State of Wisconsin
Court of Appeals
District 2
Appeal No. 2016AP000439 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Shaun L. Parish,

Defendant-Appellant.

On appeal from a judgment of the Fond du Lac County Circuit Court, The Honorable Robert J. Wirtz, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal concerning juror bias is unique, and it is not controlled by well-settled law. Therefore, the appellant recommends both oral argument or publication.

Statement of the Issues

I. Whether Parish is entitled to a new trial for the reason that the prosecutor made numerous inappropriate and prejudicial arguments during his closing argument.

Answered by the circuit court: No.

II. Whether the circuit court erred in denying Parish's postconviction motion for a new trial where it was shown that, during *voir dire,* a juror failed to disclose that she had been sexually assault while in college despite the fact that the judge specifically asked the panel whether anyone had experience with sexual assault.

Answered by the circuit court: No.

Summary of the Argument

I. The prosecutor's remarks in closing argument were highly inappropriate and prejudicial. In his closing argument, the prosecutor repeatedly implored the jury to do "justice", made reference to Biblical scripture, and suggested that KMM, because she was an orphan, was entitled to special consideration. These arguments are highly inappropriate because it is not the jury's function to "do justice". The arguments are not based on the evidence in the record, and the arguments unabashedly appeal to the passion, prejudice, and religious fervor of the jurors.

Defense counsel did not object to the arguments, though.

At the outset of the postconviction motion, the circuit judge ruled that the prosecutor's arguments were not inappropriate. Therefore, even if defense counsel had objected, the objection would have been overruled.

For this reason, the court of appeals should not apply the appellate waiver rule, requiring the court to analyze the issue in terms of ineffective assistance of counsel. The court should instead address the merits of the issue. The reasons for the waiver rule are not present here. A timely objection would not have prompted the circuit court to correct the error, because the judge was of the opinion that there was no error to correct.

If the court decides not to address the merits, then the court should find that trial counsel was ineffective for failing to object, and for failing to make a motion for a mistrial. Even though defense counsel may have had a strategic reason for not objecting during the closing argument, there can be no strategic reason for not moving for a mistrial outside the presence of the jury.

The arguments of the prosecutor were particularly prejudicial in this case because, as the testimony at the postconviction motion established, at least one of the jurors, AMM, was devoutly religious, she was disturbed about her own conduct during the trial, and consulted her pastor about the results of the trial.

II. Parish is entitled to a new trial because the evidence at the postconviction motion established that juror AMM failed to accurately answer the judge's *voir dire* question about prior sexual assaults, and she was plainly prejudiced. The evidence established that, during *voir dire*, the judge asked the jury panel whether any of the panel members had personal experience with sexual assault. A number of panel members answered in the affirmative. The lawyers and the court then followed up with these potential jurors.

Juror AMM, though, did not disclose that, while she was in college, she had been forcibly sexually assaulted. This came

to light because, not long after the trial, AMM wrote a letter to the defendant's mother indicating that she did not vote her conscience at the trial, she consulted her pastor about this, and then expressed regret that Parish had been convicted based upon "twisted truths." She expressed regret that she had not done more to protect Parish at the trial. Further investigation, in response to receiving the letter, revealed that AMM had been forcibly sexually assaulted while she was in college.

At the postconviction motion, AMM explained that she did not respond to the judge's question about personal experience with sexual assault because, in her opinion, the experience would not affect her ability to be a fair juror.

The circuit court denied Parish's postconviction motion for a new trial. The judge found that AMM's failure to respond to the court's question was not inaccurate, because, according to the judge, the court's question was qualified so as to only require a response if, in the juror's estimation, the personal experience with sexual assault would interfere with his or her ability to be fair. Further, the judge found that AMM was not biased against Parish. If anything, the judge said, the fact that AMM later wrote the letter to Parish's mother demonstrates that AMM was biased *in favor* of Parish.

As will be set forth in more detail below, under the legal analysis applicable to questions of whether a juror accurately answered a *voir dire* question, AMM's failure to respond is

plainly inaccurate. The court's question-- regardless of how the judge later qualified the question-- would have prompted any reasonable person to disclose what AMM failed to disclose. This is especially true since a number of other potential jurors responded.

Further, AMM was plainly biased. She admitted that, during deliberations, *she did not vote her conscience*. She voted guilty even though she did not believe that the evidence proved Parish to be guilty. There could be no clearer demonstration of bias and prejudice. The fact that AMM later regretted her actions, and wrote the letter to Parish's mother, hardly suggests that she was biased *in favor* of Parish at the time of deliberations.

For these reasons, Parish is entitled to a new trial.

Statement of the Case

I. Procedural History

On January 9, 2013, the defendant-appellant, Shaun L. Parish (hereinafter "Parish") was named in a criminal complaint charging him with one count of repeated sexual assault of a child, contrary to § 948.025(1)(e), Stats.[1], which is a Class C felony.

Following a preliminary hearing, Parish was bound over for trial. (R:91-17) The state filed an information alleging the same count as in the criminal complaint, and Parish entered a not guilty plea. (R:91-18)

Parish filed a pretrial motion seeking an *in-camera* inspection of the alleged victim's (KMM) mental health records. The motion alleged that KMM was in therapy, and that she had recently made a statement to her therapist that she did not want the case against Parish to be prosecuted. (R:88)

The circuit court denied the motion. (R:96-11) The judge reasoned, "My sense is that it is speculation as to why someone may not want a case to proceed. There isn't reasonable likelihood that what's in these records is, in fact, a recantation o . . . ." (R:96-11)

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[1] The complaint alleged that at least 3 of the violations were violations of s. 948.02 (1) or (2).

