COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1799-CR **Cir. Ct. No. 2012CF547**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ANTHONY R. PICO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Reversed and judgment reinstated*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 NEUBAUER, C.J. The State appeals from an order of the circuit court which, after a ***Machner***[1] hearing, vacated the judgment of conviction finding

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

Anthony R. Pico guilty of first-degree sexual assault and ordered a new trial based on Pico having received ineffective assistance of counsel at trial. We hold that trial counsel's performance was not constitutionally ineffective; therefore, we reverse the circuit court's order granting a new trial and reinstate the judgment of conviction.[2]

BACKGROUND

Charges

¶2 Pico was charged with first-degree sexual assault based on the complaints of eight-year-old D.T. She claimed that while Pico was a parent-volunteer in her second grade class and listening to her read to him, he twice put his hand inside her pants and touched her vagina.

Trial Evidence

¶3 At trial, the State's evidence primarily consisted of a recorded interview D.T. gave to Sarah Flayter, a CARE child advocacy interviewer; testimony of Jodie Jens, a counselor at D.T.'s school; and Detective Andrew Rich's recorded interview of Pico at his home. D.T. also testified but the prosecutor did not elicit any accusatory statements from her until redirect examination.

¶4 Flayter testified that she conducts interviews of children at CARE Waukesha, a child advocacy center. She testified to her training and experience,

[2] The Honorable William J. Domina presided over the trial and sentenced Pico, while the Honorable Michael O. Bohren decided Pico's postconviction motion.

which dated back to 1995. She had interviewed over 1200 children since 2006. In interviewing D.T., Flayter used the Step-Wise protocol, a methodology developed by John Yuille, which involved establishing rapport with the child using a neutral subject, ensuring that the child understands the need for telling the truth, asking the child open-ended questions about the topic of concern so that the child will provide a narrative, and closing the interview by prompting the child for any questions and returning to a neutral subject.

¶5 At trial, the prosecutor played a video of Flayter's interview with D.T. In the interview, D.T. expressed an understanding between telling the truth and a lie and that punishment results from telling a lie. D.T. said she lies a lot, for example, when she knocks something down or breaks the computer and does not want to get into trouble. However, she promised to tell the truth.

¶6 D.T. explained that Pico is the father of a friend and classmate of hers and that he was helping out with their reading class. On the prior Friday, D.T. said, Pico was sitting to her left and she was reading to him when he started rubbing her leg over her clothes. Pico moved his hand higher up D.T.'s leg and twice slid his hand down the waistband of her pants, under her underwear, and touched or rubbed where she "goes to the potty" with his fingers. She could not remember the name of the body part he had been touching. D.T. paused from reading, and Pico then took his hand out of her pants, at which point she started reading again. D.T. said that Pico said "sorry" after the first time he put his hand down her pants, but he appeared insincere because he was "smiling." Pico started touching D.T. again in the same way, but she twitched and he stopped. D.T. started reading again and Pico stopped touching her. D.T.'s teacher said it was time to move on, and Pico got up and went to speak with his daughter.

¶7 D.T. did not think that anyone saw Pico touching her. D.T. did not tell anyone about the touching until that night. She was having trouble sleeping because she "was thinking about it," and then she told her mother that Pico had stuck his hand down her pants.

¶8 When Flayter asked D.T. to circle the areas on a diagram where Pico had touched her, she circled an area including the hips, the crotch, and a portion of the left leg.

¶9 The Monday morning after the touching, Jens spoke with D.T.'s mother and then D.T. D.T. told Jens that Pico had been sitting to her left and she was reading to him when he started rubbing her leg. Pico's hand, D.T. said, "got higher and higher, and then his hands went in her pants." Pico said sorry, and then he did it again, D.T. said to Jens. During cross-examination, Jens said that D.T. did not indicate if Pico touched her on her vagina or where she goes to the bathroom, but, Jens testified on redirect, she did not ask because she did not feel that was her job.

¶10 The day after D.T.'s interview with Flayter, Rich went to Pico's home to interview him. The audio recording, with some redactions, was played for the jury. Early on during the interview, Rich told Pico that one of the students had accused him of touching her inappropriately. Rich falsely told Pico that there was a video in the classroom; that the police had recovered male DNA from the area on the girl's clothing where she claimed she had been touched; and that another student had "partially substantiated" what the girl claimed, telling Rich that she heard Pico say "sorry." Asked if this made sense, Pico said he remembered. Rich told Pico that a forensic interview of the girl had been done and that the girl had come across "extremely credible," so much so that "nobody

in the room doubted what she was saying." She did not "embellish" or "exaggerate;" rather, she "has been consistent since the moment she told her mom."

¶11 Pico knew that the complainant was D.T. Pico responded that D.T. had been reading and that she asked him "to tickle her leg or something." Now that he was thinking about it, it was inappropriate to touch her leg, "but I just tickled her leg, just tickled her knee and thigh." Rich asked if Pico's hand went "underneath her pants or something like that," and Pico replied, "[h]er shirt went up and my hand went along the edge, but it didn't—I didn't go in, I know, because I'm not like that. I don't do that to little kids. I've got a daughter." Pico added, "and I know how that would feel. I did not go in. I didn't go down. She even said, whoa, and I'm like, oh. Then she—that might have been when I said I'm sorry, and she fixed her shirt." However, Pico did not recall saying he was sorry. Rich asked if Pico's hand went underneath her underwear a little bit, and Pico said, "I don't know that."

¶12 Rich told Pico that he did not believe him. Pico answered, "she brushed up against my hand and I tickled her knee, and then she said that's fine, it felt fine, so she allowed me to do it." However, Pico said, D.T. never said, "tickle me." Rich pointed out that Pico had said earlier that D.T. had asked him to tickle her. Pico agreed with Rich that his hand went underneath her pants "a little bit." Asked if his hand went underneath her underwear as well, Pico replied, "I don't know ... I wasn't doing that. I was listening to the story." He explained that he was rubbing her leg, he probably went too high, and when he worked his hand back down he caught her pant leg and his hand "went in."

¶13 Rich told Pico that D.T. claimed that Pico touched her vagina. "Does that sound accurate?" Rich asked. Pico answered, "I don't know. I don't think so. But we were sitting on the side. I know I didn't touch her vagina."

¶14 Rich told Pico that D.T. claimed that Pico touched her one time and then said he was sorry; then he touched her a second time, going down her pants a few inches before she twitched and Pico stopped. Pico did not remember this happening.

¶15 Again Rich explained D.T.'s claim, pointing out that she said Pico touched her vagina. Rich asked Pico if this was what happened and Pico answered, "I don't recall. I don't. I don't know. I didn't. I don't know, sir. I don't remember that happening, but—." Rich followed up, "Is it possible?" Pico answered, "[Y]eah." Rich asked, "Do you know why?" Pico said, "I have no idea. I'm not sexually repressed. I got a good sex life. I have kids. I wasn't thinking along those lines at all. I was just playing." Rich said he thought Pico's hand went down D.T.'s pants on purpose and asked Pico, "Does that sound right?" Pico replied, "I don't know, sir." Rich offered that the touching might not have been done with some type of sexual intent, but Rich thought Pico did it two times and he did it intentionally. Pico answered, "I don't know…. I don't recall ever doing it the second time, but it shouldn't have happened the first time, right."

¶16 When Rich again tried to get an admission from Pico, again explaining D.T.'s allegations, Pico repeatedly answered, "I don't know," and said, "I was just there playing."

