STATE OF WISCONSIN

COURT OF APPEALS

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 FROM AN ORDER DENYING IN PART AND GRANTING IN PART A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MONROE COUNTY, THE HONORABLE MICHAEL J. ROSBOROUGH, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the trial court err when it overruled Gerrod Bell's objection to the prosecutor's closing argument, and denied Bell's postconviction challenge alleging ineffective assistance of trial counsel for not coupling his objection to the prosecutor's closing argument with a mistrial motion?

Defense counsel objected when the prosecutor argued, in essence, that to acquit Bell the jury would have to find that the teenage sisters lied when they testified that Bell sexually assaulted them. The trial court overruled defense counsel's objection that the argument shifted the burden of proof from the State to the defense. On postconviction review, Bell renewed his challenge to the prosecutor's closing argument, and argued further that trial counsel was ineffective for not coupling his objection with a mistrial motion. The postconviction court rejected the motion, holding that Bell failed to prove that counsel was ineffective because there was nothing objectionable about the prosecutor's argument. It represented a reasonable response to the defense argument that the victims lied.

2. Was defense counsel ineffective for not redacting from police reports sent to the jury during deliberations the 14 year-old victim's statements that she never had sex before Bell assaulted her?

During deliberations, the jury sent a note to the court asking to see several documents, including the reports of the police interviews with the two victims. Defense counsel re

quested that those documents be sent to the jury. The court agreed and the reports of the police interviews were sent to the jury after some editing and redactions by counsel for the State and defense. The postconviction court rejected Bell's claim that trial counsel was ineffective for not also redacting the 14 year-old victim's statements to police that she never had sex before Bell assaulted her.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves the application of established principles of law to the unique facts. The briefs of the parties should adequately address the legal and factual issues presented.

STATEMENT OF THE CASE

After a trial held September 23 to 27, 2002, a Monroe County jury found Bell guilty of three counts of second-degree sexual assault by use of force, one count of second-degree sexual assault of a child, and misdemeanor bail jumping. (87:699-700.)[1] Bell was sentenced the day after trial, September 27, 2002, to aggregate sentences the net result of which was that he received the mandatory term of

[1] All record citations will be to documents in appeal no 2015AP2667-CR, except for the transcript of the postconviction hearing, document no. 143 in appeal record 2015AP2668-CR, referred to as "R2" by Bell. *See* Bell's Br. 2 n.2.

life in prison without parole for being a persistent repeat sexual assault offender. (88:15-18.)[2]

Over the next fourteen years, this case took a variety of procedural twists and turns the net result of which, contrary to the interests in the finality of the conviction and closure for the victims, somehow enabled Bell to bring a *direct* postconviction challenge to his conviction, pursuant to Wis. Stat. § (Rule) 809.30, for the first time in *2015*. (132.) Bell challenged the propriety of the prosecutor's closing argument to the jury and the effectiveness of his trial counsel's response to the argument. He also challenged trial counsel's effectiveness for not ensuring that statements the 14 year-old victim made to police, to the effect that she was a virgin at the time of the assault by Bell, were redacted from police reports sent into the jury room.

An evidentiary hearing on the postconviction motion, at which both trial counsel and Bell testified, was held December 1, 2015. (R2, 143.) The trial court denied the motion orally from the bench at the close of the hearing (R2, 143:94-101, A-App. 106-113), and in a written order filed December 9, 2015 (143, A-App. 105). Bell now appeals. (138; R2, 144.)

[2] Two other counts were dismissed on the court's own motion at the close of trial for insufficient evidence (86:609-10).

The Relevant Facts

The two teenage victims are sisters. One was 14 and the other 17 years old when the assaults occurred during the month of July 2001. The 17 year old, A.L., described how Bell invaded the bathroom while she was taking a shower around July 2, 2001, grabbed her towel, pulled her to the floor and had vaginal intercourse without her consent. (84:185-209.) A.L. described another incident later that month when Bell grabbed her breast without consent as he sat next to her on the couch. (84:230-39.)

The 14 year old, T.P., described how Bell forced her to engage in vaginal intercourse on the ground near a bonfire at a birthday party for her sister, A.L., in late July 2001. (85:433-51.) A.L. confirmed that there was indeed a birthday party for her attended by Bell and her younger sister, T.P., in late July. She said there were occasions when Bell could have been alone with the intoxicated T.P. during the later stages of the party. (84:209-30.) Another guest at the party, John Williams, confirmed much of what the two girls said about what went on at the party, and confirmed that there were times when Bell could have been alone with the intoxicated T.P. later on at the party. (86:563-77.)

T.P. testified that she felt pain when Bell had vaginal intercourse with her. (85:488.) A pelvic examination of T.P. by a pediatrician on August 23, 2001, revealed that she had no hymen tissue, indicating to a reasonable degree of

medical certainty that the 14 year old had sexual intercourse at some point in her life. (85:421-27.)

