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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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. Shane's trial attorney was ineffective in failing to object to testimony and opening and closing statements regarding Shane's high sex drive.

1. Deficient performance.

Trial counsel was deficient in failing to object to the sex drive evidence. To prove first degree sexual assault, the state must show contact was for a sexual purpose. *See* Criminal Jury Instructions 2102E, 2101A. Contrary to the state's argument, the evidence could not have been irrelevant because it was used to prove a necessary element of the state's case.

Further, if trial counsel believed the comments were irrelevant, he should have objected. The evidence was especially important for the state to prove sexual purpose because the jury heard that any touching, if it had taken place, may have been accidental. (122:40-

41). The evidence also should have been objected to because it was conformity evidence barred by § 904.04.

The argument that trial counsel did not object because he did not want to highlight the issue also fails. The issue was already repeatedly highlighted by the state's comments about Shane's sex drive. While it may be appropriate to forego one objection in hopes the jury would miss one comment, that strategy fails here where the state's case depended on meeting this element and where the state brought up Shane's high sex drive to meet that element numerous times.

It was also unreasonable for trial counsel to only address the comments in his closing. Objecting and getting a favorable ruling from the court would have meant the jury would have heard the evidence was irrelevant or problematic. Additionally, bringing the sex drive evidence up in closing undercuts the state's argument that trial counsel failed to object because he did not want to highlight the issue. If that was true, why would he have highlighted the sex drive evidence in his closing?

The state also claims trial counsel was not deficient because instead of objecting, he chose to focus on blaming the allegations on AT's grandfather. But this was not a sound strategic choice. Objecting to the sex drive evidence would not have weakened trial counsel's arguments about the grandpa but rather would have given the jury another reason to doubt the state's position and therefore adopt the defense's theory.

2. Prejudice.

The state argues there was no prejudice because whether Shane enjoyed sex with his girlfriend was not probative of whether he sexually assaulted AT. But the prejudice comes from the fact that the sex drive evidence was used to prove an entire element of the state's case. The state cannot say now that the evidence was not probative of whether Shane assaulted AT when that is exactly how the state repeatedly argued it at trial. The sex drive evidence was vital to the state's case especially given there was no physical evidence and no witnesses and given that AT changed her story on the stand. Trial counsel's failures to object therefore prejudiced the defense.

B. Shane's trial attorney was ineffective in failing to impeach a state's witness with her prior conviction.

Shane relies on the arguments he made in his initial brief in support of this claim.

C. Trial counsel was ineffective in failing to seek and introduce the CPS report regarding AT's false allegation.

1. Deficient performance.

The state admits trial attorneys have a duty to reasonably investigate matters relevant to defense. It further acknowledges that *Strickland v. Washington*, 466 U.S. 668 (1984), establishes a presumption that a trial attorney will investigate matters thoroughly.

Trial counsel failed in that duty here. He knew there was potential evidence that AT had made a prior false allegation and took no action to follow up to establish that the prior false allegation actually happened and to obtain evidence needed to introduce the fact at trial. His excuse for not seeking it, that he "assumed it didn't occur, and basically the judge wasn't going to let [him] get it in" (124:14) was insufficient because evidence a victim has lied about being sexually assaulted is some of the best evidence possible to prove the person is lying again. It thus was deficient to not investigate such a powerful potential defense.

The state argues the evidence would not have been that helpful because it was not evidence of a prior untruthful allegation but rather a prior "unsubstantiated" allegation and that the report does not say that AT lied. The state is mistaken.

Unsubstantiated in this context means the professionals who investigated the matter believed no assault took place and thus believed AT had lied. These people are experts in child behavior and in investigating assaults and have a duty to protect children. They would have taken action in the case if they believed that an assault had actually taken place. Further, the report does include that AT admitted she lied/recanted about the allegation – it says she told her mom it happened but it really did not. (99:7).

The state cites *State v. Leather*, No. 2010AP354, 2011 WL 1238722, ¶24 (Wis. Ct. App. Apr. 5, 2011)(unpublished) (App. 3-12) but that case differs

from Shane's because the prior assault the defense sought to introduce was not a prior sexual assault and did not involve the victim saying the assault actually never happened, as AT said about JD. Similarly, *State v. Ringer*, 2010 WI 69, ¶7, 326 Wis. 2d 351, 785 N.W.2d 448, does not support the state's argument because there the prior allegation was not false, in fact the perpetrator in the prior incident admitted the conduct. Finally, *State v. Jones*, No. 2013AP1731, 2014 WL 3731998, ¶11 (Wis. Ct. App. July 30, 2014)(unpublished) (App. 13-16) does not assist the state because the allegations there did not involve a CPS investigation or report.

