RECEIVED
06-18-2020
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2419-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANGEL MERCADO,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent-Petitioner

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Statutes

INTRODUCTION

A jury convicted Angel Mercado of sexually assaulting three young girls. The State's main evidence against Mercado at trial was victim statements in videos of the victims' forensic interviews with police. On appeal, Mercado argued that the circuit court had erred in several ways when it admitted the videos into evidence. The State argued that Mercado had forfeited some of his arguments by not raising them at trial, the circuit court had properly admitted the videos, and the court's alleged procedural errors were harmless. The court of appeals disregarded Mercado's forfeitures, concluded that the circuit court had erred by admitting the videos, and reversed and remanded for a new trial.

This Court should reverse. It should first hold that the court of appeals erred by reviewing two of Mercado's forfeited arguments. It should next hold that all three victims' interview videos were admissible under the residual hearsay exception. Although the Court could end its analysis there, it should go further because the published decision below misinterprets several key provisions of Wis. Stat. § 908.08. Specifically, this Court should hold that section 908.08(2)(b) did not require the circuit court to watch the interview videos in their entirety before a pretrial hearing, the youngest victim's video satisfied section 908.08(3)(c) because she could tell the difference between the truth and a lie, the youngest victim's video was admissible as a prior inconsistent statement, and section 908.08(5)(a) allowed the State to call the youngest victim to testify before playing her video for the jury.

ISSUES PRESENTED

This case presents two overarching issues, the second of which has four sub-issues.

1. Did the court of appeals contravene Wis. Stat. § 901.03(1)(a) when it directly reviewed Angel Mercado's forfeited challenges to the admission of his victims' forensic-interview videos into evidence at trial?

This Court should conclude that the court of appeals may not disregard a forfeiture that occurs when a litigant fails to timely object to the admission of evidence at trial.

2. Did the circuit court err when it admitted the victims' forensic-interview videos into evidence at trial? This question presents four sub-issues:

a. Did the circuit court comply with Wis. Stat. § 908.08(2)(b) when it reviewed the relevant portions of two child victims' forensic-interview videos before playing them for the jury?

This Court should conclude that this statutory provision requires a circuit court to watch only the portions of a video that will allow the court to rule on objections to the video at a pretrial hearing.

b. Did the court of appeals conflict with binding case law when it rejected the State's argument that all three victims' forensic-interview videos were admissible under the residual hearsay exception?

This Court should conclude that the victims' videos were admissible under the residual hearsay exception.

c. Was the youngest victim's forensic-interview video also admissible under Wis. Stat. § 908.08(3)(c) or as a prior inconsistent statement?

This Court should conclude that this victim's video was admissible under section 908.08(3)(c) or as a prior inconsistent statement.

d. Did the circuit court comply with Wis. Stat. § 908.08(5)(a) when it allowed the youngest victim to testify before playing her forensic-interview video for the jury?

This Court should conclude that the circuit court's order of presenting this evidence was permissible or, if erroneous, harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

Mercado touched, licked, or kissed the nipples, genitals, or buttocks of three of C.C.'s daughters, N.L.G., L.A.G., and O.E.G. (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.L.G., L.A.G., and O.E.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.L.G.'s fourth birthday, when L.A.G. was four or five years old, and when O.E.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.L.G.'s and L.A.G.'s videos were inadmissible under Wis. Stat. § 908.08(3)(c), but he conceded that O.E.G.'s video satisfied that statutory provision. (R. 64:2; 71:7–18.) The circuit court found N.L.G.'s and L.A.G.'s videos admissible under section 908.08(3)(c). (R. 72:4–6.)

Mercado's first 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 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 appealed his judgment of conviction and the order denying his postconviction motion. (R. 65.) The court of appeals reversed and remanded for a new trial in a published decision. (R-App. 101–22.) Judge Michael Fitzpatrick dissented. (R-App. 123–42.)

STANDARD OF REVIEW

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.

Statutory interpretation is a question of law that this Court reviews de novo. *State v. Shoeder*, 2019 WI App 60, ¶ 6, 389 Wis. 2d 244, 936 N.W.2d 172.

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.

ARGUMENT

I. This Court should hold that Wis. Stat. § 901.03(1)(a) prohibits the court of appeals from directly reviewing a forfeited objection to the admission of evidence.

A. The court of appeals is prohibited by statute from directly reviewing a forfeited objection to the admission of evidence.

"[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).

In *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988), this Court held that it may directly review an unobjected-to jury instruction, but the court of appeals may not do so. This Court reached that conclusion for three reasons. First, the "court of appeals is an error-correcting court" and thus, unlike this Court, "does not have a law-developing or law-declaring function." *Id.* at 407. Second, giving the court of appeals a discretionary power to review an unobjected-to instruction "would amount to a repudiation of the idea underlying [Wis. Stat. §] 805.13(3)," which states that an objection to a jury instruction is waived if not raised at the instruction conference. *Id.* at 409. Third,

"the purpose of a waiver rule for unobjected-to instructions was to assure that counsel would bring these errors to the attention of the trial court, when that court could easily remedy the deficiency." *Id.* This Court suggested that the court of appeals could indirectly review an unobjected-to jury instruction under the interest-of-justice, ineffective-assistance-of-counsel, or plain-error framework. *Id.* at 402, 408 & n.14.

A different statute establishes that objections to the admission of evidence are forfeited if not timely raised. This statute provides that "[e]rror may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Wis. Stat. § 901.03(1)(a).

This statute prohibits the court of appeals from directly reviewing a forfeited objection. When a defendant does not timely object, "the error is waived and reversal is statutorily prohibited" under section 901.03(1)(a). *State v. Meeks*, 2003 WI 104, ¶ 93, 263 Wis. 2d 794, 666 N.W.2d 859 (Sykes, J., dissenting).

The reasoning of *Schumacher* compels this conclusion for three reasons: (1) the court of appeals is an error-correcting court; (2) the forfeiture rule at issue in this case is statutory, not one of judicial administration; and (3) policy considerations support this view.

First, the court of appeals remains an error-correcting court. *DNR. v. Wisconsin Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 43 n.19, 380 Wis. 2d 354, 909 N.W.2d 114. The decision below highlights the importance of this point: the court of appeals disregarded Mercado's forfeitures and decided several novel legal issues in a published decision. And, significantly, the court would have reversed for a new trial

even if it did not consider any of Mercado's forfeited arguments, given that it decided his preserved arguments in his favor. The court strayed from its error-correcting role too far into a law-developing role.

