STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP1731-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICKY H. JONES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSCONVICTION RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR MANITOWOC COUNTY, THE HONORABLE JEROME L. FOX, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Ricky H. Jones, appeals a judgment convicting him of two counts of first degree sexual assault of a child under the age of thirteen (90), and an order denying his motion for postconviction relief (118). The circuit court, the Honorable Jerome L. Fox, entered judgment of conviction after a jury found Jones guilty of both charges.

The charges against Jones stemmed from separate allegations by C.C.B. and M.R.W. that he had sexually assaulted them in the summer of 2006 (1:1-3). At the time, C.C.B. was six years old, and M.R.W. was seven years old (1:1).

Before trial, the defense moved for admission of evidence that C.C.B. had made a prior untruthful allegation of sexual assault against another man, and that M.R.W. had made a prior untruthful allegation of sexual assault against a different other man (29). The defense claimed that the allegations C.C.B. and M.R.W. made about the other men were false and were admissible to "prove" C.C.B.'s and M.R.W.'s "motive, plan, and opportunity" to falsely accuse him of sexual assault (29:5-6, 9). Step-wise interviews were conducted in each case. The District Attorney's Office did not prosecute either allegation.

The circuit court viewed the videotapes of the interviews with C.C.B. and M.R.W., and considered other documentary evidence, before determining that the evidence was inadmissible at trial in the current case. The court concluded that it could not conclude that the prior allegations were untruthful, and therefore they were not admissible under Wis. Stat. § 972.11(2)(b)3., Wisconsin's Rape Shield Law (43:19).

Jones filed an interlocutory appeal, and the court of appeals reversed and remanded to the circuit court with

instructions to determine whether a reasonable jury would have inferred that the prior allegations were untruthful. *State v. Ricky H. Jones*, No. 2008AP1595-CR, slip op. (Wis. Ct. App. Dist. II July 29, 2009) (61).

On remand, the circuit court concluded that a reasonable jury would not have found that the prior allegations were untruthful (98:7). It therefore excluded the evidence (98:7).

Jones was tried for sexually assaulting both M.R.W. and C.C.B. His trial was held on May 24-25, 2011 (99; 100).

M.R.W., who was eleven years old at the time of trial (99:144), testified at trial that Jones had made her undress (99:153), and touched her vagina (99:157).

M.R.W.'s mother testified that M.R.W. woke her up on January 31, 2007, and told her that Jones, one of her "father" Michael's friends, had "licked her pee-pee" (99:91).[1] She told Michael about M.R.W.'s allegations, and they took M.R.W. to the police station (99:92-93). Detective Erik Kowalski testified that he conducted a Step-wise interview of M.R.W. (99:111), and that M.R.W. told him that Jones had touched her vagina (99:117). The jury viewed the videotape of the interview (70; 99:114-15), and a drawing on which M.R.W. identified where she alleged Jones had touched her (99:117).

C.C.B. testified that Jones had touched her private parts, specifically her vagina, breasts, and butt (100:26). She testified that on another occasion Jones attempted to put his penis into her vagina (100:32-33).

Sara Schumacher, who worked for the Children's Hospital of Wisconsin, testified that she performed a Step-

[1] M.R.W.'s mother testified that Michael Shwoerer was not M.R.W's biological or adoptive father, but that he had "basically been her dad her whole life" (99:95-97).

wise interview of C.C.B. (99:181-82). The jury viewed the videotape of the interview (70; 99:190-91).

The defense relied primarily on the testimony of Jones and Dr. Eugene Braaksma. Jones said "I deny all allegations" (100:147). He denied inappropriately touching C.C.B. in the bathtub (100:149), or licking her vagina (100:149-50).

Jones also denied sexually assaulting M.R.W. (100:158). He said that he did not lick M.R.W.'s "pee-pee" (100:158), and that he did not touch her vagina (100:158). Jones said "I didn't molest anyone" (100:164).

Dr. Braaksma testified about the Step-wise interview process (99:219-240). When defense counsel asked Dr. Braaksma whether he had done any psychological testing of Jones, the prosecutor objected (99:241). The trial court asked for an offer of proof (99:246), and Dr. Braaksma testified that he had administered four psychological tests to Jones (99:247), and that in his opinion, Jones's psychological profile was not consistent with that of a sex offender (99:250).

The court excluded the Dr. Braaksma's testimony regarding Jones's psychological profile because it was propensity evidence, and because the defense had not disclosed Dr. Braaksma's report to the State in response to the States discovery request (100:7-14).

The jury reached a verdict in less than one hour (100:225), finding Jones guilty of two counts of having sexual contact with a person under the age of thirteen (100:225-26).

