STATE OF WISCONSIN

SUPREME COURT

Case No. 2020AP001876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

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REASONS FOR DENYING REVIEW

I. Review is not warranted because the Court of Appeals correctly applied the longstanding rule that a prosecutor may not suggest that a negative inference should be drawn from a defendant's decision not to take the stand and contest the state's allegations.

In defending the prosecutor's repeated argument that it was "uncontroverted" that Defendant-Appellant Tomas Hoyle sexually assaulted the victim, "Hannah[1]," when the only witness who could "controvert" the assault was Hoyle himself, the State's Petition for Review continues its misunderstanding of a well-established rule: A prosecutor's right to argue that negative inferences should be draw from the defendant's failure to call a particular witness does not extend to any argument based on the defendant's own failure to testify. In 1965, the Supreme Court declared that such an argument was an impermissible penalty on the Fifth Amendment privilege against self-incrimination. *Griffin v. California*, 380 U.S. 609, 615 (1965). But well before then, Wisconsin adopted the same rule as a matter of state law. *See, e.g., Martin v. State*, 79 Wis. 165, 48 N.W. 119, 122 (1891).

[1] This Response adopts the pseudonym for the victim used by the Court of Appeals in its opinion and the State in its petition.

In the first part of its Petition, the State argues that review is necessary to provide guidance on when a prosecutor's argument based on a lack of evidence supporting a defense claim becomes an impermissible comment on the defendant's decision not to testify. (Petition at 9-12). However, the Petition fails to acknowledge the long history of the current rule alluded to above. Nor does the Petition, at least in this part of its argument, acknowledge the three-part test articulated by the Court of Appeals in *State v. Jaimes*, 2006 WI App 93, ¶21, 292 Wis. 2d 656, 715 N.W.2d 669. Indeed, the State does not argue that this test should be modified in any way.

The State instead argues, in the second part of its Petition, that the Court of Appeals misapplied the *Jaimes* test. (Petition at 12). However, this Court's "primary function is that of law defining and law development," not correcting errors by the court of appeals. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 255 (1997). Moreover, the State's primary argument – that there was other evidence besides Hoyle's testimony that could have "controverted" the victim's claims – was not made to the court of appeals below, and cannot be raised in this Court on the first instance. Plus, even if the State's argument had been preserved, it is not supported by the record. Accordingly, review is not warranted.

A. It is well-established that while a prosecutor may comment on the lack of evidence supporting a defense theory, the prosecutor may not comment on the defendant's decision not to testify.

Under the English common law, defendants were not allowed to testify on their own behalf, the theory being that their natural interest in the outcome of the trial made them too unreliable as witnesses. *See State v. Albright*, 96 Wis. 2d 122, 126-127 & n. 4-5. Wisconsin, like most other jurisdictions, did away with this common law rule by statute, providing that defendants were competent to testify on their own behalf. *Id*. The statutes also provided that the prosecutor could not make any arguments based on a defendant's decision not to exercise this right to testify. *Id*.

Accordingly, as far back as 1891, this Court held that

> This [statute] having expressly declared that the omission of the defendant in a criminal action to testify shall create no presumption against him, it was highly improper *to intimate or argue* to the jury that such omission should raise any presumption against him as to his guilt.

Martin v. State, 79 Wis. 165, 48 N.W. 119, 122 (1891) (emphasis supplied). The court frequently addressed whether a prosecutor's comments were a proper remark upon the lack of evidence supporting a defense theory, or had veered over the line to impermissibly "intimate or argue" guilt based on the defendant's

failure to testify. *Id.*; *Werner v. State*, 189 Wis. 26, 206 N.W. 898, 903 (1926); *Lam Yee v. State*, 132 Wis. 527, 112 N.W. 425, 426–27 (1907); *Dunn v. State*, 118 Wis. 82, 94 N.W. 646, 648 (1903).

