STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2013AP002738

Milwaukee County Circuit Court Case No. 2010CF001632

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BEVERLY RESHALL HOLT, a/k/a BEVERLY R. MARSH,

Defendant-Appellant.

An Appeal From a Judgment of Conviction entered by the Milwaukee County Circuit Court, the Honorable Richard J. Sankovitz, Branch 29, Presiding

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Brief of the Defendant-Appellant

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STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of record.

STATEMENT OF THE ISSUES

1. Were the videotaped statement and live testimony of Jewlien, one of the alleged minor victims, properly admitted into evidence over trial counsel's objection?

Trial Court answered: Yes.

2. Was the evidence sufficient to support the verdict rendered?

Trial Court answered: Yes.

STATEMENT OF THE CASE

Pretrial Proceedings

Defendant- Appellant Beverly Holt ("Holt") was arrested on March 26, 2010 when "Michele," the mother of "Javari" and "Jewlien" (ages six and four, respectively at the time of report), reported to the police that her sons told her that Holt had had sexual contact with them. On March 31, 2010, a criminal complaint was filed charging Holt with two counts of first-degree sex assault

(intercourse with person under 12) and two counts of first-degree sex assault (sexual contact with person under age of 13). (R2). After a preliminary hearing on May 12, 2010, the State filed its information alleging the same offenses. (R6).

Trial Proceedings

The case proceeded to a jury trial on January 9, 2012, before the Milwaukee County Circuit Court, Honorable Richard J. Sankovitz presiding. (R46). Prior to the start of testimony on January 9, 2012 the trial court granted the State's motion, over defendant's objection, to amend the information to include a charge of child trafficking as count five to be adjudged at trial. (R46:15-16). The trial court also entered findings and ruled, over defendant's objection, that the videotaped testimony of Jewlien was admissible (R46:4) and that a series of voicemails left on the Ms. Michele's phone by the defendant were admissible at trial. (R46:9).

Trial Evidence

The allegations immediately preceding Ms. Holt's arrest were relayed to the jury primarily in the form of Michele's testimony. Michele and Holt had been friends for about 20 years prior to Holt's arrest. (R51:79). Michele testified that Holt was the only person that she trusted to

watch her two sons, Javari and Jewlien. (R52:6). Holt watched the two boys a total of eight to ten times, and approximately three or four of those times were overnight stays at Holt's house. (R51:86). Michele later testified that Holt only watched Javari a total of four times. (R52:6). Michele testified that one time, on or around September or October of 2008, Holt watched the boys at Michele's home. (R51:87-88) (R52:12).

According to Michele, one afternoon in March, 2010 and "out of the clear blue sky" Jewlien told Michele that he no longer wanted to go to Holt's because "[she] put [his] wee in her mouth." (R51:96). Michele testified that she inquired further, and Jewlien repeated the statement and said that Holt did the same thing to Javari. (R51:97). Michele did not immediately talk to Javari about the allegation. (R51:97). In that conversation, Jewlien apparently also used gestures to demonstrate that Michele that Holt had placed Jewlien's hand on her breast and down into her lap. (R51:98).

Michele did not immediately call the police, but instead called Holt's husband, Ken, to explain what Jewlien had told her. (R51:99). Ken Holt expressed his disbelief, and after the conversation ended, Michele waited for him to call back. (R51:99-101). When Mr. Holt did not call her

back, Michele called the police. (R51:101). The police officer who spoke to Michele scheduled an appointment to bring Jewlien in to conduct a forensic interview. (R51:101).

Between the time of Michele's call to the police and that interview, Holt called Michele's phone and left a series of voicemails. (R52:6-7). Those voicemails were admitted into evidence, over defense counsel's objection, and played at trial for the jury to hear. (R52:7-8).

Also during the time between Michele's call to the police and the scheduled interview with Jewlien, Michele asked her son, Javari, if Holt had done anything to him. (R51:101). Javari stated to Michele that Ms. Holt had not. (R51:101). However, after Michele told Javari that she "was going to talk to God," Javari told her that Holt put her mouth on his private area. (R51:103). Javari also made a gesture that seemed to indicate that Holt had placed his hand on her breast. (R52:4). Javari then told Michele that on one occasion that he was staying at Holt's house, a lady was there who had given Holt money and then got on top of him. (R52:4-5). After Javari told Michele this information, she contacted the police again, and an officer told her to bring Javari along for the interview already scheduled for Jewlien. (R52:5). The two boys were then

interviewed at Children's Hospital on March 25th, 2010. (R52:10).

