STATE OF WISCONSIN

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

DISTRICT I

Case No. 2019AP2182-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD LEE GILBERT,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS R. CIMPL (JUDGMENT) AND STEPHANIE ROTHSTEIN (ORDER), PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED

A jury found Ronald Lee Gilbert guilty of trafficking a child, second-degree sexual assault of a child, and intentional child abuse. Gilbert moved for postconviction relief, arguing his trial counsel was ineffective (1) for failing to impeach a rebuttal witness's testimony about his cellphone's location, (2) for failing to impeach the child and a cooperating co-defendant with their prior statements, and (3) for making comments during closing argument that effectively conceded his guilt. After a previous appeal, this Court remanded Gilbert's case with directions to conduct a *Machner*[1] hearing. *State v. Gilbert (Gilbert I)*, No. 2016AP1852-CR, 2018 WL 3202044, ¶¶ 34–37, 40 (Wis. Ct. App. June 26, 2018). Following the hearing, the circuit court denied Gilbert's postconviction motion a second time.

Did Gilbert prove both that his counsel's performance was deficient and that his counsel's performance prejudiced him?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication as this case involves the application of settled legal principles guiding claims of ineffective assistance of counsel to the facts of this case. Gilbert believes that publication is appropriate because it gives this Court the opportunity to clarify the scope of lay testimony regarding cellphone tracking. (Gilbert's Br. 1.) Gilbert's case provides a

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

poor vehicle for clarifying the law on this issue because counsel did not object to this testimony and this Court is limited to resolving this claim through the lens of ineffective assistance of counsel.

INTRODUCTION

This Court should affirm the circuit court's order denying Gilbert's postconviction motion and uphold his convictions. Counsel's decisions were objectively reasonable. And Gilbert cannot prove that any of the alleged deficiencies were singly or cumulatively prejudicial, based in part on his admissions to his co-actor during a one-party consent call and his testimony that he profited from another woman's prostitution.

STATEMENT OF THE CASE

I. Procedural history

In 2012, a jury found Ronald Lee Gilbert guilty of trafficking a child, JDE, a fourteen-year-old girl, contrary to Wis. Stat. § 948.051(1), second-degree sexual assault of JDE, contrary to Wis. Stat. § 948.02(2), and physical abuse of JDE by intentional causation of bodily harm, contrary to Wis. Stat. § 948.03(2)(b). (R.1:1; 36:1.) The circuit court sentenced Gilbert to a 22-year term of imprisonment. (R.51.)

Gilbert moved for postconviction relief, seeking a new trial on several different grounds, including numerous ineffective assistance of counsel claims. (R.60:9–14.) Relevant to this appeal were Gilbert's claims that his counsel was ineffective because counsel failed to (1) object on *Daubert* grounds to a detective's testimony during rebuttal about Gilbert's cellphone's location; (2) impeach JDE; and (3) present a coherent defense in closing. (R.60:13–14.) Based on its assessment of testimony from a defense expert and a police officer about cellphone location technology, the circuit

court determined counsel's performance could not have been deficient and denied Gilbert's postconviction motion without a *Machner* hearing. (R.82:5; 109:3–4.)

This Court allowed Gilbert to file a supplemental postconviction motion in which Gilbert raised additional ineffective assistance of counsel claims, including two relevant to this appeal: (1) counsel failed to impeach JDE and Pratchett with prior inconsistent statements; and (2) counsel referred to Gilbert as a "scumbag" during closing argument. (R.120:1–2; 127:1.) The court denied Gilbert's supplemental motion without a hearing, determining that additional impeachment of either witness would not have altered the trial's outcome and that counsel was referring to other people, not Gilbert, when he said "scumbag." (R.139:5, 8.)

On appeal, this Court determined that Gilbert alleged sufficient facts in his original and supplemental postconviction motions to warrant granting him an evidentiary hearing on four issues, including (1) counsel's failure to object to the detective's erroneous testimony placing Gilbert at the hotel when he allegedly trafficked JDE; (2) counsel's alleged failure to obtain pretrial discovery and review it before trial; (3) counsel's failure to adequately impeach JDE's and Pratchett's testimony with prior inconsistent statements; and (4) counsel's comments about his client's credibility during closing argument. *Gilbert I*, 2018 WL 3202044, ¶¶ 34–37, 40.

On remand, Gilbert's counsel testified at the *Machner* hearing. (R.204:8.) Gilbert conceded that counsel had obtained and reviewed the relevant discovery. (R.204:96.) The circuit court determined that counsel was not ineffective with respect to the remaining ineffective assistance claims that this Court directed the circuit court to address on remand. (R.204:119–28.)

II. Jury trial testimony

Expert testimony about prostitution. Detective Lynda Stott testified about human trafficking, specifically, the pimp and prostitute subculture known as "The Game." (R.187:38–40.) Stott explained the concept of "choosing up," or changing pimps. (R.187:41.) A "stable" means a situation when a pimp is controlling several girls. (R.187:42.) Pimps will voluntarily sell a girl to another pimp if the girl is causing a problem within the stable. (R.187:42–43.) A pimp often wants the girls in his stable to refer to him as "Daddy." (R.187:44.) The phrase "she's down" refers to a girl who is ready to engage in prostitution dates. (R.187:45.) A pimp may be referred to as a "Mac" or "Mack." (R.187:44–45; 189:44.) Stott described how pimps and traffickers use the internet, including chat lines and websites like "Back Page," to recruit girls and promote prostitution. (R.187:61–63.) Stott explained that persons engaged in prostitution use hotel rooms to avoid detection by law enforcement and to avoid being robbed. (R.187:64–65.)

Witness Brandon Pratchett's relationship to Gilbert and his plea deal. Pratchett used the street name "Woadie-Mac." (R.74:1; 189:35.) Pratchett had known Gilbert since middle school. (R.188:104.) Pratchett referred to Gilbert by nickname, T-Mac, and said that Mac is a term for pimp. (R.189:43–44.) Like Gilbert, Pratchett was also charged with sex offenses against JDE. Under a plea agreement that required Pratchett's cooperation in Gilbert's prosecution, Pratchett pleaded guilty to soliciting a child for prostitution, and three other felonies were dismissed and read in. (R.188:103; 190:12–13.)

Pratchett testified that approximately two months before the incident involving JDE, Gilbert visited Pratchett who told Gilbert how the website "Back Page" worked. (R.189:31.) Pratchett had previously posted prostitution-related ads on Back Page. (R.188:109.) Pratchett explained

that Gilbert was involved with another woman and prostitution. (R.189:31.) Gilbert talked to Pratchett about how to engage in prostitution. (R.189:31–32.)

Gilbert testified that he was aware of Pratchett's involvement with prostitution. (R.190:59.) Gilbert acknowledged trying to be a pimp. (R.190:59–60.) Gilbert claimed that "years ago" Pratchett tried to show him how to get and put out girls, including through Back Page, but Gilbert denied using the site. (R.190:60.) Gilbert stated that his child's mother prostituted herself a few times when times were hard and that they split the money. (R.190:61–62.)

JDE's initial contacts with Gilbert. JDE first met Gilbert through a hotline in January 2012 when she was 14 years old and lived with her mother, SE, in Racine. (R.188:4, 6–7; 190:15.)

Gilbert identified himself to JDE with the nickname "P." (R.188:8.) JDE and Gilbert talked about going out to eat and to the mall. Gilbert also told JDE that he would show her around. (R.188:7.) Gilbert never mentioned prostitution when he picked her up in Racine and took her to Milwaukee. (R.188:72.) JDE claimed that she told Gilbert that she was only 14. (R.188:69.)

Gilbert testified that he had a "chat line" conversation with JDE on the morning of January 7, 2012. (R.190:36, 51.) They exchanged pictures. JDE asked Gilbert to come to Racine and pick her up. (R.190:36.) Gilbert went to Racine. (R.190:38.) According to Gilbert, JDE and JDE's mother both told him that JDE was 19 years old. (R.190:39, 52.) Gilbert denied that he was looking for sex when he spoke to JDE on the chat line. (R.190:52–53.)

JDE recalled that when Gilbert took her to Milwaukee, she went to an Econo Lodge and his house and believed that Gilbert first took her to his house in Milwaukee. (R.188:9–10.)

