, the nurse who examined Dana after the assault and who testified that Dana's physical injuries were consistent with nonconsensual sex. On this issue, we begin our analysis with the question of prejudice. At the postconviction hearing, Haldemann presented the testimony of Debra Donovan, SANE-certified and supervisor of the sexual assault treatment center for Aurora Health in Milwaukee. Donovan testified at the hearing as follows:

> Question: Nurse Donovan, you were hired to review the sexual assault nurse examination report created in this case, as well as the testimony given by Nurse Robertson at the trial in this matter?
>
> Answer: Yes.
>
> Question: And Nurse Robertson's … testimony of her findings, were consistent with nonconsensual sex; is that correct?
>
> Answer: Yes.

> Question: Upon your review of the report, do you feel like her opinion or conclusions were accurate?
>
> Answer: No.
>
> Question: In what way?
>
> Answer: She … defined some redness and tenderness as being consistent with a forceful act, thus being nonconsensual intercourse, and that's not accurate.
>
> Question: In what way is it not accurate?
>
> Answer: Redness and tenderness in the specific area of the body that she was talking about, which was on the hymen, is a very nonspecific finding. It can be there for other reasons … it can be there for both consensual and nonconsensual intercourse. As well as even other reasons.

¶17 Haldemann argues that this testimony was critical to his defense, because the dispute was about consent rather than whether sex occurred. He asserts that the lack of expert testimony to rebut Robertson's opinions demonstrates prejudicially ineffective advocacy by his trial counsel. Haldemann directs us to ***State v. Zimmerman***, 2003 WI App 196, 266 Wis. 2d 1003, 669 N.W.2d 762, and ***State v. Glass***, 170 Wis. 2d 146, 488 N.W.2d 432 (Ct. App. 1992), to support his position.

¶18 In ***Zimmerman***, defense counsel failed to pursue the introduction of potentially exculpatory DNA test results, failed to present available expert testimony that the phone cord found in Zimmerman's vehicle could not have been the murder weapon, and failed to challenge a witness's hypnotically refreshed testimony. *See* ***Zimmerman***, 266 Wis. 2d 1003, ¶¶36, 41. Specifically, the State's investigating officer testified that "no evidence found at the scene provided any insight into the crime." ***Id.***, ¶38. In fact, DNA tests of fingernail scrapings and hair found on the victim excluded Zimmerman as a possible source of that physical evidence. ***Id.***, ¶37. Further, the State's medical expert testified that the

victim's "cause of … death was asphyxia due to ligature strangulation, and that a telephone cord found in Zimmerman's van may have been the object used." ***Id.***, ¶19. However, at the postconviction hearing, the Milwaukee county medical examiner testified that "the telephone cord found in Zimmerman's van could not have been the murder weapon because the mark left on [the victim's] neck was a wide, webbed, fabric-like pattern and contained a buckle mark, and was therefore inconsistent with the telephone cord." ***Id.***, ¶41. Finally, defense counsel failed to properly challenge the admission of hypnotically refreshed testimony and could not give a satisfactory explanation for that failure. ***Id.***, ¶45. We held that the cumulative effect of counsel's many deficiencies was sufficient to undermine our confidence in the trial's outcome. ***Id.***, ¶48.

¶19 In ***Glass***, the fourteen-year-old victim alleged that Glass had sexually assaulted her and testified that she "was unable to rule out the possibility" that he ejaculated inside her. ***Glass***, 170 Wis. 2d at 149, 152. A vaginal swab test result was negative for sperm, however, and therefore directly supported Glass's theory of defense that the sexual assault never took place. ***Id.*** Rather than present evidence of the negative test result, defense counsel agreed to stipulate that the test result was inconclusive. ***Id.*** at 149-50. Glass successfully argued that he received ineffective assistance of counsel because a negative test result is "far different" from an inconclusive one. ***Id.*** at 152.

¶20 Neither ***Zimmerman*** nor ***Glass*** is instructive, however, because both involved evidence that was exculpatory and conclusive. Here, the opinion of rebuttal witness Donovan was inconclusive. In particular, we note that upon cross-examination, Donovan qualified her opinion in light of the totality of Dana's injuries. For example, the prosecutor asked whether the scratches on Dana's back and the bruise on her breast could be consistent with nonconsensual sex. Donovan

replied, "It could be consistent, yes. With some kind of trauma, yes. Violence that kind of thing, yes." The prosecutor also asked Donovan if all sexual assault victims have signs of injury. She explained:

> [M]aybe half of the time. I think that has to do with … understanding the dynamics, because a perpetrator uses as much force as they need to render a victim…. [I]f there's a weapon as a threat … there might be no injury … because just the threat of the weapon was enough to render someone that says, I'm not going to resist ….

