STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2023AP2136-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DEREK J. JARVI,

Defendant-Respondent.

ON APPEAL FROM AN AMENDED ORDER GRANTING A NEW TRIAL ENTERED IN LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE DUANE M. JORGENSON, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

ISSUES PRESENTED

A jury convicted Derek Jarvi of second-degree sexual assault of a person under the influence of an intoxicant, Wis. Stat. § 940.225(2)(cm). The charge was based on allegations by "Mia," a coworker, that Jarvi entered her tent during a camping trip and had sex with her while she was heavily intoxicated.

Jarvi filed a postconviction motion seeking a new trial on numerous grounds. The circuit court granted the motion.

The issues on appeal are as follows:

1. Whether it was error for the jury to hear testimony that Jarvi declined to talk to police during the investigation, where Jarvi was never in custody or given *Miranda* warnings, or for the prosecutor to comment in closing—after Jarvi had testified—that Jarvi first told his version of events at trial.

The postconviction court called those references to Jarvi's declining to talk to police before trial "a problem." This Court should hold that those references were all permissible.

2. Whether it was an erroneous exercise of discretion (and if so, whether it was harmless) for the court to strike Jarvi's testimony about words Mia allegedly said indicating consent, where consent was not an element of the crime.

The postconviction court appeared to hold that it wrongly struck some of the testimony and that the error was not harmless, though it did not explain which strikes were erroneous, why, or why those errors were not harmless.

This Court should hold that the circuit court's initial exercise of discretion in excluding the testimony was sound under the circumstances.

3. Whether the alleged errors were harmless and nonprejudicial.

The postconviction court was unsure whether the alleged errors satisfied the harmless error or prejudice standards, but it noted that the trial was "messy" and that Jarvi should have a "clean" trial. This Court should reverse and hold that any errors were harmless and nonprejudicial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request publication. The issues are fact-specific, and a published decision by this Court is unnecessary. The parties' briefs should allow this Court to resolve the issues presented without oral argument, but the State welcomes it if this Court has questions.

INTRODUCTION

Like many sexual assault cases, this was a credibility contest between Jarvi and Mia. Here, the jury believed Mia's version of events, details of which were corroborated by testimony from a witness. After his conviction, Jarvi raised numerous claims of error in a postconviction motion. The circuit court reversed Jarvi's conviction after declaring its original trial "messy" and stating that Jarvi should have a "clean" new trial. In doing so, the court seemingly reversed some of its own discretionary trial decisions, though it did not clearly explain what errors it perceived, and it expressed uncertainty about whether any errors were ultimately harmful or prejudicial. Ultimately, the court told postconviction counsel and the prosecutor that "we can do better" and that a new trial would allow the court and parties to "clean up the mistakes." (R. 153:9–10.)

No trial is error-free; this one was no exception. But granting a new trial to "clean up" mistakes that a postconviction court was unsure were even mistakes to begin with or were reasonably likely to have affected the verdict is not the proper standard for reversing a jury verdict and requiring a new trial. The bottom line is that the alleged "errors" here were not errors, they involved sound exercises of discretion, and they were not reasonably likely to have affected the verdict.

Accordingly, a new trial is unwarranted. This Court should reverse.

STATEMENT OF THE CASE

A jury convicted Jarvi of second-degree sexual assault (sexual intercourse with an intoxicated person), in violation of Wis. Stat. § 940.225(2)(cm). (R. 89.) The conviction was based on allegations by Mia claiming that during a camping trip in September 2020, Jarvi had sex with her when she was too intoxicated to consent to it. (R. 2:2–5.)

A. Mia disclosed the assault about six weeks after it occurred. Jarvi was never arrested or detained by police.

Mia disclosed the assault to police in early November 2020. (R. 2:1.) Mia also had told her friend "Kate," who had organized the trip, immediately after the trip that Jarvi had sex with her while she "was not coherent and could not recall anything." (R. 2:1, 8.)

Police contacted Jarvi shortly after interviewing Mia and Kate. (R. 2:8.) Jarvi initially agreed to meet with the police. (R. 2:8–9.) Later, an attorney contacted police and told them that Jarvi did not want to meet with them. (R. 2:9.) Police asked counsel to contact them if Jarvi changed his mind and told Jarvi's counsel they would be referring the matter to the district attorney for charging. (R. 2:9.)

Shortly after, the State filed a complaint charging Jarvi with second-degree sexual assault of an intoxicated person. (R. 2.) That statute defines the crime as when a defendant:

> (cm) Has . . . sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have . . . sexual intercourse with the person while the person is incapable of giving consent.

Wis. Stat. § 940.225(2)(cm).

Before trial, Jarvi moved to admit an expert witness, Dr. Kim Fromme, who would testify about alcohol-induced blackouts, which "are amnesia for all or part of a drinking event during which time an individual remains fully conscious and capable of making voluntary decisions and executing complex actions," but the person does not remember parts or all of that blackout period. (R. 25:2.) The circuit court excluded Dr. Fromme's proposed expert testimony under Wis. Stat. § 907.02 as not relevant, not the product of applying sufficient facts to an accepted methodology, and an invasion of the province of the jury. (R. 98:91–95.)

B. At trial, Kate and Mia testified that Mia was so intoxicated the night of the assault that she needed assistance walking.

Kate and Mia were friends who worked together at Exact Sciences with Jarvi; the three of them were friendly with each other at work and occasionally got together outside of work. (R. 104:71–75.) Before the camping trip, Jarvi told Kate that he was interested in Mia, but Kate told him that Mia was "seeing someone." (R. 104:77.)

Kate organized an overnight camping trip to Yellowstone Lake State Park in September 2020, and both she and Mia were comfortable with Jarvi joining them. (R. 104:80–81, 178.) They arrived at their campsite in the

early afternoon, where they set up the tents and started drinking. (R. 104:81, 83.) Jarvi made tequila drinks and told Kate and Mia that he had ingested hallucinogenic mushrooms that morning. (R. 104:83.) They then hiked for about an hour and returned to the campsite, where they had two or three more drinks. (R. 104:85, 87.)

Early in the trip, Jarvi started introducing sex as a topic. (R. 104:85–87.) For example, he commented that he thought "it would be cool to be roofied," i.e., drugged and sexually assaulted. (R. 104:180.) At another point, when Mia left the campsite briefly, Jarvi proposed that either he could have sex with Mia or the three of them could all have sex together. (R. 104:85–86, 181.) When Mia returned, Kate told Mia about what Jarvi had said, and Mia said no to both and that she had a boyfriend. (R. 104:85–86, 181.)

The group then went to the lake where they swam and took photographs. (R. 104:88, 90.) At that point, Kate felt buzzed, and Mia was giggly and having fun, but Jarvi seemed to be acting like his normal self. (R. 104:90.) Kate and Mia stripped to their underwear to swim, and they allowed Jarvi to take photos with Kate's phone and to send himself some of the pictures. (R. 104:90–92.) Mia admitted at that point she was "getting pretty drunk." (R. 104:185.) She acknowledged that removing her clothes and swimming in her underwear was not something she would have normally done. (R. 104:185.)

