COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2022

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2020AP1876-CR **Cir. Ct. No. 2017CF572**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMAS JAYMITCHELL HOYLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Chippewa County: JAMES M. ISAACSON, Judge. *Reversed and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Gill, JJ.

¶1 GILL, J. Tomas Hoyle appeals his judgment of conviction for two counts of second-degree sexual assault and two counts of second-degree sexual assault of a child less than sixteen years of age. He also appeals the order denying

his motion for postconviction relief. Hoyle argues that: (1) he is entitled to a new trial based on newly discovered evidence that contradicted the victim, Hannah's,[1] trial testimony regarding counseling; (2) the circuit court erred in denying his postconviction motion for discovery of Hannah's counseling records due to her newly discovered inconsistent statements; (3) the prosecutor improperly commented on Hoyle's exercise of his Fifth Amendment privilege not to testify by stating in closing arguments that the evidence was "uncontroverted"; and (4) the court erred in denying his postconviction motion for a new trial based upon the State's failure to disclose Hannah's initial statements to law enforcement that contradicted her subsequent statements.

¶2 We resolve this appeal on the narrowest possible ground. *See* ***Miesen v. DOT***, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) (court of appeals "should decide cases on the narrowest possible grounds"); ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive). We conclude the State's repeated argument that the evidence was "uncontroverted" violated Hoyle's Fifth Amendment right not to testify at trial. We therefore reverse and remand for a new trial.

BACKGROUND

¶3 The State charged Hoyle with four sexual assault offenses that occurred in February 2017: two counts of second-degree sexual assault in

[1] We use a pseudonym to refer to the victim in this case to protect her identity and for ease of reading.

violation of WIS. STAT. § 940.225(2)(a) (2019-20)[2]; and two counts of second-degree sexual assault of a child less than sixteen years of age in violation of WIS. STAT. § 948.02(2). After a two-day trial, the jury found Hoyle guilty on all counts.

¶4 Hannah, then fifteen years old, was the State's primary witness at trial and its case depended almost entirely upon Hannah's credibility. Hannah disclosed the assault in March 2017 to a school liaison officer, Joseph Nelson. Nelson interviewed Hannah, and he then turned the investigation over to Investigator Kari Szotkowski.[3] Szotkowski then interviewed Hannah regarding the details of the assault; however, Hannah would not identify the assailant. In May 2017, Hannah identified the assailant to Nelson as Hoyle.

¶5 At trial, Hannah testified that she "had taken some Vicodin and drank some alcohol" throughout the day of the assault. Hannah further testified that on her way to her friend's house, Hoyle, the older stepbrother of her former best friend, "drove through and asked if [she] wanted to hang out." Hannah then accepted a ride from Hoyle.

¶6 Hoyle and Hannah drove toward Chippewa Falls. After driving for some time, Hoyle turned down a dead-end road. Hannah then got out of the car, and when Hoyle instructed Hannah to get back into the car, Hannah climbed into the back passenger seat. According to Hannah, Hoyle then joined her in the back

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[3] Hannah knew Szotkowski as "Kari Anderson." Szotkowski testified that "Anderson" was her former surname. To reduce confusion, we will refer to her as Szotkowski.

seat and began to sexually assault her. After the assault, Hoyle returned Hannah to her home and he said, "if anyone finds out about this, someone is going to end up dead."

¶7 Hannah's direct testimony ended with an extended explanation of why she was not emotional during her testimony.

> [District Attorney]: You mentioned that it's traumatic to you today and upsetting to you today. Is there a reason why you are not crying now?
>
> [Hannah]: I have gotten counseling to help with dealing with this.
>
> …
>
> [District Attorney]: Do you still go to counseling for this?
>
> [Hannah]: Yes.
>
> …
>
> [District Attorney]: Are they able to help you process through this?
>
> [Hannah]: Yes.
>
> [District Attorney]: So as you mentioned, your ability to deal with it gets better and better as you deal with it professionally?
>
> [Hannah]: Correct.

