STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2019AP1876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD P. COUGHLIN,

Defendant-Appellant.

AN APPEAL FROM AN ORDER DENYING POSTCONVICTION MOTIONS ENTERED IN JUNEAU COUNTY CIRCUIT COURT, THE HONORABLE STACY A. SMITH, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. A defendant bears a heavy burden on appeal to overcome the great deference given to a jury's verdict. Here, Donald Coughlin argues there was insufficient evidence to convict him of having sexual contact with three child victims. But each victim testified to numerous instances of sexual activity, including to acts of Coughlin touching their penises. Is such evidence, viewed most favorably to the State and the convictions, sufficient to sustain the guilty verdicts?

2. A defendant bears the burden to prove with corroborating evidence that a deceased trial counsel was ineffective. Here, Coughlin acknowledged at a postconviction hearing that he had the duty to provide evidence to corroborate his claim after his trial counsel, Daniel Berkos, died before the hearing. But he did not provide such corroboration. Did the circuit court properly exercise its discretion denying Coughlin's uncorroborated ineffective assistance of counsel claim?

3. An appellate court may exercise its discretionary reversal power if a defendant shows that the real controversy was not fully tried. Here, Coughlin generally asserts that "sexual activity" evidence and corresponding instructions misled the jury. But Coughlin stated at the postconviction hearing that the jury instruction was correct and he does not allege that any of the sexual activity evidence was inadmissible. Is this the exceptional case for discretionary reversal?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither publication nor oral argument because the issues presented under the facts of the case do not satisfy the criteria in Wis. Stat. §§ (Rule) 809.22(2)(b) and 809.23(1)(a)1.

STATEMENT OF THE CASE

Coughlin appeals to this Court after the circuit court denied his postconviction motions following his convictions for sexually assaulting three children. (R. 223; 257; 312.) Coughlin was the step-father of two victims, having entered their lives as a father figure when they were young children. (R. 299:124–25, 127–28; 301:27, 75.) A third victim was a cousin and close friend of the other two victims. (R. 303:12.) The three victims reported the sexual assaults to law enforcement after they became adults. (R. 299:166–67, 239–40; 301:67–70; 303:31.) A jury found Coughlin guilty. (R. 199:1–22.)

Charges. The State of Wisconsin charged Coughlin with 21 counts relevant to his appeal.[1] (R. 11 (information); 136 (amended information).) The first six counts charged Coughlin with sexually assaulting his oldest step-son, identified as John Doe 1.[2] (R. 136:1–3.) The next four counts

[1] The State only refers to the 21 relevant counts in this brief. Counts 10 and 23 are not relevant to this appeal. The court dismissed Count 10 based upon a stipulation of the parties. (R. 284:24.) The jury acquitted Coughlin of Count 23, returning a not guilty verdict to the child enticement charge in that count. (R. 199:22.)

[2] The State identifies the victims in this brief by the "John Doe" designations used in the information and amended information (R. 11; 136). *See* Wis. Stat. § (Rule) 809.86(4).

charged Coughlin with sexually assaulting John Doe 2, (R. 136:3–4), the cousin of the other two victims (R. 303:23). The remaining eleven counts charged Coughlin with sexually assaulting his youngest step-son, John Doe 3. (R. 136:4–7.) (*Compare* R. 11:3–5 (information), *with* 136:4–7 (amended information.)[3]

Each of the first six counts charged Coughlin with having sexual contact with John Doe 1 "by the defendant touching the victim's penis." (R. 136:1–3.) Each of the six counts alleged a different timeframe when Coughlin had sexual contact by touching John Doe 1's penis. (R. 136:1–3.) The first sexual assault count charged a period between September and December 1989. (R. 136:1.) The second and third sexual assault counts charged different time periods in 1990. (R. 136:1–2.) The fourth and fifth sexual assault counts charged different time periods in 1991. (R. 136:2.) The sixth sexual assault charged a period between February and mid-May 1992. (R. 136:3.)

Each of the next four counts charged Coughlin with having sexual contact with John Doe 2 "by the defendant touching the victim's penis." (R. 136:3–4.) The timeframes of

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[3] Hereinafter, the State only cites in this brief to the amended information filed on May 4, 2017, except when addressing Count 12. (R. 136; *see* 300:248–51; 304:199–200.) The amended information had a drafting error in that count. (*Compare* R. 11:3 (information), *with* 136:4 (amended information). The record demonstrates Count 12 proceeded as charged in the original information without the drafting error. (*Compare* R. 11:3 (information), *with* 199:11 (verdict form); 298:52 (charge); 305:77 (jury instruction); 307:11 (verdict instruction).) Coughlin forfeited any claim as to the error in the amended information, *see State v. Ndina*, 2009 WI 21, ¶¶ 25–39, 315 Wis. 2d 653, 761 N.W.2d 612 (forfeiture), and any such claim would fail because the record demonstrates he understood the charge in that count, *see State v. Flakes*, 140 Wis. 2d 411, 410 N.W.2d 614 (Ct. App. 1987) (drafting error).

the counts spanned differing periods, each a few months in duration. (R. 136:3–4.) The count pertaining to the earliest period, Count 7, charged Coughlin with sexually assaulting John Doe 2 between September and mid-November 1989, when John Doe 2 was under 13 years of age. (R. 136:3–4.) The count pertaining to the latest period, Count 11, charged Coughlin with sexually assaulting John Doe 2 between September and mid-November 1992. (R. 136:4.)

The remaining eleven counts each charged Coughlin with sexually assaulting John Doe 3. (R. 136:4–7.) The first ten counts charged Coughlin with having sexual contact with John Doe 3 "by the defendant touching the victim's penis." (R. 136:4–7.) The ten counts differed in timeframes. (R. 136:4–7.) The earliest timeframe, in Count 12, pertained to Coughlin touching John Doe 3's penis in late 1989. (R. 11:3; *see supra* n.3.) The eleventh count charged Coughlin with committing three or more sexual assaults involving John Doe 3 between September and early November 1994. (R. 136:7.)

Jury trial. The case proceeded to trial in the spring of 2017.[4] During jury selection, the court instructed the jury about each charge in the information. (R. 298:46–58.) The court explained that the first 20 counts charged Coughlin with having sexual contact by touching the victims' penises. (R. 298:47–57.) The court also explained that the next count charged Coughlin with committing three or more violations against John Doe 3. (R. 298:57.)

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[4] An earlier trial in June 2015 is not relevant to this appeal. At the earlier trial, a jury had found Coughlin guilty. (R. 56 (verdict forms), 285:4–21 (trial transcript).) But the court granted Coughlin's motion for a new trial. (R. 289:2–3.). The case proceeded to a second trial, beginning with jury selection on April 28, 2017. (R. 298 (trial transcript).) The issues raised on appeal do not relate to the earlier trial.