The group returned to the campsite to make dinner. (R. 104:98–99.) Kate stopped drinking "maybe a few hours after dinner." (R. 104:100.) She noticed that Mia and Jarvi still had drinks in their hands into the evening. (R. 104:100.) Kate specifically remembered that Mia at that point had grown quiet and "less giggly." (R. 104:101.) Mia testified that she had had too much to drink by that point. (R. 104:191.)

Mia was also visibly impaired. Kate had to help Mia out of her chair and support her to prevent Mia from stumbling on a walk to the bathroom. (R. 104:108.) At another point in the evening, Mia and Jarvi had walked out to the road. Kate heard Mia yell Kate's nickname loudly and multiple times; at that point, Kate and Jarvi both had to help Mia walk back to the campsite. (R. 104:109–12.)

Kate testified that "[t]he topic came up somehow between who [Kate or Mia] is the better kisser." (R. 104:114.) Jarvi got up and kissed Mia. (R. 104:114.) Kate said that Mia "froze," raised her hands up, and "got really quiet." (R. 104:114.) Jarvi then kissed Kate. (R. 104:114.) Kate said that she was "very much in shock and uncomfortable . . . considering neither of [them] had asked" Jarvi to kiss them. (R. 104:159.) She then said, "in an uncomfortable, joking manner, . . . who is the better kisser," and Jarvi kissed them each again. (R. 104:114–15, 158–59.)

Mia testified that she could remember only bits and pieces from when they returned to the campsite from the lake. (R. 104:190–91.) She remembered Kate holding her up to walk to the bathroom, and that she (Mia) had fallen and scraped her knee. (R. 104:191.) She also threw up at some point, and Kate helped her. (R. 104:192.) She remembered the kissing contest and freezing up when Jarvi kissed her; she felt shocked and confused. (R. 104:193.)

Kate went to bed first; she had a hammock to sleep in. (R. 104:115.) Kate said that Jarvi helped her zip into her hammock and that Mia was still sitting by the fire. (R. 104:115.) At that point, Kate was tipsy, not drunk. (R. 104:115.) Of the three, Jarvi did not show visible signs of intoxication, and his behavior and demeanor "changed the least throughout the night." (R. 104:113, 166–67.)

Mia remembered seeing Kate go into her hammock. (R. 104:194.) The last thing Mia remembered that night was eating chips by the fire and feeling very drunk. (R. 104:194–95.)

The next morning, Mia woke up in her tent and felt cold. (R. 104:195, 97.) The flannel shirt she wore was open, she was wet between her legs, and she was on top of her sleeping bag. (R. 104:196.) Kate and Jarvi were up when she got out of her tent; at one point, Jarvi confirmed with Mia that they had had sex and asked if she was on birth control. (R. 104:198.)

The group packed the campsite and returned home. (R. 104:115–16.) Kate stopped the car on the way back for Mia to throw up. (R. 104:116, 199.) Later that day, Mia called Kate and told her that Jarvi had sex with her the night before. (R. 104:161.) Mia also talked to another friend, her mother, and her boyfriend about the assault. (R. 104:199.)

Mia talked to Jarvi shortly after the camping trip. (R. 104:201.) Jarvi told Mia that she was "into it" and that he performed oral sex on her in addition to intercourse. (R. 104:201–02.) Mia responded that she was drunk and that she had previously made clear to Jarvi that she was not interested in sex with him. (R. 104:201–03.) She also testified that she dislikes oral sex and never would have agreed to allow anyone to do that to her. (R. 104:203.)

Mia said that the encounter traumatized her. It caused her to become fearful, and it became a work issue because she did not want Jarvi near her. (R. 104:204–05.) Mia sought a therapist, went to a rape crisis center, and eventually contacted the police. (R. 104:205–07.)

C. Jarvi initially agreed to speak with police but later declined.

Detective Sergeant Jerrett Cook of the Lafayette County Sheriff's Office interviewed Kate and Mia separately in November 2020. (R. 99:5, 9.) He also reviewed text messages, photos, and videos from the camping trip. (R. 99:11–12.)

The prosecutor asked Cook whether he had "the chance to speak to" Jarvi as part of his investigation. (R. 99:11.) Cook said, "No," but then clarified:

> I did speak to Mr. Jarvi on the cell phone to set up a time to meet with him; however, he called me back and said he couldn't make that meeting.
>
> And then we spoke again about meeting, and then I received a call from . . . his attorney at that time, [who] said that [Jarvi] was retaining an attorney and didn't want to speak with me.

(R. 99:12.) Counsel did not object to that statement, and the State ended its questioning without following up. (R. 99:12.)

On cross-examination, counsel challenged Detective Cook's thoroughness, accuracy, and objectivity in conducting his investigation, emphasizing that it was important for the detective to gather "as much information as possible" and to "find consistency in statements." (R. 99:14.) Cook found it important to ensure that his reports are accurate, to record interviews, and to get as many specific details as possible. (R. 99:14–15.) Counsel also confirmed with Cook that "as law enforcement, you have a means of obtaining additional information . . . such as through a subpoena or search warrant." (R. 99:16–17.)

Counsel then highlighted differences between Kate and Mia's testimony and what was in Cook's reports. (R. 99:18–23, 26.) Counsel brought out that Cook did not record his interview with Mia due to malfunctioning recording equipment. (R. 99:24–25.) Cook agreed, when asked, that

after he interviewed Kate and Mia, he tried "to find other information that might corroborate" either of their statements. (R. 99:26–27.) Cook was aware that there was a human resources investigation related to the incident, but Cook did not attempt to obtain those records. (R. 99:27.)

Counsel followed up, noting that the HR records might have had statements "taken even closer in time to the alleged incident . . . from [Mia], from [Jarvi]." (R. 99:27.) Detective Cook responded that because HR is not trained in investigating or interviewing people, information from that file would not be useful to (and risked tainting) the investigation. (R. 99:27–28.) Counsel also elicited that Detective Cook did not look at the SANE exam, which occurred over a week after the alleged assault. (R. 99:29.)

On redirect examination, the State established that the lack of recording of Mia's interview was accidental and unexpected, that the SANE exam would not have contained any helpful information, and that Mia provided Detective Cook some of her initial correspondence with HR. (R. 99:30–31.) Cook obtained no subpoenas or search warrants during his investigation, but Jarvi was aware of the "investigation at least through HR," and Cook used information from Mia's and Kate's phones. (R. 99:32–33.) Cook "did not get the opportunity to speak with . . . Jarvi or forensically dump his phone, which [was Cook's] normal practice; however, [Jarvi] was uncooperative as far as wanting to interview." (R. 99:33.)

D. Jarvi's testimony was that Mia showed no signs of impairment and that she led him to her tent and initiated intercourse.

Jarvi's testimony about how he met Mia and Kate and their friendly relationship up until the camping trip largely matched Mia's and Kate's descriptions. (R. 99:36, 38–40.) Jarvi admitted that he had "developed somewhat of a crush"

on Mia before the trip. (R. 99:47–48.) He knew Mia had a boyfriend but he thought it was an open relationship, and he stated that he "definitely felt chemistry between [Mia] and myself." (R. 99:46, 47.)

