STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2023AP001377 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COLTON C. SCHNEIDER,

Defendant-Appellant.

On Appeal from Judgment of Conviction and an Order Denying Postconviction Relief, Entered in the Eau Claire County Circuit Court the Honorable Michael A. Schumacher, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Is Mr. Schneider entitled to a new trial based on plain error, interests of justice, or ineffective assistance of counsel because the state introduced evidence and argument barred by the rape shield statute, Wis. Stat. § 972.11(2)(a)-(b)?

Following an evidentiary hearing, the circuit court denied Mr. Schneider's requests for a new trial. This court should reverse and remand for a new trial.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issue will be sufficiently addressed in the briefs. Publication is not warranted because the issue raised involves the application of established legal principles to the facts of this case.

STATEMENT OF THE CASE AND FACTS

The state charged Mr. Schneider with one count of third-degree sexual assault, as a repeater. The complaint alleged that on or about July 31, 2020, Mr. Schneider had sexual intercourse with S.L.[1], without S.L.'s consent. (2:1).

[1] S.L. will be referred to by her initials, pursuant to Wis. Stat. §§ 809.86(1)-(4).

Mr. Schneider entered a not guilty plea. A one-day jury trial occurred on October 11, 2021, where the following evidence was presented.

S.L. met Mr. Schneider online through an app called "MeetMe" in June of 2020. (86:80, 90). S.L. and Mr. Schneider messaged each other nearly every day through the app, and sometimes more than once a day. (86:90). They eventually met at a park, and the second time they met, they kissed. (86:91). They also visited each other's' homes on multiple occasions. (86:91). S.L. stayed overnight at his house once. (86:96).

On July 31, 2020, in the late afternoon, S.L.'s friend Brandi, drove and dropped off S.L. and Mr. Schneider at Lake Altoona. (86:81-82). S.L. and Mr. Schneider swam in the lake and also went on the swing set. (86:82).

It started to get dark, and S.L. and Mr. Schneider went to the public bathroom near the lake. (86:82-83). They began "kissing and fingering." (86: 84). According to S.L., Mr. Schneider laid his towel on the concrete floor, near the entrance of the changing room area, and he took off all of S.L.'s clothes, except for her bra. (86:84). They then had penis-to-vagina intercourse. (86:84). The whole encounter lasted "like five to ten minutes" and he ejaculated inside her. (86:84). S.L. testified that she said "no" three times and that she "didn't want it," but Mr. Schneider did not stop. (86:84, 89).

The encounter ended when S.L. received a message from Brandi saying she was coming to pick them up. (86:85, 94). They each dressed themselves, and Brandi arrived about twenty minutes later. (86:85, 94). Brandi picked them up, and they dropped Mr. Schneider off at his house. (86:85). Brandi testified that after she picked up S.L. and Mr. Schneider, S.L. "had a lot of anxiety and she was quiet", which was unlike her. (86:101).

Brandi and S.L. went to another friend's house, and S.L. eventually messaged Brandi and told her what happened. (86:87). Specifically, S.L messaged Brandi that Mr. Schneider "put his thingy in me ooooooowwwwwyyyyyy." (86:101; Ex. 3 (40)). Brandi became angry and called Mr. Schneider and "texted him trying to see if he would fess up to it." (86:101). Mr. Schneider messaged Brandi in response stating "it didn't go inside her" and "We tried doing shit but we talked about it." (86:102; Exs. 4 & 5(41; 42)). Brandi stayed the night at S.L.'s house and the next morning, they told S.L.'s mother what happened. (86:87-88, 104) S.L. went to the hospital, where she had a forensic exam. (86:88). S.L. then spoke with the police. (Id. at 89).

S.L.'s mother, Michelle, testified that she thought Mr. Schneider and S.L. were just friends. (86:107). The state elicited the following information from Michelle about S.L.'s dating history and S.L.'s readiness to have a sexual relationship:

> STATE: Has she had a lot of boyfriends?
>
> MICHELLE: No.
>
> STATE: Did you talk to your daughter about sex?
>
> MICHELLE: Yes.
>
> STATE: What would you talk about?
>
> MICHELLE: To make sure that she -- before she has it that she has the right person that she wants to spend the rest of her life with and she trusts that person before she has sex, and if she was thinking about having sex to let me know ahead of time so that I can make sure she's on proper birth control and answer any other questions she might have. We talked about what to expect and it should be an enjoyable thing and something special shared between two people.
>
> STATE: Did your daughter ever tell you that she was ready to have sex?
>
> MICHELLE. She has not told me that yet. She's not ready. She's still waiting for Mr. Right.

(86:106; App. 3).

A Sexual Assault Nurse Examiner testified about her forensic exam of S.L.. She observed no injuries, and she collected a medical forensic collection kit from S.L.. A DNA analyst testified that from the forensic kit, a sperm fraction was found on the vaginal and external genital swab, and Mr. Schneider was identified as the source of the sperm samples. (86:128-29; Exh. 7 (44)).

