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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

# REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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## INTRODUCTION

Mercado has failed to address many of the State's arguments or develop his own arguments. Although this Court could reverse based on those briefing deficiencies alone, it should make clear that the court of appeals' decision below has no precedential value.

## 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.

The State argued that Mercado forfeited his objections based on Wis. Stat. § 908.08(2)(b) and (5)(a) by not raising them at trial, and the court of appeals violated Wis. Stat. § 901.03(1)(a) by overlooking these forfeitures. (State's Br. 6–11.) Mercado has not responded to these arguments. (Mercado's Br. 23–25, 32–33.) He instead asserts that he preserved an objection to two victims' interview videos under section 908.08(3)(c). (Mercado's Br. 18–20.) That argument is a red herring because the State did not argue that Mercado had failed to object at trial under section 908.08(3)(c).

Although this Court may deem the State's forfeiture arguments conceded because Mercado did not respond to them, *Waukesha County v. S.L.L.*, 2019 WI 66, ¶ 42, 387 Wis. 2d 333, 929 N.W.2d 140, it should hold that the court of appeals may not directly review a forfeited objection to the admission of evidence.

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

N.L.G.'s video was admissible because it satisfied Wis. Stat. § 908.08(2) and (3), it satisfied the residual hearsay exception, and it was a prior inconsistent statement. The other two victims' videos were admissible because they satisfied the residual hearsay exception, and they satisfied section 908.08(2). 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.

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

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

Wisconsin Stat. § 908.08(2)(b) did not require the circuit court to watch the victims' interview videos in their entirety before the pretrial hearing, and it reviewed all that it was required to do. (State's Br. 13–17.) Mercado has not adequately developed a contrary argument. He quotes the relevant statutory language, discusses his case's procedural history, and summarizes how the court of appeals addressed this issue. (Mercado's Br. 23–25.) But he spends only one conclusory paragraph arguing that the circuit court did not review enough of the videos' content to comply with section 908.08(2)(b). (Mercado's Br. 25.) This Court, however, "will not address undeveloped arguments." *Borek Cranberry Marsh, Inc. v. Jackson Cty.*, 2010 WI 95, ¶ 34 n.12, 328 Wis. 2d 613, 785 N.W.2d 615 (citation omitted).

Besides, Mercado's undeveloped argument is meritless. He seems to argue that section 908.08(2)(b) requires a circuit court to watch an entire video before a

pretrial hearing to protect a defendant's Sixth Amendment right to confrontation. (Mercado's Br. 25.) Mercado has not explained how viewing an entire video pretrial will do so. Using a child's video at trial does not violate the Confrontation Clause if the child testifies at trial. *State v. James*, 2005 WI App 188, ¶¶ 10–11, 285 Wis. 2d 783, 703 N.W.2d 727. In fact, by requiring a child to be available for cross-examination, section 908.08(5) "specifically builds a confrontation opportunity into its procedures" and "satisfies constitutional confrontation requirements." *State v. Tarantino*, 157 Wis. 2d 199, 215, 458 N.W.2d 582 (Ct. App. 1990).

Mercado notes that the circuit court did not watch any of O.E.G.'s video before the pretrial hearing. (Mercado's Br. 23.) But the court likely did not do so because Mercado did not object to this video under section 908.08(3)(c). (State's Br. 14 n.2.) Section 908.08(2)(b) requires a circuit court to watch only the portions of a video that will enable it to rule on objections at the pretrial hearing. (State's Br. 13–17.) The circuit court thus was not required to watch O.E.G.'s video before the hearing.

Finally, the State argued that the circuit court's alleged violation of section 908.08(2)(b) was harmless. (State's Br. 17.) Mercado has failed to respond to the State's argument, so this Court should "take it as conceded." *S.L.L.*, 387 Wis. 2d 333, ¶ 42.

