COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1589-CR **Cir. Ct. No. 99-CF-503**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JAMES R. THIEL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Reversed.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 ROGGENSACK, J. The State appeals the circuit court's order for a new trial based on ineffective assistance of trial counsel. Because we conclude that the totality of trial counsel's representation in defense of Thiel was not constitutionally deficient, we reverse the circuit court's order for a new trial.

BACKGROUND

¶2 James Thiel was JoAnn P.'s treating psychiatrist from 1994 until July 1999. On August 19, 1999, JoAnn reported to the police that she and Thiel had repeated sexual contact during the course of the physician-patient relationship. According to JoAnn, the first sexual contact occurred in Thiel's office after an evening therapy session in May 1997. From that point forward, her office appointments routinely included sexual contact. In addition, JoAnn reported that she visited Thiel at his home and that sexual contact, including sexual intercourse, occurred during those visits.

¶3 According to JoAnn, she terminated the sexual relationship with Thiel in February 1999, but she continued to see him for therapy. At her final appointment on July 30, 1999, JoAnn told Thiel that she was planning to apply for government disability benefits related to her mental condition. Thiel refused to provide assistance with the application, which made JoAnn very angry. He said that as she left the office she threatened him, saying that she had a sample of his semen.

¶4 When JoAnn reported her relationship with Thiel to the La Crosse police, she brought a semen sample to the interview. She told Lieutenant Brohmer that she collected the sample after performing oral sex on Thiel at his house, and that she had stored the sample in her freezer since that time. Brohmer sent the sample to the state crime lab for DNA testing.

¶5 Based on JoAnn's report, Thiel was arrested and charged with multiple violations of WIS. STAT. § 940.22(2) (1999-2000).[1] After the DNA tests were completed and proved that the semen was not Thiel's, the police met with JoAnn. She confessed that she lied about taking a semen sample from Thiel. She said that although she knew it was wrong to provide false evidence, she hoped that Thiel would confess if he believed there was physical evidence.

¶6 After he learned of the DNA test results, Thiel substituted Attorney John Brinckman and Attorney Margarita Van Nuland as defense counsel. In discussions with his new attorneys, Thiel repeatedly said that he wished to proceed to trial as quickly as possible because he was concerned that the State's continuing investigation would result in former patients coming forward to testify as "other acts" witnesses. Although Brinckman told Thiel that they could use more time before trial, Thiel insisted that the trial occur as soon as possible. Ultimately adopting Thiel's preferred position, his attorneys did not seek a continuance of the trial date.

¶7 At trial, the prosecution relied on (1) JoAnn's version of her sexual encounters with Thiel; (2) her detailed description of the interior of Thiel's home; (3) JoAnn's physical description of Thiel, including a description of his genitalia; (4) testimony from Thiel's ex-wife, also an ex-patient of Thiel, that Thiel had sexual contact with her before the end of their physician-patient relationship; (5) testimony from Thiel's ex-wife corroborating JoAnn's testimony regarding various aspects of Thiel's appearance and personal habits; (6) testimony from

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

another female ex-patient that Thiel had sexual contact with her during a therapy session in 1994;[2] (7) testimony from JoAnn that she told her husband and a friend, Brian Ekern, about the intimate aspects of her relationship with Thiel prior to her last therapy session with Thiel on July 30, 1999; and (8) testimony from Ekern that JoAnn had confided in him, that he told her she should end the relationship and that the sexual contact constituted a crime that should be reported.

¶8 Thiel testified that he never had sexual contact with JoAnn. The defense theory was that JoAnn, having persistently lied about the physical evidence, was also lying about the entire sexual affair to retaliate against Thiel for his July 30 refusal to assist her in obtaining disability benefits. Thiel explained JoAnn's knowledge of the interior of his house by conceding that she had come to the house uninvited on three occasions, but that he told her to leave after determining that she was not at risk. He testified that he always left his house unlocked, so JoAnn could have gained access to the house at any time. Thiel also denied that he had sexual contact with his ex-wife while she was a patient and that he had sexual contact with the other former patient who testified for the State. Finally, the defense presented additional witnesses in an attempt to show that it was implausible that Thiel was carrying on an extensive relationship with JoAnn.

¶9 The jury found Thiel guilty on all seven counts of sexual exploitation by a therapist. The circuit court sentenced Thiel to concurrent four-year prison terms on three counts, and to concurrent ten-year probation terms following his release from prison on the remaining counts.

