STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1799-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTHONY PICO,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A POSTCONVICTION MOTION FOR A NEW TRIAL, ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL O. BOHREN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

BRAD D. SCHIMEL
Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

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ISSUES PRESENTED

1. At a *Machner* hearing on his claims of ineffective assistance of trial counsel, Anthony Pico presented a criminal defense lawyer to opine on Pico's trial counsel's actions and inactions. Was it proper for the circuit court to admit and rely on this "*Strickland* expert" testimony?

2. Under *Strickland*, courts presume that counsel's performance is constitutionally effective and defer to counsel's reasonable strategic decisions. Here, Pico's trial counsel explained his decision-making on all of the challenged grounds and how those reasoned decisions were consistent with the strategy that he and Pico had agreed upon.

   A. Did the circuit court misapply *Strickland* when it disregarded counsel's reasoned decisions and concluded that counsel was constitutionally deficient? and;

   B. Does the record support the circuit court's conclusion that the alleged errors were prejudicial, either individually or cumulatively?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

STATEMENT OF THE CASE

1. General overview.

A jury convicted Anthony Pico of first-degree sexual assault of a child, sexual contact with a person under the age of thirteen (43).[1] The charge was based on complaints by D.T., an eight-year-old girl, that Pico had twice slid his hand inside her pants and touched her vagina while Pico was a parent-volunteer in D.T.'s second-grade class (1). The court sentenced Pico to six years' confinement and ten years' extended supervision (43).

[1] The Honorable William J. Domina presided over Pico's trial.

Pico filed a postconviction motion seeking a new trial based on eleven allegations of ineffective assistance of counsel (57). After a two-day *Machner* hearing, the circuit court, the Honorable Michael O. Bohren, presiding, granted the motion, vacated the judgment of conviction, and ordered a new trial (98). The State now appeals.

2. Pretrial and trial.

Pico retained Attorney Jonathan LaVoy, who filed several pretrial motions on Pico's behalf. The State discusses relevant facts related to those motions in its argument. At trial, the State relied on recorded evidence and testimony from several witnesses, as described below.

a. Sarah Flayter introduced a video interview in which D.T. claimed that Pico had twice put his hand down her pants and touched where she "go[es] to the potty."

Sarah Flayter, who conducted interviews with children for CARE Waukesha, testified to her training and experience interviewing children since 1995 (90:210-15).

Flayter explained that she followed the Step-Wise protocol when interviewing children alleging sexual abuse (90:218-19). She explained that that procedure involved her (1) establishing rapport with the child on a neutral subject; (2) ensuring that the child understands the need for telling the truth; (3) asking open-ended questions to allow the child to provide a narrative of what happened; and (4) closing the interview by prompting the child for any questions and returning to a neutral subject (90:218-22). Flayter acknowledged that she interviewed D.T. on April 25, 2012, and followed the Step-Wise procedure when she did so (90:223).

At trial, the prosecutor played a video of Flayter's interview with D.T. (90:224; 31:Exh. 3; 83:Exh. 2).[2] In the interview, D.T. explained that Pico was the father of her friend and classmate, A. (83:Exh. 2 at 09:59:35-40), and that he was helping out with their second-grade reading class (*id.* at 10:04:35-57, 10:13:13-18).

D.T. said that on the previous Friday (*id.* at 10:14:05-08), she was reading to Pico, who was sitting with her to her left, when he started rubbing her left leg (*id.* at 09:59:58-10:00:40). She said that Pico worked his hand higher up her leg and twice slid his hand down the waistband of her pants (*id.* at 09:59:58-10:00:40, 10:05:30-40), under her underwear (*id.* at 10:07:45-54), and touched or rubbed where she "go[es] to the potty" with his fingers (*id.* at 10:07:55-58, 10:08:13-25). D.T. said that Pico told her "sorry" after the first time he put his hand down her pants, but that he did not appear to mean it because he was smiling (*id.* at 10:00:22-30, 10:05:48-57, 10:08:53-09:05). D.T. said that Pico stopped touching her when her teacher ended the reading activity (*id.* at 10:01:08-28), at which point Pico left D.T. to talk to A. (*id.* at 10:11:53-12:10).

D.T. did not think anyone saw Pico touch her (*id.* at 10:11:06-10). D.T. did not tell anyone about what had happened until that same night, when she had trouble sleeping because she "was thinking about it" and told her mother that Pico had stuck his hand down her pants (*id.* at 10:14:17-40). When Flayter asked D.T. to circle on a diagram of a girl's body where Pico

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[2] Counsel for the State was unable to play the DVD of the interview played at trial (31:Exh. 3), and instead references a duplicate DVD entered in the *Machner* hearing (83:Exh. 2). That DVD features a video player and two files, named Camera 17 and Camera 18, showing the same interview from different camera perspectives. Counsel found it easier to hear D.T.'s statements when watching the Camera 18 file. When citing to the DVD, the State references the running time that appears in the lower left corner of the video player.

had touched her, D.T. circled an area including the hips and the crotch and an area on the left leg (*id.* at 10:17:00-42; 31:Exh. 4).

b. When LaVoy cross-examined D.T., she agreed that Pico never touched her vagina and made other inconsistent remarks.

D.T. also testified at trial. When LaVoy cross-examined D.T., she said numerous things that were markedly inconsistent with the CARE interview and her accusations:

- D.T. said that the first time Pico's hand went down her pants, it only went down a short way for "like a second" (90:253);
- D.T. said that after the first time Pico removed his hand, she told him that he could keep rubbing her leg (90:254-55);
- D.T. said that the second time Pico's hand went in her pants "a little bit deeper," but neither time did he touch the "area where you go potty," only an area by her waistband (90:256);
- D.T. said that Pico never rubbed her inside her pants (90:257); and
- D.T. initially said that Pico only said "sorry" to her, but later said that Pico told D.T. "don't tell" when he left her (90:258, 263-64).

During redirect, D.T. stated that she had told Flayter the truth during the interview and that she told Flayter that Pico touched her where she goes potty two times under her underwear (90:271-73). D.T. stated that she did not know why she told LaVoy otherwise during his questioning (90:271).

c. Detective Andrew Rich introduced an audio recording of his interview with Pico.

Detective Andrew Rich of the Oconomowoc Police Department went to Pico's house on April 25, 2012, where he interviewed Pico (91:84-85). The State played the audio recording of the interview at trial (91:87; 31:Exh. 12; 83:Exh. H[3]).

During the interview, Rich told Pico that "one of the students you were working with went home and told her mom that you have inappropriately touched her" (83:Exh. H at 3). Rich told Pico early on that "there's video up there in the classroom and all of that kind of stuff"; that the crime lab found male DNA on the alleged victim's clothing where she said she had been touched; and that O., another student who had been sitting nearby, told Rich that she had seen Pico touching the alleged victim and heard him say, "Sorry" (*id.* at 3-5).

