COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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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. 2024AP2575-CR **Cir. Ct. No. 2021CF43**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN W. BABCOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Vernon County: DARCY J. ROOD and LISA A. RINIKER, Judges. *Affirmed*.

Before Blanchard, Kloppenburg, and Nashold, 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. Ryan Babcock appeals a judgment convicting him, following a jury trial, of first-degree sexual assault of a child under 12 and

exposing a child to harmful materials, and an order denying his postconviction motion. Babcock argues that the postconviction court should have ruled that his trial counsel was constitutionally ineffective by failing to ask for a jury instruction regarding the evaluation of testimony by children and, separately, by failing to consult with and potentially call as a witness a defense expert regarding forensic interviews of children. Separately, Babcock argues that the postconviction court should have ruled that the trial court committed two errors: (1) allowing the State to admit at trial, under WIS. STAT. § 908.08 (2023-24), the videorecorded forensic interview of the victim for the truth of the recorded statement; and (2) denying Babcock's motion to suppress statements that Babcock made to police at a time when he had not waived his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), because, according to Babcock, he made the statements after police raised allegations that transformed what began as a voluntary interview into a custodial interrogation.[1] For the reasons explained below, we affirm all of the challenged rulings.

BACKGROUND

¶2 In April 2021, the State filed a criminal complaint charging Babcock with first-degree sexual assault of A.B., a child under 12, by having sexual intercourse with her, and also with exposing A.B. to harmful material at the felony level. *See* WIS. STAT. §§ 948.02(1)(b), 948.11(2)(a). Both acts were alleged to

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

have occurred on the same date in March 2021.[2] At the time, A.B. was four years old.

¶3 Before the State filed the criminal complaint, a forensic interview was conducted with A.B., which was audio-visually recorded. Additional details about the recorded interview are included in the discussion section of this opinion below. It is sufficient as general background to note the following. The recording lasted approximately 36 minutes. This included a break in the interview, beginning at 22 minutes and 36 seconds, which lasted approximately seven minutes. Most pertinent to the issues on appeal, before the seven-minute break, A.B. denied that anyone had ever asked her to touch the person's "private part." After the break, she said that Babcock caused her to "suck" his penis "[s]ix times."

¶4 The State filed a notice of intent to offer the recording at trial as direct testimony by A.B., pursuant to WIS. STAT. § 908.08. Under this statute, a circuit court may allow a party to offer at trial a recorded oral statement of a child for the truth of the statement, even though the child is available to testify, as an alternative to relying on a hearsay exception under the rules of evidence. *See* § 908.08(1), (2), (7).

¶5 The trial court here held a hearing to determine whether the recording qualified for admission for the testimony of a child under the age of 12 under the terms of WIS. STAT. § 908.08(3).[3] Babcock's trial counsel took the

[2] Consistent with the policy of protecting victim privacy under WIS. STAT. RULE 809.86(4), we use initials that do not correspond to the victim's name.

[3] The Hon. Darcy J. Rood ("the trial court") presided over proceedings up to and including sentencing, and the Hon. Lisa A. Riniker ("the postconviction court") presided over all postconviction proceedings.

position that he wanted the jury to watch the recording, because in counsel's view it contains exculpatory elements undermining A.B.'s credibility or reliability. At the same time, however, counsel objected to the trial court allowing the State to offer it for its truth, as the equivalent of A.B.'s direct examination testimony. The trial court denied the defense objection and ruled that the State would be allowed to offer the recording into evidence for its truth.

¶6 Separately, Babcock filed a motion to suppress statements that he made to police while he was in an interview room at the Vernon County Sheriff's Office on March 31, 2021. This was based on the argument that for all or part of that interview he was in custody, and that suppression was required because he had not validly waived his ***Miranda*** rights. After conducting an evidentiary hearing, watching the video, and considering the arguments of the parties, the trial court determined that Babcock was not subjected to a custodial interrogation during any part of the interview and denied the motion to suppress.

¶7 A jury trial was held over the course of four days in October 2022. The jury found Babcock guilty on both counts charged in the amended information, and the trial court sentenced Babcock.

¶8 Represented by new counsel, Babcock filed a motion for postconviction relief, followed by a supplement to that motion. Together, these filings advanced the same arguments that he now raises on appeal. The postconviction court heard testimony from trial counsel. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979); ***State v. Balliette***, 2011 WI 79, ¶31, 336 Wis. 2d 358, 805 N.W.2d 334 (describing a ***Machner*** hearing as an "evidentiary hearing to evaluate counsel's effectiveness, which includes counsel's testimony to explain his or her handling of the case"). The postconviction court

also heard testimony from a clinical psychologist retained by Babcock bearing on the issue of whether trial counsel should have at a minimum consulted with, and possibly called as a witness, an expert on forensic interviews of children. The postconviction court denied all of Babcock's arguments for reasons that the court explained in oral rulings. Babcock appeals.

DISCUSSION

¶9 Neither party addresses as part of their arguments on appeal the fact that Babcock was convicted of two separate felony offenses. We follow the parties in their shared, implicit assumption that all of the parties' arguments apply equally to both convictions.

