STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2023AP2414-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORDERO D. COLEMAN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JOHN D. HYLAND, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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INTRODUCTION

Defendant-Appellant Cordero Coleman repeatedly sexually assaulted his eight-year-old goddaughter. A jury found him guilty, and he was convicted. He argues on appeal that (1) his constitutional right to a speedy trial was violated, and (2) he received ineffective assistance of counsel because his attorney did not file a speedy trial demand.

This court should reject both claims. First, regarding the speedy trial claim, a close examination of the procedural history demonstrates that, out of the 31 months that elapsed from the filing of the complaint to trial, only 11 days of delays are attributable to the State. Those 11 days are weighted less heavily because they were the result of congestion in the court's calendar and were not deliberate. The remaining days are primarily either valid delays not attributable to the State or delays intrinsic to the case, which are also not attributable to the State. Moreover, the delays caused by the COVID-19 pandemic totaled 697 days, or approximately 23 months, which accounts for most of the delays. These delays are not attributable to the State because, contrary to Coleman's assertion, the State did not cause them, the COVID-19 pandemic did.

Second, Coleman never made a speedy trial demand, also weighing against a finding of a speedy trial violation. Third, he was not prejudiced by the delays. He was quickly released from the jail and remained in the community for the bulk of the case. Moreover, he was not prejudiced by the inability to call his mother to testify at trial because she would not have established that he could not have been alone with the child.

Regarding the ineffective assistance of counsel claim, Coleman cannot establish his attorney was deficient because a speedy trial demand would not have obtained a trial during the COVID-19 pandemic. Moreover, a motion to dismiss based

on an alleged speedy trial violation would have been meritless. Additionally, Coleman cannot prove prejudice because his mother's testimony would not have created a substantial likelihood that he would not have been convicted.

ISSUES PRESENTED

The State reframes the issues on appeal as follows:

1. Did the circuit court err when it found Coleman's constitutional right to a speedy trial was not violated?

The circuit court answered: No.

This Court should answer: No.

2. Did Coleman meet his burden to demonstrate his counsel was ineffective for not asserting Coleman's right to speedy trial and not advising Coleman of that right?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs, and the issues presented involve the application of well-settled legal principles to the facts.

STATEMENT OF THE CASE

A. The State charged Coleman with one count of repeated sexual assault of a child.

On June 14, 2019, the State filed a criminal complaint charging Coleman with one count of repeated sexual assault

of a child.[1] (R. 1:1.) The State alleged that Coleman sexually assaulted MAJ, an 8-year-old child, four specific times between January 1, 2019, and June 1, 2019. (R. 1:1, 5.) Coleman was MAJ's godfather and babysat MAJ. (R. 1:2, 4.) MAJ and Coleman lived in two different apartment units within the same apartment building. (R. 1:1–2.) The State alleged that the sexual assaults occurred at both apartments. (R. 1:2.) Specifically, the complaint alleged that the first and third incidents occurred at her apartment. (R. 1:5.) The second and fourth incidents occurred at his apartment. (R. 1:5.) MAJ reported that the first time Coleman sexually assaulted her, he "pull[ed] her shorts down and put his private in her butt." (R. 1:2, 4.) The second time, Coleman put a blindfold on her while his mother, Brenda Tompkins, was sleeping and then placed his "private part" in MAJ's mouth and ejaculated. (R. 1:5.) The third time, she sat on a toilet seat and he ejaculated into her mouth. (R. 1:5.) For the fourth assault, she reported she was in Coleman's room and he ejaculated into her mouth. (R. 1:5.) She provided specific details about all four incidents, including what Coleman told her, what she was doing before the assaults, what he was doing while he assaulted her, and what she tasted and felt during the assaults. (R. 1:2–4.)

B. The first trial date was rescheduled without objection due to witness unavailability, and the second trial date was removed because of an emergency order in response to the COVID-19 pandemic.

On June 14, 2019, the same day the complaint was filed, the court held an initial appearance at which it set cash bail at $15,000. (R. 148:7.) The court scheduled a preliminary hearing for June 20, 2019. (R. 148:8.) Coleman waived his

[1] Coleman was arrested two days before on June 12, 2019. (R. 3:1.)

statutory right to a preliminary hearing within 10 days.[2] (R. 148:7); Wis. Stat. § 970.03(2).

On June 20, 2019, Coleman appeared for the preliminary hearing, but no attorney appeared on his behalf. (R. 133:2.) Coleman told the court he wanted an attorney and stated, "I was appointed a public defender about two days ago." (R. 133:2.) The court set the matter over because it appeared he had been appointed an attorney and the attorney was not present. (R. 133:3.) An order indicating that the State Public Defender appointed Attorney Jason Gonzalez to represent Coleman was filed on June 25, 2019. (R. 9:1.) On June 28, 2019, Coleman filed a motion to reduce the cash bail. (R. 12.)

At the July 2, 2019, preliminary hearing, the State requested a setover of the preliminary hearing due to an unavailable witness. (R. 135:2–3.) Coleman objected. (R. 135:3.) The court found good cause for the setover and rescheduled the preliminary hearing for July 23, 2019. (R. 135:4.)

The court also considered Coleman's motion to reduce the cash bail. (R. 135:4.) The State objected to the reduction of bail. (R. 135:5–6.) Coleman requested cash bail in the "realm of" $1,000 to $1,500 and indicated he was amenable to GPS monitoring via an ankle bracelet. (R. 135:5–7.) The court reduced Coleman's cash bail to $2,000 and ordered GPS monitoring through Dane County Pretrial Services. (R.135:9; A-App. 24.) Shortly after, on July 8, 2019, Coleman posted the reduced cash bail and was released from custody. (A-App. 23.)

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[2] For reasons that are not clear, the minutes state the "[p]arties did not stipulate to waive the time limits for Preliminary Hearing." (A-App. 25.) However, the transcript of the initial appearance indicates the Assistant Public Defender representing Coleman at the hearing stated: "We'll waive time limits, your Honor." (R. 148:7.)

On July 23, 2019, the court held Coleman's preliminary hearing and bound the case over for trial. (R. 134:17.) The arraignment occurred at the same hearing, and the State filed the information the same day. (R. 134:17–18.)

At the September 20, 2019, pretrial conference, the case was set for a two-day trial the week of January 6, 2020. (A-App. 21.) The parties subsequently appeared for a status conference on October 30, 2019. (A-App. 20.) The trial dates remained on the calendar, and an additional status conference was set for December 13, 2019. (A-App. 20.)

On December 12, 2019, the State filed a letter in which it requested that the January 2020 trial be rescheduled. (R. 36:1.) It stated that one of its witnesses, an expert on child abuse, was unavailable for the trial. (R. 32:3–5; 36:1.) It reported that it had contacted Attorney Gonzalez regarding the request but was unable to obtain the defense's position. (R. 36:1.) It informed the court in the letter that the parties had been discussing a plea deal and that the State was wished to further discuss a modification to the offer proposed by Coleman. (R. 36:1.)

At a status hearing the next day, Coleman did not object to the State's setover request of the January 2020 trial. (A-App. 20.) The court granted the State's request and scheduled the trial for the week of April 13, 2020. (A-App. 19–20.) Status conferences were held on January 28, 2020, and March 6, 2020. (A-App. 19.) The case remained on for trial in April of 2020. (A-App. 19.)

