STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1852-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD LEE GILBERT,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS CIMPL AND THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

BRAD D. SCHIMEL
Wisconsin Attorney General

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

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ISSUES PRESENTED

The State reframes the issues.

1. In a postconviction motion, Gilbert alleged that his trial counsel was ineffective for failing to object to a detective's rebuttal testimony about the location of his cell phone. At an evidentiary hearing, experts disagreed about the evidence regarding the cell phone's location. The circuit court determined that the detective's testimony was not erroneous and the totality of evidence was strong. The circuit court therefore did not conduct a *Machner*[1] hearing on trial counsel's failure to object to the detective's rebuttal testimony. (R.84:4; 107:55.) Did Gilbert establish that he was entitled to a *Machner* hearing?

The circuit court answered: No.

This Court should answer: No.

2. Did Gilbert's postconviction motion sufficiently allege that he was entitled to a *Machner* hearing on several other claims of ineffective assistance of counsel, including: (a) trial counsel's failure to obtain critical discovery before trial; (b) trial counsel's failure to impeach the State's witnesses with their prior inconsistent statements; (c) trial counsel's failure to strike an impartial juror; (d) trial counsel's comments during closing argument?

The circuit court answered: No.

This Court should answer: No.

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

INTRODUCTION

A jury found Ronald Lee Gilbert guilty of trafficking a child, JDE, a fourteen-year-old girl, contrary to Wis. Stat. § 948.051(1), second-degree sexual assault of JDE, contrary to Wis. Stat. § 948.02(2), and physical abuse of JDE by intentional causation of bodily harm, contrary to Wis. Stat. § 948.03(2)(b). (R.1:1; 36:1.)

Gilbert moved for postconviction relief on the ground that his trial counsel was ineffective. The circuit court conducted a hearing to determine whether Gilbert's counsel was ineffective for failing to object to a detective's rebuttal testimony regarding the location of his cell phone. After taking testimony from experts, the circuit court determined Gilbert failed to show that the detective's rebuttal testimony was erroneous. It also found that Gilbert's expert failed to demonstrate that an independent expert would have successfully cast doubt on the cell site information placed before the jury. (R.84:3.) Further, based on its consideration of the record, including the strength of the evidence against Gilbert, it determined that trial counsel was not ineffective. (R.84:4.)

Because the circuit court determined that the detective's rebuttal testimony was not erroneous, the circuit court did not conduct a *Machner* hearing with counsel's testimony. (R.107:55.) Even if the cell location evidence were erroneous, Gilbert would only be entitled to a *Machner* hearing. But a *Machner* hearing is unnecessary here because Gilbert has not proved prejudice.

The circuit court denied Gilbert's other claims of ineffective assistance of counsel without a hearing. The circuit court properly determined that Gilbert's pleadings were insufficient to entitle him to an evidentiary hearing on those claims. (R.68:4-5; 125:3-6.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties have fully developed the arguments in their briefs and the issues presented involve the application of settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE

I. Trial testimony.

JDE was 14 years old in January 2012. (R.98:4.) She lived in Racine with her mother, SE. (R.98:66; 100:15.)

Brandon Pratchett uses the street name "Woadie-Mac." (R.60:1; 99:35.) Pratchett has known Gilbert since middle school. (R.98:104.) Pratchett referred to Gilbert by a nickname, T-Mac. (R.99:43.) Like Gilbert, Pratchett was also charged with sex offenses against JDE. Under a plea agreement that required Pratchett's cooperation in Gilbert's prosecution, Pratchett pled guilty to soliciting a child for prostitution, and three other felonies were dismissed and read in. (R.98:103; 100:12-13.)

Detective Lynda Stott testified about human trafficking, specifically, the pimp and prostitute subculture known as "The Game." (R.97:38-40.) Stott explained the concept of "choosing up," or changing pimps. (R.97:41.) A "stable" means a situation when a pimp is controlling several girls. (R.97:42.) Pimps will voluntarily sell a girl to another pimp if the girl is causing a problem within the stable. (R.97:42-43.) A pimp often wants the girls in his stable to refer to him as "Daddy." (R.97:44.) The phrase "she's down" refers to a girl who is ready to engage in prostitution dates. (R.97:45.) A pimp may be referred to as a "Mac" or "Mack." (R.97:44-45; 99:44.)

Stott described how pimps and traffickers use the internet, including chat lines and websites like "Back Page" to recruit girls and promote prostitution. (R.97:61-63.) Stott explained that persons engaged in prostitution use hotel rooms to avoid detection by law enforcement and to avoid being robbed. (R.97:64-65.)

Pratchett testified that approximately two months before the incident involving JDE, Gilbert visited Pratchett at his residence. Pratchett told Gilbert how the website "Back Page" worked. (R.99:31.) Pratchett had previously posted prostitution-related ads on Back Page. (R.98:109.) Pratchett explained that Gilbert was involved with another woman and prostitution. (R.99:31.) Gilbert talked to Pratchett about how to engage in prostitution. (R.99:31-32.)

Gilbert testified that he was aware of Pratchett's involvement with prostitution. (R.100:59.) Gilbert acknowledged trying to be a pimp. (R.100:59-60.) Gilbert claimed that "years ago" Pratchett tried to show him how to get and put out girls, including through Back Page, but Gilbert denied using the site. (R.100:60.) Gilbert stated that his child's mother prostituted herself a few times when times were hard and that Gilbert and the mother split the money. (R.100:61-62.)

JDE first met Gilbert online in January 2012. (R.98:7.)[2] Gilbert identified himself to JDE with the nickname "P." (R.98:8.) JDE and Gilbert talked about going out to eat and to the mall. Gilbert also told her that he would show her around. (R.98:7.) Gilbert never mentioned prostitution when he picked her up in Racine and took her to

[2] JDE initially described it as a "hot line" through the telephone. (R.98:7.) She later called it a "chat line." (R.98:22, 69.)

Milwaukee. (R.98:72.) JDE claimed that she told Gilbert that she was only 14. (R.98:69.)

Gilbert testified that he had a "chat line" conversation with JDE on the morning of January 7, 2012. (R.100:36, 51.) They exchanged pictures. JDE asked Gilbert to come to Racine and pick her up. (R.100:36.) Gilbert went to Racine. (R.100:38.) According to Gilbert, JDE and JDE's mother both told him that JDE was 19 years old. (R.100:39, 52.) Gilbert denied that he was looking for sex when he spoke to JDE on the chat line. (R.100:52-53.)

JDE recalled that when Gilbert took her to Milwaukee, she went to an Econo Lodge and his house. She believed that Gilbert first took her to his house in Milwaukee. (R.98:9-10.) JDE said that Gilbert took her to the hotel twice on the same day. (R.98:27.)

Gilbert stipulated that on January 7, 2012, he picked up JDE in Racine and took her to an Econo Lodge on South 13th Street in Milwaukee County. (R.100:14.) Gilbert testified that he denied ever speaking to JDE about sex. (R.100:42.) When they were in the car, Gilbert claims that JDE talked about smoking weed. (R.100:39, 54.)

JDE and Gilbert's first visit to the Econo Lodge. JDE recalled stopping at a hotel. Another person, using the name "Waodie Mac" and later identified as Pratchett, was there with his "baby mama."[3] (R.98:27-98.) JDE heard Gilbert say that he wanted to get on "Back Page." (R.98:27.)[4] Gilbert and

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[3] Natisha Shannon is Pratchett's girlfriend and his son's mother. (R.98:106; 99:36.) JDE knew her as "Tisha," but referred to her as Pratchett's "baby mama." (R.98:43.)

[4] JDE later identified Exhibit 4 as the "Back Page" posting used to promote her for prostitution. (R.98:47.) JDE is not the person in the photograph. (R.98:48.) JDE stated that Pratchett and Tisha came up with the words for the post. (R.98:48.) Gilbert

JDE left the Econo Lodge, spending no more than five minutes there. (R.98:29.)

