STATE OF WISCONSIN

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

DISTRICT II

Case No. 2020AP226-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. HINEMAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN RACINE COUNTY CIRCUIT COURT, THE HONORABLE MARK F. NIELSEN, PRESIDING

AMENDED BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Statutes

Other Authorities

ISSUES PRESENTED

1. Did the prosecutor violate *Brady* when she did not provide to the defense a child protective services (CPS) report that led to a referral to law enforcement and a child's accusation against Jeffrey L. Hineman for sexual assault?

The postconviction court said no. This Court should affirm.

2. Was Hineman's trial counsel ineffective in any of the following respects:

a. Failing to compel production of the above-referenced report, where obtaining it would not have materially changed Hineman's trial strategy;

b. Waiving her opening statement based on an articulated strategy;

c. Not objecting to unnoticed expert testimony from a child advocacy center (CAC) interviewer that was either inapplicable or helpful to Hineman's case; and

d. At closing, summarizing the State's evidence in a way that neither party nor the court understood to be a concession of Hineman's guilt?

The postconviction court held that counsel was not ineffective in any of the above respects. This Court should affirm.

3. Is Hineman entitled to a new trial in the interest of justice?

The postconviction court declined to grant this extraordinary relief. This Court should do the same.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted. The parties' briefs should adequately set forth the law and facts, and the questions presented can be resolved by applying well-settled law.

INTRODUCTION

Child sexual assault cases are often credibility contests with few witnesses and little or no physical evidence. Against that backdrop, defendants on appeal regularly do what Hineman does here: declare the case close, characterize the evidence against him "slim," and allege numerous claims of error in an attempt to sow seeds of doubt in the reliability of his conviction.

Hineman's efforts must fail. While the defense should have received a CPS report before trial, the report was not reasonably probable to make a difference in the defense case or the verdict. Hineman's remaining claims are non-starters. Counsel made reasonable strategic decisions in her able representation of Hineman from the start of trial to the end. He received effective assistance and was convicted after reliable proceedings in which the real controversy was fully tried. This Court should affirm.

STATEMENT OF THE CASE

A jury found Hineman guilty of first-degree child sexual assault, sexual contact with a person under age 13. (R. 31:1.) The charge was based on disclosures by S.S. that when he was six, Hineman touched S.S.'s "front private" and "back private" over his clothes. (R. 1:1–2.)

Unless otherwise noted, the State takes the following facts from the trial evidence and testimony.

A. Hineman, a father figure to S.S. as a baby, re-entered S.S.'s life when S.S. was five.

S.S.'s biological mother was involved with Hineman when S.S. was born. (R. 78:103.) Hineman was a father figure to S.S. until S.S. was 10 months old, when S.S.'s mother moved with S.S. out of state. (R. 78:62, 103.) After that, S.S.'s father ("Dad") established paternity and obtained custody when S.S. was three. (R. 78:62.)

Hineman remained absent from S.S.'s life until S.S. was five. (R. 78:62.) S.S. was then living with Dad and Dad's wife; Dad's mother ("Grandma") had regular contact with them. In fall 2013, Hineman "kept texting" Grandma and Dad "asking if he could be a part of [S.S.'s] life again," and they agreed to his requests. (R. 78:62, 132.)

All seemed well, at first. Hineman considered S.S.'s family to be friends. (R. 78:133.) He helped with home repairs and maintenance. (R. 78:133.) Grandma said that Hineman was "very nice to [S.S.], to the family." (R. 78:62.) Hineman bought S.S. a bike and toys; he took S.S. on outings. (R. 78:62–63.) S.S. called Hineman, "Uncle Jeff." (R. 78:44, 80, 83.)

In October 2014, Dad fell seriously ill and was hospitalized for two weeks. (R. 78:63–64.) During that time, Hineman stayed at Dad's house and took care of S.S. alone for one of those weeks, which fell over Halloween. (R. 78:64, 70.) S.S. and Grandma recalled Hineman had taken S.S. trick-or-treating during that time. (R. 78:69–70.)

Grandma grew suspicious that something was not right between Hineman and S.S. around Christmas that year. (R. 78:67.) Hineman had bought S.S. a bunkbed so he could sleep over in S.S.'s room. (R. 78:67.) Around that time, Grandma learned through Dad that S.S. "didn't want to be around" Hineman; Grandma said Hineman "would get real upset and angry." (R. 78:67, 71.) Grandma "knew something was wrong"

and "kept asking" S.S. to tell her what it was, but he "kept saying nothing." (R. 78:67.)

In early 2015, the family and S.S.'s teachers saw distressing changes in S.S.'s behavior. (R. 78:64.) Grandma said that S.S. "was messing in his pants. Messing in the bathrooms at school. Being disrespectful. His grades were going down." (R. 78:64.)

B. CPS, and later the police, investigated concerns about S.S. and potentially Hineman.

In March 2015, CPS became involved and wrote a report regarding S.S.'s behavior. (R. 78:89–90.) In addition to S.S.'s other behavior, CPS learned of a specific incident where S.S. was sucking on a pen at school and told a classmate that "it feels good to have your privates sucked on." (R. 78:104–05.) When asked where he had learned that, S.S. first said he saw it in a Garfield comic or movie. (R. 78:105–06.) Both the March CPS report and a subsequent police report indicated that when Dad talked to S.S. about the pen-sucking incident, S.S. reported that he learned it from Hineman (R. 41:30; 48:4), though the jury did not hear that fact at trial.

That March, Dad and Grandma cut off Hineman from contacting S.S. (R. 78:65, 88.) Hineman was "very, very upset" and angry with that decision and contacted Grandma to object. (R. 78:65–66.) Grandma thought that Hineman "knew that I knew" and told Hineman to leave her family alone. (R. 78:65–66.)

In June 2015, CPS faxed its March report to the Racine County Sheriff's Department, and Investigator Tracy Hintz was assigned to follow up. (R. 78:76.) In July, Hintz spoke to Dad and Grandma. (R. 78:76, 106.) At Hintz's suggestion, Dad and Grandma agreed for S.S. to have a forensic interview with CAC. (R. 78:77.)

At trial, Investigator Hintz agreed that when she spoke to Dad and Grandma in July, neither claimed that S.S. had alleged that Hineman had touched him; correspondingly, a July incident report that Hintz drafted did not reflect any claims of inappropriate physical contact. (R. 78:106–08, 112.) When asked when the "initial disclosure to CPS" took place, Hintz said it was March 2015. (R. 78:90.) On cross-examination, Hintz said when she met with Dad and Grandma in July, neither had alleged that S.S. disclosed that Hineman touched his privates. (R. 78:107.) She stated that she "believed" there was a disclosure in the CPS report; she also agreed that if that disclosure was in the report, she "would think" she'd have documented it in hers. (R. 78:107–08.) Hintz stated that she first personally heard S.S. claim that Hineman touched his privates in the August CAC interview. (R. 78:77–79, 107.)

C. S.S. disclosed that Hineman touched his privates during a forensic interview and at trial.

After the forensic interviewer, Heather Jensen, gave foundational testimony, the jury watched the CAC interview. (R. 78:40.) In it, S.S. presented as a meek, soft-spoken child. (*See generally* R. 86.) When first asked why he came to talk that day, S.S. replied, "Because—," paused, and then softly said, "I can't remember though." (R. 86 at 08:22; 41:40.) After some back-and-forth, Jensen asked, "Did something happen to your body that you don't like?" (R. 86 at 09:25; 41:41.) S.S. nodded yes immediately and responded that "Uncle Jeff" was hurting him by punching and kicking him when they were at his house watching TV. (R. 86 at 09:25–11:06; 41:41–42.)