Detective Edward Bell testified about his investigation in this case, including his interviews of S.L. and Mr. Schneider. A portion of Mr. Schneider's interview was played for the jury. Mr. Schneider originally told Detective Bell that he and S.L. just kissed, but eventually he admitted that they had sex. (86:135-136). Part of the video interview that was played included Mr. Schneider's description of S.L. as a virgin: "Considering that she is a virgin and this is her first boyfriend I was her first boyfriend so, [Inaudible]—" (45:4 (Ex. 9 at 4); 51 (Ex. 8 at approx. 6:03); App. 10).

S.L. told Detective Bell that she told Mr. Schneider to stop "twice or so" and that the sexual encounter lasted three minutes total. (86:138-39). S.L. also reported that her phone was in her hand for some of the time while the encounter was happening. (86:139).

The state rested, and Mr. Schneider testified in his own defense. He stated that he and S.L. were dating in June 2020 and had hung out several times prior to July 31, 2020. (86:145-46, 150). Late that day, they went to the beach and swam and went on the swing set. (86:147). Eventually, they went to the changing room, and they began kissing, which lasted approximately ten to fifteen minutes. (86:147-48). At some point, S.L. grabbed Mr. Schneider and led him into the changing room. (86:148). S.L. put Mr. Schneider on the floor and got on top of him, and they had intercourse. (86:148).

Mr. Schneider testified that he did not tell Brandi what happened because sex is an embarrassing subject and agreed that he felt shy discussing it with a strange person. (86:149-150). He also testified that he originally did not tell Detective Bell the truth about having sex with S.L. because he was embarrassed as that's "usually a subject you talk to your significant other about." (86:150-51).

On cross-examination, Mr. Schneider was asked by the state if he was S.L.'s first boyfriend and if S.L. was a virgin:

> STATE: You were her -- in your own words -- her first boyfriend?
>
> MR. SCHNEIDER: Yes.
>
> STATE: She was a virgin?
>
> MR. SCHNEIDER: Yes.

(86:151-52; App. 4-5).

During cross-examination, the state also again referred to S.L. as a virgin: "And it's your testimony that [S.L.] -- the quiet, shy virgin -- got on top of you?" (86:153; App. 6). Mr. Schneider answered "yes." (86:153; App. 6).

In its closing remarks to the jury, the state argued that S.L.'s virginity made her version of events more plausible: "You saw [S.L.] on the stand. You heard testimony about her from her friend and from her mother. She's a quiet, shy 20 year old. When she

met [Mr. Schneider] she had never had a boyfriend. She was a virgin. There's one account that makes more sense than the other." (86:174; App. 8).

Following arguments and closing instructions, the jury found Mr. Schneider guilty of third-degree sexual assault. (86:182; 46).

At sentencing, on January 10, 2022, the Honorable Michael A. Schumacher imposed a nine-year sentence, four years of initial confinement and five years of extended supervision. (85:21; 58; App. 11-12).

Mr. Schneider subsequently filed a notice of intent to pursue postconviction relief. (65). Postconviction counsel filed a motion requesting a new trial under the plain error, interests of justice, or ineffective assistance of counsel doctrines, based on the state's introduction of improper evidence and argument that S.L. was a virgin, which is barred by Wis. Stat. § 972.11(2)(a)-(b) (collectively referred to as the "rape shield" statute). (102).

Following briefing, the court held a hearing on June 9, 2023, where trial counsel testified as the sole witness. Counsel testified that he did not object to any of the complained of evidence because he did not believe it implicated rape shield. (123:6-10; App. 18-22).[2] Counsel testified that he did consider objecting to

[2] Counsel testified that there was a question posed to S.L. about her virginity, and he considered objecting at that point, but decided not to call attention to it. (123:9-10). However, the

the state's closing argument, but he did not want to call more attention to it. (123:10-11; App. 22-23).

Following testimony and argument, the circuit court found that "some of [the statements] individually and then in a totality circumstance [sic] that there would be a violation of the rape shield statute." (123:29; 120; App. 41). However, the court ultimately concluded that the state proved beyond a reasonable doubt that Mr. Schneider was not harmed by this evidence or argument, or alternatively, that he was not prejudiced by the admission of this evidence. (123:28-35; 120; App. 40-47). It also denied his request for a new trial in the interests of justice. (123:28-35; 120; App. 40-47).

This appeal follows. Additional facts will be discussed below as necessary.

ARGUMENT

Evidence that S.L. was a virgin was barred by the rape shield statute and introduction of such evidence deprived Mr. Schneider of a fair trial.

During Mr. Schneider's trial, the state introduced improper evidence and argument that the complainant was a virgin. It is well-settled that the rape shield statute, Wis. Stat. § 972.11(2)(a)-(b),

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record does not reflect that S.L. was asked any questions about her virginity. (See, generally 83:79-89).

precludes admission of "'any evidence'" pertaining to a complainant's prior sexual conduct, which includes lack of sexual activity. *State v. Mulhern*, 2022 WI 42, ¶¶ 40-42, 402 Wis. 2d 64, 975 N.W.2d 209 (holding that the rape shield statute prohibition against admission of, or reference to, prior sexual conduct of the complaining witness included a prohibition of lack of sexual conduct); *State v. Bell*, 2018 WI 28, ¶63, 380 Wis. 2d 616, 909 N.W.2d 750 ("Prior sexual conduct includes a lack of sexual conduct, meaning that evidence that a complainant had never had sexual intercourse is inadmissible.").

