STATE OF WISCONSIN

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

DISTRICT III

Case No. 2023AP1888-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN D. ZIMMERMAN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND A DECISION AND ORDER DENYING POSTCONVICTION RELIEF, EACH ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE JOHN F. MANYDEEDS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Ryan Zimmerman was convicted of several child sex crimes, including incest with a child by a step parent, possession of child pornography and sexual exploitation of a child after a jury found him guilty of those charges. Zimmerman now alleges he is entitled to a new trial for several reasons, none of which have merit.

First, the circuit court properly denied Zimmerman's pretrial motion to suppress evidence because no Fourth Amendment violation occurred by law enforcement's retention of Zimmerman's cell phone. The seizure of Zimmerman's phone was completed in 2015 when he consented to law enforcement seizing it during the investigation of a different sexual assault allegation. The police did not "seize" the phone again in 2019 when they took it out of evidence and sought Zimmerman's consent to search it again. The Fourth Amendment was simply no longer implicated by law enforcement's continued possession of Zimmerman's old cellphone.

Next, Zimmerman's various claims of ineffective assistance of counsel fail both prongs of the ineffectiveness test. Trial counsel properly objected to the State's attempted golden rule argument, and he articulated a reasonable strategic reason for forgoing an objection and instead waiting to move for a mistrial when the State allegedly commented on Zimmerman's silence. Further, while trial counsel mistakenly failed to correct an error on the verdict form for Count 7, he mitigated that mistake by moving for a mistrial before Zimmerman's sentencing. Zimmerman was also not prejudiced by any of counsel's alleged deficiencies. Zimmerman was acquitted of the charges that would have turned on Bailey's credibility and was convicted of the charges for which there was physical, photographic evidence. The photographic evidence and the testimony related to that

evidence belie any assertion that there was a reasonable probability of a different result.

Finally, the circuit court properly denied Zimmerman's motion for a mistrial. When read in context, the prosecutor's comment that "They were unable to say, It wasn't me, it did not happen" was a comment responding to trial counsel's characterization of Bailey's siblings' testimony and not a comment on Zimmerman's silence. Because there was not an error at all, there was no error sufficiently prejudicial as to warrant a mistrial.

Accordingly, this Court should affirm.

STATEMENT OF THE ISSUES[1]

1. Was Zimmerman's consent to search his phone in 2019 valid despite law enforcement retaining his phone from an investigation that began in 2015?

Answered by the circuit court: Yes.

This Court should answer: Yes.

2. Did Zimmerman receive ineffective assistance of counsel?

Answered by the circuit court: No.

This Court should answer: No.

3. Did the circuit court erroneously exercise its discretion when it denied Zimmerman's motion for a mistrial?

This Court should answer: No.

[1] The State addresses Zimmerman's ineffective assistance of counsel argument related to the verdict form in the general ineffective assistance section.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-settled precedent to the facts of the case.

STATEMENT OF THE CASE

In January of 2019, then-sixteen-year-old Bailey[2] "told two friends that [Zimmerman], her step[ ]father, sexually assaulted her two years ago." (R. 5:4.) After talking to Bailey's school counselor, Chief Dachel of the Fall Creek Police Department "forwarded the report to the [Eau Claire Sheriff's Office]." (R. 5:4.) Bailey participated in three forensic interviews at the Chippewa Valley Child Advocacy Center. (R. 5:4.) During those forensic interviews, Bailey described "graphic accounts of [Zimmerman] sexually assaulting [Bailey]" while Bailey was in fourth through seventh grade.[3] (R. 5:4.)

During the investigation into Bailey's allegations, Detective Henning learned that law enforcement was still in possession of Zimmerman's old cellphone, which Zimmerman consented to law enforcement seizing and searching during a prior sexual assault investigation in 2015. (R. 245:19.) Henning learned that there had been technological advancements in the ability to search cellphones since the

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[2] For the sake of consistency, the State uses the same pseudonym for the victim that Zimmerman uses in his brief.

[3] Zimmerman was acquitted of repeated sexual assault of a child and exposing a child to harmful materials. The State includes only those details necessary to provide the requisite background information related to the investigation and the charges of which the jury found Zimmerman guilty.

2015 investigation. (R. 245:18–19.) Upon locating Zimmerman's old cellphone, Henning called Zimmerman and asked him to come in for an interview regarding Bailey's allegations. (R. 245:19–20.) Zimmerman agreed, and during that meeting, Henning sought Zimmerman's consent to search his old cellphone. (R. 245:36–37; 70:6.) Zimmerman consented. (R. 245:36–37; 70:6.)

Law enforcement searched Zimmerman's old cellphone again and discovered four images of suspected child pornography. (R. 5:6.) During Bailey's second forensic interview, she identified herself in three of the four images and her mother in the other image. (R. 5:6.) The images that Bailey identified as depicting her showed the following: "a close up of a female that is placing her mouth on the tip of a penis"; "a nude female that is holding an erect penis with her left hand. . . . The female's body is visible from her mouth to her knee. She is kneeling between the male[']s spread legs"; and "a female that has the head of an erect penis in her mouth. The female is naked and kneeling between the man's spread legs." (R. 5:6.)

