COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0055-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON T. HICKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT DeCHAMBEAU, Judge. *Affirmed*.

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

¶1 VERGERONT, P.J. Aaron Hicks appeals a judgment of conviction for second-degree sexual assault with an unconscious person in violation of WIS.

STAT. § 940.225(2)(d) (1997-98),[1] and the order denying his motion for postconviction relief. He contends he was denied effective assistance of counsel because trial counsel did not consult an expert on alcohol-induced blackouts and because trial counsel did not investigate his repeater status when a plea offer was made. He also contends that the real controversy was not fully tried because expert testimony on alcohol-induced blackouts was not presented to the jury. We conclude Hicks was not denied effective assistance of counsel and that the real controversy was fully tried. We therefore affirm.

BACKGROUND

¶2 The complaint alleged that in the early morning of November 20, 1998, Hicks sexually assaulted Jessica F. in her apartment. Hicks knew Jessica because he was a friend of Jessica's ex-boyfriend. The original charge against Hicks was third-degree sexual assault as a repeater. After rejecting a plea offer, Hicks was charged with having sexual intercourse with a person whom Hicks knew was unconscious, a second-degree sexual assault.

¶3 At trial Jessica testified as follows. On the evening of November 19, she went to a club with a friend. She had been drinking before she went to the club—about five or six twelve-ounce cans of beer within an hour—and at the club she drank three or four double gin and tonics within two hours. Jessica remembers seeing Hicks at the club and had a conversation with him for about ten or fifteen minutes about her ex-boyfriend. Jessica did not get along with Hicks because of an incident that had occurred a number of months earlier when Hicks grabbed

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Jessica's crotch as she was hugging him good-bye; she testified that she hated him before November 20, 1998.

¶4 Jessica testified that when she left the club, she was very drunk. She arrived at her apartment at approximately 2:30 a.m. She remembered that when she arrived she called a friend, Tyrelle P., and left a message on his answering machine. The next thing she remembered was lying down on the couch and falling asleep; she had all her clothes on. She stated that she "passed out and fell asleep." She did not remember if she locked her apartment door when she came home, but it is her custom to do so.

¶5 According to Jessica's testimony, the next thing she remembered was waking up with a burning sensation in her vagina and seeing Hicks standing over her with his penis in her vagina. Her pants and panties had been removed. Before this time she was not aware Hicks had entered her apartment or that her clothing had been removed. Jessica started to cry and rolled to the other side of her bed asking, "What are you doing?" Hicks responded several times, "If you don't stop crying and talk to me, I'm gonna leave." Jessica then heard the door close, she got up and locked the door. Jessica estimated that the incident happened between 3:00 a.m. and 4:00 a.m. Jessica called friends to tell them what had happened, as well as a crisis-line volunteer at a rape crisis center, and these people testified at trial. Jessica eventually went to the rape crisis center and then to the hospital later that day.

¶6 Jessica testified that she later discovered that she had called three other friends after leaving the message on Tyrelle's answering machine and before she discovered Hicks in her apartment. She knew their phone numbers by memory and would have had to enter the numbers manually to call them.

However, she had no recollection of placing these three phone calls. Three friends of Jessica, other than Tyrelle, testified that Jessica had called them that morning at estimated times ranging from 2:00 a.m. to 3:30 a.m. and they had talked to her for times ranging between ten and twenty minutes; all described her as very intoxicated. The content of these conversations indicates they occurred before Hicks came to Jessica's apartment.

¶7 Detective Marion Morgan first interviewed Hicks about whether he had been at Jessica's apartment on the morning of the incident. Detective Morgan testified that Hicks told her he had not been at Jessica's apartment and he did not have sexual contact or sexual intercourse with Jessica. Hicks did tell Detective Morgan, however, that he saw Jessica drinking at the club and she was "super drunk." He also told the detective that he spoke to Jessica around bar closing and she asked him what he was going to do and told him the street number of her apartment. Later that day, Hicks told Detective Morgan that the situation was bad for him and that he was "going to stick to the story he had said before and play his odds."

¶8 After presenting the above testimony, the State rested and the defense called no witnesses. The court instructed the jury that the elements of the crime with which Hicks was charged were: (1) Hicks had sexual intercourse with Jessica; (2) Jessica was unconscious at the time of sexual intercourse; and (3) Hicks knew Jessica was unconscious at the time of sexual intercourse. Unconscious was defined as "a loss of awareness, which may be caused by sleep or intoxication."

