STATE OF WISCONSIN

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

DISTRICT III

Case No. 2018AP999-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK J. BUCKI,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN LINCOLN COUNTY CIRCUIT COURT, THE HONORABLE JAY R. TLUSTY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 266-9594 (Fax)
oneilar@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Statutes

Rules

ISSUES PRESENTED

1. Did the circuit court misapply Wis. Stat. § 907.02 by not requiring corroboration for the admission of expert testimony that cadaver dogs had detected the scent of human remains at Defendant-Appellant Mark J. Bucki's residence and that trailing dogs had detected Bucki's scent in the ditch where his wife Anita's body was found?

The circuit court answered no.

This Court should affirm.

2. Did Bucki prove that his trial counsel was ineffective for (1) not calling an expert witness to rebut the dog handlers' testimony, (2) not introducing evidence that Anita had worn the shoes used to detect Bucki's scent at the ditch, and (3) not doing more during closing argument to challenge the State's theory that Bucki had initially tried to bury his wife on their property?

The circuit court answered no.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests publication. No published Wisconsin decision had addressed the admissibility of cadaver dog or trailing dog evidence under Wis. Stat. § 907.02. Publication is warranted because this case applies an established rule of law to a new factual situation and it is of "substantial and continuing public interest." Wis. Stat. § 809.23(1)(a)2. and 5. The State does not request oral argument.

INTRODUCTION

A jury convicted Bucki of killing his wife, Anita, and disposing of her body in a ditch about 12 miles from their

house. When Bucki killed her, he and Anita were separating, which Anita did not want to do.

At trial, the State introduced two kinds of dog-scent-detection evidence. One kind involved two cadaver dogs that found the scent of human remains in the Bucki residence and on the surrounding property. The other kind involved two trailing dogs that detected Bucki's scent at the ditch.

Before trial, Bucki moved to suppress the evidence. Among other challenges, he asked the court to require corroboration of the evidence before it could be admitted. The court rejected this argument and allowed the dogs' handlers to testify as expert witnesses under the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in Wis. Stat. § 907.02.

Bucki renews his corroboration argument on appeal, claiming that it should be a requirement for admission of dog evidence under Wis. Stat. § 907.02. This Court should affirm. Bucki has pointed to nothing in Wisconsin law to require corroboration of the results of an expert's testing as a precondition to admissibility. Instead, the standard for admissibility is section 907.02, and the circuit court properly exercised its discretion when applying it here. Further, even if the court erred, it was harmless.

Bucki also claims that his trial attorneys were ineffective. Specifically, he contends that his lawyers should have introduced expert testimony to generally challenge the reliability of the dog handlers' testimony. He also claims that his lawyers should have had Bucki and Anita's son, Clint, testify that Anita had worn the tennis shoe used to obtain Bucki's scent for the trailing dogs. Finally, Bucki argues that his lawyers should have done more to challenge the State's theory that he initially tried to bury Anita on their property.

This Court should reject these arguments. The circuit court correctly found that counsel did not perform deficiently and that Bucki had not shown prejudice.

STATEMENT OF THE CASE[1]

I. Anita's disappearance, the investigation, and the discovery of her body

Around six p.m. on April 26, 2013, Bucki reported to police that Anita was missing from their house outside of Merrill. (R. 119; 400:17; 401:91.) Police, including Lincoln County Sheriff's Department Lieutenant Mark Gartmann, responded. (R. 1:1.) Bucki told Gartmann that he and Anita were separated and that she had been living in Wausau. (R. 1:1.) He said that Anita had come to their house at nine p.m. the night before, and they had discussed their divorce for two or three hours. (R. 1:1.) Bucki admitted raising his voice. (R. 1:2.) He said that he went to bed after the conversation. (R. 1:1.) Anita stayed the night. (R. 1:1–2.)

Bucki told Gartmann that he woke up shortly before five a.m. on April 26 and discovered that Anita was gone. (R. 1:2.) Her car, keys, purse, cell phone, and jacket were still in the house. (R. 1:2.) The purse contained $3,000 cash, credit cards, and small electronic devices. (R. 404:50.)

In addition, Bucki told Gartmann that on the afternoon of April 26, he removed some of Anita's belongings from the basement, ripped some carpet out of a bedroom, and then burned these items. (R. 1:2.) He also said that there was a $150,000 life insurance policy on Anita and that she had texted him to split the money with their son if anything happened to her. (R. 1:2.)

---

[1] This Statement of the Case is not a comprehensive summary of what occurred in trial court. The State will include additional facts where appropriate in the brief's Argument section.

Gartmann searched Bucki's pickup truck. (R. 1:2.) Half of the bed appeared to have been cleaned, and it smelled like a household cleaner. (R. 1:2.) The other half was covered with dirt or dust. (R. 1:2.) Gartmann saw two hand prints in the bed, one larger than the other. (R. 1:2.)

On April 30, 2013, Gartmann and others searched Bucki's residence. (R. 404:41.) As part of the search, they used a cadaver dog named Izzy to search for the scent of human remains. (R. 1:2; 384:56–58; 398:85.) Izzy's handler was then-Madison Police Department Officer Solon McGill. (R. 384:14; 398:55–57.)

Izzy went to the garage and alerted for the odor of human remains near the rear, driver's side tire of Bucki's truck. (R. 398:87.) McGill took Izzy out of the garage and had her search again. (R. 398:88.) Izzy again went into the garage, and this time, she put her paws on the truck's tailgate and indicated that she smelled human remains. (R. 398:88.) Izzy then went into a different garage on her own and indicated on a trailer attached to an ATV and a large metal roller. (R. 398:88–91.) Outside on the property, Izzy indicated on a burn barrel and an area of disturbed earth. (R. 398:92, 98.) Inside the house, she indicated where a large portion of carpet had been removed and at the bathtub drain. (R. 398:95–96.)

On May 1, 2013, law enforcement had another cadaver dog, Trixie, come to the residence. (R. 385:3–4, 25; 398:137.) Trixie's handler was Jeanne Frost, a retired dog handler for the Waupun Police Department. (R. 385:3; 398:126.)

Trixie first indicated for the smell of human remains on a tarp and several logs in an area that law enforcement asked her to search. (R. 398:138–39.) They then went into one of the garages, where she alerted on a foot rest on the ATV and the cart attached to it. (R. 398:140–41.) Trixie did not alert on the truck in the other garage. (R. 398:141.) She indicated on the burn barrel, which at this point had been sealed as evidence

and placed in a trailer in the driveway. (R. 398:142–43.) Trixie also indicated on the spot where the barrel had been. (R. 398:143.) Inside the house, she alerted where the carpet was missing. (R. 398:144–45.)

On May 10, 2013, a couple on a walk in Taylor County discovered Anita's body. (R. 400:111–15.) The body was in a ditch about 40 feet off the side of a county highway. (R. 400:39–40; 400:113–15.) Anita had been stabbed seven times and strangled. (R. 398:22–24, 26–27.) A forensic dentist identified her by her dental records. (R. 1:2; 400:107–08.)

After removing Anita's body, law enforcement used two trailing dogs to see if Bucki's scent was present at the ditch.

One of the dogs, Missy, was handled by Louise Horn, a Vilas County Sheriff's Department Detective. (R. 384:92; 399:46, 52–53.) They went to the ditch the day the body was found. (R. 384:112–16; 399:52–53.)

