STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP2049-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT L. NUTTING,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE FOND DU LAC CIRCUIT COURT, THE HONORABLE RICHARD J. NUSS, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State reframes the issues as follows:

1. During Scott Nutting's trial, the State played an audio recording of Nutting's interview with police, with some redactions. The record did not show, however, which parts of the recording were redacted.

a. Is Nutting entitled to a new trial based on the defect in the record regarding what the jury heard from the recording?

The circuit court said no. This Court should affirm.

b. Was counsel ineffective with regard to how he handled the playing of the recording?

The circuit court said no. This Court should affirm.

2. Did the trial court err in refusing to allow a jury instruction that Nutting's offer to take a polygraph could be an indicia of innocence?

Nutting never asked for such an instruction. This Court should decline Nutting's request for relief.

3. Did the State violate *Brady*[1] by failing to turn over to Nutting's defense counsel a victim-impact statement that the victim wrote in a different matter?

The circuit court said no. This Court should affirm.

4. Is Nutting entitled to a new trial in the interest of justice?

The circuit court said no. This Court should affirm.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither.

INTRODUCTION

Nutting, a 40-year-old man, and P.K., a 14-year-old girl posing online as an 18-year-old, exchanged messages on an online dating site and agreed to meet in person. At that meeting, Nutting picked P.K. up at her mother's house and drove to a motel. In the car, P.K. informed Nutting that she was only 14 years old. Nutting nevertheless took her inside the motel where he had sex with her for several hours.

At trial, the jury heard P.K. testify that she and Nutting had sex in the motel room. It also heard a police detective testify that Nutting, in an interview, largely confirmed P.K.'s version of events leading up to their arrival at the motel. Nutting also told the detective that P.K. told him before they went in the room that she was 14 years old. Nutting, however, claimed that at that point he directed P.K. out of his car and that they never had sex. The jury also listened to an audio recording of Nutting's interview with the detective, with portions redacted, though the record failed to reflect those redactions. The jury convicted Nutting of second-degree sexual assault.

Nutting cannot obtain relief based on the defects in the record regarding the playing of the audio recording. The postconviction court was able to adequately reconstruct the record of what parts were redacted. In any event, that defect in the record did not deprive Nutting of his ability to appeal. Moreover, Nutting's counsel was not ineffective for failing to object to the audio recording or for his role in the omitted information in the record.

Nor can Nutting obtain relief on his remaining claims. Nutting never asked for a jury instruction concerning his

offer to take a polygraph examination. The State did not violate *Brady* when it did not turn over P.K.'s victim-impact statement from a different case, because that evidence was not favorable or material to Nutting's defense. Finally, Nutting is not entitled to a new trial in the interest of justice.

STATEMENT OF THE CASE

Pretrial proceedings

Based on Nutting's taking 14-year-old P.K. to a Fond du Lac motel room and having sex with her, the State charged Nutting with one count of second-degree sexual assault of a child, with a repeater enhancer based on Nutting's past conviction for attempting to possess child pornography. (R. 1.)

Pretrial, Nutting's counsel filed a motion to "Introduce Offer to Submit to a Polygraph." (R. 27:1–2.) The motion was based on Nutting's offer during a recorded police interview to take a lie detector test. (R. 103 Ex. 1:46.) During a pretrial hearing, Nutting's counsel explained that he anticipated that the information would come in during either Nutting's testimony or the investigating police officer's testimony. (R. 120:5.) The court and parties discussed the matter, but ultimately, the court deferred deciding the motion until it heard the officer's testimony and until it was clear whether and how Nutting's polygraph offer would come in. (R. 120:15–21.) The parties and court never revisited the issue.

On the morning of the first day of trial, the court and parties reviewed some preliminary matters, including the audio recording of a police interview of Nutting. Nutting's counsel noted that if the State were to play the entire interview, "redacting the portions that are overly prejudicial to Mr. Nutting," the court should require the State to play a

portion of the interview where Nutting offered to take a polygraph. (R. 121:15.) The court and parties discussed that issue, and then the recording more generally. (R.121:15–19.) The court asked whether, if only parts of the recording would be played, the parties had come to an agreement about what portions would be redacted. (R. 121:19–20.) Nutting's counsel responded that he and the prosecutor "discussed that before the trial, [they] discussed redacting portions [in which] Mr. Nutting indicated he was in custody and [mentioned] some of his prior convictions." (R. 121:20.)

The court remarked that it had not heard anything about the recording until the week before. It expressed frustration that on the morning of the first day of trial, "[i]f somebody's suggesting that now we have a recording and the entire recording's not coming in and somebody's taking some exception to that, that's evidentiary in nature," and the parties should have raised it earlier. (R. 121:21.) When asked "what's the deal with the recording," Nutting's counsel explained that the prosecutor intended to "introduce and play the entire recording for the jury," that there was "highly prejudicial information" to Nutting in the recording, and that counsel did not bring the issue to the court's attention sooner because he "didn't know [the prosecutor] intended to play that entire recording before the jury." (R. 121:21.)

The court responded that there was nothing to prevent the recording from being admitted, and moved on to other matters. (R. 121:21–22.)

Trial Evidence

1. P.K. testified that she met Nutting online, he took her to a motel, and had sex with her after learning she was 14 years old.

P.K. testified at trial. (R. 121:133.) At age 14, she was living in Fond du Lac with her mother, her mother's boyfriend, and her sister. (R. 121:137.) She acknowledged

that at that time, she was acting out, not following rules, and abusing alcohol. (R. 121:133–34.) Specifically, because she was not getting enough attention from her mother, she sought out older men by creating profiles on internet dating sites, using a fake name, and claiming to be 18 years old. (R. 121:137–38.) P.K. said that when she met these men in person, she would tell them her real age, "and some of them freaked out." (R. 121:138.) P.K. stated that as a result of her behavior with these older men and her other issues, she had been placed in foster care. (R. 121:134.)

