STATE OF WISCONSIN

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

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Appellant,

v. Case No. 2023AP2136-CR

DEREK J. JARVI

Defendant-Respondent.

ON APPEAL FROM ORDER GRANTING POSTCONVICTION MOTION FOR A NEW TRIAL, ENTERED IN THE LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE DUANE JORGENSON, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

COLE DANIEL RUBY
Attorney at Law
State Bar #1064819

Martinez & Ruby, LLP
620 8th Ave
Baraboo, WI 53913
(608) 355-2000
cole@martinezandruby.com

Attorney for Defendant-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Constitutional Provisions Cited

STATEMENT OF THE ISSUES

1. Whether striking Jarvi's testimony regarding remarks made by the complainant surrounding the sexual encounter and reflecting both her ability to consent and Jarvi's belief that she consented, denied Jarvi's constitutional right to due process and the right to present a defense.

Postconviction, the circuit court acknowledged that this exclusion was error and was not harmless beyond a reasonable doubt, so it granted a new trial.

2. Whether exclusion of the defense toxicologist's testimony regarding alcohol consumption and blackouts, and how that evidence relates both to a person's degree of intoxication and whether others can perceive a blackout state, denied Jarvi's constitutional right to due process and the right to present a defense.

The circuit court excluded this evidence before trial on various grounds, including that it was irrelevant and that it invaded the province of the jury. The court reiterated postconviction that it believed the proposed testimony obfuscated the real issue and was not admissible as framed.

3. Whether Jarvi's trial counsel provided ineffective assistance by:

a. Failing to make an offer of proof regarding the admissibility of the complaining witness's remarks, as well as additional remarks attributable to the complainant known to counsel at the time of trial;

b. Failing to object to improper commentary on Jarvi's right to silence; and

c. Failure to object to the prosecutor's arguments improperly exploiting the exclusion of Dr. Fromme.

The circuit court offered general commentary that it thought Attorney Anderson did an excellent job overall, but did not explicitly rule on the ineffective assistance claims. It did conclude that Det. Cook's testimony infringed upon Jarvi's right to silence, and the prosecutor's closing argument improperly commented on the issue, and this error warranted a new trial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested, but would be welcomed if the court deemed it necessary.

Publication is also not necessary; this case is controlled by ***State v. Prineas***, 2012 WI App 2, 338 Wis.2d 362, 809 N.W.2d 68, because it involved a nearly identical situation: a sexual assault charge, a consent defense, a credibility battle, the trial court improperly striking the defendant's testimony about the complainant's statements before, during, and after sex as hearsay, and the judge instructing the jury to disregard the defendant's testimony. The State argues a distinction based on the different charge (sexual intercourse with an intoxicated person), claiming that a complainant's statements bearing on consent have no relevance. This is obviously wrong, so a published decision could preclude such spurious arguments by the government in similar cases in the future.

This case also involves the court's exclusion of a defense expert in toxicology offering testimony about the impact of alcohol consumption on memory, how blackouts occur at varying degrees of intoxication, and how a person experiencing a blackout appears to outside observers. No published cases in Wisconsin directly address the relevance of such testimony to a charge under Wis. Stat. sec. 940.225(2)(cm), so this issue may warrant publication.

SUPPLEMENTAL STATEMENT OF THE CASE

A. Introduction

Derek Jarvi tried to tell his side of the story at trial on a he-said she-said sexual assault, including testifying about remarks made by his accuser, Mia, before, during, and after the sexual encounter. But the circuit court repeatedly struck Jarvi's testimony about Mia's statements as hearsay, admonishing Jarvi in front of the jury and instructing the jury to disregard his testimony. This evidence was directly relevant to Jarvi's defense—that Mia was sober enough to give consent, and that the sexual intercourse was consensual—as well as disproving elements of the offense, including that Mia was incapable of giving consent, that Jarvi knew she was incapable of giving consent, and that Jarvi had the purpose of having sex with someone incapable of consent. Postconviction, the court correctly concluded that this error, along with evidence and arguments impermissibly infringing upon Jarvi's right to pretrial silence, was not harmless and warranted a new trial.

B. Trial testimony

Two competing narratives emerged at trial—(1) the State's narrative, that Jarvi knowingly sexually assaulted Mia when she was too intoxicated to voluntarily consent to sex; and (2) the defense narrative, that Mia voluntarily consented to sex with Jarvi, that she wasn't too intoxicated to give consent, and that Jarvi believed Mia was a willing participant. The State's brief adequately summarizes the trial testimony and postconviction litigation (Appellant's Br: 9-21), with certain key exceptions, for which the defense will supplement.

First, there was a complete lack of *objective* evidence regarding Mia's degree of intoxication at the time of sex. For a violation of sec. 940.225(2)(cm), element #3 required the State to prove Mia was "under the influence of an intoxicant to a degree which rendered her incapable of giving consent." There

was no blood test result available to indicate Mia's blood alcohol level during this encounter. The only way to evaluate her "degree" of intoxication was anecdotally, based on information remembered by Mia, Kate, and Jarvi.

Mia testified she had a couple of tequila mixed drinks, one earlier in the day after Jarvi set up the tents, and one later in the day (R104:179). She subsequently drank a couple of White Claws and went swimming (R104:182). Mia felt "pretty drunk" while taking photos (R104:183). Later she felt "very drunk," threw up, and needed help going to the bathroom (R104:191-92). Kate verified that she and Mia both threw up, but testified that happened earlier in the day, after the first tequila drink, and Mia threw up shortly after (R104:100). She later observed Mia stumbling, unsteady on her feet, and needing help walking to the bathroom (R104:107-08). Significantly, however, Kate never described Mia having any of those problems during her interview with Det. Cook (R104:19-20). Additionally, Kate observed those behaviors earlier in the night, and didn't recall whether Mia displayed those problems later that night, or whether she was starting to sober up (R104:160).

Jarvi testified he had no reason to believe Mia was too drunk at the end of the night to consent to sex (R99:85). He acknowledged seeing Mia drink several alcoholic beverages, but her drinking occurred over the course of a full day at camp, after arriving around 1:00 pm, and eating dinner around 8:30 pm (R99:51-67). Jarvi also testified to several other activities occurring after dinner, including going for a walk with Mia, the kissing contest with Mia and Kate, and sitting by the fire with Mia after Kate went to bed (R99:67-73). Jarvi saw Kate throw up, but never saw Mia throw up (R99:85,100). He also denied seeing Mia have difficulty walking (R99:99-100).

Second, since Mia lacked memory of the sexual encounter, she also lacked memory as to whether she gave

consent. Although Mia testified she told Jarvi earlier that she didn't want to have sex (R104:181,187), she had virtually no memory of the time between sitting by the fire with Jarvi eating chips and salsa after Kate went to bed, and waking up alone in her tent the next morning (R104:194-95). She specifically didn't recall if Jarvi asked her to have sex, or going into her tent (R104:199). In other words, she had no memory of sex with Jarvi, what led to sex, or whether she gave consent in fact.

Third, although the State's brief summarizes Jarvi's testimony (Appellant's Br: 15-17), and the statements excluded by the circuit court (Appellant's Br: 31-32), those summaries remove important contextual facts, including the judge's admonitions of Jarvi in front of the jury, and instructions to the jury to disregard his testimony.

Jarvi testified about events that led him to believe Mia had romantic feelings for him to support the idea that this was a consensual encounter, including how Mia acted around Jarvi after they'd been naked together, kissing him while going on a walk together, and kissing again during the kissing contest (R99:68-69,85). But Mia had denied any memory of going for a walk with Jarvi, and claimed that any kissing incidents with Jarvi made her feel uncomfortable and shocked, and were not something she wanted (R104:181,193-94).

