STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

CASE NO. 2023AP1888

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN D. ZIMMERMAN,

Defendant-Appellant.

On appeal from a judgment of conviction and order denying postconviction relief, both entered in the Eau Claire County Circuit Court, the Honorable John F. Manydeeds, presiding.

BRIEF OF DEFENDANT-APPELLANT

Megan Sanders
State Bar No. 1097296

WISCONSIN DEFENSE INITIATIVE
411 West Main Street, Suite 204
Madison, WI 53703
megan@widefense.org
(608) 620-4881

Attorney for Defendant-Appellant

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ISSUES PRESENTED

This case involves child sexual assault allegations that Ryan Zimmerman has consistently denied. He went to trial on eight counts, and the jury acquitted him of three. He appeals his convictions for the remainder.

The four issues presented relate to the circuit court's suppression ruling, two statements the prosecutor made in her rebuttal argument, and an undisputed error in one of the verdict forms.

1. In 2018, Zimmerman's stepdaughter claimed he'd sexually assaulted her years prior. While interrogating Zimmerman about that claim, police told him they still had a cellphone they'd seized from him in 2015 during an unrelated investigation. Police had no particular reason for keeping the phone; it was no longer needed for the 2015 investigation or for the ensuing prosecution, which had long since concluded. Still, after telling Zimmerman that they'd gotten into the phone before and could do it again, the interrogator presented him with a consent-to-search form. He signed.

   Did law enforcement's prolonged, unjustified retention of Zimmerman's cellphone following a 2015 investigation amount to an unlawful seizure, tainting his consent to the phone's 2019 search?

The circuit court denied Zimmerman's motion to suppress. This Cout should reverse.

2. In her rebuttal argument at Zimmerman's jury trial, the prosecutor criticized defense counsel for expressing undue sympathy for two defense witnesses—both teenage boys. She said: "Counsel based his argument on … their young age.... Now think about [the complaining witness], 17 years old, a girl. Remember when you were 17 years old. Did you—" (254:115; App. 19). Trial counsel then objected: "The Golden Rule, Your Honor." (254:115; App. 19). A sidebar followed, after which the State's rebuttal continued.

   Postconviction, Zimmerman alleged that defense counsel was ineffective for failing to seek a remedy for the State's impermissible golden rule argument. But at the *Machner* hearing,[1] defense counsel couldn't recall whether he'd sought a remedy or not. Thus, he offered no strategic reason for failing to do so.

   Was defense counsel's response to the State's golden rule argument ineffective?

The circuit court held that defense counsel was not ineffective. This Court should reverse.

[1] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

3. Later in her rebuttal, the prosecutor told the jury: "[Y]ou have heard testimony about I do not recall, I have no clue, I cannot remember, or I disagree. *They were unable to say, It was not me, it did not happen.*" (254:118 (emphasis added); App. 18). Defense counsel did not object. After deliberations began, however, counsel sought a mistrial, arguing that the State had remarked on Zimmerman's decision not to testify and, in doing so, had shifted the burden of proof. The circuit court denied the mistrial motion.

   Postconviction, Zimmerman alleged that defense counsel was ineffective for delaying his objection, thereby precluding remedies less extreme than a mistrial. At the *Machner* hearing, counsel explained the delay by noting that the judge didn't like objections during closing arguments and that the sidebar process was onerous.

   This record raises two interrelated questions: Did the circuit court err in denying a mistrial based on the State's burden-shifting commentary on Zimmerman's silence at trial? And if not, was defense counsel's delayed response to that commentary ineffective?

The circuit court denied a mistrial and held that defense counsel was not ineffective. This Court should hold either that the circuit court erred in denying a mistrial or that defense counsel's delayed response was ineffective.

4. The guilty-verdict form for Count 7 contained an error that the parties and circuit court overlooked: instead of correctly specifying the charged crime as sexual exploitation of a child, it listed the charged crime as *possession of* sexual exploitation of a child. Because defense counsel did not notice the error until the State pointed it out after trial, he didn't raise it until after the jury had used it to find Zimmerman guilty. At that point, it was too late.

   Postconviction, Zimmerman alleged that this mistake deprived him of effective assistance of counsel: it is reasonably probable that the erroneous and misleading form affected the jury's decisionmaking. At the *Machner* hearing, counsel testified that he would have corrected the form had he noticed the mistake. He had no strategic reason for letting it go.

   Was defense counsel ineffective for failing to timely identify and correct the error on the Count 7 guilty-verdict form?

The circuit court held that defense counsel was not ineffective. This Court should reverse.

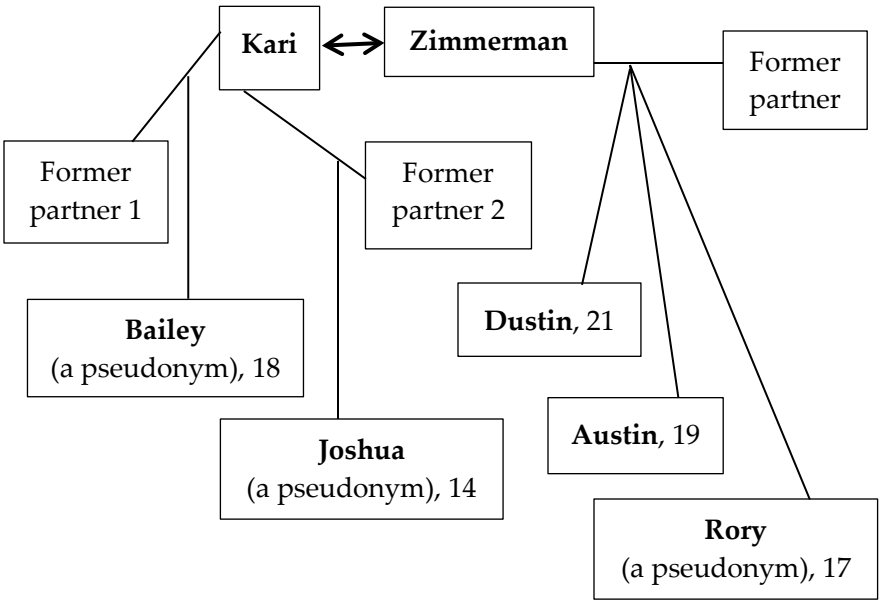
STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Zimmerman would welcome oral argument if it would help the Court resolve the issues presented.

Publication may be warranted based on the novel suppression issue this appeal presents. *See* Wis. Stat. § 809.23(1)(a)1.-2. Whether law enforcement's lengthy retention of a cellphone can transform the phone's seizure into an unlawful one, tainting a defendant's consent to the phone's subsequent examination by police, is an unsettled but recurring constitutional question. *See* § 809.23(1)(a)5. Both the individuals seeking to preserve their privacy and the police officers seeking to conduct lawful and effective criminal investigations would benefit from a published answer.

STATEMENT OF THE CASE AND FACTS

This case centers on the Zimmerman family when Zimmerman was married to Kari. Their family tree, and their children's ages at trial, were as follows:



I. Allegations and investigation.

As 2018 came to an end, Zimmerman was working as a mechanic and raising three children and two step-children with his wife, Kari. (*See* 223:5-6; 216:10). He was also helping to care for his mother, who lived in an addition Zimmerman had personally built onto the family's home. (228:3). And, after decades of struggling with alcoholism, he was finally nearing three years of sobriety. (*See* 223:6).

In January 2019, Zimmerman's life, and family, unraveled. (*See* 5:3). Kari's daughter and Zimmerman's stepdaughter, Bailey, alleged that Zimmerman had repeatedly sexually assaulted her years prior, starting when she was in fourth grade. (5:4). She said the assaults stopped when Zimmerman went to prison for sexually assaulting a 17-year-old acquaintance, Jana (a pseudonym). (223:29).