P.K. met Nutting on the dating site "xxxcupid.com" on December 28, 2011. (R. 121:148.) P.K. said that Nutting initiated the contact by picking her profile—her profile name was Miley556 and she claimed her age to be 18—and sending her messages. (R. 121:162.) P.K. viewed Nutting's profile, which featured images of an erect penis, and responded. (R. 121:163–64.) They communicated online at first, then P.K. gave Nutting her phone number and they texted each other. (R. 121:165.) They arranged to meet in person on the same afternoon they met online, and Nutting picked up P.K. at her house. (R. 121:148, 165.) P.K. told her mother that she was going to a friend's house, that her friend's dad was picking her up, and that she would be going to the mall. (R. 121:155–56.)

Nutting drove P.K. to a nearby Super 8 motel. (R. 121:156.) When they arrived, she stayed in the car while Nutting went inside to pay for a room. (R. 121:157.) After he came out, he grabbed a black duffel bag from his car and took P.K. up a back stairway to a second-floor room. (R. 121:157.) P.K. testified that she initially did not want to have sex, but Nutting promised to bring her marijuana the next time they met up, so she took off her clothes. (R. 121:166.) They then had sex multiple times over approximately three hours, including vaginal, oral, and anal. (R. 121:170, 172.) P.K. testified that she saw that Nutting

had a tattoo on his butt; P.K. acknowledged that Nutting's profile referenced his having "a little ink," but it contained no image of a tattoo and no description of what or where it was. (R. 121:166, 198.) Afterward, Nutting drove P.K. home. (R. 121:170, 195–96.)

P.K. offered contradictory testimony regarding whether and when she told Nutting that she was actually 14 years old. At times, she said that she told Nutting that she was 14 before they went into the motel room. (R. 121:150, 156, 159.) At other times, she denied telling Nutting her real age. (R. 121:158, 169, 188.) But Detective Brian Bartlet testified that he talked to P.K. three times in January and February 2012, and that P.K. consistently reported that she told Nutting that she was 14 years old before they went to the motel room, either when she got into his car, or in the motel parking lot before going into the room. (R. 122:88.) Bartlet also testified that P.K. consistently reported that she and Nutting had sex in the motel room. (R. 122:30–32.)

2. Detective Bartlet and P.K.'s mother corroborated details of P.K.'s account.

Detective Bartlet testified that before he talked to P.K., he understood that she had "some cognitive challenges,"[2] which he took into account by asking her open-ended questions followed by more specific queries "to narrow it down to get the hopefully correct answer." (R. 122:28–29.)

In a January 10 statement P.K. signed after talking to Bartlet, P.K. described meeting a man named Scott on

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[2] The extent of P.K.'s "cognitive challenges" was not clear, but P.K. testified that she has had a special-needs-based individualized education plan (IEP) at school since she was in kindergarten and that she read at a third-grade level. (R. 121:136.)

xxxcupid, and that Scott offered to pick her up from her house. (R. 41 Ex. 5:1.) Scott's profile picture was an image of his penis. (R. 41 Ex. 5:1.)

In the statement, P.K. said that when Nutting picked her up, he told her that he was 30 years old and she told him that she was 14. (R. 41 Ex. 5:2.) She described Nutting's driving her to the Super 8, taking her through a back entrance to a second-floor room, and having sex with her for three hours. (R. 41 Ex. 5:2–3.) She also said that he had a tattoo "about 2–3 inches on his right butt cheek."[3] (R. 41 Ex. 5:3.) She also told Bartlet that Nutting brought the black bag with him and described it as his "bag of tricks," but never opened it. (R. 41 Ex. 5:3.)

In a January 19 statement, P.K. said the only photos of Nutting that she had seen on his profile were of his penis. (R. 41 Ex. 6:1.) She denied having seen his tattoo before the motel room. (R. 41 Ex. 6:1.) She also said that she told Nutting that she was 14 when they parked at the motel, but "he didn't say anything." (R. 41 Ex. 6:2.)

P.K.'s mother, S.K., also testified. (R. 121:213.) She confirmed that at around 2:30 or 3:00 p.m. on December 28, 2011, P.K. told S.K. that she was going to hang out with a friend and that the friend's dad was picking her up. (R. 121:217.) S.K. saw P.K. get into a silver car driven by "a guy," but had no idea who he was, other than what P.K. had told her. (R. 121:217–18.)

While P.K. was gone, S.K. tried calling her multiple times. (R. 121:229.) She said that P.K. answered twice and said that she was at the mall with a friend. (R. 121:229.)

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[3] Nutting described the tattoo as a crescent moon, about three inches in diameter, on his "left ass cheek." (R. 103 Ex. 1:29–30.)

S.K. testified that she called P.K. so many times because she "didn't feel like [P.K.] was telling [her] the honest truth on where she was going." (R. 121:229–30.)

P.K. returned home that evening. (R. 121:231.) P.K. eventually disclosed to S.K. that she had sex with the man who picked her up. (R. 121:218, 224, 234.) S.K. said that P.K. showed her the web site she used to meet Nutting and showed S.K. Nutting's profile, which featured pictures of an erect penis. (R. 121:220–21.)

Detective Bartlet also interviewed S.K. the day after his first interview with P.K. (R. 122:32.) In a written statement from that interview, S.K. said that P.K. had disclosed on December 29 that she had sex with Nutting. (R. 41 Ex. 10:2.)

3. Nutting told Detective Bartlet that he picked up P.K. intending to have sex and believing she was an adult, but that he had nothing to do with her after he learned she was 14 years old.

Detective Bartlet testified that after his second interview with P.K., he interviewed Nutting. In that interview, Nutting admitted that he met P.K.—whom he knew as Miley556—on an online dating site. (R. 122:45–47.) He confirmed that the profile with the image of the erect penis belonged to him. (R. 122:53.) He also confirmed that the only photos on his profile were of his penis. (R. 122:53.) Nutting acknowledged that his profile contained no images of the tattoo and that his profile contained no description of the tattoo, other than to note that he had "a little ink." (R. 122:53–54.) Nutting told Bartlet that he may have mentioned the tattoo to P.K. and said something about it being "below the belt line." (R. 122:54.)

Nutting told Bartlet that on December 28, 2011, he and P.K. communicated online and through texts, he drove from his home in Appleton to Fond du Lac to pick her up,

and he took her to the Super 8. (R. 122:47–48.) He acknowledged that she stayed in the car while he went inside to pay for a room with cash. (R. 122:48.) When he returned to the car, Nutting said that P.K. told him that she was 14 years old. (R. 122:49.) Nutting told Bartlet that at that point, he directed P.K. to get out of the car; she did, and Nutting last saw P.K. walking across the motel parking lot. (R. 122:49.) Nutting said that he then went to the motel room, explaining that when he learned that P.K. was 14, he felt dirty and needed to take a shower. (R. 122:49–50.)