Both forensic interviews were recorded, and those recordings were admitted into evidence and played for the jury at trial. (R49:85) (R50:96). The prosecution called Police Officer Colleen Sturma, who conducted the interview of Javari on March 25th, 2010 (R49:83) and Officer Trisha Klauser, who conducted the interview of Jewlien on that same date (R50:93), as witnesses. The prosecution also offered evidence in the form of the expert testimony of Liz Ghilardi, who is the supervisor at Children's Hospital of Wisconsin Child Protection Center (R51:24) and Debra Donovan, a sexual assault nurse examiner at Aurora Sinai Medical Center in Milwaukee. (R52:37).

At trial, Javari testified that the defendant touched "[his] private part" one time with her hand. (R50:26-27). He testified that the defendant grabbed his hand and placed it on her "boob." (R50:28-29). When asked whether there were other things that the defendant did that Javari did not like, he responded "probably forgot." (R50:30). He then testified that the defendant kissed him on his cheeks and on his lips. (R50:30). Javari also testified that the defendant "humped" him and sucked on his private part. (R50:33-35). Javari was asked to demonstrate for the

record what he meant by this by using two dolls. (R50:37-44).

Javari also testified that the defendant had "two people in a line" (two adult females) to her bedroom who "started humping [him]." (R50:48). He testified that these two individuals gave the defendant money. (R50:55). Finally, Javari testified that he saw the defendant touching Jewlien's "private" in the bathroom. (R50:60).

Javari testified that he told his kindergarten teachers about what Holt had done to him. (R50:82). He also testified that he told his mother about what had happened when he was four years old. (R50:85). When asked "who was the very, very first person that [he] ever told," he responded "my teachers." (R50:86). When the court asked Javari to clarify the order of which he told other people about what was going on, he responded "teachers . . . [then] Mom . . . [then] video." (R50:90).

At trial, Jewlien testified that Holt touched him with her hand, and indicated by drawing a green "X" on a picture that the area of the body which Holt had touched was his "wee wee." (R50:124-27, R53:30). Jewlien also identified with a green "J" on that same picture that Holt had touched him on his "butt." (R50:127-28). When asked whether Holt had ever touched him with something besides her hand, or

with some other part of her body, Jewlien replied "No." (R50:128). The prosecutor then asked him: "Did she ever do anything to you with her mouth?" to which he again replied "No." (Id.). Then, just before the court took a break, Jewlien offered, without being asked, "and she did something to my mother." (R50:130).

When the trial continued, Jewlien was called back to the stand to give more testimony. In that testimony, he stated that he did not remember telling his mom that Holt (whom he knew as "TT Bev") used her mouth on his private. (R51:8). Jewlien maintained this even while the prosecutor asked leading questions: "Did her mouth touch on your wee wee?" "No." "What did her mouth do with your wee wee?" "Nothing." (R51:11). Jewlien testified that he did not remember making a videotape of an interview with the police officer, even after the officer had been identified and he stated that he recognized her. (R51:12-13).

On cross-examination, Jewlien testified that he did not remember ever staying at Holt's house. (R51:14). Defense counsel followed up on Jewlien's allegation that Holt hit him. Jewlien then testified that Holt had never hit him. (R51:16). Defense counsel asked again: "Never hit you?" (R51:16). Jewlien responded "Nope." (R51:16). Jewlien then testified that Holt poured beer down his

mother's throat "a few days ago" (meaning a few days before his testimony). (R51:16-17). He then testified that he had not seen her do it, but he knew about it because it was what his brother had told him. (R51:17). Jewlien went back and forth a number of times as to whether Holt slapped or hit him. (R51:16-23). Additionally, Jewlien testified that Holt was black at trial, where in the forensic interview he stated that she was white. (R51:22-23).

