STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1876-CR

STATE OF WISCONSIN,

Plaintiff -Respondent-Petitioner,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

PETITION FOR REVIEW

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STATEMENT OF THE ISSUE

The Fifth Amendment to the United States Constitution prohibits a prosecutor from commenting on a defendant's failure to take the stand. However, this Court has held that it is proper for a prosecutor to point out generally that no evidence has been introduced to show the defendant's innocence. *Bies v. State*, 53 Wis. 2d 322, 325, 193 N.W.2d 46 (1972). A prosecutor's comment that the State's evidence is uncontroverted is generally permissible under this standard. *Id.*

Here, Hoyle was charged with sexually assaulting a fifteen-year-old girl. The victim was the State's primary witness at trial, and there were no other witnesses to the crime. Hoyle's lawyer cross examined the victim, but she maintained that the assault occurred. Hoyle chose not to take the stand and the defense declined to introduce evidence of its own. The prosecutor argued in closing that the evidence against Hoyle was uncontroverted. Was this comment proper?

The circuit court answered yes.

The court of appeals answered no and held that the prosecutor's remarks violated Hoyle's Fifth Amendment right not to testify.

This Court should grant this petition for review and answer yes. The comment was not a comment on the defendant's failure to take the stand. Rather, it was a comment directed at the evidence in general, which is permissible under this Court's precedent.

STATEMENT OF CRITERIA FOR GRANTING REVIEW

This case meets two criteria for review. First, it presents a real and significant question of federal constitutional law, as interpreted in Wisconsin. Wis. Stat. § 809.62(1r)(a). Second, an opinion from this Court will help clarify the law surrounding a prosecutor's ability to comment on the evidence at trial and a defendant's Fifth Amendment right not to testify. Wis. Stat. § 809.62(1r)(c). This Court has not elaborated on its holding in *Bies v. State*,[1] and the court of appeals has given conflicting interpretations of that opinion. Clarification is warranted. Wis. Stat. § 809.62(1r)(c)1. Further, the resolution of this issue will have statewide impact. Wis. Stat. § 809.62(1r)(c)2.

STATEMENT OF THE CASE

The State charged Hoyle with four sexual assault offenses: two counts of second-degree sexual assault in violation of Wis. Stat. § 940.225(2)(a); and two counts of second-degree sexual assault of a child less than 16 years of age in violation of Wis. Stat. § 948.02(2). (R. 1:1.) After a two-day trial, the jury found Hoyle guilty on all counts. (R. 92:51.)

Hannah,[2] the victim, was the principal witness at trial. She testified that she was 15 years old at the time of the assault, which occurred in February 2017. (R. 91:144–45.) On the day of the assault, Hannah accepted a ride from Hoyle, the older stepbrother of her old best friend. (R. 91:138, 175–76.) Because she was expected back at home, she told Hoyle that she only had about five minutes to hang out. (R. 91:142–43.) At the time, she was "high" or "buzzed," having consumed

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[1] 53 Wis. 2d 322, 193 N.W.2d 46 (1972).

[2] The State uses a pseudonym, Hannah, to refer to the victim. *See* Wis. Stat. § (Rule) 809.86(4).

some Vicodin (which she took from her sister) and some liquor throughout the day. (R. 91:140–42, 171–72.)

Hoyle and Hannah started driving around, and eventually went towards Cadott on County Road X. (R. 91:143–44.) Hannah couldn't say how far into Cadott they went, but she "remember[ed] crossing a bridge and a couple of bars." (R. 91:144.) Hannah "didn't say anything [about the direction of the drive], but in my head I was kind of confused." (R. 91:144.) As they drove, Hoyle kept telling Hannah to sing along with the radio, which she didn't want to do, and "kept poking my legs." (R. 91:146.)

At some point, Hoyle turned down a dead-end road. (R. 91:145.) He stopped the car. (R. 91:145–46.) Confused, Hannah got out of the car. (R. 91:146.) Hoyle told her to get back in the car. She got into the back seat, passenger side; earlier, she had been in the front passenger seat. (R. 91:147.) She got into the back seat because "I was scared. I didn't want him touching me any more, so I thought by sitting in the back, he wouldn't have access to touching me." (R. 91:148.) She thought that once she got back in the car, Hoyle would bring her home. (R. 91:148.)