In a second interview with Zimmerman, Zimmerman "denied taking pictures, and denied having sex with [Bailey]." (R. 5:7.) Henning confronted Zimmerman with the images that Bailey identified herself in, and Zimmerman "stated, 'It really does look like it, yup" and "it's undeniable." (R. 5:7.)

The State charged Zimmerman with one count of repeated sexual assault of a child (Count 1), one count of incest with a child by a stepparent (Count 2), one count of child enticement (Count 3), three counts of possession of child pornography (Counts 4–6), one count of sexual exploitation of a child (Count 7), and one count of exposing a child to harmful material (Count 8). (R. 96.)

Pretrial, Zimmerman moved to suppress the evidence derived from the search of his old cellphone. (R. 49.) He

claimed that his consent was invalid because "the pressures of the questioning overcame Zimmerman's will and self-determination" and "the consent was obtained after prior illegal police conduct." (R. 49:2.) After several hearings, the circuit court denied Zimmerman's motion to suppress. (R. 245:92.)

Zimmerman's case proceeded to trial. At trial, the jury heard testimony from Detective Nocchi, who conducted the 2019 search of Zimmerman's old cellphone; Bailey; Bailey's mother; Bailey's siblings and stepsiblings; and Henning, among others. The jury ultimately found Zimmerman not guilty of Counts 1, 3 and 8. (R. 153; 152; 151; 146.) It found him guilty of Counts 2 and 4–7. (R. 147–50.)

After trial, Zimmerman's trial counsel noticed an error on the guilty verdict form for Count 7. (R. 224.) The guilty verdict form erroneously stated that the offense was "possession of sexual exploitation of a child." (R. 147; 224:1.) The offense was correctly phrased the second time it appeared on the guilty form and it was correctly phrased both times on the not guilty form. (R. 147.) Counsel moved for a mistrial, arguing that the inclusion of "possession of" on the guilty verdict form prejudiced Zimmerman. (R. 224:2–3.) The circuit court denied the motion at sentencing. (R. 235:6.)

Zimmerman thereafter filed a postconviction motion, alleging several claims of ineffective assistance of counsel. (R. 274.) Zimmerman argued that trial counsel performed deficiently by: (1) not seeking a remedy after objecting to the State's attempted golden rule argument during rebuttal; (2) not objecting to an alleged comment on Zimmerman's silence during rebuttal and instead waiting to move for a mistrial outside the presence of the jury; and (3) did not identify and correct the error on the guilty verdict form for Count 7. (R. 274:19–29.) As discussed in more detail below, trial counsel testified at a *Machner* hearing, explaining his strategy surrounding the challenged statements in the State's

rebuttal and explaining what happened with the verdict form. Following the *Machner* hearing, (R. 287), the circuit court denied Zimmerman's postconviction motion, (R. 295).

Zimmerman appeals.

STANDARDS OF REVIEW

Fourth Amendment

"Whether evidence should have been suppressed is a question of constitutional fact." *State v. VanBeek*, 2021 WI 51, ¶ 22, 397 Wis. 2d 311, 960 N.W.2d 32. This Court will uphold a circuit court's factual findings unless clearly erroneous, and it independently applies those facts to constitutional principles. *Id.*

Ineffective Assistance of Counsel

"Whether a defendant was denied effective assistance of counsel is a mixed question of law and fact." *State v. Savage*, 2020 WI 93, ¶ 25, 395 Wis. 2d 1, 951 N.W.2d 838 (citation omitted). This Court upholds the circuit court's findings of fact unless they are clearly erroneous. *Id.* "However, whether counsel's performance was deficient and whether a defendant was prejudiced thereby, present questions of law that [this Court] review independently." *State v. Reinwand*, 2019 WI 25, ¶ 18, 385 Wis. 2d 700, 924 N.W.2d 184 (citation omitted).

Mistrials

"The denial of a motion for mistrial will be reversed only on a clear showing of erroneous use of discretion." *State v. Ford*, 2007 WI 138, ¶ 29, 306 Wis. 2d 1, 742 N.W.2d 61.

ARGUMENT

I. There was no Fourth Amendment violation when Zimmerman consented to police searching his cellphone in this case.

Police originally possessed Zimmerman's cellphone after lawfully seizing it in 2015. During the investigation into Bailey's allegations, Henning informed Zimmerman that they still had his cellphone from the 2015 investigation. Henning provided Zimmerman with a consent form, which Zimmerman signed, permitting law enforcement to search his phone again in connection with Bailey's allegations. (R. 245:36–37; 70:6.)

Pre-trial, Zimmerman moved to suppress the evidence uncovered in the search of his cellphone, arguing that his consent was involuntary because "the pressures of the questioning overcame Zimmerman's will and self-determination," and "the consent was obtained after prior illegal police conduct." (R. 49:2.)

On appeal, Zimmerman argues only the second issue: whether the officer's continued retention of Zimmerman's phone effectuated an unlawful seizure, which, in turn, rendered his consent involuntary. (Zimmerman's Br. 33–38.) Citing *United States v. Place*, 462 U.S. 696, 709–10 (1983), Zimmerman argues that law enforcement's continued possession of his cell phone after the conclusion of his prior criminal case rendered the once lawful seizure of his effects unconstitutional. (Zimmerman's Br. 34–35.) Specifically, according to Zimmerman, "by the time Henning requested Zimmerman's consent to search his phone a second time, [the phone's] continued seizure was unlawful." (Zimmerman's Br. 34.)

