STATE OF WISCONSIN

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

DISTRICT II

Case No. 2022AP382-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CONRAD M. MADER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND A DECISION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN CALUMET COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY S. FROEHLICH, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Conrad Mader's trial counsel perform deficiently in any of the following ways:

a. Declining to object to expert opinion testimony that counsel was aware the expert would provide and that counsel strategically addressed on cross-examination?

b. Declining to object on hearsay grounds to testimony from family members describing circumstances and events around the time of the assaults supporting the inference that the assaults were happening?

c. Declining to object based on the rape shield statute to the admission of evidence of the victim's virginity and her intimacy issues as an adult?

d. Not objecting when the prosecutor referenced voir dire during closing argument?

e. Agreeing to the court's responses to requests by the jury to obtain a written exhibit and to access a recorded exhibit?

2. If counsel was deficient in any of the above ways, were those deficiencies prejudicial?

After a *Machner* hearing, the postconviction court concluded that counsel was not deficient in any of the above respects, other than failing to object to two minor instances of inadmissible testimony, and that those deficiencies did not prejudice Mader given the victim's compelling testimony and the otherwise "lopsided" evidence of Mader's guilt.

This Court should affirm the postconviction court's rulings on both deficient performance and prejudice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted. The issues presented can be resolved by applying well-established law to the facts, which the parties' briefs adequately set forth.

STATEMENT OF THE CASE

V alleged that in 2009 to 2013, when she was between 13 and 17 years old, her then-stepfather, Mader, had routinely and repeatedly sexually assaulted her. (R. 1:1–4.) After a three-day trial, a jury convicted Mader of repeated sexual assault of a child. (R. 103.)

V disclosed the abuse to police in 2018, when she was 21 years old, after her mother shared with V concerns about V's young half-sister A (Mader's daughter). (R. 116:114; 119:87.) V's mother told V that A had been touching herself excessively, there was no medical explanation for A's behavior, and A had an interview with a sexual assault crisis center at a doctor's recommendation. (R. 116:114–17.) V broke down crying after hearing this information. (R. 116:117–18; 119:86.) Without providing details to her mother, V went to the interview that was planned for A, and soon after, she met with a police detective. (R. 116:119–21, 163–64; 119:87, 137–41.) V told the detective that Mader had groomed her beginning when she was 11 with massages that progressively grew sexual, leading to him regularly sexually assaulting her when she was between 13 and 17. (R. 72:4–15.)

There were numerous witnesses at trial. The State focuses on V's allegations, which included, but were not limited to, the following:

- In December 2009, V's sister, M, was born, and her mother was in the hospital. (R. 119:44–45.) V said that Mader stayed home with her and her brother and that she and Mader had intercourse in the master bedroom.

(R. 119:44–46.) V's mother confirmed that Mader did not stay over at the hospital when M was born. (R. 116:129.)

- V hosted a sleepover for her eighth grade homecoming. (R. 119:47.) She recalled that Mader took her to the basement for sex after her friends had fallen asleep. (R. 119:48.) V recalled that that sex was painful. (R. 119:49–50.)
- On V's fourteenth birthday in November 2010, Mader gave her a "special birthday present," which involved kissing, touching, oral sex, and intercourse. (R. 119:51–52.)
- In December 2010, V's mother was hospitalized and delivered a stillborn child. (R. 119:53.) V recalled that Mader did not go to the hospital and instead had sex at home with V. (R. 119:53.) V's mother confirmed that Mader did not join or visit her in the hospital. (R. 116:128.)
- In January 2012, when her mother was hospitalized after giving birth to A, V slept in the master bedroom with Mader, and Mader had sex with V that night. (R. 119:66–67.)
- Mader often waited for V's mother to be out to initiate sex with V, particularly on Saturday mornings when V's mother worked a postal route. (R. 119:52.) V recalled that on Christmas 2010, Mader came into V's room after her mother left for an early morning shift. (R. 119:53.) V stated that her mother came home early, and that Mader had to run out of her room and jump into his bed. (R. 119:53–58.) V's mother also recalled this occasion. V's mother thought she saw Mader's shadow inside V's room while she approached the house in her car. (R. 116:125.) V's mother parked and hurried inside and

found Mader seemingly asleep in his bed. (R. 116:125–26.)

- In 2011, Mader surprised V with a hollow dildo that he had attached to a pair of his red bikini underwear and wore as a strap-on. (R. 119:60–62.) V said that Mader roughly penetrated her with it; the sex was painful and she bled from it. (R. 119:62–63.)
- V said that Mader placed the dildo and underwear between her mattress and box spring, where V's mother found it. (R. 119:63.) Mader convinced V to tell her mother that she got the dildo from a friend's house. (R. 119:63–64.) V's mother confirmed finding the dildo attached to Mader's underwear in February 2011, and stated that she first approached Mader, who offered to talk to V about it, even though he normally did not offer to take on parenting discussions with her children. (R. 116:131–36.) V's mother confirmed that V told her that the dildo belonged to a friend's mom and that she and her friend thought it was funny to attach it to Mader's underwear. (R. 116:137–38.)
- V also described an incident where Mader came into her room when her mother was in the shower, but her mother came out of the bathroom and caught Mader at the base of V's bed with his hands under the covers. (R. 119:76–77.) Mader told V's mother that he was trying to wake V up for school. (R. 119:77.) V's mother also recalled that event and Mader's explanation. (R. 116:130.)
- V described other instances, including times when she and Mader cuddled under a blanket while watching TV and he touched her vulva and clitoris. (R. 119:43.) V recalled that once she and Mader were in a cornfield, and that he bent her over and quickly penetrated her from behind. (R. 119:46.) V recalled looking down at her

feet during the assault and seeing the flip flops she was wearing. (R. 119:46.)

- Once, when V was showering with the door locked, Mader disassembled the doorknob to get in. (R. 119:71.) Mader once placed V on a sink in a bathroom for sex; V recalled feeling the faucet on her back during the act. (R. 119:71.) Another time, Mader placed her on top of a basement chest freezer for intercourse. (R. 119:78.)

The State also introduced numerous corroborative and circumstantial facts supporting the inference that the assaults had occurred, including the following:

- When V was in seventh or eighth grade, she told two friends, LR and KS, about her sexual acts with Mader. (R. 116:57, 75.) V seemed to be "bragging" about the acts, which made LR and KS uncomfortable. (R. 116:57, 61, 77.) V confirmed that she told LR and KS about the assaults. (R. 119:79–80.)

- At the time, LR told her mother about what V had said; LR and her mother then called V, who told them that it was all a lie. (R. 116:61.) LR said that back then, she believed V's recantation because she wanted the controversy "to be over." (R. 116:67.) As of trial, LR was not so convinced, and said that she had heard fear in V's voice when she recanted. (R. 116:67, 71.)

