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 OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MONROE COUNTY, THE HONORABLE MICHAEL J. ROSBOROUGH, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page(s)

Page(s)

TABLE OF AUTHORITIES

Cases

Page(s)

Page(s)

Page(s)

Statutes

Other Authorities

ISSUES PRESENTED

1. Did Bell prove his trial attorney was ineffective for not moving for a mistrial after the trial court overruled his objection that the prosecutor shifted the burden of proof when he argued that, to acquit Bell, the jury would have to find that the victims lied?

The trial court overruled defense counsel's objection that the prosecutor shifted the burden of proof to Bell when he argued that to acquit Bell the jury would have to find that the victims lied. Bell did not couple his objection with a mistrial motion. Defense counsel also did not separately object when the prosecutor argued that there was no evidence of any motive for the victims to falsely accuse Bell.

On postconviction review, Bell renewed his burden-shifting challenge to the prosecutor's closing argument. Bell argued further that trial counsel was ineffective for not coupling his objection with a mistrial motion. Bell also argued that counsel was ineffective for not objecting when the prosecutor argued that there was no evidence of any motive for the victims to lie. The trial court rejected the motion, holding that Bell failed to prove counsel was ineffective. The trial court held with respect to both challenges that the prosecutor's argument did not misstate the law or shift the burden of proof to Bell.

The court of appeals affirmed. It held that the prosecutor's argument did not misstate the law and did not shift the burden of proof to Bell in light of the evidence presented and how the case was tried. Bell failed, therefore, to prove that trial counsel was ineffective in any respect.

2. Was defense counsel ineffective for not redacting from police reports sent to the jury during deliberations the

13-year-old victim's statement 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 police interviews with the two victims. Defense counsel requested 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 the prosecutor and defense counsel.

The postconviction court did not address this claim. The court of appeals held that Bell failed to prove prejudice even assuming the victim's statement should have been redacted.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State assumes that, in granting review, this Court has deemed the case appropriate for oral argument and publication.

INTRODUCTION

Bell was tried for sexually assaulting two teenage sisters. The defense theory shaped from voir dire through closing argument was that the victims are compulsive liars who falsely accused Bell of sexual assault for reasons unknown. The choice for the jury was black and white: If the victims lied, Bell was not guilty. If the victims told the truth, Bell was guilty.

The prosecutor is afforded wide latitude in closing argument. The prosecutor's argument must be reviewed in the context of the entire trial. The prosecutor at Bell's trial used that latitude and context to argue to the jury that the

victims did not lie and, to acquit Bell, the jury must agree with defense counsel that they did lie. While the jury could theoretically have acquitted even if it believed the victims, practically that was not a realistic option in light of the defense presented. The prosecutor also used that latitude and context to draw the reasonable inference, and appeal to common sense, that one who lies will have a reason to lie.

There was no evidence of any reason for the victims to falsely accuse Bell, who was left only to speculate; something the jury is not allowed to do absent evidence to support that speculation. Because the prosecutor's argument did not misstate the law or shift the burden of proof, Bell failed to prove his attorney was ineffective in how he responded to the argument.

STATEMENT OF THE CASE

The trial evidence

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, all alleged to have occurred in July of 2001. (R. 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 life in

[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.1.)

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

The two teenage victims are sisters. One was 13 and the other 17 years old when the assaults occurred during July of 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. (R. 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. (R. 84:230–39.)

The 14-year-old (at the time of trial), 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. (R. 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 latter stages of the party. (R. 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. (R. 86:563–77.)

T.P. testified that she felt pain when Bell had vaginal intercourse with her. (R. 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

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

medical certainty that the 13-year-old had sexual intercourse at some point in her life. (R. 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., and stating that he had "no idea" and "no clue" why the two girls would falsely accuse him of sexual assault. (R. 85:355–63, 418–19, 515.)

The jury instructions and closing arguments

The court gave most of the jury instructions before closing arguments. (R. 87:622–34.) The jury was properly instructed in all of the following respects: on the presumption of Bell's innocence and the State's burden to prove him guilty beyond a reasonable doubt (R. 87:629–30); that the remarks of counsel are not evidence and, more specifically, that the closing arguments of counsel—their conclusions and opinions—are not evidence (R. 87:631); it is the jury's function to assess the weight and credibility of the evidence (R. 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 (R. 87:633–34); and the prosecutor argues before and after the defense closing argument, "because he [the prosecutor] has the burden of proof" (R. 87:634).

In his initial closing argument (R. 87:634–656, Pet-App. 142–164), the prosecutor 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 (R. 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 this length of time. (R. 87:639–40.) He acknowledged that 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 Services (JIPS) petition. (R. 87:641–42.) He argued that both girls delayed reporting the assaults because Bell threatened them. (R. 87:645.) The prosecutor acknowledged that 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. (R. 87:653–54.) The prosecutor argued that John Williams confirmed much of what A.L. and T.P. said about what happened at the party, and provided another perspective. (R. 87:651.)