Jensen then asked S.S. whether Hineman "ever [did] anything else that you didn't like?" to which S.S. immediately responded, "He touched my private parts." (R. 86 at 12:58–13:08; 41:44.) S.S. said that Hineman did this while they were

on the couch and his parents were sleeping. (R. 86 at 13:18–28; 41:45.) S.S. said that Hineman "laughed at him," then S.S. woke his parents and told them. (R. 86 at 13:43–45; 41:45.) S.S. said that this touching occurred in winter and that Hineman did that "kind of touching" four times; later, he said it happened six times. (R. 86 at 15:54–55, 16:18–19, 30:08–25; 41:48, 59.) S.S. initially said that Hineman only touched his "front private" but later disclosed that Hineman also touched his back private. (R. 86 at 17:22–23, 19:00–06; 41:49–50.) S.S. said that the touching occurred over his clothes. (R. 86 at 19:15–52; 41:50–51.)

Jensen asked S.S. whether Hineman wanted S.S. "to do something to his privates." (R. 86 at 31:01; 41:59.) S.S. started shaking his head, then paused and said, "Yeah, but I didn't do it," when Hineman told S.S. to touch his privates with his hand. (R. 86 at 31:06–22; 41:59–60.)

S.S. also said that Hineman told him "[t]o not tell anybody" about what he did, but S.S. said that he told his mom and dad. (R. 86 at 21:21–47; 41:52.) S.S. said that Hineman was "staying" at his house and sleeping on the floor in his (S.S.'s) bedroom. (R. 86 at 21:54–22:20; 41:53.) When asked what he liked and disliked about Hineman, S.S. said that he liked Hineman because he "always used to buy me toys," but didn't like him "[w]hen he was touching me." (R. 86 at 32:25–42; 41:61.)

When asked about the time "Uncle Jeff [was] taking care of you when your dad was away" (R. 86 at 22:25; 41:54), S.S. responded that Hineman was "taking bad care of me" by being mean, calling S.S. names, and pushing S.S. (R. 86 at 22:30–24:15, 28:45–30:04; 41:54–55). S.S. did not say that Hineman touched his privates during that time.

S.S. testified at trial. Even though he was then nine (R. 78:44), his testimony showed that he still had difficulty talking about the events at issue. He acknowledged that he

felt "nervous." (R. 78:48.) Ultimately, S.S. testified that "something happened" when his dad was ill and Hineman came to stay at S.S.'s house. (R. 78:46–47.) After initially repeating that he "didn't remember," he agreed that Hineman "did something to [him] that [S.S.] didn't like." (R. 78:47.) He disclosed that Hineman touched his body when they were on the couch watching cartoons. (R. 78:49.) He said it was daytime and they were alone. (R. 78:49.) "I just didn't feel right," S.S. said, because "I think he touched me on my private part." (R. 78:49.) S.S. said he used the private part to go "number one" in the bathroom. (R. 78:49–50.)

S.S. initially said that he told Grandma and Dad about Hineman's touching that day, which was the day after Hineman took him trick-or-treating and he had dressed as a vampire. (R. 78:50, 53.) He did not remember if Hineman asked him to touch him back or said not to tell. (R. 78:51, 53.) Later, S.S. said that he told Grandma and Dad a few weeks after the touching, and that he told Grandma first, though he could not remember what Grandma did after he told her. (R. 78:54–57.)

D. Hineman denied the allegations but made false and inconsistent statements.

The day after the CAC interview, Investigator Hintz contacted Hineman at his home. (R. 78:81.) Hineman was not home, but while outside his apartment the police saw him in a truck that slowed past their parked squad car and drove on. (R. 78:81–82.) Within minutes, Hintz spoke to Hineman over the phone and asked him to return to his residence, but Hineman lied that he was an hour away and could not. (R. 78:82.) Within minutes of the call, however, Hineman returned, was taken into custody, and was interviewed. (R. 78:82–83.)

Hineman told Hintz that he cared for S.S. "like he was his son" and that S.S. called him "Uncle Jeff." (R. 78:83.)

Hineman, according to Hintz, wanted to make up for lost time by buying S.S. toys, clothes, and other things, including "a set of bunkbeds and only one mattress." (R. 78:84–85.) Hineman said that he also gave S.S. money, that he created a savings account for S.S., and that he was saving up for a boat to give S.S. when he was an adult. (R. 78:85.)

Hineman acknowledged that he spent time alone with S.S. while Dad was in the hospital and that he took S.S. trick-or-treating at that time. (R. 78:86–87.)

While Hineman denied ever touching S.S., several of his statements raised red flags to Hintz. When asked why the family cut him off and S.S. alleged the assault, Hineman suggested that the family was mad that they couldn't access the savings account he'd created for S.S. (R. 78:88.) When Hintz pointed out that the family cut him off months before they learned about the savings account, Hineman offered a different reason: they were mad because he stopped doing things to help Dad around the house. (R. 78:88–89.) When Hintz told Hineman that he'd been helping the family up until they cut off contact in March, Hineman didn't have an explanation. (R. 78:88–89, 91.)

Hintz said that when she asked Hineman about his portraying S.S. as his own son, Hineman viewed himself "like a savior to the entire family where he . . . was doing all these things for him. He felt he had raised [S.S.] That he was the best father figure that [S.S.] had" even though he had no contact with S.S. for most of S.S.'s life. (R. 78:91.)

Hineman testified. He generally agreed with the timelines that Grandma had described as to when he got involved in S.S.'s life, watching S.S. while Dad was hospitalized, taking him trick-or-treating, and last seeing S.S. and his family in March 2015. (R. 78:132, 134–35, 137, 146.) He denied ever striking or inappropriately touching S.S. (R. 78:140.) Hineman suggested that the reason for the family's

cutting him off was that he saw a "significant change" in Dad after he was ill; Hineman "had spoke to [Grandma] about things" and his opinions "made them mad." (R. 78:136–37.)

Hineman also misrepresented other facts. For example, he testified that "a lot of people considered [S.S.] my son" even though he personally "never" told anyone that S.S. was his child, instead saying that he had called S.S. his stepson. (R. 78:147–48.) The State, on rebuttal, played a portion of the police interview in which Hintz commented to Hineman that his neighbors thought that S.S. was his biological son. Hineman responded by saying twice, "I've always called him my son." (R. 85 at 59:09–23.) At trial, Hineman also said that S.S. usually called him Jeff, and "very seldom" called him "Uncle Jeff." (R. 78:147–48.) In contrast, he had told Hintz that S.S. called him Uncle Jeff, as S.S. did consistently in his testimony and the interview. (R. 78:83.)

The jury found Hineman guilty. (R. 31:1.) After he was sentenced, Hineman filed postconviction motions (R. 40; 41; 55) in which he raised numerous grounds for relief. After two hearings, the postconviction court denied all the claims in a written decision and order. (R. 62.) Hineman appeals.

STANDARDS OF REVIEW

The first two claims allege constitutional violations under *Brady* and *Strickland*, respectively. To those claims, this Court applies a mixed standard of review, accepting the circuit court's factual findings unless clearly erroneous, but reviewing de novo the application of those facts to constitutional standards. *See State v. Wayerski*, 2019 WI 11, ¶¶ 32–33, 35, 385 Wis. 2d 344, 922 N.W.2d 468.

