STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case Nos. 2015AP2667-CR & 2015AP2668-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERROD R. BELL,

Defendant-Appellant.

On Appeal from Judgments of Conviction and an Order
Denying in Part and Granting in Part Postconviction Relief
Entered in the Monroe County Circuit Court,
the Honorable Michael J. Rosborough, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. By telling the jury that it could not acquit Mr. Bell of the sexual assaults alleged by the sisters without concluding that they lied and without evidence showing a reason for them to lie, did the prosecutor's closing argument deprive Mr. Bell of a fair trial by impermissibly shifting the burden of proof, depriving him of the benefits of the reasonable doubt instruction and commenting on his decision not to testify?

The circuit court deemed the arguments mere advocacy and denied Mr. Bell's request for a new trial as plain error, in the interest of justice or due to ineffective assistance of counsel.

2. Was Mr. Bell denied the right to effective assistance of counsel when, upon his attorney's request, the jury was given two unredacted exhibits containing information that the younger sister had never had sexual intercourse until she was assaulted by Mr. Bell?

Following an evidentiary hearing, the circuit court denied Mr. Bell's postconviction motion seeking a new trial without expressly addressing this claim.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Bell would welcome the opportunity for oral argument. Publication may be warranted to make clear that the sort of arguments made by the prosecutor in this case are patently improper, which, although other jurisdictions have so

recognized, have not been specifically addressed in an appellate decision in this state.

STATEMENT OF THE CASE

Following a jury trial held in 2002, Gerrod R. Bell was convicted of three counts of second-degree sexual assault by use of force in violation of Wis. Stat. § 940.225(2)(a)[1], one count of second-degree sexual assault of a child in violation of Wis. Stat. § 948.02(2), and one count of bail jumping in violation of Wis. Stat. § 946.49(1)(a). (R1, 69-71; R2, 41-42; App. 101-04).[2] The offenses involved two sisters, TP, who was 14, and her older sister, AL, who was 17. Because Mr. Bell was convicted of the sexual assault charges as a persistent repeater under Wis. Stat. § 940.225(2)(a), the court imposed life sentences on those four counts. (R1, 72; R2, 44).

Although the convictions are some 14 years old, Mr. Bell is still on his direct appeal under Wis. Stat. § (Rule) 809.30 due to an unusual and protracted procedural history.

Following sentencing in 2002, Mr. Bell filed notices of intent to seek postconviction relief, but no timely postconviction motion or notice of appeal was filed. (R1, 74; R2, 46). In 2012, the court of appeals reinstated the time for Mr. Bell's first postconviction counsel to file a no-merit report in each case. (R1, 107-09; R2, 78-79). In 2014, the

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[1] All statutory references pertaining to the crimes, which were alleged to have occurred in 2001, are to the 1999-2000 Wisconsin Statutes.

[2] "R1" refers to the appeal record in No. 2015AP2667-CR, and "R2" refers to the record in No. 2015AP2668-CR. If a document appears in both cases, the brief will refer to the document in R1.

court of appeals rejected the no-merit report filed in the case involving AL because the report had identified an arguable claim, specifically, that Mr. Bell was erroneously sentenced as a persistent repeater. (R1, 124; R2, 95). The court extended the time for filing a postconviction motion in that case and, with respect to the case involving TP, the court held in abeyance any further action on the no-merit report. (*Id*.).

Subsequently, the circuit court granted Mr. Bell's postconviction motion for resentencing in the one case. (R2, 96, 17:4). At resentencing, the court imposed sentences totaling 32 years' imprisonment, consecutive to the life sentences previously imposed in the other case. (R2, 113:16, 114). Mr. Bell filed a timely notice of intent to seek postconviction relief. (R2, 115).

On June 18, 2015, the court of appeals granted Mr. Bell's motion to reject the pending no-merit report and, in both cases, to extend until July 15, 2015, the time for filing a postconviction motion pursuant to § 809.30(2)(h). (R1, 130). Mr. Bell filed a postconviction motion on July 13, 2015, which sought to vacate the judgments of conviction and order a new trial. (R1, 132:4-17). If that relief was denied, the motion sought resentencing on one of the sexual assault convictions involving TP because, as with the convictions involving AL, he was improperly convicted as a persistent repeater.[3] (*Id*. at 17-19). Following an evidentiary hearing on December 1, 2015, the circuit court denied the request for a new trial, granted resentencing on the one count and, as requested by the parties, stayed resentencing pending completion of the appeal. (R1, 143; R2, 143:94-101; App. 106-13).

[3] Resentencing was not sought on the conviction for second-degree sexual assault of a child because on that count Mr. Bell is a persistent repeater within the meaning of the statute.

Mr. Bell filed timely notices of appeal from the judgments of conviction and the order denying in part and granting in part his motion for postconviction relief. (R1, 144; R2, 138). This court consolidated the appeals.

STATEMENT OF FACTS

Evidence Presented at Trial

The state had no DNA evidence, no other persons who witnessed the alleged assaults and no admission from Mr. Bell. Its case was dependent upon the testimony of TP and AL.

In the summer of 2001, 14-year-old TP was living in Sparta with her mother and two younger siblings, who were ages eight and eleven. (R1, 84:183; 85:313). TP's older sister, 17-year-old AL, did not live in the home but often visited. (R1, 84:176-78). Mr. Bell was a friend of their mother and spent a lot of time at her house. (*Id*. at 179). AL testified that part of the reason she visited frequently was because she was concerned that her mother was neglecting the children by leaving them alone and not having food in the house. (R1, 85:267).

At some point near the end of July, their mother decided to throw a birthday party at her home for AL, who was turning eighteen. (R1, 85:208-09). The day before, their mother asked AL, TP and Mr. Bell to go out looking for some guys to invite to the party. (R1, 84:213). Their mother served a variety of alcohol at the party. (*Id*. at 212). TP drank to the point that she fell down. (R1, 84:217; 85:328).

Mr. Bell was convicted of two crimes – second-degree sexual assault of a child and second-degree sexual assault by use of force – for an assault that TP claimed occurred at the

end of the party. (R1, 1, 11, 12, 69-71). After midnight, TP's mother told her to put out the bonfire in the backyard. (R1, 85:441). According to TP's testimony, Mr. Bell followed her outside, sat next to her on the grass and began rubbing her stomach. (R1, 85:441-43). She said that when she tried to get up, Mr. Bell pulled her to the ground and engaged in forced intercourse. (*Id*. at 444-49).

TP did not tell her mom or sister but eventually said something to a friend and, thereafter, the police were involved. (R1, 85:451-53). On August 21, 2001, TP spoke with Sergeant Dale Stickney, who testified she was "very hesitant to … report the incident." (R1, 85:353). Nevertheless, based upon her report, Mr. Bell was arrested the next day. (*Id*.). Mr. Bell told the officer that he was never alone with TP on the night of the party and denied ever touching TP in a "sexual manner." (R1, 53:4; 85:358). When asked why TP would make the allegation, Mr. Bell said he had "no clue" and said it might be "because I haven't been around to – see them, I don't know." (R1, 85:361).

