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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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. The Prosecutor Repeatedly Misstated the Law When He Told Jurors That in Order to Acquit Mr. Bell They Must Conclude the Teenagers Were Lying and There Must Be Evidence of a Reason for Them to Lie, Misstatements That Warrant a New Trial as Plain Error or Due to Ineffective Assistance of Counsel.

The state and Mr. Bell agree on at least one thing. Without any DNA evidence, any other witnesses to the alleged assaults or a confession from the accused, the state's case hinged on the testimony of TP and AL. Defense counsel's task at trial was to cast doubt on their credibility by, as the state highlights, focusing on inconsistencies, AL's delayed reporting, TP's lack of cooperation and their mother's directive that they lie about how much TP had to drink.

Although their credibility – or lack of credibility – was the centerpiece of trial, that reality does not somehow turn the prosecutor's patently improper misstatements of law into permissible advocacy. Instead, that reality demonstrates why the misstatements, which made it harder for the jury to acquit, were not only improper but "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Hurley***, 2015 WI 35, ¶96, 361 Wis. 2d 529, 861 N.W.2d 174. Consequently, a new trial is warranted as plain error or due to ineffective assistance of counsel.

A. Improper to tell jurors that to acquit Mr. Bell they must conclude TP and AL were lying.

The prosecutor did not merely tell jurors, as the state contends, "that it was up to them to decide whether Bell or

the victims were telling the truth …." (State's brief, p. 26). The prosecutor laid out for the jury a bright-line rule that it could not acquit unless it concluded the sisters were lying. After telling the jury that the "[f]irst thing I want to talk about is the State's burden of proof" (87:635), the prosecutor asked, "What must we believe … for the defendant to be not guilty?" (87:636). He then provided the answer: the jury must believe TP and AL are lying. (*Id*.). He did so not once but fourteen times.

The prosecutor's argument is what has been condemned as a "false dilemma", ***United States v. Amerson***, 185 F.3d 676, 687 (7th Cir. 1999), *citing* ***United States v. Vargas***, 583 F.2d 380, 387 (7th Cir.1978), and a "bright-line argument", ***United States v. Briseno***, 843 F.3d 264, 271 (7th Cir. 2016), that the jury cannot acquit the defendant unless it concludes the government's witnesses were lying. The argument distorts the state's burden because it did not allow the jury to acquit Bell if it had reasonable doubt about the witness' veracity. The jury could acquit only if it concluded they were lying.

None of the cases relied upon by the state involves an argument, as occurred here, that the jury can acquit only if it concludes the state's witnesses were lying. ***Amerson***, 185 F.3d at 680 ("You simply cannot believe the testimony of these police officers and believe the defendant's testimony at the same time."); ***United States v. Common***, 818 F.3d 323, 332 (7th Cir. 2016) ("If you believe that [the officers] framed an innocent man … vote not guilty"); ***United States v. Sandoval***, 347 F.3d 627, 632 (7th Cir. 2003) ("you would have to conclude that the police officers were not telling the truth if you're going to accept the defendant's testimony"). In none of those cases did the prosecutor set forth a bright-line rule for the jury that it could not acquit unless it concluded

the state's witnesses lied. Such an argument is widely condemned as misstating the burden of proof because the jury *can* acquit without concluding the government's witnesses lied, even in a case where testimony of "the prosecution and defense witnesses contained unavoidable contradictions …." ***Vargas***, 583 F.2d at 387. (*See* federal and state cases cited in Bell's brief-in-chief, pp. 17-21).

Quoting ***Common***, 818 F.3d at 332, the state maintains that 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.'" (State's brief, p. 26). Its characterization is belied by the prosecutor's words. The prosecutor told the jury ten times that we "have to believe" and four times that we "must believe" that the sisters are lying in order for the defendant to be found not guilty. (87:636-40). As in ***Briseno***, 843 F.3d at 271, the prosecutor "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" were lying. (Emphasis in original).

The argument distorted the state's burden because it did not allow for an acquittal without the jury concluding that TP and AL lied. The state recognizes that a "lie is not an involuntary act" and that "[o]ne does not accidentally lie." (State's brief, p. 33). The prosecutor told the jury it could not acquit unless it concluded the girls lied, an act understood as an intentional falsehood. The argument foreclosed for the jury the possibility of a not guilty verdict if the jury had reasonable doubt about their veracity but could not conclude they were lying. *See* ***Vargas***, 583 F.2d at 387. The jury might conclude that the sisters probably were telling the truth but that inconsistencies, delayed reporting or the lack of corroborating evidence created doubt about Bell's guilt. Or

the jury might conclude that the sisters were probably not telling the truth. Or the jury might be uncertain what actually happened. Under the "rule" set forth by the prosecutor the jury could not acquit under any of those scenarios because an acquittal was possible only if the jury concluded the sisters were lying.

B. Improper to tell jurors there must be evidence of a reason why the witnesses are lying.

The state attempts to sanitize the prosecutor's statements that there must be evidence of a reason for the sisters to lie and Bell has presented no such evidence, just speculation, by ignoring both what the prosecutor actually said and when he said it.

