

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2025AP929-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2021CF405

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD G. SCHMITT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: SANDRA J. GIERNOTH, Judge. *Affirmed.*

Before Lazar, P.J., Gundrum, and Grogan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Ronald G. Schmitt appeals from a circuit court judgment convicting him of repeated sexual assault of a child under the age of 13 after a three-day jury trial. He also appeals from the order denying his postconviction motion for a new trial. Schmitt takes issue with a number of statements made by the prosecutor at trial and with a portion of Asia’s¹ trial testimony. On appeal, Schmitt argues that his trial counsel’s failures to object to the challenged statements and testimony at trial constituted constitutionally ineffective assistance of counsel and, in any event, their admission at trial amounted to plain error. Schmitt thus argues he is entitled to a new trial. For the reasons that follow, we disagree with Schmitt. Accordingly, we affirm.

BACKGROUND

¶2 Schmitt was charged with one count of repeated sexual assault of his step-granddaughter, Asia, after Asia’s mother, Tammy, reported to law enforcement that her daughter had been sexually assaulted by Schmitt. Tammy was Schmitt’s stepdaughter.

¶3 Tammy stated that in July 2021, her other daughter, Brittany, told Tammy that Schmitt had walked into the bathroom while Brittany was showering and looked at her, which made her uncomfortable. Schmitt was also Brittany’s step-grandfather. Tammy further reported that Brittany told her Asia had confided in Brittany. Brittany shared Asia’s account of the ongoing sexual abuse by Schmitt. Asia stated that on numerous occasions Schmitt had walked into the bathroom while she was showering and touched her vagina.

¹ We use pseudonyms to refer to the victim and witnesses.

¶4 The original complaint alleged that Schmitt had fondled Asia on several occasions over an approximately two-year period. The trial was held before a jury over the course of three days. At trial, the State called Brittany as its first witness. Brittany testified that Schmitt walked into the bathroom when she was showering and would stare at her in a way that made her uncomfortable. She also told the jury about Asia's disclosure to Brittany about Schmitt sexually assaulting Asia.

¶5 Tammy testified next. She told the jury about her experience living with her mother (Asia's grandmother) and Schmitt when Tammy's children were much younger. Tammy testified that Schmitt would come into the bathroom when Tammy was bathing and would touch her breasts and vagina. She also recalled a time she was sitting on the couch with her hair down when Schmitt came in and asked Tammy if he could brush her hair because he said he liked long hair. Schmitt then put lotion on Tammy's neck and started massaging it. Finally, Tammy told the jury about when and how she discovered that Schmitt was assaulting Asia.

¶6 Asia's grandmother, Cindy, testified next. Cindy, who is Tammy's mother and was married to Schmitt during the timeframe alleged in the complaint, testified about the layout of her house and where Asia slept when she stayed with her grandparents. Cindy admitted that Schmitt told her that he would get up in the middle of the night, nearly every night, and go to Asia's room. Cindy stated Schmitt said he did so to tell Asia to get off her tablet.

¶7 Next up was the lieutenant who had investigated a sexual assault complaint Tammy had made against Schmitt almost a decade earlier. As part of

his testimony, the lieutenant stated that Schmitt had acknowledged being compelled to brush Tammy's hair.

¶18 The forensic interviewer who had discussed the allegations against Schmitt with Asia also testified. She told the jury about her work at Lakeshore Regional Child Advocacy Center and the methods and protocols for interviewing children.

¶19 Asia was the State's last witness at trial. She testified about Schmitt touching her and exposing himself to her. The vast majority of Asia's testimony centered on events that occurred in his Washington County home during the charging period the jury was to consider. However, at one point, the prosecutor asked Asia if Schmitt had ever told her what his ticklish spot was. Asia said when she was little Schmitt used to play a tickle game with her and Schmitt's tickle spot was "down there," where he goes to the bathroom. Asia said Schmitt did not tell her where his tickle spot was; he instead "pulled it out" and showed it to her. The prosecutor then asked Asia about the first time the inappropriate touching happened, and Asia said that it happened when she was "like seven." Trial counsel quickly objected after Asia testified that the tickle spot behavior started when she was seven.

¶10 When the State rested, Schmitt called Tammy's brother, who had lived with Cindy and Schmitt during the timeframe at issue and did not see any inappropriate conduct by Schmitt toward Asia. Schmitt then recalled Cindy, who testified in more detail about the layout of the house, the bathrooms, and Asia's routines at the house.

