COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 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. 2025AP1600-CR **Cir. Ct. No. 2022CF2204**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUBEN GARNER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Donald, C.J., Geenen, and Petrashek, 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. Ruben Garner, Jr. appeals from a judgment of conviction, entered upon a jury verdict, for three counts of first-degree child sexual assault and from the order denying postconviction relief. Garner argues that trial counsel was ineffective for failing to object to the State's introduction of video recordings of forensic interviews with the victims and inadmissible hearsay testimony by five witnesses, and for failing to move for severance. We conclude that Garner has not shown he received ineffective assistance of counsel, and we affirm.

BACKGROUND

¶2 In June 2022, 8-year-old Allison disclosed to her 23-year-old half-brother, Dylan, that her father, Garner, had "touched" her. Dylan was enraged by her disclosure because he had reported that Garner sexually assaulted him when he was 11 years old. Allison disclosed the inappropriate sexual contact to Dylan; Dylan's wife, Elizabeth; her aunt, Camille; her mother, Tina; and ultimately to the police.[1]

¶3 The police report led to Allison being interviewed at the Child Advocacy Center by a Milwaukee Police Department (MPD) officer trained as a forensic interviewer. Allison reported three incidents, which became the factual basis for three counts of first-degree child sexual assault against Garner, with the

[1] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4) (2023-24), we use pseudonyms when referring to the victims and family members in this case.

All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

offenses occurring between June and August 2021.[2] In the first incident, Allison reported that when she was seven years old and lived with her mother at their old house, Garner told her to "suck his private" while her mother was at work. Allison put her mouth on his "private," sucked it, and something that tasted "sour and nasty" came out. She rinsed her mouth and got a popsicle; Garner, watching her eat the popsicle, then told her that is how she should suck his "private." In the second incident, Allison reported that while she was in her mother's bedroom, Garner told her to take her clothes off and lay on her stomach. Garner then "licked between her butt cheeks." In the third incident, Allison reported that when visiting her father at his girlfriend's apartment, Garner told her to get on his lap and rock back and forth on him. She reported feeling something hard in his pants and her bottom was touching his "private" while she was rocking.

¶4 Garner was charged with a fourth count of first-degree child sexual assault arising from a years-earlier incident involving Dylan. Dylan reported that years prior to Allison's assaults, in November 2010 when he was 11 years old, he and Garner were play wrestling. Dylan alleged that Garner "pinned him down," pulled down his pants and underwear, and licked his anus. A few days later, on November 11, 2010, Dylan was forensically interviewed after he disclosed the incident to school staff.

¶5 The assault charges relating to Allison and Dylan were tried jointly. The State first called the officer who conducted the forensic interview of Allison.

[2] In the complaint, the State noted that it may offer into evidence, under WIS. STAT. § 908.08(2)(a) (2021-22), the audiovisual recording of the statement Allison made to the forensic interviewer. We note that WIS. STAT. § 908.08 was amended in April 2026; however, those changes were not in effect at the time of Garner's trial and we do not consider them in this appeal. *See* 2025 Wis. Act 246.

The State moved to admit the video recording, and the defense stated it was not objecting.[3] The recording was played for the jury.

¶6 Next, the State called Allison, who testified that she told Dylan that her father touched her, like he touched Dylan. She testified that Garner touched her with "his self," meaning he touched her with his "private." She remembered a time his private touched her mouth and another time when both of their clothes were off and his "private" touched her "private." Allison stated that the touching happened more than once at her mother's old house and also at Garner's girlfriend's apartment. During cross-examination, Allison testified that her parents were divorced, and Dylan did not get along with Garner.

¶7 The State then called Dylan, who testified about Allison nervously disclosing that Garner "did something" to her. According to Dylan, he and Allison were upstairs in his grandmother's house when Allison told him that Garner did the "same thing" to her that he had done to Dylan. Allison told Dylan that Garner made her do stuff with her mouth. Dylan was enraged after Allison told him, and he went downstairs and told his wife, Elizabeth, and his aunt, Camille, what Allison had alleged. They called Tina, who came to the house, and then they all called the police.

[3] During the trial, the circuit court asked the State if it wanted to put anything on the record about the video recording. The prosecutor stated that it put the parties on notice in the complaint that it would introduce the recording pursuant to WIS. STAT. § 908.08 (2021-22). The court commented that, typically, the admissibility of a recording is discussed prior to trial. Additionally, during the trial, counsel and Garner submitted a signed stipulation to the introduction of the recorded forensic interview of Allison, stating that the defense was aware of the statutory requirements for the admission and was making the stipulation as a strategic trial decision.

