STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP2419-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANGEL MERCADO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
rosenowse@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes

Page

Other Authorities

ISSUES PRESENTED

1. Did the circuit court properly exercise its discretion when it admitted videos of the three child victims' forensic interviews?

The circuit court answered "yes."

This Court should answer "yes."

2. Did the circuit court appropriately allow the jury to view uncertified transcripts of those videos?

The circuit court answered "yes."

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

A jury convicted Defendant-Appellant Angel Mercado of sexually assaulting three young girls. At trial, the jury saw videos of the victims' forensic interviews with police officers. On appeal, Mercado argues that those videos were inadmissible evidence, and he asserts procedural errors involving the admission of those videos. He also argues that the jury should not have seen uncertified transcripts of those videos.

This Court should affirm. Mercado forfeited several of his arguments, they have no merit, and many of the alleged errors were harmless.

STATEMENT OF THE CASE

Mercado touched, licked, or kissed the nipples, genitals, or buttocks of three of C.C.'s daughters, N.G., L.G., and O.G. (R. 1:2.) The assaults started around 2013 when O.G. was four years old. (R. 1:2.) C.C. lived near Mercado beginning in 2012. (R. 77:49.) Mercado offered to help take care of C.C.'s daughters, so C.C. moved in with him in July 2016. (R. 77:17.) Mercado and C.C. were "good friends," and she worked as his in-home caretaker. (R. 77:13–14, 20.)

In August 2016, N.G., L.G., and O.G. told their mother that Mercado had been molesting them. (R. 77:24–26, 31.) Police conducted forensic interviews of the three victims. (R. 1:2.) The State charged Mercado with three counts of first-degree sexual assault of a child, one count for each victim. (R. 6.) The charged assaults happened around N.G.'s fourth birthday, when L.G. was four or five years old, and when O.G. was seven years old. (R. 6.)

Pretrial, the State notified the circuit court and Mercado that it would introduce the victims' forensic-interview videos into evidence at trial. (R. 7–9.) At a pretrial hearing, Mercado argued that N.G.'s and L.G.'s videos were inadmissible under Wis. Stat. § 908.08(3)(c), but he conceded that O.G.'s video satisfied that statutory provision. (R. 64:2; 71:7–18.) The circuit court found N.G.'s and L.G.'s videos admissible under section 908.08(3)(c). (R. 72:4–6.)

Mercado's jury trial resulted in a mistrial because the interpreters would have been unable to interpret the English-language videos of the victims' forensic interviews for Mercado while they were played for the jury. (R. 74:3–4, 13–14.) The circuit court ordered that the State or the defense would need to transcribe the videos. (R. 74:11.) The prosecutor offered to prepare the transcripts. (R. 74:12.)

At Mercado's second jury trial, the State played the videos of the three forensic interviews for the jury. (R. 75:29–30; 77:59–60, 64–68; 78:34, 39–40.) The circuit court received English-language transcripts of the videos as exhibits. (R. 77:62, 65; 78:35; *see also* R. 20–22.) The court told the jury to rely on the videos if they conflicted with the transcripts. (R. 77:67–68.) The jury found Mercado guilty of all three counts. (R. 80:63.)

The circuit court later sentenced Mercado to ten years of initial confinement followed by three years of extended supervision on count one, 25 years of initial confinement followed by seven years of extended supervision on count two, and ten years of initial confinement followed by three years of extended supervision on count three. (R. 81:41–42.) The court ordered the sentences to be concurrent. (R. 81:42.)

Mercado filed a motion for a new trial, arguing that the circuit court erred by allowing the jury to view the videos of the victims' forensic interviews and the transcripts of those videos. (R. 49:11.) The circuit court denied the motion, "incorporate[d]" the State's response brief "by reference," and gave additional reasoning. (R. 64:4–5.)

Mercado appeals his judgment of conviction and the order denying his postconviction motion. (R. 65.)

ARGUMENT

I. The introduction of the victims' forensic-interview videos at trial does not entitle Mercado to relief.

A. Standard of review

This Court reviews a circuit court's decision admitting or excluding evidence for an erroneous exercise of discretion. *State v. Hunt*, 2014 WI 102, ¶ 20, 360 Wis. 2d 576, 851 N.W.2d 434. This Court "will not disturb a trial court's discretionary ruling if the trial court applied accepted legal standards to the

facts of record and [this Court] can discern a reasonable basis for its ruling." *State v. Snider*, 2003 WI App 172, ¶ 16, 266 Wis. 2d 830, 668 N.W.2d 784.

"When reviewing a circuit court's determination for erroneous exercise of discretion an appellate court may consider acceptable purposes for the admission of evidence other than those contemplated by the circuit court, and may affirm the circuit court's decision for reasons not stated by the circuit court." *State v. Hurley*, 2015 WI 35, ¶ 29, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted). "Regardless of the extent of the trial court's reasoning, [a reviewing court] will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." *Id.* (alteration in original) (citation omitted).

