STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP1876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR CHIPPEWA COUNTY, THE HONORABLE JAMES M. ISAACSON PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. A defendant may be granted a new trial based on newly discovered evidence if there is a reasonable probability that the evidence would have raised a reasonable doubt in the jury's mind about the defendant's guilt. Here, Defendant-Appellant Tomas Jaymitchell Hoyle discovered evidence after trial that conflicted with the victim's testimony that she had discussed the sexual assault with her counselor. The circuit court denied Hoyle's new trial motion. Did the court err?

No. Although relevant to the victim's credibility, the counseling issue was a collateral one and her inconsistent statements would not have given the jury a reasonable doubt about Hoyle's guilt.

This Court should affirm.

2. A defendant may be granted postconviction in camera review of the victim's counseling records if they are necessary to a determination of guilt or innocence and are not cumulative to evidence already available. Here, Hoyle seeks review of the victim's counseling records due to her inconsistent statements about whether she discussed the sexual assault in counseling. The court denied the motion. Did the circuit court err?

No. The records are not relevant to the question of Hoyle's guilt or innocence. Confirmation that the victim made inconsistent statements about whether she discussed the sexual assault in therapy is cumulative to the evidence already in the record and collateral to the question of Hoyle's guilt or innocence.

This Court should affirm.

3. The prosecutor may not, in closing argument, comment on the defendant's failure to take the stand. Here, the prosecutor argued in closing that the evidence against Hoyle was "uncontroverted." The circuit court found that the

prosecutor did not comment on the defendant's failure to testify. Did the circuit court err?

No. The prosecutor may state in closing that there was no evidence introduced to show the defendant's innocence.

This Court should affirm.

4. A defendant may be granted a new trial if the State suppressed, even inadvertently, evidence that is favorable to the accused and material to guilt. Here, Hoyle discovered postconviction two documents that he contends are favorable and material. The circuit court denied a new trial on this ground. Did the circuit court err?

No. The documents are neither favorable nor material, are cumulative to other evidence, and contain inconsistencies between the victim's first recorded report of the assault and her later statements that are insignificant at best.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The issues are fully briefed and can be resolved by the application of well-settled law to undisputed facts.

STATEMENT OF THE CASE

The State charged Hoyle with four sexual assault offenses: two counts of second-degree sexual assault in violation of Wis. Stat. § 940.225(2)(a); and two counts of second-degree sexual assault of a child less than 16 years of age in violation of Wis. Stat. § 948.02(2). (R. 1:1.) After a two-day trial, the jury found Hoyle guilty on all counts. (R. 92:51.)

Hannah,[1] the victim, was the principal witness. She testified that she was 15 years old at the time of the sexual assault. (R. 91:145.) She believed that Hoyle was 22 years old.[2] (R. 64:1.) When she met Hoyle, she was "high" or "buzzed," having consumed Vicodin (which she took from her sister) and hard liquor throughout the day. (R. 91:140–42, 171.) She had just left her home in the Bateman Trailer Court and was on her way to a friend's nearby house to tell her that she would not be coming over for a sleep-over because her mother would not allow it. (R. 91:138–39, 142.) This errand should have taken her about five or ten minutes. (R. 91:142.)

Instead of going directly to her friend's house, Hannah accepted a ride from Hoyle, the older stepbrother of her old best friend. (R. 91:138, 175–76.) She told Hoyle that she only had about five minutes to hang out. (R. 91:142–43.) Hannah described Hoyle's car as a small four-door sedan with gray fabric and no console in the backseat. (R. 91:153–54.)

They started driving around. First, Hoyle drove down to the Wissota Marina near the Lafayette Town Hall. (R. 91:143.) Then, he turned around in a parking lot across from the marina and started to drive towards Cadott on County Road X. (R. 91:143–44.) Hannah couldn't say how far into Cadott they went, but she "remember[ed] crossing a bridge and a couple of bars." (R. 91:144.) Hannah "didn't say anything [about the direction of the drive], but in my head I was kind of confused." (R. 91:144.) As they drove, Hoyle kept telling Hannah to sing along with the radio, which she didn't want to do, and "kept poking my legs." (R. 91:146.)

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[1] The State uses a pseudonym, Hannah, to refer to the victim. *See* Wis. Stat. § (Rule) 809.86(4). Hoyle refers to her as "HAL."

[2] In fact, Hoyle was just short of his 21st birthday. (R. 1:1.)

"After driving on [County Road] X for awhile, we turned [left] down a dead end road." (R. 91:145.) The car came to a stop. (R. 91:145–46.) Hannah got out of the car. (R. 91:146.) "I don't know what my plan was. I was confused." (R. 91:146.) He told her to get back in the car. She got into the back seat, passenger side; earlier, she had been in the front passenger seat. (R. 91:147.) She got into the back seat because "I was scared. I didn't want him touching me any more, so I thought by sitting in the back, he wouldn't have access to touching me." (R. 91:148.) She thought that once she got back in the car, Hoyle would bring her home. (R. 91:148.)

Instead, he climbed into the back seat and moved close to her. (R. 91:148.) She felt "uncomfortable," but didn't tell Hoyle that. (R. 91:148.) He started "touching me, grabbing my hands, rubbing his hands on my legs," specifically, her upper thigh. (R. 91:148–49.) This made her feel "violated" as well as uncomfortable. (R. 91:149.) She also felt "very confused." (R. 91:149.) Then, he started pulling her pants down. (R. 91:150.) Hannah tried to pull them back up, but Hoyle ultimately "won that tug of war" and removed Hannah's pants and her underwear. (R. 91:151.) She told him to stop, but he didn't listen. (R. 91:150–51.) She was scared. (R. 91:151.)

At this point, Hannah was sitting with her back against the window. (R. 91:152.) Hoyle pulled her towards him into a lying position. (R. 91:153.) Her body was spread across the back seat with Hoyle positioned over her. (R. 91:155.) Then Hoyle proceeded to penetrate her digitally for a few seconds. (R. 91:156.) She "didn't want to be touched that way," and had not given him permission to do so. (R. 91:156.) Next, he penetrated her with his penis. (R. 91:158.) She told him she might become pregnant. (R. 91:157–58.) He told her not to worry; she didn't remember if he used "protection." (R 91:158.) This lasted a few minutes until Hannah "kind of forcefully push[ed] him off of me and began getting dressed and said that I needed to go home." (R. 91:158.) They both got dressed.

(R. 91:159.) After the assault, Hannah returned to the front seat of the car. (R. 91:159.)

"On the ride back, before he dropped me off, he said that if anyone finds out about this, someone is going to end up dead." (R. 91:160.) Hannah assumed that "someone" meant herself. (R. 91:160.) Hoyle dropped her off in front of a bar across the street from the trailer court where she lived. (R. 91:159.) Hannah stated at the end of this narrative that she made it clear to Hoyle through "my words and my actions" that she didn't want to "do this." (R. 91:161.)

