STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1732-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ERIC J. DEBROW,

Defendant-Respondent.

ON APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, REVERSING A JUDGMENT OF CONVICTION ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JOHN D. HYLAND, PRESIDING

# BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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## INTRODUCTION

In 2020, a jury found Eric J. Debrow guilty of sexually assaulting his girlfriend's then-13-year-old daughter. The jury's verdict came at the end of a multi-day trial during which the victim's brother testified about seeing Debrow enter the victim's bedroom on the night in question. During his testimony, the brother commented that he had been on alert after looking on CCAP. The prosecutor and the court immediately cut off the brother's testimony, and the court instructed the jury to strike whatever they may have heard. Debrow, however, demanded a mistrial, claiming that no curative instruction would be enough to remedy the supposed jury taint. He rebuffed an offer for the jury to receive a second instruction, insisting that a mistrial was the only possible solution. His trial continued, and after the close of evidence, the court reminded the jury to disregard any stricken testimony. Following the jury's guilty verdict, the Dane County Circuit Court issued a mandatory sentence of life imprisonment based on Debrow's status as a persistent repeater.

Debrow appealed his conviction, claiming that the circuit court erred in denying his request for a mistrial. The State maintained that the circuit court appropriately exercised its discretion in concluding that a mistrial was not necessary. The court of appeals concluded that the circuit court erroneously exercised its discretion and reversed Debrow's conviction. In concluding that a mistrial was required, the court of appeals relied on its determination that the circuit court's particular instruction to the jury was insufficient, not a determination that the testimony could not be cured by a jury instruction at all.

This Court should reverse the court of appeals' decision. Whether the fleeting reference to CCAP in the middle of a multi-day trial was so significant that it required a mistrial is

a distinct inquiry from the sufficiency of any corrective instruction actually given. Debrow refused to engage with the circuit court on crafting a different instruction, and he therefore lost the ability to argue on appeal that the instruction was inappropriate. He is instead confined to his argument that the comment about CCAP so irreparably tainted the jury that a mistrial was the only solution. It did not—even the court of appeals' decision did not suggest that to be the case. Regardless, if this Court does consider the sufficiency of the instruction, it should conclude that the instruction was adequate under the circumstances or, alternatively, that any insufficiency in the instruction was harmless.

## ISSUE PRESENTED

Did the court of appeals apply the proper legal standard to its review of the circuit court's decision to deny Debrow's motion for a mistrial when it considered the adequacy of the curative instruction given by the circuit court and did the circuit court properly exercise its discretion in denying the motion for a mistrial?

The court of appeals concluded that the circuit court erred in denying the motion for a mistrial because its decision was based on a putatively insufficient curative instruction having been given.

This Court should reverse the court of appeals.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As this Court has accepted review of this case, oral argument and publication are customary and appropriate.

## BACKGROUND

This appeal arises out of Debrow's conviction at trial of one count of second-degree sexual assault of a child as a persistent repeater in Dane County case number 2018CF202. (R. 106:1.) Debrow was also charged with a separate count of first-degree sexual assault of a child as a persistent repeater in Dane County case number 2018CF1787. (R. 63:1.) The Dane County Circuit Court joined the two cases for trial,[1] and the jury convicted Debrow on the count in 2018CF202 but acquitted him on the count in 2018CF1787. (R. 118:103.)

*Investigation & Pre-Trial Proceedings*

On the morning of January 22, 2018, Madison Police responded to Safe Harbor where staff were conducting an interview of Mary[2], who was then 13 years old. (R. 1:1.) Mary reported that about one week earlier, Debrow—her mother's boyfriend—came into her room while she was sleeping and touched her. (R. 1:2.) Mary awoke to discover that Debrow had flipped her covers up and was "rubbing her legs and gripping her butt." (R. 1:2.) Mary screamed at Debrow to get out of her room, which caused the family dogs to start barking. (R. 1:2.) Debrow left, closing the bedroom door as he did. (R. 1:2.)

In an information dated February 27, 2018, the State charged Debrow with one count of sexual assault of a child under the age of 16 as a persistent repeater. (R. 13:1.) Because Debrow had been convicted of first-degree sexual assault of a child in 2004, the persistent repeater charge carried with it a mandatory life sentence without the possibility of early

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[1] The circuit court denied the State's motion to join Dane County case nos. 2018CF2282 and 2018CF2409, each of which involved multiple counts of bail jumping. (R. 63:2; 127:33–34.) Those cases are not at issue in this appeal.

