STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP1144-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN B. HUTCHINS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI AND THE HONORABLE CAROLINA M. STARK, 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

Statutes

ISSUES PRESENTED

1. Did the circuit court err by admitting the victim's testimony that implied that Defendant-Appellant Kevin B. Hutchins had previously abused her?

The circuit court answered no.

This Court should affirm.

2. Was Hutchins entitled to a *Machner* hearing on his claim that his trial counsel was ineffective for failing to request a mistrial when the State referenced the prior acts during its opening statement?

The circuit court answered no.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully address the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

A jury convicted Hutchins of sexually assaulting, falsely imprisoning, and battering MU, with whom he had a long-term relationship and children. He asserts two errors relating to what he contends was other-acts evidence of his prior physical abuse of MU. Specifically, Hutchins claims that the circuit court should not have allowed MU to testify about the prior acts and that his trial counsel should have moved for a mistrial when the State referred to them during its opening statement.

Hutchins has shown no error. Neither the State nor MU described any specific incidents of abuse at trial, so the opening statement and MU's testimony did not really involve other-acts evidence. But even assuming the opening and the

testimony were about prior acts, Hutchins is not entitled to relief because the evidence was admissible under Wis. Stat. § 904.04(2). The circuit court thus did not err by admitting it. Further, because any motion for a mistrial would have failed, Hutchins's counsel was not ineffective, and the circuit court properly denied this claim without a hearing.[1]

STATEMENT OF THE CASE

Hutchins's crimes and trial

Hutchins went to trial on two counts of second-degree sexual assault, one count of false imprisonment, and one count of battery, all as acts of domestic abuse. (R. 11.) The State accused him of assaulting MU in April 2013. (R.1:2.) MU and Hutchins had been in a long-term relationship and had three children together. (R. 1:2.) A few days before the assault, MU told Hutchins that she wanted to break up. (R. 1:2.).

The night of the crimes, Hutchins came to MU's residence while drunk. (R. 1:2.) Hutchins punched MU, forced her to have sex with him, and prevented her from leaving. (R. 1:2.) Hutchins did not leave the residence after the assaults. (R. 1:2.) MU stayed up the entire night and then went to work. (R. 1:2.) She reported the assault to police after work. (R. 1:2; 97:36.)

During its opening statement, the State described how Hutchins had come to MU's residence the night of the crimes. (R. 97:32.) It said that he asked MU about their children and what would happen if their relationship ended. (R. 97:32.) The State said that Hutchins became jealous and accused MU of

---

[1] The Honorable David L. Borowski presided at trial. The Honorable Carolina M. Stark decided Hutchins's postconviction motion. This brief does not distinguish between the two judges, and instead will refer to both as "the circuit court" or "the court."

infidelity. (R. 97:32.) When MU did not respond, Hutchins punched the side of her head. (R. 97:32–33.)

The State then said, "Unfortunately, this isn't the first time she has experienced something like this, so she makes certain decisions." (R. 97:33.) Hutchins's counsel objected. (R. 97:33.) The court overruled the objection, and the State continued, "She makes certain decisions based upon her relationship and how well she knows the defendant. She tries to predict his reactions and then respond accordingly." (R. 97:33.)

The State next explained how Hutchins had threatened to kill himself, but MU made "certain decisions" to try to calm him. (R. 97:34.) It said that Hutchins demanded that MU have sex with him, and when she refused, he forced himself on her. (R. 97:34–36.) After the assault, Hutchins said that he and MU needed to go to sleep. (R. 97:36.) But, the State said, MU was "vigilant" and stayed awake until she had to go to work. (R. 97:36.) It explained:

> And it may not make any sense to you now, but she goes to work because she needs her job. If she doesn't have a job, she has no way to support their children and no income.
>
> She explains to the police why she went to work and that she goes to work. And she also explains, as soon as work was over, she went straight to police.

(R. 97:37.)

MU testified that Hutchins punched her in the head the night of the crimes and that she "got a little shaken up." (R. 97:55.) She explained, "It was just, for us, that was kind of normal, but it was more forceful this time, more powerful. I think the anger had kind of set in a temper which he has always had, but it just [went] to a whole different level." (R. 97:55.)

