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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case Nos. 2018AP000786-CR, 2018AP000787-CR,
2018AP000788-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HARVEY A. TALLEY,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order
Denying a Postconviction Motion, Entered in Milwaukee
County Circuit Court, the Honorable M. Joseph Donald and
the Honorable Carolina Stark, Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

1. Did trial counsel provide ineffective assistance when he failed to adequately cross-examine the alleged victim and elicit favorable testimony at Mr. Talley's jury trial?

The circuit court answered "no" because it found that Mr. Talley was not prejudiced.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel does not request oral argument. Publication is not likely warranted because this case applies well established law to the facts of the case.

STATEMENT OF THE CASE AND FACTS

In Milwaukee County Case 15CF1502, the State charged Mr. Talley with two counts:

Count 1: first degree sexual assault (great bodily harm or pregnancy), contrary to Wis. Stat. §940.225(1)(a).

Count 2: sexual intercourse with a child age 16 or older, contrary to Wis. Stat. §948.09.

(1:1).¹

As probable cause for the underlying offenses, the complaint alleged that on April 4, 2015, A.D. reported to police that Mr. Talley sexually assaulted her in January 2014

¹ All citations to the record in these consolidated cases are to the record in Case No. 2018AP000786-CR, unless otherwise indicated.

when she was 16 years old. (1:1-2). According to A.D., Mr. Talley came into her bedroom, forced her pants and underwear off, and put his penis into her vagina. (1:1-2). As a result, A.D. became pregnant and gave birth to Mr. Talley's child on November 4, 2014. (1:2).

On the same day that the State filed the criminal complaint in Case 15CF1502, the State also filed a criminal complaint in Milwaukee County Case 15CM1221. (2018AP000787-CR 1:1). In Case 15CM1221, Mr. Talley was charged with two offenses:

Count 1: misdemeanor battery, domestic abuse, contrary to Wis. Stat. §940.19(1).

Count 2: disorderly conduct, domestic abuse, contrary to Wis. Stat. §947.01.

(2018AP000787-CR 1:1).

The complaint alleged that Mr. Talley's wife, T.G., recently found out that he impregnated her daughter, A.D. (2018AP000787-CR 1:1). Despite learning this information, T.G. continued her relationship with Mr. Talley and went out with him on April 4, 2015, for drinks. (2018AP000787-CR 1:2). According to T.G., while they were out, they got into an argument and Mr. Talley hit her on her hand. (2018AP000787-CR 1:2).

Further, the State charged Mr. Talley in Milwaukee County Case 15CM1276 with four counts of misdemeanor intimidation of a victim, contrary to Wis. Stat. §940.44(2). (2018AP000788-CR 1:1-2). The complaint in that case alleged that between April 4 and 5, 2015, while in custody in Case 15CF1502, Mr. Talley made four phone calls to T.G. (2018AP000788-CR 1:2). In those phone calls, which were recorded, Mr. Talley asked T.G. to go to the district

attorney's office and "fix" the charges against him related to the sexual assault of A.D., say that the allegations were false, not bring A.D.'s child to the police for DNA testing, and avoid being subpoenaed. (2018AP000788-CR 1:1-8).

Prior to Mr. Talley's trial, on July 3, 2015, A.D. spoke with an investigator working for defense counsel and told her that she had consensual sex with Mr. Talley. (71:1). The investigator generated a report that defense counsel reviewed before trial. (71:1; 90:5-7). A.D. told the investigator she lied to police during her first interview with them because she was afraid her mother would be angry she was having consensual sex with Mr. Talley. (71:1). Additionally, A.D. told the investigator she came forward with the truth—that the sex was consensual—to rid herself of guilt. (71:1).

Mr. Talley's three cases were joined, and a three-day jury trial started on September 16, 2015. (86:7-8). The first-degree sexual assault causing pregnancy charge was the most serious charge and the only felony Mr. Talley faced.² (1:1; 2018AP000787-CR1:1; 2018AP000788-CR 1:1-2). For the jury to convict Mr. Talley of that offense, the State had to prove that Mr. Talley had sex with A.D. without her consent. (86:116). The State presented evidence from several witnesses including: A.D., T.G., and Officers Gary Brown and Louise Bray of the Milwaukee Police Department.

