STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP186-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FREDERICK EUGENE WALKER,

Defendant-Appellant.

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

STATE'S RESPONSE BRIEF

BRAD D. SCHIMEL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Constitutional Provision

Statutes

Additional Authority

ISSUES PRESENTED

1. Under Wisconsin law, "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."[1] Here, when the prosecutor asked NS to describe her and her daughter TCB's emotional states when TCB disclosed that Frederick Walker sexually assaulted her. NS answered in part by saying that TCB does not lie. Was trial counsel ineffective for failing to object to that statement?

The circuit court answered: No.

This Court should answer: No.

2. Wisconsin's rape-shield law[2] prohibits the admission of evidence of a victim's "prior sexual conduct" except in very limited circumstances. Here, when the State asked TCB where Walker obtained the condom that he used during an assault, TCB testified in part that she had obtained the condoms after telling her father that she was sexually active. Did the circuit court erroneously prohibit Walker from asking TCB whom she was sexually active with?

The circuit court answered: No.

This Court should answer: No.

3. Is Walker entitled to a new trial in the interest of justice because the real controversy was not fully tried?

The circuit court answered: No.

This Court should answer: No.

---

[1] *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

[2] Wis. Stat. § 972.11(2)(b)3.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

INTRODUCTION

TCB alleged that her mother's boyfriend, Frederick Walker, sexually assaulted her. A jury found Walker guilty of repeated acts of sexual assault of the same child, TCB, who had not yet attained the age of 16 years.

This Court should reject all three grounds for relief that Walker raises on appeal. First, trial counsel was not ineffective for failing to object on *Haseltine* grounds when TCB's mother, NS, testified that her daughter does not lie when describing her and TCB's emotional states when TCB first disclosed the assault. Counsel was not deficient because NS was not vouching for TCB's testimony, and thus a *Haseltine* objection would have failed. Alternatively, Walker has not demonstrated that NS's testimony prejudiced Walker given the other evidence, the jury instructions placing responsibility for assessing a witness's credibility on the jury, and the ambiguous nature of NS's response in which she said that TCB does not lie.

Second, the circuit court properly exercised its discretion when it applied the rape shield law and foreclosed Walker from asking TCB about others with whom she may have been sexually active. Further, even if the circuit court erred, any error in excluding this testimony was harmless.

Third, Walker has not demonstrated that his case is an exceptional one that warrants a reversal in the interest of justice.

STATEMENT OF THE CASE

By an amended information, the State charged Walker with engaging in repeated acts of sexual assault of the same child, TCB, contrary to Wis. Stat. § 948.025(1)(e). (R. 14.) TCB knew Walker since she was three years old. At trial, TCB described him as her mother's boyfriend and referred to him as her stepdad. (R. 72:18.)

I. Trial

A. TCB testified to six specific instances in which Walker sexually abused her.

TCB testified that she resided with her mother (NS), her twin sister, and several other family members. (R. 72:15, 80.) She testified that Walker assaulted her multiple times, and described details of six incidents. On one occasion, TCB recalled that when she lived on 39th and Burleigh and while she was in middle school, Walker brushed past her butt. (R. 72:19.)

On a second occasion, she was in her mother's bedroom watching television with her twin sister and Walker. When her sister left the room, Walker forcibly gripped TCB's arm, touched her butt, and "whipped his penis out." (R. 72:20.) Walker wanted TCB to "touch it" and then "suck his dick." (R. 72:20.) TCB declined, but then Walker had intercourse with her by pulling her pants down, bending her over her mom's bed, and having sex with her. When they finished, TCB went to the bathroom, took a shower, forgot about it, and went to sleep. This was the only time that she had sex with Walker in her mother's room. (R. 72:21.) TCB said that the experience made her feel "weird" and that she wanted to tell her mother, but she did not know what to do or what her mother would think. (R. 72:22.)

On a third occasion, TCB said that she and her sister were waiting for her father to pick them up. (R. 72:22–23.) While TCB was in the dining room, Walker came up behind her, pulled her pants down, bent her over, and had sex with her. (R. 72:23.) TCB described this assault as quick, ending when she and Walker heard her sister coming. (R. 72:24.)

On a fourth occasion, Walker came up from behind her TCB, bent her over, and had sex with her in the dining room. (R. 72:25.) TCB stated that Walker used a condom during this assault. When asked whose condoms they were, TCB explained,

> Since my dad asked me a question on a random day, he asked me was I having sex or being sexually active. And I told him yeah. So him and his girlfriend took me and [TCB's sister] 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 every time he would do it, he would go into the drawer and take the condoms out of there.

(R. 72:26.)

TCB also described a fifth incident that happened on the living room floor. (R. 72:27.) TCB explained that on that occasion, she had showered and was wearing a towel when she walked through the living room to get to NS's room. (R. 72:27.) Walker, who was in the living room, bent her over on the couch and then he had sex with her on the floor. (R. 72:29.) "[T]hat's when it just happened on the floor. I was laying on my back. And he was on top of me." (R. 72:28.) She said that Walker was in boxers and a t-shirt when they had sex and that this only happened once in the living room. (R. 72:28.)

TCB described a sixth incident, this time in her bedroom; Walker woke TCB from her sleep and had sex with her. Her sister was in another bedroom, NS was asleep, and her uncle was outside smoking. (R. 72:29–30.) After the assault, she then went to the bathroom, looked in the mirror and stated that she "didn't know who I really was. It was just disgusting." (R. 72:30.) TCB said that this incident occurred in the summer before eighth grade. (R. 72:33.)

TCB stated that she was 12 or 13 years old when the assaults first started, which was in November or December when she was in seventh grade. (R. 72:31–32.) TCB described the sex that occurred between her and Walker as penis-to-vagina. (R. 72:30.) She said that they did not engage in oral sex. (R.72:30.) TCB said that the assaults stopped when she and her family moved. (R. 72:32.)