When reviewing a circuit court's discretionary ruling, this Court does not determine whether it thinks the ruling was "'right' or 'wrong.'" *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). Rather, the discretionary decision "will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *Id.* "It is not important that one trial judge may reach one result and another trial judge a different result based upon the same facts." *State v. Ronald L.M.*, 185 Wis. 2d 452, 463, 518 N.W.2d 270 (Ct. App. 1994).

This Court reviews de novo whether a defendant adequately preserved an objection for appeal, *State v. Kutz*, 2003 WI App 205, ¶ 27, 267 Wis. 2d 531, 671 N.W.2d 660, and whether an alleged error was harmless, *State v. King*, 2005 WI App 224, ¶ 22, 287 Wis. 2d 756, 706 N.W.2d 181.

B. The three victims' videos were admissible under Wis. Stat. § 908.08(2) and (3).

A circuit court may admit a child's videotaped statement into evidence at trial if certain requirements are met. Wis. Stat. § 908.08(2)–(3). The purposes of this statute are to avoid emotional harm to children and "to make it easier" to introduce a child's out-of-court statement, even when it is hearsay. *Snider*, 266 Wis. 2d 830, ¶ 13 & n.6.

"Hearsay is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *State v. Britt*, 203 Wis. 2d 25, 38, 553 N.W.2d 528 (Ct. App. 1996) (quoting Wis. Stat. § 908.01(3)). "Hearsay evidence is generally not admissible except as otherwise provided by rule or statute." *Id.* (citing Wis. Stat. §§ 908.02, 908.03).

"[O]nly one exception is necessary for hearsay to be admissible." *Kutz*, 267 Wis. 2d 531, ¶ 28. A child's videotaped statement is admissible if it satisfies the requirements of Wis. Stat. § 908.08(2) and (3), "even when no other hearsay exception applies." *Snider*, 266 Wis. 2d 830, ¶ 13.

Here, the three victims' videos were admissible under section 908.08(2) and (3).

1. The videos were admissible under Wis. Stat. § 908.08(2).

Mercado argues that N.G.'s and L.G.'s forensic-interview videos were inadmissible under Wis. Stat. § 908.08(2)(b) because the circuit court did not view them in their entirety before a pre-trial hearing.[1] (Mercado's Br. 27–28.) This statute provides that, "[a]t or before the hearing [on

[1] Mercado conceded pretrial that O.G.'s video statement met the admissibility requirements of Wis. Stat. § 908.08(3)(c). (R. 64:2; 71:7.) That concession likely explains why the circuit court apparently did not watch O.G.'s video before trial.

the admissibility of a child's videotaped statement], the court shall view the statement." Wis. Stat. § 908.08(2)(b).

Mercado's reliance on Wis. Stat. § 908.08(2)(b) fails for three reasons. First, Mercado forfeited this argument by not timely raising it in the circuit court. "[A] specific, contemporaneous objection is required to preserve error." *State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490. "The [forfeiture] rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal." *State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727. "It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Id.* This rule also "prevents attorneys from 'sandbagging' errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.* (citation omitted).

Mercado did not make a contemporaneous objection to N.G.'s and L.G.'s forensic-interview videos under Wis. Stat. § 908.08(2)(b). He did not object when the circuit court explained which parts of those two videos it was going to watch. (R. 71:19–21.) Nor did he object when the videos were introduced as exhibits at trial and played for the jury. (R. 75:29–30; 77:59–60, 64–68; 78:34, 39–40). Had he objected under section 908.08(2)(b), the circuit court could have fixed its alleged error by reviewing the videos in their entirety. There is a sandbagging concern because Mercado is arguing that he is entitled to "a new trial" because the circuit court did not watch the videos in their entirety before playing them for the jury. (Mercado's Br. 28.) By failing to timely object, Mercado forfeited his argument that the circuit court violated section 908.08(2)(b).

Second, regardless of forfeiture, the circuit court complied with Wis. Stat. § 908.08(2)(b). The circuit court reviewed the "relevant portions" of N.G.'s and L.G.'s videos. (R. 64:4; 72:4.) Mercado does not argue that this factual finding is clearly erroneous. He instead argues that section 908.08(2)(b) requires a circuit court to watch an entire video, reasoning that section 908.08(3)(b) requires a videotaped statement to be "free from excision, alteration or [visual or audio] distortion." (Mercado's Br. 28.)

Mercado is wrong. Courts interpret statutory language "reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *Id.* ¶ 44. "[S]tatutory interpretation begins with the language of the statute." *Id.* ¶ 45 (citation omitted). A court may also consider a statute's purpose and closely related statutes. *Id.* ¶ 49. Mercado's view would seem to unreasonably require a circuit court to watch a five-hour forensic interview in its entirety even if the parties intended to show only two minutes of the interview to the jury.