After the court entered judgment of conviction (90), Jones moved for a new trial on the ground of ineffective assistance of trial counsel (105). Jones asserted that his trial counsel was ineffective in not providing notice that he intended to introduce evidence of Dr. Braaksma's opinion about Jones's psychological

profile (105:2), not requesting an order prohibiting witnesses from referring to his having been on probation (105:3), not objecting to hearsay by prosecution witnesses (105:3-4), and inquiring about other investigations of sexual assault allegations against him (105:4).[2] The court held a hearing on the motion, at which Jones's defense counsel testified (111). After briefing (113; 114), the court denied Jones's motion in an oral ruling (125:2-14). The court then issued a written order denying the motion (118). Jones now appeals the judgment of conviction, and the order denying his motion for postconviction relief (119).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED JONES'S CLAIM THAT HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

A. Applicable legal principles and standard of review.

To prevail on an ineffective assistance of counsel claim, "[a] defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial." *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prove deficient performance, a defendant must prove that counsel "'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Allen*, 274 Wis. 2d 568, ¶ 26 (citations omitted). Reviewing courts are to be '"highly deferential'" in evaluating the actions of counsel, and are

[2] On appeal, Jones pursues his claim that his trial counsel was ineffective in regards to not providing notice of Dr. Braaksma's opinion and report about Jones's psychological profile, and inquiring about other investigations of sexual assault allegations against him. He does not pursue his claims that his trial counsel was ineffective in regards to not requesting an order prohibit mention of his having been on probation, or not objecting to hearsay testimony.

to "avoid the 'distorting effects of hindsight.'" *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citations omitted).

To prove prejudice, a defendant must show "'a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" *Allen*, 274 Wis. 2d 568, ¶ 26 (citing *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id*.

B. Not providing notice of expert witness.

Jones asserted in his motion for postconviction relief that his defense counsel was ineffective in not providing to the State notice that it intended to call Dr. Braaksma as an expert witness, to testify about Jone's psychological profile (105:2). On the first day of trial, the court allowed Braaksma to testify for the defense, out of order, during the presentation of the State's case. Braaksma testified about the Step-wise interview process (99:219-240). He specifically testified about interviewer bias (99:223-27), and other issues with the Step-wise process (99:227-40). He also testified that he had reviewed the taped interviews with the two victims in this case (99:240-41). Braaksma was then asked if he examined Jones and considered his psychological profile (99:241). Braaksma, said he had done so. The prosecutor then objected, on the ground of relevancy (99:241).

The trial court excused the jury, and then addressed whether Braaksma could testify that Jones does not present a "psychological [] profile, which would be consistent with what is known to be that of a sexual offender" (99:242).

The court questioned whether the State had made a discovery demand, and also whether the evidence was inadmissible propensity evidence (99:243). Defense

counsel asked for additional time to research the issue, and the court suggested that defense counsel make an offer of proof (99:245-46). Defense counsel then questioned Braaksma (99:246).

In the offer of proof, Dr. Braaksma testified that he administered four personality tests to Jones, the Minnesota Multiphasic Personality Inventory second edition (MMPI-2), the Hare Psychopathy Checklist-Revised (Hare), the Washington University Sentence Completion Test, and the personal Tennessee Sentence Completion Test (99:247). He said that the MMPI-2 and the Hare test are used to identify the level of psychopathy (99:247), and that the Washington University Sentence Completion Test "measures levels of ego development" (99:248). He added that the sentence completion tests use self-reported data, and give "a good sense of someone's personal history," including "their tendency toward deviant sexual acts" (99:248).

Dr. Braaksma testified that based on the "historical information and record information, I place him at a low risk level" (99:249). He was asked if Jones's "psychological profile does not present as one that's consistent with what is known in the research regarding sexual offenders?" and he answered, "That's correct" (99:250). He added that his opinion was to a "reasonable degree of scientific certainty" (99:250-51).

The next day, defense counsel argued that Dr. Braaksma's testimony regarding Jones not fitting the psychological profile of a sex offender should be admitted pursuant to *State v. Richard A.P.*, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998) (100:7-10).

The trial court concluded that the evidence was inadmissible under Wis. Stat. §§ 904.04(1), 906.08, and 906.09. The court further concluded that the evidence was inadmissible because the State had made a discovery demand, and Dr. Braaksma had produced a report, but the report was not provided to the State (100:10-13).

Later that day, during a recess, the court returned to the issue of Dr. Braaksma's testimony (100:42-44). The court noted that the defense wanted to admit the evidence pursuant to *Richard A.P* (100:42). The court stated that if the testimony and report had been disclosed to the State, the court would have had to hold a hearing under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993), to determine whether the evidence was admissible, and that the evidence "would have been subject to fairly close scrutiny under revised" Wis. Stat. § 907.02 (100:43-44). The trial then resumed.

In his motion for postconviction relief, Jones asserted that his trial counsel was ineffective in not providing the State with notice of Dr. Braaksma's testimony and report (105:2). At the hearing on the motion, Jones's trial counsel explained that through mistake or oversight, he had failed to provide Dr. Braaksma's notice to the prosecutor (111:9-10).

In its decision denying Jones's motion for a new trial (125), the circuit court concluded that Jones failed to meet his burden of demonstrating that any deficient performance by defense counsel in not providing notice of Dr. Braaksma's report to the State resulted in prejudice to Jones.

The court first noted that it "does not quibble with Jones' argument that trial counsel's failure to timely submit was deficient performance on his part" (125:10). The court then noted that the report to which Dr. Braaksma testified was introduced into evidence at the sentencing hearing (125:10).[3] The court stated that:

> The report was dated February 28, 2008 and directed to Attorney Smerlinski. It consisted of results from tests administered by a Dr. Nathan Glassman, and reflected those opinions Dr. Braaksma offered in his offer of proof.

[3] It does not appear that the report is included in the appellate record.

The written report contained a narrative recitation of various test results without any accompanying test scores.