B. TCB disclosed the abuse to several people.

TCB's disclosure to a cousin. TCB stated that she told her cousin, "N," about Walker's abuse at a family reunion. (R. 72:34.) The cousin told TCB that she should tell her mother. TCB later learned that her cousin told her cousin's mother, LM. (R. 72:35.) N was the first person to whom TCB disclosed the assault. (R. 72:54.)

On August 16, 2013, when Walker was in custody, he made calls to TCB, her sister, and NS; those calls were recorded and transcribed. (R. 20:1.) During one conversation with TCB, TCB stated that she "only told one person. I told [N]." (R. 18:1.) Walker asked TCB why she told [N]. (R. 18:2.) TCB told Walker that N was not going to tell anybody, and Walker disagreed. (R. 18:2.) Walker later asked "[W]hy would you go tell, why would tell her that, man? You know what I'm talking about, don't you know what they gon' do to me man, huh? Don't you know what's gonna happen to me, dawg?" (R. 18:3.)

TCB recalled having this conversation when she was outside. (R. 18:1, 3; 72:41, 65–66.) She then went inside and gave the phone to NS, who in turn gave it to TCB's sister. (R. 18:3.) Walker and TCB spoke again during this call. Walker asked her if she wanted him "to stay in jail forever, man?" (R. 18:9.) TCB replied, "No." (R. 18:10.)

TCB's disclosure to school officials. This disclosure, which came after TCB's disclosure to N, was prompted by another interaction between TCB and Walker. After TCB and her family moved to 89th and Hampton, TCB recalled one day when her mother had come home from work and was in the bathtub. Walker was in the home as well and asked TCB to "come here" and give him a kiss. (R. 72:46.) TCB went into the bathroom with her mother because she felt safer with her. (R. 72:61.) NS confirmed that she recalled a time when Walker was visiting and TCB came and sat in the bathroom with her. (R. 72:85.)

After this incident, TCB decided to report Walker's abuse to her coach, James Wright. (R. 72:42–43, 46.) TCB testified that she told Wright that she had sex with Walker only one time; at trial, she acknowledged that her statement to Wright was not true. (R. 72:56.)

Wright testified to his recollection of TCB's disclosure. TCB came to Wright's class on January 9, 2014. She was crying; Wright described TCB as appearing "a little upset, she was really edgy, and emotional." (R. 72:5.) After TCB "kind of disclosed to me that some things were going on at home[,]" Wright escorted TCB to the counselor's office. (R. 72:6.) According to Wright, TCB told him that her stepdad "touched against her will" and had sexual intercourse with her, and also that he had recently asked her for a kiss and that TCB joined her mother in the bathroom. (R. 72:7, 11–12.) Wright recalled that TCB seemed reluctant to discuss it with others, including NS, out of fear that her mother would disbelieve her. (R. 72:7–8.) Wright was also aware that TCB was upset

because NS and Walker were considering buying a house together. (R. 72:12.) After speaking to Wright, TCB spoke to a school guidance counselor and a school psychologist. (R. 72:55.)

TCB's disclosure to her twin sister. Before reporting to Wright, TCB told her twin sister that she was having sexual intercourse with Walker. (R. 72:36–37, 50.) TCB told her sister that she and Walker were having sex, that she did not like doing it, and he was forcing her to do it, but also that "I agreed to do it somewhat. Most of it, or some of it." (R. 72:51.) TCB recalled that her sister called her stupid and asked why she did not tell her. (R. 72:51.)

TCB's twin sister testified that TCB first told her that Walker touched her when they were high school freshmen. (R.72:71.) TCB did not claim that they were having sex. (R. 72:73.) The twin sister denied responding by telling TCB that she was stupid. (R. 72:74.) The sister never saw Walker inappropriately touch TCB. (R. 72:73.)

TCB's disclosure to NS. TCB did not initially tell NS about having sex with Walker because "I didn't know what she would think. Would she believe me if I told her this was happening[?]" (R. 72:34.)

Just before NS learned about TCB's allegations, she described TCB's emotional state as "angry" and NS did not know why. (R. 72:82.) She first learned about the allegations when police detectives met with her. (R. 72:83.) NS then went to school and met TCB. NS described both her and her daughter's emotions during this meeting.

> Well my emotions went—I just broke down crying . . . 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 [TCB] don't lie.

(R. 72:83.) NS later said that she felt "shocked," in part because she never had an indication that anything had happened between Walker and TCB. (R. 72:90–91.)

The day after NS learned about TCB's allegations, Walker kept trying to call NS, and NS tried to avoid talking to him. (R. 72:94, 96.)

TCB's statements to the police. TCB's statements to police involved some inconsistencies. When TCB first spoke to Officer Louise Bray, TCB stated that there was only some improper touching and that sexual intercourse occurred one time. (R. 72:57–58.) Later, before an earlier trial date, TCB reported additional incidents. (R. 72:58.) At trial, TCB denied telling Officer Bray that Walker touched her chest. (R. 72:59.) But later, TCB said that Walker touched her butt, her "private part," and chest. (R. 72:60.) In her testimony, TCB denied telling officers that Walker had mouth-to-vagina sexual intercourse with her on her mother's bed. (R. 72:60.) But according to Officer Bray, TCB reported that Walker gave her oral sex on two occasions in her mother's room. (R. 72:106. 113.)

C. Walker's theory of defense was that TCB was lying.

In opening statements, trial counsel identified a motive for TCB's allegations. She "didn't like her mother's boyfriend and didn't like the fact that he was coming back into her life[.]" (R. 71:61.) Trial counsel told the jury that it would have to decide "that anything happened other than a young girl who didn't like her mother's boyfriend." (R. 71:64.)

On cross-examination, TCB acknowledged that Walker and her mother had talked about moving in together before TCB's disclosures. (R. 72:61.) TCB also testified that her older sister moved out because Walker had been telling NS how to

deal with that sister. (R. 72:62–63.) NS agreed that she was getting fed up with Walker and that she found Walker's efforts at parenting her children annoying. (R. 72:88.)