Gilbert told JDE to tell Pratchett that she was 19. (R.98:71.) When JDE first came to the hotel, Pratchett heard JDE state that she was 19 years old. (R.99:54.)

Pratchett testified that on January 7, 2012, he received a telephone call from Gilbert. (R.98:105.) Pratchett told Gilbert that he was at the Econo Lodge at 13th Street and College Avenue with Tisha. (R.98:106-07.) When Gilbert and JDE arrived at the hotel (R.100:40, 41, 45), Gilbert asked Pratchett to post a prostitution-related posting related to JDE on "Back Page" (R.98:109-10).

According to Gilbert, after he used the bathroom (R.100:42), he indicated that he wanted to eat, telling JDE, "let's go" (R.100:44). When JDE did not want to go, Gilbert left the hotel and went home and napped. (R.100:47-48.) He testified that he did not see JDE after that encounter and had no sexual intercourse or any physical contact with her. (R.100:45.)

In contrast, Pratchett testified that Gilbert and JDE left the hotel together. (R.98:110.) After they left, Pratchett called Gilbert and asked him what his intentions were with JDE. Gilbert told Pratchett that he was going to try to "make some money with her," and if he was not successful, he would call Pratchett back. (R.98:111.)

JDE testified that she left with Gilbert but that he did not tell her he was taking her to his house. (R.98:13.) Once there, they sat on a bed in the living room. (R.98:12.) Gilbert took his pants down and JDE "did mouth-to-penis and then we just did it." (R.98:11.) JDE explained that after she had

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participated in creating the ad while they were at the hotel. (R.98:69-70.)

mouth-to-penis sex with Gilbert, they then had "penis-to-vagina" sex. (R.98:13-14.) Gilbert ejaculated after he removed his penis from JDE's vagina. (R.98:15.)

JDE stated that Gilbert then took her to his friend's house in Milwaukee. (R.98:15.) While there, Gilbert told JDE to get on the "hot line" and "to get some money." (R.98:17.) JDE understood that Gilbert wanted her to go on the "hot line" to see if someone was willing to pay her for sex. (R.98:18.) Gilbert told JDE to use the words "pay to play" and JDE understood this to mean that Gilbert was asking her to engage in prostitution activity. (R.98:19.) JDE did not actually talk to anyone when she was on the chat line. (R.98:19.) After JDE got off the line, JDE and Gilbert had oral sex. (R.98:19-20.) Gilbert's friend then entered the living room. (R.98:20.) JDE went with the friend to a backroom. The friend began to pull down his pants. Gilbert had told JDE to charge $60, and JDE asked the friend if he had $60. The friend did not. He pulled up his pants and walked out. (R.98:21.) When Gilbert and JDE left Gilbert's friend's house, JDE told him that she wanted to go home. (R.98:40.) Gilbert told her that the only way that she could go home was if she walked. (R.98:40.)

JDE and Gilbert then went to Gilbert's sister's house in Milwaukee. (R.98:21-22.) Gilbert told JDE to use the phone and call the chat line. (R.98:22.) JDE complied because Gilbert told her to and she was scared. (R.98:23.) JDE stated that she was cut off the chat line when she used the words "paying to play." (R.98:24.) JDE stated that they then returned to the hotel. (R.98:26.)

Gilbert's and JDE's second visit to the Econo Lodge. When Gilbert and JDE returned to the hotel, Pratchett came outside. Gilbert and Pratchett shook hands. Pratchett gave money and a silver piece of car stereo equipment to Gilbert. JDE saw this exchange. Gilbert directed her to go in

Pratchett's hotel room. (R.98:30-31.) JDE later realized that Pratchett had purchased her from Gilbert. (R.98:58.)

Pratchett testified that Gilbert returned to the hotel with JDE. (R.98:112-13.) When Gilbert arrived at the hotel, he called Pratchett and asked him to come outside. (R.98:117.) Gilbert proposed giving up JDE to Pratchett (R.98:113-14), and Pratchett paid Gilbert one hundred dollars and an amplifier for JDE (R.98:113-15). Gilbert told Pratchett that he had had "sexual contact" with JDE and "that she was good." (R.98:115.) Pratchett claimed that JDE had gone to the room when the exchange occurred inside Gilbert's car (R.98:117-18), but later said that JDE was outside the car but did not see the exchange (R.99:47). Gilbert denied that Pratchett paid him money and an amplifier for JDE. (R.100:46-47.)

JDE testified that she never completed a prostitution date for Gilbert, but that she had five or six prostitution-related dates when she was with Pratchett, who kept all the money. (R.98:38.) Pratchett acknowledged that JDE "turned dates" or exchanged sex for money when she was with him. (R.98:119.) Pratchett stated that JDE gave him the money. (R.98:119.) Pratchett explained that he showed JDE how "Back Page" worked, but that JDE "already knew things" about prostitution. (R.98:119.) Pratchett identified Exhibit 4 as the Back Page advertisement posted for JDE. (R.99:17; 137:1.) Pratchett also identified from a photograph a piece of paper with the prices that JDE was to charge for sex. (R.97:54; 99:42-43.)

Gilbert's subsequent confrontation with JDE and Pratchett at the Econo Lodge. JDE testified that approximately three days later, as a "date" was leaving the room, Gilbert showed up at the hotel. (R.98:32, 37.) Gilbert was "drunk" and had a clear liquor bottle in his hand. (R.98:33, 58-59.) Gilbert grabbed her. Pratchett entered and argued with Gilbert. Gilbert then struck JDE in the face.

When JDE ran to a door, Gilbert chased her and punched her. JDE balled up in the corner and covered her head with her arms. Pratchett told Gilbert to stop. (R.98:33.) JDE said that the left side of her face hurt where Gilbert struck her. (R.98:34.) Pratchett took JDE out to the car. Gilbert said "fuck the bitch" as they left. (R.98:35.)

JDE and Pratchett left with Pratchett's friend to buy cigarettes at a gas station. (R.98:36-37.) Gilbert followed them to the gas station and back to the hotel (R.98:37) but then left the area (R.98:37).

Pratchett testified that the encounter happened after Gilbert called him and said he had a client who wanted to spend $800 on JDE. Gilbert offered to split the earnings. (R.99:21.) Gilbert then came to the hotel room unannounced. (R.99:16-17, 18.) Pratchett explained that when he returned to the room from the hotel lobby, JDE and Gilbert were inside. (R.99:18.) Gilbert hit JDE a couple times, punching her with a closed fist and grabbing her by the back of her neck. (R.99:18-19.) Pratchett stopped Gilbert as he was about to kick JDE, who was balled up on the floor. (R.99:19.) Pratchett and JDE left the hotel room and Gilbert followed, calling JDE names. (R.99:20, 22.) Pratchett and JDE got into Pratchett's friend's car. Gilbert followed them to the gas station and back to the hotel. (R.99:25.) Pratchett did not see Gilbert after that time. (R.99:26.) Following this incident, Pratchett told JDE that he had paid Gilbert cash and merchandise in exchange for her. (R.99:27.)

JDE's report to law enforcement. On the fifth or sixth day, JDE left the room and tried unsuccessfully to get a ride from friends. (R.98:44.) A hotel employee gave her a ride to the bus stop. (R.98:45.) A woman stopped to help JDE at the bus stop. She gave JDE $20 and called the police. (R.98:45.)

Following his arrest and before entering into a plea agreement, Pratchett agreed to make a one party-consent

recording to Gilbert. (R.98:89; 99:35-36; Ex. 8.)[5] Pratchett called Gilbert at 414-519-8163 in Detective Stott's presence. (R.99:34; Ex. 8:5m30s.)