The jury heard testimony about how Coughlin groomed the victims by normalizing the touching of a child's genitals. (R. 299:152–54, 289; 301:87–88, 155–58.) John Doe 1 told the jury that early on Coughlin would "sack tap[ ]," described as "tak[ing] your hand, front or back, and smack[ing] another man in his genitals to inflict pain." (R. 299:152.) John Doe 1 said that Coughlin would "linger there for a second" sometimes after a "sack tap." (R. 299:289.) John Doe 1 explained Coughlin also would "grub[ ]" (R. 299:289), described as "tak[ing] another man's testicles or genitals in your hand and squeez[ing] them to inflict pain" (R. 299:154). John Doe 1 said Coughlin would sometimes "grub[ ]" by "try[ing] to get ahold of something and feel it." (R. 299:289.) John Doe 3 similarly explained Coughlin "grubb[ed]" by "giv[ing] your testicles a squeeze . . . and hurt[ing] them, but not until he got a good feel of what he was grabbing on to." (R. 301:87–88.) John Doe 1 said Coughlin made a game out of "sack tapping" and "grubbing" the children, and that the children started doing it with one another. (R. 299:152–54.)

Each victim testified Coughlin had a recurring interest in the size of children's penises. (R. 299:165–66; 301:48–49; 303:17–19, 23.) John Doe 1 said Coughlin was "always commenting -- from early on he'd comment at the size of my penis, telling me how big it was and how impressed he was." (R. 299:165.) John Doe 1 told the jury that Coughlin brought a tape measure and proceeded to measure John Doe 1's penis as well as the penises of John Doe 2 and John Doe 3. (R. 299:165–66.) Coughlin measuring penises stood out to John Doe 2 because it was the first instance of sexual activity between Coughlin and him. (R. 303:17–19.) John Doe 2 described multiple instances of measuring penises. (R. 303:17–19, 23.) John Doe 3 testified that Coughlin "frequently" measured his penis. (R. 301:48–49.)

John Doe 1 testified that Coughlin touched his penis repeatedly during a ten-year period from the mid-1980s until

1995. (*See* R. 299:122, 140, 162, 174, 198, 259.) He explained Coughlin first touched his penis "very near" to moving into a family home (R. 299:162), when John Doe 1 was approximately eight or nine years old, having been born in 1976 (R. 299:122, 140, 148). Coughlin continued to assault John Doe 1 throughout his childhood: "[i]t happened all the time." (R. 299:174.) Coughlin touched John Doe 1's penis by "stroking my penis" and "masturbat[ing] my penis until I ejaculated." (R. 299:162, 168.) John Doe 1 testified Coughlin also "perform[ed] oral sex on me." (R. 299:162, 168.) The masturbation of Coughlin stroking John Doe 1's penis occurred more frequently than the oral sex. (R. 299:162.) Coughlin performed oral sex on John Doe 1 about once a month, and stroked John Doe 1's penis more frequently. (R. 299:162.) John Doe 1 testified about many additional instances of masturbation during this time period, including John Doe 1 stroking Coughlin's penis and self-masturbation in the presence of others. (R. 299:168–87.) John Doe 1 explained "it escalated to a point where it was always happening, it was three nights a week, or twice a week, or the weekend, whenever he could get me away." (R. 299:174.) John Doe 1 said that it was difficult to pinpoint a specific assault with a particular date because it was a regular activity and "[t]here were so many days that it happened . . . ." (R. 299:174.) He testified that Coughlin engaged in sexual activity with him about three times per week between the fall of 1989 and the spring of 1992, (R. 299:193), stating that "[i]t never stopped happening," (R. 299:174), continuing "[a]ll the way up through high school," (R. 299:198), until he joined the Navy and moved out after graduation in the summer of 1995 (R. 299:174, 259).

John Doe 2 testified that Coughlin repeatedly sexually assaulted him between the fall of 1989 and the fall of 1992. (R. 303:28–29.) John Doe 2 said, besides measuring penises, the only sexual activity that Coughlin directly engaged in

with him was Coughlin masturbating John Doe 2's penis. (R. 303:23–24.) John Doe 2 explained that the sexual activity took place during visits with his cousins, John Doe 1 and John Doe 3, when Coughlin was alone with the boys. (*See* R. 303:12–13, 19–20, 22–23.) John Doe 2 told the jury "it happened enough times where . . . [w]e would play with ourselves, he might play with somebody, might not play with somebody." (R. 303:27.) John Doe 2 said that masturbation became such a common occurrence that Coughlin kept paper towels nearby to clean up after ejaculation. (R. 303:24.) John Doe 2 described masturbation with Coughlin happening repeatedly throughout the years, stating the conduct was most frequent during the late summer and continuing into the fall. (R. 303:25.) John Doe 2 estimated the sexual activity occurred more frequently than once a month during this time frame. (R. 303:25.)

John Doe 3 testified that Coughlin touched his penis repeatedly during sexual activity that occurred during a ten-year period from the mid-1980s until the fall of 1994. (R. 301:25, 37–38, 94–95.) John Doe 3 testified that the first sexual abuse happened when he was seven years old, having been born in 1978. (R. 301:25, 37–38.) It happened fairly often thereafter throughout his childhood. (R. 301:39–40.) John Doe 3 said, "[t]here were many of them" (R. 301:44), with Coughlin "always" asking to engage in masturbation, (R. 301:45), such that masturbating with Coughlin became "like a normal day" (R. 301:64). It was a common—even a weekly—occurrence. (R. 301:45, 59, 62, 84.) Some of the instances involved Coughlin touching and masturbating John Doe 3's penis. (R. 301:41, 45, 47–48.) John Doe 3 explain, "[b]ecause there was a lot of sexual abuse going on . . . . [it was] [k]ind of hard to keep track of all of it." (R. 301:85.) But some incidents stood out, (R. 301:46), such as Coughlin slipping a pump on John Doe 3's penis and applying suction to enlarge the child's penis. (R. 301:47–48.) John Doe 3 testified that Coughlin engaged in

sexual activity regularly between the autumn of 1989 and the autumn of 1994. John Doe 3 said there "[d]efinitely" were multiple instances in the autumn of 1989. (R. 301:58.) During 1990, the sexual activity occurred "[a]t least once a week. . . . [t]hroughout the year." (R. 301:58–59.) John Doe 3 confirmed the sexual activity continued between spring 1991 and spring 1994. (R. 301:59–61.) He similarly confirmed that three or more instances occurred between September 1994 and his 16th birthday in November 1994. (R. 301:61–62, 94–95, 97.)

These victims testified that they did not report Coughlin's sexual abuse when they were children. John Doe 3 described Coughlin as an "unstable character" and "very abusive, angry person" who was physically, sexually, and mentally abusive. (R. 301:29–30, 66.) John Doe 1 explained Coughlin used corporal discipline with "bare-assed" spankings, pulling a child's "pants down around [the] ankles and whip[ping] . . . with a belt." (R. 299:134.) John Doe 3 recalled Coughlin threatening to kill him on multiple occasions if he ever told anybody about the abuse. (R. 301:65–66.) John Doe 1 told the jury he was "scared" and "fearful" to report it because of what Coughlin had said. (R. 299:135–36; *see also* 299:160–61.) John Doe 2 agreed that Coughlin had "definitely made it known that we shouldn't tell people." (R. 303:20.) John Doe 1 was the first to report the sexual abuse after he was an adult. (R. 299:166–67, 239–40.)

