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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP000226-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JEFFREY L. HINEMAN,

Defendant-Appellant.

On Review of a Decision of the Court of Appeals, Reversing a Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Racine County Circuit Court, the Honorable Mark F. Nielsen, Presiding.

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Page

ISSUES PRESENTED 8

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 9

SUMMARY OF THE ARGUMENT 10

STATEMENT OF THE FACTS 12

ARGUMENT 19

I. The State's Failure to Turn Over the CPS Report Violated Mr. Hineman's Due Process Rights and *Brady v. Maryland, 373 U.S. 83 (1963)*..... 19

A. Materiality..... 21

B. Officer Hintz provided materially false testimony and the defense was unable to impeach it. 22

C. The CPS report bears on guilt or innocence and is not cumulative evidence. 25

1. The CPS report is not duplicative. 27

2. Impeaching the false testimony that SJS reported as early as March 12 would not have been cumulative..... 29

3. Undermining Officer Hintz's credibility and by extension the integrity of the investigation would not have been cumulative. 33

II. Mr. Hineman is Entitled to a New Trial Because He Was Denied Effective Assistance of Counsel 34

A. Failure to obtain the CPS records..... 35

B. Failure to make an opening statement..... 39

C. Failure to object to improper expert testimony. 40

D. Conceding guilt at closing 42

III. Mr. Hineman Is Entitled to a New Trial, and an in Camera Review of SJS's Treatment Records, in the Interests of Justice..... 46

A. Prosecutorial errors prevented a full and fair trial. 46

B. An in camera review of SJS's treatment records is necessary to fully try this controversy. 48

C. The remedy requested is a new trial, not acquittal. 53

CONCLUSION..... 55

CASES CITED

Bagley, 473 U.S. 667 (1985).....21, passim

Brady v. Maryland,
373 U.S. 83 (1963).....8, passim

Coffin v. United States,
156 U.S. 432 (1895)..... 54

Dunn v. Jess,
981 F.3d 582, 951 (7th Cir. 2020)..... 35

Furman v. Georgia,
408 U.S. 238 (1972)..... 54

Giglio v. United States,
405 U.S. 150 (1972)..... 21

Hough v. Anderson,
272 F.3d 878 (7th Cir. 2001)..... 21, 54

In re Winship,
397 U.S. 358 (1970)..... 54

Kyles v. Whitley,
514 U.S. 419 (1995)..... 23, 28

Mosley v. Atchison,
639 F.3d 838 (7th Cir.)..... 25

Napue v. Illinois,
360 U.S. 264 (1959)..... 22

Stanley v. Bartley,
465 F.3d 810 (7th Cir. 2006)..... 22

State v. DelReal,
225 Wis. 2d 565,
593 N.W.2d 461 (1999) 28

State v. Denis L.R.,
2005 WI 110, 283 Wis. 2d 358,
699 N.W.2d 154 ..... 28, 50, 51, 52

State v. Elm,
201 Wis. 2d 452,
549 N.W.2d 471 (Ct. App. 1996)..... 34

State v. Green,
2002 WI 68, 253 Wis. 2d 356,
646 N.W.2d 298 ..... 9, 49

State v. Harris,
2004 WI 64, 272 Wis. 2d 80,
680 N.W.2d 737 ..... 21, 31

State v. Hineman,
unpublished *per curium* slip. op.,
(Ct. App. November 24, 2021) 18

State v. Kirschbaum,
195 Wis. 2d 11,
535 N.W.2d 462 (Ct. App. 1995)..... 48

State v. Maday,
2017 WI 28, 374 Wis. 2d 164,
892 N.W.2d 611 ..... 29, 48

State v. Michaels,
642 A.2d 1372 (N.J. 1994) 30

State v. Rockette,
2006 WI App 103, 294 Wis. 2d 611,
718 N.W.2d 269 ..... 20, 26

State v. Shiffra,
175 Wis. 2d 600,
499 N.W.2d 719 (Ct. App. 1993)..... 9, 49, 50

State v. Smith,
2016 WI App 8, 366 Wis. 2d 613,
874 N.W.2d 610 37

State v. Thiel,
2003 WI 111, 264 Wis. 2d 571,
665 N.W.2d 305 ..... 35, 40, 45

State v. Wayerski,
2019 WI 11, 385 Wis. 2d 344,
922 N.W.2d 468 ..... 19, 26

State v. Zdzieblowski,
2014 WI App 130, 359 Wis. 2d 102,
857 N.W.2d 622 46

Strickland v. Washington,
466 U.S. 668 (1984)..... 21, 34, 35

United States v. Dweck,
913 F.2d 365, (7th Cir. 1990)..... 26

STATUTES CITED

48.981 ..... 28, 32, 51

752.35 46

809.15(3) 44

905.01 28

905.04 ..... 28, 50, 51

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ISSUES PRESENTED

The State wrongfully withheld the document – a CPS report dated March 12, 2015 – that triggered the investigation into Mr. Hineman's alleged criminal conduct and culminated in his conviction of sexual assault of a child. At trial, the investigating officer testified about its contents – falsely. Defense counsel was unable to impeach the officer's testimony because she had never seen the report.

1. The State concedes that the CPS report was wrongfully withheld. The question for this Court is whether the wrongfully withheld document was material and prejudicial to Mr. Hineman's defense.

The circuit court answered no. The court of appeals reversed, holding that the State violated *Brady v. Maryland,* 373 U.S. 83 (1963), because there is a reasonable probability that "had the March 12 report been turned over to Hineman prior to trial, the outcome of the trial would have been different."

2. Was Mr. Hineman denied effective assistance of counsel when trial counsel:

   a) failed to obtain the CPS report before trial;

   b) failed to make an opening statement;

   c) failed to object to improper expert testimony; and

d) conceded guilt during closing arguments.

The circuit court answered no. The court of appeals did not reach this question because it granted relief based on the *Brady* violation.

3. Is Mr. Hineman entitled to relief, including an *in camera* review of treatment records under *Shiffra/Green*,[1] in the interests of justice?

The circuit court answered no. The court of appeals held that before Mr. Hineman faces a new trial, he is entitled to an *in camera* review of the alleged victim's treatment records so that the circuit court can determine whether any of the records are material to the defense.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument has been scheduled and publication is customary for this Court.

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[1] *State v. Shiffra,* 175 Wis. 2d 600, 605, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298

SUMMARY OF THE ARGUMENT

Child sexual assault is among the most serious crimes and carries among the most significant penalties. Yet, trials involving child sexual assault charges often turn on credibility contests; a suspect can spend decades in prison on the word of a young child and nothing more. To ensure that convictions for such a grave and harshly punished offense are reliable, the Constitution and statutes governing discovery and evidence protect the interests of the accused – and the public – by requiring a complete investigation and a fair trial. Neither occurred here.

In this case, the State withheld a favorable child protective services report. The CPS report reveals that a therapist suspected Mr. Hineman of sexually abusing 6-year-old SJS not because SJS disclosed any inappropriate touching but because he had behavior problems. Despite the fact that no inappropriate touching was alleged, authorities were informed about these suspicions and the family cut off all contact with Mr. Hineman. These suspicions brewed for five months before SJS finally, during a belated forensic interview, made a statement that Mr. Hineman had touched him inappropriately.

Because defense counsel was unaware that it was a therapist who triggered the criminal investigation, she never investigated the therapist's concerns or attempted to get her records. As a result, Mr. Hineman went to trial without knowing how he'd become a suspect, without knowing who initially

reported him to authorities, and without knowing how many times SJS was questioned about Mr. Hineman inappropriately touching him before he disclosed such touching.