Bell gave oral and written statements to police August 26, 2001, admitting that he was at the birthday party for A.L., but denying that he sexually assaulted T.P. at her sister's party, and he had "no idea" and "no clue" why the two girls would falsely accuse him. (85:355-63, 418-19, 515.)

During deliberations, the jury sent out a note asking for several exhibits, including police reports of the interviews with A.L. and T.P., and the transcript of A.L.'s testimony at the preliminary hearing. (87:687-98.) Defense counsel, the prosecutor and the court accommodated the request by sending most of the requested documents to the jury. (87:697-98.) At the prosecutor's request, the court agreed to redact from one report the statement that both victims were asked to take Voice Stress Analysis tests (87:690), and to redact part of A.L.'s statement to Police Sergeant Stickney from another report (87:692-93). Defense counsel and the prosecutor jointly edited the documents and, as so edited, they were sent into the jury room. (87:696-98.)

Bell argued in his postconviction motion that the prosecutor presented improper closing argument when he told the jury, in essence, that it would have to find that the two girls lied about the assaults in order to acquit Bell. Bell argued that his trial attorney was ineffective for not following up his objection to the closing argument, overruled by the trial court, with a mistrial motion. Bell also argued

that trial counsel was ineffective for not having redacted from the police reports sent to the jury T.P.'s statement that she did not have sex before her encounter with Bell.

Bell's trial attorney, John Matousek, testified that he objected to the prosecutor's closing argument on the ground that it shifted the burden of proof from the State to Bell. (R2, 143:5-7, 18-19.) Matousek maintained that, while his theory of defense was that the girls lied, the jury could still have acquitted even if it found the girls did not lie. (R2, 143:6-7.) After his objection was overruled, counsel did not thereafter renew it because it would have been "futile" to do so. (R2, 143:11.) Matousek also did not move for a mistrial. (R2, 143:19.) Although he had moved for a mistrial on the first day of trial (84:244-45; 148:41), Matousek saw no need for a mistrial motion in response to the prosecutor's closing argument on the fourth day of trial because he and Bell both believed things were going well for the defense up to that point (R2, 143:19, 45-46).

Attorney Matousek testified at the postconviction hearing that he wanted the police interviews to go to the jury because they exposed the two girls' lies and inconsistencies. (R2, 143:22-24, 36, 39, 44, 47.) The reports of the August 21, 2001, interviews of T.P. by Sergeant Stickney included T.P.'s unredacted statements claiming that she never had sex before the assault by Bell. (55:4, A-App.147; 64:1-2, A-App. 150-51.) Matousek could not recall why he did not ask for redaction of T.P.'s denial that she had sex before

the encounter with Bell at A.L.'s birthday party. Counsel could only speculate that he may have "goofed up." (R2, 143:24, 35.)

The trial court denied the postconviction motion from the bench at the close of the hearing. It held that the prosecutor's closing argument was a reasonable response to the defense argument that the victims lied. (R2, 143:94-101.) It noted that defense counsel went so far as to file a pretrial motion to delay the trial so that possible perjury charges against the young victims and their mother could be investigated. (90:2-17; R2, 143:95-96, A-App. 107-08.) It was reasonable for defense counsel not to seek a mistrial, especially because the court's pretrial ruling that excluded evidence of other sexual assaults committed by Bell could be revisited at a retrial. (R2, 143:96-97, A-App. 108-09.) The prosecutor's argument was unobjectionable because it was "advocacy" that did not shift the burden of proof to the defense. (R2, 143:100, A-App. 112.)

The trial court did not address the separate issue whether defense counsel was ineffective for not having T.P.'s statements about her lack of sexual experience redacted from the police reports sent into the jury during deliberations.

Additional relevant facts will be discussed in the Argument to follow.

ARGUMENT

I. The prosecutor's closing argument, when considered in the context of the entire trial, was a reasonable response to the defense argument that the teenage victims lied.

Defense counsel tried to convince the jury that the teenage sisters lied when they testified that Bell sexually assaulted them. The prosecutor tried to convince the jury that the young girls told the truth. If the jury agreed with defense counsel that the girls lied, it would have found Bell not guilty. If the jury agreed with the prosecutor that the girls told the truth, then Bell was guilty. There was no "gray area" here. The defense theory was not that, regardless whether the girls told the truth, the State failed to prove its case beyond a reasonable doubt. The defense theory was that the state failed to prove its case because the girls did not tell the truth. It was reasonable for the prosecutor to appeal to the jury's collective common sense, knowledge gained from everyday life experience and reasonableness in arguing that to acquit it must agree with defense counsel that the girls lied.

A. The applicable law and standard for review of a challenge to the prosecutor's closing argument.

The prosecutor is given considerable latitude in closing argument, subject only to the rules of propriety and the trial

court's discretion. *State v. Burns,* 2011 WI 22, ¶ 48, 332 Wis. 2d 730, 798 N.W.2d 166; *State v. Bergenthal*, 47 Wis. 2d 668, 681, 178 N.W.2d 16 (1970). Prosecutors are permitted to argue their cases with vigor and zeal. They may strike hard blows, but not foul ones. *See United States v. Young*, 470 U.S. 1, 7 (1985). *See also Hoppe v. State*, 74 Wis. 2d 107, 119-20, 246 N.W.2d 122 (1976); *State v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983).