Coughlin denied ever sexually assaulting any of the victims. (R. 304:152.) Coughlin acknowledged being familiar with "sack tapping" and "grubbing," but he alleged that he never engaged in either activity. (R. 304:175–77.) Coughlin also acknowledged knowing about penis pumps, but said he never had one. (R. 304:177.) Coughlin acknowledged that people talked and acted in a sexual manner within the home. (R. 304:67.) When asked whether Coughlin participated in sexual language within the house, he replied, "Very little, no." (R. 304:67.) Coughlin acknowledged sometimes being alone

with the victims, but described it as "very seldom" and "very little." (R. 304:166–70.) Coughlin denied sexually molesting any of the victims. (R. 304:82, 85–86, 88.)

After the close of evidence, the court instructed the jury about the nature of the charges prior to its deliberation. (R. 305:64–69, 77–79, 83–85.) The court read each of the counts in the information. (R. 305:64–69, 77–79, 83–85.) In reading each of the first 20 counts, the court specifically identified the sexual contact as "the defendant touching the victim's penis." (R. 305:64–69, 77–79.) The court told the jury that "[s]exual contact is the intentional touching of the penis of [the victims]." (R. 305:70–71, 80.) The court explained "[t]he touching may be of the penis directly, or it may be through the clothing" and "[t]he touching must be done by any body part or any object, but it must be an intentional touching. . . . with intent to become sexually aroused or gratified." (R. 305:71; *see also* 305:80.) In reading the last count relevant on appeal, the court explained it charged Coughlin with committing three or more sexual assaults through sexual contact by either "the intentional touching of the penis of [John Doe 3] by the defendant" or "an intentional touching by the victim of the penis of Donald P. Coughlin, if the defendant intentionally caused or allowed the victim to do that touching." (R. 305:84–85.)

The court also read each verdict form to the jury prior to deliberation. (R. 307:4–18.) The court explained that the jury had two verdict forms for each count—one guilty and one not guilty. (R. 307:4–18.) The court read the guilty form for the first count, including: "We, the jury, find the defendant, Donald P. Coughlin, guilty of having sexual contact . . . by the defendant touching the victim's penis." (R. 307:4.) The court then read the not guilty form. (R. 307:4.) The court continued reading every guilty and not guilty form for each count, specifically identifying that the first 20 counts pertained to sexual contact "by the defendant touching the victim's penis."

(R. 307:4–17.) For the next charge—a count of repeated sexual assault of a child that was not limited to sexual contact by touching the victim's penis—the court read the guilty form, including: "We, the jury, find the defendant, Donald P. Coughlin, guilty of committing three or more sexual assaults of [John Doe 3]." (R. 307:17.) The court then read the not guilty form for that count. (R. 307:17–18.)

The jury deliberated and later returned 21 guilty verdicts against Coughlin. (R. 199:1–20.) The first 20 verdict forms each explicitly stated Coughlin was guilty of having sexual contact "by the defendant touching the victim's penis." (R. 199:1–20.) The last guilty verdict form stated Coughlin was guilty of committing three or more sexual assaults against John Doe 3 during the time period charged in that count. (R. 199:21.)

The court confirmed that each verdict form submitted was the verdict of the jury. (R. 307:49–62.) The court read each verdict form to the jury and confirmed it was the proper verdict. (R. 307:49–58.) The court confirmed with the jury that it found Coughlin guilty of 20 counts for having sexual contact "by the defendant touching the victim's penis" and one count for sexually assaulting one of the victims three or more times between September and early November 1994. (R. 307:49–58.) The court then polled each jury member and again confirmed the 21 guilty verdicts. (R. 307:59–62.)

Conviction and sentencing. The court entered judgments of conviction on the 21 counts and adjourned the case for a sentencing hearing. (R. 307:70, 72.) Thereafter, the court imposed prison for each count. (R. 308:119–22.) The combined sentences on the counts equated to a 48-year prison sentence. (R. 308:119–22.) The court entered the sentence in a judgment of conviction. (R. 220.)

Postconviction. Coughlin filed a postconviction motion raising the three issues he now presents on appeal. (*Compare*

R. 242, *with* Coughlin's Br.) First, he alleged there was an insufficient factual basis to support a conviction on each count. (R. 242:10–13.) Second, he alleged ineffectiveness of counsel for not arguing sufficiency of the evidence. (R. 242:14–15.) Third, he alleged the real controversy had not been tried. (R. 242:16.)

The court scheduled a postconviction hearing. (R. 251:2.) Coughlin had sought a *Machner* hearing in his postconviction pleadings leading up to the hearing.[5] (R. 249:2; 254:7.) But Coughlin's trial counsel, Attorney Berkos, died prior to the hearing.[6] (R. 309:4.) Postconviction counsel knew months before the hearing that "trial counsel may be dealing with significant medical issues that could impact on his availability." (R. 247.) Postconviction counsel requested "some period of time" to corroborate his ineffective assistance claim after the death of Attorney Berkos. (R. 309:6.) The court held a hearing in September 2019, addressing each of Coughlin's three claims. (R. 309.)

The court denied Coughlin's motion on the first claim after finding there was "was more than enough evidence to properly convict" him. (R. 309:19–20.) The court observed the evidence showed more sexual assaults than just the charged counts such that the State "was nice in some ways of not charging more sexual assaults." (R. 309:20.) The court found "[t]here could have been more charges out of this then what was charged, even ten fold . . . in some cases." (R. 309:20.) The court concluded "the jury acted reasonably and could be

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

[6] Attorney Berkos died on August 26, 2019. *See* https://www.wiscnews.com/juneaucountystartimes/news/local/obituaries/daniel-danny-m-berkos-mauston/article_bb80e604-b4c3-5e02-9169-a3c3858d63b6.html (last visited March 26, 2020).

convinced beyond reasonable doubt by the evidence that was presented to the jury in this case." (R. 309:20.)

Next, the court denied Coughlin's second claim after observing counsel was not ineffective because there was sufficient evidence to sustain the 21 convictions. (R. 309:21.) The court observed that Coughlin's trial counsel, Attorney Berkos, was "one of the finest attorneys in the area" who was "well-versed and accomplished," having handled "over 100 jury trials and fought extremely hard for his clients." (R. 309:11.) The court noted that Attorney Berkos "was on the State Public Defenders Board for 30 years." (R. 309:11.) The court concluded that "Coughlin could not have had a better attorney." (R. 309:11–12.)

Finally, the court found "all the real issues of the controversies have been tried to the jury in this case" so it denied Coughlin's final claim. (R. 309:21.)

The court entered an order denying Coughlin's postconviction motions on September 13, 2019. (R. 312.) Thereafter, Coughlin filed a notice of appeal and commenced with this appeal. (R. 257.)

STANDARD OF REVIEW

Sufficiency of Evidence. Under the standard to review sufficiency of the evidence, this Court may not reverse a "conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

Ineffective Assistance of Counsel. This Court reviews whether a defendant sufficiently pled an ineffective assistance of counsel claim under a two-part test that presents a mixed standard of appellate review. *State v.*

Bentley, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). First, it reviews de novo as a question of law whether the defendant alleged sufficient facts for relief. *Id*. When the motion fails to satisfy pleading requirements, this Court reviews whether a circuit court erroneously exercised its discretion in denying a hearing. *Id*. at 310–11.

