STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2010-AP-2154
(Walworth County Case No. 04-CF-220)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY L. PRINEAS,

Defendant-Appellant.

Appeal From The Final Orders Entered In The Circuit Court For Walworth County, The Honorable Robert J. Kennedy Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether exclusion of evidence of the sex assault complainant's remarks during her encounter with Prineas and reflecting both her consent to the sexual conduct and motive for falsely accusing him of sexual assault denied Prineas due process and the right to present a defense.

The circuit court held that it properly excluded the evidence on

state evidentiary grounds and that Prineas accordingly was not denied due process or the right to present a defense. That court further held that any error in excluding the evidence was harmless.

2. Whether Prineas' trial counsel denied him the effective assistance of counsel by failing to

a. Object on appropriate grounds to the exclusion of the complaining witness' remarks evidencing her consent and motive for falsely accusing Prineas of sexual assault;

b. Cross-examine the complainant regarding those remarks; and

c. Make an offer of proof regarding all such remarks attributable to the complainant known to counsel at the time.

The circuit court denied Prineas' ineffectiveness claim on the grounds that, because there was no error in excluding the complainant's remarks, counsel did not act unreasonably in failing to object, and because any error in excluding the remarks was harmless in any event.

3. Whether the failure of Prineas' post-conviction counsel to raise the due process/right to present a defense and related trial ineffectiveness claims denied him the effective assistance of post-conviction counsel.

The state below did not dispute that, if Prineas' due process/right to present a defense or related trial ineffectiveness claims were valid, then his post-conviction counsel was ineffective for not raising them in his post-conviction motions as part of the original appeal. The circuit court denied this claim, however, on the grounds that the underlying claims were not valid.

4. Whether Prineas has sufficient reason for raising his claims under Wis. Stat. §974.06(4).

The state below did not dispute that, if Prineas' claims were

valid, then he had sufficient reason under §974.06(4) for raising them now. The circuit court accordingly did not address or decide this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a). Oral argument is especially appropriate here given the extreme level of confusion regarding the applicable facts and legal standards reflected in the circuit court's decisions, both at trial and in these post-conviction proceedings.

Publication likely is justified under Wis. Stat. (Rule) 809.23. Although Prineas' entitlement to relief is clear under established Supreme Court authority, the significant misunderstanding of the concept of hearsay reflected in the trial prosecutor's objections and the circuit court's findings suggest the need for guidance from this Court.

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

On June 30, 2004, the state filed a criminal complaint charging Anthony Prineas with one count of second-degree sexual assault of KAC, alleged to have occurred in the basement at a fraternity house party at the University of Wisconsin-Whitewater during the early morning hours of April 24, 2004 (R3). Following a preliminary hearing (R89), the state filed an information expanding the number of counts to six, alleging three acts of penis to vagina intercourse in various positions (Counts 1-3), followed by one act of penis to anus intercourse (Count 4), then another act of penis to vagina intercourse (Count 5), and finally, ejaculation on KAC's chest (Count 6), all by use of force (R6).

The case proceeded to trial on November 1, 2004, Honorable Robert J. Kennedy presiding (R92-R94). On November 4, 2004, the jury acquitted Prineas of Counts 1 through 4 but convicted him on

Counts 5 and 6 (R15-R20; *See* R94:83-84). On February 3, 2005, the circuit court sentenced Prineas to ten years initial confinement and ten years extended supervision on Count 5 and a concurrent term of 30 years probation on Count 6 (R95:108-09; *see* R33).

Prineas pursued post-conviction motions and direct appeal, represented by Attorney Raymond Dall'Osto. He based those challenges primarily on the denial of Prineas' counsel of choice and the ineffectiveness of trial counsel, Joseph Cardamone. Dall'Osto identified a number of alleged errors of trial counsel in his post-conviction motion (which the circuit court labeled as "extremely general" (R55:1), a supporting memorandum, and a supplemental brief (R39; R40; R45-R49), although Dall'Osto ultimately withdrew most of them (*see* R100:3-19). Dall'Osto did not raise the due process/right to present a defense or related ineffectiveness claims raised on this appeal, however.

Following an evidentiary hearing and argument (R97-R100), the circuit court issued its decision denying Prineas' motion on July 30, 2007 (R55; R57). This Court affirmed on February 4, 2009, *see* ***State v. Prineas***, 2009 WI App 28, 316 Wis.2d 414, 766 N.W.2d 206 (R68), and the Supreme Court denied review on April 14, 2009 (R71).

Prineas then filed a federal habeas petition pursuant to 28 U.S.C. §2254 and the State Public Defender appointed undersigned counsel to represent him. With the state's consent, the federal court allowed Prineas to voluntarily dismiss his habeas petition without prejudice to provide him an opportunity to exhaust the claims raised here in state court before returning to federal court, if necessary. (*See* R75:2).

Prineas filed his Motion Pursuant to Wis. Stat. §974.06 on June 16, 2010. That motion argued, *inter alia*, that (1) the trial court's exclusion of KAC's remarks made during her encounter with Prineas denied him due process and the right to present a defense, (2) trial counsel was ineffective for not making a proper objection to the

exclusion of that evidence, and (3) post-conviction counsel was ineffective for not raising these claims on the direct appeal. (R75).

The state chose not to file a response so as to prevent Prineas from adjusting his argument and presentation of evidence to rebut the state's argument (R102:56).

Following an evidentiary hearing and substantial argument (R101-R102), the circuit court orally denied the motion in a lengthy decision on August 19, 2010 (R102:73-104; App. 6-37).[1] The court essentially stated that it was correct in excluding evidence of KAC's remarks at trial; that, despite the jury acquittals on four of the six charges, the evidence of lack of consent was overwhelming so that any error was harmless; and that accordingly, neither trial nor post-conviction counsel was ineffective for failing to raise or preserve challenge to exclusion of the evidence (R102:73-104; App. 6-37). The court entered an order reflecting that denial the same date (R79; App. 1).

Prineas filed his notice of appeal on August 27, 2010 (R80). However, apparently dissatisfied with its oral decision, the circuit court issued a lengthy addendum decision on September 2, 2010, supplementing its reasons for denying the motion, along with a new Order (R83; R84; App. 38-62). Prineas filed a supplemental notice of appeal on September 10, 2010 (R85A).

On December 20, 2010, this Court extended the deadline for Prineas' opening brief to January 3, 2011.

STATEMENT OF FACTS

KAC identified six alleged sexual acts at trial. The first

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[1] The circuit court also preceded the presentation of evidence and argument with a lengthy statement of facts, assumptions, interpretation of Prineas' allegations, and criticism of Wisconsin post-conviction procedure (R101:3-29; App. 64-90).

involved penis to vagina intercourse while she bent over the back of a chair (R92:191-94). For the second, also penis to vagina intercourse, she was lying on her back on the floor (*id.*:194-96). The third act of penis to vagina intercourse involved her on her hands and knees, during which Prineas allegedly spanked her (*id.*:196-97; *see id.*:209-10). She then claimed he pushed her on to her stomach for anal sex (*id.*:197). The fifth act again had her on her back for penis to vagina intercourse (*id.*:197-98), followed by the sixth, in which he ejaculated on her chest (*id.*:198-99). He then got dressed, thanked her, told her to take her time getting ready, and left (*id.*:200).

The primary disputed issue at trial concerned consent. The state and KAC claimed that she did not voluntarily participate in the sexual activities.

