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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2020AP001197-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS C. STRONG, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Outagamie Circuit Court,
the Honorable Mitchell J. Metropulos Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

This was a credibility case. T.W. alleged that Mr. Strong had physical contact with her without her consent and it caused her pain. Mr. Strong denied this occurred. T.W.'s teenage children testified that although they did not see any physical contact, they perceived T.W. to be scared. The issues are:

1. Whether Mr. Strong is entitled to a new trial based on the court's exclusion of a prior false report T.W. made to police about a physical altercation four months earlier.

The circuit court concluded that the evidence was not relevant.

2. Whether Mr. Strong is entitled to a new trial in the interest of justice based on:

   A. The State's introduction of prohibited other acts evidence and the court's refusal to allow Mr. Strong to rebut it.

   B. The State's elicitation of testimony from a law enforcement officer that improperly vouched for T.W.'s veracity.

The circuit court ruled that the "other acts" evidence was not other acts evidence, and although it was a "close" question as to whether it was error not to let Mr. Strong rebut the evidence, any error was harmless. The court concluded that the challenged

law enforcement testimony was not improper vouching.

3. Whether Mr. Strong is entitled to a new trial based on plain error due to the State's improper closing arguments.

The circuit court ruled that the State's arguments were close to the line but did not cross that line.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication is not authorized because this is a one-judge appeal. *See* Wis. Stat. §§ 752.31(2)(d) and 809.23(4)(b). Oral argument is not requested. Mr. Strong anticipates that the briefs will sufficiently present the issues.

INTRODUCTION

Each of the errors alleged in this appeal bear on the single more important question in this case: whether T.W. should be believed. First, the court erroneously excluded important impeachment evidence that would have undercut T.W.'s credibility. Second, the State improperly elicited propensity evidence to suggest that Mr. Strong has a bad character and Mr. Strong was not permitted to rebut this evidence. Third, the State improperly elicited testimony vouching for T.W.'s credibility. And finally, the State made improper closing arguments that

invited the jury to convict on factors other than the evidence at trial. The independent and cumulative effect of these errors warrants a new trial. Mr. Strong was pro se, and certain errors were not subject to contemporaneous objection. However, review of these errors is warranted under the interest of justice doctrine and plain error doctrine.

STATEMENT OF THE CASE AND FACTS

The State charged Mr. Strong with two counts of misdemeanor battery to T.W. and one count of disorderly conduct, as a repeater.[1] (R.2). Mr. Strong entered not guilty pleas and represented himself.

During pretrial proceedings, Mr. Strong filed a motion to compel production of police reports from a November 19, 2016, event involving T.W. and for leave to impeach her with the incident. (R.16). The State did not object to providing the reports to Mr. Strong but asked to address admissibility at the time of trial. (R.289:8). The police reports show that on November 19, 2016, T.W.'s friend Crystal Denton phoned police and reported that she was physically attacked outside a bar.[2] (R.258:25-31; App. 125). She

[1] Count one: battery as a repeater, contrary to s. 940.19(1) and s. 939.62(1)(a); Count two: disorderly conduct as a repeater, contrary to s. 947.01(1) and 939.62(1)(a); Count three: battery as a repeater, contrary to s. 940.19(1) and s. 939.62(1)(a). (R.2).

2 The police reports about the November 19, 2016, incident were attached to Mr. Strong's postconviction motion.

told police that her friend, T.W., was present and witnessed the attack. T.W. affirmed her friend's story, and falsely told police she was present and saw the attack. Then, she admitted to police that she had lied. She was not present and had told a false story at her friend's behest. *(Id.*).

Mr. Strong also moved to introduce T.W.'s prior testimony about the November 19, 2016, incident. (R.294:15). During revocation proceedings against Mr. Strong in Outagamie County Case No. 11-CF-05, T.W. testified before the administrative law judge that she lied to police—although she minimized the conduct by stating she phoned police back to admit her lie. (R.133:25:19). [3]

The court asked whether the false report was regarding Mr. Strong, and Mr. Strong said no. The court then ruled it would not be allowed. (R.294:15). "It doesn't involve you. It's not relevant." (*Id.*). The court also quashed Mr. Strong's subpoenas for two individuals involved in that incident, Crystal Denton and Nathan Williams. (R.294:14, 16).