Jarvi also agreed with Kate's and Mia's testimony about how the camping trip started, though he included details of provocative behavior by Kate and Mia. For example, he claimed that on the hike, there was a lot of "horseplay," including piggyback rides, the girls "play" attacking him, or lightly pushing him. (R. 99:52.) Jarvi did not remember proposing a threesome, but when Kate and Mia testified about it, he assumed "that it was probably something to do with our humor that we had, which was of a sexual nature. I wouldn't put it past me to make a threesome joke on a camping trip with two females." (R. 99:56–57.) He also agreed that the three of them drank alcohol throughout the day, but he claimed that Mia's demeanor remained happy and "giggly," which was how she normally was around him. (R. 99:54, 73–74, 91.)

In Jarvi's view, Mia was more comfortable being physical with him when Kate was not present and gravitated toward him after the group went swimming in the lake. (R. 99:68–69.) After swimming, Mia suggested that she and Jarvi go for a walk, took his hand, and kissed him. (R. 99:68.) Mia made a lot of eye contact with him, giggled at his jokes, and touched his tattoos on his chest. (R. 99:69.) Mia generally had "a giggly demeanor" when she was around him, and just before the sexual encounter, Mia "seemed very happy. Full of energy, just, you know, giggly." (R. 99:73, 90–91.)

Jarvi then detailed his version of events, where Mia initiated the sexual encounter after Kate went to sleep in her hammock:

> [Mia] stood up and took me by the hand. . . . She led me to her tent. . . . She let go of my hand and squatted down to unzip her tent flap and looked back at me and

> smiled and then got in her tent and held the flap for me, and I came in with her. . . . She laid down on her back, and I zipped the flap up and turned around and came over to her and started kissing her. . . . I start slowly unbuttoning her flannel shirt and down to start kissing to—down to her panties, which she helps to assist me by taking off—lifting her hips up and taking them off of her heels. I kiss down and begin to perform oral sex on her. . . . [Mia's] moaning, and it's pretty loud, and I'm kind of nervous that [Kate] might wake up, but I continue because she's obviously—the physical signs seem to indicate that she's enjoying it. . . . I had sat up and began to stimulate myself and was putting my fingers inside of her to stimulate her, at which point she took my penis and put it inside of her vagina.

(R. 99:73–75.) Jarvi also stated that Mia kissed him back when he kissed her, that he asked Mia, "Are we doing this?" after they started becoming intimate in the tent, and reiterated that she initiated the penis-to-vagina sex by putting his penis into her vagina. (R. 99:74–75, 85, 109.)

E. Jarvi was convicted and sentenced; the postconviction court granted a new trial.

The jury found Jarvi guilty. (R. 85; 99:170.) The court sentenced him to five years of initial confinement and five years of extended supervision. (R. 85:1.) Jarvi filed a lengthy postconviction motion seeking a new trial based on three sets of claimed errors. (R. 112:1–2.)

First, he claimed that the circuit court erroneously excluded: (1) Jarvi's testimony to the extent that he offered out-of-court statements that Kate and Mia made during the camping trip; and (2) Dr. Fromme's expert testimony. (R. 112:1.) He argued that those rulings violated his due process right to present a defense. (R. 112:1.)

Second, he claimed that the prosecutor committed misconduct by: (1) introducing evidence of and impermissibly commenting on Jarvi's right to pretrial silence; and (2) exploiting the exclusion of Dr. Fromme's testimony by making arguments regarding blackouts that Dr. Fromme could have rebutted. (R. 112:1.)

Third, he claimed that his trial counsel was ineffective by: (1) failing to advocate better for the admission of Mia's out-of-court statements; (2) failing to better advocate for admission of Dr. Fromme's testimony; (3) failing to object to the admission of certain text messages on hearsay grounds; (4) failing to "object to evidence and arguments infringing on Jarvi's right to pre-trial silence"; and (5) failing "to object to the prosecutor's closing [remarks] improperly exploiting the exclusion of expert testimony on blackouts." (R. 112:2.)

He further argued that the cumulative effect of the three sets of alleged errors was not harmless. (R. 112:2.)

There was an evidentiary hearing on the motion, at which Jarvi's trial counsel testified. (R. 130:5.) The circuit court[1] granted Jarvi's motion for a new trial at a separate hearing. (R. 153.) The court's reasoning was not always clear; the State summarizes it below as best as it understands it.

As an initial matter, the court affirmed its original decision excluding Dr. Fromme's testimony. (R. 153:4–7.) It noted that Fromme's testimony did not satisfy Wis. Stat. § 907.02 because it was not based on reliable scientific methods or adequate facts.[2] (R. 153:5.)

---

[1] The Honorable Duane M. Jorgenson presided over both the trial and the postconviction proceedings.

[2] The postconviction court appeared to anticipate reconsidering its decision excluding Dr. Fromme's testimony before Jarvi's new trial, though it also stated confidence in its original ruling. (R. 153:11–12.) Hence, the current law of this case is that

(Continued on next page)

The court granted a new trial, however, apparently based on two perceived errors: (1) the exclusion of portions of Jarvi's proffered testimony as hearsay; and (2) the admission and use of the fact that Jarvi declined to talk to Detective Cook before trial.

As for Jarvi's excluded testimony, the court had "some doubts" that any errors constituted a denial of the right to present a defense. (R. 153:2–3.) Nevertheless, it stated, assuming that its evidentiary rulings were in error, the question was whether those assumed errors were harmless. (R. 153:3.) The court commented that it was not "abundantly clear that [harmless error] has been shown one way or the other," but that that issue was "probably . . . more appropriate for or more looked at from appellate courts." (R. 153:3.)

The court said that the presumed errors occurred several times, and though their importance was "really hard to tell," but "in effort [to] assure that the defendant gets a clean and fair trial, I think I have to lean on the side of the defense in that case." (R. 153:3.) The court went through the additional factors of the harmless error test, noting that the excluded statements were not necessarily corroborated by or duplicative of other testimony, but also that "the State's case ultimately was pretty strong." (R. 153:4.) In all, it stated, "I tend to think it was error [to exclude Jarvi's testimony of Mia's alleged statements] on my part. And . . . I'm not going to find that it was harmless." (R. 153:4.)

The court, however, called the testimony about Jarvi's declining to speak to Detective Cook "more troubling." (R. 153:7.) The court noted that it was "alarmed initially" when Detective Cook testified that Jarvi's counsel conveyed that Jarvi "wasn't going to talk to" Cook. (R. 153:7.) The court

---

Dr. Fromme's testimony did not satisfy Wis. Stat. § 907.02. That ruling was correct, and the State does not raise it as an issue in this appeal.

noted that since it concerned a pre-arrest investigation, "there's really no *Miranda* violation there. But to draw it to the attention of the jury I thought was problematic." (R. 153:7–8.) Still, the court concluded, there was no objection to Detective Cook's statement, and that nonobjection was not deficient because it was reasonable and strategic under the circumstances. (R. 153:7–8.)

The court stated that if Cook's remark was the only mention of Jarvi's declining to tell his version of events before trial, that Cook's testimony "would've been basically harmless." (R. 153:8.) Yet, the prosecutor also stated in closing words to the effect of, "this is the first time that we're hearing" Jarvi's version of events. (R. 153:8.) That remark was "a problem" based on "the case law." (R. 153:8.) Nevertheless, the postconviction court left its discussion at that and never concluded that the prosecutor's closing remarks were prosecutorial misconduct (as Jarvi framed the claim in his postconviction filings), or plain error. (R. 153:8.)