¶17 Pico denied that he had ever previously engaged in sexual contact with a person under eighteen years of age. He denied that he was sexually attracted to children.

¶18 Again Rich asked Pico to explain what happened. In response to Rich's questions, Pico said he started touching D.T.'s thigh, leg, and knee area under the table. D.T. or Pico might have moved, but Pico's hand hit her leg, and she said, "that's okay." After she said it was okay, Pico started rubbing her thigh and knee, "massaging up, and then the hand got caught on the lip of the pants, and I might have gone in a little bit, but I stopped." Pico denied that he touched D.T. intentionally. He continued, "I didn't go into her pants. There's no way I would have gone into her pants intentionally. There's no way, not with kids there, not in my moral and I did not do this." Asked if he remembered "doing it" a second time, Pico answered, "I may have." But, then he said he remembered touching her leg a second time. Rich queried if Pico remembered his hand going into D.T.'s pants a second time, he said, "[i]t may have," but he did not know for certain if his hand was underneath her underwear. Rich expressed disbelief, saying that he thought Pico was "probably just sick to [his] stomach" when he left the classroom, and Pico agreed. Pico again denied that he touched D.T. intentionally. Pico said that "it was an accident," that he "felt bad leaving the classroom," and that he "[s]houldn't have done it."

¶19 During trial counsel's cross-examination of D.T., she testified that first Pico was rubbing her left leg and his hand went in her waistband "somewhere in the middle" a little bit, but not to where she goes "potty." It lasted "like a second," he immediately took his hand out, and said he was sorry. The second time, D.T. said to Pico that he "could keep on rubbing [her] legs if [he] want[ed]." So, he did. Pico's hand went "a little bit deeper" into her pants again, but he did not actually touch her where she goes "potty." It lasted only "[a] short time again." D.T. testified Pico just touched the area by her waistband. Pico did not

rub anything when his hand was inside her pants. D.T. twitched because she did not want Pico to keep doing it, and then Pico stopped.

¶20 On redirect examination, D.T. testified that she told Flayter the truth, that Pico touched her two times under her underwear and where she goes "potty." D.T. did not know why she testified during cross-examination that Pico's hand did not go past the waistband of her pants, but she did agree with the prosecutor that she liked Pico's daughter, that Pico never harmed her before this incident, that she "kind of like[s] him," and that it was hard to testify.

¶21 The defense did not present any evidence, relying on a reasonable doubt theory.

¶22 During closing arguments trial counsel emphasized D.T.'s unreliability and suggestibility. He argued that D.T.'s mother suggested to D.T. that Pico put his hand in her underwear. Trial counsel emphasized the major inconsistencies between D.T.'s testimony and the Flayter interview, including her trial testimony that he never touched D.T.'s vagina but only went into her waistband, which was "very similar to" what Pico told Rich. Trial counsel argued that Pico was a well-respected member of the community with no history or reason to commit this act. Trial counsel emphasized the unlikelihood that Pico would have touched D.T. sexually in a busy classroom with an experienced teacher present.

¶23 Finally, trial counsel argued that during the Rich interview, Rich confronted Pico with multiple lies, but Pico remained adamant that he never touched D.T.'s vagina. Trial counsel asserted that Pico's equivocal remarks merely reflected his understanding that it was inappropriate for him to touch D.T.'s leg and his regret that he made D.T. uncomfortable as a result.

Verdict and Sentence

¶24 The jury returned a verdict finding Pico guilty of first-degree sexual assault. The circuit court sentenced Pico to six years of initial confinement to be followed by ten years of extended supervision.

Pico's Motion for Postconviction Relief

¶25 Pico, through postconviction counsel, moved for a new trial based on trial counsel's ineffective assistance, alleging numerous instances of ineffectiveness.

¶26 Following a lengthy ***Machner*** hearing, the circuit court vacated the judgment of conviction and ordered a new trial.

¶27 The State appeals. Additional facts are included in the discussion section as necessary.

DISCUSSION

Law of Ineffective Assistance of Counsel

¶28 Under both the Wisconsin and United States Constitutions, in order for a court to find that counsel rendered ineffective assistance, a defendant must show that counsel's performance was deficient and that, as a result of that deficient performance, the defendant was prejudiced. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305.

¶29 Counsel's performance is "constitutionally deficient if it falls below an objective standard of reasonableness." ***Thiel***, 264 Wis. 2d 571, ¶19. "The

question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." ***Harrington v. Richter***, 562 U.S. 86, 105 (2011) (citation omitted). In other words, professionally competent assistance encompasses a "wide range" of conduct, and a reviewing court starts with the presumption that counsel's assistance fell within that wide range. ***Strickland***, 466 U.S. at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** A defendant's burden is to show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687.

¶30 In the context of counsel's duty to investigate on the deficiency prong, counsel must undertake a reasonable investigation or make a strategic decision that further investigation is unnecessary. ***State v. Domke***, 2011 WI 95, ¶41, 337 Wis. 2d 268, 805 N.W.2d 364. Thus, "[s]trategic decisions made after less than complete investigation of law and facts may still be adjudged reasonable." ***State v. Carter***, 2010 WI 40, ¶¶23, 34, 324 Wis. 2d 640, 782 N.W.2d 695. "In evaluating counsel's decision not to investigate, this court must assess the decision's reasonableness in light of 'all the circumstances, applying a heavy measure of deference to counsel's judgments.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 691).

¶31 Counsel's deficient performance is constitutionally prejudicial if "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." ***Thiel***, 264

Wis. 2d 571, ¶20 (citation omitted). In other words, the prejudice component asks "whether it is 'reasonably likely' the result would have been different." ***Richter***, 562 U.S. at 111. "The likelihood of a different result must be substantial, not just conceivable." ***Id.*** at 112.

¶32 The defendant bears the burden on both of these elements. ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111.

¶33 A claim of ineffective assistance of counsel is a mixed question of law and fact. The circuit court's findings of fact will be upheld unless they are clearly erroneous. ***Thiel***, 264 Wis. 2d 571, ¶21; ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. "Findings of fact include 'the circumstances of the case and the counsel's conduct and strategy.'" ***Thiel***, 264 Wis. 2d 571, ¶21 (citation omitted). The determination of counsel's effectiveness, in contrast, is a question of law, which is reviewed de novo. ***Kimbrough***, 246 Wis. 2d 648, ¶27.

Frontal Lobe Injury

¶34 Pico alleged that, as a result of a 1992 motorcycle accident, he sustained a traumatic brain injury—a frontal lobe injury. In seeking a ***Machner*** hearing, Pico argued that trial counsel's failure to obtain the records documenting his 1992 injury and to consult with an expert on the impact of a frontal lobe injury affected his case in three different ways: (1) the injury would have been the basis for a plea of not guilty by reason of mental disease or defect (NGI); (2) it would have explained his behavior with D.T.; and (3) it would have shown that Pico was

more susceptible to making false statements during Rich's interview of him, especially through Rich's use of the Reid technique.[3]

¶35 During trial counsel's testimony at the ***Machner*** hearing, he said that he knew prior to trial that Pico had suffered a head injury as a result of a motorcycle accident.[4] Pico wore an eye patch and so trial counsel asked him about it. Pico said he had been in an accident many, many years ago, that he had recovered, and he was fine. Trial counsel discussed the injury with Pico and his family and asked about any deficits from the injury, but there were none. Pico was described as funny and gregarious, although he had a different sense of humor. They said he was a great father and well adjusted. After the injury, trial counsel noted, Pico had gone on to college and maintained a number of "very impressive jobs," including an information technology job.