The statements excluded by the court as hearsay involved Jarvi's attempt to describe these events, including statements made by others. For example, after Jarvi denied Mia making any statements indicating she didn't want to sleep with him, Attorney Anderson asked what happened after returning to the campsite to get more drinks, and Jarvi's testimony about statements by others led to the court to strike Jarvi's testimony and instruct the jury to disregard:

> Jarvi: I had taken my shirt off as seen in the video. [Mia] was touching my tattoos and kind of investigating my tattoos. She said

> she liked them. We kind of bonded on that, and [Kate] was getting visibly jealous about her touching me and said to put a shirt on.
>
> State: Objection. Hearsay. I'd ask that that be stricken –
>
> Court: Sustained.
>
> State: -- from the record.
>
> Court: Yeah. Should be stricken. The jury will ignore it.

(R99:58-59).

Next, the court again sustained the State's hearsay objection when Jarvi was asked about whether he went skinny dipping and began testifying about statements made by Mia and Kate:

> Jarvi: Not at first, but after they kind of pressured me to get naked with them, said, "Come on. Let's see what you're made out of --".
>
> State: Objection. Hearsay. I'd ask that that be stricken from the record.
>
> Court: Sustained.

(R99:62).

Jarvi was allowed to explain he felt "pressured" to go skinny dipping, and that he joined them briefly (R99:62). He then described going on a walk with Mia, and kissing while on the walk, but was prohibited from testifying to what Mia said:

> Counsel: When [Mia] kissed you, were you surprised by that at all?

Jarvi:	A little, but, I mean, we were just naked not an hour ago, and I could tell that, you know, she wasn't really comfortable with being physical in front of [Kate], but when it was just me and her, she seemed to be more able to show that.
Counsel:	Did she ask -- did she ask you if you wanted to kiss?
State:	Objection. Hearsay.
Court:	Calls for hearsay. Sustained.

(R99:68).

Jarvi then described what happened during the "kissing contest," and was again shut down when referencing a statement by Kate after seeing him kiss Mia:

Jarvi:	At that point [Kate] was sitting at the fire, and she had seen it, and she exclaimed –
State:	Objection. Hearsay.
Court:	Sustained.

(R99:70).

When Jarvi began describing events immediately preceding the sexual encounter, the State again objected to any statements by Mia, *including statements indicating she consented to sex*, which caused the judge to instruct the jury to disregard Jarvi's testimony:

Counsel:	What did you guys do from there?
Jarvi:	She laid down on her back, and I zipped the flap up and turned around and came over to her and started kissing her.
Counsel:	Did you say anything to her?

> Jarvi: I said, "Are we doing this?" And she said, "Yeah."
>
> State: Objection. Hearsay. I ask that be stricken from the record.
>
> Court: It is hearsay. That will be -- objection sustained, and jury should disregard it. It's stricken.

(R99:74).

When Jarvi tried describing what happened during sex, including statements Mia made, the State objected again, leading the court to admonish Jarvi in the jury's presence:

> Counsel: What was [Mia] doing at this time?
>
> Jarvi: She was just saying affirmations --
>
> State: Objection. Hearsay. I ask that be stricken from the record, and I ask that the defendant be instructed that he can't repeat things that [Mia] said.
>
> Counsel: Please keep that in mind, Mr. Jarvi.
>
> Court: Yeah. Mr. Jarvi, you can't testify as to what someone else said.
>
> Jarvi: Yes, Your Honor.
>
> Court: Go ahead, Mr. Anderson. And I would note that that reference should be stricken from the record as well, and *I'm going to direct as well that the jury disregard all the statements that Mr. Jarvi has made as to statements that both of the -- both [Mia] and [Kate]* -- he indicates have been made. He can't testify as to hearsay, and it is all hearsay, other than what is already in the record prior to his testimony. So let's keep it clean.

Jarvi: I'm trying to, Your Honor. I apologize.

(R99:75-76) (emphasis added).

C. Postconviction litigation

The judge's admonitions to Jarvi and repeated instructions for the jury to disregard provides necessary additional context to evidence presented postconviction. The State's brief generally described the grounds for relief alleged in Jarvi's postconviction motions accurately (Appellant's Br: 18), but omitted a key part of the ineffective assistance claim: that Attorney Anderson failed to make an offer of proof regarding known additional statements Jarvi attributed to Mia which would have been part of his trial testimony, but for the chilling effect caused by the judge's repeated admonitions (R112:9-10,34).

At the evidentiary hearing, Jarvi testified that the judge's rulings "impacted [his] testimony negatively," because he thought the statements by Mia and Kate provided context and helped convey his state of mind (R130:60-61). Jarvi identified the following examples of additional statements about which he'd wanted to testify:

- *First kiss*—while walking with Mia kissed him and said "I just kissed you!" after which they kissed again (R130:61-62);

- *Kissing contest*—during the kissing contest, Jarvi kissed both Kate and Mia twice, after which Mia cupped her hand around his neck and whispered, "Tell [Kate] she's a better kisser than me, so she doesn't think that I'm better than her." (R130:62);

- *Mia's refusal to go to bed*—after Kate told Mia she was going to bed and that Mia should too, Mia didn't

> go to bed. Kate then said, "Come on [Mia], let's go to bed." Mia again refused. After a little while, Kate asked Mia again, "Will you come to bed with me" and Mia said, "I'm not tired, you go ahead." Mia then got up, grabbed the chips and salsa, and shared those with Jarvi. Kate, for the last time, asked "Please, let's go to bed," to which Mia said, "I'm fine, you go ahead, I want to stay up by the fire." (R130:63-64);
>
> - *Mia asking Jarvi to come to her tent*—after Kate had gone to sleep, he and Mia were still sitting by the fire sharing chips, until Mia put them away, came to Jarvi's chair, offered her hand and said, "Come on, let's go" (R130:65);
>
> - *Communication while undressing*—while undressing in the tent, Mia reached down and felt Jarvi's penis was not fully erect, so she asked, "what's wrong," to which he answered "nothing." Jarvi attempted to manually stimulate himself, until Mia pushed his hand away and began stimulating his penis with her hand (R130:65-66);
>
> - *Affirmations during sex*—during sex, Mia stated affirmations like, "yeah," "yes, oh God," and "God yes" (R130:66); and
>
> - *Comments after sex*—after having sex, Jarvi said, "wow," to which Mia replied, "yeah, wow" and commented, "it's so hot" (R130:66).

While the State's brief summarized how Jarvi's postconviction motion described essentially the same statements (Appellant's Br: 32-33), it omits that Jarvi also provided an offer of proof at the hearing about how Mia's remarks impacted his state of mind that night, which he would have testified to at trial but for the judge's rulings.

Specifically, Jarvi testified that nothing Mia said that night led him to believe she was too intoxicated to voluntarily have sex (R130:66-67). In particular, when he'd asked "Are we doing this" and Mia replied "Yeah," he interpreted that as consenting to sex (R130:65). Further, Jarvi testified that Mia's statements to Kate refusing to go to bed and claiming she was "not tired" and instead was "fine" led him to "believe that she was comfortable being up… [a]nd able to articulate her needs or wants to [Kate], who had been requesting for her to go to bed. And her refusal of that just suggested that she was A: not tired, B: not in a drowsy state or an intoxicated level where she needed to, you know, be alone or asleep." (R130:64).

Attorney Anderson confirmed that his strategy was to present Jarvi's testimony about Mia's statements, he believed them admissible, and he had no strategic reason for not citing applicable hearsay exceptions or making an offer of proof (R130:10-19). Attorney Anderson also corroborated Jarvi's testimony regarding the chilling effect of the judge's rulings, indicating "there were questions and responses from Mr. Jarvi that I thought were important to the case that I ended up not asking. Or asked in a way that um -- potentially would avoid an objection" (R130:19). Anderson had specifically intended to ask a line of questions about "a time in the evening where [Kate] was ready to retire for night and that [Mia] wanted to stay up and continue hanging out." (R130:20). He had also intended to ask about specific interactions between Jarvi and Mia in the tent, comments that "would have shown an awareness of what was going on" and Mia's "willingness to participate" (R130:19).

