STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2018AP200-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEDRIC EARL HAMILTON, JR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT AND ORDER ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE ELLEN R. BOSTROM AND THE HONORABLE MARK A. SANDERS, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Did the circuit court correctly deny Dedric Earl Hamilton, Jr.'s postconviction motion without a hearing?

The circuit court implicitly answered "yes."

This Court should answer "yes."

2. Should this Court order a new trial for Hamilton in the interest of justice?

Not answered by the circuit court.

This Court should answer "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication of this Court's opinion.

INTRODUCTION

In hindsight, Hamilton believes his trial counsel performed ineffectively by failing to challenge the voluntariness of his *Miranda*[1] waiver and his subsequent confession, and by failing to raise and discuss the phenomenon of false confessions. The circuit court properly denied Hamilton's postconviction motion without a hearing. The motion failed to allege sufficient material facts to establish his asserted claims. The record conclusively showed that Hamilton suffered no actual prejudice from trial counsel's allegedly deficient performance. And Hamilton has not shown that his is one of the exceptional cases warranting

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

a new trial in the interest of justice. No reason exists to disturb his convictions.

STATEMENT OF THE CASE

The two charges.

The State charged Hamilton in 2012 with first-degree sexual assault of a child under age 13 and incest. (R. 1; 6.) Hamilton's eight-year old niece, Debbie,[2] claimed that he touched her between her legs with his penis, pulled down her leggings and underwear, and roughly touched her vaginal area directly with his hand ("digging his fingers in her private part") (R. 1:1–2.) The case was tried in October of 2012.

The trial evidence.

Hamilton does not challenge the sufficiency of the evidence supporting his guilt.

The evidence relevant to the issues on appeal came from Debbie, from two investigating police officers, and from the SANE nurse who examined Debbie shortly after the assault. The State also admitted into evidence a videotaped interview of Debbie, and portions of a videotape made when police questioned Hamilton.

Debbie described the vaginal groping as specified in the complaint, and the jury watched her videotaped statement. (R. 112:35–65; 113:13–22, 25–27.) The assault caused Debbie pain; it "hurt bad." (R. 112:45; 62.)

The parties stipulated that Hamilton made a knowing and intelligent waiver of his *Miranda* rights. He gave an hour-long videotaped statement to police. (R. 113:11–12, 44–48.) The jury saw portions of that statement. (*Id.* at 44–48.)

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[2] A pseudonym.

Hamilton did not admit the charged crimes. He admitted touching Debbie's butt and vaginal area once, but over clothing and in a nonsexual way as they passed each other on the stairs. (R. 114:5–8.) He denied touching Debbie with his penis. (*Id*. at 5–6.)

During questioning, the detective asked Hamilton to account for the presence of his skin cells and DNA on Debbie's vagina. That physical evidence did not exist. (*Id*. at 5.)

The jury also heard testimony from sexual assault nurse examiner Christina Hildebrand. (*Id*. at 10–40.) Hildebrand examined Debbie on June 27, 2012. (*Id*. at 11; *See also* R. 18 (examination report).) Hildebrand began by asking Debbie if she knew why she was here. (R. 114:13.)

Hildebrand described Debbie's response, reproduced for emphasis:

> [Hamilton] came into the room and gave me a hug. I then went to pull away and he pulled me back and told me to be a good girl. He put his thing between my legs and then he pulled down my panties and started digging around in my private area with his fingers. He stuck either his middle finger or ring, there is a progress note missing . . . There it is. That's okay. His ring finger inside me. He had his thing out and he put that between my legs, Patient unsure if he penetrated her with his penis. Patient states: Then he pulled up my panties and was kissing my mouth and cheek. Patient states[:] Later he was hugging me and grabbing my butt and saying, Be a good girl.

(*Id*. at 14.)

During the examination, Hildebrand discovered several play-related injuries common in children. (*Id*. at 16–18.) But she also discovered uncommon injuries.