It would also be unreasonable to require a circuit court to watch an entire video to ensure that it "is accurate and free from excision, alteration and visual or audio distortion," Wis. Stat. § 908.08(3)(b), when there is no objection on that ground. A circuit court "shall view the [child's videotaped] statement" at or before "a hearing on the statement's admissibility." Wis. Stat. § 908.08(2)(b). "At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part." *Id.* So, the purpose of watching the video is to enable the circuit court to rule on objections. If there is no objection to a video's audibility, a circuit court would waste its precious time by viewing an entire video to ensure its audibility.

Mercado's view conflicts with the purpose of this statute. "The legislature's purpose in enacting Wis. Stat. § 908.08 was to make it easier, not harder, to employ videotaped statements of children in criminal trials and related hearings." *Snider*, 266 Wis. 2d 830, ¶ 13. That purpose would be undermined if a circuit court were required to watch an entire video when objections relate to only a small part of the video. Rather, the statute's purpose would be advanced by requiring a circuit court to review only the relevant parts of a video—those parts that are the subject of objections to the video's admissibility.

A closely related statute supports this view. This related statute, which establishes procedures for the use of video depositions, states that "[i]n ruling on objections the court may view the *entire videotape or pertinent parts* thereof, listen to an audiotape of the videotape sound track, or direct the objecting party to file a partial transcript." Wis. Stat. § 885.44(11) (emphasis added). Section 908.08(2)(b) likewise allows a circuit court to review only the pertinent parts of a child's videotaped statement. Again, this provision requires a circuit court to "rule on objections to the statement's admissibility in whole or in part." Wis. Stat. § 908.08(2)(b). Because a party may argue that a video is inadmissible only "in part," *id.*, it follows that a circuit court is required to watch only the objectionable part of the video.

In short, the circuit court here complied with Wis. Stat. § 908.08(2)(b) by watching the relevant parts of the two videos at issue.

Third, even if the circuit court violated Wis. Stat. § 908.08(2)(b), the error was harmless and did not affect the admissibility of the videos. This Court "will not reverse for error as to any matter of procedure unless, after an examination of the entire proceeding, it shall appear that the error complained of has affected the party's substantial rights." *State v. Patino*, 177 Wis. 2d 348, 383, 502 N.W.2d 601

(Ct. App. 1993). "As to this latter aspect, an error is harmless in a criminal case if there is no reasonable possibility that the error contributed to the conviction." *Id.*

Procedural errors are harmless if "[t]he jury had before it the same information it would have had if the procedural errors had not occurred." *State v. Vanmanivong*, 2003 WI 41, ¶ 49, 261 Wis. 2d 202, 661 N.W.2d 76. In *Vanmanivong*, the circuit court violated a statute by relying on an unsworn memo during an in camera proceeding when it determined not to release confidential informants' identities. *Id.* ¶ 33. That procedural error was harmless because, even without that error, "[t]he judge's ruling on disclosure would not have changed." *Id.* ¶ 48. The supreme court noted that "remand for a new in camera proceeding in this case would be repetitive, amassing only the same evidence already presented to the court and inevitably leading to the same result." *Id.* ¶ 42.

The alleged error here was also harmless. As the postconviction court explained, "the court viewed all three videos in their entirety when they were played for the jury at trial, and there was nothing in them which altered the court's view of their admissibility." (R. 64:4.) Tellingly, Mercado does not argue that the circuit court would have found the videos inadmissible had it reviewed them in their entirety before trial. The jury still would have viewed the three videos. The court's alleged violation of section 908.08(2)(b) did not affect the videos' admissibility and thus did not affect the verdict.

2. The videos were admissible under Wis. Stat. § 908.08(3).

The circuit court here determined that all three victims' forensic-interview videos were admissible at trial under Wis. Stat. § 908.08(3)(c). (R. 64:4; *see also* 58:2–3; 72:5–7.) This statutory provision states that a child's videotaped statement is admissible if "the child's statement was made upon oath or affirmation or, if the child's developmental level is

inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth." Wis. Stat. § 908.08(3)(c). The false-statements-are-punishable and importance-of-telling-the-truth phrases are "very much interrelated." *State v. Jimmie R.R.*, 2000 WI App 5, ¶ 42, 232 Wis. 2d 138, 606 N.W.2d 196. "[I]n most instances, a reasonable child would associate a warning about the importance of telling the truth with the related concept of untruthfulness and the consequences that might flow from such deceit." *Id.*

On appeal, Mercado challenges only the admissibility of N.G.'s video—not O.G.'s and L.G.'s videos—under section 908.08(3)(c). (Mercado's Br. 17–19.) Mercado instead challenges the admissibility of O.G.'s and L.G.'s videos on other grounds—specifically, section 908.08(2)(b) and 908.03(24). (Mercado's Br. 20–22, 27–29.)

"Failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's validity." *Sands v. Menard*, 2016 WI App 76, ¶ 52, 372 Wis. 2d 126, 887 N.W.2d 94, 109, *aff'd*, 2017 WI 110, 379 Wis. 2d 1, 904 N.W.2d 789. Mercado thus concedes that O.G.'s and L.G.'s videos satisfied section 908.08(3)(c) because he has not challenged the circuit court's ruling to that effect. The State thus will address only N.G.'s video.

