

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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**Appeal No. 2025AP715-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2018CF682

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNATHAN A. ROSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: JASON A. ROSSELL, Judge. *Affirmed.*

Before Lazar, P.J., Grogan, and LoCoco, 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. Johnathan A. Rose, pro se, appeals from a judgment entered after a jury found him guilty of multiple counts relating to child sex crimes against his daughter. He also appeals from an order denying his postconviction motion.¹ Rose raises 8 issues under the heading of “Prosecutorial Misconduct” and alleges 22 ways in which his trial counsel gave him ineffective assistance. Because most of these issues were not raised in the circuit court, Rose forfeited his right to seek review of them on appeal. See *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (“Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal.”).

¶2 Thus, our opinion is limited to addressing only the issues Rose has not forfeited—the five ineffective assistance issues the circuit court addressed and his claim that there was insufficient evidence on the child enticement count. Specifically, we will address whether trial counsel provided ineffective assistance for failing to: (1) before trial, discuss an audio recording with Rose between him and the victim, Cindy;² (2) use Cindy’s text messages to impeach her trial testimony; (3) hire a medical expert to support an alleged improper argument made during the defense’s closing argument; (4) object during the State’s closing argument when the prosecutor made a remark about the defense’s trial strategy; and (5) object (and move for a mistrial) during the State’s closing argument when the prosecutor made remarks that Rose believes constitute vouching for Cindy’s

¹ Rose was represented by counsel both at the trial and for the postconviction proceedings.

² We use a pseudonym in place of the victim’s name for confidentiality. WIS. STAT. RULES 809.86(4); 809.81(8) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version.

credibility. We will also address whether the evidence is sufficient to uphold the jury's guilty verdict on count seven—child enticement. Because Rose failed to prove ineffective assistance on these claims and because the evidence is sufficient on count seven, we affirm the judgment and order. All the other issues Rose raised on appeal are summarily rejected because he forfeited them, and we will not address them further.³

I. BACKGROUND

¶3 In 2018, the State charged Rose with multiple counts of child sex crimes relating to his daughter.⁴ In 2019, a jury heard the case and found Rose guilty on all charges,⁵ and the circuit court imposed a lengthy sentence.

¶4 After numerous motions obtaining extensions to file a postconviction motion, Rose's postconviction counsel finally filed a postconviction motion in 2024.⁶ The motion alleged: (1) five instances in which trial counsel provided ineffective assistance; (2) the prosecutor's remarks during closing argument were improper and constituted plain error/violation of due

³ Due to the sensitive nature of this case, we relate only the facts necessary to dispose of this appeal.

⁴ Counts 1, 3, 5, 8, and 10 were charged as sexual assault of a child under 13 years of age, as a person responsible for the welfare of a child, contrary to WIS. STAT. §§ 948.02(1), 939.50(3)(b), and 948.02(3m); counts 2, 4, and 6 were charged as incest with a child, contrary to WIS. STAT. §§ 948.06(1) and 939.50(3)(c); counts 9 and 11 were charged as incest, contrary to WIS. STAT. §§ 948.06(1) and 939.50(3)(bc); and count 7 was charged as child enticement, contrary to WIS. STAT. §§ 948.07(1) and 939.50(3)(bc).

⁵ Counts 5 and 6 were dismissed on a prosecutor's motion.

⁶ Rose's postconviction counsel filed multiple extension motions to extend the time to file a WIS. STAT. RULE 809.30 notice of appeal or postconviction motion with the first filed in April 2021 and the last filed in July 2024.

process rights and right to a fair trial; and (3) the evidence was insufficient to support counts three, four, and seven.

¶5 The specific allegations of ineffective assistance raised by Rose’s counsel in the circuit court were that trial counsel failed to: (1) review with and prepare him for cross-examination regarding a phone call recording between him and Cindy—that he says resulted in the prosecutor being able to use the phone call to undermine his credibility; (2) impeach Cindy’s testimony about their text messages that could have corrected the jury’s inaccurate impression that Rose “had done” something to Cindy; (3) hire a medical witness to support his closing argument—rendering the argument that no assault occurred based on Cindy’s medical records improper and leading to the prosecutor refuting this claim as “preposterous”; and (4) object to multiple improper remarks made by the prosecutor during closing argument (and move for a mistrial).⁷ The first remark Rose challenged involved the prosecutor’s comment that Rose’s trial counsel’s argument was “very dishonest, and I don’t mean that [Rose’s attorney] is dishonest. That’s a very dishonest way of looking at things and twisting the evidence.” Rose contends this disparaged his trial counsel by essentially calling him a liar and discredited his entire defense. The second remark challenged the prosecutor’s suggestion that specific phone communications Cindy testified to were “clearly about” Rose’s sexual assault of Cindy. The third remark challenged by Rose alleged the prosecutor improperly vouched for Cindy’s credibility when he explained why Cindy and Rose still had a close relationship. The prosecutor told the jury: “[n]ow, I deal with this stuff every day, but it ... can be – things can

⁷ The fifth instance of ineffective assistance was withdrawn by Rose, and therefore we address it no further.

seem strange if you're not familiar with sexual assaults or you're not familiar with victims of sexual assaults. There's a lot of people that say well, she didn't act like a sexual assault victim[.]”

