COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2015AP2667-CR
2015AP2668-CR

Cir. Ct. Nos. 2001CF239
2001CF249

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERROD R. BELL,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Monroe County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 BLANCHARD, J. Gerrod Bell appeals the judgment of conviction, following a jury trial, on multiple charges of sexual assault involving two victims, then aged 17 and 14, and the order denying his motion for a new trial. Bell makes two arguments. First, Bell argues that the prosecutor misstated the law to the jury,

by arguing that in order to acquit Bell jurors "must believe" that the two victims lied about the alleged sexual assaults, and that if either victim was lying there should be evidence of that victim's motive to lie.

¶2 Second, Bell makes an ineffective assistance of counsel argument involving exhibits provided to the jury during deliberations. Bell contends that trial counsel performed deficiently in failing to seek redaction of the exhibits to eliminate references to statements by the 14-year-old alleged victim that she had "never had sex" with anyone before Bell had sexual intercourse with her. Bell further contends that he was prejudiced by the jury's access to these unredacted exhibits.

¶3 We conclude that Bell is not entitled to relief on either issue, because the prosecutor did not misstate the law and because Bell fails to show prejudice from the jury's access to the unredacted exhibits. Accordingly, we affirm.

BACKGROUND

¶4 For reasons that we need not address, 13 years passed between Bell's conviction at a jury trial and Bell's direct postconviction challenge to his convictions that is the subject of this appeal, in 2015. At trial, there was evidence that Bell sexually assaulted two sisters in July 2001.

¶5 Both alleged victims, AL and TP, testified at trial. Bell waived his right to testify. However, the State elicited from a police officer statements that Bell gave to police during the investigation of the alleged sexual assaults, in which Bell said in part that he had "no clue" why TP would falsely accuse him and that "I think [TP] is trying to get someone to feel sorry for her for some reason or other."

¶6 As pertinent to this appeal, the jury convicted Bell of the following: having sexual intercourse with AL, then 17, by use of threat or force on July 2, 2001; having sexual contact with AL, touching a breast, by use of threat or force in mid to late July 2001; having sexual intercourse with TP by use of threat or force in mid to late July 2001; and sexual assault of a child, because of TP's age, then 14.

¶7 We describe in the Discussion section below additional evidence and trial events as necessary to explain our resolution of the issues on appeal. This includes the extensive comments of the prosecutor now challenged by Bell and details regarding the exhibits that Bell argues his counsel should have moved to have redacted.

¶8 In his postconviction challenge, Bell raised the two issues summarized above. The circuit court denied the postconviction motion. Bell appeals.

DISCUSSION

¶9 We first address the prosecutor's statements, then separately address the unredacted exhibits.

I. PROSECUTOR'S STATEMENTS

¶10 Bell argues that the prosecutor misstated the law by arguing to the jury that, as Bell characterizes it, the jury "could not acquit without concluding [that AL and TP] were lying and unless the defendant had presented evidence establishing a reason for them to lie." According to Bell, these statements were contrary to the following unquestionable, operative legal principles: that the State had the burden to prove beyond a reasonable doubt the facts necessary to establish

each element of each offense; that Bell was presumed innocent and had no burden to prove his innocence; and that Bell had a right to remain silent, including a right not to testify at trial.

¶11 Bell seeks a new trial. However, he acknowledges that, because the defense did not move for a mistrial based on the prosecutor's statements, he is entitled to a new trial only if he prevails under one or more of three doctrines: plain error; ineffective assistance of counsel; or the interest of justice. Bell argues that a new trial is merited under each form of relief. The State primarily argues that Bell cannot complain that the prosecutor misstated the law because, under the invited response doctrine, the prosecutor's statements were "a reasonable response" to "defense counsel's strident attack on the victims' credibility."

¶12 We affirm under all three doctrines, because we reject Bell's position that the prosecutor misstated the law.[1] We first summarize the statements of the prosecutor that Bell argues merit a new trial, then explain why we conclude that the prosecutor did not misstate the law.