[2] The State uses pseudonyms for the child victims and their family members. *See* Wis. Stat. § (Rule) 809.86.

release. *See* Wis. Stat. § 939.62(2m)(b)–(c). Debrow pleaded not guilty (R. 126:15), and the case moved toward trial. During the lead up to trial, Debrow violated the conditions of his release multiple times by contacting Mary and her mother, Kathy, by text and through Facebook. (R. 34; 38.) Debrow also changed counsel multiple times, resulting in significant delays to the trial schedule. (R. 65:1–2.)

In November 2019, the State moved to join the case involving the assault against Mary with a separate case involving an assault against Mary's younger sister, Nancy. (R. 63.) In that case, Nancy stated that Debrow entered her room one night and unbuttoned her pants. (R. 63:2.) Nancy also stated that she would sometimes sleep in bed with her mother when she was not feeling well, and that on multiple occasions when she was in bed with her mother, Debrow put his hand down her pants and rubbed her vagina. (R. 63:2.) The State also moved to join the two cases involving the bail jumping charges that resulted from Debrow's contact with Mary and Kathy following his release on bail. (R. 63:2–3.) Debrow opposed joinder (R. 68), and the circuit court held a hearing to discuss the matter on February 12, 2020 (R. 127). After argument by the parties, the circuit court determined that the cases involving the allegations by Mary and Nancy would be joined, but the bail jumping cases would remain separate. (R. 127:30–34.)

Before trial, the circuit court ruled on multiple evidentiary issues, including allowing the State to present various other-acts evidence to show the absence of mistake. (R. 120:38–40.) Following these rulings, the court took a break for lunch to allow Debrow to decide whether he would accept the State's final plea offer. (R. 120:61–62.) Following the break, Debrow told the court he rejected the State's plea offer

and the case proceeded to trial. (R. 129:7–8.) The court called in the jury[3] and trial began. (R. 129:13.)

*Trial*

The State's first witness was Mary. (R. 129:37.) Mary testified that Debrow was her mother's boyfriend and lived with the family in early 2018. (R. 129:41.) She identified a diagram as a mirror image of the apartment the family and Debrow were living in at that time. (R. 129:44.) She identified the rooms where she, her mother, her sister Nancy, and her brother slept. (R. 129:47.)

Mary said that on January 17, 2018, she woke up very early in the morning "to somebody touching [her] butt and thigh." (R. 129:50–51.) She screamed, which caused the dogs to start barking. (R. 129:51.) Mary then stayed awake until it was time for her to go to school. (R. 129:51.) Mary reported that she was "100 percent" sure that the person who touched her was Debrow. (R. 129:56.)

When Mary returned from school later that day, Kathy was telling Debrow to leave and that he should have been gone before Mary got home.[4] (R. 129:58.) At some point, Mary's brother called the police, who arrived and spoke with Mary and Nancy. (R. 129:58.)

Asked if there was ever another time she had awoken to Debrow in her room, Mary testified that when the family first moved into the apartment, she once woke up to Debrow sitting on her bed saying "shh, it's just a game" and instructing her not to tell her mother. (R. 129:60.) Mary also

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[3] Jury selection occurred the previous day, but the court did not swear in the jury at that time. (R. 130.)

[4] Kathy later testified that she was awakened by the barking dogs and, after talking to Debrow, surmised that Debrow had been in the girls' room, which violated her "ground rule[s]" for him. (R. 119:66, 77–81.)

stated that she once had a discussion with her mother about what to do "if anything were to happen" while she was in her room in the night, and "[t]he general consensus was" that she should scream. (R. 129:65.)

Mary's brother Isaac testified next for the State. (R. 129:88.) Isaac stated that the arrangement of his bedroom in the apartment allowed him to see directly out his bedroom door. (R. 129:93.) He had been lying awake in bed on the morning of January 17 when he saw Debrow enter Mary and Nancy's bedroom. (R. 129:94.) Debrow was in the room for five to ten minutes when Isaac heard his sister scream. (R. 129:96.) Debrow then immediately left the room to go back to Kathy's room. (R. 129:96.) Isaac confirmed that the dogs began to bark after he heard his sister scream. (R. 129:99.) He testified that he was angry about what he saw all day while he was at school, so when he got home later that day, he called the police. (R. 129:97.)

Isaac acknowledged that he and Debrow would occasionally fight and that sometimes the fights involved punching and kicking. (R. 129:100.) He added, however, that he viewed Debrow as a sort of father figure "until all this stuff happened." (R. 129:100.)

On cross-examination, Isaac said that he stayed awake and watched Mary and Nancy's bedroom door after Debrow left it "just to see if he was going to go back in there." (R. 129:108.) He also noted that he generally could not control how he slept and was on medication for sleeping, which was why he was awake that night to begin with. (R. 129:108.)