The prosecutor asked Donovan about all of Dana's injuries in the context of the assault as reported; ultimately, the following exchange took place:

> [Question:] When you put all of these things together, doesn't that make the case stronger that there's a sexual assault … each of the things could be caused by something else? But when you start putting them all together, doesn't that make the case stronger?
>
> [Answer:] I would agree with that.

Donovan later testified that she felt Robertson overstated the certainty that some of the evidence provided regarding the occurrence of a sexual assault, but that she did not believe the facts were inconsistent with forced sexual intercourse. We are not persuaded that the failure to present such testimony deprived Haldemann of a fair proceeding or reliable outcome. Consequently, Haldemann has failed to demonstrate the prejudice aspect of this claim of ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 687, 694.

¶21 Haldemann next argues that his trial counsel was ineffective for failing to seek admission of prior sexual conduct as a source of Dana's injuries. Haldemann asserts that, while such evidence is inadmissible under Wisconsin's rape shield law, it would have been admissible under the constitutional exception to that law as provided in ***State v. Pulizzano***, 155 Wis. 2d 633, 647, 456 N.W.2d

325 (1990). Specifically, Haldemann argues that evidence of recent consensual sex would have served as an alternate explanation for Dana's scratches, bruises, redness and swelling.[3] On this question, we first address whether there was deficient performance.

¶22 In ***Pulizzano***, the supreme court held that, under certain circumstances, evidence may be admitted over the rape shield law to protect the defendant's constitutional right to present a defense. ***Id.*** at 656-57. The court determined that a defendant must put forth a sufficient offer of proof to establish a constitutional right to present otherwise excluded evidence. ***Id.*** at 656. A sufficient offer of proof includes five elements: (1) the prior acts clearly occurred, (2) the acts closely resembled those in the present case, (3) the acts are relevant to a material issue, (4) the evidence is necessary to the defense, and (5) the probative value outweighs the prejudicial effect. ***Id.*** If the defendant makes a sufficient showing, the trial court must determine whether the defendant's rights to present the evidence are outweighed by the State's compelling interest in excluding it. *See* ***id.*** at 656-57.

¶23 At the ***Machner*** hearing, trial defense counsel testified that he believed the evidence concerning prior consensual sex was "exactly the type of thing" the rape shield law was designed to exclude. He also stated that he was familiar with ***Pulizzano*** and that, unlike the rape shield law, ***Pulizzano*** "goes into the Constitutional Right to confront your accuser, and that there are times when the Court will overrule the Rape Shield Law in order to allow a fair trial for the

[3] The rape shield law, WIS. STAT. § 972.11(2)(b), precludes evidence concerning prior sexual conduct of the complaining witness in a sexual assault trial.

defendant." Given his understanding of the law, counsel believed that it would be an "incredible stretch" to attempt admission because he could not demonstrate that the prior sexual activity closely resembled the events on the morning of July 31, which is a required element of the ***Pulizzano*** five-part test. Trial counsel stated, "I didn't see how I could make any kind of substantial offer to the Court that there was a relationship between [Dana's] injuries and anything that happened the night before."

¶24 The circuit court concluded that counsel's performance was not deficient, and stated:

> There's nothing on this record to suggest that consensual sexual intercourse the night before could have or would have in anyway resulted in what we saw [at trial]…. [T]here's no indication that consensual sexual intercourse usually results in any type of injuries as indicated in this case….
>
> When [trial defense counsel] testified and said, look, I'm familiar with ***Pulizzano***, I'm familiar with the Rape Shield Law, I just did not think we had enough to present to make this an issue to try to get in evidence…. He said, look, it wasn't going to work. He knew the facts.

These findings of fact concerning defense counsel's performance, which are based on the circuit court's first-hand assessment of the proceedings, are not clearly erroneous. Furthermore, defense counsel's strategic choice, which reflects an understanding of the law and the facts, is virtually invulnerable to second-guessing. *See* ***State v. Chu***, 2002 WI App 98, ¶52, 253 Wis. 2d 666, 643 N.W.2d 878 (citing ***Strickland***, 466 U.S. at 690-91). We conclude that defense counsel's performance was not deficient.

Discovery violations

¶25 Haldemann next argues that the State's violations of its statutory obligation to permit discovery prevented him from receiving a fair trial. WISCONSIN STAT. § 971.23 sets forth the disclosure obligations of parties in criminal cases. Any materials not disclosed in violation of the statute are to be excluded from evidence at trial unless the party whose duty it was to disclose the material can show good cause for failing to do so. Sec. 971.23(7m). The State has a continuing duty to disclose material that fits within the scope of a demand. Sec. 971.23(7).