¶9 The jury returned a guilty verdict and the court sentenced Hicks to sixteen years in prison. Hicks moved for a new trial on the grounds that his trial

counsel was ineffective for failing to consult an expert on alcohol-induced blackouts and for failing to investigate his status as a repeater. He also asked for a new trial on the ground that the real controversy was not fully tried because the jury did not hear expert testimony on alcohol-induced blackouts.

¶10 In support of his motion, Hicks submitted the report of Barry Hargan, a substance abuse specialist. Hargan testified at the ***Machner*** hearing.[2] He opined that Jessica was in a blackout state the night of the offense. During a blackout, Hargan explained, a person loses the ability to imprint new memories either partially or totally, but still has the ability to engage in complex motor activities and interact with the environment or other persons. Hargan explained the difference between being "passed out" and "blacked out"—the former means a person is unconscious, while the latter is an altered state of consciousness. Hargan testified that an individual interacting with a person in a blackout would not be able to tell that the person was unable to imprint memories of his or her own actions.

¶11 Hargan based his opinion that Jessica was in a blackout state on his estimate of her blood alcohol level (BAC)—approximately .30—his review of the police report, the trial testimony, and Hicks's version of events. Hargan's opinion was based in particular on a prior history of blackouts Jessica had reported to a police officer; those, she had reported, occurred two summers earlier when she was on medication and drank alcohol. The three phone calls Jessica could not remember were also significant in forming his opinion. However, Hargan acknowledged, he did not know if Jessica was using the term "blackout" in the

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

same way he was using it or was using it to mean "passed out," and he conceded that individuals often confuse the two terms. Hargan also acknowledged that not all persons who are highly intoxicated and have high BAC levels experience a blackout.

¶12 In his report Hargan stated it was possible that Jessica believed she was sexually assaulted but actually consented to having intercourse with Hicks. At the ***Machner*** hearing, he was more definite in his opinion that she incorrectly believed she was assaulted.

¶13 Hicks's trial counsel also testified at the ***Machner*** hearing. She stated that Hicks consistently told her that Jessica was speaking and interacting with him, and it was Jessica who had invited him and allowed him to enter her apartment. Trial counsel explained that her theory of defense was that: (1) Jessica was lying because she disliked Hicks or, alternatively, (2) Jessica was so drunk her ability to accurately recall was impaired. Trial counsel believed that the phone calls Jessica made indicated her level of ability to function and, therefore, her testimony that she was unconscious was inconsistent with her phone calls and would support the idea that she might be lying about the consensual nature of the intercourse.

¶14 Trial counsel also testified that she understood "blackout" to mean a total loss of consciousness. She was unaware of the scientific explanation of an alcohol-induced blackout and would have considered a different trial strategy had she known. That knowledge might have affected her advice regarding Hicks's decision on testifying, because she would have had something to weigh against the reasons for his not testifying—his prior record, which included seven prior convictions, and the fact that he initially lied to the police.

¶15 With respect to Hicks's rejection of the plea offer, trial counsel testified that Hicks indicated to her he did not think he was a repeater because his prior offense was too long ago.[3] However, trial counsel advised Hicks that his exposure was eleven years because of the repeater. She did not make an independent determination of the applicability of Hicks's prior conviction and believed that Hicks misunderstood the tolling periods.[4] Counsel testified that Hicks's claimed innocence was a primary reason not to plead and he was reluctant to plead to something he felt was consensual. He was also reluctant to have another sexual assault charge on his record because he did not want to be identified as a sex offender. When asked if Hicks had ever expressed that he would plead if he were looking at five years instead of eleven, trial counsel stated that she could not remember the exact years, but he did say that "if I was only looking at this instead of this, I might go ahead and plead."

¶16 Hicks did not testify at the ***Machner*** hearing nor did he submit an affidavit that he would have accepted the plea offer had the repeater enhancement not been included.

¶17 The trial court denied the postconviction motion. The court concluded that trial counsel's performance had not been deficient in presenting a defense. Her lack of knowledge of the distinction between "blackout" and "pass

[3] Third-degree sexual assault is a Class D felony and carried a maximum sentence of five years at that time. WIS. STAT. §§ 940.225(3) and 939.50(3)(d). Under WIS. STAT. § 939.62(1)(b), a "repeater's" maximum term may be increased by six years. A person is a repeater if convicted of a felony during the five-year period immediately preceding the commission of the crime for which the person is presently being sentenced, however, time spent in actual confinement tolls the preceding five-year period. Section 939.62(2).