At trial, T.W. testified that she and Mr. Strong had been friends for many years. (R.295:107). On March 21, 2017, she invited Mr. Strong over to her house. (R.295:106-07). When he got there, they were hanging out and Mr. Strong was acting normal. (R.295:109). Then, she said, Mr. Strong's attitude

[3] T.W.'s testimony was on a disc marked Exhibit 2 at trial. Her testimony about this incident begins at 25:19 of the recording. (R. 133 (Tr. Ex. 2)).

suddenly changed, and he flicked her in the face, pushed her head, put his hand on her neck, pulled on her hair and hit her face with an open hand. (R.295: 109-112, 117). T.W.'s teenage children did not witness any physical contact but observed that their mother seemed scared. (R.295:193, 203, 208). T.W.'s son testified he called police at his mother's request. (R.295:209, 214). Police responded and arrested Mr. Strong, whom they found hiding in a closet. (R.295:175). Mr. Strong said he mistook the police for someone else. (R.295:242).[4]

Officer Woelfel took part in arresting Mr. Strong. (R.295:242). The State asked him a long series of questions pertaining to his interactions with Mr. Strong after the arrest, in the squad car and at the jail. Officer Woelfel testified that Mr. Strong was acting "very strange" and asking several questions about the officer's work. (R.295:247). The State asked a leading question, "Did it appear to you that he was subtly trying to figure out who you are?" and the officer said yes. (R.295:248). The State asked about Mr. Strong's statements at the jail, and Officer Woelfel testified that Mr. Strong became more argumentative. The following exchange comprised of leading questions then occurred:

> Q. Was he argumentative in an odd, sort of creepy way?

[4] Mr. Strong attempted to introduce evidence that this was the father of T.W.'s children, and that he had a contentious relationship with him, but the court disallowed the question. (R.295:165).

A. Yes.

Q. Why?

A. Staring, asking questions blatantly about you, your police work, and just that awkward stare towards you that he would not deviate from you.

Q. When he stared at you sometimes did he say, "See you Soon?"

A. At some points, yes.

Q. And sometimes when he said that did he have a smile on his face?

A. Yes.

Q. But despite that smile did you still sort of get the heebie-jeebies? -- and I don't know how that's going to be transcribed.

A. Very much so, yes.

(R.295:248-49).

The State then played a clip of body camera footage from the jail. The State continued with questions, characterizing Mr. Strong as threatening.

Q. -- did he look at you and sort of smile and wink and then make vague threats throughout your communication with him?

A. Yes.

Q. When you saw him in the elevator, was he wobbling around a little bit?

A. A little bit, yes.

Q. And then he said, "See you soon"?

A. Uh-huh (meaning yes).

(R.295:250). The State played another clip and asked several more questions about whether Officer Woelfel perceived Mr. Strong to be threatening. (R.295:251).

Mr. Strong attempted to play a different clip to contextualize the "see you soon" comment. In that clip, Mr. Strong discussed the speedy-trial timelines. The court did not allow him to play the clip, saying it was not relevant. (R.295:263-66). The court implied that the evidence would have been relevant had the charges been different, saying in front of the jury: "it's not relevant. You're not charged with resisting or obstructing, Mr. Strong, you're charged with battery and disorderly conduct." (R.295:266).

Outside the presence of the jury, Mr. Strong expressed his concern about the evidence, stating, "honestly, I was very cordial that evening -- and I think that's creating a perception of -- I know that's not what's on trial -- but to have the officer essentially be converted into an expert witness, not as to the police investigative part, but as far as, like -- ." The court responded, "You're just babbling, Mr. Strong." (R.295:270-71).

Lieutenant DelPlaine was also present on scene, taking statements from witnesses, including T.W. The State asked Lieutenant DelPlaine about his experience with domestic abuse cases, and asked if it was common for these victims to hesitate prior to giving a full story. Lieutenant DelPlaine answered yes. (296:70). The State then asked, "Is that what occurred in this case?" and Lieutenant DelPlaine said "I believe so, sir." (R.296:71). The State continued, "In your experience dealing with hundreds and hundreds of domestic abuse victims and other victims of a crime, did it appear to you when you showed up and when she finally disclosed this incident, did it appear that she was doing this in an attempt to get back at him?" (R.296:74). Lieutenant DelPlaine said no.