Pico knew that the complainant was D.T. (*id.* at 5). He told Rich that D.T. told him to tickle her leg, so he tickled her knee and thigh, and that "[h]er shirt went up and my hand went along the edge" but that his hand never went "in" (*id.* at 4, 6). He later told Rich that he tickled D.T.'s leg without her asking but that she told him that it "felt fine" so he continued to do it (*id.* at 10). He admitted that his hand went up her leg "probably too high" and may have gone underneath D.T.'s pants "a little bit" when he started moving his hand back down and caught her waistband (*id.* at 11). Generally, Pico claimed he could not recall much of what happened during the encounter and at times said certain details of D.T.'s story were "possible," such

[3] For the postconviction proceedings, Pico transcribed the audio recording (83:Exh. H). However, Exh. H reflects the entire interview whereas the jury heard a redacted version. The two redacted portions include (1) Exh. H at page 19, line 19 (beginning "Yeah, I know. . . .") through page 20, line 8 (resuming at "So that's what is just bizarre . . . ") and (2) Exh. H at page 21, line 12 (beginning "Yeah. But nothing like this has ever happened before?") through the interview's end.

as his saying "sorry" (*see id.* at 7, 12, 13, 18). But Pico consistently denied putting his hand down D.T.'s pants on purpose (*id.* at 17) or touching D.T.'s vagina (*id.* at 11). Pico acknowledged that it was inappropriate for him to be touching D.T. at all (*id.* at 16-17).

In his testimony, Rich said that when interviewing a suspect, particularly one accused of sexual assault, he might suggest that he had more evidence than he did to encourage the suspect to be honest (91:81-82). Rich acknowledged that his statements to Pico about what O. had seen, about the DNA evidence, and about there being video footage from the school were all false (91:90-91, 98-100).

d. Other testimony.

The State also presented testimony from the following witnesses:

- S.T., D.T.'s mother, testified that shortly after going to bed on April 20, D.T. seemed upset, told S.T. that Pico had put his hands down her pants, and said "yes" and cried when S.T. asked D.T. if Pico's hands went inside her underwear (90:188-90). S.T. told D.T.'s teacher, Nancy Buss, about D.T.'s claims the following Monday (90:191-92). Buss directed S.T. to Jodie Jens, the school guidance counselor (90:192).

- Buss saw Pico reading with D.T. on April 20 but did not see Pico touch her at all (91:11, 28). Buss confirmed that S.T. reported D.T.'s claims to her on the following Monday (91:26).

- Jens confirmed that S.T. talked to her on April 23 (91:60). Jens later talked to D.T., who told Jens that Pico had rubbed her leg, moved his hand up higher, put his hand down her pants, said he was sorry and

removed it, and then repeated those actions a second time (91:71-72).

e. Pico's defense.

Pico rested, electing to not testify or present witnesses, after the close of the State's case (91:133). In closing, Pico's defense was that he only touched D.T.'s leg and, inadvertently, near her waistband. He argued that while that touching was inappropriate, it was not a crime, and the State failed to prove that Pico touched D.T.'s vagina (91:149). During closing argument, LaVoy emphasized D.T.'s unreliability and suggestibility (91:151, 155-57, 160-63). He noted that S.T. first suggested to D.T. that Pico had touched inside her underwear (91:150-51), and emphasized the major inconsistencies between her testimony and the CARE interview, including her testimony that Pico never touched her vagina (91:160-63).

LaVoy argued that Pico was a well-respected member of the community with no history or reason to commit this act (91:157, 165). LaVoy emphasized the unlikelihood that Pico would have touched D.T. sexually in a busy classroom with an experienced teacher present (91:165). Finally, LaVoy argued that during the Rich interview, police confronted Pico with multiple lies, but Pico remained adamant that he never touched D.T.'s vagina. LaVoy asserted that Pico's equivocal remarks merely reflected his understanding that it was inappropriate for him to touch D.T.'s leg and his regret that he made D.T. uncomfortable as a result (91:168-72).

3. Postconviction motion and *Machner* hearing.

By postconviction motion, Pico alleged eleven claims of ineffective assistance of counsel (57).

The first three claims stemmed from Pico's allegations that LaVoy failed to obtain Pico's medical records from a 1992 motorcycle accident in which Pico sustained a head injury

(57:1-3). Pico claimed that that failure rendered LaVoy ineffective in three respects: *first*, LaVoy could have asserted an NGI defense; *second*, LaVoy could have presented an expert to opine how Pico's injury could have explained his behavior with D.T.; and *third*, LaVoy could have presented expert testimony explaining that the brain injury left Pico especially susceptible to Rich's questions in the police interview (*id.*).

Fourth, Pico alleged that LaVoy should have presented an expert to challenge Flayter's forensic interview with D.T. and Flayter's testimony (57:3-4).

Fifth and sixth, Pico alleged that LaVoy should have objected to Detective Rich's remarks in two respects: (a) under *Daubert* to Rich's testimony where he allegedly said that he thought Pico was lying during the interview, and (b) under *Haseltine* to Rich's remark during testimony that Flayter was "'among the best in the state'" (57:4).

Eighth,[4] he alleged that LaVoy should have investigated and presented evidence that D.T. had recently been taught about "good touches and bad touches" (57:5). And ninth, Pico alleged that LaVoy should have called witnesses to testify that Pico calmed his autistic daughter with leg massage to explain his motivation in touching D.T. in that way (57:5).[5]

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[4] In the seventh claim in his motion, Pico alleged that LaVoy should have sought a psychological evaluation of D.T. (57:4-5). But in his brief to the circuit court (70), Pico abandoned that issue, and the circuit court did not address it in its decision (98). The State does not address it further.

[5] Pico's tenth and eleventh claims alleged court error and ineffective assistance by LaVoy at sentencing (70:25-29). The circuit court did not find merit to those claims (98:27-28, 32-33; A-Ap. 127-28, 132-33). Because the circuit court denied those claims and because those claims do not bear on the question whether Pico is entitled to a new trial, the State does not address them in this appeal.

The circuit court held a two-day *Machner* hearing. In addition to LaVoy, Flayter, and Detective Rich, the following witnesses testified:

1. Waring Fincke: Over the State's pre-hearing objection, Pico presented this defense lawyer to offer an opinion as to whether LaVoy conducted the trial in an effective manner (96:99).

2. Dr. John Yuille: Pico presented this psychologist who developed the Step-Wise protocol used by Flayter in the CARE interview and who had an understanding of the deception based "Reid" questioning technique used by Rich in his interview of Pico (96:126, 128-29).

3. Michelle Pico: Pico's wife testified to Pico's practice of massaging their autistic daughter's leg to calm her and to Pico's impulsive personality (96:197-203).

4. Dr. Horatio Capote: Pico presented testimony from Capote, who was a director of neuropsychiatry in Buffalo, New York (97:6). Capote reviewed Pico's medical records from the 1992 accident and opined that the lasting effects of Pico's injury could have supported an NGI defense, affected Pico's responses in the police interview, and explained his behavior with D.T. (97:13-15).

5. Dr. Craig Schoenecker: The State presented testimony from Dr. Schoenecker, a forensic psychiatrist who reviewed the same materials that Capote did and who opined that there was nothing in them to support an NGI defense or a medical explanation for his behavior (97:63-65, 92-93).

The parties submitted briefs (69; 70), and the circuit court issued an oral decision granting Pico's motion for a new trial and vacating the judgment of conviction (98).