Additional facts will be addressed where appropriate.

STANDARDS OF REVIEW

Exclusion of evidence—A trial court's decision to exclude evidence is a discretionary determination that will not be upset on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. ***State v. Yang,*** 2006 WI App 48, ¶10, 290 Wis.2d 235, 712 N.W.2d 400. Whether a court's decision to exclude evidence comports with legal principles is reviewed *de novo*. ***Id.*** However, the court's discretion may not be exercised until it accommodates the defendant's constitutional rights. ***Id.***

Constitutional right to present evidence a defense—"'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, ***Chambers v. Mississippi,*** 410 U.S. 284 (1973), or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, ***Davis v. Alaska***, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. ***California v. Trombetta***, 467 U.S. 479, 485 (1984). Courts must (1) consider whether the exclusion infringed upon the accused's "weighty interest" in his constitutional right to present a defense; and (2) determine whether the exclusion was "arbitrary or disproportionate to the purposes" served by the rule. ***United States v. Scheffer***, 523 U.S. 303, 308 (1998). Whether the exclusion of evidence violated a defendant's constitutional rights is reviewed *de novo*. ***Yang, id.,*** ¶10.

Ineffective assistance of counsel—In order to find counsel rendered ineffective assistance, the defendant must show counsel's representation was deficient and that he was prejudiced by counsel's errors. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A circuit court's findings of facts will be upheld unless clearly erroneous, but the question of whether counsel's performance satisfies the standard for ineffective assistance is a question of law reviewed *de novo*. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis.2d 571, 665 N.W.2d 305.

ARGUMENT

I. The Court Erroneously Struck Jarvi's Testimony Regarding Mia's Remarks Demonstrating Both Her Consent And Ability To Consent To Sex, Violating Jarvi's Constitutional Right To Present Evidence

A. The court erroneously excluded Jarvi's testimony about Mia's remarks before, during and after sex

1. The testimony was not inadmissible hearsay, as the State now concedes

The State repeatedly objected to Jarvi's testimony about Mia's statements as hearsay, and the circuit court struck the testimony as inadmissible hearsay (R99:58-59,62,68,70,74-76). Every single time, the court was wrong.

Jarvi's postconviction motion explained that the statements were admissible over hearsay objections for various reasons (*see* R112:10-14). Some of the proposed testimony was not an "assertion." Wis. Stat. sec. 908.01(1). Some was admissible not for the truth of the matter asserted, but to show the effect on Jarvi, the listener. Wis. Stat. sec. 908.01(3). The statements admitted for their truth were admissible under various exceptions, including present sense impressions, excited utterances, and the declarant's then-existing state of mind. Wis. Stat. secs. 908.03(1), 908.03(2), and 908.03(3).

The motion cited ***State v. Prineas***, 2012 WI App 2, 338 Wis.2d 362, 809 N.W.2d 68, where the court of appeals reversed a defendant's sexual assault convictions because the circuit court's exclusion on hearsay grounds of the defendant repeating anything the alleged victim stated before, during, or after sex was erroneous and violated the defendant's constitutional right to present evidence. ***Prineas*** stands for the fairly obvious proposition that in a sexual assault case where consent is at issue, the jury must consider words and actions

when determining whether consent exists, and the defendant's claims of what the alleged victim said are clearly admissible and not hearsay.

Without going through the hearsay analysis, the circuit court acknowledged error (R153:4) ("I tend to think it was error on my part").

The State no longer argues that any of the excluded statements were inadmissible hearsay, conceding that several likely qualify as present-sense impressions or excited utterances (Appellant's Br: 34). The State has therefore abandoned any claim that the statements were properly excluded as hearsay.

Based upon this concession, Jarvi will not address the specific hearsay exceptions for individual statements, beyond incorporating his postconviction arguments by reference.

2. The statements are relevant to both Jarvi's theory of defense and the elements of the offense

For the first time on appeal, the State alleges a new reason why it believes the statements were properly excluded: they were not relevant. This argument is legally indefensible to the point of absurdity.

Specifically, the State asserts that evidence regarding consent is not a consequential fact to a prosecution for sexual assault of an intoxicated person, and is "not relevant or admissible *because Mia could not freely consent based on her condition*" (Appellant's Br: 34) (emphasis added). The emphasized portion highlights the fallacy of the State's premise: it assumes multiple facts that the State was required to prove beyond a reasonable doubt at trial. The State needed to prove Mia's intoxicated condition. The State needed to

prove that intoxicated condition rendered her incapable of consenting. Those are facts of consequence. Any evidence challenging those facts is relevant by definition. To conclude otherwise is akin to finding only the State's evidence is admissible, and that Jarvi had no right to defend himself.

Relevance is most easily assessed by looking at the elements. For a violation of sec. sec. 940.225(2)(cm), element #3 required the State to prove Mia was "under the influence of an intoxicant to a degree which rendered her incapable of giving consent." According to the jury instructions, this requires that Mia "was incapable of giving freely given agreement to engage in sexual intercourse." (R69:9). Logically, if Mia *was* capable of freely giving consent, and if she gave consent in fact, this provides a defense to the charge.

The other contested elements went to Jarvi's knowledge and purpose. Element #4 required the State to prove that Jarvi "had actual knowledge that [Mia] was incapable of giving consent," and Element #5 required proof that Jarvi "had the purpose to have sexual intercourse while [Mia] was incapable of giving consent." (R69:9-10). Accordingly, if Jarvi believed Mia was capable of giving consent to sex, and believed that she gave consent in fact, he would not be guilty. Likewise, if his purpose was not to have sex with Mia when she was incapable of giving consent, he would not be guilty.

Despite acknowledging the need to prove these elements, the State baldly asserts "none of the excluded (or proposed) statements here bore on Mia's capacity to consent or Jarvi's knowledge of that capacity." (Appellant's Br: 35). The State splits the statements into three categories: (1) excluded statements attributable to Kate, (2) excluded statements attributable to Mia, and (3) additional statements by Mia offered postconviction (Appellant's Br: 35-36). While the statements attributable to Kate are still relevant to explain events and why Jarvi took certain actions, Jarvi will focus on

Mia's statements because those are more directly relevant to the elements of the offense.

Mia's statements before or after she and Jarvi kissed while walking were relevant to Jarvi's state of mind. Kate and Mia testified that Mia had no sexual interest in Jarvi and didn't want to kiss him (R104:181,193-94), supporting the inference that she wouldn't consensually have sex with him. Statements supporting the fact that Mia consensually kissed Jarvi earlier that evening are probative for whether she actually did have romantic interest in Jarvi, as well as his later belief that she consented to sexual intercourse (*see* R99:68-69,85).

Mia's statements at the time Kate went to bed were relevant to elements 3, 4, and 5. When Kate asked Mia multiple times to come to bed, Mia gave successive responses—"I'm not tired, you go ahead," and then "I'm fine, you go ahead, I want to stay up by the fire" (R130:63-64). Those statements directly contradict the State's theory that Mia was intoxicated to a degree where she was incapable of making voluntary choices. Jarvi's offer of proof explained how those statements affected his state of mind, because he believed Mia was "able to articulate her needs and wants," and that her refusal to go to bed suggested she was drowsy or intoxicated (R130:64). Thus these statements were relevant to whether Jarvi knew Mia was intoxicated to a degree rendering her incapable of giving consent, and logically also supported his claim that he did not have the purpose of sex with someone incapable of giving consent.

The State makes *no attempt whatsoever* to analyze the relevance of those specific statements. Instead, it offers a general assertion that Mia's 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." (Appellant's Br: 36). This analysis is conclusory and plainly wrong.

