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STATE OF WISCONSIN

IN SUPREME COURT

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERROD R. BELL,

Defendant-Appellant-Petitioner.

On Review from a Decision of the Court of Appeals Affirming Judgments of Conviction and an Order Denying a Postconviction Motion for a New Trial Entered in the Monroe County Circuit Court, the Honorable Michael J. Rosborough, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Did the prosecutor's statements, which began in voir dire and continued in closing argument impermissibly shift the burden of proof, deprive Bell of the benefits of the reasonable doubt instruction and distort the jury's credibility determination, thereby requiring a new trial as plain error or due to ineffective assistance of counsel, where the prosecutor repeatedly told the jurors that in order to find Bell not guilty:

   - they "have to believe" or "must believe" that the sisters were lying about the alleged sexual assaults; and

   - there must be evidence of a reason for the sisters to lie and the defendant has presented no reason, just speculation?

The circuit court deemed the arguments mere advocacy and denied Bell's postconviction motion for a new trial. The court of appeals affirmed, holding that the prosecutor's statements did not misstate the law.

2. Was Bell denied the right to effective assistance of counsel because the jury was given two unredacted exhibits containing information that the younger sister had never had sexual intercourse until she was assaulted by Bell?

Following an evidentiary hearing, the circuit court denied Bell's postconviction motion without expressly addressing this claim. The court of appeals held that Bell failed to show he was prejudiced by the jury's access to the unredacted exhibits.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, both oral argument and publication are warranted.

STATEMENT OF THE CASE

Following a jury trial in 2002, Gerrod R. Bell was convicted of three counts of second-degree sexual assault by use of force, one count of second-degree sexual assault of a child and bail jumping. (69-71; R2, 41-42; App. 122-25).[1] The offenses involved two sisters, TP, who was 14, and AL, who was 17. Because Bell was convicted of the sexual assault charges as a persistent repeater, the court imposed life sentences on those four counts. (72; R2, 44). Subsequently, Bell successfully challenged three of the four life sentences. (143; R2, 117:4).

Although the convictions are some 15 years old, Bell is still on his direct appeal under Wis. Stat. § 809.30 due to an unusual procedural history not relevant to the issues on appeal.[2]

In a § 809.30(2)(h) postconviction motion, Bell sought a new trial due to the prosecutor's misstatements of law to the jury and unredacted exhibits sent back to the jury during

[1] Citations are to the record in No. 2015AP2667-CR unless the document appears only in No. 2015AP2668-CR, in which case it is designated as "R2".

[2] A detailed description of that procedural history is set forth in Bell's court of appeals' brief at pages two to four.

deliberations. (132). Following a ***Machner***[3] hearing, the circuit court denied Bell's claims for a new trial. (143; R2, 143:94-101; App. 127-34).

Bell appealed from the judgments of conviction and order denying a new trial. (144; R2, 138). The court of appeals affirmed. ***State v. Bell***, slip op. ¶3 (App. 102). This court granted Bell's petition for review.

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 Bell. Its case was dependent upon the testimony of TP and AL.

In the summer of 2001, TP was living with her mother and two younger siblings. (84:183; 85:313). TP's older sister, AL, did not live in the home but often visited. (84:176-78). Bell was a friend of their mother and spent a lot of time at her house. (84:179). Near the end of July, their mother decided to throw a birthday party for AL. (85:208-09). She served a variety of alcohol at the party. (85: 212). TP drank to the point that she fell down. (84:217; 85:328).

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. (1, 11, 12, 69-71). After midnight, TP's mother told her to put out the bonfire in the backyard. (85:441). According to TP, Bell followed her outside, sat next to her on the grass and began rubbing her stomach.

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

(85:441-43). She said that when she tried to get up, Bell pulled her to the ground and engaged in forced intercourse. (85:444-49).

TP did not tell her mom or sister but eventually said something to a friend and, thereafter, the police were involved. (85:451-53). TP spoke with Sergeant Dale Stickney, who testified she was "very hesitant to … report the incident." (85:353). Nevertheless, based upon her report, Bell was arrested the next day. (*Id.*). 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." (53:4; 85:358). When asked why TP would make the allegation, Bell said he had "no clue" and said it might be "because I haven't been around to – see them, I don't know." (85:361). Bell did not testify at trial.

