STATE OF WISCONSIN

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

DISTRICT III

Case No. 2020AP1746-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH M. MARKS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN BARRON COUNTY CIRCUIT COURT, THE HONORABLE JAMES C. BABLER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs will fully address the issues presented, which can be resolved by applying well-established precedent.

INTRODUCTION

A jury convicted Joseph M. Marks of first-degree sexual assault of a child and exposing his genitals to a child. On appeal, Marks contends that the circuit court erroneously applied Wis. Stat. § 908.08 when it admitted a recorded forensic interview of his victim, RF. He further contends that his trial counsel was ineffective for not seeking reconsideration of the court's decision based on a psychologist's report critiquing the interview.

Marks has not shown that he is entitled to relief. The circuit court did not erroneously exercise its discretion when admitting the recording. And Marks has not shown that his counsel performed deficiently or that he was prejudiced. This Court should affirm.

STATEMENT OF THE CASE

The charges against Marks, RF's interview, and Marks's trial

Marks lived with RF and RF's mother, EF, in Cumberland. (R. 1:1–2; 113:123–24.) RF's father, AF, was married to SF. (R. 1:1–2; 113:81–82.) AF and EF split placement of RF, with her living with each parent for a week at a time. (R. 1:2; 131:84, 126.)

In March 2018, when she was four years old, RF told SF that she had seen Marks's penis. (R. 1:2; 113:249.) RF also said that Marks had her pull down her pants, and he touched her crotch and had her touch her crotch. (R. 1:2; 113:249.) RF also disclosed this to her pre-kindergarten teacher. (R. 1:2; 113:247.) SF reported RF's allegation to police and the teacher

reported RF's allegation to human services. (R. 1:2; 113:85–98, 247–48.)

Martha Moyer, a social worker for the Barron County Department of Human Services, conducted a forensic interview of RF. (R. 1:2; 113:206–07.) Cumberland Police Department Officer Greg Chafer was present for the interview, which took place in an interview room at the police department. (R. 1:2; 113:165–66.) RF told Moyer that Marks "told me to pull down my pants and he pulled down his pants." (R. 1:3.) "RF said she had seen the defendant's penis. RF said the defendant touched his penis, and then I touched mine." (R. 1:3.) RF pointed the genital area on a drawing of a girl as the place where Marks touched her. (R. 1:3–4.)

The State charged Marks with one count each of first-degree sexual assault and exposing genitals to a child. (R. 1.) It moved to admit an audiovisual recording of Moyer's interview of RF. (R. 6.) *See* Wis. Stat. § 908.08(2).

Testimony at a hearing in February 2019 on the State's motion revealed that the recording equipment in the interview room had failed to fully capture the interview's audio. As a result of the failure, the audio and video on the copy of the interview that the State proposed to admit were obtained from two different recording devices.

Chafer testified that when he reviewed the recording from the interview room's equipment, he discovered that the audio "was cutting in and out throughout the interview." (R. 108:6.) He contacted Moyer, who had separately audio recorded the interview on a different piece of equipment. (R. 108:6.) Moyer still had the recording, and Chafer copied it. (R. 108:6–7.) He then contacted the State Crime Laboratory, which was able to pair the video from the interview room's recorder with the audio from Moyer's recorder. (R. 108:7–8.) Chafer said that the new recording showed the entire interview, and there were no distortions. (R. 108:10.)

Larry Flessert, the forensic analyst from the crime lab who merged the two recordings, also testified at the hearing. (R. 108:13–25.) He explained how he combined the recordings and matched the audio to the video. (R. 108:15–19.) Flessert said the audio and video "matched perfectly" without any distortions or alterations. (R. 108:19.)

The court reviewed the recording that Flessert created. (R. 108:25–26.) *See* Wis. Stat. § 908.08(2)(b).

Marks opposed the State's request to admit the recording. He argued that the recording did not meet Wis. Stat. § 908.08's requirement that it "be free from excision, alteration, or distortion." (R. 108:28–29.) *See* Wis. Stat. § 908.08(3)(b). Marks pointed to the hearing testimony showing that "they pieced this together by some means." (R. 108:28–29.) He also claimed that "[t]here was a change of volume and there was a change of quality" on the audio on the reconstructed recording. (R. 108:29.)