The prosecutor pointed out that when questioned by police, Bell said he had "no idea" and "no clue" why the girls would falsely accuse him. Bell could only speculate as to reasons for the two sisters, who were friends of his, to falsely accuse him (R. 87:646–47).

The prosecutor maintained that the girls did not lie because they had no reason to lie (R. 87:647), whereas Bell lied to police about his sobriety at the party (R. 87:647–48), lied about when he left the party and denied ever being alone with T.P. at the party. (R. 87:649–50.)

Early in the argument, defense counsel objected that the prosecutor shifted the burden of proof by arguing "we have to believe" the victims lied to social workers and police, and lied in court. (R. 87:636–37.) The court overruled the objection, stating: "Well, this is argument; . . . It's not evidence and there has to be some latitude for advocacy." (R. 87:637.) The prosecutor acknowledged "it could happen" that someone might make up a false sexual assault allegation, "but it's a strange occurrence." (R. 87:638.) He reminded the jurors that they must determine the credibility of the witnesses. (R. 87:654.) He argued that the girls are either telling the truth or are just acting and if the jury believes

their testimony, it is sufficient to prove Bell guilty beyond a reasonable doubt. (R. 87:654–55.) In concluding his argument, the prosecutor reasoned that it is unlikely the two sisters would lie "again and again," and remain consistent for so long about something this extraordinary. (R. 87:655.)

Defense counsel, Attorney John Matousek, then launched into his closing argument. (R. 87:657–675, Pet-App. 165–183.)[3] The focus of his lengthy argument was almost entirely on convincing the jury that Bell was not guilty because the victims lied. First, counsel analogized Bell's trial to the infamous 17th Century "Salem Witch Hunt" trials:

> 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.

(R. 87:657.)

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[3] Nowhere in his brief does Bell even mention his own attorney's closing argument. Bell would apparently prefer that this Court also not consider his argument. When considering the propriety of the prosecutor's closing arguments in the context of the entire trial, this Court cannot ignore defense counsel's closing argument.

> 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.

(R. 87:659.)

> Now, Sergeant Stickney and [Detective] 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.

(R. 87:660.)

After setting this dramatic stage, Matousek insisted that these two victims also lied and he tried to explain to the jury why they would falsely accuse Bell:

> 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.

(R. 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.

(R. 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.[4] 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.

(R. 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

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[4] In positing these possible reasons for the victims to falsely accuse Bell, counsel no doubt was harkening back to the voir dire when several prospective jurors cited jealousy, revenge, the need for attention, and fear of getting in trouble as reasons a teenager might make up a sexual assault allegation. (R. 84:68–71, Pet-App. 136–39.)

> 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.

(R. 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.

(R. 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.

(R. 87:675.)

In his rebuttal to the defense "witch hunt" argument (R. 87:676–82, Pet-App. 184–90), 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. (R. 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. (R. 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 (R. 87:678), and that as instructed the jury could not speculate and search for doubt, but must search for the truth (R. 87:679). The prosecutor 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.

(R. 87:681–82.)

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

The victims' police statements sent to the jury during deliberations

During deliberations, the jury sent a note to the court asking for several exhibits, including reports of police interviews with A.L. and T.P., and the transcript of A.L.'s testimony at the preliminary hearing. (R. 87:687–98.) Defense counsel, the prosecutor and the court agreed to send most of the requested documents to the jury. (R. 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 (R. 87:690), and to redact part of A.L.'s statement to Police Sergeant Stickney from another report (R. 87:692–93). Defense counsel and the prosecutor jointly edited the documents and, as so edited, they were sent into the jury room. (R. 87:696–98.)

The postconviction proceedings

Due to a number of procedural twists and turns, Bell was allowed to bring a *direct* postconviction challenge to his conviction, pursuant to Wis. Stat. § (Rule) 809.30, for the first time in 2015. (R. 132.)[5] Bell raised the same arguments he presents here. 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, Pet-App. 127–134), and in a written order filed December 9, 2015 (Pet-App. 126).

[5] The trial court called these delays "tragic," considering "the rights of the victims and the public to have all this laid to rest at some point." (R2; 143:100, Pet-App. 133.)

Bell claimed in his postconviction motion that the prosecutor shifted the burden of proof to him when he argued that to acquit the jury would have to find the victims lied about the assaults. Bell argued that his trial attorney was ineffective for not coupling his burden-shifting objection, overruled by the trial court, with a mistrial motion. Bell also argued that trial counsel was ineffective for: (a) not objecting at all to the prosecutor's argument that there was no evidence of a motive for the victims to falsely accuse Bell; and (b) not redacting from the police reports sent into the jury room T.P.'s statement that she did not have sex with anyone before Bell forced her to engage in intercourse at her sister's birthday party. Bell also argued that the prosecutor's arguments were "plain error" and he was entitled to a new trial in the interest of justice. (R. 132:10–14.)