¶8 Szotkowski was the only other witness for the State. Szotkowski testified that based on the description Hannah provided, she determined that the road where the alleged assault occurred was in Chippewa County. Szotkowski admitted that she did not speak about the incident with Hannah's family members or with the friend whom Hannah was supposed to meet on the day of the assault. Szotkowski also indicated that during her interview with Hannah, Hannah made no mention of having anything to drink or being under the influence of drugs at

the time of the assault. Hoyle exercised his right not to testify, and the defense did not otherwise introduce any evidence. During closing arguments, the prosecutor repeatedly argued, over Hoyle's objection, that Hannah's testimony was "uncontroverted" and that the jury "heard no evidence disputing [Hannah's] account of that sexual assault."

¶9 After his conviction, Hoyle filed a motion for postconviction relief. Hoyle first argued that after the trial, he discovered Hannah had no counseling or therapy for the assault as she did not want to discuss the assault with her counselor for fear of reliving it. This fact was in direct contradiction to her trial testimony, and Hoyle claimed that this newly discovered evidence bore on Hannah's demeanor and credibility.

¶10 Hoyle also argued that there were previously undisclosed police reports, child protective services records, and communications regarding Hannah's initial statements to law enforcement about the assault. The State had produced only Szotkowski's police report, which briefly mentioned that Hannah had initially disclosed the assault to Nelson. However, through an open records request, Hoyle's postconviction counsel obtained an email from Nelson to Szotkowski that described in detail his initial interview of Hannah. Nelson stated in the email that "[t]his all came about because she was in my office talking about her drug dependence and she used this incident as an example of how low she goes when she is high/drunk." Nelson also wrote that Hannah said that he was the first person she told about the incident. Hannah, however, later told Szotkowski that she "shared some of what happened with a friend of hers the night of the assault or the following night," although "she was not completely truthful with her friend."

¶11 Hoyle argued that the State's failure to produce Nelson's email was a ***Brady***[4] violation, which entitled him to a new trial. After Hoyle filed his postconviction motion, the State provided a copy of Nelson's police report. Nelson's report included additional allegations that Hannah had not made elsewhere. For instance, Hannah told Nelson that Hoyle gave her cigarettes and later said, "I gave you cigarettes, now you can give me something in return," and he "then locked the doors on the vehicle." Hannah did not repeat these allegations in her subsequent interview with Szotkowski, or in her testimony at the preliminary hearing or trial. Finally, Hoyle argued that the State improperly commented on Hoyle's right not to testify by stating the evidence was "uncontroverted." The circuit court denied Hoyle's postconviction motion. Hoyle now appeals.

DISCUSSION

¶12 Whether the prosecutor improperly commented on the defendant's exercise of his or her Fifth Amendment right not to testify presents a question of law that is subject to our de novo review. *See* ***State v. Cockrell***, 2007 WI App 217, ¶14, 306 Wis. 2d 52, 741 N.W.2d 267. The "Fifth Amendment [privilege against self-incrimination] forbids … comment by the prosecution on the accused's silence." ***Griffin v. California***, 380 U.S. 609, 615 (1965). Such arguments, if not corrected by the court, amount to "a penalty imposed by courts for exercising a constitutional privilege." ***Id.*** at 614.

[4] *See* ***Brady v. Maryland***, 373 U.S. 83 (1963).

¶13 Even indirect comments about the defendant's silence will violate the privilege, such as when the prosecutor points out a lack of evidence that only the defendant could provide by waiving their privilege. *See* ***Bies v. State***, 53 Wis. 2d 322, 325-26, 193 N.W.2d 46 (1972) *see also* ***United States v. Cotnam***, 88 F.3d 487, 499 (7th Cir. 1996). Accordingly, the analysis "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) (citation omitted).

¶14 After ***Johnson***, this court set out a three-factor test for determining when a prosecutor's argument can be held "to constitute an improper reference to the defendant's failure to testify." ***State v. Jaimes***, 2006 WI App 93, ¶21, 292 Wis. 2d 656, 715 N.W.2d 669 (discussing ***United States v. Robinson***, 485 U.S. 25, 34 (1988)). First, "the comment must constitute a reference to the defendant's failure to testify." ***Jaimes***, 292 Wis. 2d 656, ¶21. 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.***

¶15 Regarding factor one, the prosecutor told the jury that Hannah's testimony was "uncontroverted." The prosecutor went on to note that the jury heard "no evidence disputing [Hannah's] account of that sexual assault." Hoyle argues that the prosecutor "quite clearly, and repeatedly," invited the jury to draw a negative inference from the lack of any evidence controverting Hannah's testimony. The only witnesses to the alleged assault were Hannah and Hoyle. The only person who could directly controvert Hannah's testimony was Hoyle. Thus, Hoyle contends "the only way for a jury to accept the prosecutor's invitation to

draw a negative inference from the lack of evidence controverting [Hannah]'s account was to draw a negative inference from Hoyle exercising his right not to give such evidence through testimony." Hoyle argues this approach violated his right against self-incrimination.