Three days after TP spoke with Sergeant Stickney, she was scheduled to give a videotaped statement in the presence of Detective LaVern Erickson and a social worker. (R1, 85: 508-09). Twice, TP walked out of the interview, declaring "it's all bullshit" and "I can't do this." (R1, 85:470-72, 509). They were not able to complete the interview but decided to try again three days later. (*Id*. at 472, 509). During the second videotaped interview, TP walked out again, saying that she couldn't do it anymore. (*Id*. at 472-73, 509). Eventually, they finished the statement. (*Id*. at 473). Detective Erickson, who had been in law enforcement since 1979, had never before seen a complainant walk out of a taped interview. (R1, 85:499, 509).

On August 23, 2001, TP was examined by a pediatrician, Dr. Ann Budzak, who testified that TP had no hymenal tissue. (R1, 85:423). Based upon the lack of hymenal tissue and TP's ability to handle the exam without signs of discomfort, the doctor opined that it was "likely" that TP had had sexual intercourse at "some point in her life." (*Id*. at 424-26).

After the assault of TP was reported, Detective Erickson asked AL if she had ever been touched by Mr. Bell. (R1, 85:259-60). She said nothing had happened to her. (*Id*.). A week or so later, AL told the detective about three incidents that allegedly occurred around the time of the party. She said that Mr. Bell had touched her breast when they were sitting on the couch, he tried to get her to go downstairs to a bedroom and, on the night of the party, he made a "pass" at her. (R1, 85:261). Five months later, AL reported for the first time that Mr. Bell raped her in the bathroom of her mother's home in early July, several weeks before the other incidents she had described and the party. (*Id*. at 262).

By the time of trial, Mr. Bell was facing four sexual assault charges based on AL's allegations, two counts of second-degree sexual assault for the alleged shower and breast-touching incidents, and two counts of attempted second-degree sexual assault for the alleged pass and attempt to force her downstairs. (R2, 6, 7, 8, 11). However, the court dismissed the two latter counts at the end of trial due to insufficient evidence. (R2, 86:609-10).

According to AL's testimony, Mr. Bell came into the bathroom as she was showering, grabbed the towel she used to cover herself and, after she slipped and fell to the floor, engaged in forced intercourse. (R1, 84:185-205). Four other persons were in the home when the assault occurred,

including a younger sister who was in the living room which was eight feet from the bathroom door. (R1, 85:277-78; 86:549). Neither the sister nor any other occupant testified about the assault. Afterwards, AL went to see her mother at the restaurant where she worked. (*Id*. at 299). Although AL said the assault occurred in early July 2001, she did not report it until January 2002. (R1, 84:185; 85:262-63).

AL also testified about an incident occurring after the party when Mr. Bell touched her breast. (84:230-31; 85:309). She said that they were seated on the couch in the living room. (R1, 84:231-33). As she tried to get up, Mr. Bell held her arm and touched her breast. (*Id*.). AL said that three of her siblings were asleep in the living room when this occurred. (*Id*. at 231).

The jury heard evidence that just a few days before trial, AL told Sergeant Stickney that her mother had told AL and TP to lie about the amount of alcohol that TP had to drink at the party, specifically, to say that she had just one wine cooler when, in fact, she was intoxicated. (R1, 85:327-29, 402-15, 457). Their mother told them to lie both after the party and before the preliminary hearing. (*Id*. at 336). The sergeant testified that when confronted a few days before trial with information that she had considerably more to drink than one wine cooler, TP persisted with her denial until the second day of questioning when she admitted to being "drunk or buzzed." (*Id*. at 405-13).

TP testified that she had lied because she had been under both JIPS and CHIPS orders and she was afraid of being sent back to the group home. (R1, 85:456). She said that human services had been involved due to inadequate supervision because her mom was often at the bars. (*Id*. at 461-62). Specifically, she described an incident when they

spotted a police car while her mother was driving under the influence and her mother had them switch so that TP, who was under age 16, was driving, while two younger children were also in the car. (*Id*. at 463-64). TP was also habitually truant and engaging in self-injuring behavior. (*Id*. at 464).

Mr. Bell did not testify at trial. When Mr. Bell told Sergeant Stickney that he did not assault TP, Stickney asked if he would take a computer voice stress analysis, which "usually can tell truth from untruth." (R1, 86:601). Without hesitation, Bell told the sergeant, "'yes, go ahead, set it up.'" (*Id*. at 602). The test was never done because the sergeant "dropped the ball." (*Id*.).

Postconviction Proceedings: Claim for New Trial Due to Prosecutor's Improper Closing Argument

In his postconviction motion, Mr. Bell sought a new trial due to the prosecutor's closing argument, which told the jury that (1) in order to find Mr. Bell not guilty, it must believe that the sisters were lying; and (2) for the jury to conclude the sisters were lying, there must be evidence proving a reason for them to lie; the defense offered only speculation as to a reason; and the reasonable doubt instruction does not allow the jury to speculate. (R1, 132:8).

The state foreshadowed the theme of its closing argument in *voir dire* when, after talking about whether a teenager would lie about something as important as sexual assault and the potential reasons for such a lie (R1, 84:67-71), the prosecutor asked, "Would you expect there would be some evidence that somebody would have a reason to lie?" (*Id*. at 71-72). Then, noting that the jury instruction on reasonable doubt does not allow the jury to speculate, the prosecutor asked, "… if you weren't to hear evidence of why a person might lie, would you feel inclined to speculate …."

(*Id*. at 72). Or, the prosecutor asked, would the panel member "follow the jury instructions and not speculate and base your decision based on the evidence or lack of evidence in this case?" (*Id*. at 73).

The prosecutor reprised this theme in closing argument when, after noting that reasonable doubt is not a doubt based on speculation (R1, 84:635; App. 115), he argued:

> I think it's interesting to start from this point of view. What must we believe, what things must we believe for the defendant to be not guilty? After hearing all the evidence that we've heard, what are the things that we must believe true if he is not guilty?
>
> First of all, when it comes to [TP], who's 13 [sic], that she first lied to Sergeant Stickney about the defendant raping her. We have to believe that she then proceeded in the videotape that occurred over two days – one of those videotapes we saw, the first one – that she then lied to the social worker, Robyn Ryba, about the rape. That the defendant, when the defendant assaulted her.
>
> We then have to believe that she lied to us. You have to believe that.
>
> We have to then believe when we look at [AL] and her testimony, we would have to believe if the defendant is not guilty, that she first lied to Detective LaVern Erickson when she told him about the incident on the couch when the defendant held her down and grabbed her breast. And that's the first thing that she came forward with.
>
> The other instances when they were investigating the night of the party, we have to believe she lied about that.

(R1, 87:635-36; App. 115-16).

At that point, defense counsel objected, expressing concern "about how he's presenting this because I think he's reversing the burden of proof." (*Id*. at 636-37; App. 116-17). The court overruled the objection:

> THE COURT: Well, this is argument; I think the jury understands that. It's not evidence and there has to be some latitude for advocacy during the course of argument. I'm not convinced that what he's saying is going beyond that at this point. And, of course, you still have the opportunity to get up there and make your presentation.
>
> So let's proceed with that in mind.

