STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP1799-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTHONY R. PICO,

Defendant-Respondent-Petitioner.

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

RESPONSE BRIEF OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED[1]

1. Under *Strickland,* courts presume that counsel's performance is constitutionally effective and strongly defer to counsel's reasonable strategic decisions.

   A. Where Anthony Pico's trial counsel explained his decision-making on each challenged ground and how those decisions were consistent with the strategy he and Pico agreed upon, did the circuit correctly apply *Strickland* deference when it concluded that counsel was deficient?, and

   B. Does the record support the conclusion that Pico proved prejudice, either individually or cumulatively?

- The circuit court held that counsel was deficient on many of his claims and appeared to hold that Pico established prejudice on a cumulative theory.
- The court of appeals reversed, holding that the circuit court's decision diverged from the *Strickland* standard and that Pico failed to prove that counsel was deficient or prejudicial in any of the respects alleged.
- This Court should affirm the court of appeals.

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[1] Pico asserts that the court of appeals improperly applied its standard of review to the circuit court's decision. (Pico's Br. 19–28.) Pico is wrong on this point. But because this Court applies the same standard of review that the court of appeals applied, the State incorporates its response to this claim when addressing the individual ineffective assistance claims.

2. In Wisconsin, no witness may testify as an expert on issues of domestic law because the court is the only such expert.[2] At his *Machner* hearing, Pico presented a third-party criminal defense lawyer to offer an expert opinion on whether trial counsel's performance was reasonable. Was it proper for the circuit court to admit and rely on this "*Strickland* expert" testimony?

- The circuit court allowed the *Strickland* expert to testify and relied on that testimony in its parts of its decision granting Pico a new trial.

- The court of appeals, in reversing the circuit court on ineffective assistance, declined to reach the issue.

- This Court should hold that admitting *Strickland* expert testimony is not proper in *Machner* hearings.

3. Did Pico properly seek review of a sentencing issue that the circuit court determined adversely to him by raising the claim in his response brief to the court of appeals, rather than through a cross-appeal?

- The circuit court did not address this issue.

- The court of appeals held that Pico needed to file a cross-appeal to seek review.

- This Court should affirm the court of appeals.

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[2] *State v. McDowell*, 2003 WI App 168, ¶ 62 n.20, 266 Wis. 2d 599, 669 N.W.2d 204.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is scheduled for February 19, 2018. This Court typically publishes its decisions.

INTRODUCTION

Second-grader D.T. claimed that Pico, who was the father of one of her best friends and who was volunteering in their classroom, twice stuck his hand down her pants and rubbed where she "went potty." After a jury found Pico guilty of first-degree sexual assault of a child under the age of 13, Pico raised eleven claims of ineffective assistance and presented testimony from multiple witnesses—including a *Strickland* expert defense attorney to opine on the reasonableness of counsel's performance—over a two-day *Machner* hearing.

At the *Machner* hearing, Pico's trial attorney, Jonathan LaVoy, testified on each challenge to his performance that he understood the law involved, he weighed the options, he discussed the issues with Pico and his family, and he obtained agreement from Pico on each strategic trial decision. Despite that testimony, the circuit court granted Pico a new trial based on ineffective assistance of counsel. Although the court's findings and holdings regarding deficiency and prejudice on each claim were unclear, it ultimately held that LaVoy was deficient for not seeking medical records from a 20-year-old accident in which Pico suffered a head injury when formulating the defense strategy and that his obtaining the files "could have" made a difference in the trial.

On the State's appeal, the court of appeals reversed. It correctly identified the highly deferential presumption of reasonableness that courts must afford defense counsel's performance and strategic decisions. It correctly stated the

appellate standard of review. And it soundly applied that standard in holding that the circuit court's findings did not support the conclusion that Pico demonstrated deficiency and prejudice.

This Court should affirm the court of appeals. The ineffective assistance claims were not a close call: LaVoy's *Machner* testimony and the totality of circumstances established that LaVoy acted well within the wide range of constitutionally permissible representation. Further, Pico failed to establish that he was prejudiced, either individually or cumulatively, given the reasonableness of LaVoy's chosen strategy and the strength of the State's case.

In addition, this Court should clarify that *Strickland* expert testimony is improper as a matter of law at *Machner* hearings. Finally, this Court should conclude that Pico needed to cross-appeal his sentencing claim; alternatively, the claim is meritless.

STATEMENT OF THE CASE

A. The State's case.

The State charged Pico with first-degree sexual assault of a child under 13. (R. 1.) The charge was based on claims by D.T., a second grader, that Pico—who was a parent-volunteer in her classroom—had twice put his hand down her pants and twice touched where she went "potty" during a reading activity. (R. 1.)

At trial, the State established through testimony from S.T., D.T.'s mother, that on Friday evening, April 20, 2012, a visibly upset D.T. told S.T. that Pico had touched her inappropriately at school that day. (R. 90:185, 189–90.) D.T.'s school counselor, Jodie Jens, testified that that D.T. disclosed the same information to her on the following Monday. (R. 91:71–72.) Further, Sarah Flayter, a CARE Waukesha

interviewer, testified that she conducted a CARE interview with D.T. on April 25, five days after Pico allegedly touched D.T. At trial, the State played the video of the forensic interview that Flayter conducted with D.T. (R. 90:223.)

In the video played for the jury,[3] D.T. explained that Pico was the father of her friend and classmate. On the previous Friday, he was volunteering with their second-grade reading class. (R. 83:2 at 09:59:35–40, 10:04:35–57, 10:13:13–18).

D.T. was reading to Pico, who was sitting to her left, when he started rubbing her left leg. Pico worked his hand higher up her leg and twice slid his hand down the waistband of her pants (R. 83:2 at 09:59:58–10:00:40, 10:05:30–40), under her underwear, and touched and rubbed his fingers where she "go[es] to the potty" (*id.* at 10:07:45–58, 10:08:13–25). D.T. said that Pico said, "Sorry" after the first time he put his hand down her pants, but he was smiling and did not seem to mean it. (*Id.* at 10:00:22–30, 10:05:48–57, 10:08:53–09:05.) Pico stopped touching D.T. when the reading activity ended. (*Id.* at 10:01:08–28.)

D.T. did not think anyone saw Pico touch her and did not alert anyone before she disclosed to her mother that night. (*Id.* at 10:11:06–10, 10:14:17–40.) Flayter asked D.T. to circle on a diagram of a girl's body where Pico had touched her, and

[3] The interview appears in the record as trial exhibit 3 (R. 31) and *Machner* hearing exhibit 2. (R. 83.) Counsel for the State found that the *Machner* DVD, specifically the Camera 18 view, had the best video and audio playback.

D.T. circled an area including the hips and the crotch and an area on the left leg. (*Id.* at 10:17:00–42; 31:4.)[4]

D.T., who was by then nine years old, also testified. (R. 90:235.) Although D.T. made inconsistent statements during cross-examination—most notably agreeing with Pico's counsel that Pico touched her under her clothing near her waistband and not where she went "potty" (R. 90:256)—on redirect, D.T. said that she liked Pico before this incident, she still then "kind of liked him," and his daughter was her friend. (R. 90:269.)

D.T. also acknowledged that she had never testified before, that it was "hard" to testify about these embarrassing details. (R. 90:271–73.) She reiterated that when she told Flayter and others that Pico had touched her "where [she] went potty" under her underwear, that was the truth. (R. 90:271–73.)

The State also presented testimony from Detective Andrew Rich of the Oconomowoc Police Department, who interviewed Pico at his house on the same day as the CARE interview, and played the audio recording of Rich's interview with Pico. (R. 91:87; 31:12; 83:H.[5])

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[4] D.T.'s disclosures in the video were more detailed than—but consistent with—what she told S.T. and Jens. For example, S.T. testified that D.T. told her that Pico "touched her inappropriately at school" at reading time by rubbing her leg and then putting his hand down her pants and under her underwear. (R. 90:189–90.) Jens's testimony of what D.T. told her was similar, except D.T. told Jens that Pico had put his hand down her pants twice and said, "Sorry" after he did it the first time. (R. 91:71–72.)

[5] Exhibit H is a transcript of the entire audio recording. (R. 83.) The jury heard a redacted version. The two redacted portions of the transcript are: (1) at page 19, line 19 (beginning "Yeah, I know. . . .") through page 20, line 8 ("So that's what is just . . . ") and (2) at page 21, line 12 ("Yeah. But nothing . . . ") through the interview's end.

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." (R. 83:H:3.) Rich then told Pico, falsely, that he had video footage from the classroom, that police found male DNA on the child's clothing, and another student saw what happened and corroborated D.T.'s account. (*Id.* at 3–5.)

Without being told names, 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. (*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. (*Id.* at 10.) He admitted that his hand went up her leg "probably too high" and may have gone underneath D.T.'s waistband "a little bit" when his hand inadvertently snagged it. (*Id.* at 11.) Pico could not recall much of the encounter and at times said some details of D.T.'s story were "possible," such as his saying "sorry." (*Id.* at 7, 12, 13, 18.) But Pico consistently denied putting his hand down D.T.'s pants on purpose or touching D.T.'s vagina. (*Id.* at 11, 17.) Pico acknowledged that it was inappropriate for him to be touching D.T. at all. (*Id.* at 16–17.)

B. Pico presented a reasonable doubt defense theory.

Pico's defense counsel, Attorney LaVoy, actively raised objections to testimony and cross-examined the witnesses. In addition to bringing out inconsistencies from D.T., he questioned Flayter on suggestibility in children (R. 90:227), and emphasized the false statements Detective Rich made at the start of the interview regarding video, DNA, and eyewitness evidence. (R. 91:98, 99.)

During closing, LaVoy argued that consistent with Pico's statements to Rich, Pico 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 (R. 91:149). During closing argument, LaVoy emphasized D.T.'s unreliability and suggestibility. (R. 91:151, 155–57, 160–63.) He noted that S.T. first suggested to D.T. that Pico had touched inside her underwear, and emphasized the inconsistencies between D.T.'s testimony and the CARE interview. (R. 91:150–51, 160–63.)