The evidentiary hearing addressed the ineffective assistance claims, pursuant to *State v. Machner,* 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Bell's trial attorney, John Matousek, testified at the hearing that he objected when the prosecutor argued that to acquit Bell the jury must believe the victims lied because 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 that they did not lie. (R2; 143:6–7.) After his objection was overruled, Matousek did not renew it thereafter because it would have been "futile" to do so. (R2; 143:11.) Matousek also did not couple his objection with a mistrial motion. (R2; 143:19.) Although he had moved for a mistrial on the first day of trial on another ground (R. 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).

Matousek testified that he wanted the police interviews of both victims to go to the jury room because the reports exposed their 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 statement that she never had sex before the assault by Bell. (R. 55:4, Pet-App. 194; R. 64:2, Pet-App. 198.) Matousek could not recall why he failed to seek redaction of T.P.'s denial that she had sex with anyone before the encounter with Bell at A.L.'s birthday party. Matousek speculated that he may have "goofed up." (R2; 143:24, 35.)

The trial court's decision denying postconviction relief.

The trial court denied the postconviction motion from the bench at the close of the hearing. It held that the prosecutor did not shift the burden of proof; the argument was a reasonable response to the defense theory that the victims lied. (R2; 143:94–101, Pet-App. 127–134.) The court noted that defense counsel went so far as to file a pretrial motion to delay the trial so that perjury charges against the young victims and their mother could be investigated. (R. 90:2–17; R2; 143:95–96, Pet-App. 128–29.) It was reasonable for defense counsel not to seek a mistrial, especially given that the court's pretrial order excluding evidence of other sexual assaults committed by Bell could be revisited at a retrial. Moreover, the court would likely not have granted a mistrial. (R2; 143:96–97, Pet-App. 129–130.) The prosecutor's arguments were unobjectionable "advocacy" that did not shift the burden of proof to the defense, the court concluded. (R2; 143:99, 100, Pet-App. 132, 133.) The court went on to hold that no "harmful error occurred by way of the prosecutor's closing argument." (R2; 143:98, Pet-App. 131.)

The trial court did not address the separate argument that defense counsel was ineffective for not redacting from the police reports sent to the jury during deliberations T.P.'s statement that she never had sex with anyone before Bell assaulted her.

The decision of the court of appeals

Bell appealed. (R. 138; 144.) The court of appeals affirmed in a Decision issued December 1, 2016. *State v. Bell,* Nos. 2015AP2667-CR & 2015AP2668-CR, 2016 WL 7742999, ¶¶ 10–48 (Wis. Ct. App. Dec. 1, 2016) (unpublished). (Pet-App. 101–121.)

The court construed Bell's challenge to the prosecutor's closing argument as twofold: (1) the prosecutor improperly told the jury that in order to acquit Bell it "must believe" the victims lied; and (2) the prosecutor improperly shifted the burden of proof from the State to Bell when he emphasized the lack of evidence of any motive for the victims to falsely accuse Bell. *Bell,* 2016 WL 7742999, ¶ 25.

The court of appeals rejected Bell's challenge to the "must believe" argument. *Id.* ¶¶ 26–30. It held that this argument, to which Bell objected, was made in the context of a trial where "under the only realistic view of the evidence, the jury was presented with two starkly contrasting factual alternatives." *Id.* ¶ 26. In that context, the prosecutor's argument "did not misstate the law" because "the comments are a case-specific argument that this particular jury was faced with just two realistic views of the evidence." *Id.* These were not "statements about what the law requires," but "were presented as comments on the facts in evidence, in particular about the mutually exclusive version of the truth presented in the evidence." *Id.* ¶ 28.

The court of appeals next rejected Bell's claim that the prosecutor shifted the burden of proof when he emphasized the lack of evidence of any motive for the victims to falsely accuse Bell. *Id.* ¶¶ 31–37. The court observed: "It is common sense that people do not lie unless there is a reason behind the lie." *Id.* ¶ 32. "It is also common sense that there is sometimes evidence available to raise at least an inference of one or more reasons for a person to lie. Referring to these common sense ideas did not undermine any legal principle cited by Bell." *Id.* The court also observed that the jury was properly instructed not to speculate about reasons for the victims to lie, and not to search for doubt but to search for the truth. *Id.* "Such speculation could prevent the jury from considering pertinent evidence or from considering the pertinent absence of evidence." *Id. See also id.* ¶ 32 n.3; Wis. JI-Criminal 140 (2000).

