STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP226-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JEFFREY L. HINEMAN,

Defendant-Appellant.

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

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUES PRESENTED

1. Before the child sexual assault trial in this case, the State failed to turn over (and counsel failed to request) a CPS report, the relevant content of which a disclosed police report summarized. Was the absence of the CPS report material under *Brady* or prejudicial under *Strickland*? And how do appellate courts limited to cold transcripts apply those standards in cases that turn on the jury's credibility determinations?

The postconviction court determined that the lack of the report was neither material nor prejudicial. The court of appeals reversed, after reviewing the transcript, but not addressing Hineman's testimony or deferring to the jury's credibility determinations.

This Court should reverse the court of appeals and clarify that reviewing courts should not reassess credibility based on a cold transcript.

2. Did Hineman satisfy his burden of demonstrating entitlement to in camera review of S.S.'s private therapy records?

The postconviction court addressed Hineman's claim, where he raised it in the ambit of *Strickland*, and held that his pleading was speculative and thus failed to show prejudice. The court of appeals reviewed the claim directly and held that in camera review was warranted.

This Court should reverse the court of appeals.

3. Should Hineman get a new trial based on any of the additional grounds he raised to the court of appeals?

The postconviction court denied these claims. The court of appeals did not reach them. This Court should hold that Hineman failed to establish ineffective assistance of counsel and decline to grant a new trial in the interests of justice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are warranted.

STATEMENT OF THE CASE

A jury found Jeffrey Hineman guilty of first-degree child sexual assault, sexual contact with a person under age 13. (R. 31:1.) The charge was based on S.S.'s claim that when he was six years old, Hineman touched S.S.'s "front private" and "back private" over his clothes. (R. 1:1–2.) S.S. also claimed that Hineman asked S.S. to touch him, which S.S. refused. (R. 1:1–2.)

In fall 2013, when S.S. was five years old, he was living in Wisconsin with his biological father ("Dad") and Dad's wife. Dad had brain cancer that affected his abilities, so he relied on his mother ("Grandma"), who lived nearby and helped raise S.S. (R. 78:62, 66, 69, 132–33.)

Around that time, Hineman texted Grandma and Dad "asking if he could be a part of [S.S.'s] life." (R. 78:62, 131.) Hineman knew S.S. when he was an infant; he was involved with S.S.'s biological mother from S.S.'s birth to 10 months. (R. 78:103.) Grandma and Dad agreed to Hineman's requests. (R. 78:62–63.)

All seemed well, at first. Hineman helped the family 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, whom S.S. called "Uncle Jeff," gave S.S. a bike and toys and took him on outings. (R. 78:62–63, 80, 83.)

In October 2014, Dad fell seriously ill with meningitis and was hospitalized for two weeks. (R. 78:63.) During that time, Hineman stayed with S.S. at Dad's house and took care of S.S. alone for one of those weeks. (R. 78:64, 69–70.)

By around Christmas of that year, Grandma sensed "something[was] not right" between Hineman and S.S. (R. 78:67.) Hineman had bought a bunkbed for S.S.'s room so he could sleep over, but S.S. "didn't want to be around" Hineman, and Hineman became "upset and angry" as a result. (R. 78:67.) Grandma "knew something was wrong" and "kept asking" S.S. to tell her, but he "kept saying nothing." (R. 78:67.)

In early 2015, the family and S.S.'s teachers saw alarming 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. He wasn't . . . listening to the teachers." (R. 78:64.) Other reports indicated that S.S. was pulling down his pants and acting like he was going to defecate on the floor, tearing his clothes off, and stating that "mean guys were going to hurt him." (R. 41:30.)

An incident at school escalated concerns: S.S. was sucking on a pen cap and told a classmate that "it feels good to have your privates sucked on." (R. 78:104–05.) S.S. first said he saw this information in a "Garfield" book or movie, but he later told his Dad that he learned it from Hineman. (R. 78:105–06; 41:30.)

These statements from S.S. precipitated two reports relevant to this appeal: a CPS report from March 2015 and a police report from July 2015.

Racine County Child Protective Services (CPS) created the March CPS report after a therapist whom S.S. was seeing contacted them expressing concerns about S.S.'s behavior and the pen incident. The CPS report included details of S.S.'s behavior and the pen incident, including that S.S. told Dad that he learned about oral sex from Hineman. (R. 48:4.) The CPS report said that the reporter "indicated that no information was given by [S.S.] that [Hineman] had touched

him or forced [S.S.] to touch [Hineman]." (R. 48:4.) Yet, the therapist was concerned that S.S. "might be too scared to share some of the information or if anyone had touched him." (R. 48:2.) That March, Dad and Grandma barred Hineman from contacting S.S. (R. 78:65, 88.) According to Grandma, Hineman was "very, very upset" and angry with that decision. (R. 78:65–66.)

In June 2015, CPS faxed its report to the Racine County Sheriff's Department, and Investigator Tracy Hintz was assigned to follow up. (R. 78:76.) In a July 2015 report (the police report), Hintz summarized the relevant information from the CPS report:

> The report indicates that [S.S.] was sucking on a pen at school and told a classmate that it feels good to have your privates sucked on. He said he learned it in a Garfield book but then stated it was from the Garfield 2 movie. The reporter spoke to [Dad] about it and [S.S.] indicated that [Hineman] had told him.

(R. 41:30.) The police report also said that the CPS report did not include information as to whether S.S. alleged touching by Hineman: "No specific information was given on if [Hineman] touched [S.S.] or forced [S.S.] to touch [Hineman]." (R. 41:30.) The police report also summarized S.S.'s other concerning behaviors, past issues, and the fact that he was seeing a counselor. (R. 41:30–31.)

The police report reflected some details from a conversation Hintz had with Dad and Grandma. (R. 78:76, 106.) Neither Grandma nor Dad reported that Hineman had touched S.S., but Grandma reported that S.S.'s toileting issues had continued to regress. (R. 41:31.) Hintz asked Dad if he had any specific reasons "why they would believe [Hineman] would do something to [S.S.]" (R. 41:31.) Dad responded "that [Hineman] has gone into [S.S.'s] room to watch a movie with the door shut and seemed to be more

interested in spending time with [S.S.] than the adults." (R. 41:31.)

At Hintz's recommendation, Dad and Grandma agreed for S.S. to have a forensic interview with the local child advocacy center (CAC). (R. 78:77.) At the CAC interview, conducted by forensic interviewer Heather Jensen in August 2015, S.S. disclosed that Hineman had touched him.