Instead, he climbed into the back seat and moved close to her. (R. 91:148.) He started pulling her pants down. (R. 91:150.) Hannah tried to pull them back up, but Hoyle ultimately "won that tug of war" and removed Hannah's pants and her underwear. (R. 91:151.) She told him to stop, but he didn't listen. (R. 91:150–51.) She was scared. (R. 91:151.) Hoyle proceeded to penetrate her with his fingers for a few seconds. (R. 91:156.) She "didn't want to be touched that way," and had not given him permission to do so. (R. 91:156.) Then he penetrated her with his penis. (R. 91:157–58.) She told him she might become pregnant. (R. 91:158.) He told her not to worry; she didn't remember if he used protection. (R 91:158.)

After the assault, Hannah returned to the front seat of the car. (R. 91:159.) "On the ride back, before he dropped me off, he said that if anyone finds out about this, someone is going to end up dead." (R. 91:160.) Hoyle dropped her off in front of a bar across the street from the trailer court where she lived. (R. 91:159.) Hannah stated at the end of this narrative that she made it clear to Hoyle through "my words and my actions" that she didn't want to "do this." (R. 91:161.)

Hannah didn't tell her mother, stepfather, or sisters that Hoyle had assaulted her. (R. 91:178.) She disclosed the assault to Officer Nelson, the school liaison officer, and Investigator Kari Szotkowski.[3] (R. 91:163–64.) Hannah shared the details of the assault with Investigator Szotkowski the month after the assault took place but did not name the person who assaulted her because she was "scared." (R. 91:165.) After that, Hannah spoke to Officer Nelson again and identified Hoyle as her assailant. (R. 91:166.)

On cross, Hannah acknowledged that she could not recall what day in February the assault occurred. (R. 91:169.) She admitted that she had taken pills and alcohol that day, though she testified that she was "buzzed" and "still had a sense of what was going on around me." (R. 91:141, 170–72.) Hannah explained how Hoyle removed her shoes and other articles of clothing while they were in the back seat. (R. 91:176–78.) She reiterated that she did not tell her mother or any family members about the assault. (R. 91:178.) She acknowledged that she did not immediately tell Investigator Szotkowski who the perpetrator was. (R. 91:179.)

Investigator Szotkowski was the only other witness for the State. (R. 91:181–88.) She testified briefly as to her investigation of the assault, based on her interviews with Hannah. (R. 91:181–88.)

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[3] Hannah knew her as "Kari Anderson." (R. 91:163–64.)

After the State rested, Hoyle exercised his right not to testify, and the defense did not introduce any evidence. (R. 91:191–93.)

In his closing argument, the prosecutor told the jury that it was "to decide this case solely, solely on the evidence offered and received at the trial." (R. 92:18.) "You're not to speculate about other things that may be out there. . . . You're to focus solely on the evidence that was presented to you yesterday in this trial." (R. 92:18.) He went on to note that Hannah's testimony "is uncontroverted. You have heard no evidence disputing her account of that sexual assault. You heard nothing." (R. 92:18–19; *accord* 92:20–21.)

Defense counsel's closing emphasized the evidence that Hannah's testimony did not provide. Hannah could not identify the date of the assault. (R. 92:29.) He also pointed out that Investigator Szotkowski did not interview Hannah's mother or the rest of her family to determine her demeanor after the assault. (R. 92:29–31.) Nor did she canvas the neighborhood or ascertain whether the bar where Hoyle dropped Hannah off might have had surveillance video. (R. 92:32.) Nor was there any physical evidence of the assault. (R. 92:32.) Defense counsel also questioned why there was not more evidence at trial about the car. (R. 92:33.) Further, counsel questioned the lack of investigation into the effect of Hannah's intoxication on her memory. (R. 92:36.) He emphasized the gradual revelation of the assault and her uncertainty not just about when the assault took place, but when she spoke to the investigators, and when she named Hoyle. (R. 92:36–37.)

In rebuttal, the prosecutor noted that the defense did not "disagree it's uncontroverted. They just say you should ask for more. It's not my job to give you information I don't have." (R. 92:44.) The prosecutor continued, "I will agree to that, you don't have that additional information, but the jury

instruction says you are not to speculate about that." (R. 92:44.)

The jury found Hoyle guilty on all four counts. (R. 92:51.) The court sentenced Hoyle to eight years of initial confinement and ten years of extended supervision. (R. 43; 93:26.)