Hineman's third claim asks this Court to exercise its discretion by granting a new trial in the interest of justice, Wis. Stat. § 752.35.

ARGUMENT

I. Hineman fails to establish a reasonable probability of a different outcome had counsel received the CPS report pretrial.

Hineman alleges a *Brady* violation based on the State's failure to produce the March CPS report. Recall that CPS sent the report to the Sheriff's Department in June 2015, which prompted Investigator Hintz to talk to Grandma and Dad in July, which prompted the August CAC interview in which S.S. disclosed that Hineman had touched him, which prompted the police interview of Hineman and the criminal charge.

The Sheriff's Office did not supply that CPS report to the prosecution; thus, the prosecution did not provide the CPS report to Hineman. Hineman's trial counsel, Aileen Henry, did not file a motion to compel production of the report.

As discussed below, Hineman cannot succeed on his *Brady* claim based on the prosecutor's nondisclosure because the absence of the report was not material for *Brady* purposes and thus did not prejudice Hineman.

A. Due process and *Brady* require the State to turn over favorable and material evidence to the defendant.

Under the Fourteenth Amendment, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). A *Brady* challenge requires the defendant to establish three things: (1) evidence must be "favorable to the accused, either because it is exculpatory or impeaching," (2) it "must have been suppressed by the State, either willfully or inadvertently," and (3) "prejudice must have ensued," that is,

it "must be material" to the defendant's guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 282 (1999); *Wayerski*, 385 Wis. 2d 344, ¶ 35.

The third prong, materiality, is the focus here. Evidence is material for *Brady* purposes "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Garrity*, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). The test for materiality is the same as the test for prejudice in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wayerski*, 385 Wis. 2d 344, ¶ 36.

"Impeachment evidence is *not* material, and thus a new trial is *not* required 'when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.'" *State v. Rockette*, 2006 WI App 103, ¶ 41, 294 Wis. 2d 611, 718 N.W.2d 269 (citation omitted). "Generally, where impeachment evidence is merely cumulative and thereby has no reasonable probability of affecting the result of trial, it does not violate the *Brady* requirement." *Id.* (quoting *United States v. Dweck*, 913 F.2d 365, 371 (7th Cir. 1990)).

B. Hineman cannot show that prejudice ensued from the nondisclosure of the CPS report.

The State agrees that Hineman satisfied the first two prongs of the *Brady* analysis. The CPS report was what prompted the police to get involved. It indicated what, if any, allegations involving Hineman existed as of March 2015—which was that S.S. simulated oral sex on a pen and told his Dad that he learned about it from Hineman. And it provided

some information regarding S.S.'s diagnoses, family life, and his other concerning behaviors.

To that end, the report was not "exculpatory." It reflected highly inculpatory information: that six-year-old S.S. simulated oral sex on a pen, commented that having one's privates sucked felt good, and attributed learning it from Hineman. While not an express claim of touching like S.S.'s CAC disclosure, it was inculpatory. It indicates that Hineman—at a minimum—talked to a six-year-old about oral sex. And a reasonable factfinder could infer that Hineman did more than tell S.S. about oral sex because a six-year-old child was unlikely to do those things based just on talk.

Nevertheless, the CPS report had potential impeachment value—and was thus favorable for *Brady* purposes—because it contained a statement of different behavior by Hineman than what S.S. disclosed in August. Because of that potential impeachment value and because law enforcement possessed the CPS report, it should have been provided to defense counsel. *See* Wis. Stat. § 971.23(1)(e); *State v. DeLao*, 2002 WI 49, ¶ 24, 252 Wis. 2d 289, 643 N.W.2d 480. While the CPS report is generally confidential by statute, the material in the report—other than the identity of the reporter, Wis. Stat. § 48.981(7)(a)1.[1]—is not confidential to Hineman.

Hineman, however, cannot satisfy the materiality prong of *Brady*. He asserts that Hintz falsely testified that she believed that the March CPS report contained a disclosure, a statement that counsel could not adequately impeach without the report. He argues that with the report, the impeachment "would have suggested to [the jury] that the investigation was in some way tainted." (Hineman's Br. 18.)

[1] That identity of the mandatory reporter would not remain confidential if the State intended to call them as a witness. Here, the mandatory reporter did not testify.

In his view, the jury was left to believe that S.S. had disclosed touching by Hineman five months before the CAC interview, which Hineman thinks made S.S.'s CAC disclosure and trial testimony about touching more reliable. (Hineman's Br. 18–19.)

Hineman fails his burden of demonstrating prejudice for four reasons. First, the police report that the State provided to Hineman contained all the relevant information from the CPS report that counsel needed to challenge Hintz's testimony. Second, if Hintz's equivocal testimony was impeachable, counsel adequately challenged it using Hintz's police report. Third, it is not reasonably probable that any further inquiry of Hintz regarding the content of the CPS report would have produced a different verdict. And fourth, that this case turned on credibility did not weaken the State's case or lessen Hineman's burden to prove prejudice.

1. Hintz's police report reproduced the relevant information from the CPS report.

Hintz's July 2015 police report (R. 41:29–31) reproduced the following information from the March CPS report: S.S., age six, had been "sucking on a pen at school and told a classmate that it feels good to have your privates sucked on." (R. 41:30.) According to the original reporter, S.S. said that he learned those things from a "Garfield" book or movie. (R. 41:30.) The reporter spoke to Dad, who said that S.S. had told him that he learned that information from Hineman. (R. 41:30.) Hintz then wrote of the CPS report, "No specific information was given on if [Hineman] touched [S.S.] or forced [S.S.] to touch [Hineman]." (R. 41:30.)

Hintz also relayed information from the CPS report detailing some concerning behavior S.S. was exhibiting at home and school, including some regressive toileting issues and S.S.'s telling his father "that mean guys were going to

hurt him." (R. 41:30.) Hintz also relayed from the CPS report S.S.'s diagnoses of anxiety and ADHD and his issues with anger management. (R. 41:30.)

That was an accurate reproduction of the information from the CPS report that Hineman believes counsel needed to properly challenge Hintz's testimony. A review of the CPS report likewise reflects (1) the pen incident; (2) the fact that S.S. first implicated Garfield but later said that he learned it from Hineman; (3) S.S.'s other concerning behavior; and (4) the fact that there were no express allegations of sexual touching or contact. (R. 48:2–7.)

Given those parallels, the postconviction court soundly found that the July police report, which Hineman had received, provided all of the relevant and material information from the March CPS report that was of use to Hineman. (R. 62:6.) That finding has support from the record, it is not clearly erroneous, and it supports the conclusion that the absence of the CPS report was not material.

2. If Hintz's equivocal testimony was impeachable, counsel adequately challenged it.

Hineman writes that Hintz's "unequivocal" testimony that she believed that the CPS report "does state that he later says that" was a "blatant misstatement of fact" because "[t]he March 12 report contained no statement that [S.S.] had been touched by Hineman." (Hineman's Br. 16.) Hineman argues that counsel's attempt to impeach Hintz with her report failed because counsel could not disprove Hintz's belief that the CPS report contained a disclosure. (Hineman's Br. 16–17.)

