STATE OF WISCONSIN

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

DISTRICT I

Case No. 2022AP1390-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW CURTIS SILLS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Defendant-appellant Matthew Curtis Sills appeals from a conviction on one count of first-degree sexual assault of a child under the age of 13 for sexually assaulting his daughter, and an order denying postconviction relief without a hearing.

1. Sills maintains that the circuit court, the Honorable David L. Borowski, was objectively biased against him. The court's bias, Sills argues, stems from its disagreement with this Court's 2020 decision allowing Sills to withdraw his original guilty plea and seek a trial. Sills did not contemporaneously raise a claim that the circuit court was objectively biased, stating the claim for the first time in his postconviction motion.

a. Is Sills's judicial bias claim adequately preserved, despite his failure to raise it at trial or sentencing?

The circuit court did not answer this question.

This Court should answer no.

b. If this Court chooses to ignore forfeiture and address the merits of Sillis's claim, has Sills rebutted by a preponderance of the evidence the presumption that the circuit court acted in a fair and impartial manner?

The circuit court answered no.

This Court should answer no.

2. Sills also argues that trial counsel rendered ineffective assistance for not seeking Judge Borowski's recusal and for the attorney's alleged mishandling of other acts evidence involving other uncharged assaults of his daughter. The circuit court denied his claims without an evidentiary hearing. Has Sills alleged sufficient facts to show

both deficient performance and prejudice to be entitled to an evidentiary hearing on either or both ineffectiveness claims?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. The issues presented may be resolved on the briefs by applying established law to the facts.

STATEMENT OF THE CASE

Guilty plea and 2020 court of appeals' decision

In June 2016, the State charged Matthew Curtis Sills with one count of First-Degree Sexual Assault of a Child Under the Age of Thirteen, contrary to Wis. Stat. § 948.02(1)(e). (R. 1:1–2.) The charge was based on disclosures Sills's seven-year-old daughter Elizabeth[1] made to her mother and a forensic interviewer that, on multiple occasions, Sills touched her vagina ("ginia") and rubbed his penis ("wee-wee") on her vagina. (R. 1:1–2.) She said that Sills put his fingers into her vagina on multiple occasions. (R. 1:2.)

Pursuant to a plea agreement, Sills pleaded guilty in February 2017 to a reduced charge of second-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(2). (R. 21:2–10; 67:1–3.) Prior to sentencing, Sills filed multiple requests to withdraw his plea, alleging that his attorney "bullied" him to take the plea offer and that he did not understand the term "sexual contact." (R. 22:1–2; 68:1.) After the court held an evidentiary hearing on the motion, defense counsel also alleged that the circuit court breached its duties under

[1] Elizabeth is a pseudonym. *See* Wis. Stat. § (Rule) 809.86(4). This Court referred to the victim by this name in its 2020 opinion. (R-App. 4.)

Bangert[2] by not advising Sills at the plea hearing that the offense carried a maximum fine of $100,000. (R. 40:39.) The circuit court, the Honorable Jeffrey A. Wagner, denied the motion and later sentenced Sills to nine years of initial confinement and six years of extended supervision on the reduced charge. (R. 34:19; 40:40.)

Sills appealed from the order denying plea withdrawal, and this Court reversed and remanded with instructions to allow Sills to withdraw his plea. *State v. Matthew Curtis Sills*, No. 2018AP1053-CR, 2020 WL 202309 (Wis. Ct. App. Jan. 14, 2020) (unpublished). (R-App. 3–18.) The Court concluded that, by not informing Sills that the pled-to offense carried a maximum $100,000 fine, the circuit court breached its plea-taking duties, and Sills did not, in fact, know about the possibility of a fine. (R-App. 17–18.)

February 2021 trial

On remand, Sills withdrew his guilty plea and the State proceeded on the original charge of First-Degree Sexual Assault of a Child under the Age of 13. (R. 83:1.) The State filed a pretrial motion to admit other-acts evidence that Sills had first sexually assaulted Elizabeth when she was three.[3] (R. 90:1–2.)

On the morning of trial in February 2021, the circuit court, the Honorable David L. Borowski, denied the State's motion in a bench ruling, noting that the alleged prior assaults were "non-substantiated" and occurred three or four years before the charged offense. (R. 128:14.) But it acknowledged that the 12-year-old child witness might

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[2] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

[3] The motion also sought to admit evidence of web searches Sills conducted on his X-Box for pornography depicting father-daughter incest. (R. 90:1–2.) The court ultimately allowed this evidence at trial, and Sills does not challenge this determination on appeal.

nonetheless volunteer information about these early incidents on the stand, and it did not say that it would prevent her from doing so:

> [S]hould [evidence of the prior assaults] stay out generally? Yes. . . .
>
> [B]ut . . . it's one thing for the State to go to an adult victim and tell them, okay, we're discussing what happened in [the] 2015 and/or 2016 period. We're not going to discuss what allegedly happened in Tomah in 2012. That's entirely different to tell that to a child who is barely 12 years old.

(R. 128:11–12.)

Also before *voir dire* and outside the presence of jurors, the circuit court recounted the case's procedural history and commented that the court of appeals' 2020 decision was "tortured" and "incorrect." (R. 128:5.) During *voir dire*, the State explained that DNA and other scientific evidence is often not available in sexual assault cases, and that it plays less of a role in real-life prosecutions than it does in TV crime dramas. (R. 128:50–53.) After multiple prospective jurors raised their hands when the State asked if anyone "needs DNA evidence" from the State to convict (R. 128:52–54), the court urged the jury to decide the case on the evidence presented, not on whether the State had presented DNA or fingerprint evidence. (R. 128:56–57.)