The State's first witness was A.D. She testified that Mr. Talley was the father of her child. (86:140). The prosecutor asked A.D. how she became pregnant by Mr. Talley, and she stated "[w]e had sex. We agreed on it. He did

² First degree sexual assault (great bodily harm or pregnancy) is a Class B felony with a maximum penalty of 60 years imprisonment. Wis. Stats. §§940.225(1)(a), 939.50(1)(b).

not rape me.” (86:141). Further, A.D. testified that she and Mr. Talley had consensual sex more than one time, and she could not recall the specific days that they had sex. (86:142-143).

A.D. testified that a short time after her mother and Mr. Talley married, she told her mother that Mr. Talley raped her. (86:147). Shortly thereafter, A.D., with the help of her mother, reported the sexual assault to Officer Brown. (86:147). She also told Officer Brown that Mr. Talley raped her. (86:148). A.D. testified at trial that the story she told her mother and Officer Brown—that Mr. Talley raped her—was untrue. (86:152).

In addition, A.D. testified that she had a second police interview, this time with Officer Bray of the Milwaukee Police Department, a few days after she spoke with Officer Brown. (86:152). A.D. told a different story to Officer Bray. During her testimony, A.D. confirmed she told Officer Bray she found Mr. Talley passed out from taking Xanax, and she climbed on top of him and had sex with him while he was unconscious, leading to her pregnancy. (86:152-154).

Finally, A.D. testified that she had a third police interview, this time with Officer Brown again, a couple days before the start of Mr. Talley’s trial. (86:154). A.D. stated she told Officer Brown “the truth—that I wasn’t raped.” (86:154). Her trial testimony was consistent with this last interview with Officer Brown. (86:142-143, 156-159).

On cross-examination, A.D. testified:

DEFENSE COUNSEL: [A.D.], at some point along the way here you told your mother the truth about what happened; correct?

A.D.: Excuse me? Can you repeat that?

DEFENSE COUNSEL: At some point you told your mother the truth about what happened, that Mr. Talley didn't rape you, but that the sex was consensual; correct?

A.D.: Yes.

DEFENSE COUNSEL: And was that about in June of this year, 2015?

A.D.: Yes.

DEFENSE COUNSEL: You told her that indeed that Mr. Talley did not rape you as you first told her and told the police but that it was mutual sex with your permission; correct?

A.D.: Yes.

DEFENSE COUNSEL: And you also met with the investigator from my office and indicated as well that that rape story was made up by you; correct?

A.D.: Yes.

DEFENSE COUNSEL: And that you had told that same investigator that you had sex with Mr. Talley two to three times; correct?

A.D.: Yes.

DEFENSE COUNSEL: And that each time that was without protection, meaning some type of birth control?

A.D.: Yes. You said – wait? With birth control?

DEFENSE COUNSEL: No, without?

A.D.: Yes, without.

DEFENSE COUNSEL: You also indicated to that same investigator, that was about in July of this year, if I told

you July 3rd, 2015, would you have reasons to dispute that? That you talked to my investigator?

A.D.: Can you repeat that?

DEFENSE COUNSEL: It's phrased badly. If I told you that you talked to my investigator on July 3rd, 2015, does that sound right?

A.D.: I cain't [sic] remember the day I talked to her.

DEFENSE COUNSEL: You talked to her at your house though, right?

A.D.: Yes.

DEFENSE COUNSEL: And you indicated to her, meaning the investigator, that Mr. Talley didn't initiate this sexual activity, but indeed it just happened. Is that a true statement?

A.D.: Yes. We agreed upon it like it just happened.

DEFENSE COUNSEL: Before you, before you met up with Officer Brown, he's here in court, right, seated with Mr. Schindhelm, the prosecutor, right?

A.D.: Yes.

DEFENSE COUNSEL: You see mister, you see Officer Brown here, right?

A.D.: Yes.

DEFENSE COUNSEL: And prior to meeting with him, had you, had you met with the district attorney's office, people from there?

A.D.: Yes.

DEFENSE COUNSEL: You told them, you told those representatives from the DA's office as well that the rape story was just made up, not true; correct?

A.D.: Yes.

DEFENSE COUNSEL: And that truth that you told to the DA's office representatives was that this was sex with your permission and with your consent; correct?