The prosecutor's argument did not, the court held, misstate the law and could reasonably be interpreted as follows: "[W]hen people lie, they typically do so for some reason or reasons; in the prosecutor's view, the jury had not been presented with evidence providing any possible reason for AL or TP to lie; and due to the lack of evidence, it would be pure speculation to decide that AL or TP had a reason or motive to lie." *Bell*, 2016 WL 7742999, ¶ 33. The prosecutor properly directed the jury to follow the instruction not to speculate. *Id.* ¶ 34. Rather than serving as a directive for the jury to find the victims credible, the prosecutor's argument, "was to stress the common sense point that people typically do not lie unless there is a reason and that, in the view of

the prosecutor, there was no evidence in this case regarding a reason for AL and TP to lie." *Id.* ¶ 36.[6]

The court next rejected Bell's claim that his trial attorney was ineffective for not redacting from the police reports sent to the jury room the 13-year-old victim's statement that she never had sex with anyone before Bell had intercourse with her at her sister's party. *Id.* ¶¶ 38–48. In holding that Bell failed to prove prejudice, the court noted that the prosecutor never mentioned the victim's "virginity" in closing arguments. *Id.* ¶ 45. It was undisputed, based on an examining pediatrician's testimony, that TP had sexual intercourse with someone, but that fact did not significantly enhance her unredacted statement or the prosecutor's argument that it was Bell who had sex with her. The unredacted statement did not significantly affect "the jury's thinking about the key question, which was whether she was lying in the first place in saying that Bell had sexual intercourse with her." The jury "could just as easily have concluded . . . that TP had had sexual intercourse with one or more men other than Bell before her examination by the physician." *Id.* ¶ 47.[7]

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[6] The court also rejected as insufficiently developed Bell's claim that the prosecutor's closing argument amounted to improper comment on his decision not to testify. *Bell,* 2016 WL 7742999, ¶ 37.

[7] The court also held: "Bell fail[ed] to develop an argument that the jury would have had any reason to view TP's statement that she lost her virginity to Bell as undermining a viable defense theory involving her lack of cooperation during the investigation." *Bell,* 2016 WL 7742999, ¶ 48.

ARGUMENT

I. The court of appeals properly held that the prosecutor's closing arguments, when considered in the context of the entire trial, did not misstate the law and did not shift the burden of proof from the State to Bell. Therefore, Bell failed to prove his trial attorney was ineffective in how he responded to those arguments.

A. The law applicable to a challenge to the propriety of a 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. *United States v. Young*, 470 U.S. 1, 7 (1985); *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. The arguments must be reviewed in context. The reviewing court must evaluate the prosecutor's remarks in light of the entire trial record to determine whether they denied the defendant a fair trial. *State v. Hurley,* 2015 WI 35, ¶ 96, 361 Wis. 2d 529, 861 N.W.2d 174; *Burns,* 332 Wis. 2d 730, ¶ 49; *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). The prosecutor may draw any reasonable inferences from the evidence.

Hurley, 361 Wis. 2d 529, ¶ 95. "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." *Neuser,* 191 Wis. 2d at 136. This Court must uphold the conviction "unless there has been a misuse of discretion which is likely to have affected the jury's verdict." *Id.*

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). S*ee also 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. Draize*, 88 Wis. 2d 445, 455–56, 276 N.W.2d 784 (1979); *State v. Hoffman*, 106 Wis. 2d 185, 220, 316 N.W.2d 143 (Ct. App. 1982). The jury is presumed to have followed those instructions. *State v. LaCount,* 2008 WI 59, ¶ 23, 310 Wis. 2d 85, 750 N.W.2d 780; State *v. Johnston*, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994).

To properly preserve an appellate challenge to the prosecutor's closing argument, the defendant must timely object 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. *See State v. Pinno* & *State v. Seaton,* 2014 WI 74, ¶¶ 8, 56–68, 356 Wis. 2d 106, 850 N.W.2d 207 (the right to challenge on appeal a structural constitutional violation may be forfeited by the defendant's failure to timely object).

B. The law applicable to a claim that counsel was ineffective for not properly objecting to the prosecutor's allegedly erroneous closing argument.

Absent an objection and mistrial motion, the propriety of the prosecutor's closing argument may only be reviewed for plain error or, more apropos here, in the context of a challenge to the effectiveness of trial counsel for not objecting, with the burden of proving both deficient performance and actual prejudice squarely on Bell. *Pinno* & *Seaton,* 356 Wis. 2d 106, ¶¶ 81–82. *See Kimmelman v. Morrison,* 477 U.S. 365, 374–75 (1986).

Bell bore the burden of proving at the postconviction hearing that the performance of his trial counsel was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

To establish deficient performance, it was not enough for Bell to prove that his attorney was "imperfect or less than ideal." *State v. Balliette,* 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334. The determinative issue was "whether the attorney's performance was reasonably effective considering all the circumstances." *Id.* Counsel is strongly presumed to have rendered reasonably competent assistance. *Id.* ¶¶ 25, 27. Bell had to present facts at the postconviction hearing sufficient to overcome that strong presumption. *Id.* ¶ 78. "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland,* 466 U.S. at 690).

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,* 589 F.3d at 356. 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; *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 that counsel's performance sunk to the level of professional malpractice. *State v. Maloney*, 2005 WI 74, ¶ 23 n.11, 281 Wis. 2d 595, 698 N.W.2d 583.