Hannah was gone from home for approximately 45 minutes. (R. 91:178.) She didn't tell her mother, stepfather, or sisters that Hoyle had assaulted her. (R. 91:178.)

The prosecutor reviewed with Hannah her preliminary hearing testimony and the statements she made to the school liaison officer and the investigating officer.

First, the prosecutor noted that at the preliminary hearing, Hannah specifically said she had "six Vicodin and three shots of vodka," and now her testimony was more general. (R. 91:161.) Hannah responded that she wasn't sure then or now how much she'd consumed, and that her preliminary hearing testimony "was just a rough estimate." (R. 91:161–62.)

Then, the prosecutor asked Hannah about her disclosures to Officer Nelson, the school liaison officer, and Investigator Kari Szotkowski,[3] who investigated the case. (R. 91:163–64.) Hannah spoke to Investigator Szotkowski on March 15, and told her that the sexual assault took place about one month before. (R. 91:164–65.) Hannah explained: "I

[3] Hannah knew her as "Kari Anderson." (R. 91:163–64.) Investigator Szotkowski testified briefly after Hannah did. (R. 91:182–88.) To reduce confusion, the State will refer to her as Investigator Szotkowski throughout this brief.

don't remember the exact date or even the day of the week, but I remember around the time that it happened." (R. 91:164.) Hannah shared the details of the assault with Investigator Szotkowski, but did not name the person who assaulted her because she was "scared." (R. 91:165.)

In May, Hannah spoke to Officer Nelson again and identified Hoyle as her assailant. (R. 91:166.) She told Nelson because "[h]e was the kind of person that I talked to, not really like a counselor, but if I had any issues, that's who I talked to." (R. 91:166.) At that time, in addition to the sexual assault, Hannah was having serious problems with her mother, involving physical abuse. (R. 91:167.)

The prosecutor closed the direct testimony by asking Hannah why, if the experience with Hoyle was "very uncomfortable and traumatic," she was not crying on the stand. (R. 91:167.) Hannah answered: "I have gotten counseling to help with dealing with this." (R. 91:167.) At the time of trial, Hannah was still in counseling. (R. 91:168.) When the prosecutor asked if her counseling concerned "issues with your mom, life in general, and this assault," Hannah answered: "Yes." (R. 91:168.)

In his closing argument, the prosecutor told the jury that it was "to decide this case solely, solely on the evidence offered and received at the trial." (R. 92:18.) "You're not to speculate about other things that may be out there. . . . You're to focus solely on the evidence that was presented to you yesterday in this trial." (R. 92:18.) He went on to note that Hannah's testimony "is uncontroverted. You have heard no evidence disputing her account of that sexual assault. You heard nothing." (R. 92:18–19; *accord* 92:20–21.)

Defense counsel's closing emphasized the evidence that Hannah's testimony did not provide. Hannah could not identify the date of the assault. (R. 92:29.) He also pointed out that Investigator Szotkowski did not interview Hannah's

mother or the rest of her family to determine her demeanor after the assault. (R. 92:29–31.) Nor did she canvas the neighborhood or ascertain whether the bar where Hoyle dropped Hannah off might have had surveillance video. (R. 92:32.) Nor was there any physical evidence of the assault. (R. 92:32.) Defense counsel also questioned why there wasn't more evidence at trial about the car. (R. 92:33.) Further, counsel questioned the lack of investigation into the effect of Hannah's intoxication on her memory. (R. 92:36.) He emphasized the gradual revelation of the assault and her uncertainty not just about when the assault took place, but when she spoke to the investigators, and when she named Hoyle. (R. 92:36–37.)

In rebuttal, the prosecutor noted that the defense did not "disagree it's uncontroverted. They just say you should ask for more. It's not my job to give you information I don't have." (R. 92:44.)

The jury found Hoyle guilty on all four counts. (R. 92:51.) Counts 1 and 2 charged Hoyle with second degree sexual assault in violation of Wis. Stat. § 940.225(2)(a) requiring proof of forcible sexual intercourse or contact; these two counts were premised on Hoyle's penile and digital penetrations of Hannah, respectively. (R. 92:5–6, 27.) Counts 3 and 4 charged Hoyle with sexual assault of a child in violation of Wis. Stat. § 948.02(2); these two counts were premised on Hoyle's penile and digital penetrations of Hannah, respectively. (R. 92:6–7, 27–28.) The court sentenced Hoyle to eight years of initial confinement and ten years of extended supervision. (R. 93:26.)

Hoyle filed a postconviction motion on August 11, 2020. (R. 63.) He made seven arguments, four of which he pursues on appeal. First, he asked for a new trial based on newly discovered evidence that Hannah told the presentence investigator that "she has not discussed the sexual assault with her counselor because she does not want to constantly

relive the assault." (R. 31:4–5; 63:3–7.) This differed from her trial testimony attributing her calm demeanor to discussing the assault in therapy. (R. 91:167–68.) Second, if the court denied the new trial motion, Hoyle asked for postconviction discovery of Hannah's counseling records. (R. 63:8–13.) Third, Hoyle asked for a new trial based on the State's alleged failure to disclose certain pretrial statements Hannah made to Officer Nelson. (R. 63:13–18.) Finally, Hoyle argued that the State's closing argument violated his Fifth Amendment right not to testify by referring to "uncontroverted evidence." (R. 63:23–26.) Additional details about the factual basis for these claims will be provided in the argument section where necessary.

The court denied relief on all four grounds. (R. 76; 94:29–32.)

This appeal follows.

STANDARD OF REVIEW

The circuit court's decision on a newly discovered evidence claim is reviewed by this Court for erroneous exercise of discretion. *State v. Plude*, 2008 WI 58, ¶ 31, 310 Wis. 2d 28, 750 N.W.2d 42. Where the four-factor test for newly discovered evidence is satisfied, this Court reviews de novo "whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt." *Id.* ¶ 33.

On appeal from an order denying in camera review of a victim's counseling records, Court reviews factual findings under the clearly erroneous standard and whether the defendant made a sufficient preliminary showing for in camera review de novo. *State v. Green*, 2002 WI 68, ¶ 20, 253 Wis. 2d 356, 646 N.W.2d 298. If the defendant satisfies that

burden, he must additionally show that the circuit court's error was not harmless. *Id.*

Whether the prosecutor improperly commented on the defendant's exercise of his Fifth Amendment right not to testify is subject to this Court's de novo review. *See State v. Cockrell*, 2007 WI App 217, ¶ 14, 306 Wis. 2d 52, 741 N.W.2d 67.