¶8 Dylan testified about his own history with Garner. He stated that around 2010, he was supposed to go to church with his mother, but Garner persuaded him to stay home. Dylan testified that they began "play fighting" while watching one of his favorite television shows about wrestling. While Dylan and Garner were "tussling" on the ground, Dylan tried to crawl away, and his pajama pants started coming down. Dylan testified Garner pinned him down, and his pajama pants and "drawers" came down. Garner grabbed Dylan's behind, spread it apart, and stuck his tongue in it. Garner got up and Dylan collected some clothes and got in the shower, where he started crying. Garner entered the bathroom and apologized to him.

¶9 Dylan testified that he was upset at school the next day and told school officials about the assault, which led to the school contacting his mother, and, ultimately, the police. Dylan recounted that the police took Garner away and Dylan lived with his grandmother, although he eventually returned to his mother's care and Garner apologized. Dylan testified that he was initially struck by disbelief when Allison disclosed the abuse, and then he became furious with rage. Dylan stated that prior to Allison's disclosure he had warned Allison to "watch herself" around Garner, but he had not told her what happened years before she was born. During cross-examination, Dylan admitted that he did not like Garner.

¶10 The State then called Tina, Elizabeth, and Camille, who each recounted Allison's disclosure that Garner was touching her and she wanted it to stop. Tina testified that Allison initially only said Garner did "bad things" to her, but Allison eventually told Tina in therapy that Garner had touched her while she was lying on her stomach on Tina's bed. Elizabeth testified that Allison, while crying and upset, had said that Garner told Allison he liked the way Allison was eating a popsicle and he wanted her to do that to him. Allison also told Elizabeth

about Garner taking Allison into her mother's bedroom, laying her on the bed, licking her butt, and putting his finger in her. Camille testified that Allison described giving Garner oral sex and he "told her to suck it like it's a popsicle." Allison also told Camille that Garner made her lie down in her mother's room, pulled off her clothes and licked her butt.

¶11 Tina and Elizabeth also testified about Dylan's rage and distress at Allison's disclosure of the assaults. They each also testified about Dylan's reporting that Garner had sexually assaulted him in 2010. Tina testified that in 2010, she was called to Dylan's school because Dylan had tried to kill himself; however, by the time she reached the school, Dylan had been taken away for urgent mental health treatment. During cross-examination, Tina testified that in the 2010 incident, she left Dylan with Garner, but Garner's five sons were also there. She observed that all of them were roughhousing. Tina stated that she was told that Garner had bitten Dylan's butt. Elizabeth testified that Dylan had disclosed "bits and pieces" of the 2010 incident over the ten years they had been together. Dylan told her that he stayed home from church with Garner, they were play wrestling, his pants got pulled down, and Garner licked Dylan's butt.

¶12 The State also presented police and healthcare witnesses who testified about the investigations into the allegations against Garner. Among the witnesses was MPD Detective Amy Stolowski, who testified she had been part of the police investigation into Dylan's allegations in 2010 and she interviewed Tina at that time. In the 2010 investigation, Tina told Stolowski that the incident occurred on a Tuesday night while she was out picking up pizza for dinner. When she returned, Dylan was in the shower, but nothing seemed out of the ordinary, they ate, and went to bed. When she picked him up from school the next day, the school staff informed her that Dylan reported that Garner kissed his buttocks while

they were wrestling. Tina explained she yelled at Garner, but he explained it was like kissing a baby's feet. The State moved to admit the recording of Dylan's forensic interview with an MPD officer in 2010, and it was played for the jury.

¶13 Garner elected to testify in his own defense. He denied ever having any sexual contact with Allison or taking any actions towards her buttocks. As for Dylan's allegations, Garner testified that in 2010, he was living with Tina and Dylan and he regularly engaged in wrestling and play fighting with Dylan, as he did with his own five sons. One day, he was roughhousing with Dylan while Tina went to pick up pizza. Dylan started coming out of his clothes while wiggling trying to get out of Garner's grasp. Garner testified Dylan "actually, like, put his butt almost in my face," and Garner bit him on the butt cheek. He denied having any sexual gratification from the act. During cross-examination, Garner testified that after the investigation in 2010, he was not charged with assaulting Dylan.