It's an exhibit in the . . . September 29, 2011 hearing, and that information is found at unpaginated pages two and three, end paren.

The only mention of sex with children came from, quote, self-report, end quote, information provided by Jones.

At the ***Machner*** hearing, the Court noted that without actual measurements it's difficult to validate the conclusions, particularly those from testing, offered by Dr. Braaksma.

Paren, Machner transcript, page 39 lines 21-25, page 40, end paren.

Based on the written report in the Braaksma offer of proof, the Court believes that any trial testimony on the defendant's psychological profile as a sex offender would have had, at best, minimal value to the defendant's defense.

Moreover, the -- the Court notes that, even in the February 28, 2008 report itself, Dr. Braaksma, the author of the report, acknowledges that attempts to determine by psychological testing or otherwise psych - - profiles of, and characteristics of -- of sex offenders, is problematical at best.

The Jones' jury heard two days of testimony, including evidence from both victims and from Jones, himself. His witness, Dr. Braaksma supplied his opinions on why he believed the Step-wise interview process to be problematical. Inferentially, this testimony suggested the -- the girls' version of the events they described were less than credible.

The fact that he could not offer an additional opinion on Jones' psychological profile does not, in the view of this Court, undermine confidence in the outcome of the case.

Moreover, not only was the trial testimony from the two alleged victims, neither of whom knew

> the other, obviously credible in the eyes of the jurors, but the jury had an opportunity to view interviews with each of them recorded on -- recorded on DVD almost four years prior to the trial, much closer to the actual events complained of.
>
> …
>
> The jury also heard the defendant testify in attempt to confute the graphic reports of his conduct offered by the two girls.
>
> The credibility and weight of their accusations convinced the jury that Jones' version of his conduct was not believable.
>
> Um, the Court finds that the actual testimony from the victims and the defendant powerfully outweighed whatever marginal value the … psychosexual profile might have added to Jones' defense.
>
> In sum, the Court finds that, while trial counsel's failure to secure the admission of sexual profile testimony may have been deficient performance, it does not undermine this Court's confidence in the outcome of the case given the totality of the circumstances.

(125:11-13.)

In his brief on appeal, Jones does not explain how he thinks the circuit court's analysis was incorrect. He argues that his trial counsel's error "resulted in the exclusion of Jones' key witness for the defense and excluded a foundational piece of evidence in support of his defense" (Jones Br. at 19) (italics removed). He adds that his trial counsel's error resulted in his "inability to present his sole defense, outside of holding the State to their burden" (Jones Br. at 20).

Of course, Jones's defense was not that he did not match the psychological profile of a sex offender. His defense was that he did not sexually assault the two child victims. Jones testified at trial (100:138-165). He was

asked if he improperly touched C.B.B., and he answered "I deny all allegations, sir" (100:147). He was asked if he ever inappropriately touched C.C.B. in the bathtub, and he answered "[t]hat never happened, sir" (100:149). Jones denied taking C.C.B. into his bedroom, and licking her vagina (100:149-50). He denied touching C.C.B. in the garage (100:150), or in a room with a mattress (100:151). He denied touching C.C.B. in the living room (100:153-54). He denied all four allegations of touching C.C.B.'s vagina, and he denied molesting her on a daily basis for two months (100:155).

Jones also denied sexually assaulting M.R.W. (100:158). He said that he did not lick M.R.W.'s "pee-pee" (100:158), and that he did not touch her vagina (100:158). Finally, Jones testified that "I didn't molest anyone" (100:164).

The testimony that was excluded—Dr. Braaksma's testimony that Jones's "psychological profile does not present as one that's consistent with what is known in the research regarding sexual offenders," was evidence that supported Jones's defense that he did not sexually assault C.C.B. or M.R.W. It was not his "sole defense, outside of holding the State to their burden" (Jones Br. at 20).

Jones does not address the circuit court's conclusion that any error in not providing the State with notice of Dr. Braaksma's report caused no prejudice. He argues only that "Jones has demonstrated that it is reasonably likely that the jury verdict would have been different if [Dr. Braaksma] was allowed to present his expert opinion" (Jones Br. at 20).

Jones does not argue that the circuit court was wrong in concluding that "[b]ased on the written report in the Braaksma offer of proof, the Court believes that any trial testimony on the defendant's psychological profile as a sex offender would have had, at best, minimal value to the defendant's defense" (*see* 125:11-12). He does not dispute the court's conclusion that "in the February 28,

2008 report itself, Dr. Braaksma, the author of the report, acknowledges that attempts to determine by psychological testing or otherwise psych -- profiles of, and characteristics of -- of sex offenders, is problematical at best" (*see* 125:12). Finally, Jones does not explain why the court was incorrect in concluding that "the actual testimony from the victims and the defendant powerfully outweighed whatever marginal value the … psychosexual profile might have added to Jones' defense" (*see* 125:13).

The circuit court in this case presided over the trial, and heard all the testimony, watched the videotaped interviews of the victims, and considered the testimony that Dr. Braaksma gave in the offer of proof, and the contents of Dr. Braaksma's report. The court concluded that the excluded testimony had only "minimal" and "marginal" value, was "powerfully outweighed" by the evidence the jury considered, and did not undermine the court's confidence in the outcome of the trial (125:12-13). Accordingly, the court found that any deficient performance by Jones's defense counsel caused no prejudice. Because Jones had not shown that the court was incorrect, this court should affirm the circuit court's decision.