Twice, TP walked out of a videotaped interview with Detective LaVern Erickson and a social worker, declaring "it's all bullshit" and "I can't do this." (85:470-72, 509). They were not able to complete the interview but decided to try again three days later. (85: 472, 509). During the second interview, TP walked out again, saying that she couldn't do it anymore. (85:472-73, 509). Eventually, they finished the statement. (85:473). The detective, who had been in law enforcement for 17 years, had never before seen a complainant walk out of a taped interview. (85:499, 509).

At about the same time, TP was examined by a pediatrician who testified that TP had no hymenal tissue. (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." (85:424-26).

After the assault of TP was reported, Detective Erickson asked AL if she had ever been touched by Bell. (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 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. (85:261). Five months later, AL reported for the first time that 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. (85:262). Although four other persons were in the home when the assault allegedly occurred, including a younger sister who was in the living room eight feet from the bathroom, neither the sister nor any other occupant testified about the assault. (85:277-78; 86:549).

By the time of trial, Bell was facing four sexual assault charges based on AL's allegations, two counts of second-degree sexual assault for the alleged bathroom 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. (86:609-10).

The jury heard evidence that just a few days before trial, AL told Sergeant Stickney that her mother had told she 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. (85:327-29, 402-15, 457). 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." (85:405-13). 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. (85:456).

Although Bell did not testify, the jury heard that when he 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." (86:601). Without hesitation, Bell told the sergeant, "'yes, go ahead, set it up.'" (86:602). The test was never done because the sergeant "dropped the ball." (*Id*.).

Facts Relevant to Bell's Claim for a New Trial Due to Prosecutor's Improper Comments

Bell sought a new trial due to the prosecutor's comments, which began in voir dire and continued in closing argument, telling the jury that (1) in order to find 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. (132:8).

Comments during voir dire

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 (84:67-71; App. 135-39), the prosecutor asked:

> Would everybody agree here that … if you're going to lie, you're going to have a reason like jealousy of some sort; there's going to be a reason why you would lie? Everybody agree with that? Everybody is nodding their head.

(84:69-70; App. 137-38). The prosecutor then asked for reasons that a "teenage girl might falsely accuse someone of sexual assault" and obtained answers including attention, revenge and jealousy. (84:70; App. 138). The prosecutor singled out two panel members, both of whom were selected for the jury (84:128), and asked if they would expect there would be "some sort of evidence" that this person would have a reason to lie.

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

(84:71-72; App. 139-40). Both responded in the affirmative, and the prosecutor followed up by referring to the jury instructions.

> [Y]ou're going to hear the jury instructions … on reasonable doubt. And one thing is going to tell you 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.

(84:72; App. 140). Turning to a panel member who said she believed her nephew had been falsely accused and who was not selected (84:128), the prosecutor asked:

> … if you weren't to hear evidence of why a person might lie, would you feel inclined to speculate based upon your past experience with a case like this with your nephew?

(*Id*.). After she said she wouldn't do that, the prosecutor asked again:

> You'd be able to not to speculate and just look at the facts, the evidence or lack of evidence in this case.

(*Id*.). The prosecutor then addressed the entire panel:

> Okay, and that question is to everybody else, would you be able to just follow the jury instructions and not speculate and base your decision based on the evidence or lack of evidence in the case?

(84:73; App. 141). The prosecutor noted that no one was shaking their head. (*Id*.).

Comments during closing argument

The prosecutor immediately reprised this theme in closing argument when, after noting that reasonable doubt is not a doubt based on speculation (87:635; App. 143), 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.

(87:635-36; App. 143-44).

At that point, defense counsel objected, expressing concern "about how he's presenting this because I think he's reversing the burden of proof." (87:636-37; App. 144-45). 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.

(87:637; App. 145).

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." (87:637-38; App. 145-46).

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." (87:646; App. 154). The state then referred to 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. (87:646-47; App. 154-55). "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." (87:647; App. 155).

Comments during rebuttal argument

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, labeling those theories "[p]ure speculation, pure speculation, pure speculation." (87:678; App. 186). He argued, "There's "no evidence that they were lying." (*Id.*). The prosecutor reminded the jurors they could not speculate about why the sisters might lie.

> 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 … you're supposed to search for the truth. And the truth is clear.