Zimmerman is not entitled to suppression of any evidence uncovered from the search of his phone. As an initial matter, it is important to note that Zimmerman *does not*

argue that his consent was involuntary for any reason other than the alleged unreasonableness of the subsequent "seizure"—i.e., the police still having his cellphone after seizing it in 2015. In fact, he has affirmatively abandoned any other arguments that his consent was invalid. (Zimmerman's Br. 35 n.2.) So, as long as law enforcement's continued possession of his phone did not implicate the Fourth Amendment, which it didn't, his consent was valid, and suppression is unwarranted.

Zimmerman's argument here fails because the Fourth Amendment was simply not implicated by law enforcement's continued possession of his cellphone.

"[T]he Fourth Amendment protects an individual's interest in retaining possession of property but not the interest in regaining possession of property." *Fox v. Van Oosterum*, 176 F.3d 342, 351 (6th Cir. 1999). Accordingly, "[o]nce [an] act of taking property is complete, the seizure has ended and the Fourth Amendment no longer applies." *Id.*; *see also Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003) (relying on *Fox* to reject the notion that continued possession of once lawfully seized property implicates the Fourth Amendment). While the *Fox* and *Lee* litigants sought to invoke the Fourth Amendment to redress the damage from law enforcement's failure to return their property, the principles of those cases should apply equally here.

The only seizure that occurred was in 2015 when Zimmerman initially consented to the search of his cellphone. There is no evidence that Zimmerman ever withdrew that consent. Quite the opposite, actually—he consented to the phone being searched a second time. Therefore, the initial seizure never became invalid. *See Lee*, 330 F.3d at 464–65 (discussing cases in which withdrawing consent may or may not result in a continued seizure becoming unreasonable). In turn, the "act of taking property [was] complete" and "the seizure . . . ended" in 2015. *Fox*, 176 F.3d at 351.

Under *Lee*, Zimmerman could not have invoked the Fourth Amendment to effect the return of his cellphone, *Lee*, 330 F.3d at 465–66, and he should not be permitted to invoke it now to transform an indisputably valid seizure into an unreasonable one merely because the cellphone he never asked law enforcement to return was possessed by law enforcement at the time of the current investigation. Indeed, he cites no authority for the proposition that continued possession of a consensually seized piece of property becomes an unreasonable seizure absent withdrawal of consent. *See id.* at 464–65 (noting that a seizure based on consent may become unreasonable if the consent is withdrawn).

Instead, Zimmerman relies generally on *Place* for the idea that a once reasonable seizure can become unreasonable with the passage of time. (Zimmerman's Br. 34–35.) But Zimmerman's reliance on *Place* is unavailing. Zimmerman's argument here is reminiscent of Lee's argument that "the Supreme Court's holding in *United States v. Place* broadly proposes that upon changed circumstances over time, a seizure of property that began as reasonable can become unreasonable." *Lee*, 330 F.3d at 464. But just as in *Lee*, Zimmerman's argument "betrays the narrow confines of [*Place*'s] holding, which is limited to brief investigative detentions of property on less than probable cause." *Id.*

As the Seventh Circuit explained, "*Place* held that an officer who can articulate a reasonable suspicion that property may be involved in a crime may act to detain that property in order to conduct further investigation." *Id.* Zimmerman does not contend that the initial seizure of his cellphone was a brief, *Terry*-style seizure for investigative purposes. "*Place* and its progeny deal *only* with the transformation of a momentary, investigative detention into a seizure," and *Place* is therefore inapposite. *Id.*

At bottom, Zimmerman's argument fails because "the Fourth Amendment no longer applie[d]" to law enforcement's

continued possession of Zimmerman's phone. *Fox*, 176 F.3d at 351. Said differently, the police did not "seize" Zimmerman's old cellphone a second time in 2019.[4] Accordingly, there was no unreasonable seizure at the time that Henning sought Zimmerman's consent. And, because he does not otherwise argue that his consent was invalid, Zimmerman's consent to law enforcement searching his phone and the subsequent search were constitutional. This Court should affirm the circuit court's pretrial decision denying Zimmerman's motion to suppress.

II. Zimmerman did not receive ineffective assistance of counsel.

A. Defendants face a heavy burden to demonstrate ineffective assistance of counsel.

Criminal defendants have a constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove that trial counsel was ineffective, a defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Id.* at 687. A defendant must show both deficient performance and prejudice to succeed on a claim of ineffective assistance of counsel. *Id.* If a defendant fails to show either, the inquiry stops. *Id.* "Surmounting

[4] Because there was no second seizure that could be deemed unreasonable, there is no need to balance "the nature and quality of the intrusion on the individuals' Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *State v. Sveum*, 2010 WI 92, ¶ 54, 328 Wis. 2d 369, 787 N.W.2d 317 (citation omitted); *see also State v. Arias*, 2008 WI 84, ¶ 47, 311 Wis. 2d 358, 752 N.W.2d 748 (conducting the governmental interest versus private interest balancing test to determine the reasonableness of a *seizure*).

