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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2018AP186-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

FREDERICK EUGENE WALKER,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND
SENTENCE ENTERED IN THE MILWAUKEE COUNTY
CIRCUIT COURT, AND ORDER DENYING
POSTCONVICTION RELIEF, THE HONORABLE JEFFREY A.
WAGNER PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND
APPENDIX

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ISSUES PRESENTED

Is Walker entitled to a new trial because he received ineffective assistance of counsel in that trial counsel failed to object at trial and move for a mistrial due to testimony from one witness, N.S., that the complaining witness, T.C.B., was telling the truth.

The trial court answered: no.

Is Walker is entitled to a new trial in the interest of justice because of the improper admission of N.S.'s testimony that T.C.B. was telling the truth.

The trial court answered: no.

Is Walker entitled to a new trial because the circuit court erroneously exercised discretion in failing to allow Walker to counter T.C.B.'s testimony that she had obtained birth control because she was sexually active, with evidence that the sexual activity T.C.B. referenced was not with Walker.

The circuit court answered: no.

Did the circuit court err in denying Walker's postconviction motion without an evidentiary hearing?

The circuit court did not consider this issue.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel would welcome oral argument should this Court determine that such argument would be helpful in addressing the issues presented in this brief.

Counsel believes that publication will not be warranted as this appeal involves the application of well-established law to a particular set of facts.

STATEMENT OF THE CASE

The State initially charged Walker with Second Degree Sexual Assault of a Child. 5:1. The complaint alleged that Walker had sexual intercourse with T.C.B., the fifteen year old

daughter of his then girlfriend. 1:1-2. The State amended the original information to assert a charge of repeated sexual assault of a child. 14:1. After various pre-trial hearings, the matter proceeded to a two day jury trial wherein the jury found Walker guilty as charged in the amended information. 74:1-6. Following a pre-sentence investigation, the circuit court sentenced Walker to 17 years confinement and 10 years extended supervision. 29:1-2. Walker timely filed a notice of intent to pursue postconviction relief, 31:1-2, pursuant to which the State Public Defender appointed initial postconviction counsel. Walker's initial postconviction counsel filed a No-Merit Notice of Appeal and a No Merit Report which this court rejected. 42:1-5. In rejecting the No Merit Report, this court identified the very issues brought forth in this appeal. 42:1-5. This court directed the SPD to consider appointment of new counsel, dismissed the no merit appeal, and enlarged the deadline to file a postconviction motion. 42:5. The SPD appointed the undersigned counsel as successor postconviction counsel for Walker. 47:1. By and through counsel,

Walker filed a postconviction motion which asserted the precise issues identified in this court's order rejecting the no merit report. 46:1-10. The circuit court denied the motion without an evidentiary or non-evidentiary hearing. 54:1-3; Ap.100-102. Walker filed a notice of appeal, 55:1, and these proceedings follow.

STATEMENT OF FACTS

Facts pertaining to N.S.'s testimony that T.C.B. was telling the truth.

During its case-in-chief, the State called T.C.B. as a witness. 72:14. T.C.B. testified that on various occasions Walker touched her butt, 72:19-20, exposed his penis to her, 72:20, and engaged in sexual intercourse with her. 72:20. T.C.B. testified that she had sexual intercourse with Walker in her mother's bedroom, 72:20-21, twice in the dining room, 72:22-23,27, once in the living room, 72:28, and once in her bedroom. 72:29. T.C.B. testified that the intercourse was penis-to-vagina. 72:30.

Following T.C.B.'s testimony, the State elicited testimony from T.C.B.'s mother, N.S., regarding the first time she had a conversation with T.C.B. about her allegations against Walker. 72:83. The State elicited the following testimony from N.S.:

Well, my emotions went—I just broke down crying. I didn't—that this can't—I don't—and so then when I went to the—I looked at her, and when I looked at her face, I'm like she doesn't lie. She's not going to lie. I'm like, I just can't believe—and I just honestly could not believe that the situation she was in took place. And quite honestly, just was baffled. I was stuck for a long time. Still kind of numb about the situation. But (T.C.B.) don't lie. 72:83:Ap.106-108.