Bell bore the burden of affirmatively proving by clear and convincing evidence at the postconviction hearing that he suffered actual prejudice caused by counsel's deficient performance. He could not speculate. *Balliette,* 336 Wis. 2d 358, ¶¶ 24, 63, 70; *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. Bell had to prove that counsel's errors were so serious they denied him a fair trial, a trial whose result is reliable. *Johnson*, 153 Wis. 2d at 127. Bell had to prove a reasonable probability that, but for counsel's unprofessional errors, 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 State v. Trawitzki,* 2011 WI 77, ¶ 40, 244 Wis. 2d 523, 628 N.W.2d 801; *Johnson*, 153 Wis. 2d at 129.

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.

C. Bell failed to prove ineffective assistance when counsel did not couple his objection to the prosecutor's "must believe" argument with a mistrial motion because, in the context of the defense presented and the evidence as it unfolded at trial, the argument did not misstate the law.

Attorney Matousek objected that the prosecutor shifted the burden of proof to him when he argued that, to acquit, the jury must find the victims lied. Matousek did not couple that objection with a mistrial motion because he believed the case was going well for the defense at that point and he wanted this jury to determine Bell's fate. There was no basis for either an objection or a mistrial motion because, in the context of how the evidence and arguments unfolded at Bell's trial, the prosecutor's argument did not misstate the law; it merely appealed to common sense and drew reasonable inferences.

From the beginning of this trial, Attorney Matousek conditioned the jury for the defense theory to be later developed and argued by him that Bell could not be found guilty because the two sisters lied.

A primary focus of inquiry at voir dire by both the prosecutor and defense counsel was on the credibility of teenage sexual assault accusers in general and on why they might delay reporting, withhold details and falsely accuse someone. (R. 84:65–91, 93–121.) The prospective jurors promised the prosecutor that they would follow the court's instruction that the State bears the burden of proving Bell guilty beyond a reasonable doubt; and promised they would not hold it against Bell if he chose to exercise his right not to testify. (R. 84:92–93.)

Conditioning the prospective jurors for his theory of defense and his closing argument, Matousek inquired whether any of them believed that a teenager might lie about sexual assault, might 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 their need for attention, love or help. (R. 84:115–121.)

Matousek maintained this theme throughout trial. On cross-examination of A.L., counsel established that her mother convinced A.L. to lie at the preliminary hearing about the underage consumption of alcohol at the birthday party. The overall focus of counsel's lengthy cross-examination was on the inconsistencies, changes and forgotten details in A.L.'s accounts over time. (R. 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 corroborate the reports of sexual assault by either of the two sisters. (R. 85:373–74, 392, 403.) Matousek 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. (R. 85:403–09, 414–16.) Her mother waited until one week before trial to tell police for the first time that T.P. was highly intoxicated at the party. (R. 85:327–32.)

On cross-examination of T.P., Matousek 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. (R. 85:471–74.) T.P. admitted she lied about the amount of

alcohol she consumed at the party because she was afraid that she would get in trouble if she told the truth. (R. 85:485.) The overall focus of the cross-examination was on T.P.'s lies, inconsistencies, confusion about details, the influence of others, her poor upbringing and the misconduct of her mother. (R. 85:459–85.)

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

Although Bell decided not to testify (R. 86:590–94), Matousek established on cross-examination of Detective Erickson that Bell denied committing the assaults when interviewed by police in August of 2001 (R. 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. (R. 86:601–02.)

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. There was no *reasonable* hypotheses consistent with innocence. (R. 87:636–38.)

The jury knew its role. It was repeatedly reminded by the parties and the court that it must determine the credibility of the witnesses and weigh the evidence. The jury must 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; the jury could not speculate and search for doubt. It could not be swayed by sympathy, passion or prejudice. The jury presumably followed all of those pattern instructions. *LaCount,* 310 Wis. 2d 85, ¶ 23; *Johnston,* 184 Wis. 2d at 822.

1. Bell failed to prove deficient performance.

The jury found Bell guilty after a fair trial before a properly instructed and impartial jury.

The jury knew, thanks to the efforts of Attorney Matousek, 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 he 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)[8] regardless of their admitted past lies and inconsistencies.

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[8] Bell had no right to ask the jury to ignore the law or the facts presented; and he had no right to an instruction telling the jury that it may do so. *State v. Bjerkaas,* 163 Wis. 2d 949, 960, 962, 472 N.W.2d 615 (Ct. App. 1991). "'[A] defendant has no entitlement to the luck of a lawless decisionmaker.'" *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (quoting *Strickland*, 466 U.S. at 695). *See* also *Lockhart v. Fretwell*, 506 U.S. 364, 369–70 (1993)

The court of appeals properly held that the prosecutor did not misstate the law in the context of this trial. It relied on the decision of the Seventh Circuit Court of Appeals in *United States v. Amerson,* 185 F.3d 676 (7th Cir. 1999). The federal court held it was not improper for the prosecutor to argue: "Who is telling the truth and who is lying here . . . . You simply cannot believe the testimony of these police officers and believe the defendant's testimony at the same time." *Id.* at 680. As in *Amerson,* the prosecutor's argument here told the jurors in essence that it was up to them to decide whether Bell or the victims were telling the truth, "and that it is up to the jury to determine who was more credible when applying the court's jury instructions to the evidence received." *Id.* at 687; *Bell,* 2016 WL 7742999, ¶ 30.