Hoyle filed a postconviction motion. (R. 63.) He made seven arguments, four of which he pursued in the court of appeals. *State v. Hoyle*, No. 2020AP1876-CR, ¶ 1 (Wis. Ct. App. Jan. 11, 2022). Relevant here, Hoyle argued that the State's closing argument violated his Fifth Amendment right not to testify by referring to "uncontroverted evidence."[4] (R. 63:23–26.) The circuit court denied relief on all four grounds. (R. 76; 94:29–32.)

In a published decision, the court of appeals resolved only one of the four issues, concluding that the State's argument that the evidence was uncontroverted violated Hoyle's Fifth Amendment right not to testify at trial. *Hoyle*, 2020AP1876-CR, ¶ 2. The court declined to decide the other three issues, holding that the Fifth Amendment issue was dispositive. *Hoyle*, 2020AP1876-CR, ¶ 2.

The *Hoyle* court relied on the test set out in *State v. Jaimes*, 2006 WI App 93, ¶ 21, 292 Wis. 2d 656, 715 N.W.2d

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[4] Hoyle's other three arguments were as follows. First, he asked for a new trial based on newly discovered evidence that Hannah told the presentence investigator that she has not discussed the sexual assault with her counselor because she does not want to constantly relive the assault. (R. 31:4–5; 63:3–7.) This differed from her trial testimony attributing her calm demeanor to discussing the assault in therapy. (R. 91:167–68.) Second, if the court denied the new trial motion, Hoyle asked for postconviction discovery of Hannah's counseling records. (R. 63:8–13.) Third, Hoyle asked for a new trial based on the State's alleged failure to disclose certain pretrial statements Hannah made to Officer Nelson. (R. 63:13–18.)

669 (discussing *United States v. Robinson*, 485 U.S. 25, 34 (1988)). *Hoyle*, 2020AP1876-CR, ¶ 14. Applying *Jaimes*, the court concluded that the prosecutor's comment was an improper reference to the defendant's failure to testify. The court reasoned that the only person who could have directly controverted Hannah's testimony was Hoyle, the sole other witness to the assault. *Hoyle*, 2020AP1876-CR, ¶ 15.

The court of appeals disagreed with the State that *Bies* authorizes the term "uncontroverted." *Hoyle*, 2020AP1876-CR, ¶¶ 16–18. The *Hoyle* court read *Bies* to mean that a prosecutor can say evidence is uncontroverted only if it concerns an aspect of the case "that the defendant did [not] actually dispute." *Hoyle*, 2020AP1876-CR, ¶ 18.

The *Hoyle* court also relied on *United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996). In that case, the Seventh Circuit said, "[i[t appears obvious that using the word 'uncontroverted' in referring to government evidence...where it is highly unlikely that anyone beyond the non-testifying defendant could contradict the evidence, is [] improper." *Hoyle*, 2020AP1876-CR, ¶ 19 (quoting *Cotnam*, 88 F.3d at 499). The *Hoyle* court decided that only Hoyle could contradict the evidence in this case. Therefore, the prosecutor's comments that the evidence was "uncontroverted" were an improper comment on Hoyle's decision not to testify. *Hoyle*, 2020AP1876-CR, ¶ 19.

The State now seeks this Court's review.[5]

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[5] The State is not asking this Court to take up the three issues the court of appeals did not decide. The court of appeals provided no analysis as to those issues, the issues do not appear to meet this Court's criteria for review, and they are not relevant to the Fifth Amendment issue. However, if this Court grants review and reverses on the Fifth Amendment issue, a remand to the court of appeals would be appropriate to resolve the remaining issues.

ARGUMENT

A. This case presents a real and significant question of constitutional law.

The issue in this case is whether a prosecutor may tell the jury that the State's evidence is uncontroverted when the defendant elects not to take the stand and there are no other direct witnesses to the crime, other than the victim. This Court should grant this petition because the issue concerns an important question of federal constitutional law, as interpreted under Wisconsin law. Wis. Stat. 809.62(1r)(a).

The self-incrimination clause of the Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This provision is made applicable to the states by the Fourteenth Amendment. *Griffin v. California*, 380 U.S. 609, 611 (1965). Wisconsin's constitution also provides that no person "may be compelled in any criminal case to be a witness against himself or herself." Wis. Const. art. I, § 8. This Court "has normally construed the right against self-incrimination in Article I, Section 8 of the Wisconsin Constitution to be consistent with the United States Supreme Court's interpretation of the federal right." *State v. Stevens*, 2012 WI 97, ¶ 40, 343 Wis. 2d 157, 822 N.W.2d 79.

