

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2013AP2139

Cir. Ct. No. 2006CF516

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL D. BOLSTAD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 LUNDSTEN, J. Daniel Bolstad was convicted, following a jury trial, of the attempted second-degree sexual assault of M.S., an adult female. Bolstad seeks a new trial in the interest of justice, arguing that false testimony

presented at his trial prevented the real controversy from being fully tried. Under the exceptional circumstances of this case, we agree with Bolstad. We express no opinion on whether M.S. truthfully testified that a man attempted to sexually assault her or whether she accurately identified Bolstad as that man. However, it is now undisputed by the State that all three key witnesses against Bolstad, including M.S., gave false testimony during trial. It is also clear that the prosecutor unknowingly, but extensively, relied on that mutually corroborating testimony to persuade the jury that Bolstad's contrary testimony was unworthy of belief. Because we conclude that the real controversy was not fully tried, we reverse and remand.

Background

¶2 In order to provide a complete context for how Bolstad's prosecution played out and why we conclude that the real controversy was not fully tried, we structure our Background section as follows. We first briefly summarize the complaint allegations, we then describe in detail the pertinent testimony and prosecution arguments at trial, and finally we highlight the factual submissions attached to Bolstad's postconviction motion that are pertinent to our interest of justice analysis.

1. Criminal Complaint

¶3 According to the criminal complaint, M.S., Bolstad, and a man named Jason were drinking together at M.S.'s house on the night of June 20, 2006. M.S. told police that she knew Bolstad and, at that time, considered Jason a friend. At some point in the evening, she was not feeling well and went to bed. She told police that she later woke up with Bolstad on top of her trying to put his penis into her vagina. Jason told police that Bolstad had locked Jason out of the house and

that Jason started knocking on a window and yelling to be let in. His knocking and yelling prompted M.S.'s sister, Christina, to come over to M.S.'s house from Christina's residence across the street. When police interviewed Bolstad, Bolstad denied committing the assault and claimed that others were inside M.S.'s house at the time of the alleged assault, including Jason, Christina, and the father of Christina's children, Todd Mitchell.

2. *Bolstad's Trial*

¶4 At trial, the prosecutor asserted during his opening statement that the issue was credibility and "who has a motive to lie." The prosecutor explained:

This is a fairly simple, straightforward case. I expect we'll be done with most of the trial this morning and early afternoon. Then it will be your turn to deliberate, and this is a case that's about evaluating credibility and determining who has a motive to lie. At the end of this case, I'm sure that you'll agree the defendant is guilty of the crime charged.

We will present to you [testimony from] three people [M.S., Jason, and Christina] who have a consistent story with no motive to lie and will tell you what happened on this night.

The prosecutor concluded his opening statement by summarizing that the State would show that M.S. and the other prosecution witnesses "have absolutely no motive to lie and no reason to lie and their story's corroborated, and the defendant's version is not logical and not corroborated."

¶5 M.S., Jason, and Christina all testified consistently about who was present and what occurred on the night in question. They all testified that only M.S., Jason, and Bolstad were together drinking at M.S.'s house on the night of the attempted assault. They denied that Mitchell or Christina were present or inside M.S.'s house at the time of the attempted assault.

¶6 M.S. testified that she decided to go to bed because she was feeling “really dizzy and sick.” Jason testified that he and Bolstad then went outside to have a cigarette, and Bolstad finished his cigarette first and walked back in the house. When Jason finished his cigarette, he tried to go back inside the house but found the door locked. Jason told the jury he started pounding on a window and yelling, asking to be let in. Jason and Christina both testified that Christina came over to the house when she heard Jason yelling.

¶7 M.S. testified that she woke up with Bolstad on top of her trying to have sex with her. She said she knew it was Bolstad because of a tattoo on his neck and his dark hair. M.S. told the jury that Bolstad stopped the assault and eventually let Christina and Jason back inside. She said that, when Jason and Christina confronted Bolstad, Bolstad accused Jason of being the assailant. M.S. did not call the police right away because she had recently been through a lot of “stuff” with her husband. M.S. told the jury she decided to call the police the next day when she realized that, if she let Bolstad get away with the assault, he might try to do it again.