[1] We also reject the State's primary position on appeal, and affirm for the reasons provided in the text. First, the invited response doctrine could not excuse a prosecutor from *affirmatively misstating* a legal proposition to the jury, which is Bell's argument on appeal, on the ground that the defense effectively invited the State to misstate the law. Second, as Bell correctly points out, the initial prosecution closing argument at trial, which is the primary focus of Bell's challenge, *preceded* the defense closing argument at trial, which is the primary focus of the State's current argument.

A. The Statements

Voir Dire

¶13 Bell contends that a complete picture of the prosecutor's alleged improper statements includes some comments made during voir dire. Bell notes that, in the course of probing whether, how often, and why anyone might falsely allege a sexual assault, the prosecutor asked prospective jurors if they would "expect" that, if an alleged victim made a false allegation, "there would be some evidence" presented at trial about why the alleged victim "would have a reason to lie." Following this, after noting that the pattern jury instruction on reasonable doubt does not permit speculation, the prosecutor asked, "[I]f you [did not] hear evidence of why a person might lie, would you feel inclined to speculate based upon your past experience …?" or, instead would jurors "follow the jury instructions and not speculate and base your decision based on the evidence or lack of evidence in this case?" The defense made no contemporaneous objections to any of these prosecution statements or questions.

Closing Argument; Purported Defense Objection

¶14 Early in closing argument, the prosecutor said:

> What … things must we believe for the defendant to be not guilty? After hearing all the evidence that we've heard, what are the things that we must believe true if he is not guilty?
>
> First of all, when it comes to [TP], who's 13 [sic], that she first lied to [a police sergeant] about the defendant raping her. We have to believe that she then proceeded in the videotape [interview of TP] that occurred over two days … that she then lied to the social worker … about the rape. That … the defendant assaulted her.
>
> We then have to believe that she lied to us. You have to believe that.

> We have to then believe when we look at [AL] and her testimony, we would have to believe if the defendant is not guilty, that she first lied to [a police detective] when she told him about the incident on the couch when the defendant held her down and grabbed her breast. And that's the first thing that she came forward with.
>
> The other instances when they were investigating the night of the party, we have to believe she lied about that.

¶15 At this point, defense counsel interrupted with a statement we now quote in its entirety:

> Your Honor, I'm concerned about how he's presenting this because I think he's reversing the burden of proof.

This brief statement is the only purported defense objection at trial to which Bell now directs us.

¶16 The prosecutor began to respond to the defense attorney's statement, "No I'm not, Your Honor; I'm simply—," at which point the court apparently interrupted to say:

> Well, this is argument[.] I think the jury understands that. It's not evidence and there has to be some latitude for advocacy during the course of argument. I'm not convinced that what [the prosecutor is] saying is going beyond that at this point. And, of course, [defense counsel] still [has] the opportunity to get up there and make [a defense] presentation.
>
> So let's proceed with that in mind.

¶17 The prosecutor resumed his closing argument as follows:

> We must believe that [AL] lied to [a police detective] about that. We must believe [that] then six months later, for some reason, she just decided to pile on another story and that she lied to [a police sergeant] when [the sergeant] said there was a pool of tears, there was a wet spot there when she got done[,] … telling him about the rape [that occurred]

> in the shower on July 2d. We have to believe that she lied about that.
>
> And we have to then believe that she lied at the preliminary hearing back in February of this year when she had to discuss both of those instances.
>
> We have to believe that she lied to us over the course of two days when she was up there [on the witness stand] for a number of hours, that she intentionally lied to us this week. That's what we'd have to believe.
>
> We discussed it [in voir dire]; it's a strange occurrence. We talk about [how] it could happen, but it's a strange occurrence where somebody were to make something up about being sexually assaulted. We said it could happen, but it's a strange occurrence.
>
> How bizarre to have two sisters saying this man raped them. Not one, but two. We're talking about odds that are so extreme, that to consider this is really an unfair and irrational consideration of the evidence….
>
> ….
>
> But there's more. There's some other details that we have to believe.

¶18 The prosecutor related details of the evidence that he argued showed that the jury "would have to believe" that AL was far more "clever" than she appeared, and also that AL and TP "are simply two of the best … actresses we have ever seen," as effective as Meryl Streep.