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

The State has explained why N.L.G.'s interview video was admissible under Wis. Stat. § 908.08(3)(c) and *State v. Jimmie R.R.*, 2000 WI App 5, 232 Wis. 2d 138, 606 N.W.2d 196. (State's Br. 17–22.) The State further argued that Mercado had "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." (State's Br. 20.)

Mercado contends that he "preserved for appellate review" an argument that L.A.G.'s video was inadmissible under section 908.08(3)(c) because he raised that argument at a pretrial hearing and at the start of his first trial. (Mercado's Br. 20.) That response misses the point. Mercado might have preserved that objection for appellate review, but he forfeited it by not raising it in the court of appeals. Because Mercado "did not respond to the [State's] argument on this point," this Court should "take it as conceded." *S.L.L.*, 387 Wis. 2d 333, ¶ 42.

As for N.L.G.'s video, Mercado has not adequately developed an argument that it was inadmissible under section 908.08(3)(c). Relying mainly on the circuit court's colloquy with N.L.G.—thus conceding the State's argument that a court may rely on a colloquy to satisfy section 908.08(3)(c)—Mercado reasons that N.L.G. "said that she did not know when her birthday was and that she was in the fifth grade." (Mercado's Br. 22.) But he has not shown that those answers were false or how they affect the inquiry under section 908.08(3)(c). He further reasons that N.L.G. "also stated that her mother, sisters, and other persons had told her what to say at the trial." (Mercado's Br. 22.) But, once again, he does not explain how that statement has any bearing on the inquiry under section 908.08(3)(c). Further, N.L.G. suggested that people had told her to tell the truth. (R. 75:27–28.) Most significantly, Mercado does not respond to the State's argument that N.L.G.'s video was admissible under the reasoning of *Jimmie R.R.* (State's Br. 18–20; Mercado's Br. 20–23.)

Mercado next argues that the circuit court "never made a finding, as required by §908.08(3)(c), that either LAG or NLG understood that false statements are punishable or the importance of telling the truth." (Mercado's Br. 22.) He seems to be arguing that a circuit court must utter "magic words" when making a finding under this statutory provision. But he does not develop that argument or cite supporting legal authority, and this Court "will not address undeveloped arguments." *Borek Cranberry Marsh, Inc.*, 328 Wis. 2d 613, ¶ 34 n.12 (citation omitted).

Further, that argument conflicts with Mercado's earlier assertion that he preserved for appellate review an objection to L.A.G.'s and N.L.G.'s videos under section 908.08(3)(c). "A *definitive* pretrial ruling preserves an objection to the admissibility of evidence without the need for an objection at trial, as long as the facts and law presented to the court in the pretrial motion are the same as those that arise at trial." *State v. Kutz*, 2003 WI App 205, ¶ 27, 267 Wis. 2d 531, 671 N.W.2d 660 (emphasis added). Citing *Kutz*, Mercado argues that he preserved this objection for appellate review because the circuit court definitively ruled on it. (Mercado's Br. 15–16, 20.) But if the circuit court never found that N.L.G.'s and L.A.G.'s videos were admissible under section 908.08(3)(c), as Mercado now claims, then he did not preserve this issue for appellate review.

Mercado seems to further argue that L.A.G.'s video was inadmissible under section 908.08(3)(c) because introducing a child's audiovisual recording at trial violates the Sixth Amendment's Confrontation Clause. (Mercado's Br. 22–23.) This Court should decline to consider that argument because Mercado does not adequately explain how an uncross-examined video violates the Confrontation Clause or how this conclusion would have any bearing on the

analysis under section 908.08(3)(c). And, again, introducing a child's video does not violate the Confrontation Clause if the child testifies at trial. *James*, 285 Wis. 2d 783, ¶¶ 10–11.

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

The State argued that the three victims' interview videos were admissible under a liberal application of the residual hearsay exception. (State's Br. 22–27.) Mercado does not meaningfully respond to that argument. (Mercado's Br. 30–31.)

The State also explained why the majority opinion below misapplied the residual hearsay exception, including its apparent conclusion that five rigid factors must all be satisfied. (State's Br. 23–27.) Mercado summarizes the majority opinion's reasoning without meaningfully responding to the State's argument. (Mercado's Br. 30–31.)