In *Jimmie R.R.*, the five-year-old victim's unsworn, videotaped statement satisfied section 908.08(3)(c). *Jimmie R.R.*, 232 Wis. 2d 138, ¶¶ 43–44. The interviewer used the word "lie" twice, and the victim correctly said that it would be a lie to say that the interviewer's shirt was purple. *Id.* ¶ 43. This Court further relied on the facts that "this interview was no ordinary event in [the victim's] life. Strangers in an unfamiliar setting were interviewing her about a difficult and sensitive topic. The solemnity and importance of such a moment would not be lost on a young child." *Id.* ¶ 44.

Here, for similar reasons, N.G.'s videotaped statement satisfies section 908.08(3)(c). Although N.G. said that she did not know the difference between a lie and the truth, moments later she showed that she understood this difference by discussing her surroundings, including colors of objects in the interview room. (R. 22:4–6.) Specifically, N.G. referred to a light-colored wall as "yellow," called a dark-colored wall "blue," correctly identified a pillow and a wall, and said that it would be "wrong" to refer to a wall as a pillow. (R. DVD Ex. 11 at 9:50–10:35.) To be sure, N.G. did not answer every test question correctly. When the interviewer pointed to a pillow and asked whether it would be right or wrong to call that object a pillow, N.G. said, "Wrong." (R. DVD Ex. 11 at 10:35–42.)

When talking about her surroundings, N.G. used the word "wrong" instead of words like "false" or "lie." (R. 22:5–6.) The interviewer explained at trial that N.G.'s "vocabulary was limited." (R. 78:38.)

Further, like the victim in *Jimmie R.R.*, N.G. was interviewed by a police investigator in a government building about a difficult and sensitive topic. (R. 22.) "The solemnity and importance of such a moment would not be lost on [N.G.]" *Jimmie R.R.*, 232 Wis. 2d 138, ¶ 44. N.G.'s videotaped statement was admissible under section 908.08(3).

In short, all three victims' videos were admissible under section 908.08(2) and (3). The circuit court thus did not err by admitting those videos at trial.

C. In any event, all three victims' videos were admissible under Wis. Stat. § 908.03(24), the residual hearsay exception.

Again, "only one exception is necessary for hearsay to be admissible." *Kutz*, 267 Wis. 2d 531, ¶ 28. "[Wisconsin] Stat. § 908.08(7) permits the admission of a child's videotaped statement under any applicable hearsay exception regardless

of whether the requirements of subsections (2) and (3) have been met." *Snider*, 266 Wis. 2d 830, ¶ 12. One hearsay exception is the "'residual' hearsay exception" found in Wis. Stat. § 908.03(24). *Id.* ¶ 16. Under this statutory provision, an out-of-court statement may be used at trial for its truth if it is "not specifically covered by any of the foregoing [hearsay] exceptions but having comparable circumstantial guarantees of trustworthiness." Wis. Stat. § 908.03(24).

In determining whether a child's videotaped statement is admissible under section 908.03(24), a court may consider several factors including

> the child's age, ability to communicate and familial relationship with the defendant; the person to whom the statement was made and that person's relationship to the child; the circumstances under which the statement was made, including the time elapsed since the alleged assault; the content of the statement itself, including any signs of deceit or falsity; and the existence of other corroborating evidence.

Snider, 266 Wis. 2d 830, ¶ 17. "The factors are not intended to be 'exclusive areas of inquiry,' and each case should be examined in light of its particular circumstances." *Id.* (citation omitted).

Here, a reasonable judge could think that the victims' three forensic videos were admissible under the residual hearsay exception. The postconviction court characterized Mercado as the victims' mother's live-in boyfriend. (R. 64:1.) The postconviction court also adopted the State's response brief opposing Mercado's postconviction motion. (R. 64:4.) As the State's postconviction response brief explained, the victims had "the equivalent of a familial relationship" with Mercado because their mother knew him for years and they lived with him. (R. 58:5.)

The circumstances of the victims' statements and the persons to whom their statements were made also support the admissibility of these statements. "All three victims understood why they were [at the interview location] and [were] unlikely, even at their young age, to not recognize the gravity of the situation." (R. 58:5.) Each victim made her statements to a police officer at a child advocacy center during a forensic interview. (R. 20:1; 21:1; 22:1.) This Court has recognized that "[t]he solemnity and importance of such a moment would not be lost on a young child" when "[s]trangers in an unfamiliar setting were interviewing [the child] about a difficult and sensitive topic." *Jimmie R.R.*, 232 Wis. 2d 138, ¶ 44. Further, "[t]here was nothing to suggest that the three victims were being false or deceitful and no evidence that the victims [were] motivated to get [Mercado] in trouble." (R. 58:5.) And, finally, "there was plenty of corroborating evidence that the victims made the same statement to numerous people, including their mother and a police officer." (R. 58:5.)

In short, all three videos were admissible under Wis. Stat. § 908.03(24) even if they were not admissible under section 908.08(2) and (3).

