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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

2020AP001197

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Dennis C. Strong Jr.,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT FOR OUTAGAMIE COUNTY

The Honorable Mitchell J. Metropulos, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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QUESTIONS PRESENTED

1. When a trial court allows testimony regarding inconsistent and false statements on cross examination, is it plain error to prohibit cumulative evidence in the form of an audio recording of the same statements already testified to?

   The trial court found no error, this court should find no plain error.

2. Did the Court error in allowing evidence corroborating the defendant's demeanor on the night of the assault?

The trial court found no error, this court should find no plain error.

3. After allowing testimony regarding the content of statements made to the police, did the court error in not allowing cumulative evidence in the form of an audiovisual recording of the same statements already testified to?

The trial court found no error, this court should find no plain error.

4. Is it plain error for a prosecutor, during closing argument, to discuss the credibility factors discussed in WI JI-CRIMINAL 300, and what evidence and inferences from that evidence the jury should consider in determining credibility?

The trial court found the closing argument was proper, this court should find no plain error.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent does not request oral argument. Pursuant to Rule § 809.22(2)(b), Stats., the briefs fully develop and explain the issues.

The Plaintiff-Respondent believes publication of this case is also unnecessary. Pursuant to Rule § 809.23(1)(b), Stats., this case involves the application of well-settled rules of law.

STATEMENT OF THE CASE

In 2017, Dennis Strong, Jr. and T.W. had been friends for nine years with intermittent periods of intimacy. (R. 295:107.) On March 27, 2017, Dennis Strong, Jr. visited T.W.'s house. (R. 295:106.) At the beginning of the night Mr. Strong was friendly and all appeared normal. (R. 295:108.) After spending some time with T.W.'s teenage son and his teenage friend, Mr. Strong and T.W. sat in the kitchen drinking alcohol and talking. (R. 295:108.) After drinking four beers and several mixed drinks, Mr. Strong "just seemed to snap." (R. 295:109.) He started making odd and arguably threatening comments like "What are you going to do for redemption from the streets?" (R. 295: 111.) He continued to get progressively more and more aggressive.

After he became aggressive, Mr. Strong flicked T.W. in the temples, pulled her hair, and pushed her head into a wall, causing T.W. pain. (R. 295: 111-114.) T.W. did not consent to being flicked, having her hair pulled, having her head pushed against a wall, or being slapped. (R. 295:119.)

Mr. Strong's aggressive and physical conduct scared T.W., so she and her daughter locked themselves in a bathroom while T.W. texted people hoping to find a way to get Mr. Strong out of her house. (R. 295:114-115.) T.W. eventually allowed Mr. Strong into the bathroom, after Mr. used a calm voice to request T.W. let him in the bathroom. (R.295:116-117.) After he gained entry into the bathroom, Mr. Strong had an "instant personality change" and went back to being angry and saying things like "what are you going to do to earn redemption from the streets?" (R. 295:118.) He also slapped T.W. in the face and resumed flicking T.W. in the temple. (R. 295:117.) The slap caused her pain without consent. (R. 295:119.)

After Mr. Strong slapped her, T.W. and her children went to the upstairs portion of the house and one of her children called 911. (R.295: 116-117 and 122.) While T.W. was upstairs, Mr. Strong stood near the bottom of the stairs saying things like "…let's go downstairs, we need to

have a talk about what you are going to do for redemption from the streets." (R.295:120.) When the police arrived, Mr. Strong hid in a closet until officers found him. (R. 295:124.)

The case proceeded to a jury trial on December 12 and 13, 2017. (R.295 and R. 296.) The State introduced the audio recording of the 911 call, testimony from a dispatcher, T.W., two of T.W.'s children, and two officers. (R. 295:2.) Mr. Strong conducted extensive cross-examination of the State's witnesses including asking T.W. about an unrelated false statement to police (R.295:133-134), testimony and an audio of a prior inconsistent statement by T.W. about what D.L. observed, and evidence about Mr. Strong's demeanor that evening including statements made to police. (R. 295:242-263.) The State rested at the end of the first day of trial. (R.295:267.)