¶6 For Rose's insufficiency claims regarding counts three and four, Rose argued the evidence never showed beyond a reasonable doubt that he had satisfied the essential elements for counts three and four.⁸ For count seven, Rose argued that the State failed to prove the first element of child enticement—that Rose enticed Cindy to go to a room or a secluded space.⁹

¶7 The postconviction court held a ***Machner***¹⁰ hearing at which Rose, his trial counsel, and the victim's ex-husband testified. Following the ***Machner*** hearing, the postconviction court ruled Rose failed to prove his trial counsel provided ineffective assistance—either because the conduct was not deficient or because Rose failed to prove he was prejudiced by counsel's conduct. Regarding Rose's first assertion, the court found that the phone call should not have come as a surprise to him as he was part of the call himself and that it was admissible evidence, and the court held that Rose otherwise being able to provide an alternative explanation for the call had he known it was coming in cross-examination did not equate to undermining the “fairness of the trial.”

⁸ Specifically, Rose alleges Cindy never testified that Rose had rubbed her vaginal area with his bare hand *under* her underwear for the charged incident.

⁹ The elements to child enticement are: “(1) that the defendant caused or attempted to cause a child to go into a vehicle, building, room or secluded place; (2) that the defendant did so with any one of the six enumerated intents, generally relating to sex and drug crimes; and (3) that the victim had not attained the age of 18.” ***State v. Derango***, 2000 WI 89, ¶31, 236 Wis. 2d 721, 613 N.W.2d 833 (citing WIS. STAT. § 948.07 and WIS. JI-CRIMINAL 2134).

¹⁰ See ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Regarding his second assertion, the court found that the trial court would not have admitted the texts for impeachment purposes because the transcript did not convey what Rose claimed it did and held “[f]ailing to seek admission of evidence that was not admissible is not deficient performance” nor is it prejudicial. Regarding his third assertion, the court found that even though there was no admitted expert testimony, the trial counsel’s arguments surrounding Cindy’s medical examination “were a fair argument based on logic and common sense” and were not deficient performance. Regarding his fourth assertion, the court found the prosecutor’s “dishonest” comment was not impermissible “name calling” but rather a carefully tailored remark criticizing Rose’s trial counsel’s *argument* as dishonest. The court also found that no vouching for Cindy’s testimony occurred; rather, the prosecutor tied his argument to his expert witness’s testimony about victim behavior.

¶18 The postconviction court did, however, grant Rose’s insufficiency motion as to counts three and four and dismissed them, stating, “[t]he court reviewed the entire transcripts and has not found any testimony, which supports the convictions in counts three and four.” The court denied Rose’s insufficiency motion on count seven, finding there was sufficient evidence for the jury to find him guilty of the child enticement charge.

¶19 Rose, now acting pro se, appeals.¹¹

II. DISCUSSION

¹¹ Rose also filed a motion to this court to file another postconviction motion to raise “over twenty arguments”; however, we denied this motion. Rose also filed pro se motions for sentence modification. These motions were withdrawn.

¶10 On appeal, Rose argues his trial counsel provided ineffective assistance and there was insufficient evidence to convict him on count seven, which alleged child enticement. We reject both arguments.

A. Ineffective Assistance of Counsel

¶11 Rose first argues his trial counsel provided ineffective assistance. Rose’s pro se brief is difficult to decipher, but it appears he reasserts two instances of ineffective assistance that were raised in his postconviction motion—the failure of counsel to prepare him for cross-examination on the phone call recording and the failure to cross-examine Cindy regarding the text messages.¹² It is not entirely clear whether Rose also is challenging the three other specific instances of ineffective assistance he raised in his postconviction motion—the failure to hire a medical expert to support his closing argument claim that Cindy’s medical records suggested no assault occurred, the prosecutor’s “dishonest” comment, and the prosecutor’s alleged vouching remarks. For the sake of completeness, we will address all five instances of alleged ineffectiveness, although we will only discuss the last three briefly.