During re-direct examination, the State requested a sidebar and sought permission to ask a leading question. (R. 129:110.) The State indicated that it wanted to address why Isaac was being particularly vigilant about Debrow and his sisters without Isaac responding in a way that told the jury that Debrow had previously been convicted of sexually

assaulting a minor. (R. 129:110–11.) Debrow's attorney opposed the State's request and said that if Isaac gave the "wrong answer," he would request a mistrial. (R. 129:112.) He further contended that the State should not be allowed to address Isaac's "feeling" about Debrow because the State originally brought it up during direct examination and the defense only followed up on it during cross-examination. (R. 129:113–14.) The State re-emphasized that it wanted to address why Isaac was watching his sisters' bedroom door "in a leading way so we don't accidentally get a mistrial about this." (R. 129:115.)

The court sustained Debrow's objection to the State asking a leading question. (R. 129:117.) It said that the State could "go into this area in not a directly leading fashion but in a very direct or indirect but not leading manner." (R. 129:116–17.) The State responded that it was concerned where Isaac's mind would go "with such a vague question," but would "try to be quick to interrupt" if need be. (R. 129:117.) The court said that it would "be happy to be on pins and needles as well to jump in if [Isaac] starts saying something" related to Debrow's criminal history. (R. 129:117.)

After the sidebar, the following exchange took place:

> Q [Isaac], I want to draw your attention to the timeframe of when you moved into [the apartment] with [Debrow] and your two sisters and your mom, okay?
>
> At any point from when you moved in, had you learned anything or heard anything that led you to be on alert that night on January 17th of 2018?
>
> A Yes.
>
> Q And were those based on things your sisters had mentioned?
>
> A No.
>
> Q Are those things that you heard from your mom?

> A It's things that I - -
>
> Q - - I don't want to get into that - -
>
> (Unreportable simultaneous interjections by Counsel.)
>
> (R. 129:118.)

Debrow moved to strike the response and indicated that he would make another motion shortly. (R. 129:118.) The court then said, "I'll - - I'll move to strike. The question was were those things you heard from your mother, and if you can just give yes or no as far as whether those were things you heard from your mother. We can't get into what they are, because that's hearsay." (R. 129:119.) Isaac began to respond with "Well, my mom did tell me - -" and the court cut him off, saying "we can't put her words into your mouth in front of the jury." (R. 129:119.) The State added, "that's why I had to speak over you, and I apologize for doing that." (R. 129:119.) The State then ended its re-direct examination, and the court directed the jury "to strike anything else that they . . . heard beyond the witness's statement that he heard from his mother but not the content of anything." (R. 129:119.)

Shortly thereafter, the court dismissed the jury and the parties stayed on the record to discuss what happened. (R. 129:121–22.) The court stated that the State asked a question that was not leading, and when Isaac started to interject, the court heard the words "I looked on CCAP." (R. 129:122.) At that, both attorneys and the court interrupted Isaac. (R. 129:123.) The court noted that it granted Debrow's motion to strike, and it said that it would "give that instruction in the end as well." (R. 129:123.)

Debrow moved for a mistrial. (R. 129:123.) He argued that even though the court struck Isaac's response, "the jury still heard it." (R. 129:123.) He contended that the jury would wonder what Isaac found on CCAP that led him to be so vigilant and concluded that the jury would surmise that

Debrow had previously been convicted of sexual assault. (R. 129:123–24.) And because Debrow believed that no curative instruction could correct the error, he felt the trial needed to start over with a new jury. (R. 129:124.)

The State disagreed that a mistrial was necessary. (R. 129:124.) It noted that a mistrial was a "drastic" remedy, and that it would be sufficient to either issue another instruction to the jury to disregard the response, or, if Debrow preferred, to not address the issue again so as to call no further attention to it. (R. 129:124–25.) The State also commented on the court's statement to Isaac that the problem with his response was hearsay, which the State believed minimized the risk that the jury would understand that Isaac was likely referring to Debrow's criminal history. (R. 129:125.)

The court noted that a mistrial is "the most serious of remedies." (R. 129:128.) It said that a few reasons reduced the necessity of granting a mistrial in Debrow's case. (R. 129:128.) First, there was no way to know how many of the 14 jurors heard Isaac mention CCAP or whether they knew what CCAP was. (R. 129:128–29.) Regardless, the court noted that Isaac did not say what it was he saw on CCAP that caused him to be on alert. (R. 129:129.) Second, the reason given to the jury for the interruption of Isaac's response was that it was getting into matters of hearsay, which were not allowed. (R. 129:129.) Finally, there were less drastic measures than a mistrial available to address Isaac's response, including giving the jury an additional curative instruction if the defense requested. (R. 129:130–31.) For those reasons, the court denied Debrow's request for a mistrial. (R. 129:131.) Debrow did not request a curative instruction at that time. (R. 129:131–33.)

