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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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A jury convicted Jarvi for having sexual intercourse with Mia when, due her intoxication, she was incapable of consenting, a fact that he knew and purposely exploited. Wis. Stat. § 940.225(2)(cm). Like all trials, his was imperfect. Nevertheless, it was fair, and the errors were nonprejudicial; a new trial is not justified.

In this reply, the State addresses the issues in the order that the postconviction court found most to least significant to its decision.

ARGUMENT

I. Jarvi is not entitled to relief based on references to his declining to talk to police during the investigation.

The State relies on the following points in its opening brief for why Jarvi is not entitled to relief either directly or through his *Strickland* claim:

Testimony regarding Jarvi's declining to speak to police during the investigation did not violate his due process or Fifth Amendment rights. (State's Br. 24–27.) Such testimony violates due process only after the accused has received (or should have received) *Miranda* warnings. *Jenkins v. Anderson*, 447 U.S. 231, 238–40 (1980); *Salinas v. Texas*, 570 U.S. 178, 188 n.3 (2013) (plurality); *State v. Brecht*, 143 Wis.2d 297, 315–17, 421 N.W.2d 96 (1988).

References to pretrial silence violate the Fifth Amendment only when that silence follows an unequivocal and personal invocation of his right to silence. *State v. Stevens*, 2012 WI 97, ¶ 64, 343 Wis.2d 157, 822 N.W.2d 79; *State v. Ward*, 2009 WI 60, ¶ 58, 318 Wis.2d 301, 767 N.W.2d 236; and *State v. Hanson*, 136 Wis.2d 195, 212–13, 401 N.W.2d 771 (1987).

The State may impeach a defendant's credibility in closing by implying that he crafted his testimony to fit the

State's evidence. *Portuondo v. Agard*, 529 U.S. 61, 65–66 (2000). (State's Br. 27–29.) Counsel was not deficient for failing to object to permissible arguments.

Jarvi argues that *Brecht* precludes a prosecutor from asking a defendant about their pretrial silence. (Jarvi's Br. 41.) Unlike Jarvi, Brecht received *Miranda* warnings at his initial appearance. Hence, only references to Brecht's pretrial silence *after* the initial appearance violated due process. *Brecht*, 143 Wis.2d at 315.

Nor was Jarvi "subject to conditions [that] might compel a reasonable person to speak and incriminate himself" when Cook left a voice mail stating that he would refer the case to a prosecutor. (Jarvi's Br. 42.) A voice mail cannot trigger the *Miranda* rule; even law enforcement's live questioning over the phone does not trigger it. *State v. Halverson*, 2021 WI 7, ¶ 31, 395 Wis.2d 385, 953 N.W.2d 847.

Cook's testimony describing Jarvi as "uncooperative" after Jarvi obtained counsel was not punishing him for invoking his right to counsel, (Jarvi's Br. 42), for two reasons. First, Jarvi was not in custody, and "a person who is not in custody cannot anticipatorily invoke a Fifth Amendment *Miranda* right to counsel or [silence]." *State v. Hambly*, 2008 WI 10, ¶ 41, 307 Wis.2d 98, 745 N.W.2d 48 Second, Cook's testimony on the point was neutral. Cook mentioned Jarvi's counsel while explaining that Jarvi initially agreed to meet with Cook but that counsel later told Cook that Jarvi "didn't want to speak with me." (R. 99:12.) Cook's later remark that Jarvi "was uncooperative as far as wanting to interview" referred to Cook's earlier testimony and explained why he never investigated Jarvi's phone. (R. 99:33.) It was not a negative comment about Jarvi's decision to hire counsel.

Jarvi string-cites federal cases that he claims hold that custody through arrest is not required for someone to invoke his Fifth Amendment rights. (Jarvi's Br. 43.) These cases are

neither controlling nor persuasive. They involve personal invocations of Fifth Amendment rights during interrogations triggering those rights.[1] Jarvi also disregards that even if Cook's phone calls with him implicated his Fifth Amendment rights, counsel could not invoke those rights for him. (State's Br. 26–27.) Jarvi's nonresponse is a concession of that point. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis.2d 97, 108–09, 279 N.W.2d 493 (Ct. App. 1979).