The state's argument that the allegation was probably true also fails. Again, the professionals who investigated the matter would have probed further, taken AT for a CAC interview, or taken some protective action if they believed the allegation could be true. Further, it would be extremely unlikely that the allegations against JD could be true. That would mean this 5-year-old girl was unlucky enough to be sexually assaulted by 3 separate people all within the same year and that 2 of them (Shane and JD) did the exact same thing to her. Those odds are very unlikely. What is more likely is that AT made false allegations because she was confused after being assaulted by her grandpa.

Finally, the state ignores that the circuit court found the CPS report involved a prior untruthful allegation of sexual assault and did not keep the report

from the parties because it involved an unsubstantiated claim. (98:2).

The state says it was acceptable for trial counsel to ignore the prior false allegation and instead focus on AT being confused because she had been assaulted by her grandpa. But adding the evidence of the prior false allegation would have done nothing to detract from the defense. In fact, it would have bolstered that theory because the jurors likely wondered if being assaulted by her grandpa could have confused AT enough to make a false allegation and the evidence of the false allegation she made against JD would have proved that was possible.

Finally, the state claims the evidence was not substantively more exculpatory than the information trial counsel had before trial. This is false. Before trial, all trial counsel knew was that Shane and his girlfriend thought AT had made an allegation against JD. Trial counsel could not have done anything with this at trial as rumors from Shane and his girlfriend would never have been admissible. Trial counsel would have needed the proof that came from the follow up investigation and CPS report, in order to introduce the evidence at trial. Thus, the evidence trial counsel failed to obtain was substantially more exculpatory than what Shane knew before trial.

2. Prejudice.

Shane was prejudiced by trial counsel's failure to obtain and introduce evidence of AT's prior false allegation. The CPS report and information regarding

law enforcement's investigation indicated AT admitted she lied about JD assaulting her and that professionals who investigated the matter believed the allegations were not credible. As stated above, this is some of the best evidence for a sexual assault defense because it speaks directly to the victim's credibility. The evidence would have been particularly helpful in this close case where there was no physical or DNA evidence, no witnesses, and where AT denied the assault on the stand. It was also especially probative and therefore prejudicial to omit because AT alleged Shane and JD did the exact same thing to her only a few months apart.

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

A. The evidence was favorable to Shane.

The first prong of *Brady* asks whether the evidence the state failed to provide was favorable to the defendant. *State v. Wayerski*, 2019 WI 11, ¶35, 385 Wis. 2d 344, 922 N.W.2d 468. This evidence was obviously favorable as it had the power to prove that AT had lied in the past and could be lying again.

The state says the report does not definitely establish AT made a false allegation, does not state AT lied, and was not favorable because it did not mention Shane. The state is mistaken because the report indicates investigators concluded AT lied and it was safe to take no protective action. That Shane is not mentioned in the report is an irrelevant red herring

because there would be no reason for him to be mentioned in a report about an unrelated allegation.

B. The evidence was suppressed by the state.

The state does not deny, and therefore concedes, that law enforcement is an arm of the state and thus has a duty to disclose exculpatory evidence. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

It says there was no suppression because a prosecutor is not required "to wade through all government files in search of potentially exculpatory evidence." *State v. Harris*, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680 N.W.2d 737. But there was nothing to wade through here, rather police had the exculpatory information and failed to produce it to the defense.

The state argues there was nothing to disclose because both parties had all the information regarding AT's allegations against JD before trial. But, as discussed above, Shane did not have the evidence he needed to introduce the false allegation until after trial.

The state also argues the state did not privately deliberate to decide not to disclose. But after *Wayerski*, 385 Wis. 2d 344, ¶58, any nondisclosure or withholding of evidence is prohibited, whether the state exhibited malicious intent or not. Further, Shane

has no way of knowing if police made a willful decision not to disclose the information.

C. AT's prior untruthful allegation was material.

Brady requires that the evidence be material. *Id.*, ¶35. The state's argument that the police investigation and the CPS report were irrelevant fails because the circuit court found the information relevant and material to the defense. (98:2).

The state's argument that the investigation and CPS report were merely duplicative of what the defense already knew also fails, for the reasons discussed above.

Finally, in arguing the result of the trial would have been the same without the error, the state ignores that AT denied she was assaulted at trial in direct contradiction of what she said in the CAC interview. That fact together with evidence of a prior untruthful allegation and AT being traumatized by her grandfather would have left jurors unable to find guilt beyond a reasonable doubt.