The State does directly address Mia's statements during and after intercourse, but its analysis is again conclusory, asserting the statements "do not bear on her capacity at the time of the intercourse or Jarvi's knowledge of that capacity" (Appellant's Br: 35). Combining the statements excluded from trial and Jarvi's offer of proof, that includes the following:

- Mia said, "Come on, let's go" to Jarvi when she led him to her tent;

- When they started kissing in the tent, Jarvi asked, "Are we doing this," and Mia answered, "Yeah;"

- When Jarvi was initially unable to become erect, Mia asked, "What's wrong," and began to manually stimulate his penis;

- During sex. Mia said, "Yeah," "Yes, oh God," and "God yes;" and

- Both Jarvi and Mia said "Wow" after sex.

(R99:74-76; R130:65-66).

The claim that Mia's statements have no bearing on either her capacity or Jarvi's knowledge of her capacity is absurd. This is clearly demonstrated by flipping the situation around; assume, instead, that Mia *said nothing* during any of these moments. Lack of verbal response would strengthen the inference that Mia lacked awareness of what was happening, and that she was incapable of consenting. If Mia made no affirmative declarations during sex, that would strengthen the inference that she was not a willing participant. And the absence of such statements would increase the inference that Jarvi had both the knowledge that Mia was incapable of consenting, and the purpose of having sex while she was

incapable. Such evidence would be undoubtedly relevant to elements 3-5.

If *negative* evidence of such verbal statements is relevant, *positive* evidence of such statements is also clearly relevant. Positive verbalizations from Mia at each step during the process would reinforce Jarvi's knowledge and belief that she was capable of consenting, and gave consent in fact. Jarvi testified to precisely this impact on his state of mind at the postconviction hearing (R130:64-67). And if Mia *did* verbally express consent, it logically supports an inference that she *was capable* of giving consent.

Simply put, while verbalized consent is not dispositive evidence of either consent or capacity to give consent, it is obviously relevant and admissible evidence of both.

The State next argues that nothing about the court's ruling prevented Jarvi from testifying to his perceptions of Mia, the physical actions that led to sex, her demeanor, and the manner of her speaking (Appellant's Br: 36). To be clear, that is a harmless error argument, not an argument that the proffered testimony was legally inadmissible. Further, that analysis ignores the impact of stripping those physical descriptions of their context by removing the corresponding verbal statements, as well as the chilling effect of the court's repeatedly erroneous rulings and instructions to the jury to disregard Jarvi's testimony. As discussed *infra*, a virtually identical argument was rejected in ***Prineas,*** and must be rejected here for the same reasons.

3. The court's exclusion violated Jarvi's constitutional rights

Because the proffered evidence was highly probative and critical to Jarvi's defense, its exclusion violated not only state rules of evidence, but also his constitutional rights to due process and to present a defense. *See, e.g.*, ***Pennsylvania v.***

Ritchie, 480 U.S. 39, 40 (1987); ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986). Exclusion of defense evidence "abridge[s] an accused's right to present a defense" where the restriction is "`arbitrary' or `disproportionate to the purposes' [it is] designed to serve," and the evidence "implicate[s] a sufficiently weighty interest of the accused." ***Scheffer***, 523 U.S. at 308-09.

This was core defense evidence, as Attorney Anderson testified at the postconviction hearing (R130:9,55). There can be no reasonable dispute that evidence of Mia's remarks to Jarvi was relevant to the central issues in the case—witness credibility, whether Mia in fact consented to sexual intercourse, whether she was incapable of giving consent, whether Jarvi knew she was incapable of giving consent, and whether he had the purpose of sex with someone incapable of giving consent—each of which was critical to Jarvi's defense. Accordingly, the evidence implicated a "sufficiently weighty interest of the accused."

Nor can there be any reasonable argument that evidence of Mia's statements was inadmissible under Wisconsin law, or that the State has *any* legitimate interest in excluding evidence of Jarvi's innocence, let alone a compelling one. Since the statements were not inadmissible hearsay, the court's exclusion of the testimony served no purpose, and was arbitrary and disproportionate. The erroneous exclusion denied Jarvi's rights to due process and to present a defense.

B. The error was not harmless

When a court determines evidence was erroneously excluded, the court must then determine whether the error was harmless. *See* ***Chapman v. California***, 386 U.S. 18, 24 (1967); ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis.2d 642, 734 N.W.2d 115. Before a constitutional error can be held harmless, the beneficiary of the error—here, the State—must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Id.***

The State argues that since Jarvi was able to testify to Mia's actions and demeanor, his testimony about what Mia said "was cumulative to and less probative than the actions Jarvi described" (Appellant's Br: 38-40).

Prineas demonstrates the fallacy of that argument. There the victim, KAC, accused Prineas of numerous acts of sexual assault at a fraternity house, claiming she repeatedly told him "no" but that he forced her to have intercourse. ***Id.,*** 2012 WI App 2, ¶¶3-5. When Prineas attempted to testify to statements made by KAC to support his consent defense, the court sustained the prosecutor's hearsay objections, excluding Prineas's testimony that KAC said "okay" when he said he had a condom; her statement that sex "wasn't working" standing up and asking if he wanted to do it on the floor; his opinion that they "consensually" went to the floor; and KAC's request that he help clean her off after sex. ***Id.,*** ¶¶6-8.

Prineas also referenced additional statements he wanted to testify about, but believed he couldn't "without going back into hearsay." ***Id.,*** ¶8. Postconviction, the defense made an offer of proof that Prineas also would have testified that (1) upon entering the room, KAC asked Prineas to make sure the door was locked; (2) when KAC was straddling Prineas on the floor, he asked KAC if she wanted to switch positions and she responded "yes"; and (3) after the encounter, KAC asked Prineas not to tell anyone. ***Id.,*** ¶12. The court of appeals concluded that testimony about KAC's remarks supporting consent to sex were not hearsay, and were instead admissible to show state of mind. ***Id.,*** ¶¶18-19.

Nonetheless, the State argued KAC's remarks were "superfluous and cumulative" because Prineas was able to characterize her participation as voluntary, arguing "[j]urors did not need to hear Prineas paraphrase KAC's alleged words to know that Prineas was claiming the floor activity was

consensual." ***Id.***, ¶¶25-26. The court of appeals rejected this, noting that KAC's alleged requests as to locking the door, wearing protection, and changing sexual positions directly affected the key issue of consent, because they "could all contribute to a finding that there was an affirmative indication of willingness." ***Id.,*** ¶26.

Likewise, Mia's excluded statements before, during, and after sex could contribute to a finding that Mia was a fully cognizant, willing participant, and that Jarvi believed she was capable of giving consent.

The State argues that it had a comparatively strong case, citing the circuit court's claim that the jury believed Mia over Jarvi (Appellant's Br: 40; R153:4). But that is precisely the problem—the jury *didn't hear* Jarvi's full testimony. Jarvi was prevented from testifying to the things Mia said before, during and after sex, why those statements supported his belief that she was capable and did in fact give consent for sex. ***Prineas*** highlighted the same problem when it observed that the "jury's finding as to consent turned on the credibility of Prineas and KAC," and the statements by KAC "if deemed credible, would bear directly on the issue of consent." ***Id.,*** ¶27.

Moreover, the State completely ignores the damaging impact of the judge instructing the jury to disregard Jarvi's testimony, no less than three times, including twice regarding Mia's statements *during* sex (R99:58-59,74-76). Both Jarvi and his attorney testified to the chilling effect these instructions had on presenting Jarvi's testimony (R130:19-20,60-61). Facing similar instructions by the judge in ***Prineas,*** the court of appeals concluded, "[w]e think it likely that the jury deemed the trial court's instruction to disregard Prineas' testimony as to KAC's alleged remarks as tantamount to an instruction to disregard Prineas' recollection of the details concerning KAC's consent," which added to the prejudice. ***Id.,*** ¶29.

This should have been a he-said she-said credibility contest. Instead, the court's erroneous rulings muzzled Jarvi, preventing him from telling his full story, and preventing the jury from fully evaluating his credibility. The State cannot possibly prove the error did not contribute to the outcome. ***Mayo, id.,*** ¶47**.** The circuit court correctly granted a new trial.

