STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2021AP447-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHANE ALLAN STROIK,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND DENIAL OF A POSTCONVICTION MOTION, ENTERED IN THE PORTAGE COUNTY CIRCUIT COURT, THE HONORABLE ROBERT J. SHANNON, PRESIDING

# BRIEF OF THE PLAINTIFF-RESPONDENT

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## INTRODUCTION

This case is about whether a defendant should receive a new trial for first-degree sexual assault of a child where he fails to show a basis for such extraordinary relief.

A jury found Shane Allen Stroik guilty of first-degree sexual assault of a child under the age of 13.[1] Stroik filed an initial Postconviction Motion for a new trial and claimed *Haseltine*[2] violations, that his trial attorney was ineffective for not objecting to the State's opening and closing statements and one witness's testimony, and not impeaching a State's witness with a prior conviction. Stroik also requested postconviction discovery of a child protective services (CPS) report involving Grace and a non-party, her minor cousin. The alleged incident was that Grace's minor cousin had touched her vagina. Stroik was aware of the alleged incident between Grace and her minor cousin because he told a police detective about it in his initial police interview. The incident was also disclosed by the State during discovery when it disclosed that detective's police report.

The CPS report involving Grace and her minor cousin was not obtained by police as part of this case and therefore not disclosed in discovery. The CPS report provided details about the alleged incident between Grace and her minor cousin and received an "unsubstantiated" designation by CPS. The CPS report does not include a finding by the social worker that Grace lied or made an untruthful allegation against her minor cousin. After the CPS report was released to the parties, Stroik filed a Supplemental Postconviction Motion and additionally claimed his trial counsel was ineffective in failing to seek out and introduce this CPS report

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[1] The State refers to the minor victim as "Grace."

[2] *State v. Haseltine*, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984).

because he argued it contained a prior untruthful allegation or a finding that Grace lied about a prior incident of sexual assault. Additionally, Stroik alleged the State violated *Brady v. Maryland*[3] and the reciprocal discovery statute[4] for failing to seek out and disclose the actual CPS report during discovery. Stroik also requested a new trial in the interests of justice. The circuit court denied Stroik's postconviction motions.

This Court should affirm the conviction.

## ISSUES PRESENTED

1. Was Stroik's trial attorney ineffective for not objecting when the State referred to Stroik's "high sex drive" in its opening statement and that Stroik was a "very sexual person" in its closing while discussing the intent element of Wis. Stat. § 948.02(1)(e)?

The circuit court concluded that the attorney was not ineffective since the State's statements were offered to prove intent and permissible.

This Court should affirm.

2. Was Stroik's trial attorney ineffective for not objecting when Stroik's girlfriend testified that he "always wanted sex?"

The circuit court concluded that the attorney was not ineffective since this testimony was relevant and probative of the issue of intent, and that its probative value was not substantially outweighed by its prejudicial effect. Further, that even had counsel objected, the circuit court would have treated it as other acts evidence admissible under the greater latitude rule.

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[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

[4] Wis. Stat. § 971.23.

This Court should find trial counsel was not ineffective because the testimony was not prejudicial and affirm the circuit court.

3. Was Stroik's trial attorney ineffective for not impeaching a State's witness with her prior conviction during her uncontroversial testimony?

The circuit court concluded that the attorney was not ineffective since he articulated a reasonable trial strategy that the testimony was not controversial or contested.

This Court should affirm.

4. Did a police detective's testimony about his investigation and conclusions at the time of that investigation violate *Haseltine* and, if so, was Stroik's trial attorney ineffective in not objecting to that testimony?

The circuit court concluded only one of the police detective's statement's violated *Haseltine* and it was properly objected to by the attorney. Further, it ruled that the failure to strike it from the record was harmless beyond a reasonable doubt. The court concluded the police detective's other testimony did not violate *Haseltine* so the attorney was not ineffective for not objecting to it.

This Court should find none of the police detective's testimony violated *Haseltine* and that Stroik's attorney was not ineffective.

5. Was Stroik's trial attorney ineffective for not seeking and introducing the CPS report involving Grace and her minor cousin?

The circuit court concluded the trial attorney was not ineffective for not seeking out the CPS report involving Grace and her non-party minor cousin since his trial strategy was to focus on the fact that Grace had been abused by her paternal grandfather and the CPS report was not more exculpatory than what was released to defense in initial discovery.

This Court should affirm.

6. Did the State violate *Brady* and the reciprocal discovery statute when it did not seek out and disclose the CPS report about Grace and her minor cousin?

The circuit court concluded the State did not violate *Brady* or the reciprocal discovery statute since the State did not suppress the report and it was no more exculpatory than the information provided during discovery.

This Court should affirm.

7. Should Stroik be granted a new trial due to cumulative prejudice?

The circuit court said no.

This Court should affirm.

8. Should Stroik be granted a new trial in the interest of justice?

The circuit court said no.

This Court should affirm.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues will be fully presented in the briefs. Publication is unwarranted as the issues can be decided by applying established legal principles to the facts of this case.

## STATEMENT OF THE CASE

In 2016, five-year old Grace's parents were separated and getting divorced. (R. 119:168–70.) Her father, Bud[5], had full custody and primary placement of Grace. (R. 119:157.)

[5] Grace's parents and paternal relatives are referred to by first name only.

Grace spent every other weekend with her mother, Lynne. (R. 119:159.) Lynne was living with her then-boyfriend, Stroik. (R. 119:171.) Grace spent her time with Lynne at Stroik's home. (R. 119:160–61.)

While visiting her paternal aunt Heather, Grace peed on the floor in the corner of a bedroom. (R. 5:2; 119:104–05.) It was unusual since Grace "never had an accident" and was fully potty trained. (R. 119:106,155.) When asked why she did it, Grace told Heather "her mom's boyfriend was touching her." (R. 119:108.) When asked where, Grace pointed "[t]o her vagina." (R. 119:108.) After this, Heather brought Grace back to Bud's home and when Bud asked "what's going on," Grace again said "[Stroik] is touching [her] meme."[6] (R. 119:175.) Heather testified about this incident at trial. (R. 119:104–15.)

Bud called the family's human services worker, Stephanie Breitenfeldt.[7] (R. 119:177.) A CPS[8] report about the incident was filed and initial assessment worker, Ben Janssen, was assigned to Grace's case. (R. 119:116.) Detective Michael Tracy was assigned to investigate. (R. 119:118–19.) On July 13, 2016, Grace was interviewed by Jacqueline Gremler at the Child Advocacy Center ("CAC"). (R. 120:8–28; 30.)

Grace testified and the interview was played for the jury at trial. (R. 120:24; 121:16.) During the interview, Grace disclosed that she was going to "tell [Gremler] about [Stroik]" and that while Lynne was in the bathroom, Stroik "pull[ed] down [her] pants and touche[d] [her] meme." (R. 33 at 9:10.)[9] Grace pointed to her vagina during this disclosure. (R. 33,

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[6] Grace refers to her vagina as her "meme." (R. 119:184.)

[7] Breitenfeldt was involved with the family due to a no-contact order between Grace's parents. (R. 119:157.)

[8] Not the CPS report that is the subject of this appeal.

[9] The second part of all cites to R.33 is the time stamp.

9:10.) She disclosed it occurred "one time." (R. 33, 9:10.) Later, as Gremler discussed the difference between a truth and a lie, Grace stated "that is the truth . . . that [Stroik] touched [her]." (R. 33, 9:12.) Grace disclosed that Stroik came into the "middle bedroom" and "pulled [her] pants down and touched [her] meme." (R. 33, 9:18.)