Trial Motions

After the State rested, defense counsel moved to dismiss the charges on the grounds that the State had not met its burden of proof with respect to any count. (R52:45). The trial court denied the motion, reasoning that "[it doesn't] know whether the jury will believe the testimony of the child witnesses, but if the testimony of the witnesses plus their video recorded statement is believed by the jury, there's ample evidence that they're going to convict [the defendant]." (R52:55-56) (emphasis added).

Verdicts and Sentencing

On January 12, 2012, the jury returned verdicts of guilty on all counts charged. (R54:4-6). Defense counsel moved for judgment notwithstanding the verdict. (R54:7). The trial court denied that motion. (R54:9)

Post-Conviction Proceedings

Defendant-Appellant Holt now appeals from her judgment of conviction and sentence, the Notice of Appeal having been filed on February 11, 2013. (R39). Ms. Holt is currently incarcerated in the Taycheedah Correctional Institution in Taycheedah, Wisconsin.

Having said the above, it is appropriate to proceed to argument. Additional facts will be inserted and referenced as necessary in the argument portion of this brief.

I. THE TRIAL COURT ERRONEOUSLY ADMITTED THE AUDIOVISUAL RECORDING OF JEWLIEN'S STATEMENT AND JEWLIEN'S TESTIMONY INTO EVIDENCE.

STANDARD OF REVIEW

Generally, the admissibility of evidence falls within the trial court's discretion. *State v. Mares*, 149 Wis.2d 519, 525, 439 N.W. 2d 146, 148 (Ct. App. 1989). An abuse of discretion can occur if it is based on an improper application of the law to the facts of the case. *Thorpe v. Thorpe*, 108 Wis.2d 189, 195, 321 N.W. 2d 237, 240-241 (1982). Whether videotaped statements fall within the statutory hearsay exception presents a question of law and statutory interpretation. *Mares* at 525, 439 N.W. 2d at 148. The admissibility of the videotaped statement in this case is a question of law to which the Court applies an independent standard of review.

Where statutory language is unambiguous, the statute will be read in accordance with the plain, clear words of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 271 Wis.2d 633, 663-64, 681 N.W. 2d 110, 124 (2004). "A statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.* If a statute is ambiguous, then the Court must resolve the ambiguity. *JP Morgan Chase Bank, NA v. Green*, 311 Wis.2d 715, 734, 753 N.W. 2d 536 546 (Ct. App. 2008).

ARGUMENT

Wisconsin Statute Section 908.08 permits the use of audiovisual recording of an oral statement at trial if certain requirements and safeguards are met. Under the statute, a videotaped statement made by a child may be used if the child is available to testify and the court makes the following findings: 1) The trial or hearing in which the recording is offered will commence before the child's 12th birthday, or the child's 16th birthday if the interests of justice warrant it, 2) that the recording is accurate and free of alteration or distortion, 3) the child's statement was made upon oath or affirmation, 4) that the time, content and circumstances of the statement provide indicia of its trustworthiness, and 5) that the

admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet the allegation. Wis. Stat. § 948.08.

The purpose of the statute is to allow for videotaped statements of children to be used at trial, but only if a number of safeguards are followed. *State v. Williquette*, 180 Wis.2d 589, 603, 510 N.W. 2d 708, 712 (Ct. App. 1993).

The Supreme Court of Wisconsin held in *State v. Sorenson* that a trial court should weigh a number of factors in order to ensure that the statement contains the indicia of reliability to support its trustworthiness in determining whether to admit a statement under Section 948.08. 143 Wis.2d 226, 245, 421 N.W. 2d 71, 84 (1988).

One of those factors is the attributes of the child making the statement, including age, the ability to communicate verbally, to know the difference between a truth and falsehood, and anything else that might affect the child's method of articulation or motivation to tell the truth. *Id.* Another factor to consider is the circumstances under which the statement is made, "including relation to the time of the alleged assault" and other contextual factors that might affect the trustworthiness of the statement. *Id.* The context of the statement itself should also be examined for signs of deceit or falsity and

also for knowledge of matters not normally known to children of the same age. *Id.* Also, the court should examine whether there is any corroborating evidence to support the statement. *Id.*

The trial court entered its findings and ruled on the admissibility of Jewlien's videotape testimony before the first day of trial on January 9, 2012. (R46:3). In its findings, the court acknowledged that Jewlien "jumped right into his version of the events before there was the standard protocol questions about truth-telling." (R46:3-4). The court also noted that Jewlien made obvious truth-telling errors. (R46:4). For example, Jewlien called the carpet red when it was actually blue. (Id.). When asked if he would tell the truth, Jewlien shook his head "no." (Id.). However, the court determined that those obvious errors were merely the "poise of somebody that young." (Id.). The court found that Jewlien knew the consequences of not telling the truth (that he would have to sit in a chair like at school). (Id.). In the end, the court acknowledged that Jewlien was not an intelligent historian and that it would be very difficult for the jury to get any meaningful detail out of his description, but that it was an issue of credibility for the jury. (Id.).