(87:679; App. 187). The prosecutor ended his rebuttal with:

> So much what [defense counsel] 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.

(87:682; App. 190).

Grounds for relief and the lower courts' rulings

In his postconviction motion, 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. (132:10-14).

At the ***Machner*** 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). Although his usual practice is to discuss with the client whether to move for a mistrial, he had "absolutely no recollection" whether he had that discussion with Bell after the prosecutor's closing argument. (R2, 143:19). He had no notes showing that such a conversation occurred. (*Id.*). Bell testified there was no such discussion. (R2, 143:49). Counsel testified it "would be safe to say" that he did not explain that it was necessary to move for a mistrial in order to preserve the objection. (R2, 143:43).

The circuit court ruled that the prosecutor's argument did not shift the burden of proof or otherwise violate the defendant's constitutional rights. (R2, 143:99-100; App. 132-33). 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*.).

The court of appeals affirmed, holding that the prosecutor did not misstate the law. ***Bell***, slip op. ¶ 3 (App. 102). As to the prosecutor's statements that the jurors must believe TP and AL are lying in order to find Bell not guilty, the court concluded that the prosecutor did not present these comments "as statements about what the law requires. Instead they were presented as comments on the facts in evidence, in particular about the mutually exclusive versions of the truth presented in the evidence." ***Id***. at ¶28 (App. 112). With regard to comments that there must be evidence of a reason for the girls to lie and the defendant has presented no reason, the court was "satisfied that the prosecutor's statements, taken as a whole, rested on common sense propositions that did not misdirect jurors on legal issues." ***Id***. at ¶33 (App. 116).

Facts Relevant to Bell's Claim for a New Trial Due to Unredacted Exhibits Given to the Jury During Deliberations

Bell alleged that trial counsel was ineffective because two exhibits containing information that TP was a virgin before the assault were given to the jury during deliberations without redaction. (132:14-17).

Initially, only one exhibit was allowed back with the jury. (87:686). However, after the jury asked for more, the parties agreed to send back most of the exhibits, although several were subject to redacting. (87:689-97). The two exhibits at issue here – Defendant's Exhibits 4 and 11 – went back without redaction. (55; 64; 87:691, 693-94; App. 191-98).

Exhibit 4 is a transcript of the taped statement that Sergeant Stickney took from TP. After eliciting information from TP about how she was assaulted by Bell, the sergeant asked, "Had you ever had sex before that point?" TP responded, "No." (55:4; App. 194).

Exhibit 11 is Sergeant Stickney's written report recounting his interview of TP. 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.

(64:2; App. 198).

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). Counsel said he may have 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 …." (R2, 143:24-25). Counsel also conceded he may have "goofed up". (R2, 143:24).

The circuit court denied Bell's request for a new trial without expressly addressing the claim regarding the unredacted exhibits. (R2, 143:94-101; App. 127-34). The court of appeals affirmed, holding that Bell failed to show that he was prejudiced. ***Bell***, slip op. ¶38 (App. 118).

ARGUMENT

I. By Framing Its Prosecution of Bell Around Legal Fictions – That the Jury Could Not Acquit Unless It Concluded the Sisters Were Lying and Unless the Defendant Presented Evidence Showing a Reason for Them to Lie – the State Violated Bell's Constitutional Rights and Denied Him a Fair Trial.

A. Summary of argument.

As representative of the government, the prosecutor's interest in a criminal prosecution "is not that it shall win the case, but that justice shall be done." ***Berger v. United States***, 295 U.S. 78, 88 (1935). While the prosecutor may "strike hard blows, he is not at liberty to strike foul ones." ***Id***. At times the line separating acceptable from improper advocacy is difficult to discern. ***United States v. Young***, 470 U.S. 1, 7 (1985). Not so here.

The prosecutor repeatedly crossed the line and struck foul blows by telling the jury that (1) to find Bell not guilty, the jurors "have to believe", "must believe" that TP and AL are lying and (2) 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 assertions misstate the law governing the jury's determination of whether the state had proven Bell guilty. They undermined what the court of appeals correctly characterized as "unquestionable, operative legal principles" (slip op. ¶10; App. 103): that the state carries the burden of proof; that the state must prove the facts necessary to establish each element by the highest standard, beyond a reasonable doubt; and that the defendant is

presumed innocent and has no burden to prove his innocence. *See* ***In re Winship***, 397 U.S. 358, 363-64 (1970).