When reviewing a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), this Court accepts the circuit court's findings of fact unless clearly erroneous, but independently reviews whether a due process violation occurred. *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 922 N.W.2d 468.

ARGUMENT

I. Hoyle is not entitled to a new trial on "newly discovered evidence" grounds because there is no reasonable probability that the jury would have had a reasonable doubt about Hoyle's guilt if it had heard the evidence.

A. Additional facts.

In their March 15 interview, Hannah told Investigator Szotkowski that she saw a counselor but had not told the counselor about the sexual assault "because she knew it would have to be reported." (R. 64:4.) At trial, Hannah said she was in counseling, where she discussed many topics, including the assault. (R. 91:168.) She testified that counseling had been very helpful in enabling her to deal with the assault. (R. 91:168.) After trial, the presentence investigator spoke to Hannah and reported that Hannah "attends counseling once a week and feels that this has helped her a lot. The counseling [she] attends is for substance abuse. She admits she has not discussed the sexual assault with her counselor because she does not want to constantly relive the assault." (R. 31:4–5.)

Hannah's statement to the presentence investigator is the basis for Hoyle's newly discovered evidence claim.

B. A new trial will be ordered on newly discovered evidence grounds only where a reasonable probability exists that the new evidence would create a reasonable doubt of the defendant's guilt.

In order to set aside a judgment of conviction on the basis of newly discovered evidence, the defendant must satisfy four criteria: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." *Plude*, 310 Wis. 2d 28, ¶ 32 (quoting *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)). The movant must prove the factors by clear and convincing evidence. *State v. Brunton*, 203 Wis. 2d 195, 197–98, 552 N.W.2d 452 (Ct. App. 1996).

If the defendant proves the four criteria, the reviewing court must then determine "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." *Plude*, 310 Wis. 2d 28, ¶ 32. Looking at the trial evidence and the newly discovered evidence side-by-side, the court "should consider whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial such that a jury would have a reasonable doubt as to the defendant's guilt." *Plude*, 310 Wis. 2d 28, ¶ 33. The burden is on the defendant. *Brunton*, 203 Wis. 2d at 197–98.

"Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial." *Plude*, 310 Wis. 2d 28, ¶ 47 (citing *Birdsall v. Fraenzel*, 154 Wis. 48, 142 N.W. 274 (1913)). In some cases, "newly discovered evidence impeaching in character might be produced so strong as to

constitute grounds for a new trial; *as for example where it is shown that the verdict is based on perjured evidence*." *Plude*, 310 Wis. 2d 28, ¶ 47 (quoting *Birdsall*, 154 Wis. at 52).

In *Plude*, the victim was found collapsed next to a toilet bowl after vomiting. *Plude*, 310 Wis. 2d 28, ¶ 7. Her husband was charged with the homicide. The State's theory was that Plude drugged and drowned his wife in the toilet; he contended that she committed suicide. *Id.* ¶ 4. Several expert witnesses testified, including Saami Shaibani, who explained that the position of the body proved that Plude drowned his wife.

Shaibani testified as an expert in "injury mechanism analysis," a field he seems to have invented, which he used "to determine whether or not an injury could have been caused by the circumstances involved." *Id.* ¶ 23 & n.8. He was not a medical doctor. *Id.* ¶ 23. To validate his worth as an expert on what was ultimately a medical question, Shaibani emphasized his experience as a clinical associate professor at Philadelphia's Temple University, where he worked with physicians and surgeons and trained them in injury mechanism analysis. *Id.* The problem was that Shaibani lied about this experience. He was not a clinical professor at Temple University and did not train physicians and surgeons. *Id.* ¶ 30. Plude uncovered this information after verdict and sought a new trial.

The supreme court found that the evidence impeaching Shaibani's testimony about his credentials warranted a new trial. The court's conclusion turned on Shaibani's self-presentation as "a quasi-medical expert notwithstanding his lack of medical education." *Id.* ¶ 36. Indeed, Shaibani probably would not have been qualified as an expert had the truth about his credentials been known and thus would not have testified at Plude's trial. "Shaibani's diminished credibility as an expert due to his misrepresentation may have affected the reliability of his testimony as well because

only an expert witness could testify as to the opinions he gave." *Id.* ¶ 38. Had he been impeached with his falsified credentials, there was a reasonable probability that a jury would have found reasonable doubt because the testimony of the other experts was inconclusive. *Id.* ¶ 50. Thus, this impeachment testimony satisfied the newly discovered evidence test because the very foundation of Shaibani's testimony was compromised—he would not have been permitted to testify at all if the truth had been known.

Under *Birdsall* and *Plude*, a new trial may be granted on the basis of newly discovered impeachment evidence, but only where that evidence shows both that a witness's trial testimony was perjured and that the verdict was based on perjured evidence.

C. Hannah's inconsistent statements about whether she discussed the assault in therapy do not make it reasonably probable that the jury would have a reasonable doubt about Hoyle's guilt.

The State concedes that the evidence—Hannah's statement to the presentence investigator that she had not discussed the sexual assault with her counselor in contrast to her trial testimony that she had—meets the first four factors of the newly discovered evidence test. *See Plude*, 310 Wis. 2d 28, ¶ 32. But the evidence does not create a reasonable probability that a jury hearing this evidence would have a reasonable doubt about Hoyle's guilt. Hoyle contends that Hannah's statement to the presentence investigator warrants a new trial because (in his view) her trial testimony about discussing the assault in therapy was essential to her credibility. (Hoyle's Br. 20–23.) Hoyle is wrong.

Hoyle's argument falls apart on the reasonable probability prong. The new evidence, if accurate, impeaches only the collateral issue of why Hannah had an unemotional

demeanor on the witness stand. It does not impeach any of her substantive statements about her identification of Hoyle, her meeting with Hoyle, and his sexual assault of her. Her account of the incident was coherent, consistent, and stood up to defense counsel's cross-examination. (R. 91:138–79.) She forthrightly admitted to her own bad behavior, consuming multiple intoxicants at the age of 15, including prescription medication she took from her sister. (R. 91:140.)

And, it is worth noting that the statements were not entirely inconsistent. True, at trial Hannah said she discussed the assault in therapy but told the presentence investigator she had not. But, in both statements, she said that the therapy had helped her deal with the emotional aftermath of the assault. (R. 91:168.) In other words, Hannah consistently reported that therapy had helped her deal with the assault emotionally, whether she discussed the assault directly or not.