¶14 The jury returned guilty verdicts on counts one, two, and four. It found Garner not guilty on count three, which related to Garner's alleged assault of Allison at Garner's girlfriend's apartment. The circuit court sentenced Garner to a 45-year term of imprisonment, divided as 30 years of initial confinement and 15 years of extended supervision.[4]

¶15 Garner filed a motion for postconviction relief, alleging that trial counsel was constitutionally ineffective for failing to object to joinder of the

[4] Garner's sentence was composed of the following: (1) on count one, a term of 35 years, divided as 25 years of initial confinement and 10 years of extended supervision; (2) on count two, a term of 15 years, divided as 10 years of initial confinement and 5 years of extended supervision, to be served concurrently with count one; and (3) on count four, a term of 10 years, divided as 5 years of initial confinement and 5 years of extended supervision, to be served consecutively to any other sentence.

charges relating to Allison and Dylan, the introduction of the forensic interview recordings, and inadmissible hearsay testimony. The circuit court granted partial relief, ordering a ***Machner***[5] hearing on the evidentiary claims, but denied the motion without a hearing on the joinder issue.

¶16 At the ***Machner*** hearing, trial counsel testified that his defense strategy was that there was a "breakdown in the family" and Dylan's animosity toward Garner resulted in Dylan "prodding" Allison to make these allegations. Counsel considered Allison and Dylan's testimony "key" and other testimony to be "cumulative." He did not object to the admission of Allison's forensic interview recording because he thought inconsistencies in her demeanor and words between her recorded interview and live testimony could raise reasonable doubt.[6] Counsel stated that when he reviewed the recording, he believed Allison's use of the word "molest" indicated adult influence, which fit the defense theory that Dylan prompted Allison to make the allegations against Garner.

¶17 Trial counsel testified that he considered the recording of Allison's interview to be "part of the whole overall evidence" to which he was not opposed. He did not object to multiple family members testifying about Allison's similar disclosures of the assault because it aligned with his trial strategy to show Dylan's

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

[6] Counsel also stated that he submitted a stipulation, signed by both himself and Garner, to the introduction of the recording of Allison's forensic interview despite noncompliance with certain statutory procedures because he considered it his responsibility as a trial attorney to clarify which issues were clear and which were not.

animosity toward Garner and the breakdown of the family relationship.[7] Counsel did not object to the admission of Dylan's forensic interview because he thought it would be useful to show any inconsistency. He was also not concerned about hearsay relating to Dylan's allegations in the testimony of Tina, Elizabeth or Detective Stolowski because it fit within the defense strategy. Counsel stated that the fact that Dylan "told other people … a lie … doesn't make that lie stronger."

¶18 The circuit court denied Garner's postconviction motion and adopted the State's findings of fact and conclusions of law as its decision. Garner now appeals.

DISCUSSION

¶19 On appeal, Garner makes three claims that trial counsel was ineffective in his representation: (1) counsel failed to object to the admission of the video recording of Allison's forensic interview at trial, which was offered without complying with the statutory requirements; (2) counsel failed to object to the admission of hearsay evidence in the form of the video recording of Dylan's forensic interview and hearsay statements from four additional witnesses; and (3) counsel failed to object to joinder and failed to move for severance.

[7] Because Garner's trial counsel made no hearsay objections, the State was not prompted to explain which exception(s) to the hearsay rule allowed certain testimony. In the ***Machner*** hearing, counsel agreed with the State that the excited utterance exception would apply to Elizabeth and Camille's testimony about the statements Dylan made while he was very upset about Allison's disclosures. Counsel also agreed that even if he had objected to the admissibility of those statements, it was likely those statements would have been admitted under rules for prior consistent or inconsistent statements. Additionally, counsel agreed that there were likely hearsay exceptions that would have allowed selections of Dylan's forensic interview to be admitted. Finally, counsel testified that he was unaware of whether WIS. STAT. § 908.08 (2021-22) was applicable after the subject of the recording was over the age of 16.

¶20 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. Mull***, 2023 WI 26, ¶31, 406 Wis. 2d 491, 987 N.W.2d 707. "The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact, which will not be overturned unless clearly erroneous; whether counsel's conduct constitutes ineffective assistance is a question of law, which we review de novo." ***State v. Breitzman***, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93.

¶21 To demonstrate that trial counsel's assistance was so defective to warrant a reversal and new trial, a defendant must show that counsel's performance was deficient and that deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Under this test, a defendant must demonstrate both prongs are satisfied, and if the claim fails under one prong, a reviewing court need not consider the other. ***Breitzman***, 378 Wis. 2d 431, ¶37.