- BB, V's current boyfriend, started dating V in 2015. (R. 119:29.) Around October of that year, V told BB that Mader had sexually abused her from when she was 13 to when she moved out of her mother's house, that it had started with massages and progressed to sexual intercourse, and that Mader would assault her when her mother wasn't home. (R. 119:29–30.)

- V said that Mader had a circular red birthmark on the head of his penis that was only visible from close up and when he was erect. (R. 119:100–01.) Police photographed Mader's penis, and from close up, they could see the birthmark when Mader pulled his penis straight. (R. 119:161–62.)

Mader testified and denied the allegations. He asserted that V was a storyteller who craved attention, and she was resurrecting a lie she had told in middle school at her mother's (his ex-wife's) urging, that V's mother wanted to get full custody of M and A, and that V wanted to win favor with her mother. (R. 120:79–81.) Mader presented witnesses to dispute some of the details from V's testimony, including where the family celebrated Christmas, the height of the freezer, and whether the bathroom doorknob could be removed as V had described. (R. 120:16, 18, 43–45, 50.) Mader and the State also called several witnesses who gave opinions of V's and V's mother's character for truthfulness. (R. 120:11, 30, 55, 86, 90, 93.) The State also played a nearly hour-long audio police interview in which Mader denied the allegations, but in which Mader made some statements that the State argued were inconsistent. (R. 119:143, 148–51.)

After Mader's conviction and sentencing, Mader raised numerous claims of ineffective assistance of trial counsel, all of which the postconviction court denied after a hearing. (R. 188.) The postconviction court determined that counsel was deficient in only two respects: failing to object when V said that she was a virgin when Mader started sexually assaulting her, and hearsay from V's mother about strange noises that V's brother said he heard in the house when the assaults were occurring. (R. 188:8–9.) It concluded that those and any other arguable errors were not prejudicial, in light of the "lopsided" and compelling evidence against Mader. (R. 188:6, 9, 14–15.)

Because Mader's claims each rely on different sets of facts, the State addresses relevant facts in the argument section below to avoid repetition.

STANDARD OF REVIEW

Whether counsel rendered ineffective assistance is "a mixed question of law and fact." *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. "This Court will uphold the [postconviction] court's findings of fact unless they are clearly erroneous." *Id*. Whether the defendant satisfies *Strickland*'s deficiency or prejudice prongs is a question of law that this Court reviews de novo. *State v. Domke*, 2011 WI 95, ¶ 33, 337 Wis. 2d 268, 805 N.W.2d 364.

ARGUMENT

I. The postconviction court correctly concluded that counsel was not deficient in most of the ways Mader alleged.

As frequently occurs in challenges to a sexual abuse conviction turning on credibility, Mader calls this case close and attempts to cast doubt on the jury's verdict by raising numerous claims of ineffective assistance of counsel. As discussed below, he is not entitled to relief.

In Part I, the State addresses the deficient-performance analysis for each claim. It addresses prejudice in Part II.

A. Mader bears the heavy burden of proving both deficient performance and prejudice to overcome the strong presumption that counsel performed effectively.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the Court concludes that the defendant has

not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). The court "strongly presume[s]" that counsel has "rendered adequate assistance." *Strickland*, 466 U.S. at 690.

B. Counsel adequately responded to the State's experts.

Mader's first claim concerns testimony from two State witnesses: Susan Lockwood, a sexual assault expert, and Detective Gary Steier, who interviewed V and investigated her allegations. Mader argues that counsel should have: (1) objected to certain statements from Steier and Lockwood about the rare prevalence of false reports of child sexual assault; and (2) hired an expert to counter that testimony. (Mader's Br. 24–35.) For the reasons below, Mader cannot show that counsel was deficient.

1. Lockwood and Steier testified to general concepts in sexual assault, including the low prevalence of false and immediate reporting.

Lockwood had been a therapist with the Sexual Assault Center in Green Bay for 31 years, during which time she worked with over 500 sexual assault victims as an advocate or therapist. (R. 116:21, 23.) Lockwood testified that false reports of sexual assault are "very uncommon." (R. 116:26.) She cited research estimating that only three to eight percent

of claims of sexual assault are false. (R. 116:26–27.) She also said that out of the approximately 500 clients she worked with, only four falsely reported. (R. 116:24–25.) Lockwood stated that one instance involved a young girl who admitted that she lied, one involved a mentally ill patient whose allegations were patently incredible, and two others in which Lockwood sensed "that something didn't feel right or seem right" about their allegations. (R. 116:25–26.) Lockwood later explained that one of the latter two patients was "clearly faking her emotional reactions," and that the other could not provide details and showed no emotion despite claiming that the assaults had just occurred. (R. 116:46.)

Lockwood also testified to other concepts, including grooming, delayed reporting, trauma from sexual assault, and the range of reactions that can occur when that trauma is triggered. (R. 116:29–31, 31–36, 38–39.)

Steier generally testified to historical facts in the investigation, i.e., that V's allegations came to his attention after she talked to the forensic interviewer; that V provided general allegations at first and then provided more detailed descriptions; and that he talked to other witnesses, including V's sisters, her brother, LR and KS, and V's current boyfriend, BB. (R. 119:137, 141–42, 158.) Steier also testified generally to his experience investigating sexual assaults. For example, Steier stated that often victims of repeated sexual assault cannot describe particular assaults because they all blur, they often repress memories, and they don't report immediately. (R. 119:155–56, 163.) When asked, Steier said that only one out of the 150 or so cases he'd investigated involved a false report of sexual assault. (R. 119:163.)

Mader argues that counsel failed to investigate, prepare, and address Lockwood's and Steier's testimony. With regard to both witnesses, Mader thinks counsel should have filed a *Daubert* motion pretrial and objected to parts of their testimony in which they noted the rarity in which they each

encountered false accusations in practice. (Mader's Br. 24–29.) He argues that counsel should have filed a pretrial motion under *Daubert* to exclude that testimony or objected to it at trial. (Mader's Br. 28–29.) He also argues that counsel should have investigated and hired Dr. David Thompson as a defense expert to counter Lockwood's and Steier's testimony regarding how and when victims allege sexual assault and how rarely false reports occur. (Mader's Br. 29–35.)

2. The law regarding the admissibility of statistical or factual testimony is unsettled, thus counsel cannot be ineffective for failing to object.

Counsel did not move to exclude or otherwise object to this testimony, so this claim is limited to review "in the context of ineffective assistance of counsel." *State v. Counihan*, 2020 WI 2, ¶ 28, 390 Wis. 2d 172, 938 N.W.2d 530.

To the extent that Mader asserts that Steier's and Lockwood's statistical testimony impermissibly vouched for the truth of V's testimony, he is wrong. Mader concedes that there is no controlling precedent in Wisconsin holding that statistical evidence of false reports constitutes impermissible vouching.[1] (Mader's Br. 26.) Counsel is not deficient for failing to argue a point of unsettled law. *State v. Morales-Pedrosa*, 2016 WI App 38, ¶ 26, 369 Wis. 2d 75, 879 N.W.2d 772.