Marks further argued that the recording did not show that RF understood the difference between truth and a lie or the consequences for lying. (R. 108:29.) *See* Wis. Stat. § 908.08(3)(c).

The circuit court admitted the interview. (R. 108:32–35.) It addressed the statutory requirements for admission listed in Wis. Stat. § 908.08(3).

The court first held that "the recording is well before the child's 12th birthday." (R. 108:32.) *See* Wis. Stat. § 908.08(3)(a)1.

Second, the court determined that the recording was "accurate and free from excision, alteration, and video audio distortion." (R. 108:32.) *See* Wis. Stat. § 908.08(3)(b). The court acknowledged that there had been problems with the recording equipment but concluded that "it was clearly able to hear and see." (R. 108:32.) The court also noted that RF appeared to have some speech problems that made her

"unintelligible" at times "but that doesn't mean it wasn't an accurate recording." (R. 108:32–33.)

Third, the court concluded that, because RF was four when she gave the interview, her developmental level was not appropriate to give the statement under oath or affirmation. (R. 108:33–34.) *See* Wis. Stat. § 908.08(3)(c). But, it determined, RF "had a clear understanding of false statements and that they are punishable and the importance of telling the truth." (R. 108:34.) The court concluded that "[t]here is a good deal of discussion about truth and lie" in the entire interview. (R. 108:33.) It said that it was clear that "she would not guess." (R. 108:33.) RF would "often say she didn't know." (R. 108:33.) She also said that "if you lie, you get in trouble, especially at Dad's house, and she got put in the corner. And she said about the difference of truth and lie, lie you get in trouble; truth, you tell the truth and you don't get into trouble." (R. 108:33–34.)

Fourth, the court found "from the time, the content, and circumstances of the statement, there's an indicia [of] trustworthiness." (R. 108:34.) *See* Wis. Stat. § 908.08(3)(d). It noted that RF had said "some pretty nice things" about Marks during the interview, including "times she apparently liked [him]." (R. 108:34.) The court also said that "[t]here didn't appear to be . . . any coaching or any animosity." (R. 108:34.)

Fifth, and finally, the court determined that admitting the statement "would not unfairly surprise any party or deprive any party of the fair opportunity to meet the allegations." (108:34.) *See* Wis. Stat. § 908.08(3)(e).

The State played the recording at trial during Moyer's testimony. (R. 113:208–15.) RF testified. (R. 113:239.) Marks chose not to cross-examine her. (R. 113:245.) SF and RF's teacher also testified about RF's disclosure of the assaults to them. (R. 113:92–97, 108–10, 246–49.)

The jury convicted Marks of first-degree sexual assault of a child and exposing genitals to a child. (R. 115:87.) The circuit court sentenced him to 12 years of initial confinement and eight years of extended supervision on the sexual assault conviction, and a concurrent 3.5 years of confinement and 1.5 years of supervision on the exposing genitals conviction. (R. 116:17.)

Marks's postconviction motion

Marks moved for postconviction relief. (R. 88.) He alleged that his trial counsel had been ineffective for not seeking reconsideration of the court's ruling admitting RF's interview. (R. 88:1–7.)

Specifically, Marks claimed that counsel should have sought reconsideration based on a report from psychologist Anthony Jurek critiquing various aspects of the interview as they related to its admissibility under Wis. Stat. § 908.08. (R. 88:3–7, 9–30.) Jurek did not submit his report to counsel until March 2019, the month after the hearing on the State's motion to admit the interview. (R. 88:4; 108:1.)

The circuit court held a hearing on Marks's motion. (R. 117.) Counsel testified that he did not consider filing a motion for reconsideration when he received Jurek's report. (R. 117:4–5.) He explained that he did not find the report's critiques of the interview "terribly compelling." (R. 117:5.) Counsel also said that he had "difficulty reaching [Jurek] for his testimony." (R. 117:5.) Counsel agreed that the report "just didn't merit a motion for reconsideration." (R. 117:5.) He also could not recall when he retained Jurek, though he believed that he had "went through the funding process before" the hearing on the recording's admissibility. (R. 117:8–9.)