Second, the forfeiture rule at issue here, like the one in *Schumacher*, is not one of judicial administration. It is instead a statutory requirement. *See* Wis. Stat. § 901.03(1)(a). The court of appeals contravenes this statutory provision if it directly reviews a forfeited objection to the admission of evidence, just like it contravenes Wis. Stat. § 805.13(3) by directly reviewing a forfeited objection to a jury instruction.

Third, because both statutory forfeiture rules apply when a party fails to make a timely objection at trial, the policy reasons behind these rules apply equally to both. By requiring a timely objection, each forfeiture rule preserves judicial resources and promotes fairness by allowing a circuit court to fix an error, possibly eliminating the need for an appeal. The facts of this case once again highlight this point: Mercado's forfeited objections involve alleged procedural errors that the circuit court could have fixed had he timely raised the issues.

B. The court of appeals erred by directly reviewing Mercado's forfeited objections.

Mercado forfeited two arguments that are before this Court by not timely objecting at trial: (1) his argument that the circuit court violated Wis. Stat. § 908.08(2)(b) by not viewing the victims' interview videos in their entirety before a pretrial hearing; and (2) his argument that the circuit

court violated Wis. Stat. § 908.08(5)(a) by having N.L.G. testify before playing her video for the jury.[1]

Mercado did not make a contemporaneous objection to N.L.G.'s and L.A.G.'s 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. By failing to timely object, Mercado forfeited his argument that the circuit court violated section 908.08(2)(b).

Mercado also forfeited his argument about the timing of N.L.G.'s testimony. Mercado did not object when the circuit court said that it would have N.L.G. testify before her video was played for the jury. (R. 78:13–16.) He also failed to object when N.L.G. testified before her video was played. (R. 75:48–53.) Had Mercado objected to the timing of N.L.G.'s testimony, the circuit court could have had N.L.G. testify after playing her video for the jury.

Yet the court of appeals reviewed those two forfeited arguments and concluded that the circuit court had erred in both respects. (R-App. 113–15, 121–22.) In a footnote, the court of appeals said that it chose "not to apply the rule of forfeiture here" because the videos were the State's main evidence at trial. (R-App. 112 n.6.) It noted that "[f]orfeiture is a rule of judicial administration, and whether we apply the

[1] Mercado also forfeited his argument that the circuit court erroneously accepted uncertified transcripts of the victims' interviews as exhibits at trial. The State did not present this issue for this Court's review because the court of appeals did not resolve it.

rule is a matter addressed to our discretion." (R-App. 112 n.6 (quoting *State v. Kaczmarski*, 2009 WI App 117, ¶ 7, 320 Wis. 2d 811, 772 N.W.2d 702).) The court contravened Wis. Stat. § 901.03(1)(a) by overlooking these forfeitures.

Of course, the court of appeals has three ways to *indirectly* review an objection that is forfeited under section 901.03(1)(a).

First, the court of appeals may review "plain errors affecting substantial rights although they were not brought to the attention of the judge." Wis. Stat. § 901.03(4); *accord State v. Lammers*, 2009 WI App 136, ¶ 12, 321 Wis. 2d 376, 773 N.W.2d 463. The plain-error doctrine allows reversal of a conviction only if a substantial and obvious error deprived a defendant of a basic constitutional right. *State v. Frank*, 2002 WI App 31, ¶ 25, 250 Wis. 2d 95, 640 N.W.2d 198. It does not allow relief for a statutory violation. *State v. Vinson*, 183 Wis. 2d 297, 306–07, 515 N.W.2d 314 (Ct. App. 1994).

Second, the court of appeals may reverse a conviction due to a forfeited objection in the interest of justice. Wis. Stat. § 752.35. But it may reverse under this statute only in an exceptional case where justice has miscarried or where the real controversy was not fully tried. *State v. Avery*, 2013 WI 13, ¶ 38 & n.18, 345 Wis. 2d 407, 826 N.W.2d 60.

Third, the court of appeals may determine whether an attorney provided ineffective assistance by declining to object to evidence. Courts normally review forfeited arguments under the rubric of ineffective assistance of counsel. *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). A defendant who asserts ineffective assistance of counsel must show that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Mercado, however, did not present his forfeited arguments through any of those three limited frameworks. Nor did the court of appeals apply any of those frameworks. The court instead directly reviewed Mercado's forfeited arguments on the merits.

Allowing the court of appeals to review forfeited objections to evidence is problematic. The court of appeals has been inconsistent in deciding whether to address the merits of forfeited claims. *State v. Counihan*, 2020 WI 12, ¶ 63, 390 Wis. 2d 172, 938 N.W.2d 530 (R.G. Bradley, J., concurring). Courts overlook forfeitures on an *ad hoc* basis, resulting in unequal treatment and unpredictability, "at the expense of the rule of law." *Id.* ¶ 65. This Court should help eliminate those concerns by holding that section 901.03(1)(a) prohibits the court of appeals from disregarding one common type of forfeiture: failure to timely object to the admission of evidence.

The decision below highlights the need for this holding. The dissenting judge rightly suggested three times that the majority opinion was abandoning its neutrality by overlooking Mercado's forfeitures and developing arguments for him. (R-App. 129, 130, 136–37.) But the court of appeals should not authoritatively construe a complex statute when, as here, a party's arguments are forfeited or not adequately developed. *See, e.g.*, *Associated Bank, N.A. v. Brogli*, 2018 WI App 47, ¶¶ 50–54, 383 Wis. 2d 756, 917 N.W.2d 37 (Hagedorn, J., dissenting).

In short, this Court should hold, consistent with *Schumacher*, that Wis. Stat. § 901.03(1)(a) prohibits the court of appeals from directly reviewing a forfeited objection to the admission of evidence. This Court should thus conclude that the court of appeals should not have resolved Mercado's forfeited objections.

II. The circuit court properly admitted all three victims' interview videos into evidence at trial.

Because this Court has a law-developing role and "broad discretionary-review power," *Schumacher*, 144 Wis. 2d at 407, it should decide the following legal issues, including the ones that Mercado forfeited. This Court should do so even if one issue is dispositive, because the court of appeals decided all these issues in a published decision and got them all wrong.