Debbie's external vaginal area was entirely and abnormally red—more redness than would normally appear

in an eight-year-old girl—and tender to the touch. (*Id.* at 20–21, 28–29.) Debbie's inner vaginal area was also red and tender throughout, and she had an abrasion. (*Id.* at 21–24, 28–29.) The abrasion was also an abnormal finding, constituting an injury, and was consistent with a report that someone had been "digging around" in a child's vaginal area. (*Id.* at 24.) There was bruising at the point of the abrasion. (*Id.* at 25.) Hildebrand also discovered an additional abrasion on the outside of Debbie's vagina. (*Id.* at 26.)

All the observed redness and injuries were consistent with the description of the assault provided by Debbie. (*Id.* at 28, 36.) Hildebrand also explained that it was unlikely that any of the observed redness and injuries were caused by Debbie's normal activities: "It could happen, but it is unlikely. As I said, this area is covered by tissue. This tissue, the labia folds over this area. For me to see these injuries, I had to pull back this tissue." (*Id.* at 28.)

Debbie gave Hildebrand no explanation of having sustained those injuries in a fall, and Hildebrand saw no indication of accidental injury. (*Id.* at 33, 40.) While poor hygiene or an infection could possibly explain the observed redness, Hildebrand saw no evidence that Debbie had poor hygiene or an infection. (*Id.* at 34, 38–39.) And Hildebrand testified that poor hygiene or infection would not explain the abrasions in Debbie's vaginal area. (*Id.* at 39.) The only pain Debbie reported during her examination was in her genital area. (*Id.* at 39.)

The defense did not present any testimony, relying principally on reasonable doubt and lack-of-intent theories.

During closing argument, the State focused on "whether or not Mr. Hamilton had sexual contact with [Debbie.]" (*Id.* at 57.) The prosecutor stressed the persuasive nature of Debbie's testimony and her pretrial statement. (*Id.* at 57–59.) He stressed the corroborative nature of

Hildebrand's medical testimony concerning Debbie's vaginal injuries. (*Id.* at 59–60.) And while he noted that Hamilton admitted only to touching Debbie's butt and vagina area over her clothing, the prosecutor described Hamilton's physical reactions during the police interview, suggesting they were consistent with consciousness of guilt. (*Id.* at 60–61.)

Trial counsel argued in closing that Hamilton did not fondle Debbie sexually, but merely gave her a nonsexual "smack[ ] on the butt." (*Id.* at 62–63, 69.) Counsel also criticized the police officer who questioned Hamilton: "He has a police officer screaming at him. You did this. You did this. And he's shaking his head, No, I didn't do this. He says numerous times over and over again, there is no way that you have that DNA that you are telling me you have. There is just no way." (*Id.* at 62.)

Counsel also suggested that Debbie, angered by the smack or pat on her butt, maybe have embellished or flat-out lied about what happened: "I'm not so sure what is being forgot, what is being made up or what's being embellished." (*Id.* at 64–67.)

The jury found Hamilton guilty on both charges. (R. 25; 26.) He eventually received sentences totaling 21 years of initial confinement and six years of extended supervision. (R. 43.)

The postconviction proceedings related to this appeal.

Through current successor counsel, Hamilton moved in 2017 for a new trial based on trial counsel's alleged ineffectiveness. (R. 83.) Hamilton claimed trial counsel performed ineffectively in three ways.

First, by not moving the circuit court to suppress his statement based on an invalid *Miranda* waiver. (*Id.* at 8–9.)

Second, by not moving for suppression based on improper police coercion during questioning. (*Id*. at 9–13.)

Third, by failing to present expert testimony at trial to support the contention that the techniques used by police during questioning "contributed to the danger of a false confession." (*Id*. at 13–19.)

To support his motion, Hamilton proffered opinions and testimony from psychologist David Thompson. Although Thompson had no method of reliably assessing Hamilton's understanding of his *Miranda* rights at the time of questioning, he believed certain "risk factors" noted in Hamilton's personal history "raise[d] serious concerns as to Mr. Hamilton's comprehension of his rights at the time." (R. 84:7.)