Grace disclosed that Stroik told her to "turn around" and that he "wanted to do something to [her]." (R. 33, 9:24.) Grace disclosed that he "pulled her pants down" and she "told him to stop it" and Stroik "didn't stop it." (R. 33, 9:24.) After, Stroik told Grace: "don't tell [your] mom." (R. 33, 9:25.) Grace also confirmed Stroik took her underwear off and then touched her vagina. (R. 33, 9:26.) Grace disclosed that when she told Stroik to stop it, she wanted him to "stop touching [her] meme." (R. 33, 9:26.) When Grace told him to stop, Stroik said "no, I'm not stopping." (R. 33, 9:26.) Grace disclosed that when Stroik touched her vagina, it made her vagina feel "not good." (R. 33, 9:28.) She confirmed that Stroik touched inside her vagina. (R. 33, 9:32.)

Grace said Stroik stopped because of the "dog" and afterwards she put her underwear back on. (R. 33, 9:32.) Grace also confirmed that Stroik wanted to touch "[her] armpit" and she told him "no." (R. 33, 9:33.) She also described how Stroik was "rubbing [her] butt" and this made her feel "not good." (R. 33, 9:53.)

During this interview, Grace also disclosed her paternal grandfather touched her. (R. 33, 9:28.) Grace disclosed that her grandfather "puts his tongue on [her] meme" and moves his "tongue around." (R. 33, 9:39.) At the time of Grace's disclosure, her grandfather was dead. (R. 119:164.) Because of that, there was not an investigation into this abuse. (R. 119:165.)

Shortly after Grace's interview, Janssen was contacted by Stroik's ex-wife, Mindy. (R. 119:123.) Mindy is the primary

custodian of Stroik's biological daughter, Lily.[10] (R. 119:123–24.) Lily had visitation with Stroik on the opposite weekend that Grace had visitation with Lynne. (R. 119:124,199.) Grace and Lily never met. (R. 119:204.) Janssen requested that Monroe County Department of Social Services interview Lily as part of Grace's case. (R. 119:126.) Lily also disclosed Stroik touched her. (R. 119:140–42.)[11]

Detective Tracy conducted interviews. (R. 122:113.) During Lynne's interview, she told him about an alleged incident between Grace and Grace's minor cousin. (R. 71:10.) According to Lynne, Grace's brother told Lynne that Grace and this minor cousin "had sex." (R. 71:10.) Lynne told Detective Tracy that Bud took Grace to the hospital to have her checked out, but nothing came of it. (R. 71:10.) Lynne reported that Grace told her someone talked to her about this incident, Detective Tracy presumed someone from health and human services, but nothing came of it. (R. 71:10.) Grace told Lynne that someone asked her about her minor cousin and she told them "[he] didn't do it." (R. 71:10.) When Lynne asked Grace why she said her minor cousin did not do it, Grace "told Lynne that her daddy told her to say that [the minor cousin] didn't do it." (R. 71:10.) Lynne's statements about the incident were disclosed in initial discovery, introduced as Defendant's Exhibit 2 at trial. (R. 71.) Detective Tracy did not obtain a copy of the CPS report involving Grace and her minor cousin. (R. 61:26.)

Lynne testified at trial about prior sexual acts with Stroik, explaining how Stroik "always wanted sex." (R.

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[10] Stroik's biological daughter is referred to as "Lily."

[11] Grace and Lily's cases were joined for trial. (R. 116:3–4.) Stroik was acquitted of the charge against Lily. (R. 122:133.) The discussion of Lily's case is included only for clarity. It is not part of this appeal.

119:205.) Lynne testified that when her kids were there she would tell Stroik she did not want to have sex. (R. 119:205.)

Detective Tracy interviewed Stroik two times.[12] (R. 122:16; 42.) During Detective Tracy's testimony at trial, clips of the interviews were played for the jury. (R. 122:30–36; 42.) During the first interview, Stroik denied the abuse and claimed he was never alone with Grace and also referenced the alleged incident between Grace and her minor cousin. (R. 122:35; 71:10.) At the second interview, as Detective Tracy was about to arrest him, Stroik asked Detective Tracy "what if I did do it?" (R. 122:40, 68.) Then Stroik told Detective Tracy "sometimes he flips" Grace over his head and during one of those times "his hand cupped her butt and her vagina over her clothes." (R. 122:40, 64).

In conjunction with the clips of Stroik's interviews, Detective Tracy testified about his investigation. (R.122:9–55.) The following specific testimony is the focus of Stroik's appeal:

- When asked by the State if "based upon [his] interviews, at some point did [he] conclude . . . [he] believed that [Stroik] did commit this offense?" (R. 122:26.) Detective Tracy responded "[y]es." (R. 122:26.) Kryshak[13] objected to this on *Haseltine* grounds. (R. 122:26–27.) The objection was sustained, and the State immediately rephrased the question. (R. 122:27.) The testimony was not stricken from the record. (R. 122:27.)

- When asked by the State what he thought about Stroik asking him what would happen if he did

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[12] Neither the State nor the clerk's office could listen to the audio of R. 42. This is consistent with the court's observation. (R. 124:73.) Therefore, citations are to Detective Tracy's testimony on Stroik's interviews.

[13] Trial counsel is referred to by his last name, "Kryshak."

do it, Detective Tracy testified that "I took it that potentially he knew that he did do it, and he wanted to know what would happen to him." (R. 122:53.) Kryshak objected to this question as improper speculation and was overruled. (R. 122:53.)

- During his first interview with Stroik, Detective Tracy asked Stroik if Grace could be confused about anything. (R.122:41.) When the State asked about Stroik's story of accidentally touching Grace, Detective Tracy explained that Stroik "had a good two weeks to think about this alternative explanation between interviews." (R. 122:41.) Kryshak did not object to this testimony. (R. 122:41–42.)

- The State asked Detective Tracy why he never spoke with Grace or Lily as part of the investigation in this matter. (R. 122:51.) Detective Tracy explained that its "best practice to not talk to the kids" and that the "CAC interview is basically the purest interview you're going to get with any child, and it's the most comfortable place for them to talk." (R. 122:51–52.)

Stroik testified and denied the abuse occurred. (R. 122:62.) He also testified that he would play physically with Grace and "flip[ ]" her over his head. (R. 122:64.)

During the State's opening and closing statements, while discussing the intent element of Wis. Stat. § 948.02(1)(e), the State referred to Stroik's "high sex drive" to establish that his contact with Grace was "for a sexual purpose." (R. 119:92.) During closing, while discussing the elements of the crime with the jury, the State referred to Stroik "as a very sexual person" and argued that the touch could not be for anything other than a "sexual purpose." (R. 122:108–09.)

A jury found Stroik guilty of first-degree sexual assault of Grace. (R. 41.) Stroik was sentenced to 68 months initial confinement and 72 months of extended supervision. (R. 123:21.)

*Postconviction proceedings*

Stroik's initial Postconviction Motion requested a new trial based on Kryshak's alleged ineffective assistance, *Haseltine* violations, and requested a new trial in the interests of justice. (R. 61:1.) Stroik also sought postconviction discovery of the CPS report involving Grace and her minor cousin. (R. 61:1.) Stroik's request for the CPS report came after his postconviction counsel requested a supplemental police report from Detective Tracy on the alleged incident between Grace and her minor cousin. (Stroik's Br. 18–19.) Detective Tracy's supplemental report indicated that a CPS investigation was initiated in February of 2016. (R. 61:26.) And that, "[t]he results of the investigation were that [Grace] (5 years old at the time) denied that [her minor cousin] had touched her inappropriately when asked by the CPS investigator." (R. 61:26.) The social worker never asked for law enforcement involvement after the initial assessment. (R. 61:26.) And that an initial assessment was completed but never obtained as part of the investigation in this matter. (R. 61:26.)

At the *Machner* hearing on Stroik's initial Postconviction Motion, Kryshak testified about his decision not to object to statements and testimony about Stroik and his decision not to impeach Heather. Kryshak explained that he chose not to object to the State's comments concerning Stroik's libido because the statements were irrelevant. (R. 124:5–6.) That "just because somebody has a high sex drive doesn't mean [they're] attracted to children." (R. 124:6.) Moreover, Kryshak explained that he chose to address these statements in his own closing argument, calling the State's inference about Stroik's libido an "absolute falsehood." (R. 124:5–6;

122:112.) He explained by not objecting during the State's opening and closing he was "[p]robably trying not to highlight it" and that in the "overall picture of the case" it was not something "important." (R. 124:18.)