The State's first witness at the four-day trial was Lynn Cook, a forensic interviewer with the Milwaukee Child Advocacy Center who interviewed Elizabeth in May 2016. (R. 129:76–77; 138:4.) The State played a video recording of the interview for the jury.[4] (R. 138:5–9.)

[4] Jurors were provided a transcript to help them follow along with the recording. (R. 138:6.) The transcript was not introduced as an exhibit and is not part of the appellate record.

On the recording, then seven-year-old Elizabeth disclosed that Sills had been touching her "genia." (Ex. 1 at 10:55–11:40, 44:55–45:05.) She said, one time, Sills opened his boxers and rubbed his "wee-wee" on her "genia" in the bathroom. (Ex. 1 at 13:45–16:00.) Elizabeth said that, more than once, Sills played a game called "horsey" with her. Sills would lay on the bed with his "wee-wee" out, and she would bounce on his legs while his "wee-wee" touched her "genia" over her clothes. (Ex. 1 at 18:40–21:55, 22:50–23:05.) Elizabeth said that, multiple times, Sills put his fingers in her "genia," sometimes causing her to bleed. (Ex. 1 at 26:45–28:00.)

Elizabeth said that Sills told her not to tell her mom about what he does because he doesn't want to go to jail. (Ex. 1 at 29:20–29:40.) She said Sills's demand that she not tell meant that she couldn't be the girl her mom wanted her to be—"tell-the-truth girl"—and the girl her dad wanted her to be at the same time. "I can't *do* it!" she said. (Ex. 1 at 29:40–30:25.)

Five years later, Elizabeth also testified at trial. Now twelve years old, Elizabeth testified that she told the truth when she disclosed Sills's abuse in 2016. (R. 130:10.) But she now had difficulty recalling when the abuse occurred. (R. 130:10.) Asked if she could "remember a time that your dad had sex with you," she responded, "I think it kind of—I kind of think it all started maybe when I was around three or four." (R. 130:10.)

In response to this answer, the prosecutor immediately sought to bring the child back to the time period of the charged offense[5]: "So when you were six or seven, when we're

[5] The State alleged that the conduct charged in the criminal complaint occurred "from about November or December 2015 through Tuesday, May 31, 2016," when Elizabeth was six and seven years old. (R. 1:1.)

talking about that time . . . do you remember . . . your dad having sex with you then?" (R. 130:10–11.) "No," Elizabeth said. (R. 130:11.) Asked if she could "think of the last time that there was any kind of sex between your dad and you," she said, "[y]eah" and said she was "[m]aybe four" at the time. (R. 130:11.) But later, Elizabeth clarified, "I don't really know the ages" when Sills touched her. (R. 130:15.)

Despite her difficulty recalling when the offenses occurred, Elizabeth testified to many of the same acts of abuse she had disclosed five years earlier. For example, she testified about the "horsey" game, Sills touching and digitally penetrating her vagina, Sills's penis touching her vagina (and penetrating it, she said), and Sills telling her not to tell because he didn't want to go to jail. (R. 130:14–26.)

Jamie,[6] Elizabeth's mother and Sills's former partner, testified that, in May 2016, she and Sills took Elizabeth hiking. (R. 138:29–30.) When they returned from the woods, Jamie checked Elizabeth for ticks, including her genital area. (R. 138:29–32.) Jamie testified that Elizabeth "didn't look right" there, and her "skin looked red and inflamed." (R. 138:30, 32–33.) Jamie then took Elizabeth to the hospital for an examination. (R. 138:39.) The nurse practitioner who examined Elizabeth testified at trial that the child's sexual assault exam was "normal," but added that "95 percent of kids that are sexually abused will have a normal exam." (R. 130:46, 51.)

Jamie also testified about discovering Sills had used his X-Box to search for incest pornography on the Internet. (R. 138:55–56.) Jamie said that she found, displayed on the TV linked to the X-Box, a picture box of a video clip with the words "father and daughter." (R. 138:55–56.) When Jamie

[6] The State refers to the victim's mother by her first name only to help protect the victim's identity.

confronted Sills about the image, he said "it was just porn and that it didn't mean anything." (R. 138:56.) An investigator later testified at trial that a forensic examination of the X-Box's hard drive found searches on pornographic websites for videos depicting incest, including "father daughter taboo sex" among others. (R. 131:55–58.)

Finally, the State presented portions of a recorded jail phone call between Sills and an outside caller. (R. 131:82–90). On the call, Sills admitted that his finger touched or penetrated Elizabeth's vagina but claimed it was an accident. (R. 131:84.)

Sills said he was seated, wearing boxers, and his hands were in his lap to keep, in his words, his "wee-wee" from "popping out" of the "pee hole" of his boxers. (Ex. 8 at 3:50–4:05.) Sills said that he had just put lotion on his hands, and so they were positioned palms up to avoid getting lotion on his boxers.[7] (Ex. 8 at 3:10–4:15.) Sills said that, at that moment, Elizabeth, dressed in a mini-skirt, sat on his lap "right on my finger," which accidentally touched or penetrated her vagina. (Ex. 8 at 3:10–4:15.) Sills told the caller that, when this happened, he pushed Elizabeth onto the bed and said, "You stupid fucking bitch! . . . . Don't do that fucking shit or I'll just beat your fucking ass! . . . [G]et the fuck away from me!" (Ex. 8 at 4:10–4:25; R. 131:87–89.)