In his closing statement, trial counsel also suggested that TCB's allegations against Walker stemmed from TCB's confrontation with her coach and that things "snowball[ed]" out of control. (R. 73:58, 68.) "Because young people don't realize the consequences of a little lie that you tell to try to fix a relationship with a coach that you think is mad at you for having a confrontation with." (R. 73:68.) Later, trial counsel argued, "Because she never realized back in January, when she wanted to make things better with her coach who was upset with her in her mind over some kind of confrontation about something, that this is where it would lead to." (R. 73:73.)

In support of Walker's defense that TCB lied, trial counsel also challenged the truthfulness of TCB's statements. In opening statements, he remarked, "[E]very time she tells somebody the truth about what happened, it's different." (R. 71:61.) Counsel told the jury that TCB initially disclosed one incident and then when she realizes "I have to tell the truth . . . Suddenly . . . it becomes all these times." (R. 71:62.) Trial counsel repeatedly told the jury about TCB's statements. "[A]t the end of the day, when you hear all the various versions of the truth, so many versions . . . you're going to be asked to" determine what the facts are. (R. 71:62–63.) He characterized TCB's statements as "this varying shifting, changing truth . . . This is the same person, who every time she comes forward to tell the truth, tells a story that doesn't sound anything like the previous time she came forward to tell the truth." (R. 71:63.) In his closing statement, trial counsel emphasized inconsistencies in TCB's statements to others and her testimony. (R. 73:60–63.)

The jury found Walker guilty. (R. 21.) The circuit court sentenced Walker to a 27-year term of imprisonment that consisted of a 17-year term of initial confinement and a 10-year term of extended supervision.

II. Postconviction proceedings

Walker's postconviction/appellate counsel filed a no-merit notice of appeal. (R. 35:1.) This Court rejected the no-merit report because it was "unable to conclude that further proceedings as to at least two issues would lack arguable merit," i.e., whether trial counsel was ineffective for failing to object when NS testified that her daughter does not lie, and whether the State opened the door to evidence otherwise inadmissible under the rape shield law. (R. 40:2–4.)

Walker received new counsel (R. 41), who filed a postconviction motion seeking a new trial. (R. 46.) In that motion, Walker raised the two claims above and asserted that he was entitled to a new trial in the interest of justice because the jury heard NS testify that TCB does not lie. (R. 46:1.)

In a written decision and order, the circuit court denied Walker's postconviction motion without an evidentiary hearing. (R. 54:1.) First, the circuit court determined that NS's testimony that TCB does not lie did not violate the *Haseltine* rule because NS was merely attempting to explain how she had perceived the allegation that Walker had assaulted her daughter. Further, the circuit court determined NS's statement would have been admissible to go to TCB's character for truthfulness. (R. 54:2.) Second, the circuit court rejected Walker's argument that he should have been allowed to explore TCB's prior sexual history, holding that it would not have allowed evidence of TCB's prior sexual behavior under the rape shield law. It also denied his request for a new trial in the interest of justice. (R. 54:3.)

Walker appeals.

ARGUMENT

I. Walker has not proved that his trial counsel was ineffective for failing to object when TCB's mother testified that TCB does not lie.

A. Standard of review and general legal principles.

A criminal defendant is guaranteed effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution. *State v. Lemberger*, 2017 WI 39, ¶ 16, 374 Wis. 2d 617, 893 N.W.2d 232.

Standard of review. A claim of ineffective assistance of counsel presents a mixed question of law and fact. "The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact." *State v. Breitzman*, 2017 WI 100, ¶ 37, 378 Wis. 2d 431, 904 N.W.2d 93. This Court will not overturn the circuit court's factual findings unless they are clearly erroneous. *Id*. Whether counsel's performance was ineffective presents a legal question that this Court reviews independently, benefiting from the circuit court's analysis. *State v. Jenkins*, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 848 N.W.2d 786.

Ineffective assistance of counsel. A defendant alleging ineffective assistance of counsel has the burden of proving both that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *Strickland v. Washing*ton, 466 U.S. 668, 687 (1984).

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all the circumstances. *Id*. at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id*. at 690.

"[F]ailure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." *Lemberger*, 374 Wis. 2d 617, ¶ 18. Trial "counsel does not perform deficiently in failing to 'object and argue a point of law' that is 'unclear.'" *State v. Morales-Pedrosa*, 2016 WI App 38, ¶ 16, 369 Wis. 2d 75, 879 N.W.2d 772 (citations omitted). Because ineffective assistance of counsel claims are "limited to situations where the law or duty is clear," counsel's performance will not be deemed deficient unless a defendant demonstrates that counsel failed to raise an issue of settled law. *Breitzman*, 378 Wis. 2d 431, ¶ 49 (citation omitted).

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced him. *Strickland*, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

A circuit court may deny a defendant's postconviction motion without a hearing if the motion fails to allege sufficient facts to raise a factual question, presents only conclusory allegations, or if the record conclusively demonstrates that a defendant is not entitled to relief. *State v. Allen*, 2004 WI 106, ¶¶ 2, 12, 274 Wis. 2d 568, 682 N.W.2d 433. A *Machner* hearing is a prerequisite to a judicial determination that a defendant received ineffective assistance of counsel. *State v. Sholar*, 2018 WI 53, ¶ 53, __ Wis. 2d __, __ N.W.2d __. Therefore, if a reviewing court determines that the circuit court erroneously denied a defendant a *Machner* hearing, the proper remedy is to remand

the case for a hearing. *See id.* (citing *State v. Curtis*, 218 Wis. 2d 550, 554–55, 582 N.W.2d 409 (Ct. App. 1998)).

B. Trial counsel's performance was not deficient for failing to object to NS's statement that "TCB does not lie" because NS's statement did not clearly violate the *Haseltine* rule.

The circuit court determined that trial counsel's failure to object to NS's testimony was not ineffective because NS was not vouching for TCB's truthfulness at trial. Rather, NS was testifying about her emotional state when she first learned that TCB had accused Walker of sexually assaulting her, which does not violate *Haseltine*. The record supports the circuit court's determination.