The day after the CAC interview, Investigator Hintz contacted Hineman at his home. (R. 78:81.) Hintz testified that while she and other officers were at his door, they saw Hineman in a truck that slowed and drove past their squad car. (R. 78:81–82.) A few minutes later, Hintz spoke to Hineman by phone and asked him to return, but Hineman lied that he was an hour away. (R. 78:82.) Within minutes, however, Hineman returned, after which Hintz interviewed him. (R. 78:82–83.)

At that interview, Hintz testified that Hineman told her 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. (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.) Hintz testified that during the interview, Hineman portrayed himself "like a savior to the entire family where he . . . was doing all these things for [S.S.] He felt he had raised [S.S.] Even though he was not involved for most of [S.S.'s] life, Hineman asserted that he was the best father figure that [S.S.] had." (R. 78:91.)

In a portion of the interview played for the jury, Hintz commented to Hineman that his neighbors thought that S.S. was his biological son. In response, Hineman twice said, "I've always called him my son." (R. 78:152; 85 at 59:09–23.)

Hintz also testified that she asked Hineman why the family cut him off and S.S. alleged the assault. (R. 78:87–88.) Hineman first told her that the family was angry that they couldn't access his savings account for S.S. (R. 78:88.) When Hintz pointed out that they learned about the savings account after cutting him off, Hineman replied that they were angry because he stopped helping Dad around the house. (R. 78:88–89.) When confronted that he'd been helping the family up until they cut him off, Hineman had no explanation. (R. 78:88–89, 91.)

At trial, the jury saw a video of the CAC interview, after the forensic interviewer, Jensen, gave foundational testimony. (R. 78:40.) Watching the video (R. 86)[1] provides a more nuanced understanding of S.S.'s disclosure than its transcript, (R. 41:32–63), does alone. In the video, S.S. was a meek, soft-spoken child. When Jensen asked why he came to talk, S.S. replied, "Because—," paused, and said softly, "I can't remember though." (R. 86 at 10:02; 41:40.) After some back-and-forth, Jensen asked, "Did something happen to your body that you don't like?" (R. 86 at 10:03–04; 41:41.) S.S. nodded yes and said "Uncle Jeff" hurt him by punching and kicking him when they were at his house watching TV. (R. 86 at 10:04–05; 41:41–42.)

When asked whether Hineman "ever [did] anything else that you didn't like?" S.S. immediately responded, "He touched my private parts." (R. 86 at 10:07; 41:44.) Hineman did this while he and S.S. were on the couch and S.S.'s parents were sleeping. (R. 86 at 10:07; 41:45.) Hineman "laughed at [S.S.]," then S.S. woke his parents and told them, even though

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[1] The scrubber tool in the CAC videos seemed to be malfunctioning on appellate counsel's review. Counsel recommends watching the video files while referencing the transcript. (R. 41:32–63.) References to R. 86 are to the hour and minute shown in the lower right-hand corner of the videos.

Hineman had said not to tell anyone. (R. 86 at 10:07, 10:15; 41:45, 52.) S.S. said that this touching occurred in winter and over his clothes and that Hineman touched him four times (though later he said six times). (R. 86 at 10:09, 10:11, 10:25; 41:46, 48, 59.) S.S. first said that Hineman touched his "front private" but later included his "back private." (R. 86 at 10:12–14; 41:49–51.)

When Jensen asked S.S. whether Hineman wanted S.S. "to do something to his privates," S.S. started shaking his head, but paused, saying, "Yeah, but I didn't do it," and said that Hineman wanted S.S. to touch his privates with his hand. (R. 86 at 10:25–26; 41:59–60.) When asked what he liked and disliked about Hineman, S.S. liked that Hineman "always used to buy me toys," but didn't like "[w]hen he was touching me." (R. 86 at 10:27–28; 41:61.)

Jensen also asked about the time "Uncle Jeff [was] taking care of you when your dad was away." (R. 86 at 10:17–18; 41:54.) S.S. said that Hineman was "taking bad care" of him by being mean, calling him names, and pushing him. (R. 86 at 10:17–18, 10:23–24; 41:54–55.)

S.S. also testified at trial. He was then nine. (R. 78:44.) Like in the CAC interview, he was "physically nervous" and struggled to talk about Hineman's assaults. (R. 78:48; 79:16.) As the prosecutor described in her closing argument, S.S.'s body language and tone in court were "very communicative." (R. 79:17.) She noted that he appeared scared and uncomfortable with Hineman sitting across from him. (R. 79:16.) He was "not quite ready to talk" about what happened and took "long pauses and carefully considered the questions" before answering. (R. 79:17.) When talking about the assault, S.S. "shrunk down in his chair." (R. 79:17.)

S.S. ultimately testified that something happened when his dad was ill and Hineman came to stay at S.S.'s house. (R. 78:46–47.) S.S. agreed that Hineman "did something to

[him] that [S.S.] didn't like," which was that Hineman touched him when they were on the couch watching cartoons. (R. 78:47, 49.) He said it was daytime, they were alone, and "I just didn't feel right," because "I think he touched me on my private part," i.e., the private part he used to go "number one." (R. 78:49–50.)

S.S. initially testified that he told Grandma and Dad about the touching immediately, though he later said that he told Grandma first and Dad a few weeks later. (R. 78:50, 53–57.) In his testimony, S.S. did not remember if Hineman asked S.S. to reciprocate the touching or to not tell. (R. 78:51, 53.)

Hineman also testified. He agreed with the timelines that Grandma described, that he watched S.S. while Dad was hospitalized, and that he last saw S.S. and his family in March. (R. 78:132, 134–35, 137, 146.) He denied ever striking or inappropriately touching S.S. (R. 78:140), but he made inconsistent statements. For example, he proposed new reasons for the family's cutting him off: a "significant change" in Dad after his hospitalization, and criticisms that Hineman shared with the family "made them mad." (R. 78:136–37.) Further, Hineman denied ever claiming that S.S. was his biological son (R. 78:147–48), in contrast to the police interview in which Hineman told Hintz, "I've always called him my son." (R. 85:59.) Hineman also stated that S.S. never or rarely called him "Uncle Jeff," (R. 78:147–48), even though he told Hintz differently in the interview, (R. 78:83), and S.S. consistently referred to him as Uncle Jeff in the CAC interview and at trial. (R. 41:41, 50; 78:44, 50–54.)

The CPS report was not introduced at trial, but it came up during Hineman's counsel's cross-examination of Hintz. Counsel began by asking Hintz whether "this whole case came about because [S.S.] told a classmate that it feels good to have your privates sucked on." (R. 78:104.) Hintz consulted the police report and confirmed that S.S. said those things at

school and said he learned it from a Garfield movie. (R. 78:105–06.) Hintz said that the first time she personally heard S.S. claim that Hineman touched his privates was during the August CAC interview. (R. 78:77–79, 107.) She could not recall, however, if that was the first time S.S. ever claimed that Hineman touched him. (R. 78:107.) She said, "I believe in the CPS report, that there was a statement in there that he said [Hineman] had done that." (R. 78:107.)