At the start of the interview, Nutting acknowledged having brought a black bag with sex toys with him in the car. (R. 103 Ex. 1:28.) He initially denied having brought the bag up to the room when he went to take a shower. (R. 103 Ex. 1:28.) He claimed he did not discuss the bag with P.K. and doubted she knew about it or its contents. (R. 103 Ex. 1:29, 48.) Later in the interview, Nutting said that he took the black duffel bag with him into the room, because "I always take everything in with me. It is like a habit." (R. 103 Ex. 1:76.)

According to Bartlet, the interview ended abruptly soon after Nutting said that he took the bag to the room; Nutting grabbed the written statement Bartlet was preparing, and tore it up. (R. 122:66.) Nutting also tried to grab the recorder, but Bartlet "knock[ed] his hands away" and put the recorder in his pocket. (R. 122:66.)

Bartlet also testified that another officer obtained a receipt for the room Nutting purchased at the Super 8, which reflected that he used room 205. (R. 41 Ex. 11; 122:33–35.) Bartlet went to the room to look at it and drew a diagram. (R. 122:38.) He talked to P.K. afterward, and asked her open-ended questions about what she remembered about the room. (R. 122:38.) P.K. told Bartlet, correctly, that the bathroom was to the left when you walked into the room, there was a mini-fridge, and there was a rocking chair closer

to the window than the bed. (R. 122:39.) Bartlet also took P.K. to the Super 8 and asked her to show him where Nutting took her. (R. 122:40.) P.K. showed Bartlet the back door where they entered and led him up the stairs to the second floor. (R. 122:40.) She identified room 206, which was across the hall from 205, as the room she and Nutting used. (R. 122:40.)

After Bartlet testified, the State played what the prosecutor described as the "majority of" the audio recording of Bartlet's interview with Nutting. (R. 122:116.) Before playing the recording, and outside the presence of the jury, the prosecutor explained that it would be redacting at least two sections of the interview. (R. 122:4–5, 21.) Although the prosecutor initially stated that he would read into the record the relevant time frames that he would be playing (R. 122:5), he did not do so, and neither the court nor defense counsel noticed that omission (R. 122:116).

The jury found Nutting guilty of second-degree sexual assault of a child. (R. 58:2.) The court sentenced him to 20 years' initial confinement and 15 years' extended supervision. (R. 58:2.)

Postconviction proceedings

Nutting sought postconviction relief, raising the following four claims:

First, he claimed that trial counsel was ineffective for failing to fully investigate the case before trial, specifically, by failing to obtain testing of a SANE kit and underwear collected from P.K. (R. 79:5–6.) Relatedly, Nutting also sought DNA testing of the kit and underwear. (R. 79:7.)

Second, he raised several claims related to the playing of the audio recording at trial, namely, that counsel was ineffective for failing to file a motion in limine regarding the recording and that the court erred in failing to require the playing of the recording to comply with SCR 71.01(1)(e) and

related statutes. (R. 79:7–9.) Nutting specifically identified segments from the full recording in which he mentioned having a conviction and having served time in prison. (R. 79:5.)

Third, he alleged that the State violated *Brady* when it failed to turn over P.K.'s October 2013 victim-impact statement from Fond du Lac County case number 2013CF523, in which P.K.'s mother, S.K., pleaded no contest to failure to protect a child. (R. 103 Ex. 3, 6.) According to the complaint in that case, P.K. told S.K. in June 2013 that she was going to have sex in her home with two men; S.K. told P.K. that she should "just not get pregnant." (R. 103 Ex. 6.) In a section of the statement prompting P.K. to state the effects S.K.'s crime had on her, P.K. wrote, "I [P.] do not listen to my mother and she tryed (sic) to stop me. [A]nd she did not do anything wrong. [I]t was all me." (R. 103 Ex. 3.) When prompted for her view on sentencing, P.K. asked for probation: "she is a good mother and I am the one that mass (sic) up by lieing (sic), and talking to old men when I was told not to. So I am asking just for probation that is it." (R. 103 Ex. 3.)

Fourth, Nutting sought a new trial in the interest of justice. (R. 79:10.)

On January 25, 2016, Nutting filed an amended postconviction motion, which included all of the above claims. (R. 83.)

Before the circuit court held a hearing on the motion in September 2016, the State agreed to allow DNA testing of the SANE kit and underwear. (R. 125:6.) The parties received results in July 2016. (R. 96; 125:6.) At the September 2016 hearing, Nutting's counsel indicated that that testing was incomplete because "there wasn't comparative testing done against [her] client's DNA sample." (R. 125:6.) The parties and court ultimately agreed to obtain

the results of that additional testing before addressing the issues in the postconviction motion. (R. 125:56–57.)

That additional testing occurred, and in January 2017, the State filed a memorandum with the lab results attached; the State indicated that "the analysis concludes that male DNA statistically comparable to [Nutting] was found in the vaginal swabs, rectal swabs, and interior crotch and rear panel of the victim's underwear." (R. 101:1.)

In February 2017, the court held a hearing on Nutting's motion. (R. 126.) Nutting's postconviction counsel withdrew the claims regarding the DNA testing, and asked to proceed on the remaining claims. (R. 126:5–6.)

The court then held an evidentiary hearing at which Nutting's trial counsel, Timothy Hogan, testified. (R. 126:13.) Hogan testified generally that he reviewed the audio recording multiple times in his trial preparation, that he and the prosecutor discussed and agreed upon which portions of the recording to redact, including portions where Nutting mentioned having a past criminal record or serving prison time, and that he listened to the recording when it played at trial and did not hear any objectionable material played to the jury. (R. 126:15–23, 32–37.) The State presents additional details of counsel's testimony in the Argument section below.