¶36 Trial counsel had met with Pico at least seven times in counsel's office and many times throughout the criminal proceedings. Trial counsel testified that Pico "wasn't expressing … any signs that [trial counsel] would typically see of somebody who had deficits or problems." He was able to communicate effectively, always understood the questions and was always "consistent" with

[3] As described in one law journal article Pico submitted at the ***Machner*** hearing critical of the Reid technique, it is a widely used police interrogation technique involving nine steps, which can include a direct police statement of absolute certainty in the suspect's guilt, minimization of the suspect's wrongdoing, and tricking the suspect into thinking there is more evidence of guilt than the police possess. Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 Hastings L.J. 529, 536, 539-40, 561-62 (2010).

[4] While postconviction counsel described Pico's head injury as one of "frontal lobe damage," trial counsel said, "a better way to describe it" is "a head injury."

counsel. Trial counsel never noticed any signs of impulsivity, and Pico was able to tell a story from start to finish in a logical manner.

¶37 Pico expressed that he knew touching D.T.'s vagina was wrong and touching her leg made her uncomfortable. Pico told trial counsel that he touched D.T.'s leg two times and that he did it on purpose; not that he was unable to restrain himself.

¶38 Trial counsel testified that even if he had an expert opinion saying that Pico did not realize this was inappropriate, he would not have retrieved Pico's 1992 medical records and would not have called an expert to testify to an NGI defense, because the defense has to be based on demonstrable signs, and Pico's symptoms did not fit the criteria for NGI. Trial counsel wanted a cohesive defense. Trial counsel, who had handled over 2000 criminal cases, noted that he always considers NGI in any criminal case. To that end, he takes a history from his client, including mental health diagnoses and whether the client is taking any medication. Pico did not identify any mental health issues. The circumstances did not even warrant consulting with a doctor. In addition, it would have been inconsistent to assert to the jury that Pico did not touch D.T.'s vagina and, then, if he did, it was because of mental health problems.

¶39 In the circuit court's analysis, it considered Pico's "injury" as "broader than the NGI plea" and how Pico's mental health affected other parts of the case. The court found that the parties' experts mostly "agreed" with the diagnosis of Pico, but the State's expert did not find Pico lacked the ability to appreciate the wrongfulness of his acts or that the brain injury affected Pico in any manner relative to the case. The court held that Pico's frontal lobe injury would

have broad significance in developing a strategy of the case. Trial counsel should have investigated the issue and it would have had an impact on the case.

¶40 We disagree and reverse.

Trial Counsel's Investigation

¶41 Here, contrary to each of Pico's three contentions, trial counsel made a reasonable investigation into Pico's 1992 accident and reasonably concluded that the head injury that resulted did not warrant further investigation. Trial counsel was not professionally incompetent as he saw no indication that Pico had an injury that impacted his behavior, much less that would have supported a viable defense.

¶42 As detailed above, trial counsel spoke with Pico, his wife, and reviewed the State's evidence. Pico explained how his injury occurred, and he said that he was fine. Pico was not undergoing any current treatment or therapy, and his "family referenced how well-adjusted and how great he is." Counsel considered mental health issues and saw no signs that he would have typically seen of somebody who had deficits or problems. He reiterated that he saw no symptoms: "There was absolutely nothing that caused me to believe he had not fully recovered other than his eye injury." Since counsel made a reasonable investigation, no further investigation was necessary. *See* ***Domke***, 337 Wis. 2d 268, ¶41 ("Counsel must either reasonably investigate the law and facts *or* make a reasonable strategic decision that makes any further investigation unnecessary." (emphasis added)).

NGI Claim

¶43 Moreover, trial counsel was not ineffective in concluding that there was no basis for an NGI plea. Such a plea requires that, assuming the existence of

a mental disease or defect, Pico "lacked substantial capacity either to appreciate the wrongfulness of his … conduct or conform his … conduct to the requirements of law." WIS. STAT. § 971.15(1) (2015-16).[5]

¶44 Pico, however, expressed to trial counsel that he knew touching D.T.'s vagina was wrong and that touching her leg made her uncomfortable. There was "no question" in trial counsel's mind that Pico knew the difference between right and wrong. Indeed, he expressed the same to Rich, telling him, "I was thinking now, [tickling her leg and thigh] is inappropriate," and, "I'm not like that. I don't do that [put his hand in her pants] to little kids." Again, Pico said to Rich, "I know I shouldn't have done it." "There's no way I would have gone into her pants intentionally," and "[t]here's no way, not with kids there, not with my moral …."

¶45 Even during the ***Machner*** hearing, Pico's wife, Michelle, said that Pico knew "no question" that touching a child's vagina was wrong. Again, trial counsel had before him proof that Pico was able to conform his conduct to the requirements of the law. This kind of allegation had never previously been made against Pico. Pico's family told trial counsel "about how great he was, how great of a father he was, how just in general how … well-adjusted he was." *See* ***Strickland***, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶46 We note that the circuit court itself seemed unpersuaded by Pico's claim that an NGI plea was viable and skirted that issue, concluding that Pico's "frontal lobe injury" was "broader than the NGI plea." We also note that the circuit court did not find trial counsel's testimony to be unworthy of belief.[6]

Impulsivity

¶47 As for the second claim, after making a reasonable investigation, trial counsel had no reason to believe that any injury from the 1992 accident would have explained Pico's behavior with D.T. As discussed above, Pico expressed to both trial counsel and to Rich that he knew that touching D.T.'s leg was wrong. To the extent Pico is suggesting he acted impulsively, one of the characteristics identified by Horatio A. Capote, M.D., a neuropsychiatrist and his expert at the ***Machner*** hearing, there was no indication Pico acted impulsively when he touched D.T. Pico told trial counsel that he touched D.T.'s leg two times, and that he did it on purpose, not that he was unable to restrain himself. Trial counsel inquired of Pico if there had been any prior allegations against him or "other times when he wasn't able to control himself or do certain things and he adamantly denied that." Trial counsel also spoke with Pico's family members and nothing in these discussions caused counsel to believe that Pico was impulsive or unable to control his behavior.

¶48 As the State notes, if Pico had serious cognitive defects that left him unable to distinguish between right and wrong or unable to control his impulses,

[6] At one point, during the court's discussion of trial counsel's testimony, it said that trial counsel "didn't discuss the issue with the family," apparently referring to the fact that Pico had a head injury. But, the court's statement is clearly erroneous, since trial counsel testified that he did discuss with Pico's family if Pico had any deficits from the injury, but there were none.

Pico and his family were the best source of that information. While Michelle testified at the ***Machner*** hearing as to certain behaviors of Pico, *no one* claimed this information was relayed to trial counsel. Trial counsel is not deficient for failing to discover information that was available to Pico and his family and that they did not share with trial counsel. ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325.

¶49 In sum, we reject Pico's challenge to trial counsel's alleged ineffectiveness in failing to obtain Pico's medical records. Trial counsel had no reason to believe that Pico's injury from the 1992 accident would have supported an NGI defense or would have explained Pico's behavior with D.T. And, even if counsel had not made a reasonable investigation, applying a heavy measure of deference to trial counsel's strategic decision not to investigate further, we fail to see how trial counsel had reason to believe that Pico had a viable NGI defense or one based on his unknowingly inappropriate or impulsive behavior.