Hamilton also proffered opinions and testimony from attorney and law professor Keith Findley. Through Findley, Hamilton hoped to prove that trial counsel performed deficiently by not becoming aware of the professional literature pertaining to false confessions, by not having Hamilton evaluated to gauge the possibility of a false confession here, and by not presenting expert opinion testimony at trial concerning false confessions. (R. 83:14–16.)

The State opposed the motion, arguing that (1) Hamilton received appropriate *Miranda* warnings and validly waived his *Miranda* rights; (2) no evidence of improper police coercion appeared in this case; (3) trial counsel did not perform deficiently by not challenging the admissibility of Hamilton's statement; and (4) even if counsel performed deficiently, Hamilton suffered no actual prejudice. (R. 93.)

The circuit court[3] denied Hamilton's motion. (R. 97.) The court made five findings relevant to this appeal.

First, while the detective's "recitation of the *Miranda* warnings was quickly given, it was after he asked the defendant if he was familiar with the Miranda warnings and told him that he could ask any questions if he did not understand them. After he read the defendant his rights, he then asked the defendant if he understood those rights, and the defendant stated that he understood them, hence the stipulation at trial." (*Id*. at 3.)

Second, Hamilton's postconviction motion failed to allege sufficient facts to identify which *Miranda* warnings he claimed not to have understood. (*Id*. at 3–4.) "Simply stating that he didn't 'fully understand' them is insufficient. *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), requires something more. There is nothing to show that the defendant did not understand the *Miranda* rights he was given other than his self-serving statement that he 'didn't fully understand them.' He has not specified what part of the warnings he didn't understand, and he has not told the court what he specifically did not understand about the part he claims he didn't understand. There is nothing in the interrogation tape to demonstrate that the defendant was confused about them or that he did not understand them. The court finds his claim conclusory, without a sufficient factual basis, and insufficient to award a new trial." (R. 97:3–4.)

Third, while Hamilton made a statement, he did not confess to what Debbie claimed he did or the crimes he was charged with. Hamilton admitted only to "a supposed

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[3] The Honorable Ellen R. Brostrom presided at Hamilton's trial. The Honorable Mark A. Sanders decided Hamilton's postconviction motion.

innocently made all-encompassing sweep of the victim's front and backside." (*Id*. at 4.)

Fourth, no police coercion occurred here because the detective's misrepresentations of evidence fell within the boundaries of permissible conduct. (*Id*. at 4–5.) Hamilton was "familiar with police procedure," and police employed no other allegedly coercive techniques during questioning. (*Id*. at 5.)

Fifth, and most importantly, Hamilton suffered no actual prejudice from the introduction of his statement at trial. Even if trial counsel had successfully asked the circuit court to suppress it, the strength of Debbie's testimony and the corroborating physical evidence would still have led the jury to convict him. (*Id*. at 5–6.)

STANDARDS OF REVIEW

Whether a postconviction motion alleges sufficient material facts to warrant a hearing presents a question of law, reviewed de novo. *State v. Allen*, 2004 WI 106, ¶¶ 9, 13, 274 Wis. 2d 568, 682 N.W.2d 433.

Ineffective assistance claims present mixed questions of fact and law. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). Circuit court findings of fact receive appellate deference unless clearly erroneous, while determinations of deficient performance and actual prejudice receive de novo review. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

ARGUMENT

I. The circuit court properly denied Hamilton's postconviction motion without a hearing because the motion failed to allege sufficient material facts, and because the record conclusively showed that Hamilton was not entitled to relief on his challenges to trial counsel's effectiveness.

A. The relevant law.

1. The factual specificity required in a postconviction motion to warrant an evidentiary hearing.

To warrant an evidentiary hearing, a postconviction motion must allege material facts significant or essential to the issues at hand. *Allen*, 274 Wis. 2d 568, ¶ 22. The motion must allege detailed, nonconclusory facts establishing who, what when, where, how, and why an alleged error justified a new trial. *Id*. ¶ 23.