The trial court ruled that the videotape was admissible, but with the caveat that "if [the trial judge sees] any lingering issues with him or refusals to tell the truth which might be one inference to be drawn from the way he shakes his head during the truth-telling protocol, then [the judge will] tell the jury to disregard his testimony." (R46:5). Essentially, if Jewlien would be unable to take the oath or otherwise demonstrate his ability to understand the importance of telling the truth when called to testify at trial, the judge would instruct the jury that they should not give his testimony or the tape any consideration. Barring that, upon these findings the court was satisfied that the videotape satisfied the reliability standards of Wis. Stat. § 908.08(3), and denied the defendant's motion to exclude it. (R46:3,5). The videotape was introduced and admitted into evidence at trial and published for the jury. (R50:95-96).

The videotaped statement in this case does not meet the statutory requirements for admissibility under Wis. Stat. § 908.08, and is inadmissible as hearsay. The trial court erred in admitting the audiovisual recording of Jewlien's testimony into evidence and allowing it to be published to the jury for a number of reasons: 1) Jewlien did not adequately demonstrate the ability to understand

the importance of telling the truth, 2) the videotaped statement did not contain the "indicia of reliability to support its trustworthiness," 3) Jewlien was not "available" to testify at trial, and 4) the videotaped statement was never transcribed for the official record as required by Wisconsin law.

A. The Statement Is Inadmissible Because Jewlien Did Not Demonstrate the Ability to Understand the Importance of Telling the Truth

In *State v. Jimmie R.R.*, the Court of Appeals affirmed a trial court's determination that a five-year-old girl sufficiently understood the importance of telling the truth and understanding that false statements are punishable. 232 Wis.2d 138, 606 N.W. 2d 196 (Ct. App. 1999). There, the child answered "lie" when the social worker, who was wearing a green shirt, asked her "[if she were to] say that [she] was wearing a purple shirt today, is that telling a truth or a lie?". *Id*. at 158-159, 606 N.W. 2d 205.

Here, there is no evidence that Jewlien could even distinguish between a truth and a lie, let alone the importance of telling the truth, and that lies are punishable. In its findings, the court explained that Jewlien answered "truth" when asked whether the statement "the floor (which was blue) is red" was a truth or a lie. (R46:4). Also, Jewlien actually shook his head "no" when

asked if he would tell the truth. (Id.). Additionally, Jewlien told the forensic interviewer that the alleged conduct happened "yesterday," meaning the day before the interview. (R51:108). This is a demonstrably false statement. Finally, Jewlien told the interviewer that "TT Bev" (Holt) was white, while Holt is actually black. (Id.).

When ruling that the videotape would be admitted at trial, the trial judge warned that he would rescind that ruling if, during Jewlien's testimony, it was apparent that he was unable to understand the difference between the truth and a lie or that telling a lie is punishable. (R46:5). That is precisely what happened during Jewlien's testimony at trial. (R50:112).

During the initial inquiry, Jewlien testified that he did not know the difference between the truth and a lie. (R50:115). Jewlien demonstrated that inability throughout the inquiry. The trial judge then conducted a sidebar and allowed the State the opportunity to rehabilitate the witness. (R50:116). The prosecutor then asked Jewlien a series of questions about the colors of objects, and whether he was a boy or a girl. (R50:117-18). The prosecutor also asked him a number of questions regarding the consequences of telling "lies" as the meaning of that

term had been established during the inquiry. (R50:118-19). The trial judge was satisfied that Jewlien was able to understand the importance of telling the truth and that he demonstrated that he could take the obligation to tell the truth seriously during his testimony. (R50:133).