Trial counsel failed to object or move for a mistrial in response to the testimony.

Facts pertaining to testimony that T.C.B. had obtained birth control because she was sexually active.

During T.C.B.'s testimony, the prosecutor asked T.C.B. if she was using condoms during the alleged sexual intercourse with Walker:

Q: Were you using condoms at all?

A: Yes.

Q: Okay. Whose condoms were they?

A: Since my dad asked me a question on a random day, he asked me was I having sex or being sexually active. I told him yeah. So him and his girlfriend took me and (T.) to Planned Parenthood. And they got me to take the Depo shot. And they gave me the pill—I mean they gave me like the extra condoms in a bag. So I kept them in the top drawer.

So he went there. I actually went in my mom's room because I didn't need them. I wasn't doing anything. So it was like everytime he would do it, he would go into the drawer and take the condoms out of there. 72:26;Ap.110.

Following such testimony, trial counsel moved during a sidebar that Walker be allowed to introduce evidence to clarify that T.C.B. had obtained the condoms because she was sexually active with persons other than Walker:

When—when (T.C.B.) was testifying, she had been asked by the state about where the condoms came from. And she indicated that she had been asked by her father if she was sexually active. She said yes. He got her Depo shots and got her condoms And we had previously, I think properly, I was told, you know, we're not getting into her sexual history. I didn't have a problem with that. But when that comes out in front of the jury, it's not—it was never made clear to them. And I asked about it, and you said no. That I could get into, wait a minute, when she's talking about being sexually active here, he's (sic) not talking about being sexually active with the defendant, at least not according to all the police reports and things that I received.

And I felt that was prejudicial because it makes it appear as though she was being sexually active with the defendant and therefore that's why she was getting into birth control. At least, that's the impression that I think the jurors are left with. 73:3-4;Ap.104-105.

The circuit court denied Walker's motion to introduce evidence to counter T.C.B.'s testimony. 73:4;Ap.105.

Facts pertaining to Walker's postconviction motion.

Walker's motion for new trial asserted the following issues:

1. Walker received ineffective assistance of counsel in that trial counsel failed to object at trial and move for a mistrial due to the admission of testimony from one witness, N.S., that another witness, in this case the complaining witness, T.C.B., was telling the truth.
2. Walker is entitled to a new trial in the interest of justice because of the improper admission of N.S.'s testimony that T.C.B. was telling the truth.
3. The circuit court erroneously exercised discretion in failing to allow Walker to counter T.C.B.'s testimony that she had obtained birth control because she was sexually active, with evidence that the sexual activity T.C.B. referenced was not with Walker. 46:1.

The motion requested an evidentiary hearing. 46:10. The circuit court denied the motion in a two and a half page decision. 54:1-3;Ap.100-102. The circuit court denied the motion without an evidentiary or non-evidentiary hearing. 54:1-3;Ap.100-102. The circuit court determined that it would have ruled against an objection or motion for mistrial based on N.S.'s testimony. 54:2;Ap.100-102. The circuit court found that N.S.'s testimony "was more about her own emotional struggle rather than vouching

for her daughter's truthfulness," 54:2;Ap.100-102. The circuit court additionally found that N.S.'s testimony was proper under Wis. R. Evid. 906.08 "which permits evidence of character with regard to truthfulness or untruthfulness after an attack on a witness's character." 54:2;Ap.100-102. During opening statement, trial counsel emphasized that T.C.B. had given many different versions regarding her allegations that Walker had sexually assaulted her. 71:61-63. The circuit court found that such statements by trial counsel amounted to an "attack on the victim's credibility" so as to allow N.S.'s testimony. 54:2;Ap.100-102. For these reasons, the circuit court denied Walker's claims that he was entitled to a new trial on grounds of ineffective assistance of counsel and in the interest of justice. 54:2;Ap.100-102. With respect to Walker's claim that the circuit court erred in refusing to allow him to counter T.C.B.'s testimony that she had obtained birth control because she was sexually active, with evidence that the sexual activity T.C.B. referenced was not with Walker, the circuit court determined that the evidence sought to be admitted by