The State will address any additional facts in its argument.

LEGAL PRINCIPLES AND STANDARD OF REVIEW

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id*. at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id*. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689. A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687.

"'Surmounting *Strickland*'s high bar is never an easy task.'" *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoted source omitted). With respect to the deficient performance prong of the *Strickland* test,

> [e]ven under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms,"

> not whether it deviated from best practices or most common custom.

Id. (citations omitted).

To demonstrate prejudice, the defendant must prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. More than merely showing that the error had some conceivable effect on the outcome, the defendant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

Like deficiency, establishing prejudice under *Strickland* is difficult:

> *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *The likelihood of a different result must be substantial, not just conceivable.*

Richter, 562 U.S. at 111-12 (citations omitted; emphasis added).

Whether counsel rendered ineffective assistance is a mixed question of law and fact. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. This court will uphold the circuit court's factual findings unless they are clearly erroneous. *Id*. Whether the defendant's proof satisfies the deficient performance or the prejudice prong is a question of law that this court reviews without deference to the trial court's conclusions. *Id.*

ARGUMENT

I. The circuit court improperly admitted and relied upon *Strickland* expert testimony.

As a threshold matter, the circuit court should not have admitted Fincke's "*Strickland* expert" testimony at the *Machner* hearing. Even if that testimony was within the court's discretion to admit, it was error for the court to rely on it in its decision.

A. Pico offered Fincke's testimony to demonstrate what a reasonable attorney "versed in the criminal law would and should do under the circumstances."

Pico sought to admit testimony by Fincke as a *Strickland* expert on the objective standard of care from criminal defense attorneys (95:4-5). The State objected by letter, explaining that under *State v. McDowell*, 2003 WI App 168, ¶62 n.20, 266 Wis. 2d 599, 669 N.W.2d 204, "expert testimony by a defense attorney on the legal issue of whether the defendant's trial attorney rendered effective assistance of counsel is *not* admissible" (61; A-Ap. 137-38). Pico responded that although the question whether counsel was effective was the court's to decide, Fincke's "testimony will only be on factual matters to show what a reasonable attorney versed in the criminal law would and should do under the circumstances at issue in this case" (62; A-Ap. 139). The circuit court circled that sentence in Pico's response letter and wrote "so ordered" (*id.*).

At the *Machner* hearing, Fincke stated that Pico retained him to review the record and "give . . . an opinion as to whether or not I believed the trial was conducted in an effective manner" (96:99). Fincke then testified that an objectively reasonable attorney would have done things differently from LaVoy under the circumstances on all of the alleged ineffective assistance grounds (*see generally* 96:99-122; 160-71).

B. *Strickland* expert testimony is not admissible at a *Machner* hearing.

In *McDowell*, this court concluded that counsel was deficient because he unreasonably abandoned a sound strategy. 266 Wis. 2d 599, ¶62. In that decision, however, this court explained that the circuit court should not have admitted *Strickland* expert testimony:

> Our conclusion [that counsel was deficient] is consistent with that of the late Dean of the Marquette University Law School, Howard Eisenberg, who testified at the *Machner* hearing. Dean Eisenberg opined that, *given Mr. Langford's undisputed account of the events*, his shift to narrative questioning was "inappropriate."
>
> Dean Eisenberg was called by McDowell to testify as an expert witness, *see* Wis. Stat. § 907.02, and give his opinion on the legal issue of whether Mr. Langford rendered effective assistance of counsel. Although we appreciate the salutary motives behind calling Dean Eisenberg, we reiterate that no witness may testify as an expert on issues of domestic law; "the only 'expert' on domestic law is the court."

Id., ¶62 n.20 (citation omitted).

Here, the court allowed Pico to present Fincke's testimony based on Pico's proposal that it would be limited to "factual testimony, not testimony as to the ultimate issue" (62; A-Ap. 139). But in the *Strickland* context, that is a distinction without a difference. Indeed, the *McDowell* court made no distinction allowing a *Strickland* expert offering "factual testimony" but barring one offering an opinion on the ultimate legal question.

Nor could it. The Court in *Strickland* contemplated that no two attorneys will try a case in the same way: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. So, whether Fincke would have done something differently—or believed that most other attorneys would have acted

differently—is irrelevant to whether LaVoy was deficient. *See id.* at 690 (stating that ultimate determination is whether performance is within the wide range of competent assistance).[6]

Moreover, the distinction between "factual testimony" and "testimony on issues of domestic law" was hollow here because Fincke did not know any facts about LaVoy's representation of Pico that LaVoy could not provide.

In short, Fincke's testimony was not admissible under *McDowell*. The circuit court erred in admitting it.

C. Even if *McDowell* does not bar Fincke's testimony, the circuit court improperly exercised its discretion in admitting it.

Wisconsin Stat. § 907.02 governs the admissibility of expert evidence:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of

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[6] Federal courts have further explained why *Strickland* experts are generally unnecessary:

> [T]he reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof. Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.

Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998); *see also Earp v. Cullen*, 623 F.3d 1065, 1075 (9th Cir. 2010) ("Expert testimony is not necessary to determine claims of ineffective assistance of counsel.").

> an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Wis. Stat. § 907.02(1). This so-called *Daubert* standard requires the court to act as a gatekeeper to ensure that the expert's opinion has a reliable foundation and is relevant to the material issues. *State v. Giese*, 2014 WI App 92, ¶¶17-18, 356 Wis. 2d 796, 854 N.W.2d 687.

This court will uphold a circuit court's exercise of discretion "if it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision." *State v. Edmunds*, 2008 WI App 33, ¶8, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). "Thus, [this court] will find an [erroneous exercise] of discretion if the circuit court's factual findings are unsupported by the evidence or if the court applied an erroneous view of the law." *Id.* (internal quotation marks and quoted source omitted).

Here, the circuit court's circling a sentence on Pico's letter was not a proper exercise of discretion (62; A-Ap. 139). Pico never identified what facts Fincke would present, and the court did not engage in the relevance determination required for admissibility, i.e., it did not explain why it believed that Fincke's testimony was "relevant to the material issues," or how it thought Fincke's "specialized knowledge" would assist it to understand the evidence or determine material facts.

Given that "'the only "expert" on domestic law is the court,'" *McDowell*, 266 Wis. 2d 599, ¶62 n.20, courts considering whether to admit *Strickland* expert testimony must assess relevance, a requirement that *Strickland* expert testimony likely never can survive. Indeed, if an expert's specialized knowledge is necessary to assist in establishing deficient performance, that performance would be per se *not* defective, because the expert's

specialized knowledge would be beyond the ken of people versed in criminal law, including a circuit court judge.[7]

Finally, the circuit court's admission of Fincke's testimony was not harmless. *See State v. Hunt*, 2014 WI 102, ¶21, 360 Wis. 2d 576, 851 N.W.2d 434 (harmless error applies to circuit court's evidentiary decisions). The court relied on Fincke's testimony in several portions of its decision (98:13, 19-20; A-Ap. 113, 119-20), which the State will address in its discussion of the individual ineffective assistance claims.

In sum, the circuit court should not have admitted Fincke's testimony, and this court should not consider it in its analysis.