(*Id*. at 637; App. 117).

The prosecutor resumed the same line of argument, telling the jury that "[w]e must believe that [AL] lied" to Detective Erickson, and "[w]e must believe" that six months later she lied to Sergeant Stickney –"[w]e have to believe that she lied about that" – and "we have to then believe that she lied at the preliminary hearing", and "[w]e have to believe that she lied to us over the course of two days … that she intentionally lied to us this week. That's what we'd have to believe." (*Id*. at 637-38; App. 117-18).

Further on, the prosecutor reminded the jury that in *voir dire* they discussed that if "somebody is going to make a flat out lie about something, they're going to have a reason. They're going to have some evidence of that reason." (*Id*. at 646; App. 126). The state then referred to Mr. Bell's statement following his arrest that he had "'no clue'" why TP would make this up and asserted the defendant "just speculates" about that. (*Id*. at 646-47; App. 126-27). "If a

person lies about something, they must have a reason. And the reason why there is no evidence in this case about why anybody would lie is because they're not lying. [TP and AL] are not lying." (*Id*. at 647; App. 127).

In rebuttal, the prosecutor dismissed the defense theories that the sisters lied for their mother's attention or simply because they grew up in a home where lying was common and asserted there was "no testimony" that they were lying for that or any other reason. (*Id*. at 678; App. 140). And he reminded the jury that it could not speculate on a reason why the sisters might lie. (*Id*. at 679; App. 141). The prosecutor ended by telling the jury that "what [defense counsel] asks you to do is sheer guesswork, sheer speculation. Something the jury instructions instruct you not to do." (*Id*. at 682; App. 144).

In his postconviction motion, Mr. Bell alleged that the prosecutor's argument was improper and entitled him to a new trial as plain error, in the interest of justice or, because counsel had not moved for a mistrial, due to ineffective assistance of counsel. (R1, 132:10-14).

At the ***Machner***[4] hearing, trial counsel testified he had objected to the prosecutor's argument because he believed it misstated the law and impermissibly shifted the burden of proof to the defense. (R2, 143:6-7). Specifically, although his strategy at trial was to try to convince the jury that the sisters should not be believed, his understanding of the law was that the jury could acquit without concluding that they lied. (*Id*. at 7). The prosecutor's argument was harmful, in his view, because he knew from three decades as a prosecutor and defense attorney that juries in child sexual assault cases

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

struggle with why the child would make it up. (*Id.* at 14-16). Although counsel believed the prosecutor continued with the "exact same thing" after his objection was overruled, he did not object again because he believed it would have been futile. (*Id*. at 9, 11).

Counsel testified that although his usual practice is to discuss with the client whether to move for a mistrial, he had "absolutely no recollection" whether he discussed with Mr. Bell whether to move for a mistrial due to the prosecutor's improper argument. (*Id*. at 19). He had no notes showing that such a conversation occurred. (*Id*.). Mr. Bell testified there was no discussion about a mistrial after the prosecutor's argument. (*Id.* at 49). Although counsel could not recall if he discussed a mistrial with Mr. Bell after the state's closing argument, he testified it "would be safe to say" that he would not have explained to Mr. Bell that it was necessary to move for a mistrial in order to preserve his objection. (*Id*. at 43).

The circuit court ruled that it was "well satisfied under Wisconsin case law" that the prosecutor's argument did not shift the burden of proof or otherwise violate the defendant's constitutional rights. (*Id*. at 99; App. 111). Although the court recognized this was "basically a credibility case", the arguments "were advocacy" that would not support a finding of error or a new trial in the interest of justice. (*Id*. at 99-100; App. 111-12). The court said it "was highly unlikely" that it would have granted a mistrial if requested. (*Id*. at 97; App. 109). Further, the court posited "at least potentially a strategic reason" why counsel did not move for a mistrial, noting that before a second trial the court might have reversed its earlier ruling and allowed the state to present other acts evidence against Mr. Bell. (*Id*. at 96-97; App. 108-09).

Postconviction Proceedings: Claim for New Trial Due to Unredacted Exhibits Given to the Jury During Deliberations

In his postconviction motion, Mr. Bell alleged that he was denied a fair trial because two exhibits containing information that TP was a virgin before the assault by Mr. Bell were given to the jury during deliberations without redaction. (R1, 132:14-17). The motion alleged counsel was ineffective by failing to redact the inadmissible information about TP's virginity. (*Id*. at 15-17).

Initially, only one exhibit, which consisted of photographs of the residence, was allowed back with the jury during deliberations. (R1, 87:686). However, the jury sent out a note requesting "the exhibits that were read from or the clerk's notes of what was read from previous testimony." (R1, 67; 87:687). In response, the parties agreed to give the jury most of the exhibits, although several were subject to redacting by the prosecutor and defense counsel. (R1, 87: 689-97). Defense counsel told the court that he wanted all defense exhibits to go to the jury. (*Id*. at 689). The two exhibits at issue here – Defendant's Exhibits 4 and 11 – were sent back without redaction. (R1, 55; 64; 87:691, 693-94; App. 144-51).

Exhibit 4 is a transcript of a taped statement that Sergeant Stickney took from TP on August 21, 2001. After eliciting information from TP about how she was assaulted by Mr. Bell, the sergeant asked, "Had you ever had sex before that point?" TP responded, "No." (R1, 55:4; App. 147).

Exhibit 11 is Sergeant Stickney's written report recounting his contact with TP and her mother, and his interview of TP on August 21, 2001. (R1, 64; App. 150-51). In the report, Stickney made the following comments about TP's lack of sexual knowledge and experience:

> She is 14 years old but seemed to have very little knowledge about sex. She had told me she had never had sex before.
>
> She also could not say if he ejaculated or even if she knew what that meant. I tried to explain and she said she did not think he did but was not sure.

(*Id*. at 2; App. 151).

When asked at the ***Machner*** hearing why he did not ask to have the above information redacted, counsel testified, "I can't tell you why I didn't"; "I can't tell you. I have no memory." (R2, 143:23). Although counsel acknowledged it was "mere speculation", he said it may have been he thought it was helpful for the jury to see it because it was "so ridiculous" that "in light of their dysfunctional lives that she's a virgin at 14 …." (*Id*. at 24-25). Counsel also conceded it may be he "goofed up". (*Id*. at 24).

The circuit court denied Mr. Bell's request for a new trial without expressly addressing the claim regarding the unredacted exhibits. (*Id*. at 94-101; App. 106-13).

ARGUMENT

I. The Prosecutor's Closing Argument, Which Told the Jury It Could Not Acquit Unless It Concluded the Sisters Were Lying and Unless the Defendant Presented Evidence of a Reason for Them to Lie, Violated Mr. Bell's Constitutional Rights and Denied Him a Fair Trial.

