STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1876-CR

STATE OF WISCONSIN ,

Plaintiff-Respondent-Petitioner,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT III, REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CHIPPEWA COUNTY CIRCUIT COURT, THE HONORABLE JAMES M. ISAACSON, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

INTRODUCTION

The Fifth Amendment to the United States Constitution generally prohibits a prosecutor from commenting on a defendant's failure to take the stand. But the United States Supreme Court has never held that the Fifth Amendment forbids a prosecutor's reference to evidence as "uncontroverted" when the defendant has elected not to testify. And this Court has held that it is proper for a prosecutor to state that evidence is uncontroverted, in order to point out generally that no evidence has been introduced to show the defendant's innocence. *Bies v. State*, 53 Wis. 2d 322, 325, 193 N.W.2d 46 (1972). That is what the prosecutor did in this case.

Tomas Jaymitchell Hoyle was charged with four counts of sexually assaulting a fifteen-year-old girl named "Hannah."[1] The victim was the State's primary witness at trial, and there were no other witnesses to the crime. Hoyle's lawyer cross-examined the victim, but she maintained that the assault occurred. Hoyle chose not to take the stand. The prosecutor argued in closing that the evidence against Hoyle was uncontroverted, but the case came down to Hannah's credibility. The jury deemed Hannah's testimony credible and returned a guilty verdict on all counts.

The State's reference to its evidence as "uncontroverted" did not amount to a Fifth Amendment violation. The prosecutor's comments were not directed at Hoyle's decision not to testify, let alone a suggestion that the jury should infer guilt on that account. The prosecutor noted that, pursuant to standard instructions, the jury was to consider only the evidence introduced at trial. He explained that the State's evidence was uncontroverted, and nothing

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

offered at trial had undermined Hannah's credibility. These comments were squarely within proper constitutional bounds. The circuit court agreed and denied Hoyle's postconviction motion on the issue.

The court of appeals reversed and remanded for a new trial, deciding that the State's comments violated the Fifth Amendment. The court's decision rests on at least two fundamental errors. First and foremost, the court failed to review the State's comments in proper context, and incorrectly assumed that only Hoyle's testimony could "controvert" the State's evidence. Second, the court misinterpreted *Bies* and relied on a Seventh Circuit decision that is neither controlling nor on all fours with this case. The court of appeals' holding is overbroad and cuts into the area of legitimate comment by the prosecutor on the strength of the State's case. It also undermines standard jury instructions pertaining to the evidence a jury should consider when reaching a verdict.

This Court should reverse and remand to the court of appeals for consideration of the remaining issues that the parties briefed, but that the court of appeals did not decide.

STATEMENT OF THE ISSUE

Were the prosecutor's comments that the State's evidence was "uncontroverted," which were grounded in standard jury instructions and focused on the evidence in general, permissible under the Fifth Amendment?

The circuit court answered yes.

The court of appeals answered no and held that the prosecutor's remarks violated Hoyle's Fifth Amendment right not to testify.

This Court should answer yes and reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

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.)

Pretrial motions

On the first day of trial, the parties and the court discussed pending motions in limine. (R. 91:13.) In the context of one of those motions, the prosecutor raised the issue of whether he could state at closing that its evidence is uncontroverted, in the event Hoyle decided not to testify. (R. 91:13.) The prosecutor explained that the remark would not be commenting upon the defense's right to silence, but rather, it would be commenting upon the evidence in front of the jurors at that time. (R. 91:14.) "I can't say it's uncontroverted because the defendant didn't testify, but I can say that [the victim's] testimony is uncontroverted and that you haven't heard any testimony to the contrary." (R. 91:14.)

Defense counsel objected on the ground that such language would shift "an impermissible burden on the defense." (R. 91:14.) Defense counsel argued that "[b]y saying that we haven't presented a witness to controvert her testimony," it implies to the jury "that because we didn't do so, he should be found guilty. We don't have a burden." (R. 91:14.)

The court responded that defense counsel could remind the jury that the burden was not on the defense and say something to the effect of "I don't have to say a thing here. He comes in here an innocent man." (R. 91:14.)

The defense maintained that the matter should not be raised. (R. 91:15.) The prosecutor disagreed, responding that "[t]he jurors are not supposed to consider stuff that is not evidence." (R. 91:15.) The prosecutor made clear that he would not say the defense didn't put on any other evidence; rather, he would say that the evidence is "uncontroverted. Her testimony here is undisputed." (R. 91:15.)

The court delayed a decision on the matter, saying he would take it up with the parties at noon. (R. 91:15.) The record does not reveal an express ruling on the issue. During opening arguments, defense counsel reminded the jury that the State had the burden of proof, and that "[t]here is no burden on the defense to put witnesses up. There is no burden on the defense to provide testimony. The State has to provide you with every single thing that they're alleging." (R. 91:133.)

Trial testimony

Hannah was the principal witness at trial. She testified that she was 15 years old at the time of the assault, which occurred in February 2017. (R. 91:144–45.) On the day of the assault, Hannah accepted a ride from Hoyle, the older stepbrother of her old best friend. (R. 91:138, 175–76.) Because she was expected back at home, she told Hoyle that she only had about five minutes to hang out. (R. 91:142–43.) At the time, she was "high" or "buzzed," having consumed some Vicodin (which she took from her sister) and some liquor throughout the day. (R. 91:140–42, 171–72.) She still "had a sense" of what was going on around her. (R. 91:141.)