The matter proceeded to trial beginning on January 26, 2015.

During *voir dire*, the judge asked the jury, "I want to know if anybody has had, in their life experience, some experience with sexual assault that would make it difficult for them to listen to the testimony in this case?" (R:96-21) One of the prospective jurors answered in the affirmative; however, as was developed in the postconviction motion, another juror, AMM, did not answer in the affirmative.[2]

Near the start of the trial, an issue developed as to whether AMM had made a prior false claim of sexual assault. The court permitted a *voir dire* of KMM outside the presence of the jury. The alleged prior false claim of sexual abuse involved her mother's ex-boyfriend "Jimmy." KMM testified that Jimmy never raped her, nor tried to rape her. (R:99-151) Moreover, KMM testified that she had never told Detective Primising that Jimmy had tried to rape her. *Id.* At that point, the court received into evidence a DVD of KMM's statement to Detective Primising. (R:99-159) In this recorded statement, KMM did tell Primising that Jimmy raped her. The court ruled that KMM's claim that "Jimmy raped me", which, at the time of trial, she now admitted was false, was admissible under the Rape Shield Law as a prior false allegation of sexual assault. (R:99-167)

After three days of testimony, the jury returned a verdict

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[2] At the postconviction motion AMM admitted that she had been date raped in college

finding Parish guilty as charged.

Thereafter, the court sentenced Parish to four and-a-half years of initial confinement, and one and-a-half years of extended supervision. (R:103-25)

Parish timely filed a notice of intent to pursue postconviction relief. He then filed a postconviction motion seeking a new trial on the grounds that (1) he had received ineffective assistance of counsel because his attorney had failed to object to numerous improper arguments made by the prosecutor during his closing argument; and, (2) there was evidence that during *voir dire* two jurors were not candid about having been sexually assaulted themselves[3]. (R:71)

On February 8, 2016, the court conducted an evidentiary hearing into Parish's postconviction motions.

The court found that Parish's trial counsel was not ineffective because, according to counsel's testimony at the postconviction hearing, the attorney had a strategic reason for not objecting; and, further, even if the attorney had objected to the prosecutor's closing argument, the court would not have sustained the objections. (R:104-53, 54)

Similarly, though the court found that one of the jurors did, in fact, fail to disclose that she had been sexually assaulted in the past, Parish had failed to show that this juror was in any way biased. (R:104-57). Therefore, the court denied Parish's

[3] The testimony at the postconviction motion, though, established that only one of the jurors, AMM, actually had prior personal experience with sexual assault.

motion for a new trial.

Parish timely filed a notice of appeal.

II. Factual Background

A. The trial

At the time of the trial, KMM was sixteen years old. (R:100-263). CT, who is KMM's mother, testified that KMM's biological father committed suicide when KMM was five years old. (R:99-115) This happened while the family was living in Tennessee. Consequently, according to KMM, they did not "have . . . money and everything" (R:100-267)

Eventually, CT and KMM moved to Wisconsin. (R:100-267) After they had been in the state for approximately four months, CT and KMM moved into an apartment with Parish. (R:99-179) There, the three lived together as a family.

KMM told the jury that when she was in seventh grade, and she was thirteen years-old, "things changed" at home. (R:100-314). About then, KMM said, Parish began coming into her room in the morning and caressing her arms and legs. *Id.* Over time, Parish progressed to caressing her stomach, and eventually he spent as much as thirty minutes caressing her. (R:100-344)

CT explained that, in the morning, Parish would usually go into KMM's bedroom and wake her up to go to school. (R:99-198). However, on January 6, 2013, CT saw Parish lying

on the bed with KMM. (R:99-198) CT claimed that she had seen Parish doing this "a couple of times." (R:99-199)

KMM said that, by the time she was in eighth grade, Parish began "caressing around the top of my cami line and he would go, like, a little bit under. Basically tracing, like, my line of my bra." (R:100-352) When his finger "went under", he was touching KMM's breast. (R:100-354) That behavior lasted about a month, and, according to KMM, Parish would come into her room about three or four times a week. (R:100-355)

Eventually, Parish began caressing under the line of KMM's shorts. *Id.* KMM said that on three occasions while she was in eighth grade, Parish caressed the lips of her vagina. (R:100-371) According to her, "[i]t was basically just, like, nail deep he would go in." *Id.*

At trial, the evidence concerning "Jimmy" was presented to the jury. CT admitted that Jimmy was physically and emotionally abusive to her, and to KMM, but she denied that KMM ever told her that Jimmy had sexually assaulted her (KMM). (R:99-169) For her part, KMM also denied in front of the jury that she had ever told a police detective, Det. Primising, that Jimmy had "raped" her. (R:100-465) At that point, the recording of her statement to Primising was played for the jury (Ex. 2; R:100-475). In this statement, KMM told Primising that Jimmy has been in the same position Shaun (Parish) is in. (R:100-476) KMM acknowledged that it was her voice on the

tape making that statement, but she claimed not to remember ever making the statement. *Id.* KMM continued to deny that Jimmy ever did rape her. She explained that she was trying to tell the detective that Jimmy had raped her mother. (R:100-583)

CT admitted that KMM told her that she (KMM) "didn't want to go to trial".[4] (R:99-193)

B. *The postconviction motion*

Parish's postconviction alleged that Parish was entitled to a new trial for two reasons. Firstly, the motion alleged that Parish was afforded ineffective assistance of counsel because his attorney failed to object to a number of inappropriate arguments made by the prosecutor in his closing argument. Secondly, the motion alleged that during *voir dire* two jurors failed to mention that they had been victims of sexual assault.