The postconviction court denied the motion in a written decision and order. (R. 108.) To start, the court stated that it "accepts responsibility for failing to note on the record those parts of the audio recording of the Defendant's interview that were played to the jury." (R. 108:2.) It did not make specific findings as to the exact start and stop times of the redacted or played material. Rather, it determined that nothing prejudicial to Nutting played: "the testimony of Attorney Hogan, coupled with the applicable Exhibits, unequivocally establishes those limited portions [of the

recording] played to the jury and clearly demonstrates the absence of any objectionable or prejudicial statements being played." (R. 108:2.) Moreover, the court opined that "[t]his omission, given the trial record, and the compelling and persuasive DNA evidence, should be considered harmless error should any be determined." (R. 108:2.)

The court held that the State did not violate *Brady* when it did not provide Attorney Hogan "with a copy of P.K.'s victim impact statement from a completely non-related case." (R. 108:2.)

Finally, the court held that Nutting failed to demonstrate entitlement to a new trial based on ineffective assistance or in the interest of justice because "[t]here is just no basis to support any claim that a new trial would produce any different result." (R. 108:3.) In denying all of Nutting's claims, the court adopted and incorporated by reference the State's reasoning in its memoranda opposing the motion. (R. 108:3, 6–7, 10–12.)

Nutting appeals.

ARGUMENT

I. Nutting is not entitled to a new trial based on the lack of start and stop times from the audio recording in the trial transcript.

The State understands Nutting in his first ground to allege that omissions in the record of the relevant running times of the audio recording played at trial prevent him from obtaining meaningful appellate review. *See State v. DeLeon*, 127 Wis. 2d 74, 77, 377 N.W.2d 635 (Ct. App. 1985). The issue, therefore, is whether the circuit court properly reconstructed the record to reflect the missing information.

This Court reviews the circuit court's decision that a missing portion of the record can be reconstructed for an erroneous exercise of discretion. *Id.* at 82. It reviews the

circuit court's findings for clear error, *see id.* (citing Wis. Stat. § 805.17(2)); those findings are also subject to harmless error review, *id.* (citing Wis. Stat. § 805.18(1)). Whether the circuit court's reconstruction is adequate is reviewed ab initio. *State v. Raflik*, 2001 WI 129, ¶ 32, 248 Wis. 2d 593, 636 N.W.2d 690.

Nutting also claims ineffective assistance of trial counsel based on the audio recording. 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 circuit court's factual findings unless they are clearly erroneous, but reviews its application of those facts to the legal standard de novo. *Id.*

A. Nutting is not entitled to relief based on his allegation of State or trial court error regarding the deficient record.

A defendant's right to appeal is absolute under the Wisconsin Constitution. Wis. Const. art. I, § 21(1); *State v. Perry*, 136 Wis. 2d 92, 98, 401 N.W.2d 748 (1987). For that right to be meaningful, a defendant must be provided "a full transcript—or a functionally equivalent substitute that, in a criminal case, beyond a reasonable doubt, portrays in a way that is meaningful to the particular appeal exactly what happened in the course of trial." *Perry*, 136 Wis. 2d at 99. A new trial is the remedy for a transcript deficiency that deprives a defendant of a meaningful appeal. *Id.*

But "not all deficiencies in the record . . . require a new trial." *Id.* at 100. Accordingly, a defendant must prove a "'colorable need,'" i.e., "an error which, were there evidence of it revealed in the [record], might lend color to a claim of prejudicial error." *Id.* at 101 (citation omitted).

If the defendant meets that burden, the trial court then must determine whether the missing part of the record can be reconstructed. *Raflik*, 248 Wis. 2d 593, ¶ 35. In reconstructing the record, the circuit court resolves any disputes between the parties regarding the substitutions to the record. *Id.* ¶ 36. In doing so, the court may "rely on its own recollection and notes or materials from the parties as an aid to reconstruction," as well as "conduct hearings or consult with counsel" in making its determination. *Id.* The court's "duty is to establish what the [missing] testimony was," not to "speculate about what the testimony probable was or might have been." *DeLeon*, 127 Wis. 2d at 81.

1. The postconviction court adequately reconstructed the record.

The reconstruction of the record here was adequate. In this case, the missing material in the record is not testimony, but rather the start and stop times from the audio recording to memorialize which portions the jury heard. In his postconviction motion (R. 83:5), Nutting identified four portions from the recording that were arguably prejudicial and that, if they were played to the jury, could support a claim that counsel was ineffective for failing to object or seek exclusion. Those statements included:

1. At 04:09 to 04:43, Nutting indicated that he served two years for theft and two years for attempted possession of child pornography. (R. 103 Ex. 1:5–6.)

2. At 15:02 to 15:33, Nutting told Bartlet that he showered after P.K. left because he felt dirty, and then said:

> I had just got done doing 43 months in prison for something that I did not do. Okay. I never sat down and searched for child porn. I never looked at it. I never tried to find it. I never went on websites. I never even tried to find it. I explained all this stuff

> before this all happened. Okay. I'm angry about this. Okay. And I got nailed.
>
> INVESTIGATOR: Okay.
>
> MR. NUTTING: For telling the truth.
>
> INVESTIGATOR: Okay.
>
> MR. NUTTING: I'm telling the truth now again. I already know what is going to happen. I'm going to go right up the damn river this time and I did nothing this time. I did it the right way.

(R. 103 Ex. 1:22.)

3. At 25:38 to 26:15, Nutting and Bartlet discussed Nutting's sex offender rules and conditions of probation, and whether maintaining a profile on a dating/sex site was a rule violation. (R. 103 Ex. 1:35.)

4. At 33:43 to 34:07, Nutting told Bartlet he did not want to continue talking to him because he did not think Bartlet believed him: "I'm already a sex offender, so my credibility is just shot. You know, I'm just a . . . piece of shit, you know, I'm just a pedophile. I'm—that's a fear that I have when people look at me because of my track record, you know." (R. 103 Ex. 1:45.)

Based on the above information, Nutting demonstrated a colorable need for clarification of the missing information regarding what portions of the recording were redacted when played for the jury. *See Perry*, 136 Wis. 2d at 101. But the court's reconstruction of the record was adequate, and thus Nutting is not entitled to relief based on the omissions in the record.