Jarvi does not meaningfully address *Agard* and *Jenkins* and the State's assertion that the prosecutor's argument was proper here. (State's Br. 28–29.) Instead, he writes that *State v. Cockrell*, 2007 WI App 217, ¶¶ 16–17, 306 Wis.2d 52, 741 N.W.2d 267, holds that his choice to testify did not permit the State's use of testimony and arguments regarding his pretrial silence. (Jarvi's Br. 43–44.)

Cockrell is distinguishable. It involved a prosecutor's reference to post-*Miranda* silence. *Cockrell*, 306 Wis.2d 52, ¶ 14. Jarvi disregards that important distinction. *See State v. Sorenson*, 143 Wis.2d 226, 262–63, 421 N.W.2d 77 (1988) (distinguishing between references to pre- and post-*Miranda* silence). Moreover, Jarvi incorrectly suggests that *Cockrell* limits when a prosecutor can impeach a testifying defendant with his pretrial silence. (Jarvi's Br. 44.) The *Cockrell* court merely discussed illustrative cases; it did not hold that impeachment was permissible only under the circumstances it discussed. *Cockrell*, 306 Wis.2d 52, ¶¶ 16–17.

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[1] *See Combs v. Coyle*, 205 F.3d 269, 286 (6th Cir. 2000) (personal invocation of right to counsel during substantive interrogation); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991) (same); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989) (statement at second questioning after relying on guarantees received at first questioning); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017–18 (7th Cir. 1987) (personal invocation during pre-custody interrogation).

Agard and *Jenkins*, not *Cockrell*, control here: the prosecutor asked the jury to consider, when weighing credibility, that Jarvi testified after hearing Mia's and Kate's testimony, whereas Mia and Kate did not know what Jarvi's version of events would be until he testified. (R. 99:120.) That argument did not concern post-*Miranda* silence; even if it did, it was not an inference that Jarvi's pre-testimony silence evinced his guilt. *See Agard*, 529 U.S. at 70–73.

For the same reasons, counsel was not ineffective for his nonobjections to these points. (Jarvi's Br. 40–44); *see State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis.2d 209, 769 N.W.2d 110 (failure to make a meritless argument is not ineffective assistance).

II. Jarvi is not entitled to relief based on evidentiary rulings excluding his proffered testimony about statements made by Mia and Kate.

A. Even if the court should have permitted Jarvi to quote Mia's alleged statements, the errors were harmless.

As argued (State's Br. 38–41), the exclusion of Jarvi's quotes of things that Mia allegedly said suggesting her consent or willingness was harmless error,[2] because none of her alleged quotes would have made him more credible, prevented him from presenting a vivid version of events countering the State's evidence, asserting that Mia initiated the intercourse, or asserting that based on her behavior, he believed she had capacity to consent. (State's Br. 39–40.) That

[2] Jarvi does not address the State's arguments regarding exclusion of Kate's alleged statements, (Jarvi's Br. 21–22), and therefore concedes those points. Thus, the State's harmless-error argument focuses on the effects of excluding Mia's statements. Still, Kate's alleged statements were peripheral to the issues at trial and their omission was highly unlikely to prejudice Jarvi.

Jarvi claims that Mia commented that she kissed him; that she said yes during sex; or that she said "Wow," would not have made his version of events more plausible.

Jarvi's response leans heavily on *Prineas*, (Jarvi's Br. 26–27); it is not on point. There, the court granted a new trial in a sexual assault case where consent was a contested element. *State v. Prineas*, 2012 WI App 2, ¶ 29, 338 Wis.2d 362, 809 N.W.2d 68. In contrast, here, whether Mia actually consented was irrelevant to a charge under section 940.225(2)(cm). A victim's specific words while intoxicated are not relevant to her capacity or the defendant's intent or belief with regard to capacity. Thus, the words Mia said were not important; *how* she said them was (e.g., whether she slurred her speech and how she behaved). Jarvi was not prevented from testifying on those points.