I. Ineffective Assistance of Counsel

¶10 Babcock argues that he was denied effective assistance of counsel when his trial counsel did not request a pattern jury instruction that addresses jury assessments of the credibility of child witnesses and also when counsel did not consult with or retain an expert on the topic of child forensic interviews. We discuss the two issues in turn, after first summarizing the legal standards that apply to claims of ineffective assistance of counsel.

A. Legal standards

¶11 A defendant shows ineffective assistance of counsel by establishing both that counsel's performance was deficient and that the deficient performance was prejudicial, and if the defendant fails to satisfy either prong of the test, the other prong need not be addressed. ***State v. Pinder***, 2018 WI 106, ¶26, 384 Wis. 2d 416, 919 N.W.2d 568 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)).

¶12 "To establish that counsel's performance was deficient, the defendant must show that it fell below 'an objective standard of reasonableness.' In general, there is a strong presumption that trial counsel's conduct 'falls within the wide range of reasonable professional assistance.'" ***Id.*** (quoted source omitted). A reviewing court can determine that defense counsel's performance was "objectively reasonable," even if counsel offers no sound strategic reason for the challenged action or inaction. ***State v. Honig***, 2016 WI App 10, ¶¶24, 28, 366 Wis. 2d 681, 874 N.W.2d 589.

¶13 In assessing prejudice under ***Strickland***, the defendant can prevail only by showing that it is "reasonably likely" that the result would have been different, and the likelihood of a different result must be substantial. ***Harrington v. Richter***, 562 U.S. 86, 111-12 (2011).

¶14 The determination of whether a defendant in a criminal case was denied effective assistance of counsel presents issues of law and fact. ***Pinder***, 384 Wis. 2d 416, ¶26. When relevant facts, including those involving counsel's conduct and strategies, are found by the circuit court, then a reviewing court will rely on those findings of fact unless they are shown to be clearly erroneous. ***Id.*** But whether counsel rendered ineffective assistance presents an issue of law that we review de novo. ***Id.***

B. Omitted jury instruction

Additional Background

¶15 The trial court purported to read to the jury WIS JI–CRIMINAL 300, which is the general pattern instruction regarding the evaluation of witness credibility. But the trial transcript reflects that, in reading it, the court apparently

inadvertently omitted the entire second paragraph, although the parties on appeal fail to recognize this omission.[4] The following is WIS JI–CRIMINAL 300, which the court read except for the paragraph we now italicize:

> It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.
>
> *In your determination of credibility, you must avoid bias, conscious, or unconscious, based on the witness's race, national origin, religion, age, ability, gender identity, sexual orientation, education, income level, or any other personal characteristic.*
>
> In determining the credibility of each witness and the weight you give to the testimony of each witness, consider the following factors:
>
> - whether the witness has an interest or lack of interest in the result of this trial;
> - the witness' conduct, appearance, and demeanor on the witness stand;
> - the clearness or lack of clearness of the witness' recollections;
> - the opportunity the witness had for observing and for knowing the matters the witness testified about;
> - the reasonableness of the witness' testimony;
> - the appearance and intelligence of the witness;
> - bias or prejudice, if any has been shown;
> - possible motives for falsifying testimony; and

[4] We remind counsel that it is often critical to examine the words actually used by a circuit court when it instructs a jury, and not only the text of a purportedly corresponding pattern jury instruction.

> - all other facts and circumstances during the trial which tend either to support or to discredit the testimony.
>
> Then give to the testimony of each witness the weight you believe it should receive.
>
> The defendant has testified in this case, and you should not discredit the testimony just because the defendant is charged with a crime. Use the same factors to determine the credibility and weight of the defendant's testimony that you use to evaluate the testimony of any other witness.
>
> There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.[5]

¶16 The record also strongly suggests that the written version of WIS JI–CRIMINAL 300 that the trial court sent back to the jury for its use during deliberations also omitted the second paragraph of the pattern instruction.

¶17 The jury was not given WIS JI–CRIMINAL 340, which the jury instructions committee states can be given in appropriate cases as "a matter of discretion" by the circuit court. WIS JI–CRIMINAL 340. This instruction states:

> The testimony of a child should be weighed in the same manner as testimony of any other witness. Considerations of age, intelligence, ability to observe and report correctly, ability to understand the questions and to answer them, sense of duty to speak the truth, conduct on the witness stand, interest, appearance, and other matters bearing on credibility apply to a child witness in common with all witnesses.

[5] A comment to the current version of the pattern instruction, WIS JI–CRIMINAL 300, explains that the jury instruction committee approved the current version of the instruction in December 2023, shortly after the trial in this case. However, the comment further explains that this change was limited to changing the order of paragraphs in the instruction, and did not involve alteration of any substantive wording.

¶18 At the postconviction evidentiary hearing, trial counsel testified that he was not aware of the existence of WIS JI–CRIMINAL 340 at the time of trial, and further testified that he "believe[d]" that, had he been aware of this instruction, he would have requested that it be given.