To start, Hintz made clear that she couldn't remember what the March CPS report said. (R. 78:107–08.) She prefaced any statement about what was in the CPS report with the equivocal "I believe." (R. 78:107–08.) Hintz's only unequivocal statement with regard to the timing of S.S.'s disclosure was

that the August CAC interview was the first time she heard S.S. disclose that Hineman had touched him. (R. 78:107.) As for whether that was the first time S.S. ever disclosed touching, Hintz "didn't know." (R. 78:107.) In addition, Hintz also agreed that, according to her report, no one as of July had stated that S.S. had claimed touching. (R. 78:106–07.) Those were all accurate statements reflecting Hintz's personal knowledge or lack thereof. They were not "blatant misstatement[s] of fact." (Hineman's Br. 16–17.)

And counsel deftly cross-examined Hintz on those points. Again, Hintz's stated belief that the CPS report contained a disclosure was accurate: S.S. had disclosed to Dad that Hineman told him that it feels good to have one's privates sucked. As the postconviction court noted (R. 62:7), Hintz clearly was confusing that inculpatory disclosure with S.S.'s CAC disclosure that Hineman had touched S.S.'s privates with his hand.

Counsel's questioning reflects that she also understood that Hintz was confusing those disclosures. Counsel allowed Hintz to look at her report from July 2015; brought out that the report contained no disclosure that Hineman touched S.S.; highlighted that neither Dad nor Grandma disclosed any touching; brought out the bare details of the pen incident and the fact that S.S. attributed it to Garfield; and elicited acknowledgements from Hintz that if the CPS report had contained an allegation of touching, that allegation likely would have been reflected in her police report. (R. 78:104–08.)

That was the best-case scenario counsel could have achieved, even if she'd had the CPS report. *See Rockette*, 294 Wis. 2d 611, ¶ 41 (stating that impeachment evidence is not material when it supplies an additional or cumulative basis to challenge an already-impeached witness). Had counsel presented Hintz with the CPS report and pressed her to confirm that it did not contain a disclosure of touching, it would have allowed Hintz to explain that she had confused

S.S.'s initial disclosure that Hineman had told him about oral sex with S.S.'s later disclosure that Hineman had touched his privates. Counsel wisely avoided that path. (R. 62:7.)

3. The totality of the evidence demonstrates that the error was immaterial.

Here, the jury watched a video of S.S., then age seven, disclose that "Uncle Jeff," a person he liked because he bought him toys, also multiple times touched S.S.'s penis over his clothes while on a couch in S.S.'s home. At trial, that same child, then nine, testified that Hineman touched his penis over his clothes while they were on a couch in S.S.'s home. The jury also heard testimony from and about Hineman, who denied the allegations but who demonstrably fudged relatively innocuous and easily confirmable facts. The jury had ample opportunities to observe and weigh S.S.'s and Hineman's demeanor, tone, body language, and delivery. Both Hineman's and S.S.'s credibility were fully before the jury.

Whether there was a disclosure of touching in the CPS report was not an important point at trial. Hineman was charged based on S.S.'s August disclosure. And to that end, S.S.'s August disclosure differed in some respects from his trial testimony. So even if the jury believed that S.S. had disclosed touching in March—despite its hearing that police did not become involved until June and that as of July no one had alerted the police that S.S. had alleged touching (R. 78:107)—it learned no details of that alleged March disclosure that it could have compared to the details in the August disclosure and his trial testimony.

Hineman points to a juror question asking "how/when/who" reported to CPS to suggest that the jury thought that the content of the March CPS report was important. (Hineman's Br. 17.) But that one juror may have been curious about the report and sought guidance does not

mean that the whole jury considered the issue important. Even if it did, or it found the testimony regarding the CPS report confusing, it did not likely resolve its quandary in the State's favor. The court instructed the jury that, to convict, it must find Hineman's guilt beyond a reasonable doubt. (R. 79:6–8.) If the evidence was unclear who reported to CPS or whether its March report contained a disclosure of touching, the jury was required by those instructions to discount it. *See State v. Miller*, 2012 WI App 68, ¶ 22 n.3, 341 Wis. 2d 737, 816 N.W.2d 331 (juries presumptively follow their instructions).

In all events, Hineman does not explain how answers to that question—i.e., that a mandatory-reporter therapist contacted CPS based in part on learning that S.S. simulated fellatio and said that he learned about it from Hineman—would have helped his defense.

He also asserts that impeachment with the March CPS report "would have raised questions as to the integrity of the investigation" and "would have suggested to [the jury] that the investigation was in some way tainted" because Hintz here "either knowingly fabricated this testimony or she was suffering from tunnel vision." (Hineman's Br. 18.)

It is unreasonable to suggest, without support, that a police investigator would perjure herself and jeopardize a child sexual assault prosecution on a confirmable and nonessential fact. Further, Hineman does not explain his tainted-investigation theory. Even with Hineman's name appearing in the CPS report, there's no evidence that police homed in on Hineman as a suspect before August, after S.S. disclosed Hineman's touching. If Hineman is suggesting that police should have been investigating more people, there is no credible evidence that someone else touched S.S. Even if there was, it would not mean that Hineman did not touch S.S.

4. The prejudice standard does not shift when a case is about credibility, and State's evidence was not "slim."

As a final point, the State disagrees with Hineman's running theme that the alleged errors under *Brady* and *Strickland* were prejudicial because the State's evidence was "slim" and because the circuit court commented at sentencing the verdict "could have gone either way." (Hineman's Br. 11–12, 19, 33.) Hineman implies that even minimal errors are constitutionally prejudicial where the case's core issue is credibility. The State disagrees with that implication and Hineman's characterization of the State's case as weak.

The test for materiality under *Brady* and prejudice under *Strickland* both require the defendant to show that but for the complained-of error, there was a reasonable probability of a different outcome at trial. Reviewing courts presume that counsel provides reasonable representation and apply "a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690–91. Likewise, there is a "general presumption of regularity and propriety" applied to the prosecutor's discharge of their *Brady*-mandated duties. *See State ex rel. Lynch v. County Court*, 82 Wis. 2d 454, 467–68, 262 N.W.2d 773 (1978).

It's a high burden for defendants to overcome. And, as *Strickland* teaches, "[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). That standard applies to *all* cases. While the relative strength of the State's case factors into the prejudice analysis, the parties need not perform perfectly just because a case turns on credibility. Rather, to show prejudice, the defendant has to show exactly how the complained-of error undermined the reliability of the proceedings.

Along those lines, the sentencing court's remark that the verdict "could have gone either way" is not proof that this was a close case. (R. 80:24.) The court made clear that it was not doubting the verdict's correctness or reaching any conclusion as to Hineman's guilt. (R. 80:24.) Rather, it was observing that credibility is a jury determination and because of that, the result is not predictable.

The statement, taken in context, was also a foundation for the court's next point explaining why it was factoring into its sentencing decision a letter it had received from Hineman's adult son credibly alleging that Hineman had sexually assaulted him for multiple years beginning when the son was 11. (R. 80:25–26.) In finding the letter credible, the court told Hineman that the letter "undermines you in a profound way." (R. 80:26–27.)

Hence, in saying that the verdict could have gone either way, the court was not commenting on the strength of the State's case. It was saying that credibility is left to the jury, and the court, as of sentencing, had powerful reasons to discount Hineman's credibility to the extent that he was claiming innocence in this case.