On March 12, 2020, the Dane County Circuit Court issued an order instituting emergency measures to combat the spread of COVID-19, protect the public, and continue certain essential functions. (R. 173:1.) The order stated the pandemic constituted good cause to postpone proceedings in all criminal cases in which a defendant was not being held in custody until after April 17, 2020. (R. 173:5.) The order stated

that proceedings involving defendants who were in custody would "presumptively" proceed as scheduled. (R. 173:5.) Coleman remained out of custody at the time of the Dane County Circuit Court's order. (A-App. 18–19.)

On March 16, 2020, the court removed the April 2020, trial dates from the calendar and noted in its minutes that this was "due to Dane County pandemic precautions." (A-App. 19.)

C. The Dane County Court did not resume trials because of COVID-19 restrictions until June 1, 2021.

Pursuant to its administrative and superintending authority over the courts, on March 22, 2020, the Wisconsin Supreme Court issued an order stating that all criminal jury trials scheduled to begin before May 22, 2020, were continued because of the COVID-19 pandemic. (R. 174:3.) However, it permitted litigants to file a motion in the Court seeking an exception to the order. (R. 174:3.) The Supreme Court made several findings in its order. (R. 174:1–3.)

It noted that the Wisconsin Department of Health Services had issued a series of emergency orders prohibiting public and private gatherings of 10 or more people in a single confined space. (R. 174:1.) It further noted that the purpose of these orders was to decrease the transmission of the COVID-19 virus as the virus can cause "serious health consequences" and place a significant strain on the State's health care system. (R. 174:1.)

It also stated that "[c]ontinuing to have jury trials would put members of the public, jurors, witnesses, law enforcement personnel, lawyers, judges, and court employees at an unacceptable level of risk to their health and for some at an unacceptable level of risk for the loss of their lives." (R. 174:2.)

Moreover, it outlined additional effects that would stem from continuing to hold jury trials. It stated jurors in high-risk categories, which it identified as older persons and persons with pre-existing health conditions, would need to be excused, and such "wide-ranging" excusal could "potentially raise challenges to the validity of a jury's verdict or result in a miscarriage of justice." (R. 174:1–2.) Also, the "increasing potential for a juror to become ill" during trial would require created an "unacceptable potential for mistrials." (R. 174:2.)

It further stated that those healthy enough to serve on a jury "would likely be distracted by, and anxious" about being in contact with each other and court staff. It stated that this would create a "substantial risk" that jurors would not be able to "[a]ct with judgment, reason, and prudence," that they would not be "very careful and deliberate in weighing the evidence," or that they would cut short their deliberations so they could leave the courthouse. (R. 174:2.)

Finally, it found that:

> The delay in conducting a jury trial that results from the temporary suspension of jury trials provided in this order is not due to the actions of the government, but is due to factors beyond the government's control.

(R. 174:2.)

On March 8, 2021, the court held a bail hearing it had set *sua sponte* to determine whether Coleman continued to require a GPS monitor because he did not appear to have committed a significant number of rule violations while being monitored. (R. 139:3, 9.) A Dane County Pretrial Services social worker informed the court that Coleman had been employed "for some time" while participating in pretrial services. (R. 139:5.)

Meanwhile, the Wisconsin Supreme Court's May 22, 2020, order was extended due to the continuing threats posed by the COVID-19 pandemic and remained in

place until May 21, 2021, when the confirmed number of COVID-19 cases decreased significantly due to widespread vaccinations. (R. 175:1; 176:1); *In re the Matter of Remote Hearing During the COVID-19 Pandemic* (S. Ct. Order issued April 15, 2020).

On June 1, 2021, the chief judge of the fifth Judicial Administrative District rescinded the Dane County Circuit Court's COVID-19 operational and jury trial plans. (R. 176:1.)

During the period in which the Dane County Circuit Court was closed due to the COVID-19 pandemic, the parties conducted at least four informal status conferences in addition to the March 8, 2021, bail hearing. (A-App. 17–19.) The requirement that Coleman appear at the status conferences was waived for all but one. (A-App. 17–19.) The parties were unable to reach an agreement to resolve the case short of trial. (A-App. 17–19.)

D. A jury found Coleman guilty of repeatedly sexually assaulting a child at the February 2022 trial.

On June 22, 2021, the court set the case for trial the week of February 7, 2022. (A-App. 17.) Coleman was successfully brought to trial that week.

A family friend as well as a peer who MAJ reported the assaults to both testified. (R. 138:118–151.) The jury was shown a video of MAJ's child forensic interview. (R. 137:159.) During the interview, MAJ gave specific sensory details regarding the sexual acts Coleman performed on her that, as the prosecutor reminded the jury, an 8-year-old should not have knowledge of. (R. 73:20–22; 138: 350–51.)

MAJ testified that she told the truth at the forensic interview. (R. 137:223.) She testified that on multiple occasions Coleman looked after her when her father and uncle were not present. (R. 137:218.) She testified this occurred at

both her apartment and his apartment. (R. 137:218.) MAJ also testified some of the offenses occurred at Tompkins' apartment. (R. 137:221.) She explained that during one offense she was playing a video game in a room at Tompkins' apartment, and Coleman came into the room, put a blindfold or bandana with a black pattern over her eyes, took his "bottom" clothes off, and put his penis in her mouth. (R. 137:221–225.) She told the jury about another incident occurring at her apartment when Coleman put his penis in her mouth. (R. 137:227–29.) She stated she did not recall if another incident occurred at Tompkins' apartment. (R. 137:230.) She also told the jury about the incident at her apartment when Coleman took her shorts off and made his penis "touch [her] butt." (R. 137:231–32.)

While discussing jury instructions in between the State's case in chief and Coleman's, Attorney Gonzalez requested a jury instruction regarding the significance of the absence of Coleman's mother at trial. (R. 138:168–70.) His mother, Tompkins, passed away in September of 2021. (R. 138:252–53.)

Attorney Gonzalez stated it was not Coleman's fault that Tompkins was deceased and that it was the court's fault for not reopening sooner. (R. 138:169.) He claimed Coleman's right to a speedy trial was violated. (R. 138:170.) The State objected to the instruction Coleman requested. (R. 138:171–73.) The court found the instruction was inapplicable to the facts of the case since it was neither parties' choice not to call Tompkins. (R. 138:175–77.)

After further argument, the court asked Attorney Gonzalez whether he wished to admit Tompkins' statement to Detective Aguirre. (R. 138:177–78.) He stated he did not. (R. 138:178, 183.) Rather, he wished to argue to the jury that "we don't know what [Tompkins] . . . would have said because . . . she's not here." (R. 138:178.) The court concluded it would prohibit Coleman from making such an argument, but it

again stated that it would entertain a request to admit specific statement from Tompkins due to her unavailability. (R. 138:179, 181–82.)

Coleman testified, and so did his brother. (R. 138:190–278.) The jury returned a guilty verdict, and Coleman was convicted of repeated sexual assault of a child. (A-App. 14.) The court ordered 32 years of prison consisting of 25 years of initial confinement followed by 7 years of extended supervision. (A-App. 11.)