[4] At sentencing, the State deleted the repeater penalty enhancer because, according to the State, the prior conviction and confinement time fell outside of the five-year period prior to the date of the offense that is the subject of this appeal.

out" and her failure to hire an expert to testify on this, were not outside prevailing professional standards; she had made reasonable decisions in pursuing the defenses she did; and Hicks's decision not to testify was a reasonable strategic decision in light of the inconsistencies of his story and his seven prior convictions.[5] With respect to the repeater charge, the court determined there was no evidence in the record that Hicks would have pleaded if the repeater did not apply.

¶18 The trial court also concluded that Hicks was not entitled to a new trial in the interest of justice because there had been a full, complete, and exhaustive trial in the case and the jury had decided the issues. In making these rulings, the court commented in detail on Hargan's testimony. The court stated that it found Hargan's testimony at best speculative, and it questioned some of the bases for his opinion, including noting that under the BAC chart in Hargan's report, Jessica's alcohol level was also the level for unconsciousness. In addition, the court did not believe Hargan could testify that Jessica had blacked out because he would be testifying to the "ultimate conclusion." If Hagan's testimony were admissible, the court stated, it would be limited to the factors that are consistent with someone having an alcohol-induced blackout, which would require a foundation relating those factors to Jessica's conduct. The court decided there was no foundation without Hicks's testimony.

[5] Because the court determined defense counsel was not deficient, it did not decide whether trial counsel's failure to pursue a blackout defense was prejudicial.

DISCUSSION

Ineffective Assistance of Counsel

¶19 Hicks contends that his trial counsel was ineffective because she failed to consult with an expert on alcohol-induced blackouts as an explanation for Jessica's behavior. A reasonably prudent counsel would have been put on notice of the need to do this, Hicks asserts, given his explanation to counsel of the events—that nothing in Jessica's behavior suggested she was unconscious—and the police report in which Jessica remarked she was not sure whether she blacked out that night and she had experienced blackouts in the past. Had trial counsel consulted an expert, Hicks continues, she could have developed another theory of defense that did not depend upon attacking Jessica's credibility: Jessica truly did not remember the events that occurred because she was in a blackout state, though conscious, and Hicks was not aware of her blackout state.

¶20 In order to prevail on a claim for ineffective assistance of counsel, Hicks must prove that trial counsel's performance was both deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance requires a showing that the identified acts or omissions of counsel fell below the objective standard of reasonableness under prevailing professional norms viewed at the time of counsel's conduct. ***State v. Hubert***, 181 Wis. 2d 333, 339, 510 N.W.2d 799 (Ct. App. 1993). The identified acts or omissions must be "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Review of counsel's performance gives great deference to the attorney, and we make every effort to avoid determinations of ineffectiveness based on hindsight. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The burden is upon the

party asserting ineffectiveness to overcome the strong presumption that counsel acted reasonably within professional norms. ***State v. Brunette***, 220 Wis. 2d 431, 446, 583 N.W.2d 174 (Ct. App. 1998).

¶21 Prejudice occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. ***Strickland***, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.***

¶22 Whether trial counsel provided ineffective assistance is a mixed question of fact and law. ***Johnson,*** 153 Wis. 2d at 127. The trial court's determinations of what trial counsel did and did not do and the basis for the challenged conduct are factual, which we uphold unless clearly erroneous. ***Id.*** In this case, the trial court accepted as credible trial counsel's testimony of what she did and why, and we therefore accept that as well. However, the ultimate determinations of whether trial counsel's performance was deficient and prejudicial are questions of law, which this court reviews de novo. ***Id.*** Since a defendant must show both deficient performance and prejudice, we resolve a claim against a defendant if he or she fails to establish either. ***Id.*** at 128.

¶23 We conclude that counsel was not deficient for not consulting an expert on alcohol-induced blackouts. We do not agree that the two pieces of evidence Hicks points to constitute notice to a reasonable attorney of the need to consult an expert for that purpose. The fact that Hicks said Jessica was conscious, talking, and interacting with him was consistent with both theories defense counsel

pursued—that Jessica had consensual sex with Hicks and was lying,[6] and that she could not remember because she was so drunk. Jessica's use of the term "blacked out" in her statements to police also does not show trial counsel should have known Jessica thought she was blacked out and not passed out, since Hargan acknowledged that people may use the terms interchangeably. This means that Jessica also could have been using them interchangeably. It also means, in the absence of any evidence about what a reasonably competent attorney would know, that trial counsel could have reasonably understood Jessica to mean "passed out" when she used the term "blacked out" to the police. Indeed, Jessica's testimony at trial was that the last thing she remembered before discovering Hicks in her apartment was that she "passed out and fell asleep." As the State points out in its brief, the dictionary definition of blackout includes "[a] temporary loss of memory or consciousness." AMERICAN HERITAGE COLLEGE DICTIONARY 145 (3d ed. 1993). Without some evidence that a reasonably competent attorney should know the technical distinction between the terms "blackout" and "passed out," there is no evidentiary basis in the record for concluding that defense counsel was deficient for not knowing the difference.