¶11 During trial, the Information was amended to charge incidents occurring only over a five-month span to conform with the evidence presented at

trial. The trial then proceeded to closing arguments. The prosecutor summarized the evidence presented through the witnesses and exhibits. She also explained how the State had proven the necessary elements of the offense. Similarly, defense counsel went through the trial testimony and argued that Asia's accusations were the result of coaching and that the State had not proven three instances of sexual assault. The jury found Schmitt guilty of repeated sexual assault of a child.

¶12 Schmitt filed a postconviction motion alleging vouching, introduction of impermissible evidence, and ineffective assistance of counsel. The circuit court held a *Machner*² hearing and ordered briefing. Based on the hearing testimony and briefs, the court denied Schmitt's motion for a new trial. The court concluded that none of the prosecutor's statements in opening or closing argument constituted impermissible vouching and Schmitt had not shown plain error.

¶13 As to the evidence, Schmitt alleged that Asia impermissibly testified the alleged assaults began when she was seven. He argued that that testimony violated a motion in limine the circuit court granted excluding evidence from when Schmitt lived in Dodge County.

¶14 The circuit court concluded that none of the challenged evidence constituted plain error. It further found that, in light of the other evidence presented at trial and defense counsel's sustained objection, Asia's testimony about being seven when the instances began was harmless. The court found that trial counsel's performance consisted of strategic decisions that were aligned with

² *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

the defense’s theory of the case—that Asia had been coached. The court also determined that trial counsel was effective at objecting when the prosecutor’s questioning went beyond the scope of permissible evidence. The court concluded counsel did not perform deficiently. Schmitt appeals.

¶15 We include additional facts below as necessary to our discussion.

DISCUSSION

¶16 Schmitt advances three arguments on appeal that he claims entitle him to a new trial. He first argues that counsel provided ineffective assistance in failing to successfully object during the trial to statements made by the prosecutor in her opening statements and closing arguments, and to Asia’s testimony that Schmitt exposed himself to her when she was about seven years old. Schmitt next argues that even if counsel was not ineffective, it was plain error by the circuit court to allow the challenged evidence and statements to come in at trial. Finally, even if we reject Schmitt’s ineffective assistance and plain error arguments, he asserts he is entitled to a new trial in the interest of justice. We address and reject each argument in turn below.

I. Ineffective Assistance of Counsel

¶17 Schmitt first argues that his trial counsel provided constitutionally ineffective assistance in his failures to successfully object to statements the prosecutor made at trial and to Asia’s testimony that Schmitt had exposed his penis to Asia. Schmitt states that this conduct apparently occurred when Schmitt lived in Dodge County, which is outside of the charging jurisdiction and charged timeframe, though Asia did not testify to the date or location of the exposure

incident. Schmitt also asserts that counsel should have moved for a mistrial on those same grounds.

¶18 Whether Schmitt was denied the effective assistance of counsel presents a mixed question of law and fact. See *State v. Breitzman*, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93. We will not overturn the circuit court’s findings regarding the factual circumstances of the case, defense counsel’s conduct, or defense counsel’s trial strategy unless those findings are clearly erroneous. *Id.* “[W]hether counsel’s conduct constitutes ineffective assistance is a question of law, which we review de novo.” *Id.*

¶19 To prevail on an ineffective assistance of counsel claim, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. We strongly presume that counsel’s conduct fell “within the wide range of reasonable professional assistance[,]” and we give counsel’s strategic decisions great deference. *Breitzman*, 378 Wis. 2d 431, ¶38 (citation omitted). If a defendant fails to make a sufficient showing on one prong of this analysis, we need not address the other. *Id.*, ¶37.

¶20 As we now explain, we conclude that trial counsel did not provide ineffective assistance as to either of Schmitt’s claimed errors. Specifically, Schmitt has failed to establish deficient performance regarding counsel’s failures to successfully object to, or seek a mistrial based on, the challenged prosecutorial

remarks during opening statements and closing arguments, or the admission of evidence regarding Schmitt exposing his penis to Asia when she was younger.

A. *The prosecutor's remarks*

¶21 In both the realms of ineffective assistance of counsel and plain error, Schmitt takes issue with a number of statements the prosecutor made during her opening statement and closing arguments. The following are among the objected-to statements from the prosecutor:

- And you will hear about how when [Brittany] would go over, sometimes she would take a shower at Nana's and Papa's house and Mr. Schmitt would come into the bathroom and open up the shower curtain and look at [Brittany].