II. The circuit court erred in concluding that LaVoy was ineffective for failing to obtain Pico's medical records from his 1992 accident.

Pico's first three claims of ineffective assistance stem from his argument that LaVoy should have obtained and investigated Pico's medical records from a motorcycle accident Pico had been involved in 20 years earlier (57:1-2). Pico claims that those records would have demonstrated that he had suffered a traumatic brain injury (*id.*). Pico argued that that evidence could have supported (1) an NGI defense, (2) expert testimony that Pico's brain injury caused him to believe that it was acceptable for him to massage D.T.'s leg, and (3) expert testimony that the brain injury made Pico extra susceptible to confessing in the police interview (70:3-15).

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[7] A circuit court's admitting and relying on *Strickland* expert testimony also puts this court in an awkward position on review. Although this court generally defers to the weight that the circuit court assigns evidence, s*ee State v. Searcy*, 2006 WI App 8, ¶35, 288 Wis. 2d 804, 709 N.W.2d 497, that deference does not seem to be warranted for *Strickland* expert testimony. This court has expertise on domestic law and is able to apply *Strickland* without expert assistance.

For the reasons below, Pico failed to demonstrate ineffective assistance or prejudice.

A. Courts must apply a "heavy measure of deference" to counsel's strategic decisions that make further investigation unnecessary.

When addressing Pico's contention that his trial counsel performed deficiently, this court "start[s] with the proposition that strategic decisions by a lawyer are virtually invulnerable to second-guessing." *State v. Westmoreland*, 2008 WI App 15, ¶20, 307 Wis. 2d 429, 744 N.W.2d 919 (citing *Strickland*, 466 U.S. at 690). That deference carries over to challenges alleging a failure to investigate. "'[C]ounsel has a duty to make reasonable investigations'" or to make a strategic decision that makes further investigation unnecessary. *State v. Thiel*, 2003 WI 111, ¶40, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting *Strickland*, 466 U.S. at 691). "In evaluating counsel's decision not to investigate, this court must assess the decision's reasonableness in light of 'all the circumstances,' 'applying a heavy measure of deference to counsel's judgments.'" *State v. Carter*, 2010 WI 40, ¶23, 324 Wis. 2d 640, 782 N.W.2d 695 (quoting *Strickland*, 466 U.S. at 691).

Moreover, a defendant cannot establish deficient performance by counsel based on counsel's failure to investigate matters within the defendant's knowledge that the defendant did not share. *See Strickland*, 466 U.S. at 691 ("Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."); *State v. Hubanks*, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992) (counsel is not ineffective for failing to investigate potential witnesses that the defendant did not identify).

B. LaVoy was not deficient for declining to seek Pico's 1992 medical records to support an NGI defense.

1. LaVoy had no reason to believe that the records would support an NGI defense.

At the *Machner* hearing, LaVoy explained that he had practiced criminal defense almost exclusively for thirteen years (96:52-53; A-Ap. 186-87). He had handled over 2000 criminal cases, including approximately thirty to fifty jury trials and twenty to thirty court trials before he represented Pico (96:55-56; A-Ap. 189-90). LaVoy has asserted NGI defenses and requested competency evaluations in past cases, and stated that he considers whether those things are appropriate "in every single case I work on" (96:56-57; A-Ap. 190-91).[8]

LaVoy evaluated Pico for a potential NGI defense. During his intake interview, when asked, Pico did not identify any mental health issues (96:59; A-Ap. 193). LaVoy asked Pico about his eye patch, which Pico explained was the result of the 1992 motorcycle accident (96:12, 59; A-Ap. 146, 193). They discussed the accident, and Pico told LaVoy that "he had recovered and he was fine" (96:12; A-Ap. 146). Pico told LaVoy that since 1992, he went to college and maintained very good jobs; it appeared to LaVoy "to be a person who made a full recovery" (*id.*). LaVoy stated that Pico did not exhibit "any signs that [he] would typically see of somebody who had deficits or problems" (*id.*). Pico was "able to carefully discuss the facts of the case and he was able to tell [LaVoy] a story from start to finish" in a logical manner (96:12-13; A-Ap. 146-47).

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[8] Although "whether . . . an attorney is experienced is not the criterion for determining whether counsel was effective in a particular case," *State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983), LaVoy's lengthy experience provides helpful context for his *Machner* testimony.

LaVoy also discussed the case with Pico's wife and family. They never indicated that Pico had deficiencies or was impulsive; rather, they painted Pico as a happy, well-adjusted person (96:11; A-Ap. 145). According to LaVoy:

> The brain injury, or lack thereof, in my opinion, really was never an issue in any of my conversations with Anthony or his family. Quite . . . the opposite, the family talked to me about how great he was, how great a father he was, how—just in general how . . . well-adjusted he was. So, there was never a concern brought to my attention that he was somehow suffering from an ongoing symptomatology involving a brain injury from his accident.

(96:17; A-Ap. 151).

LaVoy did not seek Pico's medical records because he did not observe anything "that caused [him] to believe that an NGI evaluation or at least further exploration was necessary" (96:13-14; A-Ap. 147-48). Again, Pico recounted his version of events logically and communicated effectively with LaVoy (96:66; A-Ap. 200). Pico "clearly knew the difference between right and wrong" and that "it was wrong to touch the vaginal area of a child. He knew that he made [D.T.] feel uncomfortable by touching her leg. . . . There was no question in [LaVoy's] mind that he understood those concepts" (96:66-67; A-Ap. 200-01). Further, LaVoy considered "whether [Pico] was able to conform his behavior to the requirements of the law" and saw nothing and received no indication from Pico's family that Pico "was in any way impulsive or was not able to control his behavior" (96:67; A-Ap. 201).

LaVoy even explored "whether there had been any investigations or allegations made against him when he was a volunteer at the school that maybe the police weren't involved in or other times when he wasn't able to control himself or do certain things and [Pico] adamantly denied that" (*id.*). LaVoy noted that Pico had a permanent eye injury from the accident, but reiterated that Pico "didn't reference any issues or problems to me. He didn't reference that he was ongoing with

any therapy or treatment, and then his family referenced how well-adjusted and how great he is" (96:67-68; A-Ap. 201-02). Accordingly, LaVoy saw no reason to further explore the 1992 accident (96:68; A-Ap. 202).

Given that, LaVoy concluded that Pico's best defense was to assert that Pico was innocent and and the State failed to overcome reasonable doubt (96:61; A-Ap. 195). That strategy was reasonable. As LaVoy noted, in the Rich interview, Pico unequivocally denied touching D.T.'s vagina and "stuck to his guns" on that point "under stringent examination from the officer" (96:19-20; A-Ap. 153-54). LaVoy stated that "as a strategic move, [I] talked to the Picos about this and we elected to go that route" of showing the jury that Pico did not confess under police pressure (96:20; A-Ap. 154). In addition, at trial LaVoy showed D.T.'s suggestibility during cross-examination (90:253-64), emphasized the unlikelihood that Pico would have chosen a busy classroom to touch D.T. or that Pico could have committed the acts unnoticed, and highlighted Pico's upstanding role in the community (91:157-60).

