COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2964-CR **Cir. Ct. No. 2003CF1037**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM J. PATTERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Reversed and cause remanded for a new trial*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 ANDERSON, P.J. Adam J. Patterson appeals his conviction arguing that he is entitled to a new trial for one or all of the following reasons: because he was denied his right to effective assistance of counsel, because the trial

court erred in permitting hearsay evidence, in the interest of justice. After extensive review of the record, we conclude that the real controversy has not been fully tried. We therefore exercise our discretionary reversal authority and, in the interest of justice, grant Patterson the new trial he seeks.

¶2 On September 12, 2003, the State charged Patterson with one count of first-degree sexual assault of a child in violation of WIS. STAT. §§ 948.02(1) and 939.50(3)(b) (2005-06).[1] A two-day jury trial began on January 5, 2005. At jury selection, Juror 119, who ended up a part of Patterson's jury, revealed that he had a sister who had been "raped or assaulted." After questioning from the court, the juror stated that it happened "in the seventies," and that the case was reported to the police but no one was ever charged. The court then asked:

> THE COURT: [I]s there anything about that process that would affect your ability to be fair and impartial if you are picked as juror here?
>
> JUROR: No, other than, you know, the offense itself.

Defense counsel did not exercise a peremptory strike to remove this juror or move to strike this juror.

¶3 At trial, the State called three witnesses, the alleged victim, A.C.M. (date of birth 2/14/1990), the alleged victim's mother, Nicole M.-B., and a child protective services investigator, Michelle McCabe.

¶4 A.C.M. testified that she wrote letters to Patterson and she put in these letters that she loved him and that he was her boyfriend. She said that she

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

thought this because Patterson had told her he loved her and that when she was old enough, they could live together. She agreed that she had a crush on him and said that the December before the alleged assault, she wrote to Patterson every day. She said that when Patterson came to baby-sit in January 2003, something sexual happened. She then testified to the details of the alleged assault.

¶5 A.C.M. testified that after the alleged assault she continued, as before, to write to Patterson telling him she loved him. She said he wrote back to her once but she did not keep his letter. She said that her mom found a note she had written to Patterson in which she told him she loved him and that her mom "questioned me about it and asked me if anything had happened while [Patterson had babysat]." A.C.M. said she "couldn't tell her [mom] because it was, like, too hard." She said her mom suggested they "go talk to Pastor Al about it." She said she talked to Pastor Al without her mom in the room and told him what happened. Afterward, her mom talked to Pastor Al while she waited outside the room. A.C.M. said she did not hear what Pastor Al told her mom, but that she thought he told her mom what she had just told him. She said later that same day, she and her mom talked again and she told her mom "what mainly happened" but was not specific.

¶6 A.C.M. then testified that there came a time later at school where kids in her class were talking to her sexually and it upset her so she went and told one of the teachers. At this time, she told the teacher that "something had happened." The teacher sent A.C.M. to talk to a counselor, and A.C.M. told that counselor the "whole thing" regarding Patterson's alleged assault.

¶7 The school authorities reported the alleged family sexual abuse to the Racine County Human Services Department. Investigator McCabe testified

that she received a report that A.C.M. was a victim of a sexual assault in January 2003, and Adam Patterson was the perpetrator. Patterson is Nicole's cousin and A.C.M.'s second cousin.

¶8 Nicole testified that she went on her honeymoon between January 1 and January 4 or 5, 2003. While gone, she arranged for Patterson to baby-sit her two children, one of whom is A.C.M.

¶9 Nicole testified that months later, in April 2003, she found a "disturbing"[2] letter under A.C.M.'s bed written by A.C.M. to Patterson. Nicole confronted A.C.M. about the contents of the letter. Nicole said A.C.M. told her, "Mom it's nothing, I was just goofing around on the computer." Nicole testified:

> Well, I said, [A.C.M.], it's not nothing, and I said, you know, Adam is a family member, and if you had some kind of feelings for him or have some kind of feelings for him, this is not appropriate.
>
> It took maybe about ten minutes. She was getting a little upset, and I said, [A.C.M.], if something happened, I mean this letter is disturbing, and if something happened between you two, I want you to be able to tell me.

¶10 Nicole further testified that A.C.M. was "not comfortable" telling her whether something happened. Eventually, she said to A.C.M., "[I]f I bring a Bible out, will you swear on the Bible that nothing happened and I will take your word." Nicole stated that at this point A.C.M. started to cry.

¶11 Thereafter, under questioning by the prosecutor, Nicole's testimony brought in the following "Pastor Al" evidence:

[2] The prosecutor characterized the letter as a "love note" and acknowledged "it wasn't sexually explicit." This and other letters are part of the record. There is no contention that this letter or A.C.M.'s other letters to Patterson contain any reference to the alleged assault.

[NICOLE]: [A.C.M.] did not want to tell me any of the details, and I said … you need to tell me and she wouldn't, and I said, is there anyone else that you would feel more comfortable talking to.

Q. And what did she say?

A. I asked if maybe she would be able to talk to Pastor Al at our church.

Q. Is there anybody else that was suggested?

A. Not that I recall.

Q. And did you take [A.C.M.] to Pastor Al?

A. I called the church to find out if he was available, and I kind of explained the situation to him, and he said well, I'm available, why don't you two come over.

Q. Was that the same day or—

A. Yes.

Q. Describe what happened when you went to talk to Pastor Al?

A. [A.C.M.] was still upset. I was upset. Pastor Al took her in his office. It was just her and him. She's very comfortable with him, and they were in there probably I would say a good forty-five minutes, and he—then he came out and he took me in there and he said, yes, something definitely went on.

