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STATE OF WISCONSIN
COURT OF APPEALS—DISTRICT IV

Case No. 2021AP000447-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHANE ALLAN STROIK,

Defendant-Appellant.

On Appeal from the Judgment of Conviction
and Denial of Postconviction Motion
Entered in the Portage County Circuit Court,
the Honorable Robert J. Shannon, Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Shane's trial attorney ineffective in failing to object to statements and testimony regarding Shane's high sex drive?

The circuit court answered: no.

2. Was Shane's trial attorney ineffective in failing to impeach the state's witness with her prior conviction?

The circuit court answered: no.

3. Was Shane's trial attorney ineffective in not seeking and introducing a Child Protective Services (CPS) report regarding the alleged victim's prior untruthful allegation of sexual assault?

The circuit court answered: no.

4. Did the state violate *Brady*¹ and Wis. Stat. § 971.23?

The circuit court answered: no.

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

5. Should Shane be granted a new trial because the state violated the *Haseltine*² rule which prohibits one witness from opining on whether another witness is telling the truth?

The circuit court answered: no.

6. Should Shane be granted a new trial in the interest of justice?

The circuit court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication is unwarranted because the issues can likely be decided by applying established legal principles to the facts of this case. Shane anticipates the issues will be fully presented in the briefs making oral argument unnecessary.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In 2015 and 2016, Lynne³ and Bud, the parents of the alleged victim AT, were going through a heated separation, which resulted in a restraining order and the involvement of children's services. (119:156-161,

² *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

³ In order to protect the complainant's identity, AT's parents will be referred to by first names only. Likewise, for consistency, all adult witnesses will be referred to by their first names.

168-71, 176). By 2016, they shared custody of AT. AT would stay at her father Bud's house, along with her brothers and her father's girlfriend, Mary, during the week. (119:160, 169-70). Bud's father, AT's paternal grandfather, lived nearby and regularly watched AT while Bud was at work. (119:166). On every other weekend, AT and her brothers would visit her mother, Lynne, who was living with her boyfriend, Shane Stroik. (119:159-160, 171, 199; 120:81). Lynne and Shane lived with Shane's father in a trailer at the time. (119:198, 210). Unfortunately, during this time and the year prior, AT was being sexually assaulted by her paternal grandfather. (117:4; 119:176; 120:80-81, 84). This ongoing sexual abuse involved AT's grandfather touching and licking her vagina. (117:4; 120:84; 33: 9:28-29 AM, 9:44-45 AM).

After her abusive grandfather passed away, AT had a bathroom accident whereby she urinated on the bedroom floor while her aunt, Heather, was babysitting her. (5:2-3; 119:105-06). When confronted by Mary, Bud, and Heather about why she did this, she made an allegation of sexual assault against Shane. (5:2-3; 119:107-08). Specifically, AT alleged that Shane pulled her pants down and touched her vagina (which she referred to as her "meme") one time. (5:3; 120:85; 33:9:10 AM). According to Mary, she or Bud asked AT whether someone had touched her *before* AT indicated anything inappropriate happened and before she accused Shane. (119:183, 188). After being asked that leading question, AT said that Shane had touched her. Bud testified she just disclosed the touching without being asked. (119:157). Heather could not remember if AT disclosed after being asked

specifically if someone had touched her, but said it was possible. (119:113).

During the course of the investigation regarding AT's allegation, Shane's biological daughter, SS, was interviewed. She initially said she was never assaulted by Shane but a few weeks later she stated that she too was sexually assaulted. (119:141). Shane adamantly denied both accusations and took the cases, which were joined, to trial.

Shane was acquitted of sexually assaulting SS at trial. (122:133). The state called a number of witnesses regarding AT's allegations who testified about the facts above. In addition, the state called Jacqueline Gremler who conducted a Child Advocacy Center ("CAC") interview of AT. (120:8). The video of that interview was played for the jury. (120:23; 33). In the video, AT states that "Shane pulls down my pants and touches my meme" and this happened one time. (33:9:10 AM). AT also describes Shane as being bald. (33:9:37 AM).

AT testified at trial and notably on direct examination denied that Shane had sexually assaulted her. (120:77). She reverted to saying she was sexually assaulted on cross-examination and re-direct. (120:85-86). When AT was asked whether Shane touched her on cross-examination: "And you don't even remember if [Shane] did or didn't, do you?" AT responded, "No, I do not." (120:86).

The state's last witness at trial was Detective Michael Tracy of the Plover Police Department. He testified generally regarding his investigation in the

case and about AT's CAC interview. (122:9-22, 52). Part of his testimony included discussion of statements Shane made when interrogated and portions of Shane's interrogation video were played for the jury. (42; 122:29-41). Specifically, Detective Tracy testified Shane said he only went into the middle bedroom to kiss AT good night, and this was significant because Detective Tracy had not disclosed to Shane that AT had alleged that the assault happened in the middle bedroom. (122:31-32).

Detective Tracy also testified that after the officers arrested and handcuffed Shane, he asked what would happen to him if he did do it and said it is possible he may have accidentally touched AT's private areas while flipping her over his head (a gymnastic move AT enjoyed doing). (122:40-41). He also testified that although Shane had offered to take a lie detector test, the police had not given him one. (122:47).

Shane also testified at trial telling the jury about his visits with the girls and that he had never sexually assaulted either of them. (122:59-66). He testified he asked Detective Tracy what would happen if he had done something to AT because he was scared when he was handcuffed and did not know what the consequences of the arrest would or could be. (122:64-65). He testified he was just asking what the consequences would be for this kind of allegation, not saying that he had assaulted AT. (122:65, 68). He testified that he was not bald and never had been bald. (122:60-61). He also told the jury that AT's grandfather who assaulted her was bald. (Trial Trans. Day 3 at 60-61).

During trial, the state made repeated reference to Shane's high sex drive in its opening statement ("You will hear from Lynne, that Shane has a very high sex drive...")(119:92) and in its closing statement ("Shane is described by Lynne, his former girlfriend, as a very sexual person. They had a lot more sex than she's ever had before...") (122:108-09). The state also focused on this point in its direct examination of Lynne, Shane's girlfriend at the time. (119:204-06). Shane's trial attorney did not object to any discussion of Shane's sex drive.

Although the jury acquitted Shane on the charges regarding SS, it found him guilty of First Degree Sexual Assault of a Person Under Age 13 regarding AT. (122:133). On July 3, 2018, the court sentenced Shane to 68 months of initial confinement and 72 months of extended supervision. (47; 123:21; App. 3-5).