E. The postconviction court held a *Machner* hearing and denied Coleman's postconviction motion.

Coleman filed a postconviction motion arguing that (1) his constitutional right to a speedy trial was violated, and (2) he received ineffective assistance of counsel because Attorney Gonzalez purportedly did not talk to him about a speedy trial demand and he would have asked to file one if Attorney Gonzalez had talked to him about it.

At the *Machner* hearing, Attorney Gonzalez stated he raised the speedy trial demand at trial after the State rested its case because Coleman's "mother having passed away and my concern was not having a witness to respond." (R. 166:10.) Coleman asked Attorney Gonzalez whether he discussed the right to speedy trial with his client, and Attorney Gonzalez stated "I think we might have very briefly discussed it, but I never advised him to demand a speedy trial whether constitutionally or statutorily." (R. 166:12.) When asked whether he spoke to his client "specifically about a constitutional right to speedy trial," Attorney Gonzalez stated he did not "think we ever brought that one up in particular." (R. 166:12–13.)

He clarified, "I think in conversations, we maybe early on, touched on it. And then I did not discuss any further with him or about any speedy trial issue." (R. 166:13.) Attorney

Gonzalez stated that, if they had a conversation, "it was early on when he had cash bail. But when he got out, we never discussed it again." (R. 166:14.)

Moreover, Attorney Gonzalez testified that he knew that if he had filed a speedy trial demand during the COVID-19 pandemic for a client who was not in custody, it would be a "waste of paper . . . because it's not going to happen." (R. 166:20–22.)

The postconviction court denied Coleman's motion. In doing so, it made numerous factual findings. The postconviction court determined that the delays were presumptively prejudicial. (R. 179:3–4.) It then analyzed the reasons for the delay by examining the pre-COVID-19 delays, COVID-19 delays, and post-COVID delays. (R. 179:4.)

1. Pre-COVID delays

Regarding the continuance of the June 20, 2019, preliminary hearing, the court found Coleman was the cause of the delay because he requested that it be rescheduled. (R. 179:5.)

Regarding the July 2, 2019, setover request of the rescheduled preliminary hearing by the State, the court found that the delay was intrinsic to the case because the State's setover request was based on the unavailability of its witness. (R. 179:5.) Therefore, it reasoned, that delay was not attributable to the State. (R. 179:5.)

Analyzing the court's rescheduling of the July 11, 2019, preliminary hearing to July 23, 2019, the court found the hearing was rescheduled because the July 11 date conflicted with the court's schedule. (R. 179:5.) It found the delay was due to an overcrowded court. (R. 179:5.) Accordingly, it weighted the 11 days between July 11 and July 23, 2019, against the State. (R. 179:5.) However, it weighted that period less heavily because the delay was not deliberate. (R. 179:5.)

Regarding the setover of the January 6, 2020, trial date, the court found one of the State's expert witnesses was unavailable to testify, and this was intrinsic to the case. (R. 179:5.) It further found the prosecution expressed a willingness to proceed without the witness if there was an objection to the delay by the defense, but the Coleman did not object. (R. 179:5.)

2. COVID-19 delays

The postconviction court found that the delays in the case following the onset of the COVID-19 pandemic were unavoidable. (R. 179:6.) It stated that the April 13, 2020, trial was rescheduled due to the COVID-19 pandemic and cited the Wisconsin Supreme Court's March 22, 2020, order continuing jury trials due to the substantial risk to the public, jurors, witnesses, litigants, and court employees. (R. 179:6.) Accordingly, it did not attribute the delays caused by the suspension of trials during the global pandemic to the State. (R. 179:6.)

3. Post-COVID delays

The court found that, while trials resumed in Dane County on June 1, 2021, the trial could not be scheduled before February 7, 2022, because the "judicial system was dealing with the backlog related to COVID-19 restrictions coupled with other disruptions due to the lingering pandemic." (R. 179:6–7.) It further found that "trial priority was generally being given to those defendants who were held in pretrial custody," and Coleman was not in custody. (R. 179:7.) The court concluded that these delays were caused by COVID-19 pandemic and did not attribute the delays to the State. (R. 179:7.)

Coleman now appeals.

STANDARDS OF REVIEW

Constitutional speedy trial demand

Whether a defendant was denied his right to a speedy trial is a constitutional question reviewed de novo. *State v. Urdahl*, 2005 WI App 191, ¶ 10, 286 Wis. 2d 476, 704 N.W.2d 324. However, the circuit court's findings of fact are upheld unless they are clearly erroneous. *Id.*

Ineffective assistance of counsel

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

ARGUMENT

I. The totality of the circumstances shows that the postconviction court correctly concluded that Coleman's constitutional right to a speedy trial was not violated.

A. Courts use a balancing test to analyze constitutional speedy trial challenges, and justifiable delays that do not prejudice the defendant do not violate that right.

"Both the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee an accused the right to a speedy trial." *Urdahl*, 286 Wis. 2d 476, ¶ 11; *State v. Provost*, 2020 WI App 21, ¶ 25, 392 Wis. 2d 262, 944 N.W.2d 23.

"The right to a speedy trial is not subject to bright-line determinations and must be considered based on the totality

of circumstances that exist in the specific case." *Urdahl*, 286 Wis. 2d 476, ¶ 11. To determine whether a defendant's right to a speedy trial has been violated, courts use a balancing test. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The test "weighs the conduct of the prosecution and the defense and balances the right to bring the defendant to justice against the defendant's right to have that done speedily." *Urdahl*, 286 Wis. 2d 476, ¶ 11.

Courts balance four primary factors, including: (1) whether the defendant asserted the right to a speedy trial; (2) the length of the delay; (3) the reason for the delay; and (4) prejudice to the defendant. *Id*. These are related factors that a court considers "together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533.

To evaluate a speedy-trial claim, the clock begins when the defendant formally becomes the accused, such as with the filing of a complaint. *State v. Lemay*, 155 Wis. 2d 202, 209, 216, 455 N.W.2d 233 (1990). "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors." *Barker*, 407 U.S. at 530. When the length of the delay approaches a year, it is presumptively prejudicial, triggering a closer examination of the circumstances surrounding the claim. *Urdahl*, 286 Wis. 2d 476, ¶ 12. If, under the totality of the circumstances, the defendant was denied his constitutional right to a speedy trial, "the unsatisfactorily severe remedy of dismissal" is required. *Barker*, 407 U.S. at 522.

B. The length of the delay was presumptively prejudicial, but it was not extraordinary.

The first factor, the length of the delay, plays two roles. "First, it is a triggering mechanism used to determine whether the delay is presumptively prejudicial," i.e., whether this Court need apply the remaining *Barker* factors. *Urdahl*, 286 Wis. 2d 476, ¶ 12. A post-accusation delay of one year is

generally considered presumptively prejudicial. *Id.* If the delay in the defendant's trial is presumptively prejudicial, then the length of the delay becomes one factor in the four-factor balancing test. *Id.* This Court then "considers 'the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.'" *Id.* (citation omitted). "[T]he presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett v. United States*, 505 U.S. 647, 652 (1992). For example, an "extraordinary" delay—such as an eight and one-half year delay—weighs heavily against the government, while a shorter delay weighs less heavily. *See id.* at 657–58.