Parish's postconviction motion (R:71) alleged that the following arguments by the prosecutor were improper:

a. "People have been writing about the concept of justice for four thousand years and it took me until I turned 50 to actually kind of look and see what people have said about justice. Listen to this: Cursed be anyone who deprives the alien, the orphan, the widow of justice. Do justice for the orphan and the oppressed so that those from Earth

[4] Meaning the trial in the present case

may strike terror no more. Give justice to the weak and the orphan. Maintain the right of the lowly and the destitute. Seek justice, rescue the oppressed. Defend the orphan, plead for the widow." (R:102-781). The prosecutor then proceeded to point out that the alleged victim, KMM, had a mother but that her "father died at a young age." According to Parish's motion, this argument is improper because the jury is not charged with doing justice; rather, the jury is charged with finding facts. Additionally, the argument unabashedly appeals to the jury's passion, prejudice, and religious fervor concerning the fact that KMM lost her father to suicide. It suggests that KMM, because she is fatherless, is entitled to special consideration by the jury. Finally, the argument is inappropriate because it is nearly a *verbatim* quote from the Bible, which was not in evidence.[5]

b. Having pointed out that KMM's father had passed away, the prosecutor then said, "Because parents' role and people who serve as parents, and people in this community, *and this concept of justice* is that we look out for her (meaning KMM)." (R:102-782) Again, this is an improper suggestion that the jury

[5] *See*, Deuteronomy 27:19, and Psalm 10. The passage from Deuteronomy actually refers to "the fatherless."

has some special obligation to protect KMM.

c. The prosecutor told the jury, “There’s been a lot of talk, recently, in the media and whatever, rape culture, victim blaming. You know, that stuff that I hear . . .” Defense counsel objected, and the court directed the prosecutor to make arguments reasonably related to the evidence; however, the objection was not sustained, and the jury was not directed to disregard the remark.

d. The prosecutor pointed at Parish, and then told the jury, “Mr. Parish is on trial. KMM isn’t on trial. *There has to be a reason*.” (R:102-791) This is an inappropriate argument because it suggests to the jury that it should not scrutinize KMM’s testimony; and, further, it suggests that the “reason” Parish is on trial is because the prosecutor personally believes KMM testimony to be true.

e. In an argument that was repeated a number of times, the prosecutor said,”[T]his is not popular, comfortable, or profitable. And I got up here and ranted and raved and if you didn’t like it, I apologize. But this is life. *This is justice*.” (R:102-794) Again, the argument is inappropriate because it suggests that the jury’s function is to “do justice”, when this is not true.

f. In rebuttal, the prosecutor again revisited the Bible. He told the jury, "Be the helper of the fatherless[6]. Call the evildoer to account for the wickedness that he did that would not otherwise be found out." (R:102-823) This argument is inappropriate because it is a Bible passage, and it implores the jury to find Parish guilty, not because the evidence proves him guilty beyond a reasonable doubt, but because KMM is "fatherless", and Parish is a wicked "evildoer." The prosecutor then almost immediately reiterated his point. He said, "But that's why, even thousands of years ago, somebody wrote about holding an evildoer to account for the wickedness that not otherwise would be found out." (R:102-824) Then, for good measure, the prosecutor repeated the argument a third time, saying, "Hold the evildoer to account for the wickedness that would not otherwise be found out." (R:102-827) This, Parish's motion alleged, is a wholly inappropriate argument because it urges the jury to find Parish guilty, not because the evidence proves him guilty beyond a reasonable doubt, but because the alleged victim is fatherless, Parish is an evildoer, and the jury has some moral obligation

[6] Now a direct reference to Deuteronomy 27:19, and a reference to the fact that KMM's father was dead

to afford KMM special protection.

The court conducted an evidentiary hearing into the postconviction motion. Prior to the taking of testimony, though, the court ruled that trial counsel was not constitutionally ineffective because, even if counsel had objected to prosecutor's argument, the court would not have sustained the objection because, "I don't believe that it crossed the line and exhorted the jury to do something inappropriate . . ." (R:104-6)[7]

Nevertheless, to complete the record, the court permitted Parish to present the testimony of defense counsel. When asked why he did not object to the prosecutor's arguments, counsel explained, "I thought that Mr. Krueger's emotion contrasted dramatically with that of the alleged victim." (R:104-8) Nevertheless, counsel admitted that when he heard the arguments he thought that they were improper. (R:104-9) Counsel said, "I think they were appeals to prejudice. I don't think they had anything to do with facts, other than the fact that he repeatedly referenced that she was an orphan . . ." *Id.*

Regarding the issue of juror prejudice, Parish's mother, Lynette, testified that about two weeks after the trial she

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[7] Arguably, this ruling by the circuit court takes issue out of the realm of ineffective assistance of counsel. The only reason the issue was couched in terms of ineffective assistance of counsel is because trial counsel did not object. Thus, under the waiver rule, the issue cannot be raised on appeal. The purpose of the waiver rule is to prevent litigants from "sandbagging" at the circuit court level by not objecting at a point when the judge could correct the error; and then raising it for the first time on appeal. Here, though, the circuit court ruled that even if defense counsel had objected, the court would have overruled to objection. Thus, there is no reason to apply the waiver rule. Consequently, it is not necessary on appeal to analyze the issue in terms of ineffective assistance of counsel.