JDE said that Gilbert took her to the hotel twice on the same day. (R.188:27.)

Gilbert stipulated that on January 7, 2012, he picked up JDE in Racine and took her to an Econo Lodge on South 13th Street in Milwaukee County. (R.190:14.) Gilbert testified that he denied ever speaking to JDE about sex. (R.190:42.) When they were in the car, Gilbert claims that JDE talked about smoking weed. (R.190:39, 54.)

JDE and Gilbert's first visit to the Econo Lodge. JDE recalled stopping at a hotel. Pratchett ("Woadie-Mac") was there with his "baby mama."[2] (R.188:27–28.) JDE heard Gilbert say that he wanted to get on "Back Page." (R.188:27.) Gilbert and JDE left the Econo Lodge, spending no more than five minutes there. (R.188:29.) Gilbert told JDE to tell Pratchett that she was 19. (R.188:71.) When JDE first came to the hotel, Pratchett heard JDE state that she was 19 years old. (R.189:54.)

Pratchett testified that on January 7, 2012, he received a telephone call from Gilbert. (R.188:105.) Pratchett told Gilbert that he was at the Econo Lodge at 13th Street and College Avenue with Tisha. (R.188:106–07.) When Gilbert and JDE arrived at the hotel (R.190:40, 41, 45), Gilbert asked Pratchett to post a prostitution-related posting related to JDE on "Back Page" (R.188:109–10).[3]

According to Gilbert, after he used the bathroom (R.190:42), he indicated that he wanted to eat, telling JDE,

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[2] Natisha Shannon is Pratchett's girlfriend and his son's mother. (R.188:106; 189:36.) JDE knew her as "Tisha," but referred to her as Pratchett's "baby mama." (R.188:43.)

[3] JDE identified Exhibit 4 as the "Back Page" posting used to promote her for prostitution. (R.188:47.) JDE is not the person in the photograph. (R.188:48.) JDE stated that Pratchett and Tisha came up with the words for the post and that Gilbert told them to post it. (R.188:48, 69–70.)

"let's go" (R.190:44). When JDE did not want to go, Gilbert left the hotel and went home and napped. (R.190:47–48.) He testified that he did not see JDE after that encounter and had no sexual intercourse or any physical contact with her. (R.190:45.)

In contrast, Pratchett testified that Gilbert and JDE left the hotel together. (R.188:110.) After they left, Pratchett called Gilbert and asked him what his intentions were with JDE. Gilbert told Pratchett that he was going to try to "make some money with her," and if he was not successful, he would call Pratchett back. (R.188:111.)

JDE testified that she left with Gilbert but that he did not tell her he was taking her to his house. (R.188:13.) Once there, they sat on a bed in the living room. (R.188:12.) JDE explained that after she had mouth-to-penis sex with Gilbert, they then had "penis-to-vagina" sex. (R.188:11, 13–14.) Gilbert ejaculated after he removed his penis from JDE's vagina. (R.188:15.)

JDE stated that Gilbert then took her to his friend's house in Milwaukee. (R.188:15.) While there, Gilbert told JDE to get on the "hot line" and "to get some money." (R.188:17.) JDE understood that Gilbert wanted her to go on the "hot line" to see if someone was willing to pay her for sex. (R.188:18.) Gilbert told JDE to use the words "pay to play" and JDE understood this to mean that Gilbert was asking her to engage in prostitution activity. (R.188:19.) JDE did not actually talk to anyone when she was on the chat line. (R.188:19.) After JDE got off the line, JDE and Gilbert had oral sex. (R.188:19–20.) Gilbert's friend then entered the living room. (R.188:20.) JDE went with the friend to a backroom. The friend began to pull down his pants. Gilbert had told JDE to charge $60, and JDE asked the friend if he had $60. The friend did not. He pulled up his pants and walked out. (R.188:21.) When Gilbert and JDE left Gilbert's friend's house, JDE told him that she wanted to go home.

(R.188:40.) Gilbert told her that the only way that she could go home was if she walked. (R.188:40.)

JDE and Gilbert then went to Gilbert's sister's house in Milwaukee. (R.188:21–22.) Gilbert told JDE to use the phone and call the chat line. (R.188:22.) JDE complied because Gilbert told her to and she was scared. (R.188:23.) JDE stated that she was cut off the chat line when she used the words "paying to play." (R.188:24.) JDE stated that they then returned to the hotel. (R.188:26.)

Gilbert's and JDE's second visit to the Econo Lodge. According to JDE, when Gilbert and JDE returned to the hotel, Pratchett came outside, Gilbert and Pratchett shook hands, and Gilbert told JDE to go to the hotel room. (R.188:30–31.) JDE claimed she saw Pratchett give Gilbert money and a silver piece of car stereo equipment. (*Id.*) JDE later realized that Pratchett had purchased her from Gilbert. (R.188:58.)

Pratchett testified that Gilbert returned to the hotel with JDE. (R.188:112–13.) When Gilbert arrived at the hotel, he called Pratchett and asked him to come outside. (R.188:117.) Gilbert proposed giving up JDE to Pratchett (R.188:113–14), and Pratchett paid Gilbert one hundred dollars and an amplifier for JDE (R.188:113–15). Gilbert told Pratchett that he had had "sexual contact" with JDE and "that she was good." (R.188:115.) Pratchett claimed that JDE had gone to the room when the exchange occurred inside Gilbert's car (R.188:117–18), but later said that JDE was outside the car but did not see the exchange (R.189:47). Gilbert denied that Pratchett paid him money and an amplifier for JDE. (R.190:46–47.)

JDE testified that she never completed a prostitution date for Gilbert, but that she had five or six prostitution-related dates when she was with Pratchett, who kept all the money. (R.188:38.) Pratchett acknowledged that JDE "turned

dates" or exchanged sex for money when she was with him. (R.188:119.) Pratchett stated that JDE gave him the money. (R.188:119.) Pratchett explained that he showed JDE how "Back Page" worked, but that JDE "already knew things" about prostitution. (R.188:119.) Pratchett identified Exhibit 4 as the Back Page advertisement posted for JDE. (R.189:17; 200:1.) Pratchett also identified a photograph of a piece of paper with the prices that JDE was to charge for sex. (R.187:54; 189:42–43.)

Gilbert's subsequent confrontation with JDE and Pratchett at the Econo Lodge. JDE testified that approximately three days later, as a "date" was leaving the room, Gilbert showed up at the hotel. (R.188:32, 37.) Gilbert was "drunk" and had a clear liquor bottle in his hand. (R.188:33, 58–59.) Gilbert grabbed her, Pratchett entered and argued with Gilbert, and Gilbert then struck JDE in the face. (R.188:33.) When JDE ran to a door, Gilbert chased her and punched her. JDE balled up in the corner and covered her head with her arms. (*Id.*) Pratchett told Gilbert to stop. (*Id.*) JDE said that the left side of her face hurt where Gilbert struck her. (R.188:34.) Pratchett took JDE outside, and Gilbert said "fuck that bitch" as they left. (R.188:35.)

JDE and Pratchett left with Pratchett's friend to buy cigarettes at a gas station. (R.188:36–37.) Gilbert followed them to the gas station and back to the hotel (R.188:37) but then left the area (R.188:37).

Pratchett testified that the encounter happened after Gilbert called him and said he had a client who wanted to spend $800 on JDE. Gilbert offered to split the earnings. (R.189:21.) Gilbert then came to the hotel room unannounced. (R.189:16–17, 18.) Pratchett explained that when he returned to the room from the hotel lobby, JDE and Gilbert were inside. (R.189:18.) Gilbert hit JDE a couple times, punching her with a closed fist and grabbing her by the back of her neck. (R.189:18–19.) Pratchett stopped Gilbert as he was about to

kick JDE, who was balled up on the floor. (R.189:19.) Pratchett and JDE left the hotel room and Gilbert followed, calling JDE names. (R.189:20, 22.) Pratchett and JDE got into Pratchett's friend's car. Gilbert followed them to the gas station and back to the hotel. (R.189:25.) Pratchett did not see Gilbert after that time. (R.189:26.) Pratchett later told JDE that he had paid Gilbert cash and merchandise in exchange for her. (R.189:27.)

