STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No 2020AP226-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY L. HINEMAN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief,
Entered in the Racine County Circuit Court,
the Honorable Mark F. Nielsen, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Prejudice and Materiality

The state overstates Hineman's burden to establish materiality under *Brady v. Maryland*, 373 U.S. 83 (1963) and prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984). In arguing the evidence was not slim in this case, the state is essentially arguing that there is sufficient evidence to support the verdict. This is not the test.

A prejudice or materiality inquiry must "consider the totality of the evidence before … jury. A verdict … that is overwhelmingly supported by the record is less likely to have been affected by errors than one that is only weakly supported by the record." *Hough v. Anderson*, 272 F.3d 878, 891 (7th Cir. 2001) (citing *Strickland,* 466 U.S. at 696). The issue here is not whether the defendant is actually innocent, but instead whether he would have had a "reasonable chance" of acquittal absent the errors. *Stanley v. Bartley*, 465 F.3d 810, 814 (7th Cir. 2006) (noting also that "it needn't be a 50 percent or greater chance").

Hineman does not dispute that credibility determinations are the providence of the jury and that in a trial absent of errors, a jury is well equipped to make them. But in a case where there is no consistent statement about what happened or when, no physical evidence, no third-party observations of inappropriate behaviors or other corroborating evidence, it cannot be said this was a case that displayed overwhelming – or even strong – evidence

of guilt. The fact that Hineman, who the state admits was in a father-figure role, referred to his one-time step-son as son or that he was sometimes Uncle Jeff is insignificant. Similarly, Hineman was hardly caught in a lie when asked why the family cut off contact with him – he had no idea. (78:138). That his speculations didn't add up chronologically doesn't mean he was lying. And though he didn't reveal his exact location when police first called him, he was cooperative and met with them within minutes of their call. (78:82-83). Hineman's testimony isn't demonstrably incredible and doesn't assist the state's lack of prejudice argument.

II. Hineman Was Prejudiced by the Suppression of the CPS Report.

The state concedes that the prosecution wrongfully – either willfully or inadvertently – withheld the favorable CPS report. (Resp. Br. at 10). Its arguments that the wrongful suppression of this critical document made no difference to the outcome are not supported by the record or the law.

If counsel had "deftly" cross-examined Hintz, she would have elicited "No, the CPS report did not contain a statement that Hineman touched SJS's privates." (Resp. Br. at 21). This did not happen.

When the state asked Hintz if her police report would reflect that the CPS report contained a statement that Hineman had touched SJS, Hintz responded "I would think I would have *but it's not – I might not put it in there* but that's why I would have to look at the report and look at the original CPS." (78:107). In other words, Hintz explained to the jury

that it is entirely possible that the police report would not contain that information, even if it was in the CPS report.

The circuit court finding that Hintz was "clearly confusing" the question, "Did the CPS report contain a statement that Hineman had touched SJS?" with "Did the CPS report contain a statement that Hineman had made inappropriate comments to SJS?" is clearly erroneous. (62:7). Hintz was specifically and repeatedly asked if the report contained a statement that Hineman had touched SJS. (78:107-08). There is no reason to believe she did not understand or was confused by the question.

But even if this court does not agree that this finding is clearly erroneous, such a conclusion can only be made if the evidence is viewed in a light most favorable to the state. Again, this is not the standard for under *Brady* or *Strickland*. Viewed neutrally, it is at least reasonably probable that Hintz misremembered what was in the CPS report when she testified "I believe in the CPS report, that there was a statement in there that he said Jeff had that." (78:107). In any event, it is reasonably probable that the jury would have concluded that the CPS report did contain a statement of inappropriate touching based on this testimony.

Hineman agrees there is no evidence that Hintz was intentionally perjuring herself or had other nefarious intent. While that is a possibility given her false testimony, it is far more likely that her belief was a product of tunnel vision. *See* Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 WIS. L. REV.