Hoyle and Hannah started driving around, and eventually went towards Cadott on County Road X. (R. 91:143–44.) Hannah couldn't say how far toward 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.) She did not feel she could say anything to him to stop and take her back to the trailer court. (R. 91:144.) As they drove, Hoyle kept telling Hannah to sing along with the radio, which she didn't want to do, and he "kept poking my legs." (R. 91:146.)

At some point, Hoyle turned down a dead-end road. (R. 91:145.) He stopped the car. (R. 91:145–46.) Confused, Hannah got out of the car. (R. 91:146.) Hoyle told her to get back in the car. (R. 91:147.) 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, Hoyle climbed into the back seat and moved close to her. (R. 91:148.) "He kept touching me, grabbing my hands, rubbing his hands on my legs." (R. 91:148.) The touching made Hannah feel "uncomfortable" and "violated." (R. 91:149.) She "didn't know how to handle it." (R. 91:149.)

Hoyle 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.) She told him that she "needed to go home, it was past five minutes, my mom is going to be getting worried." (R. 91:152.) Hoyle grabbed her body and pulled it toward him until she was lying

flat on her back with her knees up. (R. 91:153–55.) Hannah did not remember much about the car, other than it was a four-door car with gray cloth interior. (R. 91:153.) There was no console in the center of the back seat. (R. 91:154.)

While positioning himself over her on his hands and knees, Hoyle proceeded to penetrate Hannah with his fingers for a few seconds. (R. 91:155–56.) The penetration stopped because she scooted away from him. (R. 91:156.) She "didn't want to be touched in that way," and had not given him permission to do so. (R. 91:156.) Then he penetrated her with his penis. (R. 91:157–58.) She told him she might become pregnant. (R. 91:158.) He told her not to worry; she didn't remember if he used protection. (R. 91:158.)

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.)

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 didn't tell her mother, stepfather, or sisters that Hoyle had assaulted her.[2] (R. 91:178.) She disclosed the assault to Officer Nelson, the school liaison officer, and Investigator Kari Szotkowski.[3] (R. 91:163–64.) Hannah shared the details of the assault with Investigator Szotkowski in March 2017, the month after the assault took place, but did not name the person who assaulted her because she was

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[2] Hannah stated that she was having "abuse issues" with her mother, and was no longer living with her. (R. 91:166–67.)

[3] Hannah knew her as "Kari Anderson." (R. 91:163–64.)

"scared." (R. 91:165.) After that, in May 2017, Hannah spoke to Officer Nelson again and identified Hoyle as her assailant. (R. 91:166.) She felt comfortable talking to Officer Nelson, because "[h]e was kind of the 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.)

It was not easy for Hannah to talk about the assault because it was "very uncomfortable and traumatic." (R. 91:167.) However, Hannah did not cry while on the stand. (R. 91:167.) Hannah had seen a counselor who had helped her process the assault, as well as issues she was having with her mother and "life in general." (R. 91:167–68.)

On cross, Hannah acknowledged that she could not recall what day in February the assault occurred. (R. 91:169.) She admitted that she had taken pills and alcohol that day, though she testified that she was "buzzed" and "still had a sense of what was going on around me." (R. 91:141, 170–72.) Hannah explained how Hoyle removed her shoes and other articles of clothing while they were in the back seat. (R. 91:176–78.) She confirmed that she did not tell her mother or any family members about the assault. (R. 91:178.) She acknowledged that she did not immediately tell Investigator Szotkowski who the perpetrator was. (R. 91:179.)

Investigator Szotkowski was the only other witness for the State. (R. 91:181–88.) She testified briefly as to her investigation of the assault, based on her interviews with Hannah. (R. 91:181–88.) Szotkowski was able to determine the location of the dead-end road where the assault occurred, based on Hannah's description and Szotkowski's experience patrolling the area. (R. 91:182, 186–87.)

During her investigation, Szotkowski did not interview Hannah's mother because she had been arrested for child abuse against Hannah. (R. 91:183.) It was difficult for Szotkowski to pursue the investigation in March 2017 because she did not know who the suspect was. (R. 91:183.) She moved forward in May 2017, after Hannah had revealed Hoyle as her assailant. (R. 91:184.)

On cross, Szotkowski stated that she did not interview Hannah's family members. (R. 91:184.) She did not find out which friend Hannah was planning to visit the day the assault occurred. (R. 91:185.) She did not interview neighbors. (R. 91:185.) Szotkowski did not visit the bar or gas station where Hoyle dropped Hannah after the assault. (R. 91:185.) She was not aware Hannah had been dropped at a bar. (R. 91:185.) She did not take Hannah to the dead-end road to verify the location of the assault with her. (R. 91:187–88.)

After the State rested, Hoyle exercised his right not to testify, and the defense did not introduce any evidence. (R. 91:191–93.)

Jury instructions

The prosecutor and defense counsel jointly worked with the court to prepare the jury instructions. (R. 92:3.) The court instructed the jury that it was to "[c]onsider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict." (R. 92:5.)

