STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2019AP520-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD A. BOIE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR CLARK COUNTY, THE HONORABLE JON M. COUNSELL (TRIAL) AND THOMAS W. CLARK (POSTCONVICTION), PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Defendant-Appellant Richard A. Boie forfeit his claim concerning the admissibility of the child victim's recorded statement when he did not challenge the child's availability in the circuit court?

The circuit court did not answer this question.

This Court should answer, "Yes."

2. Did the circuit court properly err when it denied Boie's ineffective assistance of counsel claim without a hearing?

The circuit court denied Boie's postconviction motion without a hearing.

This Court should answer, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties' briefs, and the issues presented involve the application of well-established principles to the facts presented.

INTRODUCTION

A jury convicted Boie of repeatedly sexually assaulting his great-granddaughter, BH, after watching her forensic interview, hearing her answer questions on the stand, and observing her demeanor at trial. Boie filed a postconviction motion seeking to overturn the jury's verdict. He raised two claims.

First, Boie claimed that the circuit court erroneously admitted an audiovisual recording of BH's forensic interview. Specifically, Boie argued that Wis. Stat. § 908.08 required BH to be "available to testify." Wis. Stat. § 908.08(1). According to

Boie, BH was not available because she "[t]estifie[d] to a lack of memory of the subject matter of the declarant's statement." Wis. Stat. § 908.04(1)(c).

Boie forfeited that claim when he failed to challenge BH's availability in the circuit court.

Second, Boie claimed that his attorney provided constitutionally inadequate assistance when she failed to challenge BH's availability in the circuit court.

But the circuit court properly denied Boie's ineffective assistance of counsel claim because the record conclusively demonstrates that he is not entitled to relief. The record shows that Boie's attorney did not perform deficiently, as (1) Boie failed to point to a clear law or duty that required counsel to mount his new, novel availability challenge, and (2) counsel had a clear strategic reason for not raising it. In addition, the record shows that Boie was not prejudiced by any alleged deficiency because the circuit court could have admitted the recording under a number of other statutes.

This Court should affirm.

STATEMENT OF THE CASE

The State opened an investigation into Boie after his great-granddaughter, BH, reported sexual abuse to another family member. (R. 2:1.) BH was four years old when the assaults began, six years old when she reported, and nine years old by the time of trial. (R. 2:1.)

Michelle Harris, an interviewer with the Children's Advocacy Center, interviewed BH four days after her initial report. (R. 2:1.) BH described several instances of abuse during the interview, which was recorded. (R. 2:1–2; 99; 100.) Based on BH's allegations, the State charged Boie with one count of repeated sexual assault of a child. (R. 2.)

Before trial, the State moved to admit the audiovisual recording of BH's interview pursuant to Wis. Stat. § 908.08. (R. 13.) The State argued that the recording met the criteria listed under subsection 908.08(3). (R. 13.) The State also emphasized the lengthy delay between the allegations and the trial and suggested that the delay "put[ ] a tremendous burden on the memory of such a young child." (R. 13.)

At a hearing, the circuit court asked for Boie's response to the State's motion. (R. 199:28–29.) Boie argued that the recording should not be played in whole and should instead be used to refresh BH's recollection, if necessary, or for impeachment:

> It appears as though they want to have this played in addition to the direct examination of the victim. And that's not the purpose and that's not what case law states. In fact, they don't cite any case law that even supports that.
>
> If indeed the victim would have to look at that video or portion of it to refresh her recollection, then it might be played. But what they are doing is they are just trying to buttress her testimony and also use it to, in a sense, remind her what she had testified to, and I don't believe that is proper. I am presuming if they do a good job of preparing this witness, she will be shown the video numerous times before so she will know what it is. So there is no reason why to show it otherwise, because that's a prior statement of the witness. And it doesn't come in unless it is under specifically exemptions under the statutes, prior contradictory statement, a statement to refresh her recollection, such like that.
>
> Obviously, I can show portions of it for impeachment purposes.
>
> The other part of that is if they believe they have a transcript of it and they want to submit that to show the victim because it is going to be hard to

> cueup certain parts in there that would refresh her recollection.

(R. 199:29–30.)

The circuit court indicated that Boie's initial argument was refuted by a subsection of the statute, and Boie then expressed concern that the video would interfere with his ability to cross-examine BH:

> [Defense Counsel]: That's what I mean. But what happens if they are going to be getting out that whole thing before, so they are going to be seeing what's said. And I don't believe that that should be played in full. And the reason why is the jury then hears what she says then and I don't have ability to, in a sense, cross-examine her. What I believe should happen --
>
> The Court: She will be right here. You can ask her all the questions you wish.
>
> [Defense Counsel]: After they played the full direct examination, which I can't object to or anything like that. They already have that in their mind.
>
> What I believe is --
>
> The Court: You are reading things into the statute that simply are not there.

(R. 199:32.)

Boie reiterated his cross-examination concerns later:

> [Defense Counsel]: To me, the jury hears the testimony of the witnesses on the stand unless specific hearsay is allowed in for specific legitimate purpose. Playing a prior statement of an alleged victim is, to me, not that admissible purpose.
>
> The jury is going to hear what this victim is going to say regarding what happened to her years ago. Now the fact that, yes, her memory is not going to be the best because of her age, because of the time delay. And that is understandable. That can happen with an offense that occurred six months before with

> an adult. But to sit there and say we have a video of what happened previously. We are going to play that all to the jury. So in other words, believe that this is all true. And really she doesn't have to testify afterwards. All she has got to get up on the stand is say, yep, what I said then two years ago is true, everything [was] in there.
>
> What you are doing is you are then taking away the contemporaneous requirement basically in U.S. v. Crawford, ability for me to confront that witness regarding what she is saying today as she testifies. Because I don't believe they have laid the groundwork for having the full video played without a reason. And just to play it to say that, well, there is a prior video, we are going to be able to play that and have her testify, too.