On the second day of trial, Mr. Strong called six witnesses including three police officers. (R.296:2.) He repeatedly questioned to the officers on their recollection of the investigation, their roles in this investigation, their experience, police policies, and statements made by people present during the incident. (R. 296:9-20, 46-66, 80-93.)

The prosecutor's closing argument focused on the evidence and what evidence went to each element of the offenses. The prosecutor's close also discussed the factors a jury should consider in determining credibility and the evidence and inferences the jury should consider. (R. 296; 176-188.)

During Mr. Strong's closing argument he argued that T.W.'s testimony was not credible and that she made up the accusations. He focused on the inconsistencies between T.W.'s testimony at trial and her prior statements, the inconsistencies in the officers' testimony regarding those roles and observations, and accused the prosecutor of "bamboozling" the jury. (R.296:18-209.)

During the prosecutor's rebuttal, the prosecutor responded to Mr. Strong's accusation that the State "bamboozled" the jury by explaining the role of the prosecutor. (R. 296: 212.) He responded to Mr. Strong's attacks on the police officers' credibility by discussing the lack of a motive to lie in this case. (R. 296:212.)

The jury found Mr. Strong guilty of, and the Court entered judgments of conviction on, two counts of battery and one count of disorderly conduct, all as habitual offenders. (R.272) On January 17, 2020, the Court sentenced

Mr. Strong to a total bifurcated sentence of 2 years initial confinement followed by 2 years extended supervision, with 1033 days credit. (R.272 and R.301;27 and 31.) This appeal follows.

STANDARD OF REVIEW

Evidentiary rulings are within the discretion of the trial judge and cannot be overturned unless clearly erroneous. Questions of law are reviewed de novo and findings of fact are subject to the clearly erroneous standard.

ARGUMENT

1. Decisions to admit or exclude evidence

A trial court's decision to admit evidence is discretionary. *State v. Manuel*, 2005 WI 75, ¶ 24, 281 Wis. 2d 554, 568–69, 697 N.W.2d 811, 818. The Court of Appeals must uphold that decision if there was a proper exercise of discretion. *Id.* (citing State *v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983).) When reviewing an evidentiary decision, the question on appeal is not whether the appellate judge would have admitted or excluded the evidence, but whether the trial court exercised its discretion in accordance with accepted legal standards and

in accordance with the facts of record. *Id.* (citing State v. Stinson, 134 Wis.2d 224, 232, 397 N.W.2d 136 (Ct.App.1986).) A proper exercise of discretion requires that the trial court rely on facts of record, the applicable law, and, using a demonstrable rational process, reach a reasonable decision. *Id.* (citing *Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis.2d 67, 629 N.W.2d 698.) If a trial court fails to adequately set forth its reasoning in reaching a discretionary decision, the reviewing court must search the record for reasons to sustain that decision. *McCleary v. State*, 49 Wis.2d 263, 282, 182 N.W.2d 512 (1971).

The most important piece of evidence for a reviewing court is the trial transcript itself, not the postconviction court's assertions or speculation. See *State v. Dyess*, 124 Wis. 2d 525, 544–45, 370 N.W.2d 222. By focusing on the trial transcript, the reviewing court avoids speculation. See *State v. Coffee*, 2020 WI 1, ¶ 38, 389 Wis. 2d 627, 650, 937 N.W.2d 579, 590.

Wisconsin statute § 901.03(1) states that an "(e)rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and" … a "timely objection or motion to strike

appears in the record, stating the specific ground of objection…". Wis. Stat. § 901.03(1)and (1)(a). In other words, the opponent of the evidence must do all four (1) use the word "object," (2)on the record, (3) in a timely manner, and (4) must recite the particular ground for the objection. A failure to make a proper objection, for any reason, waives any error in admitting the evidence.