When Zimmerman left to serve his sentence, Bailey was 13. (*See* 216:10; 5:1). Zimmerman was released a year later and moved back in with Kari and the kids. (216:10). According to Bailey, the assaults did not resume. (5:5).

About 18 months after Zimmerman returned home, Bailey told a couple of her friends that he'd once assaulted her. (5:4). Her claim reached the police, which responded by interviewing various witnesses, including Bailey, Zimmerman, and Zimmerman's son Dustin, who Bailey said was present for at least part of one assault. (5:4-7).

Bailey provided more and more details over the course of multiple interviews, including two conducted at a child advocacy center. (*See* 5:4). She described Zimmerman sexually assaulting her several times per week for years, said he showed her pornography and involved her and Dustin in a game of strip poker, and reported that Zimmerman once took pictures of her performing oral sex on him. (5:5-6).

According to Bailey, the incidents all took place in and around their home—often in the detached garage where Zimmerman worked on cars—with the rest of

their family nearby. (*See* 5:4-6). Bailey said Zimmerman would retrieve her from the bedroom she shared with her half-brother, Joshua, and then assault her. (5:7). Bailey also alleged that her stepbrother Rory saw Zimmerman assaulting her, and that Joshua was once on the top bunk while Zimmerman assaulted her on the bottom bunk. (5:6-7).

Police questioned Zimmerman twice about Bailey's allegations, which he denied. (70:3-4; 167:3-4). He discussed difficulties Bailey was having—at school, at home, and in her relationship—just before she made her allegations. (70:9-11, 15-20). He said Bailey was known for "dramatizations," and he suggested her troubles may have led her to lash out. (70:4; 167:4).

During Zimmerman's first interrogation, Detective Don Henning noted that police still had the phone they'd seized from him several years prior, while investigating Jana's sexual assault allegation back in 2015. (70:4-5). Henning provided Zimmerman with a consent-to-search form, asking him to sign it so they could reexamine his old phone—and commenting that they'd gotten into the phone before and could do it again. (70:4-7). Zimmerman signed. (*See* 167:1).

Zimmerman's second interrogation took place after police reexamined his phone. (167:1). Henning asked him about three photos they'd discovered that appeared to be child pornography—photos law enforcement had apparently missed the first time they searched his phone. (167:3-4, 249:151). Zimmerman said he didn't remember taking any sexual pictures of Bailey. (167:3). Henning then showed him a picture in which a female was

holding a man's penis, saying Bailey had identified herself and Zimmerman as the people in the picture. Zimmerman responded, "It really looks like it." (5:7) But, he reiterated, he had no "recollection of this" and couldn't "say anything otherwise about it." (5:7).

Henning interviewed Dustin, as well. (*See* 248:61). At first, Dustin made clear that he'd never heard Bailey's strip poker allegation and had never participated in anything like that. (248:68-69). When prodded, however, Dustin claimed to vaguely recall aspects of the incident. (248:69-70). His statements remained largely equivocal, and what details he provided directly contradicted key parts of Bailey's story. (248:72-73).

II. Charges and suppression litigation.

The State charged Zimmerman with several child sex crimes based on Bailey's allegations and on the photos discovered on his old phone. (5:1-4). He was ultimately tried on eight counts: child enticement, repeated sexual assault of a child, incest with child by stepparent, sexual exploitation of a child, exposing a child to harmful material, and three counts of possession of child pornography. (249:98-110).

Pretrial, Zimmerman moved to suppress the evidence derived from the second warrantless search of his phone, which police had seized four years earlier in connection with Jana's allegations. (*See* 49). His consent to the search "was not free and voluntary," the motion argued. (49:2). While the phone was lawfully seized in 2015, "the officers held on to [it] ... for too long with no purpose to use it for a trial." (49:2). The lawful seizure transformed into an unlawful one once police lost their

basis for retaining the phone, and Zimmerman's subsequent consent—the product of pressures that "overcame [his] will," in part because he was never told he could decline to consent to a second search and no longer had possession of the phone—was fruit of the poisonous tree. (49:2).

Over the course of three hearings, the State introduced testimony from the property and evidence technician for Eau Claire law enforcement (both city and county); from Detective Jeff Nocchi, who conducted the 2019 phone search; and from Henning, who interrogated Zimmerman and got him to sign the consent-to-search form. (*See* 62:44; 245:10; 252:4, 20). The circuit court denied suppression. (245:92; App. 41). In doing so, however, it expressed unease about the fact that Zimmerman didn't have possession of the phone and that Henning never told him he had the right *not* to consent to its search. (245:89-92; App. 38-41). The circuit court did not directly address the passage of time between the two phone searches or the question of whether law enforcement's extended custody of the phone transformed its seizure into an unlawful one.

III. Jury trial.

Zimmerman's jury trial lasted four days. (*See* 248; 249; 254; 255). The State called Bailey, Kari, Bailey's maternal grandma (with whom Bailey was living at the time), Dustin, Detectives Henning and Nocchi, and a child forensic interviewer. (248:30, 37, 57, 78, 118; 249:122, 162). The defense called Rory and Joshua. (254:4, 16). The evidence was mixed.

A. Bailey's testimony.

Bailey testified on the first day of trial. (*See* 249:162). She said Zimmerman was the father figure in her life when she was growing up. (249:165). She listed her siblings (a half-brother and three former step-brothers) and explained the layout of their former family home. (2149:166).

Bailey described an array of sexual assaults, which she said were uncomfortable and sometimes painful. (249:167-85). She told the jury that Zimmerman mostly assaulted her in his shop, but she also described an incident in a makeshift teepee in her yard and one in her paternal grandma's side of the family home. (249:173, 217-18). She testified that Zimmerman took photos of her during a game of strip poker, with Dustin present. (249:224-25). She added that Zimmerman was drinking when he assaulted her and that he said not to tell anyone about their encounters. (249:171, 173-74, 179, 185, 210).

The State asked Bailey about letters—entered into evidence on cross—that she'd sent Zimmerman while he was briefly in prison for the Jana incident. (249:186-90, 251). They reflected a happy parent-child relationship, which Bailey explained by noting Zimmerman "was [her] father figure" at the time. (249:186). The State and Bailey then had the following exchange:

> Q Were there ever any letters you wrote to [Zimmerman] during this time but did not send?
>
> A Yes.
>
> Q How do you know that?

A Because I found one in a notebook while I was looking through notebooks for school.

Q And when did you find that unfinished letter?

A I don't remember.

….

Q ... [S]itting up there beside you should be ... State's Exhibit 5. Do you see that?

A Yes.

….

Q Is that a true and accurate copy of the unfinished letter you started to write to [Zimmerman]?

A Yes, it is.

(249:186-88).

An excerpt from State's Exhibit 5 (the undated letter Bailey said she drafted but never sent when Zimmerman was in prison) is reproduced on the left-hand side of the next page. (*See* 249:187-88). Beside it is an excerpt from Defense Exhibit 103, one of several letters Bailey undisputedly sent to Zimmerman during his brief stint in prison. (*See* 249:233). On cross, trial counsel highlighted the difference between Bailey's handwriting and tone in State's Exhibit 5 and her handwriting and tone in the many letters she actually mailed. (249:245-46). Bailey had no explanation. Counsel asked Bailey if she'd in fact just recently drafted the letter—for use at trial—but Bailey said "no." (249:246).

Dear Dad,

I know your not the happiest person with me. I know that once I started school everything got stressful with me. I'm really putting all of my effort into school. I know I make you mad when I give you an attitude, it's just really hard for me to talk to you about ~~[illegible]~~ certain things.