[2] Although this incident was reported to the Department of Regulation and Licensing, the Department closed the case when the complainant decided that she did not want to pursue the matter.

¶10 Thiel's postconviction counsel filed a motion for a new trial on the basis that his trial counsel was ineffective in the following respects: (1) because of an erroneous view of the law, trial counsel failed to file a motion that would have allowed the defense to introduce evidence concerning JoAnn's medical background; (2) trial counsel failed to establish inconsistencies between JoAnn's testimony and statements given by her husband and Ekern concerning the date she disclosed to each of them the sexual nature of her relationship with Thiel; (3) trial counsel failed to adequately investigate the case and prepare for trial, causing missed opportunities to impeach and attack the credibility of state witnesses, including JoAnn; and (4) trial counsel failed to take measures to exclude or strike the testimony of an expert witness who testified in rebuttal for the State.

¶11 Following an extensive ***Machner*** hearing, the circuit court concluded that Thiel's trial counsel was constitutionally ineffective and granted Thiel's motion for a new trial. The State appeals.

DISCUSSION

Standard of Review.

¶12 A motion for a new trial based on ineffective assistance of counsel raises a mixed question of fact and law. ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. We will not overturn a circuit court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***Id.*** However, in applying those facts to the constitutional standard for ineffective assistance, we determine *de novo* whether counsel's performance was deficient and whether such deficient performance prejudiced the defendant's rights. ***Id.***

Ineffective Assistance.

¶13 The Wisconsin Constitution and the Sixth Amendment to the United States Constitution grant criminal defendants the right to effective assistance of counsel. *See* ***Trawitzki***, 2001 WI 77 at ¶39. The standards for evaluating counsel's performance are the same under state and federal law. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69, 76 (1996). The relevant test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), encompasses two distinct inquiries. First, the court must determine whether counsel's performance was deficient. ***Id.*** at 687. Second, the court must determine whether the defendant was prejudiced by the deficiency. ***Id.*** The defendant bears the burden of affirmatively proving both deficient performance and prejudice. ***Sanchez***, 201 Wis. 2d at 232, 548 N.W.2d at 74.

¶14 An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness. ***Strickland***, 466 U.S. at 687-88. We assess counsel's performance by considering the facts and circumstances confronting counsel at the time of trial, not by second-guessing counsel's decisions using hindsight. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 847-48 (1990). There is a strong presumption that counsel rendered adequate assistance within the range of professional norms. ***Strickland***, 466 U.S. at 689-90.

¶15 In order to show prejudice, a defendant must demonstrate 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." ***Id.*** at 694. In making this determination, we must consider the totality of the circumstances presented to the trier of fact. ***Id.*** at 695. "The benchmark for judging any claim of

ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.*** at 686.

1. Continuance.

¶16 The State maintains that many of Thiel's complaints of error arose because trial counsel was hired shortly before trial, and though trial counsel asked Thiel to permit him to seek a continuance of the trial date, Thiel refused to do so. According to the State, Thiel may not raise a claim of ineffective assistance of counsel because trial counsel reasonably followed Thiel's persistent demand to proceed to trial as quickly as possible. The State maintains that counsel could reasonably rely on Thiel's representation regarding the risk that the State may find additional other acts witnesses, and based on Thiel's statements, counsel's decision to forgo additional investigation was a reasonable strategic decision.

¶17 A defendant can make an informed decision to proceed directly to trial when counsel explains what trial preparations he could effect if he had more time. *See* ***State v. Leighton***, 2000 WI App 156, ¶20, 237 Wis. 2d 709, 616 N.W.2d 126. Here, the circuit court found that Thiel was not fully informed about what counsel could have done in additional trial preparation if he had had more time. Because this finding is not clearly erroneous, we decline to conclude that Thiel made an informed decision to override the advice of counsel. Accordingly, his claim of ineffective assistance of counsel is not precluded by his insistence that the trial not be postponed. *See* ***United States v. Kamel***, 965 F.2d 484, 497 n.39 (7th Cir. 1992); ***United States v. Weaver***, 882 F.2d 1128, 1140 (7th Cir. 1989). Accordingly, we proceed to address the instances of ineffectiveness that Thiel raises.

2. Pre-trial Preparation.

a. Telephone records.