However, KAC admitted that, although under age, she had consumed substantial amounts of alcohol during the party (R92:161-62, 168, 212-13). She gave contradictory testimony regarding whether she tried to get away from Prineas (*Compare id.*:188, 190, 234 (she tried to turn and push him away or to pull away from him), *with id.*:193 (she wasn't really trying to get away from him because she believed it futile)). She admitted that she did not scream for help, nor did she try to kick, scratch, or bite him (*id.*:193, 197, 210, 222, 234). Indeed, she admitted asking Prineas to wear a condom and to testifying at the preliminary examination that she had helped Prineas remove at least some of her clothing (*id.*:219-220, 233). She also admitted that, other than being spanked during the third act of intercourse while on her hands and knees, she was not struck or threatened in any way (*id.*:220). She nonetheless claimed that she was afraid of Prineas, that he physically restrained her, and that she repeatedly told him "no" and that she wanted to leave (*id.*:188, 190, 195-96, 226, 233).

Sexual Abuse Nurse Examiner Patricia Stephan testified that she found a bruise in the shape of a hand on KAC's buttocks, an abrasion on her thigh, and an abrasion to her labia minora (R93:38-45). She

opined that the physical evidence was consistent with forceful intercourse (*id.*:49, 91), "force" being defined as a substantial amount of pressure applied quickly (*id.*:93), but she admitted that there was no way to tell whether the intercourse was consensual or not based on the physical evidence (*id.*:82).[2]

Prineas testified at trial (R93:172-221). He explained that, although they did not have anal intercourse, the two made out on the couch and subsequently had intercourse in various positions over a period of time. He further testified that he did spank KAC in the course of that conduct and that he ultimately ejaculated on her chest, but that he used no force nor any threats and did not restrain her. (*Id.*:177-208). However, the court barred Prineas on "hearsay" grounds from testifying to KAC's actual words that caused him to believe that the sexual activities were consensual. As a result, Prineas could only testify in general terms that "[s]he never indicated that it was not something she wanted to do," that she "agreed" to him putting his penis between her breasts, and that the encounter was "completely consensual . . . [f]rom what [he] could observe of her," (*id.*:187-88, 191, 196).

Prineas' account of the conversation that lead to the two going to the basement was admitted only to explain what Prineas did next (R93:178-79; App. 92-93).[3] Subsequent attempts to show KAC's

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[2] The circuit court's assertion that, according to the nurse's testimony, the physical evidence reflected a "very forceful sexual assault" and was not consistent with consensual sex (R84:23; App. 61), thus is clearly erroneous.

[3] The relevant question and Prineas' answer follow:

Q. And after you, um, introduced yourself, what happened next?

A. I said, "Hi, I'm Antony." She said, "Hi, I'm Kerry." I said, "I hope we can get to know each other better later." She said, "Why wait?" I said "Okay. Would you like to come with me?" She said, "Yeah.

(R93:178; App. 92). The state objected on hearsay grounds, and the court allowed (continued...)

remarks reflecting consent were blocked, however:

> Q. And what did you do when you got in the chapter room?
>
> A. As soon as we got in the chapter room, she asked me if I had protection. I said, yes. She said, okay.
>
> MR. KRUEGER: Objection, again, hearsay.
>
> THE COURT: Yep, that clearly is hearsay and does not explain –
>
> MR. KRUEGER: Move to strike.
>
> THE COURT: – why they did what they did. Strike. Jury disregard. . . ..

(R93:180; App. 94). The court then held an unreported sidebar to "make something very clear." (R93:180; App. 94).

After explaining that they had each removed their own clothing, Prineas tried to explain what happened next, but the state interrupted with a hearsay objection:

> A. Um, I tried to vaginally penetrate her standing up. She said it couldn't work and she asked if I wanted to do it on the floor.
>
> MR. KRUEGER: Objection, move to strike.
>
> THE COURT: Yes agreed. Jury disregard.
>
> Counsel, do you want to have a conference with your client because your questions – He is starting to give hearsay, and he can't. Those questions were not asked of her. They can't be used for impeachment sake therefore. Do you wish to do that?

(R93:180-81; App. 94-95). Counsel took the court's suggestion and met with Prineas (R93:181).

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[3] (...continued)
the evidence for the limited purpose of laying the foundation for what happened next (R93:178; App. 92).

Outside the presence of the jury, the court subsequently explained its theory for exclusion of statements made by KAC during the incident that led to the charges against Prineas:

> THE COURT: . . . Earlier in the examination, direct examination of the defendant, the defendant was asked questions which caused him to believe and, in fact, the defense even asked him for comments that the victim had made.
>
> Now, the problem with it is the allegation was hearsay. It wasn't being offered necessarily to show why the defendant did what he did. It was offered to show whether the victim consented. In other words, the truth of what she was saying. Um, and – and I assume that those would be, um, statements of – of, um, consent to sex.
>
> Now, the problem with that the defense, during the examination, cross-examination of the victim had not laid the groundwork for any impeachment, such as, "Isn't it a fact you said to the defendant that X, Y, and Z?" None of that had happened.
>
> Because there was no groundwork for impeachment, this – the statements she may have made later that he's attempting to testify to now are not completing the impeachment by using it to contradict what she said or to impeach her to complete the impeachment. Therefore, they couldn't be admitted on that basis.
>
> I do not believe the defense, um, suggested any other grounds under which they could have been admitted.

(R93:209-10; App. 104-05).

Prineas then attempted to explain to the jury, without using KAC's words, that they "consensually went to the floor," provoking the obvious objection, the court's order striking the word "consensually" as conclusory, and yet another unreported sidebar (R93:181-82; App. 95-96).

Prineas' subsequent testimony reflected the difficulty of explaining the true nature of what happened without being able to state what KAC actually said (*e.g.*, R93:183-84 ("After that, I – I asked if I could – I'm not sure how to answer this, like, without going back into hearsay, so –"); 184 ("Q. Again, without getting into any specifics as to what may have been said, what happened next?"). Indeed, the prosecutor subsequently used Prineas' inability to relate KAC's remarks in response to one question as grounds to attempt to impeach his testimony:

> Q. All right. And, um – But your testimony is that when you ejaculated, you got up, got dressed, and walked out?
>
> A. Considering –
>
> Q. True?
>
> A. Considering that I can't speak any of what was said between us, yes.
>
> Q. Well, now you're trying to tell us that there was conversation between the two of you?

(R93:196). Although the court sustained defense counsel's objection and struck the word "now" from the question (*id.*:196; App. 100), and Prineas was able to confirm that there was some conversation between the two before he went upstairs (R93:204), the court barred him from stating the substance of that conversation in response to a juror's question (*id.*:206-07, 211-14; App. 101-02, 106-09).

After the jury left the courtroom, Prineas explained the substance of the conversation as follows:

> THE COURT: . . . Now, back to the following. I am going to ask this question again. What did you say to her after the event before you went upstairs? And you may answer in full context; that is, what she said to you, what you said to her, et cetera. Go ahead.
>
> THE WITNESS: She said, "Do you have

> anything to clean me off with?" I responded that I did not, and that was the extent of the conversation.

(R93:211; App. 106).

Although initially noting that Prineas' response would make no sense absent evidence of KAC's question, the court nonetheless sustained the state's objection to the statements on hearsay grounds:

> THE COURT: I don't have any problem with you arguing that it's hearsay, um, and in – in that sense. Okay. I agree with you.
>
> And the defense, of course, did not offer it for any other reason earlier. Of course, the jury came up with the idea. Um, since it's the jurors who asked it, and the jurors, um, were asking in effect for hearsay, the hearsay objection then – then does stand.
>
> Now, it's – but that's as to both of it. As I say, the state originally agreed but did not apparently realize that it would call for both.
>
> If it was going to be answered, it has to be in context. The state's now objecting to the whole thing, therefore, I sustain it as hearsay.

(R93:214; App. 109). Although the court sustained the objection on hearsay grounds, the state also based its objection on the theory that KAC's remarks were inadmissible for impeachment purposes as prior inconsistent statements because Prineas had not confronted her with them in his cross-examination of her (R93:212; App. 107).

KAC was not released from her subpoena after testifying and in fact was available to testify in rebuttal had the state desired to call her (R101:51-52).