The court then addressed and rejected the ineffective assistance of counsel claims: "I have trouble with the notion that [trial counsel] violated [Jarvi's] right to effective assistance . . . . I thought [counsel] did an exceptional job of trying this case." (R. 153:8.) The court noted that since there was not a pretrial hearing at which the parties could hear Jarvi's testimony, the parties and court had to address his testimony "on the fly" during trial. (R. 153:8.)

The court ultimately granted the request for a new trial. (R. 153:9–10.) It opined that there were multiple, though not significant, errors at trial, and expressed uncertainty whether they were harmful or prejudicial, but ultimately stated that Jarvi should receive a "clean" trial:

> In any event, . . . I am going to grant the request for a new trial in this matter. I think there's too many . . . issues of . . . error, not a lot in terms of . . . significance. But the confusion and the concern

> on the part of the court, whether or not some of these are harmless as opposed to a constitutional violation and whether or not they would also constitute a change in what the verdict would be. I do think that, in total, when I take the . . . entire view of the . . . trial, I think that is warranted. Because I think it's important that a defendant know and receive a clean trial and I think we can do better. And I think we can clean up the mistakes, clean up the errors, and perhaps have everyone be better prepared for what it is that we're going to be trying.

(R. 153:9–10.) It entered an order vacating Jarvi's conviction and ordering a new trial. (R. 144.) The State appeals.

ARGUMENT

As argued below: (1) none of the references to Jarvi's declining to speak to Detective Cook were errors; (2) the trial court soundly excluded Jarvi's testimony quoting Kate and Mia; and (3) even if there were any errors, they were harmless and nonprejudicial.

I. The statements regarding Jarvi's declining to meet with Cook during the investigation were permissible.

The postconviction court granted a new trial in part based on its concerns that the jury may have improperly heard: (1) testimony from Detective Cook that Jarvi declined to meet with him; and (2) the prosecutor's remarks at closing that Mia and Kate did not have the chance to hear Jarvi's version of events before they testified. (R. 153:7–8.) However, those and similar statements were permissible and did not violate due process or the Fifth Amendment.

A. Jarvi alleged multiple legal theories of relief.

As a housekeeping matter, the proper framework for these claims is ineffective assistance of counsel.[3] Jarvi's counsel did not object to these alleged errors, and therefore he forfeited direct review of them. *State v. Haywood*, 2009 WI App 178, ¶ 15, 322 Wis. 2d 691, 777 N.W.2d 921.

Plain-error review, which "allows appellate courts to review errors that were otherwise [forfeited] by a party's failure to object," is not warranted. *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis. 2d 138, 754 N.W.2d 77; *see also* Wis. Stat. § 901.03. That doctrine is used sparingly and only when an error is fundamental, obvious, and substantial. *Jorgensen*, 310 Wis. 2d 138, ¶¶ 20–21.

Granting a new trial based on prosecutorial misconduct is a discretionary decision. *State v. Lettice*, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). "When the seriousness of prosecutorial misconduct and the weakness of evidence of guilt cause us to question a trial's fairness, we will not hesitate to reverse the resulting conviction and order a new trial." *Id.* (citation omitted). Yet "[r]eversing a criminal conviction on the basis of prosecutorial misconduct is a 'drastic step' that 'should be approached with caution.'" *Id.* (citation omitted). Such claims warrant a new trial only if the error is not harmless. *Id.*

That said, Jarvi is not entitled to relief under either the ineffective-assistance, plain-error, or prosecutorial-misconduct analyses, because the use of the complained-of statements at trial were not errors.

---

[3] Below, Jarvi framed his arguments on these points as prosecutorial misconduct, plain error, and ineffective assistance of counsel. (R. 112:26–30, 38.) The postconviction court was not clear on which framework it applied when it granted a new trial. (R. 153:9–10.)

B. The complained-of statements were that Jarvi declined to meet with Detective Cook.

There are three pieces of testimony that Jarvi claimed counsel should have objected to (R. 112:27–28):

- When the State asked whether Detective Cook had "the chance to speak to" Jarvi during his investigation, Cook said that he and Jarvi had set up a time to meet, Jarvi cancelled, they spoke again to set a new date, and then an attorney called Cook saying that Jarvi had retained him and that Jarvi "didn't want to speak with" Cook. (R. 99:12.)
- After counsel cross-examined Cook and asked about subpoenas and search warrants, the State on redirect elicited that Cook did not issue any such warrants to search Jarvi's phone—a step he'd normally take in such a case—because Jarvi "was uncooperative as far as wanting to interview." (R. 99:32–33.)
- After Jarvi testified, the prosecutor had Jarvi confirm that he listened to all of the witnesses, he reviewed the criminal complaint, he did not give a statement to Cook, and he did not give a statement to the prosecution before trial. (R. 99:87–88.)

Jarvi also challenged the following argument by the prosecutor in closing (R. 112:1, 28–30):

- The prosecutor asked the jury, in weighing credibility, to consider how Mia and Kate testified compared to how Jarvi testified, noting that Mia and Kate "had no idea what [Jarvi's] story was until he said it today. They didn't get the opportunity to come up with an explanation or refute any of the things that he said." (R. 99:119–20.)

Statements regarding a defendant's pretrial silence can violate the constitution in two ways. First, it is a due process violation under the Fourteenth Amendment for the State to impeach a non-testifying defendant with his silence after he receives *Miranda* warnings. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *State v. Brecht*, 143 Wis. 2d 297, 316, 421 N.W.2d 96 (1988). Second, it is a Fifth Amendment violation for the State to use as evidence of guilt or for impeachment purposes a defendant's silence following a valid invocation of his right to silence. *Jenkins v. Anderson*, 447 U.S. 231, 238–40 (1980).

The State did neither here, but Jarvi advanced a hybrid theory: that the State impermissibly referenced his pretrial silence multiple times in violation of his "due process and Fifth Amendment rights" under *Doyle*, 426 U.S. at 619, and *Brecht*, 143 Wis. 2d at 316. (R. 112:28–30; 138:17–19.) Though the postconviction court called Detective Cook's first reference "troubling" and the prosecutor's closing remark "a problem," it did not discuss the other references or explain why any of them were errors. (R. 153:7–8.) As explained herein, the complained-of statements violated neither the Fifth Amendment nor due process.

C. The due process analysis under *Doyle* and *Brecht* is inapplicable because Jarvi was never in custody or given *Miranda* warnings.

The United States Constitution and Wisconsin Constitution recognize that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; Wis. Const. art. I, § 8.[4] To protect a suspect's

[4] Wisconsin courts interpret article I, section 8 of the Wisconsin Constitution to provide identical rights to the Fifth Amendment. *State v. Sorenson*, 143 Wis. 2d 226, 260, 421 N.W.2d 77 (1988). As shorthand, the State references only the Fifth Amendment when discussing those rights.

Fifth Amendment rights at the time of arrest and custody, the Supreme Court mandated *Miranda* warnings as a prophylactic safeguard. *Doyle*, 426 U.S. at 617. Those warnings, which must be provided to a person held in custody for a crime, inform the accused that they have a right to remain silent, that anything they say can be used against them, and implicitly, that their post-*Miranda* silence cannot be used against them. *Id.* at 618–19.