The Wisconsin Supreme Court has repeatedly held "that an objection must be made as soon as the opponent might reasonably be aware of the objectionable nature of the testimony." *Simpson v. State*, 83 Wis. 2d 494, 509, 266 N.W.2d 270, 276 (1978); see also *U.S. v. Mezzanatto*, 513 U.S. 196, 203, 115 S.Ct. 797, 130 L.Ed.2d 697, 40 Fed. R. Evid. Serv. 1220 (1995). "First, it is the role of the appellate court to correct errors made by the trial court, not to rule on matters never considered by the trial court. Second, requiring objections at trial allows the trial judge an opportunity to correct or to avoid errors, thereby resulting in efficient judicial administration and eliminating the need for appeal." *Vollmer v Luety*, 156 Wis.2d 1, 10, 456 N.W.2d 797 (1990). Parties frequently waive evidentiary objections for strategic purposes, such tactics should be routinely honored. *Mezzanatto*, 513 U.S.

at 203. It is left to the parties to decide whether or not the rules are to be enforced. *Id.*

Trial "judges have no obligation to act as counsel or paralegal to pro se litigants." *Pliler v. Ford*, 542 U.S. 225, 231, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004). Pro se litigants, though acting without counsel, are still required to timely assert their rights. *State v. Pope*, 2019 WI 106, ¶ 46, 389 Wis. 2d 390, 936 N.W.2d 606, cert. denied, No. 19-7939, 2020 WL 5882407 (U.S. Oct. 5, 2020); see also *State v. Nelson*, 2016 WI App 80, ¶ 17, 372 Wis. 2d 184, 888 N.W.2d 22 (technical legal knowledge is not relevant in assessing a defendant's ability to represent himself.)

a. **Cross-examination of T.W. regarding a single instance of falsehood.**

"Character is evinced by a pattern of behavior or method of conduct demonstrated by an individual over the course of time. Thus, allegations of a single instance of falsehood cannot imply a character for untruthfulness …." *State v. Eugenio*, 219 Wis. 2d 391, 404, 579 N.W.2d 642 (1998). If the proposed evidence of a prior false statement is admissible to test credibility, the trial court nevertheless has the obligation to determine whether the

probative value is 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. Wis. Stat. § 904.03; and see *McClelland v. State*, 84 Wis. 2d 145, 162, 267 N.W.2d 843, 848 (1978).

Evidence of a specific instance cannot be offered through extrinsic evidence. Wis. Stat. §906.08(2); and *McClelland,* 84 Wis.2d at 162. The cross examiner may ask the defendant about a past incident, but must take the witness's answer.

At trial, Mr. Strong asked T.W. about a prior false statement she provided to police and then, without prompting, corrected. (R.295:133) The false statement related to a bar fight that did not involve Mr. Strong or T.W. (R.294:15 and R.133.) Mr. Strong sought to introduce this statement to show T.W. had a character for untruthfulness. The Court allowed questioning on the statement:

> Q: Wasn't there a point, though, that you had said that you had called the police back and said that everything you said was not true?
>
> A: No.

> Q: What was that you had said that you called the police back and said everything was not true? I thought that was –
>
> A: Never, I never said that.
>
> Q: Was that you that said that or (C.D.)? I'm not sure.

(R.295:133-134.) In response to the State objected after the question about C.D.; the Court told Mr. Strong he could "not state any other person's testimony" and instructed him to ask his next impeachment question. (R.295:134.) While the judge told the jury to disregard the question about C.D.'s false statement; the judge neither struck the question and answer regarding T.W.'s contact with police, nor instructed the jury to disregard that testimony. (R.295:134-135.) Rather than accepting the invitation to continue impeaching T.W., Mr. Strong moved on to questions about the night of March 21, 2017. (R.295:135.)

Mr. Strong was permitted to cross-examine T.W. on the false report. The court only sustained an objection to a question regarding C.D.'s statements. Regardless of whether the evidence was admissible or not, the evidence was admitted at trial.[1]

[1] Even if the trial court had struck the testimony, which he did not, this brief false statement, months before Mr. Strong's conduct, has very little if any probative value as to T.W.'s character for untruthfulness. If anything it shows her character for truthfulness in

b. Strong's demeanor with officers and exclusion of video clip.