The court denied Marks's motion. (R. 117:16–19.) It said that the interview of RF was not "great" because she did not answer many questions but that did not mean it was not accurate. (R. 117:17.) The court agreed with a portion of Jurek's report that said the interview contained little information beyond what SF and RF's teacher had reported to authorities. (R. 88:30; 117:17–18.) The interview, the court said, "gave us almost no information," and given that, a reasonable attorney would not have sought reconsideration based on the report. (R. 117:18.) The court also determined that it would have still admitted the interview even with Jurek's report. (R. 117:18.) Finally, the court said that admitting the interview was harmless because there was little incriminating evidence in it, and instead, RF's, SF's, and RF's teacher's testimony "were much more compelling." (R. 117:18–19.)

Marks appeals. (R. 91.)

ARGUMENT

I. The circuit court properly exercised its discretion by admitting the interview of RF.

A. Circuit courts are required to admit recorded statements of children if the conditions of Wis. Stat. § 908.08 are met.

"As an out-of-court statement, a child's statement during a forensic interview is hearsay if it is offered at trial for the truth of the matter asserted." *State v. Mercado*, 2021 WI 2, ¶ 40, 395 Wis. 2d 296, 953 N.W.2d 337 (citing Wis. Stat. § 908.01(3)). But "an out-of-court statement, even though hearsay, may be admissible if it fits within a recognized exception to the hearsay rule." *Id*. (citation omitted).

"Video-recordings of a child's statements are admissible if the child is available to testify and the child's statements fall into one of the provisions of Wis. Stat. § 908.08." *Id.* ¶ 41 The statutory exception serves the important purpose of "minimizing the mental and emotional strain of children's participation at trial." *Id.* (citations and alterations omitted). "[T]he legislature enacted § 908.08 to 'make it easier, not harder, to employ videotaped statements of children in criminal trials.'" *Id.* (citation omitted).

Section 908.08 requires that certain circumstances be met before a party may admit a child's recorded statement. The party seeking admission of the statement must allow the opposing party an opportunity to view the recording. *See* Wis. Stat. § 908.08(2)(a). The court "shall conduct a hearing on the statement's admissibility." Wis. Stat. § 908.08(2)(b). "At or before the hearing, the court shall view the statement." *Id.*

The court *shall admit* the statement when it finds that the recording is accurate, the child made the statement upon oath or affirmation or upon a showing that the child understood the importance of telling the truth and false statements are punishable, that the statement has indicia of trustworthiness, and that the admission of it will not unfairly surprise the other party. Wis. Stat. § 908.08(3)(b)–(e).

In addition, when the child will be between 12 and 16 years old at the start of the hearing where the recording will be introduced, the court must find that "the interests of justice warrant its admission." Wis. Stat. § 908.08(3)(a)2. No such finding is required when, as here, the child will be under 12 years old. Wis. Stat. § 908.08(3)(a)1.

This Court reviews a circuit court's decision to admit a recorded interview under Wis. Stat. § 908.08 for an erroneous exercise of discretion. *State v. James*, 2005 WI App 188, ¶ 8, 285 Wis. 2d 783, 703 N.W.2d 727. This Court affirms the circuit court's discretionary decisions if the court, relying on the facts of record and the applicable law, used a demonstrable rational process to reach a reasonable decision. *State v. Doss*, 2008 WI 93, ¶ 19, 312 Wis. 2d 570, 754 N.W.2d 150. Additionally, a court's determinations on the requirements of section 908.08 are ordinarily questions of fact reviewed for clear error. *State v. Wiskerchen*, 2019 WI 1, ¶ 17, 385 Wis. 2d 120, 921 N.W.2d 730; *State v. Jimmie R.R.,* 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 606 N.W.2d 196; *State v. Tarantino*, 157 Wis. 2d 199, 209–11, 458 N.W.2d 582 (Ct. App. 1990).[1]

B. The circuit court reasonably concluded that the interview of RF met Wis. Stat. § 908.08's requirements for admission.

This Court should conclude that the circuit court did not err by admitting the interview of RF.