received an unsigned letter with no return address. (R:104-18; R:71; App. B) The letter appeared to have been written by a juror, and it explained that the juror was not convinced of Parish's guilt. The juror, disturbed by the outcome of the trial, had consulted her pastor. The letter claimed that the evidence at trial was "twisted truths" intended to make Parish look guilty. The letter concluded, "Please forgive me for not being able to protect your precious son." *Id.* It was signed "Unconvinced in guilt." *Id.*

Parish also presented the testimony of the juror, AMM, who wrote the letter. (R:104-22) AMM admitted that, despite the fact that she was asked during *vior dire* whether she had ever been a victim of sexual assault, AMM did not answer in the affirmative. *Id.* AMM testified that she was, in fact, a victim of sexual assault. She explained that, while she was in school at Madison, she had been date raped. (R:104-23) According to AMM, the rape was forcible. AMM explained that, when the judge asked during *voir dire* whether any panel member had experience with sexual assault, she did not answer in the affirmative because, "I do not believe that it would color my opinion in this case. " (R:104-25)

Nevertheless, AMM testified that she was upset after the trial because, "[I]n my gut, I wasn't-- I did not feel that a guilty verdict should have been given and I felt harassed into giving that verdict." (R:104-29) AMM was upset enough that she

discussed the matter with her pastor, and then wrote the letter to Parish's mother. *Id.* AMM also testified that she thought it was unfair that she voted for conviction even though she believed Parish was not guilty. (R:104-33)[8]

The bailiff from Parish's trial also testified. She told the court that perhaps two months after the trial she saw AMM in a parking lot, and they discussed the case. The bailiff said that AMM, "[w]as upset because she said she had talked with her daughter, who knew-- who knew the victim and her daughter said that the victim was a liar." (R:104-37)

A second juror, CN, was also called as a witness at the postconviction motion. She denied that she had ever been the victim of a sexual assault. (R:104-42)

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[8] The prosecutor objected to the question under Sec. 906.06(2), Stats. The court sustained the objection, but AMM had answered, and there was no motion to strike the answer.

Argument

I. Parish is entitled to a new trial because the prosecutor's remarks to the jury during closing argument were inappropriate, and highly prejudicial.

In his closing argument, the prosecutor repeatedly implored the jury to do "justice", made reference to Biblical scripture, and suggested that KMM, because she was an orphan, was entitled to special consideration. These arguments are highly inappropriate because it is not the jury's function to "do justice". The arguments are not based on the evidence in the record, and the arguments unabashedly appeal to the passion and prejudice of the jurors.

Defense counsel did not object to the arguments, though.

At the outset of the postconviction motion, the circuit judge ruled that the prosecutor's arguments were not inappropriate. Therefore, even if defense counsel had objected, the objection would have been overruled.

For this reason, the court of appeals should not apply the appellate waiver rule, requiring the court to analyze the issue in terms of ineffective assistance of counsel. The court should instead address the merits of the issue. The reasons for the waiver rule are not present here. A timely objection would not

have prompted the circuit court to correct the error, because the judge was of the opinion that there was no error to correct.

If the court decides not to address the merits, then the court should find that trial counsel was ineffective for failing to object, and for failing to make a motion for a mistrial. Even though defense counsel may have had a strategic reason for not objecting to the closing argument, there can be no strategic reason for not moving for a mistrial outside the presence of the jury.

The arguments of the prosecutor were particularly prejudicial in this case because, as the testimony at the postconviction motion established, at least one of the jurors was religious, and consulted her pastor about the results of the trial.

A. It is not necessary to analyze this issue in the context ineffective assistance of counsel; the court should directly address the merits of the issue.

This issue was originally presented to the circuit court in terms of ineffective assistance of counsel. This is because defense counsel did not object to the prosecutor's argument. The failure to object would normally waive the issue on appeal.

The appellate waiver rule is well known. The court have observed that:

> The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. *Erickson,* 227 Wis.2d at 766, 596 N.W.2d 749. It also gives both

> parties and the trial judge notice of the issue and a fair opportunity to address the objection. *Erickson,* 227 Wis.2d at 766, 596 N.W.2d 749. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. *Vollmer v. Luety,* 156 Wis.2d 1, 11, 456 N.W.2d 797 (1990). Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. *Freytag,* 501 U.S. at 895, 111 S.Ct. 2631, 115 L.Ed.2d 764; *see also Vollmer,* 156 Wis.2d at 11, 456 N.W.2d 797. For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

State v. Huebner, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 493, 611 N.W.2d 727, 730.

Here, though, at the postconviction motion, the judge made perfectly clear that had defense counsel objected to the prosecutor's arguments, the court would not have sustained the objection. In other words, had defense counsel objected, it would have made no difference. The judge would not have "addressed" the error, because the judge was of the opinion that no error had occurred.