¶22 Satisfying the deficiency prong requires a defendant to show that counsel's performance "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. We are highly deferential in our review, employing a strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance." ***Breitzman***, 378 Wis. 2d 431, ¶38 (quoting ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695). "The reasonableness of counsel's conduct must be evaluated 'on the facts of the particular case, viewed as of the time of counsel's conduct.'" ***State v. Balliette***, 2011 WI 79, ¶23, 336 Wis. 2d 358, 805 N.W.2d 334 (quoting ***Strickland***, 466 U.S. at 690). "[C]ounsel's performance need not be perfect, nor even very good, to be constitutionally adequate." ***Carter***, 324 Wis. 2d 640, ¶22.

¶23 Satisfying the prejudice prong requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. Prejudice may not be presumed "simply because certain decisions or actions of counsel were made in error." ***Balliette***, 336 Wis. 2d 358, ¶24. A defendant must identify particular errors that were unreasonable and had an actual adverse effect on the defense. ***Id.***

I. Counsel was not ineffective for failing to object to the introduction of the recording of Allison's forensic interview.

¶24 Garner argues that trial counsel performed deficiently because the State failed to comply with the statutory notice provisions under WIS. STAT. § 908.08 (2021-22) to introduce the audiovisual recording of Allison's forensic interview. Further, Garner asserts that because this recording was necessary for the State to obtain a conviction, this error was prejudicial.

¶25 Trial counsel's ***Machner*** testimony established that his trial strategy and theory of defense centered around the idea that Allison was prodded by Dylan to make these allegations and that Allison's allegations were part of the "breakdown of the family." Unless trial strategy is based on caprice or an irrational tactic, counsel's performance is unlikely to be deficient or constitutionally inadequate. ***Mull***, 406 Wis. 2d 491, ¶35. Garner has not shown that counsel's strategic choices constituted deficient performance. ***Breitzman***, 378 Wis. 2d 431, ¶38.

¶26 Here, the circuit court found counsel "credible and believable" in his ***Machner*** hearing testimony. Counsel discussed his strategic choice for the jury to

see all of the evidence "unless it's really really prejudicial" because cumulative evidence can assist the defense in "jurors seeing something that's inconsistent." Counsel inferred that Allison's use of the word "molest" in the interview indicated adult influence, which corresponded to the defense theory. Although counsel conceded he did not impeach Allison with anything from the forensic interview, in our review of counsel's performance, we must consider the circumstances at the time and resist the distorting effect of hindsight. ***Breitzman***, 378 Wis. 2d 431, ¶65.

¶27 Viewing the case through that lens, we must reject Garner's assertions about counsel's ineffectiveness in deciding not to object to Allison's forensic interview. At trial, the State introduced the forensic interview before introducing Allison's testimony; therefore, it was not unreasonable for counsel to believe that Allison might say something on the stand that was inconsistent with her statements during the interview. During her testimony, Allison could recall only generally how the assaults had occurred. Ultimately, Garner was acquitted of one count relating to his conduct toward Allison, and we cannot deem counsel's tactics to be capricious or irrational. Garner has not overcome the strong presumption that counsel's performance fell within the "range of reasonable professional assistance." ***Carter***, 324 Wis. 2d 640, ¶22 (citation omitted).

¶28 Furthermore, the recording would likely be admissible under the residual exception under WIS. STAT. § 908.08(7) (2021-22), which is an alternative method to introduce recordings of a child's statement during trial. "Counsel's performance cannot be considered deficient for failing to object to admissible

evidence." ***State v. Maday***, 2017 WI 28, ¶55, 374 Wis. 2d 164, 892 N.W.2d 611.[8] Here, the State argues that the recording was admissible under the residual exception path under § 908.08(7) (2021-22) and WIS. STAT. § 908.03(24). *See* ***State v. Mercado***, 2021 WI 2, ¶55, 395 Wis. 2d 296, 953 N.W.2d 337 (reaffirming that a video recording admissible under the residual hearsay exception is not limited by the requirements of § 908.08(2) and (3)).[9] Under that analysis, the court considers whether the recording has "circumstantial guarantees of trustworthiness" and considers the factors identified in ***State v. Sorenson***, 143 Wis. 2d 226, 245, 421 N.W.2d 77 (1988).[10] ***Mercado***, 395 Wis. 2d 296, ¶¶55-57.

[8] Because we conclude that Garner has not shown counsel's performance was deficient, we decline to address specific prejudice arguments. In any case, if the recording was admissible under WIS. STAT. § 908.08(7) (2021-22), Garner could not show prejudice because there would not be a reasonable probability of a different outcome if counsel had objected. *See* ***State v. Carter***, 2010 WI 40, ¶38, 324 Wis. 2d 640, 782 N.W.2d 695; ***State v. Mercado***, 2021 WI 2, ¶55, 395 Wis. 2d 296, 953 N.W.2d 337 (discussing the residual hearsay exception for the admission of child statements); ***State v. Breitzman***, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93 (providing that a reviewing court need not consider both prongs of the ***Strickland*** test if one prong is not proven).