If this Court decides to reverse on a single ground, it still should disavow the court of appeals' decision to strip it of precedential value. "The general rule is that holdings not specifically reversed on appeal retain precedential value." *Sweeney v. Gen. Cas. Co. of Wisconsin*, 220 Wis. 2d 183, 192, 582 N.W.2d 735 (Ct. App. 1998). "[W]hen the supreme court wants to disavow [the court of appeals'] reasoning, or, at least, prevent any implicit approval of [the court of appeals'] reasoning, it does so expressly." *Id.* at 193. This Court should do so here because the decision below is fundamentally flawed and would severely hamper the State's already difficult task of prosecuting people who sexually assault young children.

A. All three victims' forensic-interview videos were admissible under Wis. Stat. § 908.08(2) and (3).

Though hearsay, a child's recorded 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. 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. *Id.* ¶ 13 & n.6. This statute allows the recorded statement to function as testimony 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.

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).

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 consider a statute's purpose. *Id.* ¶ 49.

The statutory language in question provides: "Before the trial or hearing in which the statement is offered . . . , the *court shall view the statement*. At the hearing, the court or hearing examiner *shall rule on objections to the statement's admissibility* in whole or in part." Wis. Stat. § 908.08(2)(b) (emphases added). Nothing in this plain language requires a circuit court to view an entire "video" from start to finish. It only requires a court to "view the statement." Wis. Stat. § 908.08(2)(b).

In the court of appeals, Mercado argued that N.L.G.'s and L.A.G.'s 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.[2] The court of appeals erroneously agreed with Mercado. (R-App. 113–15.)

The circuit court did what section 908.08(2)(b) required it to do—it reviewed the "relevant portions" of N.L.G.'s and L.A.G.'s videos. (R. 64:4; 72:4.) The majority opinion faults the circuit court for not explaining what it meant by "relevant portions," and it suggests that the circuit court did not watch all the dialogue in the videos. (R-App. 115 & n.7.) That concern highlights the need for an objection by Mercado. Had Mercado objected, the circuit court could have clarified what parts of the videos it had watched. Further, in denying Mercado's postconviction motion, the circuit court noted that it had watched "more than just the first few minutes." (R. 64:2.) The court further explained that it "had reviewed all relevant portions of the videos necessary to make its ruling on their admissibility, including the end of the interview with NLG." (R. 64:4.) The statute did not require the court to watch more.

Besides comporting with the statute's plain language, this view gives the statute its intended effect. Based on the plain language of subsection (2)(b), the purpose of watching the statement before the hearing is to prepare a circuit court to rule on objections to the statement. A court would advance this purpose by watching only the portions of a video that will allow the court to rule on the objections. If a defendant has no objection to a portion of a video that the State does not intend to introduce into evidence, a court would waste its time by viewing that part of the video.

---

[2] Mercado conceded pretrial that O.E.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.E.G.'s video before trial.

By requiring a circuit court to watch more, the decision below will produce unreasonable results. If the decision below is correct, then section 908.08(2)(b) would 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. The dissenting judge made a similar point: "Now, to comply with the Majority opinion, each trial court judge in this state who must 'view the statement' under Wis. Stat. § 908.08(2)(b) must view every second of the recording, regardless of whether anyone is on the screen or whether there are any voices that can be heard." (R-App. 133 n.7.) It would be unreasonable to interpret the statute as requiring a circuit court to watch a video segment that contains no speaking or a segment with statements that the parties do not intend to play for the jury. The majority opinion below violates the cardinal rule that courts should interpret statutes to avoid absurd and unreasonable results.

A hypothetical video will highlight this concern. Imagine a 90-minute video that begins with 30 minutes of an empty interview room followed by 60 minutes of talking between a child and a police officer. The parties intend to play for the jury 50 minutes of the video's dialogue. The defendant objects to the video on the grounds that the child does not understand the difference between the truth and a lie. During just the first two minutes of dialogue, the officer tests the child on this difference. So, a circuit court would need to watch only these two minutes of video to rule on this objection. If there is no other objection to the video, it would be unreasonable to require the circuit court to watch 50, 60, or 90 minutes of video before the pretrial hearing. Yet the majority opinion would seemingly require a circuit court to watch the entire 90-minute video before the pretrial hearing, including 30 minutes showing an empty room. A circuit

court is required to watch enough of a video to allow it to rule on the pretrial objections to the video. Requiring a circuit court to watch more would produce absurd and unreasonable results by wasting judicial resources.

The majority opinion below "believe[d] that the findings relating to [section 908.08(3)](b) and (d) are difficult to make without viewing the entire video." (R-App. 116.) The court did not explain this belief, and it is wrong. Paragraph (b) requires "[t]hat the recording is accurate and free from excision, alteration and visual or audio distortion." Wis. Stat. § 908.08(3)(b). True, a court likely will not know whether an entire video is free from distortion unless it views the whole video. But a court has no reason to check if a segment of video is free from distortion if neither party wishes to show that segment to the jury. Paragraph (d) requires "[t]hat the time, content and circumstances of the statement provide indicia of its trustworthiness." Wis. Stat. § 908.08(3)(d). A court needs to watch only the relevant statement to determine its "content." And a court does not need to watch an entire video, or any part of a video, to determines its time and circumstances. The party proffering the video can make an offer of proof regarding time and circumstances. And watching an entire video likely will not reveal its time and circumstances, unless, for example, the interviewer gives a monologue into the camera describing these details.

The court of appeals' reasoning supports the *State's* view of the statute. Imagine a case where a defendant's only pretrial objection is that a 30-second segment in an 80-minute video has audio distortion. Under the State's view, section 908.08(2)(b) would require the circuit court to watch those 30 seconds of video before the pretrial hearing, even if the parties intended to play the entire video for the jury. Under the majority opinion's approach, however, a circuit

court would have to watch the entire 80 minutes of video before the hearing.

If this Court determines that the circuit court violated section 908.08(2)(b), it should hold that the violation was harmless. 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. 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 did 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.

In short, Wis. Stat. § 908.08(2)(b) requires a circuit court to view only the portions of a video that will allow it to rule on objections at a pretrial hearing. The circuit court here satisfied that requirement.

