STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT III, REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CHIPPEWA COUNTY CIRCUIT COURT, THE HONORABLE JAMES M. ISAACSON, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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Hoyle asks this Court to adopt a standard that would prevent a prosecutor from fairly commenting on the uncontroverted nature of the State's evidence, particularly in cases when there is no direct witness to the crime other than the victim and defendant. He relies on numerous non-binding cases, but they do not support his position. And Hoyle's position is at odds with this Court's precedent and U.S. Supreme Court precedent.

Courts must engage in a case-by-case analysis and view a prosecutor's comments in context when considering whether they amount to a Fifth Amendment violation. To hold otherwise would drastically broaden the reach of the Fifth Amendment and hurt victims' cases in a manner that is not required by the state or federal Constitution. When reviewed in context, the prosecutor's reference to the State's uncontroverted evidence in this case was proper. The court of appeals' decision should be reversed.

A. Courts must engage in a case-by-case analysis when deciding whether a prosecutor has impermissibly commented on a defendant's decision not to testify.

The parties agree that, to decide whether an indirect comment was impermissible, a court should analyze "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 omitted); (*see also* Hoyle's Br. 18–19). The parties disagree as to whether the prosecutor's comments ran afoul of that standard. They did not.

Wisconsin courts have not closely examined this test, but the wording suggests that it is difficult to establish a

violation. *United States v. Lara*, 23 F.4th 459, 479 (5th Cir. 2022), *cert. denied*, 142 S. Ct. 2790. In *Lara*, a case Hoyle cites, the court noted that if there is an "equally plausible explanation" for the comment, then "the prosecutor's intent is not manifest" under the test's first prong. *Id.* (citations omitted). As to the second prong, "the question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury *necessarily* would have done so." *Id.* (emphasis in original) (citation omitted).

This Court has also observed that the constitutional determination must be made on a case-by-case basis. *State v. Doss*, 2008 WI 93, ¶ 92, 312 Wis. 2d 570, 754 N.W.2d 150. Consistent with this standard, the federal cases Hoyle cites largely focus on the government's comments in the context of the entire statement.[1]

Hoyle's cited cases also show it is permissible for the prosecution to point out the strength of the government's evidence, consistent with Wisconsin law. *See, e.g., United States v. Sandstrom*, 594 F.3d 634, 662 (8th Cir. 2010) (citing *United States v. Moore*, 129 F3d 989, 993 (8th Cir. 1997) (characterization of evidence as uncontroverted is permissible because it simply refers to strength and clarity of government's evidence)); *Johnson*, 121 Wis. 2d at 246 (questions about the absence of facts in the record need not be

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[1] *See, e.g., Taylor v. Medeiros*, 983 F.3d 566, 576 (1st Cir. 2020); *United States v. Whitten*, 610 F.3d 168, 199 (2d Cir. 2010); *United States v. Sotomayor-Teijeiro*, 499 F. App'x 151, 154–55 (3d Cir. 2012); *United States v. Lara*, 23 F.4th 459, 479–80 (5th Cir. 2022), *cert. denied*, 142 S. Ct. 2790 (2022); *Raper v. Mintzes*, 706 F.2d 161, 165 (6th Cir. 1983); *Hamilton v. Mullin*, 436 F.3d 1181, 1188 (10th Cir. 2006); *United States v. Hano*, 922 F.3d 1272, 1296 (11th Cir. 2019); *United States v. Mellen*, 393 F.3d 175, 182 (D.C. Cir. 2004).

taken as comment on defendant's failure to testify); *Bies v. State*, 53 Wis. 2d 322, 325, 193 N.W.2d 46 (1972) (in general, a remark that evidence is "uncontroverted" is permissible).

Hoyle contends that there is a "long held consensus" in the federal circuit courts that prosecutors cannot refer to evidence as uncontradicted or uncontroverted "when only the defendant can contradict the government's case." (Hoyle's Br. 17.) Hoyle also argues that in cases where only the defendant and victim (or other testifying witnesses) are direct witnesses to the crime, then only the defendant's testimony can controvert the State's case. (Hoyle's Br. 27–28.) The logical effect of his argument is that a prosecutor commits a per se constitutional violation when she comments on the strength of the State's evidence in cases where there are no direct witnesses. This argument lacks merit.