Pratchett referred to himself as "Woadie-Mac" and Gilbert as "T-Mac" during the call. (R.60:1; 99:35.) Pratchett told Gilbert that "the little bitch" that he "dropped off" was "only 14." (R.60:1.) Gilbert responded, "She's 14? What you mean?" (R.60:1.) He later stated, "that bitch ain't no . . . 14, bro (inaudible), they probably just want they ho back home . . . I verified all that before I even came and left from Racine. I wouldn't put a ride all the way down there on that shit." (R.60:2.) Gilbert asked Pratchett where JDE was and Pratchett said that she had left. (R.60:2.)

Gilbert asked Pratchett if he had "made yo money back off that ho though, right?" (R.60:2.) Gilbert then complained, "that ho don't work." (R.60:2.) Pratchett asked Gilbert if JDE "wasn't trying to bust no moves for [him]? 'Cause she was on some other stuff with me." (R.60:3.) Pratchett asked, "she ain't catch no money from you out there?" (R.60:3.) Gilbert replied, no. (R.60:3.) Gilbert also

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[5] Exhibit 8 is a DVD in the circuit court file. It does not have a record number affixed to it. The DVD includes several video files of Pratchett's interview with Detective Stott. On opening a DVD folder labeled PAB646IS120113-102011, several files appear, including "x1-20120113103011_PAB646IS120113-03011_000004," an audio/video file. The call appears at approximately 6 minutes and 8 second and terminates at 9 minutes and 19 seconds. (R.99:34-35.) At the circuit court's direction, the State prepared a transcript of the recording, provided a copy to counsel, and submitted it to the circuit court. (R.99:57-58.) The transcript is included in the record. (R.60.) The transcript includes two calls between Pratchett and Gilbert. Only the first call was played at trial. (R.60:1-3.)

told Pratchett that he had "slipped her the couple of dollars . . . and then I just sent her yo' way." (R.60:3.)

Gilbert testified that when he asked Pratchett about making his money back, he was not talking to Pratchett about the exchange of money for JDE. (R.100:63.)

Evidence related to cell phones. When officers arrested Gilbert on January 26, 2012, they seized a cell phone from his person and an amplifier from his car. (R.97:60; 98:93; 99:72.) The cell phone had the number 414-519-8163. (R.99:90.) Detective Stott noted that the word T-Macnifacent appeared on the screen saver. (R.99:91.) Gilbert admitted that this was his phone. (R.100:64; 137:3:Ex. 6.)

Brian Bellin, a US Cellular employee, authenticated records for two cellular telephones, including 414-519-8163, the number that Stott dialed when she placed the one-party consent call between Pratchett and Gilbert. (R.99:34, 63.) Bellin explained that the records show what switch a call is routed through, "not actually the actual cell tower." (R.99:63-64.) Bellin also stated that when a cell phone call is made, it "would connect to the nearest tower." (R.99:65-66.)

Detective Dawn Jones testified that she had prepared almost 50 subpoenas for cell phone records and is familiar with how providers keep their records, including subscriber and cell site information such as switch and tower information. (R.99:76-79.) In response to a subpoena, US Cellular provided Jones with records for Gilbert's cell phone. (R.99:79.) The records for January 7 reflected that Gilbert's cell phone hit off a tower around JDE's residence in Racine between 3:59 p.m. and 4:23 p.m. (R.99:81-82.) Based on cell phone activity, Jones stated that the phone then hit in the City of Milwaukee at approximately 5:01 p.m. (R.99:82.) Jones also noted between 15 and 20 calls were made between Gilbert's phone and Pratchett's phone on January 7,

but could not say who actually used Gilbert's phone. (R.99:84, 86-87.)

In rebuttal, Jones provided additional information about Gilbert's cell phone location on January 7. Jones explained that she took the phone records to a specialty unit in the police department. She observed another officer accurately enter information from the records into a computer. (R.101:21-22, 25.) The computer then generated maps that showed the location where the phone was located. (R.101:24-25.) Ten maps were created that were part of Exhibit 15, which was marked and received into evidence. (R.101:23, 43-44; 139:1-10.) Each map shows a circle split into three sectors, one of which is highlighted in blue, which Jones stated was where the phone was located. (R.101:27; 139:1-10.) Jones stated that the sector spans an area of 120 feet. (R.101:27, 39.) Jones then went through the maps one through six and nine, and identified the time and the sector location for the telephone,[6] as summarized below:

Map	(R.#)	Time	Location
1	(R.101:26-27; 139:1)	3:59 p.m. – 4:29 p.m.	Racine
2	(R.101:28-31; 139:2)	5:01 p.m.	Ryan Road and Hwy 41, Oak Creek & Milwaukee
3	(R.101:34-35; 139:3)	8:20 p.m.	Townsend & Fond du Lac, Milwaukee
4	(R.101:35-36; 139:4)	10:17 p.m.	Holt Avenue and Hwy 43, Milwaukee
5	(R.101:36-37; 139:5)	11:21 p.m.	Milwaukee (south side) and West Allis

[6] Map 7 related to location information the following day. (R.101:39.) Map 8 and 10 were not discussed. (R.101:39-40.)

6	(R.101:37-38; 139:6)	11:58 p.m. – 11:59 p.m.	18th & College, includes area of Econo Lodge
9	(R.101:40-41; 139:9)	6:25 p.m. to 7:29 p.m. on 1/7/12	

Jones also reviewed telephone records and determined that calls were exchanged between Gilbert and Pratchett at 8:20 p.m., 11:21 p.m., and 11:58 p.m. on January 7. (R.101:35, 36, 38.) With respect to the ninth map, Jones testified that there were calls from Gilbert's telephone to various chat lines between 6:25 p.m. and 7:29 p.m. (R.101:41-43.) Jones did not testify about the phone's location with respect to the ninth map.

II. Postconviction proceedings.

Following his conviction, Gilbert moved for postconviction relief (R.45) and supplemented his postconviction motion twice (R.115, 129). Gilbert raised numerous issues. He alleged trial counsel was ineffective for failing to challenge the cellular phone data presented as impeachment evidence. (R.45:13.) He asserted that trial counsel was ineffective for failing to obtain discovery before trial and failing to cross-examine and impeach JDE with a prior statement. (R.45:13.) In a supplemental motion, Gilbert claimed trial counsel was ineffective for failing to strike a biased juror and for referring to him as a scumbag in closing argument. (R.115:11-13.)

The circuit court granted Gilbert an evidentiary hearing on his trial counsel's failure to object to the rebuttal testimony concerning cellular telephone data. (R.68:1.) Gilbert presented the testimony of an expert, Michael O'Kelly, who questioned the reliability of the maps based on his understanding that cellular phones do not always transmit through the nearest tower. (R.106:21, 37-39, 52.)

Brian Brousseau, a Milwaukee police officer, who had experience tracking cellular telephones and mapping cellphone information in Milwaukee, testified to his creation of the maps and their accuracy. (R.106:80-108; 107:4-30.) At the conclusion of the hearing, the circuit court indicated that it would not proceed with a *Machner* hearing until it resolved the question of whether the rebuttal testimony was erroneous. (R.107:55.)

The circuit court denied Gilbert's challenge regarding the rebuttal testimony. (R.84:4.) The circuit court found that the officer did not testify as an expert and relied on Brousseau's maps. (R.84:2.) The circuit court noted that O'Kelly's own maps revealed the same geometric projections and data as Brousseau's, thus validating Brousseau's analysis. Further, the circuit court also noted that O'Kelly had not visited the area and was unfamiliar with its phone usage or the area's population and building density. In contrast, Brousseau testified that he accounted for this information when he created the maps. (R.84:3.) The circuit court determined that Gilbert failed to show that the information presented to the jury was erroneous. (R.84:3-4.)

Because the circuit court determined that Jones's testimony was not erroneous and was, therefore dispositive, the circuit court did not conduct a *Machner* hearing at which Gilbert's counsel testified. (R.107:55.)