Here, the length of the delay between the filing of the complaint and the start of the trial was 969 days, which is 31 months, or two years and 7 months.[3] (R. 1:1; 136:1.) The delay was presumptively prejudicial and triggers the *Barker* test. *Urdahl*, 286 Wis. 2d 476, ¶ 12.

The length of this delay should not weigh heavily against the State. While the 31-month delay was approximately 19 months longer than the presumptively prejudicial 12 months, it still was not on par with the "extraordinary" eight-plus-year delay in *Doggett*. *Doggett*, 505 U.S. at 652. Moreover, courts have declined to find speedy trial violations in cases involving similar and even lengthier delays than the delays in this case. *See Barker*, 407 U.S. at 533, 536 (five-year delay); *Lemay*, 155 Wis. 2d at 204 (37-month delay); *Provost*, 392 Wis. 2d 262, ¶¶ 27, 51 (almost 35-month delay); *Urdahl*, 286 Wis. 2d 476, ¶¶ 25, 37 (30-month delay, with 20 and one half months attributable to the State). Thus, the delay does not weigh as heavily against the

[3] Coleman repeatedly refers to the delay as "nearly three years" in his brief. (Coleman's Br. 6, 8, 12, 17–18, 21, 27, 33.) However, it is more accurate to describe it as two years and seven months.

government as would a lengthier delay. *See Doggett*, 505 U.S. at 657–58.

Moreover, as Coleman acknowledges, if the delays caused by the COVID-19 pandemic are removed from the ledger, the delay would be significantly lower. (Coleman's Br. 21.) Coleman opines these "non-Covid" delays amount to 524 days, which would be approximately 17 months. (Coleman's Br. 21.) And, as explained below, Coleman undercounts the delays attributable to the COVID-19 pandemic because it continued to disrupt regular court functions after trials resumed in several ways.

Though the State agrees the delay in this case was presumptively prejudicial and therefore requires the court to analyze the other factors in the *Barker* test, the length of the delay should not weigh heavily against the State. Regardless, as explained below, there were valid reasons the delays, and nearly none of them are attributable to the State.

C. The delays are not attributable to the State, with the exception of one 11-day period.

A close review of the procedural history in this case demonstrates that, of the 31 months of delays in this case, only 11 are attributable to the State. Moreover, those 11 days are weighted less heavily because they were the result of congestion in the court's calendar. The remaining days are largely either valid delays not attributable to the State or delays intrinsic to the case. Moreover, the majority of the delays occurred during the height of the COVID-19 pandemic or as the court system was laboring under the significant backlog of cases caused by the pandemic. These COVID-19 delays totaled 697 days, or approximately 23 months.

The State follows Coleman's approach of splitting the time period in question into three parts: (1) the time period from the filing of the complaint until the suspension of jury trials, (2) the time period during which jury trials were

suspended in the Dane County Circuit Court due to COVID-19, and (3) the period after the resumption of jury trials that ends with Coleman's jury trial. However, unlike Coleman, it further divides the first time period into six segments.

1. Government-caused delays are assigned weight based on the reasons and motivations, and defendant-caused delays are not counted.

"When considering the reasons for the delay, courts first identify the reason for each particular portion of the delay and accord different treatment to each category of reasons." *Urdahl*, 286 Wis. 2d 476, ¶ 26. Yet not all delays are weighted equally. Only "deliberate attempt[s] by the government to delay the trial in order to hamper the defense [are] weighted heavily against the State." *Id.* "[D]elays caused by the government's negligence or overcrowded courts . . . are weighted less heavily." *Id.*

Some delays carry no weight at all. "[I]f the delay is caused by something intrinsic to the case, such as witness unavailability, that time period is not counted." *Id.* Other valid reasons for delays include those "attributed to the ordinary demands of the judicial system." *Norwood v. State*, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976); *see also Scarbrough v. State*, 76 Wis. 2d 87, 100–02, 250 N.W.2d 354 (1977) (holding that the "period of time necessarily required for the hearing and disposition of pretrial motions, whether made by prosecution or defense, [is] not to be considered as delays caused by either party"). Valid reasons for delay "should be understood as 'a factor in the government's favor, to be weighted in considering the length of the delay, the prejudice to the accused, and the accused's assertion of right.'" *United States v. Schreane*, 331 F.3d 548, 555 (6th Cir. 2003) (citation omitted).

Finally, "if the delay is caused by the defendant, it is not counted." *Urdahl*, 286 Wis. 2d 476, ¶ 26. "[G]enerally, 'delays caused by defense counsel are properly attributed to the defendant.'" *Provost*, 392 Wis. 2d 262, ¶ 39.

2. The 272-day "pre-COVID" delay between June 14, 2019, to March 12, 2020, is not attributable to the State, with the exception of 11 days.

Coleman refers to the 272-day time period spanning from the filing of the complaint on June 14, 2019, to the issuance of the order continuing of all jury trials in Dane County on March 12, 2020, as the "pre-COVID delays." (Coleman's Br. 13–14.) He argues the delay during this time period is all attributable to either the prosecution or the circuit court. (Coleman's Br. 23.) He does not suggest whether these delays should be weighted heavily or not. (Coleman's Br. 23.) Regardless, an examination of these delays demonstrates that only 11 days in this period can be attributed to the State. These 11 days were the result of an overcrowded court that caused the court to reschedule the July 11, 2019, preliminary hearing to July 23, 2019. As the circuit court found, this period is the only "pre-COVID" delay attributable to the State. (R. 179:5.) Because it was not deliberate, it is weighted less heavily.

a. The delay from the June 14, 2019, filing of the complaint to the setover of the June 20, 2019, preliminary hearing is not attributable to the State.

The time period between the June 14, 2019, filing of the complaint and the setover of the June 20, 2019, preliminary hearing spans 6 days.

At the June 14, 2019, initial appearance, Coleman waived his statutory right to a preliminary hearing within 10

days. (R. 148:7.) However, the court still scheduled a preliminary hearing only six days into the future. (R. 148:8.) This 6-day period was the time necessarily required for "the orderly administration of criminal justice." *Scarbrough*, 76 Wis. 2d at 101; *see also Norwood*, 74 Wis. 2d at 354. The State needed time to subpoena its witnesses, provide a prosecutor to handle the hearing, and to ensure it complied with victim notice requirements, and the court would have needed time to provide the necessary staff for an orderly preliminary hearing calendar. This delay is therefore not attributable to the State. *Id*.

Coleman does not explain why this period should be attributable to the State, but even if he is correct that he did not waive the preliminary hearing time limits, the first preliminary hearing date occurred within the 10-day time limit. (Coleman's Br. 22–23); Wis. Stat. § 970.03(2). To the extent he relies on *Ziegenhagen*, a case in which neglect by both the prosecutor and the clerk of courts caused the delay, that case in inapplicable because there was no negligence here. *See State v. Ziegenhagen*, 73 Wis. 2d 656, 666–67, 245 N.W.2d 656 (1976).

b. The delay stemming from the setover of the June 20, 2019, preliminary hearing date and the July 2, 2019, preliminary hearing date is not attributable to the State.