C. Eliciting testimony that Jones had been investigated in another sexual assault case.

Jones also asserted that his trial counsel was ineffective in eliciting testimony from Detective Erik Kowalski that Detective Brain Swetlik had investigated Jones in another sexual assault case (105:4). Jones points to the following exchange between defense counsel and Detective Kowalski:

> Q Okay. So was Swetlik with you when you made this contact --
>
> A No.
>
> . . .

Q Okay. When did he -- he become involved?

A I believe when I returned to the Department.

Q And what was his role in all this?

A I believe he was investigating a different case.

Q Okay. So did you guys actually compare notes on a different case?

A I believe he expressed some concern about another case, yes.

Q And so what was this other case that he was investigating?

A Sexual assault.

Q Okay. And -- and what case did that -- who did that involve?

A I believe the defendant.

Q Okay. So what you're telling us is that both of you would have been investigating a different case concerning Mr. Jones; right?

A Correct.

(100:120-21.)

In his motion for postconviction relief, Jones argued that with this line of questioning, defense counsel elicited testimony from Detective Kowalski that Detective Swetlik was investigating an entirely different sexual assault case against Jones and that this testimony prejudiced Jones (105:4).

At the hearing on Jones's motion for postconviction relief (111), Jones did not ask his trial counsel any questions specifically relating to Detective

Kowalski's testimony about Detective Swetlik investigating a different case.

On cross-examination, the prosecutor did ask Jones's defense counsel about this testimony. Defense counsel testified that there were two investigations in this case, for two different victims, and that Detective Kowalski "was present for two other Step-wise interviews with the same victims" (111:28). Counsel testified that he wanted to "open[] the door" to testimony about the other allegations that the victims in this case had made, to show that the victims had given different stories to the officers (111:29). He said he discussed this strategy with Jones and that Jones understood the strategy (111:30).

After hearing testimony from Jones's defense counsel, the circuit court pointed out that Detective Swetlik had testified immediately after Detective Kowalski, and told the jury that he was working on the case in regards to one victim, while Detective Kowalski was working on the case in regards to the other victim (111:45-46). The court concluded that "[t]his isn't some case that was -- was out in left field that hasn't been charged. This is a case that we were talking about to this jury" (111:46).

In his brief after the hearing, Jones argued only that his trial counsel had "agreed that he also may have opened the door and allowed the jury to hear about other, uncharged allegations made against the defendant" (113:13).

The circuit court rejected Jones's claim that his trial counsel was ineffective in this regard. In its oral ruling, the court concluded that the evidence at trial that the jury heard indicated that Detective Swetlik and Detective Kowalski were working on the same case, but that Detective Swetlik was working with one victim, and Detective Kowalski with the other one (125:4-5).

The court first noted the portion of the trial transcript upon which Jones relies (125:4-5). The court explained that "Detective Swetlik was called as a witness after Kowalski completed his testimony. From his testimony, it was obvious he was investigating the allegations made by the other minor, C.C.[B.]" (125:5). The court added that:

> The record is clear that both detectives were working on the same case for which Jones was ultimately convicted, although each concentrated on a different alleged victim.
>
> To suggest that Kowalski's testimony about Swetlik concerned a sexual assault charge other than the two which this jury considered is belied by the record.

(125:5.)

On appeal, Jones argues that the court was incorrect because Detective Kowalski "was the assisting officer to the State's case in chief. In other words, he was present for the entirety of the trial, at the State's side" (Jones Br. at 23). He asserts that when the Detective referred to "'a different case,'" he was referring to a separate sexual assault investigation of Jones, and that the jury's attention would have been drawn to other bad acts (Jones Br. at 23-24).

The State maintains that the circuit court properly rejected Jones's claim. The defense called Detective Kowalski as a witness. He testified that he responded to a complaint of a sexual assault by M.R.W. (100:115). He said that Detective Swetlik was not with him when he first responded to the allegation, but that Detective Swetlik became involved in the case when Kowalski returned to the station. He said "I believe he was investigating a different case" (100:120).

The next witness that the defense called was Detective Swetlik (100:122). Defense counsel asked if he had received a complaint of a sexual assault of C.C.B. and

Detective Swetlik answered, "Yes" (100:123). The remainder of the questioning by defense counsel, and the remainder of the testimony by Detective Swetlik, concerned the investigation of the sexual assault allegations by C.C.B. (100:123-32).

As the circuit court recognized, Detective Kowalski testified as a defense witness, and his testimony was entirely about M.R.W.'s case, and not about C.C.B.'s case. When Detective Kowalski referred to Detective Swetlik working on "a different case," the jury logically would have assumed that he meant, "a different case" than the one he was working on, involving M.R.W.

Detective Swetlik testified immediately after Detective Kowalski, about working on C.C.B.'s case, but not on M.R.W.'s case. The jury therefore had no reason to infer anything other than that Detective Kowalski worked on M.R.W.'s case, and Detective Swetlik worked on "a different case," involving C.C.B.

The circuit court correctly analyzed the issue, and correctly rejected Jones's claim that his counsel performed deficiently, or that he suffered any prejudice. This court should therefore affirm the circuit court's decision rejecting Jones's ineffective assistance of counsel claim.