As to Lynne's testimony, Kryshak explained that he chose not to object, because he did not consider the testimony "that damning" since she indicated only "they had sex." (R. 124:9.) And he didn't want to highlight the statement in front of the jury. (R. 124:19.)

As to Heather, Kryshak chose not to impeach her with a prior conviction because there was "no question as to what she was saying was true." (R. 124:19.) In Kryshak's assessment, "everybody accepted the fact that [Grace] went and peed in the corner and said somebody was touching her." (R. 124:20.)

As to Detective Tracy's testimony and the potential *Haseltine* violations, Kryshak explained he did not move to strike the statement from the record after his objection was sustained because "in [his] experience . . . striking testimony is usually a waste of time." (R. 124:11.) Moreover, that in not objecting to other potential *Haseltine* testimony, he "probably didn't want to bring any more emphasis to this type of testimony." (R. 124:23.)

Kryshak also testified that he had been aware of the prior allegation between Grace and her minor cousin. (R. 124:14.) He testified he "assumed it didn't occur, and basically the judge wasn't going to let [him] get it in." (R. 124:14.) Kryshak confirmed his strategic choice was to focus on the "grandfather who had sexually assaulted [Grace], . . . [since] everybody took that for a fact. So that's who we were trying to blame it on." (R. 124:19.)

The postconviction court held the statements offered by the State in opening and closing and Lynne's testimony constituted other acts evidence and that it was "relevant and

probative of the issue of intent, and that its probative value was not substantially outweighed by the danger of unfair prejudice." (R. 124:53.) And that even had Kryshak objected to it, the court would have treated it as other acts evidence admissible under the greater latitude rule. (R. 124:53–54.) Further, the postconviction court declined to second-guess Kryshak's strategy for not objecting since the testimony had some "beneficial effect to the defense because [Stroik] was getting all of the sex he wanted or needed from his girlfriend" and further did not find deficient performance. (R. 124:53.)

As to Kryshak's decision not to impeach Heather with her prior conviction, the postconviction court found that it was not ineffective given that Heather's testimony was not controversial or contested. (R. 124:55–56.) The postconviction court found that not striking the potential *Haseltine* violation from the record, if erroneous, was harmless. (R. 124:44.) Also, the postconviction court held that Detective Tracy's other challenged statements were not *Haseltine* violations because the statements did not improperly vouch for Grace. (R. 124:48.) Further, because that testimony did not violate *Haseltine*, Kryshak was not ineffective for failing to object to it. (R. 124:50.) And even if he had objected, given the context of Detective Tracy's testimony, the circuit court would have overruled any objection. (R. 124:50.) As to the alternate request for a new trial based on the interests of justice, the postconviction court denied that as well. (R. 124:56.) The postconviction court agreed to do an *in camera* review of the CPS report involving Grace and her minor cousin. (R. 79.)

After an *in camera* review of the CPS report, the court released a redacted version to the parties. (R. 98:2.)[14] The redacted CPS report confirmed that a prior allegation of abuse

[14] Citations are to Stroik's appendix. Despite this Court's order, Record 99 remained inaccessible for much of the briefing period.

occurred between Grace and her minor cousin. (A-App. 23.) The CPS report indicated that Grace told someone about the alleged incident and they reported it to CPS. (A-App. 23.) The CPS report described the alleged incident: that Grace's paternal cousin "touched her mimi" and Grace "told [him] to stop and he would not." (A-App. 23.) Further, that the social worker asked Grace if she told Lynne about her minor cousin touching her, Grace said that she "did and did not know why she told her mother this." (A-App. 27.) The social worker concluded the report by assigning the incident an "[u]nsubstantiated" designation. (A-App. 29.) The social worker did not interview Grace's minor paternal cousin. (A-App. 27.)

Stroik's Supplemental Postconviction Motion again requested a new trial and additionally alleged ineffective assistance of counsel based on Kryshak's decision not to seek out the prior CPS report involving Grace and her minor cousin and that the State violated *Brady* and the reciprocal discovery statute. (R. 100:1.)

The postconviction court denied Stroik's final postconviction motions. (R. 104:5.) The court held that Kryshak was not ineffective for failing to seek out the CPS report because Kryshak's articulated trial strategy was instead to focus on allegations involving prior abuse by Grace's paternal grandfather. (R. 104:4.) Further, it found that no *Brady* violation occurred and the State did not suppress evidence either willfully or inadvertently. (R. 104:3.) It also concluded that the evidence in the CPS report was "no more substantively exculpatory" than the information provided to defense in discovery. (R. 104:4.) It also again denied the interests of justice claim. (R. 104:4.)

Stroik now appeals.

## STANDARD OF REVIEW

"A claim of ineffective assistance of counsel presents a mixed question of law and fact": a circuit court's factual findings are accepted unless clearly erroneous, but whether counsel's performance was constitutionally deficient and prejudicial are legal issues reviewed de novo. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis.2d 571, 665 N.W.2d 305. "Findings of fact include 'the circumstances of the case and the counsel's [representation] and strategy.'" *Id*. (citation omitted).

This Court independently reviews whether a *Brady* violation occurred, but accepts the circuit court's findings of fact unless clearly erroneous. *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis.2d 344, 922 N.W.2d 468 (citing *State v. Lock*, 2012 WI App 99, ¶ 94, 344 Wis.2d 166, 823 N.W.2d 378).

An alleged discovery violation poses a question of law that this Court reviews without deference. *State v. Rice*, 2008 WI App 10, ¶ 14, 307 Wis.2d 335, 743 N.W.2d 517.

The decision to admit or exclude evidence rests within the trial court's discretion. *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis.2d 253, 759 N.W.2d 557. An appellate court will only reverse a decision to admit or exclude evidence when the trial court has erroneously exercised that discretion. *Id*. An appellate court will not find an erroneous exercise of discretion if the record contains a reasonable basis for the circuit court's ruling. *State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis.2d 686, 613 N.W.2d 629.

## ARGUMENT

### I. Stroik fails to show that Kryshak was ineffective.

#### A. Stroik bears a heavy burden to show that Kryshak was deficient and that he was prejudiced.

Claims of ineffective assistance are governed by the familiar two-part test under *Strickland v. Washington*, which requires a defendant prove both that trial counsel was deficient and he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668 (1984).

As to deficiency, a defendant must show the acts or omissions of trial counsel that are alleged to fall outside of "reasonable professional judgment." *Id.* at 690. "The court must then determine whether, in light of all the circumstances, the [alleged] acts or omissions [fall] outside the wide range of professionally competent assistance." *Id.* In making that determination, the court gives great deference to the attorney and every effort is made "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions with reasonable professional judgment. *Id.* Strategic choices by counsel made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Id.*

As to prejudice, a defendant must affirmatively prove that counsel's alleged deficient performance prejudiced him. *Id.* at 693. A defendant cannot simply show counsel's act or omission had "some conceivable effect on the outcome." *Id.* To prove prejudice, "The 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.*

### B. Kryshak's decision not to object to statements or testimony regarding Stroik's libido was not ineffective.

Stroik argues that he is entitled to a new trial because Kryshak did not object to the State's statements or Lynne's testimony. (Stroik's Br. 22.) Kryshak's strategic decision to address the State's statements and Lynne's testimony in his own closing is not ineffective.

#### 1. Kryshak's decision to address the statements in closing argument was a reasonable strategic decision.

Kryshak's decision to address the State's commentary on Stroik's libido in closing was a reasonable strategic decision. Again, there is a strong presumption that counsel's actions fall within the "wide range of reasonable professional assistance," and Stroik must overcome a strong presumption that the challenged action is sound trial strategy. *Strickland*, 466 U.S. at 689. Stroik has not done so.