Accordingly, the prosecution may not use a defendant's post-*Miranda* silence to impeach a defendant. *Id.* at 619. Such use violates the Due Process Clause of the Fourteenth Amendment because it contradicts the government's assurances through *Miranda* warnings that the defendant's silence will not be used against him at trial. *Id.* at 618–19.

Brecht, which Jarvi relied on in his postconviction filings (R. 112:29–30), is a Wisconsin case applying *Doyle* to hold that the prosecutors violated Brecht's due process rights by referencing Brecht's silence after he received *Miranda* warnings. *Brecht*, 143 Wis. 2d at 315–17.

Therefore, the due process analysis from *Doyle* and *Brecht* only applies to an accused's silence *after* he has received *Miranda* warnings (or after a point in time where he should have received *Miranda* warnings). *Jenkins*, 447 U.S. at 238–40; *see also Salinas v. Texas*, 570 U.S. 178, 188 n.3 (2013) (plurality opinion) (explaining that the due process analysis in *Doyle* does not apply when the suspect has not been arrested or received *Miranda* warnings). *Doyle* and *Brecht* do not prohibit a prosecutor from using pre-arrest and pre-charging silence to impeach the credibility of a defendant who testifies at his own trial. *Jenkins*, 447 U.S. at 238–39; *State v. Sorenson*, 143 Wis. 2d 226, 256, 421 N.W.2d 77 (1988).

Here, Jarvi was never taken into custody and never in a position to require *Miranda* warnings. Because Jarvi never received or required *Miranda* warnings, there was no post-*Miranda* silence for the State to impermissibly reference at trial. Accordingly, the references here to Jarvi's declining to speak to Detective Cook during the investigation did not violate due process. For the same reasons, the prosecutor's references to Jarvi's pre-trial and pre-arrest silence to impeach him after he testified were wholly permissible. *Sorenson*, 143 Wis. 2d at 256.

D. The statements did not violate Jarvi's Fifth Amendment rights.

Jarvi also argued that the State violated his Fifth Amendment rights by using his pre-arrest and pre-*Miranda* silence, because he invoked his right to silence when his retained attorney contacted Detective Cook and told him that Jarvi did not want to speak with him. (R. 138:17.) That claim fails because Jarvi never personally invoked his Fifth Amendment right to silence, and the law is clear that a defendant's attorney cannot invoke the right on his behalf.

Though the Fifth Amendment applies to a person before they are in custody or given *Miranda* warnings, a person voluntarily talking with police and who is not subjected to any official compulsion must expressly and personally invoke their Fifth Amendment right to silence. For example, in *Salinas*, 570 U.S. at 185–86, a plurality of the Supreme Court concluded that the prosecution's use at trial of petitioner's noncustodial silence during a voluntary interview did not violate the Fifth Amendment, because the petitioner never expressly invoked his Fifth Amendment privilege and was never prevented from invoking it.

The constitutional right to avoid self-incrimination is personal to the accused, only "he alone can exercise those rights." *State v. Hanson*, 136 Wis. 2d 195, 212–13, 401 N.W.2d 771 (1987). "Therefore, no one but the accused can make the decision to make a statement to the police or to ask for the assistance of counsel in making his decision." *Id.* "[I]n pre-charge circumstances, a third-party *such as an attorney*, a family member, or a friend may not invoke, on behalf of the suspect," the accused's constitutional right protecting against self-incrimination. *State v. Stevens*, 2012 WI 97, ¶ 64, 343 Wis. 2d 157, 822 N.W.2d 79 (emphasis added); *accord State v. Ward*, 2009 WI 60, ¶ 58, 318 Wis. 2d 301, 767 N.W.2d 236 ("[W]e emphasize that the decision whether to invoke the [Fifth Amendment] right to counsel is personal to the suspect, and cannot be made by anyone else.").

Here, Jarvi treats his counsel's conversation with Cook as an invocation of his Fifth Amendment right to silence. (R. 138:17.) But under *Stevens*, *Ward*, and *Hanson*, only Jarvi himself could have validly invoked his right to silence. In this case, he never did.

Accordingly, the complained-of remarks indicating that Jarvi declined to meet with Cook were permissible. For the reasons given *supra*, Detective Cook's statements, the prosecutor's questions to Jarvi, and the prosecutor's closing arguments did not involve post-*Miranda* silence or post-invocation silence. Hence, the remarks were not error, and counsel was not deficient for not objecting to them.

E. The prosecutor's closing remarks were not misconduct.

The postconviction court stated here that the prosecutor's closing remarks "basically saying . . . this is the first time that we're hearing [Jarvi's] story . . . from him and . . . I think, ultimately, that when you look at the case law, I think that's a problem," though it did not explain that

conclusion any further. (R. 153:8.) The State assumes for purposes of appeal that the postconviction court agreed with Jarvi's argument that *Brecht* precluded the prosecutor from making that observation in closing. (R. 112:29–30.)

As explained *supra*, the prosecutor's closing remarks were permissible and did not violate *Brecht* or any of Jarvi's constitutional rights. As noted, *Brecht* does not apply here because the prosecutor's impermissible closing comments there referenced Brecht's post-*Miranda* silence. *See Jenkins*, 447 U.S. at 240.

Further, it is permissible and not a violation of Fifth, Sixth, or Fourteenth Amendment rights for a prosecutor to remark during closing that the defendant had the chance to listen to all the testimony and evidence against him and to tailor his version of events accordingly. *Portuondo v. Agard*, 529 U.S. 61, 65–66 (2000). In *Agard*, the prosecutor "argued that respondent was a 'smooth slick character . . . who had an answer for everything,' and that part of his testimony 'sound[ed] rehearsed.'" *Id.* at 63–64 (alteration in original) (citation omitted). Over an objection by defense counsel, the prosecutor further remarked:

> You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> . . . . .
>
> That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?
>
> . . . . .
>
> He's a smart man. I never said he was stupid . . . . He used everything to his advantage.

Id. (alterations in original) (citation omitted).

The Court upheld those remarks as permissible because they asked the jury to do something it was "perfectly entitled to do"; such arguments were aimed at impeaching the defendant's credibility (as opposed to implying that pretrial silence is evidence of guilt). *Agard*, 529 U.S. at 65–70; *see also Jenkins*, 447 U.S. at 240–41 ("[T]he use of prearrest silence to impeach a defendant's credibility does not violate the Constitution.").

The prosecutor's closing remarks here are on all fours with the remarks in *Agard*. The prosecutor asked the jury to compare Jarvi's testimony to Kate's and Mia's, to consider how his memory was strong only when it benefitted him, to consider that he was able to tailor his version of events to fit within the evidence presented, and that Kate and Mia did not have that same advantage. (R. 99:119–20.) Like in *Agard*, the prosecutor here was permitted to impeach Jarvi after he testified, just as she could any other witness. And her remarks did not ask the jury to do anything impermissible, i.e., to equate Jarvi's pretrial silence with guilt. Rather, she asked the jury to consider the witnesses' relative knowledge of one another's testimony when weighing credibility, which the jury is both entitled and instructed to do. *See Agard*, 529 U.S. at 65–70; Wis. JI–Criminal 300 (2023).