During closing, the State argued, "This all comes down to whether we believe [T.W.]." (R.296:197). It emphasized Lieutenant DelPlaine's testimony, stating, "What we heard from Lieutenant DelPlaine today is it's pretty consistent with someone who's been abused." (R.296:186). Also during closing, the State argued that none of the witnesses had anything to gain from the prosecution and neither did he (the prosecutor):

> And then he talks about police officers, who have young kids, most of them, who have families, thinking that they'll come up here and lie. To get what? All right? They're home with their families right now, they put on the badge and the gun every single day, hoping they come home safe, they're here to tell you exactly what happened, they don't care what the result is, they've moved

> on since March to probably more bigger and more exciting cases than this, they get no benefit from this verdict. So they have no motivation to lie as the defendant said, and neither do I.

(R.296:212).

The jury returned guilty verdicts. (R.140). The court, the Honorable Mitchell J. Metropulos presiding, entered judgments of conviction and sentenced Mr. Strong to prison. (R.236).

Mr. Strong filed a postconviction motion requesting a new trial and sentencing hearing. (R.258). On November 13, 2019, the court, the Honorable Mitchell J. Metropulos again presiding, held a postconviction hearing. (R.300; App. 102-123). The parties made oral arguments. At the conclusion of the hearing, the court denied the motion for a new trial but granted resentencing. (R.300:11-18; App. 112-119). A written order was entered accordingly. (R.265; App. 101). The court's ruling on the new trial claims that are raised in this appeal will be discussed in the argument section below. Mr. Strong was subsequently resentenced. (R.274).

This appeal follows.

ARGUMENT

I. The court erroneously excluded evidence that T.W. lied to police about a physical altercation four months before she alleged the physical altercation in this case.

A. Standard of review.

This Court reviews a circuit court's decision to admit or exclude evidence for an erroneous exercise of discretion. "A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record." *State v. Hunt*, 2014 WI 102, 360 Wis. 2d 576, 851 N.W.2d 434 (internal citations omitted).

B. T.W.'s lie was admissible as a prior incident of untruthful conduct and its exclusion prejudiced Mr. Strong's case.

Mr. Strong moved to introduce evidence that T.W. lied to police about a physical altercation four months before she accused Mr. Strong. The court excluded the evidence on relevance grounds. However, the evidence was not only relevant; it was highly relevant given the circumstances of the case. It was admissible under Wis. Stat. § 906.08(2) (specific incidents of untruthful conduct).

On November 19, 2016, T.W.'s friend Crystal Denton phoned police and reported that she was physically attacked outside the Corner Pub. She told police that her friend, T.W., was present and witnessed the attack. T.W. affirmed her friend's story, and falsely told police she was present and witnessed the attack. Then, she admitted that this was a lie.

T.W.'s false report to police was admissible under s. 906.08(2) which provides:

> Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

Based on this statute, at minimum, Mr. Strong should have been permitted to ask T.W. about the false report. It was not remote in time. The false report occurred on November 19, 2016, and the alleged incident here occurred on March 21, 2017—four months later. *C.f., Schultz v. Sykes*, 2001 WI App 255, ¶30, 248 Wis. 2d 746, 638 N.W.2d 604 (ten-year-

old incidents were "remote in time" and properly excluded).

The circuit court's contemporaneous ruling that the evidence was not relevant just because it did not directly involve Mr. Strong was an error of law. (R.295:15). The statute does not limit prior instances of untruthful conduct in this way. An exercise of discretion based on an improper legal standard is error. *State v. Hunt*, 360 Wis. 2d 576, ¶20.

The circuit court's postconviction ruling on this issue was somewhat different. It found the evidence to be irrelevant, but based on the time that elapsed and the fact that it was a single incident:

> I know Mr. Strong wanted to get into this other incident that apparently occurred about five months earlier, the Court did not allow that, the Court found it to be extrinsic evidence, not relevant evidence, he was trying to get it in to attack the credibility of the victim. The statute that defense counsel cites, 906.08(2), talks about specific instances of conduct with regards to a witness's character for truthfulness, and then goes on to say that if there are instances that are not remote in time, the court has discretion to allow that in. There's no real guidance in the statute as to what "remote in time" would be. In the Court's opinion, a five months earlier incident that really is not relevant to what the trial was about, one specific incident, this really doesn't go towards a witness's character for truthfulness, I don't believe there are going to be any witnesses coming forth saying that the victim has a reputation for untruthfulness, my

> understanding is he just wanted the specific instance in, and I found it to be irrelevant, and I still would find it to be irrelevant, even considering 906.08(2).