Hintz agreed that her police report contained no reports of inappropriate touching. (R. 78:107, 112.) She agreed that when she spoke to Dad and Grandma in July, neither of them claimed that S.S. reported touching by Hineman. (R. 78:107–09.) She admitted that if the CPS report had an allegation of touching, or if Dad or Grandma had reported it, it would have been important for her to document it in the police report. (R. 78:111–12.) She repeated her belief there was a disclosure of touching in the CPS report, but she conceded that she couldn't be sure without seeing the report. (R. 78:107–08, 112.)

The jury found Hineman guilty. (R. 31:1.) At sentencing, the court noted that while Hineman denied committing the offense, "[t]he jury saw it differently." (R. 80:24.) The court acknowledged that "the verdict could have gone either way. Not because I had any opinion with regard to whether you had committed the offense in evaluating the testimony," but because "[i]t came down to credibility." (R. 80:24–25.)

The court made that remark to explain that after the verdict, it reviewed a letter from Hineman's adult son providing a "graphic and apparently heartfelt condemnation of [Hineman]" describing sexual abuse that Hineman had committed against him "from age 11 onward." (R. 80:26.) Though Hineman claimed that his son was retaliating against him for rejecting the son's homosexuality, (R. 80:20), the court

did not find Hineman's "explanation to be persuasive," (R. 80:27). The court found the letter to be credible, entered it as an exhibit, and told Hineman that it undermined him "in a profound way." (R. 80:27.) It ultimately sentenced him to 25 years total. (R. 80:34.)

After sentencing, Hineman filed postconviction motions, (R. 40; 41; 55), in which he raised numerous grounds for relief.

Hineman's primary complaints centered on the March CPS report faxed to the police. In Hineman's view, his never obtaining the CPS report prevented his counsel from adequately impeaching Hintz on her mistaken belief that the CPS report contained an allegation of touching. (R. 55:6–7; 61:17–20.) Hineman also claimed that the CPS report could have spurred a successful *Shiffra/Green* motion and other defense investigations. (R. 55:1–10; 61:7–11.) He raised other ineffective assistance claims and requested a new trial in the interests of justice. (R. 41:11–26; 55:10–14; 61:20–22.)

After two hearings, including a *Machner* hearing at which Hineman's trial counsel testified, the postconviction court denied relief orally and in writing. (R. 62; 83:53–69.) As for claims related to the CPS report, the court found that all the relevant information in the CPS report appeared in the police report, which was disclosed to defense counsel, and therefore the absence of the CPS report was neither material nor prejudicial. (R. 62:6.) It also held that counsel adequately cross-examined Hintz without the CPS report, and that the other claims of prejudice were speculative. (R. 62:7.) Accordingly, there was no prejudice under *Brady* or *Strickland*. (R. 62:7.)

As for Hineman's ineffective assistance claim based on counsel's failure to file a *Shiffra/Green* motion, the court found that even with the CPS report, Hineman merely speculated "that some of [S.S.'s] statements in therapy would

bear upon the issues at trial." (R. 62:12.) It noted that the "[k]ey word is may" in Hineman's attempted showing. (R. 83:68.) Accordingly, the court held, Hineman failed to satisfy the "fact specific evidentiary showing" required to obtain in camera review. (R. 62:12; 83:68–69 (citation omitted).) The court also denied each of Hineman's other claims of ineffective assistance and his request for a new trial in the interests of justice. (R. 62:5–12.)

Hineman appeals, and the court of appeals reversed and ordered a new trial. It concluded that the CPS report was material under *Brady* because it was necessary to impeach Hintz's testimony, which it said "no doubt" bolstered S.S.'s credibility and "misled the jury" in a "close case." (Pet-App. 8–10.) The court also reached the *Shiffra/Green* issue and ordered in-camera review of S.S.'s private therapy files related to the mandatory report on remand. (Pet-App. 10.) It did not reach Hineman's remaining claims for relief. (Pet-App. 11 n.1.)

This Court granted the State's petition for review.

STANDARD OF REVIEW

Hineman's claims alleging constitutional violations under *Brady* and *Strickland* are reviewed under a mixed standard. This Court accepts the circuit court's factual findings unless they are clearly erroneous, and it applies those findings to constitutional standards de novo. *See State v. Wayerski*, 2019 WI 11, ¶¶ 32–33, 35, 385 Wis. 2d 344, 922 N.W.2d 468.

This Court reviews a postconviction court's denial of a *Shiffra/Green* motion under a similar mixed review: the circuit court's factual findings are reviewed under the clearly erroneous standard, but whether the defendant made an evidentiary showing sufficient for in camera review is

reviewed de novo. *State v. Green*, 2002 WI 68, ¶ 20, 253 Wis. 2d 356, 646 N.W.2d 298.

ARGUMENT

I. The nondisclosure of the CPS report was neither material under *Brady* nor prejudicial under *Strickland*.

Hineman alleged violations of *Brady* and *Strickland* because his trial counsel did not obtain the CPS report before trial. That omission was material and prejudicial, he argued, because (1) Hintz testified that she believed that the CPS report included a disclosure by S.S. that Hineman had touched him inappropriately; and (2) the CPS report contained noncumulative information that supposedly would have changed the "whole trajectory" of the defense, including supporting a *Shiffra/Green* motion to obtain therapy records and additional lines of investigation.

Hineman cannot establish either materiality or prejudice. The relevant information in the CPS report was cumulative to what was included in the police report, with which counsel effectively cross-examined Hintz. And Hineman failed to show that additional information in the report supported a reasonable probability of a different result.

A. Materiality and prejudice are identical difficult standards for defendants to satisfy.

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 because it is 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, 281–82 (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. These standards impose a high burden. While a defendant attempting to show materiality or prejudice need not prove that the alleged omission "more likely than not altered the outcome," the difference between the materiality and prejudice standards "and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citation omitted). In other words, "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.*

B. Hineman failed to show materiality under *Brady* or prejudice under *Strickland*.

Hineman satisfied the first two prongs of *Brady*, and the deficiency prong of *Strickland*. While the CPS report was inculpatory—it reflected that six-year-old S.S. expressed knowledge of oral sex and learned it from Hineman—before trial, the CPS report had potential impeachment value, depending on what S.S.'s testimony would have entailed.