¶18 The State first challenges the circuit court's conclusion that Thiel's trial counsel's performance was deficient because he failed to obtain records of telephone calls between JoAnn and Ekern. Both JoAnn and Ekern testified that they were not in frequent contact with one another during the events relevant to Thiel's trial. However, phone records obtained after trial showed over forty calls placed by JoAnn to Ekern's home and office between July 26, 1999 and December 13, 1999. But, three-fourths of those calls lasted one minute, so it is not apparent that any conversation between JoAnn and Ekern occurred. Moreover, the frequency of their telephone contact does not significantly effect the merits of the case apart from its potential impeachment value of JoAnn and Ekern's testimony.

¶19 Thiel also contends that trial counsel was deficient for not discovering and bringing before the jury the fact that Ekern testified in his deposition that the July 26, 1999 telephone call "very well could be" the first time that JoAnn disclosed that she and Thiel were having sexual relations. We disagree. An on-the-record pre-trial discussion shows that Thiel's counsel was aware of a potential inconsistency between Ekern's vague recollection of when JoAnn disclosed the intimate nature of the relationship and JoAnn's much more specific recollection of the sequence of events. On cross-examination, Thiel's counsel successfully established that Ekern did not have a clear recollection of when the conversation occurred and that although the conversation may have occurred around February 1999, it also could have occurred closer to the date that JoAnn went to the police. Ekern's non-committal post-trial statement that July 26 "very well could be" the date that JoAnn first disclosed the intimate nature of the

relationship is consistent with Ekern's trial testimony. Moreover, in closing argument, Thiel's counsel reasonably chose to exploit JoAnn's timeline of events concerning conversations with Ekern to argue that her story was inherently implausible. We conclude that trial counsel's performance was neither deficient nor prejudicial in this regard.

b. JoAnn's visits to Thiel's house.

¶20 JoAnn testified that she drove to Thiel's house on numerous occasions. The State challenges the circuit court's conclusion that trial counsel's performance was prejudicially deficient because counsel failed to adequately impeach her testimony regarding these visits using readily available information. For example, the circuit court concluded that trial counsel should have discovered that JoAnn did not have a driver's license at the time she claimed to be driving to Thiel's home on a regular basis. The circuit court also concluded that counsel should have brought out the fact that when JoAnn and her husband had the police follow them to Thiel's house, they made a wrong turn and had to turn around. Finally, the circuit court concluded that counsel should have visited Thiel's house to interview his neighbors for the purpose of finding witnesses who could testify that they never saw JoAnn or JoAnn's car at his house.

¶21 First, we conclude that a reasonable attorney would not necessarily investigate JoAnn's driving record. Showing that JoAnn did not have a valid operator's license is not the same as showing that she was not driving. Second, JoAnn's difficulty locating Thiel's house after Thiel was charged may not provide proof that JoAnn did not visit Thiel's house as she testified. The police report describing the route that JoAnn and her husband took from the police station to Thiel's house clearly establishes that JoAnn's husband was driving the car.

Significantly, JoAnn stated during her post-trial deposition that she could explain why they had to turn around and backtrack. Thiel's counsel refused to permit her to do so.

¶22 Third, Thiel asserts that if trial counsel had visited his house he would have been better prepared to show that JoAnn did not come to his house in the manner she claimed. However, Thiel has not identified any information about the house that counsel could have used to Thiel's advantage at trial. For example, Thiel did not argue at trial that JoAnn's description of the interior of the house was inaccurate. Rather, Thiel's testimony suggested that she could have entered the always-unlocked house at other times. Our review of the record discloses no basis for a conclusion that Thiel would have changed his trial strategy had counsel visited his house. *See* ***Leighton***, 2000 WI App 156 at ¶38 ("[A] defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case.").

¶23 The State also challenges the circuit court's conclusion that Thiel's defense was prejudiced by trial counsel's failure to investigate whether any neighbors had seen JoAnn or her car at Thiel's house. Thiel's suggestion is that there are neighbors who could have testified to having never seen JoAnn visit Thiel's house. However, Thiel has not made a showing of a particular neighbor's knowledge (or lack of knowledge) and that person's basis for being able to observe JoAnn's presence. And, not seeing a visitor to another's house is not the same as the visit never having occurred. Furthermore, even under JoAnn's version of events, her relationship with Thiel was a secretive affair and she tried not to be seen.