The court instructed that, before the jury could find the defendant guilty of each offense, "the State must prove by evidence which satisfies you beyond a reasonable doubt that the following . . . elements were present." (R. 92:7, 9, 10, 11.) "The law presumes every person charged with the commission of an offense to be innocent." (R. 92:13.)

The court provided the definition of evidence, which is "the sworn testimony of witnesses both on direct and cross-examination regardless of who called that witness." (R. 92:14.) Because no exhibits were marked and no facts were agreed upon, "the evidence in this case to be considered is the testimony of witnesses only." (R. 92:14.)

The court also instructed on the credibility of witnesses: "You are the sole judges of the credibility, that is, the believability of the witnesses and the weight to be given to their testimony." (R. 92:16.) When determining credibility, the jury was to consider a number of factors, including whether the witness has an interest or lack of interest in the result of the trial, the witnesses' demeanor on the stand, the clearness or lack of clearness of her recollections, possible motives for falsifying testimony, and all other facts and circumstances during a trial which tend either to support or to discredit the testimony. (R. 92:16–17.)

As one of its final instructions, the court stated that the defendant "has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner." (R. 92:17.)

Closing arguments

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.) "In fact, in order to reemphasize that, it's mentioned again in another instruction where it says, you are to consider only the evidence received during the trial." (R. 92:18.) "You're supposed to just focus on what you heard yesterday with the testimony." (R. 92:18.)

The prosecutor noted 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.) The prosecutor recounted Hannah's testimony as to the assault. (R. 92:19–20.) "He forced sexual intercourse on her. He forced sexual contact on her. All this, her being just 15 years of age at the time of this incident. All of that is uncontroverted." (R. 92:20.) The prosecutor stated that there was "absolutely no evidence disputing her account of what occurred." (R. 92:20.)

The prosecutor told the jury that the defense may try to emphasize things that the investigators did not do. (R. 92:20.) But "[o]nce again, the Judge instructed you, and you need to read that in the jury instructions, that you're not to base your decision, you're not to base doubt on guesswork or speculation." (R. 92:20.) "In fact, the Judge instructed you, you are not to search for doubt. You are to search for the truth." (R. 92:20.)

The prosecutor emphasized that the case came down to Hannah's credibility. (R. 92:21.) He explained, "I have a 14-year-old daughter. If she is telling me something about something that I might question, what is her motive to lie to me about this?" (R. 92:22.) The prosecutor acknowledged that Hannah had an interest in holding Hoyle accountable for what happened to her. (R. 92:22.) "But she doesn't get any other benefit from this." (R. 92:22.) "You have heard zero testimony that somehow she benefits from falsely accusing the defendant of doing this." (R. 92:22.)

As to Hannah's conduct and appearance on the witness stand, the prosecutor acknowledged that some people may expect victims to cry whenever they discuss a traumatic event. (R. 92:23.) But two years had passed, and Hannah stated she had worked through the assault with a counselor.

(R. 92:23.) The prosecutor noted that often people have an easier time discussing bad events as time passes. (R. 92:23.)

As to the clearness of her recollection, "[s]he didn't remember every little detail, but that's why I asked that question in the jury selection about how memory works." (R. 92:24.) "You focus on what you -- you remember what you focused on." (R. 92:24.) "It's when someone gives you every little detail about it that you should worry about it, because that's someone who is coached, someone who is rehearsing it, someone who is making sure every little detail is right." (R. 92:25.)

As to the reasonableness of her testimony, the prosecutor stated that "[s]he had no reason to make this up." (R. 92:26.) "She had no reason to lie to you here today." (R. 92:26.) There was "no bias shown, no prejudice shown." (R. 92:27.) Her statement was "uncontroverted." (R. 92:27.) It was "simply her giving an account as to what occurred." (R. 92:27.)

During defense counsel's closing, he told the jury not to let the prosecutor tell them that the evidence was uncontroverted. (R. 92:28.) "The State has the burden to prove absolutely everything." (R. 92:28.) Given the presumption of innocence, the defense does not have to put people up on the stand to say that Hannah was lying. (R. 92:27.)

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.) 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 was not more evidence at

trial about the car. (R. 92:33.) Thus, "all you have then is [Hannah's] credibility to go on." (R. 92:34.)

Regarding Hannah's credibility, defense counsel questioned her recount of how Hoyle was able to get her shoes, pants, and underwear off while she was seated in the car. (R. 92:35.) 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 about when the assault took place. (R. 92:36–37.)

In rebuttal, the prosecutor emphasized that the jury was not to focus on speculation. (R. 92:39.) He pointed out that it would not be surprising that Hannah could not remember the precise date of the assault: "[s]he doesn't want to focus on that date. Do you think sexual assault victims want to focus and relive over and over again the date that they were victimized by someone?" (R. 92:41.) The prosecutor also pointed out that Hannah had owned up to her drinking and taking pills, which rendered her testimony more credible. (R. 92:42.) "That's how you know when people are telling you the truth, when they own up to their own bad baggage in that and tell you what occurred." (R. 92:42.)

The prosecutor noted that the defense did not "disagree [the evidence is] 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 prosecutor continued, "I will agree to that, you don't have that additional information, but the jury instruction says you are not to speculate about that." (R. 92:44.)