A comment on a defendant's failure to take the stand violates the Fifth Amendment's guarantee against self-incrimination. *State v. Spring*, 48 Wis. 2d 333, 338–39, 179 N.W.2d 841 (1970) (citing *Griffin*, 380 U.S. 609). However, "it is proper for the district attorney to point out generally that no evidence has been introduced to show the innocence of the defendant." *Bies,* 53 Wis. 2d at 325 (citation omitted).

It is not always easy to tell when a comment moves from what is permissible under *Bies* to what is impermissible under the Fifth Amendment. When a prosecutor notes that the State's evidence is generally uncontroverted, or there is a general absence of facts in the record, the case "straddles a fine line between permissible and impermissible commentary by the State." *State v. Doss*, 2008 WI 93, ¶ 94, 312 Wis. 2d 570, 754 N.W.2d 150. Given this, a careful and thorough analysis of prosecutorial comments in the context of the record is the best approach to resolving whether the comment is permissible. *Id.* ¶ 92 (noting these issues should be resolved on a case-by-case basis).

The U.S. Supreme Court has recognized "that a prosecutor's statement that ... 'refers to testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony,' ... may not actually constitute a violation at all." *Id.* ¶ 94 (*citing United States v. Hasting*, 461 U.S. 499, 503, 506 & n.4 (1983)). *Doss* considered the issue in the context of an ineffective assistance of counsel claim, because trial counsel had failed to object to the prosecutor's comments. *Id.* ¶¶ 83, 90–94. The *Doss* Court did not directly resolve whether the comments at issue violated the Fifth Amendment.[6] *Id.* ¶¶ 90–94.

This Court should grant this petition to give lower courts further and correct guidance on this important issue of constitutional law. This case concerns overlapping obligations and rights in the criminal justice system. It concerns the jury's obligation to decide a case solely on the evidence

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[6] As explained below, Hoyle's testimony was not the only evidence that could controvert Hannah's testimony. But even assuming that it was, neither this Court nor the United States Supreme Court have held that a prosecutor's comment that the evidence was "uncontroverted" was a *per se* Fifth Amendment violation.

presented at the trial, the State's right to point out generally that no evidence has been introduced to show the innocence of the defendant, and the defendant's constitutional right not to take the stand.

The court of appeals did not engage in a thorough, contextual analysis of the prosecutor's comments. Its reasoning rests on a flawed premise, as discussed below. Further, its holding is so broad that it could prevent the State from fairly commenting on the evidence in any case in which there are no witnesses to the crime other than the victim. If left in place, *Hoyle* will tilt the playing field in a direction that could cause confusion among prosecutors as to what comments are permissible and hurt victims' cases, in a manner that is not required by the Fifth Amendment.

Resolution of this issue will have statewide impact. Wis. Stat. § 809.62(1r)(c)2. This Court would provide guidance to district attorneys' offices by clarifying how to describe the evidence in the record (and the evidence *not* in the record) when a defendant elects not testify. During closing argument, prosecutors often point out when facts are not in the record. *State v. Johnson*, 121 Wis. 2d 237, 246, 358 N.W.2d 824 (Ct. App. 1984) ("[q]uestions about the absence of facts in the record need not be taken as comment on defendant's failure to testify") (quotation omitted). Comments that the State's evidence is uncontroverted are comments on the absence of evidence generally, consistent with standard jury instructions. *See, e.g.*, Wis. JI-Criminal 50 (2020) ("[y]our duty is to decide the case based only on the evidence presented at trial and the law given to you by the court.") A decision from this Court that clarifies whether and when prosecutorial comments are proper will impact criminal trials statewide, particularly when a defendant elects not testify and when the only witness to the crime is the victim.

B. An opinion from this Court will help develop, clarify, and harmonize the law.

As a second reason to grant review, an opinion from this Court will help clarify the law. Lower courts would benefit from this Court's guidance regarding a prosecutor's ability to comment on evidence at trial without infringing on a defendant's Fifth Amendment right to remain silent. Wis. Stat. § 809.62(1r)(c). The *Hoyle* court misapplied existing court of appeals precedent by incorrectly assuming that only Hoyle's testimony could contradict the State's evidence. The court of appeals also misread *Bies* and relied on a Seventh Circuit decision that is neither controlling nor on all fours with this case. This Court should grant review and reverse.