Real Controversy Fully Tried. An appellate court may exercise its discretionary power to independently reverse a circuit court judgment in the exceptional case where the totality of the circumstances establish that the real controversy was not fully tried. *State v. Burns*, 2011 WI 22, ¶ 23, 332 Wis. 2d 730, 798 N.W.2d 166.

ARGUMENT

I. This Court should affirm the circuit court's order and decision that found sufficient evidence for the jury to find Coughlin guilty of 21 counts of sexually assaulting three child victims.

A. Coughlin bears the heavy burden to overcome the great deference this Court gives to the jury's verdict.

This Court narrowly reviews sufficiency-of-the-evidence claims, *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 25, 681 N.W.2d 203, considering only "whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt," *Blenski v. State*, 73 Wis. 2d 685, 697, 245 N.W.2d 906 (1976). This Court "only decide[s] whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." *Poellinger*, 153 Wis. 2d at 508.

The jury, not the appellate court, weighs the evidence and draws reasonable inferences from the evidence. *State v. Hauk*, 2002 WI App 226, ¶ 12, 257 Wis. 2d 579, 652 N.W.2d

393. It is the jury's task to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Poellinger*, 153 Wis. 2d at 506. The jury decides "which evidence is credible and which is not" and may "reject evidence and testimony suggestive of innocence." *Id*. at 503.

This Court's review is "highly deferential to a jury's verdict." *State v. Beamon*, 2013 WI 47, ¶ 21, 347 Wis. 2d 559, 830 N.W.2d 681. It "must affirm the jury's finding if there is *any* reasonable hypothesis that supports the conviction." *Hauk*, 257 Wis. 2d 579, ¶ 12. In *State v. Koller*, the Wisconsin Supreme Court explained that it is not necessary that the appellate court "be convinced of the defendant's guilt but only that the court is satisfied the jury acting reasonably could be so convinced." *State v. Koller*, 87 Wis. 2d 253, 266, 274 N.W.2d 651 (1979). This requirement "is the same in either a direct or circumstantial evidence case." *Poellinger*, 153 Wis. 2d at 501. When a jury may draw multiple reasonable inferences from the evidence, this Court must adopt the inference that supports the verdict. *Id.* at 504.

Coughlin, as the "defendant challenging the sufficiency of the evidence bears a heavy burden to show the evidence could not reasonably have supported a finding of guilt." *Beamon*, 347 Wis. 2d 559, ¶ 21. To succeed, he "must show a record devoid of evidence on which a reasonable jury could convict," *State v. Sholar*, 2018 WI 53, ¶ 45, 381 Wis. 2d 560, 912 N.W.2d 89, to overcome the great deference this Court gives to the jury and its verdict, *see State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530.

B. The evidence, viewed most favorably to the State and the convictions, was sufficient to sustain the jury's guilty verdicts.

This Court's review of Coughlin's sufficiency-of-the-evidence claim on appeal is limited in scope. Coughlin alleges

there was insufficient evidence for the jury to find he had sexual contact with the victims. (Coughlin's Br. 12–19.) He does not allege there was insufficient evidence on any other element of the charged crimes. (*See id*.) So this Court's review is limited to the single element of whether Coughlin had sexual contact with the victims.

This Court reviews whether there was sufficient evidence of sexual contact by comparing the evidence to the jury instructions. *See Beamon*, 347 Wis. 2d 559, ¶ 22. Here, the court's instruction to the jury aligned with the 21 counts in the information. (*Compare* R. 136 (information), *with* 298:46–57; 305:64–69, 77–79, 83–86; 307:4–18 (jury instructions).) This Court must assume the jury abided by the instructions received. *See Poellinger*, 153 Wis. 2d at 507–08.

Regarding the first 20 counts, the court instructed the jury that the alleged sexual contact consisted of Coughlin touching the victims' penises. (R. 298:46–57; 305:64–69, 77–79; 307:4–17.) The court gave the jury this instruction twice, first during jury selection, (R. 298:46–57), and again after the close of evidence, (R. 305:64–69, 77–79). Prior to deliberation, the court instructed the jury a third time by reading to the jury each verdict form. (R. 307:4–17.) Each time it instructed the jury, the court stated that the sexual contact at issue in the first 20 counts pertained to whether Coughlin touched the victims' penises. (R. 298:46–57; 305:64–69, 77–79; 307:4–17.)

The court instructed the jury that the final relevant charge on appeal—a count of repeated sexual assault of a child—alleged Coughlin sexually assaulted John Doe 3 by having sexual contact with him on three or more occasions. (R. 305:83–86; *see* 298:57; 307:17–18.) The court instructed the jury that sexual contact included an act of Coughlin intentionally touching John Doe 3's penis. (R. 305:84.) The court also instructed the jury that sexual contact in this count additionally included any act of John Doe 3 intentionally touching Coughlin's penis "if the defendant intentionally

caused or allowed the victim to do that touching." (R. 305:85.) The court explained to the jury that it could not find Coughlin guilty unless the jurors unanimously agreed that at least three of the sexual assaults occurred during the period charged in the count. (R. 305:85.)

The jury heard sufficient evidence to support its findings of sexual contact on each of the 21 counts. Coughlin argues the evidence was insufficient because testimony about Coughlin masturbating on himself and encouraging the children to masturbate was sexual activity, not sexual contact. (*See* Coughlin's Br. 12–22.) But such an argument ignores the evidence about sexual contact that included testimony of Coughlin touching the victims' penises. Such testimony provided the jury with sufficient evidence to find Coughlin guilty.

The jury had sufficient evidence to find Coughlin guilty of touching John Doe 1's penis during each of the time periods charged in the first six counts. The earliest period began on September 1, 1989, and the latest ended on May 14, 1992. (R. 136:1–3.) Each time period spanned at least three and a half months.[7] (R. 136:1–3.) John Doe 1 testified the sexual activity occurred during a ten-year period from the mid-1980s until 1995 (*See* R. 299:122, 140, 162, 174, 198, 259), much longer than the charged periods of September 1989 to May 1992 (R. 136:1–3). John Doe 1 told the jury the sexual activity "happened all the time" and "[i]t never stopped happening," (R. 299:174), until he graduated from high school, joined the Navy, and moved out in the summer of 1995 (R. 299:148, 174, 259). The jury specifically heard that Coughlin performed oral sex on John Doe 1 on a monthly basis and stroked John Doe 1's penis even more frequently. (R. 299:162.) The jury clearly

[7] Three counts charged time periods of three and a half months and the other three counts charged time periods of four months. (R. 136:1–3.)

had sufficient evidence to conclude Coughlin touched John Doe 1's penis during the six multi-month periods charged in the first six counts when he was touching John Doe 1's penis monthly to perform oral sex and more frequently to stroke the victim's penis.