¶16 At the postconviction hearing, the State relied on ***Bies*** to defend its use of the term "uncontroverted." In ***Bies***, the defendant was convicted of first-degree murder and armed robbery and was sentenced to an indeterminate term of fifteen years' imprisonment for the armed robbery to run concurrently with a mandatory term of life imprisonment for first-degree murder. ***Bies***, 53 Wis. 2d at 323. The charges stemmed from the murder and robbery of the victim after Bies and his accomplice, Flann, had been drinking at several bars. ***Id.*** Flann pleaded guilty to third-degree murder and robbery, and he was the State's chief witness at Bies' trial. ***Id.*** at 324. During closing argument, the prosecutor observed that certain evidence was uncontroverted. ***Id.*** at 325. Bies, who chose not to take the stand in his own defense, considered the term "uncontroverted" to be a comment on his failure to testify. ***Id.***

¶17 Like in ***Bies***, the State here argues "'uncontroverted' simply means that 'no evidence has been introduced to show the innocence of the defendant,' which is proper grist for the prosecutorial mill." *See* ***id.*** at 325. In addition, the State argues that the use of the word "uncontroverted" in this case "does not fit the outline of objectionable argument set out in ***Johnson***." The State contends ***Johnson*** reiterated ***Bies***' admonition that "[q]uestions about the absence of facts in the record need not be taken as comment on defendant's failure to testify." *See* ***Johnson***, 121 Wis. 2d at 246. The State argues that ***Johnson*** said prosecutorial argument is impermissible only if it is "manifestly intended or was of such

character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *See* ***id.***

¶18 The State's reliance on ***Bies*** is misplaced. ***Bies*** is not as affirming of the use of the word "uncontroverted" as the State argues. Our supreme court explained that, the State's use of the term "uncontroverted" in ***Bies*** was not violative of the defendant's Fifth Amendment rights because the prosecutor did not use of the term "uncontroverted" with respect to any aspect of the case that the defendant did actually dispute.

> [T]he 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. Unlike in ***Bies***, Hoyle did dispute whether the charged "acts" occurred. In fact, Hoyle expressly argued at trial that the State failed to meet its burden of proving that a sexual assault occurred.

¶19 Under these circumstances, the prosecutor's repeated arguments that the evidence regarding the charged assault was uncontroverted ignored the fact that Hoyle was innocent until proven guilty and could have led the jury to infer that his silence was evidence of his guilt. Hoyle explicitly argues, and we agree, that the comments made by the prosecutor met the test outlined in ***Jaimes*** because, given the nature of the allegations, "the only person who could controvert [Hannah's] testimony was Hoyle." Furthermore, as the Seventh Circuit has observed:

> It 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 just as improper as using the words "uncontradicted," "undenied," "unrebutted," "undisputed," and "unchallenged" in the same situation.

Cotnam, 88 F.3d at 499 (collecting cases). As such, the prosecutor's comments in this case constituted a reference to Hoyle's failure to testify and therefore met the first factor laid out in ***Jaimes***.

¶20 The second factor in ***Jaimes*** is that the comment on the failure to testify "propose[d] that the failure to testify demonstrates guilt." ***Jaimes***, 292 Wis. 2d 656, ¶21. This factor is met here because the prosecutor specifically argued that the lack of evidence disputing Hannah's testimony—which again, could have only come from Hoyle—demonstrated Hoyle's guilt. The last factor in ***Jaimes*** is that the defense's argument did not invite the prosecutor's comment. *See* ***id.*** The State does not raise an argument on this factor, instead contending it "does not come into play."

¶21 We conclude the State's use of the term "uncontroverted" when referring to evidence that the sexual assault occurred—a matter which Hoyle disputed—where no one but Hoyle could contradict the evidence, was improper and violated his Fifth Amendment right not to testify at trial. We therefore reverse the circuit court's judgment and order and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

Recommended for publication in the official reports.