This time period consists of 12 days. On June 20, 2019, Coleman appeared for the preliminary hearing without an attorney alongside him. (R. 133:2.) Coleman told the court, "I was appointed a public defender two days ago" and indicated he wanted an attorney. (R. 133:2.) Attorney Gonzalez later explained at the *Machner* hearing that Coleman had in fact first hired him privately but then did not have sufficient funds, so Attorney Gonzalez was later appointed to represent

him.[4] (R. 166:9.) This would explain why Coleman thought he had an attorney but none appeared. The court set the matter over as, based on the information Coleman provided, it appeared he had been appointed an attorney and the attorney was not present. (R. 133:3.) Five days later, an order indicating the State Public Defender appointed Attorney Jason Gonzalez to represent Coleman was filed on June 25, 2019. (R. 9:1.)

The postconviction court correctly found this delay was not attributable to the State. (R. 179:5.) Coleman argues it was not his fault an attorney did not appear but does not explain why it was the State was responsible for no attorney appearing.[5] (Coleman's Br. 22.) Indeed, when the court noted no attorney was present to represent Coleman and asked him if he wanted an attorney, he responded he did. The postconviction court found this was a request for a continuance, which is a reasonable inference from Coleman's statement. (R. 133:2; 179:5.) Admittedly, however, Coleman never specifically requested a continuance, (R. 133:2), and the State does not dispute that the process of receiving an attorney through the Public Defender's office is not instantaneous, particularly where a defendant is initially not eligible for a public defender appointment and attempts to hire an attorney privately. Regardless of whether the 12-day delay is attributable to Coleman (or the orderly

[4] Attorney Gonzalez's statement is corroborated by the fact that Coleman was not eligible for a public defender appointment at the time of the initial appearance. (R. 148:2.)

[5] Indeed, a recurring theme throughout Coleman's brief seems to be that, if a delay was not attributable to him, it was necessarily attributable to the State. As will be discussed, this binary view is incompatible with the realities of pre-trial proceedings, particularly when faultless delays occur due to unavoidable circumstances such as the COVID-19 pandemic.

administration of justice), the delay is not attributable to the State.

c. The delay from the July 2, 2019, preliminary hearing date to the July 11, 2019, preliminary hearing is not attributable to the State.

This time period consists of 9 days. At the rescheduled July 2, 2019, preliminary hearing, the State requested a setover because its witness was unavailable. (R. 135:2–3.) Coleman objected, but the court made a good cause finding and rescheduled the preliminary hearing to July 23, 2019. (R. 135:3–4.) The postconviction court found the witness unavailability was intrinsic to the case and therefore did not attribute the delay to the State. (R. 179:5.) The postconviction court was correct. It is well-established that delay "caused by something intrinsic to the case, such as witness unavailability," "is not counted." *Urdahl*, 286 Wis. 2d 476, ¶ 26 (citing *Ziegenhagen*, 73 Wis. 2d at 668; *Barker*, 407 U.S. at 531, 534)). Moreover, Coleman provides no argument explaining why the delay was attributable to the State aside from stating that it requested a setover due to an unavailable witness. (Coleman's Br. 22–23.)

d. The delay from the rescheduled July 11, 2019, preliminary hearing date to the July 23, 2019, preliminary hearing is not attributable to the State.

This period spans 12 days. On July 9, 2019, the July 11, 2019, preliminary hearing was rescheduled to July 23, 2019. (A-App. 22.) The postconviction court, which was presided over by the same judge, Judge John D. Hyland, found stated that "the hearing was rescheduled because the date and time set by [another judge] was in conflict with this

Court's schedule." (R. 179:5.) It found that the delay was a result of "an overcrowded court." (R. 179:5.) The postconviction court attributed the 11-day delay to the State. (R. 179:5.) However, since the delay was not deliberate, it weighted it less heavily. (R. 179:5.) The postconviction court correctly analyzed this delay. It is well-established that "delays caused by the government's negligence or overcrowded courts" are counted, but they "are weighted less heavily." *Urdahl*, 286 Wis. 2d 476, ¶ 26. Coleman does not argue that this delay should be weighted more heavily and agrees the delay was caused by court overcrowding. (Coleman's Br. 22–23.)

e. The period between the preliminary hearing on July 23, 2019, and the setover of the trial date on December 13, 2019, is not a delay attributable to the State.

This period consists of 143 days. Coleman does not argue the period between July 23, 2019, when the court ultimately held a preliminary hearing, and December 13, 2019, when the court setover the trial, constituted a delay and was attributable to the State. (Coleman's Br. 22.) The State agrees. This period of 143 days included the selection of a trial date at the September 20, 2020, pretrial conference; two pretrial conferences in which the parties discussed a possible settlement agreement and trial issues; and trial preparation, including the preparation and filing of expert notices and other pretrial documents. (R. 36:1–2; A-App. 20–22.) The period was time necessarily required for "the orderly administration of criminal justice." *Scarbrough*, 76 Wis. 2d at 100–01; *see also Norwood*, 74 Wis. 2d at 354.

f. The delay between the December 13, 2019, setover of the trial to the March 12, 2020, emergency suspension of jury trials is not attributable to the State.

This time period spans 90 days. On December 12, 2019, the State requested that the January 2020 trial be rescheduled because one of its witnesses, an expert on child abuse, was unavailable for the trial. (R. 32:3–5; 36:1.) At a status hearing the next day, Coleman did not object to the State's setover request. (A-App. 20.) The court granted the State's request and rescheduled to the week of April 13, 2020. (A-App. 20.) Status conferences were held on January 28, 2020, and March 6, 2020, and the case remained on for trial in April of 2020. (A-App. 20.) On March 12, 2020, the Dane County Circuit Court issued an order suspending jury trials. (R. 173:1–2.) On March 16, 2020, the court removed the April 2020 trial dates from the calendar and noted in its minutes that this was "due to Dane County pandemic precautions." (A-App. 20.)

The postconviction court found that the State's witness was unavailable and that the unavailability was intrinsic to the case. (R. 179:5.) Therefore, it found the delay was not attributable to the State. (R. 179:5.) Nowhere in Coleman's brief does he dispute that the expert witness was unavailable or otherwise dispute the court's factual finding. (Coleman's Br. 13, 23–23.) The same is true in his reply brief to before the postconviction court. (R. 178:3.) On appeal, he appears to argue this delay was attributable to the State, but he does not explain why. (Coleman's Br. 22–23.) At any rate, a delay "caused by something intrinsic to the case, such as witness unavailability," "is not counted." *Urdahl*, 286 Wis. 2d 476, ¶ 26 (citing *Ziegenhagen*, 73 Wis. 2d at 668; *Barker*, 407 U.S. at 531, 534)). To the extent Coleman relies on the holding in *Ziegenhagen*, that case in inapposite because there is no

evidence that the delay was caused by the State's negligence in securing the witness's availability for trial. *See Ziegenhagen*, 73 Wis. 2d at 666–67.