LaVoy argued that Pico was well respected in the community and had no reason to commit this act at all, let alone in a busy classroom with an experienced teacher present. (R. 91:157, 165.) Finally, LaVoy argued that Pico adamantly denied touching D.T.'s vagina despite Detective Rich's lies and persistent questioning. LaVoy asserted that Pico's equivocal remarks during the interview merely reflected that he knew touching D.T.'s leg was wrong and felt bad for making her uncomfortable. (R. 91:168–72.)

The jury found Pico guilty, and the court sentenced him to six years' confinement and ten years' extended supervision. (R. 43.)

C. Postconviction motion and *Machner* hearing.

After his conviction, Pico alleged numerous claims of ineffective assistance of counsel (R. 57), the following of which are relevant to this appeal:

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 brain injury. 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 susceptible to Detective Rich's questions. (R. 57:1–3.)

Fourth, Pico alleged that LaVoy should have presented an expert to challenge Flayter's forensic interview and her testimony. (R. 57:3–4.)

Fifth and sixth, Pico alleged that LaVoy should have raised *Haseltine* objections to Detective Rich's testimony and interview remarks. (R. 57:4.)

In addition, he alleged that LaVoy should have presented evidence that D.T. had recently been taught about good and bad touches, and that LaVoy should have called witnesses to testify that Pico calmed his daughter with leg massage to explain why he touched D.T.'s leg. (R. 57:5.)

Finally, Pico alleged that the sentencing court improperly increased its sentence based on Pico's refusal to admit guilt. (R. 70:25–29.)

The circuit court held a two-day *Machner* hearing. Six witnesses testified, including a *Strickland* expert and LaVoy. Details of that testimony appear below, but LaVoy's testimony established several themes: (1) Pico consistently told LaVoy that he did not touch D.T.'s vagina and that he knew that such touching was wrong; (2) Pico and his family agreed on the defense strategy used at trial and provided LaVoy no reason to believe that Pico suffered cognitive effects from his 1992 accident; and (3) on every alleged failure or omission, LaVoy considered the options, articulated his decision-making, and discussed that information with Pico and his family.

In an oral decision, the circuit court granted Pico's motion for a new trial on ineffective assistance grounds and vacated the judgment of conviction. (R. 98.) The court also considered and rejected the sentencing issue. It stated that although the sentencing court made some "problematic" remarks, the transcript as a whole reflected that the sentencing court relied on appropriate sentencing factors in crafting Pico's sentence. (R. 98:29.) The court memorialized its decision in a written order. (R. 73.)

D. The court of appeals held that LaVoy was not ineffective.

The State appealed, seeking reversal on the ineffective assistance claims. It also argued that the circuit court's admission of and reliance on the *Strickland* expert testimony was improper. In response, Pico urged the court of appeals to affirm on the ineffective assistance claims, and also raised his sentencing claim.

The court of appeals reversed. *State v. Anthony Pico*, No. 2015AP1799-CR, (Wis. Ct. App. May 10, 2017) (unpublished) (R. 99.) It held that Pico failed to demonstrate deficient performance or prejudice on any of the points alleged, and summarized that the circuit court, in ruling otherwise, failed to defer to LaVoy's reasonable strategic decisions. (R. 99:11–39.) The court did not reach the *Strickland* expert issue. (R. 99:40 n.14.) It also declined to review Pico's sentencing claim, holding that Pico needed to raise it in a cross-appeal. (R. 99:40.)

STANDARD OF REVIEW

Whether counsel rendered ineffective assistance is a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. This court will uphold

the postconviction court's factual findings unless they are clearly erroneous. *Id.*

Whether the defendant satisfies *Strickland*'s deficiency or prejudice prongs is a question of law that this Court reviews without deference to the lower courts' conclusions. *State v. Domke*, 2011 WI 95, ¶ 33, 337 Wis. 2d 268, 805 N.W.2d 364.

This Court reviews a circuit court's decision to admit expert testimony for an erroneous exercise of discretion. *State v. Shomberg*, 2006 WI 9, ¶ 10, 288 Wis. 2d 1, 709 N.W.2d 370 (citation omitted). This Court will not reverse if the lower court's decision has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record. *Id.* ¶ 11 (citation omitted).

ARGUMENT

I. Pico's *Strickland* claims are meritless because LaVoy acted well within the wide range of professionally competent assistance, and because Pico cannot prove prejudice.

A. Legal standards for *Strickland* claims.

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 defendant has not proven one prong of this test, this Court need not address the other. *Id.* at 697.

"'Surmounting *Strickland*'s high bar is never an easy task.'" *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoted source omitted). As for the deficiency, "the standard for judging counsel's representation is a most deferential one," *id.*, with the court "strongly presum[ing]" that counsel has rendered adequate assistance. *Strickland*, 466 U.S. at 690.

Hence, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 689. "A fair assessment of attorney performance requires" a reviewing court to make "every effort . . . 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.*

Prejudice is likewise a demanding burden, requiring the defendant to prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. Specifically, the defendant must show "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. In other words, "the likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 111.

B. LaVoy was not deficient or prejudicial based on his not obtaining medical records of Pico's 1992 injury.

In his first three claims, Pico believes LaVoy should have sought Pico's medical records from a motorcycle accident Pico was involved in 20 years earlier. Pico claims that those records would have demonstrated that he had suffered a traumatic brain injury, which could have supported (1) an NGI plea; (2) expert testimony that Pico's brain injury caused him to impulsively rub D.T.'s leg and to not understand that it was inappropriate; and (3) expert testimony that the brain injury made Pico susceptible to confessing during the police interview. (Pico's Br. 29–40.)

As explained below, LaVoy was not deficient and Pico cannot overcome the strong presumption otherwise. LaVoy made a reasonable investigation into Pico's injury and accident and sound strategic trial decisions.

1. Legal standards for failure-to-investigate claims.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Two aspects of LaVoy's representation are pertinent to this group of claims: (1) his reasonable investigation into Pico's accident and injury and (2) his reasonable trial strategy that made additional investigation unnecessary.

Whether counsel mounted a reasonable investigation turns on "all of the circumstances," including, crucially, the information the defendant provides. Counsel cannot be deficient for not investigating matters that the defendant knew but did not share. *See Strickland*, 466 U.S. at 691; *State v. Hubanks*, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992). To that end, a defendant may not later challenge counsel's failure to pursue certain investigations when he has given counsel reason to believe that pursuing those investigations would be fruitless. *Strickland*, 466 U.S. at 691.

Counsel need not exhaust every conceivable resource to satisfy the duty to investigate. A less-than-thorough investigation is reasonable when it is justified by reasonable professional judgment, *see*, *e.g.*, *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (stating that reasonable professional judgment supported counsel's decision not "to mount an all-out investigation into petitioner's background in search of mitigating circumstances"), or by a strategic decision

rendering the investigation unnecessary, *see, e.g.*, *State v. Carter*, 2010 WI 40, ¶ 35, 324 Wis. 2d 640, 782 N.W.2d 695.

Rather, an investigation is deficient only where counsel declined to investigate after knowing or having reason to know the investigation could bear fruit. *See, e.g.*, *Domke*, 337 Wis. 2d 268, ¶ 52 (counsel failed to reasonably investigate when he called a witness he knew might provide damaging testimony without talking to the witness); *see also Thiel*, 264 Wis. 2d 571, ¶¶ 46, 50 (counsel was deficient for his unexplained failure to independently investigate the accuser's background when accuser "had demonstrated a propensity for lying").

Further, courts afford counsel's reasonable trial strategy "the presumption of constitutional adequacy." *State v. Breitzman*, 2017 WI 100, ¶ 65, ___ Wis. 2d ___, ___ N.W.2d ___ (citations omitted). This Court "will not second-guess a reasonable trial-strategy, [unless] it was based on an irrational trial tactic or based on caprice rather than upon judgment." *Domke*, 337 Wis. 2d 268, ¶ 49 (citation omitted).

2. LaVoy provided professionally competent assistance based on his investigation and his trial strategy.

Here, LaVoy knew about Pico's 1992 accident and brain injury. But after his thorough investigation of the case and discussions with Pico and his family, he had no reason to believe that the medical files would assist Pico's defense. Because of that, LaVoy's investigation was reasonable and he had no duty to obtain the medical files under the circumstances. *Accord Burger*, 483 U.S. at 794; *Carter*, 324 Wis. 2d 640, ¶ 35.

a. LaVoy's investigation was reasonable.

LaVoy had no reason to believe that the medical files would have information supporting an NGI defense. LaVoy is an experienced criminal law attorney, having practiced criminal defense almost exclusively for 13 years (R. 96:52–53.) He handled over 2000 criminal cases, including 50 to 80 trials before he represented Pico. LaVoy had experience asserting NGI defenses and considered whether NGI is appropriate "in every single case [he] work[ed] on," including Pico's. (R. 96:55–57.)

Accordingly, LaVoy was also aware of the criteria for NGI in Wisconsin (R. 96:67), which requires proof of the existence of a mental disease or defect and that the defendant "lacked substantial capacity either to appreciate the wrongfulness of his . . . conduct or conform his . . . conduct to the requirements of law." *See* Wis. Stat. § 971.15(1).

LaVoy's investigation and the evidence available to him gave him no basis to believe an NGI was viable. First, he had no reason to believe Pico had a mental disease or defect. Pico wore an eye patch, which LaVoy asked about at Pico's intake interview. Pico explained that it was the result of a 1992 motorcycle accident. (R. 96:12, 59.) Pico and LaVoy then discussed the accident; Pico told LaVoy that he had sustained a head injury, but other than his need for the eye patch, Pico said that "he had recovered and he was fine." (R. 96:12.) Moreover, since 1992, Pico went to college, had "some very impressive jobs," married, and was raising two children. To LaVoy, Pico appeared to have "made a full recovery" other than the eye patch and "[t]here was absolutely nothing" suggesting otherwise. (R. 96:12, 69.)