Despite this well-established caselaw, the state presented evidence, through testimony by the complainant's mother and Mr. Schneider himself, that the complainant was a virgin. The state then exacerbated this error in its questioning of Mr. Schneider, and in its closing, by arguing that the complainant's virginity made her account of this incident more plausible. This Court should grant Mr. Schneider a new trial based on plain error, the interests of justice, or ineffective assistance of counsel.

A. The rape shield statute bars evidence and argument that a complainant was a virgin, including indirect references to a complainant's lack of sexual activity.

Four decades ago, the Wisconsin Supreme Court recognized that use of a victim's chastity or unchastity as evidence of consent or lack of credibility had been largely abandoned because of the growing recognition

that a person's prior willingness to engage, or not to engage, in sexual conduct bears no logical correlation to either consent or credibility. *See State v. Gavigan*, 111 Wis. 2d 15, 330 N.W.2d 571 (1983) (superseded by statute as stated in *State v. Mulhern*, 2022 WI 42, ¶¶24-26).

Then just last year, in *Mulhern*, the Wisconsin Supreme Court made abundantly clear that the plain language of the rape shield statute prohibits evidence of the complainant's lack of sexual conduct. *Mulhern*, 2022 WI 42, ¶¶ 40-42. In *Mulhern*, the state sought to introduce evidence at trial that the victim had not had sexual intercourse in the week prior to the alleged sexual assault to bolster the victim's version of the sexual assault. *Id.*, ¶¶12-15. The DNA analyst testified that there was sperm found inside the victim's vagina, but it was not a large enough sample to determine whose DNA it was. *Id.*, ¶11. The analyst also testified that a body's natural processes remove foreign DNA in the vagina after a period of five days. *Id.*, ¶11. The victim testified that the defendant penetrated her, and the defendant testified that he had not. *Id.*, ¶¶12-14.

The circuit court allowed the victim to testify that she had not had sex in the week prior to the alleged assault. *Id.*, ¶12. In so deciding, the court reviewed the definition of "sexual conduct" under the rape shield statute, and found that Wis. Stat. § 972.11(2)(a) was limited to affirmative acts so the proposed testimony regarding the victim's lack of

sexual intercourse fell outside the rape shield statute. *Id.*, ¶12.

The Wisconsin Supreme Court reversed. In so deciding that such evidence was barred by rape shield, the Court examined the plain language of the statute. Wisconsin Stat. § 972.11(2)(a) defines "sexual conduct" as "any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style." Wis. Stat. § 972.11(2)(a); *Mulhern*, 2022 WI 42, ¶30. Further, § 972.11(2)(b). prohibits the admission of "any evidence" "concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct." The Court determined that the plain meaning of the § 972.11(2)(a). and (b)., precludes admission of a broad range of evidence related to the "sexual conduct" of the victim, including the lack of sexual experience. *Mulhern*, 2022 WI 42, ¶ ¶30-33.

The Court further held that evidence of a victim's lack of sexual intercourse in the week prior to the sexual assault did not fit into any of the three legislative exceptions, § 972.11(2)(b)1., 2. and 3: 1) Evidence of the complaining witness's past conduct with the defendant; 2) Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered; 3) Evidence of prior untruthful allegations of

sexual assault made by the complaining witness. § 972.11(2)(b)1., 2. and 3.

The Court also refused "to create or recognize any other exceptions not already stated in the text," due to the legislature's amendment to § 972.11(2)(c): "the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b)1, 2 or 3." *Id.*, ¶42, n. 11.

While *Mulhern* was recently decided, the rule that a complainant's lack of sexual conduct is barred by rape shield is well-settled. *See Mulhern*, 2022 WI 42, ¶¶ 23-29 (discussing cases concluding that complainant's virginity is barred by rape shield). There are decades of controlling caselaw that hold the same. *See id.; see also eg. State v. Bell*, 2018 WI 28, ¶ 63 ("Prior sexual conduct includes a lack of sexual conduct, meaning that evidence that a complainant had never had sexual intercourse is inadmissible."); *State v. Mitchell*, 144 Wis. 2d 596, 600, 609, 424 N.W.2d 698 (1988) ("The defendant and state agree that under our prior cases 'prior sexual conduct' includes lack of prior sexual conduct, that is, virginity."). Furthermore, "[t]his prohibition extends to indirect references to a complainant's lack of sexual experience or activity." *Bell*, 2018 WI 28, ¶ 63.

B. The State improperly introduced evidence related to S.L.'s virginity through nearly half of the witnesses at trial, as well as argued in closing that S.L.'s account was more believable because she was a virgin.