The jury had sufficient evidence to find Coughlin guilty of touching John Doe 2's penis during each of the time periods charged in the next four counts.[8] Two counts related to time periods spanning four months and two related to time periods spanning two and a half months. (R. 136:3–4.) Each charged period started on September 1 during the years of 1989 to 1992. (R. 136:3–4.) John Doe 2 confirmed that Coughlin engaged in sexual activity with him during each of the charged periods. (R. 303:28–29.) John Doe 2 described Coughlin's sexual activity with masturbation occurring "a lot of times." (R. 303:53.) The jury heard the frequency varied from about once a month to up to four times a month with John Doe 2. (R. 303:53.) John Doe 2 specifically told the jury it happened "more than once a month during the late summer and fall," which "[d]efinitely" or "usually" ended with masturbation. (R. 303:25.) John Doe explained "it happened enough times where . . . [w]e would play with ourselves, he might play with somebody, might not play with somebody." (R. 303:27.) John Doe 2 confirmed Coughlin touched his penis, which he described as Coughlin masturbating him. (R. 303:24.) The jury had sufficient evidence to draw the reasonable inference from the evidence that Coughlin touched John Doe 2's penis during each multi-month time period in the four counts.

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[8] These four counts are the seventh, eighth, ninth, and eleventh count in the information. (R. 136:3–4.) The court dismissed Count 10 based upon an earlier stipulation of the parties. (R. 284:24.)

The jury had sufficient evidence to find Coughlin guilty of touching John Doe 3's penis during each of the time periods charged in the next ten counts.[9] The earliest period began on September 1, 1989, and the latest ended on May 14, 1992. (R. 11:3; 136:4–7.) Each of the ten counts related to time periods spanning several months, typically periods of three and a half to four months in duration. (R. 11:3; 136:4–7.) John Doe 3 testified the sexual activity occurred during a ten-year period from the mid-1980s through the fall of 1994, (R. 301:25, 37–38, 94–95), much longer than the charged periods in the autumn of 1989 to the spring of 1994. (R. 11:3; 136:4–7.) John Doe 3 told the jury that masturbation with Coughlin was a common—even a weekly—occurrence. (R. 301:45, 59, 62, 84.) John Doe 3 explained Coughlin "always" asked to masturbate and that masturbating with him became "like a normal day." (R. 301:45, 64; *see also* 301:62 (masturbating "[e]very time").) John Doe 3 confirmed Coughlin touched his penis, which he described as Coughlin masturbating on him. (R. 301:41, 45.) John Doe 3 testified there were "[d]efinitely" multiple instances of sexual activity in the autumn of 1989, and activity "[a]t least once a week" throughout 1990. (R. 301:58–59.) The same behavior continued during the period of spring 1991 through spring 1994. (R. 301:58–61.) The jury had sufficient evidence to draw the reasonable inference from the evidence that Coughlin touched John Doe 3's penis during each multi-month time period in these ten counts.

Finally, the jury had sufficient evidence to find Coughlin guilty of repeatedly sexually assaulting John Doe 3

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[9] These ten counts are the 12th through the 21st counts in the information and amended information. (R. 11:3–5 (information); 136:4–7 (amended information).) This brief explained earlier, *supra* n.3, that Count 12 proceeded under the charge in the original information.

by having sexual contact with him on three or more occasions between September 1 and November 9, 1994.[10] Here, the conduct was not limited to Coughlin touching John Doe 3's penis; it also included John Doe 3 touching Coughlin's penis. (R. 305:84–85.) John Doe 3 confirmed Coughlin touched his penis, which he had described as Coughlin masturbating on him. (R. 301:41.) John Doe 3 also affirmed Coughlin had the children masturbate on him. (R. 301:45.) He further confirmed he had touched Coughlin's penis because he masturbated Coughlin. (R. 301:42.) John Doe 3 explained Coughlin always initiated the masturbation. (R. 301:40, 45–46.) John Doe 3 described masturbation with Coughlin as a weekly and even biweekly occurrence in the autumn of 1994 in the period before his birthday. (R. 301:61–62.) He confirmed Coughlin engaged in sexual activity with him at least three times during this charged time period. (R. 301:61–62.) The jury had sufficient evidence to draw the reasonable inference that Coughlin had sexual contact with John Doe 3 on three or more occasions.

This Court should affirm the court's postconviction order sustaining the 21 convictions because the evidence, viewed most favorably to the State and the convictions, was sufficient for the jury to find guilt beyond a reasonable doubt. *See Poellinger*, 153 Wis. 2d at 501. The jury reasonably returned six guilty verdicts for Coughlin sexually assaulting John Doe 1, four counts for Coughlin sexually assaulting John Doe 2, and eleven guilty verdicts for Coughlin sexually assaulting John Doe 3. As the court observed at the postconviction proceedings, "[t]here could have been more charges out of this then what was charged, even ten fold . . . in some cases," such that the State "was nice in some ways of not charging more sexual assaults." (R. 309:20.) This Court should affirm because the court properly concluded at the

[10] This count is the 22nd count in the information. (R. 136:7.)

postconviction proceeding that "the jury acted reasonably and could be convinced beyond reasonable doubt by the evidence that was presented to the jury in this case." (R. 309:20.)

C. Coughlin has not shown the evidence was so insufficient in probative value and force that as a matter of law no jury, acting reasonable, could find guilt.

Coughlin correctly states in his brief to this Court the standard of review, quoting *Poellinger*, that he cannot prevail "unless the evidence viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." (Coughlin's Br. 10 (quoting *Poellinger*, 153 Wis. 2d at 507).) He acknowledges that "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court many not overturn a verdict . . . ." (Coughlin's Br. 10 (quoting *Poellinger*, 153 Wis. 2d at 507).)

Coughlin makes three claims on appeal that the evidence was insufficient. First, he alleges that the victims were either "vague" or "very general" in their testimony such that there was "no way to determine the frequency" that he had sexual contact with the victims. (Coughlin's Br. 13, 17, 19.) Second, he states "the definition of sexual contact was expanded in the jury instructions." (Coughlin's Br. 11.) Third, he complains that the State advanced a theory that "any sexual conduct between" Coughlin and the victims was sufficient, which he claims "runs afoul of [the] defendant's right to a unanimous verdict." (Coughlin's Br. 19.)

Each of Coughlin's three claims fail. His first claim fails because the jury reasonably drew appropriate inferences from the evidence adduced at trial. *See Poellinger*, 153 Wis. 2d at 507. His second claim fails on the merits and because he

forfeited and underdeveloped his argument. And Coughlin's third claim fails because appellate review assumes the jury followed the instructions it received during the trial—not a position advanced by the State postconviction long after the trial concluded. *See id*.

On the first claim, that the victims' testimony was too vague, Coughlin incorrectly states the jury had "no way to determine the frequency" of him touching John Doe 1's penis. (*Compare* Coughlin's Br. 13, *with* R. 299:162, 174, 193.) The jury specially heard from John Doe 1 that "[a]fter he showed me how to stroke his penis, he started doing mine, stroking my penis, and . . . . he began performing oral sex on me." (R. 299:162.) When asked how often Coughin performed oral sex on John Doe 1, the victim replied that "[i]t wasn't nearly as frequent as the masturbation, but maybe once a month." (R. 299:162.) The jury heard from John Doe 1 that sexual activity "happened all the time" and "[i]t never stopped happening." (R. 299:174.) John Doe 1 estimated some type of sexual activity with Coughlin occurred at a rate of "[t]hree or so per week" during the six time periods charged. (R. 299:193.) With evidence that Coughlin performed oral sex on John Doe 1 monthly—an act that clearly involves Coughlin touching John Doe 1's penis—and masturbating with and on him more frequently and multiple times per week, there was sufficient evidence for the jury to find Coughlin guilty on the six counts that each spanned a period of at least three and a half months. (R. 136:1–3.) The evidence clearly contradicts Coughlin's claim.

