STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2020AP001876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

Appeal of a Judgment of Conviction and an Order Denying Postconviction Relief in Chippewa County Circuit Court, the Hon. James M. Isaacson, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Hoyle Is Entitled To A New Trial Based On Newly Discovered Evidence Of HAL's Inconsistent Statements Regarding Counseling.

The State properly concedes that HAL's post-trial assertion that she did not receive counseling for the alleged assault, in contrast to her trial testimony explaining that her calm demeanor was due to her receiving counseling, meets the four criteria for "newly discovered evidence." (State Br. at 12) (citing *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42). The State instead argues that Hoyle has failed to meet the prejudice standard, *i.e.* that there is a "reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to [Hoyle's] guilt." *Plude*, 2008 WI 58, ¶ 33 (quotation marks, citations, and brackets omitted).

The State first argues that the new evidence "impeaches only the collateral issue of why [HAL] had an unemotional demeanor on the witness stand. It does not impeach any of her substantive statements about" the alleged assault. (State Br. at 12-13).

However, HAL's demeanor was far from a "collateral" issue at this trial. The government's case relied entirely on HAL's credibility. The prosecution did nor introduce any corroborating physical evidence or witness testimony, a point the State conspicuously fails to acknowledge. And as documented in Hoyle's

opening brief, a witness's demeanor is crucial to a jury's assessment of the witness's credibility. (Hoyle Br. at 18) (collecting cases). The prosecutor clearly understood this, and was evidently concerned about how HAL's demeanor played to the jury, as he concluded his direct examination of HAL with nine questions about her counseling, and how it explained her unemotional demeanor. (R.91:167-168).

The State next relies on the line of cases holding that the defendant may be granted a new trial "where it is shown that the verdict is based on perjured evidence." (State Br. at 13) (citations omitted). The State asserts that while the verdicts in *Plude* were based on perjured evidence, the verdicts here were not. The State's attempt to distinguish *Plude* falls short. In both *Plude* and the case at hand, the verdict was "based on perjured testimony" not because the substance of the witness's testimony was false, but because a crucial witness had given false testimony regarding their credibility.

In *Plude*, the newly discovered evidence was that the prosecution's expert "injury mechanism" witness had lied about his credentials, specifically in holding a clinical professorship at a particular university. 2008 WI 58, ¶ 30. There was no claim that the expert had lied when testifying about the mechanism of the victim's death. *Id*.

Nonetheless, the *Plude* court held that there was a reasonable probability that a jury would have acquitted Plude if it had heard that the expert had lied

about his credentials. The court observed that the expert was the only witness supporting the state's theory of the mechanism of death, as "no expert corroborated his substantive testimony." 2008 WI 58, ¶ 48. HAL's testimony was of course just as critical to the State's case as the expert's testimony in *Plude*, if not more so, as HAL's testimony was the only evidence supporting any element of the crime.

And while the *Plude* court does not explain how the discovery of false bolstering testimony can impact the jury verdict, there are at least two mechanisms. First, a jury applying the presumption of innocence may simply find a witness's testimony sufficiently reliable to convict the defendant absent the bolstering testimony. Second, a jury hearing that the witness testified falsely in order to bolster their credibility may conclude that the witness's testimony should not be trusted because the witness has a dishonest character. Wis. Stat. § 906.08. Thus, for the same reasons that the newly discovered evidence in *Plude* met the reasonable probability standard, so does the newly discovered evidence here.

Finally, the State tacitly concedes that the trial court erroneously exercised its discretion when applying the "reasonable probability" standard, as the State does not defend the court's decision. "We will not abandon our neutrality to develop arguments for the parties, so we take the State's failure to brief the issue as a tacit admission…." *State v. Anker*, 2014 WI App 107, ¶ 13, 357 Wis. 2d 565, 855 N.W.2d 483 (citation omitted).

II. Hoyle Is Entitled To Postconviction Discovery Of Counseling Records.

The State's argument seems to be that if this court denies Hoyle's newly discovered evidence argument, it should also reject HAL's alternative request for discovery of HAL's treatment records, because the records would only duplicate the newly discovered evidence, *i.e.* that HAL lied about receiving treatment for the sexual assault. (State Br. 18). Thus, as Hoyle understands the argument, if the fact that HAL lied about her treatment does not meet the "reasonable probability test," it does not matter whether the source of the evidence that HAL lied is her statement to the PSI writer or the treatment records.

In pursuing any litigation strategy, litigants have to anticipate their opponent's arguments without making the arguments for them. Here Hoyle anticipated an argument that the State has not made: that HAL's statement to the PSI writer alone was not enough to satisfy the criteria for newly discovered evidence because of the possibility that her trial testimony was correct and it was the statement to the PSI writer that was false. The treatment records would then potentially show more conclusively that it was HAL's trial testimony that was false.