291, 307-354 (2006) (various subconscious biases affect memory). This phenomenon, a leading cause of wrongful convictions, is not the product of malice, but rather "natural human tendencies." *Id.* at 292.

The CPS report is not cumulative evidence. Evidence is cumulative when it goes to prove what has already been established by other evidence. *Mosley v. Atchison.* 639 F.3d 838, 848 (7th Cir.) (quotation omitted). No other evidence was presented that attacked Hintz's credibility.

The police report is also not duplicative. In addition to revealing the fact that the reporter was the therapist not a teacher, the police report contains an ambiguity as to whether Dad failed to provide any specific information of touching when questioned about the school incident or whether SJS did. The CPS report makes clear that it was the latter – "no information was given ***by [SJS].***" (48:4). This important prepositional phrase is not in the police report.

The state argues that despite the fact that there was "not an express claim of touching like S.S.'s CAC disclosure" the CPS report was inculpatory. Even if it were true that Hineman told SJS "it feels good to have your private sucked" (and no evidence was presented to that effect), this does not equate to a concern that Mr. Hineman was sexually assaulting SJS. (48:3). Popular culture (TV, movies etc.) is filled with sexually explicit material and sexual innuendo. A hyperactive child with behavioral challenges could have been exposed to this material anywhere and could have simply asked Hineman about what he had seen or heard. If Hineman said this, it may make him

guilty of engaging in inappropriate conversation, but it does not mean he is guilty of the crime of sexually assaulting SJS.

In any event, exculpatory evidence is all evidence that *tends* to establish a criminal defendant's innocence. "While evidence that actually establishes a defendant's factual innocence will necessarily be exculpatory, the converse is not true; not all exculpatory evidence actually establishes the factual innocence of the defendant. *State v. Harris*, 2004 WI 64, n.1, 272 Wis. 2d 80, 119, 680 N.W.2d 737 (Wilcox, J. concurring). Exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence." *Giglio v. United States,* 405 U.S. 150, 154, (1972). At the very least, the CPS report contains a prior inconsistent statement about what Hineman did. This goes directly to SJS's reliability.

The response brief speculates that the juror question was the product of "one juror's" curiosity and that it doesn't mean that the whole jury considered the issue important. (Resp. Br. at 17). This is entirely speculation as we aren't privy to deliberations. All we know is that this question, which speaks for itself, was presented to the court.

Based on Hintz's unimpeached testimony, it is reasonably probable that the jury believed that SJS had reported inappropriate touching as early as March 12. It is reasonably probable this fact tipped the credibility scale in SJS's favor and for that

reason, the jury convicted. Absent this error, it is reasonably probable the outcome could have been different.

III. Trial Counsel's Multiple Instances of Deficient Performance Prejudiced Hineman.

Reviewing courts apply a deferential presumption that strategic judgments are reasonable. "But for this deference to apply, the decision must be—in fact—strategic." *Dunn v. Jess*, 981 F.3d 582, 951 (7th Cir. 2020). "A court adjudicating a *Strickland* claim can't just label a decision 'strategic' and thereby immunize it from constitutional scrutiny." *Id.* at 953 (quotations omitted).

A. Failure to obtain the CPS records.

The state concedes trial counsel was deficient for not obtaining the March 12 CPS report before trial. The prejudice of not having this document at trial is discussed above and in the brief-in-chief at 16-19, 23-28, 39-42.

B. Failure to make an opening statement.

Trial counsel's proffered strategic reason for not giving an opening – her belief that an opening statement required a preview of what her client might testify to – is irrational and cannot form the basis of a reasonable strategic decision not to give an opening.

True, ordinarily waiving an opening will not form the basis for an ineffective assistance of counsel claim. But under the circumstances of this case, the

proffered reason for waiving falls outside "the wide range of professionally competent representation." *Strickland,* 466 U.S. at 690. The lack of a defense roadmap augmented the prejudicial effect of the other errors and is therefore prejudicial under *State v. Thiel,* 2003 WI 111, ¶41, 264 Wis. 2d 571, 665 N.W.2d 305.