Following the conclusion of the State's case, Debrow elected not to testify in his own defense, and he informed the court that he would not be calling any witnesses. (R. 118:3.)

At the jury instruction conference that followed, the court asked whether the parties would like Jury Instruction 150, relating to stricken testimony, included. (R. 118:18–19.) The State took no position; Debrow requested that it be issued to the jury. (R. 118:19.) While instructing the jury, the court said the following: "During the trial the [c]ourt has ordered certain testimony to be stricken. Disregard all stricken testimony." (R. 118:37.)

After closing arguments, the jury returned verdicts of not guilty on the count of second-degree sexual assault of a child (Nancy) under the age of 13 and guilty on the count of second-degree sexual assault of a child (Mary) under the age of 16. (R. 118:99–100.) The court entered judgment on the guilty verdict. (R. 118:103.)

Debrow appealed, arguing both that the circuit court erroneously denied his motion for a mistrial and that the court erred in many of its pre-trial evidentiary decisions. The court of appeals reversed Debrow's conviction and remanded the matter for a new trial. (Pet-App. 3.) The court held that the circuit court erroneously exercised its discretion in determining that a mistrial was not necessary because the circuit court's determination was based on the fact that it gave a curative instruction, but that instruction was inadequate. (Pet-App. 22.) The court further held, however, that the circuit court's pre-trial evidentiary decisions were correct.[5] (Pet-App. 23–31.)

## STANDARD OF REVIEW

"A motion for mistrial is committed to the sound discretion of the circuit court." *State v. Ford*, 2007 WI 138,

[5] Debrow did not cross-petition for review of those evidentiary decisions, and therefore, they are not at issue before this Court.

¶ 28, 306 Wis. 2d 1, 742 N.W.2d 61. "An erroneous exercise of discretion may arise from an error in law or from the failure of the circuit court to base its decisions on the facts in the record." *Id.*

## ARGUMENT

### The Court of Appeals erroneously reversed Debrow's conviction.

#### A. Whether circumstances necessitate a mistrial is a matter entrusted to the discretion of the circuit court.

"[N]ot all errors warrant a mistrial." *State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998). Rather, the law favors less-extreme alternatives when they are available and practical. *Id.* A circuit court "is in the best position to determine the seriousness of the incident in question, particularly as it relates to what has transpired in the course of the trial." *United States v. Clarke,* 227 F.3d 874, 881 (7th Cir. 2000). For that reason, when a defendant seeks a mistrial on grounds unrelated to the prosecution's conduct, appellate courts give the circuit court's decision "great deference." *State v. Bunch*, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995) (citation omitted); *see also Ford*, 306 Wis. 2d 1, ¶ 29 ("The denial of a motion for mistrial will be reversed only on a clear showing of erroneous use of discretion.").

When considering whether a circuit court erroneously exercised its discretion in making a mistrial determination, a reviewing court's focus is on whether the circuit court considered the parties' positions and alternatives to a mistrial rather than the execution of those alternatives alone. *See State v. Williams*, 2004 WI App 56, ¶ 31, 270 Wis. 2d 761, 677 N.W.2d 691; *State v. Collier*, 220 Wis. 2d 825, 838, 584 N.W.2d

689 (Ct. App. 1998). That is, "[t]he trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." *State v. Ross*, 2003 WI App 27, ¶ 47, 260 Wis. 2d 291, 659 N.W.2d 122.

### B. Whether a mistrial is necessary depends on whether the court can cure any mistake without declaring a mistrial.

In reviewing the denial of a mistrial motion, appellate courts consider whether the complained-of error was fixable through a curative instruction or another remedy. A mistrial is not the correct solution where another, less-extreme remedy is possible.

Cases discussing mistrials focus on whether an issue *can be* fixed, not whether it *was* fixed. In *Givens*, for example, the court of appeals considered a discovery violation where an officer testified on cross-examination to the contents of a report that had not been turned over to the defense. *Givens*, 217 Wis. 2d at 191. The circuit court denied a motion for a mistrial and instead offered the defense an adjournment to review the report and have independent analysis done on its contents. *Id.* at 192. The defendant declined. *Id.* The court of appeals concluded that the circuit court's offer of the remedial step was enough to determine that the circuit court properly exercised its discretion in denying a mistrial, even though the defense rejected the remedial step offered. *Id.*

This approach makes sense. A circuit court can—indeed, should—make a mistrial decision based on forward-looking options. It will often be the case that when a circuit court is confronted with a request for a mistrial, it will need to exercise its discretion with future options to the moving party in mind. Like in *Givens*, a court may conclude that an error does not warrant a mistrial because it can be cured and instead allow the defendant to choose whether to accept that

curative option. The important thing, however, is that the court has exercised its discretion regardless of how the defense chooses to proceed.