The circuit court rejected Gilbert's other ineffective assistance of counsel claims without a hearing. (R.68:3-5.) Relying on an affidavit of trial counsel, the circuit court determined that trial counsel had obtained relevant discovery before trial, including the one-party consent recording and cell tower location maps. (R.68:5.) With respect to Gilbert's claim that trial counsel failed to impeach JDE with her prior statement in a police report, the circuit court determined that introduction of a prior statement would not have altered the jury's verdict. (R.68:4.)

In another order denying relief, the circuit court rejected Gilbert's claim that trial counsel failed to strike Juror 29 for subjective bias because it determined that Juror 29 was not subjectively biased. (R.125:4.) The circuit court again rejected Gilbert's claim that trial counsel was ineffective for failing to impeach JDE or Pratchett with prior inconsistent statements. (R.125:5.) The circuit court determined that trial counsel was not ineffective for using the word "scumbag" in his closing argument because he was referring to other people. (R.125:5.) Finally, the court rejected Gilbert's argument that he was entitled to an evidentiary hearing on his claim that trial counsel was ineffective for not seeking discovery of the recording and cell tower information. (R.125:6-7.)

Gilbert appeals.

ARGUMENT

I. Gilbert did not prove that his trial counsel was ineffective for failing to object to the admissibility of testimony related to the location of his cell phone.

A. Standard of review.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. This Court will uphold the circuit court's factual findings unless they are clearly erroneous. The circumstances of the case and the counsel's conduct and strategy are considered findings of fact. *State v. Jenkins*, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 848 N.W.2d 786. Whether counsel's performance was ineffective presents a legal question that this Court reviews independently, benefiting from the circuit court's and court of appeals' analysis. *Id.*

B. General legal principles guiding ineffective assistance of counsel claims.

A criminal defendant has the right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant alleging ineffective assistance of trial counsel has the burden of proving both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Id.* at 687. If the defendant fails to establish one prong of the test, the court need not address the other. *Id.* at 697.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Id.* at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id.* at 690. A court should presume that counsel rendered adequate assistance. *Id.* "[C]ounsel's performance need not be perfect, nor even very good, to be constitutionally adequate." *Carter*, 324 Wis. 2d 640, ¶ 22 (citation omitted).

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Strickland*, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

This Court may not review a claim of ineffective assistance without a *Machner* hearing because a *Machner* hearing is necessary to review trial counsel's performance. *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). "[I]t is a prerequisite to a claim of ineffective

representation on appeal to preserve the testimony of trial counsel." *Id*. (citation omitted). The hearing provides counsel with an opportunity to explain his or her actions and allows the circuit court, which is best positioned to assess counsel's performance, to rule on the motion. *Id*. Therefore, if this Court determines that the circuit court improperly denied a defendant a *Machner* hearing, the proper remedy is to remand the case for a *Machner* hearing. *See Curtis*, 218 Wis. 2d at 555 n.3.

C. Gilbert has not proved that his counsel's performance was deficient.

Gilbert has not proved that his counsel's performance was deficient for failing to object to Jones's rebuttal testimony. The circuit court conducted an evidentiary hearing to determine whether Jones's testimony was erroneous, and both Gilbert and the State called an expert witness. (R.106; 107.) At the hearing's conclusion, the circuit court stated, "we also have to determine if we want to proceed directly with scheduling a *Machner* hearing or not. I'm not really inclined to do that until I have made a decision on this issue because it may be dispositive." (R.107:55.) The circuit court's comments reflect an implicit determination that if the rebuttal testimony was not erroneous, counsel's performance could not have been deficient and, therefore, counsel's testimony was unnecessary to resolve this claim.

The circuit court determined that Jones's rebuttal testimony was not erroneous. It placed significant weight on the testimony of Officer Brousseau, who created the maps admitted in rebuttal. (R.84:3.) Brousseau had extensive experience identifying cellphone locations and creating maps and utilized cell phone records, his familiarity of local cell tower locations, the distance that signals travel from towers to phones in Milwaukee, and tracking cell phones. (R.106:82-86, 95-96, 99, 102.) The circuit court found that Brousseau's

maps accounted for population density and the number of towers and devices present. (R.84:3-4.)

The circuit court placed little weight on Gilbert's expert's testimony. O'Kelly had not visited the area about which he testified, did not prepare his own maps, and was unfamiliar with the number of devices being used in an area at any given time, local population or density patterns. (R.84:3.) The circuit court also noted while Gilbert criticized the geometric projections that Brousseau used to locate the phone, the circuit court noted that O'Kelly's "own exhibits reveal the same geometric projections employing the same data as used by Brousseau, thus validating his analysis." (R.84:3.)

Based on this record, Gilbert failed to demonstrate that the circuit court's determination about the credibility of Brousseau's testimony and the accuracy of the maps he created was clearly erroneous. And if the information related to the maps itself was not erroneous, then it was not deficient performance for counsel to fail to object to the admission of the maps and Jones's lay testimony about the cell tower locations.

The circuit court did not address one aspect of Gilbert's challenge to Jones's testimony. Jones twice testified that a sector spans 120 feet. (R.101:27, 39.) Based on Brousseau's testimony about how he draws his maps and the limits on obtaining location information solely on sector and tower information, this testimony was inaccurate. (R.106:101, 106; 107:13.) But this testimony did not otherwise undermine the circuit court's implicit determination that Brousseau's maps were accurate. (R.84:3.)

Even if the circuit court's determination about the accuracy of Jones's testimony was erroneous, this Court may still reject Gilbert's claim without a *Machner* hearing, if,

based on its review of the record, it determines that the rebuttal testimony did not prejudice him.

D. Gilbert has not demonstrated that there was a reasonable probability of acquittal had counsel properly challenged the rebuttal testimony about his phone's location.

Even assuming counsel performed deficiently, Gilbert has not proved prejudice because overwhelming evidence supported the jury's verdicts.[7] *See State v. Manuel*, 2005 WI 75, ¶ 75, 281 Wis. 2d 554, 697 N.W.2d 811. The circuit court rejected Gilbert's postconviction claim in part because of "the strength of the total body of the evidence against" him. (R.84:4.) The record demonstrates that Gilbert was not prejudiced by his counsel's allegedly deficient performance.

Gilbert's conviction stems in part from his own words—both in Pratchett's recorded call with him and his trial testimony. When asked about his intentions with JDE, Gilbert testified that they were not sexual and that he merely wanted to show her Milwaukee, take her out to eat, shop, "chill" with her, and use marijuana. (R.100:53, 57, 82.) But Pratchett's one-party consent call with Gilbert undermined that testimony. When Pratchett called Gilbert and told him that JDE was 14, Gilbert insisted that she was not and that he "verified all that before I even came and left from Racine." (R.60:2.) Gilbert asked Pratchett if he had made his "money back off that ho" and then complained

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[7] Gilbert's prejudice argument (Gilbert Br. 26) is undeveloped and conclusory. It is wholly insufficient: "[P]rejudice analysis is necessarily fact-dependent" and "depends upon the totality of circumstances at trial." *State v. Jenkins*, 2014 WI 59, ¶ 50, 355 Wis. 2d 180, 848 N.W.2d 786.

about how "that ho don't work." (R.60:2.) Pratchett then asked Gilbert if she was trying to do anything for him. Gilbert replied, "I pushed her . . . she was trying to." (R.60:3.)

Gilbert and Pratchett's conversation demonstrates that they viewed JDE as a source of income. Gilbert complained about JDE not working despite pushing her. Gilbert's comments corroborate JDE's testimony that after she left the hotel with Gilbert and had sex with him, Gilbert told her to start making calls on the chat line. (R.98:19, 23-25) Det. Jones confirmed that Gilbert's telephone was used to contact chat lines between 6:25 p.m. and 7:29 p.m., and that one call lasted approximately 10 minutes. (R.101:41-43.) These calls to the chat lines on Gilbert's phone after he left the hotel without JDE undermine his testimony that he simply went home and napped without JDE. (R.100:58-59.)