A conviction is not to be reversed unless the prosecutor's argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Burns,* 332 Wis. 2d 730, ¶ 49. *See Lieberman v. Washington*, 128 F.3d 1085, 1097-98 (7th Cir. 1997). *Also see Young*, 470 U.S. at 11, 16. This court must evaluate the prosecutor's remarks in light of the entire trial record to determine whether they denied the defendant a fair trial. *See Burns,* 332 Wis. 2d 730, ¶ 49; *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995); *United States v. Hall*, 165 F.3d 1095, 1115-16 (7th Cir. 1999).

> Generally, counsel is allowed latitude in closing argument and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury. *State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). We will affirm the court's ruling unless there has been a misuse of discretion which is likely to have affected the jury's verdict. *See State v. Bjerkaas*, 163 Wis. 2d 949, 963, 472 N.W.2d 615, 620 (Ct. App. 1991).

> The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784, 789 (1979). The constitutional test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Wolff*, 171 Wis. 2d at 167, 491 N.W.2d at 501 (quoted source omitted). Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. *Id.* at 168, 491 N.W.2d at 501. Thus, we examine the prosecutor's arguments in the context of the entire trial.

Neuser, 191 Wis. 2d at 136.

A defendant also cannot be heard to claim prejudicial error caused by a prosecutor's reasonable response to his own argument. *See Young*, 470 U.S. at 11-13; *State v. Patino*, 177 Wis. 2d 348, 380-83, 502 N.W.2d 601 (Ct. App. 1993); *State v. Wolff*, 171 Wis. 2d 161, 168-69, 491 N.W.2d 498 (Ct. App. 1992). An advocate is permitted considerable latitude in responding to the arguments of his opponent. *United States v. Nowak*, 448 F.2d 134, 141 (7th Cir. 1971). *Also see United States v. Hedman*, 630 F.2d 1184, 1199 (7th Cir. 1980).

Even when a prosecutor's closing argument is improper, a trial court's instruction to the jury that the arguments of counsel are not evidence places the closing

arguments in their proper perspective. *State v. Hoffman*, 106 Wis. 2d 185, 220, 316 N.W.2d 143 (Ct. App. 1982); *State v. Draize*, 88 Wis. 2d 445, 455-56, 276 N.W.2d 784 (1979). The jury is presumed to have followed those instructions. *State v. Johnston*, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994); *State v. Olson*, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998).

Finally, to properly preserve an appellate challenge to the prosecutor's closing argument, the defendant must timely object to the offending remark and move for a mistrial. *State v. Davidson,* 2000 WI 91, ¶ 86, 236 Wis. 2d 537, 613 N.W.2d 606; *Haskins v. State,* 97 Wis. 2d 408, 424, 294 N.W.2d 25 (1980); *Patino,* 177 Wis. 2d at 380. *Also see State v. Guzman,* 2001 WI App 54, ¶ 25, 241 Wis. 2d 310, 624 N.W.2d 717.

B. The prosecutor reasonably responded to the defense argument that the State's case was a witch hunt made up of lies.

For Bell to prevail, this court must do what he has done and completely divorce the prosecutor's argument from the context of the trial including Bell's own closing argument.

> Abigail Williams was 11 years old and Elizabeth Farris was 9 years old when she fell to the ground and started writhing and yelling and screaming profanities, acting bizarre and it continued for many, many, many days.
>
> The doctor was called in, his name was William Griggs. William Griggs checked the children over and made the determination that the children

were the victims of witchcraft. And so it continued and they asked the children, who is doing this to you? And the children tormented said Sarah Good, Sarah Osborne and Tituba.

(87:657.)

In June of 1692, Sarah Good was hung being [found] guilty of witchcraft. Nineteen more people followed to the gallows and a hundred fifty people were imprisoned.

(87:659.)

Now, Sergeant Stickney and Lavern Erickson got up on the stand and they said that it's very important to an investigation to search for evidence and to do the things necessary. Well, much like the Salem Witch Trials of [1692], certain people were believed and that was it, that was all that was necessary. And apparently, unfortunately – unfortunately for Gerrod Bell, that it was assumed that the girls were telling the truth.

(87:660.)

Now, that was changed to 30 seconds at trial, but nonetheless, a lot of things were changed by [A.L.]. Because they didn't make sense she recognized they didn't make sense so she had to change her story.

….

… There's a number of things that – [A.L.] could have done.

The reason is, it never happened. The reason why it doesn't make sense is it just didn't happen.

(87:662-63.)

And I then think of [T.P.] and [A.L.] and I'm saddened by [A.L.] and [T.P.]. I'm not mad at them, I'm sad. And the reason why I'm sad is it is a terrible world to live in that your mom isn't your mom because she's been – you've been taken away from her because of the way she is.