¶12 Whether Rose was denied effective assistance of counsel presents a mixed question of law and fact. See *State v. Breitman*, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93. “The factual circumstances of the case and trial counsel’s conduct and strategy are findings of fact” which we will not overturn

¹² Rose appears to have altered the presentation of his allegation with respect to the text messages as compared to in his postconviction motion. Regardless of how he presents his counsel’s failure to use the text messages to impeach Cindy, he fails to prove this constituted ineffective assistance.

unless clearly erroneous. *Id.* But, “whether counsel’s conduct constitutes ineffective assistance is a question of law, which we review de novo.” *Id.*

¶13 For Rose to prevail on his ineffective assistance of counsel claim, he must show both that the trial counsel’s performance was deficient and that the “deficient performance prejudiced the defense.” See *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 687-88. “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 “falls within the wide range of reasonable professional assistance[,]” and we give counsel’s strategic decisions and trial strategy great deference. *Breitzman*, 378 Wis. 2d 431, ¶38 (citation omitted). If a defendant fails to make a sufficient showing on one prong of the analysis, we need not address the other. *Id.*, ¶37. Accordingly, because Rose does not make a showing of deficient performance in any of the five instances, we need not address whether any alleged deficient performance is prejudicial.

1. *The phone call recording*

¶14 Rose first asserts that his trial counsel’s representation is deficient because he did not review with Rose a recording of a phone call between him and Cindy. Rose testified that his trial counsel never played the recording to him prior or during the trial and never discussed its contents with him prior to trial. Although trial counsel did not have an independent recollection of reviewing the call with Rose, a letter from trial counsel to postconviction counsel affirms that he did so, in conjunction with his practice to review all discovery with his client. The

letter stated that he “believe[s] [the call’s] trial admission was discussed with Mr. Rose since [they] spoke of [Cindy’s] transcribed statements to police and their inconsistencies. The phone call’s introduction also seemed inevitable[.]” As the State points out, trial counsel also testified that it was his practice to go over all discovery—paper or electronic—with the client. Therefore, the Record supports that trial counsel did discuss the phone call recording with Rose. Before this court, Rose fails to develop any response to the State’s arguments that trial counsel’s performance is not deficient. We conclude that Rose fails to prove he received ineffective assistance based on this instance.¹³

2. *The text messages*

¶15 We next look at whether trial counsel’s failure to impeach Cindy with the text messages is deficient performance. Cindy testified at trial that she texted Rose to “talk about this and I want to talk about how I’m hurting and what you’ve done.” Rose’s trial counsel was asked at the *Machner* hearing why he did not use the actual texts to impeach Cindy on this testimony as the actual texts did not say that she was “hurting” and did not specifically state what Rose had done or anything about Rose assaulting her. Trial counsel testified that he did not impeach Cindy’s testimony with the actual texts because it did not fit into his trial strategy of portraying the instances of sexual assault as fabricated. The defense theory also involved focusing on the positive, ongoing familial relationship between Rose and Cindy:

¹³ Even if Rose could show trial counsel’s performance was deficient, he cannot prevail on this issue as he has abandoned the prejudice argument he made in the circuit court. We decline to address the new, undeveloped prejudice argument Rose now attempts to assert.

I think I don't have a particular reason why that was not done, as much as a reason for putting on the defense. If I may, we were showing a broad picture of [Cindy] as someone who fabricated these instances of sexual assault. And we were showing the ongoing close relationship between father and daughter. We were showing, through what was to be the testimony of family, as well as potentially, likely, Mr. Rose, that there was a healthy relationship going on.

The postconviction court concluded the failure to use the text messages was a reasonable strategic choice and therefore not deficient. We agree. Based on the *Machner* hearing testimony, Rose's trial counsel's decision constitutes a reasonable strategic decision, which cannot be deficient performance. See *Breitzman*, 378 Wis. 2d 431, ¶38. Accordingly, we conclude that Rose fails to show this instance constitutes ineffective assistance.

3. *The medical examination evidence*

¶16 We next examine whether trial counsel's remarks during the defense's closing argument regarding Cindy's medical examination suggesting that she was not assaulted constitute deficient performance. Trial counsel made a statement during closing argument to the effect that if Rose had been regularly sexually assaulting Cindy, "there would have been something medically detected and yet there wasn't." This was in regard to Cindy agreeing that her doctors noted "no obvious abnormalities" on her cervix during an examination. The postconviction court ruled that trial counsel's strategy of noting the lack of physical evidence of the sexual abuse was a "fair argument based on logic and common sense." The postconviction court also stated that it believed this was a comment on the lack of evidence, which is permissible. Moreover, trial counsel testified that he made this argument without an accompanying expert opinion because the State had stipulated to the introduction of Cindy's medical records;

therefore, he was trying to show this “absence of information showing any prior abuse or sign of prior abuse” to the jury. We agree with the postconviction court. Choosing not to hire a medical expert was a strategic decision whereas, here, the medical records were introduced pursuant to a stipulation. It was not unreasonable for Rose’s trial counsel to make an argument based on the absence of evidence. This was a strategic choice, which is not deficient performance. *See Breitman*, 378 Wis. 2d 431, ¶38. Therefore, we conclude that Rose fails to establish that this instance constitutes ineffective assistance.