Finally, the cumulative prejudice from all errors will be discussed *infra. See* ***Mayo***, ***id.,*** ¶64 (prejudice from multiple constitutional errors must be viewed for cumulative effect).

II. The Court's Erroneous Exclusion Of Dr. Fromme's Testimony Violated Jarvi's Constitutional Rights

A. Factual background

The defense sought to present expert testimony from Dr. Kim Fromme on the effects of alcohol on human behavior, thinking, and memory (R25). Dr. Fromme had studied these subjects for over 35 years, and had 119 peer-reviewed publications (R25:1). The court excluded her testimony following a ***Daubert*** hearing, despite acknowledging Dr. Fromme was "very, very knowledgeable" and admitted "I'm certainly impressed by Dr. Fromme's credentials and her background" (R98:89,97). The substance of her testimony can be summarized as follows:

General impact of alcohol—At lower quantities of alcohol consumption, people become more talkative and outgoing, and at higher levels they may act reckless or aggressive, or more flirtatious (R98:28). At sufficient doses, alcohol impairs people's reaction times, coordination, and speech (R98:28-29). Alcohol affects risk management, causing people to focus on more immediate wants, such as sexual desire, compared to potential long-term concerns, such as pregnancy (R98:29).

Alcohol-induced blackouts—Alcohol impairs the mind's ability to transfer short-term memories to long-term memory for later retrieval (R98:30). Amnesia caused by drinking is referred to an alcohol-induced blackout (R98:30). People experiencing a blackout are fully conscious, actively engaged with their environment, and capable of making voluntary decisions and executing complex behaviors (R98:30). While they are aware of what's happening in the moment, short-term memories of events are not being transferred to their long-term memory (R98:30). The resulting memory loss can eliminate memories of minor events such as sending a text message, or significant events such as engaging in sex (R98:31).

Types of blackouts—Alcohol causes two types of blackouts: fragmentary, and en bloc (R98:31). For fragmentary blackouts, individuals may remember parts of an event, but not others, which is commonly referred to as having "gaps" in one's memory (R98:31). By contrast, an en bloc blackout is a long period of time for which an individual has no recollection whatsoever (R98:32). En bloc blackouts occur at higher levels of intoxication, and the memories never get encoded, so they can never be retrieved (R98:32-33).

Blackouts, impairment, and perception—Studies have confirmed that people experiencing an alcohol-induced blackout are not necessarily impaired in other ways (R98:33). Since a blackout is a process occurring inside someone else's brain, and there are no objective, observable signs that someone is in a blackout, outside observers cannot tell when someone is experiencing a blackout (R98:34-35). Studies also show that people are poor judges of other people's levels of intoxication, and this ability is further inhibited if the person assessing the intoxication levels of another is also consuming alcohol (R98:35-36).

Memory reconstruction and false memory—When a blackout occurs, people attempt to construct a narrative to explain what happened during the missing memories, such as asking others who experienced the event, or reading the accounts of others on social media (R98:31,36). People attempting to reconstruct missing memories also draw upon past experiences and their own self-concept about how they believe they would have acted given a certain situation (R98:31,36-38). Since this information may not accurately reflect what actually happened, this can lead to distorted or false memory (R98:37-38).

Opinion as to whether Mia experienced an alcohol-induced blackout, and whether Jarvi would have known—Dr. Fromme opined to a reasonable degree of scientific certainty that Mia experienced an alcohol-induced blackout (R98:42). This opinion was based in part upon individual risk factors, such as the fact that women are more prone to experiencing blackouts, including at lower levels of alcohol, and a reported history of Mia experiencing blackouts (R98:15-16, 43). This opinion was also based upon event-specific risk factors, including the amount of alcohol consumed, and consumption of hard liquor (R98:44). Additionally, Mia's description of events to police demonstrated signs of an alcohol-induced blackout, such as having no recollection of going into her tent with Jarvi, or the sexual act itself, but had a fragment of memory regarding laying on her back inside the tent (R98:44). Dr. Fromme testified that based on the science showing people are poor judges of the level of intoxication of others, especially when drinking, and the fact that Jarvi was drinking, he "would be unable to tell the level of [Mia]'s intoxication" (R98:49). Additionally, since there are no observable signs that someone else is experiencing a blackout, Dr. Fromme opined that Jarvi would have had no way of knowing whether Mia was experiencing a blackout (R98:49-50).

Limitations on opinions—Dr. Fromme also expressed limitations on what opinions she could provide, including (a) an inability to calculate Mia's estimated BAC due to the unclear timeline of alcohol consumption (R98:60-61); (b) acknowledging that alcohol consumption can render a person incapable of giving consent (R98:52-53); and (c) she could not say whether Mia consented (R98:54).

The court excluded the expert testimony in its entirety in an oral ruling (R98:87-98), followed by a written supplementary decision (R78). The defense filed a motion to stay the proceedings in order to file an interlocutory appeal (R38). The court denied that motion (R41), and the case proceeded to trial without Dr. Fromme's testimony.

B. The evidence was relevant to Mia's degree of intoxication and Jarvi's state of mind, and the court's *Daubert* analysis was erroneous

A primary reason for the court's exclusion of Dr. Fromme's testimony was the conclusion that blackouts were "irrelevant" to the issue of consent because Dr. Fromme could not opine on whether Mia was incapable of consent due to alcohol consumption (R78:2-3). The court asserted that the "issue is not whether an alcohol blackout occurred, it is rather whether [Mia] was impaired by alcohol to the extent that she was not capable of giving consent," the expert's focus on blackouts "obfuscates the issue of consent" (R78:3).

On the contrary, Dr. Fromme's proposed testimony was directly relevant to element #3, whether Mia "was under the influence of an intoxicant to a degree which rendered her incapable of giving consent;" and #4, whether Jarvi "had actual knowledge that Mia was incapable of giving consent." Wis. JI-CRIM 1212.

The language for element #3 requiring the State to prove Mia was intoxicated "to a degree" which rendered her

incapable of consenting logically makes her *degree of intoxication* relevant. Someone can be under the influence of an intoxicant, but not to a degree where the alcohol impairs their capacity to consent.

Dr. Fromme testified that alcohol consumption affected behavior at "lower amounts," and how at "sufficient doses" alcohol impairs reaction time, coordination, and speech (R98:28-29). She described the stage of intoxication where blackouts occur, the two types of blackouts (fragmentary, en bloc) and how en bloc blackouts occur at "higher levels of intoxication" (R98:30-33). She testified that women are more prone to experiencing blackouts at lower blood alcohol concentrations (R98:15-16), and that a person experiencing a blackout does not experience impairment of "[o]ther cognitive processes" (R98:33-34). This stage, logically, would be a lower "degree" of impairment than someone under the influence "to a degree" rendering them incapable of giving consent. Dr. Fromme's proposed testimony was also crucial to the defense theory, demonstrating that there was a "degree" of intoxication where the person's memory is impaired, but the ability to engage in consensual activities is not.

Such testimony would have been further relevant to rebut the contrary inference—i.e. the suggestion that since Mia had consumed enough alcohol that her memory was impaired, she was necessarily under the influence "to a degree" which rendered her incapable of giving consent. As discussed further *infra,* after Mia testified that she was "blackout drunk" (R104:218), and after Detective Cook testified that Mia described her "level of intoxication" as "blackout intoxicated," (R99:33), the State directly argued to the jury that Mia was "definitely not capable" of consenting to sex, in part, because she was "black out drunk" (R99:132-33).

Clearly, expert testimony contradicting that inference with the science of alcohol-induced blackouts, showing that the

fact a person is impaired to a degree where they experience a blackout *does not* mean that they must also be impaired to a degree impairing their capacity to consent, would have been highly probative to the defense. The fact that a blackout has no impact on consent does not make it irrelevant to consent; it makes it relevant *to the defense* when challenging the inference that someone who claimed to be "blackout drunk" must therefore have been impaired to a degree rendering them incapable of consent.