The fact that S.L. was a virgin first arose during the testimony of S.L.'s mom, Michelle. Michelle testified that S.L. was not ready for sex, and S.L. had not told her that she was ready for sex. The state then twice questioned Mr. Schneider about S.L.'s status as a "virgin", and played the portion of his interview where he described S.L. as a virgin. Then the state argued that S.L.'s version of events, that Mr. Schneider initiated and continued the sexual intercourse over S.L.'s objection, was more believable and more plausible than Mr. Schneider's account because S.L. was a virgin. As argued *supra*, it is well-established that evidence and argument that S.L. was a virgin, as well as any indirect references to S.L.'s lack of sexual experience, is evidence relating to S.L.'s "sexual conduct" and is therefore barred by the rape shield statute. *Mulhern*, 2022 WI 42, ¶¶ 40-42; *Bell*, 2018 WI 28, ¶ 63.

Introduction of evidence that could be implicated by rape shield must be litigated pre-trial, through a *motion in limine*. See Wis. Stat. § 972.11(2)(d)2.2. ("The court shall determine the admissibility of evidence under subd. 1. upon pretrial motion before it may be introduced at trial."). The state acknowledged this postconviction. (123:26; App. 38). Here, the state failed to litigate this pre-trial, so it

has waived any argument that this evidence was admissible under exceptions to the rape shield statute.

In addition to failing to seek admission of this evidence pre-trial, the fact that S.L. was a virgin was not admissible under the three established exceptions in the rape shield statute. § 972.11(2)(b)1. and 2.: 1) Evidence of the complaining witness's past conduct with the defendant; 2) Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered; or 3) Evidence of a prior untruthful allegation of sexual assault. Wis. Stat. § 972.11(2)(b) 1., 2. and 3.

Evidence that SL was a virgin is not evidence of prior SL's past conduct *with the defendant*, so the first subsection is not implicated. The Wisconsin Supreme Court has held the same: "That exception applies only when the evidence shows the complaining witness's past conduct with the defendant." *Mitchell*, 144 Wis. 2d at 610. Similarly, evidence of being a virgin has nothing to do with "determining the degree of sexual assault or the extent of the injury suffered" so the second exception is not implicated. *See Mulhern*, 2022 WI 42, ¶ 42 (holding that evidence that complainant had not had sex in last five days was barred by rape shield because the State did not use this evidence for a statutory purpose: i.e., to determine "the degree of sexual assault or the extent of injury suffered."). The Wisconsin Supreme Court has previously held that this subsection was "intended, for example, to address

cases where pregnancy or contraction of a disease is an element of the offense." *Mitchell*, 144 Wis. 2d 596, 612 (citing secs. 940.225(1)(a), 940.225(2)(b)). Finally, virginity evidence does not implicate the third exception, a prior untruthful allegation of sexual assault.

1. Michelle's testimony on S.L.'s "readiness to have sex" was barred by rape shield.

Under the rape shield statute, evidence relating to sexual activity or opinions on sexual readiness is barred. Wis. Stat. § 972.11(2)(b). prohibits the admission of "any evidence" "concerning…opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct." Michelle testified that:

- S.L. had not had a lot of boyfriends;
- Michelle discussed sex with S.L.;
- before S.L. had sex, she should make sure it was with "the right person that she wants to spend the rest of her life with and she trusts";
- that if S.L. was thinking about having sex, she should let Michelle know ahead of time to "make sure she's on proper birth control and answer any other questions she might have";
- S.L. never told Michelle that she was ready to have sex;

- In Michelle's opinion, S.L. was not ready because she was still waiting for "Mr. Right."

(86:106; App. 3).

All of this testimony relates to the broad definition of "sexual conduct" as outlined in rape shield, which is defined as "any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style." § 972.11(2)(a). The fact that evidence about whether or not S.L. was ready to have sex, her number of boyfriends, and whether she was on birth control came in through Michelle's "opinion" of S.L.'s life-style, use of contraceptives, and lack of sexual activity makes no difference, because the statute is clear that "opinions of the [complaining] witness's sexual conduct is prohibited." § 972.11(2)(b). And that its related to "lack of sexual activity" instead of actual sexual activity makes no difference—the plain meaning of the § 972.11(2)(a). and (b)., precludes admission of a broad range of evidence related to the "sexual conduct" of the victim, including the lack of sexual experience. *Mulhern*, 2022 WI 42, ¶ ¶30-33.

Consider if the inverse had been presented—if Michelle had testified that S.L. had a lot of boyfriends, had told her she was ready to have sex, was on birth control, and in Michelle's opinion was ready to have sex—this would have all been barred by rape shield. Because this too all falls clearly within the definition

of sexual conduct in the statute and is not relevant. Whether or not S.L. had a lot of boyfriends or few, was or wasn't on birth control, or was or wasn't ready to have sex, is all irrelevant to whether S.L. consented to sexual intercourse with Mr. Schneider on the date in question. *See State v. DeSantis,* 155 Wis. 2d 744, 784–85, 456 N.W.2d 600 (1990) ("The rape shield law expresses the legislature's determination that evidence of a complainant's prior sexual conduct has low probative value and a highly prejudicial effect.").

2. Mr. Schneider's taped statement to police and cross-examination questions about S.L.'s virginity was barred by rape shield.