Not only are the comments improper, they undermined the fairness of the trial, particularly given that the state presented virtually no corroborating physical evidence, no corroborating witnesses to the claimed assaults and no admission from Bell. Its entire cased hinged on the testimony of TP and AL, which, given AL's late reporting, TP's lack of cooperation and their admitted lies about TP's conduct that night regarding drinking, was shaky at best.

To determine if the prosecutor's comments affected the fairness of trial, they 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***. Whether the defendant's due process rights were violated is a question of law reviewed independently. ***State v. Burns***, 2011 WI 22, ¶23, 332 Wis. 2d 730, 798 N.W.2d 166.

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 sisters lied and unless the defense proved a reason for them to lie. The state's misrepresentations of the jury's task and the defendant's obligation undermined the fairness of Bell's trial, warranting a new trial as plain error or due to ineffective assistance of counsel.[4]

[4] Although in the lower courts Bell also sought a new trial in the interest of justice, he does not make that claim here.

B. The prosecutor's comments misstated the law and violated Bell's due process rights by depriving him of the benefit of the reasonable doubt instruction, shifting the burden of proof and distorting the jury's credibility determinations.

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

Fourteen times the prosecutor told jurors that in order to find 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." (87:636, 637, 638, 640; App. 144, 145, 146, 148). That argument distorted the state's burden of proof by shifting the jury's focus away from the proper inquiry, that is, whether the state had proved the charged offenses beyond a reasonable doubt, and framed the issue to be determined as whether the sisters had lied. Although neither this court nor the court of appeals – until Bell's case – has addressed the propriety of such arguments, they have been widely condemned by federal and state courts.

What the jury must determine to return a verdict is prescribed by the Due Process Clause of the Fourteenth Amendment and Article I, § 8 of the Wisconsin Constitution. ***Sullivan v. Louisiana***, 508 U.S. 275, 277-78 (1993); ***Holland v. State***, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979). The prosecution bears the burden of proving all elements of the charged offenses, and the prosecution must persuade the jury beyond a reasonable doubt of the facts necessary to establish each of those elements. ***Id***. The beyond a reasonable doubt standard gives "concrete substance" to the presumption of innocence, ***Winship***, 397 U.S. at 363, and impresses upon the

jury "the need to reach a subjective state of near certitude of the guilt of the accused …." ***Jackson v. Virginia***, 443 U.S. 307, 315 (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." ***United States v. Richter***, 826 F.2d 206, 209 (2nd Cir. 1987). Multiple courts have so held.

Federal courts have found improper an argument, as occurred here, telling the jury that it cannot acquit the defendant unless it finds the government's witnesses lied. ***Richter***, 826 F.2d at 209 (if the FBI agents are telling the truth, then the defendant is guilty); ***United States v. Vargas***, 583 F.2d 380, 386-87 (7th Cir. 1978) (an acquittal requires the jury to conclude the DEA agents lied); ***United States v. Cornett***, 232 F.3d 570, 573-74 (7th Cir. 2000) (if you find the defendant not guilty you have to find that the government's witnesses – two police officers and the defendant's companion – "lied to you"); ***United States v. Reed***, 724 F.2d 677, 681 (8th Cir. 1984) (for the jury to acquit they must determine that Reed is telling the truth and all the government's witnesses "are lying to you").

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).

As in ***Vargas***, the prosecutor's assertion that, in order to find Bell not guilty, the jurors "have to believe" and "must believe" that the sisters "lied to us", misstated the law by limiting the jurors ability to find Bell not guilty. The prosecutor repeatedly told the jurors they could not acquit Bell unless they determined the sisters lied. The prosecutor's assertions distorted that state's burden to the state's advantage. If the jurors found the sisters were probably telling the truth but other evidence – perhaps their delayed reporting, lack of cooperation or factual inconsistencies – created doubt, they could not acquit Bell because in order to find him not guilty, the jurors had to conclude the girls lied. Even if the jurors simply could not decide who was telling the truth, they would still have to find Bell guilty because the prosecutor told the jury that "for the defendant to be not guilty" the jurors "have to believe [TP] lied to us" and "have to believe … [AL] intentionally lied to us this week." (87:636-38; App. 144-46).