The fact that someone can be under the influence of alcohol "to a degree" where they are in a blackout state, but *not* "to a degree" where their cognitive abilities are impaired to the point rendering them incapable of giving consent, places into greater context the relevance of Dr. Fromme's proposed testimony to element #4, whether Jarvi "had actual knowledge that Mia was incapable of giving consent."

Jarvi acknowledged seeing Mia consuming alcohol, but testified he never thought she was "too drunk" to engage in sexual activity (R99:84). Had Dr. Fromme been able to testify, the defense would have argued that Mia was under the influence to a degree where she was experiencing an alcohol-induced blackout, but not to a degree where she was incapable of giving consent. Dr. Fromme's testimony that people experiencing an alcohol-induced blackout may not experience cognitive impairment (R98:33), and that there are "no observable signs that someone else is experiencing a blackout" (R98:34-35) would have provided a scientific basis to believe that Jarvi's testimony about not thinking Mia was "too drunk" was more plausible. Basically, if the jury believed Mia was only under the influence "to a degree" that she was experiencing a blackout, not significant cognitive impairment, then she wouldn't have been exhibiting observable symptoms or impairment that should have been obvious to Jarvi.

Since Dr. Fromme's testimony was clearly relevant to these elements, it would also have assisted the jury, contrary to the court's findings (R78:2).

The court's other grounds for excluding Dr. Fromme's testimony are equally flawed. For example, the court's claim that Dr. Fromme's opinions lacked "reasonable foundation" because she didn't observe the events of the case and lacked knowledge of Mia (R78:2) finds no support in the law. The defense cannot locate *any case in any jurisdiction* where a court found that an expert lacked "foundation" because the expert didn't witness the underlying events. The vast majority of expert witnesses don't observe the underlying events. Many expert witnesses never meet the witnesses involved, and instead conduct a review of documents to provide a basis for their opinions, or provide general opinions based on knowledge and experience. *See, e.g.*, ***State v. Smith***, 2016 WI App 8, 366 Wis.2d 613, 874 N.W.2d 610; ***State v. Dobbs***, 2020 WI 64, ¶42, 392 Wis.2d 505, 945 N.W.2d 609.

The court's conclusion that Dr. Fromme failed to follow her own methodology when opining that Mia experienced an alcohol-induced blackout—and therefore did not apply the methods in a reliable way (R78:4)—is also erroneous. The court unfavorably compared to the methods used *in Dr. Fromme's research studies,* where the amount of alcohol consumed and response times were carefully monitored, to the lack of such detailed information in this case (R78:4). This completely misconstrues how science works. Research studies are performed in controlled environments in order to gain an understanding of the basic scientific principles on a given subject (in this case, alcohol-induced blackouts), allowing others to apply that knowledge to form educated opinions to other cases where the circumstances are not controlled. In this case, the precise amount of alcohol, timing, and genetic factors were not necessary data for Dr. Fromme to opine that Mia experienced a blackout. She based this opinion on individual

risk factors, event-specific risk factors (including Mia's admission of consuming 4-5 White Claws, plus an unknown amount of 40-proof tequila), and Mia's admissions of having substantial gaps in her memory. For a proper ***Daubert*** analysis, the gaps in underlying data or assumptions made by the expert go to weight, not admissibility. *See, e.g.*, ***State v. Giese***, 2014 WI App 92, ¶28, 356 Wis.2d 796, 854 N.W.2d 687.

Finally, the court's conclusion that Dr. Fromme's opinions "invade the province of the jury" failed to identify which specific opinions would be improper, and why (R78:3-5). Much of Dr. Fromme's proposed testimony constituted exposition on the general science of alcohol and blackouts. Her only case-specific opinions were that (1) Mia experienced an alcohol- induced blackout on 9/14/20 (R98:42); (2) Jarvi "would be unable to tell the level of [Mia]'s intoxication" (R98:49); and (3) Jarvi would have had no way of knowing whether Mia was experiencing a blackout (R98:49-50).

It is important to delineate between opinions commenting on relevant facts or issues, versus opinions that invade the jury's province. Testimony that reaches legal conclusions or offers subjective opinions on another witness's credibility invades the province of the jury. A witness can, however, comment on the presence or absence of factors that would affect a credibility determination. *See, e.g.*, ***State v. Maday***, 2017 WI 28, ¶35, 374 Wis.2d 164, 892 N.W.2d 611.

Dr. Fromme's opinion that Mia experienced a blackout on 9/14/20 did not constitute a legal conclusion, because that was not a decision the jury needed to make, nor was it an element of the offense. It was a medical diagnosis relevant to Mia's physical condition and degree of intoxication. Likewise, Dr. Fromme's opinion that Jarvi would have had no way of knowing whether Mia was experiencing a blackout would not have usurped the jury's function. It had nothing to do with Jarvi; it was based on scientific studies showing there are no

observable indicators that someone else is in a blackout, which would apply universally.

By contrast, Dr. Fromme's opinion that Jarvi "would be unable to tell the level of [Mia]'s intoxication" may cross the line; it appears to be a subjective opinion on element #4. Thus the court could have properly excluded that opinion. However, the scientific facts supporting this opinion—that people are poor judges of another person's level of intoxication, especially when the person making that judgment is consuming alcohol—would still be admissible, and would have provided Attorney Anderson a basis to make the same argument.

Finally, Dr. Fromme never offered an opinion on whether Mia was intoxicated to a degree rendering her incapable of giving consent, contrary to the court's finding that she speculated on the issue (R78:3). On cross-exam, Dr. Fromme both acknowledged that a person *can* be under the influence to that degree, and specifically offered no opinion on whether Mia was capable of consenting (R98:52-54). Her opinions on Mia's degree of intoxication were limited to blackouts, whether Mia experienced an alcohol-induced blackout, and how being intoxicated to the degree of experiencing a blackout doesn't necessarily impair cognition. This testimony was appropriate, relevant, and admissible.

C. The court's exclusion in part based on 904.03 concerns violated Jarvi's constitutional rights

A trial court violates the defendant's constitutional right to present evidence by applying only a Rule 403 balancing analysis and not considering the constitutional implications of excluding defense evidence. *See* ***Harris v. Thompson,*** 698 F.3d 609, 626-27 (7th Cir. 2012). Similarly, when the defense asserts a constitutional right to present expert testimony, the court must consider the defendant's constitutional rights when exercising its discretion. *See* ***State v. St. George****,* 2002 WI 50, ¶¶48-49, 252 Wis.2d 499, 643 N.W.2d 777.

Wisconsin courts have set forth the following test for the defense to establish a constitutional right to admissibility of a proffered expert witness:

> 1) The testimony of the expert witness met the standards of Wis. Stat. § 907.02 governing the admission of expert testimony.
> 2) The expert witness's testimony was clearly relevant to a material issue in this case.
> 3) The expert witness's testimony was necessary to the defendant's case.
> 4) The probative value of the testimony of the defendant's expert witness outweighed its prejudicial effect.
>
> After the defendant successfully satisfies these four factors to establish a constitutional right to present the expert testimony, a court undertakes the second part of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence.

St. George, ***id.***, ¶¶53-55.

Attorney Anderson explicitly invoked Jarvi's constitutional right to present a defense and incorporated the ***St. George*** factors, arguing, "Mr. Jarvi has a constitutional right to have Dr. Fromme testify as an expert in this case, and her basis of knowledge meets the reliability of pretty much every Daubert element or test out there, and has been applied to the relevant facts of this case" (R98:72). Attorney Anderson further characterized her testimony as "essential to Mr. Jarvi's defense." (R98:72). Given the relevance analysis *supra,* the exclusion of Dr. Fromme's testimony implicated "a weighty interest of the defense." ***Scheffer,*** *supra.*

The court's complete exclusion of this evidence based on statutory grounds, without any consideration given to the defendant's constitutional right to present evidence, was

arbitrary and disproportionate to the purposes it was designed to serve, and violated his constitutional rights.