LaVoy's observations of and discussions with Pico confirmed that view, which occurred over "at least seven . . . probably more" office consultations, multiple phone consultations, and discussions before, during, and after court appearances. (R. 96:60–61.) During those meetings, LaVoy did not see "any signs that [he] would typically see [in] somebody who had deficits or problems." (R. 96:12.) Rather, Pico was "able to carefully discuss the facts of the case . . . from start to finish" and logically explain "what did [and] didn't happen." (R. 96:12–13, 67.)

LaVoy's discussions with Pico's family likewise provided no reason to believe Pico suffered cognitive defects. They painted Pico as a happy, well-adjusted, and "great" person. (R. 96:17, 67–68.) No one told LaVoy that Pico was "suffering from an ongoing symptomatology involving a brain injury from his accident"; no one referenced any issues, problems, diagnoses, therapy, or treatment. (R. 96:11, 13–14, 17, 67–68.) As LaVoy summed up, nothing in his discussions with Pico and his family led him to believe that further investigation of the medical records would produce relevant information supporting an NGI claim: "[t]he brain injury or lack thereof . . . 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 of a father he was, how . . . well-adjusted he was." (R. 96:17.) *See Strickland*, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.")

Moreover, LaVoy had no reason to believe Pico could satisfy the other NGI criterion of not understanding "the difference between right and wrong." (R. 96:66–67.) Pico expressly told LaVoy that he knew touching D.T.'s vagina was

wrong and that touching her leg made her uncomfortable. (R. 96:66–67, 70.) Pico's wife Michelle stated that there was "no question" Pico understood that it was wrong to touch a child's vagina. (R. 96:220–21.) And during his interview with Detective Rich, Pico clearly understood those concepts. *See* R. 83:H:4, 16 (stating that tickling D.T.'s leg was "inappropriate" and that he knew he "shouldn't have done it"); R. 83:H:17 (stating "[t]here's no way" he would have put his hand in D.T.'s pants).

Likewise, Pico was demonstrably able to conform his behavior to the requirements of the law. (R. 96:67.) Again, LaVoy investigated Pico's background, which showed he had a successful life and no past run-ins with law enforcement or complaints about his behavior. The court of appeals correctly concluded that LaVoy was not deficient in this respect. (R. 99:15.) Hence, LaVoy had no reason to believe that the medical files would be necessary or helpful to support a potential NGI plea.

Pico's arguments are not persuasive. He primarily argues that the circuit court's findings supported the conclusion that LaVoy had reason to know that the medical records could support Pico's defense. (Pico's Br. 29–40.) Not so. As for the potential NGI, the circuit court found that LaVoy "acknowledged he knew of the injury, but in his relationship with Mr. Pico he didn't see any . . . outward signs that would lead to an NGI plea in the case." (R. 98:12.) It found that "[h]e didn't discuss the issue with the family, . . . the issue with other people, . . . the concept of the NGI plea with the family or with Mr. Pico." (R. 98:12.) It found that in

LaVoy's view, "whatever happened in '92 Mr. Pico had fully recovered. No issues were raised with him." (R. 98:12.)[6]

Those findings do not support the conclusion that LaVoy was deficient for failing to obtain Pico's medical records. As explained above, based on what LaVoy observed and what Pico and his family told him, LaVoy had no basis to advance either an NGI defense or introduce evidence that Pico had an injury that impacted his behavior. Indeed, the circuit court's finding that "[n]o issues were raised with [LaVoy]" (R. 98:12) supports the conclusion that LaVoy cannot have been deficient for failing to seek records based on brain-injury symptoms that were neither apparent nor communicated to him. *Strickland*, 466 U.S. at 691.

Finally, *State v. Felton* does not support Pico's contention that LaVoy was deficient based on how he investigated the possibility of NGI. (Pico's Br. 22, 38.) In *Felton*, counsel was deficient when he made a "perfunctory at best" query to a state psychologist whether Felton had a mental disease or defect, then entered an NGI plea and withdrew it without consulting Felton. 110 Wis. 2d 485, 515–16, 329 N.W.2d 161 (1983). Here, as explained above, LaVoy's investigation into Pico's accident and history was well beyond perfunctory.

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[6] Of those findings, that LaVoy did not discuss the issue of the head injury with the family was clearly erroneous. LaVoy testified that he asked the family whether Pico had deficits from the head injury but was told there were none. (R. 96:11–12.) The court of appeals agreed that this finding was clearly erroneous. (R. 99:16 n.6.)

The circuit court also found, based on the opinion of the *Strickland* expert, Attorney Fincke, that LaVoy should have ordered the records based on Pico's "eye patch and the double vision that Mr. Pico was subject to." (R. 98:12–13.) For the reasons discussed in Part II, Fincke's testimony is irrelevant.

LaVoy had no reason to believe the records would support evidence that Pico impulsively touched D.T.'s leg. As for Pico's claim regarding impulsivity, Pico told LaVoy that he purposely touched D.T.'s leg and "never told [LaVoy] it was something that was compelled or he couldn't control himself." (R. 96:70.) Pico told Detective Rich the same thing. (R. 83:H:17 ("I was touching her [leg] intentionally").) Again, Pico and his family gave LaVoy no "indication of impulsivity" when LaVoy talked to them about Pico's background. (R. 96:11, 67.) And when LaVoy asked, Pico "adamantly denied" that there were any other instances where "he wasn't able to control himself." (R. 96:67.) In light of the investigation detailed above, LaVoy acted reasonably based on his conversations with Pico, his observations of Pico, his discussions with the family, and his review of the evidence.

Pico attempts to support his claim with testimony from Dr. Horatio Capote, a neuropsychiatrist who testified at the *Machner* hearing that based on his review of the medical files, Pico had brain trauma that can manifest in numerous symptoms, including impulsivity. (R. 97:12.) Pico further highlights Michelle Pico's testimony from the *Machner* hearing that Pico was impulsive, easily frustrated, and told long, boring stories. (Pico's Br. 37, 39.) In Pico's view, that combined testimony established that Pico was exhibiting signs of brain trauma that LaVoy should have explored.

To start, impulsivity and those other qualities can be present in people without brain injuries. In any event, Michelle never claimed to have told LaVoy about those things. LaVoy certainly denied ever hearing them. (R. 96:11–12, 67.) LaVoy cannot be faulted for not following up on unsupplied information. *Strickland*, 466 U.S. at 691.

The circuit court's findings do not compel a different conclusion. As best as the State can tell, the court found that Dr. Capote testified that Pico's frontal lobe injury could have caused him to "rub a child's leg and not see that as inappropriate conduct." (R. 98:10.) It found that the State's medical expert "did not note any evidence of impulsivity or poor judgment" and that "there was no evidence to conclude that the brain injury affected Mr. Pico in any manner relative to the case." (R. 98:11.)

But those findings do not support the conclusion that LaVoy was deficient. Regardless whether a brain injury could result in impulsive behavior, there was no evidence that Pico acted impulsively: Pico consistently maintained that he purposely touched D.T.'s leg and that it was inappropriate. Further, there was no evidence that Pico ever engaged in similar impulsive behavior. LaVoy had no reason to seek the medical records to support an impulsivity theory.

LaVoy had no reason to believe that the medical records would provide evidence explaining that Pico was especially susceptible to Rich's questioning. As for Pico's third claim that more investigation would have supported a theory that Pico's head injury rendered him more susceptible to Rich's questioning, LaVoy reasonably investigated Pico's accident and injury and he received no evidence suggesting Pico suffered symptoms from it.

Nothing about Detective Rich's interview or LaVoy's many interactions with Pico suggested to LaVoy that Pico was abnormally agreeable. (R. 96:21.) While during the interview, Pico said, "maybe," or "I don't know," in response to some of Rich's questions (R. 96:90), those responses are "very common with many interviews" and were not "much different" from other interviews that LaVoy had seen: "generally, . . . people

are trying to be pleasing" and agreeable; they "don't try to argue with police." (R. 96:21, 90–91.)

Further, Pico consistently maintained that he told Detective Rich "the truth," and Pico's explanation to LaVoy of his interaction with D.T. was "very consistent" with what Pico told Detective Rich. (R. 96:66, 74.) Finally, that Pico was reasonably nervous or confused during the interview was not a red flag. At the start, Pico did not know why Rich was there and worried that one of his children was hurt. When it became clear why Rich was there, the seriousness of the accusations and Rich's questions explained Pico's nervousness and confusion. (R. 96:15.)

In sum, LaVoy reasonably investigated Pico's background, asked about the accident and his history, observed Pico over numerous consultations, talked about Pico and his history with his family, and received no inkling that Pico's medical files would contain evidence supporting a viable alternative defense strategy. LaVoy's investigation was reasonable under the circumstances and he was not deficient in regard to Pico's first three claims.

In addition, for the reasons below, LaVoy's chosen defense strategy was reasonable and made further investigation into alternate theories unnecessary. *See Strickland*, 466 U.S. at 691.

b. LaVoy's defense strategy was reasonable.

Based on the information LaVoy reviewed and reasonably discovered, LaVoy concluded that Pico's best defense was that Pico did not touch D.T.'s vagina and the State failed to overcome reasonable doubt. (R. 96:61.) That was a reasonable strategic decision consistent with Pico's

adamant denials, Pico's otherwise clean history, and the State's lack of witnesses and physical evidence.

To start, Pico cannot challenge as unreasonable LaVoy's chosen strategy of arguing that the State failed to overcome reasonable doubt. *See Breitzman*, 2017 WI 100, ¶ 77 (a defendant cannot challenge an agreed-upon strategy that was reasonable at the outset). LaVoy "ran everything" by Pico, they had good communication and discussions, and "we ultimately came to agreements on the theory of defense and what we were going to pursue," including the strategy of playing the Rich interview to allow the jury to hear Pico deny the crime without testifying. (R. 96:20, 79.)