[1] Given the limits to the ineffective-assistance framework, this Court should reject Mader's undeveloped argument—based on string citations to cases from other jurisdictions—to develop a blanket rule that statistical testimony is either improper vouching or irrelevant. (Mader's Br. 26–28.) *See State v. Morales-Pedrosa*, 2016 WI App 38, ¶¶ 25–26, 369 Wis. 2d 75, 879 N.W.2d 772 (declining, within the confines of an ineffective-assistance claim, to directly rule on "what type of statistical testimony might effectively constitute improper vouching").

Nor can Mader succeed on a claim that counsel should have objected to the testimony as irrelevant and unfairly prejudicial. Again, there was no deficient performance because there is no controlling precedent in Wisconsin holding that statistical or experience-based testimony regarding the prevalence of false reports or victim behaviors in sexual assault allegations is irrelevant. Indeed, given that Mader's defense was that V fabricated the allegations by resurrecting a lie she told in middle school, testimony reflecting the general or statistical rarity of false sexual assault claims is relevant and not unduly prejudicial. And Mader has not identified (nor has the State found) any cases holding in Mader's favor on their facts.

The closest applicable case the State can identify is *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988). But that case supports the State's position. At issue in *Jensen* was expert testimony opining that the complaining witness's behavior was consistent with behavior commonly seen in victims of child sexual assault. *Id.* at 245. That evidence was soundly admitted because: (1) it was admitted to explain the context in which the complaining witness told the expert about the sexual assault; (2) it was relevant to rebut the defense theory that the complaining witness fabricated the allegations; and (3) it identified behaviors that may have been outside jurors' common knowledge and thus helped it "avoid making decisions based on misconceptions of victim behavior." *Id.* at 250–53. The court also held that such evidence is generally admissible if it would assist the trier to understand the evidence or determine a fact in issue, and so long as the expert does not "convey to the jury [their] own beliefs as to the veracity of the complainant with respect to the assault." *Id.* at 256–57.

So too, here, Lockwood's and Steier's testimony that false reports of sexual assault are uncommon was relevant to rebut Mader's theory that V was fabricating the assaults and assisted the jury with understanding behaviors that may have been outside its common knowledge. And, in accordance with the holding in *Jensen*, neither Lockwood nor Steier opined whether they thought V's allegations were truthful.

3. Counsel was not deficient for not hiring an expert such as Dr. Thompson to counter Lockwood's and Steier's testimony.

When asked at the *Machner* hearing about Lockwood's testimony, counsel stated that he had heard Lockwood testify in three previous trials, where she always qualified as an expert. (R. 156:26–27, 85.) Accordingly, counsel anticipated her testimony that research estimated a three-to-eight-percent rate of false accusations of sexual assault and the low occurrence of false reports in her actual experience. (R. 156:25–27, 87.) Counsel knew that he could cross-examine Lockwood on those points to bring out the inconsistencies between her experience and the research, to emphasize that false reports do happen, and to emphasize that Lockwood had no personal knowledge of what happened in this case. (R. 156:25–26, 87–88.) Indeed, counsel asked her about the false reports she was aware of, focusing the jury on the fact that false reports happen. (R. 116:45–46.)

The postconviction court noted counsel's testimony describing his past experience with Lockwood and his decision to handle her testimony through cross-examination, and it determined that that decision was strategic and therefore not deficient. (R. 188:5.) This Court is "'highly deferential' to counsel's strategic decisions" such that "where a lower court determines that counsel had a reasonable trial strategy, the strategy 'is virtually unassailable in an ineffective assistance of counsel analysis.'" *State v. Breitzman*, 2017 WI 100, ¶ 65,

378 Wis. 2d 431, 904 N.W.2d 93 (citations omitted). Under the circumstances, counsel's decision to cross-examine Lockwood rather than subject the jury to a battle of experts was reasonable. Accordingly, Mader cannot show that counsel's tactic to cross-examine Lockwood rather than attempt to present a defense expert was unreasonable or deficient.

Mader also fails to identify how Dr. Thompson's testimony would have effectively countered testimony that false reports are, as Lockwood put it, "very uncommon."[2] (R. 116:26–27.) Dr. Thompson testified at the postconviction hearing that he disagreed with Lockwood's use of the adjective "very," but that he agreed that false reporting is "relatively" uncommon. (R. 156:167.) Thompson also said that false reporting, to the extent that it could be measured, occurs at a four-to-five percent rate, which is within and on the lower end of the three-to-eight percent rate that Lockwood cited. (R. 156:168.) Thompson also noted that Lockwood's claim that four out of 500 of her clients falsely reporting was not "scientifically supported," though he acknowledged that Lockwood provided reasons and "reported her own experience" why she disbelieved those clients. (R. 156:132–33, 164, 166.) If anything, Thompson's testimony would have bolstered Lockwood's testimony, not rebutted it.

Mader insists that counsel's explanation of his strategy is not worthy of deference based on non-binding case law, *Dunn v. Jess*, 981 F.3d 582 (7th Cir. 2020), in which the Seventh Circuit Court of Appeals rejected as unreasonable counsel's strategy to cross-examine the State's expert rather

[2] The postconviction court noted that courts have excluded testimony from Dr. Thompson on relevance grounds. (R. 188:5 (citing *State v. Schmidt*, 2016 WI App 45, 370 Wis. 2d 139, 884 N.W.2d 510).) For purposes of this argument, the State assumes that Dr. Thompson's testimony, to the extent that it rebutted Lockwood's or Steier's testimony about false reporting, was admissible.

than present a competing expert. (Mader's Br. 34.) Since *Dunn* is not controlling authority, this Court need not address it. Even so, *Dunn* is easily distinguishable. There, the issue at trial was whether Dunn caused the victim's death, where Dunn had hit the victim, the victim appeared unharmed immediately afterward, and the victim was found dead hours later. *Dunn*, 981 F.3d at 585. Counsel eschewed presenting a pathologist who would have opined that the victim died immediately from whatever caused his death. *Id.* at 588. Instead, counsel tried but failed to elicit that evidence from the government's medical expert. *Id.* at 592. Because counsel gleaned "crucial information" from a defense expert but failed to present it (and failed to confirm that the State's expert would provide it), counsel was deficient. *Id.* By contrast, Thompson would not have offered any unpresented "crucial information," counsel adequately cross-examined Steier and Lockwood, and Thompson's testimony would have bolstered, not contradicted, the testimony regarding the infrequency of false reports.[3]

In sum, counsel was not deficient for not investigating or hiring Thompson as a defense expert. Nor, as discussed in Part II below, was counsel's choice in handling the testimony from Steier and Lockwood prejudicial.