And calling the State's evidence "slim" discounts the factors that drive jury determinations of credibility. As the jury was instructed (R. 79:11–12), it considered the witnesses' words, body language, tone, and demeanor. *See* Wis. JI–Criminal 300 (2000). It considered their clearness (or lack thereof) of recollection, the reasonableness of their testimony, their apparent intelligence, and any bias or possible motives for falsifying testimony. *Id*. The court instructed the jury to "use your common sense and experience. In everyday life you determine for yourselves the reliability of things people say to you and you should do the same thing here." (R. 79:12.)

While those intangible factors can get lost when reviewing transcripts, the parties' closing arguments provide

a sense of them and suggest the inferences that the jury could draw from the evidence presented.

As the prosecutor pointed out, S.S. was deeply uncomfortable testifying. (R. 79:16.) He had difficulty answering questions, especially regarding the assaults and Hineman, who was sitting directly across from him. (R. 78:45–57.) The prosecutor described S.S. as "very communicative with his body" and "his tone."(R. 79:17.) He "took long pauses and carefully considered the questions that were asked before he answered them." (R. 79:17.) He "shrunk down in his chair" when talking about the assault. (R. 79:17.) The prosecutor acknowledged that S.S. was inconsistent between his CAC interview and his testimony, but emphasized that he was consistent on key points: it was at home, it was on the couch, they were watching TV, and Hineman touched S.S.'s penis over his clothes. (R. 79:18.)

In contrast, Hineman was an adult who told police he was an hour away when he was clearly minutes away; who testified that he'd never called S.S. his son even though he told the police the opposite; and who testified that S.S. "seldom" called him Uncle Jeff when he told police (and S.S.'s testimony reflected) the opposite.

The jury weighed those things against the backdrop of what was not—and could not—be presented: a reasonable explanation why S.S. would fabricate the allegations. Instead, the jury heard that Hineman offered implausible explanations that the family cut off communication with him in March because they were mad about a savings account of which they were not yet aware; about his no longer helping out when he hadn't stopped helping; and about his criticism of Dad. But even if the family fell out with Hineman about any of those things, none would have reasonably resulted in their compelling S.S., a shy child with significant anxiety and behavior issues, to make up sexual assault allegations against Hineman and testify to them in court.

The court was correct that this case came down to credibility. But the State's evidence wasn't slim. S.S. was a compelling witness who had no reason to make up his allegations. Hineman, given his inexplicable deceit to police and to the jury, was not. He has failed to show that the absence of the March CPS report prejudiced him.

II. Counsel provided effective assistance.

Hineman raises multiple grounds of ineffective assistance. All of his claims failed before the postconviction court, and all of them should meet the same fate here.

A. A defendant claiming ineffective assistance must overcome the strong presumption that counsel rendered constitutionally adequate assistance.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687. If the Court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, the defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. Courts "strongly presume[]" that counsel has rendered adequate assistance. *Id.*

To show prejudice, the defendant must prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Id.* at 693. More than merely showing that the error had some conceivable effect on the outcome, "[t]he defendant must show 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; *see also Harrington v. Richter*, 562 U.S. 86, 112 (2011) (describing the standard as just slightly below more-probable-than-not and that it required "[t]he likelihood of a different result [to] be substantial, not just conceivable").

B. Counsel was not ineffective for failing to file a motion to compel discovery of the March CPS report.

Hineman argues that once the State failed to turn over the March CPS report, Attorney Henry was deficient for not filing a motion to compel its production. (Hineman's Br. 22.) The State agrees that Henry should have filed a motion to compel and invoked Wis. Stat. § 48.981(7)(a)(8). Still, Henry's omission was not prejudicial, because Hineman fails to demonstrate a reasonable probability of a different outcome had Henry obtained the March CPS report.

To start, materiality under *Brady* is the same test for prejudice under *Strickland*. Accordingly, Hineman cannot show that *Strickland* prejudice ensued based on Henry's cross-examination of Investigator Hintz about when the first touching disclosure occurred. Hineman insists that if Henry had obtained the March CPS report before trial, "the whole trajectory of the defense investigation and strategy" would have changed. (Hineman's Br. 23.) But none of his proposed reasons hold water.

1. The identity of the mandatory reporter would have changed nothing.

In claiming that the March CPS report would have changed counsel's trial preparation (*see* Hineman's Br. 23–24), Hineman relies primarily on Henry's testimony at the *Machner* hearing, where she stated that she had considered filing a *Shiffra/Green* motion to get S.S.'s therapy records. (R. 82:30.) She decided against filing such a motion because her

understanding was that S.S. was in therapy for behavior issues at school and anxiety, not sexual assault concerns. (R. 82:30.) Henry stated that she would have filed a *Shiffra/Green* motion had she known the identity of the mandatory reporter for the first CPS report. (R. 82:30.)

Assuming that Attorney Henry would have learned the identity of the mandatory reporter from the CPS report pretrial,[2] Hineman does not explain why the identity of the reporter would have made a difference in his case. He was aware that S.S. was in therapy as of March. The July police report conveyed S.S.'s diagnoses, behavior issues, and the fact that he was in therapy. Hineman identifies nothing about the reporter that would raise questions about their reliability and motivations in reporting.

In all events, Hineman had access to the CPS report in the postconviction proceedings, where he attempted but failed to show that he was entitled to in camera review of the therapy files. There, he speculated that therapy "may affect the reliability of memory" and may have involved discussion of sexual issues, created false memories, revealed other abuse in S.S.'s life, and included discussions of family and relationships. (R. 41:19–20.) He does not challenge that aspect of the postconviction court's decision where it held that Hineman merely speculated "that some of [S.S's] statements in therapy would bear upon the issues at trial" and failed to show "in this record a 'fact specific evidentiary showing' that the records of [S.S.'s] therapy support any defense to this

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[2] Chapter 48 protects the identity of the mandatory reporter from the subject of the report. Wis. Stat. § 48.981(7)(a)1. While there may be other means by which a defendant could learn the reporter's identity, the prosecutor and police were not necessarily authorized to disclose (by not redacting from the CPS report) the mandatory reporter's identity unless the State anticipated calling the reporter as a witness.

charge." (R. 62:12 (citing *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298).)

Because Hineman could not have obtained in camera review of S.S.'s therapy records even with the CPS report, he cannot demonstrate prejudice.

2. The other CPS reports contained nothing of consequence.

Next, Hineman argues that the March CPS report would have presumptively allowed Henry to access follow-up April and May CPS reports. (*See* Hineman's Br. 24–26.) Even if that presumption is correct,[3] those subsequent reports were inconsequential.

Indeed, the postconviction court said so (R. 62:6 ("The March 12 report is the only report of consequence.")), and a review of the reports supports that finding (R. 48:9–17). Neither the April nor May report identifies specific allegations of sexual assault or provides additional details on the pen incident from the March report. Both reports indicate that S.S.'s behavior was deteriorating. Both indicate that Dad and Grandma continued to suspect that Hineman had sexually abused S.S. but did not have any new allegations. Neither report was particularly favorable to Hineman. Indeed, the May report indicated that despite the family's cutting Hineman off, Hineman continued to show up at S.S.'s house uninvited. (R. 48:15.)

Hineman claims that Henry would have introduced information from the April report stating that Grandma and Dad took S.S. to a doctor, who found no signs of sexual abuse. (R. 48:10; 82:18.) That's not evidence that S.S. wasn't sexually

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[3] CPS sent only the March report to law enforcement. Accordingly, the prosecutor would not have been obligated to obtain or provide the April or May reports, though Hineman may have had other means to seek them. *See* Wis. Stat. § 48.981(7)(a)1.

abused. S.S. alleged an assault that would not have left any physical signs. Had Henry successfully introduced that evidence, it was neutral and unlikely to change the verdict.