¶19 Bell also now highlights the following subsequent portion of the prosecution closing, which begins with an apparent reference to discussion during voir dire:

> We talked about if somebody is going to make a flat out lie about something, they're going to have a reason. They're going to have some evidence of that reason.
>
> Defendant's statement; he has no idea … no clue why she would say this. He has no idea why she would make this up. He … just begins to speculate. He just

> begins to make guesses after he says he has no idea why she would make this up….
>
> … He doesn't know, he can't think of any reason. Neither can we. Because there isn't one.
>
> If a person lies about something, they must have a reason. And the reason why there is no evidence in this case about why anybody would lie is because they're not lying. [TP] and [AL] are not lying.

Rebuttal Argument

¶20 The prosecution rebuttal closing argument followed a defense closing argument that the sexual assaults "never happened" and that AL and TP lied about being sexually assaulted. Defense counsel argued that AL and TP were part of a family in which "[l]ying becomes a way of survival," and they "had to act their whole life; they've had to act [like] everything is normal when Human Services comes by." Defense counsel further told the jury that "[l]ying can be out of jealousy, lying can be out of hurt, lying can be for revenge and a lie is out of control. And that's what happened here."

¶21 Turning to the prosecution rebuttal, we place in italics the portions of the following extended passage that Bell now challenges:

> When we're talking about a fair and rational consideration, it's a consideration based on the evidence or lack of evidence…. [Testimony at trial is] the evidence we have and there is nothing to contradict what they say. Nothing.
>
> So there is no other evidence to consider…. You get to hear what happened.
>
> *[Defense counsel] says, …"lying can be out of jealousy, out of hurt, out of revenge." Pure speculation, pure speculation, pure speculation. We have no idea why these girls lie. To begin to say well, maybe they lied because they have a bad life.*

> *There's never [been] testimony [that] they were lying because of that. There's no testimony they were lying for any other reason. There's no testimony that they were lying. There's no evidence that they were lying.*
>
> TP freely admits that they haven't had the best life. So does AL. Of course, AL hasn't even been under the influence of her mother for three years. There's no evidence of that whatsoever. And we're supposed to look at the evidence or lack of evidence. To try to sit back and say[, "H]mm, I wonder what could be a possible reason why these girls would lie, say well, you know, they've had a hard life.["] We know that, because a lot of people had hard lives. A lot of people have had maybe bad parents…. [T]his just doesn't happen, to have two sisters that say they were raped by this man. It's sheer speculation, it's sheer guesswork.
>
> *If you find yourself doing that, the instructions say specifically you cannot do it; you cannot base it on mere guesswork or speculation. It says you're not to search for speculation;…you're supposed to search for the truth. And the truth is clear.*
>
> Everything that they've said is understandable. It's fair and rational that they're telling the truth based on the fact that they're teenage girls and they don't want to tell anybody.

(Emphasis added.)

¶22 The prosecutor closed with the following, using italics here for the portion now challenged by Bell:

> *So much [of] what [the defense attorney] asks you to do is sheer guesswork, sheer speculation. Something the jury instructions instruct you not to do.*
>
> I ask you to just simply follow the jury instructions and find the defendant guilty on all counts.

(Emphasis added.)

B. Analysis

¶23 As summarized above, trial counsel briefly raised with the circuit court a "concern" that the prosecutor's statements were "reversing the burden of proof." We will assume without deciding that this was sufficient to preserve a timely objection to the following effect: the prosecutor misstated the law in saying that, as Bell now puts it, the jury "could not acquit without concluding [that AL and TP] were lying and unless the defendant had presented evidence establishing a reason for them to lie."

¶24 We need not detail at this juncture the particular legal standards that apply to the plain error doctrine, to claims of ineffective assistance of counsel, or to requests to grant a new trial in the interest of justice under WIS. STAT. § 752.35 (2013-14) as they pertain to Bell's arguments based on the prosecutor's statements.[2] This is because our conclusion that the prosecutor did not misstate the law eliminates the possibility of relief under any of these doctrines. We merely note that our supreme court has explained that, when deciding whether a prosecutor's statements require a new trial in the interest of justice, "'the statements must be looked at in context of the entire trial'" as opposed to viewing them in isolation. ***State v. Burns***, 2011 WI 22, ¶49, 332 Wis. 2d 730, 798 N.W.2d 166 (quoted source omitted).