¶26 We begin with Haldemann's argument regarding the content of recorded voice mail messages. The recordings at issue are those of Haldemann speaking on Dana's voice mail after she left his apartment on July 31. Dana, her mother, and Robertson all testified that Haldemann was repeatedly calling during the hours following the assault. At the beginning of the second day of trial, defense counsel informed the court that at some point on the first day of trial, the State had provided a compact disc containing recordings of nineteen voice mail messages left by Haldemann on Dana's cell phone voice mail. Haldemann moved to exclude the recordings because they were not provided during the discovery process.

¶27 The State responded that the police reports that were provided to Haldemann made reference to the voice mail messages and, therefore, the defense could not claim surprise that they existed or that the State would seek to admit them. Out of the presence of the jury, the prosecutor read into the record the text of one of the police reports, which stated:

> I was also able to listen to several of the phone messages which Mr. Haldemann left on the voice mail of [Dana]. On [at] least one of these messages Mr. Haldemann stated that he had driven past the police department, and observed her car was not there, and that was a good thing.

¶28 Haldemann countered that the report referenced voice mail messages, but did not state that they had been recorded on a disc. Further, the inventory of discovery materials provided by the State did not make reference to the disc. Haldemann argued that hearing the messages could be much more "devastating" to the defense than a witness simply referencing them. The circuit court agreed, stating it was "concerned that the recordings themselves were not turned over [until] the last minute." The court held that the police detective could testify about what he heard on the voice mail, but the recordings could not be introduced as evidence unless Haldemann opened the door by challenging the officer's recollection. The detective testified regarding the content of three messages from Haldemann,[4] but the recordings were never played for the jury.

[4] In one of the messages, Haldemann stated he had driven past the police station and saw that Dana's car was not there, which he considered a good thing. In another, Haldemann asked how Dana was doing and how their son was doing. Later, Haldemann asked Dana why she had called him and hung up on him. Dana had testified that she accidently dialed Haldemann's number when she thought she was calling her brother. When she realized her mistake, she immediately hung up.

Haldemann now argues that the content of the voice mails should have been excluded as well as the recordings.[5]

¶29 A second discovery issue arose almost immediately at trial. The State called Dana's mother, Jacqueline, to the stand. During the course of her testimony, Jacqueline stated that she saw bruises develop on Dana a few days after the assault. She testified that she took photographs of the bruises and labeled them with the date they were taken. Haldemann objected, informing the court that the photographs had never been provided to the defense and were not with the materials that were made available by the State. The State countered that the photographs had been with the other discovery materials and were listed as five 4" x 6" color photos on the inventory sheet dated August 1, 2006. The court heard arguments from the parties and determined that the photographs could be admitted into evidence. The court stated in relevant part:

> [A]lthough I am somewhat disappointed that copies of the photographs weren't turned over to [the defense], nonetheless … ample reference has been made to injuries received by the victim in this case…. The nurse who testified indicated that she didn't see bruises, but bruises could have been seen later, generally speaking, and

[5] The circuit court excluded the recordings, but cautioned Haldemann that the recordings could be admitted if Haldemann challenged the police detective's recollection of their content on cross-examination. When the court so ruled, the State called its witnesses out of order to allow the detective to listen to and memorize the content of the recordings just before he testified. We do not agree with Haldemann that the detective's testimony regarding the content of the voice mail messages should have been excluded because the police report available to the defense clearly set forth the content of the most damaging message (that Haldemann had driven to the police department and considered it a "good thing" that Dana's car was not there), and Haldemann should have anticipated the detective would testify about that message. We do agree with Haldemann that the late disclosure of the recordings prevented him from using them to inform his trial strategy, prepare for cross-examination of the detective, and weigh in his decision to go to trial. Our analysis of the discovery violation, therefore, is focused on the impact of the recordings rather than the detective's testimony.

> specifically in this case. So the fact that there would be bruises is not a surprise.

The trial proceeded and Jacqueline described the bruises depicted in the photographs to the jury.

¶30 At the postconviction hearing, it became clear that a mistake was made. The State's inventory of discovery materials was dated August 1, 2006, and Jacqueline testified that she took the photographs of Dana's arms on August 2, 2006; therefore, the inventory did not put Haldemann on notice that the photographs of Dana's bruised arms existed. The circuit court held that although the State should have produced the photographs earlier, failure to do so was not sufficient to create a concern regarding the outcome of the case.