He also had no a plausible explanation for asking Pratchett if he had made his money back. (R.60:2; 100:63.) That question to Pratchett confirms Pratchett's statement against interest that he gave Gilbert $100 and an amplifier for JDE. (R.99:115.)

Gilbert's comments during the call also undermine his testimony that he simply intended to "chill" or "lay back" with JDE in a nonsexual way. (R.100:74.) Gilbert complained to Pratchett that JDE wanted "to lay back with [him]." (R.60:3.) Gilbert stated that he then sent her Pratchett's way (R.60:3). As Detective Stott explained, when a girl is causing a problem in the "stable," a pimp may make the girl available to another pimp. (R.97:42-43.) The jury could reasonably infer that Gilbert gave up JDE to Pratchett because JDE was more interested in "laying back" than making money for him through prostitution dates.

The jury could also reasonably infer that when Gilbert needed help promoting JDE, he turned to Pratchett, who

Gilbert knew was involved in prostitution, and who had previously showed him Back Page. (R.99:31; 100:59-60) Pratchett knew that Gilbert was previously involved in prostitution (R.99:31), and Gilbert admitted as much (R.100:59-60). JDE and Pratchett both testified that Gilbert asked Pratchett to post an ad on Back Page for JDE. (R.98:28-29, 109.)

Gilbert said he only went to the hotel once, but JDE and Pratchett told remarkably consistent stories about Gilbert's three visits to the hotel. Both agreed that, during the first visit, Gilbert asked Pratchett to create a Back Page post about JDE. (R.98:28-29, 109.) Pratchett and JDE agreed that Gilbert returned JDE to the hotel that evening and left her with Pratchett. While Pratchett disputed that JDE could see Gilbert give Pratchett stereo equipment (R.98:30; 99:47), Pratchett acknowledged that exchange occurred (R.98:113). Pratchett and JDE agreed that Gilbert returned to the hotel several days later and attacked JDE even after she balled up on the floor. (R.98:33; 99:19.)

In assessing the testimony, the jury was also aware of evidence that limited JDE's and Pratchett's credibility. The jury knew Pratchett had six prior convictions and that his testimony flowed from a favorable plea agreement. (R.99:45; 100:12-13.) The jury was also aware that JDE thought that she went to Gilbert's residence before going to the hotel and that Pratchett disputed whether JDE could see Pratchett's payment to Gilbert. (R.98:9; 99:47.)

Gilbert testified that he never returned to the hotel, claiming that he "took a nap and stuff like that." (R.100:59.) Even if the phone records did not provide pinpoint accuracy as to Gilbert's phone's location, the records showed that his phone was not stationary: calls were connecting to towers in

different areas of Milwaukee on January 7. (R.101:26-41.)[8] The US cellular employee who authenticated cell tower records also testified that when a cell phone call is made, "it would connect to the nearest tower." (R.99:63, 65-66.) Finally, because the circuit court accepted Brousseau's testimony regarding the accuracy of the maps (R.84:3), Jones's more general testimony about the location of the different cell towers based on her review of the maps and the phone records was accurate and not prejudicial.

Based on this record, Gilbert has failed to demonstrate that even if the information regarding the cell phone location was erroneous, that there was a reasonable probability of a different result at trial.

II. The circuit court properly denied Gilbert's other claims without an evidentiary hearing.

A. Standard of review and general legal principles related to pleading ineffective assistance claims.

Whether a defendant's postconviction motion alleged sufficient facts that entitled the defendant to an evidentiary hearing presents a mixed standard of review. This Court must determine if the motion on its face alleged sufficient material facts that, if true, would entitle the defendant to relief. This is a legal question that this Court reviews independently. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. If a defendant's postconviction motion "does not raise such facts, 'or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,' the grant or denial of

[8] Gilbert's expert never testified that Gilbert's phone remained stationary on January 7.

the motion is a matter of discretion entrusted to the circuit court." *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted). This Court reviews the circuit court's discretionary decision for erroneous exercise of discretion. *Allen*, 274 Wis. 2d 568, ¶ 9.

A circuit court may deny a defendant's postconviction motion alleging ineffective assistance of counsel without a hearing unless the motion alleges sufficient material facts, that if true, would entitle a defendant to relief. *Allen*, 274 Wis. 2d 568, ¶ 2. Material facts are those that are "significant or essential" to the issue. *Id.* ¶ 22. A motion is sufficient if it sets forth within the four corners of the document itself facts that answer "the five 'w's' and one 'h' test, 'that is who, what, where, when, why and how.'" *Balliette*, 336 Wis. 2d 358, ¶ 59 (citation omitted).

A circuit court may decline to conduct a hearing under three circumstances, including first, if the facts as alleged in the motion, assuming them to be true, do not entitle a defendant to relief; second, if at least one of the key facts in the motion are conclusory; or third, if the record conclusively demonstrates that a defendant is not entitled to relief. *Allen*, 274 Wis. 2d 568, ¶ 12.

B. Gilbert's postconviction motion failed to establish that trial counsel was ineffective for failing to obtain discovery.

In his first postconviction motion, Gilbert alleged trial counsel was ineffective for failing to obtain pretrial discovery from the State including Pratchett's one-party consent recording with Gilbert and the cell tower maps. (R.45:13.) Because an affidavit from trial counsel refuted Gilbert's claim, the circuit court denied it. (R.68:5.)

Gilbert contends that a factual dispute existed on the issue of whether counsel had the cell location information before trial.[9] (Gilbert's Br. 39 and cases cited therein.) But the circuit court permitted Gilbert to address this issue in a post-hearing brief (R.107:58), and stated that Gilbert had not addressed it in his brief (R.125:7).[10] While the court deemed the issue waived, it nonetheless reviewed emails between trial counsel and successor counsel regarding discovery. It determined that the communications raised no question of fact as to whether trial counsel had all these materials "at the time of trial." (R.125:7.)

Those emails support the circuit court's determination. Sentencing counsel stated that trial counsel gave him Gilbert's case file at the courthouse and that trial counsel did not give him any additional materials at any other time. (R.71:3.) An email dated August 14, 2012 from sentencing counsel to trial counsel reflects that sentencing counsel had received a CD of Gilbert's interrogation. Sentencing counsel represented that Gilbert believed that "there were additional CDs that recorded, among other things, telephone calls?" (R.71:5.) Trial counsel responded that he would look into the request and that the prosecutor said that she would as well. (R.71:6-8.) In the email

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[9] Trial counsel executed two affidavits related to Gilbert's discovery claim. In the first affidavit, counsel said that he possessed a recording that included Pratchett's one-party consent calls with Gilbert, cell phone records, and the cell tower location maps presented in rebuttal. (R.58:26.) In the second affidavit, counsel reported that he located materials in storage that included the one-party consent calls and voluminous cell phone records and related materials. (R.59:2.)

[10] Gilbert filed a supplemental response that included communications between trial counsel and sentencing counsel. (R.71:1.)

exchange, sentencing counsel did not specifically ask trial counsel about cell tower data or maps, which is the focus of Gilbert's discovery claim on appeal. (R.71.) Based on this record, the circuit court could conclude that Gilbert had not adequately raised as a question of material fact as to whether trial counsel had the discovery at the time of trial. (R.125:7.)

Even if this Court determines that Gilbert's pleadings created a factual issue regarding deficient performance as it related to discovery, this Court may still affirm the circuit court's denial of Gilbert's motion on grounds different from those grounds on which the circuit court relied. *See State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755. Assuming that Gilbert's counsel performed deficiently with respect to discovery, this Court may affirm the circuit court's denial of Gilbert's claim without a hearing if the record conclusively demonstrates that counsel's failure to obtain the discovery did not prejudice Gilbert.

As discussed above, the jury had compelling evidence upon which to base its guilty verdicts. Even if counsel performed deficiently with respect to discovery, Gilbert has failed to establish that there was a reasonable probability that the jury would not have found him guilty had counsel possessed the cell location information before trial. The circuit court properly denied this claim without a hearing.