At trial, the investigating officer testified falsely that the CPS report contained a statement that SJS had alleged that he had been touched by Mr. Hineman. Because the CPS report was withheld, defense counsel was unable to impeach this inaccurate testimony.

In addition, defense counsel made multiple, constitutionally significant errors both before and during trial. She: failed to obtain the CPS report; failed to make an opening statement to the jury; and failed to object to improper expert testimony elicited by the State at trial. Perhaps most shocking, defense counsel conceded Mr. Hineman's guilt in her closing argument.

The State's refusal to grant the defense access to the CPS report, combined with defense counsel's ineffective representation, deprived Mr. Hineman of a number of important constitutional rights. The court of appeals correctly determined that Mr. Hineman, who has fervently maintained his innocence, is thus entitled to a new trial—one in which he has full access to the evidence against him and the effective representation necessary to challenge it.

STATEMENT OF THE FACTS

~Background~

Mr. Hineman was a family friend of the S. family and a father figure to six-year-old SJS. Mr. Hineman was romantically involved with SJS's mother when SJS was born, and cared for him until his mother moved out-of-state when SJS was 14 months old. (78:61-62,129-130). A few years later, SJS returned to Wisconsin, to the custody of his biological father, Frank S.[2] (78:62). Shortly after that, Mr. Hineman reached out to SJS's paternal grandmother, Mary S.,[3] and reestablished contact with SJS. (78:62, 132).

Mr. Hineman loved SJS and considered him a stepson. (78:137, 147). He bought him gifts, took him places, and cared for him. (78:63, 137-138). Grandma explained that Mr. Hineman was "very, very nice to [SJS], to the family. We were glad he was back in [SJS's] life." (78:62-63). Mr. Hineman was even the primary caregiver for SJS during a two-week period in the fall of 2014, when Dad was in the hospital. (78:63-64). In the spring of 2015, however, the family abruptly cut off all contact with Mr. Hineman. (78:66). Mr. Hineman had no idea why. (78:137-138).

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[2] For ease of reading and to avoid confusion of multiple individuals with the same surname, this brief will refer to Frank S. simply as Dad.

[3] For ease of reading and to avoid confusion of multiple individuals with the same surname, this brief will refer to Mary S. simply as Grandma.

Unbeknownst to Mr. Hineman, SJS's private therapist had developed a concern that SJS was being sexually abused because he had been exhibiting behavior problems and was overheard making a reference to the pleasures of oral sex at school. (48:3; Pet-App. 51). On March 12, 2015, the therapist reported her concerns to CPS. (48:4; Pet-App. 52). The CPS report cites a series of conversations between the therapist and Dad, SJS's school, and SJS in which the therapist concludes that Mr. Hineman was the source of SJS's knowledge about oral sex and the CPS report identifies Mr. Hineman as the "alleged maltreater." (48:2-3; Pet-App. 52-53). The details of the therapist's conversations with each of these people, however, are not provided in the report and are still unknown. (48:3-4; Pet-App. 53-54).

Three months after the report was created, it was faxed to the Racine County Sherriff's Office. Officer Tracy Hintz then began a criminal investigation into Mr. Hineman's alleged sexual abuse of SJS. (41:29-31, Pet-App. 47-48).

On August 5, 2015, five months after Mr. Hineman was identified as the alleged maltreater and two months after the CPS report was faxed over to law enforcement, SJS participated in a child advocacy center (CAC) forensic interview where, for the first time, he disclosed that Mr. Hineman touched him inappropriately. (86). During the interview, SJS was inconsistent in his statements and did not provide a linear narrative about what happened or when. For example, SJS described an instance in which

Mr. Hineman touched his private parts over his clothing while they were on the couch, and then Mr. Hineman laughed. (86 at 10:07:25-52).[4] SJS stated it had happened four times, but then stated it had happened six times. (86 at 10:25:08; 10:11:15). When asked to talk about details of one of the other times, SJS said simply, "That was all." (86 at 10:12:20). It was never clarified if SJS was alleging more than one incident. (86 at 10:26:28). When specifically asked if the touching happened around the two-week period in which Mr. Hineman stayed with him, SJS said he did not remember. (86 at 10:27:00). There was, however, one consistent remark: SJS repeatedly reported that after Mr. Hineman touched him, he immediately told his parents, who were at home, and Mr. Hineman was then thrown out of the house. (86 at 10:15:56 10:26:49 10:07:49 10:08:08 10:10:23).

The day after the CAC interview, Mr. Hineman was charged with one count of first-degree sexual assault of a child under the age of 13. (1).

~The trial~

A trial was held on May 9-11, 2017. The State called four witnesses, but little evidence was presented about how the alleged sexual assault actually happened. As noted by the circuit court, the trial "was a contest of credibility in many ways. [Mr. Hineman]

[4] A transcription of the CAC video was not prepared for trial, however Mr. Hineman had one prepared postconviction. *See* Exhibits 2 and 3 to the postconviction motion. (41:32-64).

against the child.… [T]he verdict could have gone either way." (80:24).

The trial began, as trials usually do, with the State's opening statement previewing the evidence it believed would show Mr. Hineman's guilt. (78:16-18). When it was defense counsel's turn, she opted not to give an opening statement. (78:18).

Testimony began with forensic interviewer, Heather Jensen, who discussed her background and training and the techniques she used when interviewing SJS at the child advocacy center. (78:19-40). Although not noticed as an expert, she also testified about research on the implications of "piecemeal" and "delayed disclosure" and why children do not disclose right away. (78: 27-31; Res-App. 3-7). There was no objection to this expert testimony by a lay witness. The jury then watched a video recording of the full CAC interview.

After the CAC interview was played for the jury, nine-year-old SJS testified about the assault that had allegedly occurred two-and-one-half years prior. SJS's trial testimony, like the information he provided during his forensic interview, lacked details. Six times SJS answered the question about what happened with Mr. Hineman with "I don't remember." (78:47-50). But he eventually testified that the inappropriate touching happened one time, on one specific day: Mr. Hineman touched SJS's penis the day after Halloween in the fall of 2014. (78:49, 53). SJS then reiterated his prior CAC

interview statements that after it happened, he told his dad and grandmother. (78:55).

Grandma then testified, primarily about the family's relationship with Mr. Hineman, her son's illness in the fall of 2014, and SJS's behavior problems. (78:62-67). Grandma did not witness or have any personal knowledge of an assault, and she confirmed that SJS never told her (or, to her knowledge, Dad) about any alleged assault. (78:67).

Next, the jury heard from Officer Hintz, who testified about her significant training and experience investigating child sexual assaults, and then about her interview with Mr. Hineman. (78:92-102). Hintz explained Mr. Hineman's behavior was concerning to her because he was buying gifts for SJS and doing things for the family, which "in the totality of everything" was "described as grooming." (78:94-95, 91, 92). When the prosecutor began asking the officer about where she learned about the "concept of grooming," defense counsel objected because the prosecutor was eliciting expert testimony, Officer Hintz had not been noticed as an expert, and the police reports had not said anything about grooming. (78:92). The objection was sustained. (78:92).

Officer Hintz also testified that she believed the CPS report said SJS had reported that Mr. Hineman had touched him inappropriately. (78:107-09; Res-App. 8-10). The CPS report contains no such statement. (48:2-7; Pet-App. 50-55). This testimony was not impeached.