### C. The court appropriately exercised its discretion when it denied Debrow's motion for a mistrial. The court considered a number of facts surrounding Isaac's comment and concluded that a curative instruction could address the problem.

Here, the circuit court properly exercised its discretion in denying Debrow's motion for a mistrial.

The court considered a number of factors arriving at its decision. It noted that even though Isaac referred to seeing something on CCAP, he did not say what that was—he did not say that he knew Debrow had been convicted of sexual assault previously. (R. 129:129–30.) Additionally, the court noted, there was no indication as to what the jurors actually heard or whether they knew what sort of information is available on CCAP. (R. 129:12829.) And finally, as soon as Isaac began his answer about CCAP, the interjections by counsel and the court related to hearsay—the parties did not suggest that there was something objectionable in the substance of what Isaac was saying, but the fact that it was coming from someone else, thus masking—at least somewhat—the prejudicial effect of the comment. (R. 129:129.)

The court then weighed the options available to it. Having concluded that the risk of the jury gleaning something improper from the statement was low and could be cured by an instruction to the jury, and noting that it had already struck the testimony, the court elected to continue the trial and allow Debrow to decide whether to have the court issue a curative instruction. (R. 129:130–31.) This was an appropriate exercise of discretion. The court went on to issue an instruction on stricken testimony at the close of evidence,

telling the jury to disregard any stricken testimony. (R. 118:37.)

That Debrow chose not to avail himself of the offer for a curative instruction at the time does not render the circuit court's exercise of discretion erroneous, for two reasons. First, the court's exercise of discretion was already complete by the time Debrow elected not to request an immediate curative instruction. Second, the exercise of discretion is left to the circuit court, not the moving party. As was the case in *Givens*, the defense's ultimate decision on the offered remedy did not render the exercise of discretion unsound.

Ultimately, the court followed the clear directive of the law, which states that a mistrial should not be ordered if a less-extreme alternative is possible. *Givens*, 217 Wis. 2d at 191. That decision was entitled to great deference, *see Bunch*, 191 Wis. 2d at 507, and the court of appeals should have left it intact.

### D. The court of appeals erred by conflating the mistrial analysis with the question of whether the particular curative instruction was sufficient.

The court of appeals' decision focused on perceived flaws in the circuit court's particular instruction to the jury immediately following Isaac's comment about CCAP. That is a different inquiry from the mistrial analysis: whether an evidentiary error is so prejudicial that no curative instruction can fix it. Notably, most of the cases on which the court

relied—*Gary M.B.*[6], *Williamson*[7], *Penigar*[8], *Sullivan*[9], and *Peters*[10]—were not mistrial cases. Rather, they addressed the adequacy of specific curative instructions and the defendants' choices about whether to seek them.

The court of appeals decision was not based on Debrow's argument that no jury instruction would have been sufficient, but rather its determination that the instructions actually given were insufficient. Indeed, the court seemed to agree that a curative instruction could have cured any issue raised by Isaac's testimony. Its conclusion that the issue could be corrected should have been enough for the court of appeals to affirm on the mistrial question: the content of the curative instruction should be viewed separately from the determination about whether an issue is amenable to correction via an instruction in the first place.

The court of appeals' flawed approach was reflected in the cases it relied upon: they were appeals about whether particular curative efforts by a trial court were sufficient, not whether an error at trial was so unsolvable that it warranted a mistrial. *Williamson*, for example, addressed the issue of waiver when a defendant complains that a curative instruction to a jury is insufficient, but declines offers to provide a different instruction.

In *Williamson*, the defense moved to strike all of a witness's testimony and order the jury to disregard it entirely.

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[6] *State v. Gary M.B.*, 2004 WI 33, 270 Wis. 2d 62, 676 N.W.2d 475.

[7] *State v. Williamson*, 84 Wis. 2d 370, 267 N.W.2d 337 (1978), *overruled on other grounds by Manson v. State*, 101 Wis. 2d 413, 304 N.W.2d 729 (1981).

[8] *State v. Penigar*, 139 Wis. 2d 569, 408 N.W.2d 28 (1987).