(R. 199:34–35.)

The circuit court reminded counsel that section 908.08 did not say "we get to play it because we want to" and pointed to the "whole list of factors the court has to consider" under subsection (3). (R. 199:35–36.) The court said it wanted more time to "go through and analyze all of those factors," so it allowed Boie to file a written response to the State's motion. (R. 199:37.)

Focusing on Wis. Stat. § 908.08(3)'s requirements, Boie argued that the video should not be admitted because (1) BH was not given an oath or affirmation, and she did not demonstrate she knew the difference between the truth and a lie; (2) the time, content, and circumstances of BH's statements did not provide sufficient indicia of trustworthiness; and (3) admission of BH's statements would deprive the defense of a fair opportunity to meet the allegations, "[g]iven that the charging period encompasse[d] a 22 month period." (R. 17:2, 4, 7.)

Relatedly, Boie speculated that he might not be able to "fairly and effectively" cross-examine BH due to the passage of time:

> Given that the charging period encompasses a 22 month period it is impossible for the defense to have a fair opportunity to meet the allegations in the statement. The State will use the statement as their direct examination of B.E.H. and therefore the defense will be denied its due process right to cross-examine B.E.H. on the statement. One of the reasons is that it is anticipated B.E.H. will testify on cross examination that she doesn't remember or can't recall the specifics of the alleged sexual assaults. It is anticipated B.E.H. will testify what she told the forensic examiner over two years ago was true but she doesn't recall the offense now. That results in the jury being 'forced' to believe what B.E.H. said two years ago because the defense is not able to fairly and effective cross examine B.E.H. on the statement. There is also a very real possibility B.E.H. may refuse to submit to cross examination while therefore necessitates a mistrial in order to avert a violation of the defendant's Sixth Amendment right to confront adverse witnesses, (*Crawford* violation). There is also the possibility B.E.H. may 'clam up' on the stand which also would result in a mistrial. The defendant is entitled to a full and exacting cross examination of B.E.H., anything less would be a violation of his Sixth Amendment rights. If B.E.H. doesn't submit to cross examination the defense won't have a fair opportunity to cross examine B.E.H. on the specifics.

(R. 17:7–8.)

Boie did not mention an availability requirement in his response, nor did he argue that BH would be unavailable at trial. (R. 17.)

The circuit court ruled the recording admissible. (R. 26.) Citing the statute, the court determined that the recording satisfied all of subsection (3)'s criteria. (R. 26:1–3 (citing and

applying Wis. Stat. § 908.08).) Boie did not move for reconsideration. (*But see* 36:1 (moving for reconsideration after the circuit court denied Boie's motion for an in camera inspection of BH's counseling records).)

Both parties included BH on their witness lists. (R. 32:1; 94:1.) The State also issued a subpoena for BH's appearance at trial. (R. 94:3.)

The trial spanned five days and included fourteen witnesses. The following is a brief summary of the evidence presented at trial; it is not an exhaustive recitation of the evidence.

The State introduced evidence that Boie assaulted BH when BH's father,[1] Blake, had weekend placement with BH. Both of BH's parents testified that regular weekend placement began in December 2013. (R. 204:266, 307–08.) Both explained that for roughly two months, Blake had overnight placement every other weekend. (R. 204:266.) After that, Blake and BH's mother, Paige, would coordinate schedules. (R. 204:232, 266.) Thus, depending on the month, Blake might have BH more or less than every other weekend. (R. 204:232, 266.)

When he had placement, Blake often took BH to Boie's home. (R. 204:233.) Blake estimated that he and BH visited Boie's home once a month or, at least, once every two months. (R. 204:233.) On some weekends, they would spend the night at Boie's home. (R. 204:233.)

On occasion, Blake would retrieve BH early, on a Thursday instead of a Friday. (R. 204:271–73.) When he did, he left BH at Boie's home so he could still work. (R. 204:271.)

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[1] To preserve BH's and her family's privacy, the State refers to BH's family members only by their first names.

He estimated that he left BH at Boie's home three to seven times while he worked on Fridays. (R. 204:274.) Blake explained that Boie would be the only one awake when he left BH because great-grandmother Carol was not an early riser. (R. 204:285.)

The State played the recording from BH's interview before BH testified. (R. 192:208–44.) During the interview, BH explained that while she was at Boie's home, he "[did] some stuff that [wasn't] appropriate." (R. 192:213, 218.) She said it happened "[m]ore than once." (R. 192:213, 232.)

She specifically described Boie "kissing" and "put[ting] everything on [her]." (R. 192:218–19.) She explained that Boie would take his and her pants off and then move his "front" "around and around." (R. 192:220–23.) BH said Boie would "wiggle" on her "whole body." (R. 192:223.) It "hurt[ ]" when he "wiggled" himself on her. (R. 192:231–33.) BH explained that Boie would also kiss and touch her "bottom." (R. 192:225–28, 235–36.) She described the assaults as feeling "[s]quirmy" and "wet." (R. 192:223–28.)

After the recording, the State asked BH some background questions. (R. 204:19–21.) BH confirmed that she had weekend placement with her father and that she knew Boie. (R. 204:20–21.)

Boie, through counsel, cross-examined BH for 47 transcript pages. (R. 204:21–65, 71–72, R-App. 105–49, 155–56.) During that time, BH said she remembered talking to Interviewer Harris, (R. 204:25), and she remembered telling her grandmother about the assaults, (R. 204:61).

She also remembered Boie kissing her "[w]hen he was doing it":

> Q: Like grandpas, when grandpas will give you kisses, do you like that when guys will give you kisses?

A: Not really. I would wait until I was older.

Q: But sometimes you don't have a whole lot of choice when a grandpa or an uncle sees you and they want to give you a big bear hug and give you a smooch, right?