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

Wisconsin Stat. § 908.08(3)(c) states that a child's recorded 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.*

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. The 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, like in *Jimmie R.R.*, N.L.G.'s recorded statement satisfies section 908.08(3)(c). Although N.L.G. told her interviewer 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.L.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.L.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.L.G. used the word "wrong" instead of words like "false" or "lie." (R. 22:5–6.) The interviewer explained at trial that N.L.G.'s

"vocabulary was limited." (R. 78:38.) And the circuit court noted that N.L.G. "can barely speak." (R. 78:8.)

Further, like the victim in *Jimmie R.R.*, N.L.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.L.G.]" *Jimmie R.R.*, 232 Wis. 2d 138, ¶ 44. N.L.G.'s recorded statement was admissible under section 908.08(3).

So, N.L.G. did the same things that the child victim did in *Jimmie R.R.*: she identified different colors and objects while discussing a difficult, sensitive topic with a police investigator in a government building. Those things were enough to satisfy section 908.08(3)(c) in *Jimmie R.R.*, so they are enough here.

In addition, the circuit court's colloquy with N.L.G. at trial further showed that her recorded statement satisfied section 908.08(3)(c). The judge asked N.L.G., "A lie is when you say something that's not right. Do you understand that?" (R. 75:49.) She nodded affirmatively. (R. 75:49.) She stated multiple times that the judge's robe was black and that it would be wrong to say the robe was green. (R. 75:49–50; 78:18.) She also twice promised to tell the truth and not to lie. (R. 75:50; 78:19.)

This Court should review the circuit court's finding under Wis. Stat. § 908.08(3)(c) for clear error. "Ordinarily, a determination of whether a child understands that false statements are punishable is a question of fact." *Jimmie R.R.*, 232 Wis. 2d 138, ¶ 39. The court of appeals in *Jimmie R.R.* reviewed that determination de novo "since the only evidence on this question is the videotape itself." *Id.* But other case law holds that the clear-error standard of review applies if a circuit court made factual findings based on a

video and disputed testimony. *State v. Walli*, 2011 WI App 86, ¶ 17, 334 Wis. 2d 402, 799 N.W.2d 898. So, under *Walli*, the clear-error standard applies here if this Court considers N.L.G.'s video statement and courtroom colloquy. And this Court should apply this standard of review even if it considers only N.L.G.'s video statement. Contrary to the court of appeals' decision in *Jimmie R.R.*, this Court has held that the clear-error standard of review applies when a circuit court's findings resolve a factual dispute, "even if they are based solely on documentary evidence." *Phelps v. Physicians Ins. Co. of Wisconsin*, 2009 WI 74, ¶ 38 n.10, 319 Wis. 2d 1, 25, 768 N.W.2d 615. Under *Phelps*, this standard of review applies here even if this Court does not consider N.L.G.'s courtroom colloquy.

Under either standard of review, though, the circuit court correctly found that N.L.G.'s video statement satisfied Wis. Stat. § 908.08(3)(c), even without considering her courtroom colloquy. As explained, *Jimmie R.R.* set a very low bar for satisfying section 908.08(3)(c), even under de novo review. N.L.G.'s video statement meets that low threshold because it is like the one in *Jimmie R.R.*

On appeal, Mercado challenged only the admissibility of N.L.G.'s video—not O.E.G.'s and L.A.G.'s videos—under section 908.08(3)(c). (Mercado's Ct. App. Br. 17–19.) Mercado instead challenged the admissibility of O.E.G.'s and L.A.G.'s videos on other grounds—specifically, sections 908.08(2)(b) and 908.03(24). (Mercado's Ct. App. Br. 20–22, 27–29.) Mercado has thus forfeited an argument that O.E.G.'s and L.A.G.'s videos are inadmissible under section 908.08(3)(c) because he failed to raise it in the court of appeals. *See, e.g.*, *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶ 30 n.5, 274 Wis. 2d 1, 681 N.W.2d 914 (argument forfeited if not raised in court of appeals). The State will address that forfeited

argument in its reply brief if Mercado advances it in his response brief.

The court of appeals erred by concluding that N.L.G.'s statement was inadmissible under section 908.08(3)(c). The court did not cite *Jimmie R.R.* even once. That omission is telling because the court in *Jimmie R.R.* interpreted section 908.08(3)(c) as setting a low bar for admissibility.

The court of appeals mistakenly concluded—without explanation—that a circuit court may not rely on a colloquy during trial to help satisfy section 908.08(3)(c). (R-App. 116–17.) A circuit court must make a finding under subsection (3)(c) before it "admit[s]" a video statement. Wis. Stat. § 908.08(3). And a video statement may be "admit[ted] into evidence" at a "criminal trial." *Id.* § 908.08(1). This plain language thus shows that a circuit court must make a finding under subsection (3)(c) *at trial* when deciding whether to admit the video statement into evidence. It would be incongruous to forbid a court from relying on a colloquy during trial to make this finding.

Jimmie R.R. supports this conclusion. There, the court of appeals noted that the circuit court had made a finding under section 908.08(3)(c) at a preliminary hearing and at trial. *Jimmie R.R.*, 232 Wis. 2d 138, ¶ 39. It decided to review that finding de novo "since the only evidence on this question is the videotape itself." *Id.* That reasoning suggests that a different case could involve additional evidence, including a colloquy at trial, bearing on the question under subsection (3)(c).

In short, all three victims' videos were admissible under section 908.08(2) and (3). The circuit court satisfied subsection (2) by reviewing the relevant portions of the videos before the pretrial hearing. On appeal, Mercado challenged only N.L.G.'s video under subsection (3), and the

circuit court correctly found that this video satisfied this requirement. The circuit court thus did not err by admitting the three videos at trial.

B. Alternatively, all three victims' forensic-interview videos were admissible under the residual hearsay exception.

"[O]nly 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.

1. The residual hearsay exception liberally applies in cases of child sexual assault.

Under a statutory residual hearsay exception, 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 ha[s] comparable circumstantial guarantees of trustworthiness." Wis. Stat. § 908.03(24).