During the detective's testimony, the state played Mr. Schneider's taped interrogation with the police where he stated that S.L. was a virgin: "Considering that she is a virgin and this is her first boyfriend I was her first boyfriend so, [Inaudible]—" (45:4 (Ex. 9 at 4); 51 (Ex. 8 at approx. 6:03)). Then on cross-examination, Mr. Schneider was asked by the state if he was S.L.'s first boyfriend and if S.L. was a virgin, to which Mr. Schneider responded "yes." The state then again referenced S.L.'s virginity in a question to Mr. Schneider, implying that Mr. Schneider's account was less believable than S.L.'s because S.L. was a virgin: "And it's your testimony that [S.L.] -- the quiet, shy virgin -- got on top of you?" (86:153). Mr. Schneider answered "yes." (86:153).

Once again, all of this evidence explicitly refers to S.L.'s virginity, which is expressly forbidden by the rape shield statute and controlling caselaw. The state's question as to whether Mr. Schneider was S.L.'s "first boyfriend" explicitly relates to S.L.'s lifestyle or lack of sexual experience, so it too, is barred by rape shield. The state's question that "the quiet, shy virgin [] got on top of you" also implies that as a virgin, S.L. would not initiate sex. This too is irrelevant and barred by rape shield, as none of this evidence had any bearing on whether S.L. consented or initiated sexual intercourse on the date in question. *Cf. Heath v. State*, 849 P.2d 786, 788 (Alaska Ct. App. 1993) (explaining that the proposition that "people with no prior sexual experience are less likely to consent to a particular act of sexual intercourse" was "simply the inverse of the argument the rape shield law was designed to forestall" and, therefore, "silently rest[ed] on th[e] forbidden proposition" "that people who have sexual experience are more likely to consent to a particular act of sexual intercourse.").

3. The state's closing argument that S.L.'s account was more believable because she was a virgin was barred by rape shield.

Finally, in its closing remarks to the jury, the state argued that S.L.'s virginity made her version of events more plausible: "You saw [S.L.] on the stand. You heard testimony about her from her friend and from her mother. She's a quiet, shy 20 year old. When she met [Mr. Schneider] she had never had a boyfriend.

She was a virgin. There's one account that makes more sense than the other." (86:174).

This argument expressly told the jury that S.L.'s virginity made her account of the incident more plausible. It also references her mother's testimony on S.L.'s virginity. Again, evidence of a complainant's virginity is barred by rape shield and controlling caselaw. Evidence of lack of sexual conduct is "prohibited because it 'is generally prejudicial and bears no logical correlation to the complainant's credibility.'" *Bell*, 2018 WI 28, ¶63 (cited source omitted).

C. Mr. Schneider is entitled to a new trial due to plain error, ineffective assistance of counsel, or the interests of justice, because the state presented and argued evidence of S.L.'s virginity was a reason to believe her account over Mr. Schneider's, with no objection from defense counsel.

The state violated the rape shield statute when it presented evidence of S.L.'s virginity and argued her virginity made her account more plausible than Mr. Schneider's. This violation denied Mr. Schneider's right to a fair trial and to only be convicted on admissible and relevant evidence. However, trial counsel failed to object to any of this evidence or argument. He simply missed the issue. Although it was the state that violated Mr. Schneider's right to a fair trial, counsel's omission deprives Mr. Schneider of a remedy for the violation unless the claim is reached

as plain error or due to ineffective assistance of counsel. Alternatively, this Court should grant Mr. Schneider a new trial in the interests of justice. Given the flagrancy of the violation and its prejudicial impact, Mr. Schneider is entitled to a new trial under any of these grounds.

1. The state's conduct amounts to plain error, necessitating a new trial without this improper evidence.

Some errors, such as occurred here, are so plain and fundamental that the court should grant a new trial despite the defendant's failure to preserve the error. *State v. Davidson*, 2000 WI 91, ¶88, 236 Wis. 2d 537, 613 N.W.2d 606. Under the plain error doctrine in Wis. Stat. § 901.03(4)[3] a conviction may be vacated when an unpreserved error is fundamental, obvious and substantial. *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. "'[W]here a basic constitutional right has not been extended to the accused,' the plain error doctrine should be invoked." *State v. Lammers*, 2009 WI App 136, ¶13, 321 Wis. 2d 376, 773 N.W.2d 463, *quoting Virgil v. State*, 84 Wis. 2d 166, 195, 267 N.W.2d 852 (1978).

[3] The statute provides, "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." Wis. Stat. § 901.03(4).

If a defendant shows that an unobjected to error is fundamental, obvious and substantial, the burden shifts to the state to show beyond a reasonable doubt that the error was harmless. *Jorgensen*, 310 Wis. 2d 138, ¶23.

The erroneous admission of evidence and argument of S.L.'s virginity warrants reversal as plain error. The erroneous admission of evidence has been held to amount to plain error requiring reversal of criminal convictions. *Id. at* ¶¶53-54 ("jury heard inadmissible, prejudicial evidence that violated Jorgensen's right to confrontation and due process"); *McClelland v. State*, 84 Wis. 2d 145, 162, 267 N.W.2d 843 (1978) (extrinsic evidence showed the defendant was a violent person "who would seek self-help at the point of a gun"). The state's conduct here likewise requires reversal as plain error.

i. The error is fundamental, obvious and substantial.