The court's decision applied all the relevant factors in Wis. Stat. § 908.08(3). It noted, first, that the recording was made before RF's twelfth birthday because RF was "only four." (R. 108:32.) Section 908.08(3)(a)1. requires that the

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[1] *Jimmie R.R.* also says that this Court's review is de novo when the only evidence underlying the court's findings is the recording because the Court is "in as good a position" as the circuit court to assess the recording. *Jimmie R.R.*, 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 606 N.W.2d 196. Marks asks this Court to review the circuit court's decision de novo for that reason. (Marks's Br. 7-8.) This Court should conclude that Marks's claim fails under either a de novo or a deferential standard of review.

hearing at which the recording is played start before the child's twelfth birthday to admit the statement without a separate finding that the interest of justice requires admission. The child's age at the time of the recording does not control. But the court's misstatement here caused no error. RF was four at the time of the interview and six at the time of trial. (R. 108:32; 113:239.)

Next, the court held that the recording was accurate and free from alteration or distortion. *See* Wis. Stat. § 908.08(3)(b). The court determined that, despite the problems with the recording equipment and RF's sometimes difficult-to-hear statements, the recording accurately reflected what had happened during the interview. (R. 108:32.)

The court then determined that, while RF was too young to give her statement under oath, the recording showed that she understood false statements were punishable and that it was important to tell the truth (R. 108:33–34.) *See* Wis. Stat. § 908.08(3)(c). The recording supports the court's findings. RF said that if she told the truth, she would not get in trouble, but would get in trouble if she told a lie. (R. 32 at 3:30.)[2] She agreed that it was important to tell the truth and promised to do so. (R. 32 at 4:45.) And she explained that she had gotten in trouble for lying in the past. (R. 32 at 29:30.) The court thus properly concluded that the recording satisfied section 908.08(3)(c).

Next, the court found that the recording had indicia of trustworthiness. *See* Wis. Stat. § 908.08(3)(d). It noted that RF had said nice things about Marks during the interview and apparently liked him. The recording supports this finding; RF said that Marks was nice. (R. 32 at 28:55.) The

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[2] Citations to the recording are to the approximate times on the media player's time indicator when the noted matters begin to be discussed.

court also said that "[t]here didn't appear to be . . . any coaching or any animosity." (R. 108:34.) RF's specific statement that Marks was nice and the overall contents of the interview support these conclusions.

Finally, the court determined that admitting the recording would not unfairly surprise Marks or deprive him of a chance to respond to the allegations. (R. 108:34.) *See* Wis. Stat. § 908.08(3)(e). That was a reasonable conclusion. The complaint references the interview, so Marks was aware of it from the start of the case. (R. 1.) In addition, the court's ruling admitting the recording in February 2019 was almost seven months before trial. (R. 108; 113.) Marks knew about the recording and had plenty of time to prepare for its use against him. The circuit court did not erroneously admit RF's recorded interview.

C. Marks has failed to show that the circuit court erred by admitting RF's recorded statement.

This Court should also reject Marks's arguments that the circuit court misapplied Wis. Stat. § 908.08 when it admitted the recording of RF's interview.

Marks first contends that the equipment failure shows that the recording was not free from excision, alteration, or distortion. (Marks's Br. 8–9.) Marks, though, does not significantly develop his argument why the State's combining the video and audio from separate recording devices could not satisfy Wis. Stat. § 908.08(3)(b). This Court does not address undeveloped arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992). The purpose of section 908.08(3)(b) is to ensure that the fact finder sees an accurate representation of what happened during the interview. The reconstructed recording did that. Marks has not shown that the circuit court erred.