1. The *Hoyle* decision misapplied court of appeals precedent and incorrectly assumed that only Hoyle's testimony could contradict the State's evidence.

The *Hoyle* decision cites two published Wisconsin court of appeals decisions: *State v. Johnson*[7] and *State v. Jaimes*.[8] These cases address whether certain prosecutorial comments were permissible in order to fairly respond to an argument that the defense raised, or whether they instead were an impermissible commentary on the defendants' failure to testify. The *Hoyle* court did not correctly analyze or apply the standards set forth in those cases.

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[7] *State v. Johnson*, 121 Wis. 2d 237, 358 N.W.2d 824 (Ct. App. 1984).

[8] *State v. Jaimes*, 2006 WI App 93, 292 Wis. 2d 656, 715 N.W.2d 669.

In *Johnson*, the pro se defendant presented his own opening statement and did not testify. *Johnson*, 121 Wis. 2d at 242. The prosecutor informed the jury that Johnson's statements were not evidence and not given under oath or subject to cross examination. *Id.* Johnson contended that the prosecutor's statements were an improper comment on his failure to testify, in violation of the Fifth Amendment. *Id.* at 242–44.

To decide the issue, the court of appeals used a test from the Third Circuit, and analyzed "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.* at 246 (citing *Bontempo v. Fenton*, 692 F.2d 954, 959 (3d Cir. 1982)). "Questions about the absence of facts in the record need not be taken as comment on defendant's failure to testify." *Id.* The *Johnson* court concluded that the comment was not a comment on the defendant's failure to testify at all. *Id.* at 247–48. Rather, the remarks "were aimed at drawing the jury's attention to the distinction between arguments and evidence." *Id.* at 247. Further, "[w]hile the prosecutor's remarks might have prompted the jury to recall and reflect upon Johnson's failure to testify, we do not conclude that the remarks *highlighted* such a failure to testify." *Id.* at 248 (emphasis in the original).

After *Johnson*, the court of appeals set out a three-factor test for determining when a prosecutor's rebuttal argument can be held "to constitute an improper reference to the defendant's failure to testify." *Jaimes*, 292 Wis. 2d 656, ¶ 21 (discussing *Robinson*, 485 U.S. at 34). First, "the comment must constitute a reference to the defendant's failure to testify," using the *Johnson* analysis. *Id.* ¶¶ 21–22. Second, "the comment must propose that the failure to testify demonstrates guilt." *Id.* Third, "the comment must not be a fair response to a defense argument." *Id.*

The use of the word "uncontroverted" in this case does not fit the outline of objectionable argument set out in *Johnson* or *Jaimes*. *Johnson* reiterated *Bies*'s admonition that "[q]uestions about the absence of facts in the record need not be taken as comment on defendant's failure to testify." 121 Wis. 2d at 246 (citing *Bontempo*, 692 F.2d at 959). Here, the prosecutor said that Hannah's testimony was "uncontroverted" because there was "no evidence disputing her account of that sexual assault." (R. 92:18–19.) This comment, read in context, was not "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." *Johnson*, 121 Wis. 2d at 246 (citing *Bontempo*, 692 F.2d at 959). For the same reasons the prosecutor's argument does not violate *Johnson*, it does not violate the first two *Jaimes* factors, either. The third factor—whether the prosecutor's comment is a response to a defense argument—does not come into play here.

The *Hoyle* court held that the test outlined in *Johnson* and *Jaimes* was met because, "given the nature of the allegations, 'the only person who could controvert [Hannah's] testimony was Hoyle.'"[9] *Hoyle*, 2020AP1876-CR, ¶ 19. In other words, the indirect comment was, by necessity, a comment on the defendant's failure to take the stand because only he could controvert the State's evidence. Under these circumstances, the court believed that the comments proposed that the failure to testify demonstrates Hoyle's guilt. *Hoyle*, 2020AP1876-CR, ¶ 20.

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[9] The court also cited *Bies* for the proposition that "indirect comments about the defendant's silence will violate the [Fifth Amendment] privilege, such as when the prosecutor points out a lack of evidence that only the defendant could provide by waiving their privilege. *Hoyle*, 2020AP1876-CR, ¶ 13 (citing *Bies*, 53 Wis. 2d at 325–26). *Bies* in no way says this.