Regarding Hannah's delay in disclosing Hoyle as her assailant, the prosecutor argued that Hoyle was responsible for that. (R. 92:44.) Right after the assault, he told Hannah, "If I go to jail for this, someone is going to end up dead." (R. 92:44.)

Verdict and sentencing

The jury found Hoyle guilty on all four counts. (R. 92:51.) The court sentenced Hoyle to eight years of initial confinement and ten years of extended supervision for each count, all to run concurrently. (R. 43; 93:26.)

Postconviction motion

Hoyle filed a postconviction motion. (R. 63.) He made seven arguments, four of which he pursued in the court of appeals. *State v. Hoyle*, No. 2020AP1876-CR, slip. op., ¶ 1 n.1 (Wis. Ct. App. Apr. 26, 2022) (unpublished). Relevant here, Hoyle argued that the State's closing argument violated his Fifth Amendment right not to testify by referring to "uncontroverted evidence."[4] (R. 63:23–26.) The circuit court denied relief on all four grounds. (R. 76; 94:29–32.)

[4] Hoyle's other three arguments that he pursued in the court of appeals were as follows. 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.)

In an unpublished authored decision, the court of appeals resolved only one of the four arguments. The court concluded that the State's reference to uncontroverted evidence violated Hoyle's Fifth Amendment right not to testify at trial. *Hoyle*, slip. op., ¶ 2.[5] The court declined to decide the other three issues, holding that the Fifth Amendment issue was dispositive. *Hoyle*, slip. op., ¶ 2.

The *Hoyle* court relied on the test set out in *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)). *Hoyle*, slip. op., ¶ 12. The court concluded that the prosecutor's comments were an improper reference to the defendant's failure to testify. *Hoyle*, slip. op., ¶¶ 17–19. The court reasoned that the only person who could have directly controverted Hannah's testimony was Hoyle, the sole other witness to the assault. *Hoyle*, slip. op., ¶¶ 13, 17. The court noted that "[t]he State does not raise any argument" on the third *Jaimes* factor, "instead contending it 'does not come into play.'" *Hoyle*, slip. op., ¶ 19.

The court of appeals disagreed with the State that *Bies* authorizes the term "uncontroverted." *Hoyle*, slip. op., ¶¶ 14–16. The *Hoyle* court read *Bies* to mean that a prosecutor could not say evidence is uncontroverted if the comment was directed at an aspect of the case "that the defendant actually disputed." *Hoyle*, slip. op., ¶ 16.

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[5] The court of appeals issued a published decision in this case on January 11, 2022. In an order dated March 9, 2022, the court vacated and withdrew that opinion pursuant to Wis. Stat. § (Rule) 809.24(3). The court issued a new authored but unpublished opinion on April 26, 2022. That opinion is the subject of this appeal.

The *Hoyle* court also relied on *United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996). In that case, the Seventh Circuit said, "[i[t appears obvious that using the word 'uncontroverted' in referring to government evidence . . . where it is highly unlikely that anyone beyond the non-testifying defendant could contradict the evidence, is . . . improper." *Hoyle*, slip. op., ¶ 18 (quoting *Cotnam*, 88 F.3d at 499). The *Hoyle* court decided that only Hoyle could contradict the evidence in this case. *Hoyle*, slip. op., ¶¶ 13, 17. Therefore, the prosecutor's comments that the evidence was "uncontroverted" were an improper comment on Hoyle's decision not to testify. *Hoyle*, slip. op., ¶ 18.

The State filed a petition for review, which this Court granted on September 14, 2022.

STANDARD OF REVIEW

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 267.

ARGUMENT

The prosecutor's comments about the State's evidence were proper under the Fifth Amendment, because they were not a reference to Hoyle's decision not to testify.

A. Courts engage in a case-by-case analysis to decide whether a prosecutor has impermissibly commented on the defendant's decision not to testify.

The self-incrimination clause of the Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This provision "forbids either comment by the

prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). Wisconsin's constitution also provides that no person "may be compelled in any criminal case to be a witness against himself or herself." Wis. Const. art. I, § 8. This Court "has normally construed the right against self-incrimination in Article I, Section 8 of the Wisconsin Constitution to be consistent with the United States Supreme Court's interpretation of the federal right." *State v. Stevens*, 2012 WI 97, ¶ 40, 343 Wis. 2d 157, 822 N.W.2d 79.

Griffin prohibits the prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. *Robinson*, 485 U.S. at 32. However, if the prosecutor's reference to the defendant's opportunity to testify "is a fair response to a claim made by defendant or his counsel," then "there is no violation of the privilege." *Id.*

A *Griffin* violation is subject to a harmless error analysis. If the court believes beyond a reasonable doubt that the violation did not contribute to the jury's verdict, the error is harmless. *Chapman v. California*, 386 U.S. 18, 21–24 (1967); *see also State v. Spring*, 48 Wis. 2d 333, 339–40, 179 N.W.2d 841 (1970).