During day one of the jury trial, the State solicited testimony from Officer Woelfel regarding Mr. Strong's demeanor. (R.295:242-251.) During cross-examination of Officer Woelfel, Mr. Strong continued the line of questioning regarding his demeanor with officers. (R. 295: 252-263.) Not only did Mr. Strong not object during direct examination to the evidence of his demeanor, he continued the line of questioning during cross-examination. See *Mezzanatto*, 513 U.S. at 203. Any error in admitting the testimony or video during direct examination was waived. *Mezzanatto*, 513 U.S. at 203; *Simpson*, 83 Wis. 2d at 509; *McClelland*, 84 Wis. 2d 145, 162; and see Wis. Stat. § 901.03.

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that she initiated the call to police recanting and explaining the false statement. See Wis. Stat. 906.08(1)(b). The false statement involved C.D. asking T.W. to lie for her by saying she witnessed a bar fight. When the officer contacted T.W., T.W. initially, at the request of C.D., told the officer she witnessed the fight. T.W. then called the officer back, telling the officer she was not at the bar, did not witness the fight, and only said she did at C.D.'s request. (R.133.) The incident did not involve T.W. initiating contact with police. It did not involve T.W. claiming injury to herself, anyone attacking her, or her reporting a fight that did not occur. The false statement was quickly rectified by T.W. without any additional evidence or confrontation, and before the officer even completed his report. Even if the judge had struck the testimony or prohibited further questioning on the statement, which he did not, any further questions would have been cumulative, and resulted in a waste of time. Regardless of its probative value, the audio recording of the prior testimony is inadmissible extrinsic evidence.

i. Prohibiting publishing the body camera video to the jury

During his cross-examination of Officer Woelfel, Mr. Strong asked Officer Woelfel if, during Mr. Strong's "see you soon" statements, he mentioned his speedy trial demand. (R. 295:262-263.) Officer Woelfel twice acknowledged that at least once Mr. Strong referenced seeing him in "50 to 90 days in court." (R. 295:262-263.) As the witness acknowledged that statement, the video recording of the statement was properly excluded as cumulative evidence. See Wis. Stat. § 904.03.

ii. Corroborating evidence

Even if Mr. Strong had objected to Officer Woelfel's testimony regarding Mr. Strong's demeanor with police, the evidence was direct evidence of his demeanor that night and was corroborating evidence as to his demeanor prior to officers arriving. Even if the State had offered it solely to prove consciousness of guilt, it is admissible for that purpose. See *Wangerin v. State*, 73 Wis.2d 427, 437, 243 N.W.2d 448 (1976)(evidence of flight and related conduct is admissible); see also *State v. Subdiaz-Osorio*, 2014 WI 87, ¶ 100, 357 Wis. 2d 41, 95, 849 N.W.2d 748, 775.

During both direct examination and cross-examination, T.W., A.D., and M.D. all testified, both in cross and on direct, that Mr. Strong's demeanor changed from his normal demeanor to threatening as the evening progressed. (see ex. R. 295: 116, 192, 208, 211.) T.W. testified that his demeanor switched back and forth between calm and threatening. This was not a delayed report case, the police were called (and arrived) during the incident. (R. 295: 120-121; and R.132.)

When officers arrived at the house, they located Mr. Strong hiding in a closet. (R. 295:124, 241, and 257.) In response to cross-examination, Officer Woelfel testified that Mr. Strong did not immediately exit the closet upon Officer Woelfel finding him, rather he just stared at Officer Woelfel in an aggressive manner until additional officers were in the room. (R. 295:257.) Mr. Strong continued alternating between telling officers he respected them and making threatening comments. (R. 295:257-265.)