> … [L]ying becomes easy. Lying becomes a way of survival.

(87:665.)

> But she's crying out. And this is long before they even know Gerry. Long before they know Gerry. This is happening and she gets pulled out of the house at that time. She learns that she can manipulate what happens to her, she can manipulate not going to school, she can manipulate trying to get closer to mom and so lying becomes an easy thing. Lying can be a daily event for an individual like that, like protecting others, protecting themselves, can be a cry for attention, so I don't have to do something such as go to school, so they'll allow me to do something.
>
> Lying can be out of jealousy, lying can be out of hurt, lying can be for revenge and a lie is out of control. And that's what happened here. The lies have become so deep and so out of control that you can't bring it back. You can't expose what the truth is and that the truth that [sic] this never happened; you can't because you would be the scorn of all.

(87:666-67.)

> [The girls' mother] started this 18 years ago. It's not a plan; it's a life. That's what this is all about; a life where lies don't mean anything, they don't mean anything to these girls because they've had to live that life the entire time. It's a way to protect themselves, it's their shield. And so it's easy for them that they can look you in the eye and say I'm not lying, no, it was one wine cooler.
>
> ….
>
> … And now she testifies, she couldn't pull back from those lies. But it's so easy to look into their eyes and tell them that they're – that she's telling the truth when she wasn't.

(87:668-69.)

> Now, the lie doesn't affect the sexual assault; I can still say I was sexually assaulted, but I can get

> back at my mom. It's a lie for revenge. And so she blames mom for soliciting perjury. Well, that really wasn't a lie; she can tell the truth as it relates to that, but she can tell the truth and still maintain the lie that she was sexually assaulted.
>
> ....
>
> [T.P.] talked about the one wine cooler, one wine cooler I may have had two, but that was all. And she continues to lie and lie and lie about each of those things.

(87:674-75.)

> Well, what a – oh, what a tangled web, oh what a tangled web we weave. We can't backtrack as to this sexual assault; they have no other way but to continue with this. They had no choice.

(87:675.)

Despite repeatedly labeling the young girls "liars," Bell is of the view that the prosecutor could not respond in kind. Bell's Br. 16-19. He insists that the prosecutor committed constitutional error by responding that the girls were not "liars" and it logically follows that Bell is guilty of the sexual assaults because there was no reason for them to lie.

In the context of Bell's argument, there was nothing wrong with the prosecutor's response. If the jury agreed with defense counsel that the girls were "liars," they would have voted to acquit. If the jury agreed with the prosecutor that the girls told the truth, they would have found Bell guilty. There was no in-between. There was no evidence that the two girls suffered from mental or cognitive deficiencies that impaired their ability to distinguish reality from fantasy, or truth from fiction. There was no evidence that the girls

might have erroneously accused Bell of sexual assault because of their "misrecollection, failure of recollection or other innocent reason." Bell's Br. 18-19. The reasons offered by Bell's attorney for them to lie – jealously, revenge, a cry for attention, a lifetime of lying – do not involve a "failure of recollection" or innocence.

In the context of the trial, there was no error. The focus of the defense from start to finish was on the purported lies and inconsistencies in the girls' accounts over time. The primary focus of inquiry at voir dire by both the prosecutor and defense counsel was on the credibility of teenage alleged sexual assault victims and the reasons why they might delay reporting, withhold details and falsely accuse someone. (84:65-91, 93-121.) The prospective jurors promised the prosecutor that they would follow the court's instructions on the State's burden of proving Bell guilty beyond a reasonable doubt and would not hold Bell's exercise of his right not to testify against him. (84:92-93.)

Conditioning the prospective jurors for his theory of defense and closing argument, defense counsel inquired whether any of them believed that a teenager might lie about sexual assault, may not understand the repercussions of a lie, and might continue telling the lie that, once started, is hard to stop. Reasons for maintaining the lie might include the need for attention, love or help. (84:115-121.)

On cross-examination of A.L. at trial, defense counsel established that her mother convinced A.L. to lie at the

preliminary hearing about the underage consumption of alcohol at the birthday party. Her mother waited until one week before trial to tell police for the first time that T.P. was highly intoxicated at the party. (85:327-32.) The overall focus of defense counsel's lengthy cross-examination was on the inconsistencies, changes and forgotten details in A.L.'s accounts over time. (84:17-87, 102-04.) Sergeant Stickney admitted that when he interviewed her, T.P. did not at first want to pursue the case, A.L. did not report the rape on the bathroom floor until January 30, 2002, and there was no physical or medical evidence to support the reports of sexual assault by either of the two sisters. (85:373-74, 392, 403.) Defense counsel also drew out the alleged subornation of perjury by their mother and T.P.'s persistent denials that she was intoxicated at her sister's birthday party. (85:403-09, 414-16.)