C. Gilbert's postconviction motion failed to establish that trial counsel performed deficiently for failing to impeach JDE and Pratchett with their prior inconsistent statements.

A failure to impeach a witness with a prior statement constitutes ineffective assistance if counsel's failure to impeach was deficient and it prejudiced the defendant. *State v. Moffett*, 147 Wis. 2d 343, 353, 433 N.W.2d 572 (1989). If

counsel's errors "had only an isolated, trivial effect," then the failure to impeach is not prejudicial. *Id.* at 357.

1. The circuit court's denial of Gilbert's first motion alleging counsel was ineffective for failing to impeach JDE.

In his first postconviction motion, Gilbert asserted that trial counsel was ineffective for failing to impeach JDE with prior inconsistent statements to the police about Gilbert hitting her. (R.45:7-8.) The circuit court denied this claim without a hearing based on its determination that Gilbert's claim was "conclusory and without sufficient factual support to allow the court to find that trial counsel was ineffective." (R.68:4.) It also observed that since Pratchett's testimony supported JDE's testimony that Gilbert hit her, there was no reasonable probability that counsel's failure to question JDE about her prior statement prejudiced her. (R.68:4.)

The record supports the circuit court's determination. In his motion, Gilbert simply stated that "JDE made three different statements about what occurred" and that the second statement "provided the same exact version as Gilbert: He dropped her off at the Econolodge and never returned again." (R.45:7-8.) Gilbert did not attach copies of JDE's prior statements to authorities to his postconviction motion, but simply referred the circuit court to his counsel's comments at the sentencing hearing. (R.45:7-8.) The State did provide JDE's police interview reports to the circuit court (R.58:38-58) and they do not support Gilbert's assertion about JDE's second statement. The report reflects JDE told a detective that Gilbert (known to her as P) picked her up and brought her to Milwaukee and "*eventually dropped* her off at the Econolodge Hotel and told [JDE] that [Pratchett] and Shannon would look out for her." (R.58:45-46 (emphasis added).)

Nothing in that report suggests that the detective asked JDE about other places where Gilbert and JDE went in Milwaukee, whether they had sex, whether JDE had seen Gilbert again after he dropped her off at the hotel, or whether Gilbert hit her. And unless Stott specifically asked JDE those questions and JDE denied that those things happened, JDE's prior statement was not inconsistent with her subsequent statement or her testimony.

Finally, the circuit court correctly noted that Pratchett's testimony corroborated JDE's testimony that Gilbert returned to the hotel and struck JDE. (R.99:18-19.) Based on Pratchett's corroboration of the incident, the circuit court could reasonably determine that there was no reasonable probability that counsel's failure to question JDE about the prior statement altered the trial's outcome. (R.68:4.)

2. The circuit court's denial of Gilbert's supplemental motion alleging counsel was ineffective for failing to impeach JDE and Pratchett.

Gilbert filed a supplemental postconviction motion asserting that counsel was ineffective for failing to impeach JDE and Pratchett with prior inconsistent statements. (R.115:14-16.) With respect to JDE, Gilbert alleged his counsel should have pointed out that JDE previously testified that she was struck on a different side of her face. (R.92:32; 98:34.) Gilbert claims that counsel should have questioned Pratchett about (1) a prior statement when he said JDE created the Back Page ad and his testimony that he created the Back Page ad; (2) a prior statement that he denied spitting in JDE's face; (3) his failure in earlier statements to say anything about Gilbert's returning to the

hotel and striking JDE; and (4) testifying that he did not have sex with JDE when JDE told police she had sex with him four times.[11] (R.115:14.)

The circuit court denied Gilbert's motion because it determined that "impeachment of either witness with the items set forth [in Gilbert's] supplemental motion would not have been reasonably probable to alter the outcome of the trial." (R.125:5.)

Impeaching JDE with prior testimony about the side of her face she was struck on would simply highlight the fact that she had previously reported that Gilbert struck her. Pratchett's statement that he posted the Back Page ad actually reinforced Gilbert's defense that Pratchett, not Gilbert, was the one trafficking JDE. The fact that Pratchett did not initially disclose Gilbert's physical abuse of JDE does not mean that Pratchett's prior statements were inconsistent. And nothing within the initial interview report suggests that the detective questioned Pratchett about those events such that Pratchett's response would constitute a prior inconsistent statement.

At best, these were isolated, trivial inconsistencies between JDE's and Pratchett's trial testimony and their prior statements. Pratchett's testimony corroborated JDE's testimony in many critical respects, including what happened during each of Gilbert's three interactions with JDE and Pratchett at the hotel.

The circuit court properly denied Gilbert's second postconviction claim of failure to impeach without a hearing.

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[11] JDE's statement is not an inconsistent statement of Pratchett's that Gilbert could use to impeach Pratchett.

3. Gilbert's claims of failure to impeach on appeal.

On appeal, Gilbert challenges his counsel's failure to impeach on grounds that he previously did not raise in his postconviction motion. (Compare Gilbert's Br. 29-30 with R.45:7-8 and 115:14-16.) The failure to raise an issue in the trial court generally constitutes forfeiture. The fundamental inquiry is "whether particular arguments have been preserved, not . . . whether general issues were raised before the circuit court." *In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155. To the extent that Gilbert's claims regarding impeachment differ from the claims raised in the circuit court, this Court should decline to consider them. To the extent that Gilbert's claims overlap with his claims in his postconviction motions, the State relies on its arguments in the preceding section.

Gilbert's brief raises several assertions warranting comment. He contends that JDE "had sustained no injuries from this graphic beating." (Gilbert's Br. 29.) In fact, JDE testified that she received injuries. While she did not develop bruising or swelling, "it was just kind of pink," "it was sore. It was hurting. That's it." (98:35.) Gilbert notes that JDE and Pratchett disagreed over whether JDE could see the transaction between Pratchett and Gilbert. (Gilbert's Br. 30.) Counsel actually made this point at trial. (R.98:30, 57; 99:51.) Pratchett may have denied spitting at JDE or taking money that JDE received from prostitution dates to the police (Gilbert's Br. 30), but he admitted this conduct at trial (R.99:17, 48). In general, had counsel questioned Pratchett about discrepancies between his custodial arrest statement and subsequent statements, other portions of that statement would have been admissible as a prior consistent statement to rehabilitate him. Wis. Stat. § 908.01(4)(a)2. That statement, which included his helping Gilbert post an ad to Back Page about JDE and purchasing JDE from Gilbert,

would have simply reinforced Pratchett's other incriminating statements about Gilbert. (R.58:56.)

Gilbert's postconviction motions did not sufficiently allege that counsel was ineffective for his failure to impeach JDE and Pratchett with their prior inconsistent statements. The circuit court properly denied Gilbert's claim without a hearing.

D. Gilbert has not established that his counsel was ineffective for failing to strike Juror 29 based on subjective bias.

1. Legal standards related to jury bias and claims of ineffective assistance of counsel.

Wisconsin law recognizes three types of jury bias: statutory, subjective, and objective. *State v. Lepsch*, 2017 WI 27, ¶ 22, 374 Wis. 2d 98, 892 N.W.2d 682. "Subjective bias refers to 'bias that is revealed through the words and the demeanor of the prospective juror.'" *Id.* ¶ 23 (citation omitted). "[W]hether a prospective juror is subjectively biased turns on his or her responses on *voir dire* and a circuit court's assessment of the individual's honesty and credibility, among other relevant factors." *State v. Faucher*, 227 Wis. 2d 700, 718, 596 N.W.2d 770 (1999).