A. Introduction.

In closing argument, the prosecutor may "'strike hard blows,'" but "'he is not at liberty to strike foul ones.'" ***State v. Weiss***, 2008 WI App 72, ¶10, 312 Wis. 2d 382, 752 N.W.2d 372, *quoting* ***Berger v. United States***, 295 U.S. 78, 88 (1935). Often, the line between permissible and impermissible argument is difficult to discern. ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. Not so here. The prosecutor repeatedly crossed the line and struck foul blows by (1) arguing that to find Mr. Bell not guilty, the jurors "have to believe", "must believe" that TP and AL are lying and (2) arguing that if they are lying there must be evidence of a reason for them to lie and the defense has provided no such evidence, just speculation. The arguments are improper because they misstate the law on reasonable doubt, shift the state's burden to the defense and comment on Mr. Bell's exercise of his right not to testify.

Not only are the arguments improper, they undermined the fairness of the trial, particularly given that the state had virtually no physical evidence, no other witnesses to the claimed assaults and no admission from Mr. Bell. Its entire case hinged on the testimony of TP and AL, which given AL's late reporting, TP's lack of cooperation during the

videotaped interview and their admitted lies about TP's drinking, was shaky at best. To determine if the prosecutor's argument affected the fairness of trial, the statements must be viewed in the context of the entire trial. ***State v. Hurley***, 2015 WI 35, ¶96, 361 Wis. 2d 529, 861 N.W.2d 174. The test is whether the statements so infected the trial with unfairness as to make the resulting convictions a denial of due process. ***Id***.

Here, the theory of prosecution, revealed in *voir dire* and hammered in closing, was to convince the jury that it could not acquit unless it concluded the girls lied and unless the defense proved a reason for them to lie. The state's misrepresentations about the jury's task and the defendant's obligation jeopardized the fairness of Mr. Bell's trial, warranting a new trial as plain error, in the interest of justice or due to ineffective assistance of counsel.

B. The prosecutor's comments misstated the law and violated Mr. Bell's due process rights by shifting the burden of proof, depriving him of the benefit of the reasonable doubt instruction and commenting on his decision not to testify.

1. Telling the jurors that to find Mr. Bell not guilty they must conclude the complanaints are lying.

Fourteen times the prosecutor told jurors that in order to find Mr. Bell not guilty they "have to believe" or "must believe" that TP and AL lied to the social worker, to the police, at the preliminary hearing and "to us." (R1, 84:636, 637, 638, 640; App. 116, 117, 118, 120). That argument is improper because it distorts the burden of proof by incorrectly stating what the jury must find in order to reach a certain verdict. Multiple courts have so held.

Improper: arguing that an acquittal requires the jury to conclude the DEA agents lied. ***United States v. Vargas***, 583 F.2d 380, 386-87 (7th Cir. 1978)

Improper: if you find the defendant not guilty, you have to find the police officers lied. ***United States v. Cornett***, 232 F.3d 570, 574 (7th Cir. 2000)

Improper: if the FBI agents are telling the truth, then the defendant is guilty. ***United States v. Richter***, 826 F.2d 206, 209-10 (2nd Cir. 1987)

Improper: "If you believe Officer Steil, there is no question he is guilty as charged." ***State v. Graves***, 668 N.W.2d 860, 880 (Iowa 2003)

Improper: argument stating, "in essence," that the only way the jury could find the defendant not guilty was if it determined that five government witnesses had lied. ***State v. Singh***, 793 A.2d 226, 239 (Conn. 2002).

Although those cases are from other jurisdictions, the constitutional rights infringed by an argument that the jury cannot acquit unless it concludes the government's witnesses are lying apply equally to cases tried in Wisconsin. In state criminal trials, the due process clause of the Fourteenth Amendment to the United States Constitution protects the accused against conviction except upon proof beyond a reasonable doubt. ***Cage v. Louisiana***, 498 U.S. 39 (1990). And it is the prosecution that bears the burden of proof. ***Sullivan v. Louisiana***, 508 U.S. 275, 277-78 (1993). Those rights are also guaranteed by Article I, § 8 of the Wisconsin Constitution. ***Holland v. State***, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979). Arguments that the jury cannot acquit unless it finds the state's witnesses lied distort the

state's burden of proof and are "patently misleading." ***Richter***, 826 F.2d at 209.

In ***Vargas***, 583 F.2d at 386-87, the Seventh Circuit reversed the defendant's conviction due to the prosecutor's improper remarks, including the assertion that the jury had a choice of either finding the defendant guilty or concluding that the federal agents were liars. That assertion was erroneous because "[e]ven assuming that the testimony of the prosecution and defense witnesses contained unavoidable contradictions, it of course does not follow as a matter of law that in order to acquit Vargas the jury had to believe that the agents had lied." ***Id***. at 387. The jury may conclude that the government's witnesses told the truth and yet still conclude that the government failed to prove the defendants' guilt beyond a reasonable doubt. ***Id***.

> If the jurors believed that the agents probably were telling the truth and that Vargas probably was lying or even if the jury was convinced that all of the agents save Garcia were telling the truth and thought that Garcia probably was telling the truth it would have been proper to return a verdict of not guilty because the evidence might not be sufficient to convict defendant beyond a reasonable doubt. To tell the jurors that they had to choose between the two stories was error.

Id. (citation omitted), *see also* ***Cornett***, 232 F.3d at 574 ("it is improper for a prosecutor to argue that the jury must find that a witness lied to acquit the defendant").

Such arguments preclude the possibility that the witness' testimony conflicts with the defendant's denial for a reason other than deceit. A witness' testimony "can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved … such as misrecollection, failure of recollection or

other innocent reason." ***Singh***, 793 A.2d at 237 (citations omitted). Thus, "courts have long admonished prosecutors to avoid statements to the effect that if the defendant is innocent, the jury must conclude that witnesses have lied." ***Id***.

Telling the jury, as the prosecutor did here, that to acquit Mr. Bell it must conclude that TP and AL lied grossly distorts the state's burden because it does not allow jurors to have a reasonable doubt unless they believe the girls lied. Further, it suggests that there must be evidence that the girls are lying in order to find the defendant not guilty, thereby shifting the burden to the defense.

Trial counsel's objection was well placed, despite the court's decision to overrule the objection, thereby compounding the error. The prosecutor's contention that the jury could not acquit unless it found the complainants lied – repeated fourteen times in closing argument – was patently improper. But the prosecutor did not stop there. He told jurors if the girls were lying there had to be evidence of a reason for them to lie. And who hadn't produced such evidence? The defendant.

2. Telling the jury that there must be evidence of a reason for the girls to lie and the defendant has presented no reason, just speculation.

Having articulated the fiction that the jury could not acquit without finding TP and AL lied, the prosecutor spun a second misstatement of law, which was that there must be evidence of a reason for them to lie and the defense has failed to present such evidence. That theme began in *voir dire*, where the prosecutor commented that for a teenager to lie about something as important as sexual assault, one would "expect there would be some evidence that somebody would

have a reason to lie". (R1, 84:71-72). The prosecutor went on to instruct the panel that reasonable doubt does not allow the jury to speculate, meaning that if there wasn't evidence showing why the teenager would lie, the jury could not speculate about that. (*Id*. at 72-73).