Sills elected to testify. (R. 132:4.) He denied sexually assaulting Elizabeth in any manner. (R. 132:5.) Sills acknowledged playing "horsy" with Elizabeth but said that she would ride on his back while he was on all fours, and there was nothing sexual about it. (R. 132:14.) When defense counsel asked about Sills's story on the jail call about him accidentally touching Elizabeth when she sat on his lap, Sills

[7] His hands were in his lap to keep his penis from "popping out" of the boxers's "pee hole." (Ex. 8 at 3:55–4:05.)

said he was "over-exaggerating a little bit on the phone call." (R. 132:15.) Sills denied searching for pornography depicting incest between fathers and daughters. (R. 132:17.)

When defense counsel asked if events occurred that might explain why Elizabeth was accusing him of molesting her, Sills responded: "Long time ago when she was three, though. Do you want me to explain what happened?" (R. 132:15, 16.) (Counsel said that he did not want Sills to explain.) On cross-examination, the State reminded Sills of his reference to when Elizabeth was three, and Sills confirmed that he had previously been investigated for assaulting Elizabeth when she was that age. (R. 132:22.) After Sills's testimony, the court memorialized a brief sidebar in which the court ruled that Sills, by his reference to "when [Elizabeth] was three," opened the door for the State's questions about Elizabeth's prior allegations of abuse. (R. 132:32–34.)

The jury found Sills guilty of first-degree sexual assault of a child under the age of 13, and the matter was set for sentencing. (R. 133:8, 12.)

Sentencing hearing

At the April 2021 hearing, Elizabeth's mother Jamie read the following note from Elizabeth, who was present but chose not to speak: "I get sad and when I hear his name or read it, I'm sad that I don't have a dad." (R. 134:4–5.) Jamie said that, since the trial, Elizabeth had been engaging in self-destructive behavior. (R. 134:5.) Jamie said that Sills "is a dangerous man" who "deserves the time that he gets for everything he's done." (R. 134:6.) She said it was "very unfair" that he "put [Elizabeth] through all this again"—a second round of proceedings culminating in a trial—"knowing that he was guilty." (R. 134:6.)

The State requested a sentence of 30 to 35 years of initial confinement. (R. 134:7.) The prosecutor noted the

various ways in which Sills repeatedly sexually abused Elizabeth, and the re-traumatizing effect that testifying at trial had on her.[8] (R. 134:7–8, 12, 19.) Defense counsel requested the same sentence imposed by Judge Wagner at the first sentencing, nine years of initial confinement and six years of extended supervision. (R. 134:20.) Sills addressed the court and professed his innocence. He said that Elizabeth "said a bunch of sick lies about me, about her own father." (R. 134:26.) "You can call me whatever you want," he said to the court. "I have no regrets." (R. 134:26, 27.)

The court opened its sentencing remarks by addressing the procedural history and the court of appeals' decision vacating the original conviction. (R. 134:27.) The court called the court of appeals' decision "preposterous"—in its view, a defendant's lack of knowledge about the maximum fine for an offense should not invalidate a plea because state courts rarely, if ever, impose fines in felony sexual assault cases. (R. 134:28–29.) But it stated that there was "very little relationship" between the court of appeals' decision and "my sentencing today." (R. 134:28.) The relevant portion of the sentencing transcript on which Sills's judicial bias argument is grounded is excerpted in the Argument section.

The court said that it began with the procedural background of the case to show how Sills was now "in a different situation than [he] was with Judge Wagner." (R. 134:29.) Rejecting Sills's request for the sentence imposed in 2017, the court explained: "When Judge Wagner sentenced the defendant to a total of 15 years in the Wisconsin state prison system, nine years of initial confinement, six years of extended supervision, that was for the defendant who had pled, who had accepted responsibility." (R. 134:29.)

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[8] The State noted that, at one point during Elizabeth's testimony, the court ordered a recess because the child was too upset to continue. (R. 134:12.)

"[S]omeone who thus by pleading guilty avoided having a trial," the court continued, "not for his sake but for the victim's sake." (R. 134:29.)

The court acknowledged that the facts of Sills's underlying crimes was still the same; what Sills did to "his own daughter [is] still sick, disgusting and vile." (R. 134:30.) But by pleading guilty in the first proceeding, Sills at least did not "re-traumatize" the victim by forcing her to testify at trial. (R. 134:30.) "None of that now is true," the court said. (R. 134:30.)

Further, Sills's claims of innocence "were not believable" and compounded his woes in this proceeding. (R. 134:31–32.) "You . . . lied on the stand and perjured yourself and took the stand and made things up, so you made this case worse from your own standpoint in every way, shape or form." (R. 134:32.)

Thus, the court determined, while the offense and its gravity remained the same as in 2017, "every other thing I need to look at is not the same." (R. 134:33.) The court acknowledged that the court of appeals' decision restored his right to a trial and gave him "a second kick at the cat." (R. 134:33.) But Sills's choice to contest his daughter's allegations instead of taking responsibility hurt the court's assessment of Sills's character. (R. 134:33, 35.) The court was also "not impressed" with Sills calling his daughter "a stupid, fucking bitch" and threatening to "beat her ass"—evidence that came out only as the result of the trial. (R. 134:35–36.) The court said that the need to protect the victim and "other children of any sort" required a lengthy prison sentence. (R. 134:37.)

In determining the sentence, the court said that it was "tempt[ed]" to follow the State's recommendation of 30 to 35 years of initial confinement "given Mr. Sills presented to the court with very, very few, if any, redeeming qualities, very few, if any." (R. 134:36.) But it declined to do so, explaining

that such a sentence would be "more along the lines of a homicide sentence." (R. 134:36.)

The court summed up its assessments of the gravity of the offense, Sills's dangerousness, and his character, as follows: "Mr. Sills, you did all that to your own daughter, and you sit here as nonplus[sed] and unfazed as anybody I've ever seen sit here. You are a bad actor. You are what prisons are designed for to protect the rest of society from people like you." (R. 134:38.) The court then sentenced Sills to 20 years of initial confinement and 10 years of extended supervision. (R. 134:39.)