[redacted]

I understand that your mad at me for things that I have done, but I'm also mad for what we have done. Sometimes I want to tell someone so I don't have to be with you or have someone who might do it to me again. But then I think twice and remembered that I wouldn't have the greatest step dad ever.

6/1/16

HI Daddy,

How are you doing? I'm doing well. I got a 90/100 for my end of the year science project. I'm doing o.k. in school, just a couple of papers to turn in then I'll have all good grades.

Yesterday mom took me to the doctors and I weigh 93.4 lbs, and I'm 5.4, and I got to do a lot of shopping with mom for the pool.

If it's ok with you, and mom, can I get my ears pierced again? I just want to get it in the

After reading sections of the unmailed letter to the jury, Bailey read a portion of a different letter—one she'd sent to her maternal grandma. (249:190). In it, Bailey said she wanted to move in with her grandma because her parents yelled at her more than they yelled at her brothers, which made her "really mad." (249:190). The letter also said it bothered her when people went through her belongings. (249:190).

The State used the latter comment to segue into questions about a tally sheet Bailey said she'd kept until it was taken from her room. (249:190-91). Bailey testified: "I kept a sheet in a notebook that I kept under my bed with tally marks, and I had 105 on the paper." (249:190). Bailey said she made a tally mark "[a]fter each time [she and Zimmerman] had sex." (249:191). She did not have the tally sheet anymore, she said, because someone ripped it out of her notebook. (249:191). She believed that person was Zimmerman because "nobody else goes through [her] room." (249:191).

Bailey said she first spoke up about the assaults in January 2019, when she told some friends that Zimmerman had once raped her. (249:192). When the State asked Bailey why she decided to tell her friends on that particular night, Bailey said it was because, earlier in the evening, Zimmerman had said they should "talk about what happened." (249:191).

Trial counsel suggested a different explanation. On cross, counsel showed that Bailey was going through a tumultuous period when she made her allegations against Zimmerman, and that she wanted a way out.

(249:201-07). Bailey acknowledged that she faced significant stressors at the time:

- She had recently met her biological father and his then-wife for the first time. (249:199). They went to dinner with Zimmerman, Kari, and Kari's mother. (249:199).
- She was doing poorly in school, misbehaving there, and getting punished for it. (249:204).
- She was getting in trouble at home, too, in part for how poorly she was doing in school. (249:204-05). As a result, she would lose privileges like time with her friends or her phone, and she would have to do chores around the house. (249:204-05).
- Bailey was frustrated with how she was being treated by her parents, especially compared to her brothers. (249:205).
- Her parents had just denied her request for a birth control prescription. (249:205-06). She was upset about their decision and frustrated that it wasn't up to her. (249:206).
- Her boyfriend had just broken up with her. (249:206-07).

Towards the end of his cross, trial counsel asked Bailey whether she'd said during an interview that there were 105 tally marks on her tally sheet (she had) and whether she'd told her mom she was assaulted 365 times (she had). (249:239-40). Bailey explained the discrepancy

by saying that she was assaulted 260 more times after the tally sheet was ripped out of her notebook, which she said happened when she was 13 years old. (249:240-41).

Bailey turned 13 just two days before Zimmerman went to prison. (249:241-42). She could not explain how 260 assaults took place in two days. (249:241-42).

B. Bailey's family's testimony.

Testimony from Bailey's siblings was scattered throughout Zimmerman's trial. All three who testified denied seeing anything inappropriate occur.

Dustin said he'd never played strip poker with his father and stepsister, despite his contrary statement to Henning; he said was scared he'd get in trouble when Henning questioned him and felt coerced into agreeing with Bailey's strip-poker claim. (248:61-72). Rory denied ever seeing Zimmerman assault Bailey, though Bailey had claimed otherwise, and he noted that he "would have heard or seen something" if what Bailey described was true. (254:6-8). And Joshua, who told the jury he's a light sleeper, denied ever hearing or seeing anything improper in all the years he shared a bunkbed with Bailey. (254:17-18). All three boys also confirmed that Bailey has a reputation within the family for lying and getting in trouble. (248:74-75; 254:8, 18).

Bailey's mother and maternal grandma testified as well. (*See* 248:30, 78).

As to the photos that were the subject of Zimmerman's child pornography charges, Kari testified that she did not appear to be the female in them. (248:85). She

didn't know who it was, calling one photo "very unclear." (248:85-86).

Kari testified that her family had been happy before Bailey's allegations, and that she never observed anything suspicious. (248:93-94). She echoed Bailey's testimony as to the range of stressors Bailey faced when she first accused Zimmerman of sexual assault. (248:95-100). And she agreed with Zimmerman's sons that Bailey had regularly been getting in trouble for things like "[l]ying, stealing, [and] not following direction[s]." (248:96-97).

Finally, Bailey's maternal grandma took the stand. She confirmed that Bailey, who was living with her at that point, had recently shown her the unmailed letter that Bailey allegedly discovered in an old school notebook. Bailey's grandma had no firsthand knowledge of the letter's provenance.

C. The forensic interviewer's testimony.

Kayla Lauderdale, one of the forensic interviewers who spoke with Bailey at the child advocacy center, testified about her two conversations with Bailey, about the behaviors exhibited by youth victims of sexual assault, and about child forensic interviewing techniques generally. (248:40-48). As to victims' behavior, Lauderdale testified that some children disclose abuse with a flat affect, while others appear emotional; some children disclose abuse right after it happens, but most do not; and some children tell their full story all at once, while others do so piecemeal. (248:42-45).

Lauderdale also testified to the forensic interview methods employed with children, saying she used these methods with Bailey and that Bailey disclosed significantly more abuse in her second interview than her first. (248:46-47). She added that Bailey didn't show much emotion either time. (248:48).

Lauderdale was one of two experts at trial. The second was Detective Jeff Nocchi.

D. Testimony from police.

Nocchi testified that his specialty is digital forensics (i.e., "recovering data from electronic devices," including cellphones). (249:124). He gave an overview of Cellebrite, the tool he uses to extract data, and described the types of data it can extract. (249:125-32). He also explained the "three different types of extractions you can do." (249:128). Logical extractions are the most basic, file system extractions provide "a lot more information," and physical extractions offer even more—pulling "all of the binary data out of the phone." (249:128-31).

Nocchi testified that when police searched Zimmerman's phone in 2015 (during their investigation into Jana's allegations), there was no way to run a physical extraction. (249:139). When they searched it in 2019, the technology had advanced; a physical extraction was possible. (249:139-40). But the photos Nocchi identified as child pornography were *not* the result of the more robust extraction. (249:151). They were, according to Nocchi, visible in 2015. (249:151). Police just hadn't noticed them.

One other aspect of Nocchi's testimony stands out: he described unexplained damage to Zimmerman's phone between the 2015 and 2019 searches. (149:141). When he pulled the phone in 2019, it "wouldn't connect to the computer" due to damaged metal bars within the micro-USB port. (249:141). Nocchi tried to straighten the bars out, but he couldn't. (249:141). Eventually, he found a replacement port, unsoldered the broken one, and soldered the replacement on. (249:142-43). It worked, and Nocchi continued with the physical extraction. (249:144). There remains no explanation in the record for the damage to Zimmerman's old phone while it sat in the evidence room.

Detective Nocchi was the first witness the State called. Detective Henning was the last. (*See* 248:118).

Henning began by discussing his investigation into Jana's allegations, not Bailey's. Zimmerman had promptly confessed to Jana's allegations, and Henning was permitted to discuss his confession. (248:23-26).