Many of Hoyle's cited cases (Hoyle's Br. 19, 21–24, 27–28) do not concern or even discuss a scenario where only the defendant allegedly could controvert the government's evidence.[2] And the cases that mention that scenario do not support adopting the per se rule he advances.

For example, in *Morrison v. United States*, the Eighth Circuit held that an indirect comment did not amount to an impermissible comment on the failure of the accused to testify. 6 F.2d 809, 811 (8th Cir. 1925). Testimony by the defendant was not the only method of contradicting the story told by the government's witnesses. *Id.* Further, a comment

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[2] Presumably, when Hoyle says that "each of the federal circuit courts have adopted the *Morrison* test" (Hoyle's Br. 19), he means that the federal circuits have adopted the standard of whether the government's comment was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. That language (or substantially similar language) is present in each of the cases cited in footnote 6 of his brief.

that certain testimony is uncontradicted "is common, oftentimes helpful, and very generally held to be without error." *Id.*

The court went on to say that another case, *Linden v. United States*, 296 F. 104 (1924), was not "inconsistent" with its holding. *Id.* In *Linden*, a comment that the evidence was "uncontradicted and without explanation" was improper based on the particular facts, which included that only the defendants were present during the crime other than two customs agents who testified. *Id.* The *Linden* court concluded that only the defendants could have contradicted the evidence or explained the event. *Id.*

Even if *Morrison* were binding on this Court (which it is not), the court's observations about *Linden* do not establish that prosecutors can *never* draw attention to the government's uncontradicted evidence when the only direct witnesses to the crime are the defendants and the testifying witnesses. *See, e.g., Slakoff v. United States*, 8 F.2d 9, 11 (3d Cir. 1925) (distinguishing *Linden* and declining to find comments impermissible when other methods were available to rebut the government's proof, including presentation of documents and use of cross-examination).

Hoyle summarily cites eight federal cases and claims that each "held that such comments violate a defendant's Fifth Amendment rights when the defendant is the only possible witness." (Hoyle's Br. 22.) Those cases do not support the per se rule that Hoyle advances.[3]

In *United States v. Bey*, the First Circuit held that a prosecutor's comment that certain matters were "undisputed" was *not* a Fifth Amendment violation. 188 F.3d 1, 9 (1st Cir.

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[3] Hoyle includes *United States v. Cotnam*, 88 F.3d 487, 499 (7th Cir. 1996), but that case is distinguishable for the reasons noted in the State's opening brief.

1999). The court reasoned that the defendant's contrary argument "misse[d] the broader context of the prosecutor's closing remarks and the prosecutor's attempt to focus the jury on the relevant issue." *Id.* "*Moreover*," to dispute the facts the government suggested were beyond question, the defendant would not have had to rely on his own testimony, since the facts were within the competence of other witnesses who testified. *Id.* The context of the prosecutor's remarks were what drove *Bey*'s holding, not the secondary observation about other witnesses. The same is true of *United States v. Morrow*, 177 F.3d 272, 300 (5th Cir. 1999).

In *United States v. McDermott*, a false arrest case, the prosecutor addressed the defendants' argument that they made the arrests in good faith. 918 F.2d 319, 327 (2d Cir. 1990). The prosecutor asked the jury, "[d]id [the defendants] offer any explanation for these lies? No. The defendants put on two witnesses." *Id.* The Second Circuit held that the remarks were a permissible allusion to appellants' failure to call witnesses to support their theory. *Id.* The court stated that "[i]t is only when the evidence that the defendant has not adduced is in the control of the defendant alone or where the jury would naturally and necessarily interpret the Government's summation as a comment on the defendant's failure to testify that the Government's comments run afoul of the Fifth Amendment." *Id.* The court did not hold that a Fifth Amendment violation automatically occurs when only the defendant and the other testifying witnesses are present for the crime.