The United State Supreme Court later declared a constitutional basis for this rule, as comments on a defendant's silence amount to a "penalty" on the exercise of the Fifth Amendment privilege against self-incrimination. *Griffin v. California*, 380 U.S. 609, 615 (1965). The Court of Appeals subsequently stated that the test

> for determining whether remarks are directed to a defendant's failure to testify is whether the language used was 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 v. Johnson, 121 Wis. 2d 237, 246, 358 N.W.2d 824 (Ct. App. 1984) (citations and quotation marks omitted).

Several years after *Johnson t*he Supreme Court recognized that a defendant's own arguments may invite a prosecutor's comments about the decision not to testify. *United States v. Robinson*, 485 U.S. 25, 34 (1988). The Court of Appeals later modified the rule it announced in *Johnson* in light of *Robinson,* summarizing a three-part test as follows:

> for a prosecutor's comment to constitute an improper reference to the defendant's failure to testify, three factors must be present: (1) the comment must constitute a reference to the

> defendant's failure to testify; (2) the comment must propose that the failure to testify demonstrates guilt; and (3) the comment must not be a fair response to a defense argument.

State v. Jaimes, 2006 WI App 93, ¶ 21, 292 Wis. 2d 656, 669–70, 715 N.W.2d 669, 675. Notably, *Jaimes* retained the *Johnson* test "for determining whether remarks are directed to a defendant's failure to testify." *Id*.

The Wisconsin Supreme Court, for its part, has recognized the *Jaimes* and *Johnson* tests formulated by the Court of Appeals. *State v. Doss*, 2008 WI 93, ¶¶ 81, 93, 312 Wis. 2d 570, 619, 754 N.W.2d 150, 174. The Court has also observed that whether a prosecutor's comments are improper is a fact-intensive inquiry that "must be made case by case." *State v. Moeck*, 2005 WI 57, ¶ 74, 280 Wis. 2d 277, 306, 695 N.W.2d 783, 798 (*quoting State v. Edwardsen*, 146 Wis.2d 198, 215, 430 N.W.2d 604 (Ct.App.1988)).

In the first part of the its Petition, the State requests review so this Court may provide "guidance" on when a prosecutor's argument is an impermissible comment on the defendant's silence. (Petition at 9-12). However, the State does not acknowledge that *Jaimes* already provides this guidance. And, importantly, the State does not argue that *Jaimes* test requires any tweaking by this Court.

The State thus tacitly concedes that the *Jaimes* test is correct. Review simply to formally adopt a test that everyone agrees is correct is not a good use of this

Court's resources. Indeed, this Court recently dismissed a petition for review as improvidently granted because "[r]esolving [the defendant's] case … would require nothing more than an opinion from this court agreeing with the court of appeals … [and] [t]here are much better uses of this court's time than repeating work already done correctly by a lower court." *State v. Lee*, 2022 WI 32, ¶ 2.

The State does argue that review is warranted to clarify this court's holding in *Bies v. State*, 53 Wis. 2d 322, 325–26, 193 N.W.2d 46, 49 (1972), perceiving some conflict between the court's observation that "it is proper for the district attorney to point out generally that no evidence has been introduced to show the innocence of the defendant" and with the Court of Appeals holding below that the prosecutor's repeated claim that the evidence was "uncontroverted" was improper. (Petition at 10-11, quoting *Bies*, 53 Wis. 2d at 325).

However, there is no conflict. In *Bies*, the defendant was convicted of robbing and killing a fellow bar patron. 53 Wis. 2d at 323. The defense was not that he did not commit the acts, but that he was too intoxicated to form the requisite intent. *Id.* at 324. Bies (who appeared pro se) argued that the prosecutor's observation "that certain evidence was uncontroverted" was an impermissible comment on his decision not to testify. *Id.* at 325. The Court rejected this argument because "the certain evidence" that the prosecutor said was uncontroverted was Bies's involvement in the robbery and murder of the victim,

which again was not contested by Bies because he instead relied on an intoxication defense. *Id*. The argument could thus in no way be construed as a comment about Bies's decision not to take the stand.[2] Further, the court's recognition that "generally" a prosecutor may comment on the lack of evidence supporting a defense theory does not conflict with the long-standing recognition that arguments based on a defendant's failure to testify are an exception to this rule.