Henning explained the incident as follows. Jana knew Zimmerman just slightly, through an aunt who'd dated him. (248:122). The aunt contacted Zimmerman in the summer of 2015 because Jana wanted to learn about repairing cars. (248:123-24). The aunt arranged to have Zimmerman "show [Jana] kind of some basics [so she could] ... see if it's something that she would like to do." (248:124). To that end, Jana was dropped off at Zimmerman's home, where his shop was located, late in the evening one night in June. (248:124).

Zimmerman and Jana had a few drinks and played cards. (248:124). Eventually "they started playing strip poker." (248:124). Zimmerman admitted that, after they'd taken their clothes off, he put his fingers and tongue inside Jana's vagina. (248:125).

During the investigation into Jana's allegations, police took pictures of Zimmerman's home, shop, and yard. (248:127-35). Henning identified many of these photos for the jury, and they were entered into evidence. (248:127-35).

Henning testified that he was contacted about Bailey's allegations three and a half years later. (248:136). He arranged for Bailey's interviews at the child advocacy center, interrogated Zimmerman twice, and arranged for Nocchi to reexamine Zimmerman's phone. (248:138-39, 150). The jury viewed edited recordings of Henning's interviews with Zimmerman. (248:151-52).

Finally, the State presented Henning with a series of photos that Henning said were from Zimmerman's phone. (248:140-47). The photos, which were entered into evidence, included the alleged child pornography, plus several nude pictures of Kari. (248:140-47). Henning said he could tell the female in the alleged child pornography was Bailey and not Kari because: (1) that's what Bailey said after Lauderdale showed her the photos; and (2) there were physical signs, like that Kari's nipples were darker, her breasts were less firm, she generally wore a wedding ring and a particular necklace, and her "collarbone structure is a little different." (248:148).

E. Jury instructions and closing arguments.

The instructions conference took place after the close of evidence. (*See* 254:26). At the end, the circuit court said: "I just want to make sure that you've gone through the ... verdict forms ... to make sure that they're correct." (254:37). Trial counsel said, "I reviewed the[m] last night. I reviewed them again this morning." (254:38). The circuit court responded, "They look okay?" (254:38). Counsel said, "Yes." (254:38). The State agreed. (254:38).

After the jury returned and heard the instructions, the State gave its closing argument. (*See* 254:71). It was a relatively straightforward recap of the evidence it had introduced. Trial counsel then gave his closing, which highlighted the holes and inconsistencies in the State's case. (*See* 254:85). Finally, the State offered its rebuttal. (254:114; App. 18). Two of its comments led to objections.

First was the State's discussion of the testimony offered by Joshua and Rory, both of whom denied witnessing anything inappropriate between Bailey and Zimmerman. The State characterized trial counsel's closing argument as overly sympathetic to the boys, saying counsel "attempted to draw a picture about two poor kids being called here to testify [at] this trial." (254:116; App. 20). The State continued: "Counsel based his argument on … their young age.... It's a lot for them to come here to testify. *Now think about [Bailey], 17 years old, a girl. Remember when you were 17 years old. Did you—*" (254:115 (emphasis added); App. 19). At this point, trial counsel objected: "The Golden Rule, Your Honor." (254:115; App. 19).

The circuit court held an off-the-record sidebar, which it later summarized by saying that trial counsel "was concerned [the State] was going to be asking the jurors to put themselves in [Bailey's] position," but that the State had promised not to do so. (254:130; App. 34). Back in the courtroom, the State resumed its argument. "[T]hink about [Bailey] having to come here to testify to this very traumatic incident…. [I]f, as Defense Counsel argued, it's difficult for [Joshua] and [Rory] to be put on the stand, how about [Bailey]?" (254:116; App. 20).

Later, the State argued: "[T]hroughout this trial you have heard testimony about I do not recall, I have no clue, I cannot remember, or I disagree. *They were unable to say, It was not me, it did not happen.*" (254:118 (emphasis added); App. 22). After the jurors exited the courtroom to begin deliberating, trial counsel addressed this statement:

> I would like to object to [the rebuttal]…. I believe [the State] shifted the burden to the Defense …. [T]he State talked about … the interviews with Ryan Zimmerman, and [it] told the jury he was unable to say, It wasn't me. I think that suggests to the jury that Ryan Zimmerman has a responsibility to say that it wasn't him, to speak up on his behalf. It violates his right against self-incrimination to not say anything.

(254:131; App. 35).

Regarding the timing of his objection, counsel added: "I didn't want to make another objection right there after I made a previous objection. We had talked in our sidebar … [and I know] the Court doesn't like objecting in closing arguments.... [B]ut I wanted to make my

objection known." (254:131; App. 35). The circuit court responded: "I [told] you … that if there was a need to object, you should object." (254:131; App. 35). Counsel agreed. (254:131-32). The State then responded: "[I]f I recall correctly, I did not say 'unable.' I think I said 'he did not .... The other thing is I believe the Court and Counsel have both made it clear … as to who bears the burden of proof." (254:132; App. 36). The circuit court turned back to trial counsel, who repeated: "She said he was unable to say, It wasn't me. That's what she said. I think that … warrants a mistrial." (254:132-33; App. 36-37).

The circuit court denied the mistrial motion, telling counsel: "The jury was instructed that anything the attorneys say is simply that, argument…. I don't believe that she characterized it the way that you did. I believe that she was appropriate ...." (254:133; App. 37).

F. The verdicts and verdict form error.

The jury returned three not-guilty verdicts and five guilty verdicts. (255:10-11, 14). Zimmerman was convicted of all three counts of possession of child pornography, one count of incest with child by stepparent, and one count of "[p]ossession of" sexual exploitation of a child. (147:1; App. 17). He was acquitted of repeated sexual assault of the same child, child enticement, and exposing a child to harmful material. (255:10-14).

About four months after trial, the State wrote the circuit court a letter advising it of "a typographical error on Verdict Count Seven": the phrase "possession of" had been added to the guilty verdict form for sexual exploitation of a child. (218:1). The State noted that the not-guilty verdict form for that count was error-free. (218:1).

Then it cited Wis. Stat. § 805.13(3) for the proposition that "failing to object to the verdict or jury instructions at the jury instructions conference 'constitutes a waiver of any error in the proposed instructions or verdict.'" (218:1). Since trial counsel did not object here, said the State, the issue was waived. (218:1). Further, it continued, Zimmerman was not prejudiced; it "was a simple typographical error" and the circuit court correctly instructed the jurors regarding the elements of the crime. (218:1-2).

Trial counsel responded with a motion for a mistrial on Count 7. (*See* 224). The motion noted that "[a]t no point" prior to deliberations "did anybody recognize the mistake that was made on this verdict form." (224:1). It argued that the question was whether Zimmerman was prejudiced, which he was: "The verdict form is where the answer goes…. It was likely read by [the jurors] before answering in the jury room. As jurors are lay people, there's also the chance that … they would … assume that a mistake … would not have made it to their jury room." (224:2). Further, "[i]f even one juror believed that form to literally mean possession of sexual exploitation of a child, then the verdict is not unanimous and a mistrial must be declared." (224:2).

The circuit court denied the motion because the jury instructions were correct, as was the not-guilty verdict form for Count 7. (235:6). It also noted that the parties had been given the opportunity to review and object to the verdict forms before the jury deliberated; "[t]he purpose of distributing [instructions] ... ahead of time is to catch errors like this," it explained. (235:6). Trial counsel had missed his chance.

III. Sentencing.

The PSI recommended 9 to 10 years of initial confinement followed by 3 to 4 years of extended supervision, for a total of 12 to 14 years' imprisonment. (216: 26-27). Trial counsel's sentencing memo agreed that 14 years' imprisonment was appropriate but sought 8 in, 6 out. (223:1). Attached to the memo were a psychosexual evaluation, a recidivism risk assessment, and an alternate PSI, which again recommended 8 in, 6 out. (223:8-50).