Jarvi asserts that the error is prejudicial because the jury did not hear his "full testimony" and because of the "damaging impact of the judge instructing the jury to disregard Jarvi's" statements as to things he claimed that Mia said. (Jarvi's Br. 27.) Again, Jarvi gave vivid testimony opposing elements three through five, describing in detail how Mia behaved before, during, and after the intercourse, and his impressions of her capacity and her demeanor. The court's statements when it struck objected-to portions of Jarvi's testimony were no more "damaging" to Jarvi than any other grant of an objection.

Jarvi argues that the court's ruling "muzzled" him in this "he-said she-said" case and prevented the jury from fully evaluating credibility. (Jarvi's Br 28.) "He-said, she-said" is an inappropriate label generally and here, where an incapacitated Mia could not legally consent and nonconsent

was not an element.[3] Jarvi repeatedly misses the mark by arguing that he was harmed when he could not testify that Mia said things reflecting consent-in-fact. The issue here was Mia's capacity, not her utterance of words that might disprove nonconsent in a third-degree sexual assault case.

Because any error was harmless, Jarvi also cannot show that counsel was ineffective for not seeking alternative means to overcome the State's objections. (Jarvi's Br. 39–40.)

B. The statements were excludable on relevance grounds.

This Court may affirm the circuit court's discretion in excluding Jarvi's testimony quoting Mia and Kate before, after, and during the assault on "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). That alternative basis for excluding the statements is relevance: all of the statements seemingly went to whether Mia consented-in-fact to sex with Jarvi. Because consent-in-fact is not an issue when the only charge is sexual assault of an intoxicated person under section 940.225(2)(cm), the court could have excluded the statements as irrelevant. (State's Br. 31–35.)

Jarvi asserts that those quotes were necessary to prove that Mia actually consented. (Jarvi's Br. 21–24.) Again, because consent-in-fact is not an issue in a (2)(cm) case, the

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[3] Though "he-said, she-said" is common shorthand for credibility-centered sexual-assault cases, the phrase can perpetuate biases against female victims by implying that a male perpetrator's version of events must prevail. Lois Shepherd, *The Danger of the 'He Said, She Said' Expression*, The Hill, Oct. 12, 2018, https://thehill.com/opinion/judiciary/411157-the-danger-of-the-he-said-she-said-expression ("'He said, she said' implies that we throw up our hands in capitulation—the truth simply cannot be known.").

complained-of statements were irrelevant to Mia's intoxication level and resulting incapacity.

Jarvi strenuously objects to those arguments. (Jarvi's Br. 20–22.) He claims that because part of his defense was that Mia consented, whether she consented was a relevant, consequential fact the jury needed to find. He writes, "Logically, if Mia *was* capable of freely giving consent, and if she gave consent in fact, this provides a defense to the charge." (Jarvi's Br. 21.)

He's wrong. "[C]onsent is not an issue in alleged violations of sub. (2) . . . (cm)." Wis. Stat. § 940.225(4). The jury was instructed to find: (1) sexual intercourse; (2) Mia was intoxicated during the intercourse; (3) she was intoxicated to a degree rendering her incapable of giving legal consent, i.e., "freely giving agreement to engage in sexual intercourse"; (4) Jarvi knew of that incapacity; and (5) he purposely had intercourse with her while she was incapable of consenting. (R. 104:57–58.) If the jury concluded that element three was not satisfied—that Mia had capacity—the fourth and fifth elements likewise are unmet.

Importantly, the jury never needs to consider consent-in-fact in a (2)(cm) case. *Capacity*, not actual consent, is the defense. Jarvi misconstrues the third element to require the jury make findings on consent-in-fact (like it would for charges of third-degree sexual assault). *See, e.g.,* Wis. Stat. § 940.225(3)(a) (proscribing intercourse without "consent of that person"). Because this wasn't a third-degree sexual assault case, the issue was Mia's capacity due to her level of intoxication, not her alleged expressions of consent.

Jarvi argues (Jarvi's Br. 22), that two statements were particularly relevant: (1) Mia's stating "I just kissed you" while walking with Jarvi and saying "We should go back [to the campsite]"; and (2) Mia's demurring when Kate suggested that Mia go to bed. (R. 99:68; 112:9–10.)