It is not always easy to tell when a prosecutor's comment "crosses over 'into the forbidden area of comment on an accused's failure to testify' and 'violates constitutional rights.'" *State v. Doss*, 2008 WI 93, ¶ 92, 312 Wis. 2d 570, 754 N.W.2d 150 (citation omitted). This Court has previously declined to adopt a bright-line test to decide such a question, and instead noted that the determination must be made on a case-by-case basis. *Id.*; *see also State v. Moeck*, 2005 WI 57, ¶ 74, 280 Wis. 2d 277, 695 N.W.2d 783.

To assess prosecutorial comments, the Wisconsin court of appeals has adopted the approach of the U.S. Court of

Appeals for the Third Circuit. In *State v. Johnson*, a pro se defendant presented his own opening statement and did not testify. 121 Wis. 2d 237, 242, 358 N.W.2d 824 (Ct. App. 1984). The prosecutor informed the jury that Johnson's arguments were not evidence and not given under oath or subject to cross examination. *Id.*

To decide whether this comment was a comment on the failure to testify, the court of appeals analyzed "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." *Id.* at 246 (citing *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.*

The *Johnson* court concluded that the comment was not a comment on the defendant's failure to testify. *Id.* at 247–48. Rather, the remarks "were aimed at drawing the jury's attention to the distinction between arguments and evidence." *Id.* at 247. Further, "[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 (emphasis in the original).

After *Johnson*, the court of appeals set out a three-factor test to decide when a prosecutor's comment is an improper reference to the defendant's failure to testify. *Jaimes*, 292 Wis. 2d 656, ¶ 21. First, "the comment must constitute a reference to the defendant's failure to testify," using the *Johnson* analysis. *Id.* ¶¶ 21–22. 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.* The third factor captures the exception the U.S. Supreme Court articulated in

Robinson, when the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by the defendant or defense counsel. *Id.* ¶ 21.

Neither the Wisconsin courts nor the U.S. Supreme Court has held that a prosecutor's remarks about *evidence* violate a defendant's Fifth Amendment rights. The Supreme Court considered whether the harmless error doctrine applied to a prosecutor's statement that evidence is "uncontradicted" when the defendant had elected not to take the stand. *United States v. Hasting*, 461 U.S. 499, 503–04 (1983). The court noted that such a comment may not be a *Griffin* violation at all. *Id.* at 506 & n.4. The lead opinion described such a comment as, at most, "an attenuated violation of *Griffin*." *Id.* at 506. The court noted that Justice Stevens, in his concurrence, "may well be correct that the prosecutor's argument was permissible comment." *Id.* at 506 n.4. The court concluded that the alleged error was harmless, and did not conclusively decide whether the comments violated *Griffin*. *Id.* at 512; *see also Id.* at 506 n.4.

In his concurrence, Justice Stevens reasoned that the protective shield of the Fifth Amendment "should [not] be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." *Id.* at 515. And "[r]eference to uncontradicted portions of the Government's evidence is improper only when the statement will naturally and necessarily be construed by the jury to be an allusion to the defendant's failure to testify." *Id.* at 515 n.6.

Under Wisconsin law, a remark that evidence is "uncontroverted" is permissible under the Fifth Amendment. *Bies*, 53 Wis. 2d at 325 (citing *Spring*, 48 Wis.2d at 338). This Court reasoned that "it is proper for the district attorney to point out generally that no evidence has been introduced to show the innocence of the defendant." *Bies*, 53 Wis. 2d at 325 (citation omitted).

Bies was decided seven years after the U.S. Supreme Court decided *Griffin*. More recently, in *State v. Doss*, this Court considered a similar issue in the context of an ineffective assistance of counsel claim. Doss was found guilty of unlawfully retaining funds from her father's estate. *Doss*, 312 Wis. 2d 570, ¶ 1. Doss exercised her right not to testify. *Id.* ¶ 80. During closing argument, the prosecution argued that there "has been no accounting that has been uncovered in our investigation, no explanation as to where the money had gone[.]" *Id.* ¶ 80.

Doss argued that the prosecutor's comments were of such character that the jury would necessarily take it to be a comment on the fact that Doss herself had failed to testify and provide explanation. *Id.* Doss argued that her trial counsel was ineffective for failing to object on that basis. *Id.* ¶¶ 90–91.

This Court held that Doss failed to establish deficient performance. *Id.* ¶ 94. This Court observed that it was not clear, especially in light of Doss's attorney's arguments, that the prosecutor's statements about the absence of facts in the record "should be taken as a comment on Doss's failure to testify, particularly where there was no direct reference to Doss's failure to testify." *Id.* ¶ 94. This Court further observed that in *Hasting*, the United States Supreme Court recognized that a prosecutor's statement that falls short of a direct statement on a defendant's failure to testify, but instead "refers to testimony as uncontradicted where the defendant

has elected not to testify and when he is the only person able to dispute the testimony,' is at most an attenuated violation of *Griffin* . . . and *Robinson* . . . and may not actually constitute a violation at all." *Id.* ¶ 94 (citations omitted). For these reasons, Doss failed to establish that her counsel's failure to object was deficient performance.

B. The prosecutor's remarks were permissible because they were not a comment on Hoyle's decision not to testify.

The standards articulated in *Johnson* and *Jaimes* accurately reflect the constitutional parameters of *Griffin* and its progeny. But while these standards serve as guideposts, a prosecutor's comments must still be analyzed on a case-by-case basis, in light of the record as a whole. *Doss*, 312 Wis. 2d 570, ¶ 92. Under these standards, as well as those articulated in *Bies* and *Doss*, the prosecutor's comments in this case were proper.