A: Yeah.

Q: Did Grandpa Rich ever do that?

A: I don't remember.

Q: Okay.

A: But I don't think so.

Q: So he never kissed you?

A: No--well, yeah.

Q: Okay. When did he kiss you?

A: When I was in the middle of it.

Q: Middle of what?

A: When he was doing it.

Q: Doing what?

(R. 204:34–35.) BH broke down crying and asked for a break. (R. 204:35, 39.) Later, BH testified that she could not remember what "doing it" meant.[2] (R. 204:38.)

BH confirmed that she and her father would visit Boie's home and that sometimes her father left her there. (R. 204:36–37.)

Throughout cross-examination, BH answered Boie's questions, sometimes providing a more substantive response and sometimes responding that she did not know the answer

[2] Boie insinuates that the State directed BH to testify that she did not remember. (R. 178:5–6, Boie's Br. 31–32.) Boie has offered no evidence to support that false, bald assertion.

or did not remember the specifics of the assaults or her earlier statements. (R. 204:21–72, 76–77.) BH testified that she could remember "[s]ome things" that happened, but "[n]ot it all." (R. 204:51–52.)

BH said she never watched the recording from her interview. (R. 204:25.) BH explained that she met with the District Attorney and the Victim/Witness Coordinator before trial. (R. 204:25.) They instructed BH to answer questions with a "yes or no" and to tell the truth. (R. 204:25.)

Boie did not move for a mistrial after BH's testimony.

The State corroborated BH's testimony with statements from her grandmothers, Teri and Kay. BH initially reported the assaults to Teri.

Teri testified that she asked BH if she was excited to visit her great-grandparents, and BH said, "no." (R. 190:116.) Teri asked BH why, and BH answered that Boie "kiss[ed] [her] hard." (R. 190:117.)

When Teri asked BH to demonstrate how Boie kissed her, BH "smashed her mouth into her hand very hard with her lips." (R. 190:117.) Teri asked if Boie did anything else, and BH said, "you know, down there," and "gestur[ed] to her pelvic area." (R. 190:117–18.) Teri suggested BH draw a picture. (R. 190:118.) BH drew a picture of her and Boie in bed with Boie's "private" parts showing. (R. 190:119–21.)

Kay testified that she saw BH the weekend after she disclosed the abuse to Teri. (R. 190:87.) As she brushed BH's hair after a shower, BH told her, "Your mother's husband did something to me." (R. 190:87.) Later, BH saw a picture of Boie on Kay's phone and said, "grandma, that's him. That's him who did it, who did that to me." (R. 190:87.)

Boie, through counsel, challenged the State's evidence in several ways. Boie suggested that Interviewer Harris used improper techniques when interviewing BH. (R. 203:117–19; 204:98–101, 167.)

Boie suggested that BH believed kissing was sex and that Teri and Paige "overreacted" to BH's disclosure. (R. 203:85–87.) According to Boie, BH enjoyed the attention she received, so she continued to invent information to answer Teri's and Interviewer Harris's questions. (R. 203:86–88.)

Boie suggested he could not have assaulted BH because he was never home alone with her. (R. 190:264–03; 191:182–91, 222–40, 250–64; 203:110–13, 115.)

And Boie suggested that the State performed a perfunctory and faulty investigation. (R. 191:13–99, 106–26; 203:108–10.)

During the trial, all but one witness expressed difficulty remembering past events. (R. 192:149 ("I don't remember. It is three years ago."); 204:97 ("I don't remember."), 217 ("I don't actually recall saying that, but if I told her that, then that was true."), 249 ("Yeah, I really don't remember it."), 293 ("I don't remember."); 190:93 ("I don't recall that."), ("I don't remember."), 129 ("I can't remember. I really don't remember what we talked about."), ("It is three years ago."), 308 ("I don't recall."); 191:26 ("I don't remember."), 129 ("I guess I don't remember the exact date, so I can't answer that."), 230 ("I don't remember off the top of my head. I do need to look."), 317 ("I don't remember it specifically, no, I don't remember.").)

The jury found Boie guilty. (R. 203:155–56.) The circuit court sentenced Boie to 17 years of imprisonment, consisting of five years of initial confinement followed by 12 years of extended supervision. (R. 202:161.)

After sentencing, Boie filed a postconviction motion seeking a new trial. (R. 178.) Boie first argued that the circuit court erred when it admitted the recording from BH's interview without finding her available to testify. (R. 178:2–3.) According to Boie, BH was unavailable to testify because she lacked sufficient memory. (R. 178:2–3.) That lack of memory, Boie claimed, meant he was deprived of an opportunity to fairly meet the allegations against him. (R. 178:4.)

"Alternatively," Boie argued that the State "failed its duty to the court and violated Boie's due process rights when it did not disclose any information relevant to whether B.E.H. was available to testify."[3] (R. 178:4.)

Finally, and again "alternatively," Boie argued that counsel provided constitutionally inadequate assistance when she failed to object to the recording's admission on availability grounds and when she failed to move for a mistrial after BH testified. (R. 178:7–10.) Boie additionally argued that BH's limited memory denied his right to confrontation. (R. 178:9–10.)

The Clerk of the Circuit Court entered an order denying Boie's motion due to the passage of time. (R. 184:2); *see* Wis. Stat. § 809.30(2)(i) ("Unless an extension is requested by a party or the circuit court and granted by the court of appeals, the circuit court shall determine by an order the person's motion for postconviction or postdisposition relief within 60 days after the filing of the motion or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion.").

Boie now appeals.

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[3] Although Boie continues to criticize the State, he abandons this claim on appeal. (*Compare* R. 178:4–6, *with* Boie's Br. 23.)

ARGUMENT

I. Boie forfeited his availability challenge to the admissibility of BH's recorded interview by not advancing it in the circuit court.