II. JONES WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

A. The trial court did not err in excluding Dr. Braaksma's testimony about Jones's psychological profile

Jones next argues that he was denied the right to present a defense because the trial court erred in excluding the testimony by Dr. Braaksma that in his opinion, Jones did not match the psychological profile of a sex offender (Jones Br. at 25-27). Jones argues that the evidence was admissible under *Richard A.P.*, 223 Wis. 2d 777, and he

"should have been allowed to introduce that evidence, as part of his defense" (Jones Br. at 27).

However, the trial court did not err in excluding the evidence. It is undisputed that Jones did not provide notice to the State of Dr. Braaksma's report. It is undisputed that by not giving notice, Jones violated the applicable discovery rule, Wis. Stat. § 971.23(2m)(am). The issue is apparently whether the court properly excluded the evidence after recognizing the discovery violation.

The sanction for a failure to comply with the discovery rules is governed by Wis. Stat. § 971.23(7m)(a), which provides that "[t]he court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for the failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance."

Section 971.23(7m)(a) "requires the trial court to exclude evidence that is not produced as required by the statute "unless good cause is shown for failure to comply." Exclusion is not mandatory if the court finds "good cause." *State v. Gribble*, 2001 WI App 227, ¶ 28, 248 Wis. 2d 409, 636 N.W.2d 488 (quoting *State v. Wild*, 146 Wis. 2d 18, 27, 429 N.W.2d 105 (Ct .App. 1988)).

Jones did not argue that his failure to present Dr. Braaksma's report to the prosecution was for good cause. He did not seek a recess or a continuance during trial when the issue arose. The court was therefore left with little choice. The statute requires that a court exclude evidence not presented for inspection.

"A trial court's decision whether to exclude evidence for failure to comply with discovery requirements under Wis. Stat. § 971.23 is committed to the trial court's discretion, and if there is a reasonable

basis for the ruling," a reviewing court will "not disturb it." *Id.* ¶ 29 (citation omitted).

In this case, the trial court excluded the evidence, as the statute required it to do in the absence of good cause for the failure to produce Dr. Braaksma's report. The court properly exercised its discretion in reaching its decision.

B. The trial court did not erroneously exercise its discretion in excluding a prior allegation of sexual assault by each victim.

Jones argues that the circuit court erred in excluding evidence showing that the two victims in this case, C.C.B. and M.R.W., had each made a separate prior allegation of sexual assault against a person other than Jones. Jones moved before trial to admit videotapes of Step-wise interviews of C.C.B. and M.R.W., under Wisconsin's Rape Shield Law, Wis. Stat. § 972.11(2)(b)3., as "Evidence of prior untruthful allegations of sexual assault made by the complaining witness" (29:12) The trial court examined videotapes of Step-wise interviews of C.C.B. and M.R.W. in camera, and considered other evidence regarding the allegations (*see* 43:2). The court then held a hearing on the motion (43).

At the hearing, Jones's defense counsel argued that the allegations by C.C.B. and M.R.W. were untruthful (43:7-8, 10-12). He relied on the fact that neither allegation resulted in charges against the alleged perpetrators, and that both persons who were accused denied the allegations (43:10-11).

The circuit court denied the motion to admit the evidence under § 972.11(2)(b)3., concluding that the court "can't come to the conclusion that these young women lied" about the incidents (39; 43:19).

Jones filed an interlocutory appeal of the court's order denying the motion to admit the evidence. The court of appeals reversed, concluding that the circuit court had applied an incorrect legal standard. *State v. Ricky H. Jones*, No. 2008AP1595-CR, slip op. (Wis. Ct. App. Dist. II July 29, 2009) (61). The court of appeals noted that the standard is not whether the trial court concluded that the complaints made untruthful allegations, but whether a jury could reasonably find that the complainants made prior untruthful allegations of sexual assault. *Id.* ¶ 11. The court of appeals therefore remanded the case to the circuit court to apply that legal standard. *Id.* ¶ 16.

After the court of appeals issued its decision, the Wisconsin Supreme Court decided the issue of the proper legal standard in *State v. Ringer*, 2010 WI 69, 326 Wis. 2d 351, 785 N.W.2d 448. The supreme court set forth the test as follows:

> pursuant to the test set forth in *DeSantis*, evidence of the complainant's alleged prior untruthful allegations of sexual assault is admissible only if the circuit court first makes three determinations: (1) the proffered evidence fits within Wis. Stat. § 972.11(2)(b)3; (2) the evidence is material to a fact at issue in the case; and (3) the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature.

Id. ¶ 27 (citing *State v. DeSantis*, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990)).

In *Ringer*, the supreme court circuit court explained the first part of the test, stating that "in order to admit evidence of alleged prior untruthful allegations of sexual assault under Wis. Stat. § 972.11(2)(b)3., the circuit court must first conclude from the proffered evidence that a jury could reasonably find that the complainant made prior untruthful allegations of sexual assault." *Id.* ¶ 31.

On remand from the court of appeals, the circuit court in this case recognized that the supreme court in *Ringer* had clarified the legal standard (98:7). The court

noted the correct legal standard, and explained that if it had applied that standard initially, it would still have found the videotapes of the Step-wise interviews of the two victims in the other cases to be inadmissible (98:5-7). The court explained:

> Had I been asked to rule on the -- the standard that the court sets in this case, whether a reasonable jury could reasonably infer that the girls had been untruthful, I would have found, in my opinion, that a reasonable jury could not have reasonably inferred the -- that the girls had been untruthful.