The State later followed up with MU about this testimony. It asked, "Now you said that that was — I don't mean to twist your words so correct me if I'm wrong, but you said it was fairly typical?" (R. 97:56.) MU answered, "Uh-huh." (R. 97:57.) Hutchins's counsel objected, saying that "there has been no prior motion to bring in any other acts evidence." (R. 97:57.) The court sustained the objection "without some foundation." (R. 97:57.) The State continued:

> Q: You had mentioned that and I wanted — my ultimate question was actually, if this time you were afraid or you were just used to that.
>
> What was your emotional reaction to that particular punch by the defendant on that night?
>
> A: That it was more than a normal, something I was used to from him. It was —

(R. 97:57.)

Defense counsel objected again, and the State asked to be heard in chambers. (R. 97:57.) The court, though, overruled the objection, saying, "She answered, move on." (R. 97:57.)

Later in her testimony, MU said that she went to work the morning after the assault because "[she] had to be responsible, [she] had to be a mom." (R. 97:75.) She reported the assault to the police after work. (R. 97:76.) MU explained why she decided to report what happened:

> I guess I just throughout the day, as I looked at myself in the mirror and I thought of all the last 17 years that night, everything kind of boiled up all throughout the day and in order for it to be completely over I just knew I had to tell somebody.

(R. 97:76.)

The State then asked MU to describe the "behavior that [she had] come to sort of put up with." (R. 97:76.) Defense counsel objected, and the court excused the jury. (R. 97:77.) Counsel again argued that the State was trying to introduce other-acts evidence. (R. 97:78–79.) The State responded that it was trying to show MU's "emotional reaction and state of mind based on the history of the relationship." (R. 97:79.) It also said that it was phrasing its questions to avoid having MU discuss specific acts. (R. 97:79.)

The court overruled Hutchins's objection. (R. 97:80–82.) It concluded that the State's questions and MU's answers were appropriate to provide context for why she did not immediately report the assaults and instead went to work. (R. 97:81.) The court explained:

> It is entirely plausible that anyone, victim of abuse, especially a female in this case being abused allegedly by, in this case, by the defendant, would not want to disrupt or scare children, would want to go to work.
>
> Sometimes someone is in shock, sometimes there is all kinds of reasons they might otherwise carry on about their business, not run to the police, or not run to a neighbor or not run to the sexual assault treatment center.
>
> So, from that context, it might have been a bit close to the line, but I think it was relevant, it was appropriate, it was not unfairly prejudicial.
>
> I do not want the State to lead and I do not want other acts evidence going in. I don't think it has yet, so I'm overruling the objection for now.
>
> . . . .
>
> I don't want the questions and the statements about the defendant's overall behavior or alleged character or alleged behavior to get too unfairly prejudicial, at this point they're not, especially in light of the fact the defense will get a chance to cross and

> clarify some of these issues. So that is my ruling for right now.
>
> The objection is overruled, but I will ask the State to be careful with the questions after lunch.

(R. 97:81–82.)

The State did not elicit any further testimony from MU about Hutchins's actions before the crimes. (R. 98:5–7, 18–21.)

The jury convicted Hutchins as charged of two counts of second-degree sexual assault, one count of false imprisonment, and one count of battery. (R. 100:6–7.) The circuit court sentenced him to consecutive sentences on the assault and false imprisonment charges totaling 12 years of initial confinement and six years of extended supervision. (R. 51.) The court also gave Hutchins a nine-month jail sentence on the battery, to be served concurrently to the other sentences. (R. 33.)

Postconviction proceedings

Hutchins filed a postconviction motion. (R. 68.) He argued that the trial court had erred by allowing MU to testify about his prior acts of abuse because they were inadmissible other-acts evidence. (R. 68:6–10.) Hutchins also claimed that his trial counsel should have moved for a mistrial, instead of just objecting, when the State mentioned his past actions in its opening statement. (R. 68:10–12.)

The circuit court denied Hutchins's motion. (R. 80.) It concluded that its initial decision to allow MU's testimony was correct. (R. 80:7.) Specifically, the court said that MU's answers to the State's questions "did not cross the line into offering other acts evidence" because MU "did not describe any specific prior act" by Hutchins. (R. 80:7.) It alternatively held that, even if MU's testimony was other-acts evidence, it was admissible under the three-part test of *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). (R. 80:7–8.)

The court also denied Hutchins's ineffective-assistance claim without a hearing. (R. 80:8–9.) It determined that counsel did not act deficiently because a motion for a mistrial would have failed. (R. 80:8.) The court also concluded that Hutchins was not prejudiced because MU's testimony about the prior acts did not affect the trial's outcome. (R. 80:7–8.)

Hutchins appeals. (R. 84.)