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[3] Mader also recites other parts of Thompson's testimony and suggests that those parts could have undercut other aspects of Lockwood's and Steier's testimony. (Mader's Br. 31–33.) Mader did not advance an argument based on that testimony to the postconviction court. Even if he had, he has not developed it before this Court. Accordingly, this Court should disregard it. *See State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court."); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

C. Counsel was not deficient for not objecting to V's mother's testimony about her and Mader's diminished sex life.

Mader next claims that counsel should have objected to testimony by Mader's ex-wife (V's mother) about Mader losing interest in her sexually during the time of the assaults, and an anecdote in which V's mother said that her son had mentioned hearing suspicious noises in the house. (Mader's Br. 35–38.) As an initial matter, below, the State effectively conceded that the latter statement was objectionable hearsay, and the postconviction court determined that counsel was deficient for failing to object to it. (R. 176:17; 188:8.) The court, however, determined that that error was not prejudicial; that determination was correct, as will be discussed in Part II.

As for V's mother's testimony about Mader's decreased interest in sex with her during the charging period, the postconviction court concluded that counsel was not deficient for failing to object because that testimony was admissible under Wis. Stat. §§ 904.01 and 904.03:

> The victim's mother testified that she and the defendant had a diminished sex life during the time of the assaults. . . . [T]he diminished sex life testimony was but one of the many "red flags" or incidents of concern that the State questioned her about as she looked back at the time when the victim was being sexually assaulted by the defendant. [(R. 116:123–41.)] The victim's mother testified to the diminished sex life in addition to testimony about her finding the homemade strap-on with the defendant's underwear. (*Id.*) In this context, the testimony of the victim's mother related to observations she made during the dates of violation which showed to her, upon reflection, that the defendant was providing extraordinary attention to the victim. The Court agrees that this evidence does have a tendency to make the existence of material facts, the defendant's sexual intercourse with the victim, more probable than it would be without the evidence. See Wis. Stat. § 904.01. The Court also agrees that this is not the

> type of evidence which would inflame or improperly influence the jury, particularly in light of the graphic testimony from the victim. See Wis. Stat. § 904.03.

(R. 188:8.) In effect, the postconviction court concluded that counsel was not deficient because it would have overruled an objection by counsel to V's mother's testimony about her and Mader's diminished sex life.

That decision was sound. And, since admissibility of evidence under Wis. Stat. §§ 904.01 and 904.03 is within a circuit court's discretion, Mader cannot show that the court was clearly wrong in its determination that it would have overruled an objection. As the postconviction court noted, V's mother's statement about Mader's diminished interest came during testimony where V's mother recalled concerns that arose when the assaults were occurring. (R. 116:123.) She described Christmas 2010 when she returned home early from work and thought she saw Mader in V's bedroom. (R. 116:125–27.) She described in 2012 leaving the bathroom and finding Mader in V's room on V's bed with his hands under her covers. (R. 116:129–31.) She also noted finding the dildo attached to Mader's red underwear in V's bed in 2011. (R. 116:131–36.) She noted that Mader offered to handle talking to V about that issue, which was an unusual parenting role for him to take on. (R. 116:135–37.) Finally, V's mother said that in March 2011, she and Mader planned a romantic trip to Door County but that Mader rejected her efforts to be intimate there. (R. 116:140–41.)

In light of the other testimony V's mother provided, her statements about Mader's lack of sexual interest in March 2011 provided relevant context for her other testimony about memories that took on new meaning since V disclosed the assaults. Moreover, V's mother's testimony about Mader's decreased interest was markedly less prejudicial to him than the other incidents in which V's mother nearly caught Mader

in the act or discovered his underwear with a dildo attached to it in V's bed.

Mader also suggests that counsel should have introduced evidence that the couple's second child was born around nine months after the Door County trip, and that the couple's marriage had declined because V's mother had an affair with a coworker. (Mader's Br. 36–37.) Again, however, V's mother's testimony about Mader's allegedly diminished interest was the least harmful part of her testimony. And Mader—whom counsel opined testified well at trial, (R. 156:91)—disputed V's mother's statement. (R. 120:74.) *Strickland* did not require counsel to introduce additional evidence or launch a more significant attack on that testimony.

D. Counsel was not deficient for not objecting on rape shield grounds to testimony about birth control and the impact of the assaults on V's current intimate relationship.

Mader claims that counsel ineffectively failed to object to the following as inadmissible rape shield evidence: (1) that V was a virgin when the assaults began; (2) that V began using birth control when the assaults were ongoing; and (3) that V, as an adult, struggled with sexual intimacy due to the assaults. (Mader's Br. 38–41.) He further assigns error to: (1) the circuit court for excluding evidence that V worked as a salesperson and educator for a sex toy company; or, alternatively, (2) counsel for not advancing a better argument for its admission. (Mader's Br. 41–45.)

As it did before the postconviction court (R. 176:11), the State concedes that V's statement that she "lost [her] virginity to" Mader (R. 119:79) was inadmissible under Wis. Stat. § 972.11, and that counsel was deficient for not objecting to it. *State v. Mitchell*, 144 Wis. 2d 596, 620, 424 N.W.2d 698 (1988); *see also State v. Mulhern*, 2022 WI 42, ¶ 42, 402

Wis. 2d 64, 975 N.W.2d 209. However, counsel was not deficient for not objecting to the other evidence, because it did not violate the rape shield statute.

1. Evidence of V's birth control use was conduct incident to the alleged assaults and therefore not "prior sexual conduct."

As the postconviction court concluded, evidence that V used birth control when the assaults were occurring was not "prior sexual conduct" under the definition of Wis. Stat. § 972.11; rather, it was part of *the* sexual conduct that V asserted had occurred. The evidence about birth control came in through the following exchange between the State and V:

> Q: Did you ever get pregnant from Conrad?
>
> A: No.
>
> Q: Why is that?
>
> A: What do you mean?
>
> Q: I guess if you know, was there anything that was being used by either you or him that would prevent pregnancy?
>
> A: I was on birth control. I was on the shot, and it worked extremely effective. He made sure I had my shot on time always.
>
> Q: Who made sure?
>
> A: Conrad made sure that I had my birth control. "Did you go get your shot? Did you go get your shot?" And he made sure that I was always on birth control.
>
> Q: Did he ever use condoms?
>
> A: Yes.
>
> Q: As you sit here today, are you able to look back and say this episode he used condoms, this episode I was on birth control and he didn't?
>
> A: No, I cannot remember that.

(R. 119:84–85.) V's mother confirmed that she helped V get on birth control as a teen, after V requested it to help ameliorate her "long, painful periods." (R. 116:144–45.)

Even though a victim's pre-assault "use of birth control" can be inadmissible sexual conduct under Wis. Stat. § 972.11, V's and her mother's comments about V's use of birth control here was not "prior" sexual conduct. Rather, it is conduct that was "incident to the alleged" sexual assaults. *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (second emphasis added) (explaining that the rape shield statute bars "evidence of *all* sexual activity by the complainant *not incident to the alleged rape*"). Here, the birth control evidence was part of Mader's ongoing course of conduct. V asserted that Mader ensured that she was current on her birth control and that he otherwise used condoms. That was circumstantial evidence "incident to" the assaults because it supported the inference that Mader took steps to avoid having his assaults discovered through an accidental pregnancy. Accordingly, the evidence that V was on birth control at the time was not impermissible character evidence barred under the rape shield.