Postconviction Facts

Shane filed a postconviction motion on August 19, 2019, alleging *Haseltine* violations and that his attorney was ineffective in failing to object to testimony regarding Shane's high sex drive and failing to impeach one of the state's witnesses with her prior conviction. (61). He also sought a new trial in the interest of justice and asked the court to do an *in camera* review of a CPS report that detailed accusations of sexual assault AT brought against her cousin a few months before she accused Shane of

sexual assault. Shane also brought a motion requesting release pending appeal.⁴

The court held a hearing on the postconviction motion on January 3, 2020, at which trial counsel, Gary Kryshak, testified. (124:4-26). At the conclusion of the hearing, the court denied Shane's claims for relief regarding the alleged *Haseltine* violations and the ineffective assistance of counsel claims regarding the *Haseltine* violations, failing to object to sex drive testimony and failing to impeach a witness with a prior conviction. (124:42-56; App. 6-20). The court believed there was only one potential *Haseltine* violation but said it was harmless given the strength of the other evidence and the victim's testimony. (124:44-51; App. 8-15). It found the other statements Shane raised were not *Haseltine* vouching statements so there was no ineffective assistance in failing to object to them. (124:44-51; App. 8-15). Regarding the sex drive testimony, the court ruled it was other acts evidence which would have been admissible and stated it believed the trial attorney had sufficient strategic reasons for not objecting to the State's sex drive comments. (124:52-54; App. 16-18). The court held there was no error in failing to impeach Heather with her prior conviction because her testimony was straightforward and truthful and there would have been no point in impeaching her. (124:55; App. 19). The court also denied the interest of justice claim and ruled that the judge handling children's cases would need to rule on whether the CPS report should be released for an *in camera* review. (124:56, 66; App. 20).

⁴ The circuit court denied Shane's request for release pending appeal and Shane is not appealing that decision. (106).

The Honorable Thomas Flugaur, the judge then handling children's cases in Portage County, held a hearing on the release of the CPS report on September 29, 2020, and ruled that it should be released to the circuit court for an *in camera* review. The circuit court completed that review and issued a decision stating that the CPS report was relevant to potential claims regarding whether AT made untruthful allegations of sexual abuse prior to accusing Shane and thus should be released to the parties. (98:2). Shane subsequently filed a supplemental postconviction motion with new claims based on the released CPS report, namely that the state violated *Brady* and Wis. Stat. § 971.23 in failing to turn over the CPS report before trial and trial counsel was ineffective in not seeking and introducing the report. (100).

Facts Regarding CPS Report

The discovery, provided to trial counsel by the state prior to trial, contained the following information about a previous allegation of sexual assault made by AT:

Lynne brought up the incident that allegedly occurred between [AT] and her cousin, [JD] (08/14/06). *Shane mentioned this incident during his first interview on 7/14/16.* Lynne stated that the first time she got the kids back from Bud when he had recently moved to Plover, her son, [M.L.T. (05/29/08), had stated that [AT] and [JD] had sex. Lynne called Bud and Mary [] to discuss this. Mary informed Lynne that they took [AT] to the hospital to have her checked out about this and nothing came of it. Lynne also noted that [AT] was

taking medication for a yeast infection or a urinary tract infection at the time. When Lynne asked [AT] if [JD] touched her, she told Lynne he did touch her. Lynne asked [AT] if anyone talked to her about [JD]. [AT] told Lynne that somebody did talk to her about [JD] (presumably someone from health and Human services) and she told them that [JD] didn't do it. When Lynne asked [AT] why she said [JD] didn't do it, [AT] told Lynne that her daddy told her to say that [JD] didn't do it.

(71:10) (emphasis in original).⁵

Appellate counsel Tristan Breedlove contacted Detective Tracy and Assistant District Attorney Michael Zell in order to determine whether the government had obtained additional information regarding the JD allegation during their investigation into Shane's case. In response, Detective Michael Tracy wrote a supplemental report dated May 29, 2019, which states:

The first question that Attorney Breedlove asked was whether the police had investigated the allegation that [AT] had been sexually assaulted by her cousin [JD]. This had been mentioned by Shane Stroik and Lynne [] during the course of the investigation. During the investigation it was discovered through the records of Portage County Health and Human Services that a CPS complaint

⁵ Shane also discussed AT's allegations against JD during his July 14, 2016, interview, which the incident report reflects: "Shane stated that [AT] had recently told Lynn that [JD] had touched her inappropriately ...Shane did not know who [JD] was, but he believed that [JD] lived in the same trailer park." (71:6).

was initiated on that matter in February of 2016. The complaint was screened-in and investigated. The results of the investigation were that [AT] (5 years old at the time) denied that [JD] (9 at the time) had touched her inappropriately when asked by the CPS investigator. An initial assessment on that case was completed by Social Worker Stephanie Knutson, but was never obtained as part of the investigation. Social Worker Knutson never asked for Law Enforcement Involvement in that initial assessment investigation.

(61:26).

The relevant CPS report was released to the parties after an *in camera* review. The report states that the Portage County Health and Human Services Department received a referral regarding AT alleging her cousin, JD, touched her “meme” (Vagina) two weeks prior and that she told him to stop and he would not. (99:6; App. 26).

According to the report, when interviewed about the assault, AT denied that JD had actually touched her saying she did tell her mother it happened but she did not know why she told her that because he had not actually touched her. (99:7; App. 27). Accordingly, the Department took no further action.

**The Circuit Court’s Final
Postconviction Rulings**

On February 17, 2021, the circuit court issued a written decision denying Shane’s claims regarding the CPS report and his request for a new trial in the interest of justice. It ruled there was no *Brady*

violation because the Assistant District Attorney working on the case was not aware the CPS report existed and police knowledge of it could not be imputed on him and because the information in the report is not significantly more exculpatory than the information supplied to the defense pre-trial. (104:3-4; App. 35-36). It also found no ineffective assistance of counsel saying the trial attorney focused instead on allegations involving AT's grandfather sexually assaulting her. (104:4; App. 36). It also denied the interest of justice claim. (104:4; App. 36).

Shane now appeals.

ARGUMENT

I. This court should order a new trial because trial counsel was ineffective in: (1) failing to object to statements and testimony regarding Shane's high sex drive; (2) failing to impeach the state's witness with her prior conviction; and (3) failing to seek and introduce the CPS report regarding AT's prior false allegation.

A. Introduction and legal standard.

No DNA evidence linked Shane to the alleged assault in this case. Further, there were no witnesses to the alleged assault. The case thus hinged on whether the jury found AT or Shane more credible. Shane is entitled to a new trial because he received ineffective assistance of counsel when: (1) counsel failed to object to statements regarding Shane's high

sex drive because it was impermissible character evidence used to show Shane was capable of sexually victimizing a child; (2) counsel failed to impeach the state's witness with her prior conviction; and (3) counsel failed to seek and introduce the CPS report that proved AT had made false allegations of sexual assault in the past. These failures prejudiced Shane because they contributed to the jury finding AT credible and in making Shane look like a sex-crazed person capable of sexually assaulting a child, which in turn led to his conviction. The failure to introduce evidence AT had made a prior false allegation was prejudicial because such evidence would have shown the jury AT was so confused from being sexually assaulted by her grandpa that she had previously made false allegations of sexual assault.