The court of appeals is wrong that Bell's case is closer to ***State v. Amerson***, 185 F.3d 676 (7th Cir. 1999). ***Bell***, slip op. ¶30 (App. 114). In ***Amerson***, the prosecutor argued,

"You simply cannot believe the testimony of these police officers and believe the defendant's testimony at the same time." ***Id***. at 686. The Seventh Circuit distinguished that case from ***Vargas***, where the prosecutor "attempted to instruct the jury that the only way they could find the defendant not guilty would be to find that all of the federal agents were lying." ***Id***. at 687.

In Bell's case, the prosecutor was not merely commenting that the jury must decide who was more credible, the defendant or the government's witnesses, as in ***Amerson***. Indeed, Bell did not even testify. Rather, as in ***Vargas***, the prosecutor set up a "'false dilemma'" by arguing – repeatedly – that the jury could not acquit Bell unless it found that TP and AL were lying. *See* ***Amerson***, 185 F.3d at 687, *citing* ***Vargas***, 583 F.2d at 387. As in ***Vargas*** and ***Cornett***, the prosecutor set forth a stark, bright-line "rule" that the jury could not acquit unless it believed the state's witnesses lied, a fiction that distorted the burden of proof. *See* ***Cornett***, 232 F.3d at 574 (distinguishing that case and ***Vargas*** from ***Amerson***).

Other state courts, like the federal courts, have rightly held that such arguments are "egregious and patently improper". ***Morris v. State***, 795 A.2d 653, 660 (Del. 2002). The Delaware Supreme Court held that the trial court committed plain error by failing to "intervene sua sponte and take appropriate action to cure the effect" of the prosecutor's argument that the jury "better be satisfied" that the state's witnesses were lying if it was going to find the defendant not guilty. ***Id***. at 656, 659-60.

In ***People v. Dace***, 604 N.E.2d 1013, 1019 (Ill. App. Ct. 1992), the court reversed a defendant's conviction for sexual assault of a 13-year-old girl where the prosecutor

argued, in part, that if the jury wanted to find the defendant not guilty, it was then telling all of the state's witnesses that they were wrong.

> These comments impermissibly misstated the law and distorted the burden of proof by telling the jury, in effect, it could find the defendant not guilty only if it believed the State's witnesses were all lying or mistaken.

Id.

The Connecticut Supreme Court reversed a defendant's arson conviction where the prosecutor's argument "in essence" told the jury the only way it could conclude the defendant had not set the fire was if it determined that five government witnesses lied. ***State v. Singh***, 793 A.2d 226, 238 (Conn. 2002). 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" because such assertions distort the government's burden of proof. ***Id***. at 237-38; *see also* ***State v. Albino***, 97 A.3d 478, 494 (Conn. 2014) (improper argument where jury could have inferred that to acquit the defendant, it would have to conclude that every other witness lied); ***State v. Graves***, 668 N.W.2d 860, 880 (Iowa 2003) (counsel ineffective by failing to object to prosecutor's improper argument, "If you believe Officer Steil, there is no question that [the defendant] is guilty as charged"); ***Clewis v. State***, 605 So. 2d 974, 974-75 (Fla. Dist. Ct. App. 1992) (prosecutor's statement that reasonable doubt required the jury to believe the defendant and disbelieve the police officers distorted the state's burden of proof and required a new trial).

The wealth of authority finding such arguments improper cannot be reconciled with the court of appeals' attempt to characterize the prosecutor's "must believe"

statements as mere comments "on the facts in evidence, in particular about the mutually exclusive versions of the truth presented in the evidence." ***Bell***, slip op. ¶28 (App. 112). Its characterization is unsupported by the record and how a jury would reasonably perceive such comments.

The prosecutor's litany of what the jury must believe in order to find Bell not guilty – that TP and AL lied to the police, the social worker, at the preliminary hearing and "to us" – begins only a few paragraphs after the prosecutor discussed reasonable doubt and the state's burden of proof. Specifically, the prosecutor said, "First thing I want to talk about is the State's burden of proof." (87:635; App. 143). At the top of the very next page, the prosecutor asked:

> What must we believe, what things must we believe for the defendant to be not quilty? After hearing all the evidence that we've heard, what are the things that we must believe true if he is not guilty?