Moreover, as the postconviction court determined, that evidence was relevant under Wis. Stat. § 904.01. (R. 188:9.) Again, it was introduced to support the inference that the assaults occurred because Mader was aware of her birth control and made sure she was current with it when he assaulted her.

2. Mader fails to prove that evidence about V's current issues with intimacy was objectionable sexual conduct.

BB, who started dating V after she had moved out of her mother's home, testified that V had told him a few months into their relationship that "she was sexually abused by her stepdad and that it started from ages thirteen all the way to

when she turned eighteen and . . . that it started with massages and progressed over time over the years to sexual intercourse." (R. 119:29.) BB also explained when asked that he and V have had intimacy issues where V does not "like to be touched at all, like kissed or anything, and . . . it seems like the whole process is uncomfortable for her and that she's just doing it for me." (R. 119:32.)

V testified that she told BB about the assaults shortly after they started dating because she "was having issues within [her]self with having a relationship with" BB and that BB "needed to know" that her issues with intimacy were not his fault. (R. 119:85.) V began describing specific intimate acts that she struggled with, saying she "can't have a real relationship." (R. 119:86.) Counsel objected to those last remarks on relevancy grounds, and the State agreed to shift topics. (R. 119:86.)

Accordingly, the only testimony at issue was BB's statement that V disliked being touched or kissed and was uncomfortable in intimate situations. (R. 119:32.) Though this evidence presents a closer call than the birth control evidence,[4] BB's general statement about V's obvious discomfort with touching, kissing, and "the whole process" is more like a statement expressing general desire (or a lack thereof) than the actual conduct the statute bars. *See State v.*

[4] The postconviction court held that the evidence was not "prior sexual conduct." (R. 188:10.) If the court concluded as much because V's intimacy issues occurred *after* the alleged assaults, that reasoning is incorrect. *See State v. Gulrud*, 140 Wis. 2d 721, 729, 412 N.W.2d 139 (Ct. App. 1987) (holding that the definition of "prior" sexual conduct includes all of the witness's sexual conduct "prior to the conclusion of the sexual assault trial"). Nevertheless, this Court may affirm based on *Vonesh*. *See Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (this court "may affirm on grounds different than those relied on by the [circuit] court").

Vonesh, 135 Wis. 2d 477, 487–88, 401 N.W.2d 170 (Ct. App. 1986) (evidence of victim's expression of sexual desire is not sexual conduct under the rape shield statute).

Mader, for his part, focuses on law holding that evidence of V's virginity is inadmissible rape shield evidence, but he does not flesh out any arguments with regard to the testimony about birth control or BB's testimony about intimacy. (Mader's Br. 39–41.) He incorrectly claims that V's remark about how she "can't have a real relationship," came in "without objection." (Mader's Br. 39–40.) Yet counsel objected to that testimony as irrelevant, and the court agreed when the State offered to shift from that topic. (R. 119:86.)

Accordingly, Mader offers no basis on appeal for this Court to reverse the postconviction court's holding that V's use of birth control during the assaults and V's later intimacy issues were not objectionable under Wis. Stat. § 972.11. *See Gulrud*, 140 Wis. 2d at 730 (this court will not develop unsupported arguments for defendant).

Finally, even assuming counsel was deficient for not objecting to the evidence of birth control, V's current intimacy issues, and that she was a virgin at the time of the assaults, Mader cannot show prejudice, as discussed in Part II.

E. Counsel was not deficient in how he argued for admission of evidence of V's current employment.

Mader argues that either the trial court erroneously exercised its discretion by excluding—or that counsel inadequately argued for the admission of—evidence that V's employment involved hosting parties for a company that sells sex toys, lubricants, and other sensual items. (Mader's Br. 41–45.) Mader writes that that evidence was relevant to explain why V vividly described the dildo that Mader had fashioned into a strap on and to rebut the State's portrayal of V as "sexually inhibited and fearful" as an adult. (Mader's Br. 41–

42.) Mader faults counsel for not investigating V's social media and using evidence from her business web site describing her as informative, fun, and comfortable. (Mader's Br. 43–45.) Mader thinks that trial counsel would have convinced the court to allow Mader to question V about her current employment had he presented that information. (Mader's Br. 43–45.)

1. Mader has not adequately briefed or preserved these issues.

As an initial matter, Mader's direct challenge to the trial court's decision is undeveloped on appeal. He notes that whether to admit evidence is within the court's discretion, but incongruously declares the court's decision as "error." (Mader's Br. 42.) He does that all without addressing the trial court's reasoning supporting its exercise of discretion, which should arguably preclude review. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (this court may decline to address issues inadequately briefed).

Further, Mader did not clearly preserve a claim that counsel was deficient for inadequately arguing for the admission of V's employment as a sex educator. *See State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. In his initial postconviction brief, Mader brought up V's employment as part of his argument that counsel's handling of the rape shield issues was prejudicial. (R. 139:64–67.) He argued, without referencing either trial counsel's arguments or the court's reasoning, that V's employment would have been relevant to counter evidence that she was traumatized and fearful due to Mader's repeated assaults. (R. 139:65–66.) He wrote that counsel failed "to thoroughly advocate for the excluded evidence that could have contradicted the false portrayal of [V] as a shattered victim of child sexual assault who was so traumatized that she could not enjoy healthy adult sexual relations." (R. 139:67.) But Mader never

developed a clear ineffective assistance argument on this ground. Indeed, in his post-*Machner* hearing brief, Mader did not argue about the employment evidence, but merely included a footnote referring back to his pre-hearing brief. (R. 170:25–26, 26 n.26.)

To that end, neither the State nor the postconviction court understood Mader to be challenging counsel's performance with how he argued for admission of evidence of V's current employment. The State did not address it in its brief in opposition, (R. 176), nor did the postconviction court do so in its decision and order, (R. 188).

2. Evidence of V's employment was not relevant.

In all events, the trial court soundly exercised its discretion in declining to admit evidence of V's employment. Pretrial, counsel argued that he should be allowed to question V about that employment, which in his view could provide an alternate explanation why she knew what a dildo was and what it looked like, and could go to her credibility. (R. 118:8–9.) The court rejected counsel's request, stating that it did not "see its relevance given that there doesn't seem to be a dispute that the [dildo] was in the home at the time." (R. 118:11.)

At trial, counsel asked the court to revisit the issue, stating that since V testified that the dildo looked scary and that Mader used it roughly and caused her pain, those facts opened the door to evidence of her employment selling sex toys. (R. 119:88–89.) That was so, counsel argued, because her chosen employment was incongruent with the trauma she claimed to have experienced from Mader's using the dildo on her. (R. 119:89.)