That Pico had admitted touching D.T.'s leg did not render LaVoy's decision to advance Pico's reasonable-doubt defense irrational or capricious. *Domke*, 337 Wis. 2d 268, ¶ 49. Nor did Pico's admission necessarily require an explanation. (Pico's Br. 37.) Rather, Pico's acknowledgement that he touched D.T.'s leg, that he knew it was wrong, and that he felt bad about it while denying the crime arguably bolstered his credibility. *See Breitzman,* 2017 WI 100, ¶ 77. ("[I]t can be quite effective for a defendant to say 'I did this and I did that, but I did not do what the State has charged me with,' because it tends to establish a defendant's credibility.")

Likewise, LaVoy's decision to advise Pico to not testify was reasonable. (Pico's Br. 38.) LaVoy wanted to get a denial from Pico before the jury (R. 96:65), a decision Pico does not challenge. LaVoy's options were to present that denial through the Rich interview, through Pico's testimony, or both. LaVoy reasonably opted to play the Rich interview, in which Pico denied committing the crime under pressure. In contrast, Pico's testimony would provide the same story he provided to Rich, but with downsides: Pico was not a very compelling witness because he became "not sure of himself," and became

"very nervous" and flustered when faced with tough questions (R. 96:91–92.) In LaVoy's view, the State was likely to exploit that uncertainty during cross-examination and force Pico to explain why he was rubbing D.T.'s leg. (R. 96:47, 77.) Thus, given the low value and potential harm that Pico's testimony would bring, LaVoy presented Pico's denial solely through the Rich interview, a strategy Pico endorsed. (R. 96:20.)

Finally, counsel's strategic decision to forgo pursing an inconsistent defense is not deficient. *See, e.g.*, *State v. Kimborough*, 2001 WI App 138, ¶ 32, 246 Wis. 2d 648, 630 N.W.2d 752. As LaVoy testified, he wanted "to have a cohesive defense." (R. 96:91.) In LaVoy's view, advancing a defense that Pico did not commit the crime, with an alternative defense of "if he did do it, he was mentally problematic," would have diluted the stronger reasonable-doubt defense and would have been seen as "trying make excuses or explanations through a neurologist." (R. 96:40, 91.) That was a reasoned strategic decision that was neither illogical nor capricious. *Domke*, 337 Wis. 2d 268, ¶ 49.

In sum, LaVoy made reasonable investigations into Pico's accident, and reasonable trial strategy decisions. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.") He was not deficient with regard to Pico's first three claims.

3. Pico cannot prove prejudice.

Pico failed to show that any of his proposed alternative defense theories based on the medical records were viable or more likely to result in acquittal than the reasonable-doubt defense.

To start, a NGI defense was not available because Pico demonstrably knew that touching D.T. was wrong and had a long history of conforming his conduct to the law. *See* Wis. Stat. § 971.15(1) (providing that NGI defense requires proof that the defendant "lacked substantial capacity either to appreciate the wrongfulness of his . . . conduct or conform his . . . conduct to the requirements of law"). To advance a claim that Pico's injury caused him to touch D.T.'s vagina, the jury would have to weigh that theory against Pico's adamant denials to Rich that "I know I didn't touch her vagina." (R. 83:H:11.) It would have also weighed that theory against evidence that Pico clearly understood right from wrong and could conform his conduct to the law. Indeed, neither of the lower courts was persuaded that NGI was viable. *See* R. 99:16.

The other defenses were just as implausible. The jury would have weighed a defense theory that Pico was so impulsive he could not control himself against Pico's express understanding that touching D.T.'s leg was wrong. It would have weighed a theory that Pico's brain injury made him susceptible to Rich's questioning against the fact that Pico never claimed to give Rich false answers. Further, as the court of appeals noted, "a strategy based on suggestibility in the Rich interview would be inconsistent and would have wholly undermined defense counsel's reliance on Pico's consistent and steadfast denials while under pressure." (R. 99:20.)

And for any of those defenses, the jury would have had to accept the improbable theory that a 1992 head injury that seemingly never affected Pico in the years that followed, suddenly manifested itself during an impulsive five-to-ten minute period with D.T. or in the interview with Rich 20 years later. (R. 99:19.) *See Strickland*, 466 U.S. at 694 (requiring defendant to show reasonable probability of different result).

Pico does not articulate how he has established prejudice on any of these claims or how the circuit court reached a sound conclusion on prejudice. Here, the circuit court did not believe NGI was viable, and it did not make clear holdings on prejudice based on the impulsivity or agreeability theories. Rather, it addressed prejudice generally, writing that the brain injury was "not flushed out" in this case, and if it had been, "[i]t may be . . . nothing different would happen, but I'm satisfied with the nature of the evidence that I've heard at the hearing that in fact the result *could* be different, that there's a reasonable probability that a different result *could* occur." (R. 98:29.) But a conclusion that a different result reasonably likely *could* occur or is *conceivable*, is not a conclusion that a different result reasonably likely *would* occur or is *substantial*. *See Richter,* 562 U.S. at 111.

Accordingly, as the court of appeals correctly concluded, Pico failed to demonstrate prejudice. His first three claims fail.

4. The court of appeals correctly applied the *Strickland* standard of review.

Rather than explain why the circuit court correctly applied *Strickland* deference, Pico asserts that the court of appeals misapplied the standard of review and failed to defer to the circuit court's findings. (Pico's Br. 19–28.) Pico is wrong.

To start, the court of appeals stated the correct mixed standard of review (R. 99:11), requiring it to defer to the circuit court's factual findings but to conclude de novo whether LaVoy was deficient and prejudicial. The court of appeals held that the circuit court's findings, to the extent it made them, did not support conclusions that LaVoy was deficient or prejudicial. That is exactly how appellate courts are required to review *Strickland* claims.

In advancing his arguments, Pico mischaracterizes many of the court of appeals' legal conclusions as to deficiency and prejudice as "findings."[7] Similarly, the dissent transposes those concepts.[8] But *Strickland*'s mixed standard contemplates that an appellate court could defer to a circuit court's non-clearly-erroneous factual findings, but still reverse if it concludes that those findings do not satisfy the legal standards for deficiency and prejudice. That is what happened here.

Pico and the dissent suggest that the circuit court's conclusions on deficiency and prejudice are entitled to deference. This position echoes an argument that this Court rejected in *Thiel*. There, Thiel asked this Court to modify the *Strickland* standard and "announce a rule that appellate courts accord some degree of deference to a trial judge's assessment of counsel's deficient performance and the prejudicial effect of counsel's errors." *Thiel*, 264 Wis. 2d 571, ¶ 22. Thiel, like the dissent here, reasoned that "trial judges

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[7] *See, e.g.,* Pico's Br. 22 ("The Court of Appeals' decision . . . *found* trial counsel had no duty to investigate . . . ."); *id.* at 23 (noting that the court of appeals "found no deficiency" where the circuit court found that LaVoy did not make a proper investigation); *id.* at 40 ("Again, the Court of Appeals disregarded the factual finding . . . that [LaVoy's failure to investigate] led to the conviction.).

[8] *See* R. 99:42 ("The trial judge in our case *found* that trial counsel's decision not to investigate was unreasonable and was deficient performance."); *id.* at 42–43 ("The trial judge also *found* that given Pico's injury and his corresponding 'mental health situation,' a reasonable attorney would have investigated Pico's susceptibility to making a false confession . . . ."); *id.* at 43 ("The trial judge *concluded* that Pico's brain injury made him susceptible to 'involuntary acquiescence to authority.' The majority improperly dismisses the *finding*."); *id.* ("The trial judge *found* a 'positive' deficient performance on the part of trial counsel and a 'positive' prejudice to Pico, equaling constitutionally ineffective assistance of counsel.").

have a unique vantage point on these issues, having heard all the evidence and observed the conduct and demeanor of the witnesses . . . ." *Id.*; *see* R. 99:43 (stating "[a] trial judge sees, feels, and hears the evidence").

This Court reaffirmed *Strickland*'s mixed standard of review and rejected the notion that a circuit court's vantage point warrants heightened deference on the legal questions of deficiency and prejudice. It explained that if the circuit court made credibility or demeanor findings based on its vantage point, it "should articulate [those] findings of fact in [its] decision." *Thiel*, 264 Wis. 2d 571, ¶ 23.

In all, Pico and the dissent suggest that appellate review of *Strickland* claims is little more than a rubber stamp affirming the circuit court's decision. But *Strickland*'s mixed standard is not so deferential that it renders unchallengeable a circuit court's decision to grant or deny a new trial based on ineffective assistance. The court of appeals correctly applied *Strickland*'s standard of review; this Court should affirm.

C. LaVoy was not ineffective based on Detective Rich's interview.

As for Pico's next claims (Pico's Br. 40–49), LaVoy was not ineffective for failing to seek suppression of Detective Rich's interview based on Rich's use of deception during it, because the motion would have failed. Likewise, Pico failed to show that LaVoy was ineffective for failing to present an expert on how Rich's use of deception combined with Pico's susceptibility produced false confessions.

1. A motion to suppress based on Rich's use of deception would have failed.

Where a defendant claims, as here, that trial counsel was ineffective for failing to file a motion to suppress evidence, the failure to bring such a motion is neither deficient nor prejudicial if the trial court would have denied it, *see State v. Reynolds*, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996), or if the motion relies on an unsettled legal principle, *see Breitzman*, 2017 WI 100, ¶ 56. Further, counsel's strategic choice to forgo filing a potentially meritorious motion based on a thorough consideration of the law and facts is "virtually unchallengeable." *See Strickland*, 466 U.S. at 690.

The Reid technique is a widely used police interrogation method involving nine steps, which can include the police using deception by "tricking the suspect into thinking there is more evidence of guilt than the police possess." (R. 99:12 n.3.) Specifically, here, Detective Rich made false statements to Pico that police had video from the classroom, that they had DNA evidence, and that another child corroborated D.T.'s allegations; Pico believes a motion alleging that Rich's use of deception caused Pico to make involuntary "I don't know" or "It's possible" statements during the interview.