And this is something that [Asia] also has experienced. She describes herself taking a shower and having the defendant come in and open up the shower door to look at her while she is naked showering.

- [A]gain, back to [Tammy], our victim [Asia]'s mother. I was talking about how in 2014 [Tammy] was in a bathtub when Mr. Schmitt, who is married to [Tammy]'s mother, came into the bathtub, was washing her hair with her, and that he began to touch [Tammy]'s breasts.
- And on the stand, I had her clarify sometimes she uses the word try to touch, and I had her clarify. Well, does that mean he actually touched? Yes. All the time? Well, sometimes. Well, tell me about those some times that he tried.

And I asked specifically could -- the times he tried, could you feel anything? Yes.

What could you feel? Someone touching my bathroom spot. So it did happen. He was touching her bathroom spot.

- He is taking a series of unnecessary steps to look at that naked little girl. He is going into the bathroom. He is moving a curtain. He is opening up a sliding door to the tub, and he is looking at her.
- Another interesting thing about this statement from his own mouth, he likes long hair. It turns him on. He likes long hair. You saw these little girls testify. You saw the video of [Asia]. They have long hair.

The remainder of the objected-to statements are along similar lines to the ones above. Except as otherwise noted, we address the prosecutor's statements in collective terms.

¶22 First, as did the circuit court, we conclude that all the prosecutor's statements during her opening and her closing argument were permissible because they directly related to the evidence presented at trial. See *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998); see also *State v. Lammers*, 2009 WI App 136, ¶16, 321 Wis. 2d 376, 773 N.W.2d 463. It is entirely proper for a prosecutor to comment on the evidence, argue to a conclusion from the evidence, and state that the evidence convinces him or her and should convince the jury. *Lammers*, 321 Wis. 2d 376, ¶16. Along these lines, “[i]mproper vouching occurs when a prosecutor expresses her personal opinion about the truthfulness of a witness or when she implies that facts not before the jury lend a witness credibility.” *United States v. Cornett*, 232 F.3d 570, 575 (7th Cir. 2000). Attorneys are given great latitude in closing arguments as long as their comments relate to the evidence. *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).

¶23 Trial counsel did not perform deficiently in failing to object or move for a mistrial based on the remarks. None of the prosecutor's remarks constituted improper vouching; the remarks did not convey personal opinions but instead were

the prosecutor's summations of the testimony of Asia and the corroborating witnesses, including a summary of what the prosecutor believed that evidence proved. The prosecutor did not invite the jury to consider any evidence that it had not heard through trial testimony and did not impermissibly vouch for any of the testifying witnesses. See **Cornett**, 232 F.3d at 575.

¶24 Schmitt argues that the comments constitute vouching because the way the prosecutor phrased her statements implied that the events happened. However, a prosecutor does not impermissibly vouch anytime she makes a statement concluding that a fact or event happened; it is permissible for a prosecutor to draw reasonable inferences and conclusions from the evidence presented at trial. **Lammers**, 321 Wis. 2d 376, ¶16. The challenged comments here in no way conveyed the prosecutor's own personal opinion about whether the witnesses were being truthful. Accordingly, trial counsel did not perform deficiently in failing to object to the remarks or move for a mistrial.

¶25 We further conclude that the prosecutor's use of the term "victim" at two points during the trial was not objectionable; it was used in a purely descriptive manner to avoid confusing the jury. In the first comment, the prosecutor used the term "victim" to help the jury understand who she was talking about: "So again, back to [Tammy], our victim [Asia]'s mother." This use of the term "victim" is permissible because it is being used help the jury remember who Tammy is, not to imply that the crime occurred.

¶26 Similarly, in the second comment, the prosecutor used the term "victim" to clarify which testifying individual she is referring to. She remarked, "[t]his informs you on what is his intent when he is going and looking at [Asia], our victim in the charged offense." Trial counsel did not perform deficiently in

failing to object to the usage of the term to describe Asia. Schmitt has not cited to any Wisconsin case holding that counsel performed deficiently in failing to object to a prosecutor referring to the complaining witness at trial as a “victim,” and he has not persuaded us that we should so hold in this case.