The state characterizes the prosecutor's statements as merely an argument that there was no reasonable hypothesis consistent with Bell's innocence. (State's brief, pp. 30, 32). In fact, the prosecutor framed its case around his contention that there must be evidence of a reason for TP and AL to lie and the defense has not presented any such evidence. These comments began in voir dire, were further developed in closing argument and revisited in rebuttal. (*See* Bell's brief-in-chief, pp. 6-8, 10-11). By arguing that the defense had presented no evidence of a reason/motive for the girls to lie, the prosecutor impermissibly shifted the burden of proof.

The court should reject the state's contention that defense counsel "opened the door" to the prosecutor's argument by in closing argument offering possible motives for the sisters to lie. (State's brief, p. 32). Virtually every case cited by the state to support its contention is distinguishable because the challenged statements were made by the prosecutor in rebuttal argument in response to statements made in defense counsel's closing. *See*

United States v. Young, 470 U.S. 1, 17-18 (1985); ***State v. Jaimes***, 2006 WI App 93, ¶24, 292 Wis. 2d 656, 715 N.W.2d 669; ***State v. Patino***, 177 Wis. 2d 348, 376-77, 502 N.W.2d 601 (Ct. App. 1993). Here, the prosecutor launched his improper comments in voir dire and revisted them in closing argument, without any "opening salvo" by defense counsel. ***Young***, 470 U.S. at 12.

In addition to noting the timing problem, the court of appeals correctly recognized that a claim that the defense invited the prosecutor's argument cannot "excuse a prosecutor from *affirmatively misstating* a legal proposition to the jury …." ***State v. Bell***, slip op. ¶12 n.1 (emphasis in original). The state offers little response to Bell's argument that the prosecutor's assertions affirmatively misstated the law governing the jury's consideration of the evidence by conflating the reasonable doubt instruction with the instruction on the credibility of witnesses. Indeed, the state's brief does not even mention the credibility instruction, Wis JI-Criminal 300 (2000).

Bell's argument is not that the jury "was free to speculate and search for doubt …." (State's brief, p. 31). Rather, the prosecutor misstated the law by telling jurors that they may acquit only if the sisters are lying and only if there is evidence of a reason for them to lie. Neither the instruction on credibility nor reasonable doubt requires the jury to believe a witness unless there is evidence showing a reason for the witness to lie. Contrary to the prosecutor's assertions, the pattern instruction on credibility allows a jury to disbelieve or doubt a witness' testimony without any evidence establishing a motive for the witness to lie. The prosecutor's primer to the jury on what it must find in order to acquit, which began in voir dire and continued in closing

argument, misstated the law governing the jury's consideration of the evidence.

C. The prosecutor's misstatements of law warrant a new trial as plain error.

The state does not develop an argument in response to Bell's claim that the prosecutor's misstatements of law warrant a new trial as plain error and, instead, addresses the claim in a footnote. (State's brief, p. 37 n.11). Without an argument from the state to which he can respond, Bell will rely on the arguments and authority in his brief-in-chief (pp. 28-31). However, it is the state that carries the burden of proving 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. Because the state has not developed an argument in response to Bell's plain error claim, this court should hold that, if the prosecutor's misstatements amount to plain error as Bell has argued, the state did not meet its burden of proving the error harmless.

D. In the alternative, a new trial is warranted due to ineffective assistance of counsel.

The state maintains that counsel did not perform deficiently in failing to preserve an objection to the prosecutor's comments because the comments did not misstate the law. Above and in his brief-in-chief, Bell has established the impropriety of the arguments. Counsel's failure to preserve his objection by moving for a mistrial was both deficient and prejudicial.

No doubt, as the state argues, whether the jury would find TP and AL credible witnesses was the main issue at trial, for both the state and defense. But the fact that their credibility mattered at trial – a situation not unusual in a

sexual assault case lacking physical evidence, other eyewitnesses or a confession – does not make the prosecutor's misstatements of law permissible. Instead, it means that the misstatements are prejudicial and reversal is required. *See, e.g.*, ***People v. Wilson***, 557 N.E.2d 571, 573-75 (Ill. App. Ct. 1992) (where there were no eyewitnesses to the sexual assault other than the victim, the prosecutor's comment that to believe defense witnesses the jury must find the state witnesses lied warranted reversal); ***Morris v. State***, 795 A.2d 653, 661 (Del. 2002) (even though the state had two witnesses to the assault, reversal was required due to the prosecutor's assertion that to find the defendant not guilty the jury must conclude the state's witnesses lied, because it "attacked witness credibility which was indisputably a central issue").

Contrary to the state's assertion, for at least two reasons, this court cannot reasonably conclude that because the circuit court instructed the jury on the state's burden of proof the prosecutor's misstatements did not affect the jury.