Law enforcement gave Horn a tennis shoe from Bucki's residence for Missy to try find his scent at the scene. (R. 384:114–15; 399:52–53.) After getting the scent, Missy "committed to a track," which Horn explained meant that she became focused, and she went around a barricade that had been set up on the road. (R. 384:114–16; 399:55–57.) Missy continued down the road a short distance, stopped, and returned to Horn. (R. 384:115; 399:56.) Later at trial, Horn said that her opinion was that Missy's actions showed that the person whose scent was on the shoe had been in the area and possibly left it in a vehicle. (R. 384:115; 399: 56–59.)

The other trailing dog was named Pollie. (R. 399:7–8.) Her handler was Joanne Disher, who was not a law enforcement officer but had trained dozens of blood hounds in scent tracking since 1992. (R. 385:42; 399:6–7.)

Disher and Pollie also went to the scene on May 10, 2013. (R. 385:57, 66–67; 399:18.) They also used the shoe as the source of the scent. (R. 385:67; 399:21.) Pollie went into

the ditch where Anita's body had been found. (R. 385:68; 399:23–24.) At trial, Disher said that it was her opinion was that the person whose scent was on the shoe had been at the scene. (R. 399:25.)

II. The charges against Bucki, the pretrial *Daubert* proceedings on the admission of the dog evidence, and Bucki's trial

The State charged Bucki with first-degree intentional homicide, hiding a corpse, and strangulation and suffocation. (R. 1.)

Bucki moved to exclude the evidence of the dog searches. (R. 33.) He noted that Wisconsin courts had not yet addressed the admissibility evidence from cadaver or trailing dogs, though he acknowledged that other states had generally admitted it. (R. 33:1–3.) Bucki argued that the evidence here was unfairly prejudicial under Wis. Stat. § 904.03. (R. 33:1, 3–4.) And he claimed that the evidence did not meet the standard for admissibility of expert testimony under Wis. Stat. § 907.02 and *Daubert*. (R. 33:1, 3–4.)

The State moved separately to admit the dog evidence. (R. 38:1; 39:1–6.)

The circuit court held a two-day *Daubert* hearing. (R. 384; 385; 386; 387.) The State called McGill, Frost, Horn, and Disher. They testified about their backgrounds, how they had trained their dogs, the dogs' past work, the dogs' certifications, and the science and literature relevant to scent-trailing dogs. (R. 384:12–50, 92–113; 385:3–25, 42–66.)

The defense called Lawrence Myers, a professor of veterinary medicine at Auburn University. (R. 387:8–9.) He testified that it is very difficult to determine what specific scent a dog is smelling, and it would not be realistic to make that determination at a crime scene. (R. 387:16–17.) Myers also testified that many things could give off the scent of human decomposition, including burnt skin and blood.

(R. 387:19.) He said that there was no scientific consensus about when a dead body is detectable by dogs as having the scent of decomposition or how long the scent remains in an area. (R. 387:19–20.)

Myers also testified that when multiple people live together, their scents will mix, and this can make it difficult for dogs to determine which scent to follow. (R. 387:22.) He said that the tennis shoes used to detect Bucki's scent could have been contaminated based on the way law enforcement handled and stored them. (R. 387:40–41.) Myers explained that there was no scientific way to determine whether a dog was smelling the scent its handler wanted it to smell or something contaminating that scent. (R. 387:40–43.)

In addition, Myers testified generally about the training and certification of trailing and cadaver dogs. (R. 387: 23–38.) And he offered specific criticisms of the training records and the reliability of the dogs used in this case. (R. 387:47–56.) Myers said that there was no way to predict any of the dogs' reliability. (R. 387:55.)

The State called Rex Stockham to rebut Myers. (R. 386:25.) Stockham is the program manager for the FBI's Forensic Canine and Canine Programs. (R. 386:25.) He discussed his knowledge and experience with using and training dogs in human remains detection and scent tracking. (R. 386:42–76.) Stockham also discussed his review of the training records of the dogs used in the investigation. (R. 386:76–86.) He testified that it was his opinion that properly trained dogs could detect the smell of human remains and trail an individual person's scent. (R. 386:86–87.)

Stockham also testified that he was part of a "rather small community" of people who are experts on human-scent evidence. (R. 386:40–41.) He said Myers was not considered part of this group because he had not conducted any research. (R. 386:42.) Stockham also described his participation with

others doing work in the area of human-decomposition odors. (R. 386:42–46.) He said that this, too, was a small group of people that Myers was not considered part of due to his lack of research. (R. 386:46–47.)

The circuit court admitted both the trailing-dog and cadaver-dog evidence under the *Daubert* standard in Wis. Stat. § 907.02. (R. 392:4–27.) The court addressed six factors in reaching this decision.

First, the court determined that the handlers' testimony would be relevant under Wis. Stat. § 904.01 and not unfairly prejudicial to the defense under Wis. Stat. § 904.03. (R. 392:7–9.)

Second, the court found that the evidence would be helpful to the jury. (R. 392:9–10.) It explained that the jury could give it "whatever weight it deems appropriate." (R. 392:10.)

Third, the court concluded that the dogs' handlers were all qualified expert witnesses. (R. 392:10–14.) It reviewed each handler's background and concluded that they were all "experts due to their knowledge, skill, experience, training and/or education." (R. 392:14.)

Fourth, the court determined that the handlers' proposed testimony was based on sufficient facts and data. (R. 392:14–16.) It based this decision on each handlers' report about their conclusions from the searches. (R. 392:14–16.)

Fifth, the court found that that the handlers' proposed testimony was based on reliable principles and methods. (R. 392:16–26.) It considered seven subfactors from the advisory committee note to Federal Rule of Evidence 702:

- The court determined that the techniques for both trailing and cadaver dogs could be tested based on the dogs' training records and specific scientific studies. (R. 392:17–19.)

- The court also found, based on those studies, that the techniques had been subject to peer review. (R. 392:19–20.)

- The court next determined that both techniques had a known error rate based on studies and the handlers' own testimony about errors during training. (R. 392:20–21.)

- The court found that the scientific community had generally accepted the techniques. (R. 392:21–22.) It noted that 22 states and the District of Columbia admitted trailing-dog evidence and that Myers did not dispute its general acceptance. (R. 392:21.) The court further explained that five states had admitted cadaver-dog evidence. (R. 392:21.) It also said that while Myers said there was no scientific consensus about aspects of this evidence, Stockham testified that there was "an acceptance of cadaver dogs in the scientific community." (R. 392:22.)

- The court next concluded that the technique was not developed for litigation but instead grew out of independent research. (R. 392:22.) It pointed to testimony that both types of dogs had been used for non-criminal-investigatory purposes like finding missing people or recovering human remains after natural disasters or terrorist attacks. (R. 392:22–23.)

- The court held that the handlers had not unjustifiably extrapolated from an accepted premise to an unfounded conclusion. (R. 392:23–25.)

- Finally, the court found that the trailing-dog handlers had not accounted for obvious alternative explanations

for the results, specifically, the effect of another person having worn the tennis shoe. (R. 392:25.) The court determined that the cadaver-dog handlers had accounted for alternate explanations, specifically that the scent of human remains could have come from a source other than Anita's body. (R. 392:26.)

Sixth, and finally, the court held that the handlers had applied the principles and methods reliably to the case's facts. (R. 392:26–27.)

The court also rejected Bucki's argument that the dog evidence was inadmissible without corroboration. (R. 392:36–44.) It held that corroboration was not a requirement under *Daubert*. (R. 392:44.) Rather, the court concluded, it was a matter for cross-examination and for the jury to consider. (R. 392:44.)