First, the State's commentary was when discussing intent. During the State's opening and closing statements, the State referred to Stroik's "high sex drive" to establish that Stroik's sexual contact with Grace was "for a sexual purpose." (R. 119:92.) During closing, while discussing the elements of the crime with the jury, the State referred to Stroik "as a very sexual person" and argued that the touch could not be for anything other than a "sexual purpose." (R. 122:108–09.) Contrary to Stroik's assertion, these statements do not constitute a "wealth of evidence regarding [Stroik's] high sex drive." (Stroik's Br. 24.) Rather, they are argument offered by the State to prove intent.

Second, and most importantly, Kryshak articulated a reasonable trial strategy as to why he did not object. Kryshak testified at the *Machner* hearing that he did not object because the State's statements were irrelevant. (R. 124:5–6.) That "just because somebody has a high sex drive doesn't mean [they're] attracted to children." (R. 124:6.) Additionally, Kryshak noted that in not objecting, he was "[p]robably trying not to highlight it" and that in the "overall picture of the case" it was not something "important." (R. 124:18.) Instead of objecting, Kryshak made the decision to address the State's statements and Lynne's testimony in his own closing. (R. 124:5–6.) In his closing, Kryshak called out the potential inference that because Stroik is "highly sexual . . . he somehow molested his children" as an "absolute falsehood." (R. 122:112.) Kryshak's decision to address the State's statements in his closing, rather than object in the moment, was a reasonable strategic trial decision entitled to deference from this Court.

In summary, Kryshak made a reasonable strategic decision as to how to address the State's commentary.

### 2. Kryshak's decision not to object to Lynne's testimony was a reasonable strategic decision.

Kryshak's decision not to object to Lynne's testimony that Stroik "always wanted sex" was a reasonable strategic decision. Again, there is a strong presumption that counsel's actions fall within the "wide range of reasonable professional assistance," and Stroik must overcome a strong presumption that the challenged action is sound trial strategy. *Strickland*, 466 U.S. at 689. A decision not to object to impermissible testimony is not ineffective if it is part of a reasonable trial strategy. *State v. Breitzman*, 2017 WI 100, ¶ 74, 378 Wis.2d 431, 904 N.W.2d 93. An attorney can strategically forego an objection when it will benefit the defense's case. *See State v.*

*Simmons*, 57 Wis.2d 285, 297, 203 N.W.2d 887 (1973) (trial counsel's failure to object can also be a strategic waiver).

Even accepting Stroik's argument that Lynne's testimony was not permissible other acts evidence, Kryshak articulated a reasonable trial strategy for not objecting to it. (Stroik's Br. 26–27.) As Stroik points out, Kryshak "testified he did not object to the statements because an adult enjoying sex with another adult does not indicate he would sexually assault a child." (Stroik's Br. 26.) At the *Machner* hearing, Kryshak explained that he did not consider objecting to Lynne's testimony because it was not "that damning" since all she indicated was "they had sex." (R. 124:9.) He confirmed his "strategic choice" was to focus on other issues and that he did not think Lynne's testimony was "significant in [this] case." (R. 124:19–20.) And that he "didn't think it was hurting [Stroik] in the overall picture of this case." (R. 124:20.) Further, he explained, "a lot of times you don't object because you don't want to bring highlights to anything." (R. 124:19.) Kryshak explained his trial strategy was to focus on the abuse Grace endured from her grandfather and "blame" the allegations on him. (R. 124:19.)

Further, Kryshak addressed any impermissible inference from Lynne's testimony in his closing statement. Again, he called the inference that because "Stroik is highly sexual . . . [that] he somehow molested his children" as an "absolute falsehood." (R. 122:112.)

In summary, Kryshak had reasonable strategic reasons for not objecting to Lynne's testimony and instead dealing with it in closing arguments. Stroik fails to prove Kryshak was deficient.

### 3. Stroik fails to prove prejudice.

Even if this Court finds Kryshak deficient, Stroik fails to prove prejudice. Again, to prove prejudice, the defendant

must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Here, any potential prejudice was addressed by Kryshak in his closing statement where he specifically calls out the State's statements and Lynne's testimony and potential inference that because Stroik is "highly sexual . . . he somehow molested his children" as an "absolute falsehood." (R. 122:112.) Contrary to Stroik's assertion that the State's statements and Lynne's testimony made him look "sex-crazed and like he was capable of sexually victimizing a child," the statements and testimony were, at base, not probative of whether Stroik sexually assaulted Grace. (Stroik's Br. 27.) And Kryshak called them out as such. (R. 122:112.)

Further, the statements and Lynne's testimony do not exist in a vacuum. As the postconviction court concluded, they were clearly offered to establish the intent element of the crime charged. (R. 124:52.) And even if Kryshak had objected, the postconviction court said it would have overruled the objection. (R. 124:54); *see State v. Jacobsen*, 2014 WI App 13, ¶ 49, 352 Wis.2d 409, 842 N.W.2d 365 (counsel does not perform deficiently by failing to make a losing argument).

Beyond that, the evidence of Stroik's guilt was such that this Court should conclude that there was no reasonable probability that the result of the proceeding would have been different even if Kryshak had objected and succeeded. Grace testified that Stroik "touched [her] private" area "once." (R. 121:16.) Although her trial testimony was not linear, that is understandable given she was five at the time of the abuse and the trial occurred almost two years later. Moreover, her testimony is bolstered by the CAC interview played for the jury where she repeatedly described and confirmed that Stroik touched her vagina even after she told him to "stop it." (R. 33, 9:24.)

In summary, Stroik fails to prove prejudice.

### C. Kryshak's decision not to impeach Heather with a prior conviction was reasonable and not deficient.

Stroik next argues that Kryshak was deficient for failing to impeach Heather with evidence that she had a previous criminal conviction, which, he claims, would have affected her credibility. (Stroik's Br. 29.) This argument is a non-starter for several reasons.

#### 1. Kryshak's decision not to impeach Heather was a reasonable strategic decision.

First, Kryshak's decision not to impeach Heather was a reasonable strategic decision. Kryshak clearly explained his rationale at the *Machner* hearing that there was "no question as to what she was saying was true." (R. 124:9.) In Kryshak's assessment, "everybody accepted the fact that [Grace] went and peed in the corner and said somebody was touching her." (R. 124:20.)

Second, Heather's testimony was uncontroversial. She testified for a brief period and only that Grace peed in her pants and underwear in the corner of a bedroom. (R. 119:104–05.) No witness contradicted that testimony. It was undisputed throughout the trial.

Thus, there was no point to impeaching Heather because her testimony was not in dispute.

#### 2. Stroik fails to prove prejudice.

Even if this Court finds that Kryshak should have impeached Heather during her uncontroversial testimony, Stroik fails to prove prejudice. It is Stroik's burden to affirmatively prove prejudice. *Strickland*, 466 U.S. 668 at 687.

But Stroik offers no argument about how Kryshak's failure to impeach Heather prejudiced him. (*See* Stroik's Br. 30.) As noted, Heather's brief testimony—which amounted to simply describing when Grace urinated in the trailer—was uncontested. Heather did not witness the sexual assault. Her testimony simply provided the jury context as to how Grace's allegation came to light—not whether it was true or not.

Because he offers no argument about how Kryshak's failure to impeach Heather prejudiced him, he fails to carry his burden to affirmatively prove prejudice.

### D. Kryshak was not ineffective as it relates to the prior CPS report.

Stroik argues he is entitled to a new trial because Kryshak was ineffective in failing to seek out and introduce the "CPS report detailing [Grace's] false allegation that she was sexually assaulted by her cousin." (Stroik's Br. 30.)