At sentencing, the State sought more than double the 12- to 14-year term of imprisonment requested by the PSI, alternate PSI, and trial counsel: it asked for 40 years. (235:20-21). The circuit court landed in the middle, imposing 33 years of imprisonment in all, with 18 years of initial confinement and 15 years of extended supervision. (235:58).

IV. Postconviction litigation.

Zimmerman filed a postconviction motion. (*See* 274:17-18). He sought a new trial across the board because defense counsel was ineffective in responding to the State's impermissible rebuttal arguments. (274:19-27). And he sought a new trial as to Count 7 because defense counsel's failure to spot and correct the verdict form error rendered him ineffective as to that specific charge. (274:24, 28-29).

A *Machner* hearing followed. (287). Trial counsel was the sole witness. (*See* 287:2). He couldn't recall whether he'd sought a remedy after objecting to the State's golden rule argument (287:11), testified that he

delayed his second rebuttal objection because the judge disfavored them and because sidebars were onerous (287:21-22), and acknowledged that his failure to correct the Count 7 verdict form error was a mistake—not strategic (287:15).

The circuit court denied relief. (295:5; App. 8). Its reasoning was murky. As for defense counsel's response to the State's golden rule argument, the circuit court commented that the impermissible comment pertained to testimony that supported the ultimate verdict. The circuit court never tied that observation to the ineffectiveness rubric or the *Machner* hearing testimony. As for defense counsel's response to the State's burden-shifting commentary on Zimmerman's silence at trial, the circuit court effectively concluded that he wasn't prejudiced; the physical evidence and Zimmerman's statements to Henning meant "there was nothing going on that would have affected [him] as far as the case was concerned." (295:7; App. 10). Finally, as to the erroneous verdict form, the circuit court noted that the jury instructions were correct and again held that Zimmerman wasn't prejudiced. (295:8; App. 11).

Zimmerman appeals from the circuit court's post-conviction ruling. He further appeals from the circuit court's denials of his pretrial motion to suppress and his post-rebuttal request for a mistrial.

ARGUMENT

I. The seizure of Zimmerman's phone transformed from lawful to unlawful during the four-year period between law enforcement's two examinations of its contents. Zimmerman's consent to the second search was tainted by this unlawful seizure. Thus, the evidence derived from the second search should be suppressed.

A. Introduction.

Police seized Zimmerman's cellphone in June 2015, with his consent, during their investigation into Jana's sexual assault allegation. Zimmerman quickly confessed and entered a plea deal. He was sentenced in April 2016 and finished his confinement time in May 2017, at which point he began a 10-year term of extended supervision. Zimmerman did not file a notice of intent to pursue postconviction relief. He never challenged his conviction or sentence in Jana's case.

In January 2019—nearly three years after his cellphone was seized in connection with Jana's allegation, over two years after he pleaded to the resulting charges, and about a year and a half into his lengthy term of supervision—police still had his old phone. They made that clear when they interrogated him about Bailey's claims. Detective Henning specifically noted that they'd gotten into the phone before and could do it again. Then, with the inevitable set forth, Henning sought Zimmerman's consent to reexamine the phone. Zimmerman gave it.

The core problem here is that, by the time Henning requested Zimmerman's consent to search his phone a second time, its continued seizure was unlawful. Police had no business possessing the phone, let alone reexamining it. More specifically, both the evidence room's standard operating procedures and the constraints imposed by the Fourth Amendment show police lacked authority to hold onto Zimmerman's phone once it lost its evidentiary value *in the case for which it was seized*. That time came well before Bailey's story surfaced. It came after police had reviewed and extracted the information relevant to Jana's allegation (some text messages), after Zimmerman had entered a plea deal in the ensuing case, after he was sentenced, after his deadline for pursuing postconviction relief passed, and—most especially—after he completed his prison time and went home.

Because law enforcement's lawful seizure of Zimmerman's phone became unlawful by the time they sought consent to search it a second time, Zimmerman's consent was tainted. The resulting evidence was fruit of the poisonous tree. Suppression is warranted.

B. Governing law and standard of review.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. It is well-settled that a seizure "lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes [on] possessory interests." *United States v. Jacobsen*, 466 U.S. 109, 124 (1984). The duration of a seizure is one component of its execution and can, when unjustifiably

lengthy, render it unreasonable. *See United States v. Place*, 462 U.S. 696, 709-10 (1983). To assess whether a seizure that began as reasonable transformed into an unreasonable one, a reviewing court will "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Jacobsen*, 466 U.S. at 125.

The intrusion here is perhaps without equal, as cellphones "hold for many Americans the 'privacies of life.'" *Riley v. California*, 573 U.S. 373, 403 (2014). They contain "vast quantities of personal information," *id.* at 386, including "many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record could." *Id*. at 394. Indeed, "[t]he sum of an individual's private life," from "the mundane to the intimate," can often be "reconstructed" through the contents of his phone. *Id.* at 394-95. Accordingly, cellphone users—virtually all adults—have acute privacy and possessory interests in their phones. *Id.* at 393.

One of the questions before the circuit court,[2] then, was whether law enforcement had an interest in Zimmerman's cellphone—for *years* following the end of the investigation for which it was lawfully seized—sufficient to outweigh Zimmerman's weighty privacy and possessory interests in the same. While it denied Zimmerman's

[2] Pretrial, Zimmerman raised multiple arguments for suppression of the evidence derived from his phone. On appeal he raises one: his cellphone's seizure became unreasonable by the time Henning asked if he could reexamine it.

suppression motion, the circuit court did not articulate its analysis of this issue, so there are few relevant factual findings. Still, this Court will review the denial of Zimmerman's suppression motion in two steps, upholding the circuit court's findings of fact unless clearly erroneous, then independently deciding whether law enforcement's "conduct violated [Zimmerman's] Fourth Amendment right to be free from unreasonable search or seizure." *State v. Herr,* 2013 WI App 37, ¶6, 346 Wis. 2d 603, 828 N.W.2d 896.

C. When Henning sought Zimmerman's permission to search his phone a second time, police had no lawful reason to possess it. Its seizure had become unconstitutional, tainting Zimmerman's consent and warranting suppression of the fruits of that consent.

Zimmerman's significant privacy and possessory interests in his cellphone are indisputable for the reasons set forth above. *Riley*, 573 U.S. at 395. As the United States Supreme Court has explained, even searches of homes—the paradigmatic private space—are unlikely to reveal a fraction of the private information a phone's examination will turn up. *Id.* at 396-97.

With such weighty interests on one side of the scale, this Court must carefully assess those on the other. But at Zimmerman's suppression hearing, police weren't entirely sure why they held onto his old cellphone for so long. Perhaps the officers conducting annual evidence inventories missed it (repeatedly). (*See* 61:16-18). Perhaps

police kept it because the District Attorney's office never followed up to say police could dispose of the phone (as their standard operating procedures contemplate), or because Zimmerman never asked to have it back. (*See* 62:50-51; *see also* 60:2). Perhaps police thought, contrary to departmental policy, that they should keep the phone until Zimmerman finished supervision in case of an appeal in Jana's case (though Zimmerman never filed a notice of intent to pursue postconviction relief, and all police could possibly have needed for that appeal were texts they'd long ago extracted). (*See* 61:10-11; *see also* 60:2).