In short, review is unnecessary because there is no dispute that the test applied by the Court of Appeals below to determine the propriety of a prosecutor's comments regarding the defendant's failure to testify is the correct test.

B. The Court of Appeals properly applied the test for determining whether a prosecutor's arguments were improper comments on a defendant's failure to testify.

In the second part of its Petition, the State argues that the Court of Appeals simply misapplied *Johnson* and *Jaimes*. (Petition at 12-16). Even if it were appropriate for this court to accept review simply to correct an error by the Court of Appeals, there was no error here. Indeed, the State relies on an argument

[2] As discussed below, this is in stark contrast to the facts in this case, where Hoyle's strategy was to contest that the State had met its burden of proving that he committed a sexual assault, and the only one who could controvert the allegations was Hoyle himself.

that it failed to make to the Court of Appeals and is anyway belied by the evidence in this case: that Hoyle was not the only witness who could have contested the victim's accusations.

As stated above, the Court of Appeals summarized the three-part test as follows:

> for a prosecutor's comment to constitute an improper reference to the defendant's failure to testify, three factors must be present: (1) the comment must constitute a reference to the defendant's failure to testify; (2) the comment must propose that the failure to testify demonstrates guilt; and (3) the comment must not be a fair response to a defense argument.

Jaimes, 2006 WI App 93, ¶ 21.

Regarding the first factor, the *Jaimes* court retained the *Johnson* test, *i.e.* that the test for determining whether remarks are directed to a defendant's failure to testify is "whether the language used was 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." *Id*. (cleaned up).

Hoyle argued below that this test was met here because Hoyle was the only one who could have contested Hannah's accusations. (Hoyle Br. at 32-35). Hannah testified that one unspecified evening in February 2017, Hoyle pulled up in a car while she was walking alone, convinced Hannah to get in the car, and then drove to a secluded place where he sexually assaulted her. Thus, by Hannah's own testimony, she

and Hoyle were the only two witnesses of the alleged assault. Accordingly, the only person who could have "controverted" Hannah's version of events was Hoyle.

The court of appeals correctly identified *Jaimes* and *Johnson* as providing the proper tests for whether a prosecutor's comments constitute an improper comment on a defendant's right not to testify. Opinion at ¶¶ 11-12. The court reviewed the evidence at trial, and explained how the prosecutor's comments "necessarily constituted a reference to Hoyle's failure to testify," a reference to the test in *Johnson*. Also, the court heeded the admonition of *Moeck*, 2005 WI 57, ¶ 74, that such determinations must be made on a "case by case" basis, such as by noting that the prosecutor's comments were "improper under the circumstances of this case" and that the "prosecutor's particular comments in this case necessarily constituted a reference to Hoyle's failure to testify," and by not recommending the opinion for publication. Opinion, ¶¶ 1, 18).

The State claims that the Hoyle court "erroneously assumed, without analysis, that the only evidence that could have controverted Hannah's testimony was Hoyle's testimony." (Petition at 15). The State concedes that only Hoyle could have provided "direct evidence" controverting the alleged assault, but says that Hoyle could have provided "indirect evidence," observing that "as a general matter, victims might tell a friend or family member a different version of the events" and that "cross examination is always available." (*Id.*)

There are multiple problems with this argument. First, the State cannot fault the court of appeals for not considering whether there were "indirect" sources of evidence available to Hoyle when the State did not make any such argument to the court of appeals. While Hoyle specifically pointed out that the *Johnson* test was met because Hoyle was the only conceivable witness who could controvert Hannah's claim that he assaulted her (Hoyle Br. at 33-34), the State did not make any argument that there were other evidence that could controvert Hannah's testimony. (*See* State Response Br. at 21-24). This Court should not grant review to correct the state's failure to make an argument below. *In re Commitment of Mark*, 2006 WI 78, 292 Wis. 2d 1, 24, n. 13, 718 N.W.2d 90, 101 (observing that "this court will ordinarily not consider an argument not raised in the court of appeals[.]") (citation omitted).