The two-pronged test for ineffective assistance of counsel claims requires Shane to prove: (1) deficient performance, and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (the *Strickland* analysis applies equally to ineffectiveness claims under the state constitution).

To fulfill the first prong of *Strickland*, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. The court will give deference to strategic decisions made by trial counsel. *Strickland*, 466 U.S. at 681. However, one way to show deficiency is to show that counsel's errors were due to oversight rather than an intentional strategy. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Deficient performance is prejudicial when trial counsel's errors undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694. To prove prejudice, the defendant must show that there is a reasonable probability the result of his trial would have been different had trial counsel not performed deficiently. *State v. Trawitzki*, 2001 WI 77, ¶44, 244 Wis. 2d 523, 628 N.W.2d 801. The defendant does not need to show "that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. The focus should be on the reliability of the trial. *State v. Moffett*, 147 Wis. 2d 343, 354, 433 N.W.2d 572 (1989).

Whether a defendant was denied effective assistance of counsel is a mixed question of fact and law. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. The circuit court's findings of fact will not be overturned unless clearly erroneous but whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which appellate courts review de novo." *Id.*

- B. Shane is entitled to a new trial because his trial attorney was ineffective in failing to object to testimony and opening and closing statements regarding Shane's high sex drive.

Shane's trial did not include a smoking gun, there was no corroborating physical evidence nor any eyewitness evidence. Instead, the trial was made up of the conflicting testimony of witnesses, including that of AT. Thus, to prove its case, the state had to convince

the jury that its witnesses were more reliable, and it did that in part through the introduction of character evidence regarding Shane's sex drive. As laid out in its opening, the State hoped that evidence of Shane's libido would lead the jury to conclude that he acted in conformity with it: "Shane has a very high sex drive. And so the presumption of course is that [the assault] was for a sexual purpose." (119:92). The state continued to hone in on this point through its direct examination of Lynne, and again in its closing argument. (119:204-205; 122:108-109). Shane's trial counsel never objected.

1. Deficient performance.

Trial counsel's failure to object to improper character evidence about Shane's high sex drive was deficient performance falling below an objective standard of reasonableness.

Evidence of a person's character is generally "not admissible for the purpose of proving that the [defendant] acted in conformity therewith on a particular occasion." Wis. Stat. § 904.04(1). This bar exists because "American law has long recognized the weakness of an inference that a person necessarily acts in accordance with his character upon a particular occasion." *Milenkovic v. State*, 86 Wis. 2d 272, 278, 272 N.W. 2d 320 (Ct. App. 1978). "Evidence that the defendant is a man whom people fear is evidence of bad character, and it is inadmissible to prove his guilt." *State v. Williamson*, 84 Wis. 2d 370, 382, 267 N.W.2d 337 (1978) *overruled on other grounds by Manson v. State*, 101 Wis. 2d 413, 304 N.W.2d 729. It follows that evidence that a man likes to have sex with

adult women is inadmissible to prove that he is guilty of sexually assaulting a child.

At trial, the state introduced a wealth of evidence regarding Shane's high sex drive. The state focused on the issue during its direct examination of Lynne, the victim's mother:

State: Do you remember saying that Shane is a very sexual person?

Lynne: Yes.

State: So you remember saying that it was more sex than you ever had before?

Lynne: Yes.

State: Do you remember saying that's true?

Lynne: Yes.

District Attorney: And can you describe for us, what do you mean by that?

Lynne: He always wanted sex.

District Attorney: Ok so how often would you have sex?

Lynne: Daily.

State: And even when your kids were there?

Lynne: Yes.

State: Do you remember telling Detective Tracy that when your kids were there, you would tell him you didn't want to?

Lynne: Yes.

(119:204-205). The state highlighted Shane's "high sex drive" during its opening and closing statements, saying:

"You will hear that from Lynne, that Shane has a very high sex drive. And so the presumption of course is that [the assault] was for a sexual purpose."

....

"Shane is described by Lynne, his former girlfriend, as a very sexual person. They had a lot more sex than she's ever had before. There's all this stuff about pornography being discussed. He obviously knows porn websites and how to access them. I don't know how this could be for something other than for a sexual purpose."

(119:92 (opening); 122:108-109 (closing)).

The state kept returning to the topic of Shane's sex drive to do exactly what Wis. Stat. § 904.04 prohibits – to prove he assaulted AT in conformity with his already highly sexual nature and that the jury should not hesitate to believe Shane could jump from initiating sex with his adult partner to victimizing a child. Furthermore, Lynne's testimony that she would have sex with Shane when her kids were at the house, despite telling Shane that she did not want to, served only to cast him in a negative light. Trial counsel was deficient for not objecting because of § 904.04's bar on such evidence.

Although the circuit court ruled the state's admission of evidence relating to Shane's high sex drive constituted other acts evidence, it was actually

improper character evidence under Wis. Stat. § 904.04(1), rather than other acts evidence, because a high libido is not a specific instance of past conduct. *See* 7 Wis. Prac., Wis. Evidence §§ 404.1 and 404.101(4th ed.) (noting that other acts evidence is evidence of specific instances and character is a description of a person's disposition in respect to a general trait). The frequency at which two people in a relationship engage in sex cannot be considered an "act." Additionally, this was not a prior bad act because it is not a crime to have adult-to-adult consensual sexual relations, and it is likewise not wrong. A person's libido is a general characteristic or trait, and therefore is character evidence under Wis. Stat. § 904.04(1), falling outside the scope of the other acts exception.