At no time in any of the proceedings above did trial counsel raise an objection of circuit court bias.

Postconviction motion and decision

In January 2022, Sills, by counsel, filed a motion for a new trial and a brief in support of the motion. (R. 142:1; 143:1–14.) Sills argued for the first time that the circuit court, the Honorable David L. Borwoski, was objectively[9] biased against him. Sills pointed first to the judge's criticism of the court of appeals' 2020 decision on the morning of trial and at the sentencing hearing. (R. 143:3–6.) Sills also argued that three other instances—a comment the court made in jury selection about the absence of DNA evidence in many cases, the court's handling of other acts evidence that Elizabeth first alleged that Sills sexually abused her when she was a preschooler, and its imposition of a sentence that was more than twice as long as Judge Wagner's 2017 sentence for the same incident—further demonstrated the court's objective bias against Sills. (R. 143:6–9.)

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[9] The heading to Sills's bias argument references subjective bias, but it's clear from the body of the argument and Sills's argument on appeal that Sills's contention is that the judge was objectively biased. (R. 143:2–9.)

Sills also argued that trial counsel rendered ineffective assistance in four respects. First, he maintained that counsel was deficient for not "insist[ing] on a firmer ruling" when the court denied the State's request to introduce evidence that Sills first abused Elizabeth when she was three or four while at the same time acknowledging that its ruling might not prevent Elizabeth from spontaneously volunteering such evidence in her testimony. (R. 143:9–13.) Second, he asserted that counsel was deficient for not objecting when Elizabeth did volunteer that the abuse started when she was three or four. (R. 143:9–13.) Third, Sills argued that counsel erred by "inadvertently 'open[ing] the door'" for the State to cross-examine Sills about the prior allegations of abuse by eliciting testimony on direct referencing "what happened" when Elizabeth "was three." (R. 149:9–13.) Finally, Sills faulted counsel for not asking Judge Borowski to recuse himself for judicial bias once the judge criticized the court of appeals' decision on the morning of trial. (R. 143:13–14.) The State filed a brief in opposition, and Sills filed a reply. (R. 159:1–13; 160:1–3.)

The circuit court, Judge Borowski, issued a decision and order on July 26, 2022, denying postconviction relief without an evidentiary hearing. (R. 162:1–14.) The court determined that its statements and its conduct of the proceedings did not overcome the presumption of impartiality. The court examined each of the statements to which Sills had objected—those criticizing the court of appeals' decision and those during *voir dire* cautioning members of the jury pool that DNA evidence is not necessary to convict—and concluded that they did not show bias toward Sills. (R. 162:3–6.) Likewise, the court concluded that its recognition, when excluding evidence that Sills first molested Elizabeth when she was three or four, that Elizabeth might nonetheless volunteer information about these incidents on the stand did not show bias. (R. 162:6–7.)

And its sentence, more than twice as long as the sentence imposed by Judge Wagner, was not the product of bias but of the second court having "*significantly* more information" about Sills and his crime following the trial. (R. 162:7–9.) At sentencing, the court had stated that the appellate process "itself has nothing to do with my sentence." (R. 134:34–35; 162:10.) The court said that what it meant by this statement was that "the fact that the defendant pursued an appeal and won, and exercised his right to a jury trial afterward, did not have any impact on the court's sentence." (R. 162:10.)

The court also rejected Sills's claim of ineffective assistance of trial counsel without a hearing. (R. 162:12.) First, counsel was not deficient for not "insist[ing] on a firmer ruling" denying the State's request to introduce evidence of prior allegations of abuse because it was "sheer and total speculation that if trial counsel simply asked the court to rule differently, the court would have completely excluded the evidence." (R. 162:12.) Indeed, the court said, it "*was* asked to completely exclude any evidence of the 2012 incident, and it did not, for the reasons explained on the record." (R. 162:12.)

Second, counsel was not deficient for not objecting when Elizabeth volunteered that the abuse started when she was three or four, or for not asking for a curative instruction. (R. 162:12.) The court's ruling recognized that the child might mention the prior abuse on her own and did not forbid her from doing so. (R. 162:12–13.)

Third, counsel was not deficient for asking Sills to explain how Elizabeth might have been mistaken about the charges of abuse, the question that inadvertently elicited an answer that opened the door to cross-examination about prior, uncharged allegations of abuse. (R. 162:12–13.) Sills had already offered such an explanation on the jail call, asserting that he accidentally touched or penetrated Elizabeth when she sat on his lap. (Ex. 8 at 3:10–4:15.) So, counsel likely

expected Sills to reiterate a version of this story on the stand, and counsel's performance was not deficient. (R. 162:12–13.)

Finally, the court concluded that trial counsel was not deficient for not asking the judge to recuse himself because there were no grounds for him to do so. (R. 162:13.) Additionally, Sills could not show prejudice from not seeking the judge's recusal because he could not demonstrate a reasonable likelihood of a better outcome if his case had been handled by a different judge. (R. 162:13–14.)

Sills appeals.

ARGUMENT

I. Sills forfeited his objective bias argument. Even if this Court were to disregard forfeiture, Sills fails to show that the circuit court was objectively biased.

A. Standard of review

This Court considers independently whether a party forfeited an argument. *State v. Kaczmarski*, 2009 WI App 117, ¶ 7, 320 Wis. 2d 811, 772 N.W.2d 702. Whether a judge was objectively biased is also a question of law this Court reviews independently. *State v. Herrmann*, 2015 WI 84, ¶ 23, 364 Wis. 2d 336, 867 N.W.2d 772.