Mercado "note[s]," without developing an argument, that the State and circuit court did not rely on the residual hearsay exception at trial. (Mercado's Br. 31.) But this Court could rely on this rationale even if the circuit court never relied on it. *See State v. Gerald L.C.*, 194 Wis. 2d 548, 560 & n.7, 535 N.W.2d 777 (Ct. App. 1995) (analyzing the residual hearsay exception although the circuit court and parties had not done so). And, because the postconviction court relied on this rationale, that determination is subject to a highly deferential standard of review. (State's Br. 29.)

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

Mercado seems to argue that N.L.G.'s video statements were not admissible as prior inconsistent

statements under Wis. Stat. §§ 908.01, 906.13, and 908.08. He seems to suggest that the State forfeited this rationale and that it creates Sixth Amendment confrontation concerns. His arguments are undeveloped and meritless.

### 1. N.L.G.'s video satisfies Wis. Stat. § 908.01(4)(a).

For a prior inconsistent statement to be admissible, the person who made the statement must be "subject to cross-examination concerning the statement." Wis. Stat. § 908.01(4)(a). Mercado argues that this requirement was not met because N.L.G. testified that she did not remember her recorded statements. (Mercado's Br. 27–28.)

A witness, however, is "subject to cross-examination" under section 908.01(4)(a) even if the witness denies remembering her prior statement. *State v. Lenarchick*, 74 Wis. 2d 425, 434, 247 N.W.2d 80 (1976). In that situation, a circuit court has discretion to deem the prior statement inconsistent with the witness's testimony. *Id.* at 435–36.

This rule is not limited to instances where a witness feigns a lack of memory. Of course, a circuit court may deem a witness's purported lack of memory inconsistent with her prior statement if "the trial judge has reason to doubt the good faith of such denial." *Id.* at 436. Other courts regularly admit prior inconsistent statements in that situation. *United States v. Gajo*, 290 F.3d 922, 931 (7th Cir. 2002) (collecting cases). But even "a witness's genuine lack of memory may be inconsistent with his prior testimony." *Id.* at 932. Wisconsin case law has upheld the admission of prior inconsistent statements without considering whether a witness's purported lack of memory was genuine or feigned. *E.g., State v. Harrell*, 2010 WI App 132, ¶ 21, 329 Wis. 2d 480, 791 N.W.2d 677.

In short, N.L.G.'s recorded statements were admissible because they "were elicited by the State in response to [her] claimed lack of memory." *Id.* And N.L.G. did not just claim a lack of memory; she also flatly denied ever talking to the police officer who conducted her forensic interview. (R. 78:22.) That denial was inconsistent with her recorded statements to the officer, even if her claimed lack of memory was not.

**2. N.L.G.'s video satisfied Wis. Stat. § 906.13.**

Mercado argues that N.L.G.'s video failed the requirements of Wis. Stat. § 906.13(2)(a) because she did not remember making the statements in her video. (Mercado's Br. 27–28.) But he does not tie that reasoning to the statutory language.

This statute allows extrinsic evidence of a witness's prior inconsistent statement if "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.L.G.'s video needs to satisfy only one of those three criteria, it satisfies all three.

First, N.L.G. was cross-examined about her prior statement to a police officer, and she denied making or remembering it. (R. 78:22.) Because N.L.G. "was available to testify," her video was "admissible pursuant to Wis. Stat. § 906.13(2)(a)1." *State v. Honig*, 2016 WI App 10, ¶ 29 n.5, 366 Wis. 2d 681, 874 N.W.2d 589.

Second, N.L.G. was not excused from giving further testimony. A witness's prior statement "is admissible pursuant to § 906.13(2)(a)2." if it is introduced while the witness is "under subpoena." *State v. Smith*, 2002 WI App 118, ¶ 13, 254 Wis. 2d 654, 648 N.W.2d 15. Here, at a sidebar during Mercado's cross-examination of N.L.G., the prosecutor confirmed that N.L.G. had not been released. (R. 76:25–26.) The circuit court said that Mercado's lawyer could continue cross-examining N.L.G. after her video was played. (R. 78:26–28.) Mercado's lawyer chose not to do so after the video was played. (R. 78:58.)