Pico's Head Injury and Reid

¶50 As for the third claim that the combination of the Reid techniques Rich employed during the interview of Pico and Pico's head injury made him more susceptible to making false statements, it fails for the same reasons. Again, trial counsel reasonably investigated whether Pico had an injury and reasonably concluded that it did not impact his behavior. At the ***Machner*** hearing, he repeatedly testified that he saw *no symptoms* of ongoing injury or deficit that would make him more agreeable.

¶51 Pico told trial counsel that what he had told Rich was the "truth," and his version of what happened was "very consistent" with what Pico told Rich.

Ultimately, trial counsel testified, Pico "denied [touching D.T.'s vaginal area] under stringent examination from the officer and he stuck to his guns."

¶52 Trial counsel further explained that in reviewing Rich's interview of Pico, when Rich pressed Pico, things Pico said, such as "it could be or it's possible," "*weren't much different than other individuals [trial counsel had] seen in statements or questions*." (Emphasis added.) Pico has provided no support for his contention that his response to the interview was so different from that of scores of other suspects subjected to police interrogation, that trial counsel should have suspected something was amiss—and that his failure to do so was so incompetent that he was constitutionally deficient.

¶53 Also, Pico told trial counsel that he was initially confused as to why Rich was at his house—Pico thought one of his children was hurt—and "the very severe nature of the questions that came thereafter" could also explain Pico's confusion.

¶54 Therefore, in light of the lack of proof before trial counsel that Pico had a head injury that left him with any deficits—other than double vision—Pico's repeated acknowledgement that the factual admissions he made in the interview were true, and consistent denial despite the pressure from Rich, along with counsel's undisputed impression that Pico's interview was not out of the ordinary, there was no basis for trial counsel to go further. In sum, there was no reason to believe the accident made him more susceptible to making false statements during the Rich interview.

Trial Counsel's Strategic Decisions

¶55 This twenty-year-old head injury, as far as counsel knew, had not manifested itself in any appreciable way, not in mental health treatment and not in any impulsive behavior. To the contrary, over those twenty years, Pico finished college, had a successful career, married, raised children, and volunteered around his community. In this regard, numerous letters were submitted on Pico's behalf before sentencing attesting to his good character and many good works throughout the community. With an NGI defense strategy acknowledging the vaginal touching, the jury would have had to conclude that the injury suddenly manifested itself in criminal behavior for the first time when he assaulted D.T.—even though Pico repeatedly acknowledged he knew it was wrong, and the medical experts both opined that the brain damage would have been the same in 2012 as in 1992. A defense strategy premised on excusable inappropriate rubbing of D.T.'s leg would fare no better, given Pico's acknowledgement that it was wrong. As the State persuasively argues, presenting the jury with a reasonable doubt defense was more reasonable than a premise that a 1992 head injury that seemingly never affected Pico in any significant way manifested itself during an impulsive five-to-ten-minute period with D.T. or in the interview with Rich, twenty years later.

¶56 Furthermore, Pico's positions on appeal, relative to the effects of the brain injury on his defense, are inconsistent. Pico's position seems to be that he touched D.T.'s vagina because he could not control himself but, to the extent any of his statements to Rich could be construed as inculpatory, those were false. In other words, "I did it because I couldn't control myself," but, to the extent I did not resist Rich's pressure and indicated that I did do it, that was false. We question Pico's implicit conclusion from all this that a jury would have received this type of incoherent defense favorably. To the extent Pico is suggesting, as his

attorney expert did, that trial counsel would then have had "options," at some point trial counsel must choose an option.

¶57 And even the individual options fail to provide a more reasonable defense strategy than that chosen by trial counsel. As noted, if Pico presented expert testimony that his brain injury made him so impulsive that he could not control himself, the jury would have to weigh this against Pico's denials to Rich either that he touched D.T.'s vagina—"I know I didn't touch her vagina"—or that "anything like this ever happened before." Similarly, a strategy premised on the idea that he did not appreciate that rubbing D.T.'s leg was wrong would be inconsistent with his acknowledgement that it was.

¶58 And a strategy based on suggestibility in the Rich interview would be inconsistent and would have wholly undermined defense counsel's reliance on Pico's consistent and steadfast denials while under pressure.

¶59 Moreover, trial counsel here had to weigh the option of seeking suppression of Pico's statements against, if that motion was successful, having his client testify, since trial counsel wanted the jury to hear a denial from Pico either in his interview with Rich or through Pico's testimony. Pico does not argue that getting a denial was an unreasonable strategy, and Pico does not offer another way of getting such a denial before the jury. Pico's testimony at trial, as trial counsel pointed out, would have raised other problems.

¶60 First and foremost, trial counsel testified that the version Pico recounted to trial counsel was "very consistent" with what Pico told Rich. Pico "always" told counsel that what he had said to Rich was "what the truth is." Beyond that, trial counsel testified that he opted against recommending that Pico testify at trial because he would not have made a compelling witness. He was

unsure of himself when asked tough questions, he was "very nervous" and "very flustered." For example, Pico constantly said, "I can't believe I did this," and "I can't believe I made her feel upset." Trial counsel did not see much of a difference in Pico's demeanor between his interview with Rich and trial counsel's interview.

¶61 Trial counsel also pointed out that during cross-examination Pico would have "had a lot of explaining to do," particularly why he was rubbing D.T.'s leg. Thus, the risks of having Pico testify far outweighed the benefits, especially after trial counsel had obtained damaging cross-examination testimony from D.T. This is why strategic decisions of counsel are virtually unassailable. ***Strickland***, 466 U.S. at 690.

¶62 Ultimately, Pico made the decision not to testify, and his family agreed with counsel's recommendation.

¶63 Pico has failed to meet his burden to show that trial counsel was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687.

Prejudice

¶64 For these same reasons, Pico has not shown prejudice because he has not demonstrated a reasonable probability that the proposed defenses would have resulted in an acquittal. As the State's expert aptly put it, "[i]t would be very surprising" that Pico could have built and maintained a successful career, been such a highly regarded caregiver to his children, and active in volunteer work, if he was "suffering from problems with his judgment and impulsivity and having difficulty interpreting social cues and being unable to control primitive urges and

unable to adapt to changing situations."[7] *See* ***id.*** at 694; *see also* ***State v. McDowell***, 2003 WI App 168, ¶70, 266 Wis. 2d 599, 669 N.W.2d 204, *aff'd*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500.

Reid Technique

¶65 Relatedly, Pico claims that counsel should have moved to suppress his statements to Rich and called an expert as to the unreliability of the Reid technique for questioning suspects. To the extent Pico's claim is based on both the Reid technique and frontal lobe syndrome, that claim must fail. Pico has not shown that trial counsel was ineffective in failing to secure the medical records. Further, as discussed above, trial counsel was not ineffective for failing to move to suppress Pico's statements to Rich.

¶66 Pico has not shown that there was precedent for suppressing these statements based on the Reid technique alone. He does not cite to a single case for the proposition that a suppression motion would have been successful.

¶67 Instead, at least at the ***Machner*** hearing, Pico relied on his expert's personal experience that he had "mixed success" in the trial courts, without any documentation, and a law review article. Pico did not meet his burden of showing that this motion would have been successful. *See* ***United States v. Jacques***, 744 F.3d 804, 812 (1st Cir. 2014) (rejecting defendant's claim that Reid technique, including exaggerating evidence and minimizing gravity of offense, rendered his statement involuntary, and noting that defendant pointed to no federal authority supporting an involuntary confession under similar circumstances); ***Shelby v.***

[7] There was no dispute that once a person has a frontal lobe injury that never changes.