Coughlin's first claim also fails with respect to each of the guilty verdicts relating to John Doe 2 and John Doe 3. As explained in the preceding subsection of this brief, the jury had sufficient evidence to find Coughlin guilty of touching John Doe 2's penis during each of the four charged time periods and guilty of touching John Doe 3's penis during the ten charged periods. *See supra* Section I.B. The preceding

subsection also shows that the jury had sufficient evidence that Coughlin had sexual contact with John Doe 3 on three or more occasions during the relevant multi-month time period to find him guilty of the last charge.

Coughlin's first claim further fails because the jury may make reasonable inferences from the evidence beyond just the direct testimony about the frequency of the sexual contact. *See Poellinger*, 153 Wis. 2d at 506. The jurors heard how Coughlin "would always be there and want us to masturbate, he would want to masturbate us." (R. 301:45.) The jurors heard about Coughlin's fixation on the victims' penises through his acts of "sack tapping," "grubbing," measuring the children's penises, and inserting the children's penises into a pump to enlarge them. (R. 299:152–54, 165–66, 289; 301:47–49, 87–88; 303:17–19, 23.) The jurors may reasonably infer from these facts—in tandem with the victims' other direct testimony—the frequency of Coughlin touching the victims' penises and engaging in sexual contact. *See Poellinger*, 153 Wis. 2d at 506.

Coughlin's second claim is that the court "expanded" the definition of sexual contact in the jury instructions. (Coughlin's Br. 11.) He opens the argument on this claim by misrepresenting that "the only specific sexual conduct alleged against [the] defendant . . . [in] the information, was that *he had touched the victims' penises* . . . [and] this was the only sexual conduct alleged in the verdict forms for the relevant counts." (Coughlin's Br. 12 (emphasis added).) He ignores that the last of these counts did *not* limit the sexual contact to Coughlin touching John Doe 3's penis. That count alleged sexual assault without any limitation to *Coughlin's* touching *John Doe 3's* penis.[11] (R. 136:7.) At the close of the evidence, the court instructed the jury that the last count "requires the

[11] This is Count 22 in the information (R. 136:7), identified in this brief as the 21st relevant count, *supra* n.1.

State to prove that [the] defendant had sexual contact" with John Doe 3, which is *either* "the intentional touching of the penis of [John Doe 3] by the defendant" *or* "an intentional touching by the victim of the penis of Donald P. Coughlin, if the defendant intentionally caused or allowed the victim to do that touching." (R. 305:84–85.) Neither the court's reading of the verdicts nor the verdict returned limited sexual contact to acts of Coughlin touching John Doe 3's penis. (R. 199:21; 307:17–18.) The record conclusively shows Coughlin's representation of this count is plainly wrong.

Ultimately, Coughlin's second claim fails because he forfeited it in the circuit court. Coughlin alleges that the court expanded the definition of sexual contact during the jury instructions. (Coughlin's Br. 11 (R. 198:9, 16–17 (jury instructions); 305:70–71, 80–81 (instruction to jury).) But the record does not show that he objected to these instructions. (R. 305:7, 99–100.) And Coughlin never states in his brief that he objected to them. (*See* Coughlin's Br.) To the contrary, at a postconviction proceeding, Coughlin stated that he agreed with the definition the court provided to the jury. (R. 309:8.) So Coughlin forfeited this claim by failing to contemporaneously object to the court's instruction. *State v. McKellips*, 2016 WI 51, ¶ 47, 369 Wis. 2d 437, 881 N.W.2d 258. Even had Coughlin objected, he abandoned any claim of error by the postconviction hearing. *See A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 491–94, 588 N.W.2d 285 (Ct. App. 1998) (abandonment analysis).

Coughlin also under develops this second claim on appeal, presenting it as a factual summary—not as argument—in one and a half pages of his brief under the heading "[r]elevant facts." (*Compare* Coughlin's Br. 11–12, *with Bence v. Spinato*, 196 Wis. 2d 398, 414, 538 N.W.2d 614 (Ct. App. 1995).) Indeed, nowhere does Coughlin clearly explain how the jury instructions were wrong or how they were wrongfully "expanded." This Court does not generally

consider undeveloped and inadequately briefed claims. *Bence*, 196 Wis. 2d at 414 & n.4.

Moreover, Coughlin's second claim fails on the merits under review of the record in its totality. *See State v. Turner*, 114 Wis. 2d 544, 552, 339 N.W.2d 134 (Ct. App. 1983) (conviction may be valid even with undesirable jury instruction). He draws this Court to a few pages of transcript pertaining to instructions without discussing the multiple times the court instructed the jury and the verdict forms identified that the sexual contact at issue in the first 20 counts related to Coughlin touching the victims' penises. (R. 199:1–20 (verdict forms); 298:46–57 (jury instructions); 305:64–69, 77–79, 83–86 (jury instructions); 307:4–18 (jury instructions).) Even assuming an error, it clearly had no bearing as to the four counts against John Doe 2 because this victim testified that he never touched Coughlin's penis. (R. 303:23–24.) And any alleged error as to John Doe 1 and John Doe 3 was harmless because the instructions in total properly instructed the jury and each of these victims provided sufficient evidence that Coughlin had repeatedly touched their penises. *See supra* Section I.B; *see also Beamon*, 347 Wis. 2d 559, ¶ 19 (erroneous instructions under harmless error review).[12]

Coughlin's third claim fails on appeal because sufficiency of the evidence review assumes the jury abided by the instructions it received. *Poellinger*, 153 Wis. 2d at 507. Coughlin alleges that a broad definition of "sexual contact" suggested by the State "runs afoul of [the] defendant's right to a unanimous verdict." (Coughlin's Br. 19; *see id*. at 20–21 (quoting *State v. Lomagro*, 113 Wis. 2d 582, 335 N.W.2d 583 (1983)). The State proffered such instructional language at trial, but the court declined to give such a broad definition to

[12] The State preserves further argument relating to jury instructions. *See infra* n.13.

the jury. (R. 305:4–7.) And during the postconviction proceedings the court declined the State's request to consider the sufficiency of the evidence under its broad definition of "sexual contact."[13] (R. 309:8–9.) So the jury was not instructed and the court did not view the sufficiency of the evidence under the State's broad definition. The only definition of sexual contact the jury received and the court considered was a narrow definition. (*See* R. 305:4–7; 309:8–9.) Coughlin had no objection to this narrow definition, stating at a postconviction proceeding that "the trial court was correct in limiting its definition of sexual assault as it did in this case." (R. 309:8.)

Coughlin's third claim must fail because appellate review assumes the jury abided by the narrow definition of "sexual contact" it received in its jury instructions, which Coughlin conceded was correct. *See Poellinger*, 153 Wis. 2d at 507. The State's failed attempt for a broader definition of sexual contact is irrelevant to the sufficiency of the evidence inquiry.