MR. CABRANES [Defense Attorney]: Objection, hearsay.

THE COURT: All right. It would be hearsay as to what he said.

MR. SCHNEIDER: It's being offered to show the effect on Mother and what she actually—the subsequent actions she subsequently took. It's not for the truth of the matter asserted.

THE COURT: Let me instruct the jurors then. The statements being offered from the pastor can't be accepted by you for the truth of the matter asserted, but they're being offered to show what action the witness then took as a

> result of the statements and information she got from the pastor, okay? Go ahead.
>
> Q. So the pastor relayed to you that based on his discussions with [A.C.M.] something happened?
>
> A. Yes.
>
> Q. Did he tell you the details of it?
>
> A. He said that it was—
>
> MR. CABRANES: Objection, hearsay.
>
> THE COURT: Overruled. Again, the ruling has been made on the issue of the truth of the matter asserted. The jury has been instructed. You can go forward, Mr. [Prosecutor].
>
> Q. You may answer.
>
> A. He said that it was sexual in nature, but it was not intercourse.

¶12 In opening statements the prosecutor stated: "[M]om took [A.C.M.] to the pastor and she made a disclosure to the pastor."

¶13 In closing arguments, the prosecutor brought up the Pastor Al evidence three times and reiterated Nicole's testimony that Pastor Al said "a sex act occurred":

> [A.C.M.] was reluctant to talk to her mom.
>
> So they went to the pastor and discussed it with someone who would be a comfortable person to talk with…. [S]he disclosed it to the pastor. The pastor comes out and tells Mom a sex act occurred.
>
> ….
>
> [Mom] got [A.C.M.] to talk to the pastor. Is anybody going to say that that's unreasonable that she talks to the pastor? .... A person has a problem, they turn to a pastor. Pastors are—They're trained to give people help.
>
> ….

> Now [Patterson's defense attorney] wants you to think there's this big conspiracy about not calling the pastor … to testify. I am supposed to call the person that the girl goes to for cover, the person that the girl talks to, a pastor, a man of the cloth, a minister.

¶14 The jury found Patterson guilty of first-degree sexual assault of a child. On June 24, 2005, the trial court imposed a sentence of eight years of initial confinement followed by twelve years of extended supervision. A judgment of conviction was entered on July 20, 2005.

¶15 On July 7, 2006, Patterson filed a postconviction motion seeking a new trial based on ineffective assistance of counsel and on trial court error. His first issue was with Juror 119, the juror who stated that his sister had been the victim of rape or assault. He argued that his trial counsel failed to use a peremptory strike, move to strike for cause or ask any follow-up questions of Juror 119 and, finally, failed to move for mistrial at the seating of Juror 119.

¶16 Second, he argued that trial counsel failed to file a motion in limine barring the introduction of evidence, through the testimony of A.C.M. and Nicole, of conversations that A.C.M. and Nicole had with Pastor Al, who did not testify. He argued that introduction of this evidence was not relevant under WIS. STAT. § 904.01 and that, moreover, the unfairly prejudicial effect of this testimony outweighed any probative value contrary to WIS. STAT. § 904.03.

¶17 Third, Patterson argued that his trial counsel improperly advised him that under Wisconsin law he could not and would not bring out the nature of Patterson's prior convictions. Patterson stated that he wanted to testify, but he feared that if the jury was not allowed to hear that he had not been convicted of sex-related crimes that it would jump to the wrong conclusion. He argued that

because trial counsel misadvised him, he did not knowingly, voluntarily and intelligently waive his right to testify.

¶18 Fourth, Patterson argued that trial counsel failed to investigate and call witnesses at trial who: (a) would have been able to impeach the credibility of Nicole and A.C.M. and (b) would have been able to testify as to Patterson's character of sexual morality and truthfulness. His last argument was that trial counsel failed to file a motion in limine seeking an order barring as unfairly prejudicial any opening statement, any argument, any testimony or evidence that Patterson had shown child pornographic pictures from a magazine to A.C.M.

¶19 In his motion, Patterson's second theory was that the trial court erred and he was therefore entitled to a new trial. First, he claimed the trial court erred in allowing the introduction of testimony from A.C.M. and Nicole regarding conversations with "Pastor Al." He argued "[t]he trial court erred in allowing the jury to hear the pastor's words. The introduction of this patently unfairly prejudicial type of evidence combined with a denial of the defendant's right to confrontation deprived defendant of a fair trial." Additionally, he argued that "admission of this type of evidence unfairly bolstered the credibility of [A.C.M. and Nicole] as well as [of] a witness who was never cross-examined, the pastor." He specifically argued:

> The danger in this case is that improper opinion evidence that something sexual had happened between the child and the defendant was coming not just from any witness but from a pastor who was not subject to cross-examination. A pastor is someone who would have in the jurors' eyes a great deal of credibility and respect. In the prosecutor's closing argument on a few occasions, he directly refers to the conversations between the child, child's mother, and the pastor.

¶20 He argued that despite the court's instruction, the admitted testimony through Nicole and A.C.M. violated the hearsay rule under WIS. STAT. § 908.01 and violated Patterson's right to confrontation under the Sixth Amendment, his right to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

¶21 On the same day Patterson filed his motion seeking a new trial, Patterson and his fiancée's mother, Madeline Highland, filed sworn affidavits in support of this motion. A hearing on the motion[3] was held on September 28, 2006. Three witnesses testified: Patterson's trial counsel, John Cabranes, Madeline Highland and Patterson.