During cross-examination of Officer Woelfel, Mr. Strong used the same line of questioning about his demeanor with officers in an attempt to show he was cordial with officers and not acting in an aggressive manner. (R. 295:241.) Officer Woelfel's testimony involved a

continuation of the same demeanor discussed in earlier testimony, it was neither other acts nor cumulative evidence.

c. Cross-examination of Lt. Carlos DelPlaine

Whether Lt. DelPlaine's testimony on cross-examination was a "non-expert observation or an expert opinion" Mr. Strong waived any objection by failing to object in a timely and specific manner on a "question-by question" basis. *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2011 WI App 101, ¶ 40, 335 Wis. 2d 151, 194, 801 N.W.2d 781, 802, aff'd, 2012 WI 70, 342 Wis. 2d 29, 816 N.W.2d 853. Law enforcement officers experiences on the job often qualify them as experts. See U.S. v. Rollins, 544 F.3d 820, (7th Cir. 2008); and *Vouch v. American Standard Ins. Co*. 151 Wis. 2d 138, 442 N.W.2d 598 (Ct. App. 1989). The same witness, including law enforcement, may testify to one line of questions as a lay witness and another line of questions as an expert. See *Id*. By not contemporaneously objecting to the testimony, Mr. Strong cannot now claim that receipt of the testimony was error. *Kriefall*, 2011 WI APP 101 at ¶41.

i. Admissible expert testimony

The trial judge is entrusted with the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 1171, 143 L. Ed. 2d 238 (1999). There is no magic formula or strict list of factors required in this analysis. *Id.* at 150. The testimony is admissible when the testimony is based on "a reliable basis in the knowledge and experience of [the relevant] discipline." Id. at 149 (quoting *Daubert v. Merrell Dow Pharm.*, Inc., 509 U.S. 579, 592, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Court is not to exclude reliable and probative testimony, rather the court's sole role is to exclude "expertise that is fausse and science that is junky." *Id.* at 159 (Scalia, J., concurring).

Any witness with sufficient experience in the relevant field can provide opinion testimony if that opinion has a valid "connection to the pertinent inquiry as a precondition to admissibility." *Kuhmo Tire*, 526 U.S. at 149 (quoting *Daubert*, 509 U.S. at 592). It is irrelevant whether or not that opinion is based on an examination of

the victim or from the officer's training and experience alone. *Kuhmo Tire*, 526 U.S. at 150. The court's job is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Id*. at 152.

During Mr. Strong's case-in-chief, he called several witnesses include Lt. DelPlaine. (R.296:2 and 46.) During direct examination, Mr. Strong asked Lt. DelPlaine questions about Lt. DelPlaine's interaction with T.W. (R.296:54-63.) During cross-examination, Lt. DelPlaine testified that during his interaction with T.W. "it appeared that she had been crying, it appeared that she had had or that she was having difficulty catching her breath, so she seemed to have been very disturbed by this whole incidence." (R.296:67-68.) He also testified that he was attempting to comfort T.W. to get her to explain what happened. (R.296:70.)

Lt. DelPlaine testified that in his 32 years as an officer he has a lot of experience investigating crimes involving power and control relationships. (R.296: 70-71.) He agreed that in those types of situations, in his experience "it is pretty common for victims of a crime to

hesitate prior to actually giving (officers) the full story of what happened." (R.296:71.) Lt. DelPlaine went on to testify that "while this wasn't a statutory … domestic relationship" he believed that they were intimate, and that the relationship was in all but name a domestic situation. (R. 296:71.) T.W. was displaying behaviors similar to what he had seen a number of domestic victims displaying in past cases. (R.296:72.)

Lt. DelPlaine testified that when officers first arrived T.W. was very hesitant to provide officers with any information. He explained that her hesitation is consistent with domestic victims from his past cases. (R.296:72.) He also testified that eventually T.W. told officers that she feared retaliation for calling the police. (R.296:72-73.) On re-direct, Lt. DelPlaine emphasized that his testimony was based on his experience investigating crimes, not on particular studies or research on domestic abuse. (R. 296:75.)

Regardless of whether Lt. DelPlaine considered himself an expert, the State laid the foundation for his testimony by establishing his extensive experience in investigating domestic-type abuse. This experience and knowledge forms a "reliable basis in the knowledge and experience" from which

he testified. *Kuhmo Tire*, 526 U.S. at 149. His testimony showed not only his sufficient experience, it established a valid "connection to the pertinent inquiry." *Kuhmo Tire*, 526 U.S. at 149. Even if Mr. Strong had made a timely objection, Lt. DelPlaine's testimony was admissible as expert testimony under a *Kuhmo Tire* analysis.