The first *Jaimes* factor is whether the prosecutor's comments were a reference to the defendant's failure to testify. *Jaimes*, 292 Wis. 2d 656, ¶ 21. Like the comment in *Johnson*, the comments at issue here were not a direct comment on Hoyle's decision not to testify. The question, then, is "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 (citation omitted). It was not.

Viewed in proper context, the prosecutor's comment was grounded in standard jury instructions and directed at the evidence in the record, not at Hoyle's decision not to testify. At the beginning of his closing argument, the prosecutor focused the jury on the instructions it had received and told the jury that it was "to decide this case solely, solely

on the evidence offered and received at the trial." (R. 92:18.) Regarding the evidence offered and received, particularly Hannah's testimony, the evidence was "uncontroverted. You have heard no evidence disputing her account of that sexual assault. You heard nothing."[6] (R. 92:18–19; *accord* 92:20–21.)

The prosecutor emphasized that the case came down to Hannah's credibility. (R. 92:21.) He spent much of his closing argument explaining why the jury should find Hannah credible. (R. 92:21–27.) The prosecutor acknowledged that Hannah had an interest in holding Hoyle accountable for what happened to her. (R. 92:22.) "But she doesn't get any other benefit from this." (R. 92:22.) "You have heard zero testimony that somehow she benefits from falsely accusing the defendant of doing this." (R. 92:22.) Again, these comments focus on the strength of the State's evidence and Hannah's credibility, not Hoyle's decision not to testify.

Case law also supports a conclusion that the comment was not directed at Hoyle's decision not to testify. The State's use of the word "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." *Bies*, 53 Wis. 2d at 325.

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[6] The prosecutor's remarks related to the strength of the State's evidence and were not an attempt to shift the burden of proof to the defense. The defense and the court repeatedly reminded the jury that the State had the burden of proof and was required to prove its case beyond a reasonable doubt. (*See* R. 91:127, 133; 92:11–13, 28.) In the court of appeals, Hoyle did not argue that the State's comments impermissibly shifted the burden of proof, nor did the court of appeals reach such a conclusion. But even setting abandonment aside, this case involves whether the prosecutor's comments amounted to an impermissible comment on the defendant's constitutional right not to testify. Case law pertaining to burden shifting is not at issue here.

Further, 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). 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. Here, the prosecutor said that Hannah's testimony was "uncontroverted" because there was "no evidence disputing her account of that sexual assault." (R. 92:18–20.) This comment highlighted the State's evidence, not Hoyle's decision not to testify.

The second *Jaimes* factor is that the prosecutor's language "must propose that the failure to testify demonstrates guilt." *Jaimes*, 292 Wis. 2d 656, ¶ 21. There is no hint of this in the prosecutor's argument. The third factor—whether the prosecutor's comment is a response to a defense argument—is not implicated here.[7]

In short, the prosecutor's comments did not amount to a Fifth Amendment violation because they were not about Hoyle's decision not to testify at all, let alone a suggestion that the jury should infer guilt because Hoyle chose not to testify. The prosecutor noted that, pursuant to standard instructions,

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[7] The third *Jaimes* factor will not come into play in every case. This factor accounts for the exception the Supreme Court carved out in *Robinson*: when the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, there is no violation of the Fifth Amendment privilege. *United States v. Robinson*, 485 U.S. 25, 32 (1988). The prosecutor's comment in this case is not a reference to the defendant's failure to testify in the first instance, so the exception does not come into play.

the jury was to consider only the evidence received in the case. He explained that the State's evidence, which primarily consisted of Hannah's testimony, was uncontroverted. And nothing offered at trial had undermined Hannah's credibility, which was the central issue. The prosecutor's comments were entirely consistent with the Fifth Amendment.

C. The court of appeals' decision failed to review the prosecutor's comments in proper context and misinterpreted this Court's precedent.

The court of appeals' decision rests on at least two fundamental errors. First and foremost, the court failed to review the State's comments in proper context. The comments at closing argument were grounded in standard jury instructions, and focused on the strength of the State's evidence, not Hoyle's decision not to testify. In reaching the opposite conclusion, the court of appeals incorrectly assumed that only Hoyle's testimony could "controvert" the State's evidence. Second, the court misinterpreted *Bies* and relied on a Seventh Circuit decision that is neither controlling nor on all fours with this case.

1. The court of appeals failed to analyze the prosecutor's comments in context, and erroneously assumed that the only evidence that could controvert the State's evidence was Hoyle's testimony.

As shown above, a proper contextual analysis of the prosecutor's comments reveals that they were grounded in standard jury instructions pertaining to evidence. Such instructions included that the jurors were to "[c]onsider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment, reach your verdict."

(R. 92:5.) Evidence is defined as "the sworn testimony of witnesses both on direct and cross-examination regardless of who called that witness." (R. 92:14; *see also* WI-JI Criminal 103.[8]) Because no exhibits were marked and no facts were agreed upon, "the evidence in this case to be considered is the testimony of witnesses only." (R. 92:14.)