A police officer's use of deception alone does not warrant suppression of a suspect's interview statements. *See, e.g.*, *State v. Triggs*, 2003 WI App 91, ¶¶ 12–23, 264 Wis. 2d 861, 663 N.W.2d 396 (stating that police deception during an interrogation does not itself render a confession involuntary). Indeed, an officer's telling a suspect that he knows more than

he does "is a common interview technique."[9] *Dassey v. Dittman*, No. 16-3397, 2017 WL 6154050, *11 (7th Cir. Dec. 8, 2017). Law enforcement's use of such deception "has not led courts (and certainly not the Supreme Court) to find that a suspect's incriminating answers were involuntary." *Id.* (citing *Frazier v. Cupp*, 394 U.S. 731, 739 (1969)).[10]

Given that, LaVoy was neither deficient nor prejudicial based on his not seeking to suppress the Rich interview. If Pico believes such a motion should have been premised on Rich's use of deception combined with Pico's brain injury, that claim fails because LaVoy was not deficient for failing to seek the medical records. See Part I.B *supra*. If Pico believes that a motion based on Rich's deception alone would have succeeded, there is no settled case law supporting such a motion. *See Breitzman*, 2017 WI 100, ¶ 56; *Reynolds*, 206 Wis. 2d at 369.

Moreover, even if a motion had arguable merit, LaVoy reasonably decided against filing it because allowing the jury to hear Pico's denials despite Detective Rich's persistent questioning—and to hear it without subjecting Pico to cross-examination—was consistent with his reasonable defense strategy. *See Strickland*, 466 U.S. at 690. Additionally, LaVoy

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[9] Dr. Yuille, one of Pico's experts at the *Machner* hearing, testified that "[t]he Reid technique is the most common technique used by law enforcement throughout the U.S." (R. 96:136.)

[10] The cases Pico invokes (Pico's Br. 48) are not on point. *See Missouri v. Seibert*, 542 U.S. 600, 617 (2004) (holding confession involuntary based on *Miranda* warnings issued mid-questioning); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (addressing voluntariness of consent to enter); *State v. Hoppe*, 2003 WI 43, ¶ 59, 261 Wis. 2d 294, 661 N.W.2d 407 (addressing law enforcement's use of numerous coercive techniques with demonstrably incapacitated suspect); *State v. Eskew*, 390 P.3d 129, 135–36 (Mt. 2017) (concluding statements involuntary based on totality of coercive techniques).

discussed this strategy with Pico, who endorsed it and cannot now challenge it. *See Breitzman*, 2017 WI 100, ¶ 77. Pico cannot overcome his burden of showing either deficiency or prejudice under *Strickland* on this claim.

Contrary to his assertions in his brief (Pico's Br. 42, 48), the circuit court made no findings or conclusions whether a suppression motion would have succeeded. Nor could it, because Pico merely relied on a law review article critical of the Reid technique and Fincke's testimony that he had "mixed success" with such motions. (R. 96:109.) As the court of appeals correctly held (R. 99:22), that was not enough to satisfy Pico's burden of showing that counsel was deficient and prejudicial.

2. LaVoy was not ineffective for failing to present an expert asserting that the Reid technique produces false confessions.

For the same reasons discussed above, LaVoy was not deficient for failing to present an expert to testify that the Reid technique combined with Pico's head injury was likely to produce false confessions, because LaVoy had no reason to seek the medical files or an expert for that purpose.

Nor can Pico establish prejudice. Pico suggests that an expert would have helped mitigate the effect of Pico's equivocal statements during the interview, such as "I don't know," when asked whether he committed the crime, or his acknowledging that it was "possible" his hand went under D.T.'s pants. (Pico's Br. 45–46.) But this purported expert would have offered internally inconsistent views that Rich's deception caused a susceptible Pico to make false equivocal statements, yet that Pico was not susceptible when he truthfully denied committing the crime. Pico's speculation that he "would not have been convicted" (Pico's Br. 48–49)

falls well short of *Strickland*'s prejudice standard. *See State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (*Strickland* requires "more than rank speculation" to satisfy prejudice).

The circuit court's findings on this point do not compel a different conclusion. (Pico's Br. 42–43.) It found that LaVoy did not look into challenging the interview because Pico denied touching D.T.'s vagina and that in the interview, Pico made "inculpatory statements . . . that at best for the defense were equivocal, not outright denials." (R. 98:16–17.) Without addressing deficiency or prejudice, the court then said, "[F]urther investigation, witness development, concept development, to present other witnesses to address the issue of that type of interview or to have knowledge of how to address it in cross-examination in putting on a case would have been necessary for a viable defense in the case where you rely on the defendant not testifying." (R. 98:17.)

Those findings do not compel the conclusion that LaVoy was not functioning as competent counsel; LaVoy did not need to overturn every possible stone. *Cf. Burger,* 483 U.S. at 794. And the court's conclusion does not reflect a correct application of *Strickland*'s prejudice standard. It simply states that LaVoy should have explored more options, not that any unexplored options created a substantial likelihood that a different outcome would occur. *See Richter*, 562 U.S. at 111.

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

As for Pico's next challenges (Pico's Br. 54–59), LaVoy had no legal basis under *Haseltine* to challenge (1) Detective Rich's statement to Pico in the interview that D.T. "comes across as extremely credible," (2) Rich's testimony that he saw "deceptions or lies" during the interview, and (3) Rich's

testimony that the CARE interviewer, Flayter, was "among the best in the state." Because LaVoy cannot be deficient or prejudicial for failing to file a meritless motion, *Reynolds*, 206 Wis. 2d at 369, Pico's claims fail.

1. Any *Haseltine* objections to Rich's interview statement or testimony would have failed.

"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.*).

A police officer's testimony explaining the circumstances of an interview and what he believed at the time does not have the purpose or effect of attesting to the witness's credibility at trial and therefore does not violate *Haseltine*. *Snider*, 266 Wis. 2d 830, ¶¶ 25–26; *State v. Smith*, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992). Likewise, a police officer's taped statement made in the context of a pretrial investigation does not violate *Haseltine* because it is not sworn, in-court testimony providing an opinion regarding the truth of a witness's truthfulness at trial. *State v. Miller*, 2012 WI App 68, ¶ 15, 341 Wis. 2d 737, 816 N.W.2d 331.

Here, Detective Rich's recorded statement, in which he told Pico that D.T. "comes across as extremely credible" and that her story had been consistent (R. 83:H:4), was made during a pretrial investigation. Rich did not offer it to opine

on the truth of D.T.'s trial testimony. Therefore, it did not violate *Haseltine*. *See Miller*, 341 Wis. 2d 737, ¶ 15.

For the same reasons, Rich's testimony that he saw "deceptions or lies" in Pico's responses during the interview did not violate *Haseltine*. *See Smith*, 170 Wis. 2d at 718. Rich did not attest to Pico's truthfulness at trial; rather, Rich explained his interrogation technique and why he conducted the interview as he did. *Id.* LaVoy cannot be deemed deficient or prejudicial for failing to raise meritless objections. *Reynolds*, 206 Wis. 2d at 369.

Pico cannot persuade otherwise. He attempts to distinguish *Miller* by arguing that it only applies to taped statements (Pico's Br. 58), but fails to address *Smith*, which applies to trial testimony and controls here. Further, whether Fincke believed LaVoy should have objected or raised challenges (Pico's Br. 58–59) is irrelevant. Finally, Pico's assertion that *State v. Echols* compels a different conclusion (Pico's Br. 56, 59) fails because it is undeveloped, *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), and because in *Echols*, the witness testified that the defendant was lying at trial, which is distinguishable from the remarks challenged here.[11] 2013 WI App 58, ¶ 25, 348 Wis. 2d 81, 831 N.W.2d 768.

Finally, even if LaVoy had a legal basis to strike or exclude Rich's statements, Pico cannot demonstrate prejudice based on the jury's hearing them. Rich's two statements were brief remarks in this two-day trial; the State did not use them to make its case. Moreover, the court instructed the jury on

[11] To the lower courts, Pico argued that LaVoy should have filed a motion based on *Daubert* challenging Rich's testimony. Other than mentioning Wis. Stat. § 907.02(1) (Pico's Br. 57), Pico does not develop his *Daubert* argument to this Court, so the State does not address it.

its duty to determine credibility (R. 91:190–91), which the jury presumptively followed. *See State v. Maday*, 2017 WI 28, ¶ 52, 374 Wis. 2d 164, 892 N.W.2d 611. Pico's claim fails.

2. Rich's Flayter remark did not violate *Haseltine*.

Rich testified that in his experience, when a child alleges sexual assault, the child is interviewed at the CARE Center in Waukesha "by a very highly trained and qualified individual." (R. 91:79.) He noted that Sarah Flayter, D.T.'s interviewer, "is among the best in the state." (R. 91:79.) Pico maintains that LaVoy was ineffective for not filing a pretrial motion in limine excluding the comment calling Flayter "the best" or for not contemporaneously objecting. Because LaVoy had no basis to do either of those things, he was not ineffective.

As for a motion in limine, Rich's remark that Flayter was "among the best in the state" was a surprise that LaVoy could not have reasonably anticipated through a pretrial motion in limine (R. 96:31), and accordingly LaVoy cannot be deemed deficient as a result.

As for an objection under *Haseltine*, LaVoy was not deficient for two reasons. First, counsel's decision to not contemporaneously object to testimony is not deficient if it reflect as reasonable trial strategy. *See State v. Jacobs*, 2012 WI App 104, ¶ 30, 344 Wis. 2d 142, 822 N.W.2d 885 (stating that when a defense attorney is surprised by testimony, counsel must weigh the worth of the objection). Here, LaVoy noticed the statement when it occurred but did not want to highlight it, in part because Flayter had already testified at the point Rich made it. (R. 96:30–31.) That decision was reasonable and not deficient.

Second, an objection under *Haseltine* would have failed. When Detective Rich called Flayter "among the best," he simply stated that she was a skilled CARE interviewer. He did not comment on her truthfulness or credibility as a witness. Thus, any objection under *Haseltine* would have failed, and LaVoy was not deficient or prejudicial for failing to advance it.

Further, even if LaVoy should have objected, Flayter's testimony simply served to introduce the CARE interview and explain the Step-Wise protocol, not to establish any disputed, material facts regarding D.T.'s claims. Moreover, Rich's remark was a blip in a two-day trial: it occurred once, it was brief, and neither party highlighted it. Hence, Pico cannot demonstrate that but for LaVoy's failure, the result would have been different. *Richter*, 562 U.S. at 111.