If Hamilton's motion failed to allege sufficient material facts, or presented conclusory allegations, or if the record conclusively showed he was not entitled to relief, the circuit court could properly exercise its discretion and deny it without a hearing. *Id*. ¶¶ 9, 13.

The stand-alone sufficiency of the motion matters on appeal, not additional allegations offered in an appellant's brief. *Id*. ¶ 27.

To obtain an evidentiary hearing on an ineffective assistance claim, Hamilton had to sufficiently allege both deficient performance and actual prejudice. *Bentley*, 201 Wis. 2d at 313–18. He could not rely on conclusory allegations, hoping to supplement them at a subsequent hearing. *Id*. at 317–18.

The circuit court pointed out some deficiencies in Hamilton's motion. The State will point out others. This Court "may affirm a circuit court for any reason, even if not relied on by either the circuit court or raised by the lawyers." *Correa v. Farmers Ins. Exch.*, 2010 WI App 171, ¶ 4, 330 Wis. 2d 682, 794 N.W.2d 259.

2. The showings required to prove ineffective assistance.

This Court presumes constitutionally effective representation. *Strickland,* 466 U.S. at 689. Hamilton had to prove his trial counsel rendered deficient performance that resulted in actual prejudice. *Id.* at 687; *see also State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999).

Trial counsel performed deficiently if her acts or omissions fell outside the wide range of professionally competent assistance and reasonable professional judgment under prevailing professional norms. *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, 105 (2011) (citation omitted).

Deficient performance resulted in actual prejudice if it created a reasonable probability that, absent the error, the result of the proceeding would have been different. *Id.* at 694. Mere assertions of prejudice and speculation about possible prejudice do not satisfy this standard. *See Erickson*, 227 Wis. 2d at 773–74. And when, as here, "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697.

The overall reliability of the trial process is important to the prejudice analysis. "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth

Amendment guarantee is generally not implicated." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (citation omitted). This Court should also review the totality of the trial evidence when assessing prejudice. *Strickland*, 466 U.S. at 695.

B. Hamilton's motion failed to allege sufficient material facts to warrant a hearing.

Hamilton's jury trial occurred in 2012. Presented with compelling testimony from Debbie and the presence of corroborating medical evidence, the jury found Hamilton guilty of sexual assault and incest.

In 2017, fortified by hindsight and armed with newly-acquired opinions concerning his psychological and intellectual functioning and the phenomenon of false confessions, Hamilton tried to bring the quality of his trial counsel's performance into question.

Reviewing courts try very hard to eliminate the distorting effects of postconviction and appellate hindsight. *State v. Breitzman*, 2017 WI 100, ¶ 65, 378 Wis. 2d 431, 904 N.W.2d 93. Hamilton has not tried at all.

In his postconviction motion, Hamilton claimed trial counsel performed ineffectively (1) by not moving the circuit court to suppress his statement based on an invalid *Miranda* waiver; (2) by not moving for suppression based on improper police coercion during questioning; and (3) by failing to present expert testimony at trial that police techniques during questioning contributed to the danger of a false confession.

Using *Allen* as a template, Hamilton's pleading was deficient in at least six ways.

First, as specifically noted by the circuit court, the motion failed to allege *which* of the various *Miranda*

rights—or which aspects of those individual rights—Hamilton claimed not to understand. (R. 97:3–4.)

The *Miranda* rights encompass a subject's right to remain silent; a warning that his statements can be used against him; informing him of his right to the presence of an attorney; and informing him of his ability to receive a lawyer if he cannot afford one. *See Dickerson v. United States*, 530 U.S. 428, 435 (2000).

The circuit court noted that Hamilton's motion contained only a self-serving statement that he simply didn't "fully understand" his rights. (R. 97:3–4.) Hamilton's declaratory and conclusory contention gave the court no direction as to what part of the warnings Hamilton claimed not to have understood, and the nature of his alleged confusion. The court also noted that "[t]here is nothing in the interrogation tape to demonstrate that the defendant was confused about them or that he did not understand them. The court finds his claim conclusory, without a factual basis, and insufficient to warrant a new trial." (*Id*. at 4.)