Accordingly, the postconviction court was wrong to the extent that it deemed the prosecutor's closing remarks to be improper in this regard.

F. Because Jarvi failed to identify any errors, he is not entitled to a new trial.

As noted, Jarvi's claims here should be limited to the ineffective-assistance rubric to the extent that counsel never objected at trial to most of the statements. The only exception was when counsel objected after the State, on cross-examination, had Jarvi confirm that he never gave Detective Cook a statement. (R. 99:88.) The court responded

that the fact that Jarvi never met with Cook was already in evidence, and said to "move on." (R. 99:88.)

The court's ruling on that objection was not erroneous. Detective Cook had already stated that Jarvi, after initially agreeing to talk, later decided against meeting with Cook. (R. 99:12.) As argued above, Detective Cook's statement did not violate Jarvi's Fifth or Fourteenth Amendment rights and was not improper, because Jarvi never was in a position to need *Miranda* warnings and never invoked his Fifth Amendment rights. Therefore, the State's confirming that fact with Jarvi was not a violation.

Additionally, the postconviction court determined that counsel did not object to Detective Cook's statement for strategic reasons. (R. 153:7–8.) Though counsel denied having a strategy at the time regarding Detective Cook's statement (R. 130:23), the postconviction court indicated that at the time, it believed a non-objection would have been a reasonable strategy (R. 153:8). The court's determination that counsel's non-objection was, in effect, objectively reasonable at the time supported its conclusion that counsel was not deficient in that respect. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (requiring defendant to "show that counsel's representation fell below an objective standard of reasonableness").

And, as argued above, none of the remaining statements involved constitutional violations or any other type of error, misconduct, or deficient performance. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel cannot be deficient for failing to raise a meritless objection). Accordingly, Jarvi is not entitled to a new trial based on these claims.

II. The trial court soundly exercised its discretion when it excluded parts of Jarvi's testimony.

The trial court did not erroneously exercise its discretion in excluding Jarvi's testimony quoting either Mia or Kate, because it was not relevant to any elements or facts of consequence in this case. Though Jarvi raised these challenges in multiple forms—violation of his constitutional right to present a defense, ineffective assistance of counsel for failing to argue hearsay exceptions, and plain error—for simplicity the State argues that the trial court, in excluding Jarvi's testimony quoting Kate and Mia, soundly exercised its discretion, which defeats these claims regardless which rubric applies.

A. The court excluded six statements from Jarvi quoting certain things Kate and Mia said during the trip.

At trial, the State successfully objected to on hearsay grounds Jarvi's proffered testimony about the following things that Kate and Mia allegedly said before and during the assault:

- Kate told Jarvi to "put a shirt on" after she saw Mia touching Jarvi's tattoos. (R. 99:58–59.)
- Kate and Mia said to Jarvi, "Come on. Let's see what you're made out of —" when the three went swimming. (R. 99:62.)
- That Mia asked Jarvi if he wanted to kiss while they were walking together. (R. 99:68.)
- Kate "exclaiming" something after she saw Jarvi kiss Mia during the kissing contest. (R. 99:70.)
- After Mia allegedly led Jarvi to her tent, he said, "Are we doing this?" and she said, "Yeah." (R. 99:74.)

- During sex, Mia was "saying affirmations." (R. 99:75–76.)

Nevertheless, Jarvi was able to testify that Mia never told him she was not interested in a sexual relationship with him; that she reciprocated his flirting and seemed to respond to their alleged sexual chemistry; that she touched his tattoos when he took off his shirt; that she initiated a kiss with him when they walked alone at one point; that she led him by the hand to her tent; that she laid down in the tent and removed her clothes; and that she guided his penis into her vagina. (R. 99:58, 68–69, 73–76.) Jarvi also testified that Mia was not overly intoxicated and her demeanor was similar to how she normally was around him. (R. 99:73, 85, 91.)

In his postconviction motion, Jarvi asserted that the court's rulings excluding that testimony were erroneous and violated his constitutional right to present a defense, and alternatively, that counsel was ineffective for not arguing why the remarks satisfied hearsay exceptions. (R. 112:10–14, 34.) He also argued that the court's rulings discouraged him from offering the following additional potential testimony:

- Mia said, "I just kissed you!" during their walk; they kissed again, Kate called out to them, and Mia said, "We should go back."
- During the kissing contest, Mia told Jarvi to tell Kate that she's the better kisser "so she doesn't think I'm better than her."
- That when Kate decided to go to sleep, she asked Mia multiple times to go to bed, but Mia told her she was fine and that she wanted to stay by the fire.
- That Mia said, "C'mon, let's go" to Jarvi when she led him to her tent.
- That Jarvi was initially unable to become erect, Mia said, "What's wrong?" and then she "began manually

stimulating Jarvi to assist him before engaging in intercourse."

- Mia said, "Yes," "Oh God," and "Yeah" during sex.
- Both Jarvi and Mia said "Wow" after sex.
- "When catching her breath inside the tent, [Mia] said, 'It's so hot' to which Jarvi said, 'Mm-hmm.'"
- The next day at work, Kate told Jarvi that Mia's boyfriend broke up with her after Mia told him about Jarvi's sleeping with her.

(R. 112:9–10.)

Jarvi argued to the postconviction court that all of these statements were relevant and admissible as to Mia's consent, including whether she in fact consented, whether she was capable of consent, and Jarvi's knowledge that she was incapable of consent and his purpose to have intercourse with her in that state. (R. 112:6–14.)

Without explaining why or addressing the individual exclusions, the postconviction court "tend[ed] to think" its decisions striking Jarvi's various quotes of Mia and Kate were "error on [its] part." (R. 153:3–4) It disagreed that the exclusions amounted to a violation of Jarvi's constitutional rights. (R. 153:2.) Yet it granted a new trial, stating that there were a lot of "issues . . . of error," and that while those errors were not significant individually, "the confusion and the concern on the part of the court, whether or not some of these are harmless as opposed to a constitutional violation and whether or not they would also constitute a change in what the verdict would be." (R. 153:9.)

For the reasons below, the trial court's evidentiary decisions excluding portions of Jarvi's testimony were sound exercises of discretion.

B. The complained-of statements were excludable because they were irrelevant.

Here, the court appeared to exclude the complained-of statements as hearsay because Jarvi was offering Kate's and Mia's out-of-court statements for their truth. The State concedes that the alleged statements "[i]t's so hot," and "I just kissed you," arguably satisfy the present-sense-impression hearsay exception, and the alleged exclamations during and after intercourse arguably satisfy the excited utterance hearsay exception. Wis. Stat. § 908.03(1)–(2). Accordingly, the statements arguably were admissible under those hearsay exceptions, which counsel did not raise at trial.

Still, this Court will uphold a trial court's evidentiary decisions "if there is any reasonable basis for the trial court's ruling." *Sielaff v. Milwaukee County*, 200 Wis. 2d 105, 109, 546 N.W.2d 173 (Ct. App. 1996). Here, the proposed statements were excludable as irrelevant.

The threshold question for admissibility of evidence is relevance. Wis. Stat. § 904.01. Relevant evidence has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* In this case, the excluded statements were not relevant evidence of Mia's consent, her level of intoxication, or Jarvi's knowledge of her intoxication.