Coughlin has not shown that the evidence was so insufficient in probative value and force that as a matter of law no reasonable jury could find guilt. He bears the heavy burden to overcome the great deference this Court gives to the jury's verdict. He cannot satisfy his burden because the evidence, viewed most favorably to the State and the convictions, was sufficient to sustain the jury's guilty verdicts. This Court should affirm the court's postconviction order after it concluded the evidence sufficient for the jury to find

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[13] The State preserves further argument relating to its requested broader definition of sexual contact should this case proceed to the Wisconsin Supreme Court. *See* Wis. Stat. § (Rule) 809.62(1r) (criteria for review). But here, discussion is unnecessary given the function of this Court and assumption jurors abide by the instructions given. *See State v. Schumacher*, 144 Wis. 2d 388, 407, 424 N.W.2d 672 (1988) (error-correction).

Coughlin guilty of 21 counts for sexually assaulting the three child victims.

II. This Court should affirm the circuit court's order and decision denying Coughlin's ineffective assistance of counsel claim.

A. Coughlin bears the burden to prove with corroborating evidence that trial counsel was ineffective.

A defendant has the burden to prove "both that his trial counsel's conduct was deficient and that the deficient performance prejudiced his defense." *State v. Moats*, 156 Wis. 2d 74, 100–01, 457 N.W.2d 299 (1990) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). This Court need not consider both prongs when the defendant fails to prove by clear and convincing evidence either prong. *State v. Breitzman*, 2017 WI 100, ¶ 37, 378 Wis. 2d 431, 904 N.W.2d 93 (may consider one prong when dispositive); *State v. Lukasik*, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983) (clear and convincing burden).

An appellate court presumes that trial "counsel had a reasonable basis for his actions, and the defendant cannot by his own words rebut this presumption." *Lukasik*, 115 Wis. 2d at 140. A defendant may overcome the presumption with evidence that corroborates the ineffective assistance claim. *See State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 42 n.28, 389 Wis. 2d 516, 936 N.W.2d 587.

A defendant's postconviction motion should sufficiently allege facts to show trial counsel was ineffective and the defendant is entitled to relief. *Bentley*, 201 Wis. 2d at 310. When trial counsel dies prior to a postconviction hearing, the defendant must support his ineffective assistance allegation with corroborating evidence, such as "letters from the attorney to the client, transcripts of statements made by the attorney or any other tangible evidence which would show the

attorney's ineffective representation." *Lukasik*, 115 Wis. 2d at 140.

A circuit court may exercise discretion to deny a postconviction motion without an evidentiary hearing. *Bentley*, 201 Wis. 2d at 310–11. A circuit court may base its denial on a defendant's failure to raise a question of fact, a defendant presenting only conclusory allegations, or the record conclusively demonstrating the defendant is not entitled to relief. *Id*. (citing *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)).

B. The circuit court properly exercised its discretion denying Coughlin's ineffective claim because he only made conclusory and uncorroborated claims.

This Court's review is limited to whether the circuit court erroneously exercised its discretion when it denied Coughlin's ineffective assistance claim without a further hearing. *See Bentley*, 201 Wis. 2d at 310 (standard of review). This is the second part of the two-part *Bentley* test for an evidentiary hearing. *Id*. The first part—whether Coughlin sufficiently pled his ineffective assistance claim—is not in dispute. Coughlin conceded at the postconviction hearing that he did not provide evidence to corroborate his ineffective assistance claim required upon the death of Attorney Berkos. (R. 309:4–6 (citing *Lukasik*, 115 Wis. 2d 134).) And Coughlin makes no attempt on appeal to provide the required corroborating evidence, relying instead on his conclusory allegation that the State failed to meet its burden of proof and that Attorney Berkos failed to point that out to the jury. (*See* Coughlin's Br. 22–24.) So the sole issue is the second part of the test relating to whether the circuit court erroneously exercised its discretion denying a further hearing on the claim.

Here, the circuit court properly exercised its discretion for two reasons: (1) the record conclusively demonstrated Coughlin was not entitled to relief; and (2) Coughlin's motion presented only a conclusory allegation.

First, the record conclusively showed Coughlin was not entitled to relief because he failed to present the corroborating evidence required in *Lukasik*, 115 Wis. 2d 134.[14] Coughlin's trial counsel, Attorney Berkos, died prior to the postconviction hearing. (R. 309:4.) The record shows Coughlin knew months before the hearing that "trial counsel may be dealing with significant medical issues that could impact on his availability." (R. 247.) The record shows Coughlin conceded at the postconviction hearing that he did not provide evidence to corroborate his ineffective assistance claim. (R. 309:4–6.) Although postconviction counsel requested "some period of time" to provide corroboration, (R. 309:6), Coughlin abandoned his opportunity to provide corroboration by never alleging the existence of any such evidence in his brief to this Court. *See A.O. Smith Corp.*, 222 Wis. 2d at 491 (claim abandonment).

Second, Coughlin's ineffectiveness claim was conclusory and the record showed he was not entitled to relief. Here, Coughlin made a conclusory statement that Attorney Berkos "may have been able to convince the trial court to dismiss some counts before the counts even went to the jury." (R. 242:15.) Specifically, he alleged Attorney Berkos "could have effectively argued that for each of the time periods the State had failed to prove beyond a reasonable doubt that the victims had 'sexual contact', with [the] defendant as opposed to

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[14] This Court may affirm on this ground even though the circuit court did not address whether the ineffective assistance claim was sufficiently pled under *State v. Lukasik*, 115 Wis. 2d 134, 340 N.W.2d 62 (Ct. App. 1983). *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987) (appellate court may affirm on alternative ground).

engaging in 'sexual activity' in [the] defendant's presence." (R. 242:15.) Coughlin conceded that his dismissal theory only pertained to counts that had a "factual basis" of sexual activity. (R. 242:14.) It necessarily did not pertain to any sexual-contact count that (allegedly) lacked sufficient evidence because the remedy there would be acquittal. *State v. Miller*, 2009 WI App 111, ¶ 44, 320 Wis. 2d 724, 772 N.W.2d 188. Coughlin's suggestion that the circuit court would have dismissed any counts on his sexual-activity theory was pure conjecture. He also failed to sufficiently explain why the jury would have acquitted, despite the victims providing sufficient evidence that the jury clearly found credible. The circuit court was properly unconvinced that such a record entitled Coughlin to relief. (R. 309:20–21.)

This Court should conclude the circuit court properly exercised its discretion. The circuit court found Coughlin's presentation unpersuasive when he summarily alleged counsel was ineffective despite the presence of sufficient evidence. (R. 309:20–21.) The circuit court concluded that Coughlin was not entitled to relief. (R. 309:20–21.) The circuit court did not need to even address Coughlin's failure to provide corroborating evidence. But Coughlin's failure to provide such evidence is an independent basis for this Court to affirm the circuit court's denial of Coughlin's postconviction motion. *See supra* n.14. Under the deferential erroneous exercise of discretion standard, this Court should affirm.

C. Coughlin failed to provide corroborating evidence and, thus, has not met his burden so an affirmance—not a remand—is the appropriate outcome.