[9] WISCONSIN STAT. § 908.08 (2021-22) provides an avenue to admit the hearsay recordings of audiovisual statements of children who are available to testify. As standard procedure, the party offering a recording of a child's statement files a notice of intent to introduce the recording at least ten days before trial. Sec. 908.08(2) (2021-22). The court "shall admit the recording" upon certain findings, including that the trial commenced before the child's 12th birthday. Sec. 908.08(3) (2021-22). However, a party may introduce at trial a child's recorded statement under § 908.08(7) (2021-22), if the statement would be admissible under a hearsay exception. ***Mercado***, 395 Wis. 2d 296, ¶55.

[10] When assessing "the admissibility of a child's statements under the residual exception," our supreme court identified a non-exclusive list of factors to consider. ***State v. Sorenson***, 143 Wis. 2d 226, 245, 421 N.W.2d 77 (1988). No single factor is dispositive and the weight assigned will vary depending on the circumstances of the case. ***Id.*** at 246. The factors are as follows:

(continued)

Garner's objections are procedural in nature; they do not negate that the factors identified in ***Sorenson*** weigh in favor of admissibility.

¶29 Weighing in favor of admissibility under ***Sorenson***, Allison was seven years old at the time of assaults and eight years old when she was interviewed at the Child Advocacy Center by a police officer trained as a forensic interviewer. The interviewer established that Allison understood the importance of telling the truth. Allison's disclosures were corroborated, in the words of the

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> First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child which might affect the child's method of articulation or motivation to tell the truth.
>
> Second, the court should examine the person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact upon the statement's trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.
>
> Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness.
>
> Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.
>
> Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement.

Id. at 245-46.

prosecutor, by her "hyper-specific" allegation of Garner licking between her buttocks, the same "uncommon" act Dylan alleged Garner did to him. *See* ***Sorenson***, 143 Wis. 2d at 249 ("A young child is unlikely to fabricate a graphic account of sexual activity because it is beyond the realm of his or her experience."). Although there was about a year's delay in Allison's disclosure, delays by children disclosing sexual abuse are not uncommon.[11]

¶30 Based on the foregoing, we conclude Garner's trial counsel was not deficient for failing to object to the introduction of the recording of Allison's forensic interview. Counsel made a strategic decision not to object, both because the interview contained at least one statement that defense counsel believed supported the defense strategy, and in the hopes that Allison's trial testimony might expose inconsistencies between her descriptions of how the assaults occurred. This was not an objectively unreasonable strategy given how the evidence was presented at trial. Additionally, because the recording was admissible under the residual hearsay exception contained in WIS. STAT. § 908.08(7) (2021-22), counsel cannot be deemed deficient for failing to raise a meritless objection. *See* ***State v. Sanders***, 2018 WI 51, ¶54, 381 Wis. 2d 522, 912 N.W.2d 16.

[11] Delayed disclosures of child sexual assault and abuse is common. ***State v. Molde***, 2025 WI 21, ¶¶31-32, 416 Wis. 2d 262, 21 N.W.3d 343 (Korofsky, J., concurring). "Because delayed disclosure is the norm, corroborating evidence rarely exists." ***Id.***, ¶33. While we do not consider Allison's allegations to be less credible as a result, timing and delay are factors considered under ***Sorenson***.

II. Counsel was not ineffective for failing to object to the admission of hearsay.

¶31 Garner next argues that counsel was ineffective for failing to object to hearsay statements in three categories of evidence. First, counsel did not object when the State introduced Dylan's forensic interview from 2010. Second, counsel did not make a hearsay objection when Dylan, Tina, Elizabeth, and Camille testified about Allison's statements to them when she disclosed Garner's abuse. Third, counsel did not make a hearsay objection when Elizabeth testified about Dylan's disclosures to her, or when Detective Stolowski testified about Dylan's statements to her and Tina's recollection of what Dylan and officials from Dylan's school told her. We reject Garner's arguments and agree with the circuit court that he has failed to demonstrate ineffective assistance of counsel regarding his attorney's handling of the hearsay statements.

A. Garner has not established that the failure to object to the admission of the recording of Dylan's forensic interview was ineffective assistance.