JDE's report to law enforcement. On the fifth or sixth day, JDE left the room and tried unsuccessfully to get a ride from friends. (R.188:44.) A hotel employee gave her a ride to the bus stop. (R.188:45.) A woman stopped to help JDE and called the police. (R.188:45.)

Pratchett's recorded call with Gilbert. Following his arrest and before entering into a plea agreement, Pratchett agreed to make a one-party consent recording of Gilbert. (R.188:89; 189:35–36; Ex. 8.)[4] Pratchett called Gilbert at 414-519-8163 in Detective Stott's presence. (R.189:34; Ex. 8:5m30s.)

Pratchett referred to himself as "Woadie-Mac" and Gilbert as "T-Mac" during the call. (R.74:1; 189:35.) Pratchett told Gilbert that "the little bitch" that he "dropped off" was "only 14." (R.74:1.) Gilbert responded, "She's 14? What you mean?" (R.74:1.) He later stated, "that bitch ain't no . . . 14, bro (inaudible), they probably just want they ho back home . . . I verified all that before I even came and left from Racine.

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[4] Exhibit 8 is a DVD that includes several video files of Stott's interview with Pratchett. On opening a DVD folder labeled PAB646IS120113-102011, several files appear in the folder, including an audio/video file labelled "x1-20120113103011 _PAB646IS120113-03011_000004." The call appears at approximately 6 minutes and 8 seconds and terminates at 9 minutes and 19 seconds. (R.189:34–35.) A transcript of this call as well as a second call the jury did not hear is part of the record. (R.74; 189:57–58.)

I wouldn't put a ride all the way down there on that shit." (R.74:2.) Gilbert asked Pratchett where JDE was, and Pratchett said that she had left. (R.74:2.)

Gilbert asked Pratchett if he had "made yo money back off that ho though, right?" (R.74:2.) Gilbert then complained, "that ho don't work." (R.74:2.) Pratchett asked Gilbert if JDE "wasn't trying to bust no moves for [him]? 'Cause she was on some other stuff with me." (R.74:3.) Pratchett asked, "she ain't catch no money from you out there?" (R.74:3.) Gilbert replied, no. (R.74:3.) Gilbert also told Pratchett that he "slipped her the couple of dollars [and] sent her yo' way." (R.74:3.)

Gilbert testified that when he asked Pratchett about making his money back, he was not talking to Pratchett about the exchange of money for JDE. (R.190:63.)

Evidence related to cellphones. When officers arrested Gilbert on January 26, 2012, they seized a cellphone from his person and an amplifier from his car. (R.187:60; 188:93; 189:72.) The cellphone had the number 414-519-8163. (R.189:90.) Detective Stott noted that the word T-Macnifacent appeared on the screen saver. (R.189:91.) Gilbert admitted that this was his phone. (R.190:64; 26.)

Brian Bellin, a U.S. Cellular employee, authenticated records for two cellular telephones, including 414-519-8163, the number that Stott dialed when she placed the one-party consent call between Pratchett and Gilbert. (R.189:34, 63.) Bellin explained that the records show what switch a call is routed through, "not actually the actual cell tower." (R.189:63–64.) Bellin also stated that when a cellphone call is made, it "would connect to the nearest tower." (R.189:65–66.)

Detective Dawn Jones testified that she had prepared almost 50 subpoenas for cellphone records and is familiar with how providers keep their records, including subscriber and cell site information such as switch and tower information. (R.189:76–79.) In response to a subpoena, U.S.

Cellular provided Jones with records for Gilbert's cellphone. (R.189:79.) The records for January 7 reflected that Gilbert's cellphone hit off a tower around JDE's residence in Racine between 3:59 p.m. and 4:23 p.m. (R.189:81–82.) Based on cellphone activity, Jones stated that the phone then hit in the City of Milwaukee at approximately 5:01 p.m. (R.189:82.) Jones also noted between 15 and 20 calls were made between Gilbert's phone and Pratchett's phone on January 7, but she could not say who actually used Gilbert's phone. (R.189:84, 86–87.)

In rebuttal, Jones provided additional information about Gilbert's cellphone location on January 7. Jones explained that she took the phone records to a specialty unit in the police department and observed another officer accurately enter information from the records into a computer. (R.191:21–22, 25.) The computer then generated maps that showed the location where the phone was located. (R.191:24–25.) Ten maps were created that were part of Exhibit 15, which was marked and received into evidence. (R.191:23, 43–44; 32:1–10.) Each map shows a circle split into three sectors, one of which is highlighted in blue, which Jones stated was where the phone was located. (R.191:27; 32:1–10.) Jones stated that the sector spans an area of 120 feet. (R.191:27, 39.) With respect to the first six maps, Jones identified the time and sector location for the phone:

Map	Time	Location
1	3:59 p.m. to 4:29 p.m.	Racine
2	5:01 p.m.	Ryan Road and Hwy 41, Oak Creek & Milwaukee
3	8:20 p.m.	Townsend & Fond du Lac, Milwaukee
4	10:17 p.m.	Holt Avenue and Hwy 43, Milwaukee

5	11:21 p.m.	Milwaukee (south side) and West Allis
6	11:58 to 11:59 p.m.	18th & College, includes area of Econo Lodge

(R.32:1–6; 191:26–31, 34–38.)

Jones also reviewed telephone records and determined that calls were exchanged between Gilbert and Pratchett at 8:20 p.m., 11:21 p.m., and 11:58 p.m. on January 7. (R.191:35, 36, 38.)

Gilbert's theory of the case. In his opening statement, counsel challenged JDE's and Pratchett's credibility, noting their contradictory stories, Pratchett's incentive to shape his testimony due to his plea agreement, and his experience prostituting women. (R.187:31–32; 192:29, 31.) Counsel asserted that the evidence was insufficient to convict Gilbert beyond a reasonable doubt. (R.187:32; 192:34, 37–38.) Counsel cautioned the jury about making its decision based on the distasteful nature of the subject matter, Gilbert's morality, and his past criminal history, and emphasized the State's burden to prove its case. (R.187:30–31, 34; 192:32–34, 37–38.)

The jury found Gilbert guilty of trafficking a child, second-degree sexual assault of a child, and physical abuse of a child. (R.193:2–3.)

III. Postconviction hearing related to cell location evidence

The court denied Gilbert's postconviction motion without an evidentiary hearing except with respect to Gilbert's claim related to counsel's failure to object to Detective Jones's rebuttal testimony about the location of Gilbert's cell telephone. (R.82:1–3.)

Gilbert presented the testimony of an expert, Michael O'Kelly, who questioned the reliability of the maps based on

his understanding that cellular phones do not always transmit through the nearest tower. (R.196:21, 37–39, 52.)

Brian Brosseau, a Milwaukee police officer, who had experience tracking cellular telephones and mapping cellphone information in Milwaukee, testified to his creation of the maps and their accuracy. (R.196:80–108; 197:4–30.) At the conclusion of the hearing, the circuit court indicated that it would not proceed with a *Machner* hearing until it resolved the question of whether the rebuttal testimony was erroneous. (R.197:55.)

The circuit court denied Gilbert's challenge regarding the rebuttal testimony. (R.109:4.) The circuit court found that Detective Jones did not testify as an expert and relied on Brosseau's maps. (R.109:2.) The circuit court noted that O'Kelly's own maps revealed the same geometric projections and data as Brosseau's, thus validating Brosseau's analysis. (R.109:3.) Further, the circuit court also noted that O'Kelly had not visited the area and was unfamiliar with its phone usage or the area's population and building density. In contrast, Brosseau testified that he accounted for this information when he created the maps. (R.109:3.) The circuit court determined that Gilbert failed to show that the information presented to the jury was erroneous. (R.109:3–4.) Based on the record, the circuit court determined that counsel was not ineffective. (R.109:4.)

IV. The *Machner* hearing

Consistent with this Court's directive, *Gilbert I*, 2018 WL 3202044, ¶ 40, the circuit court conducted a *Machner* hearing. (R.204:1.) Counsel testified that he received and reviewed the discovery before trial, including Pratchett's recorded statements and maps related to cell tower data. (R.204:13–16.) Counsel said he did not hire an expert because he had no reason to question the accuracy of the data related to the maps before trial. (R.204:18.) Counsel agreed that it

was not his practice or the practice of other defense attorneys in 2012 to hire expert witnesses to attack maps related to cellphone location. (R.204:76.)