To start, the court soundly relied "on its own recollection," *Raflik*, 248 Wis. 2d 593, ¶ 36, to determine that the jury did not hear the complained-of portions of the recording. At the initial hearing on the motion on September 30, 2016, the court noted that it presided over the trial and that it read Nutting's postconviction counsel's

motion. (R. 125:51.) And based on its recollection, "there wasn't one of those statements that ever came in on the record. None." (R. 125:51.) At the later evidentiary hearing in February 2017, the postconviction court reiterated, "I presided over this [trial] and I was the judge and as I indicated previously I'll reaffirm now that there was nothing prejudicial that was addressed." (R. 126:10.)

Further, Attorney Hogan testified that he and the prosecutor had discussions and came to an agreement about what portions of the recording would play. (R. 126:33.) When the prosecutor offered as an exhibit his note sheet and asked counsel if he was familiar with it, Hogan stated, "I know I've seen it. . . . I remember you had a sheet of paper and it had some numbers on it, I don't recall if this was it or not." (R. 126:34.) But Hogan agreed that the prosecutor's note sheet had the following notations: (1) 1 minute to 5:35; (2) 25 minutes to 26:20; (3) 33:40 to 35 minutes; and (4) a box with a notation 1:05:49, with the words "when to stop" below it. (R. 103 Ex. 4; 126:38.) Those notations aligned with all of the complained-of portions of the recording, except for the portion at minute 15 where Nutting referenced child porn and having served 43 months. (R. 103 Ex. 1:2–7, 34–36, 45–46, 76.)

Attorney Hogan later elaborated on his discussions with the prosecutor, stating that he recalled comparing his notes of parts to be redacted against the prosecutor's:

> I remember seeing notes that you had made about start and stop times, I remember comparing them to the specific time notations in Exhibit Number 2 [Hogan's notes] of my file to make sure that the points that I specifically knew were improper that you had marked them on your notes to make sure that those were not going to be played.

(R. 126:40.)

Hogan also testified that he listened to the recording as it played at trial, that he did not recall hearing any objectionable material, and that if he had heard such material, he would have objected. (R. 126:37.) He agreed that Nutting's statement in the recording regarding having served 43 months and referencing child porn was prejudicial and he would have sought its exclusion, and he had no recollection or notes to confirm whether that statement was redacted. (R. 126:21–22.) But as Hogan made clear, "had I heard any information that would have been improper I believe I would have objected to it or made a record that, hey, this portion was played to the jury and I think it was improper." (R. 126:35.) Counsel reiterated that point on cross-examination, confirming that he would have "objected to pieces of the recording that [he] believed were improper." (R. 126:37.) And he confirmed that at trial, he "didn't take any notes of any statements being admitted that [he] found to be improper." (R. 126:38.)

Given all of that, the circuit court soundly found, in effect, that the defective record could be reconstructed. *See Perry*, 136 Wis. 2d at 101. Here, the missing portions of the record were simply start and stop times, both the prosecutor and trial counsel were available to reconstruct the record based on their memories and notes, and the postconviction court was also the trial judge. *See id.*

Moreover, the reconstruction effort was sound. The court relied on its recollection, testimony from trial counsel, and relevant notes and exhibits. *See Raflik*, 248 Wis. 2d 593, ¶ 36. It determined, based on "the testimony of Attorney Hogan, coupled with the applicable Exhibits, unequivocally establishes those limited portions played to the jury and clearly demonstrates the absence of any objectionable or prejudicial statements being played." (R. 108:2.) None of that is clear error.

2. Even if the postconviction court did not clarify whether the jury heard one of the challenged statements, the record as it stands does not impede his right to meaningfully appeal.

The only arguably questionable portion of the court's decision—given that the prosecutor's notes did not clearly list it and Hogan had no trial notes regarding it—relates to Nutting's statement at minute 15 regarding having served 43 months and referencing child porn. (R. 103 Ex. 1:22.) But even if it is not clear beyond a reasonable doubt that the prosecutor redacted that statement, the court's finding in that regard was harmless error. That is so because the ultimate question in transcript reconstruction cases is whether an omission in the transcript impedes a defendant's right to meaningfully appeal. *See Perry*, 136 Wis. 2d at 99.

The defect here is not missing or lost testimony; it is simply memorialization of whether the jury heard a portion of a known recorded statement. Hence, assuming that the jury did hear the complained-of portion, Nutting can proceed with an ineffective assistance of counsel claim based on allegations that counsel missed hearing it or heard it and failed to object. Thus, Nutting is not entitled to a new trial based on the defect in the transcript or the court's reconstruction.

Nutting offers no persuasive argument to the contrary. He asserts, without support, the jury heard all of the challenged statements and that, based on *Lewis*—an unpublished case—their probative value was outweighed by the danger of unfair prejudice. (Nutting's Br. 15–16 (discussing *State v. Lewis*, No. 2014AP2773-CR, 2015 WL 7722998 (Dec. 1, 2015) (unpublished)). But *Lewis* simply involved the affirmance of the discretionary evidentiary

determination by the circuit court in that case. It offers no persuasive—let alone on-point—guidance for this case.

Nutting complains that his reference to his prior conviction at minute 15 was likewise inadmissible under Wis. Stat. § 904.03 or as other-act evidence. (Nutting's Br. 15–17.) He argues that the State cannot prove harmless error from its admission. (Nutting's Br. 18–19.) But even if the evidence was inadmissible, that would not entitle Nutting to a new trial under the circumstances here, where counsel never challenged its admissibility or gave the circuit court an opportunity to rule on it. Rather, it was up to Attorney Hogan to object to it or file a motion in limine. Accordingly, the State addresses those points below when responding to Nutting's ineffective assistance of counsel claim. *See* Section I.B., *infra*.

As for the reconstruction of the record, Nutting seems to argue that the bell cannot be un-rung with regard to the parties' failure to memorialize the start and stop times or the content of the recording played to the jury. (Nutting's Br. 19–21.) He writes that he "does not agree that [a reconstruction] process applies in this context, where the record was never made" (Nutting's Br. 20), and that "there is no mechanism by which this court can be assured that highly prejudicial evidence was not presented to the jury" (Nutting's Br. 21). By that reasoning, however, nothing missing from a record could ever be satisfactorily reconstructed. The reconstruction here involves running times, which are more likely to be memorialized in the parties' notes and memories than precise testimony. Nor does he explain why the hearing in this case, in which the court consulted its memory, counsel's memory, and the parties' notes, could not satisfactorily cure the defect in the transcript.