C. Failure to object to improper expert testimony

Defense counsel's decision to not object to the concededly improper expert testimony was not the product of a developed strategy. Defense counsel testified it did not occur to her to object. (82:34); s*ee Wiggins v. Smith,* 539 U.S. 510, 526 (2003) (counsel was deficient when the alleged error "resulted from inattention, not reasoned strategic judgment").

Defense counsel's belief that the concepts of delayed or piecemeal disclosure were not at issue in this case is not reasonable. No reasonable juror would have believed that SJS reported that he was sexually assaulted in fall of 2014 and no one did anything about it. The weight of the evidence demonstrates this was a case of delayed disclosure.

Similarly, defense counsel's view that SJS's additional statement about what happened "wasn't more" but rather "was inconsistent" is simply not reflected by the record. (82:67). The first allegation regarding Hineman's inappropriate behavior was that he discussed oral sex with him. Five months later, SJS stated Hineman touched him on the penis, but was vague about when this happened. Two years after that, SJS said Hineman touched him on the

penis on the day after Halloween when his dad was in the hospital. Over the course of a two-and-one-half year investigation, SJS's statements became more detailed and precise. SJS's disclosure was piecemeal.

This court has recognized that testimony "regarding reactive behaviors common among child abuse victims" is specialized and technical knowledge in the domain of experts. *State v. Smith*, 2016 WI App 8, ¶6, 366 Wis. 2d 613, 874 N.W.2d 610. The state's argument that Jenson was merely opining on "common sense notions that jurors would recognize from their everyday experience" is contrary to law and to the states own concession that Jensen was testifying as an expert. (Resp. Br. at 29, 31); *see also* Wis. Stat. § 907.01(3) (a lay witness may not give expert testimony). Indeed, it is precisely because jurors may have a "faulty notion that the faster a victim report an assault, the more likely it actually happened" that experts are often used in cases of delayed or piecemeal disclosure. (Resp. Br. at 31). If jurors commonly understood the concepts of delayed and piecemeal disclosure, expert testimony would not only be unnecessary – but also inappropriate – in all cases. *State v. Swope,* 2008 WI App 175, ¶27, 315 Wis. 2d 120, 762 N.W.2d 725 (quotation omitted) (expert testimony is appropriate when an untrained lay people are not able to determine intelligently the particular issue without enlightenment from those who have a specialized understanding of the subject).

Jensen's testimony that research has shown that delayed and piecemeal disclosures can be reliable notwithstanding their delay or fractured-nature could only serve to harm the defense. Defense counsel could have just as easily demonstrated – and

did – the inconsistencies in SJS's testimony about immediately reporting without it. It is reasonably probable that Jensen's testimony cured the jurors "faulty notions" and without it they would have found too many reasons not to credit SJS's inconsistent statements.

D. Conceding guilt at closing.

The state does not dispute that transcript of the closing argument filed on January 19, 2018 was the subject of the litigation below. (Supp. App. 101-150).[1] In this transcript, defense counsel said "But I believe the sexual assault happened." (Supp. App. 124 at line 17). This version of the transcript was quoted in the postconviction motion (41:25), read aloud to trial counsel during the postconviction motion hearing (82:42) and again quoted in the post-hearing trial court brief (61:15). In the multiple postconviction written submissions and hearings, the prosecutor did not object to these quotations or

[1] Although not in the official record, the entire transcript can be found as Attachment A to defense motion to supplement the appellate record filed October 29, 2020. *See* acefiling.wiscourts.gov, Documents for Cases 2020AP226 at Corrected Motion to Supplement Record and Attachment A. In drafting the reply, Hineman discovered there were multiple versions of this transcript and that the transcript in the record differed from the transcript that was relied on below. Hineman filed a motion to supplement the record with the transcript that had been relied on below. The state did not object to this motion but requested additional time to file an amended brief based on the transcript that was attached to the motion. This court denied the defense motion to supplement the record because, it said, the transcript in the record was the same as the one relied on below. This is incorrect. The transcript in the record (79) is not the one that was relied on below.

otherwise indicate that it was either using or had access to a different version of the transcript when opposing this claim (82, 83, 50:14-15, 59, 60:2).