(98:6.)

The court then noted that in *Ringer*, the Supreme Court had set forth the standard using the term "find" instead of "infer" (98:6); *Ringer*, 326 Wis. 2d 351, ¶ 31. The court said "[b]ut were I to use 'find' as a standard, it would be, I think, even easier for me to conclude that no reasonable jury could find that the -- that the complainants made prior untruthful allegations of sexual assault" (98:7). The court therefore again concluded that the evidence at issue was inadmissible (98:7).

On appeal, Jones argues that the circuit court erroneously exercised its discretion in ruling the evidence inadmissible on remand. Jones asserts that:

> the trial court did nothing to explain its rationale for the ruling. Rather, the trial court summarily stated that it was denying the defense motion and was doing so because the trial court did not find that a jury could reasonably find that the prior allegations of sexual assault, as to each witness, were untruthful.

(Jones Br. at 29). Jones added that "[t]he trial court simply restated its prior ruling with the magic words of the revised legal standard. The trial court did not reason its way to the end conclusion. Further, the trial court did

not recite relevant facts from the record that supported its ruling" (Jones Br. at 29-30).[4]

The State maintains that the circuit court's decision should be affirmed. The court explained its reasoning when it initially ruled the evidence inadmissible. The court noted that it had considered the videotaped interviews and the other evidence presented, and it concluded that the evidence was inadmissible. The court stated:

> Now, I've read, we've all read, what has happened in this case, and it's acknowledged that neither of these two incidents, the one relating to Sieberlink, nor the one relating to Glowaty, were charged as crimes by the -- either the district attorney's office or any other agency.
>
> From that, the defense concludes that these allegations must have been untruthful. I think the defense also points out to the fact that -- also points to the fact M.R.W.'s mother says that she tells lies on big things or something similar to that.
>
> The Court in reviewing this record can't come to the conclusion that these young women lied. What the Court has concluded is that their version of an incident was unsubstantiated, which I find to be very much different than an untruthful allegation, and the unsubstantiated allegation, as those who practice in the area of -- of alleged sex offenses know, occurs not from time to time but very often simply because the re -- the report of the event

[4] Jones does not argue that he was denied the right to present a defense by the exclusion evidence of C.C.B. and M.R.W.'s prior sexual assault allegations, even if that exclusion was proper under Wis. Stat. § 972.11(2)(b)3. This court rejected that argument in its opinion deciding Jones's interlocutory appeal. *State v. Ricky H. Jones*, No. 2008AP1595-CR, slip op. (Wis. Ct. App. Dist. II July 29, 2009) (61). This court affirmed the circuit court's decision concluding that the offer of proof the defense presented in support of the evidence was insufficient to satisfy the requirement under *State v. Pulizzano*, 155 Wis. 2d 633, 656, 456 N.W.2d 325 (1990), that the offer of proof demonstrate that the "prior untruthful allegations clearly occurred." *Jones*, slip op. ¶ 15.

> sometimes is too stale to, uh -- to merit or at least to make the person hearing about it determine what really happen.
>
> The person that is alleged to have committed the event is not forthcoming maybe because he or she didn't do it, but in any event, uh, the tale then becomes, or the story becomes, the report becomes unsubstantiated, not untruthful. And in this case, I think that's precisely, based on my watching of the interviews of those two reporters, that is to say, C.B. and M.R.W., watching the interview of Mr. Glowaty, reading what I could find in the record either from the Department of Human Services or the police department, my reading is that nobody concluded that they were lying. There simply wasn't enough, based on what they were able to transmit by way of an allegation, to charge these persons with crimes.

(43:18-20.)

The circuit court then concluded that it did not "believe that these allegations can fairly be said to untruthful allegations" (43:20).

In its decision after remand, the court applied the correct standards, whether a reasonable jury would reasonably find that the allegations to the findings and conclusions it had already made, and concluded that a reasonable jury would not have found the allegations to be untruthful. The court's conclusion is fully supported in the record.

The court noted that Jones's argument was that the prior allegations were untruthful because they did not result in charges. In *Ringer*, the supreme court addressed this type of argument, stating:

> Finally, the fact that Christopher was never prosecuted in connection with Amber's allegations, in and of itself, does not support a finding that the allegations were untruthful. "Our cases have repeatedly acknowledged a prosecutor's broad discretion in determining whether to charge an

> accused." *State v. Krueger*, 224 Wis. 2d 59, 67, 588 N.W.2d 921 (1999); *see also State v. Kenyon*, 85 Wis. 2d 36, 45, 270 N.W.2d 160 (1978) (describing the district attorney's discretion in determining whether to commence a prosecution as "almost limitless"). A district attorney is charged with administering justice, not obtaining convictions. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). Accordingly, the district attorney is not required to prosecute all cases, including those in which it appears that the law has been violated. *Id.* In this case, Attorney Pakes chose not to prosecute Christopher despite her belief that the sexual assault occurred. A district attorney's discretionary belief that she cannot prove certain allegations beyond a reasonable doubt does not conclusively support a determination that the complainant's allegations were untruthful.

Ringer, 326 Wis. 2d 351, ¶ 40.