But the first set of statements would not have countered testimony establishing that Mia was not sexually interested in Jarvi, and not probative of Jarvi's "later belief that she consented to sexual intercourse." (Jarvi's Br. 22.) Moreover, Jarvi told the jury that Mia initiated the kiss. Her saying, "I just kissed you," or that they should go back to the campsite would have added nothing. Further, Mia's statements made well before the assault had no bearing on her later capacity to consent or Jarvi's awareness of it.

The second set of statements would not have supported the theory that Mia maintained capacity to make voluntary choices. (Jarvi's Br. 22.) Even if Mia could have articulated that she did not want to go into her tent, those words do not show capacity to consent. Indeed, Mia could have also been begging Jarvi for intercourse. That she could form words supporting actual consent if this were charged as third-degree sexual assault does not inform whether she had legal capacity to consent in this section (2)(cm) case.

Jarvi maintains that the content of the following statements by Mia were relevant: her inviting him into her tent, answering "Yeah" to his "are-we-doing-this" question, responding to his initial nonerection, affirming during intercourse, and saying "Wow" afterward. (Jarvi's Br. 23–24.) Not so. The content of those statements had no bearing on her capacity or Jarvi's perception of *how* Mia was behaving at the time. Unlike in a third-degree sexual assault case, Jarvi's perceptions, not Mia's words, were important in this section (2)(cm) case.

Jarvi suggests that Mia's alleged verbalizations would have been as relevant as her silence would have been. (Jarvi's Br. 23–24.) Jarvi was not prevented from claiming that Mia was verbal or how she spoke. Rather, he was merely prevented from quoting her.

Finally, for the same reasons supporting the court's discretionary decision, the exclusion of Mia's statements did not violate Jarvi's constitutional right to present a defense. (Jarvi's Br. 24–25.) Defendants only have a "constitutional right to present *relevant* evidence not substantially outweighed by its prejudicial effect." *State v. Pulizzano*, 155 Wis.2d 633, 646, 456 N.W.2d 325 (1990) (emphasis added). The alleged statements went to whether Mia actually consented and were therefore not relevant or probative in this case. And as argued, any error—whether constitutional or discretionary—was harmless.

III. The circuit court soundly excluded Fromme's testimony.

Jarvi sought to admit expert testimony from Dr. Kim Fromme regarding alcohol-induced blackouts. After a hearing, the circuit court excluded her testimony. (R. 78; 98:87–98.) The postconviction court reaffirmed its decision. (R. 153:5–7.)

Jarvi asks this Court to review the lower court's exclusion of Fromme's testimony and related issues. (Jarvi's Br. 28–39.) This Court should affirm the lower court's decisions rejecting Jarvi's claims.

A. Exclusion of expert testimony is discretionary.

Circuit courts have discretion "whether to admit proffered expert testimony." *State v. Dobbs*, 2020 WI 64, ¶ 27, 392 Wis.2d 505, 945 N.W.2d 609. This Court will affirm "a circuit court's decision if the decision 'had a reasonable basis,' and 'was made in accordance with accepted legal standards and . . . the facts of record.'" *Id.* (citation omitted). "This standard is highly deferential: [this Court] will search the record for reasons supporting the trial court's decision, and . . . will sustain a ruling even where [it] disagree[s] with

it, so long as appropriate discretion was exercised." *State v. Hogan*, 2021 WI App 24, ¶ 26, 397 Wis.2d 171, 959 N.W.2d 658.

Wisconsin Stat. § 907.02(1) allows expert testimony to be admitted when it satisfies three elements: (1) "the witness must be *qualified*"; (2) "the witness's testimony must be *relevant* ('[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue')"; and (3) "the witness's testimony must be *reliable* ('if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case')." *Hogan*, 397 Wis.2d 171, ¶ 19.

As the gatekeeper, the circuit court must "ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *State v. Giese*, 2014 WI App 92, ¶ 18, 356 Wis.2d 796, 854 N.W.2d 687. The court focuses on the relied-upon principles and methodology, not the conclusion. *Id*. "The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Id.* ¶ 19.