B. Legal principles

The law presumes that a judge has acted fairly and impartially. *Herrmann*, 364 Wis. 2d 336, ¶ 24. A defendant may rebut this presumption by proving bias by a preponderance of evidence. *Id.* Due process demands a fair decision-maker. *Id.* ¶ 25.

Wisconsin courts have applied both subjective and objective approaches when assessing whether due process has been violated by an unbiased judge. *Herrmann*, 364 Wis. 2d 336, ¶ 26. The subjective component concerns the court's own

determination of whether she could be impartial. *Hermann*, 364 Wis. 2d 336, ¶ 144 n.12 (Ziegler, J., concurring).

The objective analysis concerns both actual bias and the appearance of bias; "[w]hen the appearance of bias reveals a great risk of actual bias . . . a due process violation occurs." *Herrmann*, 364 Wis. 2d 336, ¶ 46.

To show actual bias, a "defendant must show that the '[circuit court] in fact treated him unfairly.'" *State v. McBride*, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994) (citation omitted). To show an unconstitutional appearance of bias, a defendant must demonstrate that a reasonable person could conclude that the average judge with ordinary human tendencies and weaknesses could not be trusted to remain neutral under the circumstances. *Herrmann*, 364 Wis. 2d 336, ¶ 32.

"Application of the constitutional standard . . . will thus be confined to rare instances." *Miller v. Carroll*, 2020 WI 56, ¶ 52, 392 Wis. 2d 49, 944 N.W.2d 542 (quoting *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 890 (2009)). "[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *Miller*, 392 Wis. 2d 49, ¶ 24 (quoting *Caperton*, 556 U.S. at 876).

A defendant forfeits his objective bias challenge by not contemporaneously raising it. *State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992). "We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge." *Id.* (citation omitted).

This comports with the rule that issues "not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. This rule of judicial administration—called either the "waiver" or

"forfeiture" rule, gives notice to the parties and court, and prevents "sandbagging"—"failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.* ¶¶ 11–12.

That said, if the judge should have *sua sponte* recused himself or herself due to *subjective* bias, a defendant does not forfeit his or her challenge to the judge's failure to do so. *Marhal*, 172 Wis. 2d at 505–06.

C. Sills forfeited his judicial bias argument.

Sills has not and does not argue subjective bias. (*See* R. 143:2–14 and *supra* n.8) (Sills's Br. 8–13.)[10]

Sills raises only an objective bias challenge. And by not raising that challenge contemporaneously, he has forfeited it. *Marhal*, 172 Wis. 2d at 505; *Huebner*, 235 Wis. 2d 486, ¶ 10.

Though the circuit court addressed his postconviction claim on its merits (R. 162:3–10), this Court may affirm the circuit court's decision on grounds other than those relied upon by the circuit court. *State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

Because Sills forfeited this argument, this Court need not consider his judicial bias claim any further.

D. If this Court chooses to overlook forfeiture, Sills fails to show objective bias.

But if this Court elects to address the objective bias claim on the merits, his claim fails. Sills fails to rebut the presumption that the circuit court acted fairly, impartially, and without prejudice under the totality of the circumstances. *See Herrmann*, 364 Wis. 2d 336, ¶ 24.

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[10] Sills's pagination of his brief does not match the page numbers from electronic filing. The State uses the electronic filing page numbers.

The circuit court's critique of the court of appeals' decision. Sills's objective bias argument starts with the circuit court's candid comments on the morning of trial and at sentencing against the court of appeals' decision vacating Sills's original conviction. (Sills's Br. 9–10.) To review, this Court vacated the original judgment because Judge Wagner did not advise Sills of the maximum fine for the offense of second-degree sexual assault of a child, and Sills asserted that he did not know this information at the time. (R-App. 4.) Noting that fines are rarely, if ever, imposed on felony sexual assault and homicide convictions, the circuit court called the decision "preposterous" and based on "an absolute and total technicality." (R. 134:28–29.)

Nevertheless, to prove his claim that the court was biased against *him*, Sills must show not only that the circuit court disagreed with the court of appeals' decision, but also that the court harbored ill-will toward *him* for exercising his right to appeal. He utterly fails to make this showing, and his bias claim fails for multiple reasons.

First, at no point in the proceedings did the circuit court blame Sills for the court of appeals' decision or criticize his choice to appeal Judge Wagner's order denying postconviction relief. The circuit court's most full-throated criticism of the court of appeals decision came at sentencing. But the court did not blame Sills for raising the argument that the court of appeals adopted in reversing Judge Wagner; in fact, the circuit court acknowledged that Sills had every right to appeal Judge Wagner's order:

> In terms of the procedural history, first of all, I'm going to make it very clear that the procedural history, meaning what the Court of Appeals ruled, has nothing to do directly with my sentence, and [Defense Counsel] Opland-Dobs is correct from what I can tell in terms of his recitation, and I read the Court of Appeals decision months ago. I've not reread

> it recently, but in this case you had a defendant who plead [sic] guilty in front of Judge Wagner.
>
> Then shortly after he plead[ed] guilty, he appealed, *which is his right* . . . . He gets a second trial on what I would consider an absolute and total technicality. The Court of Appeals said he gets a new trial because Judge Wagner at the time of the plea years ago did not advise the defendant specifically of the possible fine that could be applied in a case like this in a sexual assault situation like this.
>
> I have significant respect for the Court of Appeals. They certainly have their role. I know the judges that were involved in this decision and, again, saying that it has certainly directly no relationship and indirectly only very little relationship to my sentencing today, I found the Court of Appeals decision to be preposterous. It's preposterous when Judge Wagner did not impose a fine, and, frankly, I've been on the bench now for 18 years. I can't think of any homicide or sexual assault in my career that I imposed a fine on, and I doubt if Judge Wagner ever has. It literally is a moot point. Academically, it's a moot point from the standpoint that it never happens, but in this case it was a moot point that from my view—and I know the Court of Appeals will review this one day because I'm confident the defendant will appeal—should have been considered an absolute and total technicality because no fine was actually imposed. So if Judge Wagner may have glossed over the fine possibility who cares, but the Court of Appeals made the decision they made.