Walker “would only have amounted to a fishing expedition into how the victim had been sexually active.” 54:2;Ap.100-102. The circuit court determined that it “would not have allowed evidence of the victim’s prior behavior under the rape shield law in this instance or any of its exceptions.” 54:2;Ap.100-102.

ARGUMENT

I. Walker is entitled to a new trial because he received ineffective assistance of counsel and because the circuit court erred in excluding evidence regarding the complaining victim’s sexual activity with others.

A. Walker received ineffective assistance of counsel in that trial counsel failed to object at trial and move for a mistrial due to N.S.’s testimony that T.C.B. was telling the truth.

Criminal defendants are constitutionally guaranteed the right to counsel under both the United States Constitution and the Wisconsin Constitution. U.S. Const. amends. VI, XIV; Wis. Const. art. I, §7. The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759,

771 n.14 (1970)); *State v. Trawitzki*, 2001 WI 77, ¶39, 244 Wis.2d 523, 628 N.W.2d 801. In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's representation was deficient. *Strickland*, 446 U.S. at 687. The defendant must also show that he or she was prejudiced by the deficient performance. *Id.* Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *Id.* at 688. When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Williquette*, 180 Wis.2d 589, 605, 510 N.W.2d 708 (1993). In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Strickland*, 466 U.S. at 694. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." *State v. Pitsch*, 124 Wis.2d 628, 642, 369 N.W.2d 711 (1985). A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Trawitzki*, 244 Wis.2d 523, ¶19. This court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." *State v. Knight*, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540 (1992). Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law subject to de novo review. *Id.*

The rule is long established that "[n]o witness, expert or otherwise should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." See *State v. Haseltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Indeed, Wisconsin courts have recognized that testimony from one witness that another witness is telling the

truth can interfere with the jury's role and require reversal in the interest of justice. See *State v. Romero*, 147 Wis.2d 264, 277-278, 432 N.W.2d 899 (1988) (erroneously admitted testimony from social worker and police officer that victim was being honest required a new trial in the interest of justice); see also, *State v. Echols*, 2013 WI App 58, ¶¶ 26-27, 348 Wis.2d 81, 831 N.W.2d 768 (error to deny motion for mistrial after lay witness testified that defendant stutters when lying, particularly in a case that depends substantially on a credibility assessment); see also, *State v. Tutlewski*, 231 Wis.2d 379,391, 605 N.W.2d 561 (1999)(testimony by one witness that complaining witnesses were incapable of lying constituted reversible error). N.S.'s testimony was the type of evidence prohibited by *Haseltine*, *Romero*, *Tutlewski* and *Echols*. N.S. presented to the jury testimony that T.C.B. was telling the truth regarding her allegations against Walker. N.S. in fact repeated three times that T.C.B. "doesn't lie," "don't lie," and is "not going to lie". *Haseltine*, *Romero*, *Tutlewski* and *Echols* were published decisions that existed well before this case went to trial.

As such, trial counsel should have known that he had a viable basis under Wisconsin law to object to N.S.'s testimony and move for a mistrial because of it. Trial counsel's failure to do so was objectively unreasonable and deficient. The circuit court however disagreed. In denying Walker's motion, the circuit court determined that it would have rejected an objection or motion for mistrial based on N.S.'s testimony. 54:2;Ap.100-102.¹ In making such determination, the circuit court determined that N.S.'s testimony "was more about her own emotional struggle rather than vouching for her daughter's truthfulness." 54:2;Ap.100-102. This determination was erroneous. To the extent such finding by the circuit constituted a factual finding that N.S. did not vouch for T.C.B.'s truthfulness, such determination was clearly erroneous. N.S. plainly vouched for T.C.B.'s truthfulness. She did so three times. That N.S.'s testimony also pertained to her "emotional struggle" did not negate the fact that it constituted impermissible testimony that her daughter was telling the truth. If anything,

¹ Walker interprets the circuit court's determination in this regard to be a finding the trial counsel was not deficient. In making the determination, the circuit court adopted the first argument advanced by the State in its response to Walker's motion for new trial, that trial counsel was not deficient. See 51:3-7.