¶32 Garner argues that Dylan's forensic interview from 2010 was inadmissible hearsay, and that trial counsel was constitutionally ineffective for failing to object to its introduction. The State argues that counsel's ***Machner*** testimony supports a strategic reason for not objecting and Garner cannot show counsel's performance was deficient or that he was prejudiced by the admission of the video recording.

¶33 Garner has not demonstrated counsel's performance was deficient. Garner argues that because trial counsel could not identify any inconsistencies between Dylan's live testimony and his statements during the recorded forensic interview, we must reject counsel's assertion that he strategically declined to

object to the recording. However, that is the wrong framing to consider counsel's strategic choices during trial. When we review counsel's performance, we consider the circumstances at the time and resist the distorting effect of hindsight. ***Breitzman***, 378 Wis. 2d 431, ¶65. While in retrospect it may appear that counsel's plan to raise inconsistencies did not bear fruit, it was an objectively reasonable strategy within the "wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Similarly, we reject Garner's contention that the prosecutor's comment in closing arguments—that Dylan testified "quite consistently" with his forensic interview—was proof of counsel's deficient performance. Counsel's unsuccessful defense on three of four counts does not prove that counsel's trial strategy was irrational or capricious. *See* ***Mull***, 406 Wis. 2d 491, ¶35.

¶34 Further, Garner has not demonstrated that the admission of the recording prejudiced his defense. The jury heard Dylan's live testimony, in which he made the same allegations he made earlier during the forensic interview. While the recording may have had some bolstering effect on Dylan's credibility, we cannot assume that *without* the recording, there exists a reasonable probability that jury would have disbelieved Dylan's in-person account. It would be purely speculative for us to conclude that the recording motivated the jury to convict Garner of the 2010 assault. We conclude Garner has not established a reasonable probability of a different result absent trial counsel's failure to object to admission of the video recording of Dylan's forensic interview. Therefore, Garner has not shown counsel was ineffective on this basis.

B. Garner has not established that the failure to object to hearsay testimony concerning Allison's statements constituted ineffective assistance.

¶35 Garner argues that trial counsel was ineffective for failing to object to hearsay testimony by Dylan, Tina, Elizabeth, and Camille concerning what Allison said when she disclosed the sexual assaults by Garner. The State asserts that counsel's performance was not deficient because the testimony consisted of Allison's prior inconsistent statements, thus not hearsay, and because counsel was exercising a reasonable trial strategy when he decided not to object to the testimony. We agree on both counts.

¶36 The State first asserts that these witnesses testified about Allison's prior inconsistent statements and therefore their testimony in that respect was not hearsay under WIS. STAT. § 908.01(4)(a)1.[12] A prior statement by a witness that is inconsistent with the witness's testimony, when that witness is available and subject to cross-examination, is not hearsay. WIS. STAT. § 908.01(4)(a)1; ***State v. Lenarchick***, 74 Wis. 2d 425, 436, 442, 247 N.W.2d 80 (1976) (holding that the circuit court has discretion to admit hearsay statements of a witness who is subject to cross-examination and denies recollection or testifies inconsistently with a prior statement). "Counsel's performance cannot be considered deficient for failing to object to admissible evidence." ***Maday***, 374 Wis. 2d 164, ¶55.

[12] The State concedes that two exceptions to hearsay it advanced to the circuit court would not apply: (1) Allison's statements were not excited utterances, under WIS. STAT. § 908.03(2), and (2) they were not prior consistent statements offered in rebuttal of an implied charge of recent fabrication, based on Garner's opening statement challenging Allison's credibility, under WIS. STAT. § 908.01(4)(a)2. *See* ***State v. Peters***, 166 Wis. 2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991).

¶37 Allison's statements during her testimony appear inconsistent with her prior statements made to the other witnesses. Allison, the second witness in the trial, was unclear in her recollection of the assaults, often responding to questions by stating she could not remember and providing vague answers in her short testimony. She acknowledged being nervous and scared to testify in front of strangers, and she quite understandably testified it was "[n]ot at all" fun to do so. We agree with the State that, if Garner's trial counsel had challenged the admissibility of Allison's statements to Dylan, Tina, Elizabeth and Camille as hearsay, they would likely have been admitted as prior inconsistent statements.