As stated as long ago as *Birdsall* and as recently as *Plude*, impeaching evidence may warrant a new trial "where it is shown that the verdict is based on perjured evidence." *Plude*, 310 Wis. 2d 28, ¶ 47 (emphasis omitted); *Birdsall*, 154 Wis. at 52. In *Plude*, the court found that the verdict was based on perjured evidence because the expert Shaibani lied about his credentials, and the rest of the expert testimony was inconclusive. *See Plude*, 310 Wis. 2d 28, ¶ 50. Without Shaibani's perjured testimony, there would have been no guilty verdict. *See id.* That is not the case here.

The guilty verdicts in this case were not based on perjured evidence. Whether it was true or not, Hannah's statement about discussing the sexual assault with a counselor was not the basis of the jury's verdicts. The verdicts were based on her description of the assault and her identification of Hoyle. The uncertainty about whether she actually discussed the assault with her counselor does not support a conclusion that her substantive statements about

the assault were perjured. Unlike Shaibani, if Hannah's statement about the topics she discussed in therapy been excluded, she would still have been the key witness at Hoyle's trial. She would still have testified about the sexual assault and identified Hoyle. She would have testified differently or not at all about what she discussed with her counselor. But the most important testimony inculpating Hoyle would have remained. Therefore, there is no reasonable possibility that the newly discovered evidence would give a jury reasonable doubt about Hoyle's guilt.

Hoyle has the burden of proving that Hannah's statement to the presentence investigator would have a reasonable probability of giving a jury a reasonable doubt about his guilt. He has not met his burden. This Court should deny his request for a new trial.

II. Hoyle is not entitled to postconviction discovery of Hannah's counseling records.

A. *Shiffra*, *Green*, and their progeny require a fact-specific showing to entitle a defendant to in camera review of a victim's privileged mental health records.

To balance the defendant's right to "a meaningful opportunity to present a complete defense" with the State's "interest in protecting" a patient's privileged records from being disclosed, this Court held in *Shiffra* that a defendant may obtain in camera review of a victim's privileged counseling records by making a preliminary showing that they are material to the defense. *State v. Shiffra*, 175 Wis. 2d 600, 605, 608, 499 N.W.2d 719 (Ct. App. 1993). *Shiffra* was subsequently modified by *Green*.

In *Green*, 253 Wis. 2d 356, ¶ 34, the supreme court clarified the materiality standard, holding that the defendant must make a fact-specific evidentiary showing that

demonstrates "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." Information is "'necessary to a determination of guilt or innocence' if it 'tends to create a reasonable doubt that might not otherwise exist.'" *Id.* (citation omitted). A showing for in camera review must be based on more than "mere speculation or conjecture as to what information is in the records." *Id.* ¶ 33. Further, the evidence sought "must not be merely cumulative to evidence already available to the defendant." *Id.* "A defendant must show more than a mere possibility that the records will contain evidence that may be helpful or useful to the defense." *Id.* (citing *State v. Munoz*, 200 Wis. 2d 391, 397–98, 546 N.W.2d 570 (Ct. App. 1996)).

Typically, a successful motion for in camera review of a victim's mental health treatment records includes a fact-specific showing that the victim suffers from a psychological condition that might compromise either her ability to accurately report sexual events or her credibility generally. This Court has denied in camera review where the defendant failed to show that the victim had "a psychological disorder that would make her a poor reporter of events relating to sexual conduct or draw her credibility into question in any way." *In re Jessica J.L.*, 223 Wis. 2d 622, 635, 589 N.W.2d 660 (Ct. App. 1998); *accord Munoz*, 200 Wis. 2d at 399. In contrast, in *Shiffra*, the Court granted in camera review because the defendant alleged that the victim's post-traumatic stress disorder might cause her to view consensual sexual encounters as nonconsensual. *Shiffra*, 175 Wis. 2d at 603. And, in *Robertson*, in camera review was granted because the victim's mental health diagnosis before the alleged sexual assault could explain her belief that the encounter was an assault. *State v. Robertson*, 2003 WI App 84, ¶¶ 9–10, 263 Wis. 2d 349, 661 N.W.2d 105.

Postconviction discovery of a victim's privileged medical records is governed by *State v. Robertson*. In *Robertson*, this Court held that to obtain in camera review of the victim's medical records, the defendant must satisfy the first four factors of the newly discovered evidence test. *See Robertson*, 263 Wis. 2d 349, ¶ 22. Thus, the defendant must establish (1) discovery after trial; (2) the defendant was not negligent; (3) materiality; and (4) the records are not cumulative to other evidence presented at trial. *Id.* ¶¶ 16, 22. The materiality factor is met if the defendant shows *Shiffra/Green* materiality, i.e., a "'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." *Green*, 253 Wis. 2d 356, ¶ 32.

Should the defendant satisfy these four factors, the trial court reviews the records only if "the victim consents to the review." *Johnson v. Rogers Mem'l Hosp., Inc.,* 2005 WI 114, ¶ 73, 283 Wis. 2d 384, 700 N.W.2d 27. Without that consent, there is no in camera review and the victim may not testify. *Id.* If the victim consents, the trial court will review the records in camera and determine whether the evidence is "consequential," i.e., would "create a reasonable probability of a different outcome." *State v. O'Brien*, 223 Wis. 2d 303, 320–21, 323, 588 N.W.2d 8 (1999), *cited in Robertson*, 263 Wis. 2d 349, ¶ 22. If the court determines the evidence is consequential, then the court should turn it over to the defendant. *Robertson*, 263 Wis. 2d 349, ¶ 22. But the court will not disclose the evidence without the victim's consent. *State v. Solberg*, 211 Wis. 2d 372, 386–87, 564 N.W.2d 775 (1997).

B. Hoyle has not satisfied the *Shiffra/Green/Robertson* standard for postconviction in camera review of Hannah's counseling records.

As a threshold matter, Hoyle must set forth a specific factual showing that the counseling records will yield

information that "is relevant to and supports [the defendant's] particular defense." *Green*, 253 Wis. 2d 356, ¶ 33. Therefore, the purpose for the requested records must be connected to an articulated defense theory; the possibility that the court's review might yield some other basis for a plausible or helpful legal defense is not good enough. "Mere speculation or conjecture as to what information is in the records is not sufficient." *Robertson*, 263 Wis. 2d 349, ¶ 26.

Here, Hoyle has admitted that the sole basis for his *Shiffra* motion is to enable a challenge to Hannah's credibility based on the discrepancy between her statements about whether she discussed the assault in therapy. Thus, if that contention fails to satisfy *Shiffra*, *Green*, or *Robertson*, Hoyle's motion must fail because he has offered no other rationale for in camera review of Hannah's records.