In closing argument, the prosecutor reminded the jury of their earlier discussion and contended the defendant had offered only speculation – no evidence – as to why TP and AL would lie.

> We talked about if somebody is going to make a flat out lie about something, they're going to have a reason. They're going to have some evidence of that reason.

(R1, 87:646; App. 126). Although Mr. Bell did not testify, the prosecutor referred to his statement to Sergeant Stickney and argued Bell could not come up with a reason, just speculation.

> Defendant's statement; he has no idea. He in effect says he has no clue why she would say this. He has no idea why she would make this up. He says that repeatedly and he says he just begins to speculate.
>
> • • •
>
> Once again he's just pure speculation; he has no idea. And he says just before that, I don't know why she would say this. And his other statement to Sergeant Stickney, "I have no clue." He doesn't know, he can't think of any reason. Neither can we. Because there isn't one.
>
> If a person lies about something, they must have a reason. And the reason why there is no evidence in this case about why anybody would lie is because they're not lying. [TP] and [AL] are not lying.

(R1, 87:646-47; App. 126-27).

On rebuttal, the prosecutor dismissed defense counsel's challenge to the complainant's credibility as "pure speculation."

> Mr. Matousek says, I think I quote him, "lying can be out of jealousy, out of hurt, out of revenge." Pure speculation, pure speculation, pure speculation. We have no idea why these girls lie. To begin to say well, maybe they lied because they have a bad life.
>
> There's never testimony they were lying because of that. There's no testimony they were lying for any other reason. There's no testimony that they were lying. There's no evidence that they were lying.

(R1, 87:678; App. 140). The prosecutor asserted that speculating was not allowed.

> If you find yourself doing that, the instructions say specifically you cannot do it; you cannot base it on mere guesswork or speculation. It says you're not to search for speculation; your [sic] searching – you're supposed to search for the truth. And the truth is clear.

(R1, 87:679; App. 140-41). The prosecutor ended his argument with the theme he began in *voir dire*.

> So much what Mr. Matousek asks you to do is sheer guesswork, sheer speculation. Something the jury instructions instruct you not to do.

(R1, 87:682; App. 144).

These arguments misstate the law governing the jury's consideration of the evidence. The prosecutor's argument conflates the reasonable doubt instruction with the instruction on gauging the credibility of witnesses.

In the pattern instruction on the burden of proof and presumption of innocence, the jury is told that "reasonable doubt" is a doubt "for which reason can be given" and is not a doubt "based on mere guesswork or speculation." Wis JI-Criminal 140, pp. 1-2 (2000); *see* ***State v. Bembenek***, 111 Wis. 2d 617, 641, 331 N.W.2d 616 (Ct. App. 1983) (instruction that a reasonable doubt is a doubt for which reason can be given is "free of any error"). But while reasonable doubt is not a doubt based on speculation, the jury *can* speculate when assessing a witness' credibility.

The pattern instruction tells jurors they may consider a whole host of subjective factors when determining the credibility of a witness and the weight to give his or her testimony, including the witness' appearance and demeanor, the reasonableness of the witness' testimony and "all other facts and circumstances during the trial which tend either to support or to discredit the testimony." Wis JI-Criminal 300, p. 1 (2000). Significantly, among the factors are the "possible motives for falsifying testimony". (*Id.*). Given the reference to *possible* motives and the ambiguous and subjective nature of the factors, the message conveyed by the instruction is that the jury may indeed speculate about why the witness might not be telling the truth. Contrary to the prosecutor's argument, a juror may find a witness not credible without any evidence establishing a reason for the witness to lie.

The arguments not only misstated the law governing the jury's consideration of the evidence, they infringed Mr. Bell's constitutional rights by suggesting that he had some obligation to come forth with evidence showing a

reason for TP and AL to lie. The arguments violated due process because they shifted the burden of proof from the state to the defendant, thereby undermining the presumption of innocence, and amounted to a comment on Mr. Bell's decision to not testify.

Argument suggesting that the defendant has an obligation to present evidence providing an innocent explanation for the government's evidence was held improper and necessitated a new trial in ***United States v. Smith***, 500 F.2d 293, 296 (6th Cir. 1974). In an effort to prove that the defendants were running an illegal gambling business, the government introduced intercepted telephone conversations of the defendants, neither of whom testified at trial. ***Id***. at 294. The prosecutor argued that if the defendants have an alternative, reasonable explanation for the meaning of those calls, "'you then require them to show that to you.'" ***Id***. at 295. The comments were "clearly improper" because they had the effect of shifting the burden of proof from the government to the defendants. ***Id***. at 294-95. The comments also "violated the spirit" of ***Griffin v. California***, 380 U.S. 609, 615 (1965), which held that the Fifth and Fourteenth Amendments to the United States Constitution forbid the prosecutor from commenting on the defendant's silence.

The prosecutor's assertions in this case that the jury should expect evidence of a reason for TP and AL to lie and suggesting Mr. Bell had the burden to present such evidence had the same impact. It shifted the burden, abrogated the presumption of innocence, and allowed the jury to penalize Mr. Bell for his choice to not testify.

C. The prosecutor's improper arguments warrant the grant of a new trial as plain error, in the interest of justice or due to ineffective assistance of counsel.

Defense counsel lodged a timely and proper objection to the state's closing argument, which was overruled. Although counsel believed – correctly – that the prosecutor continued to make the same sort of improper arguments, he did not make any further objections because he concluded that further objection would be futile. Once an objection is made and overruled, counsel need not continue to object because the "law does not require counsel to perform a useless act or to make a futile objection." ***Schueler v. City of Madison***, 49 Wis. 2d 695, 707, 183 N.W.2d 116 (1971).

However, counsel forfeits an objection to the state's argument by failing to move for a mistrial. ***State v. Davidson***, 2000 WI 91, ¶86, 236 Wis. 2d 537, 613 N.W.2d 606. Apparently, this is so even though a mistrial motion would have been equally futile given that the circuit court made clear at trial and the postconviction hearing that it would not have granted a mistrial because it deemed the challenged arguments mere advocacy. Despite the potential that Mr. Bell's challenge to the improper arguments may be deemed forfeited, he is still entitled to relief as plain error, in the interest of justice or due to ineffective assistance of counsel.

1. Plain error and interest of justice.

Some errors, such as occurred here, are so plain and fundamental that the court should grant a new trial despite the defendant's failure to preserve the error. ***Davidson***, 236 Wis. 2d 537, ¶88. Under the plain error doctrine in Wis. Stat.

§ 901.03(4),[5] a conviction may be vacated when an unpreserved error is fundamental, obvious and substantial. ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. "'[W]here a basic constitutional right has not been extended to the accused,' the plain error doctrine should be utilized." ***Id***., *quoting* ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984).

When a defendant alleges that a prosecutor's statements constituted plain error, as does Mr. Bell, the test is whether the statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Miller***, 2012 WI App 68, ¶19, 341 Wis. 2d 737, 816 N.W.2d 331, *quoting* ***Davidson***, 236 Wis. 2d 537, ¶88. The burden is on the state to prove that the plain error is harmless beyond a reasonable doubt. ***State v. Mayo***, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115.