On cross-examination of T.P., defense counsel established that she walked out of both interviews with the social worker, expressing in the strongest terms her desire not to pursue the alleged assaults, only to be consoled by her mother and convinced to go back in and discuss the assaults. (85:471-74.) T.P. admitted she lied about the amount of alcohol she consumed at the party because she was afraid she would get in trouble if she told the truth. (85:485.) The overall focus of defense counsel's cross-examination of T.P. was on her lies, inconsistencies, confusion about details, the

influence of others, her poor upbringing and the misconduct of her mother. (85:459-85.)

On cross-examination of Sparta Police Detective Erickson, defense counsel established that A.L. did not tell police about the sexual assault in the bathroom when she was interviewed on August 28, 2001. T.P. did not want to discuss the alleged assault on her and stormed out of her interview exclaiming, "I can't do this." (85:500-01, 510.)

Although Bell did not testify (86:590-94), defense counsel established on cross-examination of Detective Erickson that Bell denied the assaults when interviewed by police in August of 2001 (85:515). Sergeant Stickney also admitted, when called in the defense case, that police asked Bell if he would take a voice stress test to help them assess the truthfulness of his denials, Bell accepted the offer ("Yes, go ahead, set it up"), but police "dropped the ball" and Bell was never given the opportunity to take the test. (86:601-02.)

The court gave most of the instructions before the closing arguments. (87:622-34.) The jury was properly instructed on the presumption of Bell's innocence and the State's burden to prove him guilty beyond a reasonable doubt. (87:629-30.) The remarks of counsel are not evidence and, more specifically, that the closing arguments of counsel – their conclusions and opinions – are not evidence. (87:631.) It is the jury's function to assess the weight and credibility of the evidence. (87:632-33.) Bell had the "absolute constitutional right not to testify," and his decision not to

testify could not be considered by the jury or influence its verdict in any way. (87:633-34.) Finally, the court explained to the jury that the prosecutor argues first and again in rebuttal to the defense argument "because he [the prosecutor] has the burden of proof." (87:634.)

In his initial argument, the prosecutor rightly pointed out that the two girls' accounts of what went on at the party matched significantly even though A.L. did not know the details of the assault on T.P. at that time. (87:638-39.) He argued that the girls would have to be great actors to persist in their emotional accounts of the sexual assaults over time. (87:639-40.) T.P. admitted under oath that she lied about the amount of alcohol she drank to avoid being taken out of her home on a Juvenile In Need of Protection and Service (JIPS) petition. (87:641-42.) Both girls delayed reporting the assaults because Bell threatened them. (87:645.) When questioned by police, Bell said he had "no idea" and "no clue" why the girls would falsely accuse him. (87:646-47.) The girls did not lie because they have no reason to lie (87:647), whereas Bell lied to police about his sobriety at the party (87:647-48). Bell lied about when he left the party and denied ever being alone with T.P. at the party. (87:649-50.) John Williams confirmed much of what A.L. and T.P. said about what happened at the party, and he provided another perspective. (87:651.) A.L. admitted for the first time a week before trial that her mother told her to lie about the amount of drinking that went on at the party. (87:653-54.) The

prosecutor properly reminded the jury that they are the ones who determine the credibility of the witnesses. (87:654.) The prosecutor argued that the girls are either telling the truth or are just acting and if the jury believed their testimony, it is sufficient to prove Bell guilty beyond a reasonable doubt. (87:654-55.) In concluding the argument, the prosecutor reasoned that it is unlikely the two sisters would lie "again and again," and remain consistent about something this extraordinary. (87:655.)

In his rebuttal to the defense "witch hunt" argument, the prosecutor maintained that there was no "reasonable" hypothesis consistent with Bell's innocence because there was no reason for the girls to falsely accuse him. (87:676.) He pointed out that defense counsel had to go back to 1692 to find an example where someone was falsely accused without reason. (87:677, 679, 681.) Defense counsel's contention that the sisters might be lying out of jealousy, for revenge or due to a bad upbringing was pure speculation (87:678), and that as instructed the jury could not speculate and search for doubt, but must search for the truth (87:679). The prosecutor properly concluded his rebuttal as follows:

> Everything you've heard is consistent with two girls their ages being victimized and traumatized by that man. Everything is what we would expect and we can understand why they wouldn't want to be forth coming about some details. Why they wouldn't want to sit and talk about the drinking. Those are understandable.
>
> It's simply bizarre to believe the opposite, that they're lying and that they miraculously acted for us here today.

> So much of what Mr. Matousek asks you to do is sheer guesswork, sheer speculation. Something the jury instructions instruct you not to do.
>
> I ask you to just simply follow the jury instructions and find the defendant guilty on all counts.

(87:681-82.)

The court followed up the closing arguments by admonishing the jury not to be swayed by sympathy, passion or prejudice. (87:682.)