Last, Mr. Hineman testified. Mr. Hineman discussed his relationship with the family and SJS. Mr. Hineman unequivocally stated that he never touched SJS inappropriately. (78:140).

Despite Mr. Hineman's testimony, defense counsel's closing argument included the following: "…I believe the sexual assault happened. It happened the day after trick-or-treating. It happened when his dad wasn't there. It would have had to happen when he was watching SJS during those two weeks." (Res-App. 13).

Mr. Hineman was convicted and sentenced to 25 years of imprisonment.

~Postconviction litigation~

Mr. Hineman brought postconviction motions seeking postconviction discovery and alleging a multitude of constitutional violations. (40, 41, 42, 55). The circuit court granted the postconviction discovery motion and ordered the county department of health services to provide Mr. Hineman with the original March 12 CPS report as well as two other related CPS reports. (47, 62; Pet-App. 12-24).

The original report and the two related reports from April 20, 2015 and May 29, 2015 contain information that was unknown to the defense before trial. The original report confirms that SJS had made no disclosure of inappropriate touching prior to law enforcement's involvement and reveals that it was a therapist who reported Mr. Hineman's suspected

abuse to authorities. (48:8-12; Pet-App. 56-60). The April 20 report reveals that a month after the family cut off contact with Mr. Hineman, they took SJS to be examined by a physician; the physician detected no physical signs of abuse. (48:10; Pet-App. 58). The April 20 report also states that the family thought SJS was being sexually abused by an "autistic son." (48:10; Pet-App. 58). The May 29 report reveals that SJS's therapist, school counselors, teachers, parents, and grandparents (*i.e.* all the adults in SJS's life) believed Mr. Hineman had been sexually abusing SJS long before SJS made any such disclosure. (48:13-17; Pet-App. 17).

Despite the discovery of this new information postconviction, the circuit court denied Mr. Hineman's motion for postconviction relief. Mr. Hineman appealed.

The court of appeals held that the State violated Mr. Hineman's due process rights under *Brady v. Maryland* when it failed to provide the defense with the CPS report, and it granted Mr. Hineman a new trial. The court concluded that the CPS report was material because, without it, the defense was unable to impeach Officer Hintz's false testimony that the CPS report contained an allegation of inappropriate touching. *State v. Hineman,* unpublished *per curium* slip op. ¶¶39-40 (Nov. 24, 2021) (Pet-App. 3-11). The court also held that upon remand for a new trial, Mr. Hineman would be entitled to an *in camera* review of SJS's therapist's records "related to her report to CPS on March 12." *Hineman,* ¶52.

Other details about the investigation, the trial, and the postconviction and appellate litigation will be provided below.

ARGUMENT

I. The State's Failure to Turn Over the CPS Report Violated Mr. Hineman's Due Process Rights and *Brady v. Maryland*, 373 U.S. 83 (1963).

The parties agree on the legal standard governing *Brady* challenges: "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87. The parties also agree that Mr. Hineman has met his burden to establish the first two prongs necessary to establish a *Brady* violation – that the CPS report was "favorable to the accused either because it is exculpatory or because it is impeaching" and that it was "suppressed by the State, either willfully or inadvertently." *State v. Wayerski,* 2019 WI 11, ¶35, 385 Wis. 2d 344, 922 N.W.2d 468 (citations omitted). The State does not agree, however, that Mr. Hineman has established the third prong – that the wrongfully suppressed evidence was "material."

The State questions how, or even whether, an appellate court should review *Brady* challenges in sexual assault cases that do not involve any physical

evidence, confessions, third-party eye-witnesses accounts, or other corroboration of the alleged crime – *i.e.,* close cases. The State appears to argue that in cases in which guilt or innocence depends entirely on credibility determinations, appellate courts should abandon the traditional *Brady* materiality standard – binding federal precedent for the last 50 years – in favor of a more deferential standard in which evidence is viewed in the light most favorable to the State and verdicts are upheld whenever the record contains a modicum of evidence to support the conviction. This is not the law, nor should it be.

Acquitting the guilty is detestable but so too is condemning the innocent. The criminal justice system, including the appellate process, is designed to protect against either unsavory outcome. Appellate courts are not privy to jury deliberations and the system of appellate review is necessarily limited to "cold transcripts" and court records. (State's Br. at 30). When a constitutional due process violation is alleged, as it is here, this Court is required to perform a *de novo* review based on the paper record before it. *See State v. Rockette*, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269 (appellate courts independently apply the constitutional standard to the undisputed facts of the case). For the reasons set forth below, this Court, like the court of appeals, should apply the constitutional standard to the record before it and hold that the CPS report was material and the State's failure to turn it over violated Mr. Hineman's due process right to a fair trial.

A. Materiality

Evidence is material under *Brady* when there is a "reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Harris,* 2004 WI 64, ¶14, 272 Wis. 2d 80, 680 N.W.2d 737 (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). This is the same as the prejudice test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), in ineffective assistance of counsel claims. *Id.*

Material evidence includes evidence affecting witness credibility when the reliability of the witness in question is likely determinative of guilt or innocence. *Giglio v. United States*, 405 U.S. 150, 154, (1972); *see also Harris,* 272 Wis. 2d 80, ¶31 ("[i]mpeachment evidence casting doubt on a witness's credibility is material and subject to disclosure").

A prejudice or materiality inquiry must "consider the totality of the evidence before … the 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). Thus, the issue here is not whether the defendant is innocent, but instead whether he would have had a "reasonable chance" of acquittal absent the errors in his trial.

Stanley v. Bartley, 465 F.3d 810, 814 (7th Cir. 2006) (noting that "it needn't be a 50 percent or greater chance").

The CPS report was material exculpatory impeachment evidence that went to an issue at the heart of the case – when and how SJS disclosed that Mr. Hineman had sexually assaulted him, and what the circumstances of the disclosure indicated about its reliability. Had the State turned over the report, the defense could have used it to impeach Officer Hintz's materially false and prejudicial testimony that the initial CPS report contained an allegation that Mr. Hineman had assaulted SJS – undermining both Officer Hintz's and SJS's credibility. Moreover, the defense would have gained access to important information that would have altered its trial strategy. In a case that "could have gone either way," there is a reasonable probability that providing the CPS report to the defense in advance of trial as the law requires would have produced a different outcome. (80:24).

B. Officer Hintz provided materially false testimony and the defense was unable to impeach it.

The government may not knowingly use false testimony to obtain a conviction. "The knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared." *Bagley*, 473 U.S. at 676 n. 8, (*quoting Napue v. Illinois*, 360 U.S.

264 (1959)). Indeed, the *Brady* rule "trace[s] its origins to early 20th-century strictures against misrepresentation[s]" by the state. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *see also Bagley,* 473 U.S. at 676 n.8.

Officer Hintz testified – twice – that it was her belief that the CPS report, which had triggered her investigation, contained a statement that SJS had alleged that he had been inappropriately touched by Mr. Hineman: "*I believe in the CPS report, that there was a statement in there that he said Jeff had [touched him].*" (78:107; Res-App. 8) (emphasis added). When defense counsel attempted to impeach the officer with her police report – "But if you were told that, you would have then put it in your report?" – Hintz replied, "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." (78:108; Res-App. 9). She then concluded "*I believe it does state that he later says that*." (78:108; Res-App. 9) (emphasis added).