Before all else, despite Stroik's repeated claims, the CPS report does not conclusively establish Grace lied or made a prior untruthful allegation. (*See* A-App. 22–32.) And, Kryshak was aware of the allegation between Grace and her minor cousin and made the strategic decision to focus Stroik's defense on blaming her grandfather for the abuse. (R. 124:19.)

#### 1. Kryshak was not deficient for his strategic decision not to seek out and introduce the CPS report.

Kryshak was not ineffective for deciding not to seek out and introduce the CPS report involving Grace and her minor cousin.

Generally, trial counsel has a duty to make reasonable investigations or to make a reasonable decision that makes investigations unnecessary. *Strickland*, 466 U.S. at 691. Kryshak's decision not to seek out and introduce the CPS report—presumably under the exception to Wisconsin's rape-

shield law, Wis. Stat. § 972.11(2)(b)3.—further must be "assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on the investigation. *Id.*

Here, Kryshak testified at the *Machner* hearing that he decided not to seek out and present the CPS report because he "assumed it didn't occur, and basically the judge wasn't going to let [him] get it in." (R. 124:14.) Instead, his trial strategy was to focus on Grace's paternal grandfather "who had sexually assaulted her." (R. 124:19.) Because "everybody took that for a fact," that is "who [they] were trying to blame it on." (R. 124:19.) Kryshak made the strategic choice to focus on the established and universally accepted truth that Grace's grandfather had sexually assaulted her rather than try to find a CPS report involving Grace and her minor cousin that had no clear exculpatory value. His strategy to confuse Grace by repeatedly referencing the abuse by her grandfather at trial was, in part, successful given her testimony at trial. (R. 121:16.)

Stroik argues that the CPS report would have enhanced Kryshak's trial strategy because it would have illustrated that Grace made a prior "untruthful allegation." (Stroik's Br. 34.). But the CPS report does not show a prior untruthful allegation. Nowhere in the CPS report does it say that Grace lied or that the allegation was untruthful. (A-App. 22–32.)

At most, it established the allegation was unsubstantiated. (A-App. 29.) As noted by this Court, unsubstantiated does not mean false; rather, it implies that CPS had inadequate evidence to proceed. *State v. Leather*, No.

2010AP354, 2011 WL 1238722, ¶ 26 (Wis. Ct. App. Apr. 5, 2011) (unpublished).[15]

Stroik's argument assumes the court would unquestionably accept the CPS report. But it is not that simple. A defendant seeking to pierce Wisconsin's rape shield law has the burden of establishing a sufficient factual basis that the past allegations were untruthful. *State v. DeSantis*, 155 Wis.2d 774, 787–88, 456 N.W.2d 600 (1990). An *unsubstantiated* designation does not make an allegation untruthful or a lie. Rather, the decision to *unsubstantiate* only means that CPS had inadequate evidence to proceed in its investigation. The fact that a prior allegation is designated *unsubstantiated* is not sufficient to satisfy the strict requirements of Wis. Stat. § 972.11(2)(b)3.

Rather, the admissibility of a prior allegation "is to be reviewed in terms of occurrence and whether a prior allegation of the general occurrence of a sexual assault is later recanted by the complainant or proved to be false by the defendant." *State v. Ringer*, 2010 WI 69, ¶ 39, 326 Wis.2d 351, 785 N.W.2d 448 (citation omitted); *see also State v. Jones,* No. 2013AP1731, 2014 WL 3731998, ¶ 14 (Wis. Ct. App. July 30, 2014) (unpublished) ("[T]he girls' claims were simply unsubstantiated and did not amount to untruthful claims warranting their admission at trial.").[16]

Even accepting that Grace's statements about the incident are inconsistent, additional facts explain why. Detective Tracy's initial police report also indicated that the reason Grace told the social worker it did not occur was because "her daddy told her to say that [her minor cousin]

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[15] Authored opinion cited pursuant to Wis. Stat. § (Rule) 809.23(3)(b). A copy is included at R-App. 3–12.

[16] Authored opinion cited pursuant to Wis. Stat. § (Rule) 809.23(3)(b). A copy is included at R-App. 13–15.

didn't do it." (R. 71:10.) The bottom line is that it is unclear whether Grace's allegation against her minor cousin is true or not. Given Grace's age and the turmoil surrounding her family at this time, it is just as likely the allegation was true, but she did not tell the social worker that due to familial pressure.

For these reasons, Stroik cannot demonstrate that trial counsel would have been able to satisfy his burden to prove a sufficient factual basis that the incident involving Grace's cousin constituted an untruthful allegation of sexual assault. *DeSantis*, 155 Wis.2d at 787–88. As such, he cannot show that the circuit court would have been required to admit this evidence under section 972.11(2)(b)3. And therefore, he cannot show counsel was deficient for failing to attempt to do so. *See Jacobsen*, 352 Wis.2d 409, ¶ 49 ("An attorney does not perform deficiently by failing to make a losing argument.").

**2. Stroik fails to prove prejudice.**

Stroik's prejudice argument is that the information in the CPS report "would have been particularly important for the jury to hear." (Stroik's Br. 35.) That is not enough to carry his burden to prove prejudice. Again, a defendant cannot simply show counsel's act or omission had "some conceivable effect on the outcome." *Strickland*, 466 U.S. at 693. To prove prejudice, the 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.

And again, at no point in the CPS report does it say that Grace lied or that the allegation was untruthful. (*See* A-App. 26–32.) At most, it established the allegation was unsubstantiated. (A-App. 29.) And, as the postconviction court determined, the CPS report was "no more substantively exculpatory than that information previously supplied to the defense by the prosecutor." (R. 104:4.) Even assuming the circuit court had admitted the CPS report and it was

introduced to the jury, there is not a "reasonable probability" that the "result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

In fact, it is possible that the jury would have decided the abuse did occur but was not sufficiently investigated since the social worker did not even speak with Grace's minor cousin. (A-App. 27.) Perhaps it would have increased jury sympathy for Grace and reinforced their belief in Stroik's guilt given Grace's clear and consistent CAC interview. (R. 33.) And Grace's CAC interview itself presented overwhelming evidence of Stroik's guilt such that, even had the CPS report been introduced, there is not a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

In summary, Stroik fails to prove prejudice.

## II. The State did not violate *Brady* or the reciprocal discovery statute.

### A. *Brady* and the reciprocal discovery statute require different analysis, but both are only concerned with exculpatory evidence.

*Brady v. Maryland* requires the State to disclose exculpatory evidence to the defense where that evidence is material. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Wis. Stat. § 971.23(1)(h) imposes a duty on the State to disclose any "exculpatory" evidence to the defendant.

"A *Brady* violation has three components: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material." *Wayerski*, 385 Wis.2d 344, ¶ 35. Thus, *Brady* creates a constitutionally mandated duty to disclose evidence favorable to the accused. *Strickler v. Greene*, 527 U.S. 263, 280–81

(1999). The prosecutor has a duty to disclose this evidence although there has been no formal request by the accused. *Id.*

This duty is distinct from any State discovery statutes, and the two obligations are not co-extensive. *State v. Harris*, 2004 WI 64, ¶ 24, 272 Wis.2d 80, 680 N.W.2d 737. Wisconsin Stat. § 971.23 requires the State, upon defense demand, to turn over any exculpatory evidence within a "reasonable time before trial." A claim grounded in a statutory discovery violation rests on a different footing than *Brady*. Discovery involves the defendant's right to "obtain access to evidence" whereas disclosure requires only that certain information be "ma[d]e available" by the State. *Britton v. State*, 44 Wis.2d 109, 117, 170 N.W.2d 785 (1969). Therefore, *Brady* focuses on whether the State suppressed the evidence—i.e. withheld information—that should have been made available "in time for its effective use" at trial. *Harris*, 272 Wis.2d 80, ¶ 35 (quoting *United States v. Coppa*, 267 F.3d 132, 144 (2d Cir. 2001).