¶38 The State also argues that counsel's performance was not deficient because he was exercising a reasonable trial strategy when he decided not to object to hearsay. He testified he made a tactical decision to let Dylan talk about Allison's disclosure, because it bolstered his defense that Dylan "cooked [it] up" or "got his sister to say this stuff." As for the other witnesses, counsel testified his primary focus was Allison and Dylan, the "two key witnesses," and that he regarded the others as "cumulative."[13]

¶39 Trial counsel's decision not to object conformed with his trial strategy to create reasonable doubt by highlighting any possible inconsistencies in the evidence and to suggest that Allison's allegations were instigated by Dylan. Although Garner is dismissive of counsel's strategy, he has not overcome the strong presumption that counsel's conduct fell "within the wide range of

[13] By this, we understand counsel not to have been suggesting that their testimony was objectionable as a "needless presentation of cumulative evidence" under WIS. STAT. § 904.03, but rather that their testimony did not materially undercut the defense theory that Allison had been prompted by Dylan to make up the accusations against Garner.

reasonable professional assistance." ***Carter***, 324 Wis. 2d 640, ¶22. Based upon our examination of the record, we conclude there was a sufficient basis for the defense theory such that counsel's strategy "was objectively reasonable considering all the circumstances." *See* ***id.***, ¶24. Because Garner has not shown counsel's performance was deficient, we decline to address the issue of prejudice. *See* ***Breitzman***, 378 Wis. 2d 431, ¶37.

C. Garner has not established that the failure to object to hearsay concerning Dylan's statements constituted ineffective assistance.

¶40 Similarly, Garner contends that counsel was ineffective for failing to object to hearsay in Elizabeth's testimony about Dylan's disclosures to her. In response, the State argues that Dylan's statements were excited utterances, under WIS. STAT. § 908.03(2). The excited utterance exception applies to spontaneous statements made under the stress of an incident such that the statements have sufficient trustworthiness to overcome the exclusions of hearsay. ***State v. Huntington***, 216 Wis. 2d 671, 681-82, 575 N.W.2d 268 (1998).

¶41 We agree Dylan's statements to Elizabeth following Allison's disclosure would qualify for the exception. There was testimony that Allison's disclosure to Dylan of Garner's abuse was a startling event. Dylan testified that he was "enraged." Elizabeth testified that Dylan came downstairs and immediately ranted to her. Therefore, her testimony about Dylan's statements would be admissible under the excited utterance exception and cannot form the basis for an ineffective assistance of counsel claim.

¶42 However, Elizabeth also testified that throughout their lengthy relationship, Dylan made multiple disclosures regarding the circumstances surrounding Garner's assault on him. Those statements by Dylan are unlikely to

similarly qualify as excited utterances. Nonetheless, counsel's ***Machner*** testimony showed that he did not regard Dylan's statements to his wife as harmful to the defense because Dylan had already testified. For the reasons explained above as to Allison's statements, we conclude the strategy was not irrational or capricious as it related to Dylan. *See* ***Mull***, 406 Wis. 2d 491, ¶35. Therefore, we do not consider counsel's performance deficient on this basis.

¶43 The next issue is Detective Stolowski's hearsay testimony about Dylan's statements, Tina's statements, Tina's statements about what Dylan told her, and Tina's statements about what the school officials told her about Dylan's behavior and reporting of sexual contact by Garner. The State concedes there is not a hearsay exception to cover these hearsay and double hearsay statements. However, counsel employed the same strategic reasoning identified above when he did not object to this hearsay testimony.

¶44 A contrast of Tina's and Stolowski's testimonies show counsel's strategy was not irrational. Tina testified that the 2010 incident happened on a Friday when Garner's other five sons were visiting, they were all wrestling when she went to pick up pizza, and Dylan was not showering when she returned. She stated that she learned about the incident on Monday when she was contacted by the school after Dylan attempted suicide and he was taken into mental health treatment. She stated that when police visited her that evening, she was told Dylan had been "bitten on the butt."

¶45 Stolowski, by contrast, testified that Tina told her that the incident occurred on a Tuesday night while she was picking up pizza, Dylan was showering when she returned, and the school staff told her the next day that Dylan disclosed that Garner kissed his buttocks while they were wrestling. In light of all

the circumstances—which here included clear inconsistencies between Tina's and Stolowski's testimonies—"we cannot conclude that [counsel] made an unreasonable decision" when he determined that objecting to hearsay testimony would not aid in the defense. *See* ***Carter***, 324 Wis. 2d 640, ¶35. We will not second-guess counsel's strategic choices. ***State v. Mayo***, 2007 WI 78, ¶63, 301 Wis. 2d 642, 734 N.W.2d 115.