The prosecutor did not present "a biconditional statement" that the jury can acquit "*if and only if*" it finds that the victims lied. *United States v. Common,* 818 F.3d 323, 332 (7th Cir. 2016). The prosecutor did not present the jury "with an improper mandate" that to find Bell guilty it "had to believe that all of the government witnesses *must* have lied." *Id.* ("Rather, the government presented a conditional statement: if the jury believed the officers were lying and framed Common, then the jury should acquit. This did not preclude the jury from acquitting Common for another reason, such as the government not meeting its burden of proof.")[9] *See United States v. Sandoval,* 347 F.3d

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(Blackmun, J., concurring); *State v. Flynn,* 190 Wis. 2d 31, 52, 527 N.W.2d 343 (Ct. App. 1994).

[9] The prosecutor's argument in *Common,* held by the Seventh Circuit to be proper, follows:

627, 632 (7th Cir. 2003) (not improper for prosecutor to suggest that the jury "cannot believe the testimony of the officers and that of the defendant at the same time.") *See also State v. Johnson,* 2004 WI 94, ¶¶ 19–23, 26, 273 Wis. 2d 626, 681 N.W.2d 901 (it is proper for a prosecutor to ask the defendant on cross-examination whether another witness to the same event who gave testimony contradicting his was mistaken or lying; this inquiry primarily helps the jury assess the defendant's credibility and does not significantly bolster the other witness's credibility).

Counsel performed admirably in how he addressed the prosecutor's "must believe" argument. His objection that is shifted the burden of proof was overruled. While counsel could have pointed out in his objection that the jury could acquit if it had reasonable doubt even after finding the victims credible, that was not his defense at all; the defense was that these girls are liars and this is a witch hunt. Given *that* defense strategy, the jury would not have acquitted Bell if it found the girls credible.

> If you believe that [the officers] framed an innocent man that they did not know . . . vote not guilty . . . . [I]f [Common's argument] overcomes the government's evidence and proves that these officers who testified are liars, please acquit the defendant . . . . [T]o discount those officers' testimony, you must find them to be corrupt, reckless, and stupid . . . . How can you determine who lied? . . . You can absolutely reach a verdict, and the Judge is going to instruct you on how to get there. There are two tests that you can walk through and determine . . . who lied to you.

Common, 818 F.3d at 332.

Even assuming the argument strayed close to or over the line, Bell failed to prove deficient performance when counsel did not couple his objection with a mistrial motion. Attorney Matousek had a sound strategic reason for not objecting: he and his client both believed the case was going well and they did not want to take it out of the hands of this jury.

Also, the mistrial motion would have failed. Having already overruled the underlying objection, the trial court would have denied the mistrial motion. More important, a mistrial was not the proper response to the prosecutor's argument. A curative instruction would have been the less drastic and most appropriate remedy for an erroneous argument. *State v. Moeck,* 2005 WI 57, ¶¶ 71–72, 78–79, 280 Wis. 2d 277, 695 N.W.2d 783.

2. Bell failed to prove prejudice.

Even assuming the "must believe" argument was erroneous, and assuming counsel performed deficiently by not coupling his burden-shifting objection with a mistrial motion, Bell failed to prove prejudice. As the trial court determined, there was no "harmful error . . . regardless of whether counsel did or did not object." (R2; 143:98, Pet-App. 131.) *See Common,* 818 F.3d at 832–33 (recognizing that erroneous prosecutorial argument is subject to the harmless error doctrine); *Id.* at 833 ("'improper comments during closing arguments rarely rise to the level of reversible error'" (quoted source omitted).)

Bell insists that "[a]s 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." (Bell's Br. 36.) As a "legal" matter perhaps; as a practical matter, no. Moreover, the prosecutor acknowledged in his argument

that "it could happen" that someone makes up a false sexual assault allegation, "but it's a strange occurrence." (R. 87:638.) While it is possible that the jury could have believed the victims but still found Bell not guilty, there is no reasonable probability of that remote outcome. That was not the defense theory and, if the jury believed the victims, then it would have acquitted only if it could not agree on the nature, time or location of the assaults. Those were not, however, issues of primary concern to the defense. There is nothing to indicate that the jury had difficulty agreeing as to the nature, time and location of the assaults assuming it believed the victims: Bell had vaginal intercourse with A.L. on the bathroom floor when she got out of the shower in early July, he had vaginal intercourse with T.P. in the yard at A.L.'s birthday party in late July and he touched A.L.'s breast on the couch also in late July.