Conclusory declarations do not justify postconviction hearings. They justify dismissing the motion in the first instance. *Allen*, 274 Wis. 2d 568, ¶¶ 9, 13.

Second, the motion failed to allege sufficient facts to demonstrate *why*, in 2012, trial counsel should have observed the various risk factors discovered in Hamilton by psychologist Thompson in 2017, and assigned them the same significance as Thompson. Put another way, even if she had observed them, the motion failed to allege sufficient facts to demonstrate *why Strickland* would have required her to act upon her discovery by consulting with a forensic psychologist and filing a suppression motion challenging the validity of the *Miranda* waiver.

Strickland and subsequent cases tell reviewing courts to presume effective assistance, to recognize a wide range of

professionally competent representation, and to judge counsel's performance at the time it occurred. Hamilton's motion graphically illustrated the danger of relying on hindsight when challenging trial counsel's performance.

The State is unaware of any authority for the proposition that a criminal defense attorney performs deficiently by not having her client undergo forensic psychological examination and testing whenever the State seeks to admit a custodial statement at trial. That was not the law in 2012. It is not the law today.

But Hamilton's trial counsel would had to have done that in 2012 to meet Hamilton's extreme performance expectations in 2017. His motion points to nothing that counsel should have seen in Hamilton's psychological or intellectual makeup that would have required counsel in 2012 to consult with a forensic psychologist, or present her client for examination and testing of the type favored by Thompson in 2017.

To be sure, some cases require defense consultation with experts. *See Richter*, 562 U.S. at 106. But the motion did not allege sufficient facts to demonstrate that Hamilton's case fell into that narrow category.

Third, even if the Sixth Amendment and *Strickland* required Hamilton's trial counsel to discover such risk factors in 2012, recognize their purported significance, and act upon them, the motion failed to allege sufficient facts to demonstrate *who* counsel should have consulted, and *who* was ready, willing, and able in 2012 to assist trial counsel or to serve as a trial witness.

Similarly, the motion failed to allege sufficient facts to identify with particularity *who* was ready, willing, and able to assist counsel or provide trial testimony regarding the phenomenon of false confessions.

Fourth, as to both Thompson's and Findley's prospective trial testimony, the motion failed to allege sufficient facts to demonstrate *why* the circuit court would or should have admitted such expert opinion testimony under Wis. Stat. § (Rule) 907.02, or *why* the court would have erred in excluding it. Expert opinion testimony is not automatically admissible whenever a party offers it. The motion contained no citation to Wis. Stat. § (Rule) 907.02, and no analysis pertaining to the admissibility of such testimony at trial in 2012.

Fifth, with regard to Findley's proffered postconviction testimony about trial counsel's performance, the motion failed to allege sufficient facts to demonstrate *why* that testimony would have been admissible at all at a *Machner*[4] hearing. *Strickland* expert testimony concerning counsel's performance is improper at *Machner* hearings. That is because the circuit court is the only expert on domestic law issues, including whether trial counsel performed deficiently. *State v. McDowell*, 2003 WI App 168, ¶ 62 n.20, 266 Wis. 2d 599, 669 N.W.2d 204, *aff'd*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500. "Expert testimony is not necessary to determine claims of ineffective assistance of counsel." *Earp v. Cullen*, 623 F.3d 1065, 1075 (9th Cir. 2010). This was the case at the time of Hamilton's postconviction proceedings, and it is certainly the case now. *See, e.g., State v. Pico*, 2018 WI 66, ¶¶ 40–47, 2018 WL 2994947 (June 15, 2018).