Counsel did not question Jones about her representation that the sector was 120 feet (R.204:25), noting that the prosecutor said "so many miles" and explaining he decided "not to correct them because that would allow the assistant district attorney to rehabilitate the witness because obviously it's not 120 miles, nor is it 120 feet. It's 120 degrees." (R.204:27.) Counsel noted that the phone was not registered to Gilbert and Gilbert said he was on the north side, not in the area on the map. (R.204:27, 74–75.)

According to counsel, Gilbert testified against his advice. (R.204:30.) When asked why he did not question the accuracy of the maps after Gilbert testified that the phone was his, counsel replied:

> Mr. Gilbert had informed me that he was not in that area. That phone was not his . . . even if the phone allegedly was pinged in that area, it didn't mean Mr. Gilbert was in that area and Mr. Gilbert adamantly insisted that he was on the north side of Milwaukee somewhere.

(R.204:31.) Counsel did not cross-examine Jones because "Gilbert did not say he was in possession of that phone in that area." (R.204:34.) Counsel emphasized that he did not believe the State proved that his client was within 120 feet of the Econo Lodge. (R.204:35.)

Counsel agreed that he was arguing that the case was about the credibility of the witnesses and that his goal was to establish that the evidence against Gilbert was insufficient. (R.204:43.) Counsel said that he did not cross-examine Pratchett about whether the amplifier found in Gilbert's car was the amplifier that he gave to Gilbert because he did not want to raise emotions with the jury by highlighting "the young lady was exchanged for an amplifier." (R.204:51.)

Because Pratchett testified, admitted his involvement, and accepted the State's plea agreement, counsel believed that this minimized what Pratchett said and there was no reason to further highlight Pratchett's inconsistent statements and his willingness to cooperate. (R.204:55–56.) Counsel explained that he did not introduce the rest of Pratchett's recorded statement at trial because Pratchett's "testimony itself" and his cooperation agreement with the State "was sufficient to minimize whatever impact [Pratchett] may have said against [Gilbert]. (R.204:56–57.) "I thought the jury was intelligent enough to see" that Pratchett hoped to gain something for testifying against his client. (R.204:58.) Counsel "felt the jury could understand" that Pratchett's statements were self-serving. (R.204:61–62.)

Counsel provided three reasons why he did not address inconsistencies regarding Pratchett's and JDE's allegations that Gilbert returned to the hotel and struck JDE. (R.204:64.) First, Gilbert said he was not there. (R.204:65.) Second, Pratchett's statements that he intervened were self-serving. (R.204:64.) Third, as counsel explained, he did not want to get into specifics about the incident and moved on because the allegations were "so despicable" and the jury was "cringing about this whole incident." (R.204:64–65.)

With respect to closing argument, counsel explained that because the witnesses, including Gilbert, made contradictory statements and their testimony was "so convoluted," he argued that the jury could not find beyond a reasonable doubt that Gilbert committed the crimes. (R.204:66–67, 87, 90.) Gilbert did not ask counsel whether counsel used "scum bag" as a reference to Gilbert, but counsel explained why he referenced O.J. Simpson's case, a case in which people thought he was guilty but the evidence was insufficient. (R.204:70–71.) Gilbert's case similarly "tugged" at the jurors' emotions, nevertheless Gilbert was innocent

because the evidence was insufficient to establish his guilt. (R.204:69, 71–72.)

The court denied Gilbert's postconviction motion concluding that counsel did not render ineffective assistance as to any of the claimed grounds. (R.204:128.) With respect to counsel's handling of the cellphone testimony, the circuit court determined it was not unreasonable for counsel not to have consulted an expert noting that it was "uncontroverted" that having an expert was not a "general practice in this jurisdiction at the time." (R.204:124.) In addition, the court noted that evidence related to the cellphone issue was not introduced until rebuttal and it would have been difficult for counsel to locate an expert at that time. (R.204:124.) With respect to impeachment, the court accepted counsel's explanation that Pratchett's self-motivation was self-evident and that emphasizing inconsistencies in Pratchett's statements would have only highlighted Pratchett's and Gilbert's long-term relationship. (R.204:127.) With respect to the closing argument, the court determined counsel had a clear strategy, emphasizing that the State's evidence was insufficient to prove guilt beyond a reasonable doubt. (R.204:125.)

Gilbert appeals.

STANDARD OF REVIEW

Whether a defendant received ineffective assistance of counsel presents a mixed question of fact and law. *State v. Gutierrez*, 2020 WI 52, ¶ 19, 391 Wis. 2d 799, 943 N.W.2d 870. This Court upholds the circuit court's factual findings, which include findings concerning the circumstances of the case and counsel's conduct and strategy unless they are clearly erroneous. *Id*. Whether counsel's performance constitutes ineffective assistance presents a legal question that this Court reviews de novo. *Id*.

ARGUMENT

Gilbert did not prove that his counsel's performance was deficient or that it prejudiced him.

A. Gilbert has the burden of proving that his counsel was ineffective.

The United States Constitution's Sixth Amendment right of counsel encompasses a criminal defendant's right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To succeed on an ineffective assistance of counsel claim, a defendant must prove both that trial counsel performed deficiently and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687.

To prove deficient performance, the defendant must show that counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Strickland*, 466 U.S. at 688. The defendant must demonstrate that counsel's specific acts or omissions fell "outside the wide range of professionally competent assistance." *Id*. at 690.

Counsel's decisions based on a reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable" and do not constitute ineffective assistance. *Strickland*, 466 U.S. at 690–91. Therefore, this Court gives "great deference" to counsel's "decisions in choosing a trial strategy." *State v. Balliette*, 2011 WI 79, ¶ 26, 336 Wis. 2d 358, 805 N.W.2d 334. Thus, because this Court generally does not "second-guess a reasonable trial strategy," counsel's strategic decision constitutes deficient performance only if that decision "was inconsistent with a reasonable trial strategy, that is, that it was irrational or based on caprice." *State v. Breitzman*, 2017 WI 100, ¶ 75, 378 Wis. 2d 431, 904 N.W.2d 93.

When counsel makes "a strategic choice in determining a course of action during a trial," this Court applies "an even greater degree of deference to counsel's exercise of judgment." *State v. Vinson*, 183 Wis. 2d 297, 307–08, 515 N.W.2d 314 (Ct. App. 1994). When the circuit court determines that counsel had a reasonable trial strategy, that strategy is "virtually unassailable in an ineffective assistance of counsel analysis," and counsel cannot be deemed ineffective simply because the strategy failed. *State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620.

To demonstrate prejudice, a defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Strickland*, 466 U.S. at 693. He must do more than show that counsel's errors had a conceivable effect on the outcome. *Id*. Rather, a defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

B. Gilbert did not prove counsel was ineffective for failing to object to the cell location data presented as impeachment evidence.

1. Counsel did not perform deficiently.

Gilbert contends that only an expert witness, not a lay witness, can testify to a cellphone's general location. Therefore, he contends that counsel's failure to object to Jones's lay testimony about his phone's location constitutes deficient performance. (Gilbert's Br. 18.) Based on counsel's testimony at the *Machner* hearing, the circuit court determined that counsel's failure to object to Jones's testimony did not constitute deficient performance. (R.204:124.) This Court should affirm.

First, counsel does not perform deficiently by failing to raise an argument that requires resolution of unsettled legal questions. *Breitzman*, 378 Wis. 2d 431, ¶ 49. Whether Jones, as a lay witness rather than as an expert, could testify to the location of Gilbert's phone presented an unsettled legal question in 2012 when Gilbert's case was tried. *See State v. Marcum*, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992) (deficient performance assessed "as of the time of counsel's conduct"). Relying on cases from other jurisdictions, Gilbert contends expert testimony was required. (Gilbert's Br. 18.) Only one decision, *United States v. Yeley-Davis*, 632 F.3d 673, 684 (10th Cir. 2011), had been issued when Gilbert's case was tried. And most importantly, as this Court subsequently held, "a witness need not be an expert to take the information provided by a cell phone provider and transfer that information onto a map." *State v. Cameron*, 2016 WI App 54, ¶ 15, 370 Wis. 2d 661, 885 N.W.2d 611 (quoting *State v. Butler*, No. 2014AP1769-CR, 2015 WL 3550028, ¶ 17 (Wis. Ct. App. June 9, 2015)).