[9] *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

[10] *Peters v. State*, 70 Wis. 2d 22, 233 N.W.2d 420 (1975).

*State v. Williamson*, 84 Wis. 2d 370, 389–90, 267 N.W.2d 337. When the circuit court denied that request, the defense did not request a more limited striking or instruction to the jury and instead sought relief on appeal. *Id.* at 390. Noting that the "trial court appeared willing to strike the tainted remarks or give a curative instruction or permit remedial testimony from the officer himself," but that the defense rejected these alternatives, this Court held that Williamson had strategically waived the error and was not entitled to relief. *Id.* at 391.The court of appeals here cited *Williamson* for its uncontroversial statement that "[e]ven the direct references to other criminal activity have not required a new trial if a sufficient curative instruction was given." *Id.* This Court did not even hint at a rule about when a mistrial is automatically necessary, particularly in a case without a direct reference to other crimes.

Here, by focusing on the particular instruction given to the jury, the court of appeals answered the wrong question. The sole question posed to the court was whether the circuit court erroneously exercised its discretion in denying the motion for a mistrial. That question, in turn, involved whether the circuit court correctly determined that the evidentiary error *could* be corrected. The circuit court properly exercised its discretion in determining that it could.

### E. Debrow forfeited any argument that a different instruction should have been given by failing to request a different instruction or otherwise object to the language used.

Once the circuit court considered the parties' arguments and determined that Isaac's comment did not so taint the trial that there was a need for a mistrial, it properly exercised its discretion in denying Debrow's motion for a mistrial. Debrow never requested an instruction until the

instructions conference, when the court inquired about Wisconsin JI–Criminal 150 (2000) and Debrow asked to have it included. But while Debrow appealed on the question of whether the circuit court properly exercised its discretion in denying the mistrial motion, the court of appeals instead focused on an issue he forfeited: whether the particular instructions given were sufficient.

This Court has reiterated that, in a criminal case, "[f]ailure to contemporaneously object to jury instructions results in forfeiting review of the jury instructions." *State v. McKellips*, 2016 WI 51, ¶ 47, 369 Wis. 2d 437, 881 N.W.2d 258; *State v. Trammell*, 2019 WI 59, ¶ 24, 387 Wis. 2d 156, 928 N.W.2d 564. This rule applies regardless of whether the complained-of error is an affirmative misstatement or an omission. *See State v. Cockrell*, 2007 WI App 217, ¶ 36, 306 Wis. 2d 52, 741 N.W.2d 267 (holding that the defendant forfeited his right to challenge the omission of a phrase from the jury instructions by failing to object).

"The purpose of the rule is to give the opposing party and the circuit court an opportunity to correct any error." *McKellips*, 369 Wis. 2d 437, ¶ 47. "This also helps preserve jury verdicts and conserve judicial resources." *Id.* Additionally, "requiring parties to raise issues at the trial court level encourages diligent preparation and litigation, and discourages parties from 'build[ing] in an error to ensure access to the appellate court.'" *State v. Saunders*, 2011 WI App 156, ¶ 30, 338 Wis. 2d 160, 807 N.W.2d 679 (citation omitted).

Furthermore, any objections to alleged errors in proposed jury instructions must be made at the jury instructions conference. Wis. Stat. § 805.13(3) (made applicable to criminal proceedings through Wis. Stat. § 972.11(1)). "Failure to object at the conference constitutes a

waiver of any error in the proposed instructions or verdict."[11] Wis. Stat. § 805.13(3). Indeed, "the court of appeals has no power to reach an unobjected-to jury instruction because the court of appeals lacks a discretionary power of review." *Trammell*, 387 Wis. 2d 156, ¶ 25.

In this case, Debrow was given the opportunity to request an instruction shortly after Isaac's testimony. He did not take that opportunity. He was then given another opportunity to seek a different instruction at the jury instruction conference. He instead accepted the court's issuance of the pattern jury instruction on stricken testimony without issue. He therefore forfeited any argument that a different instruction should have been given, and the court of appeals lacked the authority to reverse on that basis.

The rationale underlying the forfeiture doctrine applies equally to a curative instruction given in the middle of trial and any instruction given after the close of all evidence. Moreover, Wis. Stat. § 805.13 specifically applies to jury instructions given after the close of evidence and requires a contemporaneous objection to preserve an instruction issue for appellate review. Therefore, whether the objection is to a lack of an additional instruction to the jury immediately after the court denied Debrow's request for a mistrial, or with a lack of an instruction that went beyond Wis. JI–Criminal 150

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[11] Although the statute talks about "waiver" of the issue, the more accurate phrasing for the failure to object at the instruction conference is "forfeiture." *See State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining the distinct legal concepts embodied by the terms "forfeiture" and "waiver"); *see also State v. McKellips*, 2016 WI 51, ¶ 47, 369 Wis. 2d 437, 881 N.W.2d 258 (referring to forfeiture, rather than waiver, of review). Regardless of the terminology, however, the effect of the statute is the same—a party who fails to object to a jury instruction (or lack thereof) at the conference is precluded from challenging it later.