Finally, Nutting claims that the State improperly supplemented the record with its notes from the trial

regarding the running times. (Nutting's Br. 19.) To start, there is no rule preventing parties in a criminal postconviction hearing from submitting exhibits and additional evidence at that hearing. Indeed, fact-finding is the purpose of such hearings, and by necessity the parties will present additional evidence at these hearings. Nutting's invocation of the procedure in certiorari proceedings (Nutting's Br. 19), is entirely off-point.

Moreover, Nutting does not raise admissibility or relevance challenges to the notes, nor can he. The prosecutor's notes were certainly relevant to the question whether the record could be reconstructed to determine the start and stop times on the recording. And Nutting offers no legal basis upon which they should have been excluded.

And as for Nutting's points that the prosecutor's notes could not be authenticated or that they turned the prosecutor into a witness (Nutting's Br. 19), the prosecutor primarily introduced the notes to prompt Attorney Hogan's memory of their discussions of what portions of the recording would play (R. 126:33–34). Hogan testified that the notes looked familiar, and while he could not say whether they were the notes he specifically reviewed before the prosecutor played the recording, Hogan confirmed the running times listed on the notes. (R. 126:34–35, 38–39.) Further, to the extent the prosecutor offered the notes as proof of the redacted portions, the postconviction court, in assigning weight to the notes, understood that they were the prosecutor's and that Hogan could not authenticate them. Nutting develops no legal argument explaining how his rights were violated based on the use of the notes at the hearing.

That all said, the State does not dispute that the court and parties should have ensured that the record reflected the redacted portions of the recording. But the court was able to reconstruct the record adequately such that Nutting's

ability to meaningfully appeal remained intact. Accordingly, Nutting is not entitled to a new trial based on the oversight.

B. Nutting failed to demonstrate ineffective assistance of counsel regarding the audio recording.

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

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 88 (2011). The court "strongly presume[s]" that counsel has rendered adequate assistance. *Strickland*, 466 U.S. at 690.

To show prejudice, the defendant must prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. More than merely showing that the error had some conceivable effect on the outcome, "the defendant must show that there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (quoting *Strickland*, 466 U.S. at 694). "[P]rejudice should be assessed

based on the cumulative effect of counsel's deficiencies." *Thiel,* 264 Wis. 2d 571, ¶ 59.

Establishing prejudice under *Strickland* is difficult. The reasonable probability standard "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Richter*, 562 U.S. at 111–12 (citing *Strickland*, 466 U.S. at 693). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112 (citing same).

1. Attorney Hogan was not deficient based on his remark that he did not anticipate that the State would play the entire recording at trial.

Attorney Hogan's acknowledging just before trial that he made an incorrect assumption regarding the State's playing the recording was not deficient. Hogan was not saying that he did not think the recording was admissible. He said that he did not know that the prosecutor intended to play it. (R. 121:21.) In context with the parties' discussion leading up to that comment, Hogan appeared to be saying that he expected the State to play, at most, parts of the recording. And at the postconviction hearing, Hogan knew that the State would be calling Officer Bartlet to testify, and anticipated that Bartlet would testify to any statements Nutting provided, obviating the need to play the recording. (R. 121:15–16.) Hogan understood there was no legal reason that the State could not play the recording, he just did not anticipate that the State would play it. (R. 121:16.)

Although it would have been best practice for Hogan to have assumed that the State would use the recording at trial, Hogan's understanding and reasoning were not

objectively unreasonable. *See Richter*, 562 U.S. at 88 (deviation from best practices or most common custom is not the same as incompetent representation). Moreover, there was nothing deficient about Hogan voicing his concerns about the recording and alerting the court to potential issues with it.

Perhaps recognizing this, Nutting faults Hogan for not challenging the admissibility of the recording at trial. (Nutting's Br. 24.) But he fails to explain what legal basis Hogan could have advanced to exclude the recording. Nutting also faults Hogan for "not specifically address[ing] the prejudicial portions (other than the mention that the defendant was in custody) with the court, once it became clear that the recording would be offered by the State." (Nutting's Br. 24.) Yet the prosecutor and Hogan came to an agreement about portions to redact, obviating the need for the court to resolve any conflicts. To be sure, the better practice would have been for the prosecutor and Hogan to have memorialized on the record the portions they agreed to redact, or for Hogan to have filed a motion in limine to seek exclusion of the prejudicial portions. That said, it was not objectively unreasonable for Hogan to handle the redactions in the manner that he did.

Nutting also invokes, at length, an unpublished per curiam decision for support of his deficient performance and prejudice arguments. (Nutting's Br. 24–27 (citing *State v. Pritchard*, No. 2015AP2053-CR).) Because Nutting's citations to *Pritchard* violate Wis. Stat. § (Rule) 809.23(3)(b), the State declines to address or otherwise distinguish that case.

Moreover, Nutting cannot demonstrate that Hogan's ultimate handling of the recording was deficient. Hogan reviewed the recording "two or three times before the trial" and noted potential prejudicial information (R. 126:16); he re-reviewed the recording before the State played it and

made additional specific notes about time frames where the prejudicial portions appeared (R. 126:16); and he worked out with the prosecutor ahead of time which portions would be redacted based on points where Nutting mentioned his past prison time and crime (R. 126:19). While the recording played, Hogan took additional notes and, as he testified at the postconviction hearing, he would have objected had he heard any prejudicial information regarding Nutting. (R.126:37.) Given all of that, it is reasonable to conclude that if the portion of the recording played in which Nutting referenced serving 43 months and a child pornography crime, Hogan would have immediately noticed and objected.

In sum, given Hogan's review of the entire recording, his efforts to ensure that prejudicial portions would not play, his lack of objections during its playing, and the court's recollection at the postconviction hearings that nothing prejudicial played, Nutting failed to demonstrate that Hogan performed deficiently with regard to the recording.

2. Even if the jury heard Nutting's remark regarding his prior conviction, Nutting cannot demonstrate prejudice.

Even assuming that the State failed to redact Nutting's statement at around minute 15 of the recording that he just got done serving 43 months, denying that he ever searched for child porn, and referencing "going up the damn river this time," Nutting cannot demonstrate a substantial likelihood of a different result had Hogan better insured that the statement would not play, or had Hogan objected and sought a cautionary jury instruction. *See Richter*, 562 U.S. at 111–12 ("The likelihood of a different result must be substantial, not just conceivable.") (citation omitted).