State, 986 N.E.2d 345, 365-67 (Ind. Ct. App. 2013) (rejecting defendant's claim that his confession was involuntary because the police used the "Reid technique," including lying about evidence that the police had implicating the defendant); *see also* ***State v. Triggs***, 2003 WI App 91, ¶¶12-23, 264 Wis. 2d 861, 663 N.W.2d 396 (stating that police deception during an interrogation does not by itself render a confession involuntary but is one factor to consider in assessing the voluntariness of the defendant's confession).

¶68 Further, trial counsel did consider moving to suppress Pico's statements based on the lies Rich told him but decided against it because trial counsel wanted to be able to present the jury with a denial from Pico without having to call Pico to testify. Trial counsel noted that Pico never actually admitted to touching D.T.'s vaginal area during the interview. This was a reasonable strategy on counsel's part, as we have already explained.

¶69 Further, on the prejudice component, Pico did not offer anything of substance to show that the jury would have agreed with any expert that he made false inculpatory statements because of a head injury and the Reid technique. As even one defense expert admitted, the Reid techniques are in wide use and have been for decades. Pico's opinion is entirely speculative. ***State v. O'Brien***, 214 Wis. 2d 328, 347, 572 N.W.2d 870 (Ct. App. 1997) ("A showing of prejudice requires more than speculation.").

Rich's Testimony: ***Haseltine***[8] and ***Daubert***[9] *Challenges*

¶70 During Rich's interview of Pico, Rich falsely told Pico that the police had obtained male DNA from D.T.'s clothing, that the police had a witness who "partially substantiated" D.T.'s claims, and that there was a video in the classroom where the touching occurred.

¶71 Rich also told Pico that D.T. had undergone a "forensic interview" and that "she comes across as extremely credible." "Her story," Rich said, "has been consistent since the moment she told her mom."

¶72 During Rich's trial testimony, the prosecutor asked if he ever suggested to a suspect that he had certain information that was not necessarily true. Rich said that he had done so and explained,

> Specifically in a situation like this … these are extremely serious charges … as an investigator, getting somebody to admit to sexually molesting an eight-year-old girl is probably more difficult than getting the same man to admit that he committed a homicide. It is without question the most difficult interview that I will ever perform.
>
> [B]eing faced with those type[s] of accusations triggers a fight or flight mechanism in a person, and I don't see fight or flight in him getting up and fighting him or him running away. Where that manifests itself to an investigator is in deception or lies, and that's where I saw it in this case. So I counteract that by giving information that I may—may suggest that I have evidence that I've not yet obtained and in so doing encourage him to be honest.

[8] ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1994).

[9] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

¶73 During the ***Machner*** hearing, trial counsel testified that his understanding of the law was that Rich's comments to Pico, because they were made during an interrogation and not in court, were admissible. He "didn't find it to be something that was challengeable." During cross-examination, the prosecutor pointed out to trial counsel that she had sent a letter to the court before trial addressing this issue, and trial counsel testified, "I read your response and I was aware of that even prior to reading your response."

¶74 Without addressing whether Rich's testimony and comments during the questioning of Pico were inadmissible under ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1994), or ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993), the court said that while Rich's statements were "small," there was "no room for error" in this type of case.

¶75 Initially, the State argues that Pico, as it relates to Rich's testimony that he "saw" deception in Pico's interview, has abandoned his ***Daubert*** challenge and raises for the first time on appeal a ***Haseltine*** violation. However, contrary to the State's contention, Pico did raise a ***Haseltine*** violation as to this testimony in his motion for postconviction relief. Nor has Pico abandoned his ***Daubert*** challenge on this point. Nevertheless, Pico's challenges lack merit.

¶76 With respect to ***Daubert***, any challenge on that basis would have been unsuccessful because Rich's testimony cannot be construed as expressing an expert opinion on how to discern truthfulness. Rich's statements were made in the context of explaining that he thought Pico was lying, why Rich would lie to Pico, and how this would persuade Pico to tell the truth.

¶77 With respect to ***Haseltine***, in that case we held that it was error to allow a psychiatrist to testify at trial that there was "no doubt whatsoever" that the

defendant's daughter was an incest victim. ***Haseltine***, 120 Wis. 2d at 95-96. This was error because the psychiatrist's opinion was an opinion that the daughter was telling the truth, and "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** at 96.

¶78 In contrast, in ***State v. Snider***, 2003 WI App 172, ¶¶25-26, 266 Wis. 2d 830, 849-50, 668 N.W.2d 784, a detective testified during cross-examination that he believed the victim's statement and not the defendant's statement. The defendant argued that his attorney, by repeatedly asking if the detective believed the defendant or the victim, violated the ***Haseltine*** rule. We concluded that there was no ***Haseltine*** violation, relying on ***State v. Smith***, 170 Wis. 2d 701, 718-19, 490 N.W.2d 40 (Ct. App. 1992). We reasoned that the detective testified as to what he believed at the time he was conducting the investigation, not whether the defendant or the victim was telling the truth at trial. The detective was recounting how he conducted the interrogation and his thought processes at the time. ***Snider***, 266 Wis. 2d at 849-50.

¶79 In ***Smith***, the detective interviewed a witness who he believed assisted the defendant in burning a building. During trial, the detective testified that during the interview the witness denied any involvement in the fire, but, the detective testified, he thought that the witness "knew a lot more than he was telling." ***Smith***, 170 Wis. 2d at 706. Another officer came in to tell the witness that the defendant was cooperating. ***Id.*** After that officer left the room, the witness became more cooperative, and, the detective testified, "began to change his story to why [sic] I felt was the truth." ***Id.***

¶80 We held that there was no ***Haseltine*** violation because "neither the purpose nor the effect of the testimony was to attest to [the witness's] truthfulness." ***Smith***, 170 Wis. 2d at 718. We noted that the detective "made the statement as he was explaining the circumstances of [the witness's] interrogation and the reasons for it." ***Id.*** The detective's testimony "was simply an explanation of the course of events during the interrogation." ***Id.*** at 719.

¶81 In addition, the court concluded that the jury would have made the same inference from the continued questioning of the witness and the resulting prosecution against the defendant. ***Id.*** The court was not concerned that the jury used the detective's testimony to assess the witness's truthfulness since the jury was instructed on it being the sole judge of credibility, which it presumably followed. ***Id.***

¶82 Rich's statements to Pico during the interview that D.T. came "across as extremely credible" and "has been consistent since the moment she told her mom" were made during a pretrial investigation and, thus, under ***Miller*** and as trial counsel concluded, did not violate ***Haseltine***. *See* ***State v. Miller***, 2012 WI App 68, ¶¶4, 15-16, 341 Wis. 2d 737, 816 N.W.2d 331 (holding that ***Haseltine*** rule was not violated where video showed detective accusing the defendant of lying multiple times because "neither the purpose nor the effect" of detective's statements was to attest to defendant's truthfulness and the statements were not made as sworn testimony providing detective's opinion regarding the truth of defendant's statements to fact finder but were instead made in context of pretrial investigation and showcased an "interrogation technique").