The circuit court's decision does not assist Pico. (Pico's Br. 54–59.). Without assessing whether a motion in limine or *Haseltine* objection would have succeeded, the circuit court summarily concluded that LaVoy was deficient and prejudicial, remarking that it was a "small statement," but there was "no room for error" in cases where the defense did not present witnesses. (R. 98:19–20.)

The court's "no room for error" remarks contradict *Strickland*'s mandate that courts afford counsel a "strong presumption" that the challenged action may be sound trial strategy. *Strickland*, 466 U.S. at 689. And regardless of the chosen defense strategy, *Strickland* contemplates that reasonably competent representation does not mean error-free representation. *See Richter*, 562 U.S. at 110; *Thiel*, 264 Wis. 2d 571, ¶ 19. The question is not whether counsel committed any errors but whether the errors were deficient and substantially likely to change the result.

In sum, LaVoy was not deficient or prejudicial in any of the above three respects.

E. LaVoy was not ineffective in regard to Flayter.

Pico thinks that LaVoy should have raised challenges regarding Flayter in two respects: (1) he faults LaVoy for not retaining an expert to challenge how Flayter conducted the CARE interview, specifically for failing to clarify D.T.'s meaning when she said Pico touched her "down here," and (2) he believes LaVoy should have challenged Flayter's testimony that, in his view, implied that children of D.T.'s age were not suggestible. Neither claim has merit.

1. LaVoy was not ineffective for failing to challenge how Flayter conducted the interview.

Pico insists that LaVoy should have presented an expert on the Step-Wise protocol that Flayter used in the interview. His primary concern, and the only one the circuit court addressed, focused on D.T.'s statement during the interview that Pico touched her "down here." Pico claims that Flayter did not clarify what D.T. meant by that statement, and argues that expert testimony could have highlighted that fact. (Pico's Br. 49–50.)

LaVoy was not deficient. Counsel is entitled to formulate a reasonable strategy and to balance limited resources in accordance with effective trial tactics and strategies. *Richter*, 562 U.S. at 106. LaVoy did that here. LaVoy was familiar with the Step-Wise protocol and had retained experts to challenge such interviews before. (R. 96:25–26.) After reviewing the video, he 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." (R. 96:26.)

That decision was reasonable with respect to D.T.'s "down here" statement. The video shows that Flayter prompted D.T. to clarify what she meant. Early in the CARE interview, D.T. told Flayter that Pico had stuck his hand down her pants. (R. 83:2:09:59:58–10:00:40). When Flayter asked what part of her pants Pico had put his hand down, D.T. said "down here" and indicated her waistband near her stomach. (*Id.* at 10:07:17–24.) Flayter asked what Pico's hand touched once it was 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 of or under her underwear; D.T. said, "Under" and that Pico's fingers were rubbing back and forth. (*Id.* at 10:07:45–54; 10:08:01–06.) Flayter asked if D.T. had a name for her body part that Pico rubbed; D.T. said she forgot. (*Id.* at 10:08:08–13.) Flayter then asked what D.T. did with the body part Pico was touching; D.T. said that she went "to the potty" with it. (*Id.* at 10:08:13–19). Shortly after, Flayter also asked D.T. to circle on a diagram of a child's body where Pico's hand touched her, and D.T. circled the crotch area. (*Id.* at 10:17:00–42; 31:4.)

Given that, LaVoy's assessment and decision to not challenge the CARE interview was reasonable and not deficient. *See Strickland*, 466 U.S. at 690.

The *Machner* testimony from Dr. Yuille, who developed and taught the Step-Wise protocol, does not compel a different conclusion. (Pico's Br. 49–51.) While Dr. Yuille first testified that when D.T. said that Pico put his hand "down" her pants, "[n]o effort was made to determine what this actually referred to" (R. 96:131–32), he also said that Flayter conducted the interview well and followed the Step-Wise protocol. Indeed, in

his report, he called the lack of clarity on "down" the "one shortcoming" of the interview. (R. 96:144; 83:D:5.) Even so, when pressed for specifics, Yuille conceded that D.T. clarified that when she said "down here," she meant Pico's hand touched her where she went potty, and she circled the figure's vaginal area on the diagram. (R. 96:146.)

Nor did the circuit court's findings support the conclusion that LaVoy was deficient. (Pico's Br. 53–54.) Here, the court found that Dr. Yuille believed that Flayter's interview technique was overall appropriate, but that she should have clarified what D.T. meant by "down here." (R. 98:17–18.) 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." (R. 98:18.) The court then appeared to conclude that LaVoy was deficient, stating that "certainly in an investigation process, a lawyer in a case such as this would call a witness for investigation purposes, by calling the witness to determine how best to approach the interview and how best to approach the examination of Ms. Flayter when she was examined with regard to the interview." (R. 98:19.) It did not address prejudice.

To start, the court's finding as to LaVoy's belief was clearly erroneous. LaVoy never testified or agreed that the "hands-down-pants concept . . . should have been clarified." (R. 98:18.) Rather, LaVoy agreed when asked that "Flayter did not give an explanation of what 'down the pants' meant specifically," and he acknowledged that Pico's expert, Dr. Yuille "thought that should have been clarified." (R. 96:94.) But LaVoy simply agreed that *Yuille* thought that its meaning should have been clarified, not that *LaVoy* thought so. As the court of appeals wrote, "It was not up to Flayter to

give an explanation, but to *get* an explanation from D.T. as to what she meant, and Flayter did." (R. 99:35.)

In any event, Pico failed to demonstrate prejudice, and the court's findings do not compel a different conclusion. The jury saw the video and saw D.T. clarify by words and gestures what she meant by "down." Contrary to Pico's claim, LaVoy had no good "reason . . . to call such an expert" as Dr. Yuille (Pico's Br. 54); if LaVoy had done so, the jury would have heard Dr. Yuille testify that Flayter conducted the interview well, that she followed the Step-Wise protocol, that she appropriately asked non-leading, nonsuggestive questions, and that the interview was "devoid of suggestion." (R. 99:34.)

On prejudice, Pico writes that if the jury heard Yuille's criticism of the interview, it likely would have "found Yuille's testimony more credible and found D.T.'s testimony and interview not credible." (Pico's Br. 52.) But that argument assumes the jury would have understood Yuille's statements that Flayter ultimately had D.T. clarify what she meant by "down" as criticism. Moreover, it speculates that the jury would not have balanced that remark with its view of the video and Yuille's opinion that Flayter conducted the interview well. Such speculation is not enough to establish prejudice. *See Erickson*, 227 Wis. 2d at 774.

2. LaVoy was not ineffective regarding Flayter's remark on suggestibility.

Pico's next claim centers on Flayter's testimony stating that suggestibility—i.e., the quality of being easily influenced to believe that false information is true—is "mainly a concern for preschool children" and that kindergarteners and younger children were especially susceptible to it. (R. 90:227.) Pico claims that LaVoy should have done more through an expert

or objection to challenge Flayter's remark because, in his view, it implied that a child of D.T.'s age is not suggestible and that D.T. was credible.

To start, LaVoy was not deficient because Flayter's statement was true. *See State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (counsel is not deficient for failing to pursue meritless objection or motion). As Flayter stated and Dr. Yuille agreed, everyone is suggestible, but the risk of suggestibility decreases with age. (R. 96:134, 151, 186–87.) Hence, preschoolers are generally more suggestible than second graders. Against that background, Flayter testified that suggestibility is "mainly a concern" for preschoolers, but clarified any misconceptions when she responded to LaVoy's follow-up question that "anyone is open to suggestibility." (R. 90:227.) Her testimony was correct and did not form the basis for competing expert testimony or another challenge.

In addition, LaVoy articulated a reasonable strategic decision to not challenge Flayter's statement: while her remark "stuck out" at him, he did not want to highlight a true statement that he could not refute. (R. 96:27.) That was a reasonable trial tactic based on rational judgment, not caprice.[12] *See Domke*, 337 Wis. 2d 268, ¶ 49.

And Pico cannot demonstrate prejudice. To start, jurors take into account matters of common knowledge and experience in weighing evidence presented at trial. *See State v. Poellinger*, 153 Wis. 2d 493, 509, 451 N.W.2d 752 (1990). Here, even if the jurors thought Flayter meant that eight-year-olds were never suggestible and—contrary to their

[12] Pico notes that LaVoy also mistakenly articulated that he did not press Flayter based on D.T.'s testimony showing her suggestibility, even though D.T. had not yet testified. (Pico's Br. 53.) But even if D.T.'s demonstrated suggestibility could not support LaVoy's decision, it supports the conclusion that Pico was not prejudiced.

personal knowledge of and experience with eight-year-olds—believed her, they observed firsthand D.T.'s demonstrated suggestibility in response to LaVoy's questions, including her agreement when LaVoy suggested that Pico only touched around her waistband and that he never rubbed anything inside her pants. Given that, Pico was not prejudiced based on Flayter's remark.

Pico also argues that LaVoy should have had an expert ready to challenge Flayter's statement on suggestibility. (Pico's Br. 52–54.) But just as he was not constitutionally required to have an expert challenging Rich's "among the best" statement, LaVoy was not constitutionally required to have an expert on deck in case Flayter said something objectionable.

Finally, the circuit court did not make clear findings on this issue, other than general remarks that LaVoy believed he brought out D.T.'s suggestibility on cross. (R. 98:18.) It did not make an express holding regarding deficiency or prejudice. Accordingly, there is nothing in the circuit court's decision on this issue to support Pico's position.

F. LaVoy was not ineffective based on the potential good and 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 routinely rubbed his daughter's leg to explain why Pico was rubbing D.T.'s leg; and (2) failing to investigate the good and bad touch lesson that D.T.'s class had been taught to support expert testimony that false reporting of assaults can increase after such lessons. (Pico's Br. 60–62.)