This testimony is contrary to fact. The CPS report did not contain a statement that SJS had alleged that he had been touched by Mr. Hineman. And Officer Hintz's testimony was not equivocal. She did not say: "I don't remember what the CPS report said; it might have said that, it might not have said that." Rather, she testified, "I believe it does state that he later says that." (78:108; Res-App. 9).

The State argues that the failure to disclose the CPS report to the defense wasn't material because Hintz was effectively impeached without it. Not so. If counsel had "deftly" cross-examined Hintz, as the State argues, she would have elicited: "No, the CPS report does not contain a statement that Hineman touched SJS's privates." (State's Br. at 23).[5] This did not happen. Indeed, Officer Hintz explained to the jury that it was entirely possible that the police report would not contain that information even if it was in the CPS report. (78:108; Res-App. 9).

The circuit court finding, picked up on by the State, that Officer Hintz was "clearly confusing" the question, "Did the CPS report contain a statement that Hineman had inappropriately touched SJS?" with "Did the CPS report contain a statement that Hineman had discussed oral sex with SJS?" is clearly erroneous. (62:7; Pet-App. 18; State's Br. at 23). Hintz was specifically and repeatedly asked if the report contained a statement that Hineman had touched

[5] Undermining its argument that trial counsel was deft in her cross-examination of Officer Hintz, the State points out that trial counsel "could have directed Hintz to a sentence in the police report that state the CPS report included no information as to whether S.S. made an allegation of touching at that time." (State's Br. at 22). Mr. Hineman agrees that trial counsel could have done a lot more in her cross-examination of Hintz and was arguably ineffective in this respect. Because the primary cause of the inability to elicit favorable information was the lack of the key document, it would not make sense to bring an ineffective assistance of counsel claim based on the failure to effectively cross-examine the investigating officer.

SJS. (78:107-08; Res-App. 8). There is no reason to believe she did not understand or was confused by the question.

The only reasonable conclusion the jury could draw from Officer Hintz's testimony[6] is that law enforcement began a criminal investigation because SJS had disclosed that he had been assaulted by Mr. Hineman. But the CPS report did not mention a disclosure by SJS because he hadn't made one. Officer Hintz's testimony misrepresented a key part of the State's case – when SJS first disclosed the assault – and this misrepresentation was never corrected. This false testimony was certainly material.

C. The CPS report bears on guilt or innocence and 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.). Cases

[6] The State posits Officer Hintz's testimony left the jury with two "clear" impressions: either the officer didn't document the sexual assault or she was "overly defensive" when she "mistakenly recalled what was in the CPS report." (State's Br. at 24). There is nothing clear about this; these are competing alternatives and cannot both be true. Moreover, the latter alternative is not supported by the record. There are no verbal markers that suggest the officer was overly defensive or that she conveyed that she mistakenly recalled what was in the report. Officer Hintz testified simply and repeatedly (and contrary to fact) that she believed the CPS report contained a statement that SJS had disclosed that he had been sexually assaulted by Mr. Hineman.

rejecting *Brady* challenges – including those cited by the State – involve situations where the suppressed evidence is redundant or has no bearing on innocence or guilt. (State's Br. 21-22). *See, e.g., Wayerski,* 385 Wis. 2d 44, ¶62 (suppressed evidence regarding witness bias not material because the jury heard consistent, detailed testimony from the juveniles, the juveniles' parents, and a detective and in addition to DNA evidence linking the defendant to the victim); *Rockette*, 294 Wis. 2d 611, ¶42 (evidence attacking witness credibility cumulative when "the record shows [the witness] as an incredible, recalcitrant and unreliable witness for both the State and the defense"); *United States v. Dweck,* 913 F.2d 365, 371-72 (7th Cir. 1990) (additional evidence of witness's drug-use history cumulative when testimony in the record detailed prior convictions, use of false names and extensive illegal drug involvement).

By contrast, in this case, there was no physical evidence and no detailed accounts of the crime. No other evidence identifies the person who initially suspected Mr. Hineman of committing sexual abuse of a child. No other evidence definitively states that there had been no accusation of maltreatment by SJS when the investigation into Mr. Hineman began. No other evidence was presented that attacked Officer Hintz's credibility and, by extension, the integrity of her investigation. The suppression of the CPS report and the critical, non-cumulative information it contained *and lacked* was material to guilt or innocence in this case.

1. The CPS report is not duplicative.

The CPS report contains non-duplicative information that if disclosed by the State would have changed the trajectory of the defense. First, the CPS report is the only document that contains the clear exculpatory statement that as of March 12, SJS had not made any disclosures of maltreatment by Mr. Hineman. Though the July 14 police report states "No specific information was given on if Jeffrey touched [SJS] or forced [SJS] to touch Jeffrey," this statement is made in relation to a description of the reporter's interview with Dad. (41:30; Pet-App 48). It is not clear from the police report whether Dad failed to provide specific information regarding touching when questioned about the school incident, or whether SJS did. (82:17). The CPS report makes clear that it was the latter: "no information was given ***by [SJS].***" (48:4; Pet-App. 52). This missing prepositional phrase is material – and exculpatory – because it clarifies that SJS never implicated Mr. Hineman in sexual abuse until the investigation was firmly underway.

But even more important, the CPS report clarifies who the mandatory reporter was: SJS's therapist. Because this fact is not provided or even alluded to elsewhere, it is by definition not cumulative.

The therapist was not merely treating SJS for behavior problems: she was the person who first developed a suspicion that Mr. Hineman was sexually abusing SJS, and she reported that suspicion to a government agency. This makes the therapist a

material fact witness. Mr. Hineman has a due process right to challenge the reliability of the investigatory process by which he became a suspect. *See State v. DelReal*, 225 Wis. 2d 565, 571, 593 N.W.2d 461 (1999) (citing *Kyles* 514 U.S. at 444). Moreover, the therapist is a fact witness who possessed exculpatory knowledge: SJS did not say he had been sexually abused by Mr. Hineman prior to her report.

Typically, a health-care provider has the right to refuse to be a witness or disclose any matter as the result of the patient-provider privilege. Wis. Stat. § 905.01. This is *not* so when the therapist makes a mandatory report, as SJS's therapist did, under Wis. Stat. § 48.981. *See* Wis. Stat. § 905.04; *see also infra Section III.B.* The defense could have – and should have – been able to know not only who the reporter was but also the facts and circumstances that lead to her report. *See State v. Denis L.R.,* 2005 WI 110, ¶55, 283 Wis. 2d 358, 699 N.W.2d 154

Logically, any person trying to ascertain Mr. Hineman's guilt or innocence would want to know more about how, when, and why the reporter suspected Mr. Hineman of this crime. In this case, we know for a fact that the jury wanted this information:

March 12th? Teacher?
How/when/who reported to CPS?

Jury Question #1 (22).

But it was impossible for the jury to get answers to these questions because the case went to trial without the defense knowing them. The defense was forced to develop its theory of the case, prepare for testimony and cross-examine the State's witnesses without an understanding how Mr. Hineman became a suspect or the circumstances leading up to how SJS first disclosed an assault. There can be no confidence in a trial when such key factual components of the investigation were withheld from the defense.

2. Impeaching the false testimony that SJS reported as early as March 12 would not have been cumulative.

Officer Hintz's testimony that SJS disclosed a sexual assault five months before his CAC interview was extremely damaging to the defense. Jurors will more likely credit an allegation a child has made consistently over a long period of time, but will doubt one made after a long delay and a series of potentially suggestive conversations and interviews. *See State v. Maday*, 2017 WI 28, ¶28, 374 Wis. 2d 164,

892 N.W.2d 611 (quoting *State v. Michaels*, 642 A.2d 1372 (N.J. 1994) (it is "generally accepted" that "if a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events"). Leaving the jury with the impression that SJS had spontaneously disclosed an assault before being interrogated unquestionably bolstered SJS's later event reports.