Next, Marks argues that RF did not understand the importance of telling the truth or that false statements were punishable. (Marks's Br. 9–11.) He is wrong. "'The importance of telling the truth' and 'that false statements are punishable'" are interrelated concepts. *Jimmie R.R.*, 232 Wis. 2d 138, ¶ 42. "In most instances, a reasonable child would associate a warning about the importance of telling the truth with the related concept of untruthfulness and the consequences that might flow from such deceit." *Id*. "The same would be true in the converse situation. When warned about the consequences of lying, a reasonable child would understand the importance of being truthful." *Id*. n. 7. Here, RF said that if she told the truth, she would not get in trouble, and if she told a lie, she would get in trouble. She also said that she had gotten into trouble for lying in the past. The circuit court did not err by finding that these statements satisfied Wis. Stat. § 908.08(3)(c).

Marks compares RF's interview to those in *State v. Mercado*, 2020 WI App 14, 391 Wis. 2d 304, 941 N.W.2d 835. That decision, though, was "reversed in full and has no precedential value." *Mercado*, 395 Wis. 2d 296, ¶ 2.

In addition, RF's statements are unlike those of the victims in *Mercado*. One victim said that she did not know what would happen if an adult found out that someone said something that was wrong. *Mercado*, 395 Wis. 2d 296, ¶ 9. She also said that it was "not wrong" to call a pillow a wall. *Id*. This victim was unable to promise to tell the truth. *Mercado*, 391 Wis. 2d 304, ¶ 8. But she also "nodded affirmatively" when asked if it was important to tell what is right. *Mercado*, 395 Wis. 2d 296, ¶ 9. The other victim gave inconsistent answers when asked to say whether it was the truth that an officer's pants were a certain color. *Id*. ¶ 10. She also said that "she did not know if it was important to 'tell what really happened.'" *Id*.

RF's statements about telling the truth do not have similar concerns. Her statements showed that she knew the difference between the truth and a lie. RF knew that she could get in trouble for lying. She did not give any inconsistent answers like the victims in *Mercado*. RF promised to tell the truth and agreed that it was important to do so. And she explained that she had gotten in trouble in the past for lying. The court did not err by finding that these statements satisfied Wis. Stat. § 908.08(3)(c).

Marks also complains that RF was unable to identify any specific statements as truth or lies. He cites an unpublished case where this Court said that a victim had identified specific statements as truth or lies when it held that Wis. Stat. § 908.08(3)(c) was satisfied. (Marks's Br. 10.) And he points to Jurek's report, which criticizes RF's failure to identify any statements as truth or lies. (Marks's Br. 10–11; R. 88:16–17.)

Marks has not shown any error. Section 909.08(3)(c) does not mandate that the child identify specific statements as truth or lies. It requires that the child understand that false statements are punishable and that it is important to tell the truth. Again, RF repeatedly said that she understood that she could get in trouble for lying. And she said that she would not get in trouble if she told the truth. The circuit court did not err in finding that the interview satisfied Wis. Stat. § 908.08(3)(c).

Finally, Marks argues that the recording does not show indicia of its trustworthiness. (Marks's Br. 12–15.) His argument relies, in part, on Jurek's report, which lists several concerns about the interview's trustworthiness. (Marks's Br. 13–14; R. 88:19–20.)

This argument is forfeited because Marks did not raise it before the circuit court decided to admit the recording. *State v. Nelis*, 2007 WI 58, ¶ 31, 300 Wis. 2d 415, 733 N.W.2d 619. The failure to raise specific challenges in the circuit court forfeits a party's right to raise those challenges on appeal. *See State v. Lippold*, 2008 WI App 130, ¶ 8 n.3, 313 Wis. 2d 699, 757 N.W.2d 825. "[T]he party must object in a timely fashion with specificity to allow the court and counsel to review the objection and correct any potential error." *State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511. (citation omitted). A defendant must present any specific challenges to the admission of a recording under Wis. Stat. § 908.08 in a timely manner to the circuit court before raising them on appeal. *See Mercado*, 395 Wis. 2d 296, ¶¶ 35–38.