The supreme court added that:

> Ringer failed to bring forth evidence from which a circuit court could conclude that a jury could reasonably find that Amber's allegations against Christopher were untruthful. At most, Ringer's offer of proof shows that there were competing versions of what occurred and that Christopher may have a defense to the allegations. In this case, admitting evidence of Amber's prior allegations against Christopher could result in a trial within a trial, confuse the issues as they relate to Ringer's case, and invite the jury to speculate concerning Amber's truthfulness and whether the prior sexual assault occurred. These facts are simply too complex to support a jury's finding that Amber was untruthful without conducting a trial within a trial. The evidence would not be relevant to whether Amber made false allegations against Ringer unless the jury first determined that Amber made up the allegations against Christopher. However, we have concluded that Ringer did not produce evidence from which a jury could reasonably find that Amber's allegations against Christopher were untruthful. Despite the fact that the jury is instructed not to speculate, *see* Wis JI-Criminal 140, in this case, the jury would have to speculate in order to determine that Amber was

> untruthful. We refuse to extend § 972.11(2)(b)3 so far.

Id. ¶ 41.

The same is logically true in this case. After remand, Jones offered no new argument in support of his motion to admit the evidence. In his brief on appeal, Jones does not argue that court's reasoning was incorrect, or explain why a reasonable jury would find C.C.B. and M.R.W.'s allegations to be untruthful. The only significant argument that Jones offered was that the allegations were not charged, so they must be untruthful.

However, the circuit court addressed and rejected that argument. In its decision on remand, the court concluded that its reasoning applied to a reasonable jury as well as to the court, and that no reasonable jury could find the prior allegations to be untruthful. This decision is fully supported by the following information in the record.

C.C.B.'s Allegations About Her Mother's Boyfriend

Four months after Jones was charged with sexually assaulting C.C.B., C.C.B. told a social worker that her mother's boyfriend also sexually assaulted her (21:Police Report at 1).[5] A Step-wise Interview was conducted so, as C.C.B. put it, she could tell the social worker "'the rest of the story'" (21:DVD, Police Report at 2).

C.C.B. verified that she understood the difference between the truth and a lie and then described how her mother's boyfriend had rubbed her vagina once when he had her take a bath with him "with their swimsuits on," had kissed her "all over" when they were clothed, and had physically abused her by "hit[ting] her so hard on the butt that she was black and blue and bleeding" and "throw[ing]

[5]The circuit court entered an order on November 17, 2008, authorizing the state to cite the sealed documents in any appeal that arises out of 2007CF342.

her into the wall when he wants to" (21:DVD, Police Report at 1-2, Body Drawing). C.C.B. stated that her mother's boyfriend had touched her in the "same place" as Jones but clarified that the incidents with her mother's boyfriend were "something different" than the incidents with Jones she had already reported (21:DVD at 8:20, Police Report at 1, Child Protective Service Report at 2).

C.C.B.'s mother's boyfriend acknowledged hitting C.C.B. but denied sexually abusing her (21:Police Report at 3). C.C.B.'s social worker reported that C.C.B.'s mother would "be receptive" and "wants to 'throw the book' at" him (21:Child Protective Service Report at 2).

Police decided after talking with C.C.B. and her mother's boyfriend that the "next step may be a Voice Stress Analyzer test," but there is no indication in the record that such a test was done (21:Police Report:3).

The district attorney ultimately decided not to press charges, explaining in a letter to C.C.B.'s social worker:

> In reaching this decision, the District Attorney's Office does not mean to suggest that your version of the events was incomplete or inaccurate. However, in a criminal case, each element of an offense must be proven beyond a reasonable doubt. Unfortunately, in some cases, that proof is simply not available in spite of the best efforts of witnesses and police. This happens to be one of those cases and for that reason we are unable to proceed any further with this case at this time.

(21:December 14, 2007 Letter).

M.R.W.'s Allegations About Her Babysitter

A year before Jones was charged with sexually assaulting M.R.W., M.R.W. told her mother that her male babysitter "touches her 'all over her private parts' and asks that she 'touch herself'" (27:Police Report at 1; Child Protective Service Report at 2). M.R.W.'s mother called the police and reported the allegations (27:Child

Protective Service Report at 2). M.R.W.'s mother told police that M.R.W. had a history of "lying about 'important things'" and that M.R.W. made the disclosures the same night she was grounded after her babysitter told on her for something but also stated that she "believe[d] [M.R.W.] may have been molested" and "request[ed] that th[e] matter be investigated" (27:Child Protective Service Report at 2; Access Report at 12).

A Step-wise Interview was conducted (27:DVD #31236). M.R.W. verified that she knew the difference between the truth and a lie and then described how, when she was in the first grade, her babysitter had "touched her body parts," rubbed her vagina "in the inside with his finger," and "blow-dried her entire body while she was naked" in the bathroom of his home, where she bathed on Saturday nights because her father's tub was not "hooked up" (27:DVD #31236, Police Report at 2). M.R.W. said that her mother had made her cry by accusing her of lying but that she was not lying (27:DVD #31236 at 19:38-20:38). M.R.W. also said, when asked whether her babysitter had done anything to make her mad, that his rubbing her vagina had (27:DVD #31236 at 26:55).

M.R.W.'s babysitter denied sexually assaulting M.R.W. but claimed to have seen M.R.W. inappropriately touch herself (27:DVD #31237; Police Report at 3).