Strickland's high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

To prove deficient performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. However, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "[T]here is a strong presumption that trial counsel's conduct 'falls within the wide range of reasonable professional assistance.'" *State v. Breitzman*, 2017 WI 100, ¶ 38, 378 Wis. 2d 431, 904 N.W.2d 93 (citation omitted). And "[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). "[A] court looks to whether the attorney's performance was *reasonably* effective considering all the circumstances." *State v. Balliette*, 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334 (emphasis added).

To prove prejudice, a defendant "must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" *State v. Domke*, 2011 WI 95, ¶ 54, 337 Wis. 2d 268, 805 N.W.2d 364 (citations omitted). Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "[R]eviewing courts are instructed to consider the totality of the evidence before the trier of fact." *State v. Johnson*, 153 Wis. 2d 121, 129–30, 449 N.W.2d 845 (1990).

B. Zimmerman has not overcome his burden to prove that he received ineffective assistance of counsel.

1. Counsel did not perform deficiently.

Zimmerman accuses his trial counsel of performing deficiently in three regards. First, he claims that trial counsel performed deficiently for objecting to, but not seeking a remedy for, the State's almost golden rule argument. (Zimmerman's Br. 40–42.) Second, and on the other side of the coin, Zimmerman argues that trial counsel performed deficiently for not objecting to, but later seeking a mistrial for, the State's alleged comment on Zimmerman's decision to not testify. (Zimmerman's Br. 42–47.) Finally, Zimmerman claims counsel performed deficiently for failing to correct the verdict form for Count 7 before the verdict form went back to the jury. (Zimmerman's Br. 53.) Counsel did not perform deficiently in any regard.

a. The golden rule objection

"In a criminal case, a golden rule argument 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. "These statements are not allowed because they appeal to the jurors' sympathy for persons who have been injured or victimized by a crime." *Id.* As it relates here, during closing, the State began to say, "Now think about [Bailey], 17 years old, a girl. Remember when you were 17 years old. Did you- - . " (R. 254:115.) Before the State could ask what would appear to be the golden rule question, trial counsel objected, citing the golden rule. (R. 254:115.) The parties went into chambers for a sidebar, and when they returned, the State's closing continued without any golden rule related arguments.t (R. 254:115–16.)

Zimmerman claims that trial counsel performed deficiently by not asking for a remedy after already objecting. (Zimmerman's Br. 41.) To be clear, Zimmerman is not arguing that defense counsel failed to object or failed to object with the requisite specificity. Instead, Zimmerman takes issue only with trial counsel's decision to not take the objection a possible step further by asking for a curative instruction or moving for a mistrial. (Zimmerman's Br. 41.) He asserts that doing so was the "necessary next step." (Zimmerman's Br. 41.) Zimmerman essentially claims that trial counsel's objection was too little too late because "the State led the jury in an improper direction, . . . invit[ing] 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." (Zimmerman's Br. 41.)

The problem with Zimmerman's argument, though, is that trial counsel did all that was constitutionally necessary to prevent a potential golden rule argument from the State. Indeed, despite Zimmerman's contention that the damage was done, counsel stopped the State *before* it could contextualize its comment and invite the jury 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." (Zimmerman's Br. 41.) Because of trial counsel's timely objection, all the State could say was, "Remember when you were 17 years old. Did you - -"—the prosecutor said nothing more. (R. 254:115.)

Tellingly, Zimmerman argues that counsel "*could have* asked the circuit court" for the remedies he also argues were "necessary." (Zimmerman's Br. 41.) But "*Strickland* does not guarantee perfect representation, only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (citation omitted). "[T]here is no expectation that competent counsel will be a flawless strategist or tactician." *Id.* So, regardless of whether a reasonable attorney, in

hindsight, could have sought a remedy after objecting, it was not objectively unreasonable for trial counsel to object and stop the attempted golden rule argument in its tracks and deem that resolution sufficient.

Because Zimmerman cannot demonstrate that only objecting instead of objecting and seeking a curative instruction or a mistrial was not "an approach that no competent lawyer would have chosen." *Dunn v. Reeves*, 594 U.S. 731, 739 (2021).

b. The mistrial motion

Still during the State's rebuttal, the prosecutor made the following comment:

> [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.

(R. 254:118.)

Trial counsel did not object to that comment, but he moved for a mistrial when the jury was dismissed for deliberations. (R. 254:130–31.) When counsel moved for a mistrial, he explained that he believed the State "shifted the burden to the Defense" when the prosecutor "talked about . . . the interviews with Ryan Zimmerman, and she told the jury that he was unable to say, It wasn't me." (R. 254:130.) Trial counsel explained that he thought the argument "suggest[ed] to the jury that . . . 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." (R. 254:130–31.)

Counsel explained that he did not object because the parties "had talked in [their] sidebar to [counsel's] previous objection, and for reasons that had been discussed with that sidebar, the [c]ourt doesn't like objecting in closing arguments." (R. 254:131.) Counsel stated that he "wanted to

give [the State] the courtesy of finishing their closing argument, but [he] wanted to make [his] objection known to the [c]ourt now." (R. 254:131.) The circuit court reminded counsel that "what I had instructed you was that if there was a need to object, you should object. . . . I wasn't cutting you off from objecting completely, but I wanted to make sure that there was a basis for it." (R. 254:131–32.)