¶24 In addition to Thiel's direct testimony explaining how JoAnn might know details about his house, counsel called Thiel's former girlfriend to testify that during the period that JoAnn claimed to be visiting Thiel's home on a regular basis, his former girlfriend was with him during many of his non-working hours. Counsel also skillfully argued that several aspects of JoAnn's testimony regarding her alleged visits to Thiel's house were implausible. For example, counsel pointed out that it was unlikely that JoAnn, the mother of a young child, could have been with Thiel in the evenings at his home as often as she claimed to have been. Counsel also argued that JoAnn missed an important detail in describing Thiel's house that Thiel's former girlfriend had highlighted in her testimony: his pets. Accordingly, we conclude that Thiel has not established prejudice based on these claimed deficiencies.

c. WIS. STAT. § 972.11(3) motion.

¶25 Thiel's trial counsel did not file a pre-trial motion seeking to establish the relevance and admissibility of evidence contained within JoAnn's medical history. Because of this omission, the circuit court ruled that under WIS. STAT. § 972.11(3),[3] the defense was precluded from exploring parts of JoAnn's

[3] WISCONSIN STAT. § 972.11(3) states:

> **(3)** (a) In a prosecution under s. 940.22 involving a therapist and a patient or client, evidence of the patient's or client's personal or medical history is not admissible except if:
>
> 1. The defendant requests a hearing prior to trial and makes an offer of proof of the relevancy of the evidence; and
>
> 2. The court finds that the evidence is relevant and that its probative value outweighs its prejudicial nature.

(continued)

medical records. The circuit court also stated that had such a motion been made, it would have been granted as to all statements contained in those records that she made about Thiel. Thiel's counsel testified at the ***Machner*** hearing that the reason he did not seek the circuit court's permission to explore JoAnn's personal or medical history at trial was that he believed that if no pre-trial motion were filed, neither the defense *nor the State* could go into these areas. For purposes of this opinion, we shall assume that trial counsel's performance was deficient in this aspect of his representation of Thiel.

¶26 However, we disagree with the circuit court that the deficient performance was prejudicial. There is very limited identification in the record of what was overlooked in those records and how this evidence would have helped Thiel. Apparently, there was evidence that JoAnn maintained the lie regarding her possession of Thiel's semen to the psychiatrist who treated her after she left Thiel's care. However, other evidence at trial demonstrated that JoAnn often lied. Therefore, this evidence would have been cumulative of the well-established fact that she lied about the semen evidence to the police, to her husband and to Ekern. Furthermore, the apparent lie to her psychiatrist about her employment status adds little to Thiel's counsel's argument at trial that JoAnn lied about her insurance coverage and about the dates her husband was deployed overseas. It is true that credibility was the issue, but the jury had that well laid out before them. We see

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> (b) The court shall limit the evidence admitted under par. (a) to relevant evidence which pertains to specific information or examples of conduct. The court's order shall specify the information or conduct that is admissible and no other evidence of the patient's or client's personal or medical history may be introduced.

no prejudice in counsel's failure to pursue opportunities to present such cumulative credibility evidence.

d. Disclosure to JoAnn's husband.

¶27 JoAnn testified that she recalled telling her husband about her relationship with Thiel on June 11, 1999, which was the day he returned to the United States after nine months of overseas military service. Her husband's recollection of the conversation, as recorded in a pre-trial statement, was that it occurred following a July 16, 1999 appointment that he and JoAnn attended with Thiel. Although this inconsistency was expressly mentioned by the prosecution during opening arguments, Thiel's counsel did not develop it during the evidentiary portion of the trial. The circuit court concluded that by failing to pursue this clear inconsistency, Thiel's trial counsel unreasonably failed to take advantage of an obvious avenue for potential impeachment. Due to the centrality of JoAnn's credibility in the trial, the circuit court also concluded that the deficiency was prejudicial to Thiel's defense.

¶28 While the difference in the two recollections of when the disclosure occurred could have shown JoAnn to be an unreliable witness regarding the date of disclosure, that date was not material to Thiel's defense. It was Thiel's position at trial that JoAnn's allegation of sexual contact was concocted after she became angry with him on July 30, 1999 because he would not help her get disability payments. However, regardless of which version of the date on which JoAnn told her husband about her relationship with Thiel the jury believed, the disclosure to her husband occurred before July 30, 1999, the date on which Thiel maintains JoAnn's anger caused her to make up the allegations of sexual contact.