Moreover, the Supreme Court also recognized that, "[S]ome errors are so plain or fundamental that they cannot be waived and will be considered on appeal despite the absence of an objection." *State v. Marinez*, 2011 WI 12, ¶ 49, 331 Wis. 2d 568, 610, 797 N.W.2d 399, 422 "When a defendant alleges that a prosecutor's statements constituted misconduct, the test we apply is whether the statements " 'so infected the trial with unfairness as to make the resulting conviction a denial of due

process." *State v. Davidson,* 2000 WI 91, ¶ 88, 236 Wis. 2d 537, 579, 613 N.W.2d 606, 626

Here, the prosecutor's comments so infected the trial with unfairness that it violated Parish's due process rights. Though there is no evidence that the prosecutor knew that AMM was a devoutly religious person, it nevertheless appears that she was; and, therefore, the prosecutor's Biblical references plainly reached a receptive audience.

For these reasons, the appellate waiver rule should not apply. The court should address the merits of Parish's claim that the prosecutor's arguments were inappropriate.

B. Standard of appellate review

If the court addresses the merits of this issue, the standard of appellate review is the same that would apply had Parish made a motion for a mistrial.

The decision whether to grant a mistrial lies within the sound discretion of the trial court. *State v. Ross,* 260 Wis.2d 291, 317, 659 N.W.2d 122. The circuit court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. *Id.* The court of appeals will not reverse the denial of a motion for mistrial absent a clear showing of an erroneous exercise of discretion. *See State v. Pankow,* 144 Wis.2d 23, 47, 422 N.W.2d 913 (Ct.App.1988). A circuit court properly exercises its discretion

when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process. *State v. Bunch,* 191 Wis.2d 501, 506-07, 529 N.W.2d 923 (Ct.App.1995).

Here, the circuit court implicitly found that the improper arguments were not sufficiently prejudicial to warrant a new trial. On appeal, the court must determine whether this was an erroneous exercise of discretion.

C. The prosecutor's arguments are highly inappropriate and prejudicial.

> Closing argument is the lawyer's opportunity to tell the trier of fact how the lawyer views the evidence and is usually spoken extemporaneously and with some emotion." *Draize,* 88 Wis.2d at 455–56, 276 N.W.2d at 790. A prosecutor's closing argument is improper when it so infects the trial with unfairness as to make the conviction a denial of due process. *See State v. Wolff,* 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct.App.1992). A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors. *See Draize,* 88 Wis.2d at 454, 276 N.W.2d at 789. The prosecutor may not, however, suggest that the jury arrive at its verdict by considering factors other than the evidence. *See id.*

State v. Adams, 221 Wis. 2d 1, 19, 584 N.W.2d 695, 703 (Ct. App. 1998).

> The line between permissible and impermissible final argument is not easy to follow and is charted by the peculiar circumstances of

> each trial. Whether the prosecutor's conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial. *State v. Wolff,* 171 Wis.2d 161, 167-68, 491 N.W.2d 498 (Ct.App.1992). The line of demarcation to which we refer "is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." *State v. Draize,* 88 Wis.2d 445, 454, 276 N.W.2d 784 (1979). "Argument on matters not in evidence is improper." *State v. Albright,* 98 Wis.2d 663, 676, 298 N.W.2d 196 (Ct.App.1980).

State v. Smith, 2003 WI App 234, ¶ 23, 268 Wis. 2d 138, 150-51, 671 N.W.2d 854, 859

Here, the prosecutor talked about everything but the evidence. He did not argue that the jury should find Parish guilty because the evidence proves him to be guilty beyond a reasonable doubt. Rather, he repeatedly invoked the concept of "justice", and implored the jury to "do justice." He suggested that the jury not scrutinize KMM's testimony because she is "fatherless", and "we", the community, have a special obligation to do justice for the fatherless.

This is highly inappropriate, because it is not the proper role of the jury to administer "justice". The jury's only role is to find facts according to the burden of proof. The jury must scrutinize KMM's testimony the same as any other witness.

"Justice" is a large concept that is not susceptible to a concise definition, but here are the various dictionary meanings of the word:

> 1. the quality of being just; righteousness,equitableness, or moral rightness:
> *to uphold the justice of a cause.*
> 2.rightfulness or lawfulness, as of a claim or title;justness of ground or reason: *to complain with justice.*
> 3. the moral principle determining just conduct.
> 4. conformity to this principle, as manifested in conduct; just conduct, dealing, or treatment.
> 5. the administering of deserved punishment or reward.
> 6. the maintenance or administration of what is just by law, as by judicial or other proceedings: *a court of justice.*
> 7. judgment of persons or causes by judicial process: *to administer justice in a community.*

www.dictionary.com.

One thing that is certain is that none of these meanings of the word "justice" apply to the proper role of a jury in a criminal case. The proper role of the jury is to determine the facts of a case after being instructed about the applicable legal standards by the judge. *United States v. Standard Oil Company*, 24 F. Supp. 575, 576 (W.D. Wis. 1938). In the judge's instructions, he or she tells the jury, "You, the jury, *are the sole judges of the facts*, and the court is the judge of the law only." Wis. JI-Criminal 100 The jury is not to concern itself with the consequences of its verdict. "Under our criminal laws, the jury's sole duty is to decide the fact of guilt, and it is the sole province of the court to determine the punishment within the limits prescribed by the statute." *Bliss v. State*, 117 Wis. 596, 94 N.W. 325, 328 (1903).