(87:636; App. 144). The prosecutor answered by instructing the jury that it has to believe, must believe that the sisters lied. The phrasing is similar to the prosecutor's improper rebuttal in ***United States v. Briseno***, 843 F.3d 264, 270-71 (7th Cir. 2016):

> So just to be clear, for defendant to be not guilty of this one, what would have to happen? What exactly –how would this play out so that the defendant is not guilty that this is just a big conspiracy to frame him?

The prosecutor then proceeded to list witnesses who would have to be in on the conspiracy. ***Id***. That argument was a misstatement of law which distorted the burden of proof, not a mere comment on the facts in evidence. ***Id***. at 271. As the prosecutor did at Bell's trial, "the government began with the proposition that [the defendant] was not guilty, and indicated

that such a finding could be reached *only if* the jury concluded that the government's witnesses [gave] false testimony." ***Id***. (emphasis in original).

The jury would perceive the prosecutor's directives of what it "must believe" in order to acquit as accurate instructions on what the law requires. Misstatements by a 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." ***Berger***, 295 U.S. at 88. Therefore, "improper suggestions … are apt to carry much weight against the accused when they should properly carry none." ***Id***. 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 government's witnesses). The average juror would accept as legally correct the prosecutor's assertions that the jury can't acquit without concluding the sisters lied. In truth, the assertions are a gross distortion of the state's burden of proof.

2. Telling jurors that there must be evidence of a reason for the sisters 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. These statements were not, as the court of appeals concluded, "common sense propositions that

did not misdirect jurors on legal issues." ***Bell***, slip op. ¶33 (App. 116). The statements, which framed the state's entire case, misstated the law governing the jury's consideration of the evidence by shifting the burden to the defense to prove a motive for the girls to lie and unreasonably restricting what the jury may consider when assessing credibility.

The prosecutor's theme began in voir dire, where the he 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". (84:71-72; App. 139-40). The prosecutor went on to instruct the panel that the jury instruction on 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. (84:72-73; App. 140-41).

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.

(87:646; App. 154). The prosecutor referred to Bell's statement to Sergeant Stickney that he had "'no clue'" why TP would make up the allegation and argued he could not come up with a reason, just speculation. (87:646-47; App. 154-55).

On rebuttal, the prosecutor dismissed defense counsel's challenge to the complainants' credibility as "pure speculation" and told the jury that the jury instructions

prevented it from speculating about why the sisters would lie. (87:678-79; App. 186-87). The prosecutor ended his argument with the theme he began in voir dire.

> So much what [defense counsel] asks you to do is sheer guesswork, sheer speculation. Something the jury instructions instruct you not to do.

(87:682; App. 190).

The prosecutor impermissibly shifted the burden of proof by instructing the jury that in order to find Bell not guilty, there must be evidence of a reason the sisters are lying and the defendant had not presented any such evidence, just speculation. Due process requires the prosecutor to carry the burden of proving the defendant's guilt beyond a reasonable doubt. ***Sullivan***, 508 U.S. at 277. The defendant has no burden to prove his innocence. ***State v. Schulz***, 102 Wis. 2d 423, 427 & 435-36, 307 N.W.2d 151 (1981). Yet, the prosecutor repeatedly told the jury that it could not acquit unless it concluded the sisters lied and unless there was evidence showing a reason for them to lie. And who hadn't produced such evidence? The defendant, who offered only speculation.

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.

As in ***Smith***, the prosecutor's comments violated Bell's due process rights by shifting the burden of proof and thereby undermining the presumption of innocence by suggesting that Bell had some obligation to prove a motive for TP and AL to lie. It is well settled that because motive is not an element of any crime, the state "never" needs to prove motive. ***State v. Wilson***, 2015 WI 48, ¶63, 362 Wis. 2d 193, 864 N.W.2d 52. Yet, ironically, the prosecutor told Bell's jury that it could not acquit unless Bell presented evidence showing a motive for the sisters to lie.

In addition to impermissibly shifting the burden, the prosecutor's comments misstated the law governing the jury's deliberations by conflating the reasonable doubt instruction with the instruction on gauging the credibility of witnesses. The effect of which was to hamstring what a juror may consider when determining a witness' credibility. The prosecutor misinformed the jury that it could not find the sisters incredible unless there was evidence of a motive for them to lie. That's legally incorrect.