The State argues that Hintz's materially false testimony was "the best result Hineman could have hoped for" because if pressed further, Hintz might have testified that the CPS report indicated that SJS learned about oral sex from Mr. Hineman.[7] (State's Br. at 23). This is wrong for several reasons. First, as noted above, the best Mr. Hineman could hope for was an unequivocal statement that reflected the truth: SJS did not disclose inappropriate touching until long after Officer Hintz began her investigation.

[7] And even if it came out that SJS allegedly learned about oral sex from Hineman, this is not as damning as the State suggests. (State's Br. at 23-24). 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. Moreover, even if it were true that Hineman told SJS "it feels good to have your private sucked" (and no evidence was presented to this effect), this does not equate to, and is far less concerning, than a statement that Mr. Hineman had sexually assaulted SJS. (48:3).

But also, because trial counsel did not have the report and *did not know what the report said*, she could not press it further. The possibility that Officer Hintz would have testified differently if counsel had had the report and pressed her on it is not relevant to whether the absence of the report was material. *State v. Harris,* 272 Wis. 2d 80, ¶34 (quoting *Bagley*, 473 U.S. at 683) (a reviewing court should assess materiality "… with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response").

The State also argues that Officer Hintz's false testimony didn't bolster SJS's testimony because details in SJS's testimony weren't corroborated elsewhere. In particular, the State notes that the statements SJS said he made to his family members right after the incident were inconsistent with Grandma's testimony that SJS never told her about any inappropriate touching. (State's Br. at 24). But Officer Hintz's misrepresentation is material not because it bolsters the inconsistencies in SJS's testimony about who he disclosed to; rather it bolsters SJS's testimony that he was assaulted.

Finally, State asserts that the inability to impeach Hintz is not material because if the jury believed there was a sexual assault report and no one immediately did anything about it, it would have demonstrated a "shocking lack of urgency by the authorities and adults in S.S.'s life." (State's Br. at 25). It's not clear how this is relevant – regardless of

whether Officer Hintz was impeached, this case involves a shocking lack of urgency by the authorities. Under Wisconsin law, law enforcement should be notified within 12 hours of a report of suspected sexual abuse of a child. Wis. Stat. § 48.981(3)(2)(bm). That did not happen here. The report of suspected sexual abuse in this case was not referred to law enforcement until nearly three months after the report was generated. (42:30; Pet-App. 48). It then took over a month before law enforcement made contact with SJS's family and yet another three weeks to conduct a CAC interview. (42:30; Pet-App. 48; 78:26).

In a trial that turned on the reliability of SJS's statements, the testimony of the investigating officer that it was her belief that SJS stated that he had been assaulted by Mr. Hineman as early as March 12 strengthened the credibility of SJS's later accusations. If the jury believed that SJS stated that Mr. Hineman had inappropriately touched him before his CAC interview, it is far more likely that the jury would have concluded that this did in fact happen, despite the inconsistencies as to the specifics of how and when touching occurred. This goes to "a critical element of the State's case" – whether SJS was assaulted – and is material. (State's Br. at 30).

3. Undermining Officer Hintz's credibility and by extension the integrity of the investigation would not have been cumulative.

The State went to great lengths to establish that the investigating officer was a credible witness. The prosecution elicited testimony that Officer Hintz had been in law enforcement for over 15 years and specialized in investigating sexual assaults and crimes against children. (78:72-73). It then reviewed Officer Hintz's special trainings that made her an expert in this area and established that she had conducted over 100 investigations. (78:73-74). The jury had every reason to believe Officer Hintz when she testified that the reason she investigated Mr. Hineman was that she'd received a report that he had sexually assaulted SJS.

But this was not true. Officer Hintz either knowingly fabricated this testimony, misspoke, or was suffering from tunnel vision.[8] Either way, if the jury saw defense counsel conclusively impeach the investigating officer regarding such a critical fact, it would have cast doubt on the investigation. This would

[8] "Tunnel vision" is where lead actors in the criminal justice system "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt." *See* Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 WIS. L. REV. 291, 292 (2006). This phenomenon, a leading cause of wrongful convictions, is not the product of malice or nefarious intent but rather "natural human tendencies." *Id*. at 292.

have been a meaningful – and non-cumulative – blow to the State's case.

* * *

Based on Officer 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 that this fact tipped the credibility scale in SJS's favor, contributing to Mr. Hineman's conviction. This alone requires reversal. The fact that additional material exculpatory information was contained in the document makes it more than reasonably probable the outcome would have been different had the State produced the CPS report to the defense, as required by law.

II. Mr. Hineman is Entitled to a New Trial Because He Was Denied Effective Assistance of Counsel

Once again, the parties agree on the law and the legal standard, they just don't agree that Mr. Hineman has met the standard in this case. In order to prove that a defendant has been deprived his constitutional right to effective counsel, the defendant must establish that counsel was deficient, and that the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 696.

Generally, strategic trial decisions rationally based on facts and law do not support a claim of ineffective assistance of counsel. *State v. Elm*, 201 Wis. 2d 452, 549 N.W.2d 471 (Ct. App. 1996). "But

for this deference to apply, the decision must be—in fact—strategic." *Dunn v. Jess*, 981 F.3d 582, 951 (7th Cir. 2020). Though the State argues that the decisions Mr. Hineman claims were deficient were strategic, the proffered strategy for these decisions was objectively unreasonable. Unreasonable strategic decisions are deficient. *See id.* at 953 (quotations omitted) ("[a] court adjudicating a *Strickland* claim can't just label a decision 'strategic' and thereby immunize it from constitutional scrutiny").

Importantly, "[a] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S at 693. In a case such as this one where there are numerous deficiencies, instances of deficient performance may be viewed cumulatively in the analysis of whether there is prejudice. *State v. Thiel*, 2003 WI 111, ¶41, 264 Wis. 2d 571, 665 N.W.2d 305. The deficiencies discussed below, viewed cumulatively, and in light of the fact that the state did not have strong evidence of guilt, undermine confidence in the verdict. Mr. Hineman is entitled to a new trial.

A. Failure to obtain the CPS records.

The State concedes trial counsel was deficient for not obtaining the CPS report before trial. Mr. Hineman was prejudiced by counsel's failure to obtain this document because, as discussed above, the investigating officer materially and falsely testified about the contents of the document, and defense

counsel was unable to effectively impeach this false testimony.

In addition, had counsel filed motions pre-trial to obtain the CPS report, she likely would have obtained the related April 20 and May 29 CPS reports that were released to the defense postconviction. (47, 48). These reports contain significant additional information that was unknown and uninvestigated by the defense. Had counsel obtained these reports and utilized the information contained within, the integrity of the investigation and SJS's credibility would have been further undermined.

The April 20 report states that Grandma and Dad took SJS to be examined by a physician for signs of sexual abuse and that "there [was] nothing from his doctor who examined [SJS] that any type of sexual abuse has taken place." (48:10). Thus, this report constitutes another piece of exculpatory evidence; had defense counsel known about it, she "would have definitely tried to introduce that at trial." (82:18).