As the State points out, the circuit court assumed that HAL's trial testimony regarding her treatment was false. (State Br. at 18, n. 4) (quoting R. 94:23,32). And the State does not argue against this

Court making the same assumption. However, if this Court does *sua sponte* decide that Hoyle is not entitled to a new trial because of the nature of HAL's statement to the PSI writer, then Hoyle is entitled to discover whether more reliable evidence, in the form of her actual treatment records, corroborate her statement to the PSI writer.

The State also attacks here Hoyle's argument that HAL's "demeanor was the only basis for crediting her claim that Hoyle assaulted her." (State Br. at 20, quoting Hoyle Br. at 30). The only other grounds for crediting HAL's testimony that the State offers is the fact that HAL gave "a simple straightforward account" of the assault and that she "had no reason" to fabricate the accusation.

However, these arguments are inconsistent with the jury's duty to presume Hoyle's innocence, and the state's burden of proving Hoyle's guilt beyond a reasonable doubt. For instance, Hoyle did not have an obligation to produce evidence that HAL had a motive to lie; and in no way did the State *prove* that HAL had no motive to lie.[1] In addition, the "simplicity" of a story has no bearing on whether or not is true. Life is full of complexities. Whether an accusation is simple or complex, the jury presumes that it is untrue until the State satisfies its burden of proving its truth beyond a

[1] And as discussed below, Hoyle's discovery claims concern a potential motive to lie: embarrassment over telling a male police officer that she engaged in a consensual sexual act while using drugs.

reasonable doubt. The making of the accusation itself is not enough to overcome this burden.

Finally, the State argues that Hoyle has failed to make an argument that the denial of his request for an *in camera* inspection of the records is harmless, citing *State v. Green*, 2002 WI 68, ¶ 20, 253 Wis. 2d 356, 369, 646 N.W.2d 298, 304. (State Br. at 20). *Green* is inapplicable, as it concerns the denial of pre-trial discovery of such records. *Id*. Where, as here, the defendant requests records in service of a newly discovered evidence claim, the applicable test is laid out in *State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 365, 661 N.W.2d 105, 113. And *Robertson* only requires the defendant to meet the modified "newly discovered evidence" test in order to obtain *in camera* review of the records. *Id*. There is no requirement to show that failure to inspect the records is not "harmless." *Id*. Because Hoyle met the *Robertson* test, he is entitled to an *in camera* inspection of the records.

III. The State's repeated argument that the evidence was "uncontroverted" violated Hoyle's Fifth Amendment right not to testify at trial.

The court's holding in *Bies v. State*, 53 Wis. 2d 322, 325–26, 193 N.W.2d 46, 49 (1972), is not as simple as the state suggests. "Uncontroverted" is not a "word the *Bies* court said does not violate the Fifth Amendment." (State Br. at 22). *Bies* does not authorize a prosecutor to argue evidence is "uncontroverted" under any circumstance.

Again, as explained in the opening brief, *Bies* explicitly held that the prosecutor's use of the word "uncontroverted" was not an impermissible comment on the defendant's decision not to testify only because the prosecutor's comments were limited to an issue that the defendant in fact did not controvert: that the underlying facts occurred.

As the court explained:

> the defendant's strategy was not to deny the occurrence of the acts surrounding the murder and robbery, but rather to show that his intoxication negated the necessary intent. Since the district attorney's comments referred to evidence of the acts rather than to evidence of intoxication, we conclude that the argument was a proper comment on the testimony.

Bies, 53 Wis. 2d at 325–26. Here, of course, Hoyle did dispute whether the "acts" occurred. Hoyle argued that the state failed to meet its burden of proving that any sort of contact, let alone sexual, occurred. (R. 92:28-39).

Second, the State argues that "Hoyle makes no effort to show how the word 'uncontroverted' in this case meets [the] test" articulated in *State v. Johnson*, 121 Wis. 2d 237, 246, 358 N.W.2d 824 (Ct.App.1984), *i.e.* that an argument is impermissible if it is "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." (State Br. at 22-23). However, Hoyle explicitly argued that the comments met the *Johnson* test because,

given the nature of the allegations, "the only person who could controvert HAL's testimony was Hoyle." (Hoyle Br. at 34-35, *citing Johnson*).

Third, the State relies on a test for improper comments on a defendant's silence in *State v. Jaimes*, 2006 WI App 93, ¶ 21, 292 Wis. 2d 656, 715 N.W.2d 669. The first factor in *Jaimes* is the same as the *Johnson* factor discussed above, *i.e.* that it is a "comment" on the defendant's failure to testify, and the prosecutor's comments satisfy this factor for the same reasons.