A.D.: Yes.

DEFENSE COUNSEL: Was Mr. Schindhelm, the district attorney that's in court here, just asked you questions, was he present when you talked to them?

A.D.: Yes. He was in the room once.

DEFENSE COUNSEL: So you told him what you, what you said in court here, what the truth really here is consensual sex; correct?

A.D.: Yes.

DEFENSE COUNSEL: And then that was after that conversation with the district attorney, and there was another member of his office present; correct?

A.D.: Yes, Laura.

DEFENSE COUNSEL: Laura. Is that the woman in court here?

A.D.: Yes.

DEFENSE COUNSEL: So she and Mr. Schindhelm, the district attorney, you met with them prior to the trial, and you told them that it was consensual, true?

A.D.: Yes.

DEFENSE COUNSEL: And it's after meeting that you then talked to Officer Brown, and you told him the same thing?

A.D.: Yes.

(86:156-159).

Defense counsel did not ask A.D. to explain why she lied to the police during her first interview and accused Mr. Talley of rape. (86:156-159). Additionally, he did not elicit any testimony from A.D. explaining why she came forward with the truth that she had consensual sex with Mr. Talley. (86:156-159).

The State's next witness was A.D.'s mother, T.G. (86:162). T.G. testified that she was married to Mr. Talley on March 14, 2015. (86:162-163). T.G. said after she found out A.D. was pregnant, A.D. at first did not tell her who the father was, and then she told her it was a boy who moved out of state. (86:164). About a week after she married Mr. Talley, A.D. told her that Mr. Talley raped her and was her child's father. (86:165).

Despite learning about the sexual assault, T.G. continued to have a relationship with Mr. Talley. (86:168-169). Before calling the police to report the alleged sexual assault, she went out with Mr. Talley for drinks on April 4, 2015. (86:168-169). According to T.G., while she was out with Mr. Talley, they were involved in an argument about whether it was true that Mr. Talley sexually assaulted A.D. (86:169). T.G. flagged down Wauwatosa police and reported the argument to them, and they gave T.G. a ride home. (86:169).

While at home, T.G. called the Milwaukee Police Department to report Mr. Talley's alleged sexual assault of her daughter. (86:170). T.G. and A.D. then both spoke with Officer Brown for the first time. (86:172-176).

A few days after speaking with Officer Brown, T.G. testified that A.D. revealed to her that she had sex with Mr. Talley when he was unconscious on Xanax, and Mr. Talley did not force her to have sex. (86:182). T.G., at A.D.'s request, took A.D. to the police station to report this version of the alleged sexual assault. (86:182).

T.G. stated that she did not believe A.D. had sex with Mr. Talley when he was unconscious, and she told A.D. that when A.D. was ready she could come to her and tell her the truth. (86:182). T.G. revealed that A.D. told her the truth in June, 2015. (87:11). A.D. told her mother she willingly had a consensual sexual relationship with Mr. Talley, and A.D. apologized. (87:11).

Next, the State called Officers Brown and Bray to testify about their interviews with A.D. regarding the alleged sexual assault. (87:16, 91). Officer Brown testified that he first interviewed A.D. along with her mother T.G. on April 4, 2015. (87:28). During that first interview, A.D. told Officer Brown that Mr. Talley took her clothes off and forced her to have sex with him. (87:25-26). Both A.D. and T.G. stated to Officer Brown that Mr. Talley threatened to kill them if they called the police about the alleged sexual assault. (87:23, 28).

Officer Bray testified that on April 7, 2015, A.D. came to the police station to recant her previous statement to Officer Brown. (87:92). A.D. told officer Bray that she climbed on top of Mr. Talley and had sex with him when he was passed out from taking Xanax. (87:93).

Finally, Officer Brown testified that he conducted another interview with A.D. on September 14, 2015, the day before Mr. Talley's trial started. (87:30). During this interview, A.D. told Officer Brown that she lied during her first interview with him, was not raped, and had consensual sex with Mr. Talley. (87:30-32).

Mr. Talley did not testify at his trial. However, the State played his recorded Mirandized statement to police regarding the incident with A.D. (87:66). At trial, officers testified that Mr. Talley indicated during statements to police that he drinks alcohol, consumes drugs on a daily basis, including Xanax, and could not remember what happened with A.D. (87:39, 64).