No officer testified that law enforcement kept the phone because they wanted to retain access to the whole of its contents, in perpetuity, in connection with Jana's long-resolved assault claim. Nor did anyone testify that they wanted the phone indefinitely in case any future investigation rendered its contents relevant again—that is, for purposes of "general, exploratory rummaging." *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). Such explanations wouldn't have sufficed, as neither variety of seizure would be consistent with the Constitution. *See id.*; *Riley*, 573 U.S. at 399. That much is clear.

Instead, a fair assessment of the record shows law enforcement's proffered justification for holding onto the phone was that they had no affirmative reason to get rid of it. No one told them to. The circumstances surrounding their retention of the cellphone, meanwhile, shows there was no basis for it: the cellphone was seized for its limited relevance in Jana's case, which was long over.

The government's want of a rationale for keeping Zimmerman's cellphone is not the weighty interest needed to outweigh the privacy and possessory interests at stake. Indeed, nothing in the record suggests *any* continuing governmental interest in Zimmerman's cellphone, weighty or not. It remained in law enforcement's possession because they failed to dispose of it, not because they had a reason to keep it. Such negligence does not a lawful seizure make.

Because the seizure of Zimmerman's cellphone became unlawful before Henning asked to reexamine it, Zimmerman's consent was tainted. "Consent, even when voluntary, is not valid when obtained through exploitation of an illegal action by police." *State v. Hogan*, 2015 WI 76, ¶57, 364 Wis. 2d 167, 868 N.W.2d 124. Such exploitation is present here: not only did Zimmerman's second round of consent *follow* law enforcement's unlawful retention of his phone, Henning used his department's continued custody of the phone to help persuade Zimmerman to consent again, saying: "[W]e got into it once clearly we can get into it again." (70:7). The nexus is clear.

In sum, law enforcement's seizure of Zimmerman's cellphone was unlawful by the time they sought to search it a second time, and that the illegality tainted Zimmerman's consent to his phone's reexamination. The fruits of that reexamination should be suppressed. *See Hogan*, 364 Wis. 2d 167, ¶57.

II. Trial counsel failed to seek a remedy for the State's golden rule argument (despite timely objecting) and failed to timely object to the State's burden-shifting remark on Zimmerman's silence at trial (despite belatedly seeking a remedy). These errors rendered him ineffective.

A. Introduction and applicable law.

Both the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution guarantee defendants the right to effective assistance of counsel. To show a deprivation of that right, a defendant must show "both that counsel's performance was deficient and that counsel's errors were prejudicial." *State v. Smith*, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854.

An attorney's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). An attorney's deficient performance is prejudicial when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. When counsel makes multiple unprofessional errors, the prejudice inquiry is cumulative: the aggregate "effect of several deficient acts or omissions may … undermine a reviewing court's confidence in the outcome of a proceeding." *State v. Thiel*, 2003 WI 111, ¶60, 264 Wis. 2d 571, 665 N.W.2d 305.

Here, trial counsel performed deficiently twice during the State's rebuttal. First, while he objected to the State's golden-rule argument, he didn't seek a mistrial, a curative instruction, or any other remedy. Second, while

counsel *did* seek a mistrial based on the State's improper "unable to say, It was not me" comment, his untimely objection precluded any lesser remedy and let the comment go unchecked.

These errors weren't just unreasonable; they were also prejudicial. By inviting jurors to hold Zimmerman's silence against him and to put themselves in the victim's shoes, the State pushed them to consider improper factors in their deliberations. Counsel's failure to timely seek the right remedies for the State's unlawful and inflammatory comments meant those comments infected the jury's deliberations, undermining confidence in the outcome of Zimmerman's trial.

Zimmerman was deprived of effective assistance of counsel. The appropriate remedy is a new trial, and that is what he seeks. *See State v. Jenkins*, 2014 WI 59, ¶¶8-9, 355 Wis. 2d 180, 848 N.W.2d 786.

B. Trial counsel was deficient in responding to the State's golden rule argument.

While attorneys have latitude in closing arguments, there are limits: "The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence"—including their emotions. *State v. Neuser*, 191 Wis. 2d 131, 135, 528 N.W.2d 49 (Ct. App. 1995). One variety of improper argument has been dubbed the "golden rule argument"; in a criminal case, it "asks the jurors to place themselves in the victim's shoes." *State v. DeLain*, 2004 WI App 79, ¶23, 272 Wis. 2d 356, 679 N.W.2d 562. Golden rule arguments

impermissibly "appeal to the jurors' sympathy" rather than focusing their attention on the charges and the evidence. *Id.*

Here, the State reminded the jury that Bailey was just 17 and had taken the stand to testify. Then it instructed the jury: "Remember when you were 17 years old. Did you—?" (254:115; App. 19). Partway through the State's question, trial counsel objected. But even without finishing its thought, the State led the jury in an improper direction. It invited jurors to consider themselves at 17. It invited them to ponder what it might have been like—for them at 17—to sit on the witness stand in a sexual assault case and answer attorneys' questions. And by extending these invitations, the State implicitly urged jurors to sympathize with Bailey and consider that sympathy in their deliberations. Such appeals to emotion cloud jurors' capacity to reasonably examine the evidence and hold the State to its burden. Thus, they infect a "trial with unfairness," violating due process. *DeLain*, 272 Wis. 2d 356, ¶24.

Faced with the State's improper comment, trial counsel objected. But he didn't take the necessary next step: seeking a remedy. During a sidebar, counsel appears to have voiced his concern about where the State was headed, when in fact the State had already arrived at a problematic place. Counsel could have asked the circuit court to instruct the jury to disregard the State's improper comments. He could also have asked the circuit court to instruct (or reinstruct) the jury on the critical law: that they must decide Zimmerman's guilt by determining whether the State proved the elements of each crime beyond a reasonable doubt—*not* by considering its sym-

pathies for those involved. Finally, he could have sought a mistrial. By doing nothing, counsel allowed the State's improper comment to linger in jurors' minds as the State carried on discussing Bailey's youth and her struggles testifying.

In sum, trial counsel started, but did not finish, taking objectively reasonable steps to address the State's impermissible golden rule argument. At the tail end of a hard-fought trial, this was an instance of deficient performance.

The *Machner* hearing testimony supports this conclusion. Trial counsel recalled objecting to the State's golden rule argument but couldn't recall the specifics of the sidebar that followed. (287:10-11). He said he didn't believe he considered asking the circuit court to tell the jury to disregard the State's impermissible argument or to tell the jury "to not be swayed by sympathy for the alleged victim." (287:12). He also testified that he did not consider seeking a mistrial. (287:12).

Thus, the trial record and the *Machner* hearing transcript make the same point clear: counsel objected to the State's golden rule argument but sought no remedy. For the reasons set forth, that was an unreasonable error.

C. Trial counsel was deficient in responding to the State's burden-shifting commentary on Zimmerman's silence at trial.

Two additional, interconnected restraints on closing arguments are relevant here: the State may not make arguments that misrepresent its burden, and it may not adversely comment on a defendant's decision not to

testify. A core precept of criminal trials is that the defendant need not present evidence—his own testimony or anything else—to establish his innocence. When a prosecutor suggests otherwise in argument, she misrepresents core legal principles (that the defendant is presumed innocent and that the State bears the heavy burden of overcoming that presumption at trial) and may infringe on the defendant's Fifth Amendment right to remain silent. These problems can, in turn, violate due process, warranting reversal. *DeLain*, 272 Wis. 2d 356, ¶24.

Two cases are instructive here: the foundational case of *Griffin v. California*, 380 U.S. 609 (1965), and the Wisconsin Supreme Court's recent decision in *State v. Hoyle*, 2023 WI 24, 406 Wis. 2d 373, 987 N.W.2d 732.