The *Hoyle* court's reasoning is flawed and has troubling implications for future cases. The court erroneously assumed, without analysis, that the only evidence that could have controverted Hannah's testimony was Hoyle's testimony. *Hoyle*, 2020AP1876-CR, ¶ 15. This is not true. Hoyle's testimony may have been the only direct evidence, but the law does not require direct evidence. For example, the victim might have told a friend or family member a different version of the events. And cross examination is always available.

In this case, Hoyle's counsel cross examined Hannah, but she maintained that the assault occurred. Hoyle did not testify, which was of course Hoyle's right, as the jury was instructed. (R. 92:17.) Defense counsel's closing emphasized the evidence that Hannah's testimony did not provide. (R. 92:28–39.) The State was within its right to say that Hannah's testimony remained uncontroverted by any evidence.

Read in proper context, the prosecutor's comments were not "manifestly intended or [were] of such character that the jury would naturally and necessarily take [them] to be a comment on the failure of the accused to testify." *Johnson*, 121 Wis. 2d at 246 (citation omitted). On the contrary, the comments were not a reference to Hoyle's decision not to testify at all.

Even if this Court were to agree with the court of appeals that the only evidence that could have controverted Hannah's testimony was Hoyle's testimony, that does not create a per se constitutional violation. *See Doss*, 312 Wis. 2d 570, ¶ 94. A reviewing court is still required to analyze the comments in proper context, to determine whether they run afoul of *Bies* or *Johnson*. The court of appeals did not do that here.

If the *Hoyle* decision stands, any future cases in which a victim is the sole witness to the crime will be affected. Prosecutors need guidance as to what types of closing comments, particularly statements that the evidence is uncontroverted (or similar phrases), are permissible.

2. *Hoyle* conflicts with *Bies* and other court of appeals decisions that interpret *Bies*.

The *Hoyle* court read *Bies* to mean that a prosecutor can say evidence is uncontroverted only if it concerns an aspect of the case "that the defendant did [not] actually dispute." *Hoyle*, 2020AP1876-CR, ¶ 18. This interpretation is erroneous.

In *Bies*, the prosecutor remarked that certain evidence was uncontroverted. *Bies*, 53 Wis. 2d at 325. This Court held that the comment was proper, because a district attorney may "point out generally that no evidence has been introduced to show the innocence of the defendant." *Bies*, 53 Wis. 2d at 325. The Court added a second reason as to why the comments were proper:

> *Moreover*, in the instant case, 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.

Id. at 325–26 (emphasis added). The *Hoyle* court read *Bies* to mean that a prosecutor can say evidence is uncontroverted only if it concerns an aspect "that the defendant did [not] actually dispute." *Hoyle*, 2020AP1876-CR, ¶ 18.

The court of appeals misinterprets *Bies*. Although the *Bies* court noted the defendant's intoxication defense, that was not its core holding. Its core holding was that the use of the term "uncontroverted" was generally permissible. *Bies*, 53 Wis. 2d at 325. "*Moreover*," in Bies's case, the Fifth Amendment argument was especially weak because of the nature of his defense. *Id.* The *Hoyle* decision makes no mention of the fact that Bies' secondary observation did not drive its holding. *Hoyle*, 2020AP1876-CR, ¶ 18.

This Court has never commented on *Bies'* holding. But prior to the *Hoyle* decision, the "uncontroverted evidence" analysis in *Bies* has been cited in unpublished Wisconsin court of appeals cases. None of these decisions read *Bies* to mean that a prosecutor can use the term uncontroverted only with respect to an aspect of a case that is not in dispute. *See, e.g.*, *State v. Schmidt*, No. 98-1717-CR, 1999 WL 371594, at *4 & n.7 (Wis. Ct. App. June 9, 1999) (unpublished) (per curiam); *State v. Jones*, No. 01-0348-CR, 2002 WL 22116, ¶¶ 4–8, (Wis. Ct. App. Jan. 9, 2002) (unpublished) (per curiam); *State v. Willison*, No. 83-418-CR, 1983 WL 161371, at *8 (Wis. Ct. App. Dec. 16, 1983) (unpublished); *State v. Dawson*, No. 2014AP1085-CR, 2015 WL 4469389, ¶¶ 40–42 (Wis. Ct. App. July 23, 2015) (unpublished) (per curiam).[10]