Hineman also writes that the reports contained other details—the timing of the doctor visit, concerns that an "autistic son" was also abusing S.S., what S.S. possibly said to the reporters for those reports—that he thinks "should have been investigated." (Hineman's Br. 26.) But he has not shown what an "investigation" of that information would have revealed or how it was reasonably probable to change the outcome. *See State v. Leighton*, 2000 WI App 156, ¶ 38, 237 Wis. 2d 709, 616 N.W.2d 126. At the postconviction hearing, Hineman called none of the reporters, none of the CPS report authors, and no one else to explain what Henry would have learned had she investigated those things. Nor is there reason to believe that any of those individuals would have had relevant, helpful information.

3. The report would not have justified a defense expert.

Finally, Hineman proposes that the March CPS report would have prompted Henry to hire a defense expert to rebut the "assumption that [S.S.'s] unusual behaviors meant that he was being sexually abused" because there is no one profile of a sexually abused child. (Hineman's Br. 27.)

The mandatory reporter did not need to assume anything when she reported to CPS. Mandatory reporters have a duty to report when they have "reasonable cause to suspect" abuse or neglect or a reasonable belief that a child is threatened with abuse or neglect. Wis. Stat. § 48.981(2)(a). S.S.'s behavior and comment reflecting an understanding about oral sex was reasonable cause for the reporter to contact CPS.

Even if the reporter "assumed" sexual assault, it's not clear why Hineman thinks that that should have prompted

Henry to hire an expert. The mandatory reporter's alert simply prompted CPS to follow up with the family. And that follow-up led to a law enforcement referral, at which point law enforcement recommended a forensic interview. It was only when S.S. disclosed in the forensic interview that Hineman sexually touched him that the police took any significant steps to investigate Hineman for sexual assault. Expert testimony that there's no profile for a sexually assaulted child would have been irrelevant.

Hineman seems to suggest that counsel could have hired an expert based on a list of things that one might find in a therapist's report. (Hineman's Br. 27.) But he's failed to show a justification for in camera review of those reports, or how such expert testimony would have been relevant. It's speculation atop speculation that comes nowhere close to establishing prejudice.

In all, the March CPS report would have made no difference in Hineman's trial. Hineman cannot obtain relief on this claim.

C. Counsel was not ineffective for opting to waive an opening statement.

Hineman's challenge to this aspect of Attorney Henry's performance involves a question of trial strategy. Thus, he must "overcome the strong presumption of reasonableness afforded to trial counsel's decisions regarding trial strategy." *State v. Breitzman*, 2017 WI 100, ¶ 75, 378 Wis. 2d 431, 904 N.W.2d 93. Hence, Hineman must show that Henry's decision to waive her opening statement "was inconsistent with a reasonable trial strategy, that is, that it was irrational or based on caprice." *Id.* When a circuit court "determines that counsel had a reasonable trial strategy, the strategy 'is virtually unassailable in an ineffective assistance of counsel analysis.'" *Breitzman*, 378 Wis. 2d 431, ¶ 75 (citation omitted).

Counsel's decision to waive or defer an opening statement does not appear to support a *Strickland* claim. Indeed, courts considering such claims view deferral or waiver of the opening statement as a purely tactical call on a non-evidentiary privilege and one that is invariably not unreasonable. *See, e.g.*, *Huffington v. Nuth*, 140 F.3d 572, 583 (4th Cir. 1998); *Nguyen v. Reynolds*, 131 F.3d 1340, 1350 (10th Cir. 1997); *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985); *United States v. Salovitz*, 701 F.2d 17, 20–21 (2d Cir. 1983) ("It is common knowledge that defense counsel quite often waive openings as a simple matter of trial strategy. Such a waiver . . . ordinarily will not form the basis for a claim of ineffective assistance of counsel.").

Here, the postconviction court determined consistently with Henry's *Machner* testimony (R. 82:32) that she knew that Hineman "would deny liability generally, but she was unsure of the details. In preparations [Hineman] had been inconsistent. Rather than give an opening that she might have to take back or explain away, [Attorney Henry] elected to have [Hineman] speak for himself." (R. 62:9.) The postconviction court's determination that that was a sound strategic reason is "unassailable." *Breitzman*, 378 Wis. 2d 431, ¶ 75.

Hineman proposes an opening statement that Henry could have made, which is irrelevant to whether Henry's waiver decision was reasonable. (Hineman's Br. 29.) He argues, without legal or logical support, that waiving an opening statement—a non-evidentiary, non-mandatory portion of trial—could be understood to be a concession of guilt. (Hineman's Br. 29.) Even if it could, Henry explained her waiver during her closing to introduce her theme that the State's case was confusing and that it failed its burden of proof. (R. 79:22.)

As for Hineman's argument that the waiver was risky if Hineman decided to not testify (Hineman's Br. 29–30), it's

a moot point, since Hineman did testify. Further, any decision on an opening statement carries risks. That does not render a decision to waive—which has a significant benefit of depriving the State of a preview of the defense theory and opportunities to attack it during its direct presentation—unreasonable.

Finally, this Court need not reach prejudice on this claim, but even if it did, Hineman's speculation and guesswork at prejudicial effect (Hineman's Br. 30) falls far short of satisfying his burden.

D. Counsel performed reasonably in handling Jensen's testimony.

Hineman asserts that counsel should have objected to Jensen's testimony regarding delayed and piecemeal disclosure because Jensen was not noticed as an expert on those topics. (Hineman's Br. 30–33.) This claim fails. Counsel was prepared to address—and implemented a reasonable strategy in handling—Jensen's testimony regarding delayed and piecemeal disclosures. Moreover, Hineman cannot demonstrate prejudice.

1. Jensen provided basic information regarding delayed and piecemeal disclosures.

At trial, Jensen explained that "piecemeal disclosure" is the term for when children, disclosing abuse, will sometimes reveal it by disclosing one detail and then later giving more. (R. 78:28.) Jensen said that the additional details might come after the child gauged the listener's reaction or when initial disclosure triggered memories of additional details. (R. 78:28.) Jensen also testified that it was not unusual for young children to delay their disclosure of abuse due to any combination of fear, threats, shame, isolation, or lack of understanding that the abuse is wrong. (R. 78:28–29.)

The State did not notify Hineman that Jensen would testify as an expert on those matters, *see* Wis. Stat. § 971.23(1)(e), and Attorney Henry did not object by claiming a discovery violation, *see* Wis. Stat. § 971.23(1)(e). Instead, Attorney Henry diffused Jensen's testimony about delayed disclosure by getting Jensen to acknowledge that in the CAC interview, S.S. claimed that he told his parents right away after Hineman touched him. (R. 78:30–31.) Jensen agreed with Henry that if S.S. told his parents right away, that was not delayed disclosure. (R. 78:31.)

At the *Machner* hearing, Henry acknowledged that the State mentioned delayed disclosure in its opening and that she was prepared to address it. As she understood the State's case and the August CAC interview, S.S. said that he told his parents immediately. (R. 82:34, 58.) Accordingly, Jensen's testimony on delayed disclosure had no effect on the defense theory, Henry's strategy, or her presentation to the jury. Indeed, it allowed Henry to emphasize the lack of corroboration between S.S.'s claim that he told right away with his family's statements that he didn't. Henry would not have done anything differently had the State notified her of Jensen's expert testimony. (R. 82:59.)