Relying on *Butler*, Gilbert suggests that even if lay testimony about cell location data is admissible, Jones's was not because (1) there was no testimony about the limitations of cell location data; (2) Jones testified inaccurately about the phone's location; (3) although Jones watched as Brosseau made the maps from data she obtained from the phone company, Jones did not make the maps; and (4) this was not a case where the witness merely took information from a cellular provider and transferred it to a map. (Gilbert's Br. 19–20.) Had this court decided *Cameron* and *Butler* before Gilbert's 2012 trial, counsel would have been on notice that lay testimony regarding cellphone location is admissible, but only under the parameters established in those cases. But under *Strickland*, this Court must "determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms." *State v.*

Kimbrough, 2001 WI App 138, ¶ 31, 246 Wis. 2d 648, 630 N.W.2d 752. And because the law regarding the foundation for the admissibility of cellphone location evidence was unsettled in 2012, Gilbert did not prove counsel performed deficiently when he did not object to Jones's testimony.

Counsel's performance regarding Jones's rebuttal testimony was not deficient for other reasons. At the *Machner* hearing, the court determined counsel was not deficient for failing to hire an expert to challenge the accuracy of the maps. The circuit court agreed with counsel—and Gilbert has not shown otherwise—that it was not a general practice to hire experts to challenge cell location maps when Gilbert's case was tried. (R.204:76.) And based on the not yet developed state of the law, this assessment was not unreasonable.

Counsel testified that he had no reason to question the accuracy of the cellphone data and maps that he reviewed before trial. (R.204:15, 18.) And the record does not demonstrate that the data or maps that counsel reviewed were inaccurate. The circuit court determined Brosseau's underlying analysis of the location data was valid and accurate after considering the defense expert O'Kelly's and Brosseau's testimony at the first postconviction hearing. (R.109:3.) It reached this conclusion based on Brosseau's familiarity with factors that affect the accuracy of the data and O'Kelly's "own exhibits [that] reveal[ed] the same geometric projections employing the same data" Brosseau used. (R.109:3.) The court's factual determinations about the cell location data following the first postconviction hearing reinforce counsel's pretrial assessment that he had no reason to question their accuracy.

At the *Machner* hearing, counsel explained why he did not object to the maps or Jones's inaccurate testimony that Gilbert's phone was within 120 feet of the hotel on January 7,

2012.[5] According to counsel's uncontroverted testimony, Gilbert told counsel that "he was not in that area. That phone was not his." (R.204:31.) Consistent with Gilbert's representations to counsel, counsel got Jones to concede during the State's case-in-chief that she could not say who made the calls or whether multiple people used the phone. (R.189:86–87.) And when Gilbert later testified, he explained that "numerous people" used his phone. (R.190:69.)[6] Consistent with Gilbert's testimony, counsel also explained that he did not follow up with Jones when she said 120 feet because it was Gilbert's defense that Gilbert did not have the phone at the time and was not in the area. (R.204:17.)

Counsel did not object to Jones's testimony because he observed, "in looking at the jury . . . the district attorney was digging a hole for herself" as she questioned Jones about the maps and cellphone towers. (R.204:31.) Deciding not to object to the admission of evidence based on counsel's assessment of its impact on the jury is precisely the kind of strategic decisions that are entitled to deference under *Strickland*. "Any good trial lawyer knows to watch the jury's reaction to testimony as it is presented, because jurors' responses can inform strategic and tactical choices going forward." *United States v. Bell*, 795 F.3d 88, 113 (D.C. Cir. 2015).

Finally, Gilbert argues that Jones's testimony was inadmissible because it exceeded the scope of permissible lay testimony, she was not noticed as an expert witness, and

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[5] Based on Brosseau's testimony, the State conceded that Jones's testimony was inaccurate when she said a sector encompasses 120 feet rather than spans 120 degrees. (R.108:9.) *Gilbert I*, 2018 WL 3202044, ¶ 29. But the State does not concede that Jones's other testimony about the general location of Gilbert's phone or the call log data for the phone was inaccurate.

[6] Thus, contrary to what he argues (Gilbert's Br. 23), the fact that Gilbert admitted to owning the phone when he testified is not dispositive on this issue.

because the State failed to comply with its discovery obligations. (Gilbert's Br. 21–22.) This Court should decline to consider this claim because Gilbert did not preserve these issues in the circuit court for appellate review, *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727, and because his discovery claim is undeveloped, *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Gilbert has not proved that his counsel performed deficiently when he did not object to Jones's rebuttal testimony.

2. Gilbert cannot prove prejudice.

Even if counsel had timely objected to Jones's rebuttal testimony, his failure to object did not prejudice Gilbert. Strong evidence of Gilbert's guilt, including his own spoken words on a recorded call with Pratchett and his trial testimony, supported the jury's guilty verdicts.

When asked about his intentions with JDE, Gilbert testified that they were not sexual and that he merely wanted to show her Milwaukee, take her out to eat, shop, "chill" with her, and use marijuana. (R.190:53, 57, 82.) But Pratchett's one-party consent call with Gilbert undermined that testimony. When Pratchett called Gilbert and told him that JDE was 14, Gilbert insisted that she was not and that he "verified all that before I even came and left from Racine." (R.74:2.)

Gilbert asked Pratchett if he had made his "money back off that ho" and then complained about how "that ho don't work." (R.74:2.) Pratchett then asked Gilbert if she was trying to do anything for him. Gilbert replied, "I pushed her . . . she was trying to." (R.74:3.) Gilbert and Pratchett's conversation demonstrates that both viewed JDE as a source of income. Gilbert's comments about not working despite pushing her corroborated JDE's testimony that after she left the hotel with

Gilbert and had sex with him, Gilbert told her to start making calls on the chat line. (R.188:19, 23–25.)

Detective Jones confirmed that Gilbert's telephone was used to contact chat lines between 6:25 p.m. and 7:29 p.m., and that one call lasted approximately 10 minutes. (R.191:41–43.) These calls to the chat lines on Gilbert's phone after he left the hotel without JDE undermine Gilbert's testimony that he simply went home and napped without JDE. (R.190:58–59.)

And during *his* testimony, Gilbert had no plausible explanation for asking Pratchett if he had made his money back. (R.74:2; 190:63.) Gilbert's question to Pratchett confirmed Pratchett's statement against interest that he gave Gilbert $100 and an amplifier for JDE. (R.189:115.)

Gilbert's comments during the call also undermine his testimony that he simply intended to "chill" or "lay back" with JDE in a nonsexual way. (R.190:74.) Gilbert complained to Pratchett that JDE wanted "to lay back with [him]." (R.74:3.) Gilbert stated that he then sent her Pratchett's way. (R.74:3.) As Detective Stott explained, when a girl is causing a problem in the "stable," a pimp may make the girl available to another pimp. (R.187:42–43.) The jury could reasonably infer that Gilbert gave up JDE to Pratchett because JDE was more interested in "laying back" than making money for him through prostitution dates.

The jury could also reasonably infer that when Gilbert needed help promoting JDE, he turned to Pratchett, whom Gilbert knew was involved in prostitution and had previously showed him Back Page. (R.189:31; 190:59–60) Both JDE and Pratchett testified that Gilbert asked Pratchett to post an ad on Back Page for JDE. (R.188:28–29, 109.) Pratchett knew that Gilbert was previously involved in prostitution (R.189:31), and Gilbert admitted as much (R.190:59–60).

Gilbert said he only went to the hotel once, but JDE and Pratchett told remarkably consistent stories about Gilbert's three visits to the hotel. Both agreed that, during the first visit, Gilbert asked Pratchett to create a Back Page post about JDE. (R.188:28–29, 109.) Pratchett and JDE agreed that Gilbert returned JDE to the hotel that evening and left her with Pratchett. While Pratchett disputed that JDE could see Gilbert give Pratchett stereo equipment (R.188:30; 189:47), Pratchett acknowledged that exchange occurred (R.188:113). Pratchett and JDE agreed that Gilbert returned to the hotel several days later and attacked JDE even after she balled up on the floor. (R.188:33; 189:19.)