During its closing argument, the State reminded the jury that the first degree sexual assault causing pregnancy charge was the count that deserved their "true focus." (88:37). As it related to consent, the State told the jury: "I worry it might be easy for you to throw up your hands, and say well [A.D.] told us on the stand she consented. And so we can't possibly figure out that that wasn't the truth. That wasn't what happened, because you can figure it out." (88:37). Then, the State told the jury, "[y]ou are going to take the time to sort through [A.D.]'s stories and figure out which one of them is the truth." (88:38).

The State argued that the jury should believe A.D.'s original story to police that Mr. Talley sexually assaulted her because it contained the most detail, and Mr. Talley coerced her to change her story through his jail calls to T.G. and once he was released on bond pending trial. (88:44-45). Specifically, the State said, "[j]urors, you know from this evidence, from his statement from what happened, that he got out [of jail] and he went straight to [T.G.] and [A.D.] and he

tried to fix it. He told them what they can do to fix it for him.” (88:44).

During his closing argument, defense counsel told the jury that the first degree sexual assault causing pregnancy charge was where the “fight is” in this case. (88:59). Defense counsel conceded that the jail calls Mr. Talley made to T.G. were stupid, and he made them when he was emotional, scared, and mad. (88:52). Defense counsel stated that A.D.’s last statement to Officer Brown and her trial testimony was the truth—the sex was consensual. (88:59-60).

Prior to coming back with a verdict, the jury submitted a question to the court. (27:2). The jury asked “can a 16 year old consent to a sexual affair with an adult?” (27:2). The court instructed the jury to “review the elements of Count 1, and review the elements of Count 2. Consent is not an element of Count 2” in Case 15CF1502. (27:2).

Ultimately, the jury convicted Mr. Talley of all of the charges he faced. (88:72-73). Thereafter, on November 2, 2015, the court, the Honorable M. Joseph Donald presiding, sentenced him to 8 years of initial confinement followed by 8 years of extended supervision on the first degree sexual assault causing pregnancy charge. (37:1). On the sex with a child age 16 or older, four counts of intimidation of a victim, and battery, the court sentenced Mr. Talley to nine months jail on each count to run concurrent to each other and concurrent to his prison sentence. (37:2; 2018AP000787-CR 24:3; 2018AP000788-CR 28:1). Lastly, on the disorderly conduct, Mr. Talley was sentenced to three months jail to run concurrent to all of his other sentences. (2018AP000787-CR 24:3).

Mr. Talley filed a postconviction motion asking that the court grant him a new trial because his trial counsel was

ineffective for not adequately questioning A.D. at trial and eliciting favorable testimony from her.³ (56:10-15). The motion alleged defense counsel was ineffective for failing to ask A.D. to explain why she lied to police and said Mr. Talley raped her, and the reason she eventually came forward with the truth that she had consensual sex with Mr. Talley. (56:10-15).

After a hearing, the court denied Mr. Talley's request for a new trial. (91:15; App. 115). In denying his request, the court, the Honorable Carolina Stark presiding, found that trial counsel's performance during Mr. Talley's trial did not prejudice him because there was no reasonable probability of a different verdict had his attorney asked A.D. to explain why she originally lied to police and then came forward with the truth about what happened between her and Mr. Talley. (91:10-13; App. 110-113).

Mr. Talley now appeals.

ARGUMENT

I. Mr. Talley is entitled to a new trial because trial counsel's errors deprived him of the effective assistance of counsel.

A. Legal standards and standard of review.

A defendant's right to the effective assistance of counsel is guaranteed by the state and federal constitutions. U.S. Const. amend. VI; Wis. Const. art. I, §7. "To establish the denial of effective assistance of counsel at trial, a defendant must prove both that counsel's performance was

³ In his postconviction motion, Mr. Talley also alleged that defense counsel provided ineffective assistance of counsel during plea negotiations. Mr. Talley does not pursue that issue in this appeal.

deficient and that such deficient performance prejudiced his defense.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Artic*, 2010 WI 83, ¶24, 327 Wis. 2d 392, 768 N.W.2d 430.

To prove deficient performance, Mr. Talley must show that trial counsel’s errors fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688.