Hoyle argues that *if* this Court rejects his new trial request, it should instead order in camera review of Hannah's counseling records pursuant to *Shiffra*, *Green*, and *Robertson*. He states: "In light of H[annah]'s inconsistent statements regarding the nature of her treatment, and the state's reliance on her treatment to explain her demeanor on the stand and thus establish her credibility, Hoyle is entitled to postconviction discovery of the relevant treatment records." (Hoyle's Br. 28–29.) He argues that the records are material because they "will show that she did not discuss the sex assault with her counselor, in direct contradiction to her trial testimony." (Hoyle's Br. 30.) But her claim at trial that "she received counseling specifically for the sexual assault bolstered her credibility by explaining her unemotional demeanor on the stand." (Hoyle's Br. 30.) In fact, "[b]ecause her demeanor was the only basis for crediting her claim that Hoyle assaulted her, and H[annah]'s credibility was the only basis for the state's case against Hoyle, the counseling records are 'necessary to a determination of guilt or innocence.'" (Hoyle's Br. 30.)

Hoyle's argument fails.

Hoyle seeks a *Shiffra* order only if this Court rejects his newly discovered evidence claim. But if this Court rejects that claim, it will do so because it finds that the discrepancy between Hannah's trial testimony and her statement to the presentence investigator creates no "reasonable probability" that the jury "would have had a reasonable doubt as to the defendant's guilt" had it "heard the newly-discovered evidence." *Plude*, 310 Wis. 2d 28, ¶ 32. The *Green* materiality standard requires a showing of a "'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." *Green*, 253 Wis. 2d 356, ¶ 32. Although the *Green* materiality standard is more generous to *Hoyle* than the *Plude* standard, he cannot meet it either.

The premise of Hoyle's *Shiffra* motion is that the discrepancy between Hannah's statements undermines her credibility. But he doesn't explain how her counseling records could help him to exploit that discrepancy. If the records confirm her statement to the presentence investigator—that she did not discuss the abuse with her counselor—Hoyle will know no more than he knows now. All the counseling records would prove is that Hannah's statement to the presentence investigator was true and that her trial testimony was not—something that both Hoyle and the circuit court already assume to be true.[4] For this reason, the evidence is cumulative. *See Robertson*, 263 Wis. 2d 349, ¶ 16. Furthermore, it is hard to see how this confirmation could satisfy *Green*'s "reasonable likelihood" standard if this Court

[4] The circuit court observed: "[M]y comments in response to the first issue kind of assumes that maybe there was no disclosure." (R. 94:32.) "Obviously, if she didn't discuss it with the counselor -- which was the drug abuse counselor, not a sexual assault counselor -- and she didn't discuss with her or him, there would be no further discovery anyway because there would be nothing in the reports." (R. 94:23.)

denies Hoyle's newly discovered evidence motion and thereby determines that the discrepancy does not satisfy *Plude*'s "reasonable probability" analysis.

If, on the other hand, Hannah did (despite her statement to the presentence investigator) discuss the assault with her therapist, that means her trial testimony was truthful in this respect. If that's the case, there is no "reasonable likelihood" under *Green* that "the records will be necessary to a determination of guilt or innocence" because Hoyle's theory of innocence is premised on undermining Hannah's credibility due to the discrepancy between the two statements.

Importantly, Hoyle does not even suggest that Hannah's counseling records will show that Hannah suffers from a psychological condition that compromised her ability to understand or report her experience of the sexual assault. *See*, *e.g.*, *Jessica J.L.*, 223 Wis. 2d at 635. Nor does it go the heart of the matter, because—as framed by Hoyle in his brief—he does not contend that the records will disclose evidence that he did not sexually assault Hannah.

The circuit court concluded that the counseling evidence was not "consequential to an issue in the case. The fact that she did not tell her counselor about the assault, that's a long jump for the Court to take from that point to where that issue is consequential." (R. 94:31.) Hoyle complains that the circuit court denied his motion because it applied the wrong legal standard, (Hoyle's Br. 31), but the correct standard yields the same result. Hoyle was required to show that the evidence sought would tend "to create a reasonable doubt that might not otherwise exist." *Green*, 253 Wis. 2d 356, ¶ 34 (quoting *Commonwealth v. Fuller*, 667 N.E.2d 847, 855 (Mass. 1996)). But all he has shown is that an in camera review might reveal that Hannah's statement to the presentence investigator was truthful and her trial testimony was not. But, if this Court separately rejects

Hoyle's newly discovered evidence claim (because it concludes the discrepancy does not satisfy *Plude*), his *Shiffra* claim must fail because the information cannot be "necessary to a determination of guilt or innocence" based on a theory rejected by this Court.

Incidentally, this Court should reject Hoyle's bald assertion that Hannah's "demeanor was the only basis for crediting her claim that Hoyle assaulted her." (Hoyle's Br. 30.) The trial transcript proves otherwise. Hannah told a simple, straightforward account about how what she assumed was an innocent hangout turned into a forcible sexual assault. (R. 91:138–79.) She had no reason to make this accusation and tell this story if it wasn't true. She admitted to gaps in her memory or her knowledge. (R. 91:162, 164–66.) She admitted to her own bad behavior on the day in question. (R. 91:140.) The prosecutor was apparently concerned that her calm or flat demeanor would cause the jury to doubt her; for that reason, he wanted to forestall any doubt arising from her demeanor by establishing the effect therapy had on Hannah. (R. 91:167–68.) But that does not support Hoyle's assertion that "her demeanor was *the only basis* for crediting her claim that Hoyle assaulted her." (Hoyle's Br. 30 (emphasis added).)

Finally, Hoyle's claim fails because he makes no effort of satisfying his burden that the court's denial of his motion was not harmless. *See Green*, 253 Wis. 2d 356, ¶ 20.

For all these reasons, the circuit court's denial of Hoyle's motion for postconviction in camera review of Hannah's counseling records should be affirmed.

III. The prosecutor's statements in closing argument that Hannah's testimony was "uncontroverted" did not violate Hoyle's Fifth Amendment right to remain silent.

A. A prosecutor's description of the State's evidence as "uncontroverted" is not a comment on the defendant's exercise of his right not to testify.