Boie argued that the circuit court erred when it admitted her forensic interview without first finding that she was (1) available to testify or (2) that the admission of her interview would not deprive Boie of a fair opportunity to meet the allegations made in her statement. (R. 178:2–4.) According to Boie, BH's limited memory rendered her unavailable and left Boie with no fair opportunity to meet the allegations. (R. 178:2–4.)

Boie forfeited that argument when he failed to challenge BH's availability below.

A. Standard of review

Whether a defendant has properly preserved a claim for appellate review is a question of law that this Court reviews de novo. *See State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998).

B. An audiovisual recording of a child's statement is admissible under Wis. Stat. § 908.08

In 1986, the Legislature created a process for the admission of children's recorded statements at trial—Wis. Stat. § 908.08. It did so for specific reasons:

> SECTION 1. Legislative purpose. This act is intended to allow children to testify in criminal, juvenile and probation and parole revocation proceedings in a way which minimizes the mental and emotional strain of their participation in those proceedings; to preserve the right to all parties to cross-examine those child

> witnesses; and to allow the trier of fact to observe the demeanor of those child witnesses while testifying.

1985 Wis. Act. 262 § 1; *State v. Snider*, 2003 WI App 172, ¶ 13, 266 Wis. 2d 830, 668 N.W.2d 784 ("The legislature's purpose in enacting Wis. Stat. § 908.08 was to make it easier, not harder, to employ videotaped statements of children in criminal trials and related hearings.").

Subsection (1) tells a court the proceedings at which it may admit an audiovisual recording: "In any criminal trial or hearing . . . the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section." Wis. Stat. § 908.08(1); 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 808.1 (4th ed. 2018) ("Subsection (1) limits the use of this exception to criminal trials and hearings, juvenile fact-finding hearings, and probation and parole revocation hearings.")

Subsection (2) describes the notice and hearing requirements for admission:

> (2)
>
> (a) Not less than 10 days before trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name of the business address of the camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the statement before the hearing under par. (b).
>
> (b) Before the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or before the hearing,

> 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. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in s. 885.44(12).

Wis. Stat. § 908.08(2)(a)–(b).

Subsection (3) provides five specific prerequisites for admission:

> (3) The court or hearing examiner shall admit the recording upon finding of all the following:
>
> (a) That the trial or hearing in which the recording is offered will commence:
>
> 1. Before the child's 12th birthday; or
>
> 2. Before the child's 16th birthday and the interests of justice warrant its admission under sub. (4).
>
> (b) That the recording is accurate and free from excision, alteration and visual or audio distortion.
>
> (c) That 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.
>
> (d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.
>
> (e) That admission of the statement will not unfairly surprise any party of deprive any party of a fair opportunity to meet allegations made in statement.

Wis. Stat. § 908.08(3)(a)–(e).

Subsection (5) outlines how the recording is admitted alongside the child's testimony:

> (5)(a) 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. Except as provided in par. (b), 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.

Wis. Stat. § 908.08(5)(a). In other words, if the State offers the recording, it must play the recording first. "[I]mmediately after," the State "may" call the child for further testimony. Wis. Stat. § 908.08(5)(a). But the State is not required to call the child for further testimony.

If the State does not call the child for further testimony, the defense may then request that the child be "produced immediately following the showing of the statement to the trier of fact for cross-examination." Wis. Stat. § 908.08(5)(a). "[U]pon request," the court "shall order" that the child "be produced" for cross-examination. Wis. Stat. § 908.08(5)(a).

As Professor Daniel Blinka points out, section 908.08 does not "address what procedure should be followed where the child either 'refuses' to testify or has forgotten the subject matter of the statement." 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 808.1 (4th ed. 2018). He suggests that "the best course is to interpret this rule in accordance with the case law interpreting Wis. Stat. § 908.01(4), where the witness' forgetfulness (or recalcitrance) is a matter going to the weight of the evidence." 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 808.1 (4th ed. 2018); *see also* Wis. JI-Criminal 300 (2000) (instructing the jury to consider "the clearness of lack of clearness of the witness' recollection" when "determining the credibility of each witness and the weight [to] give to the testimony of each witness").

C. A defendant forfeits appellate review of an alleged error if he does not object to it.

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727; *see also United States v. Olano,* 507 U.S. 725 (1993) ("No procedural principal is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it." *Id.* at 731 (quoting *Yakus v. United States*, 321 U.S. 414, 444, (1944))).

"Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *Huebner*, 235 Wis. 2d 486, ¶ 10. "The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." *Id.*

The forfeiture rule is "not merely a technicality or a rule of convenience." *Huebner*, 235 Wis. 2d 486, ¶ 11. It is "essential" to the "orderly administration of justice." *Id.* "The rule promotes both efficiency and fairness, and 'go[es] to the heart of the common law tradition and the adversary system.'" *Id.* ¶ 11 (alteration in original) (quoting *State v. Caban*, 210 Wis. 2d 597, 604–05, 563 N.W.2d 501 (1997)).

The rule also "serves several important objectives." *Huebner*, 235 Wis. 2d 486, ¶ 12. First, "[r]aising 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." *Id.* Second, it "gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Id.* Third, it "encourages attorneys to diligently prepare for and conduct trials." *Id.* Finally, it "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.*

For the reasons below, Boie forfeited his claim when he failed to raise it in the circuit court.

D. Boie forfeited his claim when he failed to raise it below.

In the circuit court, Boie received ample opportunities to preserve his claim that BH's recorded interview was inadmissible because she was unavailable to testify. He availed himself of none.