Finally, even if expert testimony satisfies the criteria in Wis. Stat. § 907.02, the circuit court may exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Wis. Stat. § 904.03.

B. Fromme's testimony was not necessary, not reliable, and likely to confuse the jury.

The circuit court excluded Fromme's testimony for the following reasons:[4]

- Expert testimony on the commonly known effects of alcohol intoxication was unnecessary to assist the trier, (R. 78:2);
- Fromme's testimony focusing on alcohol-induced blackouts was not material to whether Mia was intoxicated to a degree rendering her incapable of consenting, (R. 78:2–3; 98:93–94);
- Fromme's opinion was not reliable because she did not apply her scientific methodology in researching excessive intoxication to sufficient facts to reach her opinions in this case, (R. 98:89–91); and
- Fromme's testimony was likely "to confuse and obfuscate the issues the jury is to decide." (R. 78:3–4; 98:93–95.)

Those reasons reflect a sound exercise of discretion. Courts must determine that expert testimony will assist the jury to understand the evidence or determine a fact at issue. *Hogan*, 397 Wis.2d 171, ¶ 19; *Racine County v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶ 28, 323 Wis.2d 682, 781 N.W.2d 88 (expert testimony is unnecessary and improper "to assist the trier . . . concerning matters of common knowledge or those within the realm of ordinary experience"). Here, the court noted that alcohol consumption "and the experience of observing those who are intoxicated to a very high degree" is

[4] The circuit court also excluded Fromme's testimony on procedural grounds that lack record support. (R. 78:1–2.) Accordingly, the State focuses on the court's reasons for excluding Fromme's testimony under section 907.02(1).

a common experience for the average juror such that expert guidance was not necessary. (R. 78:2–3.)

Further, Fromme's opinion was speculative, not reliably based on the facts, and irrelevant to whether Mia had capacity to consent. (R. 78:3–4; 98:89–94.) Notably, Fromme offered testimony regarding blackouts—including what they are, different types, risk factors, and what function they can impair. (R. 98:29–40.) She would have opined that Mia experienced an alcohol-induced blackout on the night of the assault. (R. 98:42–49.) But the issue was not whether Mia was blackout intoxicated, but whether she maintained capacity to consent when the assault occurred. (R. 78:2–3.) Accordingly, Fromme's testimony risked confusing the jury. (R. 78:2–3; 98:95.) Indeed, Fromme admitted that there was no scientific basis to conclude whether a person experiencing an alcohol-induced blackout could freely consent to sex, and that we "can only look at [the impaired person's] actions and infer their underlying cognitive behaviors" in assessing whether they have that capacity. (R. 78:3; 98:39.) Thus, the most Fromme could say was that Mia "may" have retained the ability to freely consent if she was blackout intoxicated. (R. 98:54.)

Her testimony on these points, the court aptly determined, would cloak speculation with a "scientific aura." (R. 78:3); *see Giese*, 356 Wis.2d 796, ¶ 19. It would have added only confusion to the jury's consideration of the elements. That was a sound exercise of discretion.

Jarvi argues that Fromme's testimony was relevant to elements three and four, and that it was crucial to his defense theory that levels of intoxication that impair memory may not affect capacity to consent. (Jarvi's Br. 31–32.) He argues that the testimony was necessary to rebut an inference by the State in closing that Mia was "blackout" drunk and therefore lacked capacity to consent and that it would have bolstered his testimony that Mia was not "too drunk" to consent. (Jarvi's Br. 33.)

The State referenced Mia's testimony that she was blackout drunk to underscore her lack of memory and her excessive alcohol consumption. It did not argue it as stand-alone proof of incapacity. There were two testimonial references to blackout intoxication, both of which concerned issues of memory and how much Mia had consumed, not capacity to consent. First, counsel elicited on cross-examination from Mia that she was "black-out" drunk, when counsel queried why she remembered some minor details but forgot larger events. (R. 104:217–18.) Second, Cook stated that during the investigation, he did not ask certain questions that he knew Mia could not answer based on her description of her level of impairment as "blackout intoxicated." (R. 99:34.)