LaVoy was not deficient. LaVoy queried Pico and his family about the 1992 accident. LaVoy screened Pico for a potential NGI by gathering information and observing Pico's abilities and demeanor. LaVoy, who had experience asserting NGI defenses, saw nothing that would prompt him to further explore that possibility. Moreover, the strategy LaVoy advocated was reasonable. An NGI defense was not available, and the reasonable doubt strategy was, in any event, more reasonable than a premise that a 1992 head injury that seemingly never affected Pico manifested itself during an impulsive five- to ten-minute period with D.T. in 2012.

Further, if Pico did have the serious cognitive deficits from the accident that he now claims, he and his family were the best initial source of that information. Yet they never shared that information with LaVoy. LaVoy cannot be deficient for failing

to investigate a matter within Pico's or Pico's family's knowledge that they declined to reveal. *See Strickland*, 466 U.S. at 691 ("Counsel's actions are usually based . . . on information supplied by the defendant."); *Hubanks*, 173 Wis. 2d at 27.

2. The circuit court did not defer to LaVoy's strategic decision-making.

Notably, the circuit court never declared any of LaVoy's testimony to be incredible. Moreover, it erroneously found that LaVoy "didn't discuss the issue with the family, he didn't discuss the issue with other people, he didn't discuss the concept of the NGI plea with the family or with Mr. Pico" (98:12; A-Ap. 112). That finding is inconsistent with LaVoy's testimony that he discussed Pico's injury with him and his family and that no one ever indicated he had an ongoing brain injury or symptoms (96:11-12; A-Ap. 145-46). It ignores LaVoy's testimony that he assessed the availability of an NGI defense in this case (96:57-59; A-Ap. 191-93). And no one asked LaVoy whether he discussed the concept of the NGI plea with Pico or the family.

The circuit court also improperly relied on Fincke's opinion that LaVoy should have obtained Pico's medical records from the 1992 accident: "[Fincke] opined that the eye patch and the double vision that Mr. Pico was subject to was the clue leading to deeper brain damage and deeper brain injury that could have an impact on the case. That in and of itself, I think, at least as I view Mr. Fincke's testimony, called for the trial attorney to conduct further investigation" (98:13; A-Ap. 113).

But Fincke is not a medical doctor. None of the medical experts testified that wearing an eye patch and having double vision is a symptom of brain damage. Nor can it reasonably lead competent counsel to suspect that that person has brain damage, particularly given LaVoy's observations of Pico and his thorough exploration of Pico's accident and past.

In all, the circuit court did not defer to LaVoy's strategic reasoning as *Strickland* demands. LaVoy was not deficient in declining to seek out the medical records or have Pico undergo a competency evaluation.

C. Pico failed to demonstrate prejudice resulting from LaVoy's decision to not seek the medical records in support of an NGI plea.

To show that any failure by LaVoy to seek the medical records prejudiced him, Pico must specifically allege what the investigation would have revealed and how it would have altered the outcome of the case. *See State v. Leighton*, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

The circuit court concluded generally that the 1992 brain injury should have been part of the defense case: "I'm satisfied that the full matter wasn't tried. I'm satisfied it had a direct impact on the nature of the case" (98:29; A-Ap. 129). The circuit court erred because Pico failed to satisfy his burden that LaVoy's obtaining the medical records would have altered the outcome.

To successfully assert an NGI defense, the jury must find that the person asserting the defense, at the time of the criminal conduct, "as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law." Wis. Stat. § 971.15(1). The jury cannot find that someone has a mental disease or defect simply because he committed a crime or because he lacked a motive. Wis. JI-Criminal 605 (May 2011).

Pico failed to prove that he had a condition supporting NGI. Pico's expert, Dr. Capote, reviewed Pico's records, but not Pico himself (98:9-10; A-Ap. 109-10). Capote stated that based on his paper-only review, the 1992 accident damaged Pico's brain, decreased his IQ, and that the damage "resulted in deficits in

the cognitive, emotional, and behavior functioning areas" (98:9; A-Ap. 109). The court found that Dr. Capote diagnosed Pico with frontal lobe syndrome (98:10; A-Ap. 110), and believed that that diagnosis could cause Pico to not see that rubbing a child's leg was inappropriate conduct (*id.*). The court made no additional findings of fact that would have supported a potential NGI defense.

The court found that the State's witness, Dr. Schoenecker "agreed with much of Dr. Capote's diagnosis" but did not find Mr. Pico lacked the ability to appreciate the wrongfulness of his acts (98:11; A-Ap. 111). It found that Schoenecker "didn't see a sufficient basis to conclude that an NGI plea would be appropriate" (*id.*). It stated that Schoenecker "saw Pico had had a good job, had done well, he did well with his family, he functioned well. He did not note any evidence of impulsivity or poor judgment. He found there was no current evidence that Mr. Pico's brain injury affected the conduct in this case" (*id.*).

The circuit court's finding that Dr. Schoenecker "agreed with much of Dr. Capote's diagnosis" (*id.*), was clearly erroneous. Schoenecker, a psychiatrist who had done 175 to 200 NGI exams (97:59; A-Ap. 318), said that a personal interview is required to render either an NGI opinion or a diagnosis of frontal lobe syndrome (97:63, 84; A-Ap. 321, 343), and believed it would be "professionally irresponsible" to do otherwise (97:95; A-Ap. 354).

Moreover, Dr. Schoenecker did not agree with Dr. Capote that an NGI defense could be asserted here. Schoenecker stated that the materials that Capote reviewed did not support a potential NGI defense, nor did they evince symptoms of frontal lobe syndrome or related dementia (97:64; A-Ap. 323). Schoenecker noted that Capote reported "deficits" in all three domains of potential symptoms of frontal lobe syndrome, but Schoenecker "did not appreciate . . . the precise deficits that fell within those three domains" (97:87; A-Ap. 346). Schoenecker

stated that the medical reports and other materials showed no evidence of dementia or symptoms associated with it or frontal lobe syndrome (97:89-91; A-Ap. 349-50). Schoenecker stated that "[i]t would be very surprising" that Pico could have built and sustained a successful career and been such a highly regarded caregiver and member of the community if he was "suffering from problems with his judgment and impulsivity and having difficulty interpreting social cues and being unable to control primitive urges and unable to adapt to changing situations" (97:78; A-Ap. 337).

Dr. Schoenecker summed up that Pico's 1992 injury could not explain his 2012 conduct: "I'm not able to offer a medical explanation as to why [Pico's] behavior would be affected in a very circumscribed way in a brief moment in time, but that there would be minimal evidence, if any, to suggest that his behavior has been affected in a similar way either before or since" the incident with D.T. (97:93; A-Ap. 352). He said that nothing in the records would support the NGI criteria (*id.*).

In all, Pico failed to demonstrate prejudice because he cannot show that an NGI plea would have been viable. Pico did not present an actual diagnosis of a mental disease or defect from a doctor who examined him. He presented no evidence that he showed symptoms or a pattern of behavior suggesting that he had mental disease or defect. There was nothing to indicate that Pico had a long-term brain injury for the last twenty years by having engaged in inappropriate (let alone criminal) behavior outside the five- to ten-minute period he was with D.T. Further, Pico consistently acknowledged that he appreciated that it was wrong to touch D.T. in any manner.