N.S.'s "emotional struggle" enhanced the problematic nature of her testimony that T.C.B. wasn't lying. A juror could reasonably infer from N.S.'s testimony that as T.C.B.'s mother she knew T.C.B. better than anyone, that she knew if T.C.B. was lying or telling the truth, and that the jury should believe T.C.B. because T.C.B. "doesn't lie" and is "not going to lie." If the testimony from a social worker and police officer that an alleged victim is telling the truth is inadmissible, see *Echols* supra, so too is testimony from an alleged victim's mother. After all, a parent's testimony would reasonably have a more emotional or visceral appeal to a jury than that of a social worker, police officer or other professional. With respect to the circuit court's determination that trial counsel, in opening statement, made an "attack on the victim's credibility" so as to allow N.S.'s testimony about her daughter's truthfulness, 54:2;Ap.100-102, such determination was also erroneous.² Wis. R. Evid. 906.08(1)(b) provides in relevant part as follows:

² To the extent that such finding by the circuit court constituted a factual finding regarding trial counsel's actions, such finding was clearly erroneous.

...evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Trial counsel never once attacked T.C.B.'s credibility during opening statement. Trial counsel never suggested that T.C.B. in general had an overall propensity or character for lying and that she was therefore lying in this instance. All trial counsel did was indicate to the jury that T.C.B. had given inconsistent statements and different versions of what happened with respect to her interaction with Walker. 71:61-63. This is different from attacking T.C.B.'s credibility in general. As the Wisconsin Supreme Court held in *State v. Eugenio*, 219 Wis.2d 391, 402, 579 N.W.2d 642 (1998), rehabilitative evidence under Rule 906.08(1) is only appropriate where an attack on the witness involves the assertion "that the witness is not only lying in this instance, *but is a liar generally.*" Italics added. Trial counsel for Walker did not in any way assert or even suggest that TCB was a liar generally. Counsel, at most, challenged the consistency and veracity of the allegations that TCB made in connection with this case. 71:61-63. Such challenge was not an assertion that TCB was a "liar

generally” such that Rule 906.08(1) allowed for evidence of the witness’s character for truthfulness. Moreover, N.S.’s testimony went beyond character for truthfulness. N.S.’s testimony expressly conveyed to the jury that T.C.B.’s accusations against Walker were true. The testimony implicitly conveyed to the jury that it too should believe T.C.B. As this court recognized in *Haseltine*, “[t]he jury is the lie detector in the courtroom.” See *State v. Haseltine*, 120 Wis.2d 92, 96 citing *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973). Indeed, it is well established that the credibility of a witness is left to the jury’s judgment. See *State v. Friedrich*, 135 Wis.2d 1, 16, 398 N.W.2d 763 (1987). N.S.’s testimony had the effect of invading the jury’s province and usurping its role in assessing issues of credibility and truthfulness. Trial counsel should have recognized the problematic nature of the testimony as such, objected to it, and moved for a mistrial. Instead, trial counsel did nothing. This court must conclude that under *Haseltine*, *Romero*, *Tutlewski*, and *Echols*, such failure amounted to deficient performance.