Courts liberally apply the residual hearsay exception when deciding whether a child sexual assault victim's out-of-court statements are admissible. This Court has "conclude[d] there is a compelling need for admission of hearsay arising from young sexual assault victims' inability or refusal to verbally express themselves in court when the child and the perpetrator are sole witnesses to the crime." *State v. Sorenson*, 143 Wis. 2d 226, 243, 421 N.W.2d 77 (1988). So, "[i]n the absence of a specific hearsay exception governing young children's statements in sexual assault cases, use of the residual exception is an appropriate method to admit

these statements if they are otherwise proven sufficiently trustworthy." *Id.* This Court in *State v. Huntington* advanced "*Sorenson*'s very liberal reading of Wis. Stat. § 908.03(24)." *State v. Huntington*, 216 Wis. 2d 671, 704, 575 N.W.2d 268 (1998) (Geske, J., dissenting).

In determining whether a child's recorded statement is admissible under section 908.03(24), a court may consider several factors including (1) "the child's age, ability to communicate and familial relationship with the defendant"; (2) "the person to whom the statement was made and that person's relationship to the child"; (3) "the circumstances under which the statement was made, including the time elapsed since the alleged assault"; (4) "the content of the statement itself, including any signs of deceit or falsity"; and (5) "the existence of other corroborating evidence." *Snider*, 266 Wis. 2d 830, ¶ 17 (citing *Sorenson*, 143 Wis. 2d at 245–46). "The factors are not intended to be 'exclusive areas of inquiry,' and each case should be examined in light of its particular circumstances." *Id.* (quoting *Sorenson*, 143 Wis. 2d at 244–45).

2. Here, the residual hearsay exception allowed the circuit court to admit the three victims' videos at trial.

The victims' three interview videos were admissible under the residual hearsay exception. All five *Sorenson* factors support this conclusion.

First, the victims' ages and relationship with Mercado weigh in favor of admissibility. The charged assaults happened around N.L.G.'s fourth birthday, when L.A.G. was four or five years old, and when O.E.G. was seven years old. (R. 6.) In one case where the victim "was mentally and emotionally at about a four year age level," this Court noted "that a child at such a young age is unlikely to review an

incident of sexual assault and calculate the effect of a statement about it. This would tend to support the veracity of the child's report of sexual abuse by her father." *Sorenson*, 143 Wis. 2d at 246 (citation omitted). Here, the three victims' difficulty communicating during their interviews was not surprising, given their young ages and the sensitive nature of their conversations. As for their relationship with Mercado, 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.)

Second, the interviewers' relationship with the three victims supports the admissibility of the recorded statements. 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.) The court of appeals 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. There is no evidence that the police officers used improper interview techniques or had any "motivation to coerce [the victims] into making such a statement." *Sorenson*, 143 Wis. 2d at 248.

To be sure, Mercado's trial testimony suggested that the victim's mother fabricated the accusations against him "because of money." (R. 79:16.) He testified that, around the time of the complaint against him, the victims' mother wanted money from him but he had refused to give it to her. (R. 79:14–15, 16.)

That testimony does not undermine the victims' credibility. Mercado did not specify whether this alleged dispute over money arose before or after the victims accused him of sexual abuse. And it is hard to believe that the victims' mother would fabricate allegations of sexual abuse as retaliation over a denied request for money. It is implausible that the mother would engage in such retaliation without first threatening Mercado with allegations of sexual abuse. Mercado, however, did not testify that she tried to extort money from him. He just testified that the accusations arose around the time that he denied the victims' mother's request for money. (R. 79:14–15.) Further, the victims' oldest sister, who was 13 years old when Mercado sexually assaulted her three younger sisters, did not accuse Mercado of any abuse. (R. 77:43.) It strains credulity to think that the mother would convince her four-year-old daughter who could barely talk, but not her 13-year-old daughter, to falsely accuse Mercado of sexual abuse. The oldest child would likely have a much easier time communicating sexual-abuse allegations than the four-year-old. Mercado's implausible explanation for why three very young victims would falsely accuse him does nothing to undermine the reliability of their statements to police.

Third, the circumstances under which the victims made the statements support their admissibility. Again, each statement was made while one victim was alone in an interview room with a police officer. (R. 20–22.) And the timing of the disclosures weighs in favor of admissibility or at least is a neutral factor. O.E.G. told a nurse that Mercado had touched her "yesterday." (R. 78:55.) But it seems unclear when exactly the assaults began in relation to when the disclosures happened. Even if the assaults began a couple months before their disclosures, this timing would not undercut the victims' reliability. "Contemporaneity and

spontaneity of statements are not as crucial in admitting hearsay statement of young sexual assault victims under the residual exception." *Sorenson*, 143 Wis. 2d at 249. Given the victims' very young ages and the fact that they lived with their abuser, it is understandable that they maybe did not disclose the assaults immediately.

Fourth, the content of the statements weighs in favor of their admissibility. Specifically, the victims' use of "crude terminology for sexual organs" supports their reliability. *Sorenson*, 143 Wis. 2d at 249. L.A.G. told police that the "old man" who had been living with her mother used his hands and tongue to touch her "Pee-Pee" and "butt." (R. 20:4, 6.) O.E.G. said that a man named "Angel" who lived with her had used his hand to touch her "private part" that she used to "pee." (R. 21:7–8.) N.L.G. said that "he licked me on my butt," and her butt is used "[t]o pee." (R. 22:12, 21.) Since the victims did not use terms like genitals or vulva, their recorded "statements did not appear to be the product of adult manipulation because [they] demonstrated knowledge appropriate to [their] age[s]." *Snider*, 266 Wis. 2d 830, ¶ 18. The victims' discussion of cunnilingus and other intimate sexual activity supports their statements' reliability, since "[a] young child is unlikely to fabricate a graphic account of sexual activity because it is beyond the realm of his or her experience." *Sorenson*, 143 Wis. 2d at 249.

Fifth, corroborating evidence weighs in favor of the statements' admissibility. The victims disclosed the assaults to their mother and then to a nurse before speaking to police. (R. 77:25–33; 78:48, 53–55.) These earlier disclosures corroborate the victims' subsequent recorded statements to police. In a similar case, the court found a child sexual assault victim's recorded statement admissible under the residual hearsay exception in part because the "videotaped statement was consistent with the statement the victim had

made to [a] guidance counselor five hours earlier." *Snider*, 266 Wis. 2d 830, ¶ 18. The same reasoning applies here.