¶8 Bolstad’s testimony differed substantially from M.S.’s, Jason’s and Christina’s testimony. Bolstad testified that Christina and Mitchell were also at M.S.’s house on the night of the assault. According to Bolstad, everyone was in the living or dining area of the house when M.S. went to bed. Bolstad said that Jason took M.S. into her bedroom. When Jason and Christina later accused Bolstad of having nonconsensual sexual contact with M.S., Bolstad became upset. Bolstad testified that he considered calling the police but decided against it because he had an outstanding fine and because he knew that there was a court order preventing Mitchell from having contact with Christina. Bolstad denied having any sexual contact with M.S.

¶9 While cross-examining Bolstad, the prosecutor highlighted further inconsistencies between Bolstad’s testimony and the other witnesses’ testimony on the topics of Bolstad locking Jason out, Christina arriving from across the street in response to Jason knocking and yelling, and the reason the other witnesses might lie about these events:

Q Did you lock [Jason] out?

A No, sir.

Q That never happened?

A That never happened.

Q Christina [] never came over because she heard Jason knocking and screaming?

A Christina was there.

Q So they made that up entirely?

A Exactly.

Q And you’re saying they made it up because they didn’t want to mention Todd Mitchell being there?

A Todd—exactly, correct.

¶10 During closing argument, the prosecutor returned to the theme of credibility and motive to lie:

I told you in the beginning that this would be a case about credibility and motive to lie, and I think you’ve seen that there’s only one person, Danny Bolstad, who has a motive to lie in this case. I think after hearing all of the witnesses, you need to determine that he is the one witness who is not credible.

The prosecutor repeatedly focused on who had a motive to lie, contrasting Bolstad’s uncorroborated testimony with the other witnesses’ mutually

corroborating testimony to show that Bolstad was lying and that Bolstad's version of events, including his claims about Mitchell, made no sense:

In this case, you heard from three people who have absolutely no motive to lie, [M.S.], Christina, and Jason....

I think after looking at [Bolstad] testifying you can conclude he is lying. You can throw out his testimony and rest your decision on what's left. The defendant is lying because he has a motive to lie. He doesn't want to be convicted of this crime, and you can also tell *that he's lying because there's no logic to his story and there's no consistency to his story and there is no corroboration of his story. His is the only testimony that's not corroborated by anybody else....*

....

What he's trying to do is just throw confusion into this. He throws in people's names that we don't even know. He mentions Todd Mitchell repeatedly. *He talks about a lot of things that aren't corroborated to try and confuse you and make you think there's something here that there isn't. He wants you to believe that Todd Mitchell was there. There's no corroboration of that. Nobody else says Todd Mitchell was there, and it wouldn't even make sense for Todd Mitchell to be there.*

....

The truth is the opposite, and that's what [M.S.] gave you, and that's what the truth looks like. She told you what happened. *Jason and Christina confirm it. There's nothing to dispute what they say happened except for the defendant.... Everything [the others] said fits together*

....

... *When you tell the truth, everything gets corroborated. Christina confirms it. Jason confirms it. Nobody disputes it.*

(Emphasis added.) The prosecutor concluded by asserting: "There's no reasonable hypothesis you can come up with to say what [Bolstad said] happened is true and everybody else is lying."

¶11 In a closing argument taking up less than four pages of transcript, Bolstad's defense counsel did not argue that the jury should believe that Todd Mitchell was present that evening. Counsel's argument consisted of trying to chip away at the credibility of prosecution witnesses, including by suggesting that Jason might have a motive to lie as a possible suspect. In addition, Bolstad's counsel tried to raise doubts about whether M.S. misidentified Bolstad as the assailant, pointing out that M.S. had been drinking and had described the assailant's clothing as different from what Bolstad claimed to be wearing that night.

¶12 In rebuttal, the prosecutor again contrasted Bolstad's testimony with that of the other witnesses, and asserted that Bolstad's story, including his claims about Mitchell, made no sense and that no one but Bolstad had a motive to lie:

There's just nothing about [M.S.] that made her less reliable or less credible than anybody else, and after testifying here today, I don't think she deserves to be called a perjurer based on what you heard today by Mr. Bolstad. There was absolutely nothing for you to doubt her story. There's certainly no motive for her to lie. She gets absolutely nothing out of testifying other than this is the truth and this man can't get away with it.