Second, the State's claim that Hoyle could have controverted Hannah's testimony with a hypothetical witness of an inconsistent statement and through cross-examination is absurd. How could Hoyle "controvert" Hannah's testimony by calling a witness that does not exist? And does the State really expect Hoyle's counsel to have a Perry Mason moment, and cause Hannah to retract her statement through cross-examination? The State does not explain, beyond its two-sentence argument. This Court should not grant review on such weak grounds.

Regarding the second factor under *Jaimes*, that "the comment must propose that the failure to testify

demonstrates guilt," 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 Hannah's testimony. The Petition does not explain why this factor is not met, other than to deny that there was any comment regarding Hoyle's failure to testify at all. (Petition at 16). Similarly,

Finally, the State concedes that the third factor *Jaimes* factor was met, as the prosecutor was not responding to a defense argument. (Petition at 15).

In sum, the second part of the State's petition asks this court to correct an alleged error in the lower court's application of a well-established rule on the limits of prosecutorial arguments implicating a defendant's decision not to testify. The alleged error is based on a weak and undeveloped argument not made to the court of appeals. Accordingly, review is not warranted.

C. Other reasons for denying the petition.

The State does not point to, and Hoyle is not aware of, any cases in other jurisdictions conflicting with the decision below. For instance, the Seventh Circuit has observed that "[i]t appears obvious that using the word 'uncontroverted' in referring to government evidence—which was this particular prosecutor's favorite—where it is highly unlikely that anyone beyond the non-testifying defendant could contradict the evidence, is just as improper as using the words 'uncontradicted,' 'undenied,' 'unrebutted,'

'undisputed,' and 'unchallenged' in the same situation." *United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996) (collecting cases). Thus, there is no indication that review is necessary to bring Wisconsin law in harmony with the prevailing cases on this point.

It should also be pointed out that at no juncture has the State argued that any error in the prosecutor's comments were harmless. The State did not argue harmless error in its briefing to the Court of Appeal or in the pending Petition. Accordingly, even if this court were to conclude that any violation was relatively minor, the State has waived any argument that it was harmless.

But regardless, the State likely conceded (even if tacitly) any harmless error argument because the State's case relied solely on Hannah's testimony, and the prosecutor's comments were not isolated. The State did not introduce any corroborating evidence of any sort, such as DNA evidence, cell phone tower records, text messages, etc. In addition, the defendant's failure to introduce evidence controverting Hannah's testimony was a prominent part of the State's closing argument.

For instance, the prosecutor argued that:

> [Hannah's] testimony that she gave here yesterday is uncontroverted. You have heard no evidence disputing her account of that sexual assault. You heard nothing.
>
> ...

> All of that is uncontroverted. There is absolutely no evidence disputing her account of what occurred.
>
> …
>
> None of that was controverted, meaning it was all uncontroverted, meaning there was nothing controverting her statements about what had occurred to law enforcement, at the preliminary hearing, and at the trial.

(R. 92:18-21).

Accordingly, even if the State were allowed to forward a harmless error test for the first time before this Court, it would fail.

As a final note, Hoyle agrees with the State that if review is granted, it should be limited to the prosecutorial comment issue that was the basis of the decision by the Court of Appeals. If the decision is reversed, then the case should be remanded to the Court of Appeals to decide the other three issues raised by Hoyle. The factually intensive nature of the remaining issues – claims for a new trial on newly discovered evidence and discovery violations, as well as for postconviction discovery -- are better suited for the Court of Appeals to address on the first instance.

CONCLUSION

For the reasons stated above, Hoyle requests that this Court deny the State's Petition for Review.

Respectfully submitted,

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Dated this 31st day of May, 2022.

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b), 8(bm), and (8g), as well as 809.62(4), and that the length of this response is 3,021 words.

I further certify that I have submitted an electronic copy of this response that is identical in content and format to the printed form of the response filed as of this date. A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 31st day of May, 2022.

Signed:

Electronically signed by Thomas B. Aquino

THOMAS B. AQUINO
Assistant State Public Defender