In Coughlin's brief to this Court, he identifies some relevant legal principles while missing other critical points of law. He properly identifies that he has the burden to prove both that Attorney Berkos was deficient and the deficiency prejudiced him. (Coughlin's Br. 22 (quoting *State v. Thiel*,

2003 WI 111, ¶ 11, 264 Wis. 2d 571, 665 N.W.2d 305).) And he acknowledges the highly deferential presumption courts apply when evaluating the performance of trial counsel. (Coughlin's Br. 22.) But Coughlin's brief contains two critical omissions. Despite citing to *Lukasik* in the postconviction proceeding, (R. 309:4–6 (citing *Lukasik*, 115 Wis. 2d 134)), his brief to this Court is silent on the requirement to provide corroboration evidence, (Coughlin's Br. 22–24). And Coughlin fails to understand this Court's role when reviewing the action of a circuit court.

Coughlin's argument to this Court on his ineffectiveness claim glaringly lacks any discussion of his requirement to provide corroborating evidence required in *Lukasik*, 115 Wis. 2d 134. He certainly knew about this requirement. (R. 309:4–6 (citing *Lukasik*, 115 Wis. 2d 134).) But he makes no attempt on appeal to allege that any corroborating evidence exists. (Coughlin's Br. 22–24.).

Coughlin fails to identify this Court's standard of review resulting in misstating the appropriate remedy on his ineffective assistance claim. (Coughlin's Br. 22–24 (no standard of review), *with id.* 25 (remedy).) He does not understand that this Court's review concerns whether the circuit court erroneously exercised its discretion when it denied Coughlin's ineffective assistance claim without a further hearing. *See Bentley*, 201 Wis. 2d at 310 (standard of review). He believes this Court can order "a new trial based on ineffective assistance of counsel." (Coughlin's Br. 25.) But, at most, this Court could remand for a further hearing on Coughlin's ineffective assistance claim. But at that point his claim would fail without corroboration evidence. *Compare Bentley*, 201 Wis. 2d at 310 (standard of review), *with Lukasik*, 115 Wis. 2d at 140 (corroboration).

This Court should affirm the circuit court's reasonable exercise of discretion. Here, a remand is not appropriate because Coughlin has not satisfied his burden on his

ineffectiveness claim. Attorney Berkos was a "well-versed and accomplished" attorney who handled "over 100 jury trials and fought extremely hard for his clients," while also serving "on the State Public Defenders Board for 30 years." (R. 309:11.) It is inappropriate for Coughlin "on appeal to attack the competency of trial counsel on an unsupported assumption that his conduct at trial was not the result of carefully reasoned professional judgment." *State v. Simmons*, 57 Wis. 2d 285, 297, 203 N.W.2d 887 (1973).

III. This Court should affirm the circuit court's order that found the real controversy was fully tried because this is not the exceptional case for discretionary reversal.

An appellate court exercises its discretionary-reversal powers only in the exceptional case. *Burns*, 332 Wis. 2d 730, ¶ 25. An appellate court exercises this formidable power "sparingly and with great caution." *State v. Watkins*, 2002 WI 101, ¶ 79, 255 Wis. 2d 265, 647 N.W.2d 244. Only a few situations warrant such an extreme remedy, such as when the jury did not hear important testimony bearing on a material issue, the jury heard testimony or received evidence improperly admitted that materially obscured a crucial issue, or an erroneous instruction prevented the real controversy from being tried. *Id*. In determining whether the real controversy was fully tried, an appellate court analyzes the totality of the circumstances at trial. *Id*.

A defendant has the burden to persuade an appellate court to exercise its discretionary reversal power under Wis. Stat. § 752.35. *See State v. Henning*, 2013 WI App 15, ¶¶ 22–23, 346 Wis. 2d 246, 828 N.W.2d 235. The defendant must overcome the formidable threshold that the alleged failure to try the real controversy resulted in a denial of due process. *See id*. ¶¶ 23–24.

Here, Coughlin has not satisfied his burden of persuasion because none of the limited situations exist to warrant the extreme remedy of discretionary reversal under Wis. Stat. § 752.35. He alleges neither the absence of critical testimony nor the presence of improper testimony. (*See* Coughlin's Br. 24–25.) And his claim of a jury instruction error fails upon review of the totality of the record. (Coughlin's Br. 25.)

Coughlin fails to establish the absence or presence of any specific evidence or testimony that rises to a due process violation. He makes no claim to this Court the jury did not hear important testimony bearing on a material issue. (*See* Coughlin's Br. 24–25.) Instead, Coughlin makes a general statement that the jury heard about "sexual activity" and alleges the State used it interchangeably with "sexual contact." (Coughlin's Br. 25.) But Coughlin makes no claim any specific sexual activity evidence was improperly admitted. (Coughlin's Br. 25.) And had he made such a claim, it would fail because evidence of Coughlin grooming the children with "sack tapping" and "grubbing" as well as normalizing masturbation in the presence of the child victims is admissible evidence to provide context and necessary background to understand his relationship with the victims. *See State v. Hunt*, 2003 WI 81, ¶ 58, 263 Wis. 2d 1, 666 N.W.2d 771 (context evidence admissible). His implicit assumption, that the jury inappropriately based its sexual-contact verdicts on incidents of sexual activity without contact, is speculative and unconvincing.

Coughlin's second alleged error—relating to a jury instruction—fails when reviewing the totality of the record. The record shows Coughlin made no objection to this jury instruction (R. 305:7, 99–100); to the contrary, at the postconviction hearing Coughlin's counsel stated: "the trial court was correct in limiting its definition of sexual assault as it did in this case." (R. 309:8.) And, as explained earlier in this

brief, *supra* Section I.C., the totality of the record shows multiple times the court instructed the jury and the verdict forms identified that the sexual contact at issue in the first 20 counts related to Coughlin touching the victims' penises. (R. 199:1–20 (verdict forms); 298:46–57 (jury instructions); 305:64–69, 77–79, 83–86 (jury instructions); 307:4–18 (jury instructions).)

This Court should affirm the circuit court's postconviction order and conclude that the real controversy was fully tried. The jury heard properly admitted relevant and probative testimony about Coughlin's sexual activity with the child victims. *See Hunt*, 263 Wis. 2d 1, ¶ 58. The jury heard sufficient evidence to find Coughlin guilty of 20 counts for touching the children's penises and one count for having repeated sexual contact with John Doe 3. *See supra* Section I.B. The record shows Coughlin made no objection to the jury instruction at the postconviction hearing. (R. 309:8.) And the totality of the record shows the court thoroughly and properly instructed the jury on each count and verdict form. (R. 199:1–20 (verdict forms); 298:46–57 (jury instructions); 305:64–69, 77–79, 83–86 (jury instructions); 307:4–18 (jury instructions).) This is not the exceptional case for this Court to reverse.

CONCLUSION

This Court should affirm the circuit court's September 13, 2019 order denying Coughlin's postconviction motions that presented the same three claims at issue in this appeal.

Dated this 31st day of March 2020.

Respectfully submitted,

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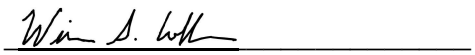
CERTIFICATION

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 9,997 words.

Dated this 31st day of March 2020.



WINN S. COLLINS
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.

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Dated this 31st day of March 2020.

WINN S. COLLINS
Assistant Attorney General