Thus, for a prosecutor to repeatedly implore a jury to "do justice" is highly inappropriate, and the repeated nature of the argument in this case suggests that it was intentional. It was not simply one unfortunate overstatement made in the heat of trial. It was a theme-- a calculated strategy by the prosecutor-- complete with scripture from the Bible, designed to unfairly prejudice Parish. Plainly, the arguments of the prosecutor were not fair inferences from the evidence. The Bible was not in evidence. The arguments were an admonition for the jury to ignore the evidence, and to find Parish guilty because KMM is fatherless, and because the community has a special obligation to protect the fatherless, and because, in the prosecutor's words, Parish is an "evildoer".

These wholly inappropriate, offensive, and oft-repeated arguments thoroughly and unfairly prejudiced the jury. This is particularly true because, in the case, later investigation revealed that juror AMM is a devoutly religious person. She voted against her conscience at the trial, regretted it, and then consulted her pastor about it. Plainly, the prosecutor's strategy was presented to a receptive audience.

D. In the event that the court finds it appropriate to apply the appellate waiver rule, then the court should find that Parish received ineffective assistance of counsel.

In the event that the court decides not to address the merits of Parish's issue, then the court should analyze the issue in terms of ineffective assistance of counsel.

The standard for ineffective assistance of counsel is well-known.

> "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763 (1970). The benchmark for judging whether counsel has acted ineffectively is stated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That requires the ultimate determination of "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. The overall purpose of this inquiry is to ensure that the criminal defendant receives a fair trial. A fair trial is defined as "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Id.* at 685, 104 S.Ct. at 2063.
>
> The *Strickland* Court set forth a two-part test for determining whether counsel's actions constitute ineffective assistance. The first test requires the defendant to show that his counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. at 2064. Review of counsel's performance gives great deference to the attorney and every effort is made to avoid

> determinations of ineffectiveness based on hindsight. Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.[4] *Id.*

State v. Johnson, 153 Wis. 2d 121, 126-27, 449 N.W.2d 845, 847-48 (1990). Writing specifically about a defense attorney's failure to object to improper closing argument by the prosecutor, though, the Wisconsin Supreme Court acknowledged that where the decision to refrain from objecting is a matter of defense strategy, the court will not second-guess defense counsel. The court wrote, "Defense counsel was not deficient, however, for failing to object to the prosecutor's improper remarks during closing arguments. . . . Defense counsel's lack of objections on these matters was found by the circuit court to involve defense strategy, which this court will not now second-guess. *State v. Mayo*, 2007 WI 78, ¶ 63, 301 Wis. 2d 642, 675, 734 N.W.2d 115, 131 Not every claim that an attorney's decision was "strategic" will be granted talismanic effect, though. A defense strategy that is objectively unreasonable will permit a finding of ineffective assistance of counsel. *See, e.g., State v. Carter,* 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 659, 782 N.W.2d 695, 704

Significantly, in the situation presented by this case, the court of appeals has recognized that defense counsel's failure to object to inappropriate remarks by a prosecutor may, by

itself, be sufficiently prejudicial for the court to conduct a hearing into whether the remarks warrant a mistrial. In *Smith*, *supra*, the court wrote:

> In the context of the total trial, we conclude that the quoted portion of the prosecutor's final argument placed the reliability of the proceedings in doubt to the extent that the fairness of the trial has been jeopardized. We conclude that Smith was prejudiced. Because the trial court did not conduct an evidentiary hearing to address the alleged deficiency of trial counsel for failure to object to the final argument or move for a mistrial, we remand for an evidentiary hearing for this determination.

Smith, 2003 WI App 234, ¶ 26, 268 Wis. 2d 138, 152, 671 N.W.2d 854, 860

Here, defense counsel testified that, although he recognized that the prosecutor's arguments were improper, he decided not to object because the emotionality of the prosecutor's argument provided a stark contrast to the testimony of KMM. As mentioned above, trial counsel's strategy is entitled to deference.

However, this strategy does not explain why defense counsel did not move for a mistrial following closing arguments, and outside the presence of the jury. Defense counsel admitted that he recognized that the arguments were improper.

Such a decision is objectively unreasonable. There can be no strategic reason to not make the motion. The motion would be based on a claim of prosecutorial overreaching, and, therefore, if granted, retrial of the defendant would be barred

under the Double Jeopardy Clause.

> [T]he supreme court would require the following elements in order to bar retrial of a defendant who moved for and obtained mistrial due to alleged prosecutorial overreaching: (1) The prosecutor's action must be intentional in the sense of a culpable state of mind in the nature of an awareness that his activity would be prejudicial to the defendant; and (2) the prosecutor's action was designed . . . to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, i. e., to harass him by successive prosecutions.

State v. Copening, 100 Wis. 2d 700, 714-15, 303 N.W.2d 821, 829 (1981)

For these reasons, if the court does not address the merits of Parish’s claim that the prosecutor’s arguments were improper, then the court should find that defense counsel was ineffective for failing to object, and, especially, for failing to move for a mistrial following closing arguments.

II. The evidence presented at the postconviction motion established that juror AMM failed to disclose that she had been the victim of sexual assault under circumstances where she should have disclosed it; and she was clearly biased against Parish.

The evidence established that, during *voir dire*, the judge asked the jury panel whether any of the panel members had personal experience with sexual assault. A number of panel members answered in the affirmative. The lawyers and the court then followed up with these potential jurors.

Juror AMM, though, did not disclose that, while she was in college, she had been forcibly sexually assaulted. This came to light because, not long after the trial, AMM wrote a letter to the defendant's mother indicating that she did not vote her conscience at the trial, she consulted her pastor about this, and then expressed regret that Parish had been convicted based upon "twisted truths." She expressed regret that she had not done more to protect Parish at the trial. Further investigation revealed that AMM had been forcibly sexually assaulted while she was in college.