Cardamone's §974.06 testimony disclosed the following additional remarks attributable to KAC that Prineas would have testified about but for the trial court's exclusion of such evidence as "hearsay" (R101:98-105, 107-09):

- Upon entering the chapter room, KAC asked Prineas to make sure the door was locked (R101:102-03, 108; R78:4).

- After he had entered her vaginally from behind and had spanked her while she was on her hands and knees, and after the two switched positions so he was lying on the floor and she straddled him, Prineas asked if she wanted to switch positions and she said "yes." They then went to the missionary position. (R101:108; R78:4).

- After their sexual encounter, KAC asked Prineas not to tell anyone (R101:104-05; *see* R78:2).

ARGUMENT

I.

EXCLUSION OF KAC'S REMARKS MADE DURING HER ENCOUNTER WITH PRINEAS DENIED HIM DUE PROCESS AND THE RIGHT TO PRESENT A DEFENSE

The central issue at trial was whether KAC consented to the sexual activities that took place in the basement of the fraternity house. She claimed she did not, while Prineas testified that KAC freely and voluntarily participated in the encounter. However, although KAC was permitted to testify that she repeatedly told Prineas "no" and that she wanted to leave, the court excluded on "hearsay" grounds Prineas' testimony of what KAC said during the encounter. Because such evidence was not hearsay or otherwise inadmissable, and because the exclusion of such evidence denied Prineas due process and the right to present a defense, he is entitled to a new trial.

The specific remarks that were either excluded, admitted only for a limited purpose, or never offered due to the court's "hearsay" theory, are as follows:

	Statement/Question	Action

1	"Why wait?" (R93:178)	Admitted for limited purpose (*id.*; App. 92)
2	"Yeah" would like to go with Prineas (R93:178)	Admitted for limited purpose (*id.*; App. 92)
3	KAC asked if Prineas had protection (R93:180)	Stricken (*id.*; App. 94)
4	KAC asked if chapter room door was locked (R101:102-03, 108; R78:4)	Not offered given court's "hearsay" ruling (R101:114-15)
5	After having trouble while standing, KAC asked if Prineas wanted to do it on the floor (R93:180-81)	Stricken (*id.*; App. 94-95)
6	While KAC straddling Prineas on floor, he asked if she wanted to change positions and she said "yes." (R101:108; R78:4).	Not offered given court's "hearsay" ruling (R101:114-15)
7	"Do you have anything to clean me off with?" (R93:211)	Excluded (R93:214; App. 109)
8	KAC asked Prineas not to tell anyone (R101:104-05; *see* R78:2)	Not offered given court's "hearsay" ruling (R101:114-15)

A. The Trial Court Erred in Excluding Evidence of KAC's Remarks Made During Her Encounter with Prineas

The trial court erred in excluding as "hearsay" evidence of KAC's remarks reflecting her consent to the sexual activity at issue here. Because the remarks were proffered as verbal acts as part of the incident itself, and not for their truth, they do not fall within the statutory definition of hearsay. Even if they were offered for their truth, however, they were fully admissible under the exception for statements of present state of mind, emotion, or belief, Wis. Stat. §908.03(3).

Moreover, because the remarks were admissible independent of any inconsistency with KAC's testimony or purpose of impeaching her (indeed, as affirmative evidence of innocence, they were admissible without regard to her even testifying) the limitations on extrinsic evidence of prior inconsistent statements under Wis. Stat. §906.13(2) do not apply. Even if §906.13(2) or Wis. Stat. §908.01(4)(a) do apply, their requirements were fully satisfied here.

Although admission of evidence generally is left to the trial court's sound discretion, the court erroneously exercises its discretion, as here, by ruling unreasonably or applying the wrong legal standard. ***State v. Miller***, 231 Wis.2d 447, 467, 605 N.W.2d 567 (Ct. App. 1999).

1. KAC's remarks made during her encounter with Prineas were not hearsay.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Wis. Stat. §908.01(3). As Cardamone argued at trial, the remarks at issue are not hearsay because they were not offered for their truth.

First, most of the remarks attributed to KAC were not assertions of fact but questions. Because the questions were not intended as an "expression of a fact, condition, or opinion," they were not statements. ***State v. Kutz***, 2003 WI App 205, ¶¶38-46, 267 Wis.2d 531, 671 N.W.2d 660; Wis. Stat. §908.01(1). Because they were neither a statement nor offered to prove the truth of the matter asserted, they were not hearsay. Wis. Stat. §908.01(3).[4]

Second, as the trial court acknowledged, the proffered evidence

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[4] The court below also seriously misunderstood the concept of when an out-of-court statement is offered for its truth, asserting that Prineas offered the evidence of KAC's remarks for the truth *that they were said* (*e.g.*, R101:22-23; R102:79, 83, 90; App. 12, 16, 23, 83-84). "Where a declarant's statement is offered for the fact that it was said, rather than for the truth of its content, it is not hearsay." ***State v. Wilson***, 160 Wis.2d 774, 779, 467 N.W.2d 130 (Ct. App. 1991).

of KAC's remarks made during and immediately before and after the sexual activity was offered to show that she in fact consented to that activity (R93:209; App. 104). The evidence concerned statements made during the course of the actual encounter in question, not those made some time afterwards and purporting to describe past events. The statements, in other words, were part of the incident itself.

Again, the core disputed issue in this matter was consent. Pursuant to Wis. Stat. §940.225(4), consent "means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." *See* ***State v. Long***, 2009 WI 36, ¶31, 317 Wis.2d 92, 765 N.W.2d 557 ("In the context of sexual assault, consent in fact requires an affirmative indication of willingness. A failure to say no or to resist does not constitute consent in fact"); ***State v. Clark***, 87 Wis.2d 804, 815, 275 N.W.2d 715 (1979) ("The plain wording of the statutory definition of consent demonstrates that failure to resist is not consent; the statute requires 'words' or 'overt acts' demonstrating 'freely given consent'"). Section 940.225(4) thus makes the complainant's statements during the alleged incident relevant and admissible without regard to their truth. What matters is what the complainant says and does, not what she intends at the time. *Compare* Wis. Stat. §939.22(48) (defining "without consent" as "no consent in fact").

KAC's remarks reflecting "a freely given agreement to have" sex thus are admissible and relevant without regard for their truth. What matters under §940.225(4) is that she said them, not that they were true.

Professor Blinka explains the similar concept of "verbal acts" that do not fall within the definition of hearsay:

> *Verbal acts or verbal parts of acts*. Some out-of-court statements are relevant just by virtue of having been made. "Verbal acts," sometimes called "operative facts," create legal rights or liabilities under the applica-

> ble substantive law. Examples abound: words of offer and acceptance or which establish conditions may have operative effect under contract law; an insurance policy may require a written proof of law; a principal may create an agency relationship by requesting another person to perform an act; criminal conspiracies are created when one person agrees with another to commit a crime; and, finally, the plaintiff in a defamation must introduce the offending words in order to establish a prima facie case. In each instance, the words themselves trigger legal rights and responsibilities entirely independent of the truth of any assertions contained in the statements. Closely related are statements which comprise a "verbal part of an act." Such statements are relied upon to characterize the nature of an otherwise ambiguous act by the declarant, such as whether the handing over of a sum of money was intended as a loan or a gift.

Blinka, Daniel, *Wisconsin Evidence* §801.3 at 665 (3d ed. 2008) ("Blinka").

Blinka provides the example of ***United States v. Moreno***, 233 F.3d 937 (7th Cir. 2000), in which the Court deemed utterances of consent and subsequent retraction (in that case, to a police search) to be verbal acts and thus not hearsay:

> Like the classic examples of verbal acts, offer and acceptance, statements that grant or withhold permission to the authorities to conduct a search carry legal significance independent of the assertive content of the words used.

Id. at 940 (citations omitted).