As shown above, the prosecutor's arguments were an obvious and substantial misstatement of the law governing the jury's determination of whether the state had proven Mr. Bell guilty. The prosecutor told the jury – incorrectly – that it could acquit only if it concluded TP and AL were lying. The prosecutor told the jury – incorrectly – that if TP and AL were lying there must be evidence of why they would lie and the defense failed to present such evidence. The arguments are plainly improper because they violate a panoply of fundamental, constitutional rights guaranteed to a defendant at a criminal trial. They lessened and shifted the state's burden of proof, undermining both the presumption of innocence and Bell's right to remain silent.

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[5] The statute provides, "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." Wis. Stat. § 901.03(4).

This very sort of misstatement necessitated the grant of a new trial as plain error in ***Vargas***, where the prosecutor told jurors they must conclude the government's witnesses lied in order to find the defendant not guilty. ***Vargas***, 583 F.2d at 387; *see also* ***United States v. Segna***, 555 F.2d 226, 230 (9th Cir. 1977) (reversal as plain error where prosecutor's argument shifted the burden of proof). If anything the prosecutor's arguments at Mr. Bell's trial were more egregious than in ***Vargas*** because they were repeated fourteen times and they were combined with the assertion that Mr. Bell had an obligation to prove why the girls were lying.

This is not a case like ***Davidson***, where the supreme court found the prosecutor's arguments were not so egregious as to constitute plain error, in part, because they "were limited in scope" and the court had sustained the defendant's objection. ***Davidson***, 236 Wis. 2d 537, ¶88. There, the prosecutor asked if jurors believed the 13-year-old complainant "as I do" and at another point referred to a fact not in evidence. Here, the impropriety was not limited to two comments as ***Davidson***. ***Id***. at ¶¶82-83. Rather, the prosecutor framed its entire case against Mr. Bell around the misstatements of law, which began during *voir dire* and then became the focal point of closing argument. In addition, the misstatements were never corrected by the court, which *overruled* defense counsel's objection. Contrast this case with ***Davidson***, where the circuit court not only "curtly sustained" the defendant's objection but told the prosecutor, "'Counsel, you know better than that.'" ***Id***. at ¶¶82, 85. With no such correction by the court, the jury was left with the impression that the prosecutor's assertions were correct, that is, it could not acquit unless it found the girls were lying and unless Mr. Bell presented evidence showing a reason for them to lie.

The state cannot prove that the improper arguments were harmless beyond a reasonable doubt, particularly given that its case, which lacked physical evidence and other witnesses to the alleged assaults, was wholly dependent upon the testimony of TP and AL. The state's arguments distorted to its advantage the law governing the jury's assessment of the complainants' credibility and what amounts to reasonable doubt in light of their testimony. The arguments were so harmful because they went to the heart of what the jury had to conclude – whether the state had proven Mr. Bell guilty through the testimony of TP and AL – and they lessened the state's burden and shifted it to the defense.

For these same reasons, reversal is appropriate in the interest of justice under Wis. Stat. § 752.35. The court has broad discretion to order a new trial where the controversy was not fully or fairly tried, "regardless of the type of error involved" and without any showing as to the likelihood of a different result on retrial. ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991).

In ***Weiss***, where this court ordered a new trial in the interest of justice, the sexual assault case "largely boiled down to a credibility battle" between the 14-year-old girl and the defendant. ***Weiss***, 312 Wis. 2d 382, ¶17. There, the prosecutor falsely insinuated that Weiss had not denied committing the offense when questioned by police. ***Id***. at ¶¶5-9. The improper argument was designed to undermine the defendant's credibility and rehabilitate the child's credibility in a case where credibility mattered. ***Id***. at ¶17. The same is true here. The state's case was dependent on the girls' testimony and its arguments were targeted at their testimony and designed to convince the jury that it could not acquit unless the girls were lying and unless the defendant presented evidence showing a reason for them to lie.

Quoting the Supreme Court, this court observed in ***Weiss*** that misstatements by the prosecutor are so insidious because the average juror will have confidence that the prosecutor's obligation to refrain from improper methods "'will be faithfully observed.'" ***Id***. at ¶10, *quoting* ***Berger***, 295 U.S. at 88-89. This is especially true when, as occurred here, the prosecutor's misstatements of the law governing the jury's deliberations go uncorrected by the court in response to defense counsel's objection. *See* ***Richter***, 826 F.2d at 209 (in response to defendant's objection, trial court should have clarified that the jurors need not find the defendant guilty if they believe the FBI agents).

The average juror would accept as legally correct the prosecutor's assertions that the jury can't acquit without concluding the girls' lied and without the defendant proving a reason for them to lie. Thus, the courts in ***Vargas*** and ***Segna*** ordered new trials where the prosecutors' statements had the effect of shifting the burden of proof and depriving the defendant of the benefit of the reasonable doubt instruction even though the trial courts had correctly instructed the juries on reasonable doubt, the burden of proof and the presumption of innocence. ***Vargas***, 583 F.2d at 387; ***Segna***, 555 F.2d at 230-32; *see also* ***Smith***, 500 F.2d at 298 (even court's curative instruction was inadequate to cure argument that shifted the burden and drew attention to the defendant's decision to not testify).

The prosecutor's arguments were not only an obvious and substantial violation of Mr. Bell's due process rights, they infected the jury's assessment of the complainants' credibility and what amounts to reasonable doubt. A new trial is warranted as plain error or in the interest of justice.

2. Ineffective assistance of counsel.

If Mr. Bell's challenge to the prosecutor's improper argument is deemed forfeited and relief is not granted as plain error or in the interest of justice, the court should hold that counsel's failure to move for a mistrial violated his right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. ***Strickland v. Washington,*** 466 U.S. 668, 686 (1984); ***State v. Trawitzki***, 2001 WI 77, ¶39, 244 Wis. 2d 523, 628 N.W.2d 801. Whether counsel was ineffective is a mixed question of law and fact. ***State v. Guerard***, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12. The circuit court's factual findings will not be disturbed unless clearly erroneous, but the ultimate issues of whether counsel's performance was deficient and prejudicial are reviewed independently. ***Id.***

An attorney's performance is constitutionally deficient if it falls below an objective standard of reasonableness. ***State v. Krueger***, 2008 WI App 162, ¶7, 314 Wis. 2d 605, 762 N.W.2d 114. "'Ineffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry into culpability. The concern is simply whether the adversary system has functioned properly.'" ***State v. Coleman***, 2015 WI App 38, ¶20, 362 Wis. 2d 447, 865 N.W.2d 190, *quoting* ***State v. Felton***, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983).

Trial counsel's performance was objectively unreasonable because he failed to move for a mistrial due to the prosecutor's improper arguments. Based upon the circuit court's comments at trial and the postconviction hearing it seems that such a motion would have been doomed, but counsel's omission meant that the adversarial system did not

function properly because the challenge to the prosecutor's misconduct was not preserved for review by a higher court.