(R.300:14-15; App. 115-16).

Contrary to the court's ruling, this evidence was clearly relevant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. The prior false report tends to make it more likely that T.W. was not being truthful with police about what happened with Mr. Strong. The false report was close in time. Moreover, the police contact was similar. In both in the prior incident and in this case, T.W. made a report to police regarding an alleged physical altercation. Lying to police is very serious and certainly probative of one's character for truthfulness. T.W. put others at risk of arrest and prosecution. T.W. admitted to lying to police so this was not disputed evidence that would require a significant diversion in the case. The evidence was relevant and admissible.

In this credibility case, the erroneous exclusion of the November 16, 2019, impeachment evidence was prejudicial. The case depended on T.W.'s credibility. Evidence showing that she lied to police about a physical assault four months earlier would have undercut her credibility, and thus, the State's case as a whole.

II. The State elicited unlawful testimony that warrants a new trial in the interest of justice.

A. Standard of review.

This Court has the broad power to order a new trial in the interest of justice in cases where errors were otherwise waived by a party's failure to object. Wis. Stat. § 752.35. Section 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

No showing of a probable likelihood of a different result at the second trial is required. *State v. Harp*, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991). A new trial is warranted where the real controversy was not fully tried. This may occur when the jury heard evidence it should not have heard or was deprived of evidence it should have heard. *State v. Schumacher*, 144 Wis. 2d 388, 400, 424 N.W.2d 672 (1988).

B. The State erroneously elicited other acts evidence about Mr. Strong.

The State improperly introduced extensive evidence about Mr. Strong's interaction with Officer Woelfel after Mr. Strong had been arrested. This evidence had no relevance to the charges. Instead, it was impermissible other acts evidence, which invited the jury to find that Mr. Strong had a bad character, permitted an inference that Mr. Strong was escaping responsibility for other criminal conduct, and confused the issues at trial.

The State asked Officer Woelfel a long series of leading questions, showing that this testimony was not incidental, but rather intentional.

- "Did it appear to you that he was subtly trying to figure out who you are?"
- "Was he argumentative in an odd, sort of creepy way?"
- "Did you still sort of get the heebie-jeebies?"
- "Did he look at you and sort of smile and wink and then make vague threats throughout your communication with him?
- And then he said, "See you soon"?

(R.295:247-50).

Mr. Strong attempted to play a different clip wherein he mentioned the speedy-trial timelines, in order to contextualize the "see you soon" comment, but the court did not allow him to play the clip, saying it was not relevant. (R.295:263-66). The court implied that the evidence *would* have been relevant had the charges been different: "it's not relevant. You're not charged with resisting or obstructing, Mr. Strong, you're charged with battery and disorderly conduct." (R.295:266).

Evidence that a defendant committed other bad acts is prohibited in a criminal trial, with enumerated exceptions. Wis. Stat. § 904.04(2); *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). The reasons for the rule excluding other acts evidence were set forth by the court in *Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557, as follows:

> (1) the overstrong tendency to believe the defendant is guilty of the charge merely because he is a person likely to do such acts;
>
> (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses;
>
> (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and
>
> (4) the confusion of issues which might result from bringing in evidence of other crimes.

Id. at 292.

The admissibility of other acts evidence is addressed by use of a three-step analysis. The proponent of other acts evidence carries the burden: (1) is the other acts evidence offered for an acceptable purpose under s. 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?; (2) is the other acts evidence relevant, considering the two facets of relevance set forth in s. 904.01?; and (3) is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* Wis. Stat. § 904.03. *Sullivan*, 216 Wis. 2d at 771, 774.

At trial, the circuit court acknowledged that the post-arrest evidence was not relevant to the case. (R.295:261-62) ("It's not relevant . . . We're here today and tomorrow on two counts of battery and a disorderly conduct, not how nice or not nice you were to the police officers"). Irrelevant evidence is not admissible. Wis. Stat. § 904.02. Furthermore, the evidence was not offered for an acceptable purpose under s. 904.04(2). Instead, the purpose of the evidence was to suggest Mr. Strong has a bad character and committed other criminal conduct not charged in the case. And finally, even if it was minimally probative, the danger of unfair prejudice and confusion of the issues outweighed it.