1. The *Haseltine* rule.

"Under Wisconsin law, a witness may not testify 'that another mentally and physically competent witness is telling the truth.'" *State v. Jensen*, 147 Wis. 2d 240, 249, 432 N.W.2d 913 (1988) (quoting *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984)). "The *Haseltine* rule is intended to prevent witnesses from interfering with the jury's role as the 'lie detector in the courtroom.'" *State v. Snider*, 2003 WI App 172, ¶ 27, 266 Wis. 2d 830, 668 N.W.2d 784 (*quoting Haseltine*, 120 Wis. 2d at 96). But a *Haseltine* violation will "not result in reversible error unless the opinion testimony creates too great a possibility that the jury abdicated its fact-finding role to the witness and did not independently find the defendant's guilt." *State v. Patterson*, 2010 WI 130, ¶ 58, 329 Wis. 2d 599, 790 N.W.2d 909 (citation omitted).

And the *Haseltine* rule is not implicated when "neither the purpose nor the effect of [a witness's] testimony was to attest to [another witness's] truthfulness." *State v. Smith*, 170 Wis. 2d 701, 718–19, 490 N.W.2d 40 (Ct. App. 1992). For

example, in *Smith*, an officer's testimony that he did not believe a witness's story during an interrogation was properly introduced to explain why the officer continued to interrogate the witness. *Id.* Similarly, in *Snider*, a detective did not violate *Haseltine* when he testified to his belief as to the believability of the victim and the defendant when "he was conducting the investigation, not whether [the defendant] or the victim was telling the truth at trial." *Snider*, 266 Wis. 2d 830, ¶ 27; *see also State v. Miller*, 2012 WI App 68, ¶ 16, 341 Wis. 2d 737, 816 N.W.2d 331 (holding that a detective's telling Miller that Miller was lying in a videotaped interview did not implicate *Haseltine* because the statements were "made in the context of a pretrial police investigation" and was not sworn testimony commenting on Miller's testimony at trial).

Whether a witness has improperly vouched for the credibility of another witness presents a legal question that this Court independently reviews. *State v. Krueger*, 2008 WI App 162, ¶ 7, 314 Wis. 2d 605, 762 N.W.2d 114. A reviewing court must examine the testimony's purpose and effect to determine whether the opinion testimony violates *Haseltine*. *State v. Tutlewski*, 231 Wis. 2d 379, 388, 605 N.W.2d 561 (Ct. App. 1999).

2. Trial counsel's performance was not deficient because NS's testimony did not violate *Haseltine*.

Trial counsel was not deficient for making a *Haseltine* objection because the *Snider-Smith-Miller* line of cases demonstrates that NS's pretrial statements were not impermissible vouching. Alternatively, if that line of cases does not apply to NS's pretrial statement, then the application of *Haseltine* to NS's statement is unsettled and cannot form the basis for an ineffective assistance claim.

Under *Snider*, *Smith*, and *Miller*, neither the purpose nor effect of NS's statement, i.e., that TCB does not lie, was to attest to TCB's truthfulness at trial. *See Snider*, 266 Wis. 2d 830, ¶ 27; *Smith*, 170 Wis. 2d at 718–19. Rather, NS's comments related to her emotional state when TCB first disclosed the allegations to her. In this regard, NS's statement was more akin to a detective's impression about a person's truthfulness during an interrogation. *See Miller*, 341 Wis. 2d 737, ¶ 16.

Thus, as the *Smith-Snider-Miller* line of cases demonstrates, *Haseltine* does not apply to a witness's pretrial assessment of another witness's believability. N.S.'s statement that TCB does not lie fits within this category of cases. N.S.'s statement was not offered to prove that the jury should believe TCB's testimony, but offered to show NS's then-existing emotional state when TCB first disclosed the allegations. Because counsel cannot be ineffective for failing to raise a meritless objection, *Breitzman*, 378 Wis. 2d 431, ¶ 49, Walker's claim fails.

Second, and alternatively, Walker identifies no settled law holding that—contrary to the above cases—NS's statements violated *Haseltine*. Walker attempts to do so (Walker's Br. 12), relying on *State v. Romero*, 147 Wis. 2d 264, 432 N.W.2d 899 (1988), *State v. Echols*, 2013 WI App 58, 348 Wis. 2d 81, 831 N.W.2d 768, and *Tutlewski*, 231 Wis. 2d 379, but those cases are readily distinguishable from Walker's case.

In *Romero*, the prosecutor asked several witnesses if the victim was an honest person. *Romero*, 147 Wis. 2d at 267–68. The prosecutor also asked witnesses, including a social worker and an officer, about the victim's reputation for truthfulness. *Id.* at 269–70. In contrast, here the prosecutor did not ask witnesses at Walker's trial whether TCB was honest. Rather, NS's comments occurred at a single moment

at trial in response to the prosecutor's question about NS's and TCB's emotional states when TCB disclosed the assault.

In *Echols*, the circuit court permitted a witness to testify that Echols eyes dropped, his head would go down, and he would stutter when he was lying. *Echols*, 348 Wis. 2d 81, ¶¶ 9–10. That testimony "went far beyond describing the [witness]'s perception of Echols at a particular moment" and characterized the witness as a person who presented himself as a "human lie detector," and was especially problematic because Echols stuttered at trial. *Id.* ¶¶ 11, 24, 27. In contrast, the prosecutor here did not attempt to portray NS as a human lie detector. Moreover, NS's statement offered no view on TCB's behaviors that the jury could have improperly used to assess to the truthfulness of her trial testimony.

In *Tutlewski*, the prosecutor asked a special education teacher about two other developmentally delayed witnesses' reputations for truthfulness. *Tutlewski*, 231 Wis. 2d at 383. There, while the prosecutor properly called the teacher to testify to the witnesses' reputations for truthfulness after Tutlewski attacked their reputations, the teacher's testimony went beyond the witness's general reputation for truthfulness when the teacher testified that "I don't think it is within their capabilities to lie or be deceitful." *Id.* at 383, 388. Moreover, in closing argument, the prosecutor relied on the teacher's statement that the victim was not capable of lying to advance his argument that the victim was not lying about the assault. *Id.* at 390. In contrast, here, the prosecutor generally asked about NS's and TCB's emotional states; he did not ask NS whether TCB had the capacity to lie or restate NS's statements that TCB does not lie in closing.