¶83 Likewise, Rich's trial testimony that he saw deception from Pico during the interview did not violate ***Haseltine***. Rich was describing "the

circumstances of [Pico's] interrogation and the reasons for it." *See* ***Smith***, 170 Wis. 2d at 718. Rich never testified that he thought that at trial D.T. or Pico was telling the truth. Neither the purpose nor the effect of Rich's testimony explaining his interview of Pico was to attest to the truthfulness of either Pico or D.T. Rather, Rich was explaining an "interrogation technique," namely, why he would lie to Pico. *See* ***Miller***, 341 Wis. 2d 737, ¶15. What Rich testified to at trial—that he saw deception from Pico—was no different than what the detective testified to in ***Smith***. *See* ***Smith***, 170 Wis. 2d at 706 (recounting that detective testified that witness "knew a lot more than he was telling me," and that the detective "was getting closer to a point with him where he might just tell me the truth"). Further, like in ***Smith***, the jury would have inferred, even without Rich's testimony, that the police did not believe Pico from the prosecution that followed his interview. *See* ***id.*** at 719.

¶84 Thus, any ***Daubert*** challenge or claimed ***Haseltine*** violation on this basis, had trial counsel raised them, would have failed, and trial counsel was not ineffective for failing to raise a meritless claim. *See, e.g*, ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999).

¶85 Relatedly, Pico argues that, at the very least, trial counsel should have sought a specific instruction from the court that Rich's vouching could not be considered in assessing the truthfulness of Pico but only as an investigative technique Rich employed, as was done in ***Miller***. *See* ***Miller***, 341 Wis. 2d 737, ¶8. Even if we were to agree with Pico that trial counsel was deficient in not seeking a specific instruction at the time of Rich's testimony, any deficiency in trial counsel's performance did not prejudice Pico because the circuit court later instructed the jury that they were the sole arbiter of credibility.

Rich's Testimony: Flayter is "among the best in the state"

¶86 During trial, Rich testified that Flayter was "among the best in the state." Trial counsel did not object to this testimony. He explained that while that testimony "did stick out" to him, it was not in response to a specific question and Rich "kind of threw it in." Trial counsel did not object because Flayter had already testified, and counsel "didn't want to draw attention to" Rich's comment. Trial counsel did not file a motion in limine regarding this issue because he did not anticipate that Rich would give this testimony.

¶87 The circuit court ruled that this testimony "could have been subject to a motion on limine," but it "wasn't filed." The court recounted that the attorney who testified as an expert for the defense proposed that this could be a ***Haseltine*** violation. The court noted that trial counsel testified that for strategic reasons he did not object; he did not want to draw attention to it and then have the jury follow the credibility instruction. Again, the court said that this, like other challenged testimony, was a "small statement," but there was "no room for error."

¶88 As the State argues, for trial counsel to have anticipated this testimony from Rich would have required a clairvoyance that goes beyond what is considered competent performance. Pico notes that trial counsel did not file a "general motion to prevent witnesses from opining as to the credibility of other witnesses." Pico, however, does not cite to a single case that shows that trial counsel's failure to file such a motion is deficient performance. Trial counsel's failure to make a pretrial motion in limine was not deficient performance.

¶89 Further, trial counsel's decision not to object when this testimony was given reflects a reasonable trial strategy. ***State v. Jacobs***, 2012 WI App 104, ¶30, 344 Wis. 2d 142, 822 N.W.2d 885 ("[W]hen a defense attorney is surprised

by a question and answer which is objectionable, and the jury has already heard the offending testimony, counsel must weigh the worth of the objection."). Trial counsel did not want to highlight the testimony, and that reason is not outside the wide range of reasonably professional assistance. *See* ***Strickland***, 466 U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way.").

¶90 Nor was this testimony a ***Haseltine*** violation such that trial counsel should have objected on this basis. As the State argues, Rich did not opine on Flayter's credibility as an interviewer. Instead, Rich's testimony amounted to him saying that Flayter was good at her job or, as the State puts it, "she was a skilled CARE interviewer."

¶91 We point out here that the circuit court's statements on deficiency and prejudice are at odds with the ***Strickland*** standard. It is true that consideration of counsel's performance and prejudice to the defendant take into account "the circumstances of the case." ***State v. Marinez***, 2010 WI App 34, ¶32 n.7, 324 Wis. 2d 282, 781 N.W.2d 511. Yet, at the same time, the ***Strickland*** standard is highly deferential towards counsel, even beginning with "a strong presumption that … under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Strickland***, 466 U.S. at 689 (citation omitted); *see* ***Harrington***, 562 U.S. at 105 ("Even under de novo review, the standard for judging counsel's representation is a most deferential one."); ***State v. Balliette***, 2011 WI 79, ¶27, 336 Wis. 2d 358, 805 N.W.2d 334 ("[T]he law affords counsel the benefit of the doubt."). Indeed, it must be shown "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687; *see* ***Padilla v. Kentucky***, 599 U.S. 356, 371 (2010) ("Surmounting ***Strickland***'s high bar is never an easy task."). In the end, a defendant is entitled to

a fair trial, not a perfect one, and that includes the right to counsel. *See* ***Harrington***, 562 U.S. at 110 (noting that a defendant is not entitled to "perfect representation, only a 'reasonably competent attorney'") (citation omitted); ***State v. Hanson***, 2000 WI App 10, ¶20, 232 Wis. 2d 291, 606 N.W.2d 278 ("[A] defendant is entitled to a fair trial, not a perfect trial, and an adequate lawyer, not the best lawyer.").

¶92 It is to be expected that counsel might make an error, but not every error is constitutionally deficient performance that results in prejudice sufficient to warrant a new trial. ***Harrington***, 562 U.S. at 111 ("[I]n some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' [but] it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." (citation omitted)).[10]

The Failure to Call an Expert or Object to Flayter's Interview

¶93 Pico claims that trial counsel should have challenged or called an expert to explain deficiencies in Flayter's interview of D.T., specifically, Flayter's testimony that suggestibility is generally more of a concern with preschool children, and her failure to clarify what D.T. had meant by saying that Pico touched her "down here."

¶94 The court, in recounting the evidence, said that trial counsel testified that the "hands-down-pants concept … should have been clarified, but he didn't

[10] In this instance, trial counsel's "active and capable advocacy" achieved, among other things, admissions from D.T. during cross-examination that Pico never touched her vagina, which trial counsel stressed in summation as one reason why the jury should render a not guilty verdict.

view that an expert witness was necessary." The court was "satisfied that … a lawyer in a case such as this would call a witness for investigation purposes, by calling the witness to determine how best to approach the interview and how best to approach the examination of Ms. Flayter when she was examined with regard to the interview."

¶95 Beginning with the issue of suggestibility, Flayter's trial testimony during cross-examination was that suggestibility is "mainly a concern for preschool children." Asked if second graders were open to suggestibility she said, "anyone is open to suggestibility. It's mainly a problem for preschoolers per the research I read." On redirect, Flayter said that preschool children are kindergartners or younger. She added that the majority of the research on suggestibility is with three- or four-year-old children.

¶96 During Flayter's ***Machner*** testimony, she testified that suggestibility is something that is a concern "with any age group," although preschool children are "more vulnerable" to suggestibility. Flayter did not see any real difference between her ***Machner*** and trial testimony on suggestibility.

¶97 Initially, the court never found that trial counsel's failure to object to Flayter's testimony was objectively unreasonable. In any case, trial counsel's decision not to object was a strategic decision that was not objectively unreasonable. He was familiar with the interview protocol and had retained experts to challenge such interviews before. He articulated that he recalled Flayter's statement, but he had no way to refute it at trial, particularly because he believed it to be generally true that all children are suggestible, but it is more likely that suggestibility is seen in younger children. He did not want to call more attention to the statement by objecting.