Accordingly, we conclude that even if we presume the conduct deficient, no prejudice occurred.

e. Description of Thiel.

¶29 While Thiel points out things he believes trial counsel should have done, when we examine ineffective assistance claims we must look at the totality of the representation provided by counsel. ***Strickland***, 466 U.S. at 695. Here, trial counsel skillfully handled JoAnn's physical description of Thiel, by securing a stipulation from the prosecution that (1) JoAnn's testimony concerning Thiel's body hair pattern was not consistent with Thiel's actual body hair and (2) JoAnn's description of Thiel's genitalia was accurate. As a significant part of the stipulation, the State agreed not to attempt to admit photographs of Thiel's body. Without the photographs in evidence, Thiel's counsel was able to credibly argue to the jury not only that part of JoAnn's description was inaccurate, but also that her description of Thiel's genitalia was so general that it was not significant. Had the photographs been admitted, this argument would have been much less plausible. Trial counsel also succeeded in keeping out of evidence the terms of Thiel's divorce from his former wife, thereby keeping out the sexual details of their relationship; provided ample evidence to the jury of the many lies JoAnn told in many different circumstances and repeatedly brought out in closing argument that JoAnn was not a credible witness.

3. Expert Witness.

¶30 During his testimony at trial, Thiel was cross-examined on his testimony that although JoAnn came to his house on three occasions and she telephoned him on several occasions, it all occurred within the context of the normal physician-patient relationship. He also testified that he had not recorded

any of these contacts in JoAnn's patient records. After Thiel's testimony, the State presented JoAnn's current psychiatrist, Dr. Metzler, as an expert witness in rebuttal. The psychiatrist testified that the contacts that Thiel described at his home were outside of reasonable physician-patient boundaries and that such encounters should have been recorded in JoAnn's medical records.

¶31 Prior to Metzler's testimony, the State did not provide Thiel with an expert report. And, although it was clear once the testimony began that the doctor would be testifying as an expert rather than a fact witness, Thiel's trial counsel did not take any steps, such as seeking an offer of proof, to learn the specific nature of the testimony prior to its being placed before the jury. However, he did object to the relevance and the admissibility of Metzler's testimony. He also aggressively cross-examined Metzler, establishing that he was JoAnn's current treating physician and that much of his testimony about the need to document contacts by a patient at a physician's home was "common sense," not a requirement of the practice of psychiatry.

¶32 While it may have been more efficient to have a report of what Metzler would testify to before trial, this was a rebuttal witness. Additionally, counsel proceeded in a competent fashion in cross-examining him. Therefore, we conclude that his performance was not deficient in this regard.

¶33 In summary, while there were instances where trial counsel did not perform as he may have if he had had more time, it was not unreasonable to take Thiel's actions into account in the way in which he handled his defense. As the Supreme Court explained,

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based,

> quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

Strickland, 466 U.S. at 695-96. However, any deficient performance that resulted, was not prejudicial to Thiel's defense. Accordingly, we conclude that Thiel was provided with constitutionally sufficient trial counsel, and we reverse the order of the circuit court ordering a new trial.

CONCLUSION

¶34 Because we conclude that the totality of trial counsel's representation in defense of Thiel was not constitutionally deficient, we reverse the circuit court's order for a new trial.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

¶35 DYKMAN, J. (*dissenting*).

> The victim's credibility was vital if the state was to obtain a conviction. Any evidence showing the victim's testimony to be less believable would be reason to believe defendant's assertion that the assaults did not occur, or the basis of a reasonable doubt as to his guilt.

¶36 This quote could easily apply to this case, where the majority has reversed the trial court's finding that the mistakes it observed undermined its confidence in the outcome of Thiel's trial. But, it is found in ***State v. Marty***, 137 Wis. 2d 352, 365, 404 N.W.2d 120 (Ct. App. 1987), *reversed on other grounds*, ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). Both cases involved sexual assaults. Though the two cases were tried on different facts, in both cases, the trial courts ordered new trials because trial counsel had failed to present to the juries relevant information which impugned the victim's credibility. Why did we affirm ***Marty*** but reverse ***Thiel***? I see no relevant difference between the cases. And I believe that although "deficient performance" and "prejudice" are questions of law, when a trial court determines that there is a reasonable probability that had the jury heard the withheld information, it would have come to a different result, we should give weight to the trial court's decision.