I come back to Mr. Bolstad's argument that all these people are lying, but, again Is there a reason to lie if they did lie? Why come up with a bizarre sequence of events, getting locked out, Christina coming across the road, and the defendant going into the victim's bedroom? There's no reason for them to make up that kind of story.... [W]here is the reason to doubt [M.S.'s] testimony, what reason can you point to? There is none.

Think of what kind of man would commit a crime like this. It would be somebody arrogant, somebody who thinks they can get away with it, *somebody that thinks they can confuse people, throw up names like ... Todd Mitchell, hope that somehow confuses. But somebody who's desperate, knows he's been caught red-handed, knows he can't get out so just tries making things up to try to throw*

things at the victim I ask you to not let him get away with it and find him guilty.

(Emphasis added.)

¶13 The jury found Bolstad guilty. Based on the testimony and the arguments of counsel, the most reasonable inference is that the jury accepted the prosecutor's theory that Bolstad was lying because Bolstad was the only witness with a motive to lie and because Bolstad's uncorroborated story could not be reconciled with the mutually corroborating testimony of the other witnesses.

3. Bolstad's Postconviction Motion And State's Response

¶14 Bolstad moved for postconviction relief based on newly discovered evidence. Bolstad's motion included allegations based on a 2012 interview of M.S., as well as an affidavit Christina signed in 2012 and an affidavit Mitchell signed in 2010. The State's response included summaries of later police interviews of M.S. and Christina. We summarize the allegations and factual submissions that are most pertinent to our analysis.

¶15 *Bolstad's postconviction allegations based on an interview of M.S.* Bolstad alleged that a law student and a private investigator interviewed M.S. in October 2012. According to these sources, during the interview M.S. maintained that Bolstad was the one who assaulted her on the night in question. M.S. admitted, however, that Jason had drugged and sexually assaulted her on other occasions and that she and Christina suspected that Jason had drugged her on the night she accused Bolstad. M.S. further admitted, contrary to her trial testimony, that Christina and Mitchell were at her house on the night of the assault and were inside her house when the assault occurred. Bolstad's postconviction motion also

included evidence pertaining to charges against Jason for drugging and sexually assaulting another woman in December 2006.

¶16 *Christina's affidavit.* According to Christina's affidavit, Christina provided false testimony about her presence and Mitchell's presence at M.S.'s house on the night of the assault. Christina averred in the affidavit that both she and Mitchell were present inside M.S.'s house at the time of the attempted assault. Christina also averred that she lied about Mitchell's presence because Christina had been warned by a judge that Christina would lose her children and that Mitchell would go to prison if Christina and Mitchell had contact. Additionally, Christina averred that M.S. and Jason provided false testimony regarding Mitchell's presence. Finally, Christina cast doubt for the first time on the accuracy of M.S.'s identification of Bolstad. Christina averred that, "[f]ollowing [M.S.'s] allegations the evening that she had been sexually assaulted, [M.S.] seemed to be unsure of who had attempted to assault her."

¶17 *Todd Mitchell's affidavit.* According to Mitchell's affidavit, he was present at M.S.'s house on the night of the assault. Mitchell averred that, when police originally contacted him about the assault, he lied about being in M.S.'s house because there was a restraining order in effect that prohibited him from having contact with Christina, and he did not want to cause problems for Christina or himself.

¶18 *State's responsive submissions—summary of police interview with M.S.* According to a summary of a 2013 police interview of M.S., M.S. confirmed that she lied about Mitchell's presence and that the reason for lying was the restraining order against Mitchell. M.S. also confirmed that she believed Jason had drugged and assaulted her on other occasions, but denied that Jason drugged

her on the night she accused Bolstad. M.S. contradicted her sister Christina's affidavit, saying that "there was no doubt in [M.S.'s] mind" about who attempted to assault her that night and that everyone was outside at the time of the assault, except she and Bolstad.

¶19 *State's responsive submissions—summary of police interview with Christina.* Christina, like M.S., confirmed in a 2013 police interview that she lied about Mitchell's presence. Christina also confirmed her affidavit statement that she and Mitchell were inside M.S.'s house at the time of the assault. However, Christina contradicted other parts of her affidavit, in particular claiming that M.S. was never confused about who attempted to assault her and that Jason was outside knocking and yelling at the time of the alleged assault.

¶20 Bolstad argued that the allegations and evidence submitted by both sides entitled him to a new trial based on newly discovered evidence. He argued that, if the submissions did not satisfy the circuit court, the court should conduct an evidentiary hearing on his newly discovered evidence claim.