The issue at trial was whether Nutting had sex with P.K. after learning that she was 14 years old. The most damning information on the recording was Nutting's admission that P.K. told him that she was 14 and his inconsistencies with regard to what happened after he learned her age. Accordingly, the only real question for the jury was whether Nutting lied when he told Bartlet that he ended contact and never had sex with P.K. after that point.

The jury had substantial evidence before it that Nutting had sex with P.K. To start, P.K. testified consistently that they had sex. (R. 121:151, 166, 170, 172.) That testimony was consistent with what P.K. told S.K. (R. 121:218, 224, 234) and every report she made to Bartlet (R. 41 Ex. 5:2–3). In addition, P.K. knew details of the motel room that she was highly unlikely to know had she never been in it. (R. 122:38–40.) P.K. knew about Nutting's black duffel bag and said he called it his bag of tricks (R. 41 Ex. 5:3.), which undercut Nutting's claim that he never told P.K. about the bag of sex toys or showed it to her (R. 103 Ex. 1:29). Further, P.K. knew about a tattoo on Nutting's backside that Nutting did not have photos of on his profile. (R. 121:166, 198.)

In addition, Nutting's interview contained inconsistencies regarding the black bag (R. 103 Ex. 1:27–28, 76) and ended with Nutting's attempting to destroy Bartlet's notes and the recording (R. 103 Ex. 1:76–77; 122:66).

Finally, if the jury heard Nutting's statement at around minute 15, it took up only about 30 seconds in a just-over-an-hour-long recorded interview played in a three-day trial. (R. 103 Ex. 1:22.) Again, assuming that the jury heard the statement, neither party revisited it; the prosecutor did not reference it in closing argument.

To be clear, if the jury heard Nutting mention his prior conviction and child pornography, that posed a risk of

prejudicial effect. Moreover, the State would not have opposed any request to redact it. But even so, the jury had overwhelming evidence before it that Nutting had sex with P.K. knowing she was 14. Hence, under the totality of circumstances at this trial, it was not reasonably likely that but for that statement, the jury would have acquitted Nutting.

Nutting makes conclusory arguments in support, simply stating that "[i]t is clear that the errors of counsel and of the trial have prejudiced Nutting." (Nutting's Br. 27.) But in addition to failing to show a reasonable probability that the jury actually heard the statement, and fails to apply *Strickland*'s prejudice standard even on the assumption that it did. This Court should affirm.[4]

II. The circuit court cannot have erred in denying a jury instruction request that Attorney Hogan never made.

For Nutting to obtain relief on his claim that the trial court erred in denying his counsel's request for a jury instruction, he must first show that counsel made such a request. Wis. Stat. § 805.13(3) (failure to object at an instruction conference waives any error in the proposed instructions); *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

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[4] Nutting asserts that the postconviction court wrongly factored in the postconviction DNA results to its conclusion that the omitted references to the redacted portions was harmless error. (Nutting's Br. 26–27.) The State agrees that the DNA evidence does not factor into questions of *Strickland* prejudice or harmless error because it was not before the jury. Nevertheless, even ignoring the DNA results, Nutting still cannot prove prejudice.

Nutting's argument fails because he never requested such an instruction. Nutting filed a pretrial motion to introduce evidence that, during his interview with Detective Bartlet, he offered to take a polygraph examination. (R. 27:1–2.). The State sees nothing in that motion, however, requesting an instruction that the evidence could be an indicia of innocence. Nutting therefore waived that argument. *Schumacher*, 144 Wis. 2d at 409.

If Nutting complains that the court deemed the evidence of his offer inadmissible (Nutting's Br. 28), the court did no such thing. The court expressed skepticism that Nutting's offer to take the polygraph would be admissible, given that Nutting was proposing that he could introduce it during his cross-examination of Officer Bartlet. (R. 120:6.) The court also questioned the relevance of polygraph testing. (R. 120:7–10.) But its larger concern was that if Nutting introduced evidence of his offer, it could open the door to allow the State to introduce impeachment evidence. (R. 120:13–19.) And ultimately, the court deferred its decision on the motion because the relevance of Nutting's offer depended in part on what Bartlet's testimony would be. (R. 120:19–20.)

In other words, the court did not deem Nutting's offer to take a polygraph inadmissible. It certainly did not deny a request for a jury instruction regarding Nutting's offer. There was no request in Nutting's motion, at the hearing, or when the court finalized the jury instructions. (R. 27; 120; 122:130–37.) And if Nutting believes that Hogan was ineffective for failing to ask the court to consider an instruction, he wholly failed to develop any such argument before the circuit court or this Court. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court."); *State v. Pettit*, 171

Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (this Court may decline to address issues inadequately briefed).

Finally, Nutting offers a suggested jury instruction on an offer to take a polygraph. (Nutting's Br. 29.) His offered instruction essentially tells the jury that it can weigh the offer to take a polygraph as an indicia of innocence, but it does not have to. (Nutting's Br. 29.) The proposed instruction offers nothing beyond the standard instructions for the jury to weigh the evidence, assess credibility, and use its common sense. This Court should summarily reject Nutting's claim.

III. The State did not violate *Brady* based on its nondisclosure of P.K.'s victim-impact statement from a different case.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Accordingly, to prove a *Brady* violation, a defendant must satisfy a three-part test and show that (1) the State suppressed evidence, (2) the evidence allegedly suppressed was favorable to the defendant, and (3) the evidence was material to an issue at trial. *State v. Rockette*, 2006 WI App 103, ¶ 39, 294 Wis. 2d 611, 718 N.W.2d 269. This Court independently applies this constitutional standard to the undisputed facts of the case. *Id.*

The first prong of *Brady* is satisfied only if "(1) the prosecution failed to disclose evidence that it or law enforcement was aware of before it was too late for the defendant to make use of the evidence, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence." *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001); *see also State v. Armstrong*, 110 Wis. 2d 555, 580, 329 N.W.2d 386 (1983) (stating that the

prosecution's duty to disclose under *Brady* "covers only evidence within the state's exclusive possession").