¶98 Trial counsel mistakenly testified at the ***Machner*** hearing that D.T. had already shown through her trial testimony that she was susceptible. In fact, D.T. testified after Flayter testified. Notwithstanding trial counsel's mistaken testimony, the jury did see first hand that D.T. was susceptible to suggestibility. On cross-examination, D.T. largely contradicted her statements to Flayter, agreeing that Pico did not touch her where she goes "potty." She testified that Pico just touched the area by her waistband and did not rub anything when his hand was inside her pants.

¶99 These admissions suggested that D.T. was either lying, mistaken, or that she was susceptible to suggestion, and Flayter's testimony that suggestibility is "mainly a concern for preschool children" was shown to be questionable. So, ultimately, given D.T.'s admissions, Flayter's testimony hardly prejudiced Pico, and an expert testifying that an eight-year-old is susceptible to suggestibility would have added little to what trial counsel had already capably demonstrated through cross-examination. The jury saw first hand that D.T. was potentially susceptible to suggestibility.

¶100 Further, it was not objectively unreasonable not to call an expert to counter Flayter's testimony about her conduct of the interview. Trial counsel testified that he knew the Step-Wise protocol that Flayter employed with D.T., that trial counsel reviewed the interview, and he concluded that there was no basis to challenge it. Indeed, counsel said that Flayter followed the protocol "very, very closely."

¶101 At the ***Machner*** hearing, the defense's expert, Yuille, a psychologist and the developer of the Step-Wise protocol, largely agreed with trial counsel's assessment of Flayter's interview. He testified that suggestibility was not just a

problem for preschoolers and affects eight-year olds. He testified that the risk of suggestibility decreases with age and that preschoolers were more suggestible than older subjects. He also agreed that D.T.'s testimony indicated she was suggestible and that everyone is suggestible.

¶102 Pico mischaracterizes Flayter's trial testimony, arguing that she implied that suggestibility "is not a concern with someone of D.T.'s age." Flayter did not testify that suggestibility is not a concern with an eight-year-old but, as Yuille testified, age matters, and the younger a person is, the more susceptible the person is. Yuille's expert testimony would have added little to the defense, especially after trial counsel had demonstrated that D.T. was potentially suggestible.

¶103 In fact, if Yuille had been called to testify at trial, his testimony would have likely damaged the defense. He acknowledged at the ***Machner*** hearing, as he would have had to on cross-examination at trial, that Flayter's interview was "generally … well conducted," and that she followed the steps and asked nonleading, nonsuggestive questions, which increased the likelihood of getting accurate information. He also would have had to acknowledge that Flayter's interview was devoid of suggestion.[11]

[11] In Pico's brief, he points out that Yuille testified that Flayter should have asked leading questions unrelated to the investigation in order to establish a lack of bias. For example, Yuille offered, if Flayter knew that D.T.'s mother was wearing shorts, Flayter could have suggested that D.T.'s mother was wearing a red dress. Flayter disagreed, asserting that leading questions should never be asked. In any case, Flayter tested D.T. for bias along those lines. During the course of the interview, when Flayter asked D.T. with whom she lived, she listed her family members, mentioning an older and younger sister. When Flayter indicated that D.T. had only one sister, D.T. corrected her. Flayter told D.T. to correct her if she got anything else wrong during the interview. Flayter also stressed several times that D.T. should tell the truth.

¶104 Further, like with Rich's statement that Flayter was among the best in the state, trial counsel cannot be expected, as a constitutional matter, to anticipate that Flayter's testimony might be objectionable in some way and to have an expert ready to counter her testimony just in case. Again, Pico was entitled to a competent defense, not an ideal one.

¶105 As for Flayter's alleged failure to clarify, during the interview with Flayter, D.T. did clarify, when prompted, that what she meant when she said Pico touched her "down there" was that he touched her vagina. D.T. said that initially Pico's hand was on her leg, rubbing it, and that his hand got higher and higher and then he stuck his hand down her pants. D.T. said that his hand went underneath her underwear and that his fingers were rubbing, touching and "going back and forth" on her part that "goes potty." A diagram in the record shows that D.T. circled the area where Pico touched her, and it is the groin area.

¶106 Notwithstanding this, the circuit court found that trial counsel testified that the hands-down-the-pants concept should have been clarified. This finding was clearly erroneous. Trial counsel never testified to as much. What he said was that Flayter did not give an explanation of what "down the pants" meant. It was not up to Flayter to *give* an explanation, but to *get* an explanation from D.T. as to what she meant, and Flayter did. So, contrary to the circuit court's conclusion, trial counsel never testified that D.T. failed to clarify what she meant by "hands down the pants."

¶107 Further, during cross-examination at the ***Machner*** hearing, Yuille even admitted the video showed Flayter clarified that D.T. claimed Pico touched her vagina. Yuille conceded the following all occurred during the recorded interview between Flayter and D.T.: D.T. showed with her hand that the touching

was of her vaginal area; Flayter asked if the touching was under or over her underwear, and D.T. said under; D.T. said the touching involved "rubbing his fingers back and forth"; Flayter then asked what part of her body was touched, and D.T. said, "the part [I] use to go to the bathroom," and D.T. clarified that meant "potty"; finally, Flayter brought out a diagram and D.T. circled the vaginal area.

¶108 Given all of this, trial counsel reasonably concluded that to challenge Flayter's interview would not have been a good use of resources, and in any event, there is no reasonable probability that the result of the proceeding would have been different. *See* ***Harrington***, 562 U.S. at 106 ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.").

Good Touch/Bad Touch Evidence

¶109 Pico alleged that trial counsel was ineffective for failing to present evidence that (1) Pico rubbed his daughter's leg as a way to soothe her, and (2) D.T. had recently learned in school about good touches and bad touches.

¶110 As to the former, the circuit court found no deficient performance on trial counsel's part. The court said that "[i]n and of itself, I don't view that as a significant error." Pico argues that this means that counsel's performance in this regard was deficient and, further, when tied in with all of trial counsel's other failures, prejudice was cumulatively established. The court, however, said no such thing.

¶111 In any event, trial counsel was not deficient for failing to present this evidence. Michelle testified that their daughter has a sensory disruption and processing disorder, meaning she cannot compartmentalize sensory information

and feels as if she is being bombarded by a lot of sensory information. Massage helps to relieve this disorder; hence Pico and Michelle rub their daughter's leg in order to calm her. Trial counsel testified that he knew that Pico and Michelle massaged their daughter's leg, and he considered "quite a bit" about presenting this to the jury. Michelle acknowledged that she discussed the issue with trial counsel. Trial counsel also discussed the issue with other lawyers at his firm. He decided not to present the evidence because he had lost a motion to present evidence about Pico's "gregarious" nature and his "kind of [being] touchy-feely with kids" and once trial counsel lost the motion, he saw this evidence as "very problematic" in that it had no context and some jurors might not like the fact he was rubbing his daughter's leg and might think he is "inappropriate with children." This was a reasonable conclusion.

¶112 Pico argues that trial counsel's strategy makes no sense because Pico admitted touching D.T.'s leg and this evidence would have explained why he touched her leg. Instead, the jury was left with no explanation as to why he touched D.T.'s leg.