There can be no dispute from this record that counsel believed the state's arguments were both improper and harmful to the defense. Counsel timely objected and correctly determined that he had no further obligation to object because it would be futile. *See, e.g.*, ***State v. Smith***, 119 Wis. 2d 361, 365, 351 N.W.2d 752 (Ct. App. 1984) (counsel need not continue to object after the court ruled on the issue). Based upon his thirty years' experience as a prosecutor and defense attorney, counsel recognized that in child sexual assault cases the jury will typically wonder why the child would lie, rarely does the defense have evidence of a motive for the child to lie and, therefore, his task is to create inferences as to why the child might make it up. (R2, 143:14-17). The prosecutor's arguments were so harmful because they told the jury that mere inferences were not enough, that the jury had to conclude that the girls were lying and the defendant had to present evidence establishing a reason for them to lie.

Given the particularly harmful impact of the prosecutor's arguments, counsel performed deficiently by failing to preserve a challenge to the prosecutor's misconduct. Noting the passage of time, counsel testified he has little memory about whether he had discussed with Mr. Bell whether to move for a mistrial due to the prosecutor's arguments. However, he was sure that he had not explained to Mr. Bell that the failure to move for a mistrial would mean that his objection would be forfeited. (R2, 143:43). That oversight is especially troubling in light of the fact that both counsel and Mr. Bell would have expected that a conviction

on any of the sexual assault charges would mean a mandatory life sentence.[6]

Although counsel believed that the trial had gone pretty well, he testified that his recollection was so poor that any testimony about an actual strategic reason for not requesting a mistrial would be nothing but speculation. (R2, 143:21). The circuit court posited as a "potentially strategic reason" the possibility that if a mistrial was granted the court may have changed its prior ruling and allowed the state to present other acts evidence. (*Id.* at 96-97; App. 108-09). However, the court did not identify anything that had occurred at the first trial that would have warranted such a change, the state did not argue that it would have sought a different ruling and counsel did not express any such concern, all of which makes the court's "speculation" worthy of little consideration.

Counsel's omission is prejudicial if there is a reasonable probability that, but for the error, the result of the proceeding would have been different. ***State v. Banks***, 2010 WI App 107, ¶26, 328 Wis. 2d 766, 790 N.W.2d 526, *citing* ***Strickland***, 466 U.S. at 694. This is not an outcome determinative standard. ***State v. Marcum***, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). Rather, a reasonable probability is a probability sufficient to undermine confidence in the outcome. ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305. "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" ***Id.***, *quoting* ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985).

[6] Years later, it was determined that the mandatory life sentence applied only to the one count of second-degree sexual assault of a child.

Confidence in the outcome of Mr. Bell's trial is undermined because the state's improper arguments undercut the foundations of a jury trial as guaranteed by the state and federal constitutions, which are: (1) the state carries the burden of proof at trial; (2) the state must prove the facts necessary to establish each element by the highest standard, proof beyond a reasonable doubt; (3) the defendant is presumed innocent and has no burden to prove his innocence; and (4) the defendant has a right to remain silent, including by not testifying. Mr. Bell was prejudiced because the entire framework of the jury's consideration of the case was distorted by the prosecutor's arguments that told the jury it could not acquit without concluding the complainants were lying and unless the defendant had presented evidence establishing a reason for them to lie.

"Even where the evidence is sufficient to sustain the conviction, when a defendant's constitutional rights are violated because of counsel's deficient performance, the adversarial process breaks down and our confidence in the outcome is undermined." ***Marcum***, 166 Wis. 2d 917. Here, it was the prosecutor's conduct that violated Mr. Bell's constitutional rights at trial, but counsel's failure to preserve the error, if not reached as plain error or in the interest of justice, would deprive Mr. Bell of a remedy for the violation.

This court has recognized the prejudicial impact of a prosecutor's improper comment about the credibility of its witnesses where, as here, credibility was the linchpin of the state's case. ***Smith***, 268 Wis. 2d 138, ¶22. There, the prosecutor incorrectly characterized the defense position as that the police officers were "lying" and then expressed frustration because the prosecutor knew how hard the officers work. ***Id***. at ¶12. The court of appeals held that Smith was prejudiced by counsel's failure to object and move for a

mistrial because the prosecutor's comment "placed the reliability of the proceedings in doubt to the extent that the fairness of the trial has been jeopardized. ***Id***. at ¶26.[7]

Not unlike Mr. Bell's case, in ***Smith***, "[c]redibility hung in the balance. The lightest wisp of influence could have directed the course of the jury's determination." ***Id***. at ¶22. Here, the state's case was dependent on convincing the jury that it should believe the testimony of TP and AL, the only evidence it had to prove the alleged assaults. Although the evidence was sufficient to support the jury's verdict, an objective view of the record – one that does not view the evidence only in the light most favorable to the state, as would be done under a sufficiency challenge – shows this was a close case. ***Strickland***, 466 U.S. at 695 (prejudice is determined by reviewing the totality of the evidence before the jury). There was no DNA evidence and no eyewitnesses even though others were in the home during the assaults described by the sisters. In fact, the evidence showed that AL's eight-year-old sister was in the living room only eight feet from the bathroom during the violent rape described by AL. And three siblings were present in the same room with AL when Mr. Bell allegedly pulled her onto the couch and touched her breast. None of those present testified at trial.

AL's claim that she was raped in the bathroom was made six months after it allegedly occurred and five months after she told the detective there were no other instances than what she first reported. The court dismissed two attempted sexual assaults reported by AL because they were unsupported by any evidence at trial. TP was an uncooperative witness who three times walked out of the

[7] Because the circuit court denied Smith's postconviction motion without a hearing, the court of appeals remanded for an evidentiary hearing to address the deficiency prong. ***Id***. at ¶26.

forensic interview, declaring "it's all bullshit" and "I can't do this." (R1, 85:470-72, 509). The evidence showed TP was a troubled teen who had been so neglected by her mother that at one point she was placed in a group home.

The entire defense was aimed at establishing reasonable doubt in the jurors' minds about the sisters' accusations, by vigorous cross-examination of AL and TP to establish inconsistencies and to show that they had been encouraged to lie by their mother about TP's drinking. Against that backdrop, the prosecutor's improper comments are particularly prejudicial. As a legal matter, the jury could have acquitted without concluding that the sisters were lying and without proof of a reason for them to lie. Yet the prosecutor repeatedly told the jury otherwise. On this record, it is highly probable that the prosecutor's argument materially affected the verdicts. Confidence in the jury's verdicts is undermined.