Police concluded that they "lacked the evidence needed to charge" M.R.W.'s babysitter, but told M.R.W.'s mother that "it was now in her hands to provide care and security for" M.R.W. (27:Police Report at 3; August 1, 2006 Letter). M.R.W.'s mother took precautionary measures like getting a new babysitter for M.R.W. and severing contact between M.R.W. and the babysitter she accused of sexual assault (27:Police Report at 3; August 1, 2006 Letter; Child Protective Services Report at 3; Incident Report at 3; Access Report at 8).

The record supports the circuit court's finding that the allegations C.C.B. and M.R.W. made about other men

have not been proven false. During the Step-wise Interviews, C.C.B. and M.R.W. both verified that they understood the difference between the truth and a lie and described where and how the other men sexually assaulted them. There is no indication in the record, nor does Jones claim, that C.C.B. or M.R.W. have recanted their allegations about the other men. The record indicates that criminal charges were not brought against the other men due to a lack of evidence and not because the allegations were ever disproved. This is underscored by statements the authorities in both investigations made about why charges were not brought, the fact that police recommended further steps to be taken in the investigation of C.C.B.'s allegations, and the fact that M.R.W.'s mother took precautions to protect M.R.W. from her babysitter.

The circuit court concluded that no reasonable jury would find the prior allegations to be untruthful. The information in the record, and supreme court's opinion in *Ringer*, confirm that the circuit court's analysis of the evidence was correct. The court's decision should therefore be affirmed.

III. JONES IS NOT ENTITLED TO A NEW TRIAL IN THE INTERESTS OF JUSTICE.

Jones argues that he is entitled to a new trial in the interests of justice, because the court did not admit certain evidence at his trial (Jones Br. at 30-31). He points to Dr. Braaksma's testimony that he did not have the psychological profile of a sex offender, and the videotaped Step-wise interviews with C.C.B. and M.R.W., relating to their prior allegations of sexual abuse by other men (Jones Br. at 31). He argues that his trial counsel was ineffective in regards to Dr. Braaksma's testimony. In regards to the videotaped interviews, he argues both that his counsel was ineffective and that the court erroneously exercised its discretion (Jones Br. at 31).

The legal standards for interests-of-justice claims are well established. The court of appeals is authorized to

reverse a judgment and order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Wis. Stat. § 752.35. The purpose of § 752.35 is to allow the court of appeals to review otherwise waived error in the interest of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17-19, 456 N.W.2d 797 (1990). To grant a new trial because the real controversy was not fully tried, "it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial." *Id.* at 19. Accordingly, the power of discretionary reversal is to be used "sparingly and with great caution." *State v. Watkins*, 2002 WI 101, ¶ 79, 255 Wis. 2d 265, 647 N.W.2d 244 (citing *Graff v. Roop*, 7 Wis. 2d 603, 606, 97 N.W.2d 393 (1959)).

> Discretionary reversals based on a determination that the jury was denied the opportunity to hear important evidence have occurred when "the jury was erroneously denied the opportunity" to hear important, relevant evidence while other evidence was erroneously admitted. [*State v. Doss*, 2008 WI 93, 312 Wis. 2d 570, ¶ 86, 754 N.W.2d 150.] The "erroneous" denial of relevant evidence refers to a legal evidentiary error by the trial court. *See, e.g., State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983) ("We conclude that the case was not fully tried inasmuch as the circuit court erred in its interpretation of sec. 906.08(1) and excluded admissible and material evidence on the critical issue of credibility."); *State v. Joyner*, 2002 WI App 250, ¶ 25, 258 Wis. 2d 249, 653 N.W.2d 290.

State v. Burns, 2011 WI 22, ¶ 45, 332 Wis. 2d 730, 798 N.W.2d 166.

In this case, as the State has explained, the videotaped Step-wise interviews were inadmissible, and the court properly excluded them. Because there was no legal evidentiary error by the trial court, the jury was not erroneously denied the opportunity to hear important, relevant evidence.

In regards to Dr. Braaksma's testimony, the trial court did not err in excluding the evidence. As the State has explained, the court was required to exclude the evidence because of a discovery violation. If the jury not hearing the evidence was the result of any error, it was an error by Jones's defense counsel, not an error by the trial court. As the circuit court concluded, any error by defense counsel did not result in prejudice to Jones.

Moreover, any error by Jones's defense counsel that resulted in the jury not hearing Dr. Braaksma's testimony was not "waived error." Instead Jones raised an ineffective assistance claim based on the jury not hearing this evidence. The issue is therefore not properly addressed as an interests-of-justice claim. *See Vollmer*, 156 Wis. 2d at 17-19.

In addition, as the circuit court concluded, the excluded testimony had only "minimal" and "marginal" value, was "powerfully outweighed" by the evidence the jury considered, and did not undermine the court's confidence in the outcome of the trial (125:12-13).

For all of these reasons, this court should decline to order a new trial in the interests of justice.

CONCLUSION

For the foregoing reasons, this court should affirm the judgment of conviction and the decision and order of the circuit court denying Ricky H. Jones's motion for postconviction relief.

Dated this 14th day of February, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,138 words.

Dated this 14th day of February, 2014.

_____
Michael C. Sanders
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of February, 2014.

_____
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