In its postconviction ruling, the circuit court concluded that the evidence was not in fact other acts evidence and if it erred by precluding Mr. Strong from rebutting the evidence, the error was harmless.

> The Court, in retrospect, would believe that the nearness of time for that evidence to come in is relevant to show the defendant's state of mind. Furthermore, if I recall correctly, the defendant hid in a closet at the location of the incident and then the officers found him in that closet, which would arguably go to why it would be relevant, and the evidence that was brought out with regards to the behavior at the jail, in the Court's opinion, was not necessarily other acts evidence, but was showing what the defendant's state of mind was at the time or relatively in close proximity to that time.
>
> . . .
>
> Now, I think counsel makes a good point that the Court did not allow Mr. Strong to introduce evidence about why he made statements as to why he would see the officer soon, that he was referring to a speedy trial demand. The Court has known Mr. Strong for a long time, he knows his rights with regards to a speedy trial, so even assuming the Court was in error in not allowing that in, which I will do for purposes of this hearing, I wouldn't find that that's overly prejudicial, I think the main thrust of the case really was the testimony of the victim, in the Court's opinion the jury believed the testimony of the victim, the evidence that came in after the incident and while the defendant was being processed at the jail really had marginal effect, if

> any, on the evidence of the crime itself, so I couldn't find even if I made an error in not allowing Mr. Strong to get that evidence in, that that would have made a difference.

(R.300:11-12; App. 112-13).

Mr. Strong disagrees that evidence he was allegedly inappropriate with police after the arrest is probative of any elements of the crimes. *C.f. State v. Hunt*, 2003 WI 81, 263 Wis. 2d 1, ¶59, 666 N.W.2d 771 (other acts evidence admissible under the greater latitude standard in a child sexual assault case for state of mind in light of the witness' recantations). Instead, as the circuit court itself said during Mr. Strong's trial, "We're here today and tomorrow on two counts of battery and a disorderly conduct, not how nice or not nice you were to the police officers." (R.295:261-62).

This evidence was prejudicial. A police officer testifying that Mr. Strong intimidated and threatened him would cause a jury to view Mr. Strong as having a bad character. Mr. Strong was not permitted to show a video clip to contextualize the "see you soon" comment, which left the jury with an unfairly one-sided and incomplete picture. The court has discretion to permit or exclude evidence, but here, the court's decision was arbitrary and preferential to the State's case. This was not harmless, as the court concluded. Instead, it invited the jury to convict because Mr. Strong is a bad guy and escaped punishment for other criminal conduct. The court mentioned the crime of resisting or

obstructing in front of the jury, suggesting that Mr. Strong's alleged threatening behavior *was* criminal conduct—conduct he was not on trial for, and for which he therefore may have "escaped" punishment. *See Whitty*, 34 Wis. 2d at 292. And while the court said that this evidence was irrelevant, it did not instruct the jury to disregard it. The error was compounded when the State emphasized the improper testimony during closing arguments, confusing the issues at trial. (R.296:180). ("acting strange toward police officers. . . these vague, weird, creepy threats"); *See Whitty*, 34 Wis. 2d at 292.

C. The State erroneously elicited testimony from a detective that vouched for T.W.'s veracity.

The State improperly asked a police witness, Lieutenant DelPlaine, for his opinion that T.W. was telling the truth. It is well-established law that one witness may not give an opinion on the veracity of another witness's testimony. *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). "Such testimony invades the province of the fact-finder as the sole determiner of credibility." *State v. Kleser*, 2010 WI 88, ¶104, 328 Wis. 2d 42, 786 N.W.2d 144 (2010).

The rule against vouching can be violated even if the witness does not use the specific words "I believe her" or "she's telling the truth." *Id.*, ¶102. The State first invited vouching when it asked Lieutenant DelPlaine if it was common for victims of

power and control crimes to hesitate prior to giving a full story, to which Lieutenant DelPlaine answered yes. (R.296:70). The State then asked, "Is that what occurred in this case?" and Lieutenant DelPlaine said "I believe so, sir." (R.296:71). This question amounted to asking Lieutenant DelPlaine if T.W. was in fact a victim, i.e. whether she was telling the truth.