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). But that language does not govern a jury's determination of credibility. Rather, the pattern instruction on credibility tells jurors they may consider a 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,

possible motives for falsifying testimony, 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).

The credibility instruction does not demand that a juror's determination of credibility rest upon a particular piece of evidence establishing either that the witness lied or that the witness told the truth. It does not demand, contrary to the prosecutor's assertions, that the jury must believe – must find credible – the state's witnesses unless there is evidence showing a reason for them to lie.

This court has long recognized that a juror's assessment of credibility may rest on hard-to-define impressions or feelings.

> In a jury trial there are a great many factors, some of them very subtle, which, consciously or unconsciously, influence the juror's mind in judging the credibility of witnesses and resolving the merits of the case.

Bangor v. Hussa C. & P. Co., 208 Wis. 191, 198, 242 N.W. 565 (1932). Credibility determinations may be based upon "nuances" of the witness' appearance and demeanor on the witness standard. ***Johnson Bank v. Brandon Apparel Group, Inc.***, 2001 WI App 159, ¶15, 246 Wis. 2d 828, 632 N.W.2d 107.

In light of the latitude given to the jury in what it may consider when judging credibility, the prosecutor's assertions that the jury could not speculate about whether the sisters were lying but, rather, must be presented with evidence showing a reason for the sisters to lie is patently false. Indeed, the pattern instruction allows the jury to consider any "possible" motives for testifying falsely, among the list of

subjective factors that the jury may consider when determining credibility. Wis JI-Criminal 300, p. 1. The instruction does not limit the jury's assessment to evidence proving a motive for testifying falsely. Certainly, contrary to the prosecutor's assertions, the jury may conclude that a witness is not credible without any evidence establishing a motive for the witness to lie.

The court of appeals was not persuaded that the prosecutor's statements "could reasonably have been interpreted as asserting that jurors must find the victims credible unless there was evidence establishing a reason for the witnesses to lie." ***Bell***, slip op., ¶36 (App. 117). But that's exactly what the jury was told. The prosecutor's statements amounted to a primer on what the law required the jury to do. It could not acquit unless the sisters are lying. If the sisters are lying, there must be evidence of a reason for them to lie. And Bell presented no such evidence, just speculation. The misstatements of law shifted the burden, impinged the presumption of innocence and warped the determination of credibility. Bell's due process rights were violated.

C. The prosecutor's misstatements of law warrant the grant of a new trial as plain error or due to ineffective assistance of counsel.

Defense counsel lodged a 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 was not required to make further objections 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. Even though Bell's challenge to the improper comments may be deemed forfeited, he is still entitled to relief as plain error or due to ineffective assistance of counsel.[5]

1. Plain error.

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)[6] 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***.

When a defendant alleges that a prosecutor's statements constituted plain error, as does Bell, the test is whether the statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***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.

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[5] The court of appeals did not reach these claims because it concluded the prosecutor's statements were not improper. ***Bell***, slip op. ¶24 (App. 110).

[6] 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).

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 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 fundamental constitutional rights guaranteed to a defendant at a criminal trial. They lessened and shifted the state's burden of proof, undermining the presumption of innocence, and unfairly limited the jury's ability to assess the credibility of its witnesses.

An argument that the jury could not acquit unless it found the government's witnesses were lying necessitated the grant of a new trial as plain error in ***Vargas***, 583 F.2d at 387. The prosecutor's arguments at Bell's trial were more egregious because they were repeated fourteen times and were combined with the assertion that Bell had to prove why the sisters were lying. Misleading prosecutorial comments "must be viewed with concern; *persistent* … misleading prosecutorial comments must be viewed with alarm." ***United States v. Diaz-Carreon***, 915 F.2d 951, 956 (5th Cir. 1990) (emphasis in original); *see also* ***Morris***, 795 A.2d at 655 (plain error when prosecutor argues the jury may acquit only if it finds the state's witnesses were lying); ***United States v. Segna***, 555 F.2d 226, 230 (9th Cir. 1977) (plain error where prosecutor's argument shifted the burden of proof).