For example, in *State v. Dawson*, Dawson and his co-defendant were accused of robbing a home. *Dawson*, 2015 WL 4469389, ¶ 3. At issue was whether Dawson and his co-defendant committed the robbery. *Id.* ¶¶ 9–12, 15. At closing, the prosecutor argued that "'[t]he ... only evidence you heard in this case was that the defendants ... were engaged in this

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[10] These unpublished decisions are included in the State's appendix. The State recognizes that per curiam decisions are not controlling and have no persuasive value in Wisconsin. But *Hoyle* reads *Bies* incorrectly, in a manner that is inconsistent with other decisions that interpret *Bies*. A decision from this Court can reconcile these differences of opinion. Wis. Stat. § 809.62(1r)(c)1.

brutal home invasion and robbery of the' victims." *Id.* ¶ 40. The prosecutor remarked that defendants "had no alibi," and the defendant argued that this comment violated his Fifth Amendment right to remain silent. *Id.* The court of appeals disagreed, citing *Bies*. *Id.* ¶ 42. The prosecutor's alibi comment touched on an aspect of the case Dawson disputed, namely, whether he committed the robbery. But the court of appeals did not qualify *Bies* as holding that the prosecutor could only comment on aspects that were not in dispute. *Id.*

This court should grant review to clarify the proper interpretation of *Bies* and further develop the law as to when a prosecutor's remarks about uncontroverted evidence are permissible.

3. Hoyle erroneously relied on a Seventh Circuit case that is distinguishable.

Hoyle cites *United States v. Cotnam*[11] for the proposition that using the word "uncontroverted," where "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." *Hoyle*, 2020AP1876-CR, ¶ 19.

Aside from the fact that *Cotnam* is not binding, it is distinguishable. The prosecutor's comments in *Cotnam* were materially different. In particular, "the prosecutor urged the jury to find [the witness] credible *because* his testimony was uncontroverted." *Cotnam*, 88 F.3d at 493 (emphasis in original). While the prosecutor acknowledged that the defendant had no obligation to put on evidence, "he did so in a way that the district court determined drew attention to Zadurski's failure to take the stand." *Id.* These comments,

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[11] *United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996).

combined with the prosecutor's repeated vouching of the witnesses' testimony, caused the district court "considerable concern." *Id.* After considering the combined effect of these remarks, the district court concluded, "I find it difficult to construe those statements in any other way other than as [focusing] on the fact that the defendant did not testify." *Id.* at 499.

Cotnam's holding relied heavily on the district court's findings. The prosecutor's use of the word uncontroverted, *in the particular context in which that word was used*, was "*manifestly intended* to indicate to the jury that the only one who could have controverted it was the defendant who remained silent throughout the trial." *Id.* (emphasis added).

Here, the circuit court did not make such a finding. (R. 94:29.) The prosecutor did not ask the jury to find Hannah was *credible*, or truthful, *because* her testimony was uncontroverted. Rather, the prosecutor's comments were fairly directed to the evidence generally, which was Hannah's uncontroverted statement that she was sexually assaulted. The jury still had to decide whether to believe her. The prosecutor's comments were not directed at Hoyle's decision not to testify.

Cotnam is the law of the Seventh Circuit, not the law of the State of Wisconsin. As explained above, Hoyle's testimony was not the only evidence that could have controverted Hannah's testimony. But even if it was, a proper contextual analysis reveals that the comments were proper. This Court should decline to apply *Cotnam* here.

***

This Court should grant this petition to clarify *Bies* and give lower courts and criminal law attorneys correct guidance on this important issue of constitutional law.

CONCLUSION

The State respectfully requests that this Court grant this petition for review.

Dated: February 10, 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 5339 words.

JENNIFER L. VANDERMEUSE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

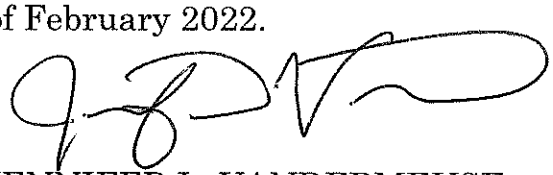
I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this petition or response filed with the court and served on all opposing parties.

Dated this 10th day of February 2022.



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