"A comment on [a] defendant's failure to take the stand is improper." *Bies v. State*, 53 Wis. 2d 322, 325, 193 N.W.2d 46 (1972). However, the prosecutor's use of the term "uncontroverted," without more, does not per se violate this rule, because "it is proper for the district attorney to point out generally that no evidence has been introduced to show the innocence of the defendant." *Id.*

In *State v. Johnson*, 121 Wis. 2d 237, 358 N.W.2d 824 (Ct. App. 1984), this Court held that to decide whether particular language used by the prosecutor in closing constitutes an improper comment on the defendant's decision not to testify, the trial court must consider "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Johnson*, 121 Wis. 2d at 246 (quoting *Bontempo v. Fenton*, 692 F.2d 954, 959 (3d Cir. 1982)). "Questions about the absence of facts in the record need not be taken as comment on defendant's failure to testify." *Id.*

After *Johnson*, this Court set out a three-factor test for determining when a prosecutor's argument can be held "to constitute an improper reference to the defendant's failure to testify." *State v. Jaimes*, 2006 WI App 93, ¶ 21, 292 Wis. 2d 656, 715 N.W.2d 669 (discussing *United States v. Robinson*, 485 U.S. 25, 34 (1988)). First, "the comment must constitute a reference to defendant's failure to testify," using the *Johnson* analysis. *Id.* ¶ 21. Second, "the comment must

propose that the failure to testify demonstrates guilt." *Id.* Third, "the comment must not be a fair response to a defense argument." *Id.*

B. The prosecutor did not comment on Hoyle's decision not to testify during his closing argument.

In this case, the prosecutor told the jury that Hannah's testimony was uncontroverted. (R. 92:18.) He went on to note that the jury had heard "no evidence disputing her account of that sexual assault." (R. 92:18–19.) Hoyle argues that these comments violated his Fifth Amendment right not to testify because he was the only person who could have controverted Hannah's testimony. (Hoyle's Br. 32–35.) The circuit court concluded that the prosecutor's closing did not comment on Hoyle's decision not to testify. (R. 94:29.)

The prosecutor's comments were permissible under *Bies*, *Johnson*, and *Jaimes*.

First, the word Hoyle objects to—"uncontroverted"—is the very word the *Bies* court said does not violate the Fifth Amendment. "Uncontroverted" simply means that "no evidence has been introduced to show the innocence of the defendant," which is proper grist for the prosecutorial mill. *Bies*, 53 Wis. 2d at 325. Hoyle tries to distinguish *Bies*, noting that the defendant in that case did not deny that the criminal acts occurred, but that "his intoxication negated the necessary intent." 53 Wis. 2d at 325–26. Although the court noted Bies's intoxication defense, that was not its core holding. Its core holding was that the use of the term "uncontroverted" was generally permissible, and that, moreover, in Bies's case the Fifth Amendment argument was especially weak because of the nature of his defense. *Id.*

Second, the use of the word "uncontroverted" in this case does not fit the outline of objectionable argument set out in *Johnson*. *Johnson* reiterated *Bies*'s admonition that

"[q]uestions about the absence of facts in the record need not be taken as comment on defendant's failure to testify." 121 Wis. 2d at 246 (quoting *Bontempo*, 692 F.2d at 959). Here, the prosecutor said that Hannah's testimony was "uncontroverted" because there was "no evidence disputing her account of that sexual assault." (R. 92:18–19.) *Johnson* said prosecutorial argument is impermissible if it is "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Johnson*, 121 Wis. 2d at 246 (quoting *Bontempo*, 692 F.2d at 959). Hoyle makes no effort to show how the word "uncontroverted" in this case meets that test, he just assumes it does. Indeed, "[w]hile the prosecutor's remarks might have prompted the jury to recall and reflect upon Johnson's failure to testify, we do not conclude that the remarks *highlighted* such a failure to testify." *Id.* at 248.

The parties asked the court to determine whether the prosecutor could use the word "uncontroverted" before the trial began. Defense counsel made the same argument made on appeal, noting that the burden of proof was on the prosecution. (R. 91:13–14.) The circuit court observed that "[d]efense counsel has [in the past] made . . . that very point":

> They say this, but you know, ladies and gentlemen of the jury, that is the rule. The burden is not on me. I don't have to say a thing here. He comes in here an innocent man. I think it works both ways. You can use that to your advantage as well.

(R. 91:14–15.)

And that's exactly what defense counsel did in closing. He emphasized all the investigating Investigator Szotkowski did not do, from interviewing witnesses to looking for surveillance video to canvassing the neighborhood. (R. 92:29–32.) He emphasized Hannah's memory lapses, delays in reporting, and the impact her intoxication may have had on

her memory. (R. 92:29, 36–37.) And he wondered aloud why there was so little evidence about the car. (R. 92:33.) Considering the two closings together, it is clear they did just what closing arguments in a criminal case should do. The prosecutor said (accurately) that the State's evidence was "uncontroverted." (R. 92:18.) In response, the defense poked holes in the State's evidence and showed the jury all the evidence that had not been presented.

Just as Hoyle's argument fails under *Bies* and *Johnson*, it does not satisfy the three-factor test set out in *Jaimes*. The first factor is to show that "uncontroverted" "constitute[s] a reference to the defendant's failure to testify." *Jaimes*, 292 Wis. 2d 656, ¶ 21. For the same reasons the prosecutor's argument does not violate *Johnson*, it does not satisfy the first *Jaimes* factor. The second factor is that the prosecutor's language "must propose that the failure to testify demonstrates guilt." *Id.* The State sees no hint of this in the prosecutor's argument and Hoyle does not point to any. The third factor—whether the prosecutor's comment is a response to a defense argument—does not come into play here.

Hoyle relies heavily on *United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996), which is not binding authority in this Court, and is inconsistent with Wisconsin law. This Court should apply the foregoing *Bies/Johnson/Jaimes* analysis, not *Cotnam*, to determine whether the use of "uncontroverted" in this particular case violated Hoyle's Fifth Amendment right.

There was no error here. This Court should affirm.

IV. The State did not violate Hoyle's right to exculpatory evidence under *Brady* and *Giglio*.

A. Additional facts.

Prior to trial, the State disclosed the police report prepared by Investigator Szotkowski to the defense. (R. 64.)

Postconviction, Hoyle discovered the existence of two other documents. First, an email exchange between Investigator Szotkowski and Officer Nelson, the school resource officer to whom Hannah first revealed the sexual assault. (R. 65.) The second was an incident report written by Officer Nelson. (R. 74.) On postconviction and appeal, Hoyle argues that the emails and the incident report contain information that was material to his defense; he contends that there are inconsistencies between these documents and Investigator Szotkowski's police report that he could have used to impeach Hannah at trial. (Hoyle's Br. 39–42.) The State will summarize and identify the alleged inconsistencies between the three documents.

Investigator Szotkowski's police report consisted of narratives entered on three different dates. On March 15, 2017, she reported that the day before she had received an email from Officer Nelson informing her that Hannah had told him she'd been sexually assaulted, that the assault took place near Cadott, and that it was not consensual. (R. 64:1.) Nelson told Szotkowski that Hannah did not name her assailant, but said he was 22 years old. (R. 64:1.)