In sum, LaVoy reasonably explored and correctly concluded that an NGI defense was not available. Pico failed to demonstrate the LaVoy was ineffective.

D. LaVoy likewise was not ineffective for not seeking the records to obtain expert witnesses.

Similarly, LaVoy was not deficient in seeking the medical files so that an expert could explain why Pico did not appreciate that it was inappropriate to rub D.T.'s leg. As stated above, LaVoy had no reason to believe that a dormant head injury from 20 years earlier could explain Pico's actions in 2012. On that point, LaVoy "didn't want to make this trial about trying to make excuses or explanations through a neurologist" (96:40; A-Ap. 174). He thought doing so would highlight the difficult fact that Pico had touched D.T.'s leg and ask the jury to accept the improbable and false notion that Pico did not understand that massaging D.T. was inappropriate (96:39-40; A-Ap. 173-74). Indeed, Pico knew that touching D.T.'s leg was wrong: "[Pico] always told [LaVoy] he knew it was inappropriate to be rubbing a stranger's leg" (96:39; A-Ap. 173). Pico said as much to Rich in the interview. *See* 83:Exh. H:16-17.

Nor was LaVoy deficient inasmuch as Pico claims that the records would have supported expert testimony that Pico was especially susceptible to confessing in the police interview. LaVoy did not believe that such expert testimony would be helpful, because Pico never confessed to the crime (96:19-20; A-Ap. 153-54). LaVoy acknowledged that Pico told Rich that he had touched D.T.'s leg and said that it was possible his hand accidentally went under her waistband slightly when he was massaging her leg. But to LaVoy, Pico's capitulation was "not different than any other cases I've seen, a lot of times when people are pressed by police they are acquiescent sometimes and say it could be or it's possible" (96:21; A-Ap. 155). Rich likewise agreed that Pico never admitted to a crime during the interview despite Rich's efforts (97:110).

Further, Pico cannot establish prejudice. The jury would have weighed any testimony that Pico did not understand that touching D.T.'s leg was inappropriate against Pico's admissions

to Rich that he knew that he shouldn't have touched D.T.'s leg. Moreover, it would not have helped to prove whether Pico committed a crime, i.e., touching D.T.'s vagina. And expert testimony that Pico was especially suggestible in the Rich interview would have been inconsistent with LaVoy's reasonable trial strategy emphasizing Pico's consistent denials while under pressure.[9]

And the bottom line on these three claims of ineffective assistance is that Pico has presented no evidence of an actual, in-person diagnosis of frontal lobe syndrome or symptoms of a brain injury. For Pico to prove prejudice based on LaVoy's failure to obtain the medical records, that would appear to be a threshold requirement. *See Leighton*, 237 Wis. 2d 709, ¶38 (defendant challenging counsel's failure to investigate must specifically allege what the investigation would have revealed

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[9] Pico cannot show that Dr. Capote would have testified at trial or that his testimony was reasonably probable to change the outcome. Capote's testimony would have been subject to a pretrial *Daubert* challenge. *See* Wis. Stat. § 907.02(1) (requiring court to conclude that "the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case"). Capote did not appear to use reliable methods to diagnose Pico with frontal-lobe syndrome based on a paper-only review. Even if Capote's testimony was admissible, the jury also would have heard Schoenecker's countervailing testimony.

The circuit court also improperly relied on Fincke's testimony "that Dr. Capote could have testified as to issues then as to susceptibility as well as suggestibility and could have been a basis to file a suppression motion or taken other steps, motions in limine with regard to both the recorded interview of Detective Rich as well as the Care Center interview" (98:13; A-Ap. 113). Again, Fincke's testimony was irrelevant. Moreover, the court did not independently assess whether Capote's testimony would have been admissible at trial or whether Fincke's proposed motions had merit.

and how it would have altered the outcome).[10] It cannot be enough to find an expert willing to say, based on a paper-only review, that Pico has a disorder, particularly where that expert also acknowledges that if Pico had this disorder, it would be as evident now as it was in 2012 and in 1992.

In sum, the circuit court erred in concluding that LaVoy provided ineffective assistance despite his reasonable decisions and strategy. Pico is not entitled to relief on these claims.

III. LaVoy was not ineffective based on alleged errors relating to Flayter.

Pico claimed that LaVoy should have retained experts (1) to explain deficiencies in Flayter's CARE interview of D.T., specifically that Flayter failed to clarify what D.T. had meant by saying that Pico touched her "down here"; and (2) to challenge Flayter's trial testimony that suggestibility generally was a concern with preschool children (70:15-19).

The court seemed to conclude that LaVoy was deficient for not hiring an expert to challenge Flayter's interview and testimony, stating that "in an investigation process, a lawyer in a case such as this would call a witness for investigative purposes, by calling the witness to determine how best to approach the interview and how best to approach the examination of Ms. Flayter" (98:19; A-Ap. 119). It did not make an individual prejudice assessment.

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[10] *See, e.g.*, *Ayala v. Hatch*, 530 F. App'x 697, 701-02 (10th Cir. 2013) (holding that the defendant failed to demonstrate prejudice where "[n]othing in the record establishes that [he] actually had the disease" that he claimed that counsel's more-thorough investigation would have revealed); *Brown v. Sternes*, 304 F.3d 677, 687-88 (7th Cir. 2002) (ineffective assistance claim for failure to investigate mental health records supported by diagnosis from doctor who personally examined the defendant).

A. Pico failed to demonstrate ineffective assistance as to the Flayter interview.

Early on in the CARE interview, D.T. told Flayter that Pico had stuck his hand down her pants (83:Exh. 2 at 09:59:58-10:00:40). She then provided details prompted by Flayter's questions (*id.* at 10:07:01). When Flayter asked D.T. what part of her pants Pico had put his hands down, D.T. said "down here" and indicated with her hands her waistband near her stomach (*id.* at 10:07:17-24). Flayter asked what Pico's hand touched once it got down D.T.'s pants, and D.T. said "right down here," pointing over her clothes to her crotch and vagina and "further down through my underwear" (*id.* at 10:07:25-45). Flayter asked if Pico's hand was on top or under her underwear, and D.T. immediately said "under" (*id.* at 10:07:45-54). D.T. said that Pico's fingers were rubbing back and forth (10:08:01-06). Flayter asked if D.T. had a name for the part of her body that Pico was rubbing, but D.T. said she forgot (*id.* at 10:08:08-13). Flayter then asked what she did with the part of her body that Pico was touching, and D.T. said that she went "to the potty" with that part (*id.* at 10:08:13-19).

The circuit court made limited findings on this claim, noting that Dr. Yuille opined that Flayter's interview technique was overall appropriate, but that she should have clarified what D.T. meant by "down here" (98:17-18; A-Ap. 117-18). The court found that LaVoy agreed that "[t]he hands-down-pants concept . . . should have been clarified, but he didn't view that an expert witness was necessary" (98:18; A-Ap. 118).