¶21 The circuit court denied Bolstad's motion without a hearing. The court stated that, even if it resolved all factual disputes in Bolstad's favor, the record demonstrated that Bolstad was not entitled to relief. The court reasoned that, although there was now no dispute that M.S. and the others had lied about who was present on the night of the assault, nothing in the record undermined M.S.'s identification of Bolstad as the assailant. The court stated that M.S. had always been certain about the assailant's identity and that there was nothing that

showed M.S. would have falsely accused Bolstad. Therefore, the circuit court concluded, there was no reasonable probability of a different result on retrial.¹

Discussion

¶22 On appeal, Bolstad continues to advance his newly discovered evidence claim. In addition, he argues in the alternative that we should exercise our discretionary authority to reverse in the interest of justice because the real controversy was not fully tried. We agree with Bolstad’s alternative interest of justice argument, and reverse and remand for a new trial on that basis. As the Background section makes clear, and as we further discuss below, the prosecutor at trial relied heavily on what the State now concedes was false testimony of M.S., Jason, and Christina to persuade the jury that Bolstad’s trial testimony was not credible. We conclude that the prosecutor’s unknowing use of false testimony so clouded the crucial issue of credibility that the real controversy was not fully tried.²

¹ If the defendant proves all of the other requirements for a newly discovered evidence claim, the court must determine “whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant’s guilt.” *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. The other requirements are that ““(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.”” *Id.* (quoted source omitted).

² Because we reverse in the interest of justice, we express no opinion on Bolstad’s newly discovered evidence argument. Although Bolstad’s newly discovered evidence argument was the focus in the circuit court, Bolstad prominently makes his interest of justice argument on appeal, albeit incorporating in it by reference portions of his newly discovered evidence argument. In his newly discovered evidence argument, Bolstad relies on essentially the same reasoning we use to conclude that the real controversy was not fully tried. Our point here is that the State has had a full opportunity to address whether the real controversy was fully tried, be that in the context of responding to Bolstad’s interest of justice argument directly, or in the context of responding to Bolstad’s newly discovered evidence argument.

¶23 Our supreme court recently summarized appellate courts’ discretionary power to reverse in the interest of justice:

The supreme court and the court of appeals may set aside a conviction through the use of our discretionary reversal powers, though the circuit court does not have such discretionary powers. See *State v. Burns*, 2011 WI 22, ¶24, 332 Wis. 2d 730, 798 N.W.2d 166; *State v. Henley*, 2010 WI 97, ¶98, 328 Wis. 2d 544, 787 N.W.2d 350. However, such discretionary reversal power is exercised only in “exceptional cases.” *Id.*, ¶25; *State v. Hicks*, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996). The power to grant a new trial in the interest of justice is to be exercised “infrequently and judiciously.” *State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). “This court approaches a request for a new trial with great caution. We are reluctant to grant a new trial in the interest of justice....” *Armstrong*, 283 Wis. 2d 639, ¶114 (citation omitted).

State v. Avery, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (footnotes omitted); see also WIS. STAT. § 752.35 (describing court of appeals’ discretionary reversal power).³

¶24 One of the grounds on which we may exercise our discretionary reversal power is when “it appears from the record that the real controversy has not been fully tried.” WIS. STAT. § 752.35. The supreme court has explained that this may occur “(1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.” *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

³ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶25 More specifically, as pertinent here, the supreme court and this court have exercised their discretionary reversal power when credibility was the central issue at trial and when it later became clear that the credibility issue was tried based on evidence that should not have been admitted or when new information put the credibility issue in a substantially different light. *See State v. Romero*, 147 Wis. 2d 264, 267, 277-79, 432 N.W.2d 899 (1988); *State v. Penigar*, 139 Wis. 2d 569, 572, 586, 408 N.W.2d 28 (1987); *State v. Cuyler*, 110 Wis. 2d 133, 134, 136, 138, 141-43, 327 N.W.2d 662 (1983); *Garcia v. State*, 73 Wis. 2d 651, 652-56, 245 N.W.2d 654 (1976); *Logan v. State*, 43 Wis. 2d 128, 133-37, 168 N.W.2d 171 (1969); *State v. Jeffrey A.W.*, 2010 WI App 29, ¶¶1-5, 13-18, 22, 323 Wis. 2d 541, 780 N.W.2d 231. In at least one case, the supreme court concluded that the real controversy was not fully tried when the prosecution's case hinged on testimony that the State later conceded was false. *Penigar*, 139 Wis. 2d at 576, 586.