ARGUMENT

I. The circuit court properly admitted MU's testimony about Hutchins's past abuse.

A. A circuit court can admit other-acts evidence if it is offered for a proper purpose, is relevant, and not unfairly prejudicial.

Wisconsin Stat. § 904.04(2) prohibits the admission of evidence of other acts "to prove the character of a person in order to show that the person acted in conformity therewith." Such evidence is not prohibited when it is offered for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Normington*, 2008 WI App 8, ¶ 15, 306 Wis. 2d 727, 744 N.W.2d 867 (citing Wis. Stat. § 904.04(2)).

A three-step framework guides a court's decision whether to admit evidence pursuant to section 904.04(2). *Normington*, 306 Wis. 2d 727. ¶ 16. The three steps ask: (1) "[i]s the other acts evidence offered for an acceptable purpose under [section] § 904.04(2)?"; (2) is the evidence relevant under section § 904.01?; and (3) is the probative value of the evidence "substantially outweighed by the danger of unfair prejudice, confusion, or delay under [section] § 904.03?" *Id.* (citing *Sullivan*, 216 Wis. 2d at 783–90).

Evidence is relevant if it has "any tendency to make the existence of any fact . . . of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Although evidence may be relevant, it nonetheless "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," or if introducing it would cause undue delay, waste time, or needlessly present cumulative evidence. Wis. Stat. § 904.03.

"'Unfair prejudice' does not mean damage to a party's cause since such damage will always result from the introduction of evidence contrary to the party's contentions." *State v. Doss*, 2008 WI 93, ¶ 78, 312 Wis. 2d 570, 754 N.W.2d 150 (quoted source omitted). Evidence is unfairly prejudicial if it would tend to influence the outcome by improper means or "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." *Id*.

A trial court's decision to admit evidence is discretionary. *See State v. Jensen,* 2011 WI App 3, ¶ 75, 331 Wis. 2d 440, 794 N.W.2d 482 (citation omitted). This Court will affirm a trial court's exercise of discretion if the court correctly applied the legal standards to the facts of record and, using a rational process, came to a conclusion a reasonable judge could reach. *Id.* (citation omitted).

B. Even assuming MU's testimony was other-acts evidence, the circuit court properly exercised its discretion when it admitted it.

This Court should conclude that the circuit court reasonably exercised its discretion by allowing MU to testify about Hutchins's past actions. The testimony was admissible under the three-part test for admitting other-acts evidence.

Initially, it is not clear that MU's testimony really involves other-acts evidence. When confronting the admission of evidence involving past bad acts, the circuit court and parties should ask "what is the purpose of the [party's] intention to admit the evidence?" *State v. Bauer*, 2000 WI App 206, ¶ 7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902 (citation omitted). If it is not to show a similarity between the other act and the alleged act, then perhaps the parties should entertain the question of whether it is "other acts" evidence at all. *Id*. (citation omitted).

Here, the similarity between Hutchins's prior acts and the crimes that he was on trial for is not apparent. MU's testimony did not mention any specific prior acts of abuse by Hutchins. Instead, she testified that her getting punched the night of the crimes "was kind of normal, but it was more forceful this time, more powerful" and "more rough than a normal, something I was used to from him." (R. 97:55, 57.) She also agreed with the State that it was "fairly typical." (R. 97:56–57.) And while the State asked her to describe the behavior that "you have come to sort of put up with," MU never answered the question. (R. 97:76–82; 98:5–7, 18–21.)

Thus, MU never said that Hutchins had battered, sexually assaulted, or falsely imprisoned her in the past. Her testimony did not assert that Hutchins had engaged in nearly identical behavior toward her before the night of the crimes. Indeed, MU's testimony suggested otherwise—she said that Hutchins's behavior was worse than what she had been used to. MU did not testify that Hutchins had committed acts in the past similar to the ones he was accused of, and her testimony was not other-acts evidence.

But even if MU's testimony was other-acts evidence, the circuit court did not erroneously exercise its discretion when admitting it.

MU's testimony was admissible for the acceptable purpose of showing her state of mind and the context of how she reacted to the assault. *See State v. Hunt*, 2003 WI 81, ¶¶ 58–59, 263 Wis. 2d 1, 666 N.W.2d 771. The evidence of MU's past with Hutchins explained why MU chose to protect herself by not immediately reporting the assault. (R. 97:81.) As the State said in its opening, her past abuse at Hutchins's hands influenced the decision she made after the assault. "She tries to predict his reactions and then respond accordingly." (R. 97:33.) Knowing that Hutchins had abused MU in the past allowed the jury to understand why she did not immediately leave her residence to report the assault and instead let Hutchins fall asleep there. It also let the jury understand why she went about her day normally by going to work and only later, when she was away from Hutchins, decided to report what had happened. The State offered MU's testimony for a permissible purpose.