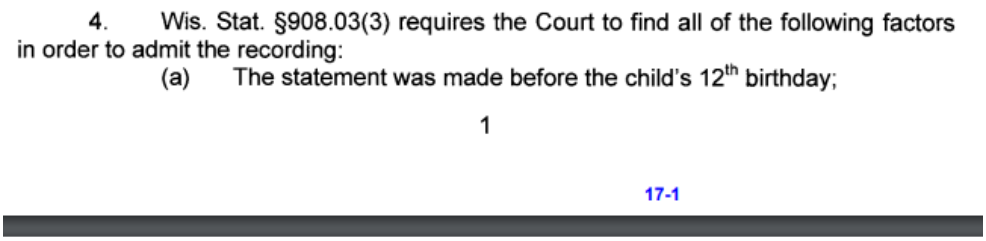
First, the circuit court asked for Boie's response to the State's motion to admit the recording at the hearing. (R. 199:29.) Boie made many arguments, none challenging BH's availability at trial.

On the contrary, Boie, through counsel, made several references indicating that BH would be available for questioning at trial:

- "The jury is going to hear what this victim is going to say regarding what happened to her years ago. Now the fact that, yes, her memory is not going to be the best because of her age, because of the time delay. And that is understandable. That can happen with an offense that occurred six months before with an adult." (R. 199:34–35);
- "Because [her school records] are relevant when she is cross-examined since she is going to have to testify." (R. 199:13).

The circuit court also referenced the fact that BH would be available for questioning: "She will be right here. You can ask her all the questions you wish." (R. 199:32.)

Second, the circuit court gave Boie the opportunity to file a written response, and Boie responded, arguing that the video could not be admitted under section 908.08. (R. 17:1.) Notably, Boie did not identify "availability" as a statutory prerequisite to admission:



4. Wis. Stat. §908.03(3) requires the Court to find all of the following factors in order to admit the recording:

(a) The statement was made before the child's 12th birthday;

1

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(b) The recording is accurate and free from excision, alteration and visual or audio distortion;

(c) 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;

(d) The time, content and circumstances of the statement provide indicia of its trustworthiness; and

(e) The admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(R. 17:1–2.) Nor did Boie question—much less challenge—BH's availability.

At best, Boie expressed concern that because BH may not remember "the specifics" of the assaults due to the passage of time, he might not be "able to fairly and effectively cross examine" her.[4] (R. 17:7.) But "[t]o preserve an alleged error for review, 'trial counsel or the party must object in a

[4] *But see State v. Rockette*, 2006 WI App 103, ¶ 22, 294 Wis. 2d 611, 718 N.W.2d 269 ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extend, the defense might wish. The Confrontation Clause does not guarantee that a witness's testimony will not be 'marred by forgetfulness, confusion, or evasion." (citations omitted) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20–22 (1985)).

timely fashion *with specificity* to allow the court and counsel to review the objection and correct any potential error.'" *State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511 (emphasis added) (quoting *State v. Nielsen*, 2001 WI App 192, ¶ 11, 247 Wis. 2d 466, 634 N.W.2d 325)). Boie did not specifically challenge BH's availability.

In sum, Boie forfeited his claim when he did not question BH's availability pretrial or move for a mistrial after BH testified. Because Boie forfeited his claim, it must be analyzed through the ineffective assistance of counsel rubric.

II. The circuit court properly denied Boie's ineffective assistance of counsel claim without a hearing.

A. Standard of review

A circuit court may deny a postconviction motion without a hearing if the motion fails to raise facts sufficient to entitle the movant to relief, the movant presents only conclusory allegations, or the record conclusively shows that the movant is not entitled to relief. *State v. Sulla*, 2016 WI 46, ¶ 27, 369 Wis. 2d 225, 880 N.W.2d 659. A court reviews *de novo* whether a defendant's postconviction motion clears those three prongs. *Id.* ¶ 23. If the motion fails one or more of those prongs, a circuit court has discretion to grant or deny a hearing. *Id.* If a hearing was not required, a court reviews a decision granting or denying a hearing under the "deferential erroneous exercise of discretion standard." *Id.* (citation omitted).

B. A defendant must make two showings to succeed on an ineffective assistance of counsel claim: deficient performance and prejudice.

Both the United States Constitution and the Wisconsin Constitution guarantee a criminal defendant "the right to

effective assistance of counsel." *State v. Lemberger*, 2017 WI 39, ¶ 16, 374 Wis. 2d 617, 893 N.W.2d 232 (citation omitted); U.S. Const. amend. VI, XIV; Wis. Const. art. I, § 7. Accordingly, a defendant may raise a constitutional challenge to counsel's effectiveness.

To succeed on an ineffective assistance of counsel claim, a defendant must make two showings. "First, the defendant must show that counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.*

1. Deficient performance

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Thus, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88.

A defendant fails to make that showing if he simply complains "that his counsel was imperfect or less than ideal." *State v. Burton*, 2013 WI 61, ¶ 48, 349 Wis. 2d 1, 832 N.W.2d 611 (citation omitted). In fact, "[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). To make the requisite showing, a defendant must point to specific acts or omissions of counsel that fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

Adding to this tough burden is the highly deferential posture courts take when examining counsel's performance. *Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential."). This deferential posture requires that "counsel [is] 'strongly presumed to have rendered' adequate assistance within the bounds of reasonably professional judgment." *State v. Balliette*, 2011 WI 79, ¶ 25, 336 Wis. 2d 358, 805 N.W.2d 334 (citing *Strickland*, 466 U.S. at 690).

Relevant here, "ineffective assistance of counsel cases should be limited to situations where the law or duty is clear." *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93 (quoting *Lemberger*, 374 Wis. 2d 617, ¶ 33). As a general rule, "[c]ounsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective." *Lemberger*, 374 Wis. 2d 617, ¶ 18 (alterations in original) (quoting *Basham v. United States*, 811 F.3d 1026, 1029 (8th Cir. 2016)).