¶26 When we consider whether the real controversy was fully tried, our analysis does not include determining whether a different result is likely on retrial. *Jeffrey A.W.*, 323 Wis. 2d 541, ¶14. “Instead, we reverse to maintain the integrity of our system of criminal justice and so that we can say with confidence that justice has prevailed.” *Id.*; *see also Hicks*, 202 Wis. 2d at 160 (quoting *State v. Wyss*, 124 Wis. 2d 681, 735-36, 370 N.W.2d 745 (1985), for similar propositions).

¶27 Here, it is now undisputed that M.S., Jason, and Christina all testified falsely, and it cannot seriously be disputed that this false testimony enabled the prosecutor to argue that the three must be telling the truth and, correspondingly, that Bolstad must be lying. From the start of this one-day trial, the prosecutor portrayed the case as a credibility contest pitting three people with no motive to lie against one person who had a clear motive to lie. In particular,

the prosecutor spent most of his closing argument stressing two interrelated assertions that conflicted with Bolstad's trial testimony: (1) that Todd Mitchell was not present at M.S.'s house during the night of the assault, and (2) that no one except Bolstad had a motive to lie. The prosecutor did not know it then, but it is now undisputed that both of these assertions are false.

¶28 As to who was present that night, the prosecutor repeatedly made use of Bolstad's testimony that Mitchell was present, contrasting it with M.S.'s, Jason's, and Christina's mutually corroborating and false testimony to the contrary. On appeal, the State does not dispute that M.S., Christina, and Jason testified falsely about Mitchell. On the contrary, in the State's postconviction submissions—the police interview summaries—M.S. and Christina took the positions that they testified falsely when they said that Mitchell was not present at M.S.'s house on the night of the assault.

¶29 As to motive to lie, the prosecutor repeatedly emphasized that no one but Bolstad had a motive to lie about who was present or about other circumstances that evening. For example, the prosecutor acknowledged that Christina had a restraining order against Mitchell, but argued that she told the truth about Mitchell and that the restraining order was a reason Mitchell *would not be present*. The prosecutor argued that there was no reason for Christina to lie about Mitchell or be concerned if he was present. The prosecutor told the jury there was no evidence that Christina would get in trouble or lose her children if Mitchell was around. The clear import of the prosecutor's argument was that, if Christina had no reason to be concerned about Mitchell's presence, then her sister M.S. and her friend Jason had no reason to lie about Mitchell either. However, as the State now concedes, the record now shows exactly the opposite. As the State puts it: “[M.S.] and Christina [] [have now] admitted that they lied about Todd Mitchell

being at the house ... for one simple reason—to avoid any adverse consequences for him and/or [Christina] based on [Mitchell’s] violation of a no-contact order between Mitchell and [Christina] (who share seven children).” Similarly, the circuit court observed:

It is now clear why everyone but Bolstad lied to police and at trial about Mitchell’s presence at the house on the night of the assault. Mitchell is the father of [Christina]’s seven children, but they were under court order at the time of the assault not to have contact with each other. [Christina] was afraid that she would lose her children if the police found out or if it came out at trial that she and Mitchell were together that night. [M.S.] and her sister were lying to protect [Christina]’s children and Mitchell

¶30 Additionally, although our analysis above would be enough, we observe that the prosecutor’s theory and closing argument depended on a third assertion that is now called into serious question. That assertion is that, not only were Mitchell and Christina not present, but also Bolstad was the only adult *inside* the house with M.S. at the time of the assault. The prosecutor used the now-admittedly-false testimony about Mitchell, combined with Jason’s testimony about being locked out, to demonstrate that only Bolstad was inside the house with M.S. at the time of the assault, further undermining Bolstad’s version of events. On appeal, however, the State fails to dispute Christina’s admission in her affidavit that she and Mitchell were *inside* M.S.’s house at the time of the assault. Indeed, in the summary of Christina’s police interview, she takes a position confirming this.⁴

⁴ As indicated in ¶18 above, in M.S.’s police interview, M.S. maintained that only she and Bolstad were inside the house at the time of the assault.