It was in this context that the prosecutor argued the jury could acquit only if it believed the girls lied to police, to the social worker and to the jury about being sexually assaulted by Bell. (87:636-38.) The jury knew its role. It was repeatedly reminded by the parties and the court that its role was to determine the credibility of the witnesses and weigh the evidence. It was required to apply the presumption of innocence and hold the state to its burden of proving Bell guilty of all counts beyond a reasonable doubt. The jury was to consider the closing arguments of counsel, but those arguments were not evidence. The verdict had to be based only on the evidence and the law presented; not on sympathy, passion or prejudice. The jury presumably followed those instructions. *Johnston,* 184 Wis. 2d at 822; *Olson,* 217 Wis. 2d at 743.

The jury knew, thanks to the efforts of defense counsel, that the girls lied in the past, gave inconsistent accounts over time, delayed reporting and withheld details. The jury learned that Bell denied the assaults, but had "no

clue" why the girls would falsely accuse him. If the jury believed Bell's denial and did not believe the girls, the jury would have acquitted. Conversely, if the jury believed the girls when they testified that Bell forced vaginal intercourse upon both of them and grabbed A.L.'s breast, the jury would have found him guilty (barring jury nullification). The jury found Bell guilty after a fair trial before a properly instructed and impartial jury.

Bell insists it was wrong for the prosecutor to argue that the jury should not speculate but must search for the truth, there was no reasonable hypothesis consistent with Bell's innocence, and there was no reason for the girls to falsely accuse him. Bell's Br. 19-22. But, the pattern instructions told the jury just that:

> If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty.
>
> The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.
>
> A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

> While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.

(87:629-30.)

> In weighing the evidence, you may take into account matters of your common knowledge and your observations and experience in the affairs of life.

(87:631.) Wis. JI-Criminal 140 (2000).

Bell does not challenge the propriety of these time-honored instructions. They are constitutional. *State v. Cooper,* 117 Wis. 2d 30, 34-37, 344 N.W.2d 194 (Ct. App. 1983); *Bembenek,* 111 Wis. 2d at 641-42.

The prosecutor did exactly as the instructions allowed: He appealed to the jury's collective reason, common sense, knowledge and experience in the affairs of life in arguing that there was no reason these young girls would falsely accuse a family friend. The jury should not speculate or search for doubt, because there was no *reasonable* hypothesis consistent with Bell's innocence. Bell's argument on appeal that the jury is free to speculate and search for doubt despite the absence of any evidence to support the speculation or the search, flies in the face of these unambiguous instructions.

Nonetheless, defense counsel offered possible reasons for the girls to lie: jealousy, revenge, bad upbringing, and cries for attention. In speculating why the girls might have falsely accused him, Bell "opened the door" to the prosecutor's argument that there was no evidence to support that speculation. *See Young*, 470 U.S. at 11-13; *Patino*, 177

Wis. 2d at 380-83. It was for the jury to decide whether there was any such evidence and whether the reasons offered by defense counsel for them to lie amounted to reasonable hypotheses consistent with innocence.

Bell's quarrel is misplaced. Rather than as he does misinterpret the instructions or complain about the prosecutor's argument, his complaint is in reality with defense counsel for not asking the jury to speculate even more, as he now claims the instructions allowed counsel to do. But that was not counsel's argument strategy because that was not the defense theory he chose. Counsel argued that the girls lied, and even offered reasons for them to lie, such as their need for love and attention, and their poor upbringing with a mother who created a culture of lying. It would have been foolhardy for counsel to argue in the next breath that even if the jury did not find that the girls lied, the instructions allowed the jury to acquit Bell if they could find other reasons why the girls might lie that neither the State nor the defense could find. On the other hand, the jury was properly instructed and it is presumed the jury followed those instructions. If the instructions indeed allowed the jury to do as Bell now suggests despite what the prosecutor argued, then the jury may very well have considered but rejected other possible reasons for the girls to lie beyond those offered by defense counsel.

Bell complains that the prosecutor somehow "comment[ed] on Mr. Bell's decision not to testify." Bell's Br.

20, 23. No, the prosecutor commented on Bell's statement to police. Though denying that he sexually assaulted the girls, Bell said he had "no clue" why they would falsely accuse him. The prosecutor commented on something Bell said to police, not on something he had a constitutional right not to say to police. Bell's admission that he had no idea why the girls would lie is in itself evidence bolstering their credibility, as was their persistence despite the ordeal that the two girls had to endure to see their allegations through to trial.

Bell's complaint that the prosecutor somehow shifted the burden of proof to him is without merit. Instructive is this court's decision in *State v. Jaimes,* 2006 WI App 93, 292 Wis. 2d 656, 715 N.W.2d 669.

Mr. Jaimes was convicted of two counts of delivery of cocaine. In his closing argument, defense counsel questioned the lack of testimony from two collaborators in the alleged drug deals – Velazquez and Albiter. The prosecutor in rebuttal pointed out that these people were not likely to come into court and admit their involvement in the drug deals. *Id.* ¶ 18. The prosecutor also pointed out that "they have the same rights as he [Jaimes] does," and "he's got subpoena power the same way I do to ask people to come here." *Id.* ¶ 19.