Third, the interests of justice warranted the admission of N.L.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.

### 3. Mercado's confrontation concerns are undeveloped and baseless.

Mercado suggests that the Sixth Amendment's Confrontation Clause supports his view that N.L.G.'s video was not admissible as a prior inconsistent statement. (Mercado's Br. 28–29.) This Court should reject that argument as undeveloped and forfeited. In any event, a witness's prior statement does not implicate the Confrontation Clause if the witness answers questions on cross-examination at trial, even if the witness claims an inability to remember the prior statement or the events surrounding it. *State v. Rockette*, 2006 WI App 103, ¶¶ 20–27, 294 Wis. 2d 611, 718 N.W.2d 269.

#### 4. Wisconsin Stat. § 908.08 does not exclude prior inconsistent statements from evidence.

Mercado further suggests that section 908.08 does not allow a court to admit a video as a prior inconsistent statement. (Mercado's Br. 28, 29.) But section 908.08(7) allows a statement to be admitted if it satisfies any hearsay exception, regardless of whether the requirements of section 908.08 are met. (State's Br. 30–33.)

#### 5. The State may advance this prior-inconsistent-statement rationale.

Mercado notes that the State and circuit court did not rely on the prior-inconsistent-statement rationale at trial. (Mercado's Br. 26.) This Court should ignore that observation, which is not a developed argument. Besides, this Court could rely on the prior-inconsistent-statement rationale even if the circuit court and State had not relied on it below. *See State v. Butler*, 2009 WI App 52, ¶ 15, 317 Wis. 2d 515, 768 N.W.2d 46. And, because the circuit court relied on this rationale when it denied Mercado's postconviction motion, this Court should review that determination for an erroneous exercise of discretion. (*See* State's Br. 29.)

### 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.

Mercado failed to respond to many of the State's arguments about Wis. Stat. § 908.08(5)(a). The State urged this Court to withdraw *James*'s dicta suggesting that this statutory provision requires a circuit court to play a child's video before allowing the child to testify. (State's Br. 36–38.) The State further argued "that section 908.08(5)(a) does not

apply where, as here, a video is admissible on some ground besides section 908.08." (State's Br. 37.) The State explained why the circuit court's alleged violation of section 908.08(5)(a) was harmless (State's Br. 39), and why the court of appeals' view of this statutory provision would altogether prohibit some child victims from giving live testimony (State's Br. 33). Mercado has conceded all these arguments by not responding to them. *S.L.L.*, 387 Wis. 2d 333, ¶ 42.

Mercado makes an undeveloped argument about policy considerations. He asserts that "the legislature had good reason for requiring the video to be played first and then having the child witness testify second," suggesting that having a child testify both before and after the video would be problematic for some unspecified reason. (Mercado's Br. 33.) Mercado is wrong. A prosecutor might want to briefly call a frightened child to testify first to calm the child's nerves.

Policy considerations aside, the relevant statutes gave the circuit court discretion to allow the State to call N.L.G. to testify before playing her video. Wisconsin Stat. § 906.11(1) "provides the circuit court with broad discretion in its control over the presentation of evidence at trial," except "where the exercise of discretion runs afoul of other statutory provisions that are not discretionary." *Smith*, 254 Wis. 2d 654, ¶ 15 (citations omitted). Section 906.11 thus allows a court to let a child testify before the video. But this statute does not allow a court to *force* the State to call the child first, because the State "may . . . call the child to testify immediately after the [video] is shown to the trier of fact." Wis. Stat. § 908.08(5)(a). (*See* State's Br. 35–37.)

## CONCLUSION

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

Dated this 16th day of July 2020.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2958 words.

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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of July 2020.

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