Thus, even if NS's statements somehow presented a factual scenario outside the *Smith-Snider-Miller* line of cases, Walker has not identified any settled law in which the court applied the *Haseltine* rule to the circumstances here. Because ineffective assistance of counsel claims are "limited to

situations where the law or duty is clear," trial counsel's failure to object to NS's testimony cannot be deemed deficient because Walker has not demonstrated trial counsel failed to raise an issue of settled law. *See Breitzman*, 378 Wis. 2d 431, ¶ 49. His claim fails.

Aside from his claim that counsel was ineffective for not objecting under *Haseltine*, Walker criticizes the circuit court's determination that his attack on TCB's truthfulness in his opening statement opened the door to NS's testimony about TCB's truthful character under Wis. Stat. § 906.08. (Walker's Br. 14–16; R. 54:2.) Whether testimony is admissible character evidence under section 906.08 is a different question than whether evidence violates *Haseltine*. *See Tutlewski*, 231 Wis. 2d at 386–87. Trial counsel did not raise this challenge during trial; further, on appeal, Walker fails to develop this argument as an ineffective assistance claim. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In any event, Walker's claim fails because any objection to the admissibility of NS's statement under section 906.08 would have failed.

Wisconsin Stat. § 906.08(1) states that a party may attack or support the credibility of a witness "by evidence in the form of reputation or opinion." *Id.* "[E]vidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Wis. Stat. § 906.08(1)(b).

Defense counsel's remarks about the character of a witness during an opening statement may constitute an attack on a witness's character for truthfulness; that is so because those remarks reach the jury, who must assess the character and credibility of the challenged witness. *State v. Eugenio*, 219 Wis. 2d 391, 402, 579 N.W.2d 642 (1998). Questions posed during cross-examination also may be viewed as an attack on a witness's character for truthfulness. *Id.* at 406–07.

If trial counsel had simply questioned TCB's perception of events or lack of memory or merely suggested that TCB was lying in a specific instance, evidence of TCB's character for truthfulness would not have been inadmissible. *See id.* at 402–403. But here, Walker's counsel repeatedly broadly attacked TCB's truthfulness throughout his opening statement (R. 71:61–63) and in cross-examining her at trial about inconsistencies and drawing out motives for her to lie (R. 72:56–58, 63–64). Those attacks on TCB's credibility were sufficient to admit rehabilitative evidence of TCB's character for truthfulness.

Thus, NS's statement that "TCB does not lie" was admissible under section 906.08(1) to counter Walker's assertion that TCB made untruthful allegations about Walker because she did not like Walker and did not want him around and she wanted to deflect her coach's frustrations with her. Walker's claim to the contrary fails.

C. Walker has not demonstrated that his trial counsel's failure to object to TCB's mother's testimony prejudiced him.

Even assuming that trial counsel could have successfully objected to NS's testimony under *Haseltine* or that the evidence was not admissible as character evidence, Walker cannot demonstrate that there is a reasonable probability that the jury would have found him not guilty.

Indeed, any prejudice that flowed from NS's comments was marginal at best. NS's statements that TCB does not lie appear on a single page of the trial transcript. (R. 72:83.) To be sure, the prosecutor generally referenced NS's emotional response to TCB's disclosure in his closing statement, but he did not repeat NS's statements about TCB's truthfulness. (R. 73:42.)

Walker's focus on NS's statement that TCB does not lie also takes NS's testimony out of context. Within the same response, NS expressed her disbelief about TCB's allegations when TCB first disclosed the allegations. "I just honestly could not believe that the situation she was in took place. And quite honestly, just baffled." (R. 72:83.) Thus, NS's expression of doubt about TCB's allegations diluted any prejudice that stemmed from NS's statements about TCB's truthfulness.

Further, the circuit court's instructions on credibility, both before opening and closing statements, mitigated any prejudice that may have flowed from NS's testimony. Before opening statements, the circuit court told the jurors that they were "the sole judges of the weight and credit to be given to the testimony of those witnesses." (R. 71:54.) It identified several factors that the jurors should consider in assessing credibility, including the bias, interest in the trial's outcome, the lack of clearness or recollection, and motives to testify falsely. (R. 71:54–55.) Finally, the circuit court directed the jurors to "give to the testimony of each witness just such weight you—and credit you believe it is fairly entitled to receive." (R. 71:55.) Before closing arguments, the circuit court told the jurors that it was their responsibility to assess witness credibility and re-identified the factors that they should use to assess witness credibility. *See* Wis. JI—Criminal 300 (2000) (R. 73:33–34.)

Jurors are presumed to follow instructions. *Miller*, 341 Wis. 2d 737, ¶ 22. Here, the circuit court's instructions on credibility alleviated "the likelihood that jurors placed any significant weight on [N.S.]'s comments other than the weight that came from their own independent examination of the evidence." *Id.* (principle applied in response to challenge to prosecutor's remarks in closing argument).

Finally, the trial evidence as a whole supported Walker's conviction and minimized any prejudice that flowed from NS's isolated statements that TCB does not lie.

TCB testified to Walker's assaults of her. While TCB initially reported a single assault (R. 72:56–57), she eventually reported that Walker had assaulted her on several occasions at several locations inside her family's apartment (R. 72:21–32). The jury also heard about TCB's disclosures to a coach (R. 72:7), her sister (R. 72:71), and her mother (R. 72:84). Walker's counsel cross-examined TCB and other witnesses, including her sister and officers, about TCB's different statements. (R. 72:10, 57–60, 73–74, 113–14.)

An officer testified that delayed disclosures are common in cases involving child sexual assault, often due to threats or worry about how a parent will handle it. (R.72:99; 73:8, 13.) Further, delayed disclosures are often piecemeal, with the victim initially disclosing only a portion of what happened and disclosing more information later. (R. 72:100; 73:17–18.) That TCB's disclosures here were delayed and piecemeal was not unusual and was consistent with other disclosures that the officer observed in her experience. (R. 73:19.)