D. Further, N.G.'s video was admissible as a prior inconsistent statement.

Again, a child's videotaped statement is admissible if it satisfies "any applicable hearsay exception regardless of whether the requirements of [Wis. Stat. § 908.08(2) and (3)] have been met." *Snider*, 266 Wis. 2d 830, ¶ 12. A witness's statement is not hearsay if it is inconsistent with his or her testimony. Wis. Stat. § 908.01(4)(a)1. A witness's prior inconsistent statement is substantive evidence. *Vogel v. State*, 96 Wis. 2d 372, 384, 291 N.W.2d 838 (1980). When a witness claims a lack of memory, a circuit court may deem the witness's testimony inconsistent with his or her prior

statement and allow it to be admitted into evidence. *State v. Lenarchick*, 74 Wis. 2d 425, 435–36, 247 N.W.2d 80 (1976).

N.G.'s videotaped statement was admissible as a prior inconsistent statement. The postconviction court correctly reached the same conclusion. (R. 64:4–5.) At trial, N.G. denied talking—or at least denied remembering talking—to the police officer who conducted the forensic interview of her. (R. 78:22.) Her videotaped statement to that police officer was thus a prior inconsistent statement.

Mercado's arguments are unavailing. He argues that children's videotaped statements are not admissible as prior inconsistent statements because Wis. Stat. § 908.08 does not say so. (Mercado's Br. 19.) But that statute provides that a circuit court may admit a child's videotaped hearsay statement into evidence at a trial if the statement "is admissible under this chapter as an exception to the hearsay rule." Wis. Stat. § 908.08(7). That provision "permits the admission of a child's videotaped statement under any applicable hearsay exception." *Snider*, 266 Wis. 2d 830, ¶ 12. A prior inconsistent statement is a hearsay exception. Wis. Stat. § 908.01(4)(a)1.

Mercado further argues that N.G.'s videotaped statement does not satisfy any criterion in Wis. Stat. § 906.13(2)(a). (Mercado's Br. 19–20.) This statute provides that

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable:
>
> 1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement.
>
> 2. The witness has not been excused from giving further testimony in the action.
>
> 3. The interests of justice otherwise require.

Wis. Stat. § 906.13(2)(a).

Although N.G.'s video needs to satisfy only one of those three criteria, it satisfies all of them. First, N.G. was cross-examined about her prior statement to the police officer and she denied making it. (R. 78:22.) Second, N.G. was not excused from giving further testimony. Rather, the circuit court said that Mercado's lawyer could continue cross-examining N.G. after her video was played. (R. 78:26–28.) Mercado's lawyer chose not to do so. (R. 78:58.) Third, the interests of justice warranted the admission of N.G.'s video into evidence because otherwise the State likely would not have been able to prove that Mercado had sexually assaulted her. It would be unjust to allow Mercado to get away with sexually assaulting a four-year-old child simply because she was too scared or too young to directly tell the jury about the assault. Indeed, the reason for using a child's videotaped statement as evidence is because a child may "be traumatized by having to testify in the direct eye-to-eye contact of his or her alleged abuser." *State v. Ruiz-Velez*, 2008 WI App 169, ¶ 5, 314 Wis. 2d 724, 762 N.W.2d 449; *see also Snider*, 266 Wis. 2d 830, ¶ 13 & n.6.

In sum, N.G.'s videotaped statement was admissible for three reasons: it satisfied Wis. Stat. § 908.08(2) and (3), it fit within the residual hearsay exception, and it was a prior inconsistent statement.

E. The circuit court's alleged failure to comply with Wis. Stat. § 908.08(5) does not entitle Mercado to relief.

Mercado argues that he is entitled to a new trial because the circuit court violated Wis. Stat. § 908.08(5) by having N.G. testify *before* playing her video. (Mercado's Br. 25–27.) This statutory provision "requires the videotape to precede direct and cross-examination." *State v. James*, 2005

WI App 188, ¶ 9, 285 Wis. 2d 783, 703 N.W.2d 727. Mercado's argument fails for three reasons.

First, he forfeited this argument. Again, "a specific, contemporaneous objection is required to preserve error." *Delgado*, 250 Wis. 2d 689, ¶ 12. Mercado did not object when the circuit court said that it would have N.G. testify before her video was played for the jury. (R. 78:13–16.) Mercado also failed to object when N.G. testified before her video was played. (R. 75:48–53.) Had Mercado objected to the timing of N.G.'s testimony, the circuit court could have complied with Wis. Stat. § 908.08(5). There is also a sandbagging concern because Mercado is seeking a new trial based on an issue that he failed to raise at trial when he had the opportunity to do so.

Second, Mercado is wrong to argue that a violation of section 908.08(5) can result in a new trial. He claims that "[i]n *James*, the Court held that if the trial court failed to abide by the procedure mandated by the statute, the defendant was entitled to have his conviction reversed and a new trial ordered." (Mercado's Br. 26 (citing *James*, 285 Wis. 2d at 802–03 [¶¶ 24–25]).) The *James* court held no such thing.