Marks did not argue at the motion hearing that the recording was not trustworthy. (R. 108:28–29.) The record also does not reveal that Marks otherwise made any argument that the recording was untrustworthy before the court decided to admit it.[3] And Marks, of course, never relied on Jurek's analysis to argue that the recording was not trustworthy since he did not submit it to he court until after his trial. This Court should thus hold that Marks forfeited his argument that the recording lacks indicia of trustworthiness.

In addition, Marks has not shown that circuit court erred when it concluded that the recording was trustworthy. He cites *State v. Sorenson*, 143 Wis. 2d 226, 242, 421 N.W.2d 77 (1988), which lists factors for determining whether a statement contains circumstantial guarantees of trustworthiness. (Marks's Br. 12.) But Marks never specifically applies those factors to the recording here.

[3] At the motion hearing, Marks's counsel referred to a "motion" that he filed in response to the State's request to admit the recording. (R. 108:29.) The State has been unable to find that document in the record.

Instead, he mostly quotes Jurek's concerns from his report without developing an argument about how they show that RF's statement lacks trustworthiness under Wis. Stat. § 908.08(3)(d).

Further, *Sorenson* applies the residual hearsay exception, not Wis. Stat. § 908.08(3)(d). *Sorenson*, 143 Wis. 2d at 242–50. Section 908.08 was enacted to "make it easier, not harder, to employ videotaped statements of children in criminal trials." *Mercado*, 395 Wis. 2d 296, ¶ 41 (citation omitted). A videotaped statement is admissible if it satisfies the requirements of section 908.08(2) and (3), regardless of whether it satisfies any other hearsay exception. *Id.* ¶ 66. And *State v. Kevin L.C.*, 216 Wis. 2d 166, 183, 576 N.W.2d 62 (Ct. App. 1997), another published case on which Marks relies to argue RF's statement lacked trustworthiness, addresses these reliability factors in the context of the Confrontation Clause. (Marks's Br. 12–13.) RF testified at trial and was available for cross-examination. The reliability of her statements for confrontation purposes is not at issue.

Similarly, none of the cases that Marks cites establish any sort of baseline for a finding of trustworthiness. Instead, they weigh various factors to assess whether a child's statements are trustworthy. Again, Marks does not specifically apply those factors, so, even assuming that the cases establish the relevant test for trustworthiness, he has not shown that the circuit court erred.

Finally, the recording is trustworthy. As the circuit court noted, RF did not appear to be coached or have any animosity toward Marks. She described the assaults in a manner proper to a four-year-old child, saying that Marks twice touched her private part when her pants and underwear were off and also once asked her to touch his penis. (R. 32 at 6:10.) RF gave her statement to a social worker and a police officer, strangers that she would have no reason to lie to. And she made the statement on March 22, 2018, which was very

close in time to the charged dates of the crime, between January 1 and March 18, 2018. (R. 49; 113:8; 115:33–34.) The circuit court properly held that RF's recorded statement showed indicia of trustworthiness.

II. Marks has not shown that his trial counsel was ineffective for not seeking reconsideration of the court's decision to admit RF's recorded interview.

This Court should also deny Marks relief on his claim that his trial counsel was ineffective for not using Jurek's report to seek reconsideration of the circuit court's order admitting RF's statement. Marks's claim is undeveloped. Counsel also reasonably decided not to file a motion for reconsideration, and had counsel filed one, it would have failed. Finally, even had the court excluded the recording, the result of Marks's trial would have been the same.

To show that counsel was ineffective, a defendant must establish both that trial counsel's performance was deficient, and that this performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To demonstrate deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In proving that counsel was deficient, "[t]he defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms." *State v. Swinson*, 2003 WI App 45, ¶ 58, 261 Wis. 2d 633, 660 N.W.2d 12. Counsel's strategic choices that were made after thorough consideration of the options in light of the relevant facts and law are virtually unchallengeable. *See Strickland*, 466 U.S. at 690–91.

To satisfy the prejudice prong, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

An ineffective-assistance-of-counsel claim presents this Court with a "mixed question of fact and law." *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Under this standard of review, the trial court's findings of fact will not be disturbed "unless they are clearly erroneous." *Id*. The ultimate issue of whether counsel was ineffective based on these facts is subject to independent appellate review. *State v. Balliette*, 2011 WI 79, ¶¶ 18–19, 336 Wis. 2d 358, 805 N.W.2d 334.