¶22 Cabranes was the first witness. Cabranes testified that he did not file a motion in limine to bar A.C.M.'s testimony that Patterson had shown her pornographic material because he "believe[d] that evidence was legitimate evidence and was going to get in."

¶23 In response to questions regarding his decision not to strike or object to Juror 119, Cabranes testified that "[a]s a general rule it's probably not a good idea" to permit a juror who in voir dire states that he has a sister that has been sexually assaulted to sit on a jury.

¶24 With regard to the Pastor Al evidence brought in through Nicole and A.C.M., and Cabranes' decision not to file a motion in limine requesting that the trial court bar any testimony that related to conversations with Pastor Al, Cabranes testified: "I believed that Pastor Al was going to testify at trial." Cabranes also

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

testified that though he did lodge an objection on hearsay grounds to Nicole's testimony regarding Pastor Al's statements, he did not think of also lodging an objection on the grounds that Patterson's right to confront the witness was being violated.

¶25 Cabranes additionally stated that after the trial court overruled his hearsay objection, he did not make a record to move for a mistrial. Cabranes said that he did not contemplate filing an objection to the admission of the Pastor Al evidence on the grounds that it was unfairly prejudicial in nature and outweighed any probative value and was therefore in violation of WIS. STAT. § 904.03. Nor, acknowledged Cabranes, did he ever contemplate filing an objection that this type of evidence unfairly bolstered the credibility of the child complainant and the child's mother. Cabranes stated that he did not contemplate an objection to the prosecutor's portion of his closing argument in which the prosecutor brought up the role of Pastor Al and the meeting that Pastor Al had with Nicole and A.C.M. Cabranes did not contemplate interrupting the prosecutor's closing argument to object on the basis of improper argument and to move for a mistrial. He also stated that his decision had no tactical rationale. Finally, he stated his own opinion that "Pastor Al never testified, but he essentially did testify. He had testified through the child's mother, and that's what I had the problem with, and so there was—it was testimony in my opinion…. I always saw the prejudicial effect."

¶26 Cabranes testified that it was his intention to call Patterson as a witness and Patterson wanted to testify "[u]p until the last day." Cabranes said he remembered that Patterson initially told the court that he did want to testify.

¶27 However, Cabranes said he did not recall the exchange that took place after Patterson told the court he wanted to testify. In this exchange, the court

noticed some hesitation on Patterson's part regarding testifying and pointed this hesitation out. It then asked Patterson if he had some issue or some concern. Patterson replied that he did. Thereafter, the court excused Patterson and Cabranes to discuss whether he wanted to testify.

¶28 Cabranes indicated that he did not recall the meeting that followed:

> If you say so. I know there had to have been a meeting because obviously we had a meeting. Who was present in that meeting, there may have been other people there. There probably were other people there. I couldn't tell you who they were.

¶29 Cabranes further stated that though he was "sure there must have been a conversation," he "cannot give … any specifics as to what took place during that conversation." He said he did not recall telling Patterson that, as his attorney, he would not and could not under Wisconsin law bring out the nature and background of Patterson's convictions. He said there were no notes of the conversation, and he doubted that the conversation happened the way Patterson claims and that it does not sound like something he would say; however, he also stated that he "cannot categorically deny that it happened." Again stating that he did not have a specific recollection, he said he could not remember why Patterson did not testify.

¶30 With regard to not calling witnesses to impeach Nicole, Cabranes stated: "I don't know that it would necessarily impeach [Nicole's] credibility, but yes, [Patterson] did give me information." He said he remembered that at some point in pretrial preparation, Patterson told him that Nicole had made an accusation of sexual assault against Timothy Patterson—the defendant's and Nicole's uncle. However, Cabranes said he did not recall Patterson also saying that Nicole told Patterson that she was going to "get even" with him for what their

uncle Tim had done to her. Cabranes stated that he did not cross-examine Nicole regarding this because the fact that Nicole claimed to be a victim or may have had other motives for encouraging A.C.M. to make accusations against Patterson was not the theory of the defense and, therefore, in his opinion, would not have been probative to his case. Though Cabranes did not call any witnesses at trial, he did state that he had his investigator interview some of Patterson's family members and that Patterson's fiancée was present at some of the meetings he had with Patterson.

¶31 Madeline Highland testified next. Highland stated that she knew Patterson because he was her daughter Melissa's fiancé. She stated that she, her husband Rob, Melissa, as well as Patterson's brother, Kevin, Patterson and Attorney Cabranes were all present at the meeting that took place on day two of the trial towards the end of the case. She stated that Cabranes told them that Patterson was having trouble deciding whether or not to testify. She stated that she was not excluded during any part of the discussion and that she was encouraged to participate and give an opinion. She said that she recalled Cabranes giving advice to Patterson as to what Wisconsin law was. She said that Cabranes told them that if Patterson testifies, the prosecutor will bring up his other four convictions. She said they all said, "[So?]." She said that, at this point, Cabranes told them that "under the state law of Wisconsin I cannot and will not divulge what they're for."

¶32 Highland then explained that she said, "[I]f [Patterson] can't tell what they're for, then they can think it's sexual in nature." She said Cabranes told them, "[T]hey can think anything they want, yes, they can think it's sexual." She said that Cabranes also said, "I have told [Patterson] before he doesn't have to

testify. They do not have any proof." She said Cabranes also told them that "they have to make reasonable doubt and … there is no proof."