(R. 134:27–29 (emphasis added).)

Granted, as Sills notes (Sills's Br. 10), the court stated on the morning of trial when addressing the admissibility of the recording of Elizabeth's 2016 forensic interview that "the only reason we're here four years later is because of the defendant's actions and because of the Court of Appeals . . ." (R. 128:7.) But this statement was not, as Sills suggests, a general statement of bias against *him*. Rather, the court considered Sills's exercise of his right to appeal and the

resulting delays only for the limited purpose of deciding whether to admit the recording of the interview.

Under Wis. Stat. § 908.08(3)(a), such a recording is admissible if offered at trial before a child's 12th birthday, or if offered after the child's 12th birthday but before his or her 16th birthday and "the interests of justice warrant its admission." Here, the court indicated that the recording of the interview should be admitted because the delay in trial—which meant Elizabeth was now 12 years old—was due to Sills's change of heart about pleading guilty and his appeal. (R. 128:7; 162:4–6.) That was not an attack on Sills but a statement of fact. Importantly, Sills does not argue that the court erroneously exercised its discretion in admitting this evidence by considering Sills's part in causing this delay, and, given the context, the above statement does not evince objective bias against Sills.[11]

Second, the court made clear in other statements that neither Sills's decision to appeal nor the court of appeals' decision had any effect on the sentence imposed. In the above excerpt, the circuit court stated that the court of appeals'

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[11] Sills also suggests that the fact that the court asked the prosecutor on the morning of trial whether the State had charged Sills with first-degree sexual assault of a child under Wis. Stat. § 948.02(1)(b), the section carrying a 25-year mandatory minimum period of confinement (no), and whether it could have done so (yes), shows that it *wanted* the State to proceed under that section. (Sills's Br. 10.) This is pure speculation.

Likely, the court simply wanted to know the section under which the State was proceeding (and could proceed) given the uniqueness of the statute. A conviction for first-degree sexual assault by sexual intercourse of a child under the age of 12, section 948.02(1)(b), carries the 25-year mandatory minimum. *See* Wis. Stat. § 939.616(1r). But a conviction on the related offense with which Sills was charged, first-degree sexual assault by sexual contact or sexual intercourse of a child under the age of 13, section 948.02(1)(e), carries *no* mandatory minimum.

decision "has nothing to do directly with my sentence" and "has certainly directly no relationship and indirectly only very little relationship to my sentencing today." (R. 134:27–29.) Of course, the court of appeals' decision had an "indirect" relationship to the proceeding; without it, there would not have been a new sentencing hearing. But, as the court's full explanation of sentence shows, there was no "direct[ ]" relationship between the court of appeals' decision and the sentence itself.[12]

Moreover, later at sentencing, the court stated that "the appellate process . . . itself has nothing to do with my sentence." (R. 134:34–35.) In its postconviction decision, the circuit court explained that this statement meant that "the fact that the defendant pursued an appeal and won, and exercised his right to a jury trial afterward, did not have any impact on the court's sentence." (R. 162:10.) *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (a court may elaborate on statements made at sentencing in postconviction proceedings).

Third, to the extent the court's criticism of the court of appeals' decision might somehow be tied to Sills as the beneficiary of the decision, the circuit court's negative comments do not automatically equal bias. "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display" and "[a] judge's negative comments do not automatically equal bias." *State v. Pirtle*, 2011 WI App 89,

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[12] Sills argues that the court's statement that the court of appeals' decision "has nothing to do *directly* with my sentence" "does not inspire confidence." (Sills's Br. 10) (emphasis added by Sills). But italicizing directly to suggest that the word "directly" somehow hints at the court's actual reliance on the court's decision or Sills's exercise of his appeal right in imposing sentence only shows the weakness of Sills's objective bias argument.

¶ 34, 334 Wis. 2d 211, 799 N.W.2d 492 (quoting *Liteky v. United States*, 510 U.S. 540, 555–56 (1994)).

Finally, the absence of support in the record for Sills's theory of judicial bias in his case—that the circuit court was biased *against him* for exercising his right to appeal, and not just critical of the court of appeals' decision in the first appeal—undermines Sills's argument that other actions of the court were expressions of bias. As shown below, these actions were wholly appropriate and were driven by the circumstances and the court's stated reasons.

The court's sentence. Sills argues that the fact that the court imposed a sentence with more than twice the confinement time (20 years) of Judge Wagner's 2017 sentence (9 years) demonstrates the court's bias against him. But the sentencing transcript shows that the court relied on appropriate factors in imposing sentence, not bias. And the decision to impose a longer sentence was based on the fact that, after trial, the court had "*significantly* more information" about Sills's offense, his dangerousness, and his character than Judge Wagner did at the first sentencing. (R. 162:8.)

A sentencing court properly exercises its discretion by providing a rational explanation for the sentence based upon appropriate sentencing factors and the facts of record. *See McCleary v. State*, 49 Wis. 2d 263, 276–77, 182 N.W.2d 512 (1971). "Sentencing decisions are afforded a presumption of reasonability consistent with our strong public policy against interference with the circuit court's discretion." *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 N.W.2d 409. A court must consider three factors in fashioning its sentence: the gravity of the offense, the defendant's character, and the need to protect the public. *Id.* ¶ 28. The court determines within its broad discretion the relative weight to assign to each factor. *Id.*

Here, the court explained that, while Sills's "sick, disgusting and vile" crimes remained the same in the second proceeding, "every other thing I need to look at is not the same." (R. 134:30, 33.) Sills's decision to take the case to trial "retraumatiz[ed]" his daughter by forcing her to testify about Sills's repeated acts of abuse. And the court did not believe Sills's claims of innocence, further harming its assessment of his character: "You . . . lied on the stand and perjured yourself and took the stand and made things up, so you made this case worse from your own standpoint in every way, shape or form." (R. 134:32.)