In *Griffin*, the trial court instructed the jury that if Griffin did not testify, or if he testified but "fail[ed] to deny or explain [incriminating] evidence," the jury could "take that failure into consideration as tending to indicate the truth of such evidence and as indicating that … the inferences … unfavorable to the defendant are ... more probable." 380 U.S. at 610. Later, the prosecutor repeatedly emphasized Griffin's failure to testify, and the jury found him guilty.

The United States Supreme Court held that this commentary on Griffin's silence violated his Fifth Amendment right to remain silent. It reasoned that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Id.* at 614 (citation omitted). "It is a penalty imposed … for exercising a constitutional pri-

vilege," the Court explained, and it "cuts down on the privilege by making its assertion costly." *Id.*

Griffin involved a crystal-clear case of adverse commentary on a defendant's silence. More often, the State merely insinuates that a defendant's silence demonstrates his guilt. Hoyle claimed that that's what happened at his trial when, during closing arguments, the prosecutor repeatedly referred to the alleged victim's testimony as "uncontroverted." *Hoyle*, 406 Wis. 2d 373, ¶2. Hoyle argued that, because he was charged with committing a sexual assault in which only the perpetrator and victim were present, calling the victim's testimony uncontroverted amounted to a comment on his failure to testify. In rejecting Hoyle's claim, the Wisconsin Supreme Court adopted a three-part test for determining whether a prosecutor's argument violates the Fifth Amendment. A defendant must show:

1. The prosecutor's words were "manifestly intended" to comment on the defendant's silence or were "of such a character that the jury would naturally and necessarily take" them to do so. *Id.*, ¶29.

2. The prosecutor's words were "manifestly intended" to be "adverse" or they were "of such character that the jury would naturally and necessarily" interpret them as such. *Id.*

3. "[T]he prosecutor's comments must not have been 'a fair response to a claim made by [the] defendant or his counsel.'" *Id.*

Here, the State made a remark in rebuttal that ran afoul of the principles these cases espouse. The State argued: "They were unable to say, It was not me, it did not happen."[3] (254:118; App. 22). Zimmerman, in other words, was "unable" to tell the jury that he wasn't the perpetrator or that the crime didn't happen. (254:118; App. 22). That is the natural and necessary reading of the State's remark. It constitutes a comment on Zimmerman's failure to testify, and it conveys that he remained silent because he was "unable" to testify to his innocence Because nothing in trial counsel's closing argument justified or invited this improper argument, it was a constitutional violation.

Trial counsel recognized the problem with the State's remark right away. Once the jury began deliberating, he told the circuit court he "nearly jumped out of [his] seat" when the State made its improper comment, but he prioritized "maintain[ing] courtroom decorum."

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[3] The word "They" at the beginning of this sentence is confusing. Did the State mean to convey that *no defense witness* could say, "It was not me"? Or, since there was only one person alleged to have committed any crime, did it mean to convey that *Zimmerman* was "unable to say, It was not me"? The sentence would make much more sense if it began with "He."

It is possible that the State *did* say "He" rather than "They"; this may be a transcription error. The evidence for that comes not just from the internal logic of the sentence but from the parties' arguments about it. They disputed whether the State said "unable" (the transcript reflects that it did), but no one disputed that the State's comment began with "He."

Whether or not the State started its sentence with "They," it acknowledged it was referring to Zimmerman, and the remainder of the sentence made that apparent.

(254:132; App. 36). He then sought a mistrial, citing both the burden shift and the Fifth Amendment violation that the State's comment encompassed. What he couldn't seek—because the moment had passed and the jury was already deliberating—was an instruction that the jury disregard the comment or a reinstruction on the relevant law (i.e., that the jury must not consider Zimmerman's silence as evidence of guilt).

The circuit court denied trial counsel's mistrial motion—perhaps unsurprisingly, as a mistrial is an extreme remedy, especially so late in the game. But a contemporaneous objection should have resulted in some lesser remedy, which would have offered some assurance that the jury's deliberations weren't tainted.

The circuit court suggested that a lesser remedy would have been an option, given a contemporaneous objection, when it implied that trial counsel's objection was tardy. It noted that, after counsel objected to the State's golden rule argument, it made clear that he could object again if needed. Since trial counsel didn't do so, the circuit court was left with a remedy it was unwilling to grant.

The objectively reasonable response when the State has the last word and makes unconstitutional comments is to object—right away. The objection might be paired with a particular request for a remedy, or for a sidebar to discuss the appropriate remedy. Or the circuit court might sustain a simple objection and decide on its own to direct the jury to disregard the State's last remark.

One way or another, a timely objection would have enabled the circuit court to address remarks that threatened to lead the jury astray. By declining to speak up until prompt intervention was off the table, trial counsel erred.

D. Trial counsel's deficient response to the State's unlawful rebuttal was prejudicial.

The basic question in the prejudice realm is whether, absent counsel's errors, it's reasonably probable that Zimmerman's trial would have had a different result. Importantly, the reasonable-probability standard is not high; Zimmerman need not show that a different result is more likely than not. *Strickland*, 466 U.S. at 693. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

Here, the precise impact of trial counsel's failure to seek immediate remedies during closing arguments is impossible to measure. But it's clear that counsel left the State's improper comments uncorrected. The jurors were never told that they should not, in fact, imagine themselves at 17 when assessing Bailey's credibility. The jury was not reminded, after the State remarked on Zimmerman's failure to testify or present firm evidence of his innocence, that Zimmerman had no obligation to testify or to prove his innocence by any means at all. And the jury was not reinstructed, after the State's unlawful commentary on his decision not to testify, that Zimmerman's silence could not be taken as proof of guilt—even though the State suggested it could. The jury's deliberations

were thus tainted by unlawful invitations from the State to find Zimmerman guilty for reasons other than the relevant evidence, rendering "[t]he result of [the] proceeding … unreliable, and … the proceeding itself unfair." *Id.* That is prejudice.

The trial evidence and the jury's eventual verdicts support this conclusion. This was not a trial in which the State's evidence overwhelmingly established Zimmerman's guilt. Indeed, the jury found Zimmerman not guilty of repeated sexual assault of a child, child enticement, and exposing a child to harmful material. It therefore appears the jury considered Bailey incredible: accepting even half her testimony as true would easily fulfill the elements of all the crimes charged.

Their skepticism was well-founded. Testimony established that Bailey had a reputation for lying, and that she was working to extricate herself from several difficult situations (and her home) when she made the allegations in question. Testimony established that Zimmerman had previously engaged in some of the conduct alleged here, but with a 17-year-old acquaintance; Bailey thus had a template to work from in making her claims against Zimmerman. (Notably, Zimmerman readily admitted to engaging in sexual conduct with the 17-year-old, and he entered a plea agreement in that case. Not so here.)

What's more, some of what Bailey testified to could not stand up to scrutiny. The affectionate letters she wrote to Zimmerman while he was in prison appear to have been penned by a much younger child than the unsent letter alluding to nefarious conduct, which Bailey

improbably claimed she'd drafted at the same time. And Bailey's insistence that she was sexually assaulted 365 times, even though that number contradicted the timeline she presented, was telling. When confronted with strong evidence that she was misremembering (or lying), Bailey dug her heels in. If she was so certain of her 365-assaults claim and it couldn't be right, what other aspects of her testimony were false—but less easily established as such?

Finally, while the guilty verdicts appeared largely tied to physical evidence (namely photos), that evidence wasn't ironclad either: the images were unclear and neither the male subject's face nor much of his body were depicted. A jury may also have been skeptical of the photos' provenance given that they weren't discovered when police searched Zimmerman's phone in 2015, and his phone was mysteriously damaged between that search and the one in 2019, when they *were* discovered.