The victims' living arrangement also corroborates their accusations. The victims' mother and Mercado both testified that Mercado lived with the victims and their mother from June to August 2016. (R. 77:12; 79:9.) Mercado lived with the victims and their mother when they disclosed the assaults to their mother in August 2016. (R. 77:25–31.) This living arrangement was "consistent with [the victims'] statements about when the assault[s] occurred" and "provided the defendant with the opportunity to commit the crime." *Sorenson*, 143 Wis. 2d at 250.

The lack of physical evidence of sexual assaults has little significance. "Although the record reflects no physical evidence corroborating the alleged sexual abuse, such a dearth of evidence is of little import because the alleged abuse is not of the type that would leave tell-tale physical damage." *Huntington*, 216 Wis. 2d at 691.

3. The decision below misapplied the residual hearsay exception.

The court of appeals erred by finding the recorded statements inadmissible under the residual hearsay exception. Seemingly applying de novo review to the five *Sorenson* factors, it determined that "[t]he videos do not meet *all* of these requirements." (R-App. 118 (emphasis added).) Based on its earlier conclusion that the videos were inadmissible under Wis. Stat. § 908.08(3)(c), the court determined that the videos failed the first *Sorenson* factor. (R-App. 118.) And, based on its earlier conclusion that the circuit court erred by not reviewing the videos in their entirety as required by section 908.08(5)(a), the court of appeals determined that the videos failed the fourth *Sorenson* factor. (R-App. 118.)

The court of appeals' rationale is flawed for three reasons.

First, as just explained, all five *Sorenson* factors weigh in favor of admissibility here.

Second, even if two of these five factors weigh against admissibility here, the court of appeals was wrong to conclude that the video statements are inadmissible. "The weight accorded to each factor may vary given the circumstances unique to each case. It is intended, however, that no single factor be dispositive of a statement's trustworthiness." *Sorenson*, 143 Wis. 2d at 246. The court in *Sorenson* further noted that these five factors "need not be exclusive areas of inquiry." *Id.* at 245. The court below was wrong to treat the first and fourth factors as dispositive. This Court should clarify that the applicable test looks at the totality of the circumstances, rather than imposing a rigid five-part checklist.

Indeed, the analysis below makes the residual hearsay exception meaningless. The purpose of this exception is to allow a court to admit hearsay evidence "that may not comport with established exceptions." *Huntington*, 216 Wis. 2d at 687. Under Wis. Stat. § 908.08(7), a child's recorded statement is admissible if it satisfies any hearsay exception, including the residual hearsay exception, even if it fails the requirements of Wis. Stat. § 908.08(3). *Snider*, 266 Wis. 2d 830, ¶¶ 12–19. Yet the court of appeals here thought that the residual hearsay exception was not satisfied because the victims' videos did not comport with section 908.08(3) and (5). Besides conflicting with *Snider*, this analysis is flawed because it renders the residual hearsay exception redundant with section 908.08(3). In other words, under the court of appeals' analysis, a video will be inadmissible under the residual hearsay exception whenever

it is not admitted in compliance with section 908.08(3) and (5).

Third, the court of appeals did not explain why the circuit court's reliance on the residual hearsay exception was a misuse of discretion. An appellate court reviews a circuit court's determination of evidence admissibility for an erroneous exercise of discretion, even if the circuit court made that ruling in a postconviction context. *See State v. Vollbrecht*, 2012 WI App 90, ¶¶ 30–31, 33, 344 Wis. 2d 69, 820 N.W.2d 443 (applying this standard of review to a postconviction court's ruling that other-acts evidence was admissible). This deferential standard of review at least applies when, as here, the same judge presided over the trial and postconviction proceedings. *Cf. State v. Herfel*, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971) (standard of review for newly-discovered-evidence claim depends on whether postconviction judge presided over trial); *State v. Tobatto*, 2016 WI App 28, ¶¶ 14, 18, 368 Wis. 2d 300, 878 N.W.2d 701 (making same distinction for postconviction court's findings regarding trial, relying on *Herfel*).

This "highly deferential" standard of review is important. *State v. Shomberg*, 2006 WI 9, ¶ 11, 288 Wis. 2d 1, 709 N.W.2d 370 (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.*

In short, all three victims' recorded statements were admissible under the residual hearsay exception regardless of whether they were admissible under section 908.08(2) and (3). This conclusion holds true even under de novo review

because the residual hearsay exception applies very liberally in cases of child sexual assault. And this conclusion is especially true under the highly deferential standard of review that applies here.

C. The youngest victim's interview video was also admissible as a prior inconsistent statement.

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).

A child's recorded statement is admissible when 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.

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

The court of appeals disagreed, reasoning that, "pursuant to its definition set forth at WIS. STAT. § 908.01(4)(a)1., a prior inconsistent statement is *not* hearsay. Therefore, it cannot be categorized as a hearsay exception that would allow for admission of the video pursuant to § 908.08(7)." (R-App. 120.)

That reasoning is flawed. Of course, a prior inconsistent statement is a hearsay "exemption," not a hearsay "exception," because it is defined as non-hearsay. But this academic distinction is meaningless—hearsay exemptions and exceptions both circumvent the general rule against hearsay evidence. *See State v. Savanh*, 2005 WI App 245, ¶ 32 n.4, 287 Wis. 2d 876, 707 N.W.2d 549. This is why the majority opinion's reasoning proves too much: if N.L.G.'s interview video fits within a hearsay exemption, then why is it inadmissible?

The majority opinion's answer to this question, apparently, is that Wis. Stat. § 908.08(7) deems *non-hearsay* recorded statements of child victims inadmissible. In other words, under the majority opinion's logic, section 908.08(7) allows a circuit court to introduce a child's recorded statement into evidence only if the statement (1) is defined as hearsay, and (2) fits within a hearsay exception. The dissenting opinion reads the majority opinion the same way. (R-App. 138–42.)

The majority opinion's logic does not make sense because the purpose of section 908.08 is to allow the State to introduce a child's recorded statement when it would otherwise be inadmissible hearsay. *Snider*, 266 Wis. 2d 830, ¶ 12. And "the plain language of WIS. STAT. § 908.08(7) permits the admission of a child's videotaped statement under any applicable hearsay exception." *Id.* The majority opinion, however, treats subsection (7) as rendering any child victim's recorded statement *inadmissible* if it is *not* hearsay. This view conflicts with the Legislature's purpose behind this statute: "to make it easier, not harder, to employ videotaped statements of children in criminal trials and related hearings." *Snider*, 266 Wis. 2d 830, ¶ 13. As the dissent noted, the majority opinion's view "leads to an absurd result in that an otherwise admissible prior

inconsistent statement—which should now be easier to get into evidence—is now blocked from admissibility by the Majority opinion's incorrect reading of § 908.08." (R-App. 141–42.)