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 trial 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. ***Id***. at ¶¶82-83. At Bell's trial, the impropriety was not limited to two comments. Rather, the prosecutor framed its entire case around the misstatements of law, which began in voir dire and 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 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 here, the jury was left with the impression that the prosecutor's assertions were correct, that is, it could not acquit unless it found the sisters were lying and unless Bell presented evidence showing a reason for them to lie.

The state cannot prove that the misstatements of law 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 prosecutor's statements 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 statements were so harmful because they went to the heart of what the jury had to conclude – whether the state had proven Bell guilty through the testimony of TP and AL – and they lessened the state's burden and shifted it to the defense.

The average juror would trust that the prosecutor would not misstate the law and, therefore, would accept as legally correct the prosecutor's assertions that the jury can't acquit without concluding the sisters 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).

The prosecutor's statements were not only an obvious and substantial violation of Bell's due process rights, they infected the jury's assessment of the complainants' credibility and what amounts to reasonable doubt. The misstatements of law constitute plain error warranting a new trial.

2. Ineffective assistance of counsel.

If Bell's challenge to the prosecutor's improper comments is deemed forfeited and relief is not granted as plain error, 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. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. "'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 statements to the jury. Based upon the circuit court's comments at trial and the postconviction hearing deeming the statements mere advocacy, 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.

Counsel believed the prosecutor's statements were both improper and harmful to the defense. Counsel objected and correctly determined that he had no further obligation to object because it would be futile. 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, counsel's 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. Rather, in order to find Bell not guilty, the jury had to conclude that the sisters were

lying and Bell 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 had little memory about whether he had discussed with Bell whether to move for a mistrial due to the prosecutor's comments. However, he was sure that he had not explained to 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 Bell would have expected that a conviction on any of the sexual assault charges would mean a mandatory life sentence.[7]

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. ***Thiel***, 264 Wis. 2d 571, ¶20, *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. ***Thiel***, 264 Wis. 2d 571, ¶20. "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).

Confidence in the outcome of Bell's trial is undermined because the prosecutor's misstatements of law undercut constitutional foundations of a jury trial, specifically, the presumption of innocence and the state's

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

burden to prove guilt beyond a reasonable doubt. The entire framework of the jury's consideration of the case was distorted by the prosecutor's assertions that the jury 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 Bell's constitutional rights at trial, but counsel's failure to preserve the error, if not reached as plain error, would deprive Bell of a remedy for the violation.

The prejudicial impact of a prosecutor's improper comments about the credibility of its witnesses is particularly grave where, as here, credibility is the linchpin of the state's case. ***State v. Smith***, 2003 WI App 234, ¶22, 268 Wis. 2d 138, 671 N.W.2d 854. In ***Smith***, 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.[8]

[8] 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.

Not unlike 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 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 forensic interview, declaring "it's all bullshit" and "I can't do this." (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 by their mother to lie 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 misstatements materially affected the verdicts. Confidence in the jury's verdicts is undermined.

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 Bell around two legal fictions, that the jury could not acquit without concluding that TP and AL were lying and 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 Bell's trial and require a new trial.

II. 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 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 Bell. As previously noted, the "ultimate issues" of whether counsel's performance was deficient and prejudicial are questions of law reviewed independently. ***Guerard***, 273 Wis. 2d 250, ¶19.

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.[9] Both exhibits contained information that TP was a virgin before she was assaulted by Bell. In one, the sergeant asked if she had "sex before that point" and TP responded, "No." (55:4; App. 194). 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. (64:2; App. 198). 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

[9] The court of appeals assumed without deciding that counsel performed deficiently but concluded "this assumed error would have had little or no impact on the jury …." ***Bell***, slip op. ¶46 (App. 120).

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. (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 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 the doctor who had conducted a pelvic examination of TP approximately a month after the alleged assault and two days after her statement to Sergeant Stickney. She testified that TP had no hymenal tissue. (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 TP had had sexual intercourse at "some point in her life." (85:424-26).

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 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 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 comments to the jury. ***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 Bell of a fair trial with a reliable outcome.

CONCLUSION

Mr. Bell respectfully requests that the court reverse and remand for a new trial.

Dated this 12th day of April, 2017.

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 10,923 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 12th day of April, 2017.

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; and (3) 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 first names and last initials 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 12th day of April, 2017.

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