As an initial matter, consent is not an issue in or a consequential fact to a prosecution for sexual assault of an intoxicated person. Wis. Stat. § 940.225(4). Thus, in this case alleging that Jarvi violated Wis. Stat. § 940.225(2)(cm), evidence of "words and overt actions" of Mia "indicating a freely given agreement to have sexual intercourse or sexual contact" are not relevant or admissible because Mia could not freely consent based on her condition. Wis. Stat. § 940.225(4). Even if Mia had made overt statements expressing consent,

those statements are not relevant because "without consent" was not an element or an issue in this case.

That said, statements by a victim expressing consent may sometimes be relevant in a section 940.225(2)(cm) prosecution. "[E]vidence relating to consent *may be relevant* to the elements that refer to the victim being incapable of giving consent." Wis. JI–Criminal 1212 n.3 (2022) (emphasis added). Yet none of the excluded (or proposed) statements here bore on Mia's capacity to consent or Jarvi's knowledge of that capacity.

Of the six statements that the circuit court excluded, three were alleged statements by Kate: (1) telling Jarvi to "put a shirt on," (2) saying, "Come on. Let's see what you're made out of —," and (3) exclaiming something during the kissing contest. (R. 99:58–59, 62, 70.) None of those statements have any arguable bearing on whether Mia had capacity to consent at the relevant time, Jarvi's knowledge of Mia's incapacity, or Jarvi's purpose in having sex with her.

The same is true regarding the three remaining statements where Mia allegedly: (1) asked Jarvi if he wanted to kiss when they went for a walk; (2) said, "[y]eah" after he asked if they were "doing this"; and (3) was "saying affirmations" during sex. (R. 99:68, 74–76.) Mia allegedly made the first statement before the sexual intercourse occurred; accordingly, it is not probative of whether Mia was incapacitated later. As for the remaining two statements, Jarvi seemingly offered them to reflect that Mia used words indicating consent. Again, Mia's two statements on their own do not bear on her capacity at the time of the intercourse or Jarvi's knowledge of that capacity.

The additional statements that Jarvi claims he would have introduced but for the court's rulings are of the same flavor as the excluded statements. (R. 112:10.) Mia's statements hours or the day after the intercourse do not tell

us whether she was incapacitated during the intercourse. Her alleged statements just before, during, and after the intercourse say little about whether she had capacity to consent, had no bearing on Jarvi's knowledge of her capacity, and had no bearing on his purpose.

Importantly, the content of her statements would have told the jury nothing about her capacity to consent. And nothing about the court's rulings preventing Jarvi from quoting Mia prevented counsel from asking or Jarvi from testifying *how* Mia was speaking and otherwise acting, which would be relevant to her level of intoxication, her ability to consent, and Jarvi's knowledge of that level of intoxication. At bottom, Jarvi seems to be complaining that excluding Mia's statements prevented him from disputing her capacity and his knowledge of it. But nothing about the court's ruling prevented Jarvi from testifying that Mia did not seem too drunk to consent, that she walked him to her tent, that she initiated the sexual intercourse, that her demeanor was similar to her normal self, that she was speaking coherently, that she physically steady, that she was not slurring her words, that she made eye contact with him, and so on.

And to the extent that Jarvi alleges that the court's rulings prevented him from introducing some of Mia's conduct—for example, that Mia allegedly manually stimulated him in the tent (R. 112:10)—nothing about the trial court's rulings would have barred that Jarvi from testifying about that conduct.

In his postconviction filings, Jarvi heavily relied on *State v. Prineas*, 2012 WI App 2, 338 Wis. 2d 362, 809 N.W.2d 68, in arguing that the trial court's rulings were erroneous. (R. 112:12–14; 130:21; 138:2–3.) There, Prineas was charged with second-degree sexual assault, Wis. Stat. § 940.225(2)(a), which unlike section (2)(cm), requires the State to prove the absence of consent. *Prineas*, 338 Wis. 2d 362, ¶ 16. And there, the trial court excluded on hearsay grounds statements that

the victim allegedly made to Prineas when he assaulted her. Those exclusions were erroneous because the statements were relevant to the "without consent" element of the crime. *Id.* ¶¶ 16–20. That court further held that the excluded statements were not excludable on hearsay grounds because they were admissible either as non-hearsay or under the state-of-mind hearsay exception. *Id.* ¶¶ 16–20.

Prineas is inapplicable here. There, "without consent" was an element and the key issue of the sexual assault alleged in that case. Here, "without consent" was not an issue. The *Prineas* decision offers no insight on assessing when or how a victim's specific words are relevant in a case involving Wis. Stat. § 940.225(2)(cm) or other cases where "without consent" is not an element and affirmative consent is not a defense.

Accordingly, this Court should uphold the trial court's exercises of discretion when it excluded Jarvi's statements about what Mia and Kate allegedly said to him during parts of the camping trip. As a result, Jarvi's constitutional right to present a complete defense was not violated. *State v. Cardenas-Hernandez*, 219 Wis. 2d 516, 536, 579 N.W.2d 678 (1998) ("[T]here is no constitutional right to present irrelevant evidence."). And counsel was not deficient for failing to argue hearsay exceptions. *Wheat*, 256 Wis. 2d 270, ¶ 14.

III. Any errors were harmless, and Jarvi cannot establish prejudice.

For errors to be harmless, the State must demonstrate that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). The standard is "essentially consistent" with the standard for prejudice in ineffective-assistance cases, except that under *Strickland*, the defendant bears the burden of

proof. *Id.* ¶ 41 (citing *State v. Dyess*, 124 Wis. 2d 525, 544, 370 N.W.2d 222 (1985)).

In considering harmless error and prejudice, this Court must consider the totality of the evidence presented at trial. *State v. Hunt*, 2014 WI 102, ¶ 29, 360 Wis. 2d 576, 851 N.W.2d 434. While "harmless error is not subject to a precise mathematical formula," *State v. Monahan*, 2018 WI 80, ¶ 63, 383 Wis. 2d 100, 913 N.W.2d 894, multiple non-exhaustive factors may assist the analysis, including: the prevalence and "importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense [and] . . . the State's case; and the overall strength of the State's case." *Hunt*, 360 Wis. 2d 576, ¶ 27.

Similarly, to show prejudice, Jarvi "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (quoting *Strickland*, 466 U.S. at 694); *see Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citation omitted) ("[T]he difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' The likelihood of a different result must be substantial, not just conceivable.").

A. Any errors in excluding Mia's statements before, during, or after the intercourse were harmless and nonprejudicial.

Because the alleged oral expressions of consent here were not relevant, Mia's statements allegedly expressing consent were not important to his defense or to the State's case. To that end, none of the excluded statements were probative of Mia's degree of intoxication or her capacity to consent. All of the statements Jarvi claims should have been

admitted—brief affirmations or observations—were words that a highly intoxicated person could say and thus were not particularly probative of Mia's incapacity or Jarvi's understanding of it. Again, nothing about the circuit court's rulings prevented Jarvi from testifying about Mia's actions and *how* she spoke—i.e., whether she was slurring her words, using complete sentences, speaking coherently—which would have been relevant and probative to her capacity and Jarvi's awareness of it.