The court declined counsel's request. It stated that the testimony presented was that people react to trauma in numerous ways, from avoiding things that remind them of the event to being drawn to those things. (R. 119:91–92.) The

court did not believe evidence of V's employment had relevance or probative value. (R. 119:92 ("That information doesn't really provide anything of substance for the jury to consider given the different ways that people react to traumatic events.").) It further determined that the low probative value of V's employment was substantially outweighed by the risk of confusion and prejudice. (R. 119:92.) The bottom line for the court was relevance: "[t]he only reason [V's current employment] could have been relevant is if [V] had to get the information [about the dildo] from some other source, but there's no doubt that this object existed. Three people have confirmed having seen it, so there's just no legitimate reason for that information to go before the jury." (R. 119:92.)

That was a sound exercise of discretion. V's knowledge of sex toys was not probative to the evidence of the dildo, which everyone agreed existed, was attached to Mader's red underwear, and was found by V's mother. It added little value to the question of whether V was credible based on her trauma response, given that such responses run a wide spectrum, including cases where the victim seeks out items that traumatized her.

Nor was counsel deficient in how he argued for admission. Trial counsel advanced the same points appellate counsel now proposes. Even if trial counsel had highlighted information from V's web site and argued that that information was relevant to contradict the perception that V was sexually inhibited and traumatized by the assaults, the court's answer would have been the same. In short, the evidence would only be arguably relevant if the existence of the dildo was in question; it wasn't. Mader cannot demonstrate an erroneous exercise of discretion by the court or deficient performance by counsel.

F. The prosecutor did not argue facts outside of evidence; thus counsel was not deficient in not objecting.

At one point in closing, the prosecutor argued that sexual assault happens more than one would want to believe. (R. 120:116.) The prosecutor referenced voir dire, and said, "Remember how many people put their hands up? Holy cow. It's a lot more popular than we would like to know. It's a lot more prevalent." (R. 120:116–17.) The prosecutor went on noting that one of those people "had never reported [the assault] to the police. You saw in your own small demographic area the amount of sexual assaults that happened just by being called into jury duty." (R. 120:117.)

Mader faults counsel for not objecting to the prosecutor's statements about voir dire because they involve facts not in evidence. (Mader's Br. 45–47.) But the prosecutor was not arguing facts not in evidence. He was referencing a matter within the jury panel's common knowledge and experience, which the jury is instructed to use in weighing credibility and the weight of evidence. *See* Wis. JI—Criminal 170 (2000), 195 (2000), 300 (2022).

Indeed, at voir dire, the court asked prospective jurors whether they, a family member, or a close friend had been a victim of sexual assault. (R. 114:12.) Five potential jurors raised their hands and provided brief explanations of those experiences. (R. 114:12–18.) Everyone who served on the jury would have seen and heard those responses.

Mader disagrees, writing that "the reference to hands raised about sexual assaults and comments made by prospective jurors during voir dire involved primarily jurors who did not deliberate upon a verdict, so they were not part of the common life experience of the deliberating jurors." (Mader's Br. 46.) Mader misses the point. Every person at voir dire, regardless whether they served on the panel, observed

multiple people raising hands when asked whether they or a loved one had been a victim of sexual assault. The prosecutor referenced that common experience to urge the jurors to not begin deliberations with a biased, inaccurate notion that sexual assault "could never happen." (R. 120:117.)

The prosecutor's argument was not improper. Counsel was not deficient for failing to object to it. And in all events, as the postconviction court noted, there was no prejudice, given that the jury was instructed that closing arguments are not evidence, and Mader cannot overcome the presumption that the jury followed its instructions. (R. 188:12.)

G. Defense counsel reasonably agreed to the court's responses to the jury questions.

Mader's final challenge homes in on counsel's agreeing to the trial court's responses to jury questions. (Mader's Br. 47–51.) During deliberations, the jury requested: (1) V's statement, which was a 15-page handwritten statement that she prepared at Detective Steier's request recounting as much as she could remember about the assaults; and (2) the recording of Mader's police interview or a transcript of it. (R. 120:180.) The court, after consulting with the parties, sent V's statement with agreed-upon redactions to the jury. (R. 73; 120:182–83, 187, 190–92.) As for the police interview, the court, with the parties' agreement, responded that there was no transcript of the recording, and that it could listen to the recording in the courtroom if it wished. (R. 82; 120:180.) The jury never followed up with a request to return to the courtroom to listen to the recording.

A circuit court has discretion whether to send trial exhibits to the jury during deliberations. *Jensen*, 147 Wis. 2d at 259–60. That discretionary decision is guided by three criteria: (1) "whether the exhibit will aid the jury in proper consideration of the case"; (2) "whether a party will be unduly prejudiced by submission of the exhibit"; and (3) "whether the

exhibit could be subjected to improper use by the jury." *Id.* at 260.

1. Counsel's decision with regard to V's statement was based on a reasonable trial strategy.

As for V's statement, both the prosecutor and counsel agreed that a redacted version should go back to the jury. (R. 120:181–82.) The parties also agreed that the court should instruct the jury to not speculate on what information was redacted. (R. 120:182–83.) The parties then conferred on and agreed to what should be redacted. (R. 120:189–90.) The parties indicated that the redactions eliminated only about two and half of the 15 total pages. (R. 120:188.) When asked by the court, Mader said that he understood what was being redacted and that he had sufficient time to discuss the matter with counsel. (R. 120:189–90.)

The court also asked the parties and Mader about whether V's statement should be sent to the jury room or instead read aloud to the jury. (R. 120:187–90.) After reviewing case law and after counsel discussed the matter with Mader, Mader requested that the written statement be sent to the jury. (R. 120:190.)

At the *Machner* hearing, counsel stated that he did not oppose V's statement going back to the jury and that he thought the redactions were appropriate. (R. 156:79.) Counsel stated, "[P]art of our defense [was] that [V's] a storyteller, and she wrote out . . . a fifteen-page novel about all this stuff that could have been described in one or two pages. She wrote fifteen. That was my purpose of not objecting to it going back, that she's a storyteller." (R. 156:78.) Counsel agreed that he went through "line by line to agree to the redactions," the purpose of which was to take out "irrelevant information." (R. 156:101.) He agreed that anything that he wanted redacted was redacted from the statement. (R. 156:101.)

Based on that testimony, the postconviction court determined that counsel made a reasonable strategic decision in agreeing to have V's redacted statement sent to the jury. (R. 188:13.) That determination is "virtually unassailable" on appeal. *See Breitzman*, 378 Wis. 2d 431, ¶ 65. Under the circumstances, Mader's decision to send V's statement to the jury was reasonable, informed, and consistent with his defense theory.