¶33 Highland said she told Patterson that "he can't testify, they will think [your other convictions are] sexual in nature." She said that Rob, Melissa and Kevin all agreed with her advice.

¶34 Highland said, thereafter, when they were in the courtroom, the trial court asked Cabranes whether Patterson was going to testify. She said she was "shocked" when she heard Cabranes' response. She said Cabranes told the court that, against his advice, Patterson was not going to testify. She said that in the conference room, Cabranes never stated that Patterson's decision not to testify was against his advice and that Cabranes specifically said, "I keep telling him he doesn't have to testify."

¶35 Highland said that not only was she shocked, "We were all shocked. Melissa turned around. My husband looked at me like what," and Patterson "turned around and lifted his hands like I don't know."

¶36 Patterson's testimony followed. He stated that he wanted the jury to be aware of what his prior convictions were because he "was afraid they would think I was a sexual predator or some kind of a molester when I am not." He said:

> When I asked [Cabranes] if … we could bring up my record and if I could explain it to the jury, that's when [Cabranes] told me he wouldn't and couldn't under Wisconsin law bring up my prior convictions. That's a quote.
>
> ….
>
> [This advice is] the only reason I did not testify.

Patterson also stated that

> at the end of the conversation … I was weighing the option of even testifying without being able to divulge what my prior convictions were, [and Cabranes] said, well, there's already reasonable doubt anyway.… I took that as him advising me that, you know, you really don't have to testify, there's reasonable doubt anyway.

¶37 Patterson said that Cabranes encouraged his brother, his fiancée and his fiancée's parents to give him advice as to whether to testify. He said his brother and Highland were "most vocal." He explained:

> I was trying to put myself on the jury and seeing it through their eyes, and when Madeline reiterated what I already felt, that if you can't tell them your record, they're going to think … that those four are sexual in nature … and that you've been to prison before, and my brother, Kevin, agreed and everybody agreed and we walked out of that meeting … knowing that I was not going to testify.

¶38 Patterson said that when Cabranes told the court that the decision to not testify was against his advice, he was "absolutely shocked" because "[i]t was the opposite of what was coming out of [Cabranes'] mouth in that room. It came out of nowhere." Patterson said he could not believe what he had heard: "I turned around … [and] looked behind me to see if I was in fact hearing the right thing." He said he answered yes to the court's questioning that he was testifying against attorney advice because he was afraid to contradict Cabranes.

> I was scared of Cabranes. His demeanor. The way he was. The way he would say one thing and act another way…. It was so surreal. I was just answering yes because I thought I had to.

¶39 At the close of argument, the trial court denied Patterson's motion for a new trial. The order denying the postconviction motion was signed and entered on November 10, 2006. This appeal followed.

¶40 WISCONSIN STAT. § 904.03 provides, in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice …."

¶41 WISCONSIN STAT. § 908.01(3) provides: "'Hearsay'" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

¶42 A defendant's right to confront witnesses is guaranteed by the confrontation clause of the Sixth Amendment to the United States Constitution and by article I, section 7 of the Wisconsin Constitution.[4] A trial court's decision to admit a hearsay statement is a discretionary one, and we will not reverse the trial court's decision "unless the record shows that the ruling was manifestly wrong and an [erroneous exercise] of discretion." *See* ***State v. Moats***, 156 Wis. 2d 74, 96, 457 N.W.2d 299 (1990). Whether the admission of hearsay violates a defendant's right of confrontation, however, is an issue subject to de novo review. ***State v. Ballos***, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999).

¶43 WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from,

[4] The Sixth Amendment to the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Article I, section 7 of the Wisconsin Constitution provides, in part: "In all criminal prosecutions the accused shall enjoy the right ... to meet the witnesses face to face."

The provisions of the Sixth Amendment are applicable to the states through the Fourteenth Amendment. ***Pointer v. Texas***, 380 U.S. 400, 403 (1965). Also, the federal and state provisions are effectively the same. ***State v. Martinez***, 150 Wis. 2d 62, 75 n.6, 440 N.W.2d 783 (1989).

> regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

¶44 It is a fair conclusion that the real controversy has not been fully tried "when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case" or "[w]hen the jury had before it evidence not properly admitted which so clouded a crucial issue." *See* ***State v. Johnson***, 149 Wis. 2d 418, 429, 439 N.W.2d 122 (1989) (citation omitted). A finding of a substantial probability of a different result on retrial is not required for a case to be reversed if the real controversy has not been fully tried. ***Id.***

¶45 We reverse today because we do not have confidence that the real controversy was fully tried. The record convinces this court that a new trial is warranted in the interest of justice.

¶46 The supreme court's decision in ***Johnson*** does not dissuade us from our holding as the State suggests it should. In fact, our conclusion is guided in part by the supreme court's reasoning. In ***Johnson***, the supreme court reversed a court of appeals reversal of Johnson's conviction by a jury of two counts of second-degree sexual assault. ***Id.*** at 419-20. The court of appeals, exercising its discretionary reversal power, ruled that the real controversy had not been fully tried because evidence that the victim had not contemplated or initiated a civil suit against the defendant for the alleged assault was introduced at the trial. ***Id.*** at 420. In reversing the court of appeals decision, the supreme court agreed with the court of appeals that it was error to admit evidence that the victim had not contemplated

or initiated a civil suit against the defendant for the alleged assault before such an assertion was made by the defendant to challenge the victim's credibility. ***Id.*** at 420. However, the supreme court determined that the court of appeals could not reasonably conclude the inadmissible evidence so clouded a crucial issue that it prevented the real controversy from being fully tried. ***Id.*** at 420.