The same standard applies to statements of consent to sexual activity. ***State v. Ciacchi***, 2010 WL 1796311, ¶¶17-20 (Ohio App. May 6, 2010) (slip opinion) (due process denied by exclusion of evidence that alleged rape victim offered defendant sex for money; such statements were "verbal acts" supporting consent defense, and thus not hearsay); ***People v. Dell***, 232 Cal.App.3d 248, 258, 283

Cal.Rptr. 361 (1991); ***State v. Connally***, 79 Hawaii 123, 125, 899 P.2d 406 (1995). *See also* ***State v. Welker***, 536 So.2d 1017, 1020 (Fla. 1988) ("[T]he giving of consent is a verbal act, and therefore testimony that someone has given consent is not hearsay").

Although Cardamone did not use the term "verbal act," his objection that the evidence was not admitted for its truth squarely encompasses §940.225(4)'s definition of consent as addressing the complainant's "words or overt actions" rather than actual consent. Prineas' account of KAC's words reflecting consent to the sexual activities, if credited by the jury, establish a complete defense to the charge of sexual assault, regardless of what she actually may have thought at the time. Cardamone thus was correct that those remarks were operative facts, not offered for their truth, and thus not hearsay.

KAC's inquiry of Prineas after the incident regarding whether he had anything to clean her off with (R93:211), likewise plainly was not hearsay. The remark was not offered for its truth; it was a question, not an assertion of fact. ***Kutz***, 2003 WI App 205, ¶¶38-46. Moreover, its significance lay in the fact it was said and the nature of Prineas' response, not in any "truth" that may somehow be attributed to it. Because it was neither a statement nor offered to prove the truth of the matter asserted, it was not hearsay. Wis. Stat. §908.01(3). Accordingly, the circuit court likewise erred in excluding that statement, as well as Prineas' response, on hearsay grounds.

2. KAC's remarks were admissible as statements of her present state of mind, emotion, or belief, Wis. Stat. §908.03(3).

Wis. Stat. §908.03(3) excludes from the hearsay rule

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless

it relates to the execution, revocation, identification, or terms of declarant's will.

Accordingly, even if KAC's statements of agreement and consent made during her encounter with Prineas could be viewed as "hearsay" under Wis. Stat. §908.01(3), those statements remained admissible as statements of her then existing state of mind to freely consent to the sexual encounter. *See* Blinka, *supra*, §803.301 at 748-49.

The circuit court conceded that KAC's remarks likely were admissible under §908.03(3),[5] but suggested that it nonetheless had discretion to exclude, apparently based on its assessment that Prineas' testimony that she said them was not credible (R102:89-95; R84:6; App. 22-28, 44). However, §908.03(3) does not authorize exclusion for perceived "untrustworthiness," *compare* Wis. Stat. §908.03(6). In any event, trustworthiness under a statutory hearsay exception turns on the trustworthiness of the *declarant's* statement, not the credibility of the person who witnessed the statement. *E.g.*, ***Padilla v. Terhune***, 309 F.3d 614, 620 (9th Cir. 2002).

3. KAC's remarks are not excludable under Wis. Stat. §§906.13 or 908.01(4)(a)

The court below also sought to base its exclusion of evidence of KAC's remarks on grounds that Prineas' trial counsel had not cross-examined her on those expressions (R93:180-81, 209-10; App. 94-95, 104-05). The court viewed the remarks as prior inconsistent statements and claimed to rely upon Wis. Stat. §908.01(4)(a) for this cross-examination requirement (R102:3-5, 77-79, 89-90, 101; App. 3-5, 10-12, 22-23, 34). That reliance was misplaced.

Section 908.01(4)(a)1 provides that prior inconsistent statements are "not hearsay" if "the declarant testifies at the trial . . . and is subject

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[5] The court conceded thinking at trial that §908.03(3) may apply but believed it was not its role to suggest it (R101:25-26, 85-87; App. 18-20).

to cross-examination concerning the statements." That provision, however, "simply means that the declarant must have been *subject* to cross-examination, not that the declarant must, in fact, have been *cross-examined* about the statement." ***Miller***, 231 Wis.2d at 470-71 (emphasis in original). Section 908.01(4)(a) accordingly does not bar admission of a prior statement merely because the proponent did not question the declarant about it. *See* ***id.*** at 467-71 (admitting prior consistent statement despite state's failure to examine declarant about it). *See also* ***State v. Nelis***, 2007 WI 58, 300 Wis.2d 415, 733 N.W.2d 619 (upholding admission of prior inconsistent statements under §908.01(4)(a) - no evidence that proponent examined declarant regarding statement). Rather, it is the *opponent* of the evidence (here, the state) that must have an opportunity to examine the declarant regarding the statement, ***Miller***, 231 Wis.2d at 471 (citation omitted), and such opportunity may be provided where, as here (R101:51-52), the witness is subject to recall. ***Nelis***, ¶¶64-72 (Bradley, J., concurring) (witness "subject to cross-examination" when available to be recalled).

Although the court below claimed otherwise (R102:3-5, 101; App. 3-5, 34), it is Wis. Stat. §906.13(2)(a) that imposes the "opportunity to explain" requirement on which it relied. Section 906.13(2) provides:

> **(2) Extrinsic evidence of prior inconsistent statement of a witness.**
>
> (a) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable:
>
> 1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement.
>
> 2. The witness has not been excused from giving further testimony in the action.
>
> 3. The interests of justice otherwise require.

By its terms, however, §906.13(2)(a)1 is limited to extrinsic evidence of statements offered as "prior inconsistent statements." In other words, §906.13(2) is directed at impeachment evidence. *See* Judicial Council Committee's Note to Wis. Stat. §906.13 (1974) (describing this provision as imposing a "'prior warning' condition to extrinsic evidence *of impeachment*" (emphasis added)).

Contrary to the court's misunderstanding below (R93:180-81, 209-10; R101:9, 19, 26-27; R102:3-4, 77-79, 95; App. 3-4, 10-12, 28, 70, 80, 87-88, 94-95, 104-05), Prineas offered KAC's remarks, not for impeachment, but as affirmative evidence of her consent and as establishing her motive to falsely accuse Prineas of sexual assault. Such evidence was admissible without regard to KAC even testifying. Any inconsistency between what she said at trial and what she said during the encounter thus is irrelevant to their admissibility and §906.13(2)(a) therefore simply does not apply here.

Regardless, KAC's remarks met the requirements of §906.13(2)(a). Admissibility of extrinsic evidence under that section is not limited to circumstances where the witness was given an opportunity to explain or deny the prior inconsistent statement. Rather, such evidence also is admissible where, as here, "the witness has not been excused from giving further testimony" or "the interests of justice otherwise require." Wis. Stat. §906.13(2)(a)2 & 3. *See* ***State v. Smith***, 2002 WI App 118, ¶¶12-13, 254 Wis.2d 654, 648 N.W.2d 15.

Here, KAC was not excused as a witness when she finished her testimony on the first day of trial. Rather, the court merely allowed her to "step down" (R92:266). She remained under subpoena and available to explain or deny Prineas' account of her statements throughout the remainder of the trial (*see id.*; R101:51-52 (state concedes KAC remained available and subject to subpoena)).

Finally, the interests of justice required admission of direct evidence of KAC's consent and motive to fabricate the charges in order

to protect Prineas' rights to due process and to present a defense. Because KAC remained available to explain or deny Prineas' testimony regarding her statements during their encounter, any perceived violation of §906.13(2) was purely a technical one. As such, the arbitrary application of that provision to deny Prineas evidence critical to his defense denied him due process. *See* Section I,B, *infra*.

Accordingly, the foundation requirements under §906.13(2) were met and exclusion was reversible error. *E.g.*, ***Smith***, *supra*.