While there was no physical evidence to corroborate TCB's allegations, Walker's own statements did. TCB reported that she disclosed the assault to her cousin N. (R. 72:34–35, 54.) While N did not testify, the jury heard a recorded telephone conversation between Walker and TCB, who told Walker that N is the only person that TCB told. Walker was clearly upset and asked TCB why she told N, expressing that he could go to jail as a result. (R. 18:2–3.) While TCB and Walker did not specifically discuss sex during this telephone conversation, TCB testified at trial that she was talking to Walker about the sex that she had with him when she lived on 39th Street. (R. 72:36, 40–41.) And while the conversation between TCB and Walker was vague, what is clear is that, Walker did not accuse TCB of lying. Instead, he expressed his fear that what TCB told N could result in his incarceration. On this record, the jury could reasonably infer

that Walker's statement about jail is an implicit admission that he sexually assaulted TCB.

Relying on *Earls v. McCaughtry*, 379 F.3d 489 (7th Cir. 2004), Walker asserts that NS's statements prejudiced him. (Walker's Br. 18–19.) In *Earls*, the State asked a forensic interviewer several questions related to whether the victim was being truthful with her. *Earls*, 379 F.3d at 493. When the jury saw the videotaped interview, it heard the interviewer make several comments that reflected on the victim's truthfulness, and which the circuit court had ordered redacted. *Id*. Further, the State asked the victim's family members whether they believed that the victim was truthful and whether the victim had any reason to make up the story. *Id*. at 494.

Earls provides no persuasive value for Walker. Here, the State did not present expert witness testimony that suggested that TCB was being truthful or question family members about TCB's reputation for truthfulness. Rather, NS's comments about TCB not lying arose at a single point in the trial when the prosecutor asked NS to testify as to their emotional states when TCB disclosed the assault.

This is not a case where NS's statements at a single moment in a trial created "too great a possibility that the jury abdicated its fact-finding role to the witness and did not independently find [Walker]'s guilt." *Patterson*, 329 Wis. 2d 599, ¶ 58. Based on this record, there is no reasonable probability that the jury would have found Walker not guilty had his counsel objected to N.S.'s testimony.

In sum, the record conclusively demonstrates that trial counsel's failure to object to NS's testimony was neither deficient nor prejudicial. The circuit court properly denied Walker's ineffective assistance of counsel claim without a hearing.

II. Walker has not demonstrated that the circuit court erroneously exercised its discretion when it prohibited Walker from asking TCB about her statement about being sexually active.

A. Standard of review and general legal principles.

The decision to admit evidence is subject to the circuit court's exercise of discretion. This Court will not disturb the circuit court's decision to admit evidence unless the circuit court erroneously exercised its discretion. A circuit court erroneously exercises its discretion if it applied a wrong legal standard or the facts of record fail to support the circuit court's decision. *State v. Ringer*, 2010 WI 69, ¶ 24, 326 Wis. 2d 351, 785 N.W.2d 448.

Wisconsin's rape shield statute, Wis. Stat. § 972.11(2), "generally prohibits the introduction of any evidence of the complainant's prior sexual conduct 'regardless of the purpose.'" *Ringer*, 326 Wis. 2d 351, ¶ 25 (quoting section 972.11(2)(c)). Section 972.11(2)(a) defines sexual conduct to include "any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style." *Id.*

Section 972.11(2) serves "to counteract outdated beliefs that a complainant's sexual past could shed light on the truthfulness of sexually assault allegations." *Ringer*, 326 Wis. 2d 351, ¶ 25 (citation omitted). "The law reflects the legislature's determination that evidence of a complainant's prior sexual conduct is largely irrelevant or, if relevant, substantially outweighed by its prejudicial effect." *Id.* ¶ 25 (citation omitted).

Evidence of a victim's prior sexual conduct may be admissible if three criteria are met. First, the proffered evidence must fit within section 972.11(2)(b)'s recognized exceptions. These exception include "[e]vidence of the complaining witness's past conduct with the defendant"; "[e]vidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of the injury suffered"; and "[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness." Wis. Stat. § 972.11(2)(b)1.–3. Second, assuming that the evidence fits within a recognized exception, the evidence must be material to a fact at issue in the case. Third, "the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature." *Ringer*, 326 Wis. 2d 351, ¶¶ 3, 26–27.[3]

Evidence otherwise barred by the rape shield statute may also be admissible under the curative admissibility doctrine. Under that doctrine, when a "party accidentally or purposefully takes advantage of a piece of evidence that is otherwise inadmissible," the circuit court may exercise its discretion and "allow the opposing party to introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to cure some unfair prejudice." *State v. Dunlap*, 2002 WI 19, ¶ 32, 250 Wis. 2d 466, 640 N.W.2d 112.

---

[3] Circumstances may arise in which section 972.11(2)'s application impermissibly abridges an accused's right to present a defense. *State v. Pulizzano,* 155 Wis. 2d 633, 647–48, 456 N.W.2d 325 (1990). Walker does not argue that the circuit court's decision that foreclosed him from asking TCB further questions about birth control intruded on his constitutional right to present a defense. Therefore, the State does not address Walker's claim under a *Pullizano* analysis.

B. The circuit court soundly exercised its discretion when it denied Walker's request to ask TCB about prior sexual activity after TCB explained where Walker got the condoms that he used when he assaulted her.

The circuit court determined that TCB's explanation about where she got the condoms did not prejudice Walker and declined to allow Walker to question TCB about her sexual activity. (R. 73:4.) In its decision and order denying postconviction relief, the circuit court stated that it would not have allowed evidence of TCB's prior behavior under the rape shield law in this instance or under its exceptions. (R. 54:3.) The circuit court noted, "It is unknown what prior acts would have been alluded to in this case, but it would only have amounted to a fishing expedition into how the victim had been sexually active." (R. 54:3.) The record supports the circuit court's determination that the evidence was not admissible under section 972.11(2) or the curative admissibility doctrine. (R. 54:3.)