The jury convicted Bucki after an eight-day trial. (R. 406:5–6.) The circuit court sentenced him to life imprisonment on his first-degree intentional homicide conviction, making him eligible for release to extended supervision after 35 years. (R. 241:1.) It sentenced him to a concurrent four-year sentence for the hiding a corpse conviction and a concurrent three-year sentence for strangulation and suffocation. (R. 241:3.)

III. Bucki's postconviction claims of ineffective assistance of trial counsel

Bucki moved for postconviction relief. (R. 267.) As relevant here, he argued that his trial attorneys had been ineffective for not presenting Myers as an expert witness at trial. (R. 267:17–18.) Bucki specifically claimed that Myers would have been able to challenge the reliability of the handlers' conclusions. (R. 267:18.) He also argued that Myers would have testified about the likelihood that the tennis shoe the trailing dogs used was contaminated by other scents. (R. 267:19–20.)

Bucki further claimed that his lawyers should have had Clint testify that Anita had worn the tennis shoes used to detect Bucki's scent at the ditch. (R. 267:20.) This, he maintained, would have allowed them to argue that the dogs were merely smelling her scent at the ditch, not his. (R. 267:20.) Finally, Bucki argued that his lawyers should have done more to challenge the State's theory that a section of disturbed ground on Bucki's property was where he had tried to initially bury Anita. (R. 267:21–22.)

The circuit court denied Bucki's motion in a written order after a two-day evidentiary hearing. (R. 374; 415; 416.)

A. Not calling Myers at trial

The court found that Bucki's attorneys, Jessica Schuster and James Lex, had, after consulting with Bucki, made a reasonable strategic decision not to call Myers. (R. 374:6–8, 13–15.) This decision was based on their belief that the cross-examination of the dog handlers had gone well, and that Myers had weaknesses as a witness. (R. 374:13–15.)

Schuster was primarily responsible for handling the dog-related issues, though she and Lex made strategic decisions jointly. (R. 374:6; 415:10, 95.) Schuster prepared to cross-examine the dog handlers based on what she learned at the *Daubert* hearing. (R. 415:11–12.) She and Lex had Myers on standby ready to testify at trial if necessary. (R. 374:7; 415:11–12.) Schuster and Lex agreed that the cross-examination of the handlers had gone "much better" at trial than it had at the *Daubert* hearing. (374:7, 14; 415: 56–63.) This included highlighting weaknesses in the handlers' testimony. (R. 415:56–63; 374:7.) Lex thought the cross-examination of the handlers had elicited much of what they would have gotten from Myers's testimony. (R. 415:106.)

The attorneys were also concerned that Myers was a weak witness. (R. 374:7; 415:19–20, 98–101, 106–07.) Schuster said that while he could have clarified some issues

for the defense, the State's cross-examination at the *Daubert* hearing had made him look "not as great as he could have been." (R. 415:20.) She was concerned about the same thing happening at trial. (R. 415:28.) Both attorneys were concerned that the State would call Stockham in rebuttal. (R. 374:7; 415:19, 29, 98.) Lex said Stockham was a "very good witness." (R. 415:98.) Schuster explained that she was concerned that Stockham had actual experience training dogs while Myers had "just a scientific aspect of it." (R. 374:8; 415:20.)

After the handlers' cross-examination, Bucki and the attorneys met to discuss whether to call Myers. (R. 374:7, 13; 415:13, 28–31, 100–01.) The lawyers told Bucki that they thought the cross-examination had gone well and expressed their concerns about calling Myers. (R. 374:8; 415:29–30, 98–101.) They made a group decision not to call Myers, though Bucki had final say. (R. 415:28–30, 100–01, 107.) Bucki "maybe reluctantly" agreed with this strategy. (R. 374:8; 416:110.) The attorneys would have called Myers had Bucki wanted them to. (R. 415:30, 107.)

The court also found that the attorneys were not ineffective for failing to call Meyers to testify about potential scent contamination on the tennis shoes. (R. 374:15–16.) It determined that the same concerns the attorneys had with Myers testifying in general also made their decision not to call him about potential contamination a reasonable one. (R. 374:16.)

B. Not presenting evidence that Anita had worn the tennis shoes

Next, the court determined that Bucki's attorneys were not deficient by not having Clint testify that Anita wore the tennis shoes. (R. 374:16–17.) It found that the attorneys acted reasonably because Clint had been unable to tell them before trial if Anita had worn the shoes. (R. 374:17.)

At trial, Lex tried to ask Clint on recross-examination if Anita might have worn the shoes. (R. 401:67.) The court sustained the State's objection that the question was beyond the scope of redirect examination. (R. 401:67.) In his postconviction motion, Bucki argued that Lex should have instead brought out this information on Clint's cross-examination. (R. 267:20.)

At the *Machner* hearing, Clint testified that the shoes were his and that he had left them at his parent's house in 2010. (R. 415:167–68.) They were a men's size 12 or 13. (R. 415:173.) He claimed that Anita, who was 5' 1" and had small feet, wore the shoes in 2010 and possibly again in 2013. (R. 374:9; 415:168–69, 173.) Clint said that he told his father's lawyers before trial that Anita had worn the shoes. (R. 415:170.)

Both Schuster and Lex contradicted Clint's testimony about their pretrial discussions, and the circuit court believed them. The court found that both Schuster and Lex recalled that they asked Clint multiple times before trial if Anita had worn the shoes. (R. 374:9, 16–17; 415:37–38, 104–05.) Lex explained, "We saw that as an issue and we asked him about that." (R. 415:105.) They both said that Clint was unable to tell them if Anita had worn the shoes. (R. 347:9, 415:61–62, 104.)

The court determined that the lawyers acted reasonably by not asking Clint earlier about the shoes because they did not know how he would answer. (R. 374:17.)

C. Not doing more to challenge the disturbed-earth evidence

The court also determined that the attorneys reasonably responded to the State's theory Bucki had initially tried to bury Anita on the patch of disturbed ground on the Bucki property. (R. 374:18–21.)

Bucki claimed that counsel needed to do more to refute the State's theory. (R. 267:21–22; 366:14–16.) In circuit court, he asserted several things that he thought counsel should have done. (R. 267:21–22; 366:14–16.) On appeal, though, he argues only that his attorneys should have done more to attack the theory in closing argument. (Bucki's Br. 51–53.)

Specifically, Bucki contends that his lawyers should have used photographs of the disturbed earth to back up testimony from Wisconsin Department of Justice Division of Criminal Investigation Agent Nicholas Pendergast that law enforcement had driven a vehicle to the area. (R. 401:84–85; Bucki's Br. 52.) Bucki claims that the vehicle was a utility terrain vehicle (UTV) that had flat tracks rather than tires. (Bucki's Br. 52.) Law enforcement had brought the UTV to the property when searching it. (Bucki's Br. 52.) He argues the photos show tracks from the UTV. (Bucki's Br. 52.) This, he claims, would refute any suggestion that he used his ATV and trailer, on which the cadaver dogs indicated, to transport Anita's body to the site to try to bury her because the ATV and trailer had tires. (Bucki's Br. 52.) It would also, he argues, refute Izzy's alert for human remains at the site. (Bucki's Br. 52.) Bucki identified the photos at the *Machner* hearing and claimed that tracks visible in them were from the UTV. (R. 416:85–102.)