[2] *See* ***State v. Jorgensen***, 2008 WI 60, ¶24, 310 Wis. 2d 138, 754 N.W.2d 77 and WIS. STAT. § 901.03(4) (plain error); ***State v. Thiel***, 2003 WI 111, ¶¶18-21, 264 Wis. 2d 571, 665 N.W.2d 305 (ineffective assistance); ***State v. Kucharski***, 2015 WI 64, ¶5, 363 Wis. 2d 658, 866 N.W.2d 697 (interest of justice).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶25 Bell's argument challenging the prosecutor's statements has two, related parts, which we address in turn, although our resolution of the issues is similar and our reasoning overlaps regarding each part of Bell's argument. The first part of Bell's argument is that the prosecutor improperly told the jury that it "could not acquit without concluding [that AL and TP] were lying." We will refer to this argument as Bell's "must believe" argument because that is the phrase that the prosecutor repeatedly used when advancing this concept. The second part of the argument is that the prosecutor improperly told the jury that it could not find that the alleged victims lied "unless the defendant had presented evidence establishing a reason for them to lie." We will refer to this as Bell's "burden-to-prove-motive" argument.

The "Must Believe" Argument

¶26 We construe the prosecutor's "must believe" comments, when considered in the context of the closing argument and the trial as a whole, to constitute an argument that, under the only realistic view of the evidence, the jury was presented with two starkly contrasting factual alternatives. The prosecutor argued that one of the factual alternatives was plausible and the other was not: either (1) AL and TP told the truth about the assaults, or (2) AL and TP fabricated the assault allegations. We conclude that, understood this way, these comments did not misstate the law. Rather, as explained below, the comments are a case-specific argument that this particular jury was faced with just two realistic views of the evidence.

¶27 It is significant that Bell does not argue that the jury instructions given by the court misstated any pertinent legal standard. Therefore, we start from the presumption that the jury understood that, as the court unambiguously

instructed the jury: the State had the burden to prove the facts necessary to establish each element of each offense beyond a reasonable doubt; Bell was presumed innocent and had no burden to prove his innocence; and Bell had a right to remain silent, including a right not to testify at trial. *See* ***Weborg v. Jenny***, 2012 WI 67, ¶86, 341 Wis. 2d 668, 816 N.W.2d 191 (courts "expect juries to follow instructions"). At the same time, as Bell properly points out, this court has quoted the U.S. Supreme Court's identification, in the seminal ***Berger*** opinion, of the concern that "'the average jury, in a greater or less degree, has confidence that'" prosecutors will not make "'improper suggestions [and] insinuations,'" *see* ***State v. Weiss***, 2008 WI App 72, 312 Wis. 2d 382, 389, 752 N.W.2d 372 (quoting ***Berger v. United States***, 295 U.S. 78, 88 (1935)), and we see no reasonable argument that an affirmative misstatement of a pertinent legal standard would not qualify as an "improper suggestion."

¶28 Turning to the facts here, we conclude that the prosecutor did not present the "must believe" comments as statements about what the law requires. Instead they were presented as comments on the facts in evidence, in particular about the mutually exclusive versions of the truth presented in the evidence. As quoted above, the prosecutor introduced the concept in closing by saying, "*After hearing all the evidence that we've heard*, what are the things that we must believe true if he is not guilty?" (Emphasis added.) In the same vein, the passages quoted above reveal that the prosecutor tied his "must believe" comments to particular pieces of evidence, inviting the jury to apply the State's two-stark-alternatives theory to the particulars of the case.