In closing, the State argued Mia's blackout state as probative of her high level of intoxication:

> The girl who couldn't walk to the bathroom by herself, who needed assistance getting in and out of her chair, who fell, who scraped her knee, and who literally told you she was [blackout] drunk. She doesn't remember any of it.

(R. 99:132–33.) There, the State appropriately highlighted testimony establishing that Mia had consumed so much alcohol that she was blackout drunk as a result, and that she was so visibly intoxicated and impaired that her condition would have been obvious to Jarvi. It permissibly argued that that evidence supported inferences that the third and fourth elements were satisfied. At no point did the State argue that Mia's statement that she was blackout drunk excused the jury from finding the third element.

Jarvi writes that Fromme's testimony would have allowed the jury to believe that if Mia was "only" drunk enough to be experiencing a blackout, "then she wouldn't have been exhibiting observable symptoms or impairment that should have been obvious to Jarvi." (Jarvi's Br. 33.) But the

jurors' common knowledge would tell them that blackout intoxication typically does not result from minimal alcohol consumption, and people who are blackout drunk likely show some signs of impairment. Nothing in the record reflects that Fromme would have contradicted that common knowledge.[5] All Fromme would have said was that a person experiencing blackout intoxication might or might not retain capacity to consent.

Moreover, Fromme's testimony would not have caused the jury to disbelieve the obvious signs of impairment that the State introduced, including that Mia could not walk on her own, that she could not get out of her chair on her own, that she fell and scraped her knee, and evidence of how much she drank that day.

Finally, the circuit court soundly excluded Fromme's testimony based on concerns that it would confuse the issues. Wis. Stat. § 904.03. As Jarvi notes (Jarvi's Br. 35), Fromme's expert opinions boiled down to the following: (1) Mia experienced an alcohol-induced blackout on the night of the assault; and (2) Jarvi would have been a poor judge of her intoxication level, because everyone is; and (3) Jarvi had no way of knowing whether Mia was blackout drunk.

The first and third points would have risked confusing the issues and the jury, because the jury did not need to find

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[5] At the motion hearing, the closest Fromme came to making those points was by saying that 50 percent of people drinking the same amount of alcohol will experience blackouts and that women typically experience blackouts at lower alcohol concentrations than men do. (R. 98:13, 16.) Fromme also opined that an observer generally would not know if someone was experiencing a blackout, i.e., not producing memories. (R. 98:35, 49.) She did not say that blackout intoxication can result from low alcohol consumption or that a blackout-intoxicated person generally shows no signs of intoxication.

that Mia was blackout drunk or that Jarvi was aware that Mia's short-term memory was impaired. Again, the jury needed to find that Mia's impairment caused her to lack capacity to consent, and that Jarvi had knowledge and intent with regard to that lack of capacity.

The court's second point was encapsulated by Fromme's statement: "Unless a person has lost consciousness we can only speculate about their ability to think and reason . . . we can only look at their actions and infer their underlying cognitive behaviors." (R. 78:3.) As the circuit court reasonably found, Fromme's testimony would be more likely to confuse than assist the jury. (R. 78:3–4.)

C. The exclusion did not violate Jarvi's constitutional rights.

Jarvi identifies the factors in *St. George* to establish when excluded expert testimony violates a defendant's constitutional rights (Jarvi's Br. 37), but he does not explain why those factors are satisfied. This Court may disregard this undeveloped argument. *State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633.

Alternatively, Jarvi cannot establish a constitutional violation. The test for when exclusion of expert testimony violates constitutional rights asks whether "the proffered evidence was 'essential to' the defense, and . . . without the proffered evidence, the defendant had 'no reasonable means of defending his case.'" *State v. Williams*, 2002 WI 58, ¶ 70, 253 Wis.2d 99, 644 N.W.2d 919 (quoted source omitted).