The April 20 report also raises questions about why, if there were concerns that Mr. Hineman was abusing SJS, did Grandma take SJS to be examined for signs of sexual abuse over a month after the family had cut off all contact with Mr. Hineman. Perhaps it was because Grandma was also concerned that an "autistic son" was sexually abusing SJS. (48:10). This information underscores that it was SJS's behaviors, not Mr. Hineman's, that led to the concern that SJS was being abused. In addition, the fact that SJS was

taken to be examined for signs of sexual abuse implies that he was informed about the concept of inappropriate touching long before he disclosed that he was inappropriately touched. This fact directly impacts the reliability of his eventual vague and inconsistent statement that he had been touched inappropriately by Mr. Hineman.

The May 29 report indicates that the school teacher, the school counselor, Dad, Grandma, and "others involved in the situation for [SJS]" had been communicating about SJS's declining behaviors and Mr. Hineman's alleged role in the decline. (48:13, 15). Like the initial CPS report, the May 29 report identifies a conversation with SJS among the sources of information for the report, suggesting that SJS was repeatedly questioned about Mr. Hineman and inappropriate sexual touching long before SJS disclosed any such thing. (48:13). All this should have been investigated and brought out at trial.

Had counsel obtained these CPS reports before trial, a defense expert[9] could have rebutted the therapist's assumption that SJS's unusual behaviors meant that he was being sexually abused. *State v. Smith,* 2016 WI App 8, ¶6, 366 Wis. 2d 613, 874 N.W.2d 610 (testimony "regarding reactive

[9] Postconviction counsel hired Dr. David Thompson to review the case. Although his review was limited because SJS's treatment records were never released to the defense, he submitted a report describing the accepted scientific research on a variety of factors that may have affected the reliability of a SJS's statements in this case. (58).

behaviors common among child abuse victims" is specialized and technical knowledge in the domain of experts). To the extent Mr. Hineman became a suspect due to SJS's behavior problems, the defense expert would have pointed out that "there is not a profile of an abused child that could be used to substantiate a history of, or the presence of physical or sexual abuse. Children evidence a number of behaviors for many different reasons." (58:9).

A defense expert also would have been able to introduce the jury to many documented psychological phenomena affecting the reliability of a child's delayed disclosure, including repeated questioning, negative stereotype induction,[10] source misattribution, therapeutic effects on memory, and other empirical factors that may affect the reliability of a child's statements. (*See* 58:2-5, 9 and 41:91-94 for a discussion of these phenomena). This is particularly important in a case where it is documented that the disclosure was significantly delayed and that all the adults in SJS's life were operating under the assumption that Mr. Hineman had assaulted SJS long before SJS made any statement to that effect. (48:10, 13, 15-17).

In short, the CPS reports offered a host of reasons to support the defense theory that SJS's

[10] "[R]esearch on negative stereotype induction tells us that simply over-hearing other people talk in a negative manner about an individual can lead to the child making reports consistent with the negative characteristics attributed to the person in question." (58:4 (citations omitted)).

eventual disclosure was unreliable and not credible. Had counsel obtained the critical information regarding how Mr. Hineman became a suspect in this case, the trajectory of the defense investigation and trial strategy would have been materially altered. (82:18, 30). There can be no confidence in the outcome when such significant facts were unknown and uninvestigated by the defense. Mr. Hineman was prejudiced by counsel's deficiency.

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 say if he chose to testify – is irrational and unreasonable. (82:32). Criminal defendants have a constitutional right not to testify and often the defendant does not decide whether to testify until the middle of trial. Foregoing an opening statement because you are not sure what your client is going to say – when he has a constitutional right to say nothing at all – is not reasonable strategy. Regardless of what Mr. Hineman was going to say, any reasonable, prudent attorney would have used the opening as opportunity to tell the jury the evidence is slim, the accusation is unreliable, and Mr. Hineman is not guilty of the crime charged.

While failing to give an opening statement is not always prejudicial, in a case like this – where the evidence of guilt was equivocal – declining to give the jury a roadmap to acquittal hurt the defense. This is

particularly true given that defense counsel's closing argument was also deficient; the jury never once heard Mr. Hineman's advocate say that her client was innocent. *See infra* at II.D; *Thiel*, 264 Wis. 2d 571, ¶41.

C. Failure to object to improper expert testimony.

After forensic interviewer Heather Jensen testified generally about the child advocacy center and the forensic interview process, the prosecution asked her to explain the concept of "piecemeal disclosure" and "delayed disclosure." (78:27). Jensen then cited "research" and explained why children might not immediately disclose. (78:27-29). There was no objection by defense counsel that this constituted expert testimony.

Postconviction, the State conceded that Jensen's testimony on delayed and piecemeal disclosure was expert testimony and therefore also conceded that it had violated the discovery statutes by not noticing her as such. (50:11). The question, then, is whether it was reasonable for defense counsel not to object to unnoticed, improper expert testimony?

Defense counsel testified that she did not object because she "didn't think this was a case of delayed disclosure." (82:34). Her strategy, she explained, was to deal with Jensen's expert testimony by establishing that it was inapplicable because SJS had immediately disclosed. (82:34). Once again, this strategy was unreasonable.

Jensen's expert testimony bolstered the reliability of SJS's delayed and incomplete statements – exactly what the defense was trying to attack. Jensen's description of delayed and piecemeal disclosure gave the jury a reason, supported by "research," for why it was unnecessary to have precise details about what happened. (78:27-28). Jensen's expert testimony told the jury that despite the long delay and inconsistent details, SJS's statements could still be reliable.

Defense counsel's goal of establishing that SJS had immediately disclosed was also unreasonable. Had SJS immediately disclosed, that would be a very bad fact for the defense!

Further, the record of Mr. Hineman's trial contradicts the strategy defense counsel proffered postconviction. She elicited testimony from Grandma and Officer Hintz that SJS had not immediately disclosed the assault, despite SJS's testimony that he had. (78:67, 108). By impeaching SJS's testimony, defense counsel was establishing that SJS's statement of immediate disclosure was not credible; this was, therefore, a case of delayed disclosure.

In sum, attacking Jensen's improper expert testimony by trying to establish that this case involved an immediate disclosure – when that testimony could have been kept out altogether – would have undermined the defense strategy and bolstered SJS's incriminating statements. While the record belies this claimed strategy, it also shows that it was an

unreasonable one, and therefore that counsel was deficient if she pursued it.

Finally, in a case "that could have gone either way," permitting the State to bolster their main witness's equivocal and inconsistent testimony was prejudicial. (***). There is a reasonable probability that the jury would have acquitted had defense counsel kept Jensen from explaining to the jury that young children's allegations of sexual assault are reliable even when the allegations arrive piecemeal and after a lengthy delay.

D. Conceding guilt at closing

This claim involves the extraordinarily unusual situation in which multiple, nearly identical transcripts of Day 3 of the trial were prepared, filed and served.[11] Despite conceding in the court of appeals that the January 19, 2018, version of the Day 3 transcript was the "trial transcript used and relied on by the court and parties at the postconviction hearing in this case,"[12] the State's brief before this Court does not acknowledge its existence and instead cites to, and quotes from, a version of the transcript that it knows was *not* used and *not* relied on below.

To be clear: Mr. Hineman based this aspect of his ineffective assistance of counsel claim on the

[11] *See* Motion to Supplement the Record and Affidavit filed 7/11/22.

[12] *See* State's letter to Clerk of the Court of Appeals, dated 11/6/20.