The state's introduction of virginity evidence and argument improperly infringed on Mr. Schneider's fundamental right to due process under both the Wisconsin and US Constitutions. See U.S. Const. amend. XIV, § 1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law...."); Wis. Const. art. I, § 8 ("No person may be held to answer for a criminal offense without due process of law...."). The fact that Mr. Schneider was convicted based on improper and highly prejudicial character evidence that clouded the main

issue in this case—whether there was consent—deprived him of those due process rights to a fair trial.

Where, as here, the plain error involves the violation of a constitutional right, the issue presents a question of law reviewed de novo. *Bell*, 2018 WI 28, 380 Wis. 2d 616, ¶8.

The state's violation of Mr. Schneider's due process rights is obvious and substantial, given the decades of caselaw and recent Wisconsin Supreme Court case holding that a complainant's lack of sexual activity is inadmissible. *See Mulhern*, 2022 WI 42, ¶¶ 23-29 (discussing cases concluding that complainant's virginity is barred by rape shield)*; see also eg*. *Bell*, 2018 WI 28, ¶ 63 ("Prior sexual conduct includes a lack of sexual conduct, meaning that evidence that a complainant had never had sexual intercourse is inadmissible."); *Mitchell*, 144 Wis. 2d 596, 600, 609 (The defendant and state agree that under our prior cases 'prior sexual conduct' includes lack of prior sexual conduct, that is, virginity.").

ii. The state cannot prove the error harmless.

The erroneous admission of the virginity evidence and argument is harmless only if the state can prove beyond a reasonable doubt that a rational jury would have found Mr. Schneider guilty absent the error. *Jorgensen*, 310 Wis. 2d 138, ¶23. Any claim by the state that it can meet that heavy burden is inconsistent with its heavy reliance on that evidence at trial. Nearly half the witnesses at the one-day trial

introduced evidence on S.L.'s virginity and lack of experience. The state also relied on S.L.'s virginity in closing arguments to establish that S.L.'s account was more plausible because she was a virgin.

The circuit court concluded that Mr. Schneider was not harmed by the admission of this evidence because at trial, S.L. testified more consistently than Mr. Schneider, finding "it's my conclusion that the admission of any evidence about the complaining witness's virginity was harmless beyond a reasonable doubt. (123:31-33; App. 43-45).

While this court reviews the circuit court's legal conclusion that any error was harmless de novo, *Bell*, 2018 WI 28, ¶8, and is therefore not bound by the circuit court's conclusions in this regard, its conclusion that this evidence was not harmful because S.L. was more credible at trial than Mr. Schneider is problematic. The circuit court was not the fact-finder at the trial—it was the jury's role to weigh and determine credibility. Mr. Schneider's request is that he receive a new trial—without this improper evidence and argument—where the jury will be able to consider the case and Mr. Schneider's credibility without this tainted evidence. *Cf. State v. Jenkins*, 2014 WI 59, ¶ 64, 355 Wis. 2d 180, 202–03, 848 N.W.2d 786, 797 ("In assessing the prejudice caused by the defense trial counsel's performance, i.e., the effect of the defense trial counsel's deficient performance, a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible.)"(emphasis removed).

Mr. Schneider provided reasons as to why his account changed—he was embarrassed to discuss his sex life with near-strangers or complete strangers. And there was no third-party witness to what happened in the changing room—the entire case revolved around who to believe. And S.L.'s testimony was not completely consistent—the number of times she allegedly told Mr. Schneider to stop was inconsistent between her testimony and the detective's, as well as the length of time the entire encounter lasted. (86:84, 138-39).

"Erroneously admitted evidence may tip the scales in favor of reversal in a close case, even though the same evidence would be harmless in the context of a case demonstrating overwhelming evidence of guilt." *Virgil v. State*, 84 Wis.2d 166, 191, 267 N.W.2d 852 (1978). No bright-line rule exists to determine when reversal is warranted. *See State v. Mayo*, 2007 WI 78, ¶29, 301 Wis. 2d 642,734 N.W.2d 115.

Here, in this he-said vs. she-said, the improper evidence and closing arguments tips the scales in favor of reversal. Mr. Schneider was denied his right to due process because these errors infected his trial with unfairness. The errors occurred repeatedly throughout the one-day trial; the questions and evidence on S.L.'s virginity were tied to the elements of the offense charged, were highly prejudicial, and inadmissible. Here, the State's evidence and argument that S.L. was a virgin served only to engender sympathy for S.L., bolster her account, and punish Mr. Schneider for "taking" away her virginity. *See Bell*, 2018 WI 28, ¶ 63

(cited source omitted) (Evidence of lack of sexual conduct is "prohibited because it 'is generally prejudicial and bears no logical correlation to the complainant's credibility.'").

2. Counsel's failure to object to the virginity evidence and argument deprived Schneider of effective assistance of counsel.

If relief is not granted as plain error, the court should hold that counsel's failure to object to admission of evidence and argument concerning S.L.'s virginity violated his right to effective assistance of counsel guaranteed by the Sixth Amendment and Article I, § 7. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. "'Ineffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry into culpability. The concern is simply whether the adversary system has functioned properly.'" *State v. Coleman*, 2015 WI App 38, ¶20, 362 Wis. 2d 447, 865 N.W.2d 190, *quoting State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983).