Analysis

¶19 We conclude that Babcock fails to show that trial counsel's failure to ask the trial court to give WIS JI–CRIMINAL 340 was deficient performance, in light of the portions of WIS JI–CRIMINAL 300 that were given.

¶20 It is true that trial counsel offered no strategic reason for failing to request WIS JI–CRIMINAL 340. Further, it is not disputed that the State's case depended on the jury both viewing A.B. as credible and giving her testimony great weight. We also assume without deciding that, as Babcock contends, if trial counsel had requested CRIMINAL 340, the trial court likely would have given it.

¶21 But, when we compare the content of WIS JI–CRIMINAL 300 as it was given with the content of the closely related WIS JI–CRIMINAL 340, we are not persuaded that CRIMINAL 340 would have, as Babcock contends, "provided crucial guidance on how the jury should consider [A.B.'s] testimony" that was not already in all material ways provided in CRIMINAL 300. Therefore, Babcock has not overcome the strong presumption that trial counsel's handling of the jury instructions fell within the wide range of reasonable professional assistance and was objectively reasonable.

¶22 Explaining further, the first sentence in WIS JI–CRIMINAL 340, as well as its final phrase, would have served to merely reinforce for the jury repeated references contained in WIS JI–CRIMINAL 300 as given. The first

sentence of CRIMINAL 340 is, "The testimony of a child should be weighed in the same manner as testimony of any other witness." Its final phrase reads, "…apply to a child witness in common with all witnesses." These directions closely align with the following references in CRIMINAL 300 as given: "In determining the credibility *of each witness* and the weight you give to the testimony *of each witness*, consider [specified] factors…"; "Then give to the testimony *of each witness*, the weight you believe it should receive." (Emphasis added.) What remains in CRIMINAL 340 are directions to consider the same kinds of factors that are referred to, in more expansive terms, in CRIMINAL 300 as given: "Considerations of age, intelligence, ability to observe and report correctly, ability to understand the questions and to answer them, sense of duty to speak the truth, conduct on the witness stand, interest, appearance, and other matters bearing on credibility."

¶23 Babcock contends that WIS JI–CRIMINAL 340 was a missing "vital arrow" that would have "ensur[ed]" that "the jury did not give undue weight to [A.B.'s] testimony." But we conclude that CRIMINAL 340 would not have meaningfully added to the jury's understanding not already provided by WIS JI–CRIMINAL 300 as given.

¶24 Notably, Babcock fails to develop an argument that any trial events should have suggested to trial counsel, had he been aware of WIS JI–CRIMINAL 340, that CRIMINAL 340 was needed because otherwise jurors might misunderstand that the considerations in WIS JI–CRIMINAL 300 as given should not, or could not, be applied to A.B.'s testimony in the same way that those considerations should be applied to the testimony of all other witnesses. More specifically, Babcock does not refer to events that could reasonably have contributed to such a misunderstanding, such as any other instructions or

statements given by the court to the jury, any evidence offered by either side, or any argument by counsel for either side. Babcock does not persuade us that jurors had any reason to misunderstand, or to fail to take seriously, the strong implication in CRIMINAL 300 as given that *all* witnesses were to be evaluated in the manner described in CRIMINAL 300 as given, which is essentially echoed in CRIMINAL 340 in the specific context of child witnesses.

¶25 Babcock makes the broad observation that many substantive and procedural legal rules in Wisconsin treat children differently from adults due to, as Babcock puts it, "their perceived vulnerability by society." This is true. But Babcock fails to develop from this broad observation a persuasive argument that is tied to the specific terms used in WIS JI–CRIMINAL 300 as given and WIS JI–CRIMINAL 340.

¶26 Regarding the apparently inadvertent omission of the second paragraph of WIS JI–CRIMINAL 300, this caused the jury not to be instructed that it "must avoid bias, conscious, or unconscious based on" numerous witness characteristics, including age. But that paragraph is clearly intended to dissuade jurors from allowing personal biases against a witness as a member of a group of people—including, in its long list, a group defined by age—to unfairly influence the evaluation of a witness's testimony. In this case, we are not persuaded that it would have helped Babcock's defense for the jury to be specifically directed not to allow bias based on age to affect its evaluation of A.B.'s testimony.

¶27 Although it is not well developed, Babcock may mean to suggest the following argument. The trial court reading to the jury WIS JI–CRIMINAL 340 in its entirety would have discouraged the jury from being biased *in favor* of A.B. based on her youth, and this would have served to caution jurors not to think that,

because she was so young, she was necessarily a reliable truth teller. But if Babcock intends to make this argument, we are not persuaded. CRIMINAL 340 would have given the jury no pertinent direction in this case not already conveyed by many other parts of WIS JI–CRIMINAL 300 that the trial court did read, such as the direction to consider the A.B.'s demeanor, the reasonableness of her testimony, and her apparent intelligence.