The second factor is that the comment on the failure to testify "propose[s] that the failure to testify demonstrates guilt." Here, the prosecutor specifically argued that Hoyle's guilt is demonstrated by the fact that there was no evidence – which again, could have only come from Hoyle – controverting HAL's testimony. Thus, the second factor of *Jaimes* is met.

The third *Jaimes* factor is that the defense argument did not invite the comment, and as the State concedes this factor is met here. (State Br. at 23).

And finally, the State does not argue that any error in allowing the prosecutor's argument was harmless, thus conceding the issue. (Hoyle Br. at 35).

IV. Hoyle is Entitled To A New Trial Based On The State's Failure to Disclose HAL's Initial Statement to the Police.

In a case that relied entirely on the complaining witness's testimony, and lacked any corroborating testimony or physical evidence, the witness's initial statement to the police was absolutely critical. The initial statement included numerous inconsistencies with her subsequent statement and testimony. The statement also suggested a potential motive for HAL to falsely accuse Hoyle of sexual assault: what a young person thought was a seemingly small and private lie about whether a sexual encounter with an unnamed person was consensual snowballed out-of-control when pressed by police. While the State tries to downplay the significance of individual aspects of the initial statements, in total the prior statements were "favorable to the accused, either because [they were] exculpatory or impeaching." *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 362, 922 N.W.2d 468, 477.

First, according to both the email and the report, HAL told Officer Nelson that he was the first person she told about the assault. (R. 65, 74:4). Even if, as the State posits, this statement was arguably consistent with her later statement to Investigator Anderson that she had told her friend about aspects of the assault, the fact that it was arguably inconsistent meant that it was fodder for cross-examination, and could have been used to show how HAL gave inconsistent accounts of what happened.

Second, contrary to the State's suggestion, the difference between HAL telling Officer Nelson that she was high from smoking weed, rather than drunk from alcohol, is not trivial. The fact that HAL was not in the right state of mind when she encountered Hoyle was a key aspect of the State's case. Further, inconsistent statements suggest that she was trying, but failing, to remember her prior versions of this story, instead of testifying from her memory of what actually happened. HAL might also think that a jury would find a teenager drinking alcohol more acceptable than a teenager using an illegal drug, and Hoyle could have argued that HAL was tailing her testimony to the jury's expectations, instead of hewing to the truth.

Third, regarding HAL initially stating that Hoyle used him giving her cigarettes as justifying his assault of her, there perhaps would have been some risk in Hoyle pointing out that she had initially made a more salacious accusation. On the other hand, in a case that relied entirely on HAL's credibility, the fact that HAL did not think to relate such a detail could again be used to suggest that HAL was not testifying from her present memory of the incident, because the incident did not happen.

Finally, it is true that the undisclosed statements do not explicitly state that HAL first described a sexual encounter, and then claimed it was nonconsensual out of embarrassment. However, Nelson's initial email regarding the origin of the initial accusation is that "[t]his all came about because [HAL] was in my office talking about her drug dependence

and she used this incident as an example of how low she goes when she is high/drunk." (R. 65).

It is reasonable to conclude from this description of the initial report that HAL initially blamed herself – it was "an example of how low she goes" – for engaging in a consensual sexual encounter that she would not have engaged in if she had been completely sober, but then to absolve herself claimed that the encounter was not consensual. Similarly, it would not be unheard of for a young person, embarrassed about a sexual encounter, to claim that the encounter was not consensual.

This of course is not to suggest that an adult having a sexual encounter with a minor, or that anyone having a sexual encounter with a person incapacitated by drugs or alcohol, is "consensual." However, the failure to name Hoyle as the perpetrator until months later, after police approach her to "confirm" his identify, could be used to suggest that he was not involved at all.

Finally, the State concedes that the email and report were "suppressed" under *Brady*, and relies on its earlier arguments for why they were not "material." State Br. at 28, n. 6, and 32. Hoyle likewise relies on his earlier arguments regarding materiality.

CONCLUSION

For the reasons stated above and in his initial brief, Hoyle is entitled to a new trial, or in the alternative, postconviction discovery of HAL's counseling records.

Dated this 25th day of June, 2021.

Respectfully submitted,

Electronically signed by Thomas B. Aquino

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,650 words.

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Electronic Filing Project, Order No. 19-02

I further certify that a copy of this certificate has been served with the brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 25th day of June, 2021.

Signed:

Electronically signed by Thomas B. Aquino

THOMAS B. AQUINO
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