The prosecutor's closing comments invoked these instructions and directed the jury to the evidence in the record, not to Hoyle's decision not to testify. 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.) The evidence "offered and received" was the testimony of the State's two witnesses. That evidence was "uncontroverted" because the jury heard no evidence disputing the account of the sexual assault. (R. 92:18–19; *accord* 92:20–21.)

Although the evidence was uncontroverted, the jury still had to decide whether Hannah's testimony was credible. That is why, at closing, the prosecutor focused on the jury instructions surrounding witness credibility. Credibility factors included whether Hannah had an interest in the result of the trial, her demeanor on the witness stand, the clearness or lack of clearness of her recollections, possible motives for falsifying testimony, and all other facts and circumstances during a trial which tend either to support or to discredit her testimony. (R. 92:16–17.) The prosecutor thoroughly explained why the jury should find Hannah credible in light of these factors. (R. 92:21–27.) The case came down to Hannah's credibility, and ultimately, the jury deemed her credible and found Hoyle guilty.

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[8] "Evidence defined," *available at*: https://wilawlibrary.gov/jury/files/criminal/0103.pdf.

The court of appeals failed to view the prosecutor's comments contextually, as they related to standard jury instructions. Instead, the court held that the test outlined in *Johnson* and *Jaimes* was met because, "given the nature of the alleged victim's allegations and the dearth of other facts presented at trial, 'the only person who could controvert [Hannah's] testimony was Hoyle.'" *Hoyle*, slip. op., ¶ 17. In other words, the court decided that the indirect comment was, by necessity, a comment on Hoyle's failure to take the stand because only he could controvert the State's evidence. *Hoyle*, slip. op., ¶ 13. Under these circumstances, the court believed that the State's comments implied that Hoyle's failure to testify demonstrates Hoyle's guilt. *Hoyle*, slip. op., ¶ 19.

The court's reasoning is flawed and has troubling implications for future cases, particularly those that rely primarily on a victim's testimony. The court erroneously assumed, without analysis, that the only evidence that could have controverted Hannah's testimony was Hoyle's testimony. *Hoyle*, slip. op., ¶¶ 13, 17. This is not true. Hoyle's testimony may have been the only direct evidence, but the law does not require direct evidence. For example, as a general matter, victims might tell a friend or family member a different version of the events. And cross examination is always available, as shown in this case.

Hoyle's counsel cross examined Hannah, but he was unable to poke any significant holes in her basic story, and she maintained that the assault occurred. Hoyle did not testify, which was of course Hoyle's right, as the jury was instructed. (R. 92:17.) Defense counsel's closing emphasized the evidence that Hannah's testimony did not provide. (R. 92:28–39.) The State was within its right to say that Hannah's testimony remained uncontroverted by any evidence.

Read in proper context, the prosecutor's comments were not "manifestly intended or [were] of such character that the jury would naturally and necessarily take [them] to be a comment on the failure of the accused to testify." *Johnson*, 121 Wis. 2d at 246 (citation omitted). On the contrary, the comments did not refer to Hoyle's decision not to testify at all.

Even if this Court were to agree with the court of appeals that the only evidence that could have controverted Hannah's testimony was Hoyle's testimony, that does not create a per se constitutional violation. *See Hasting*, 461 U.S. at 506 & n.4; *Doss*, 312 Wis. 2d 570, ¶ 94. A reviewing court is still required to analyze the comments in proper context, to determine whether they run afoul of the Fifth Amendment. The court of appeals did not do that here.

2. The court of appeals' decision misapplied *Bies* and relied on case law that is neither controlling nor on point.

The court of appeals read *Bies* to mean that a prosecutor could not say evidence is uncontroverted if the comment was directed at an aspect of the case "that the defendant actually

disputed." *Hoyle*, slip. op., ¶ 16. This interpretation is erroneous.[9]

In *Bies*, the prosecutor remarked that certain evidence was uncontroverted. *Bies*, 53 Wis. 2d at 325. This Court held that the comment was proper, because a district attorney may "point out generally that no evidence has been introduced to show the innocence of the defendant." *Bies*, 53 Wis. 2d at 325. The Court added a second reason as to why the comments were proper:

> *Moreover*, in the instant case, the defendant's strategy was not to deny the occurrence of the acts surrounding the murder and robbery, but rather to show that his intoxication negated the necessary intent. Since the district attorney's comments referred to evidence of the acts rather than to evidence of intoxication, we conclude that the argument was a proper comment on the testimony.

Id. at 325–26 (emphasis added). The *Hoyle* court read *Bies* to mean that a prosecutor can say evidence is uncontroverted only if it concerns an aspect that the defendant did not actually dispute *Hoyle*, slip. op., ¶ 16.

The court of appeals misinterpreted *Bies*. Although the *Bies* court noted the defendant's intoxication defense, the court led with its observation that the term "uncontroverted" was generally permissible. *Bies*, 53 Wis. 2d at 325.

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[9] The court also cited *Bies* for the proposition that "indirect comments about the defendant's silence will violate the [Fifth Amendment] privilege, such as when the prosecutor points out a lack of evidence that only the defendant could provide by waiving [their] privilege." *State v. Hoyle*, No. 2020AP1876-CR, slip. op., ¶ 11, (Wis. Ct. App. April 26, 2022) (unpublished) (citing *Bies v. State*, 53 Wis. 2d 322, 325–26, 193 N.W.2d 46 (1972)). *Bies* in no way says this.