This court must also find that it was prejudicial. In this respect, the jury's determination depended substantially, if not exclusively, on an assessment of T.C.B.'s credibility and the veracity of her story. Other than T.C.B.'s testimony, there was no other evidence to support the allegation that Walker sexually assaulted her. There was no confession, no eyewitness testimony, no physical evidence, no biological evidence and no medical evidence. Even the prosecutor in closing statement acknowledged, "[y]ou either believe (T.C.B.) that she was sexually assaulted three or more times, or you don't." 73:43. Yet literally just seconds before the prosecutor said that, he asked the jury to consider the emotional response of N.S. upon hearing from T.C.B. that she had been assaulted. 73:42. In doing so, the prosecutor expressly relied upon N.S.'s improper testimony to bolster T.C.B.'s credibility and asked the jury to do the same. Further, N.S.'s improper testimony and the prosecutor's reference to it went wholly unmitigated by any curative or limiting instruction. In this regard, there was no instruction which guided or limited the jury's consideration of

N.S.'s testimony that T.C.B. wasn't lying. As such, the jury was free to receive and consider N.S.'s testimony as it saw fit. Given the lack of any corroborating evidence for T.C.B.'s allegations, there is a reasonable probability that the jury, as asked to do so by the prosecutor, 73:42, considered N.S.'s emotional testimony as T.C.B.'s mother, and simply deferred to N.S.'s judgment that her daughter was not lying. The State's actions in this regard deprived Walker of a fair deliberation of properly admitted evidence and made the result of the trial unreliable. The ultimate question in terms of prejudice is not whether Walker has proven that the outcome of the case would have been different without the deficiencies. Indeed, a defendant need not establish that the final result of the proceeding would have been different. See *State v. Smith*, 207 Wis.2d 258, 275, 558 N.W.2d 379 (1997). The essential question "is whether the deficient performance undermines confidence in the outcome." *State v. Maday*, 2017 WI 28, ¶54, 374 Wis.2d 164, 892 N.W.2d 611. In *Earls v. McCaughtry*, 379 F.3d 489 (7th Cir. 2004), the 7th Circuit, in a

habeas corpus action, stated “[w]e have previously held that when a trial comes down to a single issue such as the credibility of a witness, deficient performance by defense counsel regarding that credibility issue may cause prejudice.” *Id.* at 495. The 7th Circuit in *Earls* determined that trial counsel’s failure to object to testimony by one witness that the complaining witness was telling truth was indeed both deficient and prejudicial. *Id.* at 494-496.³ For reasons discussed above, this court must come to the same conclusion in this case.

B. The circuit court erroneously exercised discretion in failing to allow Walker to counter T.C.B.’s testimony that she had obtained birth control because she was sexually active, with evidence that the sexual activity T.C.B. referenced was not with Walker.

A reviewing court applies an erroneous exercise of discretion standard regarding a circuit court’s evidentiary decisions. *See State v. Echols*, 2013 WI App 58 at 14. The question on appeal is not whether the reviewing court, ruling

³ Notably, the 7th Circuit also looked “askance” at the Wisconsin court’s holding that because the alleged victim’s character for truthfulness had been attacked, testimony from her mother, father, aunt and uncle that the alleged victim was truthful and not making up her story, was admissible under Wis. R. Evid. 906.08(1). As discussed earlier in this brief, this was the same rationale the circuit court advanced in denying Walker’s postconviction motion.

initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. *See id.* An appellate court upholds the lower court's decisions, if it concludes that the trial court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." *See id.* If the reviewing court determines that the trial court erroneously exercised its discretion in admitting or excluding evidence, it must then "conduct a harmless error analysis to determine whether the error "affected [the defendant's] substantial rights." *Id.* In other words, it must determine whether "there is a reasonable possibility that the error contributed to the outcome of the case." *See id.* An error is *not* harmless if it undermines the court's confidence in the outcome of the proceeding. *See id.* Whether an error is harmless presents a question of law that this court reviews *de novo*. *Id.*