United States v. Sotomayor-Teijeiro also supports the State's position. There, the prosecutor told the jury, "the only testimony from the witness stand has been about drug trafficking . . . [w]e haven't heard of any sources of income not from the witness stand." 499 F. App'x 151, 154 (3d Cir. 2012). Analyzing the prosecutor's remarks in context, the court

concluded that the jury would not "naturally and necessarily" have perceived the remarks as "a comment on the defendants' failure to testify." *Id.* The prosecutor's remarks "simply reminded the jury that all the evidence they heard regarding the source and purpose of the money was that it was related to drug dealing, and urged the jury to draw the conclusion that drug trafficking occurred." *Id.* at 155.

The facts of *United States v. Triplett* are distinguishable from those here. (Hoyle's Br. 23.) There, the Eighth Circuit concluded that the jury would have understood the prosecutor's statement that "what you didn't hear was evidence that the defendant didn't possess the drugs" as a reference to the defendant's silence because, "*according to the government's own theory of the case*, no one other than [the defendant] himself could have testified about his possession of the drugs." *United States v. Triplett*, 195 F.3d 990, 995 (8th Cir. 1999) (emphasis added). The State advanced no such theory here.

In *Rhoades v. Henry*, the court analyzed the prosecutor's comments in context and concluded that they were permissible because they were aimed at the weaknesses in a defense witness's testimony. 598 F.3d 495, 510 (9th Cir. 2010). And finally, in *Hamilton v. Mullin*, the Tenth Circuit reviewed a prosecutor's comments in context, which revealed that he was discussing a particular jury instruction and was asking the jury to use their "common sense" regarding the defendant's flight. 436 F.3d 1181, 1188 (10th Cir. 2006). These comments were permissible. *Id.*

To be sure, some of these cases mention that the Fifth Amendment could be violated when a prosecutor comments on uncontroverted evidence and no one but the defendant could dispute the evidence. But not one of these cases holds that a prosecutor commits a per se Fifth Amendment violation when she comments on the strength of the State's evidence in

cases where there are no direct witnesses to the crime. The federal consensus, if anything, shows that the analysis is case-by-case and contextual.

Hoyle's discussion of U.S. Supreme Court and Wisconsin law fares no better. He argues that this Court misread *Hasting*, and asserts that *Hasting* does not establish "that an argument that the evidence is uncontradicted, when only the defendant can contradict the evidence, is permitted under the Fifth Amendment." (Hoyle's Br. 40.) This argument is misguided, because *Doss* and *Hasting* support the inverse, which is really the point. In other words, a prosecutor's comments about uncontroverted evidence do not establish a per se constitutional violation, even in rare cases where the only evidence that could controvert the government's evidence was the defendant's testimony. *United States v. Hasting*, 461 U.S. 499, 506 & n.4 (1983); *Doss*, 312 Wis. 2d 570, ¶ 94. A reviewing court is required to analyze the comments in context to determine whether they run afoul of the Fifth Amendment. *Id.* ¶ 92. The court of appeals did not do that here.

Hoyle argues that the Wisconsin Court of Appeals correctly read and applied *Bies*. (Hoyle's Br. 35.) He is wrong. The court of appeals read *Bies* to mean that a prosecutor can say evidence is uncontroverted if it concerns an aspect of the case that is not in dispute. But this is not what *Bies* says. *Bies*, 53 Wis. 2d at 325. To the extent *Bies* could be interpreted in this way, the State respectfully requests that this Court clarify that a prosecutor's remarks about uncontroverted evidence are not automatically barred when directed at disputed facts. Again, the proper analysis is a contextual, case-by-case one; per se tests are inconsistent with that standard.

B. On the record in this case, the prosecutor's comments were permissible.

As explained in the State's opening brief, the prosecutor's closing comments were directed at the strength of the State's evidence generally, which was Hannah's uncontroverted statement that she was sexually assaulted. The jury had to decide whether to believe Hannah, and the prosecutor directed the jury to the relevant factors for credibility, as found in standard jury instructions. The prosecutor's comments were not directed at Hoyle's decision not to testify, and the jury would not "naturally and necessarily" interpret them as such.

Hoyle argues that the only person who could contradict Hannah's version of events was Hoyle, because they were the only two people present during the assault. (Hoyle's Br. 27–30.) He further argues that the prosecutor "quite clearly and repeatedly" argued that Hoyle should be convicted because Hannah's testimony was uncontroverted. (Hoyle's Br. 30–34.) He is wrong on both points.

