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 an Order
Denying in Part and Granting in Part Postconviction Relief
Entered in the Monroe County Circuit Court,
the Honorable Michael J. Rosborough, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The Invited Response Doctrine Relied Upon by the State Is Nowhere Near Broad Enough to Reach the Prosecutor's Improper Comments That Began in *Voir Dire* and Continued in Closing, All Before Defense Counsel Addressed the Jury in Closing Argument.

The state's response to Mr. Bell's argument that the prosecutor's improper comments necessitate a new trial as plain error, in the interest of justice or due to ineffective assistance of counsel rests on one contention. The state maintains that the prosecutor's comments, which began in *voir dire* and continued in closing argument, were a reasonable response to defense counsel's argument. Its contention is legally and factually flawed.

The state attempts to wedge this case within the "invited response" doctrine, but it is a poor fit. The doctrine is not the prosecutor's "license" to make improper arguments. ***United States v. Young***, 470 U.S. 1, 12 (1985). Rather, it is used to determine "whether the prosecutor's 'invited response,' taken in context, unfairly prejudiced the defendant." ***Id***. In making that determination, "the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account *defense counsel's opening salvo*." ***Id***. (emphasis added).

> Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.

Id. at 12-13 (footnote omitted).

The problem for the state in relying on this doctrine is that the prosecutor launched its improper comments without an "opening salvo" by defense counsel. The misstatements about the state's and defendant's burdens and the jury's duties began in *voir dire* and were fully developed in the prosecutor's closing argument, all before defense counsel addressed the jury in closing argument.

In every case cited by the state in support of its "reasonable response" argument (state's brief, pp. 10, 24), the challenged statements were made in the prosecutor's *rebuttal* argument and were a response to defense counsel's closing argument.

In ***Young***, the prosecutor's improper remarks – stating his personal opinion that the defendant was guilty and urging the jury to "do its job" – were made in rebuttal and in direct response to defense counsel's own improper arguments. ***Young***, 470 U.S. at 17-18. The Supreme Court concluded that the potential harm from the prosecutor's remarks "was mitigated by the jury's understanding that the prosecutor was countering" defense counsel's own improper arguments. ***Id***.

In ***State v. Jaimes***, 2006 WI App 93, ¶24, 292 Wis. 2d 656, 715 N.W.2d 669, defense counsel suggested in closing argument that two co-actors did not testify because they would not corroborate the officer's version. In rebuttal, the prosecutor "fairly suggested" that they had a constitutional right against self-incrimination, which was "a fair response" to defense counsel's argument that the witnesses' absence "should be held against the State." ***Id.***

In ***State v. Wolff***, 171 Wis. 2d 161, 166 & 169, 491 N.W.2d 498 (Ct. App. 1992), the court of appeals held that the prosecutor's remark that the defendant could receive probation was "a measured and reasonable response" to defense counsel's argument that the prosecutor "'grossly overcharged'" the case. As in ***Young*** and ***Jaimes***, the challenged remark was made in the prosecutor's rebuttal argument, which the prosecutor began by referring back to defense counsel's argument. ***Id***. at 166. Likewise, in ***State v. Patino***, 177 Wis. 2d 348, 382, 502 N.W.2d 601 (Ct. App. 1993), the prosecutor's comments in rebuttal about the defendant's limited questioning of witnesses at the preliminary hearing was a direct response to defense counsel's argument. *See also* ***United States v. Nowak***, 448 F.2d 134, 141 (7th Cir. 1971) (challenged remark was made in prosecutor's rebuttal and was "merely a response" to defense counsel's argument); ***United States v. Hedman***, 630 F.2d 1184, 1199(7th Cir. 1980) (challenged remark made in prosecutor's rebuttal).

The invited response doctrine has no place where, as here, the challenged statements are not confined to the prosecutor's rebuttal to defense counsel's argument but begin before defense counsel has said a word to the jury.