In order to find that counsel rendered ineffective assistance, the defendant must show that counsel's representation was deficient and that he was prejudiced by the deficient performance. *Thiel*, 264 Wis. 2d 571, ¶18, *citing Strickland*, 466 U.S. at 687. Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. *Id*. at ¶19. Counsel's omission is prejudicial if there is a

reasonable probability that, but for the error, the result of the proceeding would have been different. *Id*. at ¶20. This is not an outcome determinative standard. *State v. Marcum*, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). Rather, a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Thiel*, 264 Wis. 2d 571, ¶20. "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" *Id*., *quoting State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985).

Whether counsel was ineffective is a mixed question of law and fact. *State v. Guerard*, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12. The circuit court's factual findings will not be disturbed unless clearly erroneous, but the ultimate issues of whether counsel's performance was deficient and prejudicial are reviewed independently. *Id*.

i. Deficient performance.

If this court agrees that the state's use of the virginity evidence violated rape shield, as the circuit court seemingly concluded, the question of deficient performance is easily resolved. The circuit court found that "some of [the statements] individually and then in a totality circumstance that there would be a violation of the rape shield statute." (123:29; 120; App. 41). However, it did not address the deficient performance prong explicitly in its ultimate ruling, noting that because the state had already proven the error was harmless: "I can go right to the prejudice

analysis…I can find that the defendant has failed to show prejudice based on the rationale that I've already gone through here today." (123:34; App. 46). Regardless of this circuit court's conclusions, this court reviews the question of deficient performance de novo.

Counsel's failure to object was deficient. Counsel testified that none of the evidence challenged—Michelle's testimony and Mr. Schneider's taped statement or cross-examination—did not implicate rape shield. (123:6-10; App. 18-22). As established *supra*, these statements directly related to S.L.'s virginity, lack of sexual experience, or opinion on S.L.'s sexual readiness, and therefore are barred by the plain language of the rape shield statute. But counsel missed this. Counsel was therefore deficient in failing to recognize that this evidence was barred by rape shield and for failing to object to these instances. *see State v. Dillard*, 2014 WI 123, ¶92, 358 Wis. 2d 543, 859 N.W.2d 44 (counsel is required to know or investigate the relevant law); *see also State v. Domke*, 2011 WI 95, ¶46, 337 Wis. 2d 268, 805 N.W.2d 364 (attorney's performance may be deficient if the attorney could have prevented the admission of evidence by making a timely objection but failed to do so).

Regarding the state's closing argument on S.L.'s virginity, counsel testified that he did consider objecting as it did implicate rape shield, but he did not want to call more attention to it: "[O]nce the horse is out of the barn, it's really difficult to put it back in. The difficulty with objecting to the closing argument is that

you draw attention to the statement again. And at that point is it better to draw further attention to it and get a curative instruction which draws further attention to it or try to let it slip by." (123:10-11; App. 22-23).

But again, this was based on counsel's mistaken belief that the rape shield evidence had perhaps only come up once prior, not four other times, through nearly half of the witnesses that testified at the one-day trial. It is unreasonable to allow repeated, prejudicial references to the complainant's virginity to go unchallenged, especially when some of those questions and arguments suggested that S.L.'s version of the incident was more credible than Mr. Schneider's because she was a virgin at the time. This stated "strategy" of not objecting is not entitled to any deference because its not based on an understanding of the facts presented and the applicable law. *Domke*, 337 Wis. 2d 268, ¶49 (Reviewing courts "will not second-guess a reasonable trial strategy, but th[e] court may conclude that an attorney's performance was deficient if it was based on an 'irrational trial tactic' or 'based upon caprice rather than upon judgment.'").

ii. Prejudice

Mr. Schneider was prejudiced by counsel's failure to seek exclusion of S.L.'s virginity evidence and argument. The question of prejudice is not a review of the sufficiency of the evidence. *State v. Sholar*, 2018 WI 53, ¶¶44-46, 381 Wis. 2d 560, 912 N.W.2d 89. "Even where the evidence is sufficient to

sustain the conviction, when a defendant's constitutional rights are violated because of counsel's deficient performance, the adversarial process breaks down and our confidence in the outcome is undermined." *Marcum*, 166 Wis. 2d at 917.

Here, the virginity evidence and argument was prejudicial because it was introduced throughout the trial and the state explicitly used this evidence to argue that S.L.'s account was more believable, more plausible than Mr. Schneider's, because she was a virgin. The reason that evidence concerning a complainant's lack of sexual conduct is because it is "generally prejudicial and bears no logical correlation to the complainant's credibility.'" *Bell*, 2018 WI 28, ¶ 63 (cited source omitted). Here, in a case that centered around whether there was consent, and who to believe, there is a reasonable probability that this inadmissible evidence and improper argument affected the outcome.

Furthermore, the virginity evidence and argument was prejudicial because it had no other purpose than to influence the outcome by "improper means," such as by appealing to the jury's sympathies, provoking its instinct to punish, and asking the jury to base its decision on something other than the established propositions in the case. *State v. Sullivan*, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998). Here, the state's evidence and argument that S.L. was a virgin served only to engender sympathy for S.L., bolster her account, and punish Mr. Schneider for "taking" away her virginity.