January 19, 2018, version of the transcript of Day 3 of his trial – NOT the R79[13] version quoted in the State's brief. This version was quoted in the postconviction motion (41:25), read aloud to trial counsel during the postconviction motion hearing (82:42), quoted in the posthearing trial court brief (61:15), quoted before the court of appeals (Hineman COA Opening Br. at 33) and is reproduced again below:

> *"…I believe the sexual assault happened. It happened the day after trick-or-treating. It happened when his dad wasn't there. It would have had to happened when he was watching SJS during those two weeks."*
>
> – Defense counsel, in closing, page 24, lines 17-20 of the January 19, 2018 version of the transcript. (Res-App. 13).

By ignoring its own concession that R79 was not the transcript relied on below, the State also ignores the circuit court's factual finding: "In regard to the defense attorney having conceded during closing that the assault occurred…. It is true that this is what the transcript says. It is also true that this is what the

[13] R79 in this brief refers to the March 6, 2018 version of the Day 3 trial transcript. This version does not contain the word "I". Upon information and belief, this Court has access to the 2017 version of the transcript, as the Racine County Clerk of Courts stated that was the version it transmitted on appeal. *See* 8/3/22 Letter from Racine County Clerk. Also upon information and belief, both the 2017 version and the January 19, 2018, version – attached to the Motion to Supplement – have the same page 24, line 17 (*i.e.* they both contain the "I").

court recalls as being said." (62:11). Because the State did not address the multiple transcripts issue or acknowledge its agreement to refer to the January 19, 2018, transcript in briefing, (*see* Colbert 7/11/22 Aff't., ¶11), this Court should uphold the circuit court's factual finding, which is not clearly erroneous, that defense counsel said, "I believe the sexual assault happened."

The State argued in the court of appeals that although the January 19, 2018, transcript says "I believe the sexual assault happened," this must not have been what trial counsel said. According to the State, "counsel likely really said, 'But *to* believe,' or 'But *for you to* believe.'" (State's Br. at 32). In other words, the state argues both transcribed versions contain separate errors.

The problem with the State's argument is that this factual dispute was raised, litigated, and resolved below. Trial counsel testified that she did not think that she had said "I believe the sexual assault happened." (82:42). If the State agreed with trial counsel, it could have moved to correct the record or otherwise offered testimony about what was actually said. *See* Wis. Stat. § 809.15(3). The State did not do that. This Court should disregard the State's new, unsupported assertion that the correct version of the transcript contains an additional three unreported words not present in any version of the transcript.

The circuit court also found that in making that statement "I believe the sexual assault happened," trial counsel was "speaking ironically," thereby "indicating doubt." (62:12; Pet-App. 23). The circuit court determined that this was an effective strategy. But conceding guilt – even in jest – is not a reasonable strategy in a first-degree sexual assault of a child trial, regardless of the tone of voice used. In order for this to come close to being a reasonable strategy, there would need to be very clear verbal markers that the concession of guilt should not be taken literally. Here, there were none. Further, trial counsel would have to pair the ironic concession with an assertion of innocence. Here, there was none.

It is entirely possible that counsel lost her train of thought or misspoke when she said she personally believed the assault happened, but the fact is, the jury heard her say "I believe the sexual assault happened" before describing the state's theory of how it happened. It is reasonably possible that a jury would be influenced, or at the very least confused, by her argument. In conjunction with all the errors in this case, the inadvertent concession of Mr. Hineman's guilt in closing undermines confidence in the outcome of his trial. *See Thiel*, 264 Wis. 2d 571, ¶41.

III. Mr. Hineman Is Entitled to a New Trial, and an *in Camera* Review of SJS's Treatment Records, in the Interests of Justice.

An appellate court may reverse a conviction if it determines the controversy has not been fully tried. *State v. Zdzieblowski*, 2014 WI App 130, ¶24, 359 Wis. 2d 102, 857 N.W.2d 622; Wis. Stat. § 752.35. If a court determines the controversy is not fully tried, it may do so without first concluding that the outcome would be different on retrial. *Id.*

In this case, the adversary system failed. Not only is there a *Brady* violation and multiple instances of ineffective assistance of counsel, other prosecutorial errors also undermined the trial's truth-seeking function. Because of the State's multiple discovery violations, as well as the fact that critical information about how Mr. Hineman became a suspect is still unknown, the real controversy in this case has not been not fully tried.

A. Prosecutorial errors prevented a full and fair trial.

The State's theory of this case wasn't rooted in the facts alone but also in the specialized knowledge of experts. Specifically, the State relied on Jensen's discussion of delayed and piecemeal disclosure to bolster SJS's statements, and on Officer Hintz's discussion of grooming by sexual predators to reframe Mr. Hineman's history of generosity towards SJS. The fact that the State failed to notice these two witnesses

as experts as required by Wis. Stat. § 971.23(e) put the defense at a severe disadvantage. Even if there were strategic reasons for not objecting to improper expert testimony, or for not moving for a mistrial after the jury heard about grooming, the State was able to advance its theory of the case without giving the statutorily required notice.

Although the defense objection to grooming testimony was sustained, it was too late; the bell was rung. The jury was informed that the "concept of grooming"[14] existed and that law enforcement was trained on it for the investigation of child sex crimes. (78:92). Although the jury was not informed about the details of what grooming entails, they learned that Officer Hintz believed, based on her training, that the attention and gifts Mr. Hineman gave SJS and his family were a red flag. (78:91-92). Despite the objection, the jury had been introduced to another, sinister, view of the facts. Without Officer Hintz's testimony that she believed Mr. Hineman was grooming, it is unlikely a juror would have thought it unusual that a person present for a child's birth, who acted as a stepparent for over a year, would want to stay close.

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[14] Sexual grooming is a preparatory process in which a perpetrator gradually gains a person's or family's trust with the intent to be sexually abusive. Pollack, David, "Understanding Sexual Grooming in Child Abuse Cases" Nov. 1, 2015 available at: https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/november-2015/understanding-sexual-grooming-in-child-abuse-cases/

This testimony on grooming, combined with the testimony on delayed and piecemeal disclosure, hurt the defense. Defense counsel was forced to deal with unnoticed expert testimony on her feet and without preparation. Had the experts been noticed, defense counsel could have prepared a more careful, thorough cross-examination. In other words, the State's theory of guilt would have been subject to adversarial testing in the manner prescribed by law, allowing for the controversy to be fully tried. Because this did not happen, Mr. Hineman is entitled to a new trial in the interests of justice.

B. An *in camera* review of SJS's treatment records is necessary to fully try this controversy.

A review of SJS's treatment records is critically important in this case because of the significantly delayed disclosure. Both scientific literature and case law recognize that young children are susceptible to suggestive interviewing techniques and other external influences that may affect the reliability of their statements. *See* (58:10-12); *Maday,* 374 Wis.2d 164, ¶¶27-33; *State v. Kirschbaum*, 195 Wis. 2d 11, 24, 535 N.W.2d 462 (Ct. App. 1995). Because Mr. Hineman became a suspect before SJS alleged he had been touched inappropriately, understanding how SJS was questioned and treated is key to assessing the reliability of his disclosure months later.

With respect to *Shiffra/Green,* Mr. Hineman again agrees with legal standard set forth by the State: in order to obtain an *in camera* review, a defendant must identify "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." *Green*, 253 Wis. 2d 356, ¶34. Mr. Hineman has identified the following specific facts that show the treatment records will have information relevant to SJS's "ability to accurately perceive and describe past events and to truthfully testify." (State's Br. at 35).