The testimony was relevant under Wis. Stat. § 904.01 because it bolstered MU's testimony that Hutchins had committed the crimes. Relevant other-acts evidence relates to a fact of consequence and tends to make that fact "more or less probable than it would be without the evidence." *See State v. Dorsey*, 2018 WI 10, ¶ 44, 379 Wis. 2d 386, 906 N.W.2d 158 (citation omitted). And a witness's credibility is always a fact of consequence under section 904.01. *Id.* ¶ 50.

MU's testimony about the prior acts of abuse tended to make it more likely that she was telling the truth that Hutchins had committed the crimes he was on trial for. The testimony refuted the suggestion that her delay in reporting meant that she was not telling the truth about Hutchins's crimes by providing an explanation for the delay. The testimony was thus relevant.

The testimony was also not unfairly prejudicial. It did not arouse the jury's sense of horror or provoke its instinct to punish. *Doss*, 312 Wis. 2d 570, ¶ 78. The primary danger with other acts evidence is that the jury will make the inference prohibited by Wis. Stat. § 904.04(2) that the defendant acted in conformity with his past actions. That risk was not present here because MU never gave any details about the past abuse. She did not even say that Hutchins had done anything to her in the past like he was currently on trial for. The State deliberately tried to avoid presenting such details to minimize potential prejudice. (R. 97:79.) And the State heeded the circuit court's warning not to present this information. (R. 97:81–82.) Hutchins suffered no unfair prejudice from MU's nonspecific testimony about his past actions.

Further, Hutchins's attempts to show error fail. He claims that the State's explanation that it was introducing the evidence to show MU's state of mind was really just an attempt to get the jury to make the inference prohibited by Wis. Stat. § 904.04(2). (Hutchins's Br. 19.) But his argument on this point is not developed. It is thus not adequate to show that the circuit court erroneously exercised its discretion. *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

Hutchins next claims that the evidence was not relevant because it did not give details about the past abuse. (Hutchins's Br. 19–21.) But, as explained, the circuit court held that MU's testimony was relevant to show why she did not immediately report the assault. Hutchins does not address the court's decision or explain why it was erroneous. He thus has not shown that the circuit court erred when finding the evidence relevant.

Hutchins also has not shown that the evidence was unfairly prejudicial. He contends that the State's opening claimed that he had previously punched MU. (Hutchins's Br. 22.) But the State did not specifically say that was what

Hutchins had done to MU in the past. Further, the court instructed the jury that it was supposed to decide the case based only on the evidence, which did not include the attorneys' remarks. (R. 99:38–39.) This Court presumes that the jury follows the court's instructions. *State v. Delgado*, 2002 WI App 38, ¶ 17, 250 Wis. 2d 689, 641 N.W.2d 490. Counsel's opening statement was not prejudicial.

In addition, Hutchins complains that MU's testimony about the past acts was prejudicial because the jury necessarily drew the inference prohibited by Wis. Stat. § 904.04(2). (Hutchins's Br. 22–25.) But Hutchins does not explain why that was so under the particular facts of his case. Again, MU's testimony was brief and nonspecific. The jury heard about no specific actions by Hutchins that it could have found him to be acting in conformity with. The absence of details about Hutchins's past actions made it unlikely that the jury drew the prohibited inference from MU's testimony.

Finally, Hutchins argues that the State's failure to disclose before trial that it intended to introduce the evidence prejudiced him. (Hutchins's Br. 22–23.) He contends that the lack of disclosure denied him the opportunity to defend against the prior acts. (Hutchins's Br. 22–23.) But Hutchins could have denied any past acts of abuse had he not waived his right to testify. (R. 99:8–10.) And again, MU's testimony was not specific. Had Hutchins wanted to defend against the other acts, it is likely that the parties would have needed to identify specific instances of abuse to allow Hutchins to challenge them. That might have led the court to let the State introduce evidence of Hutchins's specific acts, which would have been more, not less, prejudicial than MU's brief and nonspecific testimony. Hutchins has shown no error.

C. Even if the Court erred by admitting MU's testimony, it was harmless.

Should this Court determine that the circuit court erred by allowing MU's testimony, it should conclude that the error was harmless. The result of Hutchins's trial would have been the same without MU's brief and nonspecific testimony about Hutchins's past actions.

