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STATE OF WISCONSIN  
COURT OF APPEALS

DISTRICT I

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

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HARVEY A. TALLEY,

Defendant-Appellant.

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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.

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REPLY BRIEF OF DEFENDANT-APPELLANT

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## ARGUMENT

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

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

Mr. Talley's guilt or innocence on the first degree sexual assault causing pregnancy charge in this case turned completely on which of A.D.'s statements the jury believed.

A.D. told multiple conflicting stories about the nature of her sexual relationship with Mr. Talley. Originally, A.D. told police that Mr. Talley 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. (86:152-154; 87:92-93).

Then, just over two months prior to trial, defense counsel's investigator spoke with A.D. (71:1). A.D. told the investigator that Mr. Talley did not force her to have sex and 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 forced her to have sex because she did not want her mother to be angry with her for having a consensual sexual relationship with Mr. Talley.

(71:1). A.D. also stated that she eventually came forward with a truthful account of what happened—that she and Mr. Talley were having a consensual sexual relationship—to rid herself of guilt. (71:1).

Shortly 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).

Consistent with her statement to the defense investigator and her last statement to police, A.D. testified at Mr. Talley's trial that she had consensual sex with Mr. Talley. (86:142-143; 156-159). In addition to this testimony, A.D.'s three statements to police were introduced into evidence through testimony at trial. (86:147-148, 152-154, 165, 182; 87:11, 25-26, 30-32, 92-93)

Based on A.D.'s conflicting stories about what happened between her and Mr. Talley, an explanation as to why A.D. lied in her original statement to police and was now telling the truth at trial was essential.

Trial counsel, through cross-examination of A.D., had the ability to provide this explanation to the jury and he did not. (86:156-159). At trial, A.D. never explained, as she did to the defense 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. (86:156-159). Had trial counsel

asked A.D. why she lied to police and told them she was raped, 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.

Trial counsel's failure to ask A.D. these important questions on cross-examination was not strategic. Trial counsel admitted at the postconviction motion hearing in this case that he was unsure why he failed to ask A.D. about the reason she lied about being raped and eventually came forward with the truth about her consensual sexual relationship with Mr. Talley. (90:7-8).

Moreover, contrary to the State's argument on appeal, trial counsel had no sufficient reason to limit his questioning of A.D. (State's Br. at 16). He knew what her answers to the questions of why she lied to police and said she was raped and why she was now coming forward with the truth at trial would be because his investigator interviewed A.D. before trial and obtained those answers. (71:1). In addition, any concern trial counsel may have had about A.D. changing her story again at trial during cross-examination was alleviated when A.D. testified

consistent with the version of events she told the defense investigator. (86:141-143).

Further, the State's contention that T.G., A.D.'s mother, provided enough testimony to explain why the jury should believe A.D.'s most recent statements and trial testimony that she consented to sex with Mr. Talley is mistaken. (State's Br. at 16-17). T.G. testified that A.D. eventually told her the truth—that she had consensual sex with Mr. Talley—and apologized for betraying her. (87:11). This testimony does not provide any explanation whatsoever as to why A.D. originally lied to police and told them that Mr. Talley forced her to have sex.

At Mr. Talley's trial, 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. More specifically, the jury was offered no explanation from A.D. as to why she would have lied to police and said she was raped. Trial counsel's failure to cross-examine A.D. on her reason for lying to police 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.

B. 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). “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).

Contrary to the circuit court’s ruling on Mr. Talley’s postconviction motion and the State’s arguments on appeal, the evidence at trial against Mr. Talley was far from overwhelming and damning. (91:11-13; Appellant’s Br. App. 111-113) (State’s Br. 19-21). A.D. testified *at trial* that the sex between them was consensual. (86:141, 156-159). She also told a defense investigator and police before trial that the sex was consensual. (71:1; 86:154). In light of this evidence and the questions surrounding A.D.’s credibility, it simply cannot be said that the evidence that Mr. Talley forced A.D. to have sex with him was overwhelming.

Because the evidence against Mr. Talley was far from overwhelming, A.D.’s testimony as to why she lied to police and said she was raped and was now coming forward at trial with the truth was critical. That evidence, had trial counsel introduced

it, represented the only testimonial explanation to the jury as to why A.D. would have lied to police and said Mr. Talley raped her in her initial statement or why she was telling the truth at trial. Without that testimony, the jury was stripped of the possibility of fully assessing A.D.'s credibility and making a decision based on all the available evidence.

As the State points out, the jury in this case knew that its verdict turned on whether it believed A.D.'s first statement to police that she did not consent to sex with Mr. Talley. (State's Br. at 17-18). And the jury was provided with evidence and arguments from the State at trial about why A.D.'s initial statement to police was credible. This included the greater detail in A.D.'s initial statement to police about what happened between her and Mr. Talley, Mr. Talley's alleged coercion through his jail calls to get A.D. to recant her initial statement to police, and Mr. Talley's post-arrest statement that he could not remember having sex with A.D. (State's Br. 19-20).

Problematically, the jury was never presented with testimony that would have given an alternate explanation for why A.D. recanted and was now telling the truth at trial or why her initial statement to police was false. Again, this testimony—that A.D. lied because she did not want to anger her mother and was now telling the truth to rid herself of guilt—was readily available for trial counsel to introduce at Mr. Talley's trial. (71:1). The lack of this favorable evidence undermines the confidence in the results of Mr. Talley's trial and, therefore, he was prejudiced.



## CONCLUSION

For the reasons stated in this brief and Mr. Talley's brief-in-chief, this Court should vacate his 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 24<sup>th</sup> day of October, 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 1,483 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 24<sup>th</sup> day of October, 2018.

Signed:

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CHRISTOPHER D. SOBIC  
Assistant State Public Defender