As Mr. Bell argued in this brief-in-chief, the state's entire case was framed around a two-pronged theme that, in order to find Bell not guilty, the jury had to believe the sisters were lying and the defendant had to present evidence showing a reason for them to lie. The prosecutor began this line of argument in *voir dire*, where he posed the following questions:

> I mean, maybe let me ask you, what are some of the typical things you might expect a teenager to lie about?

(84:65). Addressing an 18-year-old panel member about things a teenager wouldn't lie about:

> you said that's the type of thing you wouldn't lie about, the more serious things in life?

(84:66). And then, after reminding the panel that this case involves serious allegations of sexual assault:

> Would most of you agree with that, that that's some more serious type of thing to discuss, so you're more inclined not to lie about that?

(84:68).

> Would everyone agree here that – that, though, that if you're going to lie, you're going to have a reason … there's going to be a reason why you would lie? Everybody agree with that? Everybody is nodding their head.

(84:69-70).

> Would you expect there would be some evidence that somebody would have a reason to lie? … do you think there would be some sort of evidence that this person had lied?

(84:71-72). Referring to the instructions the jury would receive:

> you're not allowed to speculate, that it's going to be a doubt based upon either the evidence or lack of evidence and you're not going to be allowed to speculate. … if you weren't to hear evidence of why a person might lie, would you feel inclined to speculate …?

(84:72).

In *voir dire* the state set the table for the arguments it would then serve up in closing, arguments that misstated the law on reasonable doubt, shifted the state's burden to the defense and commented on Mr. Bell's exercise of his right not to testify. All of that would occur before defense counsel's closing argument, which the state quotes at length in its brief (pp. 11-14). But the prosecutor's comments cannot be deemed an "invited response," a "reasonable response" or a "measured response" to an argument that had not yet been made. To apply the doctrine here would be a license for the prosecutor to not just make improper arguments in closing but to frame his entire case upon misstatements of the law that denigrate the defendant's basic constitutional rights at trial.

The state does not address the case law cited in Mr. Bell's brief to show the impropriety of the prosecutor's arguments that the jury has to believe that TP and AL are lying in order to acquit and that the jury cannot speculate about why they would lie because there must be evidence of a reason for them to lie. Instead, the state characterizes the comments as a mere "appeal" to "the jury's collective reason, common sense, knowledge and experience in the affairs of life …." (State's brief, pp. 8, 22). Its characterization in this court does not mesh with what it said at trial. The prosecutor was giving the jury a primer on what the law required it to do. But the instructions were wrong. The jury could indeed acquit without concluding that TP and AL were lying. Mr. Bell carried no burden to present evidence showing a reason for the sisters to lie. And while reasonable doubt is not a doubt based on guesswork or speculation, when assessing the credibility of witnesses, the jury may speculate about the witness' "possible motives for falsifying testimony." Wis JI-Criminal 300, p. 1 (2000).

The prosecutor's misstatements are so insidious because the average juror would believe that the prosecutor is correctly describing the jury's duty. ***State v. Weiss***, 2008 WI App 72, ¶10, 312 Wis. 2d 382, 752 N.W.2d 372, *citing* ***Berger v. United States***, 295 U.S. 78, 88-89 (1935) (average juror will have confidence the prosecutor will faithfully observe his obligations not to strike foul blows). That is especially true here because defense counsel's objection to the prosecutor's improper argument was overruled, leaving the impression that the prosecutor's primer was correct.

Finally, the state recites how defense counsel was able in his cross-examination of TP, AL and the detective to highlight inconsistencies and cast doubt on the investigation. (State's brief, pp. 15-17). But that only reinforces Mr. Bell's argument that this was a close case. And particularly in a close case, the prosecutor must exercise special care in his or her arguments or risk jeopardizing a conviction. ***State v. Smith***, 2003 WI App 234, ¶24, 268 Wis. 2d 138, 671 N.W.2d 854. If this court accepts the state's argument and denies Mr. Bell relief under the invited response doctrine, that doctrine will become what it was never intended to be – a license for the prosecution to strike foul blows in a case where it has been dealt a challenging evidentiary hand.