Thus, the State should have provided or counsel should have sought the report. But Hineman failed to satisfy the third prong of *Brady* and the prejudice prong of *Strickland*.

1. The relevant information in the CPS report was cumulative, counsel ably cross-examined Hintz, and Hintz's statement about the report did not bolster the State's case.

Hineman pointed to the cross-examination of Hintz to argue that the absence of the CPS report was material to his defense. But the information in the report was cumulative to information available to his counsel to cross-examine Hintz; counsel deftly used a misunderstanding Hintz had about the report to Hineman's advantage; and the court of appeals was wrong in concluding that Hintz's misunderstanding about the report helped the State.

a. The information in the CPS report was cumulative to the information in the police report.

Impeachment evidence is material in two situations: (1) if the witness being attacked provided the only evidence linking the defendant to the crime, or, as is pertinent here, (2) "where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case." *State v. Rockette*, 2006 WI App 103, ¶ 41, 294 Wis. 2d 611, 718 N.W.2d 269 (citation omitted). "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.'" *Id.* (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)).

The police report, (R. 41:29–31), reproduced information from the CPS report:[2] 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); the original reporter said that S.S. had first attributed seeing those things in a "Garfield" book or movie, but later, S.S. told Dad that Hineman was the source, (R. 41:30); S.S. had exhibited concerning behavior at home and school, including inappropriate defecation and acting out, (R. 41:30); and S.S. had diagnoses of anxiety and ADHD and issues with anger management, (R. 41:30). The police report indicated that in the CPS report "No specific information was given on if [Hineman] touched [S.S.] or forced [S.S.] to touch [Hineman]." (R. 41:30.) Nothing else in the CPS report was relevant to S.S.'s later claims that Hineman touched him.

b. Hineman's counsel was able to effectively cross-examine Hintz.

Unsurprisingly, Hineman's counsel effectively cross-examined Hintz without the CPS report.

To start, regarding Hintz's uncertainty about the CPS report, counsel could have directed Hintz to a sentence in the police report that stated the CPS report included no information as to whether S.S. made an allegation of touching at that time: "No specific information was given on if

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[2] Though the March report was the only one that CPS appeared to send to police, Hineman also provided CPS reports from April and May in support of his postconviction motion. (R. 48:8–17.) The postconviction court found that the March report "is the only report of consequence." (R. 62:5–6.) The State focuses on the March CPS report in this section.

[Hineman] touched [S.S.] or forced [S.S.] to touch [Hineman]." (R. 41:30.) She did not need the near-identical sentence in the CPS report itself.

Even without directing Hintz to that sentence, counsel deftly cross-examined Hintz. Again, in both the CPS report and police report, there was an inculpatory disclosure by S.S.—that he had learned about oral sex from Hineman. As the postconviction court noted, Hintz was mistakenly thinking about that disclosure when she was asked whether S.S. had disclosed touching in March. (R. 62:7.) Had counsel persisted in refreshing Hintz's memory, that could have caused Hintz to explain that S.S. had not disclosed touching but had attributed learning about oral sex from Hineman.

Instead, counsel understood that Hintz was confused and exploited that confusion for Hineman's benefit. She allowed Hintz to look at her police report. (R. 78:105.) Then she elicited 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 S.S.'s attributing it to Garfield (without implicating Hineman); and prompted Hintz's acknowledgements that if the CPS report contained an allegation of touching, she should have included it in her police report. (R. 78:105–08.)

That was the best result Hineman could have hoped for, even if he had the CPS report. As the postconviction court determined, counsel's choices in questioning Hintz were reasonable and avoided introducing inculpatory information about Hineman:

> Counsel . . . found herself in a tricky situation. The witness was clearly confusing an allegation [that Hineman discussed] oral sexual practices with S.S. with an [allegation] of actual physical contact. . . . While that [allegation that Hineman discussed oral sex] does not violate the same criminal statute, it is

> hardly innocent behavior. Having sailed too close to a sensitive topic, [counsel] decided to let the matter drop rather than to delve into it. Her choice strikes the court as the wiser course of action. Proving that the claim of actual physical contact . . . was preceded by a discussion of sexual grooming would have amounted to a Pyrrhic victory.

(R. 62:7.)

Accordingly, any failure by counsel to obtain the report was not prejudicial under *Strickland* and not material under *Brady*, because its relevant contents were cumulative to the information in the police report, and counsel used the police report to thoroughly and reasonably question Hintz.

c. Contrary to the court of appeal's view, Hintz's statement weakened the State's case rather than strengthened it.

The court of appeals considered Hintz's equivocations about the content of the CPS report as "an important error" that "no doubt bolstered [S.S.]'s credibility and reliability in the eyes of the jury regarding his allegation of sexual assault by Hineman." (Pet-App. 8.) Hintz's statement cannot have bolstered S.S.'s testimony so much to reasonably make a difference in the verdict, for two reasons.

First, Hintz's testimony was not only equivocal, it was also confusing with its multiple contradictions. The only "clear" impressions Hintz left the jury were either: (1) she failed to document an actual disclosure of inappropriate touching, instead focusing on a pen incident that she told the jury S.S. had credited to an animated cat; or (2) she mistakenly recalled what was in the CPS report and was overly defensive about it. Neither impression cast Hintz in a favorable light.

Second, even if the jury somehow understood Hintz's confusion to reflect that S.S. alleged touching in March, that didn't bolster S.S.'s testimony. Hintz's testimony merely explained how police got involved and provided details from her interview with Hineman. Hintz had no firsthand knowledge of what S.S. alleged beyond what she saw in his August interview. Moreover, the jury learned no details of S.S.'s alleged March allegation of touching or whether it was consistent with his claim at trial or in the interview. It could not bolster any of S.S.'s testimony about when he disclosed or whom he disclosed to. S.S. never claimed to tell anyone about the touching other than his parents and Grandma within weeks of it occurring, which Grandma's testimony established never happened.

Finally, the jury's finding that S.S. reported touching in March would not help the State's case, since the jury would then also have to question what would seem a shocking lack of urgency by the authorities and adults in S.S.'s life. Indeed, the jury would likely wonder why CPS took three months to send the report to police, why Hintz took another month to talk to Dad and Grandma, or why Dad and Grandma had no awareness as of July that S.S. had disclosed touching in March.

2. Any noncumulative information in the CPS report was immaterial, and its absence was not prejudicial.

Hineman also alleged that not having the CPS report was material and prejudicial because it contained additional information. As discussed by the court of appeals, there were two relevant additional facts raised by Hineman: (1) the reporter was S.S.'s therapist, whom he was seeing for behavior issues; and (2) S.S.'s behavior included "just ripping his clothes off" and the reporter was concerned that S.S.