First, although counsel properly objected to the prosecutor's closing argument, the court overruled the objection and, in the jury's presence, characterized the statements as mere "advocacy during the course of argument." (87:637). This is not a case where the court not only sustained the objection but, in front of the jury, chastised the prosecutor by commenting, "'Counsel, you know better than that.'" ***State v. Davidson***, 2000 WI 91, ¶82, 236 Wis. 2d 537, 613 N.W.2d 606. Nor is this a case where, when defense counsel objected to the prosecutor's assertion that in order to acquit the jury must conclude that all of the government's witnesses are lying, the court sustained the objection and immediately gave a curative instruction. ***United States v. Reed***, 724 F.2d 677, 681 (8th Cir. 1984). Here, the jury was

left with the erroneous impression that the prosecutor's statements were a correct statement of law. *See* ***United States v. Richter***, 826 F.2d 206, 209 (2nd Cir. 1987) (in response to defendant's objection court should have clarified the prosecutor's argument – that if the jury finds the FBI agents are telling the truth then the defendant is guilty – was an improper statement of the law).

Second, the prosecutor's misstatements were far from an isolated comment, *see* ***Davidson***, 236 Wis. 2d 537, ¶88, but, rather, framed the state's entire case from voir dire through rebuttal argument. The prosecutor set forth a two-pronged theme that, in order to find Bell not guilty, the jury had to conclude the sisters were lying and the defendant has to present evidence showing a reason for them to lie. Although both are misstatements of law, the "average jury" will have "confidence" that a prosecutor will "faithfully" observe his duty to refrain from improper methods. ***Berger v. United States***, 295 U.S. 78, 88 (1935). Bell was prejudiced by the prosecutor's repeated and uncorrected misstatements of law, and counsel's failure to preserve an objection to those misstatements was deficient.

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

The state does not dispute that: (1) evidence that 14-year-old TP had not had sexual intercourse before the

assault by Bell was inadmissible;[1] and (2) trial counsel performed deficiently by failing to redact the inadmissible information from exhibits sent to the jury during deliberations. The state's sole response is that Bell was not prejudiced.

The state's argument ignores the heart of Bell's claim, which is that it was the combination of the inadmissible evidence with the testimony of the pediatrician who examined TP that makes the inadmissible evidence particularly prejudicial. Bell does not disagree with the state that "[p]roof that T.P. lost her virginity to Bell 'is not more prejudicial than testimony that [Bell] had intercourse with a 14-year-old child.'" (State's brief, p. 35, *quoting* ***State v. Burns***, 2011 WI 22, ¶39, 332 Wis. 2d 730, 798 N.W.2d 166). But evidence that TP was a virgin before the assault by Bell is prejudicial because when combined with the pediatrician's testimony it corroborates – in part, through inadmissible evidence – TP's testimony that she was assaulted by Bell.

The pediatrician who examined TP a month after the alleged assault testified that TP had no hymenal tissue. (85:423). Based upon that fact 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). The jury might conclude from that testimony, as suggested by defense counsel and the state (R2, 143:24-25) (state's brief, p. 36), that TP was a sexually active teenager who lost her virginity not to Bell but to someone else.

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[1] The state writes that TP was 13 at the time of the alleged assault but, in fact, she was 14. TP was born on February 9, 1987 (85:43), and the alleged assault occurred on or about July 20, 2001. (72). TP was 14 at the time of the alleged assault and 15 when she testified at trial in September of 2002.

That conclusion becomes much less likely in the face of the inadmissible evidence that TP told Sergeant Stickney that she had never had sex before she was assaulted by Bell and Stickney's notation that TP seemed to "have little knowledge about sex." (64:2). "She could not say if [Bell] ejaculated or even if she knew what that meant." (*Id.*). This inadmissible evidence, combined with the doctor's finding, corroborated TP's claim that she was assaulted by Bell. While the doctor merely opined that it was likely TP had sexual intercourse at some point in her life, the inadmissible evidence would have led the jury to believe that TP was not a sexually experienced teen but, rather, a virgin until she was assaulted by Bell. The results of the examination combined with the inadmissible evidence prejudiced Bell because they corroborated TP's claim that he assaulted her.

Absent from the state's response is any acknowledgement about the closeness of the case. But for the pediatrician's testimony, the state had no physical evidence corroborating the sisters' allegations. Even though there were other people, sometimes multiple people, present when the alleged assaults occurred, the state did not produce any witness who saw or heard anything to support the sisters' claims.[2] Defense counsel ably elicited inconsistencies in their claims. But he "goofed up" when he failed to redact the inadmissible information from exhibits sent to the jury during deliberations. Because this was a close case, where "[c]redibility hung in the balance", the "slightest wisp of influence could have directed the course of the jury's

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

determination." ***State v. Smith***, 2003 WI App 234, ¶22, 268 Wis. 2d 138, 671 N.W.2d 854. Bell was prejudiced by the unredacted information that unfairly bolstered TP's credibility.

CONCLUSION

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

Dated this 15th day of June, 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 2,984 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 15th day of June, 2017.

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