In *James*, the State "sought to introduce the videotaped statements of two child witnesses in a sexual assault trial in lieu of full-blown live direct examination and to subsequently make the children available for questioning at the defendant's request." *James*, 285 Wis. 2d 783, ¶ 1. The circuit court, however, ordered that the two victims would have to be subjected to direct and cross-examination before the State could introduce their videos. *Id.* ¶¶ 1, 4. The State appealed that order in an interlocutory appeal. *See id.* ¶¶ 1, 25. This Court held that "§ 908.08(5) is couched in mandatory terms and unambiguously requires the videotape to precede direct and cross-examination." *Id.* ¶ 9. This Court "reverse[d] and remand[ed] with directions to admit the videotape evidence pursuant to the statutorily prescribed procedures." *Id.* ¶ 25.

Contrary to Mercado's assertion, the *James* court did not reverse a conviction and remand for a new trial. The defendant had not even been convicted yet because *James* involved an interlocutory appeal by the State. Mercado is wrong to argue that "[i]n accordance with *James*, [he] is entitled to a reversal of his convictions and a new trial ordered." (Mercado's Br. 27.)

Third, the circuit court's failure to follow Wis. Stat. § 908.08(5) was harmless error. Again, procedural errors are harmless and thus do not warrant relief if "[t]he jury had before it the same information it would have had if the procedural errors had not occurred." *Vanmanivong*, 261 Wis. 2d 202, ¶ 49. Even if the circuit court played N.G.'s video before having her testify, the jury still would have seen her video. The order of presenting N.G.'s video and testimony to the jury did not affect the verdict.

In short, Wis. Stat. § 908.08(5) does not entitle Mercado to relief.

II. The uncertified forensic-interview transcripts do not entitle Mercado to relief.

Mercado next argues that he is entitled to a new trial because the forensic-interview transcripts that were accepted as exhibits were not certified. (Mercado's Br. 22–25.) He relies on Wis. Stat. § 885.42(4), Supreme Court Rule ("SCR") 71.01(2), and *Ruiz-Velez*. Mercado also seems to argue that he is entitled to a new trial because there is no official transcript of the forensic-interview videos that were played for the jury. (Mercado's Br. 22–25.) Neither of these arguments entitles him to relief.

A. Standard of review

This Court reviews for an erroneous exercise of discretion a circuit court's decision on whether a missing transcript will frustrate a defendant's right to an appeal. *See State v. Perry*, 136 Wis. 2d 92, 108–09, 401 N.W.2d 748 (1987). As noted above, this Court reviews a circuit court's decision admitting or excluding evidence for an erroneous exercise of discretion, *Hunt*, 360 Wis. 2d 576, ¶ 20, but it independently determines whether a defendant adequately preserved an objection for appeal, *Kutz*, 267 Wis. 2d 531, ¶ 27, and whether an alleged error was harmless, *King*, 287 Wis. 2d 756, ¶ 22.

B. Mercado is not entitled to relief on the grounds that the circuit court accepted uncertified transcripts as exhibits at trial.

Mercado's challenge to the use of the uncertified transcripts fails for three reasons.

First, Mercado forfeited this argument. As already noted, "a specific, contemporaneous objection is required to preserve error." *Delgado*, 250 Wis. 2d 689, ¶ 12. Mercado did not object when the forensic-interview transcripts were offered and accepted as exhibits at trial. (R. 77:62, 65; 78:36.) The postconviction court was correct to conclude that "[a]lthough the transcripts were not certified, [Mercado] forfeited any objection by not raising the issue at trial." (R. 64:5.) Had Mercado raised this issue at trial, the circuit court could have declined to accept the transcripts as exhibits. There is also a sandbagging concern because Mercado is seeking a new trial due to an issue that he could have raised at trial but failed to do so.

Second, the transcripts were admissible as exhibits even though they were not certified. "[Trial] courts have wide discretion in determining whether to allow juries to use written transcripts as aids in listening to audiotape recordings." *United States v. Cheek*, 740 F.3d 440, 450–51 (7th

Cir. 2014) (citation omitted). A trial court may admit a transcript of a recording into evidence if the recording is played at trial. *Id.* at 451. Mercado's contrary argument relies on a statute and rule that have nothing to do with the admissibly of transcripts as exhibits.

This statute provides that, "[a]t trial, videotape depositions shall be reported unless accompanied with a certified transcript submitted in accordance with SCR 71.01(2)(d)." Wis. Stat. § 885.42(4). And "[s]uch other evidence as is appropriate may be recorded by videotape and be presented at a trial. The court may direct a party or the court reporter to prepare a transcript of an audio or audiovisual recording presented under this subsection in accordance with SCR 71.01(2)(e)." Wis. Stat. § 885.42(2). This statute further states that "[a]ll trial proceedings, including evidence in its entirety, may be presented at a trial by videotape upon the approval of all parties and the trial judge." Wis. Stat. § 885.42(3).