"might be too scared to share some of the information or if anyone had touched him." (Pet-App. 9.)[3]

The absence of that additional information was neither material nor prejudicial.

a. The identity of the reporter, if not kept confidential, was not material.

Regarding the identity of the reporter as S.S.'s therapist, it is not clear that Hineman would have learned that information to begin with. Even if Hineman's counsel had sought the report directly from CPS, CPS reports are generally confidential. Even if Hineman was arguably a "subject" of the report, the identity of the reporter would have remained confidential. *See* Wis. Stat. § 48.981(7)(a)1. In terms of the State's obligation to provide the CPS report, the State had to disclose the identity of the reporter if it had anticipated calling them as a witness. Wis. Stat. § 971.23(1)(d). That was not the case here. Accordingly, had the State turned over the CPS report before trial, it would have been within its discretion to redact the reporter's identity.

Even if Hineman had learned that the reporter was S.S.'s therapist, that fact cannot have made a difference at trial. The court of appeals speculated that, on the theory that therapy is an "obvious opportunity" to disclose inappropriate touching, the fact that S.S. did not disclose could mean that that the therapist asked and S.S. denied that Hineman had inappropriately touched him. (Pet-App. 8.) But that premise

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[3] The court of appeals also noted that the CPS report said "that no information was given *by [S.S.]* that Hineman had touched him or forced [S.S.] to touch Hineman," whereas the police report omitted those the two italicized words. (Pet-App. 8 (emphasis added).) That difference didn't matter because the information would have had to come from S.S.

is incorrect: there's no such thing as an "obvious opportunity" to disclose abuse. Victims disclose abuse when they are ready, not simply at an appointed formal moment. And there's nothing in the CPS report to support the understanding that the therapist asked and S.S. denied touching.

b. The later CPS reports were not material; moreover, Hineman failed to show what an investigation would have produced.

The court of appeals concluded that pretrial disclosure of the March CPS report "likely would have led to Hineman receiving" the April and May CPS reports, which the court of appeals thought could have allowed counsel to question Hintz on the thoroughness of the investigation or to question Grandma about someone else who could have committed the assaults. (Pet-App. 8–9.) But the police report reflects only receipt of the March report. (R. 41:30.) There is no evidence that the State possessed those reports for *Brady* purposes.

Even assuming that Hineman could have obtained those other reports, the postconviction court found that the March CPS report was "the only report of consequence." (R. 62:6.) That finding is not clearly erroneous. Although the later reports included information from a nurse, a teacher, and a school counselor that S.S.'s behavior was deteriorating further, they contained no disclosures of touching. (R. 48:10, 15.) This is not surprising, since in July, Hintz talked to Dad and Grandma and they did not report or know of any disclosures of touching.

The April report contained a statement that Dad and Grandma also "indicated that an autistic son, whose name is not known, may also be the maltreater." (R. 48:10.) The court of appeals proposed that this comment could have raised a

theory about a third-party assailant and Hintz's non-investigation of that individual. (Pet-App. 8–9.)

Dad and Grandma's additional suspicions and speculations about the autistic son did not lessen their suspicion of Hineman. (R. 48:10.) And evidence that S.S.'s caregivers may have wondered whether a second person harmed S.S. is not probative to whether Hineman abused S.S. "Evidence going to prove one sexual encounter does not assist the trier of fact in determining whether a separate sexual encounter also occurred—the two events are not mutually exclusive." *In Int. of Michael R.B.*, 175 Wis. 2d 713, 726, 499 N.W.2d 641 (1993). Ultimately, if Hintz focused on Hineman, it was warranted. Hineman was the only person S.S. identified as abusing him, and Hintz did not find Hineman credible in her interview with him.

Finally, the additional material cannot support a finding of materiality or prejudice because it is not actual admissible evidence. Defendants cannot prove materiality or prejudice and get new trials simply by identifying breadcrumbs of evidence that may or may not pan out. They must show what an investigation would have revealed. *State v. Leighton*, 2000 WI App 156, ¶ 38, 237 Wis. 2d 709, 616 N.W.2d 126. Hineman did not do that here.

C. The court of appeals erred by reweighing the witnesses' credibility based on a paper record, displacing the role of the factfinder.

Beyond the specific errors described above, the court of appeals started on the wrong foot by assuming that because the case was a credibility contest, virtually anything could have tipped the verdict toward Hineman. Fundamentally, the court's view that the case was "close," based on a paper-only review of the transcripts, effectively functioned as a reweighing of the credibility of S.S. (Pet-App. 8.)

The court of appeals erred in framing the case as "close" merely because it was a credibility contest between a child and the adult whom the child was accusing of sexual assault. That view depended on the court of appeals' reweighing the core witnesses' credibility, which it cannot do from a cold transcript. Rather than declaring that virtually anything could have made a difference, reviewing courts should assess how the missing evidence or omitted acts would have impacted the core witnesses' testimony and the critical elements of the case.

That a case's critical elements turn on credibility does not automatically make it "close." The strength of one side's case is relative to the strength of the other's. For example, a case turning on an inconsistent child victim's age-appropriate testimony that a trusted adult sexually assaulted him may not appear strong on paper, yet it certainly is not weak when the defendant testifies and comes across as inherently unbelievable.

To call the State's case weak by tabulating the victim's inconsistencies from a cold transcript shortchanges the jury's unanimous finding of guilt beyond a reasonable doubt and compromises the finality of sexual assault cases, especially those involving young children. Most of these cases are credibility contests. In child sexual assault cases, it is especially difficult to persuade a jury to convict. *See State v. Hurley*, 2015 WI 35, ¶ 81, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted) ("Child sexual abuse prosecutions often proceed under three major disabilities: they rely on a single witness who is very young and whose allegations are frequently unsupported by physical evidence."). Given the State's high burden of proof and the difficulties it faces in these matters, if the jury viewed the State's case as weak or "close," it more likely would acquit than convict.

More importantly, a reviewing court's reweighing credibility based on cold transcripts invades the factfinder's role:

> It is axiomatic that "we do not sit as a thirteenth juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. . . . Rather, we must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude."

State v. Ayala, 215 A.3d 116, 125 (Conn. 2019). A reviewing court's assessing the closeness of the case by tabulating inconsistencies in a victim's testimony gives the defendant an unfair second shot at persuading that the victim was not credible after workshopping that argument at trial. *See Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) (citation omitted) (emphasizing that a "trial on the merits" is the "main event," not a "tryout on the road").