B. Exclusion of the Evidence Violated Prineas' Rights to Due Process and Present a Defense.

Because the proffered evidence was highly relevant, indeed critical, to Prineas' defense, its exclusion violated not only state rules of evidence, but also his constitutional rights to due process and to present a defense. *See, e.g.*, ***Pennsylvania v. Ritchie***, 480 U.S. 39, 40 (1987) (recognizing criminal defendant's "right to put before the jury evidence that might influence the determination of the guilt"); ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986).

While the admission of evidence generally rests within the sound exercise of trial court discretion and may be subject to reasonable restrictions, ***United States v. Scheffer***, 523 U.S. 303, 308 (1998), such limitations may deny the defendant his rights to due process, compulsory process, and confrontation where, as here, they have the effect of concealing relevant, exculpatory evidence from the jury. *See* ***Delaware v. Van Arsdall***, 475 U.S. 673 (1986). The jurors are "entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on [a witness'] testimony which provided 'a crucial link in the proof. . . of petitioner's act.'" ***Davis v. Alaska***, 415 U.S. 308, 317 (1974) (citation omitted).

A defendant's right to present a defense includes the right to offer testimony by witnesses and to compel their attendance. ***Chambers v. Mississippi***, 410 U.S. 284 (1973); ***Washington v. Texas***, 388

U.S. 14, 19 (1967). The Supreme Court has recognized that "few rights are more fundamental than that of an accused to present witnesses in his own defense." ***Chambers***, 410 U.S. at 302.

At the same time, a defendant's right to present relevant testimony is not without limitation and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." ***Chambers***, 410 U.S. at 295; ***Rock v. Arkansas***, 483 U.S. 44, 55 (1987). Still, while "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," ***Scheffer***, 523 U.S. at 308, the Supreme Court has expressed disapproval of rules "applied mechanistically to defeat the ends of justice," ***Rock***, 483 U.S. at 55. Accordingly, such rules violate the right to present a defense if their application in a particular case is "arbitrary" or "disproportionate to the purposes they are designed to serve." ***Rock***, 483 U.S. at 56.

Even if evidence is properly excluded under state evidence rules, such exclusion may violate the defendant's constitutional rights. *E.g.*, ***State v. St. George***, 2002 WI 50, 252 Wis.2d 499, 643 N.W.2d 777. To establish that exclusion of defense evidence violates his right to present a defense, the defendant must show (1) that admission of the evidence would not have been a misuse of discretion, (2) that the evidence "was relevant to a material issue in [the] case," (3) that the evidence "was necessary to the defendant's case," and (4) that "[t]he probative value of the [evidence] outweighed its prejudicial effect." ***St. George***, ¶54 (footnotes omitted). "After the defendant successfully satisfies these four factors to establish a constitutional right to present the [evidence,] a court undertakes the second part of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence." ***Id.*** ¶55.

There can be no reasonable dispute that evidence of KAC's remarks made during her encounter with Prineas were admissible under

Wisconsin law, such that the court would not have misused its discretion by admitting evidence of them. *See* Section I,A, *supra*. Nor is there any reasonable dispute that direct evidence of KAC's remarks indicating consent and supporting a motive for her to falsely accuse Prineas was relevant to the central issues in the case, that the evidence of Prineas' innocence and KAC's motive to lie was critical to his defense, and that, given the high probative value of such evidence and the total absence of any conflicting unfair prejudicial effect, the former outweighed the latter. Nor is there any rational argument that the state has *any* legitimate interest in excluding evidence of Prineas' innocence, let alone a compelling one. As such, the improper exclusion of the evidence denied Prineas the rights to due process and to present a defense. ***St. George***, *supra*; ***Chambers***, *supra*.

C. The Improper Exclusion Was Not Harmless

Contrary to the circuit court's conclusion (R102:95-101; R84:8-23; App. 28-34, 46-61), there can be no reasonable suggestion that the exclusion of evidence of KAC's "words . . . indicating a freely given agreement to have sexual intercourse or sexual contact," Wis. Stat. §940.225(4), and supporting her motive to fabricate these charges was harmless beyond a reasonable doubt. *See* ***State v. Dyess***, 124 Wis.2d 525, 370 N.W.2d 222, 231-32 (1985) (beneficiary of error must demonstrate harmlessness beyond reasonable doubt).

The primary disputed issue at trial concerned whether KAC consented to the sexual conduct. KAC claimed that she did not; Prineas testified that she did. KAC's own testimony was enough to give the jury reason to doubt her on that point, whether it was the substantial amount of alcohol she had consumed that night, her contradictory testimony regarding whether she tried to get away from Prineas, her failure to scream for help or to attempt to fight him off, the absence of any threats by Prineas, or the fact that she admitted to helping Prineas remove her clothing and asking Prineas to use a condom. Add to this the implausibility of both her assertion that she went to the basement to

use her cell phone and the suggestion that Prineas could open the condom package and put it on, apparently without her noticing it and without releasing her, and it is not surprising that the jury doubted her claims sufficiently to require acquittal on four of the six charges even without the excluded evidence of her statements showing that she in fact consented.[6]

Where, as here, the state's case already is of marginal sufficiency, even otherwise minor errors can have a great impact on the jury. *Cf.* ***United States v. Agurs***, 427 U.S. 97, 113 (1976).

Given these circumstances, Prineas' evidence of KAC's actual statements reflecting the context of the incident and her freely given consent to the sexual conduct cannot reasonably be deemed harmless. Given the improper exclusion of evidence of KAC's statements during the incident, Prineas and the jury were left only with inherently ambiguous evidence of her conduct, KAC's testimony that she

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[6] The circuit court's belief that the bruise on KAC's buttocks demonstrates one or more "very hard blows" (R95:4; *see* R84:22; App. 60) and that Prineas thus necessarily was lying is not accurate. First, erotic spanking is a well-known sexual practice. *See, e.g.*, "Erotic Spanking." http://en.wikipedia.org/wiki/Erotic_spanking. Second, although overlooked by the court, women are much more likely to bruise than are men, and are especially subject to easy bruising on the buttocks. *E.g.*, Dr. Bernadette Garvey, *Easy Bruising in Women*, 30 Can. Fam. Physician 1841 (Sept., 1984)("Easy bruising is common, especially among young women. . . . [and] are most often seen on the arms, thighs and buttocks"), available on line at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2154228/pdf/canfamphys00223-0135.pdf; David G. Young, N.D., *Easy Bruising*, http://pages.prodigy.net/naturedoctor/bruising.html ("Women seem more prone than men to bruise from minor injury, especially on the thighs, buttocks, and upper arms").

Finally, the presence of a bruise does not, as the court suggested, require one or more "very hard blows." Even ignoring the fact that women bruise more easily, especially on the buttocks, the existence or perceived severity of a bruise can be the result of repetition (as both KAC and Prineas testified to here) rather than one or more "very hard blows." *See, e.g.*, "Bruising: Severity of Bruises," http://primehealthsolutions.com/bruising.html#Severity%20of%20bruises ("Repeated impacts aggravate the bruising").

continually said "no" and asked to leave, and Prineas' necessarily conclusory testimony that she "agreed" or "consented" to the conduct, on which to decide whether her "words or overt actions . . . indicat[ed] a freely given agreement to have sexual intercourse . . .." Wis. Stat. §940.225(4). The jury, in other words, was provided evidence of what KAC claims she said at the time, but was denied evidence of what Prineas claims she said.

Because the question of consent, by statute, turns squarely on the complainant's actual words under §940.225(4) and requires "an affirmative indication of willingness," ***Long***, 2009 WI 36, ¶31, it is not enough for the defense to present evidence merely that "[s]he never indicated that it was not something she wanted to do." (R93:187-88, 191, 196). Also, because a conclusion is only as strong as the evidence supporting it, evidence that KAC "agreed" or "consented," without evidence of her actual words, is little better than nothing. "Juries are unlikely to give much weight to a witness's unsupported opinion or conclusion." Blinka, *supra*, §701.1 at 557. Because the error here resulted in the jury being denied substantial evidence that KAC's actual words supported a finding of consent, it cannot be harmless.