At the postconviction motion, AMM explained that she did not respond to the judge's question about personal experience with sexual assault because, in her opinion, the experience would not affect her ability to be a fair juror.

The circuit court denied Parish's postconviction motion for a new trial. The judge found that AMM's failure to respond to the court's question was not inaccurate, because, according to the judge, the court's question was qualified so as to only require a response if, in the juror's estimation, the personal experience with sexual assault would interfere with his or her ability to be fair. Further, the judge found that AMM was not biased against Parish. If anything, the judge said, the fact that AMM later wrote the letter to Parish's mother demonstrates that AMM was biased *in favor* of Parish.

As will be set forth in more detail below, under the legal analysis applicable to questions of whether a juror accurately answered a *voir dire* question, AMM's failure to respond is plainly inaccurate. The court's question-- regardless of how the judge later qualified the question-- would have prompted any reasonable person to disclose what AMM failed to disclose. This is especially true since a number of other potential jurors responded. Further, AMM was plainly biased. She admitted that, during deliberations, *she did not vote her conscience*. She voted guilty even though she did not believe that the evidence proved Parish to be guilty. There could be no clearer demonstration of bias and prejudice. The fact that AMM later regretted her actions, and wrote the letter to Parish's mother, hardly suggests that she was biased *in favor* of Parish at the time of deliberations.

Standard of appellate review

> Whether a juror is objectively biased is a mixed question of fact and law. As is true of appellate review of factual findings generally, a circuit court's findings regarding the facts and circumstances surrounding *voir dire* and the case will be upheld unless they are clearly erroneous. Whether those facts fulfill the legal standard of objective bias is a question of law. This court does not ordinarily defer to the circuit court's determination of a question of law. *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong,* 184 Wis.2d 572, 590, 516 N.W.2d 410 (1994). However, a circuit court's conclusion on objective bias is intertwined with factual findings supporting that conclusion. Therefore, it is appropriate that this court give weight to the circuit court's conclusion on that question. *See Figliuzzi,* 184 Wis.2d at 590, 516 N.W.2d 410 (although whether facts meet the legal determination of unreasonable interference is a question of law, this court gives weight to the circuit court's conclusion on reasonableness because the facts and the law are closely intertwined); *see also Koenings v. Joseph Schlitz Brewing Co.,* 126 Wis.2d 349, 358, 377 N.W.2d 593 (1985) ("An appellate court need not defer to the trial court's determination on a question of law, although it should be given weight where the legal and factual determinations are intertwined....").

State v. Faucher, 227 Wis. 2d 700, 720, 596 N.W.2d 770, 779 (1999)

The law requires a fair jury

The Sixth Amendment of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution guarantee

criminal defendants the right to an impartial jury. *State v. Funk,* 335 Wis. 2d 369, 388–89 (2011). "Prospective jurors are presumed impartial," and the party challenging a juror's impartiality bears the burden of rebutting this presumption and proving bias. *State v. Louis*, 156 Wis.2d 470, 478 (1990). Juror bias is evaluated according to a two-step test. *Funk*, 335 Wis. 2d 369, 388–89 (2011); *see State v. Wyss,* 124 Wis. 2d 681 717–18 (1985). Under that test, in order to be granted a new trial, a litigant must prove: (1) that the juror incorrectly or incompletely responded to a material question on voir dire; and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party. *Funk*, 335 Wis. 2d at 388–89.

1. AMM failed to disclose that she had been sexually assaulted under circumstances where she should have disclosed it..

Material questions are those questions to which the direct or immediate answer reveals a juror's bias. *Funk,* 335 Wis. 2d at 391. If the defendant proves that the question and its correct answer would have incited further inquiry which would likely have uncovered bias, the initial question is material. *Id.* Thus, if the question the juror incompletely or incorrectly answered is of consequence to the determination of bias it is material. *Id*. A

juror's nonresponse to a material question is considered an "incorrect or incomplete" response. See *State v. Delgado,* 223 Wis. 2d 270, 281 (1999) (discussing that a juror "incorrectly or incompletely responded to material questions on voir dire asking whether she had been a victim of sexual assault.").

Here, AMM failed to respond to the material question of whether she had, in her life experience, some experience with sexual assault that might call into question her ability to be fair and impartial. She also failed to respond to other material questions, of whether they knew someone who had "done a sexual assault," or whether anyone had been "a victim of a reported crime," had been "a witness in a court case," or had "any experience" with the criminal justice system.

At the postconviction motion, AMM admitted that, while she was in college, she had been sexually assaulted; and she admitted that she did not respond to the court's question about prior sexual assault experience. AMM's explanation was that, in her own estimation, her prior experience with sexual would not prevent her from being a fair juror.

At a minimum, though, these questions would have incited further inquiry, if not directly revealed, any issue of juror bias related to sexual assault. While the "failure of a juror in a sexual assault case to answer correctly or completely a question during voir dire about his or her experience of sexual assault does not constitute bias *per se*," the post-conviction

hearing more fully informed the record. *State v. Delgado*, 223 Wis. 2d 282 (1999).