The problem with the inquiry is that it reveals nothing about Jewlien's ability (age-appropriate or not) to understand the difference between a truth and a lie in real life, and certainly not within the more complicated contexts presented by the trial. The only ability that the prosecution's truth/lie inquiry tested was the ability to determine the correct color of certain objects, and not the ability to determine the veracity of a statement. For example, it tells us nothing about Jewlien's ability to determine whether the allegations against Holt, which are far more abstract concepts, were the truth or a lie. It only reveals that Jewlien knows his colors and that he knows he is a boy. Certainly, the interest of ascertaining of truth, the primary purpose of trial testimony, calls for more.

B. **Jewlien's Videotaped Statement Did Not Contain the "Indicia of Reliability to Support its Trustworthiness" Under the Factors Articulated in *Sorenson*.**

The trial court abused its discretion in allowing the

videotape into evidence because, considering the factors set out in *Sorenson*, the statement did not meet the level of reliability and trustworthiness required to justify its admission under the statutory hearsay exception.

The context under which the statement was made leads to the conclusion that it is unreliable. This factor was articulated in *Sorenson* and should also be addressed in the trial court's findings under Section 908.08(3)(c). The trial court was satisfied that Jewlien understood what happens if you don't tell the truth, specifically by his response that "your name goes on the wall and you have to set [sic] in the chair . . .." (R46:4). The State also produced expert testimony regarding the procedures for child forensic interviews.

However, the forensic interview in this case was conducted on March 25th, 2010, when Jewlien was four years old. (R50:96). Furthermore, the Information dated March 31, 2010 indicates that the acts allegedly occurred before October 31, 2008, which was over 16 months prior to the date that the interview occurred. Therefore, Jewlien was being interviewed almost a year-and-a-half after the alleged acts, which had occurred when he had just turned three years old.

Finally, there is no corroborating evidence to support the statement. The statement is unchecked hearsay. In fact, the two investigating officers who conducted the interviews acknowledged that they could not obtain any corroborating evidence to support the statements made during the interview. (R50:11-14, R50:105-06). The only evidence that arguably corroborate the allegations made in the statements is the hearsay testimony of the boys' mother, Michele, in which she merely relayed to the jury what they had told her. This certainly is not "corroboration;" she was simply repeating the allegations.

The court found that Jewlien's inability to articulate the truth was merely the "poise of somebody that young." (R46:4). Under that reasoning, there can be no instance where the videotaped statement of a child would be excluded from evidence. No matter how blatant the inability to understand what is truth, how obvious the child's demeanor or unwillingness to tell it, the trial courts would allow every statement into evidence because "that's just what kids do."

The trial court's findings simply do not support the admissibility of Jewlien's videotaped statement under the factors of Section 908.08(3) and *Sorenson*. Its findings only addressed the issue of ability to understand the

truth, which is merely part of the inquiry. As demonstrated, the court's findings and ruling were made in error.

C. **Jewlien Was Not "Available" to Testify at Trial.**

Under Wisconsin law, a witness is unavailable to testify if he or she "testifies as to lack of memory of the subject matter of the declarant's statement." Wis. Stat. § 908.04(1)(c). The inability to answer questions regarding the prior statement, therefore, render a witness "unavailable" to testify at trial.

Not only did Jewlien specifically state that he could not remember ever being at Holt's house, where he alleged that the conduct occurred, he demonstrated his inability to testify with any accuracy as to the subject matter of his previously-videotaped statement. He stated that Holt did not "suck his wee wee" on direct examination (R51:11), that he could not remember ever staying at Holt's house (R51:14), or ever conducting the interview during which the previous statement was made and recorded (R51:12-13).

Where some hearsay exceptions require an "unavailable" witness, Section 908.08 requires an "available" witness. The reason for this requirement is clear. Wisconsin Statute Section 908.08 was enacted as part of 1985 Wisconsin Act 262. Among the purposes of the statute, as

expressed by the legislative intent, was to "preserve the right of all parties to cross-examine those witnesses" giving videotaped statements. This is clearly not accomplished when there is no meaningful opportunity to confront the accuser.

D. The Trial Court Erred by Failing to Transcribe the Audiovisual Recording of Jewlien's Statement to the Official Court Record as Requested by the Defendant.