The record does not support the circuit court's findings. To be sure, Dr. Yuille testified that when D.T. told Flayter that Pico touched her "down" there, "[n]o effort was made to determine what this actually referred to" (96:132; A-Ap. 237). But he also said that Flayter conducted the interview well and followed the Step-Wise protocol (96:144; A-Ap. 249). When pressed for specifics, Yuille stated that it would have been better if Flayter

did not limit D.T. to saying that Pico touched her either over or under her underwear, but he agreed that D.T. clarified in her own words that Pico touched her where she went potty, and circled the figure's vaginal area on the diagram (96:146; A-Ap. 251). In all, Yuille criticized how Flayter asked the over/under question, but he ultimately agreed that Flayter clarified what D.T. meant by "down" there (96:146; A-Ap. 251).[11]

And LaVoy never testified that the "hands-down-pants concept . . . should have been clarified," as the circuit court found (98:18; A-Ap. 118). LaVoy was familiar with the Step-Wise protocol and had retained experts to challenge such forensic interviews before (96:25-26; A-Ap. 159-60). He reviewed Flayter's interview of D.T. and concluded that Flayter "followed the Step-Wise protocol very, very closely, and [he] didn't see anything in that interview that caused [him] concerns enough to bring in an expert under those circumstances" (96:26; A-Ap. 160).

Given that, LaVoy was not deficient. LaVoy knew the Step-Wise protocol, he reviewed the interview, and he concluded that there was no basis to challenge it. The circuit court failed to defer to that reasoning. Further, Pico failed to demonstrate prejudice. Flayter had D.T. clarify in her own words what she had meant by "down here" when D.T. pointed to her crotch, when she explained that his fingers went under her underwear, when she said the part he was touching was where she went potty, and when she circled the vaginal area on a diagram. Indeed, Yuille agreed that Flayter clarified the point. Expert testimony challenging Flayter's interview was not reasonably probable to change the outcome.

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[11] At the *Machner* hearing, Flayter also testified that she clarified D.T.'s "down here" statement by asking if D.T. had a name for the body part Pico touched and what the touched body part did, and by having her circle the part on a diagram (96:177-78).

B. Pico failed to demonstrate ineffective assistance based on a challenge to Flayter's testimony as to suggestibility.

During her trial testimony, Flayter said that suggestibility—i.e., when information is suggested to a child, he or she believes it is true even though it never happened—is "mainly a concern for preschool children" (90:227). When LaVoy asked whether it could occur in second graders, Flayter agreed that "anyone is open" to it (90:227). But she later reiterated that kindergarteners and younger children were more susceptible (90:230-31). Pico claims that LaVoy should have done more to challenge that remark.

The circuit court did not make clear findings on this issue. It noted that LaVoy believed that his demonstration on cross that D.T. was suggestible did not require him to challenge Flayter's statement further (98:18; A-Ap. 118). Although that finding was not clearly erroneous, it is not enough to support a conclusion that LaVoy was deficient; again, the court did not defer to LaVoy's reasoning.

Flayter's statement about preschool children being more susceptible "stuck out at [LaVoy]" but was generally true (96:27; A-Ap. 161). If LaVoy had objected, he would draw more attention to a true statement that he could not refute (*id.*). He stated he more effectively brought out the point that D.T. was suggestible when he questioned D.T. and D.T. agreed that Pico never touched her vagina (96:28; A-Ap. 162).

Dr. Yuille testified that suggestibility was not just a problem for preschoolers and affects eight-year-olds (96:134; A-Ap. 239). He observed that D.T.'s testimony demonstrated that she was suggestible (96:135; A-Ap. 135). But he also agreed that everyone was suggestible, that risk of suggestibility decreased with age, and that preschoolers were more suggestible than older subjects (96:151; A-Ap. 256). Yuille also agreed that there was nothing in Flayter's interview to suggest that she was

asking leading questions or that she needed to stop to test D.T.'s suggestibility (*id.*).

Flayter testified that suggestibility is a concern with any age group, and that her remark that it was particularly so for preschoolers did not mean that suggestibility was not a problem for older children (96:186-87). She said that a "suggestibility check" in an interview occurs when she asks the child to correct her or tell her "'I don't know,'" which she did early in D.T.'s interview (96:189).

In all, LaVoy was not deficient or prejudicial for declining to hire an expert who would (1) agree with Flayter that suggestibility affects everyone, particularly the very youngest subjects, and (2) to observe that Flayter never used leading questions or failed to do a necessary suggestibility check during the interview. Indeed, such testimony could have undercut the much stronger point that D.T., through her testimony, was very suggestible (90:256-57).

IV. LaVoy was not ineffective for failing to challenge Detective Rich's testimony or statement in his interview.

Pico claims that LaVoy should have objected under *Haseltine* when Detective Rich testified that Sarah Flayter was "'among the best in the state'" (91:79; 70:19); and should have asserted *Haseltine* and *Daubert* challenges to some of Rich's interview statements and testimony (83:Exh. H:4; 70:20-21).

A. LaVoy's decision not to object to Rich's Flayter remark was reasonable to avoid highlighting it, and because it was not a *Haseltine* violation.

The circuit court found that Detective Rich's statement "could have been subject to a motion in limine, wasn't filed," and that Fincke proposed that it could be a *Haseltine* violation, and that LaVoy "stated for strategic reasons he decided not to

object, not wanting to draw attention to the statement and then have the jury follow the credibility instruction" (98:19; A-Ap. 119). The court then concluded that LaVoy was deficient, remarking that it was a "small statement," but there was "no room for error" in cases where the defense did not present witnesses (98:20; A-Ap. 120).

The court's findings were erroneous and its conclusion was wrong. Rich's remark that Flayter was "among the best in the state" was a surprise and not one LaVoy should have reasonably anticipated by filing a motion in limine (96:31; A-Ap. 165; *see* 91:79). Further, LaVoy articulated a reasonable strategy, i.e., declining to call more attention to an off-hand remark where the jury would be instructed on credibility. *See Carter*, 324 Wis. 2d 640, ¶22 (court will not second-guess counsel's reasonable strategic decisions); *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (stating presumption that jury follows instructions).

Moreover, LaVoy cannot be ineffective for failing to raise a meritless *Haseltine* objection. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). "The *Haseltine* rule is intended to prevent witnesses from interfering with the jury's role as the 'lie detector in the courtroom.'" *State v. Snider*, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784 (quoting *id.*).

Detective Rich's remark that Flayter was "among the best" simply provided that she was a skilled CARE interviewer. He did not comment on her truthfulness or credibility. His remark was not a *Haseltine* violation, and any objection on that basis

would have failed.[12] In any event, Flayter's testimony served to introduce the CARE interview and explain the Step-Wise protocol, not to establish any disputed, material facts. Hence, Rich's remark did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Patterson*, 2010 WI 130, ¶58, 329 Wis. 2d 599, 790 N.W.2d 909 (internal quotation marks and citation omitted).

B. LaVoy was not deficient for failing to challenge Rich's interview statements under *Daubert* or *Haseltine*.

Pico also complained that LaVoy should have challenged particular statements in Detective Rich's interview of Pico (70:20-22). He complained that (1) when Detective Rich told Pico during the interview that D.T. "'comes across as extremely credible,'" and that her story had been consistent, LaVoy should have sought to redact that statement under *Haseltine* and *Daubert* (70:20-21); and (2) Detective Rich testified that he though Pico was lying during the interview, and that LaVoy should have raised a *Daubert* objection to that testimony (70:21-22).