¶29 Bell fails to persuade us that the two-stark-alternatives theory was not a fair characterization of the evidence. For example, there was no attempt by the defense to elicit evidence of a possible mistaken identity (Bell was well known

to AL and TP; there was undisputed testimony that Bell spent much time at TP's residence, where AL visited often). Nor did the defense attempt to elicit evidence that any of the sexual assaults involved misinterpreted or accidental sexual contact, or that the allegations were the result of any particular coaching or coercion. Instead of presenting any of those defenses, the defense predicted in its opening statement that the evidence would show either that AL and TP told the truth about the alleged sexual assaults, or else that the assaults "did not occur" because the allegations were the product of the "tragic" lives of AL and TP. Consistent with this view of the evidence, the defense cross-examinations of AL and TP reflected only efforts to suggest that the allegations were entirely false at the onset and that the girls persisted in lying thereafter. Efforts to elicit from AL and TP reasons they might lie were unproductive. The content of the questions might have suggested vague reasons to falsely accuse Bell, but nothing in the girls' answers indicated a motive to do so. It is in this evidentiary context that the prosecutor's theory emerged that jurors "must believe" either that the victims were lying (and acquit) or that the victims were telling the truth (and convict), because under the only realistic view of the evidence there were no other alternatives.

¶30 Bell acknowledges that no Wisconsin precedent supports his "must believe" argument. Instead, he rests heavily on persuasive authority, featuring cases from the federal Seventh Circuit Court of Appeals, to the effect that, as a general rule, it is improper for a prosecutor to argue that a defendant could be innocent only if witnesses, typically government agents or police officers, have lied. *See, e.g.*, ***United States v. Cornett***, 232 F.3d 570, 574 (7th Cir. 2000) (prosecutor misstates the burden of proof in arguing that in order to acquit the defendant, jurors had to conclude that police lied; "the jury could have believed that the witnesses told the truth and yet still found that the government had failed

to prove Cornett's guilt beyond a reasonable doubt"). However, the circumstances here most closely resemble a Seventh Circuit case in which the court found unobjectionable a prosecutor's "mere statement of fact" to the practical effect that jurors "had a chance to determine whether the officers or the defendant [were] telling the truth and that it is up to the jury to determine who was more credible when applying the court's jury instructions to the evidence received." *See* ***United States v. Amerson***, 185 F.3d 676, 680 (7th Cir. 1999) (not improper for prosecutor to comment that jurors "simply cannot believe the testimony of these police officers and believe the defendant's testimony at the same time").

The "Burden-To-Prove-Motive" Argument

¶31 To repeat, Bell's "burden-to-prove-motive" argument involves Bell's characterization of the prosecutor's statements as telling the jury that it could not find that the alleged victims lied "unless the defendant had presented evidence establishing a reason for them to lie," that is, a motive to lie, effectively shifting the burden of proof from the prosecution to Bell. Bell further contends that the prosecution used this argument to "comment on Mr. Bell's decision to not testify."

¶32 We begin with the voir dire discussion highlighted by Bell and quoted above, and much of what we say about the voir dire discussion resolves this issue against Bell. To repeat, the prosecutor asked whether prospective jurors would "expect," in the event that an alleged victim made a false sexual assault allegation, that "there would be some evidence" at trial that the alleged victim had a reason to lie, and if jurors might improperly "speculate based upon your past experience" about possible reasons for an alleged victim to lie. We see nothing improper in these questions. It is common sense that people do not lie unless there

is a reason behind the lie. That is, at least ordinarily, and arguably by definition, a lie is the result of a decision to convey a falsehood. It is also common sense that there is sometimes evidence available to raise at least an inference of one or more reasons for a person to lie. Referring to these common sense ideas did not undermine any legal principle cited by Bell. It was not inconsistent with instructions properly given in this case, including those involving speculation.[3] Similarly, it was a reasonable concern for the State to express, and not contrary to any legal principle cited by Bell, that a juror might improperly rely on personal

[3] The jury was given the pattern instructions that primarily address the topic of speculation:

> If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty.
>
> The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.
>
> *A reasonable doubt is not a doubt which is based on mere guesswork or speculation.* A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.
>
> *While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth*.
>
> ….
>
> In weighing the evidence, you may take into account matters of your common knowledge and your observations and experience in the affairs of life.

(Emphasis added.)

experiences to speculate about possible reasons why an alleged victim might have lied. Such speculation could prevent the juror from considering pertinent evidence or from considering the pertinent absence of evidence. In sum, we conclude that the voir dire discussion by the prosecutor adds nothing to Bell's argument.