Gilbert testified that he never returned to the hotel, claiming that he "took a nap and stuff like that." (R.190:59.) Even if the phone records did not provide pinpoint accuracy as to Gilbert's phone's location, the records showed that his phone was not stationary: calls were connecting to towers in different areas of Milwaukee on January 7. (R.191:26–41.)[7] The U.S. Cellular employee who authenticated cell tower records also testified that when a cellphone call is made, "it would connect to the nearest tower." (R.189:63, 65–66.) Finally, because the circuit court accepted Brosseau's testimony regarding the accuracy of the maps at the postconviction hearing (R.109:3), Jones's more general testimony about the location of the different cell towers based on her review of the maps and the phone records was accurate and not prejudicial.

While Gilbert denied using JDE for prostitution, the jury had ample evidence to believe that Gilbert prostituted JDE based on Pratchett's testimony (R.189:31), Gilbert's admissions that he profited from prostitution with his child's mother (R.190:59–60, 62), and texts recovered from Gilbert's

[7] Gilbert's expert never testified that Gilbert's phone remained stationary on January 7.

phone (R.26:1). When asked about a text message between himself and someone named, "my bitch," Gilbert said it was his girlfriend. (R.190:68, 74.) In the text, his girlfriend referred to him as "daddy." (R.26:1; 190:68.) Detective Stott testified that pimps often want their girls to refer to them as "Daddy," and both Stott and Pratchett, who was known as Woadie-Mac, testified "Mack" is another name for pimp. (R.187:44; 188:28; 189:44.) While acknowledging that his nickname was T-Mack, Gilbert said it had nothing to do with prostitution. (R.190:61, 65.) Claiming other people used his phone, Gilbert said he did not know about a text message that said, "You just lost out on a good potental [sic] customer that spends PLENTY." (R.26:1; 190:69.) Based on this evidence, the jury reasonably disbelieved Gilbert's nonsensical explanations for the text messages.

Gilbert testified that while at the hotel, JDE "choosed up" with Pratchett. (R.190:64.) Detective Stott explained that "choosing up" refers to how a girl working for one pimp ends up working for another pimp. (R.187:41.) While Gilbert recognized "choose up" may refer to pimping, he said it simply meant that a person "digs" one person more than another person. (R.190:71.) The jury was free to reject Gilbert's explanation and conclude, consistent with the evidence, that JDE had chosen Pratchett over Gilbert as her pimp.

Detective Stott testified how chat lines are used to facilitate prostitution, including through hotels. (R.187:64.) Gilbert testified that he met JDE on a chat line, picked her up that day, and took her to the hotel, which corroborated JDE's testimony about how she met Gilbert through a chat line, how he took her to Milwaukee, and how she ended up at the hotel with Pratchett. (R.188:6–7, 27–28; 190:36–40.) In light of this, Gilbert's explanation that he simply wanted to show JDE Milwaukee was implausible.

Gilbert has not proved prejudice, because even without the rebuttal cellphone testimony, the record includes strong

evidence of guilt, including Gilbert's own statements, and there is no reasonable probability that the jury would have acquitted him.

C. Gilbert did not prove counsel was ineffective for failing to impeach witnesses with every inconsistent statement.

Gilbert contends counsel performed deficiently for failing to impeach Pratchett and JDE with their prior inconsistent statements, permitting the State to present an "unblemished narrative" of their accounts. (Gilbert's Br. 27–29.) Based on counsel's testimony, the court rejected this claim, noting that the credibility of these witnesses "was impugned," and it accepted counsel's explanation that Pratchett's motives were self-evident and that further impeachment would have emphasized Gilbert's close association with Pratchett and would have done more harm than good. (R.204:127.) The record supports the court's determination.

1. Counsel is not ineffective for failing to impeach with a prior statement if the witness's credibility has already been impeached.

A failure to impeach a witness with a prior statement constitutes ineffective assistance of counsel. *State v. Moffett*, 147 Wis. 2d 343, 353, 433 N.W.2d 572 (1989). But if counsel's errors "had only an isolated, trivial effect," then the failure to impeach is not prejudicial. *Moffett*, 147 Wis. 2d at 357. Thus, no prejudice occurs when counsel fails to impeach a witness with additional impeachment evidence that might have "incrementally weakened" the credibility of a witness who has already been impeached. *State v. Trawitzki*, 2001 WI 77, ¶ 44, 244 Wis. 2d 523, 628 N.W.2d 801 (no prejudice when jury knew witnesses were incarcerated because of their

participation in crime that led to charges against defendant and witnesses appeared in jail clothing).

Likewise, counsel's failure to impeach a witness with prior convictions is not prejudicial when the jury has an "ample basis to discredit" the witness's testimony. *State v. Tkacz*, 2002 WI App 281, ¶ 22, 258 Wis. 2d 611, 654 N.W.2d 37. An "ample basis to discredit" has been found based on the witness's participation in the crime, receipt of a favorable recommendation from the State in exchange for their testimony, drug use, and admitted perjury. *Id.*

2. Counsel's performance was not deficient.

Gilmore's claim that counsel should have impeached Pratchett through his prior statements to detectives in which he sought to avoid punishment fails for several reasons. (Gilbert's Br. 27.) First, based on a stipulation and Pratchett's testimony, the jury already knew that Pratchett had received substantial benefits as part of an agreement to testify at Gilbert's trial. Specifically, the jury was aware that Pratchett benefited by the dismissal of three of four felony charges against him, a plea to a single count of soliciting a child for prostitution related to this case, and a potentially favorable sentencing recommendation from the State. (R.188:103; 189:38–39, 45, 52; 190:12–13.) More importantly, counsel could reasonably assess that Pratchett's testimony had minimal impact on the jury because it was self-serving based on his admissions, his plea, and a deal in exchange for his testimony. (R.204:56, 61–62.)

Further, had counsel attacked Pratchett's credibility through his prior requests for leniency based on cooperation, counsel would have potentially opened the door to the State's introduction of the remainder of Pratchett's statement under the rule of completeness, Wis. Stat. § 901.07, or as a prior consistent statement, Wis. Stat. § 908.01(4)(a)2. Pratchett

admitted that he knew Gilbert and provided detectives with Gilbert's number. (R.172:10.) Pratchett admitted pimping out another woman at the hotel through online ads, that Gilbert brought JDE to the hotel, that Gilbert asked Pratchett to post online ads for JDE, and that Pratchett helped post online ads for JDE. (R.172:10–12.) Pratchett also admitted that he left the room when JDE engaged in prostitution dates, that he would write notes for JDE to follow when she was on the phone, and that he negotiated to purchase JDE from Gilbert for $100 and an amp. (*Id.*)

Had counsel questioned Gilbert about Pratchett's earlier requests for leniency, the jury would have heard Pratchett's prior out-of-court statements that (1) corroborated JDE's testimony that she engaged in prostitution activities at Gilbert's and Pratchett's request, (2) enhanced Pratchett's credibility because he made statements against his interest, and (3) highlighted Pratchett and Gilbert's relationship, including their involvement in prostitution. Given the potential for this damaging testimony, counsel's decision to not further impeach Pratchett was objectively reasonable under the circumstances.

At trial, a detective testified that officers seized an amplifier from Gilbert's car on January 26, weeks after the charged offenses. (R.188:77–78.) Gilbert contends that counsel should have questioned Pratchett about his prior statement to police that the amplifier the police recovered was not the amplifier Pratchett gave Gilbert. (Gilbert's Br. 27–28.) But counsel explained that whether the amplifier recovered was the same one, both Pratchett and JDE said the transaction occurred and additional questioning would have highlighted that Gilbert and Pratchett exchanged property for JDE, raising the jury's emotions. (R.204:48, 51.) It did not matter if the amplifier in the photos was the precise amplifier exchanged by Pratchett because Pratchett had already admitted he exchanged *an* amplifier.