The circuit court appeared to conclude that LaVoy should have sought to redact those statements from the interview (98:20-21; A-Ap. 120-21), though it did not assess whether a *Haseltine* or *Daubert* motion would have succeeded and did not address the claim regarding a *Daubert* objection to Rich's testimony.

As for Rich's interview remarks, LaVoy said that a *Haseltine* objection would have failed because Detective Rich's

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[12] Again, the court improperly invoked Fincke's opinion that LaVoy could have objected to Rich's testimony and statements under *Haseltine* and *Daubert* (98:19-20; A-Ap. 119-20), without independently assessing whether those proposed objections had merit.

statements in the interview were part of the police investigation, not sworn in-court testimony intended to bolster the credibility of another witness (96:28-29; A-Ap. 128-29). LaVoy was correct. This court squarely rejected Pico's *Haseltine* argument in *State v. Miller*, 2012 WI App 68, ¶11, 341 Wis. 2d 737, 816 N.W.2d 331 ("We conclude that because the comments made by [police] on the video were made in the context of a pretrial police investigation and were not made as sworn testimony in court, the *Haseltine* rule was not violated.").

For those same reasons, a *Daubert* challenge to Rich's interview statements would have been frivolous. *Daubert* requires a court to limit expert testimony to that which will assist the fact-finder. *See* Wis. Stat. § 907.02(1). Rich made his statements during an interview with a suspect at which Rich explained he was trying to get the suspect to tell the truth. By making these statements to Pico in that context, Rich cannot have been understood to be holding himself out to a jury as an expert on whether someone was truthful.

As for a potential *Daubert* challenge to Rich's testimony, LaVoy had no reason to raise one. Rich testified that interviews with child sex assault suspects are typically difficult, that the accusations often trigger a fight or flight response in the suspect, and that that response "manifests itself . . . in deception or lies, and that's where I saw it in this case" (91:81-82). LaVoy stated that Rich's remark came during a long, rambling answer in which Rich talked generally about when a suspect appears to be lying, not specifically about Pico (96:31-32; A-Ap. 165-66). Accordingly, it did not strike LaVoy as a challengeable statement (96:32; A-Ap. 166).

LaVoy's understanding of Rich's remark was reasonable. In any event, a *Daubert* challenge to it would have failed because Detective Rich was not holding himself out as an expert on lying when he made the remark. At most, he was explaining that during the interview, he believed that Pico was lying, and

that was why he conducted the interview as he did. That stray remark cannot feasibly be understood to trigger a viable *Daubert* challenge.

Accordingly, LaVoy was neither deficient nor prejudicial for declining to challenge Rich's statements, because any proposed challenge would have failed.

V. LaVoy was not ineffective based on the potential good touch/bad touch or leg massage evidence.

In his final two claims, Pico alleged that LaVoy was ineffective for (1) failing to call a witness to testify that Pico rubbed his daughter's leg to calm her to explain why Pico was similarly rubbing D.T.'s leg; and (2) failing to investigate the good touch/bad touch unit that D.T.'s class had been taught to support testimony that false reporting of assaults can increase after such lessons (70:23-25).

As for the leg massage, the court wrote that the issue "ties into the issue of [Pico's] mental health status" but that it did not "view that [omission] as a significant error" (98:22; A-Ap. 122). It is unclear whether the court determined that LaVoy was deficient in this respect, but if it did, it was wrong.

LaVoy considered "quite a bit" whether to introduce testimony that Pico massaged his daughter's legs, and had multiple conversations with the Picos and other firm lawyers about it (96:37-38; A-Ap. 171-72). He decided to not introduce that evidence for two reasons. First, he had filed a pretrial motion in limine to introduce character evidence that Pico was "gregarious and very kind of touchy-feely with kids," but the court denied the motion. That evidence would have provided context for the leg-massage evidence (96:38; A-Ap. 172).

Second, given that pretrial ruling, LaVoy concluded that the leg-massage evidence taken alone could raise concerns that Pico was possibly inappropriate with his own daughter or

other children (96:38-39; A-Ap. 172-73). LaVoy explained that Pico always said that he knew it was inappropriate to touch a stranger's leg, and that testimony to the contrary would have required the jury to make a logical leap that Pico's rubbing his daughter's leg made him believe it was acceptable to do the same to another child (96:39; A-Ap. 173).

LaVoy's decision to not introduce leg massage testimony was reasonable. Pico's complaints to the contrary simply second-guess the strategy that Pico had endorsed. Pico failed to demonstrate that LaVoy was deficient.

Similarly, LaVoy was not ineffective for declining to introduce evidence that D.T. had recently been taught a good touch/bad touch unit in her class. The circuit court faulted LaVoy for not investigating what the good touch/bad touch materials involved (98:21; A-Ap. 121), although it did not explain what LaVoy would have discovered or address LaVoy's explanation for why he concluded that not introducing the issue was a better strategy.

When asked whether he considered introducing evidence that D.T.'s class was learning about good and bad touches that same week that D.T. made the accusations, LaVoy said that he "though about that a lot" and talked with Pico and his family, and other lawyers at the firm about it (96:34-35; A-Ap. 168-69). He said that ultimately, "[w]e all agreed that [it] was not a good avenue to go down" (96:35; A-Ap. 169). He concluded that the jury learning that D.T. had been taught the difference between good and bad touch "would be devastating to us" (96:35-36; A-Ap. 169-70). LaVoy acknowledged that he never sought out the materials for the good/bad touch unit, but said that based on his own young children, he knew the general concepts of the lesson (96:36; A-Ap. 170).

As a threshold matter, Pico cannot establish that LaVoy was ineffective based on failing to investigate the good/bad touch materials because he never identified what LaVoy would have

discovered. *See Leighton*, 237 Wis. 2d 709, ¶38. In any event, LaVoy's decision to not introduce that information was part of a reasonable trial strategy given its potential to hurt Pico's defense.

Accordingly, Pico is not entitled to relief on these claims.

VI. Because LaVoy was not deficient in any of the above claims, there was no cumulative prejudice.

The circuit court concluded that LaVoy's performance was prejudicial on a cumulative theory, stating that "any one of the factors may not have been enough" to establish prejudice, but taken together with the more significant brain-injury issue, LaVoy's deficiencies were prejudicial (98:28; A-Ap. 128).

Because LaVoy was not deficient in any of the alleged errors above, there was no cumulative prejudice. *Thiel*, 264 Wis. 2d 571, ¶61 ("[E]ach alleged error must be deficient in law . . . in order to be included in the calculus for prejudice."). "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

CONCLUSION

LaVoy provided constitutionally effective assistance. The State requests that this court reverse the decision and order of the circuit court granting Pico a new trial, and remand with instructions to reinstate his judgment of conviction.

Dated this 29th day of January, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,864 words.

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Sarah L. Burgundy
Assistant Attorney General

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Dated this 29th day of January, 2016.

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Sarah L. Burgundy
Assistant Attorney General