¶113 The circumstances of the two rubbings are not similar. Pico rubbed his daughter's leg in order to soothe her, but he never said he rubbed D.T.'s leg in order to soothe her. In fact, when Rich first confronted Pico, he said that D.T. asked him to tickle her leg and that he knew it was inappropriate. Later, he said he was just playing.[12] It was also a reasonable strategy to avoid focusing on the fact that Pico admitted rubbing D.T. and that his hand went up to, and inside, her

[12] Pico never testified at the ***Machner*** hearing, and he has never said that he rubbed D.T.'s leg in order to soothe her.

waistband, which presumably would not be explained by his behavior with his daughter.

¶114 As for getting good touch/bad touch materials from D.T.'s school because she had learned about good touch/bad touch in school that week, trial counsel testified that he "thought about that a lot." Pico and Michelle brought it up to him, he discussed it with other attorneys at his firm, and they all agreed to avoid the topic. Trial counsel thought that if D.T. had just learned the difference between a good touch and a bad touch, she would more likely be able to identify the difference, which would have been "a very big negative." Trial counsel never obtained the materials from D.T.'s school. It would not have changed his mind had he obtained the materials because he has "young school children" and he knew "the stuff they've gone through" so he "generally [knew] the general concepts."

¶115 Yuille testified that research on good touch/bad touch programs suggested that after this program is taught in school, disclosure increases; some disclosures are valid and others are not. Significantly, there was no evidence that the invalid disclosures outnumbered valid ones.

¶116 The circuit court essentially agreed with Pico that trial counsel could not make a strategic decision about whether or not to present this information if he never saw it.

¶117 As the State argues, because Pico never obtained the good touch/bad touch materials and presented them at the ***Machner*** hearing, we are at a loss to know what was contained within them and how they might have impacted the defense. On a claim for ineffective assistance of counsel, the burden is on the defendant to show both deficient performance and prejudice. ***State v. Sanchez***,

201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996); ***State v. Leighton***, 2000 WI App 156, ¶¶38-39, 237 Wis. 2d 709, 616 N.W.2d 126. Without this evidence, Pico's claim is purely speculative.

Cumulative Prejudice

¶118 While the circuit court essentially concluded that the cumulative effect of trial counsel's errors was prejudicial to Pico, we, however, have concluded that none of Pico's claims amounted to deficient performance. Consequently, there was also no prejudice to Pico. In other words, "[z]ero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976); *see* ***State v. Simpson***, 185 Wis. 2d 772, 786, 519 N.W.2d 662 (Ct. App. 1994).

Remaining Claims

¶119 In Pico's brief, he raises three additional claims: (1) trial counsel was ineffective for failing to object when the presentence report characterized a prior conviction in California as a sexual assault conviction, (2) trial counsel was ineffective for failing to object when the circuit court tried to compel Pico to admit his guilt at sentencing, and (3) the circuit court erred when it denied Pico's motion in limine to present character evidence.

¶120 The third claim is raised for the first time on appeal and, thus, is not properly before us.

¶121 The remaining two claims were raised before the circuit court, but they were denied.[13] Since the circuit court ordered a new trial, if we were to conclude that counsel was ineffective either because he did not object to the presentence report or to the circuit court's comments at sentencing, it would result, not in a new trial, as the circuit court ordered, but in a new sentencing hearing. In other words, we would be modifying the order appealed from, not affirming it. However, only the State has appealed from the order. Pico did not file a cross-appeal. Under WIS. STAT. RULE 809.10(2)(b), "[a] respondent who seeks a modification of the judgment or order appealed from … entered in the same action or proceeding shall file a notice of cross-appeal …." *See* ***State v. Huff***, 123 Wis. 2d 397, 408, 367 N.W.2d 226 (Ct. App. 1985); *cf.* ***McLellan v. Charly***, 2008 WI App 126, ¶18 n.2, 313 Wis. 2d 623, 758 N.W.2d 94 ("A cross-appeal is unnecessary in order to raise this challenge because the plaintiffs are not seeking relief that is different than that ordered by the circuit court.… They are simply arguing that they are entitled to that same relief on an alternative ground." (citation omitted)). Since Pico failed to file a cross-appeal, these two claims he raises are unreviewable.[14]

CONCLUSION

¶122 The circuit court erred when it granted Pico a new trial on the basis that he received ineffective assistance of counsel. Pico was not denied his right to

[13] The court explicitly denied Pico's ineffective assistance claim based on his refusal to admit guilt, while the court implicitly denied the other claim.

[14] In light of our determination, we need not address the State's remaining argument that the circuit court erred in allowing Pico to present expert testimony from an attorney.

effective assistance of counsel. Therefore, we reverse the order granting his postconviction motion for a new trial and reinstate the judgment.

By the Court.—Order reversed and judgment reinstated.

Not recommended for publication in the official reports.

¶123 REILLY, P.J. (*dissenting*). I respectfully dissent as the majority errs in its application of the standard of review. "Findings of fact include 'the circumstances of the case and the counsel's conduct and strategy.'" ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). We are to uphold a trial judge's findings of fact unless they are clearly erroneous. ***Id.*** This case parallels ***Thiel***, which also involved a "he said, she said" claim of sexual assault, a finding by the trial court of a failure to investigate, and deficient performance by trial counsel. *See* ***id.***, ¶¶13-16, 57, 81. In ***Thiel***, our supreme court upheld the trial judge's findings and observed that an appellate court must be "sensitive" to the trial judge's assessments of credibility and demeanor and not exclude those assessments, "either expressly or impliedly, from an analysis of deficiency and prejudice, unless they are clearly erroneous." ***Id.***, ¶23.

¶124 The trial judge in our case found that trial counsel's decision not to investigate was unreasonable and was deficient performance. The ***Machner***[1] hearing spanned two days of testimony culminating with the trial judge finding that Pico's 1992 brain injury had a "broad impact" on strategy and development of the theory of the case, the injury caused "decreased cognitive abilities," and was an issue that a reasonable attorney would have investigated. The trial judge also found that given Pico's injury and his corresponding "mental health situation," a reasonable attorney would have investigated Pico's susceptibility to making a false

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

confession when confronted with the Reid interrogation technique—a technique that legally (and regrettably) authorizes the government to impose pressure upon a suspect by blatantly lying to a suspect that it has scientific, absolute proof of their guilt in order to persuade a confession. The trial judge concluded that Pico's brain injury made him susceptible to "involuntary acquiescence to authority." The majority improperly dismisses the finding.

¶125 The majority errs by reaching its own conclusions from the facts. While the majority acknowledges the trial judge's finding that Pico did have a brain injury, the majority determines based upon its own analysis of the written record that trial counsel's performance was not deficient. Majority, ¶¶39-63. The majority's decision ignores facts supporting the trial judge's decision and keys in on facts it finds more desirable in order to reach its own conclusions. While the majority's finding that "[z]ero plus zero equals zero" is mathematically true, Majority, ¶121, its application to the facts of Pico's representation is itself a finding of fact, i.e., that there was a "zero" and a "zero" to add together. After two days of testimony the trial judge did not find "zeros." The trial judge found a "positive" deficient performance on the part of trial counsel and a "positive" prejudice to Pico, equaling constitutionally ineffective assistance of counsel.

¶126 The majority, having read only the written record, believes that it has the ability to independently "see" and "feel" the evidence and substitutes its own finding that trial counsel's failure to investigate Pico's brain injury was not constitutionally deficient. The majority errs by placing itself in the role of the trial judge. A trial judge sees, feels, and hears the evidence. We do not. I defer to the trial judge's findings of fact rather than the majority's findings of fact and respectfully dissent.