1. LaVoy was not ineffective with regard to the leg massage evidence.

LaVoy was not deficient because his decision to forgo the leg massage evidence was a reasonable strategic decision. Here, Michelle Pico testified that their daughter has a sensory disruption and processing disorder; when she becomes anxious as a result of the disorder, Pico and Michelle massage her leg to calm her. (R. 96:199–200.) Before trial, LaVoy was aware of this information. (R. 96:37.) He considered "quite a bit" whether to introduce testimony that Pico massaged his daughter's leg, and had multiple conversations with the Picos and other lawyers about it. (R. 96:37–38.) He decided to not introduce that evidence because he had lost a motion to introduce character evidence that Pico was "gregarious and very kind of touchy-feely with kids." Without that evidence, he saw the leg-massage evidence as "very problematic" because it lacked context and could backfire by concerning jurors that Pico was being inappropriate with his daughter. (R. 96:38.) That was a reasonable strategy and not deficient.

Pico's arguments to the contrary are not persuasive. He asserts that the strategy did not make sense because the jury needed some explanation why Pico was touching D.T.'s leg. (Pico's Br. 61–62.) But Pico's rubbing his daughter's leg would not have explained why he rubbed D.T.'s leg. Pico rubbed his daughter's leg to soothe her when she had anxiety from her sensory-processing disorder. D.T. was not Pico's daughter, did not have a sensory-processing disorder, and was not in need of soothing during the class. Indeed, Pico never claimed that he was touching D.T.'s leg to soothe her. When Pico first talked to Rich, he said that he was tickling D.T after she asked him to. In any event, he consistently acknowledged that touching D.T. was inappropriate and it made her uncomfortable. Moreover, his massaging his daughter's leg

would not have explained why Pico's hand was near D.T.'s waistband, a point that LaVoy reasonably did not want the jury to focus on.

For the same reasons, Pico cannot demonstrate prejudice. As noted above, the leg massage evidence was dissimilar to the circumstances of Pico's touching D.T.'s leg; it was not substantially likely to have affected the verdict because it would not have explained why Pico touched D.T.'s leg and risked focusing the jury on potentially harmful facts.

2. LaVoy was not ineffective for failing to obtain evidence that D.T. had recently learned about good and bad touches.

A defendant alleging ineffective assistance for failure to investigate "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." *State v. Leighton*, 2000 WI App 156, ¶¶ 38–39, 237 Wis. 2d 709, 616 N.W.2d 126. Here, because Pico never obtained or presented at the *Machner* hearing the materials he faults LaVoy for not obtaining, he cannot prove deficient performance or prejudice.

In any event, Pico cannot prove deficient performance on this record. Again, counsel's "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. Here, LaVoy "thought about [the recently taught good and bad touch unit] a lot" and talked with Pico, his family, and other lawyers at his firm about it. (R. 96:34–35.) Ultimately, "[w]e all agreed that [it] was not a good avenue to go down." (R. 96:35.) If the jury knew that D.T. had just learned the difference between a good and bad touch, it could easily conclude that she understood the differences, which would

have been "a very big negative." (*Id.*) That was a reasonable strategic decision that Pico endorsed and is entitled to deference. *See Strickland*, 466 U.S. at 690 (strategic decisions by counsel are invulnerable to second-guessing); *Breitzman*, 2017 WI 100, ¶ 77 (a defendant cannot challenge an agreed-upon strategy that was reasonable at the outset).

Nor can Pico prove prejudice. He argues that if LaVoy investigated the materials, he could have presented evidence from Yuille that both true and false disclosures increase after such lessons. (Pico's Br. 60.) He asserts that D.T. "may have made [a] false disclosure due to the unit." (*Id.*) But the evidence at the *Machner* hearing was that *all* disclosures increased after such units; there was no evidence that false disclosures disproportionately increased or exceeded the true ones. Moreover, the jury was aware that D.T.'s disclosure was possibly false. Indeed, determining whether her disclosure was true was the point of the police investigation, the CARE interview, and the trial. Had the jury learned that all disclosures increase after good and bad touch lessons, nothing would have changed; the jury could have easily believed D.T. fully understood "bad touch" due to her recent lesson on it. Pico was not prejudiced.

Finally, nothing in the circuit court's decision supports the conclusion that LaVoy was ineffective. The circuit court seemed to fault LaVoy for not obtaining the good and bad touch materials (R. 98:21), but it did not explain what LaVoy would have discovered or address LaVoy's strategic decision to avoid the issue. LaVoy was not ineffective on this basis.

G. Pico failed to establish cumulative prejudice.

This Court may consider whether the aggregate effects of counsel's deficiencies establish cumulative prejudice. *Thiel*, 264 Wis. 2d 571, ¶ 60. That said, "a convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial." *Id.* ¶ 61. "[I]n most cases errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." *Id.* In addition, only actual deficient errors are "included in the calculus for prejudice." *Id.*

Here, because LaVoy was not deficient in any of the above alleged respects, there are no errors to include in the calculus of cumulative prejudice. *Id.* The circuit court's conclusion to the contrary (R. 98:28) is wrong. Even assuming LaVoy was deficient in any of the above respects, Pico cannot satisfy his burden of establishing cumulative prejudice.

The State's case was compelling and Pico received a fair trial. The issue in this case boiled down to a credibility contest between D.T. and Pico. *Cf. Domke*, 337 Wis. 2d 268, ¶ 57 (stating that in sex assault case hinging on credibility of the victim, the State had a "very strong case"). The State presented D.T.'s detailed explanation of Pico's assaults through the CARE Center interview, along with corroborating testimony from her mother and Jens that D.T. was consistent in her allegations. D.T.'s mother also testified to the change she saw in D.T. before she disclosed and D.T.'s distress when she disclosed what happened. Further, D.T. testified that what she said in the CARE interview was true.

Although D.T. offered several inconsistent details—including denying that the crime occurred—in response to LaVoy's well-crafted questions, her allegations were believable because she had no reason to fabricate them; in fact, she had all the reason in the world to pretend the assaults never happened. She explained that Pico's daughter was her close friend and that she still "kinda liked" Pico. She acknowledged that she testified inconsistently in response to LaVoy's questions, but the State aptly emphasized that D.T. was a third grader who never testified in court before, let alone testified about acts that left her personally "embarrassed" to discuss, and that impacted many people she liked and cared about. Despite all of that, though, in the end she reiterated that what she had said to her mother, to Jens, and to Flayter in the CARE interview was correct and that Pico had twice touched her where she "went potty."

Thus, the State provided a compelling explanation for D.T.'s inconsistencies based on her youth, her inexperience, the intimidating nature of the proceedings, and the fact that she was accusing her friend's father of a serious crime.

Of Pico's claims asserting that LaVoy should have done more to challenge D.T.'s credibility—i.e., the Flayter interview, suggestibility, good/bad touch, Rich testimony—none would have provided an explanation or motive for D.T. to have made false allegations. Moreover, each of those theories would have been at best a double-edged sword requiring the jury to focus on evidence negative to Pico. Even combined, they were not likely to favor Pico's defense, let alone make a different result substantially probable.

And as for any deficiency regarding Pico's 20-year-old brain injury, Pico was not prejudiced because that was an inconsistent and improbable defense that LaVoy had no logical reason to advance. *See, e.g.*, *Kimbrough*, 246 Wis. 2d

648, ¶ 32 (decision to advance one defense over multiple inconsistent defenses was reasonable); *State v. McDowell*, 2004 WI 70, ¶ 64, 272 Wis. 2d 488, 681 N.W.2d 500 (noting that McDowell's implausible proposed defense supported conclusion that he was not prejudiced). As noted, an alternative defense that Pico had a 20-year-old brain injury that seemingly did not affect him in any meaningful way except for a five-to-ten minute period with D.T. risked confusing the jury and undercutting Pico's primary defense that the assaults did not occur.

Pico suggests that there was cumulative prejudice here (Pico's Br. 21, 61), but he does not develop an argument on this point. He has failed to demonstrate prejudice on any of these claims, individually or cumulatively. This Court must affirm the court of appeals.

II. *Strickland* expert testimony is improper at *Machner* hearings.

This Court should hold that the circuit court's admission of Attorney Fincke's testimony at the *Machner* hearing was improper as a matter of law, because the court is the only expert on matters of domestic law and such testimony cannot assist a court assessing *Strickland* matters.

To start, *Strickland* expert testimony is not necessary to assist the court at *Machner* hearings. In Wisconsin, "expert testimony is not necessary to assist the trier of fact concerning matters of common knowledge or those within the realm of ordinary experience." *Racine County v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶ 28, 323 Wis. 2d 682, 781 N.W.2d 88. Indeed, "if the court or jury is able to draw its own conclusions without the aid of expert testimony, 'the admission of such testimony is not only unnecessary but improper.'" *Id.* (quoting

Cramer v. Theda Clark Mem'l Hosp., 45 Wis. 2d 147, 151, 172 N.W.2d 427 (1969)).

In a *Machner* hearing, the trier is the court, which is "the only 'expert' on domestic law." *See Wisconsin Patients Compensation Fund v. Physicians Ins. Co. of Wisconsin, Inc.*, 2000 WI App 248, ¶ 8 n.3, 239 Wis. 2d 360, 620 N.W.2d 457. Accordingly, at a *Machner* hearing, the court is equipped draw its own conclusions on the legal question whether trial counsel's performance was constitutionally deficient. Hence, the admission of *Strickland* expert testimony "is not only unnecessary but improper." *See Oracular Milwaukee*, 323 Wis. 2d 682, ¶ 28.

The court of appeals applied that reasoning when it rejected the court's admission of a *Strickland* expert in *State v. McDowell*, 2003 WI App 168, ¶ 62 n.20, 266 Wis. 2d 599, 669 N.W.2d 204. There, the court of appeals observed that a *Strickland* expert provided his opinion at the *Machner* hearing on whether counsel performed reasonably; the court deemed that testimony improper: "we reiterate that no witness may testify as an expert on issues of domestic law." *Id.* (citing *Wisconsin Patients Compensation Fund*, 239 Wis. 2d 360, ¶ 8 n.3).