Where a defendant alleges the State violated its discovery obligations under Wis. Stat. § 971.23, a three-step test applies. *Rice*, 307 Wis.2d 335, ¶ 14. "First, [this Court] decide[s] whether the State failed to disclose information it was required to disclose under Wis. Stat. § 971.23(1)." *Id.* Second, it determines "whether the State had good cause for any failure to disclose under § 971.23." *Id.* Third, this court decides if the error was harmless. *Id.*

### B. The State did not violate *Brady*.

Stroik asks this Court for a new trial and claims the State "failed to disclose information about the investigation into [Grace's] prior accusation [against her minor cousin] and the fact that it was determined that [Grace] had been untruthful." (Stroik's Br. 35.) First, the State did disclose the information about the prior allegation between Grace and her minor cousin when it disclosed Detective Tracy's initial police

report. (R. 71:10.) Stroik was also aware of the allegation because he told Detective Tracy about it in his police interviews. (R. 122:35; 71:10.) Second, again, there was not a finding or determination that Grace lied or made a prior untruthful allegation against her minor cousin. (*See* A-App. 22–32.) Lastly, even accepting that the CPS report itself was not obtained by police and disclosed to defense, it does not constitute a *Brady* violation.

### 1. The CPS report was not favorable to Stroik.

The CPS report was not favorable to Stroik. Evidence is favorable to an accused, when, "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Harris*, 272 Wis.2d 80, ¶ 12 (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

Here, Stroik relies on a flawed argument that the CPS report contained evidence of a prior untruthful allegation and/or a finding that Grace lied. (Stroik's Br. 36.) As described above, this misstates the contents of the CPS report.

Unlike in *Wayerski*, where the prosecutor had knowledge of clearly favorable evidence to a defendant, Stroik is not mentioned in the CPS report nor is there a finding that Grace lied or made an "untruthful allegation." *See Wayerski*, 385 Wis.2d 344, ¶ 59 (evidence of a witness's pending charges was impeachment evidence and favorable to defendant).

At most, the CPS report established that a prior allegation of sexual assault against Grace's minor cousin was unsubstantiated by CPS. (A-App. 27.) An unsubstantiated designation does not make this allegation false, just that CPS had inadequate evidence to proceed. *Leather*, 2011 WL 1238722, ¶ 26. This is not the same thing as a prior untruthful allegation or a lie that could effectively be offered for impeachment purposes.

Because of that, as argued, it is unlikely the CPS report would have satisfied the strict requirements of Wisconsin's rape shield law and been admitted at trial. And even if it had been admitted, the jury likely would have concluded the abuse did occur but was not sufficiently investigated by CPS.

In summary, the CPS report is not favorable to Stroik. But even if this Court decides the evidence is favorable, the evidence was not suppressed by the State.

### 2. The CPS report was not suppressed by the State.

The CPS report was not suppressed by the State. In *State v. Wayerski*, the Wisconsin Supreme Court established that "suppression is nondisclosure or the withholding of evidence from the defense." *Wayerski*, 385 Wis.2d 344, ¶ 58. *Wayerski* rejected prior Wisconsin precedent that imposed limitations on the suppression analysis. *Id.* ¶ 44. *Wayerski* rejected the prior "'exclusive possession and control,' 'reasonable diligence,' and 'intolerable burden' limitations" in favor of a more liberal interpretation of suppression. *Id.* ¶ 55. After *Wayerski*, suppression is simply nondisclosure or the withholding of evidence. *Id.* ¶ 58.

Here, Stroik and the State were both aware of the prior allegation of sexual assault between Grace and her minor cousin prior to trial. The only thing that was not disclosed was the actual CPS report; and it is undisputed that neither the prosecutor nor the police had the actual CPS report. While *Wayerski*'s definition of suppression is broad, "A defendant's request for *Brady* Material . . . does not require a prosecutor to wade through all government files in search of potentially exculpatory evidence." *Harris*, 272 Wis.2d 80, ¶ 15 (quoting *United States v. Lov-it Creamery, Inc.,* 704 F.Supp. 1532, 1552 (E.D. Wis. 1989)).

Unlike in *Wayerski*, the State did not possess clear impeachment evidence and engage in private deliberations to

not disclose it. *See Wayerski*, 385 Wis.2d 344, ¶ 58 (suppression where the prosecutor suppressed evidence of pending charges).

At most, the State referenced an unrelated and irrelevant CPS report in Detective Tracy's initial police report and had no reason to seek it out. Unlike in *Wayerski*, there were no private deliberations to not disclose the CPS report. Again, at no point in the CPS report does it mention Stroik or affirmatively establish Grace lied or made a prior untruthful allegation.

In summary, the State did not suppress the CPS report. But even if this Court decides the State did suppress the CPS report, the CPS report was not material.

### 3. The CPS report was not material.

The CPS report was not material. This Court reviews the materiality requirement of *Brady* under the same analysis as the prejudice prong of *Strickland*. *Wayerski*, 385 Wis.2d 344, ¶ 36. "Evidence is not material under *Brady* unless the nondisclosure 'was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" *Id*. (citation omitted).

Again, Stroik's argument here hinges on his assertion that the CPS report contained a finding that Grace lied or made a "prior untruthful allegation." (Stroik's Br. 40.) As described above, there is nothing in the CPS report that established Grace lied or that the allegation was untruthful. The CPS report only confirmed what was already disclosed to the defense in discovery. That a prior allegation of abuse occurred between Grace and her minor cousin and nothing came of it. The CPS report states the allegation was "[u]nsubstantiated." (A-App. 29.) Unsubstantiated in this context means there was inadequate evidence for CPS to proceed. *Leather*, 2011 WL 1238722, ¶ 26. This is not the same

thing as an untruthful allegation or a lie. It is just as likely that the allegation was true, but the failure to interview all parties involved, made it impossible to prove it definitively. (A-App. 27.)

Just like in *Wayerski*, even had the CPS report been admitted, there is not a reasonable probability the result of the proceeding would have been different. *See Wayerski*, 385 Wis.2d 344, ¶ 62 (suppression of impeachment evidence not material where the State provided compelling evidence of defendant's guilt). It is likely, in reviewing the CPS report, the jury would conclude the abuse probably did occur, but was not sufficiently investigated, since the social worker did not even speak with Grace's minor cousin. (A-App. 27.) And further, that Grace's inconsistent statements about the alleged incident were due to her age and familial pressure since it is also reported in Detective Tracy's initial report that Bud told Grace to deny that her cousin assaulted her. (R. 71:10.)

Most importantly, the State offered compelling evidence of Stroik's guilt. As argued, the CAC interview was played for the jury and Grace is consistent and explicit that Stroik touched her vagina even after she told him to stop. (R. 33.)

In summary, the CPS report was not material under *Brady*.

### C. The State did not violate the discovery statute.

Stroik develops no argument about how the State violated Wis. Stat. § 971.23(1)(h), and instead focuses exclusively on *Brady*. (*See* Stroik Br. 35–41.) But the analysis for an alleged discovery violation is different. *Rice*, 307 Wis.2d 335, ¶ 14. Again, this Court analyzes alleged discovery violations in three steps. *Id*. "First, [this Court] decide[s] whether the State failed to disclose information it was required to disclose under Wis. Stat. § 971.23(1)." *Id*. Second,

it determines "whether the State had good cause for any failure to disclose under § 971.23." *Id.* Third, this court decides if the error was prejudicial or harmless. *Id.*

### 1. The State was not required to disclose the CPS report.

Stroik's argument assumes the State had access to clearly exculpatory information and it made the conscious decision not to disclose it. (Stroik's Br. 36–39.) The CPS report was not exculpatory and therefore the State was not required to seek it out and disclose it under the discovery statute. At minimum, the discovery statute requires that the prosecutor disclose the type of information required under *Brady*. *Harris*, 272 Wis.2d 80, ¶ 27. "The prosecutor's duty to obtain information from investigative agencies is not, however, limitless." *State v. DeLao*, 2002 WI 49, ¶ 24, 252 Wis.2d 289, 643 N.W.2d 480. Further, a defendant is entitled only to constitutional and statutory discovery requirements. *Id.* ¶ 48. Due diligence does not require the prosecutor to contact every individual who could conceivably have information respecting a case. *Id.* ¶ 24. Rather, the State is "charged with knowledge of material and information in the possession or control of others who have participated in the investigation" and who regularly report on the case to the prosecutor's office. *Id.*

First, as argued, the CPS report is not exculpatory under *Brady*; therefore, it is not required to be disclosed under the discovery statute. The CPS report does not mention Stroik, nor does it conclusively establish Grace lied or made a prior untruthful allegation. (A-App. 22–32.) At most, it established a prior allegation of sexual assault was unsubstantiated by CPS. (A-App. 29.)