The acquittals on the first four charges chronologically do not alter the prejudicial effect of the exclusions. The existence of reasonable doubt on those counts does not mean that additional evidence bolstering the consensual nature of the encounter could have no effect on the jury's assessment of whether the remaining acts were consensual as well. Also, evidence of KAC's affirmative response when asked whether she wished to switch to the missionary position underlying Count 5 *after* the erotic spanking (R101:108; R78:4) would rebut the circuit court's theory that the spanking spelled the difference between consent and non-consent.[7]

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[7] The circuit court's speculative suggestion that the spanking spelled the difference between the counts of acquittal and those of conviction (R95:5-6; (continued...)

The probability of prejudice on all the counts is heightened even more when, as here, the same error resulted in the exclusion of evidence that would provide a reasonable motive for KAC's false claims, as well as an innocent explanation for her distress immediately following the incident. Specifically, Prineas sought to explain that, after the incident was over and he had dressed, KAC asked him for something to clean herself up with. However, he responded that he had nothing, did nothing to help her, and merely returned to the party, leaving her to fend for herself. (R93:211; *see id.*:197). While not directly relevant to the issue of consent - "buyer's remorse" due to post-coitus disregard for one's partner does not transform prior consensual sex into rape - evidence of such boorish behavior would help explain why KAC's response turned from one of voluntary and consensual involvement to the type of confusion and anger subsequently witnessed by her friend, Angela Perry (*see* R92:243-46), and to these allegations of rape.

Because the improperly excluded evidence would have provided noncumulative, affirmative evidence of actual consent, as well as a reasonable explanation for why someone who had consented to sex would subsequently turn on her sex partner, that exclusion cannot reasonably be excused as harmless.

D. Relief Remains Appropriate Even if Cardamone's Objection to Exclusion of the Evidence was Inadequate

Even if this Court deems Cardamone's objection that the evidence was not offered for its truth inadequate to preserve the claim, relief remains appropriate because waiver is a rule of judicial administration, not a jurisdictional defect. ***State v. McMahon***, 186 Wis.2d 68,

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[7] (...continued)
R84:8, 19, 22; App. 46, 57, 60), is dubious in any event. The spanking took place while KAC was on her hands and knees, i.e., the third penis to vagina position (R92:196-97, 209-10), representing Count 3, for which Prineas was acquitted. If the court's theory was correct, Prineas would have been convicted on that count.

93, 519 N.W.2d 621 (Ct. App.1994). Relief also remains appropriate on ineffectiveness grounds, *see* Section II, *infra*, and because the trial court committed plain error by excluding the evidence, *see* Wis. Stat. §901.03(4).

The contemporaneous objection rule gives parties and the trial judge notice of the issue and a fair opportunity to address the objection, thus eliminating the need for appeal. ***State v. Huebner***, 2000 WI 59, ¶12, 235 Wis.2d 486, 611 N.W.2d 727. Where, as here, defense counsel attempts to admit important evidence rebutting an element of the offense, and the trial court knows or should know that evidence is admissible, albeit not on the specific theory asserted, it is therefore plain error to sustain an objection to the evidence. Trials are not games, turning on whether counsel mouths the magic words, but a means to search for the truth (R94:55-56). Defendants are entitled to relief from errors that, as here, are fundamental, substantial, and obvious, despite their attorney's failure to object. ***State v. Mayo***, 2007 WI 78, ¶29, 301 Wis.2d 642, 734 N.W.2d 115.

II. CARDAMONE'S FAILURE TO PROPERLY PRESERVE OBJECTION TO THE EXCLUSION OF KAC'S REMARKS DENIED PRINEAS THE EFFECTIVE ASSISTANCE OF COUNSEL

To the extent that Prineas's trial counsel, Joseph Cardamone, failed properly to preserve objection to the improper exclusion of evidence of KAC's consent to the sexual conduct at issue in this case, Prineas was denied the effective assistance of counsel at trial. U.S. Const. amends. VI & XIV; Wis. Const. art. I, §7. There was no legitimate tactical basis for the identified failures of counsel, such failures were unreasonable under prevailing professional norms, and they prejudiced Prineas' defense.

A. Standard for Ineffectiveness

A defendant alleging ineffective assistance of counsel first "must show that 'counsel's representation fell below an objective

standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176 (1986), *quoting* ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). It is not necessary to demonstrate total incompetence of counsel, and the defendant makes no such claim here. Rather, a single serious error may justify reversal. ***Kimmelman v. Morrison***, 477 U.S. 365, 383 (1986); *see* ***United States v. Cronic***, 466 U.S. 648, 657 n.20 (1984). The deficiency prong of the ***Strickland*** test is met when counsel's errors resulted from oversight rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572 (1989).

Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "The defendant is not required [under ***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, 147 Wis.2d at 354, *quoting* ***Strickland***, 466 U.S. at 693. Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." ***Id.*** at 357.

"Reasonable probability," under this standard, is defined as "'probability sufficient to undermine confidence in the outcome.'" *Id*., *quoting* ***Strickland***, 466 U.S. at 694. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000). In addressing this issue, the Court normally must consider the totality of the circumstances. ***Strickland***, 466 U.S. at 695.

Once the facts are established, each prong of the analysis is reviewed *de novo*. ***State v. Cummings***, 199 Wis.2d 721, 747-48, 546 N.W.2d 406 (1996).

B. Relevant Facts

At the hearing on Prineas' motion, his trial counsel, Joseph

Cardamone, acknowledged his belief at trial that the complainant's actual statements to Prineas during their encounter were both "very important" to the consent defense and admissible for purposes other than for their truth (R101:36, 44-45, 72). Cardamone conducted no pretrial legal research on this question and was surprised by the state's objection and the exclusion of the evidence (*id.*:44-45, 73-74, 94-95). He had not seen the issue as one of hearsay and did not consider arguing that the evidence would constitute "verbal acts" (he was unaware of that doctrine) or qualify under the present sense impression exception to the hearsay rule, Wis. Stat. §908.03(3). (*Id.*:48-49, 54, 56-57). He wanted the evidence in and had no strategic or tactical reason for not making an adequate argument or objecting to its exclusion for the reasons stated in Prineas' §974.06 motion (*id.*:37, 58).

Cardamone did not believe it was legally necessary to ask the complainant whether she made the statements before having Prineas testify about them (R101:39-40). He disavowed the circuit court's theory that he might have wanted the jury to hear of the complainant's statements directly from Prineas, and even at the risk of having them stricken, rather than give her the chance to rebut them (*id.*:39-40, 62-65).

Cardamone admitted that he should have made an offer of proof regarding KAC's other statements reflected in his file that Prineas would have testified to but for the trial court's exclusionary order. He explained that, given his surprise at the exclusion of the evidence, he improvised as best he could at that point and that he had no strategic or tactical reason for not making that proffer. (R101:94-109, 112; *see* R78). Cardamone explained that he did not ask Prineas about the complainant's other statements given the trial court's orders excluding similar statements as hearsay (R101:114).

Although Cardamone agreed with the court below that he was able to elicit substantial evidence of the complainant's consent, he was unable to fully present Prineas' defense due to the exclusion of

evidence of the complainant's actual statements reflecting her consent at the time of the incident (*id.*:116-17). The excluded evidence would have helped the defense case (*e.g.*, *id.*:120).