¶33 We have the same view of the prosecutor's burden-to-prove-motive comments made during closing and rebuttal arguments. We are satisfied that the prosecutor's statements, taken as a whole, rested on common sense propositions that did not misdirect jurors on legal issues. Echoing our reasoning in addressing Bell's must believe argument above, the prosecutor's comments on this topic could be reasonably interpreted to properly imply the following sequence of ideas: when people lie, they typically do so for some reason or reasons; in the prosecutor's view, the jury had not been presented with evidence providing any possible reason for AL or TP to lie; and due to the lack of evidence, it would be pure speculation to decide that AL or TP had a reason or motive to lie.

¶34 We note that the prosecutor clarified his theory at the end of his closing, in language quoted above, arguing that the defense was asking jurors to engage in "sheer guesswork, sheer speculation. Something the jury instructions instruct you not to do. I ask you to just simply follow the jury instructions and find the defendant guilty on all counts." This directed the jury to apply the instructions on the topic of speculation.

¶35 Bell argues that jurors "*can* speculate when assessing a witness'[s] credibility," and that the prosecutor's statements indicated the opposite. (Emphasis in Bell briefing). We reject the pro-speculation premise of this argument. Bell cites WIS JI—CRIMINAL 300 ("credibility of witnesses"), which instructs that jurors have broad latitude to consider all "facts and circumstances

during the trial which tend either to support or to discredit the testimony," and to consider "possible motives for falsifying testimony." A reasonable reading of the instruction is that it invites the jury to consider a wide range of factors bearing on credibility, based on the "facts and circumstances" of the particular case, but it is not an invitation to engage in guesswork or speculation.

¶36 In a related argument, Bell contends that "a juror may find a witness not credible without any evidence establishing a reason for the witness to lie," and that the prosecutor's statements indicated the opposite. The premise of this argument is no doubt true. A jury might, for example, decide that a witness lacks credibility because the witness has in good faith misperceived one or more facts. Or perhaps the witness's reasoning, while appearing sincere, is questionable. However, Bell fails to persuade us that the challenged statements of the prosecutor here could reasonably have been interpreted as asserting that jurors must find the victims credible unless there was evidence establishing a reason for the witness to lie. Instead, as discussed above, the essence of the statements such as the following, also quoted above, was to stress the common sense point that people typically do not lie unless there is a reason and that, in the view of the prosecutor, there was no evidence in this case regarding a reason for AL or TP to lie:

> If a person lies about something, they must have a reason. And the reason *why there is no evidence in this case about why anybody would lie* is because they're not lying. [TP] and [AL] are not lying.

Bell is mistaken if he means to argue that a prosecutor cannot point to a lack of evidence on a topic, or remind the jury that it is not allowed to speculate, without impermissibly shifting the burden of proof to the defense.

¶37 Bell's argument that the prosecutor commented on Bell's decision not to testify is not well developed. Although Bell baldly asserts that the prosecutor "commented on Mr. Bell's exercise of his right not to testify," Bell points to no place in the record where this occurred. Instead, he apparently intends to argue only that, to the extent that the prosecutor's statements highlighted an absence of evidence, it shifted the burden of proof to the defendant, an argument we have rejected for reasons already discussed.

II. UNREDACTED EXHIBITS

¶38 Bell argues that he was denied effective assistance of counsel when counsel failed to move to redact exhibits reflecting statements that TP made to police that she had never "had sex" before Bell had sexual intercourse with her. We reject this argument on the ground that Bell fails to show that he was prejudiced by the jury's access to these unredacted exhibits.

¶39 Under the familiar two-part inquiry for ineffective assistance of counsel, "[a] defendant must show both (1) that counsel performed deficiently; and (2) that the deficient performance prejudiced the defendant." ***State v. Jenkins***, 2014 WI 59, ¶35, 355 Wis. 2d 180, 848 N.W.2d 786. Regardless of whether counsel's performance was deficient, in order to prevail a defendant "must show prejudice by demonstrating that there is a reasonable probability that the errors 'had an adverse effect on the defense.'" ***Id.***, ¶37 (quoted source omitted). "The required showing of prejudice is that 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" ***Id.*** (quoted source omitted). This is "a question of law which we determine independently of the circuit court …." ***Id.***, ¶38.