Second, even accepting that Detective Tracy's knowledge is imputed to the prosecutor, the information he provided in his postconviction supplemental report was no more substantive than what was provided by the State in

initial discovery. Again, in initial discovery the State disclosed that a prior allegation occurred between Grace and her minor cousin, the details, and included that "somebody did talk to [Grace] about [her minor cousin] (presumably someone from health and Human Services) and [Grace] told them that [her minor cousin] didn't do it." (R. 71:10.) The only additional information provided in Detective Tracy's postconviction supplemental report is that the incident was investigated by health and human services in February of 2016 and law enforcement did not obtain a copy of the social worker's assessment. (R. 61:26.) The crucial information—that a prior incident was alleged, that someone from health and human services talked to Grace about it, and that she denied it when asked by the social worker—was disclosed in initial discovery.

Lastly, even accepting that Detective Tracy had knowledge of the investigation, he did not possess the CPS report. (R. 61:26.) Moreover, neither his postconviction supplemental report nor the CPS report established Grace lied or made a prior untruthful allegation. (R. 61:26; 71:10.) Yet Stroik argues that the prosecutor should have disclosed the CPS report to defense in initial discovery. (Stroik Br. 38–39.) Stroik's argument ignores both the jurisdictional barriers to accessing and releasing CPS reports and relies, again, on the flawed argument that the CPS report is clearly exculpatory.

In summary, the State was not required to seek out and disclose the CPS report.

### 2. Even if this Court finds the State should have disclosed the CPS report, the State had good cause for not doing so.

Even if the Court finds the State should have disclosed the CPS report in initial discovery, the State had good cause for not doing so.

First, the State did not obtain the CPS report as part of its investigation. (R. 61:26.) The first time the State received the CPS report was when it was released to the parties by the postconviction court. (R. 98.) And, even accepting that Detective Tracy's knowledge of the investigation is imputed to the State, there is no conclusion by Detective Tracy or in the CPS report that Grace lied or made a prior untruthful allegation. (R. 61:26; A-App. 22–32.) Again, all the CPS report proved is that a prior allegation was given an unsubstantiated designation by CPS. (A-App. 22–32.) Therefore, the State had no reason to seek it out since its contents were not clearly exculpatory. There is no case that imposes an affirmative duty on the State to seek out confidential records in every case and where the contents are not clearly exculpatory.

Second, Stroik's argument ignores the procedural and jurisdictional barriers associated with obtaining a CPS report. (Stroik's Br. 36–39.) A CPS report is not like a police report or other material in possession of members of the prosecutor's staff. As evidenced by postconviction proceedings in this case, it is not as simple as the prosecutor accessing and disclosing a CPS report at will. As the postconviction court noted by reference to this Court's decision in *Courtney F. v. Ramiro M.C.*, 2004 WI App 36, 269 Wis.2d 709, 676 N.W.2d 545, the release of confidential records requires an *in camera* review by the juvenile court prior to their release in another proceeding. (R. 124:63.)

In summary, the State had good cause for not seeking out and releasing the CPS report.

### 3. Stroik was not prejudiced and any discovery violation was harmless.

Given the evidence of Stroik's guilt, any error was harmless beyond a reasonable doubt. *See Rice*, 307 Wis.2d 335, ¶ 14 (discovery violations are reviewed for harmless error). "A violation is harmless when there is no 'reasonable probability' that the violation contributed to the conviction." *Id*. ¶ 19 (citation omitted). Stated differently, "the error must be 'sufficient to undermine [the Court's] confidence in the outcome' of the trial." *Id*. The standard is functionally the same as this Court's prejudice analysis under *Strickland*. *Strickland*, 466 U.S. at 693.

Again, at no point in the CPS report does it say that Grace lied or that the allegation was untruthful. (*See* A-App. 26–32.) At most, it established the allegation was unsubstantiated. (A-App. 29.) And, as the postconviction court determined, the CPS report was "no more substantively exculpatory than that information previously supplied to the defense by the prosecutor." (R. 104:4.) Even assuming the circuit court had admitted the CPS report and it was introduced to the jury, there is not a "reasonable probability" that the result of the trial would have been different. *Rice*, 307 Wis.2d 335, ¶ 19.

As argued above, it is possible that the jury would have decided the abuse did occur but was not sufficiently investigated since the social worker did not even speak with Grace's minor cousin. (A-App. 27.) Perhaps it would have increased jury sympathy for Grace and reinforced their belief in Stroik's guilt given Grace's clear and consistent CAC interview. (R. 33.)

Further, evidence of Stroik's guilt was such that there is not a reasonable probability that the absence of the CPS report contributed to the conviction. Grace's CAC interview is

explicit and consistent that Stroik touched her vagina even after she told him to "stop it." (R. 33,9:24.)

In summary, Stroik was not prejudiced and any error was harmless.

## III. Detective Tracy's testimony did not violate *Haseltine* and Kryshak cannot be ineffective.

### A. *Haseltine* only applies to improper vouching testimony and does not prohibit a police detective from testifying about the investigation and his contemporaneous conclusions.

The *Haseltine* rule prohibits a witness from testifying that another witness is "telling the truth" about some fact or event. *State v. Haseltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984); *see also State v. Romero*, 147 Wis.2d 264, 278, 432 N.W.2d 899 (1988). The prohibition exists because it is uniquely the role of the factfinder to act as "the lie detector in the courtroom." *Haseltine*, 120 Wis.2d at 96 (quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)). *Haseltine* does not preclude testimony from a witness that assists the jurors in their fact-finding role. *Id*. To determine whether testimony violates *Haseltine*, this Court examines the testimony's purpose and effect. *State v. Tutlewski*, 231 Wis.2d 379, 388, 605 N.W.2d 561 (Ct. App. 1999).

This Court has consistently held that a police investigator may testify about the course of his investigation and his opinions at the time of that investigation. In *State v. Smith*, this Court did not find a *Haseltine* violation where a police detective testified that a witness "knew a lot more than he was telling [him]" and that the witness finally gave a version that, to the police detective, "felt was the truth" since the testimony was not offered to attest to the witness's truthfulness but was offered to explain the circumstances of an interrogation. *State v. Smith*, 170 Wis.2d 701, 718, 490

N.W.2d 40 (Ct. App. 1992). There, the police detective's testimony explained the circumstances of his investigation and his opinions based on what the witness said and did during a police interview. *Id.*

Similarly, in *State v. Snider*, this Court did not find a *Haseltine* violation where a police detective testified that he believed the minor victim and did not believe the defendant's version of events because the detective was recounting how he conducted an interrogation and his thought process at the time. *State v. Snider*, 2003 WI App 172, ¶ 27, 266 Wis.2d 830, 668 N.W.2d 784; *cf. State v. Patterson*, 2009 WI App 161, ¶ 36, 321 Wis.2d 752, 776 N.W.2d 602 (*Haseltine* violation where the only purpose of a police officer's testimony that a witness was truthful was to bolster that witness's credibility).