The next entry was dated March 17, and summarized Investigator Szotkowski's interview with Hannah. Hannah told Szotkowski that the incident took place about a month before the March 17 interview. (R. 64:1.) The summary of Hannah's narrative was very detailed and largely consistent with Hannah's trial testimony but there were some small differences. (*Compare* R. 64, *and* R. 91:138–79.) It included a statement that on the way to the dead end, the assailant gave her a cigarette, which she accepted and smoked, and offered her another cigarette on the way back to the trailer park, which she did not accept. (R. 64:2.) Hannah did not mention cigarettes during her trial testimony. As she did in her trial testimony, Hannah admitted that she was "under the influence, high, and really messed up" at the time of the

assault, but did not specify what she had consumed. (R. 64:2.) In describing the minutes before the assault, Hannah said she got out of the car, and got back in when the assailant ordered her to. (R. 64:2.) Then he locked the doors and they both climbed onto the back seats from the front seats. (R. 64:2.) This differed slightly from her trial testimony. *See supra* at 4.

During this interview, Hannah did not name her assailant, but did reveal that "she knew the guy and it was her old best friend's stepbrother." (R. 64:1.) She told Investigator Szotkowski that "she really wanted to tell [her] who it was but also did not because of not wanting to talk about the incident." (R. 64:4.) Szotkowski gave Hannah her business card and said "to contact [her] if and when she was ready to tell me who the guy that assaulted her was." (R. 64:4.) Hannah noted that she had not told her counselor about the incident "because she knew it would have to be reported. [Hannah] shared some of what happened with a friend of hers the night of the assault or the following night. [Hannah] said she was not completely truthful with her friend." (R 64:4.)

The last entry in the police report was made on May 10, 2017. (R. 64:4.) Investigator Szotkowski had been informed by Officer Nelson that Hannah had identified Hoyle, the stepbrother of J.G., as her assailant. (R. 64:4.)

The email exchange between Officer Nelson and Investigator Szotkowski did not differ significantly from the police report. Nelson wrote that Hannah "said I am the first person she told, and she said people know this guy." (R. 65:2.) "She also said he is 'gross' and we would know who he is." (R. 65:2.)

The incident report written by Officer Nelson on March 14, 2017, was largely consistent with Investigator Szotkowski's police report, but contained some additional information and minor differences. (R. 74.) He started by noting that Hannah "was not wishing to report a crime[, but]

wanted to speak with me as a person she trusted to talk to about her ongoing issues at school and home." (R. 74:4.) In the course of talking about her addiction issues, Hannah said "this super bad thing happen[ed] to me," which she didn't want to "tell anybody because it would have to be reported." (R. 74:4.) She said she "was on a bunch of pills, and smoked weed." (R. 74:4.) She was sexually assaulted. She said "she was high before she met with the male, but he did provide her cigarettes. . . . [He] then told her, I gave you cigarettes, now you can give me something in return." (R. 74:4.) She said her assailant "locked the doors on the vehicle." (R. 74:4.) She told Officer Nelson "this was the first time she told anybody, not a single person." (R. 74:4.)

B. To prevail on a *Brady/Giglio* claim, the defendant must show that the "suppressed" evidence is material and favorable to the accused.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment . . . ." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The *Brady* rule extends to impeachment evidence. *Giglio v. United States*, 405 U.S. 150, 154 (1972),

In *Wayerski*, the supreme court summarized the modern *Brady/Giglio* test as follows: (1) the evidence is favorable to the accused, either because it is exculpatory or has impeachment value; (2) it was deliberately or inadvertently suppressed by the State; and (3) it is material. *Wayerski,* 385 Wis. 2d 344, ¶ 35. Evidence "favorable to the accused" is evidence that, if disclosed and used effectively, "may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 675–76 (1985). Evidence is "material" if its nondisclosure "was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Wayerski*, 385

Wis. 2d 344, ¶ 36 (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999)). Put another way, "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *State v. Harris*, 2004 WI 64, ¶ 15, 272 Wis. 2d 80, 680 N.W.2d 737 (quoting *Strickler*, 527 U.S. at 290).

C. The email exchange and Officer Nelson's incident report contain no previously unknown evidence that is both material and favorable to Hoyle.

Hoyle's argument fails because none of the alleged inconsistencies is significant. Hoyle contends that the State violated the *Brady/Giglio* doctrine by failing to produce Officer Nelson's incident report and email exchange with Investigator Szotkowski, which he claims were exculpatory and/or impeaching in six particular ways. But, as the circuit court observed, much of the Officer Nelson material is "cumulative. Nothing there was terribly news to anybody, I don't think." (R. 94:32.) In short, the evidence is neither exculpatory nor valuable for impeachment purposes and is not material.[5]

First, Hoyle observes that Hannah told Officer Nelson that he was the first person she revealed the assault to, but later told Investigator Szotkowski that she had earlier told a friend about it shortly after the assault. (Hoyle's Br. 40.) Hannah's full statement to Szotkowski was that she "shared some of what happened with a friend of hers the night of the assault or the following night. [Hannah] said she was not completely truthful with her friend." (R. 64:4.) The two statements are not inconsistent: sharing a partial—and only

[5] The State concedes that the evidence was "inadvertently" "suppressed" by the State. *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 922 N.W.2d 468.

partially true—version of what happened that night is not the same as telling the whole true story. Therefore, Hannah's statement to Nelson that he was the first person she told does not contradict her later statement that she had previously shared some of the information with another person. Hoyle claims that Nelson's statement could be used "to point out that there was yet another potential witness," i.e., the friend. (Hoyle's Br. 40.) Hoyle is mistaken. The existence of the friend was revealed in *Szotkowski's report*, not Nelson's. (R. 64:4.) So, Hoyle already had what he needed to ask the State about this "potential witness."

Hoyle's second cited inconsistency is that Hannah told Officer Nelson that she was "on a bunch of pills, and smoked weed." (R. 74:4.) Hoyle then implies that she told Investigator Szotkowski something different, but there is no evidence that she told Szotkowski anything more specific than "she was under the influence, high, and really messed up." (R. 64:2.) Hannah testified at trial that she had consumed pills and alcohol. (R. 91:140–42, 171.) Hoyle says that he could have used this inconsistency—weeds or alcohol—to "impeach H[annah]'s credibility." (Hoyle's Br. 40.) He does not explain how this trivial discrepancy would have had any significant impeachment value.

Third, Hoyle points to Hannah's statement to Officer Nelson that, after giving her a cigarette, Hoyle said "now you can give me something in return." (R. 74:4.) Hannah did not mention this comment in either her statement to Investigator Szotkowski or her trial testimony. Hoyle says he could have used the statement to impeach Hannah at trial.[6] (Hoyle's Br. 40.) How, exactly? She did not say anything about this cigarette exchange at trial, so it would not have been a prior inconsistent statement. Why else would counsel ask her about

[6] The statement would have been admissible under Wis. Stat. § 906.13.

it? Any answer would be at best indifferent and at worst damaging to the defense. Hannah might have answered, "oh, yes, I forgot about that, thanks for reminding me. Hoyle said I owed him sex because he gave me a cigarette." Less damaging, but still unhelpful, Hannah might have answered, "did I say that? I don't remember saying that." Would such a denial have helped Hoyle in any way? It's hard to imagine how.