Although "the Constitution guarantees criminal defendants a competent attorney, it 'does not ensure that defense counsel will raise every conceivable constitutional claim.'" *Lemberger*, 374 Wis. 2d 617, ¶ 18 (quoting *Basham*, 811 F.3d at 1029). Thus, the "[f]ailure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." *Id.* (quoting *Basham*, 811 F.3d at 1029).

Finally, because "[t]here are countless ways to provide effective assistance in any given case," a "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). "[S]trategic choices made after thorough investigation of law and facts

relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91.

2. Prejudice

"[A] defendant must affirmatively prove prejudice by 'show[ing] that particular errors of counsel were unreasonable' and that those errors 'had an adverse effect on the defense.'" *Burton*, 349 Wis. 2d 1, ¶ 49 (quoting *Strickland*, 466 U.S. at 693). In the context of ineffective assistance of counsel, the proper test for prejudice is "whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citation omitted).

C. A court may deny a postconviction motion without a hearing if it fails to satisfy pleading requirements.

A challenge to trial counsel's effectiveness must be raised in a postconviction motion under Wis. Stat. § 974.02. *Balliette*, 336 Wis. 2d 358, ¶ 29. Without a postconviction motion in the circuit court, a claim of ineffective assistance of trial counsel cannot be reviewed on appeal. *Id.*

A postconviction motion alleging ineffective assistance must meet certain pleading requirements, or it will be denied without a *Machner*[5] hearing. A *Machner* hearing is "required

[5] *State v. Machner*, 92 Wis. 2d 797, 285 Wis. 2d 905 (Ct. App. 1979).

before a court may conclude a defendant received ineffective assistance." *State v. Sholar*, 2018 WI 53, ¶ 53, 381 Wis. 2d 560, 912 N.W.2d 89.

To meet the pleading requirements for a *Machner* hearing, a postconviction motion must allege "sufficient facts, which if true, would entitle [the defendant] to relief." *Sholar*, 381 Wis. 2d 560, ¶ 50. This means a defendant's motion must allege material facts answering the questions who, what, when, where, why and how the movant would successfully prove at an evidentiary hearing that he is entitled to a relief: "the five 'w's' and one 'h'" test. *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433.

In reviewing a motion, the court looks only to "the allegations contained in the four corners of [the defendant's] motion, and not any additional allegations that are contained in [the defendant's] brief." *Allen*, 274 Wis. 2d 568, ¶ 27.

If the motion fails to set forth sufficient facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court may deny the motion without a hearing. *Allen*, 274 Wis. 2d 568, ¶ 9. When a court denies a postconviction motion without a hearing, "the issue for the court of appeals reviewing an ineffective assistance claim is whether the defendant's motion alleged sufficient facts entitling him to a hearing." *Sholar*, 381 Wis. 2d 560, ¶ 51.

For the reasons below, Boie is not entitled to a hearing on his ineffective assistance claim.

D. Boie is not entitled to a hearing because the record conclusively demonstrates that counsel was not ineffective.

1. The record conclusively demonstrates that counsel did not provide deficient performance.

Here, the record conclusively demonstrates that counsel did not provide deficient performance because no clear law or duty required counsel to raise Boie's new, novel unavailability argument. *Breitzman*, 378 Wis. 2d 431, ¶ 49.

As a preliminary matter, neither the statute nor Chapter 908 defines the word "available" or the phrase "available to testify."

Nevertheless, BH was "available to testify, as provided in this section." Wis. Stat. § 908.08(1). The section speaks to a child testifying only if the party who offered the statement calls her "to testify." Wis. Stat. § 908.08(5)(a); *Snider*, 266 Wis. 2d 830, ¶ 13 ("[T]he legislature has provided a way for these statements to be admitted even when no other hearsay exception applies, *and even if the statement is produced in preparation for trial as an express means of avoiding having a child give direct testimony at all*. (emphasis added)).

Otherwise, the section speaks to the child's production "for cross-examination." Wis. Stat. § 908.08(5)(a) ("[I]f 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 statements to the trier of fact *for cross-examination*." (emphasis added)).

That the statute is primarily concerned about the child's production for cross-examination is confirmed by its legislative purpose. 1985 Wis. Act. 262 § 1 (providing that the Act was intended "to allow children to testify in criminal . . . proceedings in a way which minimizes the mental and emotional strain of their participation in those proceedings" and "to preserve the right to all parties to cross-examine those child witnesses"). Section 908.08 satisfies those purposes when it allows the recording to serve as all or most of the child's direct testimony but requires the child's production for cross-examination.

As contemplated by the statute, BH was produced for cross-examination, and Boie thoroughly cross-examined her. Wis. Stat. § 908.08(5)(a). The record shows that Boie quizzed BH for 47 transcript pages. (R. 204:21–65, 71–72.)

To make BH "unavailable," Boie plucked language from another statute and smushed it into section 908.08. Specifically, he yanked section 908.04(1)(c), which—in the context of hearsay exceptions—speaks to "[u]navailability as a witness" when the "declarant" "[t]estifies to a lack of memory of the subject matter of the declarant's statement." Wis. Stat. 908.04(1)(c).

Boie did not explain why section 908.04(1)'s phrase "unavailability as a witness" necessarily covers section 908.08(1)'s phrase "available to testify." Because the two sections use different words, "unavailability" versus "available" and "witness" versus "to testify," it is not obvious the two must be interpreted together.[6]

[6] Through its rule making authority, the Wisconsin Supreme Court created section 908.04 in 1973. *See* Sup. Ct. Order 59 Wis. 2d R1, R302 (1973). In a note, the Judicial Council Committee

Indeed, section 908.08 seems to separate itself from the other sections in Chapter 908: "In any criminal trial or hearing . . . the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, *as provided in this section*." Wis. Stat. § 908.08(1) (emphasis added).