Schuster testified that she and Lex considered the disturbed ground a "red herring" and not significant to the defense. (R. 415:39.) She explained that she thought Izzy's alert was "false . . . because nothing was found there." (R. 415:39.) The defense strategy to address Izzy's alert was to argue that water had carried the scent of decomposition there from another source, possibly a buried body. (R. 415:40.) Schuster added that "it made no sense to us that the State thought that Mr. Bucki was going to kill his wife and bury her within sight distance of his house." (R. 415:39.)

At the hearing, Lincoln County Sheriff's Deputy Travis Watruba testified, as he had at trial, that he drove the UTV at the property, but not near the disturbed-earth area. (R. 402:81; 416:21–22.) Lincoln County Sheriff's Lieutenant Grant Peterson testified that he also drove the UTV on the property on April 26, 2013, though not near the disturbed earth. (R. 416:55–56.) He also did not see anyone drive the UTV at the disturbed-earth area on April 26 or during the search warrant's execution from April 30–May 2, 2013. (R. 416:55–56.) The circuit court found Watruba's and Peterson's testimony credible. (R. 374:11–12, 23.)

The court determined that Schuster and Lex had not performed deficiently with respect to the disturbed earth. (R. 374:20–21.) It noted that the defense strategy was to emphasize that there was another source for the scent and no physical evidence to support the State's theory that Bucki had tried to bury Anita there. (R. 374:20.) The court also said that there was no evidence presented at the hearing to show that anyone other than Bucki might have created the area. (R. 374:20.)

D. Prejudice

Finally, the court determined that Bucki had not shown that he was prejudiced by his attorneys' performance. (R. 374:21–23.) The court concluded that even had the jury "totally discounted" the dog and disturbed-earth evidence, it still would have convicted Bucki. (R. 374:22.) The court acknowledged that the State's evidence was entirely circumstantial. (R. 374:22.) But, the court explained, that evidence was significant, pointing specifically to the State's closing argument outlining the circumstantial evidence of Bucki's guilt. (R. 374:22.)

Bucki appeals. (R. 375.)

ARGUMENT

I. The circuit court properly exercised its discretion when it admitted the dog evidence without imposing a corroboration requirement.

A. If the circuit court applies the correct legal standard, its decision to admit expert testimony is reviewed for an erroneous exercise of discretion.

The admissibility of evidence is a matter for the circuit court's discretion. *In re Commitment of Jones*, 2018 WI 44, ¶ 27, 381 Wis. 2d 284, 911 N.W.2d 97. This Court does not examine whether it agrees with the court's decision. *Id*. Rather, it reviews whether the court exercised its discretion in accordance with the applicable legal standard and the facts of record. *Id*. "A circuit court properly exercises its discretion when it considers the relevant facts, applies the correct law, and articulates a reasonable basis for its decision." *Id*.

The admissibility of expert testimony is governed by Wis. Stat. § 907.02. *Jones*, 381 Wis. 2d 284, ¶ 29. Whether the circuit court correctly applies the statute's legal standard is a question of statutory interpretation that this Court reviews de novo. *Id*. ¶ 27.

Section 907.02 states in relevant part:

> **Testimony by experts.** (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Wis. Stat. § 907.02(1).

This statute adopts the reliability standard of *Daubert*. *State v. Smith*, 2016 WI App 8, ¶ 5, 366 Wis. 2d 613, 874 N.W.2d 610. The circuit court's job under this test "is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Id.* (citing *State v. Giese*, 2014 WI App 92, ¶ 19, 356 Wis. 2d 796, 854 N.W.2d 687). The focus is on the principles and methodology that the expert relied on, not the conclusions reached. *Id.* "The goal is to prevent the jury from being presented with speculation dressed up as an expert opinion." *Id.*

"The standard is flexible but has teeth." *Giese*, 356 Wis. 2d 796, ¶ 19. The court's role is to keep junk science from the jury. *Jones*, 381 Wis. 2d 284, ¶ 33. But circuit courts still have "substantial discretion" when deciding to admit expert testimony. *Id.* The court must be satisfied "by a preponderance of the evidence" that the testimony is reliable. *Seifert v. Balink*, 2017 WI 2, ¶ 58, 372 Wis. 2d 525, 888 N.W.2d 816.

The statute requires courts to make five determinations when deciding to admit expert testimony. *Jones*, 381 Wis. 2d 284, ¶ 29. These are whether: (1) "the scientific, technical, or other specialized knowledge will assist the [jury] to understand the evidence" or determine a fact at issue, (2) the expert is qualified "by knowledge, skill, experience, training, or education," (3) "the testimony is based upon sufficient facts or data," (4) the testimony is based on "reliable principles and methods," and (5) the witness reliably applied those principles and methods to the case's facts. *Id.*

Daubert lists several factors that courts can consider in applying the standard, including whether the expert's approach can be objectively tested, whether it has been subject to peer review and publication, the known or potential error rate, the existence and maintenance of standards of control, and its general acceptance in the scientific

community. *Jones*, 381 Wis. 2d 284, ¶ 33 (citing *Daubert*, 509 U.S. at 593–94). Also relevant are whether the expert's opinions were developed expressly for the purposes of testifying and whether the expert accounted for obvious alternative explanations. *See Seifert*, 372 Wis. 2d 525, ¶ 63. These are not exclusive factors. *Jones*, 381 Wis. 2d 284, ¶ 33.

B. The circuit court did not erroneously exercise its discretion by admitting the dog evidence without requiring corroboration of the expert's conclusions.

1. Bucki largely does not challenge the court's application of *Daubert*, which does not require corroboration of an expert's opinion for a court to admit it.

Bucki argues that the circuit court should have required corroboration of the dog-search results before admitting the handlers' testimony. (Bucki's Br. 24–34.) Without corroboration, he claims, the handlers' opinions about the dogs' searches were not based on sufficient facts and data, as required by Wis. Stat. § 907.02. (Bucki's Br. 29.) He also contends that not requiring corroboration made the dog evidence less relevant and unfairly prejudicial. (Bucki's Br. 30.)

This Court should reject these arguments. Initially, the State notes that Bucki does not challenge most of the circuit court's decision to admit the evidence. As explained, after a lengthy hearing, the court determined that the evidence was relevant and not unfairly prejudicial. (R. 392:4–27.) It made specific findings on each of the determinations required by Wis. Stat. § 907.02. (R. 392:4–27.) In particular, the court made detailed findings that the handlers' testimony was based on reliable principles and methods. (R. 392:17–26.) This Court should conclude that the circuit court did not err in assessing the requirements of section 907.02 that Bucki does

not challenge. *See State v. Goetz*, 2001 WI App 294, ¶ 18, 249 Wis. 2d 380, 638 N.W.2d 386 (this Court does not consider arguments not made on appeal).

The only aspect of the court's decision that Bucki challenges is its determination that the handlers' conclusions were based on "sufficient facts or data." (Bucki's Br. 29.) He claims that corroboration was necessary for the court to make that finding. (Bucki's Br. 29.) The court found that each handler's testimony satisfied this requirement based on their reports about the searches they had conducted in the case. (R. 392:14–16.) Bucki though, does not specifically address this determination or argue that it was an erroneous exercise of the court's discretion. This Court should thus conclude that the circuit court did not err in applying the "sufficient facts or data" portion, or any other part, of Wis. Stat. § 907.02.