Fourth, Hoyle sets great significance by Hannah's telling Officer Nelson that Hoyle "locked the doors on the vehicle" before the assault. (R. 74:4.) In contrast, at trial, Hannah did not say that he locked the car. (Hoyle's Br. 41.) But she told Investigator Szotkowski the same thing she told Nelson, that "[t]he guy locked the doors." (R. 64:2.) Whether or not the doors were locked does not seem terribly significant. But, even if it is, Hoyle could have used Szotkowski's police report to impeach Hannah on this fact at trial; he didn't need Nelson's incident report.

Hoyle's fifth observation is that, according to Officer Nelson, Hannah's revelation "did not come about as a result of [her] seeking to speak with someone about the alleged assault," but came up "as an example of how low she goes when she is high/drunk." (Hoyle's Br. 41 (quoting R. 65:2).) So what? Hoyle asserts that this apparent trigger for Hannah's disclosure would have caused the jury to "discount [her] credibility," but he doesn't explain why. (Hoyle's Br. 41.) Hoyle cites no case law or treatise on human nature to support his suggestion. Indeed, it's counterintuitive. Arguably, Hannah's disclosure to Nelson is *more believable* because she did not come to his office with the plan to tell him she had been sexually assaulted.

Finally, Hoyle argues that the email exchange and Officer Nelson's incident report "suggest[ ] that law enforcement were pressuring H[annah] to name someone, [and] suggest[ ] why H[annah] falsely implicated Hoyle in an

assault." (Hoyle's Br. 41.) He focuses on Nelson's statement that he could "convince" Hannah to name the assailant, and Investigator Szotkowski's later statement that Hannah "confirmed" that Hoyle assaulted her, which Hoyle interprets as meaning that Nelson, not Hannah, was the first to name Hoyle. (Hoyle's Br. 42 (quoting R. 64:4).) Hoyle's analysis is overblown and ignores a key fact.

To start, he puts far too much freight on Investigator Szotkowski's use of the word "confirmed"—it is unreasonable to deduce from this word that it was Officer Nelson, not Hannah, who identified Hoyle. Moreover, Investigator Szotkowski's police report—the source of the word "confirmed"—was in Hoyle's possession before trial and could have been used to cross-examine Hannah to determine whether it was she or Nelson who first raised Hoyle's name. Similarly, Hoyle draws more from the word "convince" than is warranted. The whole point of police investigation is to uncover crimes and identify their perpetrators. Where, as here, a victim is reluctant to identify her assailant, the police have two choices: to investigate without the victim's assistance or urge the victim to make the identification. The latter approach is not (without more) tantamount to improper "pressur[e]" or conducive to "false[ ]" accusations. (Hoyle's Br. 41.)[7] Furthermore, if Nelson told Szotkowski on March 13 he

[7] In this section of his argument, Hoyle infers from Officer Nelson's incident report the following: Hannah was describing a consensual experience "she regretted, became embarrassed, and claimed it was forced rather than consensual. And because she did not want to get her *actual partner* in trouble, she refused to identify the alleged assailant." (Hoyle's Br. 41–42 (emphasis added).) This interpretation is unsupportable. Nelson introduced Hannah's revelation this way: Hannah said "this super bad thing happen[ed] to me . . . [that] she did not want to tell anybody because it would have to be reported." (R. 74:4.) There is no way to interpret that language as the confession of a consensual sexual encounter. And,

would "convince" Hannah to identify her assailant, and she did not identify Hoyle until May 10, Nelson's purported attempts at coercion must have been pretty weak indeed. (R. 64:4; 65:2.)

Hoyle also ignores an important fact at odds with his claim that Hannah's identification of him was a last-minute fabrication driven by police pressure. In Investigator Szotkowski's initial report dated March 15, 2017, she noted that Hannah told Officer Nelson that her assailant was 22 years old.[8] (R. 64:1.) In her March 15 interview with Szotkowski, Hannah refused to name her assailant but said he "was her old best friend's stepbrother." (R. 64:1.) In the May 10 entry to her police report, Szotkowski said that the assailant was Hoyle, "[J.G.]'s stepbrother." (R. 64:4.) At trial, Hannah confirmed that Hoyle was the stepbrother of her "old best friend." (R. 91:175–76.) Thus, two months before she named Hoyle, Hannah had narrowed down the pool of suspects considerably. He would have to be a 22-year-old older stepbrother of someone who could fit the description of a person who was once Hannah's best friend. In other words, if Hannah was bowing to police pressure as Hoyle implies and just looking around for someone to accuse so the police would stop bothering her, she would have to come up with someone who fit the narrow bill that she had created earlier.

Taken individually or together, Hoyle fails to show a *Brady/Giglio* violation. None of these six exaggerated or non-existent discrepancies between Hannah's first statement to Officer Nelson and her later statements would have made "the difference between conviction and acquittal" and are therefore not "favorable to the accused." *Bagley*, 473 U.S. at

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Hoyle's reference to the person who sexually assaulted Hannah as her "partner" is offensive in the extreme.

[8] Although Hannah believed Hoyle was 22, he was just shy of his 21st birthday at the time of the assault. (R. 1:1.)

675–76. The purported inconsistencies were either insignificant (weed versus alcohol), exaggerated (interpreting "convince" to mean "pressure"), false (Hannah told Nelson but not Investigator Szotkowski that Hoyle "locked" the car doors), not inconsistent (Hannah told Nelson he was the first person she told and told Szotkowski that she previously told a friend a partial and partially false version of the assault), not helpful to the defense (trading cigarettes for sex), fanciful (the jury would doubt Hannah's story because she disclosed it while talking about her substance abuse), or belied by the facts (Hannah named Hoyle only because of police pressure despite the fact that she had effectively described him two months before).

Just as the statements were not favorable to the accused they are not material, and for the same reasons. This constellation of facts poses no "reasonable probability . . . [of] a different verdict," or could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 281, 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

Hoyle has failed to prove a *Bradley/Giglio* violation.

CONCLUSION

For the reasons stated, the State of Wisconsin respectfully requests that this Court affirm the conviction, sentence, and order denying postconviction relief entered in the court below.

Dated this 21st day of May 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,658 words.

Dated this 21st day of May 2021.

Electronically signed by:

s/ Maura Whelan
MAURA WHELAN

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 21st day of May 2021.

Electronically signed by:

s/ Maura Whelan
MAURA WHELAN