Because prospective jurors are presumed impartial, a defendant bears the burden of rebutting the presumption of impartiality and proving bias. *Lepsch*, 374 Wis. 2d 98, ¶ 22. Further, the circuit court is best situated to assess a prospective juror's demeanor and disposition and whether the juror is subjectively biased. *Faucher*, 227 Wis. 2d at 718. Because a circuit court is best situated to assess a juror's demeanor and disposition, this Court will defer to the circuit court's factual finding of whether a prospective juror is

subjectively biased unless the finding is clearly erroneous. *Lepsch*, 374 Wis. 2d 98, ¶ 23.

To succeed on a claim of ineffective assistance of counsel in this context, a defendant must prove that his counsel acted deficiently during jury selection and that counsel's performance prejudiced him. *Id.* ¶ 25. Prejudice arises when counsel's performance results in a biased juror's seating. *State v. Koller*, 2001 WI App 253, ¶ 14, 248 Wis. 2d 259, 635 N.W.2d 838, *modified on other grounds*, *State v. Schaefer*, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760.

To establish prejudice, a defendant must show that had his counsel "asked more or better questions, those questions would have resulted in the discovery of bias" on the part of a seated juror. *Koller*, 248 Wis. 2d 259, ¶ 15. A defendant may make this showing by calling a suspect juror at a postconviction hearing and asking the juror questions that he claims his trial counsel should have asked. *Id.*; *see*, *e.g.*, *State v. Delgado*, 223 Wis. 2d 270, 588 N.W.2d 1 (1999). Absent such a showing, the assertion of juror bias is merely speculative. *Koller*, 248 Wis. 2d 259, ¶ 15.

2. Gilbert has not proved that his trial counsel's performance was deficient or that it prejudiced him.

Based on the record, Gilbert has not proved that his trial counsel was ineffective for failing to strike Juror 29.

During voir dire, the prosecutor asked the jurors if they had ever had an experience as a victim of a crime such "that that experience makes it so they can't be fair and impartial?" (R.96:96.) Juror 29 responded, "[T]o be honest with you, I really don't know. I was the victim of an armed robbery at my place of employment. I had a .38 [in my face]." (R.96:96-97.) Juror 29 acknowledged that it was a traumatic experience. (R.96:97.) Responding to the prosecutor's

question about her ability to be fair and impartial, she responded, "I — I can't say. I haven't heard the evidence. I can't— So I'm—I'm not going to say that I can honestly put it aside. I don't know." (R.96:97.) Neither the circuit court nor trial counsel directed specific additional questions to Juror 29. (R.96:109-112.)

Juror 29 candidly acknowledged that she "might have trouble being fair and impartial" based on her past victimization. (R.96:97.) But she also recognized that she had not heard the evidence. (R.96:97.) As the postconviction court recognized, that response "attest[s] to her fairness in and of itself and demonstrates that she had not formed an opinion about the case because she had not heard the evidence at that point." (R.125:4.)

The equivocal nature of Juror 29's statements does not mean that she was biased. As the supreme court has recognized, "[A] prospective juror need not respond to voir dire questions with unequivocal declarations of impartiality. Indeed, we . . . fully expect a juror's honest answers at times to be less than unequivocal." *State v. Erickson*, 227 Wis. 2d 758, 776, 596 N.W.2d 749 (1999). Additionally, Juror 29's equivocal response to the prosecutor's questions should not be viewed in isolation, but against the circuit court's and parties' efforts generally to secure a fair and impartial jury for Gilbert's trial.

On at least four occasions, the circuit court asked the panel, including Juror 29, questions designed to flush out bias.

First, the circuit court read from the information, identifying the three charges that the State had filed against Gilbert. (R.96:9-11.) The jurors were asked if anyone had "any feelings of bias or prejudice with regard to this case?" (R.96:16.) While another juror answered affirmatively, Juror 29 did not. (R.96:16-17.)

Second, the circuit court asked the jury about sexual assault cases. "This is a sexual assault case. A lot of people would say, 'Give me a murder. Give me a robbery. Give me a car theft. Anything but a sexual assault. I just don't want to be involved in that.' Anybody feel that way?" (R.96:17.) While other jurors affirmatively answered this question, Juror 29 did not. (R.96:17-20.)

Third, the circuit court also asked the jurors if they had "any other opinions about this case?" (R.96:21.) Juror 29 did not respond to this question. (R.96:21.)

Fourth, after the circuit court told the jury that Gilbert was presumed innocent, it asked if anyone "cannot give the defendant the presumption of innocence?" (R.96:28.) Juror 29 did not respond to this question. (R.96:28.)

Following her exchange with Juror 29, the prosecutor also directed several questions to the jury panel in an effort to reveal bias. She addressed the presumption of innocence and asked the jurors if they believed Gilbert was guilty without seeing any evidence. No jurors responded. (R.96:101.) The prosecutor discussed the general nature of the allegations and asked the jurors if they were unable "to be fair and impartial" or had "concerns." (R.96:102.) No jurors responded. (R.96:102.)

While Gilbert's trial counsel did not direct specific questions to Juror 29 or any other jurors (R.96:110), trial counsel explained to the jury the need for a "fair-minded" jury (R.96:110). He told the jury that "[t]his fairness issue goes to the root of our system of justice in this country. So when we say we're looking for someone fair, we've got to have someone fair. Someone who's going to be unbiased. Just give us your best shot." (R.96:111.) Trial counsel then asked the jurors generally if "for any reasons that we've heard today since you've been here amongst us," that they had

"heard enough" and did not want to be "bothered." No jurors responded. (R.96:111-12.)

Following jury selection, the circuit court made a record regarding its strikes for cause with respect to other jurors. Trial counsel did not object to the record. No one raised any concerns about Juror 29. (R.96:132-134.) The circuit court then administered an oath to the jury requiring them to render a true verdict according to the law and evidence given in court. (R.97:4.)

There is no reason to believe that Juror 29 did not truthfully answer the questions designed to flush out bias. And most importantly, there is no reason to believe that Juror 29 was untruthful when she declared that she would render a "true verdict" "according to the law and evidence given in court." (R.97:4.) Because Juror 29's equivocal response alone is insufficient to demonstrate subjective bias, Gilbert has not met his burden of demonstrating that counsel performed deficiently during jury selection.

Gilbert disagrees and contends that this Court need not address the prejudice prong because juror bias constitutes structural error. (Gilbert's Br. 31.) To the contrary, in *Lepsch*, the supreme court stated that Lepsch had the burden of showing both deficient performance as it related to jury selection and prejudice. *Lepsch*, 374 Wis. 2d 98, ¶ 25. Gilbert relies on *State v. Tody*, 2009 WI 31, ¶ 44, 316 Wis. 2d 689, 764 N.W.2d 737 (footnote omitted), *abrogated on other grounds by State v. Sellhausen*, 2012 WI 5, 338 Wis. 2d 286, 809 N.W.2d 14, but that case did not expressly state that juror bias constituted structural error. *See also Tody*, 316 Wis. 2d 689, ¶ 54 (Prosser, concurring). Further, *Tody* was not analyzed within the context of a claim of ineffective assistance of counsel, and the continued viability of the lead decision is

questionable following *Sellhausen*, where Justice Ziegler opined that her concurrence in *Tody*, which said the issue was incorrectly framed as juror bias (*Tody*, 316 Wis. 2d 689, ¶¶ 60-67), now represents the opinion of the majority of the court. *Sellhausen*, 338 Wis. 2d 286, ¶ 73 (Ziegler, concurring).

On this record, Gilbert has failed to prove both that his counsel performed deficiently during jury selection and that counsel's performance prejudiced Gilbert.

3. At best, Gilbert is entitled to a hearing on his claim that trial counsel provided ineffective assistance during jury selection.