More so than other cases, a trial in a credibility contest is not just about what the witnesses said, but how they said it. And reviewing courts simply cannot assess the persuasiveness of a witness' testimony based on a cold transcript. Accordingly, to show materiality or prejudice, defendants seeking review of these claims must show a but-for cause-and-effect that would so undermine a critical element of the State's case that the likelihood of a different result is substantial. *See Richter*, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable."); *Rockette*, 294 Wis. 2d 611, ¶ 41 (citation omitted) (requiring "likely impact on the witness's credibility would have undermined a critical element in the prosecution's case").

This Court's decision in *State v. Hunt*, 2014 WI 102, 360 Wis. 2d 434, 851 N.W.2d 576,[4] is instructive. There, the charges alleged that Hunt exposed a child to a sexually explicit video. *Id.* ¶ 4. The trial court erroneously excluded evidence that Hunt's friend denied sending Hunt the video in question, which would have corroborated Hunt's denial of the allegations. *Id.* ¶ 25. Hunt argued that because the case came down to credibility, the excluded evidence corroborating his version of events was "vitally important" and not harmless. *Id.* ¶ 28. This Court disagreed, holding that the error was harmless because other evidence had virtually identical corroborative effect, and because the source of the video was not a critical element of the State's case. *Id.* ¶¶ 30, 35.

Like in *Hunt*, here, there is no nexus between the complained-of error and key elements of the State's case. The State's case was based on S.S.'s testimony that Hineman touched his penis when Hineman was taking care of him in October 2015. The State based the allegation on S.S.'s disclosure to Jensen in August 2016 and his trial testimony. Whether S.S. disclosed touching in March (or whether Hintz correctly remembered what was in the CPS report) was not a critical element of the State's case. The CPS report said nothing about touching, but that was consistent with the testimony that S.S. first disclosed touching in August.

A final point: the court of appeals leaned on the trial court's remark that it thought the case could have gone either way. (Pet-App. 9.) That statement did not support a view that the case was close. The trial court made that remark at sentencing to explain why it was considering a credible letter from Hineman's son alleging abuse when he was a child. Moreover, the remark reflected not that the case was close,

[4] Though *Hunt* is a harmless-error case, harmless error is substantively consistent with *Strickland*'s prejudice standard. *See State v. Dyess*, 124 Wis. 2d 525, 544, 370 N.W.2d 222 (1985).

but that the result was unpredictable because it came down to credibility. Ultimately, that same court, in its postconviction capacity, also concluded that Hineman failed to show that the CPS report was reasonably likely to change anything.

In sum, this Court should reverse the court of appeals. It should hold that the omission of the CPS report was neither material under *Brady* nor prejudicial under *Strickland*.

II. The court of appeals incorrectly granted Hineman's *Shiffra/Green* claim.

In addition to ordering a new trial, the court of appeals also reversed the postconviction court on a *Shiffra/Green* issue that Hineman had advanced on appeal as a reason to grant a new trial in the interests of justice.[5] But because Hineman failed to make a fact-specific showing that he would be entitled to in-camera review of S.S.'s therapy records, this Court should also reverse this claim.[6]

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[5] Hineman arguably abandoned any preserved *Shiffra/Green* claim to the court of appeals, since he did not reference his attempt to satisfy his burden to the postconviction court or its decision, instead arguing grounds anew to show prejudice and seek a new trial in the interests of justice. Though the court of appeals should not have reached this issue, *see A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998), the State expects that this Court will address the issue in some form, as noted below.

[6] As of this writing, this Court is considering whether *Shiffra* correctly allows defendants a means to access a sexual assault victim's private therapy records. *State v. Alan S. Johnson*, Case No. 2019AP664-CR. If this Court overrules *Shiffra* in *Johnson*, it should summarily vacate the court of appeals' *Shiffra/Green* decision here.

A. If the CPS report is not material, this Court may summarily deny the *Shiffra/Green* claim.

To obtain in camera review of a sexual assault victim's therapy records, a defendant must establish "a specific factual basis demonstrating a reasonable likelihood that the [victim's] records contain relevant information that is necessary to a determination of guilt or innocence and not merely cumulative to evidence already available to the defendant." *State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 661 N.W.2d 105 (citing *Green*, 253 Wis. 2d 356, ¶ 34). This pleading is a demonstration of materiality. *Id.* ¶¶ 1, 13.

If this Court concludes that the CPS report was not material under *Brady*, Hineman cannot show that the report supports a viable *Shiffra/Green* motion for in camera review. In other words, since the CPS report was either cumulative to the police report, or not material to the extent that it was noncumulative, the report cannot establish materiality under the *Shiffra/Green* standard. This Court may thus summarily deny this claim.

If *Shiffra* continues to apply to private records, and this Court denies Hineman's requests for a new trial, addressing the *Shiffra/Green* ground is warranted to determine if a retrospective in camera hearing is necessary. *See State v. Robertson*, 2003 WI App 84, ¶ 31, 263 Wis. 2d 349, 661 N.W.2d 105. In addition, the court of appeals' decision reflects an overly broad reading of the limited *Shiffra/Green* pleading standard, which warrants clarification from this Court.

B. Hineman cannot show that in camera review of S.S.'s therapy records is warranted.

Even leaving the fatal failures of lack of materiality or prejudice, the court of appeals misconstrued the *Green* standard and wrongly concluded that the information in the CPS report allowed Hineman to establish materiality warranting production and in camera review of S.S.'s private therapy records.

1. The *Shiffra/Green* pleading standard is narrow.

The court of appeals first established the pleading standard for defendants to obtain in camera review of a victim's therapy records. *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993). That case involved intercourse between adults that the victim claimed was assault and that Shiffra claimed was consensual. *Id.* at 602–03. Shiffra made a specific offer to the court, presenting evidence that the victim suffered from disorders that would prevent her from truthfully relating the facts or accurately recalling past events. *Id.* at 603. That evidence included that the victim had PTSD, other psychiatric problems, and substance abuse issues. *Id.* at 610. The offer of proof also included the victim's past reckless behavior and the victim's sister's belief that the victim could not distinguish between reality and fantasy. *Id.* The court of appeals concluded that in camera review was warranted because Shiffra demonstrated that the psychiatric records likely contained evidence relating to the victim's ability to perceive and truthfully relate events, which was relevant to her credibility and bore directly on Shiffra's consent defense. *Id.* at 612.