Further, even if this court agrees an other acts analysis was appropriate, the evidence still should not have been admitted because: (1) it was not admitted for a permissible purpose as it did not show motive or intent or any of the other purposes listed in Wis. Stat. § 904.04(2), (2) it was not relevant because an adult's interest in sex with his adult partner is not indicative of a tendency to assault children, and (3) it was more prejudicial than probative especially in how the state used it to tell the jury it could assume Shane's guilt. *See State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

Failing to object to this improper evidence and argument was deficient. Trial counsel testified he did not object to the statements because an adult enjoying sex with another adult does not indicate he would sexually assault a child. (124:5-7). But a trial

attorney's strategic decisions are entitled to deference only if they were not "based on an 'irrational trial tactic' or 'based upon caprice rather than upon judgment.'" *State v. Domke*, 2011 WI 95, ¶49, 337 Wis. 2d 268, 805 N.W.2d 364 (quoting *State v. Felton*, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983)). Here, trial counsel did not object to repeated discussions of irrelevant character evidence regarding Shane's sex drive with his adult girlfriend—a character trait distinctly unrelated to sexually assaulting a child even when the state was specifically using the evidence to show Shane was more likely to sexually assault a child. Furthermore, he did not move for a mistrial or ask for a curative instruction after this improper character evidence came in. His failure to object, move for a mistrial or ask for a curative instruction was deficient because the state used the evidence to show Shane had a propensity to assault because of his high sex drive and told the jurors they could assume he touched AT for a sexual purpose because of his high sex drive. *State v. Davidson*, 2000 WI 91, ¶86, 236 Wis. 2d 537, 613 N.W.2d 606.

2. Prejudice.

The introduction of the sex drive evidence was prejudicial to Shane's defense in that it served to make him look sex-crazed and like he was capable of sexually victimizing a child. Had counsel objected, the sex drive testimony and statements would have been excluded because "[t]he only inference that can be drawn from the evidence is that because a defendant committed prior act X, he is therefore of such a character and disposition to commit present act Y." *State v. Tabor*, 191 Wis. 2d 482, 493, 529 N.W. 2d 915

(Ct. App. 1995) (citing *State v. Plymesser*, 172 Wis. 2d 583, 592, 493 N.W.2d 367 (1992)). Prohibition of character evidence such as this comports with common sense—someone who lawfully discharges their firearm at a shooting range every day is not more likely to intentionally murder someone. The Wisconsin Court of Appeals has similarly denounced the logic of suggesting that a man of previously unchaste character is more likely to rape a woman. *Milenkovic*, 86 Wis. 2d at 279.

Shane's general sex drive is not related to the specific behavior that was at issue in his trial—high sex drive with adults does not equate to a sexual interest in children. This testimony and opening/closing arguments were prejudicial because it only served to encourage jurors to draw the forbidden propensity inference. The state argued this impermissible propensity in both opening and closing, telling the jury that because Shane had a high sex drive, he touched AT for a sexual purpose: “You will hear that from Lynne, that Shane has a very high sex drive. And so the presumption of course is that [the assault] was for a sexual purpose” and “Shane is described by Lynne, his former girlfriend, as a very sexual person. They had a lot more sex than she's ever had before.... I don't know how this could be for something other than for a sexual purpose.” (119:92 (opening); 122:108-109 (closing)). Likewise, Lynne's testimony that Shane wanted constant sex and that they would have sex even when she told him she did not want to served only to cast him in a negative light. (119:204-205).

In a close case like this with no physical evidence and a young victim who changed her story, evidence that tended to show Shane in a negative way was particularly impactful. As such, the trial attorney's failures to object were prejudicial, and this court should grant Shane a new trial.

- C. Shane is entitled to a new trial because his trial attorney was ineffective in failing to impeach a state's witness with her prior conviction.

Prior to the start of trial, the parties informed the court that one witness, Heather, had one prior conviction. (119:76). At trial, Heather testified on behalf of the state. Heather is AT's aunt and was the first witness to testify at trial. (119:102). She testified that the day of AT's disclosure, AT peed on the floor of her house, which was unusual because AT was potty trained. (119:105). At no time during her testimony was she impeached with her prior conviction. (*See generally* 119:102-115).

The circuit court ruled trial counsel was not ineffective in failing to impeach Heather with her prior conviction because her testimony was true and there would have been no point. (124:55; App. 19). But prior convictions are relevant to the credibility of a witness's testimony. *State v. Kruzycki*, 192 Wis. 2d 509, 524-25, 531 N.W.2d 429 (Ct. App. 1995) (citation omitted). Moreover, it is presumed "that a person who has been convicted of a crime is less likely to be a truthful witness than a person who has not been convicted." *Id.* Because counsel failed to impeach Heather with her prior conviction, the jury was not able to fully and

accurately assess her credibility as a witness. This was significant because Heather was the first one to notice AT's bathroom accident which led to the allegations against Shane. Defense counsel's failure to impeach Heather with her prior conviction was deficient performance which prejudiced Shane. *State v. Smith*, 203 Wis. 2d 288, 300-301, 553 N.W.2d 824 (Ct. App. 1996) (wrongful exclusion of prior conviction reversible error when state's case rested on credibility of witness and no way to know what effect, if any, knowledge of prior convictions might have had on the jury).

- D. Shane is entitled to a new trial because trial counsel was ineffective in failing to seek and introduce the CPS report regarding AT's false allegation that she was sexually assaulted by her cousin.

With no DNA evidence or witnesses to the alleged assault, this trial came down to the jury's credibility determination regarding the 7-year-old AT. The fact that AT previously accused her cousin of sexual assault and then later admitted the assault never actually happened was highly relevant to her credibility and whether her allegation against Shane was false. Shane is entitled to a new trial because he received ineffective assistance of counsel when his trial attorney failed to seek and introduce the CPS report detailing AT's false allegation that she was sexually assaulted by her cousin. These errors were prejudicial because the CPS information was highly relevant to whether Shane was actually guilty and the fact the jury was not able to hear it may well have changed the outcome. The omission therefore undermined confidence in the outcome of the trial.

1. Deficient performance.

Shane's trial attorney was aware that AT had made allegations of sexual assault against her cousin before she accused Shane of sexual assault. He also knew Lynne and Shane had reported that AT had then later admitted that the assault never took place. But trial counsel never asked whether the allegation was ever investigated and never sought the CPS report that confirms that AT had made a false allegation. Trial counsel's failures to seek and introduce the CPS report amounted to deficient performance which fell below an objective standard of reasonableness.

First, had he sought an *in camera* review of the CPS report, the report would have been reviewed and provided to him, as it was to appellate counsel. After the circuit court did the *in camera* review of the CPS report, it said it contained "relevant information material to the defense." (98:2). Second, the court would have had reason to allow the CPS report and evidence of AT's prior false allegation to be disclosed to the jury. While Wisconsin's rape shield law generally prohibits the introduction of evidence of the complainant's prior sexual conduct, there are exceptions including "evidence of prior untruthful allegations of sexual assault made by the complaining witness." Wis. Stat. § 972.11(2)(b)3. The CPS report confirms AT made a prior untruthful allegation. That would have been invaluable impeachment evidence for Shane's defense. The CPS report also contains information material to Shane's constitutional right to present a defense and to confront his accuser in order to reveal "possible biases, prejudices or ulterior motives of the witness as they may relate directly to

issues or personalities in the case at hand.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

The prior false allegation would have been particularly probative in this case where AT changed her story on the witness stand saying on direct examination that Shane had not actually assaulted her and on cross-examination saying she did not remember if he did. (120:77, 86). Evidence of the prior untruthful allegation would also have been valuable to the jury because the allegations against JD and Shane were made in similar ways. It seems in both cases, AT alleged sexual assault after being asked a leading question by a family member. So, in both instances, when asked by a trusted adult if she had been sexually assaulted, AT accused a male in her life. As such, evidence that AT had made a previous allegation against another person at someone else’s suggestion of abuse, and that previous allegation turned out to be false, was not heard by the jury. This evidence was critical to Shane’s defense – just like AT previously accused JD, she falsely accused Shane as a result of a suggestive question.