Sixth, the motion failed to allege sufficient facts to demonstrate *why* the detective's limited use of misrepresentation during Hamilton's questioning constituted the coercive or improper police conduct necessary

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

for a finding of involuntariness. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986); *State v. Moss*, 2003 WI App 239, ¶ 13, 267 Wis. 2d 772, 672 N.W.2d 125. The presence of coercive or improper police conduct is also necessary before a reviewing court may consider how a subject's personal characteristics may affect voluntariness. *State v. Markwardt*, 2007 WI App 242, ¶ 50, 306 Wis. 2d 420, 742 N.W.2d 546; *State v. Albrecht*, 184 Wis. 2d 287, 301, 516 N.W.2d 776 (Ct. App. 1994).

Police misrepresentation during questioning is not inherently coercive, but is relevant to the voluntariness determination. *See Albrecht,* 184 Wis. 2d at 302; *State v. Triggs*, 2003 WI App 91, ¶ 17, 264 Wis. 2d 861, 663 N.W.2d 396. Here, as the circuit court noted, the motion did not establish that the misrepresentation regarding the existence of incriminating DNA and skin cell evidence had any coercive effect on Hamilton at all, much less an improper one. (R. 97:4.) Hamilton stayed true to his contention that only a single, benign, nonsexual touching over clothing occurred—a swat on the butt—and no sexual assault as alleged at trial. "[W]e have repeatedly held that a law-enforcement agent may actively mislead a defendant in order to obtain a confession, so long as a rational decision remains possible." *United States v. Sturdivant*, 796 F.3d 690, 697 (7th Cir. 2015) (citation omitted). Hamilton plainly had the ability to rationally decide whether and what to say during the questioning. He stuck to his story.

Similarly, when a defendant retains the ability to assess a police officer's exaggeration of evidence in light of his own memory of the event, the officer's conduct will not make a resulting statement involuntary. *See State v. Lemoine*, 2013 WI 5, ¶ 32, 345 Wis. 2d 171, 827 N.W.2d 589. The detective's exaggeration—we have skin cells and DNA on Debbie's vaginal area—would not have caused Hamilton to make an involuntary statement because Hamilton "could

check any exaggerations with his own memory of the event and determine whether the interviewer was lying." *Id*. He was not led to consider anything beyond his own beliefs regarding his actual guilt or innocence. *See Triggs*, 264 Wis. 2d 861, ¶ 19.

And seventh, despite Hamilton's desire to place his case squarely among those where a defendant—for whatever reason—falsely confesses to a crime that he did not actually commit, his motion failed to allege sufficient facts to demonstrate *why* his case falls into that category.

The most important aspect of Hamilton's statement was not a confession to the charged crimes. It was a flat-out denial. What he actually admitted—a nonsexual touching over clothing, without intent to become sexually gratified—constituted a protestation of innocence, not an admission of criminal liability. The circuit court perceived this when it stated that Hamilton "did not actually confess to what the victim said he did; rather, he only 'confessed' to a supposedly innocently made all-encompassing sweep of the victim's front and backside. This is not even close to what the victim said occurred." (R. 97:4.)

And the circuit court's observation exposed additional inadequacies in Hamilton's pleading. The motion failed to state *which* portion or portions of his statement Hamilton considered false, *whether* the jury actually heard them and, if it did, *why* he suffered actual prejudice as a result.

Considered individually or separately, these deficiencies justified the circuit court's dismissal of Hamilton's petition without a hearing.

C. Hamilton has not demonstrated actual prejudice because no reasonable probability exists that suppression of his statement would have resulted in acquittal.

The circuit court considered the absence of actual prejudice the "primary basis" for its decision to deny the motion without a hearing. (R. 97:5–6.) The court relied on the powerful testimony provided by Debbie—corroborated by the physical injuries observed by Christina Hildebrand—to reach this conclusion. (*Id*. at 6–7.)

The circuit court followed *Strickland's* invitation to decide ineffective assistance claims based on lack of actual prejudice when it is proper to do so. *Strickland,* 466 U.S. at 697. This Court should do so as well.

The circuit court's finding of no prejudice was manifestly reasonable. Recall that Debbie described the vaginal groping as specified in the complaint, and the jury saw and heard her videotaped statement. (R. 112:35–65; 113:13–22, 25–27.) The assault caused Debbie pain; it "hurt bad." (R. 112:45; 62.)