¶27 In summary, we conclude that the circuit court did not err in concluding that counsel did not render ineffective assistance at trial in failing to object to any of the challenged statements by the prosecutor. An objection would have been fruitless because, as the court concluded, none of the prosecutor’s remarks were impermissible.

B. The exposure incident

¶28 Schmitt also argues that trial counsel provided ineffective assistance in failing to keep out Asia’s testimony about Schmitt telling her about his “tickle spot,” exposing his penis to Asia, and touching her “bathroom spot.” At the end of that line of questioning from the prosecutor, to which trial counsel objected, Asia testified that she was around seven years old when these incidents began.

¶29 This testimony was not stricken from the record, and Schmitt’s attorney did not move for a mistrial based on its admission. Schmitt argues that this testimony was objectionable because it related to events that happened before the charging period and in a different county from the charge brought against him at the trial underlying this appeal. He asserts that, because the circuit court ordered pretrial that evidence of sexual contact outside of the charging period or in Dodge County was inadmissible, Asia’s testimony regarding Schmitt exposing his penis to her should not have been admitted.

¶30 We first note, as does the State, that Asia’s testimony did not expressly reference a date or location, meaning that it is unclear whether it was prohibited by the circuit court’s ruling. Moreover, it is not clear from the transcript whether Asia’s testimony was that Schmitt began touching her when she was seven years old, or whether Schmitt began exposing himself to her when she was seven. Because Schmitt exposing himself to Asia is not evidence of sexual contact, the testimony does not clearly allege an incident that could be considered as an instance of sexual contact the jury could convict him on.

¶31 We further observe that trial counsel effectively shortened the challenged testimony by objecting immediately after Asia referenced the challenged exposure event. Additionally, based on Asia’s testimony to events that occurred outside the charged timeframe, counsel requested that the timeframe the jury was to consider be narrowed because “there was some reference as the testimony was heard to other things having happened at an earlier point in time. I just don’t want that to be weighed against my client.” The circuit court granted the request.

¶32 As noted above, nothing Asia testified to was clearly impermissible under the circuit court’s ruling. Further, her lone remark about being seven when it happened did not create a necessity for a mistrial. The jury was expressly instructed to consider only the timeframe of March 2021 to August 2021, when Asia was twelve years old, in rendering its verdict. Thus, Schmitt’s argument that the jury may have convicted Schmitt based on the exposure incident some five years before the relevant charging period in rendering its guilty verdict is unpersuasive. See *State v. Dorsey*, 2018 WI 10, ¶55, 379 Wis.2d 386, 906 N.W.2d 158 (observing that “[w]e presume that jurors follow the instructions given by the court.”).

¶33 Rather, as did the circuit court, we conclude here that Asia’s limited testimony as to the exposure was admissible panorama evidence essential to providing context for the jury. *See, e.g., State v. Jensen*, 2011 WI App 3, ¶77, 331 Wis.2d 440, 794 N.W.2d 482 (explaining “[a]ccepted bases for the admissibility of evidence of other acts ... arise when such evidence provides background or furnishes part of the context of the crime or case or is necessary to a full presentation of the case.”). As the State argued at the postconviction hearing, the challenged testimony from Asia was “part and parcel of the charged offense,” was necessary for the jury’s understanding, provided context to the offense, and was “intrinsically tied into what this victim is talking about.” We agree and conclude that trial counsel did not perform deficiently with respect to the challenged testimony.

II. Plain Error Doctrine

¶34 Schmitt next argues that, even though we have concluded that counsel did not perform deficiently in failing to object to the prosecutor’s remarks and failing to successfully keep out the exposure evidence, it was plain error for the circuit court to allow these items to come in at trial.³ With respect to the prosecutor’s remarks and the admission of the exposure testimony, Schmitt argues that these errors “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *See State v. Jorgensen*, 2008 WI 60, ¶40, 310 Wis. 2d 138, 754 N.W.2d 77 (quoted source omitted).

³ We note that trial counsel did object to the prosecutor’s questions related to Schmitt’s exposure. Accordingly, the plain error doctrine does not apply to the admission of this evidence, which we already ruled was not improper.

¶35 Pursuant to the plain error doctrine, we may “review errors that were otherwise [forfeited] by a party’s failure to object.” *Jorgensen*, 310 Wis. 2d 138, ¶21. “Plain error is ‘error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.’” *Id.* (citation omitted). We review this question de novo. *State v. Bell*, 2018 WI 28, ¶8, 380 Wis. 2d 616, 909 N.W.2d 750. The error must also be “obvious and substantial.” *Jorgensen*, 310 Wis. 2d 138, ¶21 (quoted source omitted).