(2000) after the close of evidence, Debrow's failure to raise a challenge precludes appellate review.

### F. The jury instruction was sufficient, and regardless, any shortcoming in the instruction was harmless.

Finally, even if this Court chooses to reach the sufficiency of the instruction, it still should affirm because the court's use of the pattern jury instruction was proper and any shortcoming in the instruction was harmless. The State did not forfeit a harmless error argument regarding the adequacy of the instructions because Debrow's appeal alleged an improperly denied mistrial, which is not subject to a harmless error analysis. He cannot both convert his appeal to a different issue and then allege that the State cannot address his new argument.

"A trial court has broad discretion to decide when to give a curative instruction and what it should contain." *State v. Schutte*, 2006 WI App 135, ¶ 37, 295 Wis. 2d 256, 720 N.W.2d 469 (citing *State v. Lombard*, 2003 WI App 163, ¶ 18, 266 Wis. 2d 887, 669 N.W.2d 157).

It is well established that when assessing prejudice to a party due to improper evidence, an appellate court "should presume that the jury followed the instructions given to them by the trial court." *State v. Pharm*, 2000 WI App 167, ¶ 31, 238 Wis. 2d 97, 617 N.W.2d 163; *State v. Deer*, 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985)."[T]he general rule in this state [is] that limiting and admonitory instructions are presumed to cure the prejudicial effect of erroneously admitted evidence." *State v. Jennaro*, 76 Wis. 2d 499, 508, 251 N.W.2d 800 (1977); *see also Collier*, 220 Wis. 2d at 837 ("Potential prejudice is presumptively erased when admonitory instructions are properly given by a trial court.").

Because of this presumption, appellate courts generally defer to a circuit court's determination that a curative instruction cures any prejudice unless the record shows the jury disregarded the trial court's instructions. *See, e.g.*, *Genova v. State*, 91 Wis. 2d 595, 622, 283 N.W.2d 483 (Ct. App. 1979); *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894. For example, in *Sigarroa*, a State's witness improperly implied to the jury that the defendant had a criminal record. *Sigarroa,* 269 Wis. 2d 234, ¶ 23. The defendant moved for a mistrial and argued that the "statement informed the jury that Sigarroa had a prior criminal conviction." *Id.* ¶ 11. Ultimately, the trial court concluded that a "curative instruction was sufficient" to cure any prejudice. *Id*. The court of appeals agreed and concluded that the trial court immediately "striking" the improper testimony as well as providing a "jury instruction at the close of testimony" was "sufficiently curative." *Id*. ¶ 26. Similarly, in *Johnson v. State*, this Court affirmed a circuit court's decision to deny a defendant's motion for mistrial based on the "steps taken by the trial court to mitigate any prejudice." *Johnson v. State*, 75 Wis. 2d 344, 366, 249 N.W.2d 593 (1977).

When Isaac mentioned CCAP, the record about everything that was said became unclear because of "[u]nreportable simultaneous interjections by Counsel." (R. 129:118.) However, the record reflects that the defense objected and moved to strike Isaac's answer. (R. 129:118.) The court seemingly sustained the objection and granted the motion to strike, responding, "I'll – I'll move to strike." (R. 129:119.) After some interjections by the court and the prosecutor about whether Isaac heard anything from his mother, the court continued, "to the extent that – - as the State was . . . raising an interjection[,] the answer beyond what he gave just now will be -- I'll direct the jury to strike anything else that they . . . heard beyond the witness's statement that he heard from his mother[,] but not the

content of anything." (R. 129:119.) Then, at the close of testimony (having not received a request for an additional instruction prior to then), the court instructed the jury as follows: "[d]uring the trial the [c]ourt has ordered certain testimony to be stricken. Disregard all stricken testimony." (R. 118:37.)

This jury instruction, which copied the language of Wis. JI–Criminal 150 (2000) verbatim, was sufficient. It properly instructed the jurors to disregard any stricken testimony. And, as the circuit court noted, there was only one such instance during the trial. (R. 118:19.) Moreover, the timing of the instruction was appropriate; the comment to the instruction notes that it "may be given at the time the testimony is stricken, at the end of the trial, or at both times." Wis. JI–Criminal 150 (2000). In short, the court struck testimony and issued the pattern instruction in accordance with the comments to that instruction. Nothing more was needed.