Furthermore, any argument that Boie was denied his right to confrontation because of BH's inability to remember specific details is a nonstarter. (R. 178:9–10.) As both the United States Supreme Court and this Court have recognized, "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. The Confrontation Clause does not guarantee that a witness's testimony will not be 'marred by forgetfulness, confusion, or evasion.'" *State v. Rockette*, 2006 WI App 103, ¶ 22, 294 Wis. 2d 611, 718 N.W.2d 269 (internal citations omitted) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20–22 (1985)).

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explained that the "lack of memory" situation arose in a civil case, where the plaintiff claimed he suffered from "amnesia":

> (c). Although no Wisconsin case has expressed this doctrine as an unavailability basis for a hearsay exception, the rule is consistent with the rationale in *Schemenauer v. Travelers Indemnity Co.*, 34 Wis. 2d 299, 308, 149 N.W.2d 644, 648 (1967), where a plaintiff's claim of amnesia was under attack. The court held that such a circumstance was within the ambit of conduct by silence and justified the absent available witness instruction because it made his cross-examination unavailable to the defendants.

Sup. Ct. Order 59 Wis. 2d at R303. This is not a case where BH claimed a complete lack of memory.

Accordingly, a "witness's claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the Confrontation Clause under *Crawford*, so long as the witness is present at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination." *Rockette*, 294 Wis. 2d 611, ¶ 26.

BH took the stand at trial, agreed to testify truthfully, and answered the questions Boie asked. (R. 204:16–77); *Rockette*, 294 Wis. 2d 611, ¶ 27 ("Grandberry took the stand at trial, agreed to testify truthfully and answered the questions posed by Rockette's counsel."). Boie was thus able to test BH's recollection and to "hold [her] testimony up to the jury so that the jury could decide whether it was worthy of belief." *Rockette*, 294 Wis. 2d 611, ¶ 27.

This leads to the next point—the record also conclusively demonstrates that counsel made a strategic decision to not object to BH's testimony or move for a mistrial.

Often, "a prime[ ] objective of cross-examination," is "the very fact that [the witness] has a bad memory." *State v. Rockette*, 294 Wis. 2d 611, ¶ 23 (quoting *United States v. Owen*, 484 U.S. 554, 559 (1988)). Boie's attorney pounced on that prime objective, highlighting BH's limited memory during her closing statement:

> On cross, she has no problem talking about Easter Bunny, Santa, everything else. But then what happens is when I was talking to her about kissing and I said, well, you don't like it when Grandpa Rich gives you a kiss, did you see the change? I don't like a kiss. Why not. That's when he is doing it.
>
> Her mom started crying. She started crying. And we had a break. She comes back and all of a sudden memory lapse. She admitted she talked to the DA before. I don't know what happened during the break. But all of a sudden she doesn't remember anything. And it is important to say when I asked her,

> she said grandpa kisses her when we are doing it. Those were the words. And I asked her later when she composed herself and came back in, what does doing it mean? What was her response? Not that I don't want to talk about it, I don't remember. Well, how can it be you know you are doing it, but you don't remember it? Why would you say it was when we were doing it, but you don't remember. It doesn't make sense. . . . .
>
> . . . .
>
> So on cross-examination, she starts crying. And it is hard to see a little girl cry, nobody wants that. But this is three to four years later. What is she crying about, ladies and gentleman, if she doesn't remember what happened? . . . .

(R. 203:95–97.)

Indeed, one of the final statements counsel made to the jury emphasized BH's limited memory and attacked her credibility: "And remember, also, what she said when she then stopped talking to me, grandpa was doing it, but I don't remember what that was. Physical impossibility. There is way too much speculation here. And look at the credibility." (R. 203:125.)

Given that a "prime objective" of cross-examination is to highlight a witness's limited memory, counsel made a reasonable strategic decision when she decided to emphasize BH's limited memory rather than seek a mistrial.

That the jury rejected it does not make it bad strategy, nor does it make counsel ineffective. *See Owen*, 484 U.S. at 560 ("The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee."); *State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620 ("Trial counsel is not ineffective simply because an otherwise reasonable trial strategy was unsuccessful.").

Finally, in his brief, Boie argues that counsel should have moved for a mistrial "when it became evident the State probably withheld information" concerning BH's availability. (Boie's Br. 30.) Boie cannot show that the State actually withheld any information regarding BH's availability, so counsel cannot have performed deficiently for not moving for a mistrial.

In sum, Boie is not entitled to a hearing on his claim because the record conclusively demonstrates that he is not entitled to relief. The record shows that counsel did not perform deficiently because (1) Boie failed to point to a clear law or duty that required counsel to raise his new, novel availability claim, and (2) counsel had a clear strategic reason for not challenging BH's availability.

2. Boie failed to show he was prejudiced by counsel's performance.

Boie is also not entitled to a hearing because the record conclusively demonstrates that he was not prejudiced by any alleged deficiency.

Boie claimed that counsel's "deficiency prejudiced [him] [because] he had no opportunity to put B.E.H.'s allegations to the test of cross-examination as required by the statute." (R. 178:9.) In addition, he said he was "prejudiced because the video was the State's primary inculpatory evidence." (R. 178:9.)

First, as discussed above, Boie received the cross-examination owed him under the Constitution. *Rockette*, 294 Wis. 2d 611, ¶ 26 ("[A] refusal or inability by the witness to recall the events recorded in a prior statement does not render the witness unavailable for purposes of cross-examination.").

Second, Boie incorrectly assumed that the circuit court could not have admitted the recording but for section 908.08. Wis. Stat. § 908.08(7) ("[A] court . . . may also admit into evidence an audiovisual recording of an oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule.").

But the circuit court could have admitted the recording as a recorded recollection. A recorded recollection is a "memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly." Wis. Stat. § 908.03(5). "[T]he focus of Rule 908.3(5) is whether a witness's contemporaneous knowledge concerning an event was accurately recorded, not whether the knowledge in fact accurately reflects the event." *State v. Jenkins*, 168 Wis. 2d 175, 195, 483 N.W.2d 262 (Ct. App. 1992).