In sum, a close examination of the 272-day period from the filing of the complaint on June 14, 2019, to the issuance of the order continuing all jury trials in Dane County on March 12, 2020, demonstrates that none of the delays except for 11 days are attributable to the State. Even then, that short period is not weighted heavily as the delay was not deliberate. 12-days of the delay are attributable to Coleman. Coleman's argument that the entirety of the 276-day period is attributable to the State is unsupported by the record.

3. The period from the suspension of trials in Dane County on March 12, 2020, to their resumption on June 1, 2021, is not a delay attributable to the State.

This period, which Coleman refers to as the "COVID delays," consists of 446 days. (Coleman's Br. 23.) Coleman asserts that this delay is "undoubtedly attributable to the state." (Coleman's Br. 23–24.) Coleman's argument that the State is responsible for the delays caused by the COVID-19 pandemic consist of two short paragraphs. (Coleman's Br. 23–24.) They are unpersuasive and unsupported by authority.

First, Coleman argues that the 466 days should be attributable to the State because "it was the state via state courts and county courts that delayed jury trials indefinitely." (Coleman's Br. 23.) He cites no authority for this proposition. (Coleman's Br. 23.)

The State is unaware of any published Wisconsin case addressing the issue of whether the State is responsible for delays caused by the COVID-19 pandemic. However, in its May 22, 2020, order, the Wisconsin Supreme Court stated:

> The delay in conducting a jury trial that results from the temporary suspension of jury trials provided in this order is not due to the actions of the government, but is due to factors beyond the government's control.

(R. 174:2.) Coleman does not appear to challenge the Wisconsin Supreme Court's order, which sets forth specific findings regarding: (1) the "unacceptable level of risk" to the lives of jurors, litigants, court staff, and the broader public; (2) the "unacceptable potential for mistrials"; and (3) the unacceptable risk that there will be miscarriages of justice if trials were to continue. (R. 174:1–2.)

Moreover, numerous state courts throughout the country have concluded that delays due to the COVID-19 pandemic are not properly attributed to the State. *See e.g.*, *Cotney v. State*, 503 P.3d 58, 67 (Wyo. 2022) ("the delay caused by the district court's continuances of the trial due to the COVID-19 pandemic is neutral because neither Mr. Cotney nor the State caused the delay," so "it cannot be weighed heavily for or against either party"); *Labbee v. State*, 869 S.E.2d 520, 530 (Ga. Ct. App. 2022) (delays caused by COVID-19 should "not be weighed against the State" because "neither party is responsible for the delays caused by the COVID-19 pandemic.")(citation omitted); *State v. Conatser*, 645 S.W.3d 925, 930 (Tex. App. 2022) ("Delay caused by the onset of a pandemic cannot be attributed as fault to the State."); *Berryman v. State*, 337 So. 3d 1116, 1129 (Miss. Ct. App. 2021), c*ert. denied*, 143 S. Ct. 581 (U.S. Jan. 9, 2023) (No. 22–5336) (delay due to COVID-19 restrictions "is not weighed against either party."); *Ali v. Commonwealth*, 872 S.E.2d 662, 676 (Va. Ct. App. 2022) ("The cause for the delay due to the pandemic was valid, unavoidable, and outside the Commonwealth's control," so it is not counted against the Commonwealth); *State v. Jackson*, 968 N.W.2d 55, 61 (Minn. Ct. App. 2021) (delay due to COVID-19 pandemic "is not attributable to either party"); *State v. Paige*, 977 N.W.2d 829,

843 (Minn. 2022) ("We do not weigh against the State the fact that the Minnesota judicial system responded to the then-unclear and largely unprecedented risks posed by COVID-19 by postponing jury trials.").

Federal courts have reached a similar conclusion. *See, e.g.*, *United States v. Keith*, 61 F.4th 839, 853 (10th Cir. 2023), *cert. denied,* 144 S. Ct. 420 (U.S. Nov. 20, 2023) (No. 22–7761) ("We choose to treat COVID-19 as a truly neutral justification—not favoring either side. The extenuating circumstances brought about by the pandemic prevented the government from trying Keith in a speedy fashion."); *United States v. Pair*, 84 F.4th 577, 589, 2023 WL 6989947 (4th Cir. 2023), *cert. denied* (U.S. May 28, 2024) (No. 23–7232) ("much of the [401–day] interruption 'was attributable to the unpredictable and unavoidable" COVID-19 pandemic, which is a "valid reason for delay")(citation omitted); *United States v. Snyder*, 71 F.4th 555, 578 (7th Cir. 2023) ("[T]he pandemic-related delays in Snyder's case were justifiable and cannot fairly be attributed to the government."); *United States v. Walker*, 68 F.4th 1227, 1238, (9th Cir. 2023), *cert. denied,* 144 S. Ct. 1050, (March 4, 2024) (No. 23–6716) ("The pandemic, not the prosecution, caused the delay.").

Coleman appears to argue it is "not well-established" that it is permissible to suspended jury trials during the COVID-19 pandemic, but the Supreme Court's May 22, 2020, order and the persuasive authority from state and federal courts around the country demonstrate otherwise. (Coleman's Br. 23.) Coleman cites the dissenting opinions to two Wisconsin Supreme Court pandemic orders, but he only appears to cite them as support for his contention that the suspension of trial is "not well-established." (Coleman's Br. 23.) Coleman does not appear to advance the substantive arguments of the dissent, either in whole or in part. (Coleman's Br. 23.) Accordingly, the State does not further address the dissents.

Finally, Coleman argues that "neither the federal or state constitutions contain any exceptions for the guarantee that" the accused shall enjoy the right to a speedy trial. (Coleman's Br. 24.) However, the test for whether there has been a speedy trial violation is a balancing test that is "not subject to bright-line determinations and must be considered based on the totality of circumstances." *Urdahl*, 286 Wis. 2d 476, ¶ 11. Moreover, *Barker* sets forth that "a *valid reason*, such as a missing witness, should serve to justify appropriate delay." *Barker*, 407 U.S. at 531 (emphasis added). As many courts have reasoned, the suspension of jury trials in response to the COVID-19 pandemic is a "valid reason" for a delay under *Barker*. *See, e.g., Pair*, 84 F.4th at 589 (collecting cases); *Snyder*, 71 F.4th at 578.

Here, the COVID-19 pandemic was a valid reason for the 446–day period Coleman refers to as the "COVID delays." Valid reasons for delay "should be understood as 'a factor in the government's favor.'" *Schreane*, 331 F.3d at 555. Coleman's claim that the delays were "indisputably" caused by the State rings hollow.

4. The period from when trials resumed in Dane County on June 1, 2021, to the trial on February 7, 2022, is not attributable to the State.

This period, which Coleman characterizes as the "post-COVID" period, is 251 days. On June 1, 2021, the chief judge of the fifth Judicial Administrative District rescinded the Dane County Circuit Court's COVID-19 operational and jury trial plans. (R. 176:1.) On June 22, 2021, the court set the case for trial the week of February 7, 2022. (A-App. 17.) Coleman was brought to trial on that date. (A-App. 15.)