Further, had counsel questioned Pratchett and other witnesses about the amplifier found in Gilbert's car, the State would have played the second recorded call in which Pratchett asked Gilbert if he had installed the amplifier and Gilbert complained that his other amplifier was stronger. (R.74:6; 169:160.) Their conversation demonstrates Gilbert had more than one amplifier and circumstantially corroborated Pratchett's claims that he traded the amplifier for JDE.

Gilbert asserts counsel should have questioned JDE and Pratchett about inconsistencies about JDE's altercation with Gilbert. Counsel provided a reasonable explanation for not questioning JDE or Pratchett about the altercation, explaining that he wanted to avoid highlighting allegations that Gilbert had an altercation with a teenage victim when Gilbert denied it and the jury was "cringing about this whole incident." (R.204:64–65.) Counsel's decision to avoid questioning of a child victim after observing the jury's negative reaction to testimony is certainly a reasonable strategic decision entitled to deference.

Gilbert suggests that counsel should have questioned JDE about her absence of any injuries after the altercation with Gilbert and her conflicting statements about whether she had sex with Pratchett. (Gilbert's Br. 25.) This Court should deem this claim forfeited since it does not appear that Gilbert asked counsel at the *Machner* hearing specifically about his failure to impeach JDE on these points. *See State v. Elm*, 201 Wis. 2d 452, 463, 549 N.W.2d 471 (Ct. App. 1996). Further, with respect to the injury claim, JDE did not testify, as Gilbert asserts, that she sustained no injuries during the altercation at the hotel. To the contrary, JDE sustained bodily harm, *see* Wis. Stat. § 939.22(4), testifying that while she did not develop swelling or bruising, "it was just kind of pink," and "it was sore [and] hurting." (R.188:35.)

Further, JDE's and Pratchett's testimony regarding Gilbert's attack was remarkably similar, with both testifying

that Gilbert punched JDE, that JDE was balled up on the floor, that Pratchett intervened by stopping Gilbert, that they all left the hotel room, and that Gilbert followed Pratchett and JDE to the gas station and back to the hotel. (R.188:33–37; 189:18–22, 25.) Based on the consistency of JDE's and Pratchett's testimony regarding the altercation, examining them about the beating would have enhanced their credibility and highlighted Gilbert's motivation to return to the hotel: Gilbert had a customer willing to spend $800 on JDE and was willing to share it with Pratchett. (R.189:21.)

Gilbert asserts that counsel should have questioned JDE about her conflicting statements about whether she had sex with Pratchett. (Gilbert's Br. 25.) Counsel offered no explanation for not impeaching Pratchett on this point. (R.204:62–63.) But even if this were deficient, Gilbert has not demonstrated how this prejudiced him.

3. Gilbert has not proved prejudice.

For several reasons, Gilbert has not demonstrated that counsel's failure to impeach JDE and Pratchett with any of their inconsistent statements, including those the State may not have addressed above, prejudiced him. First, the State presented strong evidence of Gilbert's guilt. *See supra* Section B.3.

Second, the jury is presumed to follow the court's instructions, *State v. LaCount*, 2008 WI 59, ¶ 23, 310 Wis. 2d 85, 750 N.W.2d 780, and here, the court gave several instructions guiding its credibility assessment. The court reminded jurors that they were the "sole judges of the credibility," identifying several factors that assist in the assessment of credibility, including the witness's bias, the clarity of a witness's recollection, and the witness's opportunity to observe what happened. (R.186:119–20; 191:55–56.) The court provided a separate instruction on assessing a child's credibility. (R.191:59–60.) Finally, it

cautioned the jury about Pratchett's testimony, reminding it that Pratchett "received concessions, consisting of a reduction in charges and a hope for a favorable sentencing recommendation for the State," asking it to consider whether "receiving concessions affected the testimony and [to] give the testimony the weight you believe it should -- it is entitled to receive." (R.191:58–59.)

Third, while counsel had additional evidence with which he could have impeached JDE and Pratchett, the record demonstrates that their credibility had already been impeached, as discussed above. Additional impeachment would have had a minimal effect on the jury's assessment of their credibility. *Trawitzki*, 244 Wis. 2d 523, ¶ 44.

The jury had reason to question Pratchett's credibility and deem his testimony self-serving. Not only did the jury know about his six prior convictions, it was repeatedly reminded of Pratchett's plea to soliciting a child for prostitution as part of a plea agreement during his testimony, a stipulation, instructions, and closing argument. (R.188:102–03; 189:45; 190:12–13; 191:58–59; 192:30, 32–33.) While counsel did not question Pratchett about whether he had sex with JDE, Pratchett admitted facilitating JDE's prostitution activity over several days and profiting from it. (R.188:119–20; 189:17, 42–43, 47.)

The jury also was aware of inconsistences in JDE's testimony that potentially undermined it, including whether Gilbert took her to his house before going to the hotel and what she told others about her age. (R.188:9, 26–27, 59, 69, 71–72.) Finally, the jury could have disbelieved JDE's and Pratchett's testimony based on discrepancies about events that they both testified. For example, while JDE claimed to have witnessed the exchange between Pratchett and Gilbert for money and silver stereo equipment, Pratchett said that JDE had already gone into the hotel room. (R.188:30, 58, 118; 189:51, 54.)

Both JDE's and Pratchett's credibility were impeached at trial. Impeaching them with additional specific instances would have, at best, incrementally weakened their credibility and does not prove prejudice. *Trawitzki*, 244 Wis. 2d 523, ¶ 44.

D. Gilbert did not prove ineffective assistance with respect to counsel's closing argument.

1. Counsel's performance was not deficient.

Gilbert contends that counsel performed deficiently during closing argument, improperly conceding Gilbert's guilt when he used the word "scumbag" and commented about JDE's, Pratchett's, and Gilbert's lack of credibility. (Gilbert's Br. 29–32.) In *Gilbert I*, this Court disagreed with the circuit court's assessment that counsel was referring to other people when he used "scumbag" in closing argument. *Gilbert I*, 2018 WL 3202044, ¶ 37. This Court directed the circuit court to revisit the closing argument in the context of the entire case, explaining that counsel's questioning of Gilbert's "credibility and characterizing him as a scumbag present[ed] questions of performance and prejudice that should be further addressed in the *Machner* hearing." *Id.* On remand, the circuit court determined that counsel did not perform deficiently with respect to closing argument because counsel's argument was geared toward acquitting Gilbert based on the insufficiency of the evidence. (R.204:122–23.) The record supports its determination.

A concession of guilt during closing argument that is "the functional equivalent of a guilty plea" may constitute deficient performance. *State v. Gordon*, 2003 WI 69, ¶ 27, 262 Wis. 2d 380, 663 N.W.2d 765. In *Gordon*, counsel conceded guilt on a disorderly conduct count in a multi-count prosecution when Gordon admitted facts in his testimony that constituted disorderly conduct. *Id.* ¶ 26. The supreme court

determined that counsel's concession did not constitute deficient performance because it was "a reasonable tactical approach . . . plainly calculated to maintain credibility with the jury and enhance the prospects of acquittal on the . . . more serious charges." *Id.*

Gilbert's counsel was not deficient because he *never* conceded Gilbert's guilt as to the charged crimes or any of their constituent elements. To the contrary, counsel clearly emphasized throughout the trial that the State could not and did not prove Gilbert's guilt beyond a reasonable doubt. (R.187:32–33; 192:33–34, 37–39.) In his opening statement and closing argument, counsel emphasized that neither JDE nor Pratchett were credible witnesses and that they provided contradictory statements. (R.187:31–32; 192:30–31.) Counsel carefully sought to avoid disparaging a child victim, JDE, while at the same time raising questions about her credibility. (R.192:30–32, 39–42.) Counsel attacked Pratchett's credibility, pointing out his six prior convictions, his admissions that prostituted JDE, his use of Back Page to promote prostitution, and his plea deal limiting his exposure. (R.192:32–33, 40.) Gilbert's case is not one where "an actual breakdown of the adversarial process" occurred and where the trial lost "its character as a confrontation between adversaries." *United States v. Cronic*, 466 U.S. 648, 656–67 (1984).