¶37 A conclusion of "reasonableness" is so intertwined with the facts underlying the conclusion that we are to give weight to a trial court's determination as to reasonableness. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983). *See also* ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 122 n.3, 334 N.W.2d 580 (Ct. App. 1983) ("'Reasonableness' turns on the totality

of facts and circumstances ….”); ***Dussault v. Chrysler Corp.***, 229 Wis. 2d 296, 308, 600 N.W.2d 6 (Ct. App. 1999) (“reasonable attempt to repair” is a factual question.).

¶38 Equally important is the trial court’s vantage point. A transcript of a trial conveys nothing of pauses, body language, uneasiness and discomfort of both witnesses and trial counsel. A trial judge gains as much from these as from the language that shows up on a transcript. Thus, I am unwilling to second guess a trial judge who writes that his or her confidence in the result of a recently observed trial is undermined. And I am equally reluctant to ignore a trial judge’s determination that there is a reasonable probability that a jury, had it seen information brought out at a postconviction hearing, would have reached a different result. Appellate judges can know little of what to expect from juries. A trial judge observes many juries. Following ***Wassenaar***, I would give weight to the trial judge’s decision on these questions, and affirm its conclusions.

¶39 And what did the trial court find as to these facts/conclusions? Though its explanation for its decision is lengthy, there is no shorter way to explain that decision. I therefore quote the relevant parts of that decision:

> Counsel in this case failed to review in a thorough fashion the discovery which was provided. A thorough review of that discovery is well within professional norms. A reasonably prudent lawyer, faced with representing an individual accused of seven felony counts, can reasonably be expected to read all of the discovery provided. Failure to do so does not meet minimal levels of adequacy, nor does it comport with any objective standard of reasonableness. Had [counsel] reviewed all of the discovery, he would have learned from the reports of Metzler and Stwertka several pieces of information which would have been extremely useful in the presentation of the case. That information would have included discussions by the complainant with the doctors about her allegations against Thiel. [Counsel] would have learned that, despite

the fact that she went to Brohmer on August 19, 1999, she was meeting with Thiel three days later, on August 22, 1999. This would be logically inconsistent with her claims and with the demeanor she displayed when she was interviewed by Brohmer three days earlier. In addition, she testified at trial as to her employment over the last three or four years prior to trial, and told Stwertka that she had been unemployed for a period of three or four years. The complainant also told Metzler that she was "enraged" when Thiel did not support her disability claim, and it was at that point she threatened him with physical evidence. In addition, in a case such as this, which hinged directly on the credibility of the accuser and the accused, the fact that in a confidential setting she was lying to a therapist who was trying to help her was potentially powerful. The same is true of her statements to Metzler about obtaining the semen from Thiel some 16 months before her conversation with him on August 31, 1999.

A review of the discovery provided would also have disclosed that Ekern had told the police, in a taped statement, that the complainant had told him of the assaults by Thiel "shortly before, I think she reported it." (Ex. 24(15) at 2). He went on to express some equivocation, saying "You know. I guess I don't even know, might (inaudible) a year ago." The significance is that a reasonably prudent lawyer would have recognized that it was inconsistent with the complainant's version of events—that she had first reported the sexual contact with Thiel to Ekern in February of 1999.

In fact, at trial the complainant testified that she first told Ekern of the sexual contact in the spring of 1998. When the prosecutor tried to clarify whether or not it was the spring of 1998 or the spring of 1999, the complainant reiterated that it was the spring of 1998 that she had first told Ekern of the sexual intercourse. (Trial Tr. at 117). The value of that presentation for the prosecution was that it effectively diminished the defense argument that the accusations against Thiel were false, and were made in retaliation for his refusal to assist the complainant in her disability claim. Counsel would have been able, having thoroughly reviewed the statement, to exploit the inconsistency of her trial testimony that she first told Ekern in the spring of 1998, and her earlier statements to the police that she had told Ekern in February of 1999, and Ekern's statements that he told her shortly before going to the police, since that did not occur until August 19, 1999.