AT also accused both JD and Shane of the same thing and the accusations were made close in time. She said both JD and Shane had touched her “meme” and she said she told them both to stop and they would not. (5:3; 99:6; 120:85; App. 26). The assault she alleged against Shane (touching her “meme” once for only a moment and not moving his hand in any way) seems unusual. It sounds even less likely to be true when one knows that she made the exact same allegation against someone else only a few months prior and that allegation turned out to be false. (AT

made the allegation against JD in February, 2016 and made the allegation against Shane in June, 2016)(5:2; 99:6).

Finally, the jury knew that AT had been repeatedly sexually assaulted by her grandfather. Jurors may have guessed that such abuse at her young age could confuse AT and may lead to her making false allegations against others. Hearing that AT had in fact made allegations and then admitted they were untrue would have confirmed that hypothesis for jurors leading them to acquit instead of convict. The effect would have been especially significant given that the two accusations were made only a few months apart.

Trial counsel's failures were deficient. Trial counsel's strategic decisions are entitled to deference, unless based on an irrational trial tactic. *Domke*, 337 Wis. 2d 268, ¶49. But trial counsel had no strategic reason for not seeking or introducing AT's prior untruthful allegation. He testified he reviewed the police report that discussed Shane and Lynne saying AT accused her cousin but did not recall ever asking whether the allegation had ever been investigated. (124:14). He further testified he assumed the assault had not happened and also assumed the judge would not allow the evidence to be introduced. (124:14). This testimony is problematic for multiple reasons. First, trial counsel admitted he was aware of the allegation but did not try to find out if the matter had ever been investigated or if there was confirmation that it was a false allegation. As a trial attorney, he knew, or should have known, that prior untruthful allegations are an exception to the rape shield law and thus the court would have had reason

to allow evidence of the untruthful allegation to be admitted. As such, he had no strategic reason for not seeking out and introducing the CPS report.

Defense counsel testified his trial strategy was to try to blame the allegation on the fact that AT was confused because she had been sexually assaulted by her grandfather. (124:19). The circuit court ruled the trial attorney was not ineffective in failing to seek and introduce the CPS report because this was a sufficient strategy. (104:4; App. 36). But what the circuit court failed to address is that introducing the CPS report would have enhanced that strategy significantly and therefore failing to introduce it was deficient performance. Introducing the CPS report would have only helped that strategy because, as discussed above, illustrating to the jury that AT had in fact made a false allegation after being assaulted by her grandfather would have proved to the jury that confusion leading to making a false allegation can, and did, happen. As such, trial counsel had no reason to not seek and introduce evidence of AT's false allegation regarding her cousin.

2. Prejudice.

Trial counsel's failure to seek and introduce evidence that AT made a prior untruthful allegation of assault, only a few months before accusing Shane, prejudiced the defense. This was a close case as evidenced by the fact that the jury acquitted on one count. It involved no physical evidence and the victim was a young girl who had been traumatized by a prior assault by her grandfather and who changed her story on the stand. Evidence that she had made false

accusations of sexual assault in the past and did not know why she did it would have been particularly important for the jury to hear. (99:7; App. 27). Not hearing this evidence undermined confidence in the outcome of the trial. *See Strickland*, 466 U.S. at 694. As such, trial counsel's failure to seek and introduce evidence of AT's prior untruthful allegation constituted ineffective assistance and this court should grant Shane a new trial.

II. This court should order a new trial because the state violated *Brady* and the reciprocal discovery statute.

This court should order a new trial because the state failed to disclose information about the investigation into AT's prior accusation and the fact that it was determined that AT had been untruthful. Before trial, the state had exculpatory evidence helpful to the defense which the state had a duty under Wis. Stat. § 971.23, and under *Brady*, 373 U.S. 83, to disclose. Specifically, Wis. Stat. § 971.23(1)(h) says the state has a duty to disclose "any exculpatory" evidence to the defendant, within a reasonable time before trial and the court in *Brady* held one party's failure to disclose evidence favorable to the other party violates due process where that evidence is material to guilt. *Id.*, at 87.

The suppression by the prosecution of evidence favorable to an accused violates due process when the evidence is material to guilt, irrespective of the good or bad faith of the prosecution. *State v. Harris*, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737 (citing *Brady v. Maryland*, 373 U.S. at 87). Evidence is

favorable to an accused when, “if disclosed and used effectively, it may make the difference between conviction and acquittal.” *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). *Brady* evidence encompasses both exculpatory and impeachment evidence. *Id.* Appellate courts independently review whether a *Brady* due process violation has occurred but accept the trial court's findings of historical fact unless clearly erroneous. *State v. Lock*, 2012 WI App 99, ¶94, 344 Wis. 2d 166, 823 N.W.2d 378. Shane was prejudiced here by the state’s failure to disclose information regarding AT’s prior false allegation and the remedy for this discovery violation is a new trial. *State v. DeLao*, 2002 WI 49, ¶66, 252 Wis. 2d 289, 643 N.W.2d 480.

A. The components of a *Brady* violation.

A *Brady* violation has three components: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence was suppressed by the state; and (3) the evidence is material. *See State v. Harris*, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680 N.W.2d 737 (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

1. The evidence was favorable to Shane.

As discussed in more detail below, it is undeniable that evidence AT made an almost identical allegation against her cousin only a few months before accusing Shane, and then admitted that allegation was a lie, would have been favorable for Shane.

2. The evidence was suppressed by the state - the state was aware of AT's prior allegation and that an investigation had determined AT had been untruthful.

Under certain circumstances, the state's discovery obligations extend to information in the possession of law enforcement but not personally known to the prosecutor. "The test of whether evidence should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence [the prosecutor] should have discovered it." *Jones v. State*, 69 Wis. 2d 337, 349, 230 N.W.2d 677 (1975) (citing *Wold v. State*, 57 Wis. 2d 344, 349-50, 204 N.W.2d 482 (1973); *DeLao*, 252 Wis. 2d 289, ¶22.