Additionally, the state's use of S.L.'s virginity was improper character evidence. A person's character is generally "not admissible for the purpose of proving that the [person] acted in conformity therewith on a particular occasion." Wis. Stat. § 904.04(1); *see also State v. Tabor*, 191 Wis. 2d 482, 490, 529 N.W. 2d 915 (Ct. App. 1995). 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 of lack of sexual conduct is "prohibited because it 'is generally prejudicial and bears no logical correlation to the complainant's credibility.'" *Bell*, 2018 WI 28, ¶ 63 (cited source omitted).

Here, the state used S.L.'s virginity as improper character propensity evidence, which prejudiced Mr. Schneider's defense, because the state essentially argued that S.L. was predisposed towards chastity, and, therefore, was inclined to not consent to sexual intercourse. *Cf. Heath v. State*, 849 P.2d at 788. (explaining that the proposition that "people with no prior sexual experience are less likely to consent to a particular act of sexual intercourse" was "simply the inverse of the argument the rape shield law was designed to forestall" and, therefore, "silently rest[ed] on th[e] forbidden proposition" "that people who have sexual experience are more likely to consent to a particular act of sexual intercourse."); *see also State v. Stroik*, 2022 WI App 11, ¶¶ 41-42, 401 Wis. 2d 150, 972 N.W.2d 640 (evidence of defendant's "high sex drive"

constituted "general character evidence" that was prohibited by § 904.04(1)).

Consider the *Mitchell* case, where the state agreed that evidence that the victim was a virgin was not admissible, but argued that the admission of this evidence was harmless. The Wisconsin Supreme Court agreed, finding that "The complainant was eleven years old, and consent was not an issue. We are not persuaded that the jury would have given more credence to her testimony merely because she testified that she was a virgin." *State v. Mitchell*, 144 Wis. 2d 596, 620, 424 N.W.2d 698, 707 (1988).

Here, consent was the issue—it was undisputed that sexual intercourse occurred. Mr. Schneider testified that S.L. climbed on top of him and initiated the sexual intercourse. The DNA evidence did not shed any light on the issue of consent. And Mr. Schneider provided reasons for why he initially did not admit to sexual intercourse to Brandi and Detective Bell—he was embarrassed to discuss his personal life with strangers. The question for the jury was who to believe—Mr. Schneider or S.L.?

But the state improperly bolstered S.L.'s credibility by introducing her virginity as evidence that S.L.'s version of the sexual encounter was more believable: "And it's your testimony that [S.L.] -- the quiet, shy virgin -- got on top of you?" (86:153). Mr. Schneider answered "yes." (86:153). The state then explicitly told the jury that S.L.'s virginity made her version of the sexual intercourse more plausible:

"When she met [Mr. Schneider] she had never had a boyfriend. She was a virgin. There's one account that makes more sense than the other." (86:174).

Counsel's failure to object to this evidence and argument deprived Mr. Schneider of a fair trial. The state elicited this improper evidence then erroneously argued that this improper evidence made S.L.'s account more believable. Counsel's deficient performance in failing to prevent evidence and argument concerning S.L.'s virginity undermines confidence in the outcome of the trial.

3. Mr. Schneider is entitled to a new trial in the interests of justice.

This court has statutory authority to order a new trial in its discretion in the interest of justice when it concludes that the real controversy has not been fully tried. Wisconsin Statute § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or for a new trial….

As the court explained in *State v. Hicks*, 202 Wis. 2d 150, 159, 549 N.W.2d 435 (1996), the court of appeals possesses this authority even when the trial court has exercised its power to deny a new trial.

As *Hicks* explains, there are two types of scenarios in which a court may conclude that the real controversy was not fully tried: where the jury was erroneously not given an opportunity to hear important and relevant evidence; and the converse, 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.* at 160.

Here, the latter standard is implicated. "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *See Bruton v. United States*, 391 U.S. 123, 131 n.6 (1968). For all the reasons already articulated, the improper and unobjected to evidence and argument that S.L. was a virgin unfairly weighted the trial in the state's favor, and prevented the real controversy—the credibility dispute between Mr. Schneider and S.L.—from being fairly and fully tried. *See State v. Lettice*, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996) (when an error causes a court to question a trial's fairness, it should order a new trial).

The prosecution used S.L.'s testimony about the lack of sexual experience in exactly the same manner that caused the courts and legislature to bar this evidence. It argued to the jury that evidence of her lack of sexual experience proved that S.L. did not consent. Mr. Schneider should be granted a new trial in the interest of justice. *See*, *e.g.*, *State v. Penigar*, 139 Wis. 2d 569, 572, 408 N.W.2d 28 (1987) (real controversy

not fully tried due to the erroneous admission of complainant's false testimony that she had never had sexual intercourse before the alleged assault).

CONCLUSION

For the foregoing reasons, Mr. Schneider respectfully requests that this Court reverse the order denying his postconviction motion, and remand his case with directions to hold a new trial.

Dated this 11th day of October, 2023.

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 7,708 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 11th day of October, 2023.

Signed:
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