2. Closing arguments

Failing to timely move for a mistrial, even when a defendant objects to a prosecutor's closing argument, waives any objection to the prosecutor's closing argument statements. *State v. Davidson*, 2000 WI 91, ¶ 86, 236 Wis. 2d 537, 613 N.W.2d 606; and *State v. Bell*, 2018 WI 28, n. 13, 380 Wis. 2d 616, 629, 909 N.W.2d 750, 756. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 and *Bell*, 2018 WI 28, n.13.

The appellate court may still review errors even when they are not properly preserved under the plain error doctrine. *Bell*, 2018 WI 28, at ¶ 12. To qualify for plain

error review, however, the error "must be 'obvious and substantial[,]'" and "'so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.'" *Id.* (quoting *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77.)

There can be no plain error unless the prosecutor's closing or rebuttal argument was improper, therefore the first step is to determine whether the prosecutor's argument was improper. *Bell*, 2018 WI 28, ¶ 14. Only if the argument is improper does the appellate court move to whether the error "was an error so obvious, substantial, and fundamental that a new trial is necessary." *Id.*

In order for a closing argument to be so substantial and fundamental that a new trial is necessary, the commentary must deprive Mr. Strong's right to due process of law. See *Id.* at ¶ 15. The due process right extends to the State's comments during trial: "When a defendant alleges that a prosecutor's statements and arguments constituted misconduct, the test applied is whether the statements 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " Bell, 2018 WI 28, ¶ 15 (citing State v. Mayo, 2007 WI 78, ¶ 43, 301 Wis. 2d 642, 734 N.W.2d 115).

The State is not prevented from pressing its case. The prosecutor is expected to "prosecute with earnestness and vigor." *Bell*, 2018 WI 28, ¶ 16 (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).

Although there are boundaries on what prosecutors may say, prosecutors are "allowed considerable latitude in closing arguments, with discretion given to the trial court in determining the propriety of the argument." *Bell*, 2018 WI 28, ¶ 39 (quoting *State v. Burns*, 2011 WI 22, ¶ 48, 332 Wis. 2d 730, 798 N.W.2d 166). A "prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors." *Id.* (quoting *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citation and internal marks omitted)). But a prosecutor cannot suggest that the jury consider facts not in evidence. *Id.* (citing *Burns*, 2011 Wi 22 at ¶ 48).

In *Bell*, the defendant was charged with sexually assaulting two victims. The prosecutor and Mr. Bell both argued the case depended on the victims' credibility. Mr. Bell argued the victims lied and the prosecution argued the jury "could not find the defendant not guilty unless the

victims lied." On appeal, Mr. Bell argued the State shifted the burden to the defendant to prove the victims lied. *Bell*, 2018 Wi 28, ¶ 10.

Mr. Bell did not argue that victims' description of events failed to satisfy the statutory elements of the crimes. Through comments in voir dire, the outline of the case provided in opening statements, the examination of witnesses, and closing arguments, Mr. Bell offered the jury one reason, and one reason only, for acquitting him—to wit, the untruthfulness of the victims. *Id. at* ¶ 43. The *Bell* case presented a situation where:

> the logical prerequisites for each party's success are symmetrical. This category comprises situations in which, for example, the State need only prove the truth of one condition to obtain a conviction. From the State's perspective, that condition is both necessary and sufficient. Unlike the prior category of cases, the defendant's perspective is the mirror image—an acquittal is not possible unless that one condition is not true. That is to say, it is not just sufficient that the one condition be untrue, it is also necessary.

Id. at ¶ 46. The one condition in the case was whether the victims were telling the truth. If they were, all elements were proved. If they were not, the State failed to prove the elements. *Id.* at ¶ 47. Mr. Bell offered the jury no weakness in the State's case other than the victims'

credibility. He could not present a theory how (absent jury nullification) the jury could have acquitted him if it nonetheless believed the victims. And jury nullification is not an option—there is no right to have the jury disregard the law or evidence. *Id*.