The circuit court also correctly rejected Bucki's corroboration argument. (R. 392:44.). Requiring corroboration of an expert's opinion to admit it would go beyond the requirements of the *Daubert* standard, which is concerned only with whether the expert's opinion is based on a reliable foundation. The court does not consider whether the expert's conclusions are reliable. *Smith*, 366 Wis. 2d 613, ¶ 5. Imposing a corroboration requirement would violate this rule. It would force the proponent of the evidence to show that something else supports the expert's conclusions. Or, put another way, the proponent would have to show that other evidence makes the expert's opinion more reliable. That is not what *Daubert* requires, and the circuit court was correct to reject Bucki's argument.

2. Bucki has not demonstrated that the circuit court erred by not requiring corroboration of the dog evidence for admissibility.

Further, none of Bucki's specific arguments why corroboration is necessary are persuasive. He first compares the dogs used here to the use of drug-detecting dogs to establish probable cause for a search. (Bucki's Br. 23–25.) He contends corroboration is required for the dogs here because the evidence was admitted to prove his guilt, not probable cause. (Bucki's Br. 23–24.) Bucki also claims that a probable-cause finding based on a drug dog is "never evaluated in hindsight, based on what a search does or does not turn up." (Bucki's Br. 25 (citing *Florida v. Harris*, 568 U.S. 237, 249 (2013)).)

This Court should reject these arguments. Simply because the dog evidence tended to show Bucki's guilt does not mean that corroboration was required for its admission. In *Harris*, the Supreme Court held that an alert by a reliable drug dog is enough to support probable cause for a search. 568 U.S. at 246–48. The State does not contend that the dog evidence here would, standing alone, be enough to convict Bucki. Rather, a circuit court can admit such evidence as proof of guilt if the court finds that it is reliable. And Bucki is incorrect that a drug dog's reliability is never subject to challenge after a search. *Harris* specifically held that a defendant must be allowed to challenge a drug dog's reliability by challenging its handler, training, and certifications, or by presenting an expert witness. *Id*. at 247.

Bucki next argues that not requiring corroboration violates the "wider latitude and more leeway" requirement of *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). (Bucki's Br. 22, 25, 29.) He contends that a wider reliability analysis should apply because there is no way to determine exactly

what a trailing or cadaver dog is smelling when they alert. (Bucki's Br. 25.)

This argument misunderstands the holding of *Kumho Tire*. That case held that the *Daubert* standard applied to the admission of expert testimony based on "technical" and "other specialized" knowledge in addition to scientific knowledge. *Kumho Tire*, 526 U.S. at 148–49. And the leeway that the Court discussed referred to the various factors a court may consider when admitting expert testimony. *Id*. at 151–52. The decision did not impose any specific requirements on trial courts. Rather, it emphasized that the factors for determining reliability depend on the case and the type of expert testimony presented. *Id*. The circuit court's decision not to require corroboration does not violate *Kumho Tire*.

Bucki notes that cadaver- and trailing-dog evidence is "admissible on a case-by-case basis in the majority of jurisdictions." (Bucki's Br. 25–26.) He contends that these states apply a variety of standards for admissibility, including *Daubert* and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). (Bucki's Br. 26.) The threshold, according to Bucki, "appears to be whether the State can present enough foundational evidence to satisfy a multi-prong test." (Bucki's Br. 26 (quotation marks omitted).)

Bucki's point is unclear. None of the cases that he points to require corroboration to admit dog evidence. The three cases involving trailing dogs all establish various foundational requirements to admit the evidence, but none require corroboration. *See McDuffie v. State,* 484 N.W.2d 234, 237 (Minn. Ct. App. 1992); *State v. Wilson*, 429 A.2d 931, 935 (Conn. 1980);); *People v. Centolella*, 61 Misc. 2d 726, 727–29, 305 N.Y.S.2d 460 (Oneida Cty. Ct. 1969). *McDuffie* holds that dog evidence is not enough to support a *conviction* without corroboration, but it does not impose that requirement for admissibility. 484 N.W.2d at 237. The other cases do not mention corroboration at all. They also do not apply *Daubert*.

Further, Bucki does not argue that any of these cases' other admissibility requirements should apply here. Nor does he dispute the circuit court's conclusion that it implicitly considered many similar requirements when it conducted its *Daubert* analysis. (R. 392:34–36.)

Bucki also cites *Clark v. State*, a case involving cadaver dogs. There, the court applied *Frye*. 781 A.2d 913, 934–35 (Md. Ct. App. 2001). But the court also upheld the admission of cadaver-dog evidence over the defendant's complaint that it was not corroborated. *Id*.

Next, Bucki cites three cases in what appears to be a clearer attempt to argue that corroboration is necessary for admissibility. (Bucki's Br. 27.) But all of the cases hold that corroboration of dog evidence is necessary for a *conviction*, not admissibility. In other words, the cases all hold that dog evidence alone is not enough to show guilt beyond a reasonable doubt. *See People v. Gonzalez*, 218 Cal. App. 3d 403, 408 (Cal. Ct. App. 1990); *State v. Loucks*, 656 P.2d 480, 482 (Wash. 1983); *People v. McPherson*, 271 N.W.2d 228, 443–46 (Mich. Ct. App. 1978).

In addition, one of these courts later rejected Bucki's argument that corroboration is required because it is not scientifically possible to know what specific scent tracking and cadaver dogs are altering on. (Bucki's Br. 25.) The Michigan Court of Appeals concluded this was not a reason to blanketly exclude trailing- or cadaver-dog evidence that is otherwise reliable under *Frye* and *Daubert*. *People v. Lane*, 862 N.W.2d 446, 457 (Mich. Ct. App. 2014).

Bucki also points to *Brooks v. People*, 975 P.2d 1105, 1114–15 (Colo. 1999), where the Colorado Supreme Court adopted a corroboration requirement for the admission of scent-tracking evidence. (Bucki's Br. 31–33.) *Brooks*, though, is based on an erroneous reading of the law. The court said that it was adopting the corroboration-for-admission rule

from decisions of other state courts. *Brooks*, 975 P.2d at 1114. But the cases it cited all hold that dog evidence is not enough to sustain a conviction without corroboration. *Id*. (citing *State v. Wainwright*, 856 P.2d 163, 166 (Kan. Ct. App. 1992); *McPherson*, 271 N.W.2d at 230; *Loucks*, 656 P.2d at 482). These cases do not require corroboration for admission.

Bucki further notes cases from several states that categorically exclude trailing-dog evidence. (Bucki's Br. 27–28.) But he does not ask this Court to adopt any of the cases' reasoning.

And to the extent that Bucki is asking this Court to follow these cases, it should decline the invitation. None of the decisions apply *Daubert* or apply a similar inquiry into the science underlying dog evidence. Most of the decisions precede *Daubert* by decades, and the ones that do not rely on pre-*Daubert* precedent. *See People v. Tyler*, 974 N.E.2d 963, 970 (Ill. Ct. App. 2012) (citing *People v. Cruz*, 643 N.E.2d 636 (Ill. 1994), and *People v. Phanschmidt*, 104 N.E.2d 804 (1914)); *Brafford v. State*, 516 N.E.2d 45, 49 (Ind. 1987) (citing *Ruse v. State*, 115 N.E. 778 (1917)); *People v. Griffin*, 198 N.E.2d 115, 117 (Ill. Ct. App. 1964) (citing *Phanschmidt*); *State v. Storm*, 238 P.2d 1161, 1176–72 (Mont. 1951); *Brott v. State*, 97 N.W.2d 593, 593–94 (Neb. 1903). In addition, Indiana's prohibition precedes the state's adoption of its rule of evidence on expert witnesses, and it is unclear whether the prohibition survived the rule. *See Meyers v. State*, 33 N.E.3d 1077, 1099 (Ind. Ct. App. 2015).