The circuit court denied a mistrial. It reasoned that "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 she characterized it the way that you did. I believe that she was appropriate in what she was saying." (R. 254:133.)

Zimmerman argues that counsel performed deficiently because he did not object during closing and instead waited to ask for a mistrial outside the presence of the jury. (Zimmerman's Br. 46.) According to Zimmerman, it is "perhaps unsurprising" that the circuit court denied counsel's motion for a mistrial "so late in the game," and "a contemporaneous objection . . . would have offered some assurance that the jury's deliberations weren't tainted." (Zimmerman's Br. 46.) He goes on to speculate, without any citation to the record, that "[t]he 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." (Zimmerman's Br. 46.) Zimmerman's argument is wrong for two reasons.

First, counsel offered a valid strategic reason for not objecting again during the State's rebuttal. It is true that *part* of counsel's justification was that he thought the circuit court did not want interruptions to closing arguments. (R. 254:131.) It is equally true, however, that counsel explained at the *Machner* hearing that he did not object in part because he "didn't . . . want to make another big objection and bring the attention to that." (R. 287:13.) "A competent trial strategy

frequently is to mitigate damaging evidence by allowing it to come in without drawing additional attention to it, such as an objection would." *Hardamon v. United States*, 319 F.3d 943, 949 (7th Cir. 2003). Trial counsel's decision to forego an objection and instead wait to move for a mistrial outside the presence of the jury was therefore not objectively unreasonable.

Second, as he does for his first claim of ineffective assistance, Zimmerman appears to simply assume that the circuit court would have sustained an objection or granted a request for a burden of proof reminder instruction. (Zimmerman's Br. 46.) As noted above, Zimmerman claims that the circuit court "suggested that a lesser remedy would have been an option," but he cites nothing in the record to support that assertion. (Zimmerman's Br. 46.) All the circuit court did was put on the record that counsel *could have* objected again if there was a basis for the objection. (R. 254:132.) What the circuit court did not do, however, was suggest that it would have granted any sort of lesser remedy. Instead, when it denied counsel's motion for a mistrial, the circuit court expressly concluded that the State's comment was not as Zimmerman characterized it. In fact, as discussed below, the prosecutor's comment was not one related to Zimmerman's silence at all;[5] objecting before moving for a mistrial would have therefore been pointless. In turn, trial counsel cannot be faulted for failing to raise a losing argument in the first instance. *State v. Jacobsen*, 2014 WI App 13, ¶ 49, 352 Wis. 2d 409, 842 N.W.2d 365 ("An attorney does not perform deficiently by failing to make a losing argument.").

c. The erroneous verdict form

Count 7 of the fourth amended information charged Zimmerman with sexual exploitation of a child. The guilty

[5] Section III., *infra*.

verdict form for Count 7 erroneously stated "We, the jury, find the defendant, Ryan D. Zimmerman, GUILTY of *Possession of* Sexual Exploitation of a Child, as charged in the seventh count of the Information." (R. 147.) The error apparently went unnoticed by trial counsel, the State, and the circuit court. The charge was correctly titled in the next line of the verdict form, was correct on the not guilty verdict form, and the circuit court correctly instructed the jury on the elements of the charge. (R. 147; 254:57–59.)

Zimmerman argues that trial counsel performed deficiently because he did not catch the error on the verdict form before it was submitted to the jury. (Zimmerman's Br. 53.) While it is true that trial counsel missed the error during trial, when trial counsel noticed the error before sentencing, he moved for a mistrial. (R. 224.) In the motion, he articulated the same basis for prejudice that Zimmerman argues on appeal. (R. 224:2–3.)

While it was certainly not perfect advocacy to not notice or correct the verdict form during trial and before the form was submitted to the jury, the constitution does not require guarantee perfect representation. *Richter*, 562 U.S. at 110 ("*Strickland* does not guarantee perfect representation, only a 'reasonably competent attorney.'"). To that end, upon noticing the error in the verdict form trial counsel made a reasonably competent decision to move for a mistrial before Zimmerman's sentencing. *See id.* Accordingly, despite counsel's mistake in not noticing the error in the verdict form, he did not perform deficiently, and this final claim of ineffective assistance fails as well.

2. Zimmerman cannot prove prejudice.

Regarding prejudice, "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Richter*, 562 U.S. at 111 (citation omitted). "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.'" *Id.* at 111–12 (citation omitted). Indeed, "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. Further, assessing prejudice in multi-count trials like Zimmerman's is "count-specific." *State v. Sholar*, 2018 WI 53, ¶ 37, 381 Wis. 2d 560, 912 N.W.2d 89. This is because "*Strickland* acknowledges that some factual findings will be altogether unaffected by defense counsel's error." *Id.*

a. The golden rule objection and the mistrial motion

Looking at the jury's verdicts, it is entirely unclear how there is a reasonable probability of a different result if counsel had sought a remedy after objecting to the almost golden rule argument or objected before seeking a mistrial on the alleged comment on Zimmerman's silence.