A review of the reports also indicates that the complainant misidentified Thiel's address despite the fact that she claimed to have been there over 100 times. She identified his address as 2002 Adams Street. The actual address was 2006 Adams Street. The complainant also told Brohmer that she believed Thiel's house was the third house from the corner. A review of the police report shows that the house was in fact the second house from the corner.

The discovery also discloses that the complainant was very specific about the date upon which she told her husband about her sexual relations with Thiel. She named a specific date, June 11, 1999—the very day that her husband returned from Bosnia. Materials provided in discovery included a written statement from her husband indicating that he first learned of the affair with Thiel following a meeting with his wife, himself, and Thiel on July 16, 1999. This inconsistency is evident in the reports and is not explored at trial. Given the nature of the communication, it is likely that the conversation would have been a memorable one. The disparity in their recollections would create an inference that someone was not truthful. In failing to thoroughly digest these facts, contained in the discovery that was provided, counsel failed to make a reasonable investigation under any objective standard.

Counsel also failed to do any additional investigation. He did not interview or attempt to interview the complainant. While it is very possible that the complainant would have refused to speak to him, no harm would have been done to the defense in the attempt. Counsel only conducted the most perfunctory interviews with Brohmer. It is likely, this Court concludes, that Brohmer would have been willing to speak with defense counsel. Had defense counsel explored the inconsistencies in the discovery as set forth above with Brohmer, he would have learned in all likelihood of the complainant's difficulty in locating Thiel's home. He would also have learned about the lack of recollection of any neighbor of seeing the complainant or the complainant's cars at Thiel's home.

Counsel also did only the most perfunctory interview with Ekern. That interview failed to develop the inconsistency between his statement that he had learned from the complainant of the sexual relationship "shortly" before she went to the police, and her claims that she told Ekern of this in February of 1999. These pieces of evidence had the potentially powerful persuasive effect that

some, if not all, of the complainant's testimony was not to be believed. While other explanations might be offered for these facts by the prosecution, the sum total effect of this, had it been heard by the jury, was to substantially diminish the complainant's believability.

Interviews with Brohmer about what he had or had not done might have provided a basis for further investigation. It may have prompted interviews with other neighbors to determine whether or not they had seen the complainant or the complainant's vehicle. It was also fodder for cross examination of Brohmer on a "things not done" basis.

The relationship between Ekern and the complainant was not disclosed until shortly before trial. Nevertheless, it would have been prudent for counsel to have attempted to determine the extent of that relationship. While it may not be customary in the average case to subpoena telephone records, in this particular case, given the gravity of the charges and the nature of the evidence that Ekern was to offer—a "prior consistent statement" which effectively diminished one avenue of defense—it would have been prudent for defense counsel to do so. The record clearly demonstrates that those phone records would also have been very useful pieces of evidence, and would have forced the admission of Ekern that he "may very well" have not learned about this sexual relationship until July of 1999. Even if it was admissible as a prior consistent statement, having been made on July 26, 1999, before the accusation was made on August 19, 1999, its evidentiary value would have been severely diminished in the eyes of any reasonable juror. These phone records would also have demonstrated that contrary to their trial testimony, Ekern and the complainant had a substantial number of contacts during the relevant periods of time. The lengthy conversations occurred before important events in the chronology of this case.

The failure to do any one of these things, or to have not developed any one of these lines of questioning, standing alone, might not constitute a deficient performance. Nevertheless, the value of evidence has to be seen in the context of the proceedings as a whole. This case is a classic "she says/he says" confrontation. Credibility of the accuser and of the accused were critical factors in the outcome of the case. The corroboration which would be offered by the prior consistent statement to Ekern, along with the claim that the husband was advised

on June 11, 1999, were subject to attack which was never put before the jury.

Additional evidence that might have readily been discovered through simple checks were that the complainant, although she testified she drove on a regular basis to Thiel's home, never had a driver's license.

Defense counsel also failed to pursue a motion to introduce portions of the complainant's medical history as contained in the reports to Stwertka and Metzler. A motion under WIS. STAT. § 972.11(3) would have been granted as to all of the statements concerning the allegations against Thiel. Those statements, and their timing, are highly probative of her truthfulness and are not prejudicial in the sense that they do not go to her medical condition. This decision was apparently based on a misunderstanding of the law and a failure to investigate the facts.