¶40 At trial here, the parties agreed to allow the jury to have access to identified trial exhibits during deliberations. This included defendant's exhibits 4 and 11, described in pertinent part below. Neither side sought redactions to exhibits 4 and 11.

¶41 Exhibit 4 was a six-page transcript of a statement given by TP to a police sergeant. This transcript included the following exchange:

> [Police sergeant]: Had you ever had sex before [Bell had sexual intercourse with you]?
>
> [TP]: No.

¶42 Exhibit 11 was a two-page police report, prepared by the police sergeant, which includes the following:

> [TP] is 14 years old but seemed to have very little knowledge about sex. She had told me she had never had sex before.
>
> ….
>
> … [Describing the sexual assault, TP] could not say if [Bell] ejaculated or even if she knew what that meant. I tried to explain and she said she did not think he did but was not sure.

¶43 As part of Bell's argument that defense counsel provided ineffective assistance in allowing the jury access to the portions of exhibits 4 and 11 just quoted, Bell cites additional evidence, namely, trial testimony from a doctor who conducted a pelvic examination of TP after Bell allegedly had sexual intercourse with her. The doctor opined that, given the absence of hymenal tissue and TP's general lack of discomfort during the exam, it was "likely" that T.P. had had sexual intercourse at "some point in her life."

¶44 Bell now argues as follows:

> Combined, the doctor's testimony and information in the exhibits that TP was a virgin created a strong inference that, because TP had never before had intercourse, the destruction of her hymen occurred during the only time she had intercourse, and that was the assault by Mr. Bell. A reasonable jury would conclude that it was not only likely that TP had sexual intercourse at some point in her life, as the doctor testified, it was likely that the act of intercourse was Mr. Bell's assault of her. The information in the exhibits unfairly bolstered the credibility of TP's accusation.

To these ideas, Bell adds the argument that TP's statement about losing her virginity may have led the jury to conclude that "TP's reluctance to talk about the alleged assault stemmed from her lack of knowledge and experience about sexual matters," as opposed to her reluctance stemming from her difficulty in telling a lie.

¶45 As the State points out, the prosecutor did not mention TP's virginity in closing arguments. The now-challenged passages were not a focus of the arguments at trial.

¶46 Assuming without deciding that it was deficient performance for trial counsel to fail to move for redaction of these references, we conclude that this assumed error would have had little or no impact on the jury and therefore was not so serious as to deprive Bell of a trial with a reliable result.[4]

¶47 Regardless of the contents of the exhibits, the jury heard the doctor's testimony that this 14-year-old girl likely had had sexual intercourse at some point, which in itself no doubt increased the probability that TP was telling the

[4] In addressing the question of deficient performance, Bell argues that the references to the length of time that TP remained a virgin were inadmissible under the rape shield law, WIS. STAT. § 972.11(2)(b). We do not address this topic, because we assume the deficient performance question in Bell's favor and because we do not discern in Bell's references to the rape shield law any additional point that supports his prejudice argument.

truth when she testified that *someone* had had intercourse with her. However, Bell fails to provide a persuasive argument that it significantly added to the jury's assessment of the State's argument that it was *Bell* who had had intercourse with TP. That is, assuming that the jury took notice of the statement by TP in the exhibits that she lost her virginity to Bell, this additional information could not reasonably have added meaningfully to the jury's thinking about the key question, which was whether she was lying in the first place in saying that Bell had sexual intercourse with her. The jury could have just as easily concluded, at least from this virginity-related evidence alone, that TP had had intercourse with one or more men other than Bell before her examination by the physician.

¶48 Bell emphasizes weaknesses in the prosecution's case, such as the lack of third-party witnesses to any of the assaults, delays in reporting by both AL and TP, and the fact that the case depended almost entirely on the credibility of AL and TP. But Bell fails to convince us that redaction on this topic would have reasonably tipped the scales to any meaningful degree in favor of the defense. As for TP's lack of cooperation in the investigation, Bell fails to develop an argument that the jury would have had any reason to view TP's statement that she lost her virginity to Bell as undermining a viable defense theory involving her lack of cooperation during the investigation.

CONCLUSION

¶49 For these reasons, we reject Bell's arguments and affirm the judgment of conviction and order denying postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.