As the circuit court recognized in its oral ruling denying Zimmerman's postconviction motion, Zimmerman was acquitted of the charges that would have turned on Bailey's credibility. (R. 295:5–6.) Zimmerman was charged with one count of repeated sexual assault of a child (Count 1), one count of incest with a child by a stepparent (Count 2), one count of child enticement (Count 3), three counts of possession of child pornography (Counts 4–6), one count of sexual exploitation of a child (filming) (Count 7), and one count of exposing a child to harmful materials (Count 8). The jury found Zimmerman not guilty of Counts 1, 3, and 8—the counts for which there was no physical evidence (i.e., pictures). Conversely, it found him guilty of Counts 2 and 4–7, the charges for which there *was* photographic evidence.

The jury saw Exhibits 2 through 4, which formed the basis for Counts 2 and 4 through 7. (R. 249:149.) The jury heard testimony from Detective Nocchi who explained that he

recognized Bailey in the photos when he extracted them from Zimmerman's phone. (R. 249:158.) Bailey testified that it was her in the photos. (R. 249:177–78.) The jury heard testimony from Henning, who explained that he compared the photos in Exhibits 2 through 4 to photos that Zimmerman had of his wife to differentiate the subjects in the photos. (R. 248:142–49.) The jury heard Zimmerman's interview with Henning wherein he admitted that it did look like Bailey in the photos. (R. 248:152.)

In turn, while Bailey did testify that it was her in the photos, the jury's assessment of whether Zimmerman had sexual contact with Bailey (Count 2), possessed child pornography (Counts 4–6), and recorded his sexual contact with Bailey (Count 7), did not turn primarily on Bailey's credibility or Zimmerman's denial or lack of recollection. Instead, the assessment turned on the physical evidence produced by the State and the testimony surrounding that evidence, including the testimony from the detectives who recognized Bailey in the photos. In other words, the factual findings required to find Zimmerman guilty of Counts 2 and 4–7 were "altogether unaffected by defense counsel's [alleged] error[s]." *Sholar*, 381 Wis. 2d 560, ¶ 37.

Attempting to show prejudice, Zimmerman merely speculates that "the jury may have been skeptical of the photos' provenance" and "[t]here 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." (Zimmerman's Br. 49.) He does not, however, address how the prosecutor's comments contributed to the supposed skepticism as to the photo-related counts in any meaningful way. Zimmerman does not explain how the almost golden rule argument or the alleged comment on his silence, both of which were argument that the jury was

instructed was not evidence, was sufficient to undermine the physical evidence against him on Counts 2 and 4–7.

Zimmerman's argument, at most, demonstrates that counsel's alleged errors "'had some conceivable effect on the outcome' of his trial." *State v. Erickson*, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999) (citation omitted). But that is insufficient to prove prejudice, especially given the physical evidence supporting the jury's verdicts on Counts 2 and 4–7. *Id.* At bottom, Zimmerman "can only speculate" as to the effect of the State's allegedly improper comments during rebuttal. *Id.* at 774. But Zimmerman must "offer more than rank speculation to satisfy the prejudice prong." *Id.* He has not, and he has therefore failed to meet his burden to prove prejudice.

b. Count 7 verdict form

On this issue, Zimmerman's prejudice argument fails because he does not examine the totality of the evidence before the jury, and he does not overcome the presumption that jurors follow instructions provided by the circuit court.

Zimmerman's entire prejudice argument on this issue is as follows:

> 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.

(Zimmerman's Br. 53–54.) That conclusory paragraph is insufficient to meet his burden.

Zimmerman is absolutely right that "particularly crucial is the fact that the jury concluded that Zimmerman had, in fact, possessed child pornography on his phone." (Zimmerman's Br. 53.) What Zimmerman fails to acknowledge, however, is that the child pornography that the jury found him guilty of possessing was *of Bailey*. The fact that it was Bailey depicted in the photographs directly ties Count 7 to Counts 4–6. As the State explained in closing, "Count 7 is the sexual exploitation of a child count, and that count is for [Zimmerman] actually recording [Bailey] engaged in this sexually explicit conduct. So it's for [Zimmerman] *actually creating* the pictures that are the subject of Counts 4, 5, and 6." (R. 254:80 (emphasis added).) In other words, Zimmerman sexually exploited Bailey, which resulted in him possessing the three pieces of child pornography.

Examining the totality of the evidence related to Counts 4–7 demonstrates that there is no reasonable probability of a different result absent the error in the verdict form.

The State introduced and published Exhibits 2 through 4, which formed the basis for the child pornography charges during Detective Nocchi's testimony. (R. 249:149.) Detective Nocchi testified that he informed Henning about the photographs that he found during the forensic examination of Zimmerman's phone because he "became aware of what [Bailey] looked like, . . . and so [he] was able to see what [he] believed to be her at that time" in the photos. (R. 249:158.)

The State had Bailey look at Exhibits 2 through 4 and describe what they depicted. Looking at State's Exhibit 2, Bailey testified that the photograph depicted her "on top of [Zimmerman] rubbing his penis with [her] hand." (R. 249:177.) She testified that she knew it was her based on "the way [her] body is," and specifically the size of her breasts. (R. 249:177.) Regarding State's Exhibit 3, Bailey testified that the photograph depicted "a deck of cards and . . . [her] eyes." (R. 249:177.) She testified that the picture also depicts her

"[s]ucking on [Zimmerman's] penis." (R. 249:177.) Bailey explained that she knew it was Zimmerman in the picture because he took the picture. (R. 249:177.) Finally, regarding State's Exhibit 4, Bailey testified that the image depicted her "sucking on [Zimmerman's] penis." (R. 249:178.) She explained that she knew it was her in the picture based on "the way of [her] nose" and knew it was Zimmerman based on "the shape of his body." (R. 249:178.)