C. Lack of defense expert

Additional Background

¶28 In support of the postconviction motion, Babcock retained clinical psychologist Emily Peissig, who asserted that she had expertise in "interviewing procedures and their effects on memory, factors that can impact memory during investigative procedures, and best practices for child forensic interviews." Peissig reported that her sources of information in this case were, in addition to her professional training and experience, viewing the video recording and accompanying transcript of the interview of A.B., and reading the criminal complaint and one police report. At the postconviction evidentiary hearing, Peissig testified about a report that she had written critiquing aspects of the recorded interview of A.B., including techniques used by the interviewer, JoEllen Egge, an investigator with the Vernon County Sheriff's Office.

¶29 Also at the evidentiary hearing, trial counsel testified about his decision not to consult with an expert in forensic interviews of children, as discussed in more detail in the following subsection of this opinion.

Analysis

¶30 We conclude that Babcock fails to show deficient performance in trial counsel's failure to consult with an expert in forensic interviews of children, based on the following points that trial counsel made at the evidentiary hearing, all of which were explicitly or implicitly credited by the postconviction court. This includes Babcock's argument on appeal that trial counsel was obligated, to avoid deficient performance, to hire an expert to learn the information that Peissig related in her report and testified to, because this would have allowed counsel to persuade the trial court to preclude the State from introducing the recorded interview in its case in chief.

¶31 First, trial counsel considered the forensic interview here to be, "on its face"—meaning, in the understanding of the trial court and the jury, and without the benefit of expert opinion—"very, very suspicious, very suggestive." "[T]here was a lot of good stuff in that interview that we believed that we could use offensively in trying to persuade the jury that the statements were unreliable on their face." Referring to Investigator Egge, counsel testified,

> [W]e felt very strongly that her techniques and her questioning spoke for itself. I think that in my opinion her questioning of this child was blatantly suggestive. I think there were half a dozen instances where this child said she knew nothing negative in terms of what they were trying to draw from her, and then ultimately the child was allowed to leave the room and go talk to her mother and grandmother and come back in the room and immediately give inculpatory statements, so we felt like we wanted to leave that alone.

The video itself was "a key piece of evidence in proving" that A.B.'s "statements were the product of adult suggestion," because it reflected that A.B. "was prompted to" make inculpatory statements. For those reasons, according to

counsel, this was "probably one of the few cases where I told the judge ahead of time that I planned to use the interview." This was a professional judgment by trial counsel that was not unreasonable under prevailing professional norms. Babcock fails to show that the various purported flaws identified by Peissig were not sufficiently apparent to trial counsel at the time of trial. Nor does Babcock establish that trial counsel could not reasonably have considered any purported flaws to have been either obvious, insignificant, or flaws that trial counsel could capably explain to the jury without the need to consult with an expert or to call one as a witness.

¶32 Second, and closely related to the first point, trial counsel testified that he followed an effective strategy during his cross examination of Egge. This was to walk her "through the interview and to have her agree that" some of the techniques she used might be considered problematic. This included "not using open-ended techniques," given that Egge used "close-ended techniques" during the interview, which trial counsel believed to be "leading in some respects." Trial counsel noted that his approach to cross examining Egge resulted in some testimony that was favorable to the defense. This included Egge's admission that A.B. did not make any inculpatory statements until after A.B. was allowed to leave the interview room for approximately seven minutes and then reenter the interview room—despite the fact that Egge asked what trial counsel characterized as leading questions, "or offering an alternative to [A.B.] that includes an answer [that the interviewer] may have wanted." Trial counsel decided that retaining an expert would have been "sort of like bringing in a weatherman to tell you which way the wind is blowing. It was obvious that it was improper." Again here, trial counsel made a judgment about whether he could undermine Egge's testimony,

and the reliability of the interview, by cross examining her, and Babcock fails to demonstrate that this was an unreasonable approach.

¶33 Third, trial counsel testified that he was pleased that the prosecutor had not named an expert witness on the topic of proper interviewing techniques, because "I don't like having to go up against experts if I can avoid that. I think that they can be very persuasive for juries, and in this particular case we weren't facing an extra hand." That is, counsel hoped to avoid "trigger[ing]" the prosecutor "into getting an expert" on the topic. On this point, Babcock contends that trial counsel's expressed fear that the State might call an expert lacks merit, because Investigator Egge testified that she was trained in child forensic interview techniques and therefore the defense was already up against an expert for the prosecution. But Egge, a sheriff's office investigator, could not have served as a purportedly neutral expert who could objectively analyze Egge's own performance in interviewing A.B. Trial counsel could reasonably have feared negative dynamics for the defense if the State retained such an expert, beyond any benefit the prosecution would be able to derive from the testimony of Egge. Babcock also suggests that trial counsel was deficient, at minimum, for not privately consulting with an expert, reserving the mere option of calling that person as a witness as might be needed. But Babcock does not develop a supported argument that failure to consult an expert was, in itself, deficient performance under the circumstances. For example, he fails to demonstrate that trial counsel could not reasonably determine that he was capable of conveying to the jury, through other trial evidence and common-sense concepts, the same basic points made by Peissig that could undermine the reliability of the interview in the eyes of the jury.

¶34 Fourth, trial counsel expressed the opinion that there is generally a low ceiling on the value of defense experts addressing forensic child interviews.