Bucki next argues that the lack of corroboration for the cadaver dogs led the jury to improperly speculate that what could have been entirely innocent scents were evidence of his guilt. (Bucki's Br. 30–31.) But Bucki's attorneys addressed this possibility when cross-examining the handlers. Counsel got the cadaver-dog handlers to admit that the scent of human remains the dogs detected could have been from years ago and not from Anita or even a dead body. (R. 398:103–04, 148–54.)

Bucki also complains that it was possible that the scent of remains from the disturbed area could have been transported there by water movement (Bucki's Br. 30.) Counsel established this possibility with one of the handlers as well. (R. 398:105–06.) It is unlikely that the jury improperly speculated from the dog evidence.

Bucki also claims that corroboration was necessary because the cadaver dogs did not both indicate on the bed of Bucki's truck. (Bucki's Br. 31.) But this ignores that the dogs both alerted to the ATV in the garage, the burn barrel, and the area missing carpet in the house. (R. 398:82–95, 138–45.) If Bucki wants corroboration, the significant overlap in the cadaver-dog results, as well as the trailing-dog results, provide it.

Next, Bucki argues that corroboration was needed because the State "effectively conceded" that the disturbed earth was "not connected to the case" because of the "watery conditions." (Bucki's Br. 31.) But he provides no citation for what he claims is the State's concession, so the State cannot respond to the argument. And this Court "is not required to sift through the record" to try to find what Bucki is talking about. *See State v. Ross*, 2003 WI App 27, ¶ 28 n.5, 260 Wis. 2d 291, 659 N.W.2d 122; Wis. Stat. § (Rule) 809.19(1)(e).

Bucki further claims that Izzy's alert at the disturbed earth was unfairly prejudicial because he never drove his ATV to the area on the day of Anita's disappearance. (Bucki's Br. 31.) But as the State will discuss in response to Bucki's related ineffective-assistance-of-counsel claim, that is merely Bucki's interpretation of the evidence, not an undisputed fact.

Bucki next contends that this Court implicitly required corroboration to admit expert testimony about the application of the Drug Recognition Evaluation Protocol in *State v. Chitwood*, 2016 WI App 36, 369 Wis. 2d 132, 879 N.W.2d 786.

(Bucki's Br. 33.) In *Chitwood*, though, this Court merely noted that the protocol's results were confirmed by the results of a toxicology report, and this supported the circuit court's decision to admit the testimony. 369 Wis. 2d 132, ¶ 45. It did not require corroboration for admission.

Bucki also complains that the trailing-dog evidence was unreliable because it was possible that Anita's scent was on the tennis shoe, and it was the scent that the dogs were detecting by the ditch. (Bucki's Br. 33.) This argument just restates his complaint that it is impossible to determine the precise scents that the dogs were detecting. As argued, that is not a reason to exclude the evidence. Additionally, the trailing-dog handlers admitted on cross-examination that it was possible that Anita's scent was on the shoes and the dogs had alerted to it instead of Bucki's scent. (R. 399:33–34, 63–65.) The jury was thus aware of the limits of the trailing-dog evidence.

Next, Bucki complains that the court should have given a cautionary instruction on the dog evidence. (Bucki's Br. 33–34.) He does not explain what that instruction should have been, but he claims that the court "compounded this error by substantially rejecting" his requested instruction that "the jury consider the lack of corroboration . . . for its reliability determination." (Bucki's Br. 34; R. 411:127–137.)

This argument fails. Bucki appears to be arguing that the court should have instructed the jury that it could not find the dog evidence reliable unless there was corroboration. The court did not need to give that instruction, though, because, as argued, Bucki has failed to show that is what the law requires.

In addition, the circuit court gave part of Bucki's requested instruction about how to consider the dog evidence. (R. 225:1; 410:18–19.) The court said to consider the evidence with all the other evidence presented. (R. 410:18.) And it

instructed the jury to consider the "training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler." (R. 410:18–19.) The court declined to instruct the jury to view the evidence "with the utmost caution" and that it alone could not be the basis for a conviction. (R. 225:1; R. 411:127–37.) This was sufficient to allow the jury to assess the reliability of the dog evidence.

Finally, Bucki contends that if this Court declines to require corroboration, it should hold the State to a higher burden of proof to admit dog evidence. (Bucki's Br. 34–36.) Specifically, he argues that the clear-and-convincing-evidence standard should apply rather than the preponderance-of-the-evidence standard. (Bucki's Br. 34–36.) Bucki did not raise this argument in the circuit court, though, so it is forfeited. *See State v. Rogers*, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995). This Court should decline to address it.

C. If the court erred in admitting the dog evidence, it was harmless.

An "error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.'" *State v. Harris*, 2008 WI 15, ¶ 42, 307 Wis. 2d 555, 745 N.W.2d 397 (citation omitted). Alternatively stated, an error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* ¶ 43 (citation omitted).

Here, any error by the court in admitting the dog evidence was harmless because the jury would have still convicted Bucki without it. The State's case against Bucki, while circumstantial, was strong.

The evidence also showed that Bucki had motives to kill Anita. First, Bucki wanted a divorce, but Anita wanted to try to fix their marriage. (R. 397:106; 399:76–78; 399:121–28; 400:87.) Bucki and Anita had been separated, and she had

been staying with her friend Julie Zietlow in the days before she was killed. (R. 400:50–54.) Anita went to her and Bucki's house the night of April 25. (R. 400:54–55.) Bucki invited her there, but when he reported her missing on April 26, he lied and told the dispatcher that she came over unexpectedly (R. 411:91–92.) Bucki claimed that they talked about getting divorced for a few hours, and he went to bed thinking "everything was good." (R. 411:51.) Before it was clear that Anita was dead, Bucki told police that Anita was "at peace" after their conversation. (R. 404:78; 411:52.) He later used this phrase to describe her in letters to his sister and Clint after it was clear that she was dead. (R. 404:76–77.)

Second, Bucki's desire to continue his new relationship with Angela Mattison also gave him a motive to kill Anita. The two had started their relationship a few weeks before Anita's disappearance. (R. 397:48.) Bucki told Mattison that he and Anita had mutually broken up, which seems unlikely given the evidence that Anita did not want a divorce. (R. 397:54.) Bucki and Mattison were texting the night of April 25 when Bucki and Anita were supposedly discussing their marriage. (R. 128; 397:53.) Further, Anita knew about Mattison. An external hard drive from Anita's purse contained a background check for Mattison that was located in a folder called "Blondie." (R. 399:118.) Bucki was worried that Anita would tell Mattison's husband about the relationship. (R. 397:81.) He said he would hurt Mattison's husband if he harmed her. (R. 397:79.) Bucki also wrote Mattison a letter saying that Anita had made his "to be happiest summer" into the "worst." (R. 198; 199; 404:75–76.)

Third, Bucki had a financial motive to kill Anita. Bucki was not working due to an injury. (R. 411:10–11, 83.) He was waiting for a worker's compensation settlement. (R. 411:14–15.) They were out of savings and retirement funds. (R. 411:83.) They also had been "playing the credit card game" and were behind on their payments. (R. 411:16, 83.) Bucki told

law enforcement that there was a $150,000 life insurance policy on Anita, though he initially lied and said there was no insurance. (R. 411:84, 108.) And Bucki knew that if he and Anita got divorced, he would have to split the house, their 84 acres, and the settlement with her. (R. 411:84.) Bucki also had told Anita that she should find an apartment and keep making the house payment because "he had adventures and fantasies planned with his girlfriend and he wanted nothing to do with [her]." (R. 400:76.) Further, Bucki wrote a letter to Mattison saying that "[b]etween settlements and insurance, I'll be set for a while." (R. 196; 197; 404:75.)