¶46 Furthermore, Garner has not shown that even if we assumed counsel's performance was deficient for failing to object to the hearsay testimony concerning Dylan's statements to Elizabeth, and Dylan's and Tina's statements to Stolowski, that any such failure prejudiced Garner's defense. Dylan testified directly about the sexual assault by Garner. Garner has not demonstrated that there was a reasonable probability of a different outcome if counsel had objected. *See* ***Carter***, 324 Wis. 2d 640, ¶38.[14]

III. Garner has not demonstrated that counsel was ineffective for failing to object to joinder or move for severance.

¶47 Finally, Garner argues that trial counsel was ineffective for failing to object to the joinder of counts one through three related to Allison and count four related to Dylan for trial, or alternatively, for failing to bring a motion for

[14] Additionally, Garner argues that multiple instances of deficient performance had a cumulative effect that prejudiced his defense. *See* ***State v. Thiel***, 2003 WI 111, ¶60, 264 Wis. 2d 571, 665 N.W.2d 305. We have rejected most of his claims of deficient performance, which means there are few "cumulative" instances to consider. However, even multiple "unreasonable errors[] will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling." ***Id.*** ¶61. That is the case here.

severance of the charges.[15] Initial joinder of charges is proper when two or more crimes are: "of the same or similar character"; "based on the same act or transaction"; based on two or more acts that are "connected together"; or based on two or more acts that constitute a "common scheme or plan." WIS. STAT. § 971.12(1). If it appears that a party is prejudiced by the joinder of charges, the circuit court may grant a severance of trial of the issues. Sec. 971.12(3).

¶48 Garner argues that the crimes were not of the same character, based on the ages of the victims at the time of the assaults, the location of the assaults, and the more than ten-year gap in time between the assaults. Garner asserts that the joined trial frustrated a presentation of separate defenses, particularly for the assault of Dylan, which had been investigated by police a decade earlier with no charges filed. Accordingly, he asserts the matters should not have been joined in the first instance or, alternatively, that trial counsel should have moved for severance.

¶49 The State disagrees on both fronts. It argues that joinder was clearly appropriate given, among other things, the similar character of the offenses and the familial connection between Garner and the victims. The State also argues that Garner's trial counsel could not demonstrate "substantial prejudice" to support severance because evidence of the crimes would be admissible as other acts if separate trials were held. *See* ***State v. Bettinger***, 100 Wis. 2d 691, 695-97, 303

[15] Garner was charged in a single criminal complaint, information, and amended information. There were no motions for severance and it does not appear on the record that the parties ever discussed having separate trials for these counts. By "[f]ailing to make a severance motion, regardless of the reason," Garner is limited to review of this issue as a matter of ineffective assistance of counsel. *See* ***State v. Salinas***, 2016 WI 44, ¶49, 369 Wis. 2d 9, 879 N.W.2d 609.

N.W.2d 585 (1981), *amended*, 100 Wis. 2d 691, 305 N.W.2d 57 (1981) (discussing that although there is a risk of prejudice from joinder if the jury will be unable to separate the evidence or it suggests the accused is predisposed to committing crimes, the risk is not significant if the same evidence would be introduced whether one or both crimes were being tried). Because of the nature of the familial relationships between Garner and the victims, the form of Allison's disclosure to Dylan, and the similarities in the sexual assault acts, "evidence of one crime" was "relevant and material to the proof of a second crime[.]" ***Id.*** at 697. As the circuit court concluded in its postconviction decision, the offenses were connected through their similar character and common elements, despite the time gap. Dylan's furious reaction to Allison's disclosure shows that the acts were not isolated, but a pattern of behavior.

¶50 We agree with the State. Any objection to the initial joinder of the crimes would have been rejected.[16] As the circuit court recognized, the crimes against Dylan and Allison were of similar character and connected together in various ways. Moreover, any motion for severance would not have insulated the jury from hearing about Garner's conduct toward the other victim, as such conduct would have likely qualified as other-acts evidence: it was relevant, probative, demonstrated Garner's motive or absence of mistake, and did not bear a high risk of unfair prejudice, confusion of issues, or misleading the jury. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Accordingly, Garner could not make a showing of substantial prejudice, and his severance motion would have been denied. *See* ***State v. Jacobsen***, 2014 WI App 13, ¶49, 352

[16] "The initial decision on joinder is a question of law that we review de novo." ***Salinas***, 369 Wis. 2d 9, ¶30.

Wis. 2d 409, 842 N.W.2d 365 (discussing that an attorney does not perform deficiently by failing to make a losing argument). Without a viable severance motion, Garner cannot establish that counsel was deficient or that his defense was prejudiced over a failure to object to joinder.

By the Court.—Judgment and order affirmed.

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