As the court indicated at sentencing and postconviction, the trial—particularly Elizabeth's recorded statements to the forensic interviewer and her trial testimony—further revealed Sills's dangerousness and the seriousness of his offense. (R. 134:30, 37; 162:8.) But, more than anything, the trial showed his depraved, selfish character, the factor upon which the sentencing court relied most heavily in passing sentence. For example, without the trial, the court would not have heard the recording of Sills calling his daughter "a stupid, fucking bitch" and threatening to "beat her ass"—albeit as a part of an implausible scenario in which he said he accidentally touched or penetrated her vagina when she sat on his lap. (R. 134:35–36.)

The transcript shows that Sills's sentence was a proper exercise of the court's discretion, not a product of objective bias against him.

The court's handling of the State's request to admit other acts evidence. As noted, the court denied the State's request to present evidence that Sills had first molested Elizabeth when she was three and four years old. (R. 90:1–2; 128:14.) But the court acknowledged that the 12-year-old victim might nonetheless volunteer information about these incidents, and the court appeared to suggest that it would not intervene to prevent her from offering such testimony. (R. 128:11–12.) The

court confirmed in its postconviction decision that, had defense counsel objected when Elizabeth volunteered at trial that the abuse started when she was three or four, the court would have denied the objection. (R. 162:12.)

Sills cites this ruling as an instance of "actual bias." (Sills's Br. 11–13.) He does not come close to making this showing. In fact, the court did not erroneously exercise its discretion by declining to interfere if the child volunteered testimony about the prior alleged incidents—and Sills does not develop an argument that the court misused its discretion in this respect. *See State v. Weed*, 2003 WI 85, ¶ 9, 263 Wis. 2d 434, 666 N.W.2d 485 (circuit court has broad discretion in determining the admissibility of evidence). The court's decision to deny the State's request to admit evidence of the prior allegations of abuse, while declining to silence the child victim if she volunteered testimony about these instances, was not an erroneous exercise of discretion.

Further, the court's decision not to restrict Elizabeth's own account was consistent with the established fact that children often have difficulty placing events in time. *See State v. Fawcett*, 145 Wis. 2d 244, 249, 426 N.W.2d 91 (Ct. App. 1988). Here, five years after the assaults ended, 12-year-old Elizabeth was unable to place when the charged assaults occurred—she initially said she thought that they ended when she was "[m]aybe four," then admitted, "I don't really know the ages" when Sills assaulted her. (R. 130:11, 15.) Had the court decided to bar Elizabeth from testifying about assaults occurring when she was *four*, much, if not all, of her testimony about the assaults would have been stricken—merely because the child could no longer remember when the assaults occurred.

The court's other acts evidence ruling did not bespeak actual or objective bias against Sills.

Comments about DNA evidence during jury selection. Finally, Sills argues that statements the court made to the prospective jurors about basing their verdict on the evidence presented, and not on the absence of scientific evidence like DNA and fingerprints, also shows "actual bias." (Sills's Br. 11.) Again, these remarks do not demonstrate actual or objective bias.

The State addressed in *voir dire* the differences between criminal prosecutions as depicted in TV crime dramas and those in real life. The State noted that such programs "you can see some pretty crazy technology and some really interesting kinds of evidence," but that real-life prosecutions don't always rely on scientific evidence.[13] (R. 128:50–51.) Later, when multiple prospective jurors raised their hands when asked if "anyone here who needs DNA evidence to come to a conviction" (R. 128:53), the court chimed in that the State was asking if jurors could base their decision on the evidence presented and the court's instructions, and not on the absence of DNA or other scientific evidence:

> In an ideal world . . . there would be 25 witnesses and six examples of DNA and 10 fingerprints. That's not the real world. . . . I don't know what evidence is going to be presented in this case, but I'm sure there will be testimony. . . . You cannot sit there and speculate or wish "well, geez, I wish the State had DNA or I wish they had 'x' or I wish they had a fingerprint." That's not your role. Does everybody understand that? You have to accept whatever is presented and analyze that according to rules that I'm going to give you, and they're not optional rules.

(R. 128:56–57.)

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[13] Modern jurors' expectations from TV crime shows that the State will rely on scientific evidence at trial to prove its case has been examined by legal scholars and been dubbed "the CSI effect." *See State v. Swope*, 2008 WI App 175, ¶ 7 n.3, 315 Wis. 2d 120, 762 N.W.2d 725.

This additional guidance from the court was not unreasonable; notably, defense counsel raised no objection. The court's decision to supplement the State's point about relying on the evidence presented was appropriate where multiple jurors raised their hands when asked if they needed DNA evidence to reach a verdict. (R. 128:52–54.) These comments do not constitute actual or objective bias.

* * * *

For the reasons discussed above, Sills forfeited his objective bias claim. Even if this Court disregards forfeiture, Sills's judicial bias claim fails because the circuit court acted with fairness and impartiality in his case, and Sills has not shown otherwise. *See Herrmann*, 364 Wis. 2d 336, ¶ 24.