¶24 We do not agree with Hicks that our decision in ***State v. Anthony Hicks***, 195 Wis. 2d 620, 536 N.W. 2d 487 (Ct. App. 1995) (***Anthony Hicks I***) *aff'd on other grounds*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996) (***Anthony Hicks II***), supports his position. In ***Anthony Hicks I***, the issue was whether defense

[6] The record shows that on cross-examination and in closing argument, defense counsel attempted to portray Jessica's relationship with Hicks as more complex than she admitted to, suggesting that, although Jessica may have had reasons for not liking Hicks before November 19, 1998, on that night, she initiated a conversation with him at the club, invited him to come over to her apartment, willingly let him in, and engaged in consensual sex with him, which she later regretted.

counsel was deficient for not pursuing DNA analysis of the defendant's hair specimens. We concluded that he was because the evidence showed: defense counsel knew the match of the defendant's hair sample with that found at the scene of the crime was a major issue in the case; he knew the root tissue of the hair sample could be subject to DNA testing at out-of-state laboratories, and he knew the technology used for that testing; he did not discuss the possibility of DNA testing with his client or the district attorney, did not petition the court to have the test performed, or do anything to pursue the test; and the reasons he gave for not doing this were not rationally founded on the facts and law. ***Id.*** at 627-630. In ***Anthony Hicks I***, then, defense counsel knew of the availability of the DNA testing, and the precise issue was whether his decision not to pursue it was a strategic or a tactical decision based on the law and the facts. In this case, in contrast, the evidence is that trial counsel did not know that a blacked-out, alcohol-induced state was different from a passed-out, alcohol-induced state, and the issue is whether a reasonably competent attorney should know that.

¶25 We also observe that, although trial counsel did not know that the term "blackout" referred to an alcohol-induced condition distinct from "passed out," one of the theories she pursued was that Jessica was conscious and interacting with Hicks, but could not remember because she was so drunk. This explanation for reconciling Jessica's ability to interact with others with her testimony at trial that she could not recall doing so is consistent with Hargan's testimony on the effects of an alcohol-induced blackout; and it is understandable to jurors based on their common experience. Thus, although trial counsel did not consult an expert, she did present as one theory of defense the same view of the evidence that Hargan's testimony supported.

¶26 In the absence of some evidence that a reasonably competent attorney should have known to consult an expert, given the information trial counsel had in this case, we cannot conclude that her failure to do so, given the defenses she did pursue, fell below the objective standard of reasonableness under prevailing professional norms.

¶27 Hicks also argues that trial counsel was ineffective for failing to investigate whether the repeater portion of the plea offer was correct. He contends that he rejected the offer after counsel advised him that his penalty exposure was eleven years. He argues in his brief that, had he known his true penalty exposure, he would have accepted the offer and pleaded guilty to third-degree sexual assault.

¶28 We do not decide whether counsel's performance was deficient with respect to the repeater enhancement, because we agree with the trial court that Hicks has not shown prejudice. Hicks did not testify at the ***Machner*** hearing, and the record contains no sworn statement that he would have accepted the plea offer had he known his true exposure. He asserts that he would have done so in his brief in support of his postconviction motion and in his appellate brief, but these self-serving statements alone are insufficient to establish prejudice. ***Toro v. Fairman***, 940 F.2d 1065, 1068 (7th Cir. 1991). The testimony of Hicks's trial counsel at the ***Machner*** hearing shows that Hicks was reluctant to plead to something he felt was consensual and to have another sexual assault conviction on his record.

New Trial in the Interest of Justice

¶29 Hicks contends that, even if counsel was not ineffective for failing to consult an expert on alcohol-induced blackouts, he is entitled to a new trial in the interests of justice because the jury did not hear expert testimony on that subject.

Since it appears that Hicks is both challenging the trial court's failure to grant a new trial and asserting that we should exercise our discretionary power to grant a new trial, we will address both contentions.