The decision itself cannot be viewed as strategic or tactical because it is not rationally based on the facts or the law. It is simply not reasonable to interpret WIS. STAT. § 972.11(3) as placing the control on the admission of relevant information at trial in the hands of a defendant. Under the interpretation of the statute given by defense counsel in this case, the State would be prohibited from offering medical evidence in a sexual exploitation case unless the defendant, the only party named in WIS. STAT. § 972.11(3), was willing to file a motion to introduce the evidence in advance of trial. Moreover, [counsel] could not have properly weighed the value or lack of value of bringing such a motion, having not read the very reports that he might wish to use. Had the decision not to file such a motion been based upon a reasonable reading of the law, or a full knowledge of the available facts, this Court would not second guess trial counsel's decision. Nevertheless, this Court cannot consider the decision not to file such a motion as a tactical or strategic decision given the misunderstanding of the law and the lack of investigation of the available facts. ***Felton***, 110 Wis. 2d at 502.

This Court, therefore, concludes as a matter of law that the performance of counsel in terms of the investigation and pretrial motion practice was deficient, and that the deficiency severely impacted on counsel's ability to adequately represent the defendant at trial.

Having concluded that the performance was deficient, the Court now turns to the prejudice prong. In this case, the victim's credibility was vital. Evidence

which shows that a victim is lying would be viewed by an ordinarily prudent lawyer as essential. ***State v. Marty***, 137 Wis. 2d 352 at 361. In the case at bar, as in ***Marty***, "the victim's testimony is the whole case." ***Id.*** at 365. It was essential to establish here, as in ***Marty***, the victim's credibility, in order to obtain convictions. Evidence showing that the victim's testimony would be less believable would be reason to believe that Thiel did not engage in sexual relations, or it would form a basis for reasonable doubt as to his guilt.

This was a case where counsel went to trial before counsel was ready to try the case. It may very well be that counsel felt pressured to do so by his client, and the result of this decision will be that Thiel will be rewarded for an error to which he contributed. The Rules of Professional Conduct, SCR 20:1.2, however, do not give to the client the ability to force an attorney to trial before he is ready. It was defense counsel's obligation to make sure that this case was not tried before counsel was ready. Counsel had an obligation to make that fact clear to the defendant. Thiel is not a lawyer. Thiel had to depend on counsel to tell Thiel what he needed to know. ***State v. Fritz***, 212 Wis. 2d 284, 294, [569] N.W.2d 48 (Ct. App. 1997). In this case, the mistakes that were made undermine confidence in the result of this trial. There is a reasonable probability that a jury, had it heard the information produced at the postconviction hearing—information which was readily available and critical to the presentation of the defense—would have come to a different conclusion than the jury in this case. The credibility of the complainant was critical to the State's presentation. It was subject to attack with readily available information. Although the jury was aware of some information impeaching her credibility, the other evidence developed at the postconviction hearing was of sufficient quantity and persuasiveness to put into question the reliability of the proceedings held in this trial.

….

This decision is not made lightly. The Court is fully aware of the investment of time, energy, and emotion that all parties have put into the first trial. It would be far preferable that this matter not be tried again.

> We do not live in a perfect world. In cases such as this, we must depend upon the jury to deliver justice. To maintain the integrity of our system of criminal justice, the jury must be afforded the opportunity to hear and

> evaluate such critical, relevant, and material evidence, or at the very least, not be presented with evidence on a critical issue that is later determined to be inconsistent with the facts. Only then can we say with confidence that justice has prevailed.
>
> ***State v. Hicks***, 202 Wis. 2d 150, 171-72, 549 N.W.2d 435 (1996).
>
> The ultimate guarantor of a just result is a fair trial. A fair trial requires the effective assistance of counsel. That standard was not met in this case.

¶40 What the majority has done is what the trial court warned against: "The failure to do any one of these things, or to have not developed any one of these lines of questioning, standing alone, might not constitute a deficient performance. Nevertheless, the value of evidence has to be seen in the context of the proceedings as a whole."

¶41 By examining each instance of asserted deficient performance and concluding that it was either not deficient or not prejudicial, the majority has overlooked the proceedings as a whole. I point this out, not as criticism, but as an observation that an appellate court can never have the "feel" that a trial judge, or an observer, for that matter, has for the ultimate question: Was this a fair trial? When a trial judge answers that question "no," and there are facts and evidence to support that answer, appellate courts should only in a rare case reverse that answer. This is not one of those cases. That is why I respectfully dissent.