On direct examination, T.C.B. testified about using birth control, condoms and being sexually active. 72:26. In response to T.C.B.'s testimony in this regard, Walker, on cross-examination, sought to clarify that T.C.B. was sexually active with persons other than Walker and because of those relations, she was using birth control. 73:3-4;Ap.103-105. In seeking to admit this evidence, Walker argued that T.C.B.'s testimony created the false impression that she was using birth control because of the alleged conduct with Walker. 73:3-4;Ap.103-105. Walker argued that such false impression was prejudicial and warranted the admission of evidence to correct it. 73:3-4;Ap.103-105. The circuit court denied Walker's motion. 73:4;Ap.103-105. The circuit court's decision was erroneous as it ignored relevant facts and applicable law. Under the curative admissibility doctrine, when one party accidentally or purposefully takes advantage of a piece of evidence that is otherwise inadmissible, the court may, in its discretion, allow the opposing party to introduce otherwise inadmissible evidence if it is required by the concept of

fundamental fairness to cure some unfair prejudice. See *State v. Dunlap*, 2002 WI 19, ¶32, 250 Wis.2d 466, 640 N.W.2d 112. For example, a litigant may introduce otherwise inadmissible evidence about hypnotically-refreshed testimony used to support an expert's opinion when the opposing party has opened the door by challenging the reliability of the facts on which the expert based the opinion. See *State v. Coogan*, 154 Wis. 2d 387, 400, 453 N.W.2d 186 (Ct. App. 1990). Similarly, the doctrine has been used to allow evidence that a defendant was armed, even when the prosecution had made a pre-trial promise not to introduce such evidence, in order to cure the prejudice that arose when the defendant introduced extraneous evidence that the police officers had drawn their guns during the defendant's arrest. See *United States v. Bolin*, 514 F.2d 554, 558-59 (7th Cir. 1975). In this case, evidence regarding T.C.B.'s sexual history came before the jury through T.C.B.'s own testimony during the State's case-in-chief. The evidence, as trial counsel argued, suggested that Walker's conduct had caused T.C.B to begin taking birth control

medication, specifically, shots, and using condoms, when she otherwise would not have done so. Such impression was unfairly prejudicial because it was false. It was also unfairly prejudicial because it served to bolster T.C.B.'s allegations that she had sexual relations with Walker. After all, the use of contraception is consistent with sexual activity. It was also unfairly prejudicial in that jurors could take offense that Walker's alleged conduct had caused a young girl to prematurely adopt birth control practices. For these reasons, Walker sought to dispel the false impression and avoid the unfair prejudice created by T.C.B.'s testimony. Walker sought to do this simply by cross-examining T.C.B. to elicit testimony that she was sexually active with other persons and that she began using birth control because of her relations with those persons. Fundamental fairness and the doctrine of curative admissibility compelled that Walker be permitted to introduce such evidence before the jury. The circuit court abused its discretion in not permitting him to do so. For the reasons discussed above, the error was not harmless. The

court's refusal to allow Walker to simply clarify that T.C.B. was sexually active with persons other than Walker allowed a false impression to permeate the jury, one that was inflammatory and that bolstered the credibility of T.C.B. and the veracity of her accusations. Given that this case involved little, if any, other substantive evidence beyond T.C.B.'s own testimony, the circuit court's error in preventing Walker from presenting this part of his defense undermines confidence in the outcome of the proceeding.

C. Walker is entitled to a new trial in the interest of justice.

In support of this argument, counsel incorporates all factual and legal arguments made in subsections A and B as they are relevant to this argument as well. This court has the authority under Wis. Stat. §752.35 to grant a new trial in the interest of justice when it appears that the real controversy has not been fully tried. *In re the commitment of R.D.S.*, 2010 WI App 166, ¶37, 330 Wis.2d 628, 795 N.W.2d 456, review denied,

331 Wis.2d 47, 794 N.W.2d 900. The party seeking a new trial on this ground need not show a probable likelihood of a different result on retrial. *Id.* The real controversy has not been fully tried when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *Id.* The real controversy has also not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case. *State v. Davis*, 2011 WI App 147, ¶16, 337 Wis.2d 688, 808 Wis.2d 130, review denied, 353 Wis.2d 428, 839 N.W.2d 615. This case meets both of the above standards. As discussed in subsection B, the jury did not have the opportunity to hear testimony that T.C.B. was sexually active with persons other than Walker. As discussed earlier in this brief, such testimony was significant in numerous respects. It would have dispelled the false impression that Walker's alleged conduct had caused T.C.B to begin taking birth control medication, specifically, shots, and using condoms, when she otherwise would not have done so.