¶30 A trial court may grant a new trial in the interest of justice under WIS. STAT. § 805.15(1) (1999-2000).[7] Under this statute, courts have discretion to set aside a verdict and order a new trial when the real controversy has not been fully tried. ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991). The trial court's discretionary authority to grant a new trial because the real controversy has not been fully tried is comparable to our discretionary authority under WIS. STAT. § 752.35 (1999-2000).[8] *See* ***Harp***, 161 Wis. 2d at 779,

[7] WISCONSIN STAT. § 805.15(1) (1999-2000) provides:

> MOTION. A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice. Motions under this subsection may be heard as prescribed in s. 807.13. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

[8] WISCONSIN STAT. § 752.35 (1999-2000) provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

782. A party seeking a new trial on this ground need not show a probable likelihood of a different result. ***Id***. at 779. One of the situations in which the real controversy may not have been fully tried is when the jury was erroneously not given the opportunity to hear important evidence that bore on an important issue in the case. ***Anthony Hicks II***, 202 Wis. 2d at 160.

¶31 We affirm a trial court's order granting or denying a new trial under WIS. STAT. § 805.15(1) if it properly exercised its discretion, that is, if the court applied the correct law to the relevant facts of record and reached a reasonable result. *See* ***State v. Wyss***, 124 Wis. 2d 681, 717, 733-34, 370 N.W.2d 745 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). In reviewing the trial court's decision, we bear in mind that the trial court is in the best position to evaluate the relevance of undisclosed evidence and consider its impact on the outcome of the trial. ***Id.*** at 717.

¶32 Hicks contends the trial court erroneously exercised its discretion because it failed to consider the significance of the evidence on how an alcohol-induced blackout affects behaviors and recall. Hicks relies on the trial court's statement, "Blackout, passed out, unconscious, it's the same thing in general parlance, at least that's my belief," and contends this statement is not supported by the record. We disagree with Hicks's interpretation of this comment and his resulting conclusion that it is not supported by the record.

¶33 The court made this statement in the context of explaining why, in its view, Hargan's testimony was speculative. The court was discussing, one by one, the various pieces of information Hargan testified that he relied on in forming his opinion that Jessica was in a blackout state and was explaining why it viewed them as providing a weak foundation. One piece of information Hargan testified

he relied on was Jessica's statement in the police report that she was not sure whether she had blacked out. The court's statement that "blacked out," "passed out," and "unconscious" were the same thing in "general parlance" meant that the court did not agree with the significance Hargan attached to Jessica's use of the term "blacked out," because, as Hargan himself acknowledged, not everyone understands that it is different from being passed out or unconscious, and Hargan had no way of knowing whether Jessica did.[9] The quoted comment is therefore a reasonable view of the record and does not show that the court did not understand the distinction Hargan was making in his testimony between blackout and passed out: rather, the court had doubts about its admissibility and its persuasiveness.

¶34 We conclude that the court did not erroneously exercise its discretion in denying Hicks's motion for a new trial. The court considered and discussed Hargan's testimony in detail, but simply did not view it as significant for a number of reasons; the court explained the reasons and they have a rational basis in the record. That analysis, together with the court's analysis of the defenses trial counsel presented, which also has a rational basis in the record, supports the trial court's conclusion that the absence of Hargan's testimony did not prevent the real controversy from being fully tried.

¶35 We next decide whether we should exercise our discretionary authority under WIS. STAT. § 752.35 on the ground that the real controversy has

[9] The court stated:

> Officer Baylas' report, she wasn't sure whether or not she blacked out last night. Common parlance, a blackout is a blackout. I don't know of anyone … that would not use the term blackout interchangeably with pass out. Blackout, passed out, unconscious, it's the same thing in general parlance, at least that's my belief.

not been tried. Like the supreme court in exercising its statutory discretionary authority, we do so only in exceptional cases. *See* ***Anthony Hicks II***, 202 Wis. 2d at 161. In ***Anthony Hicks II***, the supreme court decided that the real controversy of identification was not fully tried because the jury did not hear evidence of DNA testing that excluded the defendant as the source of one of the hairs found at the scene; instead, the State had used the hair evidence as proof of the defendant's guilt. ***Id.*** at 158. The court emphasized that the "determinative factor … was that the State assertively and repetitively used hair evidence throughout the course of the trial as affirmative proof of … [the defendant's] guilt." ***Id.*** at 164. In this case, after considering Hargan's testimony in the context of the evidence and argument presented to the jury, we conclude that the testimony does not warrant a new trial on the ground that the real controversy was not tried.