To the extent that Jarvi was unable to quote Mia, Jarvi nevertheless painted a vivid picture of his observations of Mia supporting his defense that she was capable of consenting and that he had no knowledge that she was not. Jarvi testified that after swimming, Mia suggested that she and Jarvi go for a walk, that Mia took his hand, and that she initiated a kiss with him. (R. 99:68.) Jarvi claimed that Mia seemed more comfortable being physical with him when Kate was not present. (R. 99:68.) He also stated that he and Mia had chemistry and that after they swam in the lake, Mia seemed to gravitate toward Jarvi more than Kate. (R. 99:69.) According to Jarvi, Mia made a lot of eye contact with him, giggled at his jokes, and touched his tattoos on his chest. (R. 99:69.)

Jarvi also testified that Mia generally had "a giggly demeanor" when she was around him and that just before the sexual encounter, Mia's "seemed very happy. Full of energy, just, you know, giggly." (R. 99:73, 90–91.) Jarvi then detailed his version of events where Mia initiated the sexual encounter after Kate went to sleep in her hammock:

> [Mia] stood up and took me by the hand. . . . She led me to her tent. . . . She let go of my hand and squatted down to unzip her tent flap and looked back at me and smiled and then got in her tent and held the flap for me, and I came in with her. . . . She laid down on her back, and I zipped the flap up and turned around and came over to her and started kissing her. . . . I start

> slowly unbuttoning her flannel shirt and down to start kissing to—down to her panties, which she helps to assist me by taking off—lifting her hips up and taking them off of her heels. I kiss down and begin to perform oral sex on her. . . . [Mia's] moaning, and it's pretty loud, and I'm kind of nervous that [Kate] might wake up, but I continue because she's obviously—the physical signs seem to indicate that she's enjoying it. . . . I had sat up and began to stimulate myself and was putting my fingers inside of her to stimulate her, at which point she took my penis and put it inside of her vagina.

(R. 99:73–75.) Jarvi also stated that Mia kissed him back when he kissed her, that he asked Mia, "Are we doing this?" after they started becoming intimate in the tent, and reiterated that she initiated the penis-to-vagina sex by putting his penis into her vagina. (R. 99:74–75, 85, 109.)

Based on the evidence that Jarvi did present, his claims of things Mia said to him leading up to and during the assault was cumulative to and less probative than the actions Jarvi described. For example, Jarvi's testimony that Mia led him into the tent, took off her clothes, moaned in pleasure when he had oral sex with her, and guided his penis into her vagina conveyed his point that Mia either instigated the sex or was a proactive and willing participant. Accordingly, Jarvi's testimony that Mia also said, "C'mon, let's go" before leading him by the hand to the tent, that she affirmed when he asked whether they were "doing this," that she said affirmations during the sex, and that she said "Wow" afterward would not have added anything to make his version of events more credible or persuasive. (R. 99:74; 112:10.)

Further, the comparative strength of the State's case supports the conclusion that any errors were harmless. The postconviction court found that "the State's case ultimately was pretty strong," given that the jury believed Mia's version of events over Jarvi's. (R. 153:4.) Mia testified that Kate had to help her walk to the bathroom, and that she (Mia) had

fallen and scraped her knee. (R. 104:191.) Mia and Kate both remembered Mia throwing up that day or evening. (R. 104:100, 192.) Both also remembered the kissing contest, that Jarvi initiated it and did not ask if he could kiss them, and that Mia froze up and got quiet when Jarvi kissed her. (R. 104:114, 193–94.) Mia described feeling shocked and confused. (R. 104:193.)

Mia's version of events had support in Kate's testimony. Kate corroborated that Mia was not interested in Jarvi beyond friendship and that Mia was extremely intoxicated before the assault to the point that she needed assistance walking and getting up. (R. 104:78, 108–09.) Kate also noted that Jarvi throughout the day and night showed the fewest signs of intoxication. (R. 104:113, 166–67.)

In contrast, Jarvi's version of events was that he and Mia had palpable chemistry, that Kate seemed jealous of them, that Mia initiated kissing and physical contact with him, that she invited him into her tent, that she welcomed a series of sexual acts by Jarvi, and that she initiated sexual intercourse with him. That version of events did not square with evidence that Mia had expressed to Jarvi that she was not interested in him, or acknowledge Mia's and Kate's testimony that Mia was extremely intoxicated that night. Allowing Jarvi to also testify that Mia allegedly made affirmations or statements such as, "yeah," "Wow," "I just kissed you," or "It's so hot," would have added nothing to make his version of events (which again, he was able to vividly describe based on Mia's alleged conduct) more believable.

B. The statements about Jarvi's declining to talk to Cook also were harmless.

For the same reasons, there was no harm or prejudice resulting from any alleged error with regard to Detective Cook's testimony about Jarvi declining to speak with him, the prosecutor's cross-examination of Jarvi, or the

prosecutor's closing remark that Jarvi did not share his version of events until trial. As an initial matter, only references to post-*Miranda* silence would be included in the harmless error analysis. *Brecht*, 143 Wis. 2d at 317–18. Again, there were no references to post-*Miranda* silence here. To the extent it was improper for Cook to testify about Jarvi's declining to talk to him before Jarvi testified, or for the prosecutor to note that Jarvi provided no statements to the State at all before trial, those were infrequent and cumulative of the relevant, admissible statements that Jarvi did not meet with Cook during Cook's investigation.

What's more, none of the complained-of statements even arguably rose to an impermissible assertion that the jury should consider Jarvi's declining to talk to Cook as evidence of guilt. Again, all that Detective Cook said was that Jarvi at first seemed willing to talk but ultimately declined. He said those things to explain the steps he would normally take investigating sexual assault allegations and why those steps did not happen in this case. At no point was there a suggestion that the jury should consider Jarvi's declining to talk to Cook as evidence of guilt.

And the prosecutor's cross-examination of Jarvi and remark in closing likewise were nowhere close to an argument that the jury should consider Jarvi guilty because he did not talk to police. Rather, the prosecutor simply argued obvious facts: Jarvi heard all the evidence at trial, whereas Kate and Mia did not have an opportunity to hear his version of events until after they testified.

Finally, the prosecutor's remark in closing was a minor point; it consisted of three or four sentences in a 20-page summation. The overarching theme of closing argument was not focused on Jarvi, but rather on Mia's lack of motivation to lie, based on not just her testimony but her demeanor and conduct (which included tears and visible fear), as well as Kate's similar lack of motivation to lie. (R. 99:130, 134–37.)

The bottom line is that the jury here believed Mia over Jarvi, and nothing about the alleged errors called that credibility determination into question. Thus, even assuming that the jury should have heard Jarvi quote some of Mia's statements and should not have heard that Jarvi did not talk to Cook before trial, the errors were harmless. For the same reasons, Jarvi cannot demonstrate that counsel's failures to argue for admission of his proffered hearsay testimony or to object to particular testimony by Detective Cook was prejudicial.

CONCLUSION

This Court should reverse the decision of the postconviction court granting a new trial and remand with instructions to reinstate the judgment of conviction and to enter an order denying the motion for a new trial.

Dated this 23rd day of July 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,674 words.

Dated this 23rd day of July 2024.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of July 2024.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General