¶36 If the defendant sufficiently demonstrates that an error was fundamental, obvious, and substantial, the burden shifts to the State to show the error was harmless. *State v. Mayo*, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115. “[T]he error is harmless if the beneficiary of the error proves ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Id.*, ¶47 (citation omitted). We “employ [the plain error] doctrine sparingly.” *See Bell*, 380 Wis. 2d 616, ¶12.

¶37 It is undisputed that defense counsel did not object to any of the prosecutor’s alleged vouching comments; thus, Schmitt forfeited his claim that the State provided an improper opening statement or closing argument. *See State v. Mercado*, 2021 WI 2, ¶¶35-36, 395 Wis. 2d 296, 953 N.W.2d 337. As a result, Schmitt argues that the prosecutor’s allegedly improper remarks constituted plain error entitling him to a new trial.

¶38 We have already explained why the failures by trial counsel to object to the prosecutor’s remarks or the admission of the exposure testimony without moving for a mistrial did not amount to the ineffective assistance of counsel. We similarly conclude that they did not constitute plain error.

¶39 As noted above, Schmitt argues that the prosecutor’s challenged remarks and admission of this piece of Asia’s testimony constituted obvious and substantial errors that warrant a new trial. He asserts that “this was a very close case” and cites to the jury note that it could not reach a unanimous verdict, sent shortly after deliberation began, in support of his position. With respect to Asia’s testimony, we note that it was not a ground for a mistrial, as stated above. We further observe that the challenged evidence constituted approximately one page of a trial transcript that spans three days and numerous witnesses.

¶40 Regarding the prosecutor’s statements, as a general matter, “[c]ounsel is allowed considerable latitude in closing arguments, with discretion given to the [circuit] court in determining the propriety of the argument.” *State v. Burns*, 2011 WI 22, ¶48, 332 Wis. 2d 730, 798 N.W.2d 166. And, as we observed in our discussion above, a “prosecutor may ‘comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him [or her] and should convince the jurors.’” See *Draize*, 88 Wis. 2d at 454 (citation omitted). “When a defendant alleges that a prosecutor’s statements constituted misconduct, the test we apply is whether the statements so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. Hurley*, 2015 WI 35, ¶96, 361 Wis. 2d 529, 861 N.W.2d 174 (quoted source omitted). “Even if there are improper statements by a prosecutor, the statements alone will not be cause to overturn a conviction. Rather, the statements must be looked at in context of the entire trial.” *Mayo*, 301 Wis. 2d 642, ¶43.

¶41 As we discussed above, none of the prosecutor’s remarks, nor Asia’s testimony about Schmitt exposing his penis to her, were impermissible at trial. However, even if we were to conclude that the prosecutor here had made improper remarks, Schmitt fails to persuade us that this would entitle him to a new trial.

There simply is no evidence to support a conclusion that the trial was “so infected ... with unfairness as to make the resulting conviction a denial of due process.” See *Hurley*, 361 Wis. 2d 529, ¶96 (quoted source omitted). The circuit court therefore did not err in allowing their admission.

III. Interest of Justice

¶42 Finally, we decline Schmitt’s invitation to order a new trial in the interest of justice. “In an exceptional case, after all other claims are weighed and determined to be unsuccessful, a reviewing court may determine that reversal is nevertheless appropriate under WIS. STAT. § 752.35.”⁴ *State v. Kucharski*, 2015 WI 64, ¶43, 363 Wis. 2d 658, 866 N.W.2d 697. As we have explained, Schmitt fails to persuade us that trial counsel performed deficiently or that the circuit court committed plain error. Schmitt further fails to explain how he was prejudiced by the any other alleged errors by the State, trial counsel, and the court. Accordingly, this is not “an exceptional case” warranting reversal.

CONCLUSION

¶43 Based on the foregoing reasons, we affirm the judgment of conviction and the postconviction order denying Schmitt’s motion for a new trial. Schmitt has not established any errors nor any erroneous exercises of discretion by the circuit court that warrant reversal.

⁴ All references to the Wisconsin Statutes are to the 2023-24 version.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT.
RULE 809.23(1)(b)5.