Specifically, the postconviction hearing established that AMM's failure to respond to material questions was not inadvertent. Rather, AMM deliberately made the choice not to respond under the pretext that her prior experience with sexual assault, in her own self-estimation, would not make her an unfair juror. Nevermind the fact that the lawyers and the court, who are charged with evaluating not just subjective bias, but also objective bias, would almost certainly have wanted to know about AMM's prior experience. *Faucher,* 227 Wis. 2d at 718–19 (1999).

The inquiry into whether a juror is subjectively biased is focused on the specific juror's state of mind. *Faucher*, 227 Wis. 2d at 718 Jurors are subjectively biased when they have "expressed or formed any opinion" about the case prior to hearing the evidence. Id. at 717. A juror may reveal his or her subjective bias either through words, namely his or her explicit assertion of bias or partiality, through demeanor, or through a combination of the two. Id.; see also *State v. Lindell*, 245 Wis.2d 689 (2001). "While there may be the occasion when a prospective juror explicitly admits to a prejudice, or explicitly admits to an inability to set aside a prejudice, most frequently the prospective juror's subjective bias will [ ] be revealed [only] through his or her demeanor." *Faucher,* 227 Wis.2d at 718

(1999). When subjective bias is evidenced by a juror's demeanor, the circuit court's assessment will often rest on its analysis of the juror's honesty and credibility. *Id*.

Here, AMM testified that, subjectively, she did not think she was biased against Parish. Nevertheless, her demeanor and conduct strongly suggest otherwise.

First we must address the state's remarkable argument, an argument that was accepted by the court, that AMM was actually biased *in favor* of Parish, as evidenced by the emotional letter AMM wrote to Parish's mother.

In evaluating AMM's subjective bias, we cannot simply ignore the fact that *AMM voted to find Parish guilty, even though, by her own admission, she believed that the evidence did not prove him to be guilty beyond a reasonable doubt.*

What more persuasive evidence of bias and prejudice could there possibly be? The very definition of "bias and prejudice" is that the decision is made on some basis other than the evidence in the record.

The fact that AMM later regretted the fact that she convicted Parish on some basis other than the evidence certainly does not establish, as the state argued and the judge inexplicably accepted, that AMM was not prejudiced at the time she cast her guilty vote. Her conduct is a dictionary definition of *prejudice*.

Now, AMM claimed in her postconviction testimony that

her guilty vote was coerced, apparently by the harassing conduct of the other jurors, and was not motivated by a concern for her own sexual assault. This is completely beside the point, though. Perhaps she would not have been susceptible to the pressure of the other jurors if she were not weakened by her own experience with sexual assault.

Objective bias is “whether [a] reasonable person in the individual prospective juror's position could be impartial.” *Faucher*, 227 Wis. 2d at, 719 (1999). The focus is on the facts and circumstances surrounding the voir dire and trial, and whether given those facts and circumstances, a reasonable person in the juror's position would be biased. Id. at 718–19. In cases involving a juror who was not forthcoming during voir dire and subsequently sat on the jury, a circuit court is to consider the following three, non-exclusive, factors to determine objective bias: (1) did the question asked sufficiently inquire into the subject matter to be disclosed by the juror; (2) were the responses of other jurors to the same question sufficient to put a reasonable person on notice that an answer was required; (3) did the juror become aware of his or her false or misleading answers at any time during the trial and fail to notify the trial court? Id. at 727.

As to the first factor, the multitude of questions asked by the Court, the prosecutor, and the defense attorney, were aimed at eliciting potential juror’s prior knowledge or experience of

sexual assault. Each question was sufficient to elicit either a direct response from AMM, or elicit a response which would have incited further inquiry which would likely have uncovered AMM's prior experience with sexual assault. Given the various, recurrent questioning on the subject, AMM's silence was unjustified.

As to the second factor, responses of other jurors to questions designed to elicit information regarding jurors' experience with sexual assault were sufficient to put AMM on notice that she should have revealed her own prior experiences. Voir dire revealed four members of the jury panel that could not be fair and impartial due to their prior experiences with sexual assault. Those four panel members were excused by the court. Five other jurors reported that they knew someone named as someone who had committed a sexual assault. Four of those jurors believed they could remain fair and impartial, while one felt they could not be fair and impartial, and was excused. Discussion with a total of nine potential jurors regarding their experience with sexual assault should have put AMM on notice that she should reveal her own prior experience with sexual assault.

As to the third factor, at some point during deliberations, it should have been apparent to AMM that she was feeling unable to vote her conscience. By her own description, she was feeling susceptible to the coercion of the other jurors. Still,

AMM did not notify the court that, perhaps, her prior experience with sexual assault was affecting her ability to be a fair and impartial juror.

Plainly, AMM was both subjectively and objectively biased.

Conclusion

For these reasons it is respectfully requested that the court of appeals should find that the prosecutor's remarks during closing argument were inappropriate and prejudicial, reverse Parish's conviction, and remand the matter to the circuit court with instructions to conduct a hearing into whether Parish may be tried under principles of double jeopardy (i.e. was the "mistrial" caused by prosecutorial misconduct).

In the alternative, the court should find that Parish's jury was biased, and order a new trial.

Dated at Milwaukee, Wisconsin, this _____ day of June, 2016.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 9393 words.

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Dated this _____ day of June, 2016:

____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 2
Appeal No. 2016AP000439 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Shaun L. Parish,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal
B. Letter from Juror AMM to Lynette Parish
C. Excerpt of circuit court ruling on postconviction motion

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of

fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of June, 2016.

____

Jeffrey W. Jensen