To prove prejudice, he must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of” the jury trial would have been different. *Id.* at 694. “A reasonable probability is one sufficient to undermine the confidence in the outcome of the trial.” *State v. Delgado*, 194 Wis. 2d 737, 751, 535 N.W.2d 450 (Ct. App. 1995). “The focus of this inquiry is not on the outcome of the trial, but on the reliability of the proceedings.” *State v. Thiel*, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citations and internal quotations omitted).

Ineffective assistance of counsel claims present mixed questions of law and fact. *State v. Zimmerman*, 2003 WI App 196, ¶35, 266 Wis. 2d 1003, 669 N.W.2d 762. A circuit court’s factual findings must be upheld unless they are clearly erroneous, but whether counsel’s performance was deficient and, if so, whether the deficient performance prejudiced the defendant present questions of law, which this Court reviews *de novo*. *Id.*

B. Defense counsel performed deficiently in questioning A.D. during trial.

The failure to adequately question a witness and elicit favorable testimony at trial is a basis for an ineffective assistance of counsel claim. *Id.* at ¶39. In this case, trial counsel failed to elicit testimony from A.D. favorable to Mr.

Talley's defense that he had consensual sex with A.D. Therefore, counsel was deficient.

Here, testimony from witnesses at Mr. Talley's trial revealed A.D. gave three different stories to police about whether the sex between them was consensual. Originally, A.D. told police that Mr. Talley took off her clothes and forced her to have sex with him. (86:148; 87:25-26). Three days later, A.D. again spoke with police, and she told them Mr. Talley did not force her to have sex, but instead, she got on top of him and had sex with him when he was passed out from taking Xanax. (86:152-154; 87:92-93). Then, two days before the start of Mr. Talley's jury trial, A.D. had another conversation with police and told them she willingly engaged in a consensual sexual relationship with Mr. Talley. (86:154; 87:30-32). A.D. also testified at trial that she had consensual sex with Mr. Talley. (86:142-143; 156-159).

Prior to trial, trial counsel's investigator spoke with A.D. (71:1). During the interview, A.D. explained the reasons for her conflicting statements. (71:1). A.D. stated that she lied to police when she told them that Mr. Talley raped her. (71:1). She told the investigator that she lied and said that Mr. Talley raped her because she did not want her mother to be angry with her for having a consensual sexual relationship with Mr. Talley, her mother's boyfriend and eventual husband. (71:1). A.D. went on to verify that she eventually came forward and provided police with a truthful account of what happened—that she and Mr. Talley were having a consensual sexual relationship—to rid herself of the guilt of lying. (71:1).

Remarkably, trial counsel did not elicit this favorable testimony from A.D. explaining the reasons for her conflicting testimony. At trial, A.D. never explained, as she

did to the investigator, why she lied to police and said Mr. Talley raped her, or why she eventually came forward with the truth that she had consensual sex with Mr. Talley. Trial counsel should have elicited this testimony, which was favorable to his defense that they had consensual sex.

Testimony from A.D. regarding her reason for lying to police initially was critically important to Mr. Talley's defense that the sex was consensual. Here, the sole issue at trial was whether Mr. Talley and A.D. had consensual sex. If the jury determined that the sex was consensual, the jury could not have found Mr. Talley guilty of first degree sexual assault causing pregnancy—the most serious charge and only felony he faced—because that charge required proof that the sex was without consent. (86:116). Given A.D.'s conflicting statements and testimony about what happened, the case turned on whether the jury had a reason to doubt the truth of A.D.'s initial statement to police that Mr. Talley forced her to have sex.

Accordingly, evidence that supported A.D.'s trial testimony that the sex was consensual—and undermined her first statement to police that Mr. Talley forced her to have sex—was crucially important. Had trial counsel asked A.D. why she lied to police, she would have said because she did not want to anger her mother. (71:1). This explanation is plausible, and would have given the jury a strong reason to doubt the veracity of her original statement to police that she was raped. Similarly, had trial counsel asked A.D. what made her come forward with the truth that the sex was consensual, she would have said to rid herself of guilt. (71:1). This testimony would have given the jury reason to believe the truth of her trial testimony.