The state essentially concedes that if trial counsel said "I believe the sexual assault happened" that would be ineffective assistance of counsel. But, the state argues, this must not have been what she said. The state further argues that the version of the closing argument filed in March 2018 is also an inaccurate representation of what was said. According to the state, both transcripts must contain separate yet different transcription errors. (Resp. Br. at 32).

The problem with the state's argument is that when this issue was raised and litigated below the state did not move to correct the record or otherwise offer testimony about what might have been actually said if not "But I believe." *See* Wis. Stat. § 809.15(3) ("A party who believes that the record, including the transcript of the court reporter's verbatim record, is defective or that the record does not accurately reflect what occurred in the circuit court may move the court in which the record is located to supplement or correct the record.").

Hineman agrees trial counsel did not intend to say "I believe the sexual assault happened." But mistakes happen. Well-intended people lose their train of thought; well-intended people can misspeak.

Further, in denying the motion for postconviction relief, after weighing the arguments before it, the circuit court stated "In regard to the defense attorney having conceded during closing that

the assault occurred….It is true that this is what the transcript says." (62:11). The court did not indicate that its findings were based on anything other than what had been alleged and litigated.

The fact that the transcript reflects that defense counsel said "I believe the sexual assault happened" creates a reasonable probability that she did say it and the jury credited it. It may be equally probable that there is a transcription error. But again, Hineman need not show more likely than not – only a reasonable probability.

IV. Hineman's Interest of Justice Claim Is Not Duplicative of the Ineffective Assistance of Counsel Claims.

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. Nobles, 422 U.S. 225, 230-31 (1975).

While it may be that the full extent of the prejudice in the Hineman's ineffective assistance claims is unknown without an in camera review of SJS's treatment records, Hineman's interest of justice claim is not a repackaging of an ineffective assistance claim. Justice was not achieved in this case because sloppy prosecution prevented a full investigation and

vetting of the issues in the case. First degree sexually assault of a child is too serious a crime to gloss over multiple discovery violations and their truncating effects on the trajectory of the case.

Hineman is absolutely challenging the circuit court's denial of an in camera review of the treatment records. (Opening Br. at 39-41). He cannot know – or even investigate much less call witnesses to testify – how SJS was questioned or treated without a court order. But it is known that young children are susceptible to suggestive interviewing techniques and other therapeutic practices that may affect the reliability of their statements. *State v. Kirschbaum*, 195 Wis. 2d 11, 24, 535 N.W.2d 462 (Ct. App. 1995). Hineman has a right to present a psychological expert to opine on these factors, if they were present. *Id.* He has identified the problematic techniques and presented sufficient facts – that the therapist developed the abuse concern and that she was treating the child both before and after the suspicions and delayed allegations came to light – to meet the relevancy prong under *Shiffra/Green*.

If the interest of justice claim were based solely on *Shiffra/Green,* it may be that correct remedy is to conduct an in camera review before ordering reversal. But since this issue is intertwined with so many others and this court need not conclude that the outcome would have been different on retrial, this court should reverse in the interests of justice. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435, 440 (1996).

CONCLUSION

For the reasons stated, Jeffrey L. Hineman respectfully requests that the court reverse his conviction and remand for a new trial.

Dated this 23rd day of December, 2020.

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 2,959 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief of appellant, including the supplemental appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 23rd day of December, 2020.

Signed:

Electronically Signed by
Frances Reynolds Colbert

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SUPPLEMENTAL APPENDIX

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