At trial, TCB stated that she used condoms. (R. 72:26.) The prosecutors asked where she got the condoms. TCB answered the question rather circuitously.

> Since my dad asked me a question on a random day, he asked me was I having sex or being sexually active. And I told him yeah. So him and his girlfriend took me and [twin sister] 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 every time he would do it, he would go into the drawer and take the condoms out of there.

(R. 72:26.)

After a brief, unrecorded sidebar at trial counsel's request, the prosecutor resumed his examination and did not question TCB about birth control. (R. 72:26–27.) The following day, Walker's counsel explained that he should have been allowed to explore TCB's sexual history based on TCB's testimony about being sexually active. Walker asserted that TCB's testimony was prejudicial because "it makes it appear as though [TCB] was being sexually active with the defendant and therefore that's why she was getting into the birth control." (R. 73:4.) The prosecutor disagreed. "I think the jury took it as she was sexually active with somebody else." (R. 73:4.)

First, Walker's desire to question TCB further about her sexual activity with others implicated the rape shield law. Questioning TCB about whether she was having sexual activity with another person does not fall within any of the three exceptions recognized in section 972.11(2)(b). It is not evidence of TCB's past sexual conduct with the defendant. It is not evidence that shows the source of or origin of semen, pregnancy, or disease. It does not impact the degree of sexual assault or extent of injury suffered. It is not evidence that TCB made a prior, untruthful allegation of a sexual assault. Wis. Stat. § 972.11(2)(b)1.–3. But even if such questioning would have fit within one of section 971.11(2)(b)'s exceptions, the fact that TCB may have been sexually active with others was not material to the issue of whether Walker had repeatedly sexually assaulted her. Further, the evidence was simply not of "sufficient probative value to outweigh its inflammatory and prejudicial nature." *Ringer*, 326 Wis. 2d 351, ¶¶ 3, 26–27.

Second, TCB's testimony about birth control did not render otherwise inadmissible evidence admissible under the curative admissibility doctrine. The prosecutor simply asked

TCB where Walker got the condom. TCB explained that she obtained the condoms and other birth control services after she told her father that she was sexually active. (R. 72:26.) TCB's testimony that she told her father that she was sexually active did not implicate Walker. In fact, TCB was insistent that she never told anyone about her sexual contact with Walker until she disclosed it to her cousin N. (R. 72:35, 52.) Further, TCB's response prompted her father to take both TCB and her twin sister, who insisted that Walker never acted inappropriately around her, to the clinic. So when TCB told her father that she was sexually active, jurors hearing her testimony would reasonably believe that she was sexually active with someone other than Walker.

Dunlap controls here. In *Dunlap*, the defendant sought to introduce evidence of a child's other inappropriate sexual activity to counter certain expert witness testimony by demonstrating that a child had detailed and unexplained sexual knowledge. *Dunlap*, 250 Wis. 2d 466, ¶¶ 7–8. That proffered evidence was not admissible under the curative admissibility doctrine to counter certain expert testimony. In reaching this determination, the supreme court noted that the expert did not opine on the veracity of the victim's allegations. *Id*. ¶¶ 40–41. Similarly, TCB's statement about being sexually active did not implicate Walker and did not open the door to further inquiry into other sexual activity.

Walker suggests that he should have been allowed to examine TCB about her sexual activity because, "[a]fter all, the use of contraception is consistent with sexual activity." (Walker's Br. 23.) But this argument ignores the very purpose of the rape shield law. A child's explanation about where she obtained the condoms that an assailant used does not provide a justification for overriding the strong legislative principles underlying the rape shield law, including the legislative determination that evidence of a victim's contraceptive use or

other sexual activity is simply irrelevant in a sexual assault prosecution. *See* Wis. Stat. § 972.11(2)(a).

In sum, Walker cannot show that the circuit court erroneously exercised its discretion in declining Walker's request to probe TCB on her comment about being sexually active. But if this Court disagrees, the error was harmless, as discussed below.

C. Any error in excluding evidence related to TCB's sexual activity with others was harmless.

"An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial. The appellate court must conduct a harmless error analysis to determine whether the error 'affected the substantial rights of the party.'" *Martindale v. Ripp*, 2001 WI 113, ¶ 30, 246 Wis. 2d 67, 629 N.W.2d 698. An error is harmless if it did not affect a party's substantial rights. *Id*. "An error affects the substantial rights of a party if there is a reasonable probability of a different outcome." *State v. Kleser*, 2010 WI 88, ¶ 94, 328 Wis. 2d 42, 786 N.W.2d 144.

Here, TCB stated that she was "sexually active" in response to the prosecutor's question about where Walker got the condoms. Nothing about TCB's answer suggests that she told her father that she was sexually active because of Walker and the jury could have just as easily inferred that she was sexually active with others. TCB made her unsolicited statement about being sexually active once at Walker's trial. The State did not attempt to exploit TCB's comment, either through its examination of other witnesses or in closing argument.

Further, when viewing TCB's statement in the context of the evidence as a whole, the error was harmless.[4] As the State demonstrated in section I.C., above, the State presented strong evidence of Walker's guilt including TCB's testimony, testimony concerning her disclosures to her coach, her twin sister, and her mother, and the recorded telephone call in which Walker asserts that TCB's statements to her cousin could result in his incarceration.

The State did not present its case in a vacuum. Rather, Walker vigorously challenged the truthfulness of TCB's allegations about Walker. In his opening statement, Walker's counsel noted that TCB's version of the truth shifted, changed, and varied. Through his examination of TCB and other witnesses, he identified inconsistencies in TCB's statements to others and at trial. He also identified potential motives for TCB's allegations.

The jury had the opportunity to consider TCB's allegations against a strong challenge to her credibility. On this record, any error in the circuit court's decision to foreclose further inquiry into TCB's uninvited comment that she was sexually active did not create a reasonable probability of a different outcome at Walker's trial.