After examining the prosecutors statements that the jury could not acquit unless they believed the victims were lying, and that the jury should not to discount the victims' testimony in the absence of a motive to lie, the Supreme Court determined that the prosecutor arguments on credibility were "persuasion, not a statement of the law." Nor was his admonition that the jurors must not speculate, even with respect to matters of credibility, erroneous. Consequently, the *Bell* court determined that neither the "must believe" nor the "motive" statements were improper." *Id* at ¶ 59.

a. State's closing argument

Mr. Strong, like Bell, argued throughout the trial that the victim, T.W.'s, accusations were not credible. Because T.W. and Mr. Strong were the only people in the kitchen when the battery occurred, the only source of evidence proving the elements of the crimes charged was

T.W.'s testimony. All the other testimony went to T.W.'s credibility. Neither the State nor Mr. Strong submitted evidence of mistaken identity or that the actions were misconstrued. Mr. Strong argued T.W. made up the conduct, and that the police were untrustworthy.

In the State's closing argument, the prosecutor started with a narrative recitation of what the prosecutor believed the evidence showed happened on March 21, 2017. (R. 296: 176-180.) The prosecutor then recommended the jury go through each element of each crime and consider what evidence proved each element. (R.296: 181-1822.) The prosecutor then went through each element explaining what evidence, in the State's view, proved each element of each charge. (R.296: 182-183.) He then told the jury:

> So if you take (T.W.'s) statements, all of those elements are met. So what does this come down to now, since we know that those are met by (T.W.'s) statement? Do you believe what (T.W.) said? If you do, the defendant's guilty of all three. Do you not believe what (T.W.) said? If you don't believe her, you think she's lying, then the defendant's not guilty, and that's what this comes down to, the credibility of (T.W.) versus the credibility of the defense theory.

(R.296: 183-184.) Almost the exact same argument as the prosecutor in *Bell*. *See Bell*, 2018 Wi 28, ¶ 34-35, and 59.

The prosecutor then discussed the evidence presented to the jury that supported T.W.'s credibility, including 911 call, the witness' "conduct, appearance, and demeanor on the stand"; "the witness' interest or lack of interest in the result of the trial"; "the opportunity the witness had for observing and for knowing the matters the witness testified about"; the consistency of the testimony; and lack of a motive to lie. (R. 296: 185-187); and see WIS JI-CRIMINAL 300. After discussing the evidence supporting the credibility of the State's witnesses, the prosecutor discussed the evidence showing Mr. Strong's consciousness of guilt, before suggesting T.W. did not have motivation to lie in March 2017 or on the day of trial. (R.296: 188.)

After the State's closing argument, Mr. Strong made his closing argument. (R.296: 188.) Mr. Strong focused entirely on credibility. While he discussed lack of specific start and stop times for the conduct, T.W.'s prior inconsistent statements, and prior inconsistent statements made by and about a defense witness; Mr. Strong also spent time attacking the prosecutor's strategy, and statements during opening statements and closing arguments; the court's evidentiary rulings; and officers' investigation, policies, and credibility. (R.296: 188-209.)

In the State's rebuttal argument, the prosecutor specifically responded to Mr. Strong's closing argument. Mr. Strong stated at the end of his closing argument that the prosecutor "himself had not, even with the bamboozle that they used yesterday," proved the case.[2] (R.296: 208-209.) The prosecutor responded to that accusation that he fooled or cheated the jury by explaining the prosecutor's role in the system, including that prosecutors have discretion not to file charges. (R. 296: 212.)

The prosecutor then responded to Mr. Strong's attack on the police officers involved in the case by describing the job requirements of an officer and how they could impact a person's life in arguing that officers have no motivation to lie. (R.296:212.) At no time did the prosecutor tell the jury that officers never lie, he did not say he knew the officers and vouched for them, and he did not say that the officers were telling the truth in this case. To the contrary, he asked the jury "to look at the facts," and to compare T.W. "to the defendant's theory of the case." (R. 296:212.)