¶36 There were two issues for the jury to decide—whether Jessica was unconscious when she had sex with Hicks and whether Hicks knew that she was unconscious.[10] The State relied heavily on Jessica's testimony that she "passed out and fell asleep" and remembered nothing until she woke up with a burning sensation and saw Hicks standing over her with his penis in her vagina. The defense sought to dispute that Jessica was unconscious by focusing on evidence that Jessica had done and said things close to the time she had sex with Hicks and was obviously not unconscious when she did and said those things. The three phone calls were the primary focus, but there was other evidence as well that defense counsel brought out in cross-examination and highlighted in argument—such as the evidence suggesting that Jessica must have let Hicks into her apartment. Jessica testified that she had to buzz people into the apartment building

[10] Hicks did not attempt to dispute that he had sex with Jessica.

because it was a secured building. As we have explained above, trial counsel, through cross-examination and argument, presented two alternative explanations for why Jessica would testify that she could not recall things she did—either she could remember and was lying, or she could not remember because she was too drunk. Either of these explanations, if accepted by the jury, would have provided a basis for deciding that Jessica might not have been unconscious when she had sex with Hicks. It is in this context that we examine Hargan's testimony.

¶37 First, we are not persuaded that all of Hargan's testimony at the ***Machner*** hearing would be admissible at trial. Case law supports the trial court's view that Hargan's testimony that Jessica did experience a blackout, did incorrectly believe she was assaulted, and did engage in the conduct Hicks said she did is not admissible because it communicates Hargan's view of Jessica's veracity. *See* ***State v. Pittman***, 174 Wis. 2d 255, 270-72, 496 N.W.2d 74 (1993). The fact that this testimony communicates that Hargan believes some of Jessica's testimony (that she cannot remember certain things) and disbelieves other testimony (that she passed out) does not make it any more admissible. *Compare* ***id.*** at 272 (evidence inadmissible because it amounted to expert testimony victim is lying) *with* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (evidence inadmissible because it amounted to expert opinion that victim is telling the truth).

¶38 Focusing on the rest of Hargan's testimony, we will assume for purposes of this decision that his testimony on the effects of alcohol, the difference between a blackout and being passed out or unconscious, and Jessica's estimated BAC are admissible, as well as an opinion that Jessica's estimated BAC, her drinking history as he understood it, and her inability to remember the three phone

calls are consistent with her being in a blackout state. We do not view this testimony as either crucial to the defense or as strongly exculpatory.

¶39 As we have stated in the preceding section, we do not view Hargan's testimony as presenting a new defense or a new issue for the jury to decide, but as providing an explanation in chemical terms for one of the theories trial counsel suggested for Jessica's testimony that she could not recall things that indisputably happened. While Hargan's testimony may have been helpful to the jury, we do not agree with Hicks that without it jurors would not know that someone could do and say things when highly intoxicated and later not remember them.

¶40 We also do not agree that Hargan's testimony is inconsistent with Jessica passing out at some point before the moment she describes as waking up. As the trial court pointed out, the information attached to Hargan's report describes the effect of a .30 BAC as "loss of consciousness"; this is evidence that Jessica's BAC is consistent with passing out as well as with blacking out. Also, Hargan did not testify that a blackout state was never followed by a passed-out state. Therefore, there is no reason, based on his testimony, that the jury could not decide that Jessica was in a blackout state when she made the three phone calls and let Hicks into the apartment, and passed out at a later point.

¶41 Finally, we disagree with Hicks's contention that Hargan's testimony wholly supports Jessica's credibility and therefore has the virtue of exculpating Hicks while not challenging Jessica's credibility. Hargan's testimony, as we have indicated above, does support Jessica's credibility in some respects, but not in others. Jessica testified that she "passed out and fell asleep" and that she was awakened by a burning sensation to find Hicks having intercourse with

her; but, if one believes she was in a blackout state the entire time, then she did not pass out or fall asleep.

¶42 We recognize that when a claim is made that the real controversy has not been fully tried, there is no requirement that the evidence not presented would likely produce a different result if it were presented. ***Harp***, 161 Wis. 2d at 779. Nevertheless, the strength and clarity of the evidence not presented is an appropriate consideration. *See* ***Anthony Hicks II***, 202 Wis. 2d at 171. While the admissible testimony of Hargan may have been helpful to the defense, we are not convinced that its absence prevented the real controversy from being fully tried.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.