II. Mr. Bell Was Prejudiced by Counsel's Failure to Redact from Two Exhibits Information that TP Had Never Had Sexual Intercourse until She Was Assaulted by Mr. Bell.

The state does not dispute Mr. Bell's contention that the information counsel failed to redact from the exhibits – that TP was a virgin before she was assaulted by Bell – was inadmissible. Any such contention would be without merit in

light of case law making clear that Wis. Stat. § 972.11(2)(b) bars such evidence. *See* ***State v. Gavigan***, 111 Wis. 2d 150, 159, 330 N.W.2d 571 (1983); ***State v. Mitchell***, 144 Wis. 2d 596, 619, 424 N.W.2d 698 (1988).

While the state does not concede that counsel performed deficiently, it appears to center its response on the notion that the inadmissible information was not harmful to Mr. Bell. Indeed, any attempt to defend counsel's failure to redact the inadmissible information would be difficult given counsel's testimony that he may have "goofed up". (R2, 143:23-24).

The state's argument that Mr. Bell was not prejudiced is premised on the contention that if the jury believed TP was lying, "it does not matter when, or even if, TP lost her virginity; she was not assaulted by Bell." (State's brief, p. 29). That simplistic contention misses the point. The jury had to determine if the state had proven beyond a reasonable doubt that Mr. Bell had sexual intercourse with TP. Evidence that TP never had intercourse before the assault by Bell is highly prejudicial when combined with the pediatrician's testimony that TP had no hymen and in her opinion it was "likely" TP had had sexual intercourse. (R1, 85:423-26). The combination of those two facts – physical evidence that TP was not a virgin and the unredacted information that she was a virgin until assaulted by Bell – provided the jury with significant evidence from which to conclude that TP was, in fact, assaulted by Bell.

The state maintains that "assuming Bell had intercourse" with 14-year-old TP, it would "come as no great shock to the jury" that this was TP's first such experience. (State's brief, p. 29). Again, the state's argument misses the point. The inadmissible evidence is prejudicial because it

provides corroboration for TP's claim that she was assaulted by Bell. Moreover, it undercuts the defense characterization that TP was an uncooperative witness because the assault didn't occur, not because she was so traumatized by the event or so uncomfortable talking about it. After all, three times TP stormed out of the forensic interviews, declaring "it's all bullshit" and "I can't do this." (R1, 85:470-72, 509). But the unredacted information painted a different picture given what Sergeant Stickney wrote in his report:

> 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.

(R1, 64:2). This inadmissible information bolstered the prosecutor's characterization that TP was not a great actor but, rather, the victim of a sexual assault.

Absent from the state's response is any acknowledgement about the closeness of the case. But for the pediatrician's testimony, the state had no physical evidence corroborating the allegations of TP and AL. Even though there were other people, sometimes multiple people, present when the alleged assaults occurred, the state did not produce any witness who saw or heard anything to support the sisters' claims.[1] Defense counsel ably elicited inconsistencies in their claims. But he dropped the ball – "goofed up" – when he

[1] The state writes that John Williams "confirmed that there were times when Bell could have been alone with the intoxicated T.P. later on at the party." (State's brief, p. 4). To be clear, Williams was never asked if Bell was alone with TP. Williams testified that he and others left the party four times, and Bell was with them each time. (R1, 86:563-77).

failed to redact the inadmissible information from the exhibits that were before the jury during deliberations. Because this was a close case, where "[c]redibility hung in the balance", the "slightest wisp of influence could have directed the course of the jury's determination." ***Smith***, 268 Wis. 2d 138, ¶22. Mr. Bell was prejudiced by the unredacted information that unfairly bolstered TP's credibility.

CONCLUSION

For the reasons set forth above and in his brief-in-chief, Mr. Bell respectfully requests that the court reverse the judgments of conviction and the order denying postconviction relief and remand with directs that he is entitled to a new trial.

Dated this 28th day of June, 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 2,279 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 28th day of June, 2016.

Signed:

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