Mader argues that the statement should never have been given to the jury because some of the redactions eliminated helpful information and because some of the non-redacted material was unduly prejudicial to Mader. (Mader's Br. 49–50.) For example, Mader complains that one redaction removes information that a fight V had with her mother over a phone led to her moving out, and left in a remark that V moved out to get away from Mader. (Mader's Br. 49–50 (discussing R. 73:13).) Yet, the redactions took out V's statements about her health, which was the actual basis of the fight V described between her and her mother. (R. 72:12.) Moreover, the jury was aware V moved out in part because of her mother. V made multiple statements that she and her mother did not get along and that her mother was emotionally hurtful to her. (R. 72:11–12.) V testified that she moved out due to both Mader's abuse and her mother's lack of support. (R. 119:83–84.) Even so, given the multitude of sexual assaults that V said she endured, the jury could easily infer that V moved out at least in part to escape Mader.

Mader also points to an unredacted paragraph in V's statement in which V commented that she was disclosing the abuse because of her sisters, that she wanted to protect them, that she wanted to believe that Mader has not harmed them as he did her, and that Mader had made her feel like she didn't matter. (Mader's Br. 50 (discussing R. 73:16).) Mader claims that that paragraph was inflammatory and unduly prejudicial because it suggested that Mader assaulted his

younger daughters, that he was the devil, and that V had to prosecute Mader to protect her sisters' welfare. (Mader's Br. 50.) Mader insists that "[n]one of this was testified to at trial and none of it should have gone to the jury." (Mader's Br. 50.)

To start, V's statement was admitted into evidence. (R. 119:177–78.) That it wasn't read into the record does not mean it could not go back to the jury. Even so, Mader is wrong that any of that paragraph was new or improperly disclosed information or that it is unduly prejudicial. The jury learned at trial that V's sisters each had forensic interviews and that neither disclosed assaultive or otherwise suspicious behavior. (R. 119:165.) V and BB both testified that V disclosed in January 2018 due to fears that her youngest sister was being sexually abused. (R. 119:28, 31, 87.) V testified at trial, consistent with her statement, that her sisters "mean absolutely everything to me." (R. 119:69, 83.) V and BB also testified that V did not disclose sooner because she did not want her sisters to grow up without their father. (R. 119:30, 69.) As for V's calling Mader "the devil" and saying he traumatized her, again, V testified at length about the trauma Mader inflicted. Given that, the jury would not have been moved by V's word choice in her statement.

All in all, Mader has not identified anything about the redactions or non-redacted material that counsel should have handled differently.

2. Counsel reasonably agreed with the court's response to the jury's request to "get" Mader's recorded statement.

A court has discretion whether to grant a jury's request to access a recorded exhibit, but if the court grants the request, the jury should be brought back into the courtroom for the replay. *Franklin v. State*, 74 Wis. 2d 717, 724–25, 247 N.W.2d 721 (1976). Here, the jury requested that it "get" a

transcript or recording of Mader's interview with Steier. (R. 81; 120:180.) The court answered that there was no transcript of the interview, and that the recording of the interview could not go to the jury room, but that the whole 55-minute recording or portions of it could be played again in open court. (R. 82; 120:180.) Both counsel agreed that that answer was appropriate. (R. 120:180.)

That answer was sound and consistent with the law. Counsel was not ineffective for agreeing to the court's response that the jury could listen to all or part of the interview in the courtroom. At the *Machner* hearing, counsel indicated that he did not understand the court's response as foreclosing the jury from listening to the interview; indeed, counsel had expected the jury to follow up with a request to listen to it in the courtroom. (R. 156:102.) That the jury never did so does not render the court's answer unclear or counsel's understanding incorrect. The jury just determined that it didn't need to listen to the interview.

Mader disagrees, suggesting that the court's answer should have explicitly informed the jury that it had to repeat its request. (Mader's Br. 48.) Yet that the ball was in the jury's court was clear from the court's answer. Indeed, the jury understood that it could continue communicating with the court, given that it sent a third question on a different topic after receiving the court's answer. (R. 120:184.) Nor was the trial court's informing the jury that it could listen to the recording again in the court room an improper exercise of discretion. *Cf. State v. Anderson*, 2006 WI 77, ¶ 110, 291 Wis. 2d 673, 717 N.W.2d 74 (holding that trial court "placed an unnecessary burden on the jury" by responding to its request to have testimony read back with instructions for the jury to itemize matters it did not understand or remember), *overruled on other grounds by State v. Alexander*, 2013 WI 70, ¶ 28, 349 Wis. 2d 327, 833 N.W.2d 126.

Mader also insists that counsel should have ensured that the jury heard the recording again, but he does not explain how counsel should have done that. (Mader's Br. 48.) Mader cites no law providing that a party can force a jury to reexamine a particular piece of evidence during deliberations. He instead invokes law stating that a jury has a right to have testimony read back to it, within the trial court's discretion to limit the reading. (Mader's Br. 47.) But this was a request for a particular exhibit, not testimony, that could not be sent to the jury room. Given that, the court appropriately responded by explaining how the recording could be played back and left it to jury to discuss and decide whether it wanted to take that step. Neither the court nor the parties were required to follow up again with the jury.

Mader argues that these two alleged errors aggravated each other, inasmuch as sending V's redacted statement to the jury overemphasized that statement in the State's favor, which would have been counteracted by its rehearing Mader's interview. (Mader's Br. 50–51.) Again, however, the jury retained the opportunity to listen to the recording; it simply opted not to. Further, Mader was given the option to have V's statement read to the jury, which can prevent the jury from overweighing material in exhibits it receives during deliberation. He chose to send the written version to them. That choice was consistent with his defense theory to emphasize to the jury that V was a storyteller and spinning an elaborate tale in her statement.

In sum, counsel was not deficient for his handling of the jury's requests for exhibits. Nor was he deficient in any of the other ways Mader alleges, other than two minor errors: the failure to object to rape shield evidence that V was a virgin before Mader assaulted her and the failure to object to hearsay by V's mother about sounds that V's brother heard. Those errors, even considered along with any other possible errors, were not prejudicial.

II. Mader failed to demonstrate that any errors were prejudicial.

Mader argues that the combined effect of counsel's deficiencies establish prejudice. (Mader's Br. 51–55.) *See Thiel*, 264 Wis. 2d 571, ¶ 59.

To show prejudice, the defendant must prove that the alleged defect in counsel's performance "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. That burden requires Mader to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Prejudice is a demanding standard. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. While it is lower than the more-likely-than-not standard, the difference between those standards "is slight and matters 'only in the rarest case.'" *Id.* (citation omitted).

Here, counsel's errors in not objecting to testimony that V lost her virginity to Mader when she was around 13 years old, and to hearsay that V's brother had commented about hearing strange noises in the house, did not undermine confidence in the jury's verdict. To start, virginity evidence is problematic if it is offered to suggest that the victim is more credible or the defendant more culpable. *See Mitchell*, 144 Wis. 2d at 620. Here, the State elicited that detail not for those purposes, but to explain V's response to Mader's grooming and increasingly sexualized behavior toward her. It was not a significant part of the State's case, consent was not an issue, and the jury was unlikely to be swayed either way to learn that V had not yet had sex when she was 13 years old. *See id.* (concluding that evidence that the 11-year-old victim was a virgin when the assault occurred was not likely

to cause the jury to give more credence to her testimony). So too with the other alleged rape-shield evidence, i.e., that V used birth control when the assaults occurred and that V had intimacy issues as an adult. Neither of those things were especially helpful to the State's case or harmful to Mader's defense.