¶31 We apply a three-step analysis to alleged discovery violations. ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517 (Ct. App. 2007). Each step poses a question of law reviewed without deference to the circuit court. ***Id.*** First, we decide whether the State failed to disclose information it was required by statute to disclose. ***Id.*** Next, we decide whether the State had good cause for any failure to disclose. ***Id.*** If good cause exists, the circuit court may admit the evidence and grant other relief, such as a continuance. ***Id.***; WIS. STAT. § 971.23(7m). Finally, if evidence should have been excluded under the first two steps, we decide whether admission of the evidence was harmless. ***Rice***, 307 Wis. 2d 335, ¶14.

¶32 The State cannot reasonably dispute that it had a duty under WIS. STAT. § 971.23(1) to disclose the voice mail recordings and the photographs. The State makes an anemic argument that Haldemann was not entitled to disclosure because he did not make a formal discovery request. The record reveals that

defense counsel reasonably relied on the Waukesha county district attorney's "open file policy" and responded to the State's correspondence notifying him that the discovery materials were available. By letter dated November 9, 2006, counsel requested copies of "the 100 pages of discoverable material" available from the State.

¶33 The State asserts that the prosecutor turned over a copy of the recorded voice mail messages as soon as he learned of them. Although the duty to track down every piece of evidence from investigators is "not limitless," the fact that these recordings were in the possession of the police detective until the week of trial does not excuse the State from its responsibility to produce them. *See* ***State v. DeLao***, 2002 WI 49, ¶24, 252 Wis. 2d 289, 643 N.W.2d 480. "The State is charged with knowledge of material and information in the possession or control of others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecutor's office." ***Id.*** Here, the recordings were in the possession of a lead detective in the investigation.

¶34 Furthermore, disclosure during trial does not meet the statutory standard of producing the materials "within a reasonable time before trial." *See* WIS. STAT. § 971.23(1). Although the State faults Haldemann for failing to take full advantage of his right to discovery by going to the police department and examining all of the material, it is clear that the voice mail recordings would not have been there and it is unclear when the photographs of Dana's bruises were added after the inventory was prepared. We conclude that the State failed to disclose information it was required by statute to disclose and we move to the next question, whether the State has shown good cause for its error. *See* ***Rice***, 307 Wis. 2d 335, ¶14.

¶35 At trial, the circuit court gave the State the opportunity to explain the tardy production of the voice mail recordings and the photographs. The prosecutor stated, "[I]t's not that the State sought to hide anything; I simply, until cases actually proceed to trial, I don't act proactively to make sure that everything possibly discoverable to a defendant has been provided." He mistakenly informed the court that the photographs had been part of the August 1, 2006 inventory available to Haldemann. At the postconviction hearing, the prosecutor cited statistics from the clerk of court's office showing that "between January 2007, and April of 2008 … criminal traffic division set 3,095 cases for jury trial. Vast majority of them had witnesses notified by my office…. That works out to 193 per attorney during that time in my office." He continued, "It's not possible for the State to prepare every case for trial."

¶36 On appeal, the State emphasizes that a prosecutor's caseload and the complexity of the current case provided good cause for a discovery violation. It directs us to ***State v. Long***, 2002 WI App 114, ¶¶34-35, 255 Wis. 2d 729, 647 N.W.2d 884, for the proposition that large amounts of discovery and enormity of pretrial investigation can constitute good cause. However, as Haldemann observes, there were only two lead detectives on this case and they were the State's witnesses at trial. These detectives were in possession of the voice mail recordings and the photographs. The State called only six witnesses at the trial, which lasted less than two days from jury selection to verdict. We are not persuaded that the facts here rise to that level of complexity that would demonstrate good cause. As our supreme court recently stated:

> It is of no moment under the criminal discovery statute that the State was unaware until the day before the trial or during the trial that it possessed the [evidence]…. The prosecutor's belated discovery of the evidence in his possession did not absolve the prosecutor of his duty under

> WIS. STAT. § 971.23(1) to reveal the evidence within a reasonable time before trial. The prosecutor's duty is to seek to know of the existence of [information] that should be disclosed. The test of whether evidence "should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence the prosecutor should have discovered it."

State v. Harris, 2008 WI 15, ¶39, 307 Wis. 2d 555, 745 N.W.2d 397 (footnotes omitted).