Recall also that Debbie's version of events—as related to Christina Hildebrand—tallied with the State's allegations:

> [Hamilton] came into the room and gave me a hug. I then went to pull away and he pulled me back and told me to be a good girl. He put his thing between my legs and then he pulled down my panties and started digging around in my private area with his fingers. He stuck either his middle finger or ring, there is a progress note missing . . . There it is. That's okay. His ring finger inside me. He had his thing out and he put that between my legs, Patient unsure if he penetrated her with his penis. Patient states: Then he pulled up my panties and was kissing my mouth and cheek. Patient states[:] Later he was hugging me and grabbing my butt and saying, Be a good girl.

(R. 114:14.)

Many child sexual assault victims suffer no physical injuries from their victimization. This case is different.

The State will not repeat its summary of Hildebrand's testimony regarding Debbie's injuries. (State's Br. 3–4.) It is enough to note that Debbie's external and internal vaginal areas were entirely and abnormally red, and tender to the touch. She suffered abrasions consistent with her claim that Hamilton had been "digging around" that area. She also suffered bruising in her vaginal area. Hildebrand testified that all of this was abnormal, consistent with the reported sexual assault, and unlikely to have been caused by Debbie's normal activities, or poor hygiene, or infection. The only pain Debbie felt upon examination was in her vaginal area.

No reasonable probability exists that, had the jury never heard Hamilton's statement claiming only a nonsexual, over-the-clothes touching of Debbie, the result of the proceeding would have been different. No substantial likelihood exists of a different result at a retrial minus the statement. And no reason at all exists for this Court to question the reliability of Hamilton's trial.

D. Hamilton's corresponding appellate argument does not bring the correctness of the circuit court's refusal to order an evidentiary hearing into doubt.

Hamilton begins his argument by stressing the general importance of confessions in criminal prosecutions. (Hamilton's Br. 15.) But as the circuit court pointed out, Hamilton did not confess to the charged crimes. He admitted a single, nonsexual, over-the-clothes slap-on-the-butt. His statement was actually a protestation of innocence.

Hamilton also asserts—again without citation to case authority—that trial counsel should have perceived the need for expert assistance with respect to the voluntariness of his

statement. (*Id*.) This was an underdeveloped portion of the postconviction motion; it remains so on appeal. This Court should disregard it. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

Next, Hamilton summarizes Findley's proffered postconviction testimony. (Hamilton's Br. 16–17.) He assumes the testimony would have been relevant and admissible. He is wrong. *See McDowell*, 266 Wis. 2d 599, ¶ 62 n.20.

Hamilton claims the detective recited the *Miranda* warnings too fast for comprehension. (Hamilton's Br. 18–20.) That argument turns on Thompson's proffered opinion regarding Hamilton's risk factors, not available to Hamilton's trial counsel in 2012. (*Id*.) It also fails to account for the impact of Hamilton's previous encounters with law enforcement. And even Thompson was unwilling to offer an opinion that Hamilton did not understand those rights: "This examiner does not have a method for reliably assessing either Mr. Hamilton's specific understanding of his Miranda rights on that date or the extent to which his experiences since that date have increased his understanding of those rights." (R. 84:7.)

And Hamilton does not account for his original failure to adequately allege which rights he supposedly did not understand.

A substantial portion of Hamilton's brief discusses how his personal characteristics may have affected the voluntariness of his statement. (Hamilton's Br. 21–27.) But that presupposes the predicate—the existence of improper coercion or police tactics during the questioning. *Markwardt*, 306 Wis. 2d 420, ¶ 50. The State has already discussed the detective's use of misrepresentation and exaggeration, and why they do not rise to the level of coercion or improper conduct under the facts here. (State's Br. 14–15.) And while

Hamilton's brief refers to the "Reid Technique" of police questioning—and its supposed role here—Hamilton's postconviction motion made no mention of the Reid Technique.