In *State v. Wayerski*, the Wisconsin Supreme Court rejected the rule that evidence is suppressed under *Brady* only where the evidence was in the state's exclusive possession and control finding in favor of a more liberal approach that suppression is any nondisclosure or withholding of evidence from the defense and the "prosecutor's mindset or 'passivity' is irrelevant to this suppression inquiry." 2019 WI 11, ¶¶50, 58, 385 Wis. 2d 344, 922 N.W.2d 468.

The United States Supreme Court has also spoken on this issue saying the state's obligation to turn over evidence encompasses evidence "known only to police...and not to the prosecutor." *Strickler*, 527 U.S. at 280-81. Therefore, in order to comply with *Brady*, the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the

government's behalf...including the police." *Id.* (internal quotations omitted).

Here, the Assistant District Attorney knew before trial that both Lynne and Shane had reported that AT had accused her cousin, JD, of sexual assault and later changed her story to deny that it had actually happened. (71:10). The police had additional information they did not disclose to Shane pre-trial namely that they knew from Portage County Health and Human Services records that AT had in fact made the allegation and it had been investigated and a determination was made that AT had lied and no assault had actually occurred. (61:26). This confirmation that AT had made an untruthful allegation of sexual assault only a few months before she accused Shane of assaulting her was clearly exculpatory and should have been disclosed to Shane before the trial.

The circuit court ruled that there was no error because the Assistant District Attorney had no obligation to make himself aware of the CPS report. (104:3; App. 35). But the circuit court misses the point that police are an arm of the state when it comes to discovery duties. *See Jones*, 69 Wis. 2d at 349 (a prosecuting attorney's obligations extend to material in possession of members of his staff and any others who participated in the investigation); *State v. Martinez*, 166 Wis. 2d 250, 260, 479 N.W.2d 224 (Ct. App. 1991) ("We view an investigative police agency which holds relevant evidence as an arm of the prosecution."). This makes sense as the alternative would be that it would be acceptable for different arms of the state to keep information from one another to

the disadvantage of criminal defendants. Here the police were aware of exculpatory information, namely that AT had made a prior untruthful allegation of sexual assault, and yet the state did not turn over all the information known about that allegation to Shane before trial. Such a failure amounts to a *Brady* violation and a violation of Wis. Stat. § 971.23.

Further, the failure to disclose information regarding the investigation and confirmation that AT had lied was in contradiction of Shane's October 27, 2016 pre-trial discovery request which asked the state to disclose: (1) "evidence regarding any present or past mental condition of any witness...or any other information which would affect that person's ability to...tell the truth, or which would affect their credibility," (2) "any evidence...which tends to adversely affect the credibility of any witness," and (3) "any evidence...of any follow-up investigations conducted by law enforcement officers with regard to the possibility that the defendant was not as culpable to the charged crime as originally believed." (7:3-4).

3. AT's prior untruthful allegation was material and would have been admissible had it been disclosed to trial counsel.

The third step in *Brady* asks whether the evidence was material. Evidence is not material under *Brady* unless the nondisclosure "was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281.

The evidence here meets that criteria - it was material and would have been admissible at trial had it been disclosed to the defense. One exception to Wisconsin's rape shield law is that evidence of an alleged victim's prior untruthful allegations may be admissible at trial. Wis. Stat. § 972.11(2)(b)3. Here, under Wis. Stat. § 971.23, the state was obligated to inform Shane of the evidence of AT's prior untruthful allegation even if the court ultimately decided it was inadmissible. But, the court likely would have found the evidence admissible as it meets the exception to the rape shield law and was highly relevant given: (1) the case hinged on a credibility determination because there was no physical evidence or witnesses, (2) AT changed her story on the stand, and (3) AT could easily have been confused and therefore apt to make false allegations due to the trauma she experienced by being assaulted by her grandpa. The state had no good cause for its failure to produce evidence that an investigation had occurred and confirmed AT had been untruthful and because the information would likely have been found admissible and would have had a great effect on AT's credibility in the minds of the jurors, the state's failure to disclose the information it had which confirmed the allegation was untruthful was prejudicial to Shane.

The similarity between the allegation AT made against her cousin, which she admitted was a lie, and the allegations she made against Shane – saying both touched her vagina once and would not stop when she asked them to, made this prior false allegation even more probative. The jury very well may have decided to acquit had it known AT made almost identical

allegations a few months prior to accusing Shane and then admitted those allegations were false saying she did not know why she lied, she just did. This is especially true in light of the fact she had been sexually assaulted by her grandfather from a very young age and would have had unusually advanced sexual knowledge, trauma and confusion from that experience.

The circuit court held there was no *Brady* violation in part because the information in the CPS report was not substantially more exculpatory than what the defense knew at trial. (104:4). The circuit court was incorrect. Before trial, all the trial attorney knew was that Shane and his girlfriend said AT had made allegations against J.D. which she later retracted. Trial counsel could not have done anything with this information at trial. Rumors from the defendant and his girlfriend that the victim made a prior false allegation would never have been admissible. Plus, the jury hearing from Shane and his girlfriend that AT made a false allegation would not have been nearly as credible or persuasive as hearing that professionals investigated the allegation and determined AT had lied. Finally, as discussed above, the information trial counsel had prior to trial was a rumor of some type of alleged sexual assault by JD whereas the CPS report released after trial indicated AT made the exact same allegation against JD as she did against Shane, making the information significantly more probative.

III. This court should grant Shane a new trial because Detective Tracy improperly opined on Shane's guilt and truthfulness and on the veracity of AT's CAC interview in violation of the *Haseltine* rule.

A. The *Haseltine* rule prohibits witnesses from opining on the veracity of other witness's statements.

Generally, “[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.” *State v. Patterson*, 2009 WI App 161, ¶34, 321 Wis. 2d 752, 776 N.W. 2d 602 (citing *Haseltine*, 120 Wis. 2d at 96). Commonly referred to as the “*Haseltine* rule,” it is meant to “prevent witnesses from interfering with the jury’s role as ‘lie detector in the courtroom.’” *State v. Snider*, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W. 2d 784 (cited source omitted). And when the *Haseltine* rule is violated it can constitute prejudicial error, warranting a new trial. *State v. Romero*, 147 Wis. 2d 264, 278, 432 N.W. 2d 899 (1988).

There were multiple *Haseltine* violations in Shane’s case all involving the testimony of Detective Tracy. First, Detective Tracy repeatedly opined on Shane’s guilt during his testimony. (122:26-27). Instead of simply explaining what happened in the case thereby allowing the jurors to draw their own conclusions regarding guilt, Detective Tracy twice told the jury he believed Shane was guilty and told the jury he believed Shane was a liar who had concocted an alternative version of events. (122:26-27, 41, 53). He

also opined on the veracity of statements AT made in her CAC interview saying that a CAC interview is “basically the purest interview you’re going to get with any child,” and that “they are the most comfortable place for [the children] to talk.” (122:52). These statements lent credibility to the recorded CAC interview over the testimony AT provided at trial, which included her denial and uncertainty about whether the incident ever actually took place.