In *Green*, this Court clarified and tightened up the pleading standard introduced in *Shiffra*. There, this Court

rejected language in *Shiffra* suggesting that the defendant merely show that the records "may be helpful to the defense" or "may be necessary to a fair determination of guilt or innocence." *Green*, 253 Wis. 2d 356, ¶ 25 (citation omitted). Instead, it held that defendants must set forth "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." *Id.* ¶ 34. Such evidence must tend to "create a reasonable doubt that might not otherwise exist." *Id.*

While the standard is not "unduly high," it is challenging. *Id.* ¶ 35. It must be "independently probative to the defense," noncumulative to other available evidence, and requires a fact-specific evidentiary showing describing as precisely as possible the information sought and how it is relevant to and supports an articulated defense. *Id.* ¶¶ 33–34. The defendant must reasonably "investigate the victim's background and counseling through other means first." *Id.* ¶ 33. And he cannot merely speculate or guess at what information is in the records; likewise, he "must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense." *Id.* ¶ 33. Importantly, "[t]he mere assertion . . . that the sexual assault was discussed during counseling and that the counseling records may contain statements that are inconsistent with other reports is insufficient to compel an in camera review." *Id.* ¶ 37.

Along those lines, appellate courts reviewing *Shiffra/Green* decisions have limited in camera review to situations similar to those presented in *Shiffra*, i.e., where the defendant offered specific facts that the victim suffered from a disorder that could impact their ability to accurately perceive and describe past events and to truthfully testify.

Compare Robertson, 263 Wis. 2d 349, ¶ 27 (in camera review warranted where victim experienced delusions and hallucinations that could impact ability to accurately perceive or relate events); *and State v. Lynch*, 2015 WI App 2, ¶ 23, 359 Wis. 2d 482, 859 N.W.2d 125 (same where victim suffered from PTSD linked to impaired ability to accurately recall and describe events); *with State v. Giacomantonio*, 2016 WI App 62, ¶¶ 2, 45, 371 Wis. 2d 452, 885 N.W.2d 394 (no in camera review where defendant claimed therapy addressed "interpersonal relationships" and would confirm that the victim did not disclose to her therapist); *and State v. Behnke*, 203 Wis. 2d 43, 53, 553 N.W.2d 265 (Ct. App. 1996) (same where defendant failed to link diagnoses to recall or perception issues). The common thread in these cases is that to obtain in camera review, defendants must link information that is only available in the records, if at all (e.g., details of a mental health condition or diagnosis and its effects), and that relates directly to the defendant's defense (e.g., the victim's ability to testify credibly and reliably).

2. The postconviction court correctly determined that Hineman's pleading was speculative and fell short of the standard.

Here, Hineman's offer of proof was deficient. In the postconviction proceedings, he speculated that since the therapist suspected that S.S. was too scared to report touching, and he was in therapy for behavioral problems, there must have been some discussion around sexual assault, and therefore likely relevant information in the records. (R. 83:58–67.) Hineman thought that that evidence would show that S.S. was questioned repeatedly about the assaults such that his eventual disclosure was tainted. (R. 83:66–67.) To the court of appeals, Hineman asserted that it was enough that the therapist developed a concern about abuse and was

treating the child both before and after S.S. reported that Hineman had touched him.

Yet Hineman conceded to both the postconviction court and the court of appeals that he could not show that the records were reasonably likely to contain independent information material to his defense. (R. 83:58–59 (acknowledging that Hineman could only know whether records contained relevant information if the court looked at them); COA Reply Br. 16 ("[Hineman] cannot know—or even investigate much less call witnesses to testify—how [S.S.] was questioned or treated without a court order.").)

3. The court of appeals misconstrued the *Green* standard.

Despite Hineman's concessions, the court of appeals limited its discussion of the *Green* standard to one of potential relevancy: "We consider whether there is at least 'a reasonable likelihood that the therapist's records' being sought 'contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant.'" (Pet-App. 10 (citation omitted).) The court of appeals reasoned that the records likely contained relevant information necessary to a determination of guilt or innocence based on the following: the therapist was a mandatory reporter, contacted CPS about the pen comment and display, and had concerns that he was too scared to share more details, and because S.S. was in therapy to address behavior problems. (Pet-App. 10.)

But that reasoning is akin to granting in camera review simply because S.S. was in therapy to address his behavior and potential sexual assault. That is not enough: "The mere assertion . . . that the sexual assault was discussed during counseling and that the counseling records may contain

statements that are inconsistent with other reports is insufficient to compel an in camera review." *Green*, 253 Wis. 2d 356, ¶ 37.

Nor is it sufficient to assert that in camera review should occur because the victim's therapist, instead of another adult, reported sexual assault concerns to CPS. A therapist's reporting sexual assault concerns to CPS does not inherently support a *Shiffra/Green* motion. As discussed above, the identity of a reporter to CPS is kept confidential, even to the subject of a report.

The court of appeals selectively quoted and misunderstood the *Green* standard, making it much broader and easier to satisfy than this Court intended. The court limited its discussion of *Green* to its general language requiring a "reasonable likelihood that the" records "contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available." (Pet-App. 10.) It did not discuss the additional language in *Green* clarifying its narrowness or other published decisions reflecting the limited circumstances under which in camera review is granted.

Here, the therapist's making a mandatory report did not support a reasonable likelihood that the records contained independent, noncumulative information that was reasonably likely to create a reasonable doubt. The *Green* standard requires more than showing that therapy records might have potential helpful material, such as impeachment material or additional evidence to support an already-available defense. It requires a showing ultimately grounded in the circumstances offered in *Shiffra*: that the victims suffer from disorders that impair their ability to accurately report their experiences or testify truthfully.

Accordingly, if Hineman had sought the reports to learn whether the therapist used particular types of therapy that

an expert could testify about, that wasn't enough for in camera review. So too if he had wanted the records to possibly impeach S.S., by learning more details about whether the therapist directly asked about sexual assault, S.S. affirmatively denied sexual assault, or S.S. provided inconsistent information. None of those proposed uses relates to a disorder that compromises S.S.'s ability to testify truthfully: none of those proposed uses relates to a disorder that would compromise S.S.'s ability to accurately describe events relating to sexual matters.

In sum, the postconviction court soundly found that Hineman's offer was speculative and conclusory, (R. 83:68–69), and it correctly concluded that Hineman failed his burden of making a "fact specific evidentiary showing" that access to the records would "support any defense to this charge," (R. 62:12 (citation omitted)). The court of appeals erred in reversing that decision.

III. This Court should reject Hineman's remaining claims for a new trial.

A. Counsel provided effective assistance.

Hineman also claimed to the court of appeals that counsel was ineffective for (1) opting to waive an opening statement; (2) not objecting to the CPS interviewer's testimony; and (3) assertedly conceding Hineman's guilt during closing arguments. The court of appeals did not reach these claims since it reversed on the *Brady* issue. Still, none of these claims have merit.