Moreover, only testimony that is objected to is reviewed for court error; unobjected to testimony is forfeited and not reviewable by this Court for error. *State v. Mercado*, 2021 WI 2, ¶ 36, 395 Wis.2d 296, 953 N.W.2d 337. A failure to object is reviewed for ineffective assistance of counsel. *Id.*

### B. No *Haseltine* violations occurred.

Stroik argues there "were multiple *Haseltine* violations" in this case." (Stroik's Br. 42.) Further, that Detective Tracy "repeatedly opined on [Stroik's] guilt." (Stroik's Br. 42.)

At the start, the analysis for Detective Tracy's testimony is not uniform. Kryshak objected to one statement on *Haseltine* grounds, that objection was sustained, but not striken from the record; therefore, that statement is reviewed for harmless error. *Mercado*, 395 Wis.2d 296, ¶ 36. The rest of his testimony is analyzed for ineffective assistance of counsel for Kryshak's decision not to object on *Haseltine* grounds. *Id.*

### 1. Detective Tracy's testimony did not violate *Haseltine* so no court error.

Detective Tracy's testimony did not violate *Haseltine*.

Here, Kryshak objected to one alleged *Haseltine* statement, as follows:

> Q: And so based upon your interviews, at some point did you conclude that [Stroik] -- that you believed that [he] did commit this offense?
>
> A: Yes.

(R. 122:26.)

This objection was sustained, but it was not striken from the record. (R. 122:26–27.) Detective Tracy testified as to his opinion at the time based on his interviews with Stroik to explain the context of his decision to arrest Stroik. Just like in *Snider*, Detective Tracy's testimony reflected his belief that Stroik should be arrested for the charged crime based on his investigation, specifically his interviews with Stroik. The testimony was not offered to bolster Grace's testimony nor usurp the jury's factfinding role. Therefore, the testimony was not objectionable given its purpose and effect and did not violate *Haseltine*.

Because his testimony did not violate *Haseltine*, there was no court error.

### 2. Even if this Court finds error, the error was harmless.

Even if this Court concludes Detective Tracy's above statement was objectionable under *Haseltine* and should have been stricken from the record by the circuit court, the error was harmless. The harmless error rule prohibits reversal when errors do not affect the substantial rights of a defendant. Wis. Stat. § 805.18; *see also* Wis. Stat. § 972.11(1).

Trial errors that occur during a case can be assessed in the context of other evidence to determine if they are harmless beyond a reasonable doubt. *State v. Nelson*, 2014 WI 70, ¶ 30, 355 Wis.2d 722, 849 N.W.2d 317.

Here, the fact that Detective Tracy's testimony was not stricken from the record is harmless beyond a reasonable doubt. Given the purpose and context of Detective Tracy's entire testimony, which as Stroik points out, "largely outlined the chronology of his investigation and the various discussions he had with significant actors," (Stroik's Br. 43), any potential error was harmless.

Even though the alleged error was not striken from the record, the State immediately rephrased the question. (R. 122:26–27.) Further, the jury was instructed that they were the "sole judges of the facts." (R. 122:78.) This statement was a small part of the trial and of Detective Tracy's testimony. Again, as pointed out by Stroik, Detective Tracy's testimony at large "outlined the chronology of his investigation." (Stroik's Br. 43.) This single statement did not usurp the jury's factfinding role; it reflected Detective Tracy's opinion at the time of the investigation based on his interviews with Stroik. Therefore, the alleged error was harmless beyond a reasonable doubt.

### 3. Kryshak was not ineffective because the testimony did not violate *Haseltine*.

The rest of Detective Tracy's testimony was not objectionable so Kryshak cannot be ineffective for not objecting on *Haseltine* grounds.

Here, Stroik objects to Detective Tracy's testimony on what he thought of Stroik asking him what would happen if Stroik did sexually assault Grace. Detective Tracy testified that "[he] took it that potentially [Stroik] knew that he did do it, and he wanted to know what would happen to him." (R.

122:53.) The other testimony relates to what Detective Tracy thought when Stroik, in his second interview, brought up the possibility of accidentally touching Grace. (R. 122:41.) There, Detective Tracy testified that Stroik "had a good two weeks to think about this alternative explanation between interviews." (R. 122:41.)

Additionally, Stroik's final *Haseltine* argument has to do with Detective Tracy's description of the CAC interview in the context of a criminal investigation. (Stroik's Br. 44.) The State asked Detective Tracy why he never spoke with Grace as part of the investigation in this matter. (R. 122:51.) When asked why he did not press Lily, not Grace, on inconsistencies in her CAC interview, he explained that it is "best practice to not talk to the kids," (R. 122:51), and that the "CAC interview is the purest interview you're going to get with any child, and it's the most comfortable place for [children] to talk," (R. 122:52).

Detective Tracy did not offer his opinion as to whether Grace was truthful in her CAC interview. He described the purpose of a CAC interview in the context of a criminal investigation; and his response has to do with Lily, not Grace. And, just like in *Smith* and *Snider*, his other statements reflect his opinions at the time of his investigation when Stroik asked him "what if I did do it" and what he thought when Stroik came up with an alterative story as to why he may have touched Grace accidentally.

In short, because there were no *Haseltine* violations, Kryshak cannot be ineffective. *Jacobsen*, 352 Wis.2d 409, ¶ 49.

Even if this Court finds that Kryshak was deficient, he fails to prove prejudice. Prejudice requires Stroik prove that had Kryshak objected to Detective Tracy's testimony or moved to strike it from the record, there is "a reasonable probability . . . the result of the proceeding would have been different."

*State v. Harbor*, 2011 WI 28, ¶ 72, 333 Wis.2d 53, 797 N.W.2d 828 (quoting *Strickland*, 466 U.S. at 694).

The postconviction court concluded that even had Kryshak objected to this testimony, it would have concluded they were not *Haseltine* violations. (R. 124:48.) So, even had Kryshak objected, there is not a reasonable probability that the result of the proceeding would have been different.

Further, even had he objected and succeeded, Grace's compelling and consistent CAC interview makes it unlikely that the exclusion of Detective Tracy's testimony, which outlined the course of his investigation, would not have changed the outcome of this proceeding.

In summary, he fails to prove prejudice.

## IV. There is no basis for a new trial based on cumulative prejudice.

Stroik characterizes this as a "close case" that, but for Kryshak's alleged deficiencies, he would have prevailed. (Stroik's Br. 51.) But Stroik has not shown prejudice for any of the alleged errors so he cannot show cumulative prejudice. *See Mentek v. State*, 71 Wis.2d 799, 809, 238 N.W.2d 752 (1976) ("[Z]ero plus zero equals zero.").

Accordingly, this Court should not give Stroik a new trial based on cumulative prejudice.

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

Finally, Stroik argues that the "real controversy—the credibility dispute between [Stroik] and [Grace]" was not tried and asks this Court for a new trial. (Stroik's Br. 53.)

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). To establish that the real controversy has not been tried, a defendant must convince this Court that the jury was precluded from hearing important testimony that bore on an important issue or that impermissible evidence 'clouded a crucial issue' in the case. *State v. Cleveland*, 2000 WI App 142, ¶ 21, 237 Wis.2d 558, 614 N.W.2d 543. The Court approaches "a request for a new trial with great caution," and will exercise its discretionary power "only in exceptional cases." *Morden v. Cont'l AG*, 2000 WI 51, ¶ 87, 235 Wis.2d 325, 611 N.W.2d 659.

This is not an exceptional case. The real controversy—both Grace's and Stroik's credibility as to whether Stroik assaulted Grace by touching her vagina—was fully tried. Both Grace and Stroik testified. The jury was able to watch both their testimony and Grace's CAC interview. In that interview, Grace is consistent and explicit that Stroik demanded she take off her clothes and then he touched her vagina, even after she told him to stop. (R. 33.)

## CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 28th day of September 2021.

Respectfully submitted,

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## 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 10,997 words.

Dated this 28th day of September 2021.

Electronically signed by:

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## CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 28th day of September 2021.

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