The State then asked Lieutenant DelPlaine, "In your experience dealing with hundreds and hundreds of domestic abuse victims and other victims of a crime, did it appear to you when you showed up and when she finally disclosed this incident, did it appear that she was doing this in an attempt to get back at him?" (R.296:74). This question also amounted to asking Lieutenant DelPlaine whether he believed T.W. was telling the truth as opposed to making up the story. The error was compounded when the State emphasized Lieutenant DelPlaine's testimony during closing argument, stating, "What we heard from Lieutenant DelPlaine today is it's pretty consistent with someone who's been abused." (R.296:186).

The circuit court concluded that this evidence was not improper vouching, but said it was a "close call."

> The second grounds that the defense has offered here today is that the State elicited prohibited vouching evidence, and I think it's arguably a close call as to whether that's vouching evidence or it's just evidence, as counsel pointed out, where, the Jensen evidence, where the officer is saying, "Well, based on my experience, it's not

> unusual for victims of crimes to be hesitant in giving us an account of what happened," and I think that's really the thrust of what happened here, so I don't really find that to be vouching evidence.

(R.300:13; App. 114).

The court's reference to Jensen evidence comes from *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988). *Jensen* permitted expert testimony on common behaviors of sexual assault victims and the meaning of that behavior. *Id.* at 250. This rationale has been extended to domestic abuse situations as well. *State v. Bednarz*, 179 Wis. 2d 460, 507 N.W.2d 168 (Ct. App. 1993). This is not a *Jensen* or *Bednarz* situation. T.W. was an adult and this was not a domestic situation, but rather, an interaction between long-term friends. A jury can use its common experience to evaluate this dynamic.

The State's elicitation of vouching evidence improperly invaded the province of the jury. *See State v. Richardson*, 189 Wis. 2d 418, 423, 525 N.W.2d 378 ("[e]xpert testimony does not assist the fact finder if it conveys to the jury the expert's own beliefs about the veracity of another witness because such testimony usurps the jury's role"). Vouching was particularly harmful in this case because the State's case hinged on T.W.'s credibility. As the State argued in closing, "This all comes down to whether we believe [T.W.]." (R.296: 197).

A new trial is warranted in the interest of justice because the jury heard prejudicial testimony it should not have heard that unfairly tipped the scales toward the State's case and prevented the real controversy from being fully and fairly tried.

III. The State made improper closing arguments, resulting in plain error.

A. Standard of review.

This Court has authority under s. 901.03(4) to reverse based on plain error. Improper closing arguments can amount to grounds for reversal under the plain error doctrine. *State v. Jorgensen*, 2008 WI 60, ¶39, 310 Wis. 2d 138, 754 N.W.2d 77. The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object. Subsection 901.03(4) provides: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." Plain error is used sparingly, but should be used where error is fundamental, obvious, and substantial. *State v. Jorgensen*, 310 Wis. 2d 138, ¶¶21-22.

B. The State's closing was improper and prejudicial.

The State's closing arguments improperly suggested that the jury reach a verdict by considering factors other than evidence. The line between permissible and impermissible closing arguments is "drawn where the prosecutor goes beyond reasoning

from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence" *State v. Smith*, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854 (internal citation omitted). Improper closing arguments warrant reversal if they infect the trial with unfairness resulting in a violation of due process. *State v. Mayo*, 2007 WI 78, 43, 301 Wis. 2d 642, 734 N.W. 2d 115 (internal citation omitted).

First, the State improperly vouched for police witnesses and asked the jury to rely on facts about the police officers that were not in evidence. The State argued:

> And then he talks about police officers, who have young kids, most of them, who have families, thinking that they'll come up here and lie. To get what? All right? They're home with their families right now, they put on the badge and the gun every single day, hoping they come home safe, they're here to tell you exactly what happened, they don't care what the result is, they've moved on since March to probably more bigger and more exciting cases than this, they get no benefit from this verdict. So they have no motivation to lie as the defendant said, and neither do I.

(R.296:212).

In *State v. Smith*, this Court reversed based on the prosecutor vouching for police witnesses during closing arguments. The statements were akin to the prosecutor's statements in the instant case. The *Smith* prosecutor stated: "[I know] these officers; and

you know them now too. You know them. They work hard. They do a tough job. They come in here to testify a lot of times. They work long, long hours. You weigh their testimony against the defendant's." 268 Wis. 2d 138, ¶25.