Marks's claim that his counsel was ineffective is undeveloped, and this Court should deny it on that basis. *See Pettit*, 171 Wis. 2d at 646–47. Marks identifies the controlling legal standard for his claim, but he does not apply it to the facts in anything but a conclusory manner. (Marks's Br. 7, 15.) For example, Marks does not address counsel's testimony explaining why he did not seek reconsideration. Marks also does not explain how the result of his trial would have been different had counsel filed the motion. He has thus not met his burden of proving that his counsel was ineffective.

In addition, counsel did not perform deficiently because not seeking reconsideration was reasonable under the circumstances. Counsel explained that he did not think that Jurek's conclusions were "terribly compelling" and said that he had hard time contacting him. (R. 117:5.) Counsel thought that Jurek's report "didn't merit a motion for reconsideration." (R. 117:5.) This Court presumes that counsel's actions were reasonable. And because Marks does not address counsel's testimony about Jurek's report, he

cannot overcome this presumption to meet his burden of showing deficient performance.

This Court should also conclude that counsel was not ineffective because a motion for reconsideration would not have been successful. Counsel is not ineffective for failing to pursue a motion or other legal challenge that would have failed. *See State v. Butler*, 2009 WI App 52, ¶ 8, 317 Wis. 2d 515, 768 N.W.2d 46.

A motion for reconsideration would have failed for two reasons. First, as the circuit court explained postconviction, it would have still admitted RF's interview even had it seen Jurek's report. If the court would not have changed its ruling admitting the interview, then Marks cannot show prejudice because the outcome of his trial would have been the same.

Second, the motion would have failed because Marks has not shown that he could meet the legal standard for reconsideration.

To prevail on a motion for reconsideration, a party must present newly discovered evidence or show that the court made a manifest error of law or fact. *State v. White*, 2008 WI App 96, ¶ 8, 312 Wis. 2d 799, 754 N.W.2d 214. The new evidence must not be evidence that the party could have introduced earlier. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 46, 275 Wis. 2d 397, 685 N.W.2d 853.

Marks appears to argue that Jurek's report was new evidence because it was not available at the time of the motion hearing. (Marks's Br. 15.) But the mere fact that Jurek did not provide his report until after the hearing does not mean that Marks has proven that he could not have presented the report at the hearing.

Marks does not explain when his counsel retained Jurek as an expert. The only evidence in the record regarding the timing of Jurek's hiring is counsel's testimony that he got the funding to retain Jurek before the hearing but could not remember when he actually hired him. (R. 117:7–9.). This does not establish that it was impossible to have gotten Jurek's report before the hearing. It is possible that counsel was waiting for the report at the time of the hearing. If that is the case, then counsel could have asked for a continuance so he could present the report before the court rendered its decision. Marks has not shown that he could not have presented Jurek's report at the hearing.

In addition, much of Jurek's report simply analyzes and critiques the way Moyer and Chafer conducted the interview and RF's responses to their questions. (R. 88:9–30.) Jurek's report was not necessary for Marks to make arguments based on these supposed shortcomings. The report was thus not new evidence justifying a motion for reconsideration.

Finally, this Court should conclude that Marks was not prejudiced because the result of his trial would have been the same had the court excluded RF's interview. While RF was unable to recall disclosing the assaults or much of her interview, SF and RF's teacher both testified that she disclosed and described the assaults to them. (R. 113:239–47, 249.) SF and the teacher reported what RF had said to the authorities, and their reports led to the recorded interview. (R. 113:92–97, 108–10, 207, 248.) Thus, even without the interview, the jury would still have heard and believed RF's accusations and found Marks guilty. There is no reasonable probability of a different result had the court excluded the interview.

CONCLUSION

This Court should affirm the circuit court's judgment of conviction and order denying Marks's motion for postconviction relief.

Dated: April 1, 2021.

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 5354 words.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE

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 1st day of April 2021.

Electronically signed by:

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