Jarvi cannot show a constitutional violation for the same reasons that the circuit court soundly exercised its discretion in excluding Fromme's testimony under Wis. Stat. §§ 904.02, 904.03, and 907.02. Nor does Jarvi explain how in this case, Fromme's testimony was necessary to his defense or its absence gave him "no reasonable means of defending his case." *Williams*, 253 Wis.2d 99, ¶ 70. For example, a defense

expert likely is constitutionally "necessary" when a case comes down to a "battle of the experts." *See, e.g.*, *State v. St. George*, 2002 WI 50, ¶ 63, 252 Wis.2d 499, 643 N.W.2d 777. This was not such a case. Fromme's testimony was not constitutionally necessary to his defense, and its absence did not leave him defenseless. Indeed, Jarvi fully testified to his version of events, cross-examined the State's witnesses, and meaningfully argued that the State failed its burden. (R. 99:73–75.)

IV. Counsel was not ineffective.

Counsel was not deficient for not objecting to the State's references to Mia being blackout intoxicated in closing. (Jarvi's Br. 44–46.)[6]

To start, Jarvi did not develop a record supporting a claim of deficiency. He merely elicited at the postconviction hearing that counsel did not consider objecting to those references. (R. 130:32–33.) Jarvi did not ask whether counsel thought the State's argument actually was improper or that an objection would have benefitted Jarvi. Without that testimony, this Court cannot hold that counsel was deficient. *State v. Machner*, 92 Wis.2d 797, 804, 385 N.W.2d 905 (Ct. App. 1979).

Jarvi thinks counsel should have objected on prosecutorial-misconduct grounds. (Jarvi's Br 45–46.) But any objection on that basis would have failed. Such an allegation asks the court to consider whether the statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Mayo*, 2007 WI 78, ¶ 43, 301 Wis.2d 642, 734 N.W.2d 115 (quoted source omitted). Even if the prosecutor makes improper arguments at closing, a new trial is not warranted unless the statements,

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[6] The State's arguments in Parts I and II above foreclose Jarvi's other two ineffective-assistance claims. (Jarvi's Br. 39–44.)

taken in the context of the whole trial, prejudiced the defendant. *Id.*

The prosecutor's closing remarks here were sound. As discussed above in Part III.B, the State appropriately highlighted testimony establishing that Mia had consumed so much alcohol that she was blackout drunk as a result, and that she was visibly impaired to an obvious degree. It permissibly argued that that evidence—including the fact that Mia drank enough to reach a blackout state—supported inferences that the third and fourth elements were satisfied here.

Further, Jarvi cannot establish prejudice because counsel countered that argument in his closing. He argued that the evidence of Mia's level of intoxication was weak. (R. 99:141.) He highlighted that there was no evidence that Mia was slurring her speech, could not carry on a conversation, or even how much she actually had to drink. (R. 99:142–43.) Further, counsel asked the jury to consider its own experience in dealing with someone who was blackout intoxicated and that they would not necessarily be able to tell that they were that impaired or judge their capacity:

> How would you know? If you're out drinking with a buddy, do you know when they're [blackout intoxicated]? I think at a certain point when they're passed out . . . you could maybe figure it out, but use your own experiences in making that determination.

(R. 99:145.) Accordingly, counsel reasonably rebutted the prosecutor's closing argument; his lack of objection was not deficient or prejudicial.

Finally, Jarvi's prejudice argument boils down to emphasizing that this was a weakly-supported credibility contest where Mia's memory was limited and Kate's testimony was unhelpful and suspect. (Jarvi's Br. 46–47.) Again (State's Br. 37–43), Jarvi was not prejudiced because Kate and Mia largely corroborated each other's testimony and

Jarvi's version of events was implausible. Admitting the excluded testimony and striking the challenged parts of the State's closing arguments would not have contradicted anything that Kate and Mia said or rehabilitated Jarvi's unconvincing testimony that Mia actively initiated and drove the intercourse.

CONCLUSION

This Court should reverse, with instructions for the circuit court to vacate the order granting a new trial and to reinstate Jarvi's conviction.

Dated this 13th day of March 2025.

Respectfully submitted,

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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 4,998 words.

Dated this 13th day of March 2025.

Electronically signed by:

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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 13th day of March 2025.

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