4. *The “dishonest” comment*

¶17 We next examine whether Rose’s trial counsel’s choice to not object to the prosecutor’s closing argument is deficient performance. Specifically, the prosecutor said that “it’s very dishonest, and I don’t mean that [trial counsel] is dishonest. That’s a very dishonest way of looking at things and twisting the evidence. I think the number one aspect of that is this testimony about the medical record.” The postconviction court rejected Rose’s claim, reasoning that the prosecutor was calling Rose’s trial counsel’s *argument* dishonest, not the trial counsel himself, and that the prosecution emphasized this distinction to the jury. Further, at the *Machner* hearing, Rose’s trial counsel explained that he generally does not like to object when an “opposing counsel mak[es] broad swaths or characterizations of the evidence” because “[t]hey are just that, arguments and not evidence.” We agree with the postconviction court that failure to object to the prosecutor’s remarks regarding dishonesty is not deficient performance. First, the dishonesty comment is not improper name calling. Second, Rose’s trial counsel employs a strategy of not objecting to these types of remarks during closing arguments, which is not deficient performance. *See Breitman*, 378 Wis. 2d 431,

¶38. Therefore, we conclude Rose fails to prove his trial counsel’s decision not to object during the prosecutor’s closing constitutes ineffective assistance.

5. *The vouching remarks*

¶18 Lastly, we examine whether the prosecution vouched for Cindy during closing remarks and whether trial counsel’s failure to object to the alleged vouching is deficient performance. During the State’s closing argument, the prosecutor told the jury that: “[n]ow, I deal with this stuff every day but it can be -- things can seem strange if you’re not familiar with sexual assaults or you’re not familiar with victims of sexual assaults. There’s a lot of people that say well, she didn’t act like a sexual assault victim.” Rose wants us to look at this quote in a vacuum; however, the totality of the prosecutor’s statements indicate that this is not vouching for Cindy’s credibility.

¶19 “Improper vouching occurs when the prosecutor expresses [a] personal opinion about the truthfulness of a witness or when [he or] she implies that facts not before the jury lend a witness credibility.” ***United States v. Cornett***, 232 F.3d 570, 575 (7th Cir. 2000). The postconviction court concluded the prosecutor’s comment was not vouching; rather, the prosecutor was simply making a permissible comment on how the behavior by the victim might not always align with the expected behavior of a sexual assault victim, or might be strange, and related it back to expert testimony that accounted for this discrepancy. We agree that this comment is not vouching. It also was tied to admitted evidence in this case. Thus, failing to object to it would not have mattered as any objection would have been overruled. See ***State v. Maday***, 2017 WI 28, ¶55, 374 Wis. 2d 164, 892 N.W.2d 611 (stating that failing to object to admissible evidence is not deficient performance). Therefore, we reject Rose’s claim that counsel acted

deficiently with respect to the prosecutor’s remarks. We conclude Rose fails to show that this instance constitutes ineffective assistance.

B. Sufficiency of the Evidence

¶20 Lastly, Rose argues there is insufficient evidence to convict him of count seven, child enticement. Specifically, Rose argues the State failed to introduce any evidence to satisfy the first element of child enticement. In reviewing the sufficiency of the evidence to support a conviction, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no jury, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Therefore, if more than one reasonable inference can be drawn from the evidence, we must “accept and follow” the inference that supports the jury’s verdict. ***Id.*** at 506-07.

¶21 Here, the postconviction court found Cindy testified that Rose had her sit on his lap and then began to touch her inappropriately and pull her pants down. Cindy testified:

The next one I recall was probably a couple years later. We were in the basement in his office, and it was not like a fully finished basement but we had a family room and then behind a partition was his office. And I remember that he was on his computer at his desk and *he had me* sit on his lap facing away from him, and he began to touch me and pull down my pants as well.

(Emphasis added.)

¶22 The court found that “he had me” created an inference that Rose “caused her to go into a separate room from the basement for the purposes” of sexually touching her. We agree with the postconviction court’s assessment.

Given these facts, we cannot say that no jury, acting reasonably, could have found guilt beyond a reasonable doubt. *Id.* at 507. One reasonable inference from the evidence presented is that Rose enticed Cindy to go to the partitioned part of the basement solely to touch her, satisfying this element for child enticement. Therefore, we reject Rose's insufficiency of the evidence claim and affirm the conviction on count seven reached by the jury.

By the Court.—Judgment and order affirmed.

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