- B. Detective Tracy usurped the jury’s role because his testimony provided his subjective opinion of Shane’s guilt and truthfulness.

Detective Tracy’s testimony largely outlined the chronology of his investigation and the various discussions he had with significant actors, but it also did something else. It provided the jury with his subjective belief about the veracity of Shane’s statements that were videotaped and played for the jury. Specifically, Detective Tracy opined as follows:

- when asked his opinion on whether he “believed that Shane did commit this offense?” he responded “yes.” (122:26-27);
- when asked what he thought about Shane asking what would happen if he were arrested, Detective Tracy responded “I took it that potentially he knew that he did do it, and he wanted to know what would happen to him.” (122:53);
- when asked about Shane bringing up the possibility of accidentally touching AT,

Detective Tracy opined that Shane made up an alternative explanation of accidental touching to cover up his actual story, stating Shane “had a good two weeks to think about this alternative explanation between interviews.” (122:41).

This testimony was repetitious and served one function—to damage Shane’s credibility and bolster the credibility of the children testifying against him. *Patterson*, 321 Wis. 2d 752, ¶36. Detective Tracy’s belief that Shane committed the offense could not assist the jury in assessing Shane’s credibility because he provided them with his subjective opinion, rather than objective observations, which the jury could have analyzed independently from his conclusions. These statements thus served to replace the jury’s fact-finding with that of Detective Tracy’s. As such, they violate the *Haseltine* rule and should not have been presented as evidence to the jury.

Detective Tracy usurped the jury’s credibility determining role in repeatedly opining that CAC interviews should be given more weight than other testimony. At trial, Detective Tracy repeatedly vouched for the veracity of statements AT made in her CAC interview. He said that a CAC interview is “basically the purest interview you’re going to get with any child” and that “they are the most comfortable place for [the children] to talk.” (122:52). In making these statements, Detective Tracy was telling the jury that AT was truthful in her CAC interview and they should give statements from that interview more weight than her testimony at trial. When

Detective Tracy said CAC interviews are the purest look at what really happened, he was not testifying about behavioral indications that AT's account was accurate, nor would he have been qualified to. Instead, Detective Tracy was testifying about the honesty of AT during the interview. As the court wrote in *State v. Krueger*, “[O]pinion testimony as to a particular child may not cross the line by including a subjective determination as to the credibility of the complainant....The fact-finder jury is as capable as the expert of reaching a conclusion about the complainant's truthfulness, and thus, the jury is solely entrusted to do so.” 2008 WI App 162, ¶19, 314 Wis. 2d 605, 762 N.W.2d 114.

C. A new trial should be ordered based on court error or on ineffective assistance of counsel.

Because the statements discussed above were *Haseltine* violations, they should not have been admitted at trial. Shane's trial attorney objected to the *Haseltine* testimony two times. One objection, regarding Detective Tracy saying based on his interviews he concluded Shane was guilty, was upheld, but the testimony was not stricken from the record, and the jury was not provided with an instruction to discount its admission. (122:26-27). Accordingly, its introduction as evidence should be evaluated for circuit court error.

The trial attorney's second objection, to Detective Tracy's comment that he took Shane's question about what would happen to him after arrest to mean that Shane was guilty of the crime, was made

on the basis of speculation, instead of *Haseltine*, and was overruled. (122:53). The third *Haseltine* violation, Detective Tracy saying he believed Shane was lying about an alternative version of events, was not objected to. (122:41). Additionally, Detective Tracy's comments about the veracity of CAC interviews were not objected to. (122:52). These statements that were not objected to should be evaluated under the *Strickland* standard for ineffective assistance of counsel.

1. Deficient performance.

As explained above, trial counsel's performance was deficient because he failed to object to multiple *Haseltine* violations, allowing Detective Tracy to offer his conclusions that Shane was guilty and a liar and that the CAC interview was more trustworthy than other testimony. Trial counsel should have objected when the state elicited testimony from Detective Tracy that Shane was lying and guilty and that the CAC interview was inherently reliable and truthful. Trial counsel could have had no strategic reason for not objecting to the *Haseltine* testimony and thus was deficient.

Although trial counsel is permitted to determine strategy within a "wide range of professionally competent assistance," here no reasonable strategy could involve failing to object to the detective's testimony. *State v. Cooper*, 2003 WI App 227, ¶21, 267 Wis. 2d 886, 672 N.W.2d 118. Allowing another witness to improperly vouch for the credibility of the witness whose testimony the case relies upon, and likewise allowing another witness to testify that the

defendant was lying and guilty, cannot be supported under any competent theory of defense.

Here trial counsel articulated no good reasons for not objecting to the *Haseltine* testimony. He said he could not remember if he considered objecting to Detective Tracy's comments that he believed Shane committed the crime and that Shane created a false alternative explanation of what happened. (124:11-12). He testified he did not move to strike Detective Tracy's testimony that he concluded Shane was guilty because he finds striking to be a waste of time and said he never thought of asking for a limiting instruction. (124:11). Finally, he had no reason for not objecting to Detective Tracy's comments about the CAC interview, saying only that SS's CAC interview was especially weak. (124:12-13). Missing the fact that he should have objected and asked for a limiting instruction, as well as deciding, without any basis, that it would be a waste of time to strike testimony was deficient performance.

2. Prejudice.

The prejudice of trial counsel's deficient performance is determined by looking at the totality of evidence in the trial. *State v. Jenkins*, 2014 WI 59, ¶50, 355 Wis. 2d 180, 848 N.W.2d 786. Here, the state's case rested entirely on AT's statements and on a credibility determination between Shane and AT. There was no physical evidence or eye witnesses at trial to support Shane's conviction.

Given the context of this one-on-one credibility battle, “[t]here was a significant possibility that the jurors ... simply deferred to witnesses with experience in evaluating the truthfulness of victims of crime.” *Romero*, 147 Wis. 2d at 279. Here the jury heard from Detective Tracy, an experienced police officer, that he believed Shane was guilty and untruthful. And as an officer with “ten years” of experience in a police department and a “bachelor’s in law, crime, and deviance,” he had significant experience upon which the jury could rely, thereby giving rise to the “significant possibility” that the jurors would defer to his judgment. (122:9-10). Such testimony was prejudicial to Shane because the jurors would have reason to believe Detective Tracy’s opinion given his experience.