Likewise, as for Jensen's statements on piecemeal disclosure, Henry saw that testimony as "beneficial to us because [S.S.'s disclosure] was really inconsistent. It wasn't just [S.S.] . . . telling a part of his story then continuing later on. It was these new details that I think were really inconsistent and didn't add up." (R. 82:67.) When asked, Henry agreed that the additional information S.S. provided "wasn't more" but "was inconsistent." (R. 82:67.) Accordingly, Henry would have not approached the matter differently had she received notice. (R. 82:67–68.) She did not perform deficiently by declining to object to Jensen's testimony.

2. Henry implemented a reasonable strategy in handling Jensen's testimony.

As with the above claim, the postconviction court determined that Attorney Henry made a reasonable tactical decision by cross-examining Jensen rather than objecting, especially given that it paid off when Jensen said that S.S. did not delay the disclosure. (R. 62:10.) That decision is "unassailable." *Breitzman*, 378 Wis. 2d 431, ¶ 75.

Hineman does not explain why he thinks Henry was deficient with regard to Jensen's statements about piecemeal disclosure. As Henry noted, S.S.'s disclosure was more confusing than piecemeal: he didn't start with vague statements and become more specific. (R. 82:67.) Rather, he offered "these new details that . . . were really inconsistent and didn't add up." (R. 82:67.) Like the delayed disclosure, in Henry's mind, the piecemeal disclosure testimony helped Hineman and supported the theory that S.S.'s claims were too inconsistent and contradictory for the State to meet its burden. (R. 82:67.)

As with the above claim, and contrary to Hineman's arguments (Hineman's Br. 31–32), Henry reasonably handled Jensen's testimony in a way that allowed her to highlight the lack of corroboration of S.S.'s claim that he told right away. As the defense theory went, if the State wanted the jury to believe that the assault occurred, the jury had to accept one of two seemingly incongruent propositions: (1) that S.S. disclosed right away and no one did anything, or (2) that S.S.'s claims of assault were reliable even though he was clearly wrong about disclosing right away.

3. Hineman cannot establish a reasonable probability of a different result.

Hineman premises his arguments on the faulty notion that the faster a victim reports an assault, the more likely it actually happened. (Hineman's Br. 32.) Hineman does not and cannot support that theory. Regardless when a child victim discloses an assault, ultimately the jury still must determine that the child's account satisfies the elements of the crime and must weigh the credibility of the child and the defendant.

And in arguing prejudice, Hineman overstates the potential effect of the jury's having heard Jensen's very limited expert testimony on delayed and piecemeal disclosure. (Hineman's Br. 32.) While courts regularly admit evidence explaining delayed and piecemeal disclosure through witnesses like Jensen, *see, e.g., State v. Smith*, 2016 WI App 8, ¶ 10, 366 Wis. 2d 613, 874 N.W.2d 610, those concepts are not highly technical or difficult to understand. Rather, they are based on common-sense notions that jurors would recognize from their everyday experiences: young children feel shame, isolation, and fear when someone—particularly a trusted figure—sexually assaults them, and those emotions can impact how and when they disclose.

Even assuming that Henry should have objected and could have excluded Jensen's testimony on the topics, its minimal use at trial could not undermine confidence in the outcome. Jensen's direct testimony on piecemeal and delayed disclosure was brief, approximately one transcript page for each topic. (R. 78:28–30.) Correspondingly, the State's use of that testimony at trial was minimal. In closing, the State briefly brought up piecemeal disclosure and argued that that was how S.S. disclosed. (R. 79:16.) It did not mention delayed disclosure. Rather, the focus of its closing was that S.S., despite inconsistencies in his story, made a compelling witness who had no reason to fabricate the assault, whereas

Hineman—given Hineman's shifting explanations and false statements—was not compelling. (R. 79:16–21, 31.)

In sum, there was no deficiency or prejudice with regard to Jensen's testimony.

E. Counsel did not concede Hineman's guilt.

If Henry had conceded Hineman's guilt, that would be ineffective assistance. Yet that's not what happened.

To start, the basis of this claim is language in the May 11, 2017, trial transcript. (R. 79.) The court reporter apparently filed two versions of that transcript. In the version used at the postconviction hearing, filed January 2018, the transcript reflected that Henry, during closing, said, "But *I* believe the sexual assault happened." (Hineman's Br. 33.)[4]

The court reporter later filed a second version of that transcript in March 2018, which reflects that Henry said, "*But* believe that the sexual assault happened." (R. 79:24.) That version of the transcript is the only version that appears in the appellate record. (R. 79.)

The State highlights the distinction to explain why the parties at the postconviction hearing referenced different language from what is in the transcript of record. The discrepancy, however, is immaterial. Regardless whether the reporter thought Henry said, "But believe" or "But I believe," Henry did not concede Hineman's guilt.

Context demonstrates why. Henry made the challenged remark while noting that S.S. disclosed in the CAC interview that the assault occurred during a time when S.S.'s parents

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[4] Appellate counsel attached a copy of that transcript to a motion filed in this Court. *See* acefiling.wiscourts.gov, Documents for Case 2020AP226, Motion to Withdraw MCR and Correct, filed October 29, 2020. The "But I believe" language referenced at the postconviction hearing appears at page 30 of the motion.

were home. She said that now, at trial, the State was asking the jury to believe S.S.'s trial testimony, which was that the assault occurred the day after trick-or-treating when S.S. was home alone with Hineman. (R. 79:24.) Henry expressed surprise that, for the first time at trial, the State claimed that the assault happened the day after trick-or-treating, a time that everyone conveniently remembered. (R. 79:24.) The transcript then reads:

> I don't know what to make of that information. You can do with it what you want. But believe that the sexual assault happened. It happened the day after trick-or-treating. It happened when his dad wasn't there. It would have had to happen when he was watching [S.S.] during those two weeks.

(R. 79:24.) Henry followed by identifying the inconsistencies of that version of events from what S.S. said in the forensic interview:

> He was clear on the forensic interview nothing happened while he was watching TV.
>
> Now when he testified yesterday he said he was touched once on his penis. No one was home. But he told his dad and his grandma the same day. Later on in his testimony he said well I told them a few weeks later. Okay. Whether you want to believe his mom, his dad, or his grandma, okay. You saw [Grandma.] You think if [S.S.] had told [Grandma] Uncle Jeff touched me that [Grandma] wouldn't have at least called the cops? . . .
>
> Now for you to believe that a sexual assault happened, you are going to have to believe one of these versions. Which one is it? I mean is it the one where he says it happened four times at my house. I told my parents. They kicked him out. Is it the one where he said—the one well it happened once. Nobody was home.

(R. 79:24–25.) Henry, in the rest of her closing argument, emphasized that the State failed to prove a crime beyond a reasonable doubt and that therefore Hineman was not guilty.

(R. 79:25–27.) Taken in context, one cannot reasonably understand Henry to have conceded guilt with her "But believe" statement.

Indeed, it would be a stunning moment if Henry conceded Hineman's guilt. Yet the court made no comments during or after Henry's argument indicating concerns about a concession. The prosecutor, who arguably listened more carefully to Henry's closing than anyone to craft her rebuttal, said nothing during rebuttal about Henry's conceding Hineman's guilt. (R. 79:27–36.)