The remainder of Hamilton's argument involves speculation as to how the testimony of Thompson and Findley might have led the jury to conclude that Hamilton's statement was false and how, absent that expert testimony, this Court cannot trust the correctness and reliability of the guilty verdicts. (Hamilton's Br. 28–34.)

Once again, Hamilton presumes the predicate—that such evidence would have been admitted at his 2012 trial. He made no argument on that point in the postconviction motion. Once again, Hamilton ignores the fact that his statement did not constitute an admission to the charged crimes—he maintained his innocence throughout. And once again, the strength of the State's case was far greater than Hamilton wishes to believe. (State's Br. 2–4, 15–17.)

II. A new trial is not required in the interest of justice.

This Court possesses discretionary authority under Wis. Stat. § 752.35 to grant a new trial if the record shows that the real controversy was not fully tried, or if it is probable that justice miscarried. It should not exercise that authority in this case.

The power of discretionary reversal is a "formidable" statutory power. *State v. Wery*, 2007 WI App 169, ¶ 21, 304 Wis. 2d 355, 737 N.W.2d 66. The Wisconsin Supreme Court has charged this Court with exercising that formidable power only in exceptional cases—infrequently, judiciously, with great caution, and with reluctance. *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60. This Court must also explain why it considers a case "exceptional." *State*

v. McKellips, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258.

Few cases satisfy this strict standard. "In order to grant a discretionary reversal for a miscarriage of justice, there must be a substantial probability of a different result on retrial." *Wery*, 304 Wis. 2d 355, ¶ 21. Hope of a better outcome at a new trial does not suffice: "In order for this court to exercise its discretion and for such a probability [of a miscarriage of justice] to exist we would at least have to be convinced that the defendant should not have been found guilty and that justice demands the defendant be given another trial." *Lock v. State*, 31 Wis. 2d 110, 118, 142 N.W.2d 183 (1966), *quoted with approval in State v. Davis*, 2011 WI App 147, ¶ 16 n.4, 337 Wis. 2d 688, 808 N.W.2d 130.

Hamilton has not shown that his is one of the exceptional cases requiring reversal in the interest of justice. He characterized the "real controversy" in his case as the truthfulness or falsity of his confession, rather than whether he sexually groped Debbie. (Hamilton's Br. 35–36.)

But no false confession of guilt occurred. And this case involves claims of ineffective assistance, which obligated Hamilton to show actual prejudice. He could not prove it. His inability to prove it—or to prove that he should not have been convicted—does not improve in the context of a request for discretionary reversal.

Did Hamilton sexually grope Debbie? Debbie said he did, and the medical evidence bears that out. Even though the circuit court called that the primary factor in its postconviction decision, Hamilton relegates his own discussion of the medical evidence supporting Debbie's version of events to a single paragraph of his brief. He says Debbie's injuries could have had innocent causes. (Hamilton's Br. 31–32.)

The State invites this Court to review Hildebrand's unambiguous—and essentially unrefuted—testimony on point. (R. 114:11–40.) Debbie suffered abnormal, painful injuries to her genital area, wholly consistent with her description of what Hamilton did to her. It was unlikely that Debbie received those injuries from normal activity. (*Id*. at 28.) There was no indication that Debbie suffered from poor hygiene or infection that could explain the redness and irritation, and poor hygiene or infection could not explain the abrasions and bruising (*Id*. at 38–39.) And her condition could not reasonably be explained by a fall. (*Id*. at 39–40.)

Is there a reasonable probability that, absent evidence of Hamilton's statement denying the charged crimes, the jury would have acquitted him? No.

Should Hamilton have been found guilty? Yes.

Those two answers should direct the outcome of this appeal.

CONCLUSION

This Court should affirm Hamilton's convictions and the order denying his postconviction motion.

Dated at Madison, Wisconsin, this 28th day of June, 2018.

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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 5,740 words.

Dated at Madison, Wisconsin, this 28th day of June, 2018.

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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 at Madison, Wisconsin, this 28th day of June, 2018.

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