¶47 In explaining its decision, the supreme court stated that consent was the crucial issue of Johnson's case and the evidence of whether the victim had filed a civil action against Johnson had no direct connection with whether the alleged victim consented to the sexual contact. ***Id.*** at 432. Rather, the supreme court noted "[t]hat evidence is related to her general credibility as she testified as a witness at trial, not whether she consented to the sexual encounter. The jury was given ample opportunity to assess [the alleged victim's] credibility." ***Id.*** The supreme court went on to emphasize that the actual references to the possible civil suit were slight when measured against the whole record: "While there were several references to the subject, it was not a topic which pervaded the atmosphere of the entire trial. When read in context of the complete record, these references are only small isolated items which had no measurable impact on the crucial issue of consent." ***Id.*** The supreme court said that the court of appeals improperly relied on ***State v. Penigar***, 139 Wis. 2d 569, 586, 408 N.W.2d 28 (1987), a sexual assault case in which the supreme court had upheld a court of appeals conviction reversal based on improperly admitted evidence. ***Johnson***, 149 Wis. 2d at 431. The supreme court distinguished ***Penigar*** from Johnson's case, emphasizing that in ***Penigar***, the inadmissible evidence was *closely related* to the key issue of the case and used by the prosecutor to persuade on that issue. ***Johnson***, 149 Wis. 2d at 431-32.

¶48 Unlike in ***Johnson***, consent is not at issue in this case because the alleged victim is a child. There were no witnesses to the alleged assault and no physical evidence, so the crucial issue in Patterson's case is credibility. Patterson's case is much more like ***Penigar*** than ***Johnson***: here, as in ***Penigar***, the inadmissible evidence is *closely related* to the key issue of the case and was used by the prosecutor to persuade on that issue. That is, the Pastor Al evidence admitted through Nicole is closely related to the key issue of credibility. Furthermore, Patterson's last-minute decision not to testify based, he convincingly argues, on his attorney's incorrect statement of the law is also *closely related* to the key issue of credibility, i.e., the jury did not have an opportunity to assess Patterson's credibility and supposedly would have if he had not been given incorrect information regarding what the law is.

¶49 Like the supreme court in ***Johnson***, we have meticulously reviewed and taken into account the entire record. The record as a whole guides our decision that the crucial issue of credibility was so clouded that it is likely that the real controversy was not fully tried. First, the record demonstrates a violation of Patterson's right of confrontation because of the trial court's erroneous admission of the Pastor Al evidence through Nicole. Second, the record contains uncontroverted evidence that Patterson's original decision to testify was changed "only" because he was given incorrect legal advice from his attorney. We note that Patterson's other arguments, in isolation, do not sway this court. However, cumulatively, they serve to enhance our conclusion that the real controversy has likely not been fully tried. Regardless, because we base our decision primarily on the right-to-confrontation and right-to-testify issues, we do not discuss the other arguments further.

¶50 Again, this is not a case with physical evidence of assault or a confession. Thus, if the assault claim can in some way be supported or validated, this could be key to the prosecution's case. Pastor Al was not called as a witness, yet the prosecution was allowed to tell the jury, through Nicole's testimony, Pastor Al's conclusion that "something definitely went on [and] it was sexual in nature." This validation of A.C.M.'s claim came not only from an individual whose occupation would likely lend credibility and respect to his opinion, but from an individual who was not sworn under oath and who was not subject to cross-examination.

¶51 It is our conclusion that the admission of the words and opinion of Pastor Al in all likelihood was linked to the State's success in this case. To further bring to light its importance to the State's case, we need only look to the district attorney's closing argument in which he turns to it repeatedly.

¶52 The fact that Pastor Al's words were brought in through Nicole's testimony is what turns the risk of prejudice into an *unfair* risk of prejudice outweighing the probative value. This unfair risk of prejudice outweighs the probative value of Pastor Al's words even in the face of the trial court's instruction not to accept them for the truth of the matter asserted. Both reason and authority indicate that it is likely that the jury could not follow the court's limiting instruction. Federal appellate courts in similar situations have determined the same.

¶53 In ***United States v. Reyes***, 18 F.3d 65 (2nd Cir. 1994), a drug crime case, the prosecutor asked a federal agent/witness the following question: "And did those further discussions with these individuals cause you to believe that there were other people involved with them in this particular criminal activity?" ***Id.*** at

67. The agent answered, "Yes," and then identified two of the defendants. ***Id.*** This testimony was received over the defendant's hearsay objection and provoked a motion for a mistrial. ***Id.*** at 68. In answer, the government successfully argued that the evidence should be received not for the truth of the matter asserted but as background, showing the agent's state of mind and the reasons for her actions. ***Id.*** The district court instructed the jury not to consider the out-of-court declarations the agent referred to as proof of the truth of the matter asserted. ***Id.*** at 69. On appeal, the government contended that the agent's testimony involved no hearsay because (1) the declarant's words were not repeated and (2) in any event, the jury was instructed that the statements were received not for their truth but only to explain the agent's state of mind. ***Id.*** The federal appellate court rejected the first contention because, although the jury was not told exactly what words were spoken, the agent's testimony "clearly conveyed the substance" of what was said. ***Id.*** The court explained:

> [W]hen the likelihood is sufficiently high that the jury will not follow the limiting instructions, but will treat the evidence as proof of the truth of the declaration, the evidence is functionally indistinguishable from hearsay. Whether such evidence may be received turns not merely on the delivery of a limiting instruction that the jury may be unable to follow, but on a more complex balancing of factors ….