He testified that such experts, who generally rely on reviewing recordings of the interview at issue in a case as their raw material, "are going to be pretty restricted in what they can say, the ultimate opinions that they can give. They can talk about best practices and they can talk about the overall reliability of the interviewing process, but they can't really … give an opinion that the child's testimony was not reliable." We see nothing in Peissig's report and testimony that undermines trial counsel's judgment on this point.

¶35 Fifth, trial counsel considered the prosecutor who was pursuing the case to be especially experienced and skillful, and therefore perhaps able to cross examine a defense expert in ways damaging to the defense.

¶36 We conclude that, even standing alone, various of these points would be sufficient to support the presumption of non-deficient performance. In any case, considered together they easily defeat Babcock's argument for deficiency.

¶37 Babcock flatly asserts that trial counsel had "no strategic reason" "not to have consulted, retained, or called a child forensic interview expert." This assertion fails to come to grips with the points just summarized.

II. Admission of recording of forensic interview

¶38 Babcock argues that the trial court erroneously exercised its discretion in allowing the State to offer the recorded interview of A.B. for its truth under WIS. STAT. § 908.08, because the State failed to show that "the time, content and circumstances of the statement provide indicia of its trustworthiness," as required by § 908.08(3)(d). After providing additional legal context, we explain why we reject this argument.

Additional Legal Context

¶39 Under WIS. STAT. § 908.08, if the party offering a recorded oral statement of a child for its truth makes a timely, proper offer of proof, this triggers the obligation of the circuit court to hold a pretrial hearing on admissibility. Sec. 908.08(2). The court must view the recording at or before the hearing, and then rule on objections to admissibility. Sec. 908.08(2)(b). The court is to admit the recording if five conditions stated in § 908.08(3) are met, and we now italicize the condition that is at issue in this appeal:[6]

> (a) That the trial or hearing in which the recording is offered will commence:
>
> 1. Before the child's 12th birthday; or
>
> 2. Before the child's 16th birthday and the interests of justice warrant its admission under sub. (4).
>
> (b) That the recording is accurate and free from excision, alteration[,] and visual or audio distortion.
>
> (c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.
>
> *(d) That the time, content[,] and circumstances of the statement provide indicia of its trustworthiness.*
>
> (e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

[6] A legislative act, 2025 Wis. Act 246, effective April 11, 2026, included two changes to WIS. STAT. § 908.08, but neither could matter on the facts here. One change is to establish that the date that matters in § 908.08(3)(a) is the date of the recording, not the trial date, and the other is to raise the age from 16 to 18 under § 908.08(3)(a)2. Here, A.B.'s young age makes both of these changes irrelevant.

¶40 Regarding our standard of review, while we generally review evidentiary rulings for an erroneous exercise of discretion, when the issue is whether a recording contains sufficient indicia of trustworthiness under WIS. STAT. § 908.08(3)(d), this court in viewing the recording is often in the same position as the circuit court to make a determination, and therefore our review is de novo. ***State v. Marks***, 2022 WI App 20, ¶19, 402 Wis. 2d 285, 975 N.W.2d 238.[7] Further, in making a determination under subpart (3)(d), "there is no specific set of facts that must be present in order for a court to conclude that a child's statement is sufficiently trustworthy under" subpart (3)(d). *See* ***Marks***, 402 Wis. 2d 285, ¶32.

Analysis

¶41 Babcock argues that three sets of facts, considered together, caused "the reliability of" A.B.'s statements in the recording to be "shrouded much too heavily in suspicion to be admissible." The three sets of facts cited by Babcock are: (1) significant friction between Babcock and A.B.'s mother—which resulted in a disorderly conduct charge against Babcock, her petitioning for a restraining order against him, and her petitioning for divorce—shortly before she called police to report that Babcock had sexually assaulted A.B.; (2) inconsistencies in statements that A.B.'s mother made to two deputies regarding what A.B. had disclosed to the mother; and (3) the extended break during the recorded interview,

[7] We acknowledged in ***State v. Marks***, 2022 WI App 20, 402 Wis. 2d 285, 975 N.W.2d 238, that "in some circumstances, the determination of 'indicia of trustworthiness' might involve either discretionary decision-making or fact-finding [by the circuit court] not based on the recording itself, and thus might warrant deferential review" on appeal. *See* ***id.***, ¶19 n.6. Neither party on appeal suggests that we should not apply the de novo standard—the standard most favorable to Babcock—and accordingly we rely on that standard of review.

during which A.B. was apparently allowed to speak briefly to her mother and grandmother, and after which she made inculpatory statements for the first time in the recorded interview. Babcock argues that these facts strongly support a finding that A.B.'s mother, "who had an axe to grind with Babcock," improperly "coach[ed]" A.B. to falsely accuse Babcock of sexually assaulting her.

¶42 On our de novo review, we conclude that the recording, considered as a whole, contained sufficient indicia of trustworthiness, even taking into account the facts identified by Babcock that could weigh against that conclusion.