The postconviction court found that the trial could not be scheduled before February 7, 2022, because the "judicial system was dealing with the backlog related to COVID-19

restrictions coupled with other disruptions due to the lingering pandemic." (R. 179:6–7.) As it stated, Coleman was not in custody, and "trial priority was generally being given to those defendant[s who] were held in pretrial custody." (R. 179:7.) Citing persuasive authority, the court concluded that these delays were caused by COVID-19 and did not attribute the delays to the State. (R. 179:7.)

Coleman argues the State was at fault of the delays caused by the suspension of jury trials during the height of the COVID-19 pandemic. (Coleman's Br. 24.) Contrary to Coleman's suggestion, the period at issue was not one in which the COVID-19 pandemic or its impact on trials had ended. As the postconviction court found, the trial could not be scheduled before February 7, 2022, because of the significant backlog of trials caused by the "COVID-19 restrictions coupled with other disruptions due to the lingering pandemic." (R. 179:6–7.)

It is simply not true that, once courts reopened in Dane County, everyone who wished for a trial could receive one at once. As the court referenced, required restrictions to minimize the risks to the public, and that was because the COVID-19 pandemic was still ongoing and capable of causing unpredictable spikes in cases. (R. 179:6–7.) Just as with the delays during the suspension of jury trials, the backlog following the resumption of jury trials was caused by the COVID-19 pandemic and should not be attributable to the State. *See, e.g., Paige*, 977 N.W.2d at 839–40; *Cotney*, 503 P.3d at 67 ("the delay caused by the district court's continuances of the trial due to the COVID-19 pandemic" "cannot be weighed heavily for or against either party"); *Labbee*, 869 S.E.2d at 530 (delays caused by COVID-19 should "not be weighed against the State"); *Conatser*, 645 S.W.3d at 930 ("Delay caused by the onset of a pandemic cannot be attributed as fault to the State."). In other words, but for the COVID-19 pandemic, the court system would not have labored under the significant

trial backlog it did in 2021. The delays caused by the COVID-19 trial backlog were "valid" under *Barker* and should not be attributed to the State.

Regarding the delays in this particular case, a significant factor is that the defendant remained out of custody and never demanded a speedy trial, unlike many other defendants whose trials had to be prioritized. (R. 179:7.)

In sum, only 11 days of delays are attributable to the State out of 31 months. Those 11 days are weighted less heavily because they were the result of congestion in the court's calendar and were not deliberate. The remaining days are primarily either valid delays not attributable to the State or delays intrinsic to the case. The delays caused by the COVID-19 pandemic totaled 697 days, or approximately 23 months. This leaves only approximately 8 months of delays, and virtually none of those are attributable to the State.

D. Coleman never asserted his speedy trial rights during the delays.

While the State has a duty to facilitate speedy trials, courts "emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Urdahl*, 286 Wis. 2d 476, ¶ 33 (citation omitted).

Here, Coleman never made a speedy trial demand during the 31 months that the case was pending. In fact, he did not object to the State's setover request of the January 2020 trial despite the opportunity to do so. (A-App. 20.) Moreover, as the postconviction court found, the prosecution expressed a willingness to proceed to trial without the expert witness if there was an objection to the delay by the defense. (R. 179:5.) At no point during the pendency of the case did Coleman make it known he wished to assert his speedy trial rights.

This Court should weigh Coleman's failure to demand a speedy trial heavily against him, just as the postconviction court did. (R. 179:7.) *See Hatcher v. State*, 83 Wis. 2d 559, 568, 266 N.W.2d 320 (1978). Though not fatal to his claim, this factor makes it "difficult for [him] to prove that he was denied a speedy trial." *Urdahl*, 286 Wis. 2d 476, ¶ 33 (citation omitted).

E. The delays did not prejudice Coleman.

"Courts consider the element of prejudice with reference to the three interests that the right to a speedy trial protects: prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense." *Urdahl*, 286 Wis. 2d 476, ¶ 34 (citing *Ziegenhagen*, 73 Wis. 2d at 671). The third interest, prevention of impairment of defense, "is the most significant because 'the inability of a defendant [to] adequately . . . prepare his case skews the fairness of the entire system.'" *Id.* (alterations in original) (citation omitted).

The postconviction court did not err when it found Coleman was not prejudiced under *Barker*. (R. 179:11–12.)

As to the first interest, oppressive pretrial incarceration, that interest was not harmed here because Coleman's cash bail was quickly reduced, and he was released from custody on July 8, 2019. (A-App. 23.) For the vast majority of the case, he was free to live and work in the community. Coleman does not meaningfully dispute this. (Coleman's Br. 26–27.) Rather, he focuses on the other two interests. (Coleman's Br. 26–27.)

Coleman argues he suffered "nearly three years' worth of anxiety and concern" and was "forced to put his life on hold." (Coleman's Br. 27.) However, there was no testimony that the was forced to put his life on hold. (R. 166:36.) Moreover, a Dane County Pretrial Services social worker

informed the court that Coleman had been employed "for some time" while participating in pretrial services. (R. 139:4–5.) As in *Urdahl*, Coleman offers only the "bare fact of unresolved charges—which exists in every criminal case." *Urdahl*, 286 Wis. 2d 476, ¶ 35. In fact, the extent of his testimony in response to the question, "How did you feel waiting for that trial?" was: "Anxious. Nervous. I just – I didn't know what was going to happen, so I just kind of wanted to get it over – get it over with as soon as possible." (R. 166:34.) The anxiety Coleman testified he felt would exist in virtually every criminal case and would certainly be less than that felt by person who was held in custody for the pendency of the case. *See Urdahl*, 286 Wis. 2d 476, ¶ 35. At most, this amounts to a minimal level of prejudice. *Id.*

Coleman also argues he was prejudiced because his mother, Tompkins, passed away in September of 2021. (Coleman's Br. 27.) He claims her statements were "not allowed at trial" and that they would have "undoubtedly helped Mr. Coleman's case" by serving as "a sort of alibi or as a path to refute the charges." (Coleman's Br. 27.) First, it is not correct that her statements were not permitted at trial. As the postconviction court recognized, it told the parties the statements she made to Detective Aguirre could be admissible. (R. 138:178; 179:15.) Coleman chose not to pursue the court's suggestion. (R. 138:178, 183.)

Second, Coleman notably never specifies what, exactly, Tompkins would have stated at trial.[6] (Coleman's Br. 27.) His

[6] Coleman claims twice in his brief that Tompkins would testify that "she was present virtually all of the time that either Mr. Coleman or his brother were present in the apartment and did not witness any of the alleged incidents." (Coleman's Br. 9, 27.) Tellingly, the record citations he provides do not support that claim. (Coleman's Br. 9, 27); (R. 136:84–85, 110–11; 138:196–97, 264.) For example, Coleman cites a portion of the voir dire in which

claim that she would have provided an alibi defense and would have allowed him to refute the charges are conclusory and "too speculative to show prejudice." *See Urdahl*, 286 Wis. 2d 476, ¶ 36. The speculative nature of Coleman's claim is demonstrated by the police report Detective Aguirre completed based on his interview of Tompkins. In contrast to defendant's vague claim that Tompkins would have provided an unspecified alibi defense and somehow allowed him to refute the charges, her statements support the State's contention that Coleman could have been alone with MAJ.