Id. *See also* ***United States v. Williams***, 133 F.3d 1048, 1051 (7th Cir. 1998) (a government agent's testimony about an out-of-court statement made by a confidential informant which identified the defendant as a suspect in a bank robbery was inadmissible hearsay, despite the government's claim that the testimony provided context for police investigation).

¶54 Like the agent's testimony in ***Reyes***, Nicole's testimony regarding Pastor Al's conversation with her reveals a likelihood sufficiently high that the

jury did not follow the limiting instructions, but treated the evidence as proof of the truth of the declaration. Therefore, like the federal appellate court in ***Reyes***, we deem this evidence functionally indistinguishable from hearsay.[5] Thus, the admission of this evidence violated Patterson's right to confrontation.

¶55 Moreover, we agree with Patterson that the admission of the Pastor Al evidence was further compounded by the prosecutor's use of it several times in his closing argument, each time without objection. We cannot agree with the attorney general that the prosecutor's closing argument mentioned this evidence "only in passing or only" to rebut specific arguments made by the defense. Rather, its content and who it came from were relied on and touted by the prosecutor in a way that adds to the unfairly prejudicial nature of this evidence and the likelihood that the jury would not be able to follow the court's limiting instruction. First, the prosecutor stated, "The pastor comes out and tells Mom a sex act occurred." Later, he argued:

> Where is it in the parent manual how to handle this? [Nicole] thought she was doing what was best. She got [A.C.M.] to talk to the pastor. Is anybody going to say that that's unreasonable that she talks to a pastor? Why is that even an issue here. A person has a problem, they turn to a pastor. Pastors are—They're trained to give people help.

Finally, he argued, "Now [Patterson's defense attorney] wants you to think there's this big conspiracy about not calling the pastor …. I am supposed to call the

[5] This court finds it telling that the State never mentions ***United States v. Reyes***, 18 F.3d 65 (2nd Cir. 1994), the primary case Patterson relies on for his argument that the prosecutor improperly introduced hearsay testimony under the claim that it was "background" evidence. It is interesting because ***Reyes*** is the primary case that guides our agreement with Patterson on this issue.

person that the girl goes to for cover, the person that the girl talks to, a pastor, a man of the cloth, a minister."

¶56 In all, the admission of this evidence and the prosecutor's repeated use of it in his closing statement contributed to the likelihood that the real controversy was not fully tried. This was not evidence that had a probative value that outweighed its unfairly prejudicial effect—unless, of course, its assertion *was* for the truth of the matter.

¶57 Added to this issue is our concern that Patterson did not make a knowing and voluntary decision not to testify. Both Patterson and Highland have clear and specific recollections of a meeting with Cabranes in which they say Cabranes expressly told them that if Patterson testifies, the prosecutor will bring up his other four convictions and, under Wisconsin law, he could not and would not divulge what they are for. They both remember being advised that, therefore, the jury could think the crimes are sexual in nature. Both remember Cabranes telling them that Patterson does not have to testify because the State does not have proof. They both stated that Cabranes told them the State has to make reasonable doubt and there is no proof. Finally, they both said they were "shocked" when, after the meeting which resulted in Patterson's decision to not testify, Cabranes told the trial court that Patterson made this decision against Cabranes' advice. They both described Patterson looking back in the courtroom with a confused expression. What is more, the trial court itself stated on the record: "I have to say I do recall the perplexed look on Mr. Patterson's face when he paused when he was talking about giving up his rights and testifying and that's why we stopped."

¶58 Despite the fact that Cabranes could not recall what was said at the meeting and despite the fact that he admitted that he could not deny Patterson's

and Highland's claim that he gave incorrect information regarding the law, the trial court concluded that there was a miscommunication, not misinformation. It explained its decision:

> [Cabranes] is familiar with the law. So it doesn't make any sense in my mind that he gives wrong legal advice when he knows the law…. [T]he defendant feels he wasn't given the correct understanding of the law; but I can't find that that was because Mr. Cabranes didn't know the law or misstated the law. He says he doesn't recall the conversation that occurred in the room. But obviously to accept your position, I'd have to infer that Mr. Cabranes would give Mr. Patterson incorrect information regarding the law.

Thus, the trial court was not bothered that Cabranes could offer nothing to counter not only Patterson's specific testimony, but an unimpeached witness' corroborating and very specific recollection testimony. We are.

¶59 The cumulative events of record, including the trial court's erroneous admission of hearsay evidence, convince this court that it is likely that the real controversy was not fully tried. Therefore, we reverse in the interest of justice.

By the Court.—Judgment and order reversed and cause remanded for a new trial.

Not recommended for publication in the official reports.

¶60 BROWN, C.J. (*dissenting*). The majority has decided to throw out the jury verdict in this case because it concludes that the real controversy was not tried. It identifies two primary reasons for this: the admission of the mother's testimony about what Pastor Al told her, and Patterson's claim that his trial attorney misinformed him about what would happen if he took the stand. I cannot agree with the majority for three reasons. First, even assuming that the Pastor Al testimony was excludable hearsay, the only thing it tends to show is that the victim told Pastor Al that an assault happened—which the jury had already heard, without objection, from the victim herself. I would hold it harmless, and I cannot by any stretch agree that it "so clouded a crucial issue" that it prevented the real controversy from being tried. Second, I believe the majority misapplies ***United States v. Reyes***, 18 F.3d 65 (2nd Cir. 1994), in such a way that virtually any out-of-court statement would be rendered inadmissible regardless of the traditional statutory and common-law rules. Finally, regarding Patterson's decision not to testify, the majority has usurped the trial court's fact-finding and credibility-weighing role. At the ***Machner***[1] hearing, Patterson, his fiancée's mother, and Attorney Cabranes each gave an account of the conversation leading to Patterson's decision not to testify. The trial court believed Cabranes. It is not within our authority as an appellate court to second-guess the trial court's call. Accordingly, I dissent.