The jury was properly instructed on the state's burden of proof; an instruction the jury presumably followed. *Common,* 818 F.3d at 833; *LaCount,* 310 Wis. 2d 85, ¶ 23. While Bell did not invite the prosecutor's remarks in his initial closing argument, he certainly invited the prosecutor's rebuttal remarks with his impassioned "Salem Witch Hunt" argument in which he accused the girls and their mother of being compulsive liars. Moreover, Bell set the stage for the prosecutor's remarks in both his initial and rebuttal closing arguments by conditioning this jury with his voir dire questions and his cross-examination of the State's witnesses at trial to the defense theory that the sisters lied.

Finally, the prosecutor's "statements were not clearly out of bounds," in light of the defense theory presented, and in light of how this case unfolded from voir dire on. *Common,* 818 F.3d at 833. Bell failed to prove a reasonable probability of a different outcome had the prosecutor stopped at pointing

out the diametrically opposed positons taken by the defense and the state regarding whether the victims lied, and had merely stated that if you (the jury) believe defense counsel's argument that the victims lied, then you should acquit. *Id.* All indications are that, as the law presumes, the jury would have followed the court's instructions, made its own independent assessment of the victims' credibility against Bell's denial and his defense that they lied, and held the State to its burden of overcoming the presumption of innocence with proof beyond a reasonable doubt that the sexual assaults occurred.

D. Defense counsel reasonably decided not to object when the prosecutor properly pointed to the lack of any motive for the victims to falsely accuse Bell; and properly urged the jury not to speculate in the absence of any proof of a motive for them to falsely accuse him.

1. The prosecutor did not misstate the law when he told the jury not to speculate in the absence of evidence.

Bell insists defense counsel should have objected when the prosecutor argued that the jury should not speculate but must search for the truth, that there was no reasonable hypothesis consistent with Bell's innocence, and that there was no reason for the girls to falsely accuse him. (Bell's Br. 24–27.) But, the pattern instructions told the jury just that —do not speculate without evidence to support it:

> 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.

(R. 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.

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

Bell does not challenge the propriety of these time-honored instructions. They are constitutional. *State v. Avila,* 192 Wis. 2d 870, 887–890, 532 N.W.2d 423 (1995), *overruled on other grounds by State v. Gordon*, 2003 WI 69, ¶ 5, 262 Wis. 2d 380, 663 N.W.2d 765; *State v. Cooper,* 117 Wis. 2d 30, 34–37, 344 N.W.2d 194 (Ct. App. 1983); *Bembenek,* 111 Wis. 2d at 641–42. Bell's argument that the jury was 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 and constitutional instructions.

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, and none was offered at trial. The jury should not speculate or search for doubt; there must be a *reasonable* hypothesis consistent with Bell's innocence based on the evidence (or lack thereof) and none was offered here.

In his own closing argument, Matousek speculated as to a number of reasons why the sisters might lie: jealousy, the need for love and attention, the ability to manipulate others to get what they want, the desire to get revenge against their mother, and as a means of survival. Matousek presented no expert testimony to support any of this speculation. He never argued that, because the girls were compulsive liars who no longer knew truth from falsehood, the jury must acquit even if it was persuaded that one or more of the sexual assaults probably occurred.

When Matousek offered possible motives for the sisters to lie—jealousy, revenge, bad upbringing, and cries for attention—he opened the door to the prosecutor's rebuttal argument that there was no evidence to support his 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 the sisters to lie amounted to a reasonable hypothesis consistent with Bell's innocence. *See State v. Saunders,* 2011 WI App 156, ¶ 26, 338 Wis. 2d 160, 807 N.W.2d 679 (the prosecutor did not shift the burden of proof by commenting on the defendant's failure to call a witness, "Paul," who may not even have existed and who could not have corroborated the defendant's alibi. *Id.* ¶¶ 11–

14, 24); *State v. Jaimes,* 2006 WI App 93, ¶¶ 18–26, 292 Wis. 2d 656, 715 N.W.2d 669 (the prosecutor did not shift burden of proof when he pointed out, in rebuttal to the defense argument speculating as to why the State failed to call two witnesses to the defendant's drug deals, that those witnesses have the right not to incriminate themselves and the defense has the same subpoena power as does the State to bring those witnesses to court). *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 (same). The prosecutor drew the reasonable, common sense inference that when someone lies, they will have a reason to lie. When someone falsely accuses another of sexual assault, they will have a reason to do so. *See Hurley,* 361 Wis. 2d 529, ¶ 95 (the prosecutor "is permitted to draw any reasonable inferences from the evidence").

2. Bell failed to prove deficient performance and prejudice.

Because the prosecutor's argument was proper and an eminently reasonable response to defense counsel's strident "witch hunt" attack on the victims' credibility, there was no reason for counsel to object. Counsel was not ineffective for failing to interpose a meritless objection. *E.g., 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.