Henning testified to the comparative analysis he undertook to determine the differences between images that Zimmerman had of his wife and the images in Exhibits 2 through 4. He testified to the difference in the bodies of the females in the images, the lack of a wedding ring in Exhibits 2 through 4, and the absence of the pendant necklace that Zimmerman's wife was consistently seen wearing in photographs on Zimmerman's phone. (R. 248:140–49.) The jury saw Zimmerman's recorded interviews where Henning confronted him with the information that Bailey identified herself in the photographs. The jury heard Zimmerman in that interview say that "it does absolutely look like her. I see it," "[t]hat really looks like it, yep," and "I do absolutely see what you're saying there I mean it's undeniable." (R. 167:3–4.)

Based on the above evidence, the jury had all that it needed to determine whether Zimmerman "record[ed] or display[ed] in any way a child engaged in sexually explicit conduct with knowledge of the character and content of the sexually explicit conduct involving the child." Wis. JI–Criminal 2121 at 1 (2020). The fact that the verdict form erroneously included the words "possession of child exploitation" would not have overcome the evidence that Zimmerman did in fact record Bailey engaged in sexually explicit conduct, which was shown by Exhibits 2 through 4. Accordingly, there is no reasonable probability of a different result even if counsel had caught and corrected the verdict

form prior to it being submitted to the jury based on the totality of the evidence.

Finally, any potential prejudicial effect of the error on the verdict form was cured by the circuit court's instructions, which correctly informed the jury of the elements of sexual exploitation of a child. This Court presumes that juries follow the instructions of the court, and that presumption should not be overcome absent overwhelming evidence that the jury was unable to follow the instructions as given. *United States v. Puckett*, 405 F.3d 589, 599 (7th Cir. 2005) (noting that the presumption that juries follow instructions can be overcome only by "an '*overwhelming* probability' that the jury was unable to follow the instructions as given" (emphasis added) (citations omitted)). A single typographical error, which, importantly, was not present on the not guilty verdict form, is not sufficient to overcome the presumption that the jury followed the court's instructions of the offense.

III. The circuit court properly exercised its discretion when it denied Zimmerman's motion for a mistrial.

Zimmerman contends that, the claim of ineffective assistance aside, the circuit court erred when it denied his motion for a mistrial relating to the prosecutor's comment that "they were unable to say it wasn't me, it did not happen." Zimmerman is wrong because the alleged error was (a) not an error at all and (b) not sufficiently prejudicial to warrant a mistrial.

"When faced with a motion for mistrial, 'the circuit court must decide, in light of the entire facts and circumstances, whether . . . the claimed error is sufficiently prejudicial to warrant a mistrial.'" *State v. Debrow*, 2023 WI 54, ¶ 15, 408 Wis. 2d 178, 992 N.W.2d 114 (alteration in original) (citation omitted). However, "not all errors warrant a mistrial," and the law favors less-extreme alternatives when

they are applicable and practical. *State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998). A circuit court "is in the best position to determine the seriousness of the incident in question." *United States v. Clarke*, 227 F.3d 874, 881 (7th Cir. 2000). "The denial of a motion for mistrial will be reversed only on a clear showing of erroneous use of discretion." *Ford*, 306 Wis. 2d 1, ¶ 29. "An erroneous exercise of discretion may arise from an error in law or from the failure of the circuit court to base its decision on the facts in the record." *Debrow*, 408 Wis. 2d 178, ¶ 15 (citation omitted).

Here, Zimmerman claims he was entitled to a mistrial because the State violated his right to silence during its rebuttal argument. (Zimmerman's Br. 45–46, 52.) "'[D]etermin[ing] whether a defendant's Fifth Amendment privilege against compulsory incrimination [has been] violated,' . . . involves 'the application of constitutional principles to facts,' which [this Court] review[s independently]." *State v. Hoyle*, 2023 WI 24, ¶ 15, 406 Wis. 2d 373, 987 N.W.2d 732 (citations omitted) (third alteration in original).

This Court employs a three-pronged test to determine whether the State violated a defendant's right to silence. *Id.* ¶ 29. "First, the prosecutor's language must have been 'manifestly intended to be' or was 'of such character that the jury would naturally and necessarily take it to be' a 'comment on the failure of the [defendant] to testify.'" *Id.* (citation omitted). "Second, the prosecutor's language must have also been 'manifestly intended to be' or was 'of such a character that the jury would naturally and necessarily take it to be' 'adverse,' meaning comment[ing] 'that such silence is evidence of guilt.'" *Id.* (citation omitted). "Finally, the prosecutor's comments must not have been 'a fair response to a claim made by the defendant or his counsel.'" *Id.* (citation omitted)

Zimmerman cannot succeed under any of *Hoyle*'s requirements.