1. Hineman 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, Hineman 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.* The State discussed the prejudice standard in Part I above; stated again, "[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." *Id.* at 694.

2. Counsel reasonably waived opening argument.

Counsel opted to waive her opening statement at trial. (R. 78:18, 122.) At the *Machner* hearing, she stated that when she prepped Hineman to testify, she "had some concerns about what he would say when he took the stand." (R. 82:32.) She didn't want her opening to "commit him to something that he wouldn't then say in his direct." (R. 82:32.) The postconviction court determined that that was a sound strategy. It found that counsel 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, defense counsel elected to have [Hineman] speak for himself." (R. 62:9.)

Counsel's tactical decision to waive or defer an opening statement will not generally support a *Strickland* claim,[7] and that's the case here: counsel explained her decision and Hineman cannot show that it "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. The postconviction court's determination here that "counsel had a reasonable trial strategy, . . . 'is virtually unassailable'" on appeal. *Id.* (citation omitted).

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

Hineman alleged that counsel should have objected to Jensen's testimony regarding delayed and piecemeal disclosure because the State had not provided notice that Jensen was an expert on those topics.

At trial, Jensen explained that "[p]iecemeal disclosure" is the term for when children, disclosing abuse, 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 saw the listener's reaction or if initial disclosure triggered memories of additional details. (R. 78:28.) Jensen also said that it was not unusual for young children to delay their disclosure of abuse due to fear, threats, shame, isolation, or confusion. (R. 78:28–29.)

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[7] *See, e.g.*, *Moss v. Hofbauer*, 286 F.3d 851, 863 (6th Cir. 2002); *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) (citation omitted) ("[D]efense 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."); *Rodriguez v. State*, 109 A.3d 1075, 1080 (Del. 2015); *Dawson v. State*, 10 P.3d 49, 69 (Mont. 2000).

Counsel 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 counsel that if S.S. had told his parents right away, S.S. did not delay his disclosure. (R. 78:31.)

At the *Machner* hearing, counsel stated that the State had 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, counsel's strategy, or her presentation to the jury. (R. 82:59.) Indeed, it allowed counsel to emphasize the inconsistency in S.S.'s statements about what, when, or to whom he told. Nothing in the *Machner* transcript reflected that counsel would have done anything differently had the State noticed Jensen as an expert.

Likewise, as for Jensen's statements on piecemeal disclosure, counsel saw that testimony as "beneficial to us because [S.S.'s disclosure] was really inconsistent," not piecemeal: "It wasn't just [S.S.] . . . telling a part of his story then continuing later on. It was these new details that . . . were really inconsistent and didn't add up." (R. 82:67.) Again, counsel would have not approached the matter differently had she received notice. (R. 82:67–68.)

The postconviction court determined that counsel made a reasonable tactical decision by cross-examining Jensen on delayed disclosure, noting that the strategy paid off when Jensen said that S.S. did not delay the disclosure. (R. 62:9–10.) Accordingly, counsel was not deficient.

Moreover, Hineman cannot establish prejudice. Even if counsel had objected, it is not apparent that the trial court would have struck Jensen's testimony on those points. While

courts regularly admit expert evidence explaining delayed and piecemeal disclosure, *see, e.g., State v. Smith*, 2016 WI App 8, ¶ 10, 366 Wis. 2d 613, 874 N.W.2d 610, those concepts are based on common-sense notions that jurors can 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 if the court would have excluded Jensen's testimony, its minimal use at trial could not undermine confidence in the outcome. Jensen's direct testimony on piecemeal and delayed disclosure covered approximately one transcript page for each topic. (R. 78:28–30.) In closing, the State did not mention delayed disclosure; it only briefly brought up piecemeal disclosure, and counsel's point remained that S.S.'s disclosures were more inconsistent than piecemeal. (R. 79:16.) Hineman is not entitled to a new trial on this claim.

4. Counsel did not concede Hineman's guilt.

Finally, Hineman argued that counsel was ineffective for supposedly conceding Hineman's guilt in closing. Counsel did not concede guilt, and this Court should affirm the postconviction court's denial of this claim.

Counsel's closing argument focused on S.S.'s inconsistencies. She noted that S.S. told Jensen that the assault occurred when S.S.'s parents were home, but at trial, the State was asking the jury to believe that the assault occurred in October when everyone knew S.S. was alone with Hineman. (R. 79:24.) Counsel expressed surprise that S.S. now recalled a specific time when the assault happened. (R. 79:24.) The transcript continued:

> 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 (emphasis added).)

Counsel then identified more inconsistencies in S.S.'s accusations, including how many times it happened, what the circumstances were, and whom he told. (R. 79:24–25.) She returned to the remark about what it would take to believe S.S.:

> *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 (emphasis added).) In the rest of her closing argument, counsel emphasized that the State failed to prove the crime beyond a reasonable doubt and that therefore Hineman was not guilty. (R. 79:25–27.)

That context reflects that counsel's "[b]ut believe" statement was a transcription error, where counsel likely really said, "But *to* believe," or "But *for you to* believe . . . ." Counsel's *Machner* testimony supports that understanding. She testified that she did not concede guilt and that she was asking the jury "what version do you believe." (R. 82:42.) Her husband, the investigator, and the judge were all in the courtroom and "would have said something to me" had she conceded. (R. 82:42–43.) Yet, the record contained no such fallout or reaction from the court, the prosecutor, or counsel.

Moreover, the postconviction court also presided at trial and recalled the tone and theme of the closing. She "played to doubt" in setting forth the two versions of events the State

was advancing and did not concede. (R. 62:11–12.) Hineman has no basis to argue that the circuit court misremembered counsel's words and tone, that its findings are clearly erroneous, or that those findings do not support the conclusion that counsel performed effectively.

B. 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). Still, 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. This is worlds away from an exceptional case.

Both S.S.'s and Hineman's credibility were fully tried. Both S.S. and Hineman testified. The jury watched S.S. disclose on the stand and in a CAC video that Hineman had touched him. It watched Hineman testify and heard what he said to Hintz through her testimony and through a snippet of her interview of him. Hineman chose to put his credibility at issue. And he chose to pursue a defense that the State failed its burden to prove guilt beyond a reasonable doubt. The jury believed S.S., strongly enough that it determined that the State overcame the reasonable-doubt threshold. There is no principled basis for this Court to exercise its discretion and grant this extraordinary relief.

CONCLUSION

This Court should reverse the decision of the court of appeals.

Dated this 24th day of June 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,768 words.

Dated this 24th day of June 2022.

SARAH L. BURGUNDY
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

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. § (Rule) 809.19(12) (2019-20).

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 24th day of June 2022.

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