- There was a significant (5 month) delay between the report of suspected sexual abuse and SJS's disclosure of sexual abuse. (48:3; Pet-App.51; 78:40).

- The CPS report indicates that the mandatory report was based on SJS's behaviors and on conversations with Dad, school staff, and SJS—*not* on a disclosure of inappropriate sexual touching. (48:2-7; Pet-App 50-55).

- In the five months after the mandatory report but before the disclosure of inappropriate touching, all the adults in SJS's life operated under the assumption that Mr. Hineman had been abusing SJS. (48:8-48:17; Pet-App. 56-65).

- Respected research recognizes young children's statements may be unreliable when there is repeated interviewing, and

negative stereotype induction; Mr. Hineman presented an expert report describing the phenomena that would have affected the reliability of the event report in this case. (58).

- SJS was diagnosed with ADHD, which is "strongly related to the reliability of event reports." (48:4; Pet-App. 52; 58:8).

First, as noted above, because the therapist made a report of suspected sexual abuse to a government agency, "there is no privilege with regard to any confidential communications … regarding the sexual assault for treatment purposes." *Denis L.R.,* 283 Wis. 2d 358, ¶55, (citing Wis. Stat. § 905.04 and noting privilege refers to "confidential communications made or information obtained or disseminated for purpose of … treatment of the patient's … mental or emotional condition…"). The circumstances that created the basis for the mandatory report are not confidential, and Mr. Hineman has a due process right to this information.

The State is confident in the jury's verdict in this case even though it was based on an incomplete understanding of the circumstances that triggered the mandatory report. But this would not always be so. For example, in *Denis,* the State did not object to a *Shiffra* motion because it, too, needed access to therapy records in order to successfully prosecute the suspected child sex abuse. *Denis,* 283 Wis. 2d 358, ¶¶12-13. *Denis* involved a situation in which a very young child disclosed to a therapist that she had been

touched inappropriately by her maternal grandfather, and the therapist reported the suspected sexual abuse to authorities. *Id.* ¶¶2-3. The child later recanted, also in therapy, at which point neither the defendant's grandfather nor the child's mother wanted the State to have access to the therapist or the therapy records. *Id.,* ¶6. This Court held "reporting the abuse to the authorities under Wis. Stat. § 48.981 extinguishes [any] privilege under Wis. Stat. (Rule) § 905.04(4)(e)2" and there was therefore nothing confidential with respect to the reasons for the report of the sexual abuse. *Id.,* ¶7.

In the instant case, where the child did not even make a disclosure, access to the treatment records is even more important. Like in *Denis,* the fact that Mr. Hineman was named a suspect in the subsequent criminal investigation was entirely due to the mandatory report. But unlike *Denis,* the report in this case was the product of the therapist's conjectures about the cause of the child's behavior problems, not any disclosures of abuse. In this case, prior to making the report, the therapist conducted a mini-investigation in which she interviewed Dad, school staff, and SJS. (48:2; Pet.-App. 50). Based on this investigation, she determined that she had reasonable cause to suspect that Mr. Hineman had been sexually assaulting SJS. But cause to make a report doesn't mean that her conjecture or investigation were reliable. The defense has a right to investigate this matter.

Further, the chance that external influences may have impacted SJS's statement is higher in this case than most because the subsequent CPS reports confirm that after March 12, every adult in SJS's life believed Mr. Hineman had been sexually abusing him. (48:8-48:17; Pet-App. 56-65). The potential that SJS overheard discussions or was even told about these suspicions is very high. The defense should have known before trial "the nature of the treatment programming, as well as any discussions between SJS and his therapist concerning abuse, 'Uncle Jeff,' family relationships, and sex." (58:8); *see also Denis,* 283 Wis. 2d 358, ¶7. The possibility of external influences is particularly relevant in this case because it could counter the expert testimony bolstering SJS's delayed and piecemeal disclosure. The "jury should have been made aware that SJS was receiving therapy and should have been instructed as to the ways in which various treatment techniques can affect a child's memory and event reports." (58:8).

The treatment records are also relevant because the integrity of the investigation is at issue. There is a reasonable likelihood that the treatment records will document the conversations the therapist had with Dad and clarify if SJS was questioned by Dad, the therapist, or Dad and the therapist together. It is not clear from the available information whether Dad pointed the finger at Mr. Hineman or if SJS did.[15] (82:18).

[15] Notably, the CPS and police reports suggests Dad had a motive to deflect attention away from himself: he had a

To be sure, as Mr. Hineman conceded below, it is unknown exactly what information these records contain. But what is clear is that Mr. Hineman has met his burden to establish that the records are relevant and necessary to a determination of guilt or innocence in this case.

C. The remedy requested is a new trial, not acquittal.

Mr. Hineman does not dispute that credibility determinations are the province of the jury and that, in a trial without errors, a jury is well-equipped to make them. But in a case where the State wrongfully withheld exculpatory evidence; where the lead investigator provided false testimony about the withheld document; where the State failed to notice its experts, but got its theory of defense before the jury anyway; where both the defense and the prosecution were unaware of the circumstances that led to the initial suspicion that Mr. Hineman had committed this crime; and where there are multiple instances of ineffective assistance of counsel, the adversary system has failed and the jury's decision was not a product of a "trial on the merits." (State's Br. at 30).

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criminal record, including a prior conviction for second degree sexual assault of a child; Dad did not initially respond to law enforcement calls; and Dad acted "confused and nervous" when law enforcement did contact him; there were concerns about parental neglect (including excessive drinking, yelling at and hitting SJS, not laundering SJS's clothes) and general dysfunction in the S. home. (41:31, 80).

The State argues the evidence wasn't slim, because, it says, SJS was believable and Mr. Hineman wasn't. (State's Br. at 29). But every credibility contest has a winner and a loser. This case was still a credibility contest without corroborating evidence of guilt. And it is harder to have confidence in a conviction that is the product of errors when there isn't corroborating evidence of guilt than when there is. *Hough,* 272 F.3d at 891.

In advocating for a more deferential standard of review, the State abdicates its role as justice-seeker and assumes the role of conviction seeker. *Bagley,* 473 U.S. at 676 ("The prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.") For centuries, a basic tenet of our criminal justice system has been that it is better that ten guilty persons go free than that one innocent person is convicted. *See* 4 W. Blackstone, Commentaries on the Laws of England (1769) c. 27, p. 352; *see also Coffin v. United States,* 156 U.S. 432, 453 (1895); *Furman v. Georgia*, 408 U.S. 238, 367 n. 158 (1972) (Marshall, J., concurring); *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). To uphold a conviction that is the product of multiple prejudicial constitutional violations would impermissibly upset the balance of equities adopted by our Founding Fathers so long ago.

But above all, Mr. Hineman is not requesting acquittal or dismissal of this case. He asks to be afforded his constitutional right to a fair trial in which jurors can make their credibility determinations after receiving all the relevant information, vetted and addressed by both sides. Because that did not happen here, this Court should affirm the court of appeals and remand for a new trial.

CONCLUSION

For the reasons stated, Jeffrey L. Hineman respectfully requests that the Court reverse his conviction and remand for a new trial, with directions for an *in camera* review of SJS's treatment records in advance of trial.

Dated and filed this 30th day of September, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 10,154 words.

Dated this 30th day of September, 2022.

Signed:

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FRANCES REYNOLDS COLBERT
Assistant State Public Defender

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 30th day of September, 2022.

Signed:

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FRANCES REYNOLDS COLBERT
Assistant State Public Defender