The relevant Supreme Court Rule, in turns, states:

> (2) All proceedings in the circuit court shall be reported, except for the following:
>
> . . . .
>
> (d) If accompanied with a certified transcript, videotape depositions offered as evidence during any hearing or other court proceeding.
>
> (e) Audio and audiovisual recordings of any type, if not submitted under par. (d), that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is played in court, the part played shall be precisely identified in the record. The court may direct a party or the court reporter to prepare the transcript of a recording submitted under this paragraph.

SCR 71.01(2).

Based on their plain language, Wis. Stat. § 885.42 and SCR 71.01 do not help Mercado. This statute and rule dictate what must be transcribed—a court reporter must transcribe a video deposition unless it is accompanied by a certified transcript, and other videos are not required to be transcribed unless a circuit court so orders. Wis. Stat. § 885.42(2) & (4); SCR 71.01(2). This statute further allows for *videos* to be presented as evidence at trial. Wis. Stat. § 885.42(2) & (3). But this rule and statute say nothing about whether *transcripts* of videos are admissible as exhibits. Nothing in this rule or statute says that transcripts of videos are inadmissible evidence unless they are duplicated by a court reporter or certified. The circuit court properly accepted the uncertified transcripts as exhibits.

Third, if the circuit court erred by accepting the uncertified transcripts as exhibits, the error was harmless. Again, "an error is harmless in a criminal case if there is no reasonable possibility that the error contributed to the conviction." *Patino*, 177 Wis. 2d at 383. The jury saw the videos of the three victims' forensic interviews. (R. 77:66–68; 75:29–30; 78:39–40.) The jury was told that the transcripts of those interviews were imperfect and said "unclear" and "unintelligible" at times. (R. 77:61, 65; 78:35.) The court told the jury to rely on the videos if they conflicted with the transcripts. (R. 77:67–68.) "A reviewing court may not assume that the jury did not follow its instructions." *Burch v. Am. Family Mut. Ins. Co.*, 198 Wis. 2d 465, 477 n.6, 543 N.W.2d 277 (1996). The jury thus would have resolved any discrepancy between the videos and the transcripts in favor of the videos. And, as the postconviction court noted, Mercado "has made no showing that [the transcripts] were inaccurate." (R. 64:5.) The uncertified transcripts were harmless.

Mercado argues that the transcripts were not harmless because the jury convicted him "on the basis of the interviews and the uncertified transcripts." (Mercado's Br. 25.) His

argument shows why the transcripts were harmless: they were cumulative with the video evidence. And, even if they conflicted in any way, which Mercado does not claim, the jury would have relied on the video instead of the inconsistent transcript.

C. The lack of official transcripts of the forensic-interview videos does not entitle Mercado to relief.

"[A] missing transcript that cannot be re-created entitles the defendant to a new trial if the defendant demonstrates a 'colorable need' for the transcript." *State v. Parker*, 2002 WI App 159, ¶ 9, 256 Wis. 2d 154, 647 N.W.2d 430 (quoting *Perry*, 136 Wis. 2d at 108). A missing transcript "can 'prevent[ ] a putative appellant from demonstrating possible error,' thereby depriving him or her of the constitutional right to appeal." *Id.* ¶ 10 (alteration in original) (quoting *Perry*, 136 Wis. 2d at 99).

To the extent that Mercado argues that the lack of official transcripts entitles him to relief, he did not adequately develop that argument. This Court generally does not consider inadequately developed arguments. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In any event, the lack of official transcripts does not entitle Mercado to relief for three reasons.

First, under the *Perry* line of cases, a missing transcript does not entitle a defendant to relief if SCR 71.01 did not require that type of transcript to be produced. *See State v. Taylor*, 2004 WI App 81, ¶ 11 n.4, 272 Wis. 2d 642, 679 N.W.2d 893. This rule did not require the victims' videos to be transcribed at Mercado's trial. An overview of this rule's history is helpful to understanding why.

In *Ruiz-Velez*, this Court held that Wis. Stat. § 885.42(4) and SCR 71.01(2) required a recording of a child's statement to be transcribed during trial. *Ruiz-Velez*,

314 Wis. 2d 724, ¶¶ 5–6. When *Ruiz-Velez* was decided, Wis. Stat. § 885.42(4) provided that: "At trial, videotape depositions *and other testimony presented by videotape* shall be reported." *Id.* ¶ 4 (emphasis added). This Court noted that SCR 71.01(2)'s exceptions to the transcription requirement did not apply. *Id.* ¶ 6.

This statute and rule were amended after *Ruiz-Velez* to exempt video statements from the transcription requirement. The Wisconsin Supreme Court created SCR 71.01(2)(e), which originally stated that transcripts were not required for "[a]udio recordings of any type that are played during the proceeding, marked as an exhibit, and offered into evidence." Supreme Court Order 09-05, 2009 WI 104, § 1 (eff. Jan. 1, 2010). Under that amendment, SCR 71.01 "no longer require[d] video statements played during the proceeding to be reported." *State v. Marinez*, 2010 WI App 34, ¶ 19 n.4, 324 Wis. 2d 282, 781 N.W.2d 511.