Gilbert contends that he was entitled to an evidentiary hearing on his claim that Juror 29 was subjectively biased. (Gilbert's Br. 39.) Here, the circuit court appropriately denied this claim without a hearing because the postconviction pleading was insufficient. Gilbert explained why he believed that Juror 29 was biased, and simply asserted that this bias entitled him to a new trial. (R.115:2-3, 12-13.) In a footnote, Gilbert explained that the court could grant him a new trial in the interest of justice, making a *Machner* hearing unnecessary. (R.115:13, n.12.) Gilbert did not affirmatively demand a hearing for the purpose of demonstrating that trial counsel could have established bias if he had simply asked more or better questions of the juror. He never suggested, for example, that at a hearing, he would ask Juror 29 questions that counsel might have asked to demonstrate the juror's bias. *See Koller*, 248 Wis. 2d 259, ¶ 15. But if this Court disagrees and determines that Gilbert's pleading was sufficient, it should order an evidentiary hearing on this claim.

E. Gilbert has failed to establish that his counsel's use of the word "scumbag" during closing argument constituted ineffective assistance.

Trial counsel's conduct during a closing statement constitutes ineffective assistance only if Gilbert proves that his trial counsel performed deficiently and the performance prejudiced his client. *State v. Gordon*, 2003 WI 69, ¶ 23, 262 Wis. 2d 380, 663 N.W.2d 765. In the context of a closing argument, "showing prejudice means showing that, but for counsel's challenged performance, there is a 'reasonable probability that . . . the result of the proceeding would have been different.'" *Koller*, 248 Wis. 2d 259, ¶ 18 (quoting *Strickland*, 466 U.S. at 694).

The circuit court properly rejected Gilbert's claim that his counsel specifically referred to him as a scumbag. "Trial counsel did not specifically refer to the defendant as a scumbag. He was referring to other people." (R.125:5.) The record supports this determination.

Here, counsel stated, "In this Country . . . we would rather . . . let some scumbags go free because we can't find that person guilty if we don't have enough evidence." (R.102:34.)[12] Counsel used the term "scumbags" within the context of a general discussion of the presumption of innocence and the burden of proof, rather than as a specific reference to his client. In the preceding paragraph, counsel reminded the jury that citizens, including Gilbert, have the

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[12] Had counsel instead told the jury that "it is far worse to convict an innocent man than let a guilty man go free," counsel's use of the word "guilty" would not be considered a reference to Gilbert. *See In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). Rather, reasonable people would deem it a reference to the obligation that the State has to prove its case beyond a reasonable doubt.

right to be "deemed innocent until proven guilty." (R.102:34.) Further, after using the word "scumbags," trial counsel told the jury that the State's case "smells" and rhetorically asked whether "it [met] the criteria that's necessary to find this person guilty in a court of law?" (R.102:34.) Then, consistent with his theme in which he challenged the strength of the evidence against Gilbert, counsel questioned whether there was any evidence that corroborated JDE's claims. (R.102:35.)

Counsel did not use the phrase "some scumbags" to refer to his client. In fact, he called O.J. Simpson a scumbag when he reminded the jury that the not guilty verdict in Simpson's homicide trial simply meant that there was not enough evidence to convict him. (R.102:36-37.) Counsel then transitioned back to his theme: the State charged Gilbert and it had the burden of proving Gilbert's guilt beyond a reasonable doubt. (R.102:37-38.) Counsel reminded the jury that it was their job to decide the case "based on the evidence" and assess the credibility of witnesses. (R.102:38.) Counsel then went through each offense and challenged the State's case, including JDE's claims and the State's reliance on Pratchett, an admitted trafficker. (R.102:39-40.)

Gilbert also contends that counsel improperly attacked his credibility when he said, "but I'm not sure I believe any of them"—referring to JDE, Pratchett, and Gilbert. (R.102:30; Gilbert's Br. 35.) Before making this comment, counsel noted that this case is about "the credibility of three people" and turned on whom they believed. (R.102:29-30.) After expressing his opinion, he then returned to the discussion of how to assess the credibility of the "three main actors." (R.102:30.) He then questioned JDE's credibility, based on the version of events she recounted, and Pratchett's credibility, based on the deal that he struck with the State and his criminal history. (R.102:31-33.)

When viewed against the entire backdrop of counsel's closing argument and his emphasis on the State's burden to

prove Gilbert's guilt, trial counsel's performance was not deficient. But even if it were, Gilbert has failed to demonstrate prejudice. Gilbert argues that prejudice should be "conclusively presumed" based on counsel's statements. (Gilbert's Br. 36.) That argument ignores his burden to "analyze the strengths and weaknesses of the State's case or attempt to explain why a different closing argument might have produced different verdicts." *See Koller*, 248 Wis. 2d 259, ¶ 19.

Gilbert's testimony placed counsel into a difficult spot. Gilbert acknowledged that he attempted to be a pimp (R.100:60) and admitted pimping out his child's mother when times were "hard" (R.100:62-63, 85-86). He confirmed Pratchett's testimony that Pratchett had previously talked to Gilbert about prostitution and the use of "Back Page." (R.99:31-32; 100:60.) While counsel acknowledged Gilbert's flaws, he repeatedly challenged JDE's and Pratchett's credibility and implored the jury to focus on the State's burden to prove Gilbert's guilt.

Further, to the extent that counsel expressed an opinion about Gilbert or anyone else's credibility, counsel acknowledged that his opinion "don't mean squat." (R.102:39.) The circuit court also told the jury that counsel's opinions are not evidence and that it should base its decision on the evidence. (R.102:3.) The jury is presumed to have followed the instructions. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

Relying on *Gordon*, Gilbert contends that counsel's comments effectively constituted a concession that he was guilty. (Gilbert's Br. 35.) *Gordon* is off point. In *Gordon*, Gordon's trial counsel conceded his guilt on one of the charged offenses. *Gordon*, 262 Wis. 2d 380, ¶ 3. In contrast, Gilbert's counsel never conceded that Gilbert had committed the charged offenses. Counsel repeatedly asserted that the

State did not meet its burden to prove Gilbert's guilt with credible evidence.

Likewise, counsel's comments did not run afoul of this Court's decision in *State v. Coleman*, 2015 WI App 38, 362 Wis. 2d 447, 865 N.W.2d 190. (Gilbert's Br. 36.) In *Coleman*, counsel told the jury in *voir dire* that his client had been to prison and in opening that his client was "not an angel" and had done all kinds "of things in his past." *Id.* ¶ 42. But that information was irrelevant unless Coleman decided to testify. *Id.* In contrast, Gilbert's counsel comments addressed Gilbert's past only after Gilbert testified, which placed his credibility at issue.

The circuit court properly denied Gilbert's claim without a hearing because his pleading failed to establish that his counsel's performance in closing argument was deficient or prejudiced him.

F. Counsel's errors, if any, did not result in cumulative prejudice such that it undermines confidence in the outcome of Gilbert's trial.

Under the doctrine of "cumulative prejudice," a defendant who suffers multiple instances of deficient performance may rely on the aggregate effect of those deficiencies to establish the prejudice necessary to sustain a claim of ineffective assistance of counsel. *State v. Thiel*, 2003 WI 111, ¶¶ 59-60, 264 Wis. 2d 571, 665 N.W.2d 305. To establish cumulative prejudice, "each alleged error must be deficient in law—that is, each act or omission must fall below an objective standard of reasonableness." *Id.* ¶ 61. In most cases, trial counsel's 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.*

This Court should not reach Gilbert's claim of cumulative error because the circuit court never actually conducted a hearing at which Gilbert's counsel testified about any of Gilbert's claims of ineffective assistance. If this Court determines rebuttal evidence was erroneous and prejudicial or that he sufficiently alleged ineffective assistance with respect to his remaining claims, Gilbert's remedy is limited to an evidentiary hearing on those claims.

CONCLUSION

For the above reasons, the State respectfully requests this Court to affirm the circuit court's entry of Gilbert's judgment of conviction and orders denying postconviction relief.

Dated this 30th day of October, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,818 words.

_____
DONALD V. LATORRACA
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).

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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 30th day of October, 2017.

_____
DONALD V. LATORRACA
Assistant Attorney General