¶43 We interpret the phrase "the time" in subpart (3)(d) to mean the timing of the recorded statement in relation to other pertinent events in the case, including in relation to alleged criminal acts by a suspect. Here, the recording was made shortly after Babcock's alleged sexual assault and harmful exposure.

¶44 Here, the "content" of the recording as referenced in subpart (3)(d) includes, as the trial court aptly noted, reasonably clear answers by A.B. to specific relevant questions, including A.B. correcting Egge on the difference between "licking" and "sucking." For example, A.B. was able to correctly identify the anatomical parts of a girl and a boy. This was also true on small points, such as when she corrected Egge on how to pronounce A.B.'s nickname for her grandmother. Beyond that, when A.B. gave the inculpatory statements, she provided such details as describing Babcock sitting on his pants on his chair, gestured to show how Babcock held his arms during sexual assaults, and described his "peter" as "soft" and "wet."

¶45 Stepping back, our observation is that A.B. appears throughout the interview to be generally comfortable and willing to speak in an open manner to

Egge, even though she was easily distracted and sometimes non-linear in her discussion in ways that one would expect from a typical four-year-old.

¶46 Babcock's primary argument is based on the fact that A.B. did not make inculpatory statements during approximately 23 minutes of questioning which occurred before the seven-minute break in the interview, but then made inculpatory statements after the break. Further, Babcock relies on an assertion contained in the criminal complaint that, during the interview break, A.B. "saw her mom and grandmother for a minute." We assume in Babcock's favor that this occurred. But, even with that assumption, here, as in ***Marks***, we are "unable to determine whether a person other than the interviewer told [the child] what to say," and the recording itself as a whole does not suggest "any ulterior motive for alleging" sexual intercourse by Babcock. *See* ***Marks***, 402 Wis. 2d 285, ¶34. There was certainly an opportunity for A.B. to be improperly coached in some manner during the brief break. But it would be speculation to assume improper coaching by anyone during the seven minutes, including during the minute when we assume that she interacted with her mother and grandmother, apparently in the presence of at least one police witness.

¶47 Also, we note that A.B. did not directly and immediately deny all potential improper sexual activity by Babcock or anyone else when questioned before the break. She did this at times. But, at other times, she conveyed reluctance or ambivalence in answering difficult questions, such as when Egge asked at one point, "Did you tell Mommy a secret last night?" A.B. gave ambiguous answers and changed the subject, saying, "Well, we could go boating tomorrow." Later, still before the break, she said that her secret with Babcock is that he "always yells." But when pressed on that point, she shifted to the secret being "about [Babcock] hugging me and kissing me and [inaudible] …. That isn't

nice." Yet later, she changed the subject again when Egge brought up "that secret." The point is that A.B. gave various clues before the break that she might have more to say if given more opportunities to do so, which is a point in favor of reliability.

¶48 In addition, the general change in A.B.'s answers after the break could also be explained in part by the fact that Egge used one significantly different interview technique after the break. Instead of either sitting in a low chair opposite A.B.'s chair or perching next to A.B.'s chair, as she had before the break, Egge reclined on her side on the floor directly in front of A.B. This may have contributed to A.B. feeling more comfortable in opening up about a difficult subject. After steadily building a rapport with A.B. throughout the interview, both before and after the break, Egge's changed body positioning after the break could reasonably help explain the new disclosures.

¶49 Regarding the "circumstances of the statement" referred to in subpart (3)(d), the significant friction between Babcock and A.B.'s mother could, in theory, have motivated the mother to encourage A.B. to inculpate Babcock regardless of the truth. But again, it would be speculation to conclude that the mother did in fact encourage A.B. to make false statements because of the significant friction. To note one weakness in Babcock's argument, it is one thing to encourage someone to make a particular statement, but quite a different thing to support the person in telling the truth, whatever it is, even if telling the truth is difficult. At least as far as Babcock is able to show with any degree of reliability, even if the mother or grandmother gave some encouragement or direction to A.B. regarding the interview, including during a brief interaction during the break, that direction could have been for A.B. to be sure to tell the truth or to not be afraid. A.B.'s interactions with people outside the interview room that day were not

recorded or testified to by anyone, and therefore Babcock's challenge rests on mere speculation.

¶50 In sum on this issue, we conclude that the time, content, and circumstances of the recorded statement provide sufficient indicia of trustworthiness under subpart (3)(d).[8]

III. Custody for purposes of *Miranda*

¶51 Babcock challenges the interview conducted at the sheriff's office on the sole ground that he was in custody and did not waive his ***Miranda*** rights. He does not argue that his statements were not voluntary or that his constitutional rights were violated in any other way.

A. Legal standards

¶52 Under ***Miranda***, a person subject to questioning must waive the warning before custodial interrogation. ***Miranda***, 384 U.S. at 444. Our supreme court recently explained that we use "a two-pronged inquiry to determine whether a suspect is 'in custody' for purposes of ***Miranda***." ***State v. K.R.C.***, 2026 WI 10, ¶18, 419 Wis. 2d 587, 33 N.W.3d 93.