¶37 The final step in our analysis is whether the State's discovery violations were harmless. When evaluating whether an error is harmless, we focus on the effect of the error on the jury's verdict. ***State v. Weed***, 2003 WI 85, ¶29, 263 Wis. 2d 434, 666 N.W.2d 485. The test is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Harris***, 307 Wis. 2d 555, ¶43 (quoting ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189; ***Neder v. United States***, 527 U.S. 1, 18 (1999)). In our analysis, we consider factors such as the frequency of the error, the importance of the evidence admitted over the defendant's objection, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether erroneously admitted evidence duplicates untainted evidence, the nature of the defense, and the nature and overall strength of the State's case. ***Harris***, 307 Wis. 2d 555, ¶45.

¶38 To ascertain the impact of the State's discovery violations, we reviewed the trial testimony, the closing arguments, the totality of the evidence presented, and materials requested by the jury during deliberations. In particular, we searched the State's closing argument for instances where the tainted evidence was emphasized. The prosecutor argued to the jury that Haldemann's third voice mail message to Dana stated that he drove past the police department looking for

her car because "he knew she would have to go to … that police station, if she were going to report this." When he did not see her car there, "he knew everything was cool." The prosecutor then asked, "Why then does he have 16 more voice mails to her after that ... call at 12:20?" The prosecutor made reference to the voice mail messages several times after that, emphasizing that Haldemann wanted to get back together with Dana and was harassing her and "manipulating her."

¶39 The State's closing argument also made reference to the bruises on Dana's arms, which were described by Jacqueline while she held the photographs she had taken herself a few days after the assault. The State asserted that the bruises on Dana's arms corroborated her testimony that Haldemann had grabbed her and thrown her onto the couch and held her down. We observe, however, that the bruises also corroborate Haldemann's testimony that the two of them scuffled during an argument over custody and placement.

¶40 With regard to the recorded messages, our review indicates that the substance of the most inculpatory message was not a surprise to the defense. The fact that Haldemann had called Dana frantically asking her to talk to him and expressing his relief that she had not gone to the police station was apparent from the police investigation report. In another problematic message, Haldemann asked Dana why she had called him and hung up without speaking. This message, Haldemann argues, damaged his credibility because his statement to the police during the investigation was that Dana had called and they had argued about custody of their son. His voice mail message clearly contradicted that. In context, this is less critical than Haldemann suggests. The evidence already indicated that he and Dana argued often about custody. During his testimony, Haldemann explained that he had that call confused with others because there were "a lot of

phone calls since we split up. And … even that weekend there [were] a lot of phone calls."

¶41 The surprise here was that Haldemann's words had been preserved in a recording by the police. As Haldemann argued in the circuit court, "It's certainly much more devastating when you hear a recording of the calls, especially indicating what times they came in, how frequently they came in." Defense counsel stated that advance knowledge of the recorded messages may have changed his cross-examination of Dana and his preparation for Haldemann's testimony.

¶42 The photographs of Dana's bruised arms were also a surprise. Defense counsel testified that part of his strategy was to impugn Dana's credibility by highlighting the absence of injuries. In fact, he elicited testimony from Robertson that Dana did not have any visible bruising. We agree with Haldemann that the subsequent introduction of the photographs set up a situation that directly discredited an aspect of his argument. However, we also note that on re-direct by the State, Robertson agreed that it "does … take time for bruises to develop." The potential for bruising, therefore, had been established.

¶43 This trial tested the credibility of the parties on the question of consent. Absent the recorded voice mail messages and the photographs of Dana's bruised arms, the State had compelling evidence that the sexual intercourse was nonconsensual. First, Robertson testified that her examination resulted in findings consistent with nonconsensual sex. Second, the State presented evidence that an open knife was found in the bed sheets, which corroborated Dana's testimony that Haldemann threatened her. A police detective described finding the open knife in the bed during the search of Haldemann's apartment. The knife was partially

concealed by the sheets. The detective testified that the knife blade was open when they found it. During deliberations, the jury foreman sent a note to the court stating that the "jury requests to see the pictures of [the] knife in [the] bed and the picture of the bedroom." We are convinced beyond a reasonable doubt that a rational jury would have found Haldemann guilty even if the recordings and photographs of the bruises on Dana's arms had been timely disclosed.

CONCLUSION

¶44 We conclude that Haldemann's trial attorney provided effective assistance of counsel. Counsel was not deficient for reasoning that the rape shield law and ***Pulizzano*** required exclusion of Dana's past sexual conduct; further, counsel's decision not to engage a witness to rebut Robertson's testimony was not prejudicial. We also conclude that the State failed to meet its statutory duty to provide discovery to the defense "within a reasonable time before trial." *See* WIS. STAT. § 971.23(1). The State could not demonstrate good cause for its error; however, an exhaustive review of the record reveals that the error was harmless. The judgment of conviction and the order denying postconviction relief are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.