The evidence showed that Bucki killed Anita. Anita was killed and left in a ditch. She was stabbed seven times and strangled. (R. 398:22–24, 26–27.) It is thus unlikely that she committed suicide. And Bucki, the evidence demonstrated that Bucki, the last person with her, was responsible for her death. When it was found, Anita's body had on the same shirt that Zietlow said that she was wearing when she went to see Bucki on April 25. (R. 400:68–69.) The evidence also showed that Anita did not leave the house on her own. Her winter coat was still in the house, even though it was about 32 degrees around midnight between April 25 and 26. (R. 404:74, 81.) Her purse, with credit cards, personal items, and about $3,000 cash was also in the house. (R. 401:47; 404:50.) And her car was parked at the house. (R. 402:16.)

Bucki's behavior after the crime demonstrated his guilt. He showed no to little concern about Anita in his interviews with police and no interest in helping with the search. (R. 403:49; 404:7–8, 30, 42–44.) Bucki never asked police during the investigation about developments, though he did ask when he could get back some property seized from the house, including his cell phone, his planner, and Anita's computer. (R. 401:28–29; 404:55–64.) He also never asked police about Anita after the news reported that a body had been found. (R. 403:50–51; 411:100.) And when police told him

that they had found Anita's body, Bucki merely said, "Oh." (R. 403:54–55; 411:104–05.) He did not ask how she died. (R. 403:55; 404:70.) Bucki also asked a friend not to give his new cell phone number to police. (R. 399:78–79.) He also told the friend that Anita had left a suicide note and said to her, "[P]lease don't hate me." (R. 399.78.)

Bucki also had Mattison over to his house on April 26 before he reported Anita missing. (R. 397:62–63.) He later told police that he wanted her there "because when he has a death in the family he likes a friend rather than family to be around." (R. 403:62.) Bucki, though, would not have known Anita was dead on April 26 unless he killed her. And when Mattison told Bucki that she was worried about coming over because of Anita, he did not seem concerned. (R. 397:63–64.) Instead, Bucki told her that Anita had gone on a walk and would be gone before she got there. (R. 397:64.)

Additionally, the evidence showed that Bucki took actions to cover up his crimes. He burned carpet and Anita's belongings from the house in his burn barrel on April 26. (R. 411:22–26, 33–34.) Bucki also cleaned out the bed of his truck—multiple law enforcement officers said it smelled strongly of orange-scented cleaner—that he might have used to move Anita's body. (R. 401:105; 402:18–19, 87; 403:12; 404:17; 411:64–65.) The truck, though, still had human handprints and marks where something might have been dragged out in the remaining dust. (R. 404:19.) Bucki had also recently graded his driveway, which might have covered up incriminating tire tracks or footprints. (R. 401:99; 403:15, 404:17; 411:88.) Finally, he removed a trail camera looking out on his driveway that would have shown him driving away with Anita's body or perhaps something else incriminating. (R. 399:119–20; 402:111; 411:39–40.)

Thus, even without the dog evidence, the jury would have convicted Bucki based on his motive, the circumstances

of her death, and his behavior after the crime. Any error in admitting the evidence was harmless.

II. Bucki has not demonstrated that his trial attorneys were ineffective.

A. Bucki needs to prove both that his attorneys performed deficiently and that their performance was prejudicial to prevail on his claims.

To prove ineffective assistance of counsel, a defendant must establish both that counsel's performance was deficient and that this performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To demonstrate deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

"The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms." *State v. Swinson*, 2003 WI App 45, ¶ 58, 261 Wis. 2d 633, 660 N.W.2d 12 (citation omitted). The defendant must demonstrate that his attorney made serious mistakes which could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *See Strickland*, 466 U.S. at 689–91. Trial counsel's strategic choices that were made after thorough consideration of the options in light of the relevant facts and law are virtually unchallengeable. *See id.* at 690–91.

To satisfy the prejudice prong, the defendant must show a "reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

An ineffective-assistance-of-counsel claim presents this Court with a "mixed question of fact and law." *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Under this standard of review, the trial court's findings of fact will not be disturbed "unless they are clearly erroneous." *Id*. Thus, what counsel did or did not do is a factual issue for the circuit court. *State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). The ultimate issue of whether counsel was ineffective based on these facts is subject to independent appellate review. *State v. Balliette*, 2011 WI 79, ¶¶ 18–19, 336 Wis. 2d 358, 805 N.W.2d 334.

B. Bucki's attorneys made a reasonable strategic decision not to call Myers to rebut the dog handlers' testimony.

Bucki's first ineffective-assistance claim is that his lawyers should have called Myers to rebut the dog handlers' testimony. (Bucki's Br. 39–48.) Schuster and Lex did not perform deficiently because they made a reasonable strategic decision not to call Myers.

The circuit court found that, after consulting with Bucki, the attorneys decided not to call Myers because they thought Schuster's cross-examination of the dog handlers went well. (R. 374:13–15.) The court also found that they did not call Myers because they were concerned about his weaknesses as a witness. (R. 374:13–15.)

This was a reasonable strategic decision. *See Strickland*, 466 U.S. at 690–91. Schuster cross-examined the dog experts effectively. As noted, she elicited testimony from the cadaver-dog handlers that the scent the dogs detected might not have been from Anita or even a dead body. (R. 398:103–04, 114–19, 148–54.) McGill admitted that he had no idea what Izzy was alerting to apart from it being the

scent of human remains. (R. 398:114–18.) Schuster also established the possibility that moving water could have been responsible for bringing the scent of remains detected at the area of disturbed earth. (R. 398:105–06.) Schuster also brought out the limitations of the trailing-dog evidence. Those handlers admitted on cross-examination that it was possible that Anita's scent was on the shoes, and the dogs had alerted to it instead of Bucki's scent. (R. 399:33–34, 63–65.)

And Schuster and Lex were correct that Myers had problems as a witness. He had almost no experience training or handling cadaver and trailing dogs. (R. 387:66–67.) Further, the attorneys were properly concerned that the State would call Stockham in rebuttal to Myers. (R. 374:13–14.) Lex thought Stockham was a "very good witness." (R. 415:98.) And Schuster was concerned that Stockham, unlike Myers, had actual experience and knowledge training dogs. (R. 374:8; 415:20.) Stockham also would have testified that he was part of the very small groups working on human decomposition and scent research, and Myers was not part of these groups. (R. 386:40–47.)

Bucki does not address counsels' reasons for not calling Myers or the circuit court's determination that they were reasonable. (Bucki's Br. 39–48.) Instead, he dedicates most of his argument to explaining why Myers's testimony was helpful to him. (Bucki's Br. 39–46.) This Court should conclude that Bucki has forfeited any challenge to the circuit court's conclusion that counsel were not deficient. *Goetz*, 249 Wis. 2d 380, ¶ 18; *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

Bucki also complains that his attorneys unreasonably made him decide whether to call Myers. (Bucki's Br. 46–48.) He claims that this was improper because he was not involved with the investigation or preparing the defense. (Bucki's Br. 46.) Bucki further contends that the decision to call a witness

is for counsel alone and that he should not have needed to make the decision. (Bucki's Br. 47.)