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶61 The prejudicial effect of the Pastor Al testimony is crucial to both whether the testimony should have been excluded under ***Reyes*** and whether we should reverse in the interest of justice, so I will start by saying that neither Patterson nor the majority have convincingly explained how the testimony strengthened the State's case or damaged Patterson's. The jury heard the mother testify that after talking with A.C.M., Pastor Al came out and told her that "yes, something definitely went on" and that it was "sexual in nature, but it was not intercourse." Because, by all accounts, the meeting between Pastor Al and A.C.M. was Pastor Al's only way of knowing about the sexual activity, the obvious meaning of Pastor Al's statement to the mother was that A.C.M. *had just told him* that something sexual happened that was not intercourse. He was not, as Patterson suggests, "opining" about what happened. In the context of the mother's testimony it is quite clear that Pastor Al was only relaying what A.C.M. said.

¶62 Now, consider that the day before the mother recounted this conversation on the witness stand the jury had heard A.C.M. herself testify that Patterson had shown her a pornographic magazine and then had her perform oral sex on him, which she described in some detail. The jury had *also* heard A.C.M. acknowledge, without objection, that she had told Pastor Al "specific information" about the sexual activity and that Pastor Al had, in turn, "filled [her] mom in on the details." If this case somehow hinged on whether that conversation occurred, then allowing the mother to confirm it via hearsay would not be harmless error, and it might even justify reversal in the interest of justice. But this case did not turn on what A.C.M. told Pastor Al, it turned on what she told the jury. The jury hearing from the mother that A.C.M. told Pastor Al about sexual activity pales in comparison to the jury hearing about the alleged assault from A.C.M. herself.

¶63 I therefore fail to see how the Pastor Al testimony could have "so clouded a crucial issue" that we should overturn the jury's verdict. But the low-to-nonexistent prejudicial value of the mother's relaying of Pastor Al's comments is important to this case in another way. The majority relies on ***Reyes*** to argue that even if the Pastor Al testimony was technically admissible for its effect on the listener, it should still be excluded. Majority, ¶¶53-54. But the ***Reyes*** analysis requires a balancing of the legitimate probative value of a particular out-of-court statement against the prejudicial effect of its hearsay component. The majority opinion engages in no such balancing and appears to find the Pastor Al testimony prejudicial simply because it is hearsay. This shortcut results in a circular argument—the Pastor Al testimony is excludable hearsay because it is prejudicial, and is prejudicial because it is hearsay.

¶64 The thrust of the ***Reyes*** opinion is this: if an out-of-court statement, when considered for the truth of the matter asserted, is highly damaging to a criminal defendant, it is not enough for a prosecutor to find some slim thread of nonhearsay admissibility. *See* ***Reyes***, 18 F.3d at 69-70. Courts generally presume that a jury follows instructions and so they often allow jurors to hear statements that they may not properly consider as proving what they assert. But there is a limit to how far this can go. In ***Reyes***, the particular statements at issue were a co-conspirator's out-of-court statements to an investigator implicating the defendant. ***Id.*** at 71. The defendant objected on hearsay grounds, and the prosecutor responded that the statements were offered only to show their effect on the investigator's state of mind and the reasons for her actions. ***Id.*** at 68. While allowing that this was technically a nonhearsay ground for admission, the Second Circuit nevertheless faulted the trial court for allowing the statements, because the investigator's state of mind had nothing to do with proving the defendant's guilt or

innocence. ***Id.*** at 69, 71. For the jury's purposes, it did not matter why the investigator did what she did and so there was little need for them to hear evidence on this point. *See* ***id.*** Meanwhile, the matter asserted in the statements was an accusation by a co-conspirator—a piece of evidence likely to weigh heavily in the jurors' minds regardless of any limiting instruction. ***Id.*** at 71. The ***Reyes*** court's approach was essentially to graft the prejudice/probativeness inquiry (found in our evidentiary law at WIS. STAT. § 904.03) onto the hearsay inquiry. *See* ***Reyes***, 18 F.3d at 70.

¶65 I agree completely that, as a general matter, it is error to admit an out-of-court statement for its effect on the listener's mental state without considering whether the listener's mental state is relevant to the issues in the case. Further, even where a listener's mental state may be of some minimal value, it is error not to realistically assess the danger that the jury may consider a statement as proof of the matter asserted despite instructions not to. Where the matter asserted is inflammatory or otherwise highly likely to influence a jury toward a guilty verdict and the legitimate nonhearsay probative value of a statement is low, that statement should be excluded.