Evidence is "favorable" to the accused, when "if disclosed and used effectively, it may make the difference between conviction and acquittal." *State v. Harris*, 2004 WI 64, ¶ 12, 272 Wis. 2d 80, 680 N.W.2d 737 (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

Finally, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682; *see also Giglio v. United States*, 405 U.S. 150, 154 (1972). The materiality element encompasses prejudice: "the defendant is not prejudiced unless 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Harris*, 272 Wis. 2d 80, ¶ 15 (quoting *Strickler v. Greene*, 527 U.S. 263, 290 (1999)).

Here, the prosecutor had no duty to disclose the complained-of material because it was not favorable or material to Nutting's defense. The undisclosed material was P.K.'s victim-impact statement from S.K.'s failure-to-protect case. In the statement, P.K. wrote, "I [P.] do not listen to my mother and she tryed (sic) to stop me. [A]nd she did not do anything wrong. [I]t was all me." (R. 103 Ex. 3.) P.K. also wrote: "she is a good mother and I am the one that mass (sic) up by lieing (sic), and talking to old men when I was told not to. So I am asking just for probation that is it." (R. 103 Ex. 3.)

The victim-impact statement is not favorable to Nutting's defense. P.K.'s reference to lying, in context, reflected that she was lying to her mother about talking to

older men in June 2013. Moreover, P.K. statement that "it was all me" in context reflects P.K.'s acknowledgement that she, by her actions, undermined S.K.'s ability to protect her. It is not evidence that reasonably could "make the difference between conviction and acquittal." *Harris*, 272 Wis. 2d 80, ¶ 12 (quoted source omitted).

In any event, the statement is not material, because there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. It would not have cast doubt on the credibility of P.K. (*see* Nutting's Br. 31–32), any more than P.K.'s own testimony already did.

To that end, the jury heard that P.K. lied about her age on her online dating profiles (R. 121:138, 176); she lied to S.K. about who she was talking to and where she was going on December 28, 2011 (R. 121:154, 186); she lied to S.K. when she answered S.K.'s calls in the motel room (R. 121:229); and she lied about certain details in her report to police (R. 121:190). Further, her trial testimony as to whether and when she told Nutting her age was internally inconsistent. (R. 121:150, 156, 158–59, 169, 188.) P.K.'s credibility problems were before the jury in full force. The jury nevertheless believed P.K.'s claims that Nutting had sex with her at the Super 8 after learning her age. The victim-impact statement in which P.K. acknowledged different, vague lies in regard to different acts was not reasonably probable to change the trial result or call into question confidence in the outcome. *Bagley*, 473 U.S. at 682.

Nutting also complains that the State did not disclose before trial that it had charged S.K. with failure to prevent sexual assault of a child. (Nutting's Br. 32–33.) But as with his claim regarding the victim-impact statement, he wholly fails to argue how that information and evidence, had it been disclosed, reasonably could have changed the result of the trial. He is not entitled to relief on this claim.

IV. Nutting is not entitled to a new trial in the interest of justice.

Nutting does not make clear whether he is appealing the trial court's denial of his request for a new trial in the interest of justice, he is asking this Court to exercise its authority to grant a new trial, or both. No matter. He is not entitled to this extraordinary relief.

Under Wis. Stat. § 805.15(1), a trial court has discretion to order a new trial "in the interest of justice." *State v. Harp*, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991). This extraordinary remedy may be warranted in situations where "the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). This Court reviews a postconviction court's denial of a motion for a new trial in the interest of justice for an erroneous exercise of discretion. *State v. Williams*, 2006 WI App 212, ¶ 13, 296 Wis. 2d 834, 723 N.W.2d 719.

Here, the postconviction court soundly exercised its discretion in determining that the real controversy was tried and that therefore, Nutting was not entitled to a new trial in the interest of justice:

> This case was the subject of extensive discovery and a three day jury trial. The record, coupled in light of the totality of the evidence, conclusively demonstrates that the Defendant is not entitled to any post conviction relief. The evidence in this case was compelling and persuasive. The jury determines weight and credibility—and they rendered their verdict beyond a reasonable doubt.

(R.108:3.) Nutting offers nothing to persuade that the court erroneously exercised its discretion in denying him relief.

Likewise, this Court should not exercise its authority to grant a new trial in the interest of justice. Under Wis. Stat. § 752.35, this Court may order discretionary reversal for a new trial: (1) where the real controversy has not been tried; or (2) where there has been a miscarriage of justice. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

Nutting does not appear to offer a miscarriage of justice argument, nor can he: as noted above, the evidence at trial supporting Nutting's conviction was strong. At a new trial, the State would likely present, in addition to that evidence, the DNA results showing that DNA consistent with Nutting was found on P.K.'s underwear. Hence, Nutting cannot satisfy his burden of showing, under the miscarriage of justice test, that "there is a substantial probability that a new trial would produce a different result." *State v. Kucharski*, 2015 WI 64, ¶ 5, 363 Wis. 2d 658, 866 N.W.2d 697.

If Nutting claims that the real controversy was not tried, this Court may exercise this power without finding the probability of a different result on retrial. *Hicks*, 202 Wis. 2d at 160. At the same rate, this Court approaches "a request for a new trial with great caution," and will exercise its discretionary power "only in exceptional cases." *Morden v. Continental AG*, 2000 WI 51, ¶ 87, 235 Wis. 2d 325, 611 N.W.2d 659 (citation omitted).

P.K.'s credibility was fully tried to the jury, which also heard significant evidence that Nutting had sex with P.K. knowing that she was 14 years old. The postconviction court adequately reconstructed the record regarding the redacted portions of the recording. Even if the jury did hear Nutting mention his past crime and sentence, that information cannot have reasonably changed the outcome given the overwhelming evidence of Nutting's guilt. Moreover, there was no error with regard to jury instructions and no *Brady* violation. Contrary to Nutting's assertions of cumulative

prejudice (Nutting's Br. 34–35), there is no prejudice to calculate here. *See Mentek v. State*, 71 Wis. 2d 799, 238 N.W.2d 752 (1976) ("Zero plus zero equals zero."). He is not entitled to a new trial in the interest of justice.

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 8th day of November, 2018.

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. The length of this brief is 9,853 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 8th day of November, 2018.

_____
SARAH L. BURGUNDY
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