This Court should reject these arguments. Counsel did not leave the decision to Bucki. Instead, they consulted with him after the handlers' testimony and decided together not to call Myers. (R. 374:14.) Schuster and Lex told Bucki their concerns about calling Myers and asked for Bucki's input. (R. 374:14.) Bucki agreed, perhaps "somewhat reluctantly" with his attorneys' recommendation not to call Myers. (R. 374:14.) It was a group decision, though Bucki could have overruled his attorneys. (R. 415:28–30, 100–01, 107.) Bucki was not, as he claims, forced to decide whether to call Myers without assistance from his lawyers. They did not perform deficiently.

C. Counsel were not deficient for failing to have Clint testify at trial that Anita wore his shoes.

Next, Bucki claims that Lex was deficient for waiting until recross-examination to ask Clint whether Anita wore the tennis shoes used to track Bucki's scent at the ditch. (Bucki's Br. 48–50.) Bucki contends that his attorneys should have determined before trial that Clint would have been able to testify that Anita had worn the shoes. (Bucki's Br. 50–51.) He argues that they then could have asked Clint about this on cross-examination rather than asking on recross-examination, which resulted in the circuit court's sustaining the State's objection to the question. (Bucki's Br. 50–51.)

The circuit court's factual findings disprove Bucki's claim. Clint testified at the postconviction hearing that he told Schuster and Lex that Anita had worn the shoes. (R. 415:170.) The attorneys testified that he had been unable to tell them whether Anita had done so after they asked him multiple times before trial. (R. 415:37–38, 61, 104–05.) The circuit court believed the attorneys. (R. 374:9, 16–17.)

This Court should reject Bucki's claim given the court's finding. At trial, both attorneys believed that Clint would not be able to testify that he knew Anita wore the shoes. They thus could not have performed deficiently for failing to ask him this on cross-examination. Further, having Clint answer "no" to the question would likely have damaged the defense, developed through the cross-examination, that the trailing dogs might have been detecting Anita's scent from the shoe at the ditch. (R. 399:33–34, 63–65.)

Bucki ignores the circuit court's credibility finding. (Bucki's Br. 50–51.) He argues as though the court believed Clint and not counsel. (Bucki's Br. 50–51.) Witness credibility, though, is a matter solely for the circuit court to resolve. *See State v. Ayala*, 2011 WI App 6, ¶ 10, 331 Wis. 2d 171, 793 N.W.2d 511. Bucki's claim fails given the court's finding.

Bucki also questions why if Lex did not know what Clint would say, he asked him about the shoes on recross-examination. (Bucki's Br. 51.) But Lex explained at the postconviction hearing that this was something that he and Schuster discussed during trial and decided to include it "as an afterthought." (R. 415:104.) Given that Clint could not say before trial that Anita had worn the shoes, Lex was not deficient for waiting to ask the question when, again, a "no" answer could have damaged the case.

D. Counsel reasonably responded to the disturbed-earth evidence.

Finally, Bucki contends that his attorneys should have done more in closing argument to challenge the State's theory that he tried to bury Anita at the disturbed-earth site. (Bucki's Br. 51–53.) Specifically, he claims that photos of the site would have backed up testimony from Agent Pendergast that law enforcement had driven their UTV to the area. (Bucki's Br. 52; R. 401:84–85.) The photos, he claims, show only flat tracks from the UTV. (Bucki's Br. 52.) Bucki argues

that this would refute any evidence suggesting that he drove his ATV with round tires to the area to try to bury Anita, like Izzy's alert for human remains at the area or both cadaver dogs' alerts on the ATV and trailer. (Bucki's Br. 52–53.)

Bucki has not shown that his attorneys were deficient. Notably, Bucki was not able to prove at the *Machner* hearing that the UTV was ever in the area. Two law enforcement officers who operated the UTV on the property said they did not drive it in the area or see anyone else do so. (R. 416:21–22, 55–56.) The court believed this testimony. (R. 374:11–12.) Further, the photos do not, in the State's estimation, indisputably show flat tracks. (R. 337; 338; 339; 340; 341; 342; 343; 344; 345; 346.) And in any event, Bucki does not explain when these photos were introduced at trial so that counsel could have used them during closing argument. He also does not say why it would have been impossible for him to travel to the area on his ATV without leaving tracks.

In addition, Bucki's attorneys had a reasonable strategy for dealing with the disturbed-earth theory. They got the court to prevent the State from referring to the area as a "shallow grave." (R. 391:30–31.) Schuster developed testimony that the dog alert at the site might have been brought there by moving water. (R. 398:105–06.) And in closing, Lex emphasized that nothing of evidentiary value had been found there. (R. 410:89–90.) As Schuster explained after trial, it made no sense to them that the State was arguing that Bucki killed Anita and tried to bury her close to their house. (R. 415:39.) Counsel reasonably responded to the State's disturbed-earth evidence.

E. Bucki has not shown prejudice.

This Court should also conclude that Bucki has failed to show that he was prejudiced by any of counsel's actions.

Bucki's first two ineffective-assistance claims relate entirely to the dog evidence. And part of Bucki's third claim—

in particular, Izzy's alerting on the area of disturbed earth—also relates to the dog evidence. As argued, the introduction of the dog evidence, if it was error, was harmless. For the same reasons, this Court should conclude that Bucki was not prejudiced by any of counsel's actions related to challenging the dog evidence. The tests for harmless error and *Strickland* prejudice are essentially the same. *State v. Harvey,* 2002 WI 93, ¶ 41, 254 Wis. 2d 442, 647 N.W.2d 189.

Further, calling Myers to testify would not have changed the trial's outcome. There is no reason to believe that the jury would have credited his testimony since he really had no in-person experience with trailing or cadaver dogs. In addition, Stockham would have testified, in effect, that Myers was not an expert regarding scent detection. And Bucki's attorneys highlighted most of the facts they would have discussed with Myers when cross-examining the handlers. Calling Myers thus would not have led to a different result.

The same is true for counsel's not asking Clint if Anita had worn the tennis shoes. Bucki's lawyers established on cross-examination of the trailing-dog handlers that the dogs could have been alerting to Anita's scent if she wore the shoes or if her scent had otherwise contaminated the shoe. (R. 399:33–34, 60–61, 63–64.) It was not necessary for Clint to testify that Anita wore the shoes for counsel to make this point. And the theory was a bit of a stretch anyway. It required the jury to believe that the 5' 1" Anita, who had small feet, would wear men's size 12 or 13 shoes. (R. 415:173.)

Finally, Bucki was not prejudiced regarding counsel's not introducing the photographs of the disturbed-earth area. The photographs do not prove that the tracks were created by law enforcement or that it was impossible for Bucki to have been in the area on his ATV. Moreover, as the circuit court found, Bucki failed to establish at the postconviction hearing that someone other than him might have created the area. (R. 374:20–23.) Schuster also established on cross-

examination that Izzy's alert at the site might have been due to a scent brought there by moving water. (R. 398:105–06.) And, as Lex emphasized in his closing, no physical evidence was found at the site to connect Bucki to the crimes. (R. 410:89–90.) Bucki was not prejudiced by this, or any other actions by his attorneys.

CONCLUSION

This Court should affirm the circuit court's judgment of conviction and order denying Bucki's motion for postconviction relief.

Dated March 20, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

AARON R. O'NEIL
Assistant Attorney General
State Bar #1041818

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 266-9594 (Fax)
oneilar@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,906 words.

Dated this 20th day of March, 2019.

_____
AARON R. O'NEIL
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 20th day of March, 2019.

_____
AARON R. O'NEIL
Assistant Attorney General