¶31 In its appellate brief, the State dismisses the conflicting testimony over Mitchell's presence as having "no bearing on the identity of [M.S.'s] attacker." But it is clear that the prosecutor at trial did not share this assessment. Rather, as we have explained, the prosecutor spent considerable time during his closing argument emphasizing the discrepancy between Bolstad's assertion that Mitchell was present and M.S.'s, Christina's, and Jason's opposite assertion. Indeed, in the prosecutor's closing and rebuttal closing arguments, covering just 11 pages of transcript, he referred to Mitchell by name, and by the pronouns "he" and "him," 21 times.

¶32 For different reasons, the circuit court also discounted the importance of the conflicting testimony as to who was present on the night of the assault. Albeit in the context of rejecting Bolstad's newly discovered evidence argument, the circuit court reasoned that, although M.S. and the others had lied about who was present, M.S. had always been certain about her assailant's identity. We do not agree with this assessment of the record. First, Christina's affidavit states that, "[f]ollowing [M.S.'s] allegations the evening that she had been sexually assaulted, [M.S.] seemed to be unsure of who had attempted to assault her." Second, M.S. testified at trial that she went to bed because she was feeling "really dizzy and sick." Third, M.S. told a police investigator that Jason had drugged and sexually assaulted her on other occasions. Fourth, M.S. allegedly told a defense investigator and a law student that, on the night of the assault, she and Christina suspected that Jason had drugged her.⁵

⁵ M.S. may have backtracked on that topic when she was interviewed by a police investigator. Still, M.S.'s statement to Bolstad's investigator and the law student appears to be admissible evidence that adds to the items in the record indicating, contrary to the circuit court's observation, that M.S. had not always been certain about who attempted to assault her.

¶33 For the reasons stated above, we conclude that Bolstad's case warrants reversal in the interest of justice. The prosecutor's use of M.S.'s, Christina's, and Jason's false testimony as critical evidence to establish that Bolstad was lying so clouded the crucial issue of credibility as to prevent the real controversy from being fully tried.

¶34 We emphasize that we do not reverse simply because of the presence of false testimony. Rather, we reverse because, under the particular circumstances here, the testimony at issue played such a prominent role in the trial. As we have explained, the thrust of the prosecutor's closing argument had a simple logic to it: (1) three people with no motive to lie testified truthfully in all respects, (2) the three people corroborated each other with respect to significant facts that could not be reconciled with Bolstad's trial testimony, (3) as to those facts, Bolstad must have lied, and (4) if Bolstad lied about those facts, nothing else Bolstad told the jury deserved any weight. There is now every reason to believe, however, that this seemingly simple logic was based on false testimony.

¶35 Before concluding, we pause to comment on two issues relating to evidence implicating Jason. We comment on the first to make clear what does *not* form the basis for our reversal of Bolstad's conviction, and on the second to give the circuit court and parties guidance on an issue that is likely to arise on remand.

¶36 First, the State argues that Bolstad is procedurally barred from receiving a new trial based on evidence relating to Jason's conviction for the sexual assault of a woman other than M.S. We need not address that argument. We acknowledge that, in a previous appeal, we rejected Bolstad's argument that he was entitled to a new trial based in part on assertions relating to Jason's conviction. *See State v. Bolstad*, No. 2010AP2797, unpublished slip op. ¶¶7-10

(WI App Feb. 23, 2012). At that time, however, we were not presented with M.S.'s or Christina's subsequent admissions to testifying falsely, and we did not address whether Bolstad should receive a new trial in the interest of justice because the real controversy was not fully tried. Here, we rely on those admissions, which are undisputed by the State. We need not and do not rely on evidence of Jason's conviction, which does not play a part in our reasoning for why the real controversy was not fully tried.

¶37 Second, the parties dispute whether Jason's conviction would be admissible in a new trial under WIS. STAT. § 904.04, *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), and *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). This is a topic that should be addressed first by the circuit court if Bolstad is retried and if Bolstad seeks to admit evidence that Jason assaulted another woman. It is sufficient to say that the issue deserves more detailed and less speculative arguments than the parties have presented to us in this appeal.

Conclusion

¶38 In sum, we reverse the order denying Bolstad's motion for postconviction relief, and remand for further proceedings consistent with this opinion.

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

Not recommended for publication in the official reports.