II. The circuit court properly denied Sills's claims of ineffective assistance without an evidentiary hearing.

A. Standard of review

Whether a defendant was deprived of the right to effective assistance of counsel is a question of constitutional fact reviewed under a mixed standard of review. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115. This Court reviews *de novo* whether the allegations in a postconviction motion are sufficient to warrant an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

B. Applicable legal principles

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 show deficient performance, a defendant must demonstrate that specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id.* Failure to raise a meritless issue is not deficient performance. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441.

To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (quoting *Strickland*, 466 U.S. at 694).

Establishing prejudice under *Strickland* is difficult. "*Strickland* asks whether it is 'reasonably likely' the result would have been different. This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (citations omitted). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

A defendant if entitled to an evidentiary hearing on a claim of ineffective assistance if the postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. But if the motion does not raise facts sufficient to entitle the defendant to relief, or presents only cursory allegations, or if the record conclusively

demonstrates that the defendant is not entitled to relief, the circuit court may deny the motion without a hearing within its discretion. *Id.*

C. Sills is not entitled to a hearing on either of his claims of ineffective assistance.

Sills alleges two instances of ineffective assistance. Because Sills's allegations are insufficient to entitle Sills to relief, his claims were properly denied without an evidentiary hearing. *See Allen*, 274 Wis. 2d 568, ¶ 9.

Handling of evidence of Sills's alleged prior abuse. Sills maintains that trial counsel rendered ineffective assistance by (1) not insisting on a "firmer ruling" from the circuit court to intervene if Elizabeth mentioned the prior alleged assaults and exclude such evidence; (2) not objecting when Elizabeth testified that the assaults began when she was three or four years old and requesting a curative instruction; and (3) "inadvertently 'open[ing] the door' to additional damning testimony," namely, Sills's volunteering to testify about "what happened" when Elizabeth "was three" when counsel asked if any events might explain Elizabeth's accusations. (R. 132:15; 143:6–11.) Sills cannot show deficient performance or prejudice on the allegations in his postconviction motion, which closely resemble those in his appellate brief. (R. 143:6–8.)

First, counsel did not perform deficiently in not insisting on a "firmer ruling" and not objecting to Elizabeth's trial testimony because, as argued above, such motions would have been rejected because the court properly exercised its discretion in the first instance in addressing the State's other acts motion. It is also difficult to fault counsel for asking the question that "opened the door" to further examination by the State of Elizabeth's allegations of prior abuse. The question appears meant to elicit testimony consistent with Sills's statement in the jail call—Elizabeth was mistaken about

being assaulted because it was an accident. Counsel could not have reasonably foreseen that Sills would instead offer testimony that would permit the State to question him about prior allegations of assault.

Second, Sills cannot show prejudice resulting from the alleged deficiencies for multiple reasons. Sills cannot show that, if his attorney had requested a "firmer ruling" deeming inadmissible any testimony from Elizabeth about prior assaults, the request would have been granted; indeed, the court said in the postconviction decision that it would have denied such a request. (R. 162:6–7.) Further, counsel's alleged failure for not seeking the "firmer ruling" or objecting to Elizabeth's trial testimony is not prejudicial because, even if these requests had been granted, the jury would have heard evidence of these prior allegations anyway. That's because Sills "opened the door" for the State to introduce such evidence on cross-examination of Sills, and Sills does not dispute that his testimony did, in fact, permit the State to cross-examine him on this topic.

Finally, Sills cannot prevail on *Strickland*'s second prong because he makes no real effort to show that, had counsel pursued any of these courses of action, there is a reasonable probability that the outcome of the trial would have been different. Sills may believe that prejudice is a forgone conclusion if Elizabeth's testimony had been limited. But her admissible statements from the forensic interview were far more detailed and damning than her general trial testimony about the abuse starting when she was three. And, as argued, Sills's own testimony opened the door to evidence about these prior allegations.

For these reasons, counsel was not deficient in his handling of the other acts evidence, and Sills has failed to meet his burden to show that counsel's omissions were prejudicial.

Not seeking the circuit court judge's recusal. Finally, Sills argues that trial counsel was ineffective for not moving to recuse Judge Borowski when he criticized the court of appeals' decision on the morning of trial, or, at the very latest, before sentencing. Sills again fails to show deficient performance or prejudice. For the reasons discussed at length above, Judge Borowski was fair and impartial in this case, and Sills failed to show otherwise. The judge's sentence was well grounded in the facts, within the maximum sentence for a Class B felony, and did not evince objective bias.

Thus, counsel had little basis on which to seek recusal at any stage, and Sills fails to show a reasonable probability of a different outcome had he moved for recusal for two reasons: (1) the court would have appropriately denied such a motion; and (2) even if the court had somehow granted the motion, the suggestion that the sentence would have been substantially shorter on these facts is wholly speculative and belied by the court's sentencing remarks.

* * * *

For these reasons, Sills fails to show that the allegations in his postconviction motion are sufficient to entitle him to a hearing on either allegation of ineffective assistance. The court properly exercised its discretion in denying his ineffectiveness claim without a hearing.

CONCLUSION

This Court should affirm the judgment of conviction and the circuit court's order denying postconviction relief.[14]

Dated this 26th day of January 2023.

Respectfully submitted,

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[14] Sills appears to request a new trial on his claim of ineffective assistance. (Sills's Br. 17.) If he were to prevail on this claim, the appropriate remedy would be remand for an evidentiary hearing, not a new trial. *See State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶ 22, 314 Wis. 2d 112, 758 N.W.2d 806 (circuit court must hold an evidentiary hearing before a new trial may be ordered on a claim of ineffective assistance).

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 8,672 words.

Dated this 26th day of January 2023.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER

CERTIFICATE OF EFILE/SERVICE

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

Dated this 26th day of January 2023.

Electronically signed by:

Jacob J. Wittwer
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