D. The state violated the reciprocal discovery statute.

The state failed to disclose information it was required to disclose under Wis. Stat. § 971.23(1). *See State v. Rice*, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517.

As discussed above, the CPS report and fact that police conducted additional investigation was exculpatory and helpful to the defense. The state admits it is "charged with knowledge of material and information in the possession or control of others who have participated in the investigation" and who regularly report…to the prosecutor's office. The facts of this case meet that requirement exactly – the information was in the possession of law enforcement working on this exact case and was not disclosed to the defense in violation of the statute.

The state has also failed to show good cause for its failure. *Id*. The state argues the good case was that the CPS report itself was not obtained by police. The state misses the point. The fact that police looked into the rumor and found out AT had in fact made a false allegation was material to Shane's defense. Had Shane's attorney been aware even that police did this additional investigation, he could have sought the CPS report, as appellate counsel did, and used it as part of his defense at trial. By withholding that information, Shane was left disadvantaged and without information regarding what could have been the strongest part of his defense. It cannot be that the state's failure to obtain the CPS report can be to Shane's detriment – if the branches of the state do not work together, under *Brady* and *Wayerski* that error must disadvantage the state, not the defense.

Finally, the error in failing to disclose was prejudicial for the reasons discussed on p. 9. *See Rice*, 307 Wis. 2d 335, ¶14.

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.

A. Detective Tracy usurped the jury's role because his testimony provided his subjective opinion of Shane's guilt and truthfulness.

Detective Tracy's comments that: (1) he believed Shane committed the crime (122:26-27), (2) Shane knew he had committed the crime (122:53), and (3) Shane had come up with a lie to serve as an alternative explanation of how AT was touched (122:41), were all in violation of *Haseltine*. The comments could not have assisted the jury in assessing Shane's credibility because they were based on the detective's own subjective opinion.

Detective Tracy's comments regarding the trustworthiness of CAC interviews were equally problematic as he told the jury the CAC interview was more reliable than AT's trial testimony where she denied being assaulted.

The state says first that the comments did not violate *Haseltine*. But the circuit court ruled at least one did. (122:26-27). The court erred in not also striking that testimony. Shane's trial attorney was deficient in failing to object to the other problematic testimony for the reasons discussed in Shane's initial brief.

The errors were also prejudicial. Given the case relied on a credibility battle, it was especially problematic that the jury heard from the detective that he had decided about Shane's guilt and that he was lying. Such testimony was prejudicial because jurors would have reason to believe Detective Tracy's opinion given his experience. His comments regarding the trustworthiness of the CAC interview were prejudicial because AT denied the assault occurred on the stand. This meant the state had to rely significantly on the CAC interview in which she said she was assaulted. It was thus significant that Detective Tracy bolstered the reliability of the CAC interview.

The state cited *State v. Smith*, 170 Wis. 2d 701, 490 N.W.2d 40 (Ct. App. 1992) in support of its argument these were not *Haseltine* violations because police can testify about their investigations. But *Smith* differs significantly from this case. First, the officer there was opining on the veracity of another witness's statements, not the defendant's statements. Further, the statements in *Smith* were used to explain why an investigation was continuing. *Id.* at 718. The same is not true here – the statements were not used to show why the investigation started or continued but were rather just comments about Detective Tracy's beliefs about Shane's trustworthiness and the quality of CAC interviews.

Likewise, *State v. Snider*, 2003 WI App 172, 266 Wis. 2d 830, 668 N.W.2d 784, cited by the state, is distinguishable. There the defense argued trial

counsel was ineffective for eliciting testimony that the officer believed the victim, rather than the defendant's, version of events. But that case differs from Shane's because the trial attorney testified she had a specific strategy to bring up the fact the officer had believed the victim all along to show that the officer was biased against the defendant from the very beginning of the investigation. *Id.*, ¶26. Shane's trial attorney had no similar strategy justifying his failure to object.

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

This case is exactly the type which warrants a new trial in the interest of justice. The real issue was not fully tried because the jury heard what it should not have (sex drive statements and Detective Tracy's statements in violation of *Haseltine*) and also did not hear key evidence that should have been presented (that AT had made an identical false allegation just a few months prior and that one witness had a prior conviction). These errors were monumental in such a close case and this court should order a new trial.

CONCLUSION

For the reasons discussed above and in his initial brief, Shane asks that this court vacate his judgment of conviction and order a new trial.

Dated this 25th day of October, 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 2,965 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 this 25th day of October, 2021.

Signed:
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