As could be expected of a parent hearing her son was accused of child sexual assault, Tompkins initially stated she "cannot believe any of this" and asked where the assaults occurred. (R. 177:3.) She also stated she was "present at all times with [MAJ] and in the same room with her." (R. 177:3.) When Detective Aguirre asked her whether she could have fallen asleep when MAJ was in her care, she first stated she did not think she would fall asleep but then acknowledged that it was "possible" she occasionally did given MAJ's tendency to stay up late. (R. 177:3.) She then stated that "the only way this could have really occurred for sure is if she wasn't home and [MAJ] and [Coleman] were left alone," though she would not have intentionally left MAJ alone with Coleman if MAJ was in her care. (R. 177:3.) Contrary to Coleman's argument, her statement left open the possibility that MAJ was sometimes alone with Coleman. (R. 177:3.)

As the postconviction court noted, Coleman himself testified at trial that Tompkins sometimes left the apartment to go to dialysis and other medical appointments. (R. 138:264–66; 179:11–12.) Indeed, Coleman testified at one point that he "honestly" did not remember if he was alone with MAJ at the apartment during these times.

Attorney Gonzalez told the jury Coleman's mother died. (R. 136:85.)

(R. 138:264–66.) Coleman also testified he was the closest thing MAJ had to a father figure and admitted he watched her at her father's house. (R. 138: 271–3.)

Moreover, rather than a ringing endorsement of Coleman's innocence, Tompkins told the detective that "she was very concerned by the information that [MAJ] had shared," that "these types of things children don't usually make up," and "if her son did indeed to do these things . . . he should pay the consequences." (R. 177:4.) Tompkins' statement would not have established an alibi defense or otherwise allowed Coleman to refute the charges.

Importantly, Coleman offered no testimony at the *Machner* hearing about what his mother would have stated at trial. (R. 166:35–37.) Detective Aguirre's report is the only evidence of what her testimony would have been. Coleman's assertion that Tompkins would have testified differently is pure speculation. Therefore, he did not demonstrate he was prejudiced. *Urdahl*, 286 Wis. 2d 476, ¶ 36.

Finally, Tompkins did not become unavailable due to any delays attributable to the State. Tompkins passed away in September of 2021, which is well after the date the trial had been set for trial on April 13, 2020. That trial was only continued because of the COVID-19 pandemic. There is no evidence the trial would not have occurred on the April 13, 2020, date if not for the COVID-19 pandemic. Therefore, the pandemic and the suspension of jury trials it caused was the reason Tompkins was unable to testify, not because of any delays attributable to the State. Coleman has not shown that his "witnesses died or otherwise became unavailable *owing to the delay*." *Barker*, 407 U.S. at 534 (emphasis added).

F. Balancing all four factors together reflects that there was no constitutional speedy trial violation.

The postconviction court did not err when it found that, balancing "the four factors of the *Barker* test does not favor a conclusion that Coleman was deprived of a speedy trial." (R. 179:12.) Out of 31 months, only 11 days are attributable to the State, and that small period is weighted less heavily. Moreover, the bulk of the delays were "valid delays" caused by the COVID-19 pandemic. These totaled 697 days, or approximately 23 months.

The remaining factors weigh in favor of no violation. Coleman never made a speedy trial demand while the case was pending. He was released and remained in the community for the bulk of the case, and he was not prejudiced by the inability to call his mother. Moreover, his mother's inability to testify was not caused by any delays attributed to the State. It was caused by the COVID-19 pandemic. The postconviction court did not err.

II. The postconviction court correctly concluded that Coleman failed to demonstrate he received ineffective assistance of counsel.

A. Coleman bears a heavy burden to prove both that his counsel's performance was deficient and that he was prejudiced by that deficiency.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that the defendant suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the Court concludes the defendant has not proven one prong, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that fall "outside the wide range of professionally competent assistance." *Id.* at 690. This means that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

When evaluating counsel's performance, courts "strongly presume[ ]" that counsel has delivered "adequate assistance." *Id.* at 690. Courts are "highly deferential" and must avoid the "distorting effects of hindsight" and "evaluate the conduct from counsel's perspective at the time." *Id.*

To demonstrate prejudice, a defendant must affirmatively prove that the alleged deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 693. Prejudice occurs 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. Although that is not as difficult a standard to meet as "more likely than not," the difference matters "only in the rarest case." *Richter*, 562 U.S. at 111–12.

B. Coleman has not demonstrated his counsel's performance was deficient.

As the postconviction court determined, even if Attorney Gonzalez filed a speedy trial demand on Coleman's behalf during the COVID-19 pandemic, he would not have received a trial at that time. (R. 179:14–15.) And if Coleman had moved to dismiss on the basis of a constitutional speedy trial demand, the court would have denied it, for the reasons previously argued. (R. 179:14–15.) Attorney Gonzalez indicated he understood this when he testified at the *Machner*

hearing that if he had filed a speedy trial demand during the COVID-19 pandemic for a client who was not in custody, it would be a "waste of paper." (R. 166:20–22.) An attorney is not ineffective for not making an objection that would have been overruled. *State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987). Therefore, Coleman cannot show Attorney Gonzalez performed deficiently.

Similarly, if this Court determines the law regarding the constitutional right to a speedy trial unsettled in the context of pandemic delays, Attorney Gonzalez would not have been required to file a speedy trial demand because "ineffective assistance of counsel cases [are] limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v. Maloney*, 2005 WI 74, ¶ 29, 281 Wis. 2d 595, 698 N.W.2d 583 (citation omitted); *State v. Maday*, 2017 WI 28, ¶ 55, 374 Wis. 2d 164, 892 N.W.2d 611 ("'[c]ounsel is not required to object and argue a point of law that is unsettled.'")(citation omitted).

C. Coleman also failed to meet his burden to demonstrate he was prejudiced by any deficient performance by his counsel.

Prejudice is a demanding standard. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. Coleman failed to establish that, under the totality of the evidence, there is a substantial likelihood that, but for the lack of a speedy trial demand, he would not have been convicted. *See Id.* at 112.

Coleman's asserts that if his attorney had advised him of a speedy trial demand, he would have made one, which would have allowed Tompkins to testify and sway the jury to acquit him. As previously argued, the claim that Tompkins' testimony would have tipped the balance in his favor is based on nothing more than speculation. There has been no showing

that this would overcome MAJ's detailed and compelling testimony about the numerous times her godfather sexually assaulted her.

Moreover, Coleman did not object to the setover of the January 2020 trial. Given there is no evidence to the contrary, it appears his desire for a speedy trial arose after January 2020. Given that jury trials would be suspended shortly after in March of 2020, and that, upon their resumption, there would be a significant backlog requiring the prioritization of defendants who were in custody, Coleman has not established he would have received a trial by the time his mother died in September 2020. As the postconviction court found, given the significant backlog of trials and that Coleman was not in custody, the trial could not be scheduled before February 7, 2022. (R. 179:6–7.)

CONCLUSION

This Court should affirm the circuit court's denial of Coleman's postconviction motion.

Dated this 12th day of June 2024.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,767 words.

Dated this 12th day of June 2024.

Electronically signed by:

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HECTOR S. AL-HOMSI
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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 12th day of June 2024.

Electronically signed by:

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