¶66 But though the majority opinion relies on ***Reyes***, it does so with almost no discussion of the balancing inquiry that ***Reyes*** lays out. It contains absolutely no discussion of the relevancy or probativeness of the nonhearsay use of Pastor Al's statement for its effect on the listener. On the prejudice side, it states in a conclusory fashion that there was a "likelihood sufficiently high that the jury did not follow the limiting instructions." *See* Majority, ¶54. In fact, the majority seems to be saying that the very fact that the Pastor Al statement was made out of court—i.e., hearsay—makes it more prejudicial than probative. *See* ***id.***, ¶52. But the majority *also* says that it is the statement's potential for prejudice

that, under ***Reyes***, makes it "functionally indistinguishable from hearsay." Majority, ¶54. If we accept the logical loop that an out-of-court statement is prejudicial because it is hearsay, and hearsay because it is prejudicial, then no out-of-court statement can ever be admitted for any purpose. As deployed by the majority, ***Reyes*** erases the whole body of hearsay law.

¶67 I hasten to add that, in my view, the effect of Pastor Al's statement on the mother was totally irrelevant. The action the mother took after talking to Pastor Al (namely, no action) does not in any way tend to show what the State was required to show: that Patterson committed the sexual assault. In response to a proper objection, the trial court should have excluded it for this reason. And all judges and trial attorneys should keep in mind that "effect on the listener" is not an all-powerful incantation that trumps all hearsay objections: the relevance of the nonhearsay use must be shown, and the jury's ability to disregard the statement for its truth value must be realistically assessed. Nevertheless, as I argue above, even if the Pastor Al statement should have been excluded, it was harmless error to admit it, and certainly not such a great error that it prevented the real issue from being tried.

¶68 The majority's reversal is also based on Patterson's claim that he did not waive his right to testify knowingly and voluntarily. Certainly, if Patterson's account of what Cabranes said to him is true, his claim is merited and we must reverse. And the majority quite clearly gives credence to the account of Patterson and his fiancée's mother. *See* Majority, ¶¶57-58. But the trial court found otherwise, and it is the trial court's job to find the facts, not ours. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). This is particularly true where fact-finding depends on credibility determinations. *See* WIS. STAT. § 805.17(2).

¶69 The majority seems to accept Patterson's argument that, since Cabranes did not have a specific recollection of the conversation and therefore felt that he could not absolutely deny Patterson's version, the trial court was required to accept Patterson's version. But Cabranes's testimony, while not an outright repudiation of Patterson's version of events, certainly cast doubt on it. Asked by Patterson's postconviction counsel whether he had told Patterson that he, as defense counsel, could not bring out the nonsexual nature of Patterson's previous convictions, Cabranes testified: "Do I think it happened? I mean I doubt that it happened. Am I saying that … I could categorically deny that it happened? I cannot categorically deny that it happened." Asked whether he told Patterson that there was no need for him to testify, Cabranes responded: "I mean I don't recall the conversation, but I will tell you right now that does not sound like something I would say." Asked again whether he discouraged Patterson from testifying, Cabranes responded:

> I sincerely doubt that I discouraged him. It is not my job and I do not make it a practice to tell a client testify or don't testify. I lay things out for them. I tell them the good, I tell them the bad, and then they make the decision.

Cabranes's testimony was that the conduct Patterson ascribed to him was unlikely because, though he could not remember the precise conversation, he was not in the habit of doing the things of which Patterson accused him. This sort of testimony is perfectly acceptable and relevant to show that a person did or did not do something in a particular instance. *See* WIS. STAT. § 904.06.

¶70 Later, in response to questioning by the State, Cabranes correctly recited the rules regarding who may bring out what information about prior convictions. At the conclusion of the hearing, the trial court made its finding:

> [T]here's a perception or an understanding that comes to the defendant and his witness that they were told something wrong under law, which just doesn't make any sense at all, in my mind, because Mr. Cabranes knows the law.
>
> I mean, as you know, he's an experienced lawyer. You've seen his work yourself, [postconviction counsel]. He's been a lawyer for 11 years. He does a lot of criminal work in Racine County. He's done a lot of trial work and … as far as my experience with him is … he knows the law in terms of the representation issues that come from criminal records and knows that obviously the State can't ask the nature of the prior convictions but the defense can, and he stated that on this record. He's familiar with the law. So it doesn't make any sense in my mind that he gives wrong legal advice when knows the law.
>
> So I can only conclude that there's miscommunication. Not misinformation but miscommunication between attorney and client….
>
> And it's clear, I think at this point in time, in retrospect, the defendant feels he wasn't given the correct understanding of the law; but I can't find that that was because Mr. Cabranes didn't know the law or misstated the law. He says he doesn't recall the conversation that occurred in the room. But obviously to accept your position, I'd have to infer that Mr. Cabranes would give Mr. Patterson incorrect information regarding the law.
>
> ….
>
> So I guess that's about as perplexing as anything I've heard in a long time in terms of how miscommunication can occur in a circumstance like that, but I can't find that Mr. Cabranes just doesn't know the law and gave incorrect information.[2]

[2] I would also add that it appears to me that the trial court's statement that "I do recall the perplexed look on Mr. Patterson's face" did not refer to the postconversation statement by Cabranes but to the preconversation confusion that led the court to recess and direct that Patterson and Cabranes consult in the first place. It thus does not give support to Patterson's version of the conversation.

¶71 The trial court believed Cabranes's statement that he would not have said the things that Patterson attributed to him and disbelieved Patterson's and his fiancée's mother's accounts of the conversation. I would point out that both Patterson and his fiancée's mother had an obvious motive to be untruthful, as well as nearly two years between the trial and the postconviction hearing to square their stories. But my point is not that I would make a different call about the truthfulness of Patterson, his fiancée's mother, and Cabranes; rather, it is that the call is not mine, or this court's, to make. For this and the foregoing reasons, I dissent.