First, it is important to look at the prosecutor's statement in context. *Id.* ¶¶ 33–38 (examining the context of the trial and the prosecutor's comment to determine whether it met the first prong of the test). The paragraph immediately preceding the challenged comment, the prosecutor signaled to the jury that she was addressing witness credibility: "Let's talk about credibility." (R. 254:117.) She then compared the answers of Bailey's stepbrother and brother during their testimony with Bailey's during hers. (R. 254:117.) In the sentence preceding the challenged comment, the prosecutor noted, "throughout this trial you have heard testimony about I do not recall, I have no clue, I cannot remember, or I disagree." (R. 254:118.) Then, the prosecutor said, "*They* were unable to say, It was not me, it did not happen." (R. 254:118 (emphasis added).)

Looking at the full context of the prosecutor's statement, the comment was not "'manifestly intended to be' or was 'of such a character that the jury would naturally and necessarily take it to be' a 'comment on the failure of the defendant to testify.'" *Hoyle*, 406 Wis. 2d 373, ¶ 29 (citation omitted). Instead, it appears that the prosecutor merely used the wrong pronoun for the context. Contextually, the comment was more likely related to the testimony of Bailey's stepbrother and brother, making the correct pronoun "him" instead of "me".

During his testimony, Bailey's stepbrother repeatedly said he "disagree[d] 100 percent" or "[d]isagree[d] entirely." (R. 254:6–7.) He also said he "d[idn't] really remember 100 percent" whether he played on Zimmerman's phone when he was younger. (R. 254:8.) Similarly, Bailey's brother testified that he did not remember how long he lived at the Otter Creek Road house and did not remember any sexual assaults

happening on the bottom bunk of the bunk bed that he shared with Bailey. (R. 254:17–18.)

The testimony from Bailey's siblings is consistent with the sentence that immediately preceded the challenged comment where the prosecutor commented, "throughout this trial you have heard testimony about I do not recall, I have no clue, I cannot remember, or I disagree." (R. 254:118.) Contextually, then, the "they" that followed was more likely about Bailey's siblings who, although they said they disagreed with the allegations or did not remember the events that led to the allegations occurring, "they were unable to say, It was not" Zimmerman or "it did not happen." So, although the prosecutor said, "they were unable to say, It was not *me*," in context, "him" appears to be more accurately what the prosecutor meant. Accordingly, the comment was a statement relating to Bailey's siblings' testimony, and not one that was manifestly intended or would have otherwise been understood to be related to Zimmerman's decision not to testify.

Zimmerman cannot demonstrate the second prong, either. Because the statement was not about Zimmerman's choice to not testify at all, it could not have been manifestly intended to or of such a character that the jury would necessarily understand it to mean that Zimmerman was guilty.

Finally, the prosecutor's comment on rebuttal was a fair response to Zimmerman's closing argument. During closing, Zimmerman's trial attorney argued that Bailey's siblings "were witnesses to[o]." (R. 254:89.) Counsel argued that Bailey's stepbrother "told you that didn't happen. I never saw that." (R. 254:89.) Similarly, according to trial counsel, Bailey's brother "told you that never happened." (R. 254:89.) Trial counsel finished this line of argument with "[Bailey's stepbrother and brother] said it didn't happen, and the physical evidence shows that it didn't happen." (R. 254:89.) Looking at that argument, the prosecutor's comment during

rebuttal makes much more sense. She argued that Bailey's siblings testified that they disagreed, couldn't remember, or couldn't recall—they never actually testified, as trial counsel intimated, that Zimmerman did not commit the alleged assaults or that they did not happen.

Because the prosecutor did not impermissibly comment on Zimmerman's silence, the circuit court properly denied Zimmerman's motion for a mistrial. After all, if no error occurred, that claimed error cannot be sufficiently prejudicial to warrant a mistrial. *See, e.g., State v. Grady*, 93 Wis. 2d 1, 12–13, 286 N.W.2d 607 (Ct. App. 1979) (circuit court did not erroneously deny motion for a mistrial where claimed error was not actually an error).

Beyond a mistrial being a legally unavailable remedy for an error that did not occur, the circuit court's reasoning was sound. It noted that "the evidence speaks for itself." (R. 254:132–33.) As shown above, that is true; the evidence spoke for itself in the sense that neither of Bailey's siblings testified that it was not Zimmerman that committed the assaults or that the assaults did not happen. The circuit court also noted that it instructed the jury that the attorneys' arguments were only argument and not evidence. (R. 254:132.) Not only did the circuit court instruct the jury that the attorneys' arguments are nothing more than argument, but it also instructed the jury that Zimmerman has the absolute right to not testify and that "the [d]efendant's decision to not testify must not be considered by you in any way and must not influence your verdict in any manner." (R. 254:67, 70.) Zimmerman has not overcome the presumption that the jury follows instructions. Finally, because the prosecutor's comment was not one related to Zimmerman's silence, the circuit court was correct to disagree with trial counsel's characterization of the comment. (R.254:132.)

In sum, the prosecutor's comment was not related to Zimmerman's silence; instead, it was responding to trial counsel's closing argument about and addressing the character of Bailey's siblings' testimony. The circuit court therefore properly exercised its discretion because "[t]here was no prejudicial error sufficient to warrant a mistrial." *Grady*, 93 Wis. 2d at 13.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated this 24th day of July 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,803 words.

Dated this 24th day of July 2024.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

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

Dated this 24th day of July 2024.

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