"*Moreover*," in Bies's case, the Fifth Amendment argument was especially weak because of the nature of his defense. *Id.* In other words, this circumstance was not *necessary* to conclude that no Fifth Amendment violation occurred. The court of appeals made a critical error in its application of *Bies*. *Hoyle*, slip. op., ¶ 16.

The court of appeals also cited *United States v. Cotnam*[10] for the proposition that using the word "uncontroverted" where it is "highly unlikely that anyone beyond the non-testifying defendant could contradict the evidence, is just as improper as using the words 'uncontradicted,' 'undenied,' 'unrebutted,' 'undisputed,' and 'unchallenged' in the same situation." *Hoyle*, slip. op., ¶ 18.

Aside from the fact that *Cotnam* is not binding, it is distinguishable. The prosecutor's comments in *Cotnam* were materially different for at least two reasons: (1) the prosecutor urged the jury to find the witness credible *because* his testimony was uncontroverted (rather than describing indicia of credibility per standard jury instructions); and (2) the prosecutor referred to the witness's right to decline to testify in a way that drew attention to his failure to take the stand.

On the first point, the prosecutor said, "[n]ow, the defendant will argue that [the witness] is not credible, although the evidence I just discussed is basically uncontroverted." *Cotnam*, 88 F.3d at 493. In essence, the prosecutor was urging the jury "to find [the witness] credible *because* his testimony was uncontroverted." *Id.* (emphasis in original). On the second point, the prosecutor acknowledged that the defendant had no obligation to put on evidence, but "he did so in a way that the district court determined drew attention to Zadurski's failure to take the stand." *Id.* Among other things, the prosecutor referred to cocaine found in the

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[10] *United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996).

defendant's bag and stated, "He takes the position that's not mine, that's not mine. That's who knows who that belongs to. And he doesn't have to put evidence on, don't misunderstand the government's position." *Id.*

These comments, combined with the prosecutor's repeated vouching of the witnesses' testimony, caused the district court "considerable concern." *Id.* After considering the combined effect of these remarks, the district court concluded, "I find it difficult to construe those statements in any other way other than as [focusing] on the fact that the defendant did not testify." *Id.* at 499.

The Seventh Circuit relied heavily on the district court's findings. The findings compelled the court's conclusion. The prosecutor's use of the word uncontroverted, *in the particular context in which that word was used*, was "*manifestly intended* to indicate to the jury that the only one who could have controverted it was the defendant who remained silent throughout the trial." *Id.* (emphasis added).

Here, the circuit court did not make such a finding. (R. 94:29.) And the prosecutor did not ask the jury to find Hannah was credible, or truthful, *because* her testimony was uncontroverted. Rather, the prosecutor's comments were directed to the strength of the evidence generally, which was Hannah's uncontroverted statement that she was sexually assaulted. The jury still had to decide whether to believe her, and the prosecutor correctly directed the jury to the relevant factors for credibility, as found in standard jury instructions. The prosecutor's comments were not directed at Hoyle's decision not to testify.

As a final matter, the *Cotnam* court suggested that cases exist where it is "highly unlikely that anyone beyond the non-testifying defendant could contradict the [government's] evidence." *Cotnam*, 88 F.3d at 499. It would be a rare case in which a defendant's testimony were the only evidence that

could controvert the State's evidence. And certainly, this is not such a case. Hoyle's testimony was not the only evidence that could have controverted Hannah's testimony. But even if it had been, a proper contextual analysis reveals that the comments were proper.

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The court of appeals' holding is so broad that it could prevent the State from fairly commenting on the evidence in any case, particularly in those where there are no witnesses to the crime other than the victim. If left in place, the holding will cause confusion among prosecutors as to what comments are permissible and hurt victims' cases, in a manner that is not required by the Fifth Amendment. This Court should hold that the State's comments were permissible and reverse the court of appeals.

CONCLUSION

The State respectfully requests that this Court reverse the court of appeals' decision and remand to the court of appeals for consideration of the remaining issues that were briefed on appeal.

Dated: October 25, 2022.

Respectfully submitted,

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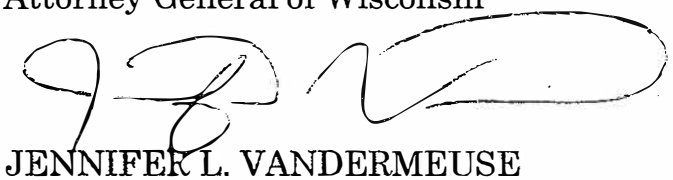

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8572 words.

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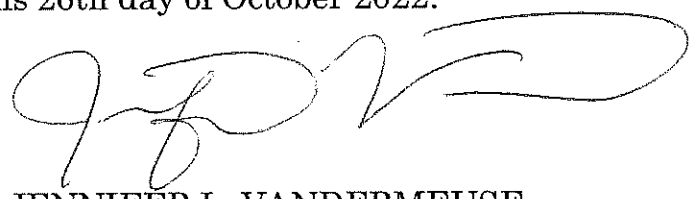

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