> First, we ask whether a reasonable person would have felt free to leave. To do so, we consider the totality of the circumstances. We must look at the objective circumstances, not subjective views. Relevant factors include "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the

[8] Because we reject Babcock's argument that subpart (3)(d) was not satisfied, we do not reach the alternative theory for admission that the trial court concluded also applied, namely, the residual hearsay exception in WIS. STAT. § 908.03(24).

> questioning." We have also said we consider "the degree of restraint; the purpose, place, and length of the interrogation; and what has been communicated by police officers." In turn, when evaluating the "degree of restraint" we consider "whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved."
>
> Second, we ask "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in ***Miranda***."

Id., ¶¶19-20 (citations omitted).

¶53 In reviewing a circuit court decision addressing a motion to suppress, the circuit court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Dobbs***, 2020 WI 64, ¶28, 392 Wis. 2d 505, 945 N.W.2d 609. In contrast, we independently apply constitutional principles to the facts. ***Id.*** Whether Babcock was in custody for purposes of ***Miranda*** presents an issue of law that we review de novo. *See* ***Dobbs***, 392 Wis. 2d 505, ¶28.

B. Additional Background

¶54 One witness testified at the suppression hearing, Lt. Scott Bjerkos of the Vernon County Sheriff's Office. During his testimony, a copy of a video made of the interview of Babcock was admitted into evidence. The parties made arguments to the trial court based on both the hearing testimony and what is reflected in the video, and the court viewed the video before making its suppression ruling.

Hearing testimony

¶55 Lt. Bjerkos testified to the following. Babcock was invited by the sheriff's office to retrieve a firearm that had been seized from him, and he drove

his own vehicle to that office, which is located in the same building as the county jail. Lt. Bjerkos met Babcock in the lobby and invited Babcock to join him in an interview room, where the two men sat at a table and spoke for about 25 minutes regarding Babcock's "personal stuff," such as his employment and his purported lack of drinking alcohol in recent days. Bjerkos told Babcock that "he was free to leave at any time." Babcock did not show hesitation in joining Bjerkos in the interview room, and throughout the interview Babcock never requested any food or drink, or an opportunity to use a restroom. Bjerkos was wearing plain clothes, but he carried a firearm that was partially covered by a vest. Bjerkos closed the door to the interview room and told Babcock that he had done so "for privacy," because there were officers and possibly non-officers walking around in the area. Babcock could have opened the door from the inside of the room at any time during the interview. Before Babcock was placed under formal arrest at the end of the interview, Babcock never asked if he was under arrest, and he also did not ask if he could leave or attempt to leave the room.

¶56 Lt. Bjerkos flipped a switch in the interview room to activate recording equipment in the interview room, but without alerting Babcock that the interview would be recorded. About 25 minutes into the interview, which lasted a total of about 80 minutes, Bjerkos raised the topics of A.B. and A.B.'s mother, and the two spoke about Babcock's "personal life and then his parenting activities and things of that nature." About 45 to 48 minutes into the interview, Investigator Egge joined Bjerkos and Babcock in the interview room, but the tone or tenor of the interview did not change with her entrance. This was a few days after Egge had conducted the child forensic interview with A.B. discussed above. Egge did not, in the words of the questioner at the hearing, "ever get in Mr. Babcock's face,

raise her voice, [or] become accusatory at all." While Egge was likely also armed, she did not pull out or brandish the firearm at any time during the interview.

¶57 During his interactions with Babcock that day, Lt. Bjerkos never brandished his firearm. He also did not point a finger at Babcock, raise his voice, or become harshly accusatory in his comments. Babcock was not restrained in any manner during the relevant time period. He was placed in restraints only after the interview was completed and he was formally placed under arrest. Throughout the interview, Babcock was "very cordial" to Bjerkos, and Babcock used a "normal tone" in speaking, although Babcock started to appear nervous when Bjerkos began referring to the inculpatory statements made by A.B.

¶58 After raising the topic of A.B.'s inculpatory statements, Bjerkos told Babcock that he believed A.B. was telling the truth. Babcock denied the allegations, and Bjerkos told him that he believed that A.B. did not come up with the allegations on her own.

¶59 Babcock was not given ***Miranda*** warnings until he was formally placed under arrest at the end of the interview. This occurred shortly after the officers asked Babcock to give them consent to look at the contents of his smart phone, at which point Babcock asked for the chance to speak with an attorney.

Video

¶60 Having viewed the video, we conclude that it is consistent in all relevant respects with Lt. Bjerkos's testimony. We include some additional observations in the discussion below.

Trial court ruling

¶61 The trial court ruled that, under the totality of the circumstances, Babcock was not in custody for ***Miranda*** purposes until the end of the interview. The court found that: Lt. Bjerkos used "a very conversational tone" in speaking with Babcock; Babcock was "not restrained"; the interview was "not adversarial" or "coercive," and neither Bjerkos nor Egge "was aggressive or threatened anything"; Bjerkos made clear to Babcock he was shutting the door of the interview room "for privacy," as opposed to closing it for the purpose of keeping Babcock in the room, and Babcock "didn't object" to the door being closed; and Bjerkos "made very clear that Mr. Babcock did not have to remain" in the room. The court further found that Babcock is "an intelligent man" and "a smart man," implying that Babcock did not require additional information from Bjerkos or Egge to understand that he was free to leave. The court noted that the officers did not tell Babcock that "he couldn't have an attorney" in connection with the subject matter of the interview.