The upshot is that the evidence was a mixed bag, and the jury did not deem the State's main witness wholly credible. There is a reasonable probability that adequately addressing the State's improper rebuttal arguments would have shifted the jury's assessment of the evidence just enough to lead to Zimmerman's acquittal on the photo-related counts, as well. It would not have been an open-and-shut defense case, but it would have been better—unmarred by improper considerations—and it may well have been good enough for not-guilty verdicts across the board. That, not certain (or even probable) victory, is all Zimmerman need establish to demonstrate prejudice.

III. Regardless of whether trial counsel was ineffective for belatedly objecting to the State's burden-shifting commentary on Zimmerman's silence at trial, that commentary warrants a new trial. The circuit court thus erred in denying Zimmerman's mistrial motion.

As discussed above, the State's "They were unable to say, It was not me" argument impermissibly shifted the burden of proof and violated Zimmerman's right not to testify. Trial counsel sought a mistrial on that basis, but the circuit court denied it, incorrectly finding that trial counsel was wrong about what the State said and that the rebuttal was "appropriate." This was error. Regardless of whether trial counsel's response to the argument was ineffective, reversal is warranted.

A circuit court has discretion to grant or deny a mistrial. *State v. Debrow*, 2023 WI 54, ¶15, 408 Wis. 2d 178, 992 N.W.2d 114. In exercising that discretion, it must determine, "in light of the entire facts and circumstances, whether . . . the claimed error is sufficiently prejudicial to warrant a mistrial." in light of the entire facts and circumstances, whether . . . the claimed error is sufficiently prejudicial to warrant a mistrial. This Court will review the circuit court's denial of Zimmerman's mistrial motion for an erroneous exercise of discretion, which "may arise from an error in law or from the failure of the circuit court to base its decisions on the facts in the record." *Id.*

Here, the circuit court didn't accurately recall what the State said in rebuttal—didn't remember the comments trial counsel was objecting to—and denied Zimmerman's mistrial motion based in part on a miscon-

ception about the State's phrasing. This factual error rendered the circuit court's exercise of discretion erroneous. *See id.* By contrast, a fair application of the law to the correct facts shows a mistrial was warranted.

After trial counsel insisted that he heard the State say Zimmerman "was unable to say, It wasn't me," the circuit court offered just a few sentences of explanation for denying his mistrial motion. (254:132-33; App. 36-37). It said: "I think the evidence speaks for itself. The jury was instructed that anything the attorneys say is simply that, argument. It's nothing more. *I don't believe that she [the State] characterized it the way that you [trial counsel] did.* I believe that she was appropriate in what she was saying." (254:133; App. 37 (emphasis added)).

There are three pieces to the circuit court's rationale: (1) it believed the evidence spoke for itself; (2) it believed the jury would grasp, based on the instructions it heard, that any impermissible commentary from the State was mere argument; and (3) it did not believe the State actually told the jury that Zimmerman "was unable to say, It was not me." (*See* 254:133; App. 37). None hold water.

First, what does it mean for evidence to speak for itself? Perhaps the circuit court concluded that the evidence was so black-and-white that counsels' arguments were irrelevant. If so, it was wrong: the evidence was murky, as set forth at length above, and as the mixed verdicts demonstrate.

Second, while the circuit court was right to note that jury instructions differentiate between evidence and argument—and convey that what attorney say is was

merely argument—both case law and common sense dictate that arguments can influence jurors' interpretation of evidence: that's why they're made. Indeed, the cases restricting what prosecutors may argue (including *Griffin*, *Neuser*, *DeLain*, and *Hoyle*[4]) are premised on the notion that an impermissible argument can infect a jury's deliberations and render a trial unfair.

The reason the circuit court declined to offer such an explanation is likely tied to the third component of its analysis: it didn't think the State had *made* an impermissible argument. Although the transcript shows that trial counsel was exactly right in his recitation of the State's burden-shifting commentary on Zimmerman's silence, the circuit court's own recollection didn't align with trial counsel's representations. The circuit court was mistaken. Its factual error does not support the exercise of discretion under review.

Thus, the circuit court erred. For the reasons enumerated in the ineffectiveness discussion above[5]—specifically regarding the *Strickland* prejudice prong—the unlawful rebuttal argument at issue infected Zimmerman's trial with unfairness and was sufficient "to warrant a mistrial." *Debrow*, 408 Wis. 2d 178 178, ¶15.

Because the circuit court's on-the-record explanation of its reasons for denying Zimmerman's mistrial motion do not evince "an appropriate process of reasoning," this Court should reverse and remand for a new trial regardless of its ineffectiveness ruling. *See id*., ¶18.

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[4] *See supra* pp. 40-44.

[5] *See supra* pp. 47-49.

IV. Trial counsel was ineffective for failing to identify and timely correct a significant error in the guilty-verdict form for Count 7.

There is no dispute that the words "possession of" were incorrectly inserted before "sexual exploitation of a child" on the Count 7 guilty verdict form. There is no question the error would have been corrected were the circuit court timely advised of the mistake. And the record makes clear that trial counsel failed to timely advise the circuit court of the mistake because he didn't notice it; he said as much at the *Machner* hearing.

While understandable, an oversight is not a reasoned strategy. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003). There can be little question that one of counsel's obligations at Zimmerman's jury trial was to review the documents the jury would use, and to check for any errors that might hurt his client's chances. By missing a clear error on the Count 7 guilty-verdict form, counsel performed deficiently. *See id.*

It is reasonably probable that correcting the verdict form error would have led the jury to a different conclusion about Count 7. The broader picture of the trial evidence, summarized above, is again relevant. But particularly crucial is the fact that the jury concluded that Zimmerman had, in fact, possessed child pornography on his phone. It found him guilty of doing so on three separate counts. By contrast, Zimmerman was acquitted of most of the non-possession counts. Absent the incorrect "possession of" language on the guilty verdict form,

Count 7 may have been on the acquittal side of the ledger. That's prejudice. *Strickland v. Washington*, 466 U.S. at 694.

The fact that jurors were instructed properly does not negate the prejudice inflicted by the verdict form error; sound instructions are not a cure-all. A juror may look to the title of the crime as a kind of summary, while the jury instructions delve into the details. And, indeed, the details of the jury instruction in question are in part consistent with a possession offense: the third element asked jurors whether Zimmerman "acted for the purpose of recording the sexually explicit conduct," with "recording" defined in part as "stor[ing] data representing an image or a sound." (154:13). That sounds a lot like possessing an image on a phone.

While jurors are presumed to follow instructions, that presumption is little help when they receive inconsistent information. It is trial counsel's obligation to prevent inconsistencies and ambiguities (assuming they're unfavorable). Doing so helps ensure a reliable result, while failing to do so enables a breakdown in the adversary system and casts doubt on the reliability of the jury's verdict. Because such doubt is present here, Zimmerman was prejudiced. *See Strickland*, 466 U.S. at 687. Regardless of how the Court rules on Zimmerman's rebuttal-based ineffectiveness claims, a new trial on Count 7 is warranted.

CONCLUSION

Zimmerman respectfully requests that this Court reverse the circuit court's postconviction order and remand with instructions to vacate the judgment of conviction, suppress the phone evidence, and hold a new trial.

Dated this 25th day of April, 2024.

Respectfully submitted,

Electronically signed by
Megan Sanders

Megan Sanders
State Bar No. 1097296

WISCONSIN DEFENSE INITIATIVE
411 West Main Street, Suite 204
Madison, WI 53703
megan@widefense.org
(608) 620-4881

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,977 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated and filed this 25th day of April, 2024.

Signed:

Electronically signed by Megan Sanders

Megan Sanders