C. Trial Counsel's Performance Was Deficient.

Attorney Cardamone understandably sought to introduce evidence of KAC's remarks during the incident that, in the words of §940.225(4), "indicat[e] a freely given agreement to have sexual intercourse . . .," as well as evidence supporting KAC's motive to falsely accuse Prineas of sexual assault. Such evidence was not hearsay (or fell within an obvious exception), was admissible pursuant to the statutory definition of "consent" and thus admissible as affirmative evidence of innocence rather than merely as impeachment, and was critical to presentation of Prineas' defense. Yet, when confronted with the state's misplaced hearsay objections and the court's apparent agreement, Cardamone offered only the assertion that the evidence was not offered for the truth of the matters asserted.

Cardamone's objection was correct. The evidence was admissible and relevant without regard to its truth. Section I,A,1, *supra*. Should this Court find otherwise, however, Cardamone acted unreasonably by failing to make a proper objection and, to the extent the Court deems §§906.13(2) or 908.01(4)(a) applicable and unsatisfied by failing to meet the requirements of that provision, by failing to question KAC about her statements.

Cardamone did not intentionally fail to preserve objection to improper exclusion of the evidence or the denial of Prineas' right to present a defense. He wanted those statements in evidence and, as any reasonable attorney in the circumstances, would have known that KAC's actual remarks indicating consent and giving rise to a motive to lie were critical to his client's defense (*see* R101:36-37, 44-45, 58, 72, 120). Under no rational view of the situation would an attorney intentionally forego a valid objection to the improper exclusion of evidence critical to the defense. Rather, as Cardamone admitted at the

§974.06 hearing, he simply did not recognize why, beyond what he asserted, the exclusion was erroneous. The circuit court conceded that Cardamone's failures in this regard were not for strategic or tactical reasons (*see* R102:92). Deficient performance is shown where counsel's failures are the results of oversight rather than a reasoned defense strategy. *E.g.*, ***Wiggins***, 539 U.S. at 534; ***Moffett***, 147 Wis.2d at 353.

Although the court below suggested that a reasonable attorney would not necessarily be familiar with the "verbal acts" doctrine (R101:52-56; R102:83-84; R84:6; App. 16-17, 44), a reasonable attorney *would* be familiar with the fact that the definition of consent under §940.225(4) produces the same result that it is what the complainant says, and not the truth of her statements, that is relevant to consent.

The court's suggestion that no reasonable attorney would elicit the evidence of Prineas' boorish behavior following the sexual encounter (R101:23; R102:79-80; App. 12-13, 84) overlooks the fact that Cardamone sought to do just that (R78:2), and with good reason. It provided reasonable, and non-criminal, explanation for why KAC was so upset afterwards, something he had trouble with in closing given the exclusion of this evidence (*see* R94:32-33).

The circuit court deemed Cardamone's belief that he need not cross-examine KAC on the remarks attributed to her by Prineas "not very effective" (R102:85; App. 18). If the court was correct that such cross-examination was required, then it also was correct that Cardamone acted unreasonably by not conducting that cross-examination.

Finally, to the extent that this Court deems Prineas' objection to the exclusion of specific statements waived because Cardamone failed to make an offer of proof concerning those statements at the time of trial, his failure to make that offer likewise was unreasonable and

deficient performance. Cardamone knew that the court's erroneous exclusion order covered additional evidence not in the trial record, yet failed to make the offer of proof required to preserve the objection. He had no strategic or tactical reason for the failure; he simply overlooked the requirement to make one given his surprise at the objection and the court's exclusion of the evidence. (R101:94-109, 112). Errors due to oversight constitute deficient performance. *E.g.*, ***Wiggins***, 539 U.S. at 534; ***Moffett***, 147 Wis.2d at 353.

D. Trial Counsel's Deficient Performance Prejudiced Prineas' Defense at Trial

For the same reasons stated in Section I,C, *supra*, Cardamone's unreasonable failures to preserve the objection to the erroneous exclusion of the evidence of KAC's remarks reflecting her consent to the sexual activities and to the resulting denial of Prineas' right to present a defense prejudiced his client's case. The circuit court's contrary belief was no doubt tainted by its view that the evidence against Prineas was overwhelming on all of the counts and its failure to accept as reasonable any opposing view, including the jury's acquittal of Prineas on four of the original six charges (*see* R102:100 (court was "absolutely shocked" by the acquittals)).

Viewing the evidence objectively, as this Court must, there exists far more than a reasonable probability of a different result but for counsel's errors in failing properly to preserve objection to that exclusion.

III. POST-CONVICTION COUNSEL'S FAILURE TO CHALLENGE THE EXCLUSION OF KAC'S REMARKS AND TRIAL COUNSEL'S RELATED INEFFECTIVENESS DENIED PRINEAS THE EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL

Prineas also was denied the effective assistance of post-conviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205

Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996) (ineffectiveness of post-conviction counsel properly raised under Wis. Stat. §974.06). Specifically, Prineas' post-conviction counsel, Raymond Dall'Osto, unreasonably failed to identify and challenge either the exclusion of Prineas' testimony concerning KAC's remarks or the related trial ineffectiveness claims identified here.

The circuit court did not independently analyze this claim, resting instead on its erroneous belief that there was no underlying substantive error (R102:73-104; R84; App. 6-37, 39-62).

A. Applicable Legal Principles

Although post-conviction or appellate counsel is not constitutionally ineffective solely because the attorney fails to raise every potentially meritorious issue, *see* ***Smith v. Robbins***, 528 U.S. 259, 287-88 (2000), counsel's decisions in choosing among issues cannot be isolated from review. *E.g.*, *id.*; ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986). The same ***Strickland*** standard for ineffectiveness applies, with appropriate modifications, to assess the constitutional effectiveness of post-conviction or appellate counsel. ***Smith***, *supra*; *see* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis.2d 468, 673 N.W.2d 369.

The Seventh Circuit has summarized the standards as follows:

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient . . . and when that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial," we will deem the lack of effective assistance prejudicial.

Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) (state appellate attorney's failure to raise preserved hearsay issue constituted ineffective assistance of appellate counsel, mandating federal habeas relief).

Again, review of both prongs of an ineffectiveness claim is *de*

novo. ***Cummings***, 199 Wis.2d at 747-48.

B. Relevant Facts

Because Attorney Dall'Osto was unavailable (R101:29-31), and there was no real dispute concerning his testimony, the parties stipulated to Dall'Osto's testimony (*id.*:122-29; R102:5-7). As relevant here, Dall'Osto identified the trial ineffectiveness and right to present a defense issues raised here but had no strategic or tactical reason for not raising them in post-conviction motions or the direct appeal (R101:124). Given his experience, evidence of the alleged victim's actual statements of consent would have been very important (*id.*). He either knew of the specific additional statements reflected in Cardamone's witness file on Prineas or it would have made no difference to his decision whether to raise the claims (R102:5-6).

C. Denial of Effective Assistance of Post-Conviction Counsel

For the reasons stated in Section I, *supra*, the issues that Dall'Osto failed to raise here were both significant and obvious. Given the strength of those claims, especially when compared with the relative weakness of the claims he chose to raise (most of which he ultimately withdrew or failed to adequately argue), no reasonable or legitimate strategic purpose for withholding the claims raised here readily presents itself. No reasonable defense strategy would support raising multiple ineffectiveness claims that one cannot support while not raising claims that are both squarely supported by the record and significantly prejudiced Prineas' right to a fair trial. Rather, it appears that Dall'Osto just missed the importance of this issue. Again, deficient performance is shown where counsel's errors result from oversight rather than a reasoned defense strategy. *E.g.*, ***Wiggins***, 539 U.S. at 534.

Because the issues unreasonably omitted by Attorney Dall'Osto "may have resulted in a reversal of the conviction, or an order for a new trial," ***Mason***, 97 F.3d at 893 (citation and internal markings omitted),

see Sections I & II, *supra*, the circuit court erred in concluding that Prineas was not denied the effective assistance of post-conviction counsel.