Moreover, Detective Tracy’s comments on the CAC interview were similarly prejudicial. Only the CAC interview video and AT’s testimony at trial served to form the factual basis for Shane’s conviction. But given the inconsistencies of AT’s testimony at trial, first denying then confirming that Shane had touched her then stating she was unsure whether the touching really happened, the state’s case rested even more heavily on the content of the CAC video. Accordingly, admission of Detective Tracy’s testimony supporting the veracity of the CAC video prejudiced Shane by telling the jurors to place extra weight on the CAC video of AT—the only evidence where AT conclusively stated Shane touched her. This testimony “simply went too far, and its effect was to usurp the role of the jury in determining credibility.” *Krueger*, 314 Wis. 2d 605, ¶16.

The level of prejudice presented by this testimony is supported by the jury's acquittal of Shane on the charges against SS. Similarly, to AT, SS gave inconsistent testimony at trial, stating both that Shane touched her and that she did not remember this occurring. (120:92). But unlike with AT, SS's inconsistent testimony at trial was not bolstered by vouching statements about her CAC interview. The interviewer's techniques in SS's CAC interview were the subject of much criticism at trial; to the point that even the state in closing noted that SS's allegations against Shane may be unreliable. (122:103). Without a reliable interview to contrast with her unreliable trial testimony, the jury acquitted Shane of charges against SS.

But for AT, whose CAC video testimony was bolstered by the Detective's objectionable but unchallenged testimony, the jury looked past her inconsistent trial testimony and convicted Shane. Had Shane's trial counsel performed adequately in objecting to the detective's testimony, thus giving the trial court the opportunity to eliminate this testimony from consideration of the jury, the evidence in support of the charges involving AT would have been on more equal footing with those of SS. As a result, there is a reasonable likelihood of a different outcome had this testimony been properly excluded. *See Romero*, 147 Wis. 2d at 279-280 (improper *Haseltine* testimony requires reversible error when "[t]here is a significant possibility that the jurors, when faced with the determination of credibility, simply deferred to witnesses with experience in evaluating the truthfulness of victims of crime."). Accordingly, trial

counsel's deficient performance in failing to object, move to strike, move for a mistrial, or ask for a curative instruction prejudiced the outcome of Shane's trial.

For the same reasons, the circuit court's error—in not striking or informing the jurors to disregard Detective Tracy's testimony that based on his interviews he concluded Shane was guilty—was prejudicial. *See Romero*, 147 Wis. 2d at 280; (122:26-27).

The circuit court ruled only Detective Tracy's comment that he concluded Shane was guilty was inappropriate vouching testimony but said any error in failing to move to strike the testimony was harmless given the strength of the other evidence against Shane. (124:44; App. 8). But the circuit court failed to acknowledge there actually was not a lot of evidence against Shane. There was no DNA evidence and no witnesses and the case rested solely on a 7-year-old's testimony which was inconsistent and involved a denial and a situation where she was confused by other assaults and had made other false allegations in the past.

The circuit court ruled the other comments Shane raised were not inappropriate vouching and thus had trial counsel objected, the objections would have been overruled. (124:49-51; App. 13-15). The circuit court also presumed that even if one of the statements was inappropriate, it did not influence the jury because the jury acquitted on one count. (124:49; App. 13). But that logic fails for the reasons discussed above, namely that the jury may have acquitted Shane

if it were not for the inappropriate vouching comments made by Detective Tracy.

IV. Cumulative prejudice warrants a new trial.

If the court concludes that any of the errors discussed above alone does not constitute prejudicial error, even though Shane maintains that each error does, the cumulative effect of the deficiencies constitutes ineffective assistance of counsel, as well as the error by circuit court, and warrants a new trial. The court may “aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under *Strickland*.” *Thiel*, 264 Wis. 2d 571, ¶60. In determining whether Shane was prejudiced, the court must consider whether counsel’s failure to object to *Haseltine* violations, failure to object to impermissible character evidence of Shane’s high sex drive, failure to impeach a state’s witness with her prior conviction, and failure to seek and introduce the CPS report, prejudiced Shane.

Here, as in most sexual assault cases, credibility was critical, and the errors when considered in the aggregate, leave no doubt that there is a probability of a different outcome. This was a close case as the circuit court recognized in saying “this case was a difficult and uncertain one for both sides” (104:4; App. 36). The court of appeals has noted that “[w]e give special scrutiny to a defendant's claim that he or she was prejudiced by what the lawyer did or did not do when the case is close.” *State v. White*, 2004 WI App 78, ¶11, 271 Wis. 2d 742, 680 N.W.2d 362. All of the

deficiencies described above improperly bolstered AT's credibility or negatively impacted Shane's credibility. As such, this court should order a new trial.

V. This court should order a new trial in the interest of justice.

This court has the authority, under Wis. Stat. § 752.35, to reverse a judgment in the interest of justice. This court independently reviews whether a defendant is entitled to a new trial in the interest of justice under § 752.35. *State v. Williams*, 2006 WI App 212, ¶12, 296 Wis. 2d 834, 723 N.W.2d 719.

The court may consider the totality of the circumstances and determine whether a new trial is necessary “to accomplish the ends of justice.” *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) (quoted source omitted). The court in *Hicks* explained a new trial may be ordered in either of two ways: “whenever the real controversy has not been fully tried” or “whenever it is probable that justice has for any reason miscarried.” *Id.* at 159-160. Wisconsin courts have held that the real controversy was not fully tried in two situations: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *Id.* Shane's claim falls under both categories.

Specifically, the jury had before it: (1) irrelevant and unduly prejudicial character evidence regarding Shane's high sex drive; (2) impermissible testimony on

Shane's guilt and truthfulness; and (3) impermissible vouching testimony on the honesty of AT in her CAC interview. Furthermore, the jury did not get to hear important impeachment evidence due to defense counsel's failure to introduce a prior conviction of a state's witness. The jury also did not get to hear important evidence about AT making a nearly identical false allegation of sexual assault just a few months before she accused Shane. Because the case relied on the jury making a credibility determination about AT, the real controversy was not fully tried without this evidence. Justice was also miscarried by these errors again because the case hinged on AT's credibility and the jury heard evidence it should not have and was not given all the relevant information necessary to assess credibility.

All the errors described above unfairly weighted the trial in the state's favor, and prevented the real controversy—the credibility dispute between Shane and AT—from being fairly and fully tried. Shane should be granted a new trial in the interest of justice.

CONCLUSION

Based on the foregoing, Shane asks that this court vacate his judgment of conviction and order a new trial.

Dated and filed this 12th day of July, 2021.

Respectfully submitted,

Electronically signed by

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 10,603 words.

CERTIFICATION AS TO APPENDIX

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated and filed this 12th day of July, 2021.

Signed:

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