Here, BH's contemporaneous knowledge about the assaults against her was accurately recorded via an audiovisual recording. (R. 99.) The matter was fresh in her mind, as she had just reported the assaults to her grandmother. (R. 2:1.) And at trial, BH's limited memory hampered her ability to testify fully and accurately to the events. Because the recording satisfied the criteria for admission, the circuit court could have admitted BH's recording under section 908.03(5).

The circuit court also could have admitted the recording as a prior consistent statement. A prior consistent statement of a testifying witness, who is subject to cross examination, is admissible non-hearsay if the statement is "[c]onsistent with the declarant's testimony and is offered to rebut an express or

implied charge against the declarant of recent fabrication or improper influence or motive." Wis. Stat. § 908.01(4)(a)2.

Here, the recording was consistent with BH's trial testimony. BH testified that she remembered meeting with Interviewer Harris. (R. 204:25, 28.) Albeit briefly, BH testified about Boie assaulting her:

> Q: So he never kissed you?
>
> A: No--well, yeah.
>
> Q: Okay. When did he kiss you?
>
> A: When I was in the middle of it.
>
> Q: Middle of what?
>
> A: When he was doing it.

(R. 204:35.)

Throughout the trial, Boie suggested that BH had been improperly influenced. For example, Boie hinted that Paige "jumped to" conclusions, (R. 203:125–126) and pursued criminal action because it could benefit her custody arrangement:

> And I think it is really important to note, too, after [Paige] find this information out and she knows it is no allegation that Blake did, who is the first person she calls? Her custody attorney, before she even calls law enforcement. Because she knows Blake is not a suspect, but maybe I can use this to my advantage and alter that placement again.

(R. 203:117.)

Additionally, Boie suggested that BH concocted the allegations to gain attention (i.e., improper motive):

- "And she sees the attention she is getting from grandma and says, oh, I don't want to kiss grandpa. Oh, my gosh, she is getting a lot of attention. We all remember when we are little kids, we like to get more attention than anybody else." (R. 203:86–87);

- "[S]he is going with the vivid imagination with it, because she realizes now someone is expecting her to say more things even though it is not the truth. But she is a drama queen like her mom said." (R. 203:90);
- "But children can lie just like adults. They can lie to suit their own interests or to make an adult happy, because they can see an adult wants them to say something." (R. 203:94.)

Accordingly, the circuit court could have admitted the recording to rebut an implied charge of improper influence and motive.

Alternatively, the circuit court could have admitted the recording 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. 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); *see also State v. Nelis*, 2007 WI 58, ¶¶ 11, 31–33, 300 Wis. 2d 415, 733 N.W.2d 619; *Vogel v. State*, 96 Wis. 2d 372, 384, 291 Wis. 2d 838 (1980) (noting that a party can introduce the prior consistent statements of its own witness).

Here, BH testified that she did not remember much of her interview, nor did she remember much of the specific assaults. BH's prior statements in her interview, though, revealed that she gave numerous details about the assaults, including who assaulted her, where the assaults occurred, and how she was assaulted. Because BH's limited memory at trial arguably rendered her prior statements inconsistent with her trial testimony, the circuit court could have admitted the recording under section 908.01(4)(a)1.

Finally, the circuit court could have admitted the recording under a catchall provision. *See* Wis. Stat. §§ 908.03(24), 908.045(6) (both providing for the admission of "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness"). Chapter 908's residual clause applies with particular force in child sexual assault cases:

> We conclude 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 the sole witnesses to the crime. In 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.

State v. Sorenson, 143 Wis. 2d 226, 243, 421 N.W.2d 77 (1988).

A court considers several factors when determining whether a child's statement is admissible under the residual clause, including

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

Snider, 266 Wis. 2d 830, ¶ 17.

Here, BH was six years old at the time of the interview. Her statements demonstrated knowledge appropriate of her age. (*See e.g.*, R. 192:223–228 (using words like "wiggle," "squirmy," and "wet" to describe the assaults)); *Sorenson*, 143 Wis. 2d at 249 ("A young child is unlikely to fabricate a

graphic account of sexual activity because it is beyond the real of his or her experience."). BH made the allegations against her great-grandfather, and she expressed concern about whether her family could hear her statements. (R. 100:6–7); *Snider*, 266 Wis. 2d 830, ¶ 18.

BH confided in a forensic interviewer, who had experience working with sexual assault victims. (R. 192:181–82.) And, despite Boie's assertions otherwise, there was no evidence of a possible motive for Interviewer Harris to fabricate or distort BH's statements. *Sorenson*, 143 Wis. 2d at 247–48. Moreover, BH exhibited no signs of deceit or falsity on the video, and although her statements to Interviewer Harris contained more information, they were consistent with the statements she made to grandmas Teri and Kay. *Snider*, 266 Wis. 2d 830, ¶ 18.

Put simply, because BH's statements during the interview were sufficiently trustworthy, the circuit court could have admitted the recording of that interview under the residual hearsay exception.

In sum, Boie is not entitled to a hearing on his claim because the record conclusively demonstrates that he was not prejudiced by the admission of the recording. As outlined above, the circuit court could have admitted the recording under numerous hearsay provisions.

CONCLUSION

This Court should affirm the circuit court's order denying Boie's postconviction motion without a hearing. If this Court disagrees, it should remand for a *Machner* hearing.

Dated this 15th day of August 2019.

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 9,393 words.

_____
JENNIFER R. REMINGTON
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 15th day of August 2019.

_____
JENNIFER R. REMINGTON
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Richard A. Boie
Case No. 2019AP0520-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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JENNIFER R. REMINGTON
Assistant Attorney General

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I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 15th day of August, 2019.

_____
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