This Court found this argument improper on two primary grounds. First, there was no evidence presented to support the prosecutor's contentions, and second, the prosecutor's statements amounted for unfair vouching for the witnesses' credibility: "It is undisputed that there is no evidentiary basis for the officers' work habits or job demands, or the basis for the prosecutor's knowledge of them. This portion of the prosecutor's closing argument unfairly referenced matters not in the record and vouched for the credibility of the police witnesses." *Id.*, ¶26.

The *Smith* court emphasized that the defense did not suggest the police were lying: "we cannot ignore the prosecutor's self-imposed frustration at his own proposed suggestion that testifying police officers may have lied . . . There is, however, no basis in the record to assume the suggestion that any police witness lied . . . Once the prosecutor's rhetorical straw man was created, however, it had to be eliminated." *Id.*, ¶25.

The same is true here, where Mr. Strong's defense that T.W. was untruthful—not the police. He did question some of the officers' testimony as being convenient, but also said the officers were human, implying it could be inadvertence or mistake.

(R.296:194). The prosecutor additionally claimed he had no motivation to lie, but Mr. Strong never alleged that he was lying to begin with.

The State also erred by encouraging the jury to rely on its sympathy for T.W., based in part on facts not in evidence. "Do you think it's easy for her to take off work for two days to sit out in the hallway and see some of his supporters and other individuals and then take the stand and cry? And what does she get out of it?" (R.296:187). There was no evidence presented that T.W. had to miss work or that she was upset by Mr. Strong's "supporters" in the hallway. The prosecutor also said, "it hurts me just to know that she has to go through this." (*Id.*). This personalized the case and improperly appealed to the jury's sympathy.

The circuit court concluded that the State's closing arguments were "close to the line," but not over the line or prejudicial enough to warrant reversal.

> In reviewing what the prosecutor stated in closing, I would note first that the Court instructs the jury that these are arguments, these they are not evidence, they are not to be construed as evidence, and they're not allowed to take notes during arguments, and, therefore, they have to rely on the evidence in determining whether the defendant's guilty or not guilty. You know, I think, in all fairness to defense counsel, there are statements made by the prosecutor get close to the line, but I don't think they cross the line. There is leeway the Court gives to parties in

> their arguments, as long as they're not necessarily contrary to the evidence, and the prosecutor, in my opinion, is making a common sense argument that, you know, there's really no reason for the police officers to have any concern about the outcome of this case, you know, I don't think the officer has to establish at trial that officers go home to their families at night, I think it's just a common sense and a general statement of what people do when they're done with court, and so I can't find that those statements would be in error, an improper closing argument. Even if they would be deemed that way, I don't find them to be so prejudicial that it would have affected the outcome of the trial, -- again, the trial was really based on the victim's testimony -- the behavior of the defendant after the incident occurred; I believe the victim's accounting of what took place, I believe there are some other witnesses that were there at or near the time, and they made their decision, and found that the State had met their burden.

(R.300:15-16; App. 116-17).

The court's ruling underestimates the pernicious effect improper closing statements by the State have on a jury. Prosecutors hold a special role and jurors have confidence that they will abide by their professional responsibilities. *State v. Neuser*, 191 Wis. 2d 131, 528 N.W.2d 49 (Ct. App. 1995) (the prosecutor is a prominent public authority figures in the eyes of a jury); *Berger v. U.S.*, 295 U.S. 78, 88-89 (1935).

The circuit court noted that it instructed the jury that closing arguments are not evidence; however, in *all* cases in Wisconsin, the court instructs the jury that closing arguments are not evidence—at least if they are following the pattern jury instructions. *See* WIS JI-CRIMINAL 160. Yet this does not mean that all improper closing arguments are harmless. *E.g.*, *Jorgensen*, 310 Wis. 2d 138, ¶¶40-41 (improper closing statements, among other errors, rose to the level of plain error).

* * *

T.W.'s credibility was the foundation for the State's case. Her credibility was improperly bolstered by the court's exclusion of important impeachment evidence, the State's introduction of inadmissible and prejudicial evidence, and the State's improper closing arguments. A new trial should be granted.

CONCLUSION

For the foregoing reasons, Mr. Strong respectfully asks the Court to reverse and remand with directions to vacate the judgment of conviction and order a new trial.

Dated and filed by U.S. Mail this 16th day of October, 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 5,832 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated and filed by U.S. Mail this 16th day of October, 2020.

Signed:

COLLEEN MARION
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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

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

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