[2] Mirriam-Webster dictionary defines "bamboozle" as "(1) to deceive by underhanded methods: dupe, hoodwink. (2) to confuse, frustrate, or throw off thoroughly or completely." https://www.merriam-webster.com/dictionary/bamboozle last visited on November 17, 2020.

The prosecutor in this case did not go beyond discussing the evidence presented during testimony and reasonable inferences from that evidence. That a witness takes time off work is common sense. The witness complained during cross-examination, and in the presence of the jury, about the people outside the courtroom, requesting the court close the windows or move the people. (R.295:133 and 135-136.) It is reasonable to infer the people distracting her were associated with the case and Mr. Strong. Mr. Strong specifically and clearly attacked the credibility of the police witnesses and the department as a whole throughout the trial. The prosecutor responded to these attacks with assumptions well within every person's common knowledge. He did not say he personally knew the officers or their families. He did say that he has found the officers trustworthy in the past. He simply made an argument regarding the officers lack of a motivation to lie. See WIS JI-CRIMINAL 300 (possible motives for falsifying evidence and all other circumstances to support testimony).

The prosecutors arguments during close and rebuttal did not include personally vouching for any witness's credibility, were in direct response to Mr. Strong's

attacks on the witness' credibility, and asked the jury to apply the admissible evidence and reasonable inferences, as directed by their "common sense and experience." See WI JI-CRIMINAL 300 and *Bell*, 2018 WI 28, ¶ 57 and 59. The prosecutor's closing argument and rebuttal were not improper.

3. No errors were so obvious, substantial, and fundamental that a new trial is necessary.

If this Court finds the defendant met his burden and proved an error or errors existed, he still must prove the error(s) are "so obvious, substantial, and fundamental that a new trial is necessary." *Bell*, 2018 WI 28, ¶ 14.

This case does not involve evidence of two competing stories. It involves T.W.'s testimony, and a series of witnesses providing corroborating evidence. No evidence was introduced showing a motive to lie, or any other reason to believe she lied, other than minor inconsistent statements. Mr. Strong asked T.W. about her prior false statement to an officer, he was allowed to play audio from the probation revocation hearing that included T.W.'s inconsistent testimony, and Officer Woelfel testified that at least once Mr. Strong mentioned an upcoming court hearing while telling the officer "I will see you soon." While Mr.

Strong may have wished to introduce additional, cumulative evidence on those issues, the evidence was presented to the jury.

The testimony of Officer Woelfel and Lt. DelPlaine were admissible under the rules of evidence. And Mr. Strong not only failed to make a timely objection to the evidence, his cross-examination of the officer witnesses sought to advance his theory of defense through the same line of questioning. Even if that evidence was excluded, the evidence in this case consisted solely of T.W.'s account of the evening and corroborating evidence regarding T.W.'s demeanor that night and Mr. Strong's demeanor that night. All the corroborating evidence supported T.W.'s credibility and led to a conclusion that Mr. Strong was acting in an "odd" and threatening manner that evening.

Nothing in the trial transcript proves any error was "so obvious, substantial, and fundamental that a new trial is necessary."

CONCLUSION

Evidentiary rulings are within the discretion of the trial judge and cannot be overturned unless clearly erroneous. *State v. Manuel*, 2005 WI 75, ¶ 24, 281 Wis. 2d

554, 568–69, 697 N.W.2d 811, 818. The Court of Appeals must uphold that decision if there was a proper exercise of discretion. *Id.* If a trial court fails to adequately set forth its reasoning in reaching a discretionary decision, the reviewing court must search the record for reasons to sustain that decision. *McCleary v. State*, 49 Wis.2d 263, 282, 182 N.W.2d 512 (1971).

None of the challenged evidentiary rulings were clearly erroneous. Mr. Strong has not shown any rulings or arguments meet the high bar of "plain error." And, even if the court errored, the error was not substantial enough to necessitate a new trial.

Respectfully submitted this 18th day of November, 2020.

By:_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 31 pages.

Dated: November 18, 2020

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CERTIFICATION OF THIRD-PARTY COMMERICIAL DELIVERY

I certify that on November 16, 2020, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: November 18, 2020

Signature: _____

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 18th day of November, 2020.

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