Federal courts likewise deem *Strickland* expert testimony improper because the reasonableness of counsel's performance is a legal question for the court to decide. *See, e.g.*, *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998). Because of that, *Strickland* expert testimony opining on the reasonableness of counsel's actions is irrelevant: "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." *Id.*; *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.").

Moreover, *Strickland* expert testimony cannot satisfy admissibility standards. Expert testimony is admissible provided that the witness is "qualified as an expert by knowledge, skill, experience, training, or education," and the testimony is helpful, i.e., if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Wis. Stat. § 907.02.

Strickland expert testimony offered at a *Machner* hearing can never satisfy the helpfulness requirement under section 907.02 for at least two reasons. First, a *Strickland* expert cannot assist the trier of fact—i.e., the court—to understand the evidence at a *Machner* hearing. The objective standard of care is provided in *Strickland* and ineffective assistance case law. Courts also look to the ABA standards for guidance. *See State v. Ortiz-Mondragon*, 2015 WI 73, ¶ 85, 364 Wis. 2d 1, 866 N.W.2d 717. But an individual attorney's opinion of what challenged counsel should have done cannot assist a court in determining whether challenged counsel performed within the wide range of competent assistance. That is so because "[t]here 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.

Second, a Strickland expert cannot assist the court in determining facts in issue, because the facts in issue at a *Machner* hearing are the facts available to counsel at the time of the challenged representation. A *Strickland* expert, by definition, has no firsthand knowledge of those facts and what counsel did at the time. Accordingly, for an expert to speculate on what should have happened runs counter to *Strickland*'s mandate for courts to make "every effort . . . 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." *Strickland*, 466 U.S. at 689.

Applying the facts here, the circuit court's admission of Attorney Fincke's testimony was contrary to the legal standards in *McDowell* and Wis. Stat. § 907.02. Here, when Pico sought to admit testimony by Fincke regarding the objective standard of care for criminal defense attorneys (R. 95:4–5), the State objected (R. 61), and Pico responded that 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." (R. 62.) The court circled that sentence in Pico's letter and wrote, "So ordered." (*Id.*) That decision was wrong because it was not based on an examination of the relevant facts, application of the legal standard, or based on a "demonstrated rational process." *Shomberg*, 288 Wis. 2d 1, ¶ 11.

Pico cites no authority compelling a different conclusion. (Pico's Br. 72–73.) *State v. LaCount* did not involve a *Strickland* expert and is not analogous. 2008 WI 59, ¶ 21, 310 Wis. 2d 85, 750 N.W.2d 780. The malpractice cases[13] are inapt because a jury lacks expertise on an attorney's standard of care. Of the *Strickland* cases Pico invokes, the courts mentioned that an expert on ineffectiveness testified without

[13] *See* Pico's Br. 72–73 (citing *Helmbrecht v. St. Paul Insurance Co.*, 122 Wis. 2d 94, 112, 362 N.W.2d 118 (1985), *Pierce v. Colwell*, 209 Wis. 2d 355, 362, 563 N.W.2d 166 (Ct. App. 1997), *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 382, 541 N.W.2d 753 (1995), *Talmage v. Harris*, 354 F. Supp. 2d 860, 866 (W.D. Wis. 2005)).

addressing the content or necessity of the testimony,[14] or the soundness of its admission.[15] But Pico has not identified, nor can the State find, any cases in which courts endorse or justify admitting *Strickland* expert testimony in hearings on ineffective assistance claims.

Finally, Pico's claim that Fincke's testimony did not make any difference in the court's decision (Pico's Br. 74–75) is at odds with the rest of his brief, in which he uses Fincke's testimony to support his ineffective assistance arguments. (Pico's Br. 35–36, 45, 58, 62). He also ignores the portions of the court's decision where it relied on Fincke's testimony, including the failure to obtain the records (R. 98:13) and the evidentiary grounds (R. 98:19–20). Since the circuit court largely based its decision to grant Pico's motion on LaVoy's not seeking the medical files (R. 98:28–29), one cannot fairly say that Fincke's testimony had no effect.

In sum, this Court should clarify that *Strickland* expert testimony is unnecessary and inadmissible as a matter of law in *Machner* hearings.

III. Because the circuit court denied Pico's sentencing claim, and Pico did not cross-appeal, the claim is not properly before this Court.

A person initiates an appeal by filing a notice of appeal identifying the judgment or order from which the person is appealing. Wis. Stat. § 809.10(1)(b). An appeal from a final judgment or final order is not limited to matters in that judgment or order; rather, it "brings before the court all prior nonfinal judgments, orders and rulings *adverse to the*

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[14] *See Banks v. Reynolds*, 54 F.3d 1508, 1513 (10th Cir. 1995), *Weddell v. Weber*, 604 N.W.2d 274, 282 (S.D. 2000).

[15] *See, e.g., Earp*, 623 F.3d 1065, 1073 (9th Cir. 2010).

appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." Wis. Stat. (Rule) § 809.10(4) (emphasis added).

Accordingly, when an appellant files a notice of appeal, a respondent wishing to seek modification of a final or nonfinal judgment or order in the same proceedings must do so by filing a notice of cross-appeal within 30 days of the notice of appeal. Wis. Stat. (Rule) § 809.10(2)(b). The only exception occurs "when all that is sought is the raising of an error which, if corrected, would sustain the judgment . . . ." *Auric v. Continental Cas. Co.*, 111 Wis. 2d 507, 515, 331 N.W.2d 325 (1983). In those situations, a respondent may argue that the circuit court was "right for the wrong reason" to sustain the judgment. *Id.* (citing *State v. Alles*, 106 Wis. 2d 368, 391, 316 N.W.2d 378 (1982)).

Here, the circuit court ruled adversely to Pico on the sentencing issue in the same oral hearing in which it granted him a new trial. On the *Scales* issue, the court saw some of the sentencing court's remarks as "problematic," but held that the sentencing court overall soundly considered and applied the sentencing factors and did not violate *Scales*. (R. 98:27–29.) The written order entered after its oral decision stated that it granted Pico's motion "for reasons stated on the record [in its oral decision]," and ordered a new trial, and vacated the sentence. (R. 73.)

Had the State not appealed that order, Pico is correct that he had nothing to appeal; the grant of a new trial made the sentencing decision moot. But once the State appealed, Pico was on notice that the court of appeals could reverse the grant of a new trial, which would mean the adverse sentencing ruling was no longer moot. Hence, he needed to cross-appeal that order to get the sentencing claim and any other adverse decisions before the court of appeals. Wis. Stat. (Rule) § 809.10(2)(b), (4).

Instead of cross-appealing, Pico raised the sentencing claim in his court of appeals brief; that was improper because the claim was not a right-for-the-wrong-reason argument to sustain the circuit court's judgment.

Pico suggests that the circuit court ruled in his favor and granted him "a new sentencing, implicitly in the alternative." (Pico's Br. 65–66.) That is not what the court said or implied. Further, Pico's now-stated belief is inconsistent with his raising and seeking relief on the sentencing issue in his court of appeals brief.

Relatedly, Pico asserts that he had "no legal basis to cross-appeal" because the ruling on the sentencing issue "essentially dicta until the Court of Appeals reversed the order for a new trial." (Pico's Br. 67.) But dicta is nonbinding language in an appellate decision that does not "address . . . the question before" that court "or [that is not] necessary to its decision." *American Family Mut. Ins. Co. v. Shannon*, 120 Wis. 2d 560, 565, 356 N.W.2d 175 (1984). If Pico means that the circuit court's adverse decision on the sentencing issue was *moot* because it granted a new trial, as explained above, he still had to cross-appeal to obtain review of that issue.

Finally, even if Pico's *Scales* claim is properly before this Court on appeal, it lacks merit. A sentencing court cannot solely rely on a defendant's refusal to admit guilt in setting its sentence. *Scales v. State*, 64 Wis. 2d 485 495–96, 219 N.W.2d 286 (1974). Yet it may consider that refusal as a factor so long as it does not place undue weight on it by imposing greater penalties. *State v. Baldwin*, 101 Wis. 2d 441, 459, 304 N.W.2d 742 (1981). Indeed, a defendant's attitude toward his crime is relevant to the factors sentencing courts must consider, including the defendant's character, his rehabilitative needs, and the public's need for protection. *Id.*

Here, D.T.'s family wanted Pico to acknowledge the crime. Pico made clear that he was not going to do so. (R. 98:22–25.) The sentencing court criticized Pico for not taking responsibility and told him that it would consider whether he "demonstrate[d] remorse" in fashioning its sentence. (R. 92:38.)

The court then addressed the sentencing factors. (R. 92:38–39.) It noted that the gravity of the offense was "very serious" and the public needed protection from his conduct. (R. 92:39.)

It weighed Pico's character and considered Pico's failure to admit to the crime in addition to his lack of prior offenses or similar conduct, his good employment history, his military service, and his 1992 accident and injury. (R. 92:40–45.) It considered a report opining that Pico was not pedophilic but "might have boundary problems." It credited Pico for his "beautiful family" and their support, it considered the statements of D.T.'s family, and it considered that Pico had no drug or alcohol issues. (R. 92:45, 46.)

It explained that a community-based sentence was inappropriate because that "would . . . leave the community with a sense of concern and fear and risk." (R. 92:45.) It sentenced Pico to six years of confinement and ten years of supervision. (R. 92:48.) That was less confinement than the State (eight years) and the DOC PSI writer (seven to nine years) recommended (R. 92:9–10), and the 16 years were well below the 60-year maximum Pico faced. In all, the court sentenced Pico on a host of factors and appropriately considered his refusal to admit to the crime.

CONCLUSION

This Court should affirm the decision of the court of appeals reversing the circuit court's order and reinstating the judgment. This Court should also hold that *Strickland* expert testimony is improper at *Machner* hearings.

Dated this 21st day of December, 2017.

Respectfully submitted,

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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 and this Court's order allowing me to file a brief no more than 15,000 words in length. The length of this brief is 14,891 words.

_____
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of December, 2017.

_____
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