D. The error was not harmless

The State cannot prove this error harmless beyond a reasonable doubt. None of the evidence provided anything definitive as to Mia's actual "degree" of intoxication at the end of the night. That makes Mia's blackout state crucially important, and where exclusion of Dr. Fromme's testimony was devastating to the defense. The State used the fact of Mia's alcohol-induced blackout as affirmative evidence that she was too intoxicated to freely consent, essentially equating being "blackout drunk" (R104:218) with being "incapable of consent" (R99:132-33). But Dr. Fromme's testimony would have explained that the two states are not remotely equivalent, and a "blackout" only means that alcohol has caused the person to lose memory, not that it necessarily impairs cognition. She would have strongly supported the defense theory that just because Mia didn't remember being a willing, consenting participant in the sexual activity didn't rule out the possibility that Mia did consent, but simply didn't record that memory due to her blackout. This evidence was therefore both relevant to a material issue and necessary to the defense, and its exclusion "significantly impaired the defendant's ability to present a defense." ***St. George,*** 2002 WI 50, ¶72.

Dr. Fromme's testimony also would have lent plausibility to Jarvi's testimony that despite Mia consuming enough alcohol to blackout, he didn't think she was too intoxicated. This would have been supported by Dr. Fromme's opinion that someone experiencing a blackout doesn't exhibit obvious signs observable to others. This would have been directly relevant to the defense theory that Jarvi lacked actual knowledge that Mia was incapable of giving consent, and that he didn't have the purpose of having sex with Mia when she was incapable of giving consent. This exclusion significantly

impaired the defense because it prevented the jury from fairly assessing Jarvi's credibility.

Further, as discussed *infra*, the prosecutor twice argued to the jury in closing arguments that Mia's claims of being blackout intoxicated demonstrated she was incapable of consenting to sex (*see* R99:132,155)—directly connecting the claim of Mia's blackout as affirmative evidence of guilt. Yet the defense was not permitted to present expert testimony to contradict these claims. The result was an unfair trial where only one side was permitted to present evidence on a key topic affecting two elements of the offense, violating Jarvi's constitutional right to present evidence.

III. Trial Counsel's Failures To Provide Legal Basis To Admit Mia's Statements And Failure To Object To Improper Evidence And Arguments Violated Jarvi's Rights To Effective Assistance Of Counsel

A. Deficient Performance

1. *Failure to present offer of proof and cite hearsay exceptions to admit Mia's out-of-court statements*

Failure to make an offer of proof or cite the proper statutory authority in support of defense evidence, resulting in exclusion of that evidence, is deficient. *See* ***Prineas,*** 2012 WI App 2, ¶21. In this case, Attorney Anderson asked Jarvi questions that would solicit Mia's out-of-court statements regarding their encounter. However, when the State objected to hearsay, Attorney Anderson never cited applicable exceptions to the hearsay rules. Further, Attorney Anderson did not make an offer of proof from Jarvi to discuss other statements made by Mia that were directly relevant to the defense, as summarized *supra*.

These errors were non-strategic, as Attorney Anderson admitted at the evidentiary hearing. He wanted to present this evidence, and believed it was "absolutely essential to our defense" (R130:17-18). The repeated hearsay objections and rulings caused Anderson not to ask certain questions, including asking Jarvi about the interaction between Mia and Kate when Mia expressed wanting to stay up with Jarvi (R130:19-20). Attorney Anderson acknowledged having no strategic reason for failing to argue any hearsay exceptions, or failing to make an offer of proof (R130:12-13,17-18). This was deficient.

2. Failure To Object To Improper Commentary On Pretrial Silence And Right To Counsel

The privilege against self-incrimination is guaranteed by art. I, § 8, of the Wisconsin Constitution and by the Fifth Amendment to the United States Constitution. In ***Doyle v. Ohio,*** 426 U.S. 610, 619 (1976), the United States Supreme Court held that use for impeachment purposes of a defendant's post-***Miranda*** silence violated the due process provision of the fourteenth amendment. The Wisconsin Supreme Court followed ***Doyle*** in ***State v. Brecht***, 143 Wis.2d 297, 316, 421 N.W.2d 96 (1988).

In its case-in-chief, the State presented evidence that Jarvi exercised his pretrial rights to silence and counsel through testimony of Detective Cook. After describing the usual "steps" of an investigation, which include "meet[ing] with the suspect and try to get a statement from that individual," (R99:7), the prosecutor ended her direct examination of Det. Cook by asking if he ever got to speak with Jarvi, to which Cook answered:

> Det. Cook: 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, I believe, Mr. Anderson, his attorney at that time, and

> said that he was retaining an attorney and didn't want to speak with me.

(R99:12).

After the defense asked Det. Cook a general question about law enforcement's ability to obtain additional information through subpoenas or search warrants (R99:16-17), the prosecutor inquired further about that, and Det. Cook again referenced Jarvi's refusal to speak with him, stating he "did not get the opportunity to speak with Mr. Jarvi or forensically dump his phone, which would be my normal practice; however, *he was uncooperative as far as wanting to interview*." (R99:33-34) (emphasis added). Attorney Anderson did not object to any of this testimony.

When Jarvi testified, the prosecutor asked about his lack of statements to Det. Cook, drawing an objection from Attorney Anderson regarding commentary on his right to remain silent (R99:88). The court did not formally rule on the objection, instead noting that "it's already in the record," and instructing the prosecutor to move on (R99:88). Instead, the prosecutor immediately asked again Jarvi about his lack of pretrial statements (R99:88).

In closing arguments, the prosecutor explicitly drew the jury's attention to Jarvi's lack of pretrial statements, arguing, "They didn't get to hear his story. They had no idea what his story was until he said it today" (R99:120).

The ***Brecht*** decision demonstrates that the right to pretrial silence includes not just silence in the face of direct questioning, but silence in the time leading up to trial, as it found that the State improperly violated Brecht's rights to silence through the following questions and arguments that are similar to the prosecution's attacks on Jarvi. ***Id.*** at 315-16 ("[T]he first time you have ever told this story is when you testified here today, was it not?")

Attorney Anderson offered no strategic reason for his failure to object to the improper questioning (R130:23-24). The failure to object was deficient. Postconviction, the circuit court agreed that these remarks were problematic and warranted a new trial (R153:7-8), though it did not specify whether it was making that finding based upon ineffective assistance or plain error.

The State argues that Jarvi's right to silence never attached because he was not arrested or in a position to receive ***Miranda*** warnings (Appellant's Br: 24-26). But Jarvi was subject to conditions which might compel a reasonable person to speak and incriminate himself. When Jarvi missed their scheduled meeting for questioning, Det. Cook called Jarvi and left a message indicating if he didn't hear back from Jarvi, he would refer the case to the District Attorney for review and charging (R138:25).

Further, this case is not just about silence. Jarvi didn't merely choose to remain silent; he invoked his right to counsel by having his attorney inform Det. Cook that he refused to answer questions (R99:12). Based upon this refusal, Det. Cook testified that Jarvi was "uncooperative" (R99:33-34). This is improper; defendants cannot be penalized for invoking their constitutional rights. *See* ***State v. Banks***, 2010 WI App 107, 328 Wis.2d 766, 778–779, 790 N.W.2d 526. In his ***Grunewald*** concurrence, Justice Black explained, "The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution." ***Grunewald v. United States,*** 353 U.S. 391, 425-26 (1957) (Black, J., concurring).