This court warned that in close cases, "a prosecutor must be sensitive to the evidentiary hand that he or she has been dealt." ***Smith***, 268 Wis. 2d 138, ¶24. "Artful subtleties, ill-cast and expressed, may be occasion for error." ***Id***. Here, the prosecutor's tactic for dealing with the evidentiary weaknesses of his case was anything but subtle. The state framed its case against Mr. Bell around two legal fictions, that the jury could not acquit without concluding that TP and AL were lying and Mr. Bell had to present evidence proving a reason for them to lie. The state's response to the hand it was dealt was to cheat by repeatedly striking foul blows. A criminal trial is not a card game and the "prosecutor's interest as a representative of the state is 'not [to] win a case but [to see] that justice shall be done.'" ***Id***., *quoting* ***Viereck v. United States***, 318 U.S. 236, 248 (1943). The prosecutor's

improper arguments undermined the reliability of Mr. Bell's trial and require a new trial.

II. Mr. Bell Was Denied Effective Assistance of Counsel When, at His Attorney's Request, the Jury Was Given During Deliberations Two Unredacted Exhibits Containing Inadmissible and Prejudicial Information That TP Had Never Had Sexual Intercourse Until She Was Assaulted by Mr. Bell.

Trial counsel provided deficient and prejudicial representation when during deliberations he asked that two exhibits be given to the jury without redacting inadmissible information that TP had not had sexual intercourse before the assault by Mr. Bell. As previously noted, the "final determinations" of whether counsel's performance was deficient and prejudicial are questions of law reviewed *de novo*. ***Krueger***, 314 Wis. 2d 605, ¶7.

Counsel's performance fell below an objective standard of reasonableness when he allowed the jury to see evidence that the legislature and supreme court have deemed inadmissible, that is, evidence that the complainant alleging sexual assault was a virgin before the assault. The rape shield statute, Wis. Stat. § 972.11(2)(b) (1999-2000), precludes the admission of "any evidence" of the complainant's "prior sexual conduct." In ***State v. Gavigan***, 111 Wis. 2d 150, 159, 330 N.W.2d 571 (1983), the supreme court held that "prior sexual conduct" includes the lack of sexual conduct and, therefore, evidence that the complainant, in that case an adult woman, was a virgin was inadmissible.

Further, the supreme court held that indirect references to a complainant's virginity are also generally inadmissible. ***Id***., *citing* ***State v. Clark***, 87 Wis. 2d 804, 817, 275 N.W.2d 715 (1979). Thus, it is "immaterial" if the word virgin is not

used where the information "clearly conveyed to the jury that the complainant was a virgin." ***Id***.

Subsequently, the supreme court applied those principles to a case, as here, where the complainant was an adolescent. ***State v. Mitchell***, 144 Wis. 2d 596, 601, 424 N.W.2d 698 (1988). The court held that the rape shield statute barred testimony from the 11-year-old complainant and her mother that she had never had sexual intercourse before her encounter with the defendant. ***Id***. at 607-08, 619. Evidence of a complainant's prior sexual conduct, including lack of sexual activity, "is generally prejudicial and bears no logical correlation to the complainant's credibility." ***Gavigan***, 111 Wis. 2d at 156. Therefore, "such evidence should ordinarily be excluded at trial." ***Id***.

Given this well-established law, counsel performed deficiently by failing to ensure that the inadmissible information about TP's prior lack of sexual experience was redacted from the two exhibits sent back to the jury during deliberations. Both exhibits contained information that TP was a virgin before she was assaulted by Mr. Bell. In one, the sergeant asked if she had "sex before that point" and TP responded, "No." (R1, 55:4; App. 147). In the second, the sergeant opined that 14-year-old TP "seemed to have very little knowledge about sex," demonstrated, in part, because she did not know what ejaculated meant, and noted that TP told him she had never had sex before. (R1, 64:2; App. 151). That information conveyed that TP was a virgin and was inadmissible.

The record shows that had counsel sought to redact the inadmissible information, he would have been allowed to do so. In response to the jury's request for exhibits, the court allowed defense counsel and the prosecutor to go through

exhibits and redact as they believed appropriate. The record shows that the parties made redactions on four exhibits, which did not include the two at issue here. (R1, 87:696-98).

In his testimony, counsel could not recall why he did not seek to redact information that TP was a virgin and conceded he may have "goofed up". (R2, 143:23-24). Admitting it was just speculation, counsel said he might have thought the information was helpful because it was "ridiculous" to believe that, given the dysfunction in her home, TP was a virgin at age 14. Counsel's speculation about a possible strategic reason should be given little or no weight.

Labeling counsel's omission a trial strategy "does not insulate review of the reasonableness of that strategy." ***Coleman***, 362 Wis. 2d 447, ¶27. Counsel's decisions "'must be based upon the facts and law upon which an ordinarily prudent lawyer would have then relied.'" ***Id***., *quoting* ***Felton***, 110 Wis. 2d at 503. The standard "'implies deliberateness, caution and circumspection" and the decision "must evince reasonableness under the circumstances.'" ***Id***. Here, counsel was merely guessing about a "strategy" that runs afoul of well-established law and allowed the jury access to highly prejudicial information. Moreover, counsel's assumption that a jury would find it ridiculous that a 14-year-old with a difficult upbringing would necessarily be sexually experienced is dubious at best. Rather, the jury may have concluded, as the sergeant did, that TP's reluctance to talk about the alleged assault stemmed from her lack of knowledge and experience about sexual matters. The information was likely to arouse sympathy for TP and undercut defense counsel's contention that she was uncooperative because the assault never occurred.

Evidence that TP had not had sexual intercourse until she was assaulted by Mr. Bell undermines confidence in the outcome. This is particularly so given the testimony of the pediatrician, the only witness to provide any sort of physical evidence corroborating the complainants' testimony. Immediately before TP testified, the state called Dr. Budzek, who had conducted a pelvic examination of TP approximately a month after the alleged assault and two days after her statement to Sergeant Stickney. Dr. Budzak testified that TP had no hymenal tissue. (R1, 85:423). Based on the lack of hymenal tissue and TP's ability to handle the exam without signs of discomfort, the doctor opined that it was "likely" that T. P. had had sexual intercourse at "some point in her life." (*Id*. at 424-26).

Combined, the doctor's testimony and information in the exhibits that TP was a virgin created a strong inference that, because TP had never before had intercourse, the destruction of her hymen occurred during the only time she had intercourse, and that was the assault by Mr. Bell. A reasonable jury would conclude that it was not only likely that TP had sexual intercourse at some point in her life, as the doctor testified, it was likely that the act of intercourse was Mr. Bell's assault of her. The information in the exhibits unfairly bolstered the credibility of TP's accusation.

When assessing the prejudicial impact of the unredacted exhibits, the court should also consider the prejudice arising from counsel's failure to preserve an objection to the prosecutor's improper argument. ***Thiel***, 264 Wis. 2d 571, ¶59 (prejudice assessed based upon the cumulative effect of counsel's deficiencies). The state's case hinged upon convincing the jury to believe the complainants. Both errors improperly skewed the credibility determination

to the state's advantage, thereby depriving Mr. Bell of a fair trial with a reliable outcome.

CONCLUSION

For these reasons, Mr. Bell respectfully requests that the court reverse the judgments of conviction and the order denying postconviction relief and remand with directions that he is entitled to a new trial.

Dated this 13th day of April, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,693 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 13th day of April, 2016.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of April, 2016.

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