---

[4] The same evidence that supports the State's position that NS's isolated statements about TCB's truthfulness did not prejudice Walker also supports the State's position that TCB's testimony about being sexually active did not prejudice Walker. The harmless error analysis is "essentially consistent" with the *Strickland* test for actual prejudice. *State v. Harvey*, 2002 WI 93, ¶ 41, 254 Wis. 2d 442, 647 N.W.2d 189. The only distinction is that the defendant bears the burden of proving prejudice in an ineffective assistance of counsel claim. *Id*.

III. The real controversy was fully tried.

A. General legal principles.

Wisconsin Stat. § 752.35 confers discretionary authority on this Court to review a claim of error, reverse a judgment, and order a new trial in the interest of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17–19, 456 N.W.2d 797 (1990). An appellate court may order a new trial in the interest of justice: "(1) whenever the real controversy has not been fully tried or (2) whenever it is probable that justice has for any reason miscarried." *Id.* at 16 (citation omitted).

The supreme court has recognized two situations when the real controversy has not been tried: first, when the jury does not have the opportunity to hear important evidence that bears on an important issue; and second, when the jury had before it improperly admitted evidence and "this material obscured a crucial issue and prevented the real controversy from being tried." *State v. Burns*, 2011 WI 22, ¶ 24, 332 Wis. 2d 730, 798 N.W.2d 166 (citation omitted).

Because "reversals under Wis. Stat. § 752.35 are rare and reserved for exceptional cases[,]" this Court should exercise this discretionary authority only "after all other claims are weighed and determined to be unsuccessful." *State v. Kucharski*, 2015 WI 64, ¶¶ 41, 43, 363 Wis. 2d 658, 866 N.W.2d 697.

B. Walker has not met his burden of demonstrating that his case is an exceptional one that warrants reversal in the interest of justice.

Neither the circuit court's decision to allow Walker to probe TCB's sexual activity nor trial counsel's failure to object to NS's testimony about TCB's truthfulness prevented the real controversy from being tried.

Walker's inability to explore TCB's statement that she was sexually active did not undermine Walker's ability to challenge TCB's credibility. To the contrary, the jury heard significant evidence that bore on TCB's credibility. TCB testified that Walker repeatedly sexually assaulted her. *See* section I.C., above. Throughout the trial, Walker challenged the truthfulness of TCB's allegations. In his opening statement, Walker noted that TCB told different versions of the truth that varied, shifted, and changed over time. (R. 71:60–63.) Walker not only examined TCB about her inconsistent statements, he examined other witnesses, including her coach, her twin sister, and the officers about TCB's inconsistent statements. *See* Section I.C., above. Walker also identified TCB's motives for making false allegations against him. He noted that TCB did not like Walker and that TCB made the allegations after Walker talked to NS about moving in with her. (R. 71:61, 64; 72:61.) Walker also suggested that TCB used the allegations to explain the difficulties that she was having with her coach. (R. 73:58, 68, 73.) Walker's conviction required the jury to believe TCB, which it did despite hearing other significant evidence and arguments that her claims were not credible.

Nor did NS's testimony that TCB does not lie obscure a crucial issue and prevent the real controversy from being tried. Again, the crucial issue was TCB's credibility, which Walker certainly challenged throughout the trial. Further, the circuit court's credibility instructions, both at the trial's start and conclusion, squarely placed responsibility on the jury to assess TCB's credibility and minimized any risk that NS's isolated statements usurped the jury's role.

Walker string cites several cases in which Wisconsin courts have exercised their discretionary authority to grant a new trial when credibility was the central issue at trial and when credibility-related evidence was either improperly admitted or excluded. (Walker's Br. 26–27.) But *Burns*, which

Walker does not cite, is more directly on point. Like Walker's case, *Burns* involved an allegation of repeated acts of sexual assault of a child. *Burns*, 332 Wis. 2d 730, ¶ 2. Burns asserted that the real controversy was not tried because the victim gave an incomplete statement that implied that Burns took the victim's virginity and Burns could not challenge the misleading nature of the victim's statement. Further, Burns also asserted that the jury should have heard evidence about the victim's prior sexual assaults by her grandfather. Finally, the prosecutor made improper statements during closing argument. *Id.* ¶ 26.

The supreme court rejected Burns' argument that these issues prevented the real controversy from being tried. *Id.* ¶ 27. There, the victim's misleading statement about her virginity did not render evidence of her grandfather's assaults admissible under an exception to section 972.11(2) or Burns' constitutional right to present a defense. *Burns*, 332 Wis. 2d 730, ¶¶ 34, 36. Moreover, while the victim's testimony about her virginity was untruthful, her testimony did not "so cloud[] a crucial issue that it may be fairly said that the real controversy was not fully tried." *Id.* ¶¶ 37–38 (citation omitted).

Burns' real controversy argument failed in large part because Burns was otherwise able to challenge the victim's truthfulness about her allegations. *Id.* ¶¶ 40–43.[5] As the supreme court explained, "This was a trial of [the victim]'s credibility as the reporter of sexual assaults by Burns. Attempting to undermine her credibility was the central focus of Burn's defense . . . . The issue of [the victim]'s credibility was fully tried." *Id.* ¶ 55.

[5] The supreme court also rejected Burns' other arguments in support of his interest of justice claims. *Burns*, 332 Wis. 2d 730, ¶¶ 44–53.

For the same reasons Burns was not entitled to a new trial in the interest of justice, this Court should reject Walker's request. Here, TCB's statement about being sexually active was not nearly as prejudicial to Walker as the victim's untruthful statement about her virginity in *Burns*. Like Burns, Walker had the opportunity to squarely challenge the victim's credibility at trial. The real controversy was tried. Walker has not met his burden of demonstrating that his case is an exceptional one that warrants a reversal in the interest of justice.

CONCLUSION

The State respectfully requests this Court to affirm the judgment of conviction and the circuit court's order denying postconviction relief.

Dated this 11th day of June, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

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 9,074 words.

_____
DONALD V. LATORRACA
Assistant Attorney General

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 this 11th day of June, 2018.

_____
DONALD V. LATORRACA
Assistant Attorney General