The rule was amended once more after *Marinez* to require transcription of video depositions. A rule petition asked the supreme court to resolve "possible conflicting language in [Wis. Stat.] § 885.42 by proposing that videotape depositions continue to be reported and transcribed by the court reporter but other audio and audiovisual recordings need not be reported and transcribed unless ordered by the court." Supreme Court Order 10-06, 2010 WI 128. The supreme court "grant[ed] the petition." *Id.* The court removed the "and other testimony presented by videotape" language from Wis. Stat. § 885.42(4). Supreme Court Order 10-06, 2010 WI 128, § 4 (eff. Jan. 1, 2011). This change clarified that the transcription requirement in section 885.42(4) applies only to *deposition* videos. *See id.*

The court further added the underlined language to SCR 71.01(2)(e), providing that transcripts are not required for "[a]udio <u>and audiovisual</u> recordings of any type<u>, if not submitted under par. (d),</u> that are played during the

proceeding, marked as an exhibit, and offered into evidence." Supreme Court Order 10-06, 2010 WI 128, § 1 (eff. Jan. 1, 2011). Paragraph (d) provides that "videotape depositions" need not be transcribed "[i]f accompanied with a certified transcript" and "offered as evidence during any hearing or other court proceeding." SCR 71.01(2)(d). This change clarified that SCR 71.01(2)(e)'s exemption from the transcription requirement does not apply to deposition videos, i.e., videos submitted under SCR 71.01(2)(d).

So, a *non-deposition* video does not need to be transcribed when it "is played during the proceeding, marked as an exhibit, and offered into evidence." SCR 71.01(2)(e). But a video deposition must be transcribed unless it is accompanied by a certified transcript. Wis. Stat. § 885.42(4); SCR 71.01(2)(d).

The videos at issue here did not need to be transcribed during Mercado's trial because they were not deposition videos. "A deposition is a statement made under oath." *State v. Haefer*, 110 Wis. 2d 381, 387, 328 N.W.2d 894 (Ct. App. 1982). The victims here were not under oath in their videos at issue. (*See* R. 20–22.) Because SCR 71.01(2)(e) exempted these videos from the transcription requirement, the lack of official transcripts of these videos does not entitle Mercado to relief. *See Taylor*, 272 Wis. 2d 642, ¶ 11 n.4.

Second, even if these videos were required to be recorded at trial by a court reporter, Mercado does not have a "colorable need" for the non-existent official transcripts. *Perry*, 136 Wis. 2d at 108 (citation omitted). The three videos and uncertified transcripts of them are part of the appellate record. (R. 20–22; 82.) Even without *official* transcripts of those videos, Mercado could rely on the videos themselves or the uncertified transcripts to raise a claim of error. Because he lacks a colorable need for the non-existent official transcripts, this absence of transcripts does not entitle him to a new trial.

Third, for the same reason, the lack of official transcripts is harmless. "Error in transcript preparation or production, like error in trial procedure, is subject to the harmless-error rule." *Perry*, 136 Wis. 2d at 100. The lack of official transcripts of the forensic interviews is harmless because the videos of those interviews and their uncertified transcripts are part of the record. (R. 20–22; 82.)

Mercado's reliance on *Ruiz-Velez* is misplaced. He asserts that the *Ruiz-Velez* court "held that since the official court reporter at the trial had not transcribed the audiovisual recordings that had been received in evidence and played to the jury, the defendant was entitled to have his convictions reversed." (Mercado's Br. 23.) Once again, Mercado is misrepresenting precedent.

In *Ruiz-Velez*, after being convicted of sexually assaulting a child, the defendant moved the circuit court "to have the official court reporter transcribe audiovisual recordings of statements made by the child whom Ruiz–Velez was convicted of sexually assaulting that were received into evidence." *Ruiz-Velez*, 314 Wis. 2d 724, ¶ 1. The postconviction court denied the motion, so the defendant pursued an interlocutory appeal from that "non-final order." *Id.* This Court "reverse[d] and remand[ed] with directions that the recordings be transcribed by the official court reporter." *Id.* The validity of the defendant's conviction was not at issue on appeal. Indeed, the defendant noted an issue with part of the recordings but conceded "that it is not yet ripe for postconviction review." *Id.* ¶ 2 n.2. Contrary to Mercado's assertion, this Court in *Ruiz-Velez* did not reverse a conviction or order a new trial.

In sum, the forensic-interview transcripts were admissible as exhibits, their introduction into evidence was harmless, the court reporter was not required to transcribe those interviews during trial, and the absence of official

transcripts is harmless. The uncertified transcripts and lack of official transcripts do not entitle Mercado to relief.

CONCLUSION

This Court should affirm Mercado's judgment of conviction and the circuit court's order denying his postconviction motion.

Dated this 14th day of May 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
rosenowse@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 7094 words.

_____
SCOTT E. ROSENOW
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 14th day of May, 2019.

_____
SCOTT E. ROSENOW
Assistant Attorney General