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.'" *See 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." *See id.* ¶ 43 (citation omitted).

The jury would have still convicted Hutchins had MU not testified about his past acts. As the parties acknowledged in their closing arguments, the dispute at trial was whether MU was telling the truth that Hutchins attacked her the night of the crimes. (R. 99:43–44, 51.) MU's testimony about Hutchins's prior acts did not really do much to bolster her credibility. The State used the testimony to explain why MU waited to report the crimes. But MU's delay was minimal. She waited only until she was done working the day after the crimes to report them. And she explained that she went to work because "[she] had to be responsible, [she] had to be a mom." (R. 97:75.) That, more than any past abuse by Hutchins, explained her decision to briefly wait to report the crimes.

The testimony also was harmless because it was nonspecific and only a small part of MU's overall testimony. *See State v. Norman*, 2003 WI 72, ¶ 48, 262 Wis. 2d 506, 664 N.W.2d 97 (frequency of error and importance of evidence are factors to consider when determining whether error is

harmless.) Again, MU never testified about any specific acts of prior abuse. And her overall testimony focused on Hutchins's actions the night of the assault, not their past. (R. 97:45–76, 98:5–7.) MU's testimony about Hutchins's past actions did not contribute to the jury's verdict, and it would have still convicted him had the circuit court excluded it.

II. The record shows that counsel's failure to move for a mistrial during the State's opening was neither deficient nor prejudicial.

A. A circuit court can deny an ineffective assistance of counsel claim without a hearing if the record conclusively demonstrates that the defendant is not entitled to relief.

Before a defendant can succeed on an ineffective assistance of counsel claim, the circuit court must hold an evidentiary hearing to preserve counsel's testimony. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

But a defendant is not automatically entitled to an evidentiary hearing. If the petitioner does not raise sufficient facts, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the trial court has the discretion to deny a request for an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996).

To show that counsel was ineffective, a defendant must establish both that trial 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.

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.

Whether a motion is sufficient to warrant a hearing and whether the record shows that the defendant is not entitled to relief are questions of law that this Court reviews de novo. *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659.

B. Because a motion for a mistrial would have failed, the record conclusively shows that counsel was not ineffective for failing to make one.

This Court should conclude that the record conclusively demonstrates that Hutchins's counsel was not ineffective for failing to move for a mistrial because the circuit court would have correctly rejected counsel's request.

To succeed on his ineffective-assistance claim, Hutchins must show that the circuit court would have granted his counsel's request for a mistrial. Counsel is not deficient for not making a motion that the court would have denied. *See State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110. And if the court would have properly denied the motion had counsel made it, there can be no reasonable probability of a different result. *See Strickland*, 466 U.S. at 694.

Thus, for Hutchins to prevail on his claim, he has to show that the court would have granted a mistrial had counsel asked for one. That means that he has to show that the State improperly referenced the other acts in its opening, which in turn requires him to show that the circuit court erred by admitting the other acts at trial. If the prior acts were admissible, the State was allowed to discuss them during its opening.

Hutchins cannot make these showings. As explained in section one of this argument, the circuit court properly admitted MU's testimony. The State thus properly mentioned the prior acts in its opening. A motion for a mistrial would have failed, and the circuit court properly denied Hutchins's motion without a hearing.

This Court should also reject Hutchins's attempts to show that the circuit court erred.

Hutchins claims that his counsel was deficient because a motion for a mistrial was necessary to preserve an appellate challenge to the State's opening. (Hutchins's Br. 29–31.) But again, counsel is not deficient for not making an objection that the court would have properly overruled. *Berggren*, 320 Wis. 2d 209, ¶ 21. And this Court has held that a motion for a mistrial is necessary only when the court sustains an objection to counsel's argument. *State v. Cockrell*, 2007 WI App 217, ¶ 44 n.14, 306 Wis. 2d 52, 741 N.W.2d 267. The motion is not necessary to preserve a claim when, as here, the court overrules the objection. *Id*.

Hutchins asserts that he was prejudiced because the State's opening "set up" MU's testimony. (Hutchins's Br. 32.) But as explained, the circuit court properly admitted MU's testimony, so any mistrial request would have failed, and the outcome of Hutchins's trial would have been the same. His ineffective-assistance claim fails.

CONCLUSION

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

Dated this 19th day of February, 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 4579 words.

_____
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 19th day of February, 2019.

_____
AARON R. O'NEIL
Assistant Attorney General