Hoyle does not persuasively refute the State's observation that cross-examination is a form of evidence that could controvert the government's evidence. Wis. JI–Criminal 103 (2000) (defining evidence as "the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness.") The fact that the cases he cites do not grapple with this form of evidence does not effectively refute this point. *See Slakoff*, 8 F.2d at 11. And Hoyle's contention that a witness whose testimony is impeached is not "controverted" misses the mark. (Hoyle's Br. 29–30.) Cross-examination can be used as a tool to call a witness's basic story into question, thus "controverting" the witness's testimony.

Hoyle points to cases from three state courts and one federal circuit, which are not helpful here. (Hoyle's Br. 28.)

State v. Keesecker is distinguishable because the prosecutor's statements were materially different. The government commented to the jury that "[y]ou never heard anybody come in here and say . . . no one ever came in here and said . . . no one ever said." *State v. Keesecker*, 663 S.E. 2d 593, 601 (2008). Coupled with the court's finding that only the defendant could have contradicted the confession that was read to the jury, the comments were deemed impermissible. *Id. Keesecker* differs from this case, in which the prosecutor stated that its *evidence* was uncontroverted, and there was no indication that only Hoyle's testimony could controvert it. *Bies*, 53 Wis. 2d at 325.

State v. Scutchings, *Aaron v. State*, and *Runnels v. Hess* suggest that when sexual assault victims are alone with a perpetrator, a prosecutor's comments about the victim's uncontroverted evidence "necessarily" focus the jury on the defendant's failure to testify because it is "highly unlikely" that anyone other than the defendant could refute the evidence. *Aaron v. State*, 846 S.W.2d 655, 657 (1993); *see also State v. Scutchings*, 759 N.W.2d 729, 732 (2009); *Runnels v. Hess*, 653 F.2d 1359, 1363 (10th Cir. 1981). These cases lend some support to Hoyle's position. But their reasoning should not be adopted, for two reasons.

First, these cases essentially establish a per se rule, which is diametrically opposed to the contextual, case-by-case analysis that this Court and federal courts have endorsed. The case-by-case approach is the best approach, since the specific facts and prosecutorial comments vary widely. That standard also strikes a balance between protecting a defendant's Fifth Amendment rights and not cutting into the area of legitimate comment by the prosecutor on the weaknesses in the defense's case. *Hasting*, 461 U.S. at 515 (Stevens, J., concurring).

Second, this position has troubling implications for cases in which only the victim witnessed the crime,

particularly child sexual assault cases such as this one. In another context, this Court has noted "the difficulty sexually abused children experience in testifying," as well as the difficulty prosecutors have "in obtaining admissible evidence in such cases." *State v. Hurley*, 2015 WI 35, ¶ 59 n.19, 361 Wis. 2d 529, 861 N.W.2d 174 (discussing rationale for the greater latitude rule in child sexual assault cases) (citation omitted). If this Court were to adopt a bright-line rule, it would drastically broaden the reach of the Fifth Amendment and hurt victims' cases in a manner that is not required by the State or federal Constitution.

Hoyle argues that the prosecutor's references to the standard jury instructions "reinforced the notion that the jury should convict Hoyle simply because he did not controvert Hannah's testimony." (Hoyle's Br. 30–31.) That characterization is inaccurate and takes the prosecutor's comments out of context. "[T]he prosecutor's comment was grounded in standard jury instructions and directed at the evidence in the record, not at Hoyle's decision not to testify." (State's Opening Br. 24–25.) Hoyle barely acknowledges the prosecutor's emphasis at closing, which was Hannah's credibility. (R. 92:21–27.)

Adopting the rule that Hoyle advances would run contrary to the Supreme Court's admonition against giving *Griffin* "a broad reading." *United States v. Robinson*, 485 U.S. 25, 31 (1988). The prosecutor's comments were permissible under the Fifth Amendment.

CONCLUSION

The State requests that this Court reverse the court of appeals' decision and remand for consideration of the remaining issues that the parties briefed, but that the court of appeals did not decide.

Dated this 29th day of November 2022.

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 2,997 words.

Dated this 29th day of November 2022.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

I hereby certify that:

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I further certify that:

This electronic brief 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 brief filed with the court and served on all opposing parties.

Dated this 29th day of November 2022.

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