The majority opinion further reasoned that admitting N.L.G.'s video as a prior inconsistent statement would make the requirements of section 908.08 "superfluous." (R-App. 121.) Not so. The Legislature created section 908.08(7) to allow a court to admit a child's recorded statement if any hearsay exception applies, even if the requirements of section 908.08(2) and (3) are not met. *Snider*, 266 Wis. 2d 830, ¶ 12. Under the majority opinion's logic, though, meeting section 908.08's requirements is the only avenue for admitting a child's recorded statement at trial. Relying on any other hearsay exception, according to the majority opinion's reasoning, would make section 908.08 superfluous. That reasoning effectively writes subsection (7) out of the statute. And nothing about subsection (7) makes the rest of the statute superfluous. Section 908.08 is a self-contained hearsay exception that allows a court to admit a child's recorded statement if subsections (2) and (3) are met, "even when no other hearsay exception applies." *Id.* ¶ 13. Relying on any single hearsay exception—including section 908.08—does not make other hearsay exceptions superfluous. The majority opinion's logic makes all hearsay exceptions besides section 908.08 superfluous in the context of a child's recorded statement.

The court of appeals further reasoned that N.L.G.'s video was not admissible as a prior inconsistent statement because the circuit court erroneously put N.L.G. on the witness stand *before* determining whether her video satisfied section 908.08(3)(c) and *before* playing the video for the jury. (R-App. 121–22.) The State has already explained why a circuit court may rely on a colloquy during trial to determine

whether a video statement satisfies section 908.08(3)(c). The State will explain next why the circuit court permissibly allowed the State to call N.L.G. to testify before playing her video for the jury.

For now, the State notes that the majority opinion's timing rationale creates a troubling Catch-22: a circuit court must preclude a child from testifying unless it first plays the child's *inadmissible* video. The majority opinion determined that N.L.G.'s video was not admissible as a prior inconsistent statement "because the statement of N.L.G. upon which that argument is based—that she did not remember the forensic interview—was only given as a result of the court erroneously allowing N.L.G. to be questioned prior to the showing of her video." (R-App. 122.) That reasoning does not make sense because the majority opinion had already concluded that N.L.G.'s video was inadmissible under section 908.08(3)(c) and the residual hearsay exception. (R-App. 116–18.) So, under the majority opinion's logic, the circuit court should *not* have played N.L.G.'s inadmissible video for the jury, although it *should* have played her video before allowing her to testify. Taken to its logical conclusion, this reasoning would altogether prohibit N.L.G. from testifying.

The law does not mandate this absurd result. If a child testifies consistently with her inadmissible video statement, the video might remain inadmissible—but the child's testimony could support a conviction. And, if a child's testimony conflicts with her otherwise inadmissible video statement, the video would become admissible as a prior inconsistent statement. Because prior inconsistent statements are substantive evidence, the video could support a conviction. Under the majority opinion's flawed logic, however, a jury could not hear a child's testimony or video statement if the video is inadmissible.

In sum, N.L.G.'s recorded statement was admissible as a prior inconsistent statement.

D. Wisconsin Stat. § 908.08(5)(a) does not prohibit a party from calling its child witness to give live testimony before playing the child's video for the jury.

The circuit court here properly allowed the State to call N.L.G. to briefly testify before playing her interview video for the jury. Dictum in *State v. James*, 2005 WI App 188, 285 Wis. 2d 783, 703 N.W.2d 727, suggests that this order of presentation was improper under Wis. Stat. § 908.08(5)(a). This Court should withdraw that language from *James*.

1. A circuit court may allow a party to call its child witness before playing the child's video, and it must allow the party to call its child after the video.

The relevant statutory language provides: "If the court or hearing examiner admits a recorded statement under this section, the party who has offered the statement into evidence *may* nonetheless call the child to testify immediately after the statement is shown to the trier of fact." Wis. Stat. § 908.08(5)(a) (emphasis added). The statue continues, "if that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination." *Id.*

This language says nothing about whether a party may call its child witness to testify before playing the child's recorded statement for the jury. It just establishes the procedure for calling the child to testify after the video is

played. "[A] matter not covered is to be treated as not covered." *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, ¶ 18, 387 Wis. 2d 50, 928 N.W.2d 480 (citation omitted).

This statute, though, prohibits a circuit court from *forcing* a party to call its child witness before playing the child's video. In *James*, the State wanted to call two child witnesses to testify *after* their video statements were played for the jury, but the circuit court *required* them to testify *before* their videos were played. *James*, 285 Wis. 2d 783, ¶¶ 1, 4. The appellate court rightly determined that "the trial court exceeded its discretion in refusing to obey" section 908.08, and it correctly "reverse[d] and remand[ed] with directions to admit the videotape evidence pursuant to the statutorily prescribed procedures." *Id.* ¶ 25.

The circuit court in *James* had cited Wis. Stat. §§ 906.11 (which gives circuit courts control over the mode and order of presenting evidence) and 904.03 (which allows circuit courts to exclude relevant evidence if certain concerns substantially outweigh its probative value) to support its ruling. *James*, 285 Wis. 2d 783, ¶ 12. The court of appeals rejected that rationale and held that "§ 908.08, which deals specifically with the admissibility and presentation of videotaped statements by child witnesses, controls over §§ 904.03 and 906.11, more general statutes regarding the court's authority to control the admission, order, and presentation of evidence." *Id.* ¶ 23.

That holding is correct. Again, section 908.08 states that "the party who has offered the [child's recorded] statement into evidence *may* nonetheless call the child to testify immediately after the statement is shown to the trier of fact." Wis. Stat. § 908.08(5)(a) (emphasis added). This plain language entitles the State to call its child witness to testify after the child's recorded statement is played for the

jury. The circuit court in *James* was wrong to think otherwise.