Similarly, V's mother's testimony about V's brother's comment about hearing strange noises had little to no role in the State's case. V's mother talked about it briefly to explain that Mader was withdrawing from her sexually after the stillbirth of their child. She recounted an incident with extended family when her son mentioned hearing noises in the house, and another family member joked that it was probably the adults having sex in the morning. (R. 116:142.) For V's mother, that comment hit a sore spot at the time because she was never home in the mornings and she and Mader were not having sex. (R. 116:142–43.)

Mader insists that the State elicited that hearsay to support an inference that Mader and V were making the noises V's brother heard. (Mader's Br. 37–38.) Not so. The State appeared to be asking V's mother about the incident as additional evidence of Mader's and V's mother's stunted sex life. (R. 116:141.) In all events, that statement at best weakly supported the inference that V's brother heard noises and that they were Mader and V. V's brother specifically testified that he never saw or heard anything suggesting that Mader and V had a sexual relationship. (R. 119:19.) Moreover, the State did not follow up on that topic or refer to that testimony in closing.

Further, had counsel objected to both of these pieces of testimony, the outcome would have been the same because the evidence, as the postconviction court noted, was lopsided in the State's favor. (R. 188:6.) V testified in detail to numerous sexual assaults by Mader over the years, many tied to memorable dates, i.e., a birthday, homecoming, her

mother's hospitalizations. V's mother corroborated that on some of those dates, she saw Mader with V in her room. V accurately described a birthmark on Mader's penis that can only be seen from up close and when he was erect. V, her mother, and Mader all independently identified a dildo someone had attached to Mader's red underwear and that was found in V's bed in 2011; V confirmed that Mader had used it on her. V disclosed the assaults three times—to LR, KS, and BB—before she reported them to police in 2018. When V finally disclosed to police, it was after learning of concerns that her young sister was being assaulted.

The jury heard and watched V testify, as did the circuit court, which presided over both the trial and the postconviction hearing. The court found that V's "conduct, appearance, and demeanor on the witness stand was compelling." (R. 188:14.) She provided specific and "unexpected" details, including the sound of Mader's knees cracking when he massaged her, the flip flops on her feet in the cornfield, and the faucet hitting her back. (R. 188:14–15.) She "displayed an understandable and appropriate amount of emotion." (R. 188:14.) And she provided other details that were striking, including where Mader hid a paperclip that he used to unlock her bedroom door, and the appearance of the birthmark on his penis. (R. 188:15.)

The jury also heard and watched Mader testify. While Mader consistently denied the allegations, the strongest defense he could fashion—that V's mother compelled V to recycle a lie she told in middle school—lacked support. V's mother had no motive to have Mader, the father of her two young daughters, convicted of a felony and imprisoned. V's mother said that they split custody evenly, there were no support payments from either side, and they communicated as needed to facilitate shared bills and custody. (R. 116:149–51.) Both Mader and V's mother stated that in January 2018 they were "on decent terms" and each had moved on

romantically. (R. 116:149–52; 120:81.) Moreover, there was no evidence that V told her mother any details of the assaults or that they aligned their testimony before V talked to police or before trial. In middle school, V had no motive to lie that she was having sex with Mader. And there was no explanation why V resurrected that alleged lie in 2015 by repeating it to BB.

In addition to the points that the postconviction court made, other aspects of the State's case made it particularly compelling. For instance, V provided details that reflected the complicated and confusing feelings that arise when a parental figure abuses a young person's trust. She testified that she liked Mader's touching her at first; that Mader awakened sexual feelings in her; that she was bragging when she told her middle school friends; that she wore clothing that allowed him to easily touch her; that their encounters felt like a "fun" game; and that she sometimes guided his hands to touch her. (R. 119:41–44, 48, 58, 80, 103.) Of course, V was a child when Mader assaulted her; she could not consent to or be culpable for what Mader did. But that V acknowledged that she enjoyed what Mader did at first lent credibility to her version of events.

Mader faults the postconviction court for finding that V's appearance and demeanor at trial were compelling, that her emotions were understandable and appropriate, and that her credibility was supported by the details she was able to provide. (Mader's Br. 53 (discussing R. 188:14–15).) He asserts that V was not fully cross-examined because evidence of her employment was not admitted and the "myriad of inadmissible" rape shield testimony improperly bolstered her claims. (Mader's Br. 53.) Again, V's employment was not relevant and the court soundly excluded it. The rape shield evidence, both actual and alleged, was not a "myriad" but rather a few insignificant statements that had no bearing on V's credibility or Mader's defense.

Mader also highlights inconsistencies that he brought out on cross-examination, for example, that V and her brother would traditionally be at their father's house on Christmas day; that Mader was unlikely able to dismantle the bathroom doorknob as V described; V had initially said that Mader's birthmark was on the shaft, not the head, of his penis; and the freezer on which she claimed Mader once placed her was too high. (Mader's Br. 53–54.) These inconsistencies, even if believed, were not compelling given the breadth of detail and corroboration in the State's case.

Finally, to the extent that Mader faults the postconviction court for making findings on V's credibility at trial, that criticism is invalid. (Mader's Br. 54–55.) Mader cites cases stating that the postconviction "court may not substitute its judgment for that of the jury in assessing" the credibility of witnesses who were not presented at trial. *See, e.g.*, *State v. Jenkins*, 2014 WI 59, ¶ 64, 355 Wis. 2d 180, 848 N.W.2d 786; *State v. Guerard*, 2004 WI 85, ¶¶ 46, 49, 273 Wis. 2d 250, 682 N.W.2d 12. But circuit courts may make findings as to the credibility of trial witnesses that they personally observed. Indeed, in determining whether counsel's errors established a reasonable probability of a different result, the circuit court has to consider witness credibility. A circuit court's credibility findings warrant this Court's deference on appeal, given that court's unique and superior vantage to observe a witness's demeanor. *See, e.g.*, *Guerard*, 273 Wis. 2d 250, ¶ 47 (acknowledging that victim's testimony at trial was compelling based on strong impression it made on trial judge); *see also State v. McCallum*, 208 Wis. 2d 463, 479–80, 561 N.W.2d 707 (1997) (stating that because appellate courts are "bound by the cold, appellate record," they defer to circuit court's determinations of trial witness credibility in assessing whether a reasonable probability exists of a different outcome in newly discovered evidence context).

In summary, Mader cannot demonstrate deficient performance beyond the two minor errors conceded above. Nor can Mader demonstrate prejudice based on the cumulative effect of those two errors, or any other alleged errors.

CONCLUSION

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

Dated this 17th day of October 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,839 words.

Dated this 17th day of October 2022.

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.

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Electronically signed by:

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