Bell failed to prove prejudice. The court of appeals was right: it is a matter of plain common sense that one who lies usually has a reason to lie. A lie is not an involuntary act. A lie cannot reasonably be divorced from motive and intent. One does not accidentally lie. One might falsely accuse by

mistake or misperception. But, one does not *intentionally* falsely accuse by mistake; there has to be a reason for that person's intentional decision to lie about something as grave as sexual assault. Lacking any concrete reason, Bell's attorney could only speculate. The prosecutor properly pointed that out to the jury.[10]

II. The court of appeals properly agreed with the trial court that Bell did not prove actual prejudice to his defense caused by counsel's failure to redact from the police report sent in to the jury during deliberations the 13-year-old victim's statement that she never had sex before Bell assaulted her.

As discussed above, the jury asked to view various documents during deliberations, including the summaries of the police interviews with the two sisters. Defense counsel asked that all of the requested exhibits be sent to the jury but with some edits and redactions. The court agreed. (R. 87:687–98.) 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 room with the trial court's approval. (R. 87:693–98.) 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'

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[10] In his zeal, Bell accuses the trial prosecutor of "cheat[ing] by repeatedly striking foul blows." (Bell's Br. 36.) This smacks of an accusation that the prosecutor intentionally engaged in misconduct. The charge is baseless. The State categorically denies that its diligent prosecutor "cheated" to gain an unjust conviction. The trial court and the court of appeals did not believe that the prosecutor's appeal to common sense, and his reasonable response to the defense proof and argument, was "cheating;" nor should this Court.

accounts. Counsel did not, however, ask the court to redact the portion of the interview where 13-year-old T.P. told police she never had sex before Bell assaulted her at her sister's birthday party in late July, 2001. Bell argues that Attorney Matousek was ineffective for not having this portion of T.P.'s statement redacted from the reports sent to the jury.

The trial court on postconviction review did not rule on this aspect of Bell's motion. It addressed only the issues relating to the prosecutor's closing argument. The court of appeals addressed the issue and correctly ruled that Bell failed to prove actual prejudice. There is no reasonable probability of a different outcome had the statement been redacted.

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 did not lose it to Bell.

Second, T.P. was 13 years old in July of 2001. It would come as no great shock to the jury, assuming it found that Bell had intercourse with T.P., that it was her first 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. T.P.'s unredacted statement that Bell "took her virginity did not differ in any significant way from her allegation that [Bell] had intercourse with her when she was [13] 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 that they revealed the falsehoods and inconsistencies in the sisters' accounts. If the jury agreed with counsel that their stories did not withstand

scrutiny, T.P.'s denial of any previous sexual experience would also not hold up. Because the jury learned through the pediatrician that T.P. likely had engaged in sexual intercourse at some point in the past (R. 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, as the court of appeals noted, the prosecutor never mentioned T.P.'s virginity in his closing arguments and her unredacted statements "were not a focus of the arguments at trial." *Bell,* 2016 WL 7742999, ¶ 45.

Sixth, T.P. told police and testified without objection that she felt significant pain when Bell inserted his penis into her vagina. (R. 55:4, Pet-App. 147; R. 64:2, Pet-App. 151; R. 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 statement 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; that pain was caused by someone else. If the pediatrician was correct that she had sexual intercourse with someone, it was not with Bell. *Bell,* 2016 WL 7742999, ¶ 47.

There is no reasonable probability of an acquittal had the jury learned, as it did from the pediatrician, that T.P. was no longer a virgin but had not learned that T.P. told police she lost her virginity to Bell. As defense counsel argued to the jury, this case rose and fell on 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. If T.P. was lying about Bell, then she lost her virginity to someone else.

Of greater significance, readily apparent from reading the police reports, was T.P.'s becoming emotionally overwhelmed and having difficulty discussing the details of the assault during the interviews. (R. 55, Pet-App. 144–49; R. 64, Pet-App. 1150–51.) As the prosecutor aptly argued, 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 13-year-old at her sister's birthday party in July of 2001. Redaction would not "have reasonably tipped the scales to any meaningful degree in favor of the defense." *Bell,* 2016 WL 7742999, ¶ 48.[11]

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[11] Because there was no error and because Bell failed to prove ineffective assistance, it follows that there was no "plain error." *See State v. Romero*, 147 Wis. 2d 264, 275–76 n.3, 432 N.W.2d 899 (1988); *State v. Sonnenberg*, 117 Wis. 2d 159, 178, 344 N.W.2d 95 (1984) ("plain error" rule is to be applied only sparingly when the waived or forfeited error resulted in the denial of a fundamental constitutional right or the substantial impairment of the right to a fair trial). Bell failed to prove that his attorney's failure to properly object to the prosecutor's argument involved error that was "fundamental, obvious, and substantial." *State v. Jorgensen,* 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77. For the same

CONCLUSION

Therefore, the State of Wisconsin requests that the decision of the court of appeals be affirmed.

Dated: June 1, 2017.

Respectfully submitted,

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reasons that Bell failed to prove prejudice, discussed above, the state has shown that any error was harmless. *Id. See Common,* 818 F.3d at 833 ("'improper comments during closing arguments rarely rise to the level of reversible error'" (quoted source omitted)).

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,361 words.

_____
DANIEL J. O'BRIEN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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: June 1, 2017.

_____
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