Nonetheless, Gilbert contends that counsel's attack on his character and his credibility had the same effect as conceding his guilt. (Gilbert's Br. 30–32.) But Gilbert advances his argument in a vacuum, without regard to the impact of his decision to testify against advice of counsel. (R.190:32.) By testifying, Gilbert placed his credibility before the jury, which was obligated to assess his credibility like that of other witnesses, including whether his prior convictions made him less credible. (R.191:55–57.) And Gilbert's testimony, which the sentencing court characterized as

ridiculous (R.195:28), undermined both his moral character and his credibility.

As the court recognized, counsel would have lost credibility with the jury had he presented Gilbert as a law-abiding, naïve individual. (R.204:126.) The jury would have undoubtedly found Gilbert's testimony in which he effectively admitted to pimping out his child's mother morally repugnant and damaging to his credibility. (R.190:59, 62.) Likewise, Gilbert gave the jury other reasons to doubt his credibility. For example, when confronted with a text message that said, "You just lost out on a good potental [sic] customer that spends PLENTY," Gilbert disclaimed knowledge of the message and asserted "numerous people" use his phone. (R.26:1; 190:69.)

Against this backdrop, counsel acted in an objectively reasonable manner by cautioning the jury not to make its decision based on the distasteful nature of the subject matter, Gilbert's morality, or his criminal history. (R.187:30–31, 34.) Counsel sought to defuse the impact of Gilbert's self-destructive testimony by emphasizing the State's failure to prove its case beyond a reasonable doubt based on JDE's and Pratchett's conflicting testimony. (R.192:32–33; 204:69.) Although unsuccessful, counsel's attempts to dilute the weight of the evidence against Gilbert constituted an objectively reasonable strategy and did not constitute deficient performance. *See United States v. Walker*, 24 F. App'x 57, 60 (2d Cir. 2001).

To be sure, counsel stated that he was "not sure [he] believe[d] any of them," but this statement fits counsel's prior comment, "it's about who you believe," and his subsequent comment about the jury's task of assessing credibility and determining who is telling the truth. (R.192:30–31, 33.) Counsel's argument to the jury was that the State did not prove its case, not that the jury should believe Gilbert's story. And consistent with his theory of the case, he argued that

even if the jury had good reason not to believe Gilbert, JDE's and Pratchett's contradictory testimony was insufficient to establish Gilbert's guilt beyond a reasonable doubt. (R.192:37–41.)

Gilbert contends that counsel's conduct was worse than the conduct trial counsel displayed in *State v. Coleman*, 2015 WI App 38, 362 Wis. 2d 447, 865 N.W.2d 190. (Gilbert's Br. 32–33.) There, Coleman elected not to testify despite counsel's representation in the opening statement that Coleman would testify, that he had a criminal record, and that he was "not an angel." *Coleman*, 362 Wis. 2d 447, ¶ 5. This Court found counsel's performance deficient because counsel commented on Coleman's background and represented Coleman would be testifying when counsel knew that Coleman did not want to testify, that Coleman never told him that he wanted to testify, and that counsel misstated the law by telling the jury that defense attorneys decide whether their client's will testify. *Id.* ¶¶ 27, 31–32.

Gilbert's case is readily distinguishable from *Coleman*. First, unlike in *Coleman*, and consistent with his theory that the State had the burden of proving guilt beyond a reasonable doubt, counsel told the jury in his opening statement that Gilbert had the constitutional right to remain silent and not testify. (R.187:34.) Second, unlike in *Coleman*, Gilbert elected to testify following a colloquy. (R.190:32–34). By testifying, Gilbert placed his credibility in issue and thus it was a reasonable strategy to dampen the impact of evidence that would undermine his credibility. *Coleman*, 362 Wis. 2d 447, ¶ 27.

Gilbert also contends counsel performed deficiently when he told the jury, "In this Country . . . we would rather . . . let some scumbags go free because we can't find that

person guilty if we don't have enough evidence." (R.192:34.)[8] This Court disagreed with the circuit court's previous assessment that counsel was referring to other persons and not Gilbert when he used the word "scumbag." *Gilbert I*, 2018 WL 3202044, ¶ 37. On remand, the circuit court again determined that counsel was referring to O.J. Simpson and not Gilbert. (R.204:121–22.) The record supports the circuit court's determination.

Counsel used "scumbags" within the context of a general discussion of the presumption of innocence and the burden of proof, not as a specific reference to Gilbert. After using the plural "scumbags," counsel asked whether the State met its burden necessary for the jury to find Gilbert guilty. (R.192:34.) Consistent with his theme, counsel challenged the strength of the evidence against Gilbert, questioning whether the evidence corroborated JDE's claims. (R.192:35.) Counsel then referred to O.J. Simpson as a scumbag, noting that the jury's "not guilty" verdict in Simpson's case simply meant the evidence was insufficient to convict him. (R.192:36–37.) Counsel then transitioned back to his theme: the State charged Gilbert and it had the burden of proving Gilbert's guilt beyond a reasonable doubt, it was the jury's responsibility to assess the witnesses' credibility, and JDE and Pratchett were not believable, and, therefore, the jury should not find Gilbert guilty. (R.192:37–42.)

Gilbert has not proved deficient performance. Although Gilbert's testimony limited counsel's options, counsel never conceded Gilbert's guilt and pursued a reasonable defense

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[8] Had counsel told the jury that "it is far worse to convict an innocent man than to let a guilty man go free," counsel's use of the word "guilty" would not be considered a reference to Gilbert. *See In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). Rather, reasonable people would deem it a reference to the obligation that the State has to prove its case beyond a reasonable doubt.

strategy, arguing that JDE's and Pratchett's testimony did not establish guilt beyond a reasonable doubt.

2. Counsel's closing argument did not prejudice Gilbert.

Gilbert cannot show prejudice based on the strength of the evidence against him, including his own testimony. *See supra* Section B.2.

Additionally, the jury benefited from the court's instructions, which limited the impact of counsel's allegedly improper comments and reinforced counsel's legitimate argument that the State did not prove its case. First, consistent with counsel's "reasonable doubt" theory of defense, the court repeatedly instructed the jury regarding the State's burden of proving guilt beyond a reasonable doubt. (R.186:126; 191:51–52.) Second, consistent with counsel's argument that JDE and Pratchett were not credible, the court's instructions highlighted factors that undermined their credibility. (R.191:56–59.) Third, reinforcing counsel's statement that his opinion "don't mean squat" (R.192:39), the court told the jury that the attorneys' remarks were not evidence and to "decide the case solely on the evidence offered and received at trial" (R.191:53, 55). *See Breitzman*, 378 Wis. 2d 431, ¶ 63 (suggesting that the court's instruction that "attorney arguments are not evidence" may cure unfair prejudice from an attorney's deficient performance).

The court's instructions reinforced counsel's theory of the case: because JDE and Pratchett were not credible, the State did not prove Gilbert's guilt beyond a reasonable doubt. In sum, Gilbert did not prove counsel's closing argument prejudiced him.

E. Gilbert has not proven cumulative prejudice.

Under the doctrine of "cumulative prejudice," a defendant who suffers multiple instances of deficient performance may rely on the aggregate effect of those deficiencies to establish the prejudice necessary to sustain a claim of ineffective assistance of counsel. *State v. Thiel*, 2003 WI 111, ¶¶ 59–60, 264 Wis. 2d 571, 665 N.W.2d 305. To establish cumulative prejudice, "each alleged error must be deficient in law—that is, each act or omission must fall below an objective standard of reasonableness." *Id.* ¶ 61. In most cases, trial counsel's errors "will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." *Id.*

Even if this Court disagrees with the postconviction court's determination that counsel did not perform deficiently, Gilbert has not proved that his counsel's alleged errors—either individually or cumulatively—undermine confidence in the jury's guilty verdicts based on the strength of the evidence against him. *See supra* Section B.2., C.2., and D.2.

CONCLUSION

This Court should affirm Gilbert's judgment of conviction and order denying postconviction relief.

Dated this 18th day of September 2020.

Respectfully submitted,

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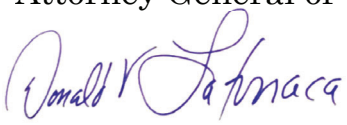

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CERTIFICATION

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 10,943 words.

Dated this 18th day of September 2020.

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 18th day of September 2020.

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