IV. SUFFICIENT REASON EXISTS FOR RAISING PRINEAS' CLAIMS

Although the issues raised here were not raised on Prineas' direct appeal, he is not barred from raising them now under Wis. Stat. §974.06(4) as construed in ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994). A motion under Wis. Stat. §974.06 remains appropriate where, as here, the defendant has "sufficient reason" for not having raised, or for having inadequately raised, the issue on a prior motion or appeal. Wis. Stat. §974.06(4); ***State v. Howard***, 211 Wis.2d 269, 564 N.W.2d 753, 761-62 (1997).[8]

The state below focused solely on the merits of Prineas' claims and did not dispute that he showed "sufficient reason" under §974.06(4) if he was correct on the merits (*see* R102:21-24; 52-68). It therefore waived any challenge on the point. ***State v. Avery***, 213 Wis.2d 228, 247, 570 N.W.2d 573 (Ct. App. 1997).[9]

In any event, sufficient reason is shown where, as here, the failure to raise the claim, or failure to adequately raise the claim, on the prior motion is due to ineffectiveness of post-conviction counsel or the defendant did not knowingly and personally choose not to raise the claims on the prior motion or appeal.

A. Sufficient Reason on the Post-Conviction Ineffectiveness Claim

The fact that Attorney Dall'Osto could not challenge his own ineffectiveness constitutes sufficient reason under §974.06(4),

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[8] ***State v. Gordon***, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765, overruled a different portion of ***Howard*** on other grounds.

[9] ***State v. Armstrong***, 2005 WI 119, ¶ 162, 283 Wis.2d 639, 700 N.W.2d 98, overruled a different portion of ***Avery*** on other grounds.

authorizing Prineas to raise his post-conviction ineffectiveness claim now. ***State v. Hensley***, 221 Wis.2d 473, 585 N.W.2d 683 (Ct. App. 1998); ***State v. Robinson***, 177 Wis.2d 46, 501 N.W.2d 831, 834 (Ct. App. 1993). *See also* ***United States v. Taglia,*** 922 F.2d 413, 418 (7th Cir. 1991) (counsel cannot be expected to attack his own effectiveness).

B. Ineffective Assistance of Post-Conviction Counsel Constitutes Sufficient Reason

Sufficient reason exists under Wis. Stat. §974.06(4) whenever the claim which a defendant seeks to raise under §974.06 was omitted from, or inadequately raised in, a prior direct appeal due to the ineffectiveness of post-conviction or appellate counsel. ***Rothering***, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996). *Accord* ***Murray v. Carrier***, 477 U.S. 478 (1986) (ineffective assistance of appellate counsel meets stricter federal "cause and prejudice" standard permitting federal habeas review despite failure adequately to present underlying issue to state courts).

For the reasons stated in Section III, *supra*, Attorney Dall'Osto did not act reasonably in failing to raise the identified issues in Prineas' original post-conviction motion and that failure prejudiced Prineas' defense.

C. Sufficient Reason Exists Where the Defendant Did Not Know the Basis for a Claim and Intentionally Omit it from a Prior Post-conviction Motion

Regardless whether prior counsel's failure to raise or adequately argue a claim constitutes sufficient reason in a particular case under ***Escalona-Naranjo*** and §974.06(4), that standard is satisfied where the defendant did not himself knowingly and intentionally omit the claim from a prior post-conviction motion.

Section 974.06(4) does not define "sufficient reason," nor has the Supreme Court. In assessing the scope of the sufficient reason standard, however, it is important to keep in mind that this standard,

adopted from the Uniform Post-Conviction Procedures Act (1966), *see* ***Escalona-Naranjo***, 517 N.W.2d at 160, was established long before the United States Supreme Court appended the restrictive "cause and prejudice" standard to the federal habeas statute. Indeed, the Commissioners' Comment to the Uniform Act states that the provision was intended to implement the relatively liberal standards for successive petitions controlling at the time the Uniform Act was approved:

> The Supreme Court has directed the lower federal courts to be liberal in entertaining successive habeas corpus petitions despite repetition of issues, ***Sanders v. United States***, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). By adopting a similar permissiveness, this section will postpone the exhaustion of state remedies available to the applicant which ***Fay v. Noia***, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) holds is required by statute for federal habeas corpus jurisdiction, 28 U.S.C. Sec. 2254. Thus, the adjudication of meritorious claims will increasingly be accomplished within the state court system.

11 U.L.A. 528 (West 1974).

Fay and ***Sanders*** reflected the position that criminal defendants should not be penalized by the defaults of their attorneys in which they themselves did not participate. ***Sanders*** directed the federal courts to consider successive petitions on the merits unless: (1) the specific ground alleged was heard and determined on the merits on a prior application, or (2) the prisoner personally either deliberately withheld an issue previously or deliberately abandoned an issue previously raised. 373 U.S. at 15-19. ***Fay*** similarly held that federal habeas relief would not be denied on the basis of "procedural default" unless the inmate had "deliberately by-passed the orderly procedure of the state courts," 372 U.S. at 438, by personal waiver of the claim amounting to "'an intentional relinquishment or abandonment of a known right or privilege,'" ***id.*** at 439 (citation omitted).

Only years after the standards of ***Fay*** and ***Sanders*** were incorporated into Wisconsin law with the adoption of §974.06(4) did the Supreme Court replace those standards with the restrictive "cause and prejudice" standard for purposes of federal habeas. *See* ***Wainwright v. Sykes***, 433 U.S. 72 (1977). Construction of the sufficient reason standard in §974.06(4) thus must be made in light of the permissive standards of ***Sanders*** and ***Fay***, not the preclusive standard of ***Wainwright***. While barring the type of strategic withholding of claims condemned in ***Escalona-Naranjo***, that section does not act to promote finality at the expense of justice. *Cf.* ***Hayes v. State***, 46 Wis.2d 93, 175 N.W.2d 625, 631 (1970) ("It is more important to be able to settle a matter right with a little uncertainty than to settle it wrong irrevocably").[10] Rather, a petitioner's lack of knowledge or informed personal involvement in the failure previously to present an issue constitutes sufficient reason to permit the person claiming unlawful confinement to raise his or her claims under §974.06.

State v. Howard, 211 Wis.2d 269, 564 N.W.2d 753 (1997), further supports this construction of the sufficient reason standard. In holding that Howard's claim was not barred under §974.06(4), despite the theoretical availability of the claim at the time of his prior appeal, the Court emphasized Howard's subjective ignorance of the legal basis for the claim. 564 N.W.2d at 762.

This approach likewise is fully consistent with ***Escalona-Naranjo***. The Court there was concerned with abuses caused by the strategic withholding of certain claims, emphasizing that it intended neither to "forego[] fairness for finality" nor to "abdicate [its] responsibility to protect federal constitutional rights." 517 N.W.2d at 164. The Court summarized its holding in language barring claims which were intentionally withheld from a prior motion while permitting those of which the defendant previously had no knowledge:

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[10] ***State v. Taylor***, 60 Wis.2d 506, 210 N.W.2d 873, 882 (1973), overruled ***Hayes*** on other grounds.

> Section 974.06(4) was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later. Rather, the defendant should raise the constitutional issues *of which he or she is aware* as part of the original postconviction proceedings.

Id. (emphasis added).

Attorney Dall'Osto did not in fact advise Prineas of the possibility of raising any of the claims identified in this motion at the time of his initial motion and direct appeal; Prineas did not in fact understand that these claims could provide bases for relief from his conviction; and he did not intentionally withhold those claims on his initial post-conviction motion or direct appeal. (R102:6-7). Accordingly, he has shown sufficient reason to raise them now.

CONCLUSION

For these reasons, Anthony L. Prineas respectfully asks that the Court reverse the order denying his postconviction motion and grant him a new trial.

Dated at Milwaukee, Wisconsin, January 3, 2011.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,997 words.

Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 3rd day of January, 2011, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Anthony L. Prineas to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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Robert R. Henak

Prineas 974.06 COA Brief.wpd