This court upheld the trial court's determination that the prosecutor's rebuttal argument "was a proper response

to defense counsel's argument." *Id.* ¶ 20. This court reasoned:

> Rather, the prosecutor's comment was a fair response to the defense counsel's argument that failure on the part of alleged collaborators Velazquez and Albiter to testify should be held against the State. Specifically, defense counsel prompted jurors to speculate that Velazquez and Albiter did not testify because they would not corroborate the accusations of the undercover officer. In response, the prosecutor fairly suggested that the pair had the right not to testify in accordance with their Fifth Amendment right against self-incrimination.

Id. ¶ 24. With respect to the prosecutor's argument about the equal ability of the defense to subpoena witnesses, this court held:

> The prosecutor simply stated that Jaimes has "got subpoena power the same way I do to ask people to come here." Thus, the prosecutor was pointing to the ability of both the State and Jaimes to subpoena witnesses. *See Elam v. State,* 50 Wis. 2d 383, 389, 184 N.W.2d 176 (1971). It has been held previously that "it is not improper for a prosecutor to note that the defendant has the same subpoena powers as the government, 'particularly when done in response to a defendant's argument about the prosecutor's failure to call a specific witness.'" *United States v. Hernandez,* 145 F.3d 1433, 1439 (11th Cir. 1998) (citation omitted).

Id. ¶ 26. *See also State v. Gonzalez,* 2013 WI App 105, ¶¶ 22-30, 349 Wis. 2d 789, 837 N.W.2d 178 (unpublished authored opinion cited for persuasive value only), *affirmed on other grounds, State v. Gonzalez,* 2014 WI 124, 359 Wis. 2d 1, 856 N.W.2d 580.

Because the prosecutor's argument was proper and an eminently reasonable response to defense counsel's strident attack on the victims' credibility and on the supposed lack of

corroborative evidence, there was no reason for counsel to object. Defense counsel did, however, object and his objection was overruled. He wisely did not renew the objection because it would have been "futile."

It follows that there was no reason to move for a mistrial. Counsel was not required to further pursue a meritless objection or mistrial motion. In any event, counsel strategically chose not to move for a mistrial because he believed things were going well for the defense at that point. Bell failed to prove, therefore, that his attorney's performance was deficient and prejudicial. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). Because there was no error and because counsel performed reasonably, there was no "plain error" and no miscarriage of justice.

II. Bell failed to prove that his attorney was ineffective for not having redacted from the police interview reports sent into the jury room the 14 year-old victim's statement that she did not have sex before Bell assaulted her.

A. Proving an ineffective assistance of counsel challenge.

Bell had the burden of proving at the postconviction hearing that the performance of his trial counsel was both deficient and prejudicial. *Strickland*, 466 U.S. at 687; *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

To prove deficient performance, Bell had to overcome a strong presumption that counsel acted reasonably within professional norms. *Strickland,* 466 U.S. at 690; *State v. Trawitzki,* 2001 WI 77, ¶ 40, 244 Wis. 2d 523, 628 N.W.2d

801; *Johnson*, 153 Wis. 2d at 127. There is a strong presumption that counsel exercised reasonable professional judgment, and that counsel's decisions were based on sound trial strategy. *State v. Maloney*, 2005 WI 74, ¶ 43, 281 Wis. 2d 595, 698 N.W.2d 583; *State v. Marty*, 137 Wis. 2d 352, 360, 404 N.W.2d 120 (Ct. App. 1987). *See Eckstein v. Kingston,* 460 F.3d 844, 848-49 (7th Cir. 2006).

This court is not to evaluate counsel's conduct in hindsight, but must make every effort to evaluate counsel's conduct from counsel's perspective at the time. *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009). Bell was not entitled to error-free representation. Trial counsel need not even be very good to be deemed constitutionally adequate. *McAfee,* 589 F.3d at 355-56. *See State v. Wright*, 2003 WI App 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386. Ordinarily, a defendant does not prevail unless he proves counsel's performance sunk to the level of professional malpractice. *Maloney*, 281 Wis. 2d 595, ¶ 23 n.11.

To prove prejudice, Bell had to prove that counsel's error was so serious it deprived him of a fair trial, a trial whose result is reliable. *Johnson*, 153 Wis. 2d at 127. He had to prove a reasonable probability that, but for counsel's unprofessional error, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *McAfee,* 589 F.3d at 357. *See Trawitzki,* 244 Wis. 2d 523, ¶ 40; *Johnson*, 153 Wis. 2d at 129. Bell could not speculate. He had to affirmatively

prove prejudice. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433.

Trial counsel is not ineffective for failing to pursue meritless challenges. *See State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987); *State v. Berggren,* 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110; *State v. Swinson*, 2003 WI App 45, ¶ 59, 261 Wis. 2d 633, 660 N.W.2d 12; *State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

The court need not address both the deficient performance and prejudice components if Bell failed to make a sufficient showing as to one of them. *State v. Mayo,* 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115.