In addition, this favorable testimony from A.D. explaining the reasons for her conflicting statements about what happened between her and Mr. Talley would have undermined one of the State's central arguments in this case. The State argued that A.D. made conflicting statements because Mr. Talley coerced her to say that the sex between them was consensual. (88:44). In essence, the State argued that Mr. Talley coerced A.D. through her mother to change her statement with his jail calls to T.G. telling her to "fix" the case against him and following his release from custody. Had A.D. explained at trial her initial false statement was made because of her fear her mother would be angry at her for her sexual relationship with Mr. Talley, and that she changed her statement not due to coercion by Mr. Talley, but because she felt guilty for falsely accusing Mr. Talley of rape, this testimony would have significantly rebutted the State's coercion argument.

In sum, the jury was left without a reasonable explanation—even though one was readily available—from A.D. as to why she told conflicting stories about what happened between her and Mr. Talley, or why the jury should believe that A.D. had consensual sex with Mr. Talley. Trial counsel's failure to cross-examine A.D. on her reason for lying to Officer Brown during her initial interview and why her subsequent statement and trial testimony were true fell below an objective standard of reasonableness and constituted deficient performance.

C. Defense counsel's deficient performance in questioning A.D. prejudiced Mr. Talley's defense at trial.

"The result of a proceeding can be rendered unreliable, and hence the proceeding itself, unfair, even if the errors of

counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985). Therefore, “a defendant need not prove the outcome would more likely than not be different in order to establish prejudice in ineffective assistance cases.” *State v. Sholar*, 2018 WI 53, ¶44, 381 Wis. 2d 560, 912 N.W.2d 89 (internal quotes and citation omitted).

In this case, trial counsel’s errors in questioning A.D. were highly prejudicial and undermine confidence in the outcome of Mr. Talley’s trial. Contrary to the circuit court’s ruling on Mr. Talley’s postconviction motion, the evidence at trial against Mr. Talley was far from overwhelming. A.D. testified *at trial* that the sex between them was consensual. (86:141, 156-159). She also told a defense investigator and Officer Brown before trial that the sex was consensual. (71:1; 86:154).

Mr. Talley’s defense was that he had consensual sex with A.D. For that defense to be successful, the jury had to have a reasonable doubt regarding the truth of A.D.’s initial statement to police that that she was raped. The failure of trial counsel to introduce the favorable evidence regarding A.D.’s reason for lying and why she subsequently told police and the jury the truth prejudiced Mr. Talley because, if introduced, it is reasonable to believe the jury could have reached the conclusion that A.D.’s initial statement to police was a lie, and that she lied because she was afraid of angering her mother. Moreover, the favorable evidence would have given the jury reason to believe A.D.’s trial testimony because she would have explained that she came forward and admitted the truth at trial that she and Mr. Talley had consensual sex to rid herself of guilt. Certainly, the lack of this favorable evidence undermines the confidence in the results of Mr. Talley’s trial on the first degree sexual assault causing pregnancy charge.

Notably, during deliberations, the jury sent the court a question asking, “can a 16 year old consent to a sexual affair with an adult?” (27:2). It is clear from the jury’s question that they were grappling over the consent issue in this case. (27:2). Therefore, it is reasonable to believe that this favorable testimony from A.D. may have tipped the scales in Mr. Talley’s favor. Instead, the jury was left to attempt to reconcile A.D.’s conflicting statements, without any explanation or reason why she would have lied to police and initially told police that Mr. Talley sexually assaulted her. Counsel’s failure to cross-examine A.D. regarding her reasons for falsely reporting the sexual contact as rape and her subsequent acknowledgment that the sex was consensual undermines the confidence in the results of Mr. Talley’s trial.

Overall, Mr. Talley was prejudiced because counsel’s deficiency in questioning A.D. at trial undermines confidence in the jury’s verdict, and this Court should grant a new trial on the first degree sexual assault causing pregnancy charge. *See id.* at ¶38.

CONCLUSION

For the reasons stated above, this Court should vacate Mr. Talley's conviction on the charge of first degree sexual assault causing pregnancy, contrary Wis. Stat. §940.225(1)(a), in Case 15CF1502, and grant Mr. Talley a new trial.

Dated this 10th day of July, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,493 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of July, 2018.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of July, 2018.

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