2. This Court should withdraw dicta in *James*.

The court of appeals in *James* went too far by writing broad dicta. "Dicta is a statement or language expressed in a court's opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it." *State v. Sartin*, 200 Wis. 2d 47, 60 n.7, 546 N.W.2d 449 (1996). As noted above, the State in *James* wanted to call two child witnesses to testify *after* their video statements were played for the jury, but the circuit court *required* them to testify *before* their videos were played. *James*, 285 Wis. 2d 783, ¶¶ 1, 4. So, on the State's interlocutory appeal, the issue was whether a circuit court may *require* a child witness to testify before the video is played, over the objection of the party calling the witness. The issue was *not* whether a court may *allow* a party to call its child witness before playing the child's video.

Yet the *James* court's broad dicta decided this latter issue in the negative, even though it was not the issue presented. The appellate court in *James* stated that section 908.08(5)(a) "deprives the [circuit] court of the right to control the order in which this evidence is to be taken" and "requires the videotape to precede direct and cross-examination." *James*, 285 Wis. 2d 783, ¶¶ 9, 20. That broad language seemingly prohibits a circuit court from allowing a party to call its child witness before playing the child's video, even when the party wishes to use this order. That factual scenario was absent in *James* but is present here. That language in *James* is thus dicta because it extended beyond the facts of that case and was broader than necessary to resolve the issue on appeal.

In dicta, the *James* court effectively added language to the statute. A court, however, "should not read into [a] statute language that the legislature did not put in." *State v. Simmelink*, 2014 WI App 102, ¶ 11, 357 Wis. 2d 430, 855 N.W.2d 437 (citation omitted). A court thus will not read "requirements," *id.*, or "limitation[s]" into a statute, *State v. Kozel*, 2017 WI 3, ¶ 39, 373 Wis. 2d 1, 889 N.W.2d 423 (citation omitted). Despite those established canons of statutory interpretation, the *James* court limited a party's ability to call its child witness to testify before playing the child's recorded statement for the jury, instead requiring the video to always precede the child's live testimony.

Wisconsin Stat. § 906.11 controls here and permits a circuit court to allow a child's direct examination to precede his or her video statement. Section 908.08(5)(a) does not control in this situation because it says nothing about whether a party may call its child witness to testify before playing the video statement, or whether a circuit court may allow a party to do so. Section 908.08(5)(a) is the more specific—and thus controlling—statute when a party wishes to play a child's video statement before calling the child to testify. Under section 908.08(5)(a), a party is entitled but not required to play the child's video first.

If this Court decides not to withdraw language in *James*, it should hold that section 908.08(5)(a) does not apply where, as here, a video is admissible on some ground besides section 908.08. "[I]f a child's videotape statement is admissible under one of the hearsay exceptions set forth in Wis. Stat. § 908.03, the requirements listed in the preceding subsections of § 908.08 are inapplicable." *Snider*, 266 Wis. 2d 830, ¶ 12. So, because N.L.G.'s video was admissible as a prior inconsistent statement and under the residual hearsay exception, the *James* court's view of section 908.08(5)(a)'s requirements is inapplicable. The statute's plain language

supports this view. The procedures in subsection (5)(a) apply "[i]f the court or hearing examiner admits a recorded statement under this section." Wis. Stat. § 908.08(5)(a). When, as here, a video is admitted under the residual hearsay exception or as a prior inconsistent statement, it is not admitted "under this section."

In sum, this Court should hold that section 908.08(5)(a) does not prohibit a party from calling its child witness to give live testimony before playing the child's video for the jury. When a party wants to present its child witness's live testimony before playing his or her video, Wis. Stat. § 906.11 authorizes the circuit court to allow this order. This Court should withdraw any language in *James* that is inconsistent with this holding. This Court at least should clarify that *James*'s view of section 908.08(5)(a) is inapplicable when a video is admissible on some ground besides section 908.08.

3. The circuit court properly allowed the youngest victim to testify before playing her forensic-interview video for the jury.

Here, the circuit court did not violate section 908.08(5)(a) by allowing N.L.G. to testify before it played her interview video for the jury. Unlike in *James*, the circuit court here did not force the State over objection to call one of its witnesses to give live testimony before playing her video for the jury.

The court of appeals determined that the circuit court erred by allowing N.L.G. to testify before it played her interview video for the jury. (R-App. 121–22.) This determination, in turn, supported the court of appeals' conclusion that the circuit court should not have treated N.L.G.'s video statement as a prior inconsistent statement.

(R-App. 121–22.) It reasoned that *James* had interpreted Wis. Stat. § 908.08(5)(a) to "unambiguously require[] the videotape to *precede* direct and cross-examination." (R-App. 121 (quoting *James*, 285 Wis. 2d 783, ¶ 9 (alteration in original)).) As just explained, this Court should withdraw that dicta from *James* and hold that the circuit court here did not violate section 908.08(5)(a).

If the circuit court's order of presentation was error, it was harmless. 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. Had the circuit court played N.L.G.'s video before having her testify, the jury still would have seen her video. Playing the video first would have been proper because it was admissible under the residual hearsay exception and section 908.08(2) and (3). And if her video was not admissible under those rationales, the State would have needed to call her to testify before her video could be played. In that scenario, her video was admissible as a prior inconsistent statement. Either way, the jury was going to hear her video statement regardless of its timing at trial. The order of presenting N.L.G.'s video and live testimony to the jury did not affect the verdict.

* * *

The three victims' videos were admissible at Mercado's trial. N.L.G.'s video was admissible for three separate reasons: it satisfied Wis. Stat. § 908.08(2) and (3), it fit within the residual hearsay exception, and it was a prior inconsistent statement. The other two victims' videos were admissible for two independent reasons: their videos fit within the residual hearsay exception, and their videos satisfied section 908.08(2) but Mercado did not argue on appeal that their statements failed section 908.08(3). The

circuit court did not violate section 908.08(5)(a) by allowing the State to call N.L.G. to testify before playing her video for the jury. And the circuit court's alleged violations of section 908.08(2)(b) and (5)(a) were harmless.

CONCLUSION

This Court should reverse the court of appeals' decision and remand for that court to address Mercado's unresolved arguments.

Dated this 18th day of June 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 294-2907 (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 10,947 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 18th day of June 2020.

_____
SCOTT E. ROSENOW
Assistant Attorney General