With respect to harmless error, the State acknowledges that it did not make a harmless error argument in the court of appeals. That is because Debrow was asserting that the circuit court erroneously exercised its discretion in not declaring a mistrial, which is not subject to harmless error review. The court of appeals, however, reversed on grounds distinct from Debrow's argument—the sufficiency of the jury instruction. (Pet-App. 22.) That claim *is* subject to harmless error review. *See State v. Harvey*, 2002 WI 93, ¶ 42, 254 Wis. 2d 442, 647 N.W.2d 189.

"In order for an error to be harmless, the State, as the party benefitting from the error, must prove that it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Nelson*, 2014 WI 70, ¶ 44, 355 Wis. 2d 722, 849 N.W.2d 317 (quoting *Harvey*, 254 Wis. 2d 442, ¶ 46). In other words, this Court

must be sure "'that the jury *would* have arrived at the same verdict had the error not occurred.'" *Id.* (quoting *State v. Martin*, 2012 WI 96, ¶ 45, 343 Wis. 2d 278, 816 N.W.2d 270). Factors to consider in assessing the error include the frequency of the error, the importance of any erroneously admitted evidence, the presence/absence of corroborating or contradicting evidence, nature of the defense, nature of the State's case, and the strength of the State's case. *Martin*, 343 Wis. 2d 278, ¶ 46.

Here, the error in question would be the circuit court's instruction to the jury regarding the stricken testimony. Again, the instruction as read by the court stated, "[d]uring the trial, the [c]ourt has ordered certain testimony to be stricken. Disregard all stricken testimony." (R. 118:37.) Debrow did not offer an alternate instruction to the court, but the court of appeals relied on *Penigar* for the proposition that the instruction should have specifically identified the testimony to be disregarded. (Pet-App. 20.)

Even if the court's instruction to the jury had identified the specific testimony to be disregarded[12], it is clear beyond a reasonable doubt that the jury still would have convicted Debrow of assaulting Mary. First, even if one or more jurors

[12] The court of appeals' approach allowed Debrow to receive review of a jury instruction question while insulating it from harmless error analysis by framing it as a mistrial question. But the State notes that there may have been a strategic reason for the defense not to want the court to repeat Isaac's comment about CCAP to the jury. Yet by addressing the merits of the jury instruction issue, the court of appeals gave Debrow the benefit of that potentially strategic choice while also allowing him to benefit from the alleged error on appeal. "A defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal." State v. Gary M.B., 2004 WI 33, ¶ 11, 270 Wis. 2d 62, 676 N.W.2d 475 (citation omitted); *see also Henry v. Mississippi*, 379 U.S. 443, 451 (1965).

heard the comment about CCAP and understood it to be a reference to Debrow's prior conviction, it cannot be said that the comment irreparably tainted the jury because it still acquitted Debrow of assaulting Mary's sister, Nancy. Second, Isaac's comment about CCAP was the only instance of stricken testimony. (R. 118:19.) If members of the jury were not able to tie the instruction to the CCAP comment, it was almost certainly because they did not hear or recall the comment itself; it therefore could not have had an effect on deliberations.

The State also provided significant, corroborated evidence of Debrow's guilt. Mary testified in detail about Debrow attacking her, saying that she was 100% certain of his identity. (R. 129:50–51, 56.) That attack caused Mary to yell, causing the family dogs to bark. (R. 129:51.) Isaac testified to seeing Debrow enter Mary's room and confirmed hearing Mary scream and the dogs barking. (R. 129:94–99.) Kathy confirmed hearing Mary scream "get out" repeatedly and the dogs barking, and she testified that Debrow was not in their room at that time. (R. 119:77–81.) And the State provided the jury with admissible other-acts evidence showing that Debrow had searched for and viewed a pornographic video titled "Stepdaughter is scared to get fucked while wife sleeps" and that he had entered Mary's room at night on a different occasion, causing Mary to wake up and scream. (Pet-App. 23, 26.)

All in all, any shortcoming in the jury instruction was a minor error in response to a single moment during a multiday trial. It is clear from the entire context of the trial that any error did not result in Debrow's conviction. Thus, if this Court reaches the issue, it should reverse the court of appeals.

## CONCLUSION

For the reasons discussed, this Court should reverse the court of appeals' decision.

Dated this 10th day of February 2023.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,994 words.

Dated this 10th day of February 2023.

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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 Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 10th day of February 2023.

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