Several federal circuit courts have previously held that the State's substantive use of a defendant's pre-arrest invocation of the rights to counsel and silence violate the Fifth Amendment privilege against self-incrimination—even when the defendant is not in custody. *See* ***Coppola v. Powell***, 878 F.2d 1562, 1568 (1st Cir. 1989) (defendant's pre-arrest, non-custodial statement to police that "if you think I'm going to confess to you, you're crazy[,]" invoked privilege against self-incrimination, and State's use of statement in its case-in-chief violated Fifth Amendment); ***Combs v. Coyle***, 205 F.3d 269, 286 (6th Cir. 2000) (defendant's pre-arrest statement to police, "talk to my lawyer," was invocation of privilege against self-incrimination, and prosecutor's closing argument comment on defendant's statement violated Fifth Amendment); ***United States v. Burson***, 952 F.2d 1196, 1201 (10th Cir. 1991) (defendant's actions in refusing to cooperate with I.R.S. criminal agents investigating a second tax fraud suspect constituted an invocation of his right to remain silent and State's use in its case-in-chief of defendant's silence violated Fifth Amendment); ***United States ex rel. Savory v. Lane***, 832 F.2d 1011, 1017-18 (7th Cir. 1987) (State's use in its case-in-chief and in closing argument of murder defendant's pre-custody statement to police that "he didn't want to talk about it, he didn't want to make any statements" violated Fifth Amendment). As the 1st Circuit explained, "the disclosure of the words [the defendant] used to claim his privilege results in the same dilemma addressed" in the Supreme Court cases dealing with prosecutorial reference to a defendant's silence." ***Coppola,*** 878 F.2d at 1567.

Nor does the fact that Jarvi chose to testify permit the State to present evidence that his attorney invoked his constitutional right to silence on his behalf, or for a detective to call Jarvi "uncooperative" as a result of that invocation.

The fact that a defendant decides to testify can make pretrial silence admissible for impeachment without violating

a defendant's due process rights. *See* ***State v. Cockrell***, 2007 WI App 217, ¶¶16-17, 306 Wis.2d 52, 741 N.W.2d. 267 (impeachment of testifying defendant with silence permissible only when: (1) where defendant's testimony conveys that he cooperated with the police; (2) where defendant volunteered his reason for not telling the police his version of the crime; and (3) where defendant testified that he attempted to tell the officers what happened but they wouldn't let him speak). None of the circumstances identified in ***Cockrell*** were present here. This distinguishes this situation from the ***Agard*** and ***Jenkins*** cases cited by the State (*see* Appellant's Br: 28-29).

The testimony and arguments presented by the State were improper, designed to discredit Jarvi by suggesting that he was uncooperative during the investigation by invoking counsel and not giving a statement, and therefore his trial testimony was a fabrication. These errors violated Jarvi's due process and Fifth Amendment rights.

3. Failure to object to arguments improperly capitalizing on excluded evidence

As discussed *supra*, the prosecution successfully sought exclusion of Dr. Fromme's proposed expert testimony regarding blackouts, arguing that it was "not relevant" to the case (R98:76-79). The court agreed that evidence of blackouts was irrelevant to the case (R78:3-4).

At trial, the State capitalized on this exclusion by making arguments to the jury directly inferring that Mia must have been too intoxicated to give consent to sexual activity because she was blackout drunk. This occurred after Mia testified on cross-exam, in response to a question how she remembered what she drank, that she was "black-out drunk," and there were "chunks of the night" she didn't remember (R104:218). A second reference to blackouts occurred during Det. Cook's redirect, when the prosecutor asked why he didn't question Kate about whether Mia was stumbling or exhibiting

slurred speech, and Cook referenced Mia's statements "describing her level of intoxication, which is blackout intoxicated," which Cook claimed "was a level of intoxication that is not normal for most people" (R99:33-34).

Rather than avoiding the subject of a blackout in closing arguments, the State explicitly used Mia's testimony about being blackout intoxicated as evidence that she was incapable of consenting:

> [Mia] *literally told you she was black out drunk. She doesn't remember any of it. Yes. She was definitely not capable of making decisions.* She was definitely not capable of making important decisions like having sex with someone that she's never had sex with before.

(R99:132) (emphasis added).

The State concluded its rebuttal with a similar argument (R99:155) ("Was somebody who could barely walk, couldn't walk without assistance, was so drunk that she did black out, capable of leading Derek Jarvi into her tent, unzipping it, and participating in sexual intercourse? Was she able to process that and give consent and agree to it? She wasn't.").

The State had also argued Mia's blackout state as affirmative evidence of element #4: "the defendant had actual knowledge that [M.T.] was incapable of giving consent. He's telling us today that he didn't see any impairment by [M.T.], *but she's telling us the complete opposite, that she was black out drunk*." (R99:133) (emphasis added). This brazenly argues the exact opposite of key testimony that Dr. Fromme was prevented from giving—that people experiencing an alcohol-induced blackout are not necessarily impaired in other ways (R98:33), and that since a blackout is a process occurring inside someone else's brain, outside observers wouldn't know the person's experiencing a blackout (R98:34-35).

These arguments were highly improper. A prosecutor cannot successfully move for the exclusion of key defense evidence on the theory that it is irrelevant, and then exploit the absence of that evidence in its arguments. *See, e.g.*, ***People v. Varona*** 143 Cal.App.3d 566, 569-70 (1983) (kidnapping and rape convictions overturned based on prosecutor's improper arguments; after successfully moving to exclude evidence that the accuser was a prostitute, "it was misconduct for the prosecutor to argue that there was no proof that the woman was a prostitute when he had, by his objections, prevented the defense from proving that fact").

Attorney Anderson did not consider objecting to these arguments because it did not occur to him (R130:31-33). This is oversight, not entitled to deference, and deficient given the court's ruling excluding Dr. Fromme.

B. Prejudice

Whether assessed individually or, as required by law, cumulatively, these errors prevented a fair procedure for assessing whether the State met its burden of proving Jarvi guilty beyond a reasonable doubt. Given the weaknesses in the State's case at trial and the substantial harmful impact of the identified errors discussed *supra*, those errors create far more than a reasonable probability of a different result but for those errors, *e.g.*, ***Strickland,*** 466 U.S. at 694.

This case was a pure credibility contest. Jarvi testified on his own behalf, describing a consensual encounter, but the jury was not allowed to fully evaluate his credibility due to the court repeatedly striking his testimony regarding statements made by Mia. The harm from that error is exacerbated by Attorney Anderson's failure to identity the hearsay exceptions that would have made those statements admissible, and failure to make an offer of proof as to additional statements that were

highly relevant, including Mia's statements to Kate saying she was "fine" and wanted to stay up with Jarvi.

Mia's credibility was limited due to her memory loss. She had no memory of the sexual encounter, and therefore no memory of whether or not she gave consent in fact. There was no *objective* evidence regarding her degree of intoxication. The court's rulings—and counsel's errors—tainted the jury's analysis on these issues. Mia was permitted to testify she was blackout drunk, and the prosecutor was permitted to argue that blackout state meant Mia was incapable of giving consent. The defense wasn't able to present Dr. Fromme's testimony explaining blackouts only affected memory, not capacity, and can occur at lower degrees of intoxication. And Attorney Anderson failed to object when the State improperly exploited the exclusion of Dr. Fromme in closing arguments.

There were no other witnesses to the encounter. Kate went to bed beforehand, and didn't see how the sexual encounter began. Her testimony about Mia's extreme intoxication that night was suspect, considering Kate didn't describe those observations during her initial statement to Det. Cook (R104:19-20).

The improper evidence regarding Jarvi's failure to give a pretrial statement further damaged his credibility by implying guilt based on his exercise of the right to pretrial silence. This error was not harmless because of the importance of the credibility determination: simply put, if Jarvi's testimony describing a fully consensual encounter provided enough doubt, the jury would have been required to acquit.

Whether viewed individually or cumulatively, the substantial prejudice caused by these errors warrant a new trial.

CONCLUSION

For these reasons, Jarvi asks this court to affirm the circuit court's order vacating the judgment of conviction and granting a new trial.

Signed 11/29/2024

Electronically signed by: Cole Ruby

COLE DANIEL RUBY
Attorney at Law
State Bar #1064819

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a respondent's brief produced with a proportional serif font. The length of this brief is 10,992 words.

Signed 11/29/2024:

Electronically signed by: Cole Ruby

COLE DANIEL RUBY
Attorney at Law
State Bar #1064819