At the *Machner* hearing, Henry stated that in making the challenged remark, she was asking the jury "what version do you believe" and was not conceding. (R. 82:42.) She denied saying what the transcript reflected; she noted that her husband and the investigator were in the courtroom and "would have said something to me" had she conceded, as would the judge. (R. 82:42–43.) Her only explanation was that the court reporter possibly made a transcription error. (R. 82:43.)

Context reflects that a transcription error is the most reasonable explanation. Apparently, the court reporter did not hear or missed a word or words after "But," as in, "But [to] believe . . . " or "But [for you to] believe . . . " before Henry listed the new details S.S. testified to. That correction would correspond with Henry's and the court's memory of what she said, how she said it, and her later lead-in to the alternative version of facts: "Now *for you to* believe that a sexual assault happened . . . ." (R. 79:24–25.)

It also would line up with the postconviction court's findings that based on the tone and theme of Henry's closing, Henry did not concede guilt, but rather "played to doubt" in setting forth the two versions of events the State was advancing. (R. 62:11–12.) Contrary to Hineman's assertion (Hineman's Br. 34), the court did not find that Henry stated

"she believed" the sexual assault happened. The court found that the transcript said what it said. (R. 62:11.) It also determined that what it recalled Henry having said was not a concession. (R. 62:11–12.) Hineman has no basis to argue that the circuit court misremembered Henry's words and tone. As noted, the record contained no reaction by anyone to what would have been an extraordinary mistake by Henry, which buttresses the conclusion that there was no concession.

Finally, while Hineman cites *Thiel*, he does not develop a detailed cumulative-prejudice argument in his brief, other than to generally argue that counsel's "deficiencies . . . viewed cumulatively, and in light of the fact that the [S]tate did not have strong evidence of guilt, undermine confidence in the verdict." (Hineman's Br. 21.)

The only deficiency by counsel was her failure to compel production of the CPS report. There are no other deficiencies to accumulate, and therefore no cumulative prejudice. *See Thiel*, 264 Wis. 2d 571, ¶ 60 (requiring multiple deficiencies for cumulative prejudice). Moreover, the State's case was not lacking; if the case was close, it was *because* of Henry's performance, not *despite* it. Hineman is not entitled to a new trial on ineffective assistance grounds.

III. There is no basis for a new trial in the interest of justice.

Under Wis. Stat. § 752.35, this Court may order discretionary reversal for a new trial: (1) where the real controversy has not been tried; or (2) where there has been a miscarriage of justice. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). This Court may exercise its discretionary reversal power on the real-controversy basis without finding the probability of a different result on retrial. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). At the same rate, this Court approaches "a request for a new trial with great caution," and will exercise its discretionary power "only

in exceptional cases." *Morden v. Continental AG*, 2000 WI 51, ¶ 87, 235 Wis. 2d 325, 611 N.W.2d 659 (citation omitted).

This is worlds away from such an exceptional case.

Hineman wrongly describes the standard as a determination whether "the controversy has not been fully tried." (Hineman's Br. 36.) The standard is the "*real* controversy," and the real controversy—both S.S.'s and Hineman's credibility as to whether Hineman assaulted S.S. by touching his penis with his hand—was fully tried. Both S.S. and Hineman testified. The jury watched S.S. disclose on the stand and in a CAC video. It watched Hineman testify and heard what he said to Investigator Hintz through her testimony.

Hineman repurposes his ineffective assistance argument regarding the State's failure to notice Jensen regarding her testimony (Hineman's Br. 37), which, as explained above, did not disadvantage Hineman remotely and which counsel handled effectively. *See State v. Ferguson*, 2014 WI App 48, ¶ 33, 354 Wis. 2d 253, 847 N.W.2d 900 (repurposed claims that this Court has already rejected does not support new trial in the interest of justice).

Hineman also repurposes an ineffective-assistance claim that he lost below and does not raise as a *Strickland* challenge here; he argues that the State's failure to notice Henry that Hintz would give expert testimony on grooming put the defense "at a severe disadvantage." (Hineman's Br. 37–38.) While a claim framed as ineffective assistance can also support a real-controversy claim, *see State v. Williams*, 2006 WI App 212, ¶ 17, 296 Wis. 2d 834, 723 N.W.2d 719, a losing, repackaged ineffective assistance claim does not justify a new trial in the interest of justice. *See Ferguson*, 354 Wis. 2d 253, ¶ 33. So, here, the postconviction court concluded that Henry was neither deficient nor prejudicial in her handling of Hintz's testimony. Hineman does not challenge

the correctness of that decision under *Strickland* and it cannot reasonably support a real-controversy claim. Even so, the postconviction court's decision was correct. Henry was prepared for Hintz's testimony, she successfully objected right away, and she allowed the jury to hear about all the generous things that Hineman did for S.S. without allowing the State to develop an argument that Hineman was grooming S.S. (R. 62:10.) There was no prejudice and nothing to suggest that the real controversy was not fully tried.

Similarly, this Court should reject Hineman's repurposed, abandoned *Shiffra/Green* claim. (Hineman's Br. 39–40.) To start, it's not a basis for an interest-of-justice reversal for a new trial. Even if Hineman could satisfy his pleading burden under *Shiffra/Green*, the remedy would be retrospective in camera proceedings.

In all events, the postconviction court already held that Hineman failed to make a fact-specific pleading entitling him to in camera review. (R. 62:12.) Hineman advances essentially the same speculations that he did below by noting things that may or may not happen in therapy without any explanation why S.S.'s records were reasonably likely to contain discussion regarding sexual touching when S.S. had first disclosed it in August 2015. (Hineman's Br. 40–41.) He has failed to demonstrate entitlement to in camera review, let alone a new trial in the interest of justice.

Hineman's final argument is confusing. He seems to think the real controversy wasn't tried because he possibly "was implicated on Dad's statement alone." (Hineman's Br. 41.) But, for lack of a better phrase, so what? Dad soundly shared with S.S.'s therapist that S.S. revealed that Hineman had told him about oral sex. Dad's concerns were wholly justified, especially in light of S.S.'s later disclosure in the forensic interview.

Hineman then essentially accuses Dad of neglect or worse, because Dad had a "motive for deflecting attention away from his own behaviors." (Hineman's Br. 42.) The State doesn't understand the point of this argument, other than to broadcast negative facts and opinions of Dad. If Hineman is claiming that he couldn't build a defense around blaming Dad for S.S.'s disclosure that Hineman assaulted him, he had all the information he needed to do that without the CPS report.

Moreover, it's not clear what Hineman thinks Dad would have deflected the authorities' attention from. Henry stated that there was no basis to believe that the family or therapist turned S.S. against Hineman. (R. 82:79–80.) And if Dad possibly had any role in S.S.'s problems, it would have come up. The police and CPS screened Dad's criminal history just as they did Hineman's. Dad's confusion and nervousness at the police visit in July was due to known cognitive deficits from past illnesses. (R. 78:66, 70.) All mentions of Dad in the CPS and police reports reflect that he was an attentive parent and deeply worried about S.S. There were zero concerns with his parenting of S.S. and zero evidence that he compelled S.S. to make up the allegations.

The real controversy was fully tried. There is no basis for this Court to grant that extraordinary discretionary relief.

CONCLUSION

This Court should affirm the judgment of conviction and the decision and order denying postconviction relief.

Dated this 30th day of November 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 10,992 words.

Dated this 30th day of November 2020.

Electronically signed by:

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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 the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 30th day of November 2020.

Electronically signed by:

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