C. Analysis

¶62 We conclude that, under the totality of the objective circumstances, a reasonable person in Babcock's position would have felt free to leave at any time up until he was formally placed under arrest, and that the environment did not present the inherently coercive pressures at issue in ***Miranda***.

¶63 Many features of the recording strongly support our conclusions. This includes the fact that both Bjerkos and Egge—after she entered the room, 48 minutes and 35 seconds into the approximately 80-minute interview—used notably low-key approaches throughout the interview. The officers called Babcock by his first name in a consistently cordial manner. They allowed him to

talk at length without interruption, and frequently paused in a respectful manner between questions. They generally sat back in their seats. They never invaded Babcock's personal space or made abrupt or potentially startling gestures. The officers repeatedly conveyed empathy to Babcock as he related various struggles in his life. The following is one notable example of their approach. At one point, Bjerkos apologized to Babcock, without apparent sarcasm or irony, for using what Bjerkos told Babcock he considered to be the overly "harsh" term "perpetrator" in referring to the child sexual assault allegation against him.

¶64 Babcock was never restrained until the interview was completed. He sat, seemingly at ease and comfortable, in the chair closest to the door throughout, often with his hands folded in a relaxed manner. It is also true that he became somewhat more animated, and at times expressed concern, when the officers referred to the allegations of child sexual assault. But even then, he did not express extreme emotion, such as panic or anguish, as best we can discern given that everyone wore face masks (likely due to the pandemic).

¶65 Babcock points out that the recording, which captured communications between Bjerkos and Babcock only after they entered the interview room, does not reflect Bjerkos telling Babcock that he was free to leave. But the trial court appeared to credit Bjerkos's testimony that he did tell Babcock at some point early on that he was free to leave at any time. Further, the video reflects Bjerkos making clear, on multiple occasions, that the door was being closed only so that they could have "a private conversation," and also telling Babcock, "You're not under arrest."

¶66 Babcock appears to advance two main arguments, which we address in turn.

¶67 One involves the fact—which was testified to by Lt. Bjerkos and also referred to during the course of the interview—that Babcock arrived at the sheriff's office that day to retrieve a firearm and learned only after he arrived that Bjerkos wanted to interview him. But at no point throughout the recorded interview did Babcock object to being interviewed despite the fact that he had arrived at the sheriff's office intending only to pick up his firearm. Further, more generally, Babcock does not support an argument that the use of this form of ruse to gain the opportunity to interview him at the sheriff's office lends weight to an argument that a reasonable person in his position would not have felt free to leave. To the contrary, by all appearances in the video, Babcock repeatedly seemed eager to continue the conversation, even after the officers told him that they believed A.B.'s inculpatory statements.

¶68 Babcock's other primary argument is that what began as a voluntary interview became custodial interrogation after "Bjerkos began questioning Babcock about the allegations of sexual assault." The video does not support this argument. It is sufficient to make two points on this issue.

¶69 First, the video reflects that when Bjerkos, before Egge joined the two men, eased into the topic of A.B. and then later the inculpatory allegations, he did so in a gradual manner and not at all abruptly. Consistent with this, Babcock did not at any point blurt out anything resembling a clear confession to having committed an intentional child sexual assault. Instead, in the course of a cordial back-and-forth conversation, during which the officers expressed confidence in the truth of A.B.'s inculpatory statements and also sympathy for Babcock, Babcock eventually said the following: that he had no memory of sexually assaulting A.B.; that he did not think that he had done so, but that A.B. would not lie about this; and that if it happened, then it must have occurred when Babcock had "blacked

out" from alcohol, or perhaps a combination of alcohol and one or more prescription medications.

¶70 Further, while the officers repeatedly expressed confidence in A.B.'s inculpatory statements, they consistently expressed this to Babcock in a calm manner. Babcock suggests that it increased the "psychological pressure" on him for the officers to raise the possibility that Babcock's drinking to excess—which Babcock freely and repeatedly admitted—could have led him to "black out," or to fail to recall, times when he might have sexually assaulted A.B. But assuming without deciding that this could be characterized as a form of psychological manipulation, the recording reflects that when the officers raised the possibility of a blackout, Babcock gave every indication to the officers that he was freely willing to discuss it, and that he was not contemplating how he could leave or thinking that he would not be allowed to leave. There is no suggestion in the recording that the officers raising the possibility of a blackout objectively contributed to an environment in which a person in Babcock's position would have thought that he was not free to leave.

¶71 Second, as already referenced, throughout the questioning by Bjerkos, and after Egge joined them, the two officers maintained the same empathetic, non-confrontational manner in conversing with Babcock, right up to the moment of the formal arrest.

CONCLUSION

¶72 For all of these reasons, the judgment of conviction and the order denying the postconviction motion are affirmed.

By the Court.—Judgment and order affirmed.

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