B. Bell failed to prove trial counsel engaged in prejudicially deficient performance for not seeking redaction of T.P.'s statement to police that she had not engaged in sex before Bell sexually assaulted her.

As discussed above, the jury asked to view various documents during deliberations, including the summaries of the police interviews with the girls. Defense counsel asked that all of the requested exhibits be sent to the jury but with some edits and redactions. The court agreed. (87:687-98.) Defense counsel explained at the postconviction hearing that he wanted the reports of the police interviews sent in because, he believed, they exposed the lies and inconsistencies in the girls' accounts. Counsel did not, however, ask the court to redact the portion of the interviews

where 14 year-old T.P. told police she never had sex before Bell assaulted her at her sister's birthday party in July 2001. Bell argues that his attorney was ineffective for not having T.P.'s denial of sexual activity redacted from the reports sent to the jury.

The postconviction court never ruled on this aspect of Bell's motion. It addressed only the issues relating to the prosecutor's closing argument. Perhaps this court could remand with directions for the trial court to specifically rule on this separate ineffective assistance challenge arising out of counsel's failure to redact T.P.'s denial of prior sexual activity. The state asks that this court not do so because this case has dragged on far too long already, and the argument may be resolved here because it is so plainly devoid of merit.

First and foremost, if the jury agreed with defense counsel that the girls lied, it does not matter when, or even if, T.P. lost her virginity; she was not assaulted by Bell.

Second, T.P. was 14 years old in July of 2001. It would come as no great shock to the jury that assuming Bell had intercourse with her then, it was her first such experience. Proof that T.P. lost her virginity to Bell "is not more prejudicial than testimony that [Bell] had intercourse with a 14-year-old child." *Burns,* 332 Wis. 2d 730, ¶ 39. This evidence that Bell "took her virginity did not differ in any significant way from her allegation that [Bell] had intercourse with her when she was 14 years old; [Bell] was

able to challenge [T.P.'s] truthfulness that intercourse took place." *Id.* ¶ 43.

Third, the importance of the police reports from defense counsel's point of view was in how they revealed the falsehoods and inconsistencies in the girls' accounts. If the jury agreed that their stories did not hold up, T.P.'s denial of any previous sexual experience would not matter because she was not assaulted by Bell. Because the jury learned through the pediatrician that T.P. likely had engaged in sexual intercourse at some point in the past (85:424-27), it may well have found that she lost her virginity not to Bell but to someone else and she falsely accused Bell to stay out of trouble. Proof that T.P. lost her virginity to someone other than Bell would be far more prejudicial to her than to Bell.

Fourth, Bell was able to aggressively challenge T.P.'s credibility in general, and her allegation that he had intercourse with her in particular, as discussed at length above. *See Burns,* 332 Wis. 2d 730, ¶¶ 40-42.

Fifth, the prosecutor never mentioned T.P.'s virginity in closing arguments to the jury.

Sixth, T.P. told police and testified without objection that she felt significant pain when Bell inserted his penis into her vagina. (55:4, A-App. 147; 64:2, A-App. 151; 85:488.) If believed, this would indicate strongly to the jury that she indeed had little or no experience with vaginal intercourse before then. Bell does not argue that his attorney was ineffective for allowing in T.P.'s statements to police and her

trial testimony that intercourse with Bell caused her pain. And, again, if the jury agreed with defense counsel that she was lying, it would not have believed T.P.'s claim that Bell had vaginal intercourse with her and it caused her pain. If the pediatrician was correct that she had sexual intercourse at some time, it was not with Bell.

Finally, defense counsel and the prosecutor meticulously went through all of the reports, editing and redacting where necessary, before the reports were sent to the jury with the trial court's approval. (87:693-98.) Bell failed to prove his attorney performed deficiently in not also redacting 14 year-old T.P.'s "no" answer to Sgt. Stickney's question whether she had engaged in sex before then. Bell failed to prove prejudice even if her answer should have been redacted, because there is no reasonable probability of an acquittal if the jury learned, as it did from the pediatrician, that T.P. was no longer a virgin but did not learn that she claimed to have lost her virginity to Bell. As defense counsel argued to the jury, this case rose and fell based upon whether the girls lied about the sexual assaults. That credibility determination was not influenced, in all reasonable probability, by when T.P. claimed to have lost her virginity. Of far greater significance, readily apparent from reading the police reports, was T.P.'s becoming emotionally overwhelmed and her difficulty discussing the details of the assault during the interviews. (55, A-App. 144-49; 64, A-App. 1150-51.) As the prosecutor aptly argued to the jury, T.P.

was either telling the truth or was a great actor. The jury believed the former and it mattered little whether T.P. was a virgin when Bell sexually assaulted the 14 year-old at her sister's birthday party.

CONCLUSION

The State respectfully requests that the judgment of conviction and order denying postconviction relief be AFFIRMED.

Dated this 13th day of June, 2016.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 7,574 words.

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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 13th day of June, 2016.

_____
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