It would also have dispelled the false impression that Walker's alleged conduct had caused a young girl to prematurely adopt birth control practices. Finally, it would have undercut the inference that since use of contraception is consistent with sexual activity, T.C.B. was in fact having sexual relations with Walker. Next, in contrast to not hearing evidence which it should have heard, the jury also heard evidence which it should not have heard. This of course occurred through the testimony of N.S. as discussed in subsection A. Ultimately, T.C.B.'s credibility and the veracity of her story constituted the real controversy at trial. The compromised status of the evidence however precluded the controversy from being fully tried. Both this court and the Supreme Court have exercised their discretionary reversal power when credibility was the central issue at trial and when it later became clear that the credibility issue was tried based on evidence that should not have been admitted or when new information put the credibility issue in a substantially different light. See *State v. Romero*, supra; *State v. Penigar*, 139 Wis.2d

569, 572, 586, 408 N.W.2d 28 (1987); *State v. Cuyler*, 110 Wis.2d 133, 134, 136, 138, 141-43, 327 N.W.2d 662 (1983); *Garcia v. State*, 73 Wis.2d 651, 652-56, 245 N.W.2d 654 (1976); *Logan v. State*, 43 Wis.2d 128, 133-137, 168 N.W.2d 171 (1969); *State v. Jeffrey A. W.*, 2010 WI App 29, ¶¶1-5, 13-18, 22, 323 Wis.2d 541, 780 N.W.2d 231. This court should do the same.

II. The circuit court erred in denying Walker's postconviction motion without an evidentiary hearing.

In support of this argument, Walker incorporates all factual references and legal arguments made in Section I as they are relevant to arguments in this section as well. Walker maintains that the record, as referenced throughout this brief, establishes that he received ineffective assistance of counsel and that the real controversy has not been fully tried. As such, Walker requests that this court vacate the judgment of conviction and sentence and remand the case for a new trial. In the alternative, Walker maintains that he has at least established that he is entitled to an evidentiary hearing on the ineffective assistance of

counsel issue. Walker's postconviction motion sufficiently alleged facts that, if true, would entitle him to relief. In this regard, the motion alleged specific omissions by trial counsel. 46:4-6. These omissions of course, as discussed throughout this brief, involved trial counsel's failure to object to N.S.'s testimony and move for a mistrial. In addition to alleging specific deficiencies by trial counsel, Walker specifically alleged in his postconviction motion how such deficiencies caused him prejudice. 46:4-6. This court is required to accept as true the facts alleged in the motion. See *State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W.2d 50 (1996). Walker's postconviction motion alleged sufficient facts both as to deficiency and prejudice. The motion did not allege merely conclusory allegations. Finally, the record does not conclusively establish that Walker is not entitled to relief. If anything, the record establishes that he is. For these reasons, if this court does not grant a new trial on grounds of ineffective assistance of counsel or in the interest of justice, it should at least remand the case for an evidentiary hearing.

CONCLUSION

For the above-stated reasons, this court should vacate the judgment of conviction and sentence, and remand the case for a new trial. In the alternative, the court should remand the case for an evidentiary hearing as to Walker's ineffective assistance of counsel claim.

Dated this _____ day of March 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 5172 words.

Dated this ___ day of March 2018

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CERTIFICATION

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 s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 the 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.

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CERTIFICATION 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 s. 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 upon all opposing parties.

Dated this ___ day of March 2018.

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