If an audiovisual recording is entered into evidence under Wis. Stat. § 908.08 and published for the jury, the recording must be transcribed for the official court record. *State v. Ruiz-Velez*, 314 Wis. 2d 724, 762 N.W.2d 449 (Ct. App. 2008). The question whether an official court reporter must transcribe audiovisual recordings received into evidence under Section 908.08 is a question of law that the court reviews de novo. *Id.* at 726-727, 450 (citing *State v. Turnpaugh*, 2007 WI App 222, ¶2, 305 Wis. 2d 722, 725, 741 N.W.2d 488, 490).

In *Ruiz-Velez*, the court of appeals noted that the "record [did] not reveal that Ruiz-Velez asked that the recordings be taken down by the court reporter as they were played for the jury, and the judge presiding over the trial did not order it. *Id.* at 725, 449. In that case, a postconviction court ordered that the audiovisual recordings be transcribed by the official court reporter,

and the State conceded. *Id.* The Court of Appeals agreed, and reversed and remanded the case with instructions that the audiovisual recording be transcribed by the court reporter. *Id.* at 726, 450.

The trial court erred in *Ruiz-Velez* when it "conclude[ed] that the recordings were 'exhibits' and not 'sworn testimony,' and that if [the defendant] wanted them transcribed he could 'have somebody' do it but that it was 'not ordering the State's court reporter to do it.'" *Id.*

Wisconsin Statutes Section 885.42(4) provides "At trial, videotape depositions shall be reported unless accompanied with a certified transcript submitted in accordance with SCR 71.01(2)(d)."

The *Ruiz-Velez* court held that Wis. Stat. § 885.42(4) and SCR 71.02(2)(d) are applicable to audiovisual recordings of children under Wis. Stat. § 908.08, reasoning that the recording "is *the testimony* of that child, supplemented by in-court testimony . . .." *Ruiz-Velez* at 727, 762 N.W.2d at 450. The court concluded that SCR 71.01(1), which requires that all proceedings in circuit court be reported, also requires that the audiovisual recordings and testimony of children under Wis. Stat. § 908.08 be recording verbatim for the record. "Supreme Court Rule 71.02(2)'s all-encompassing command [ended the

court's] analysis," and the court reversed and remanded with instructions that the audiovisual recording be transcribed for the record.

In this case, defense counsel moved the court by motion in limine to order "that a complete record be made of all aspects of the trial of this matter, pursuant to Wis. Stat. 757.55, and SCR 71.01(1),(3), & (4). (R16:2) (emphasis added).

The videotaped recording of Jewlien's forensic interview was admitted into evidence and published for the jury on the second day of trial. (R50:96-97). The interview was not transcribed by the court reporter for the trial record. There is no transcript of the interview. Also, Javari's interview was never transcribed. A transcript of the forensic interviews has been requested by appellant's current counsel, but the State indicated on November 27, 2013 that the interviews were never transcribed.

This was not harmless error. The publication of a video statement of a boy so young is extremely prejudicial to the outcome of the trial. Because the videotaped statement was improperly admitted, and the verdict was prejudiced by, if not based solely on, that evidence, the

Court should vacate the trial court's judgment of conviction and remand this case for a new trial.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT RENDERED

After the State rested, defense counsel moved to dismiss the charges on the grounds that the State had not met its burden of proof with respect to any count. (R52:45). The trial court denied the motion, reasoning that "[it doesn't] know whether the jury will believe the testimony of the child witnesses, but if the testimony of the witnesses plus their video recorded statement is believed by the jury, there's ample evidence that they're going to convict [the defendant]." (R52:55-56) (emphasis added).

After the jury returned the verdicts of guilty, defense counsel moved for judgment notwithstanding the verdict. (R54:7). The trial court denied that motion. (R54:9)

The evidence produced by the State is insufficient to prove the elements of the offenses charged proven beyond a reasonable doubt, so the convictions must therefore be vacated and the charges dismissed. The reasons for this are as follows: 1) The evidence relied upon to reach the

guilty verdict was inherently and patently incredible, and, 2) even if it is given weight and credibility, the evidence does not establish every element of the crimes charged beyond a reasonable doubt.

STANNDARD OF REVIEW

The applicable standard of review for an appellate court analyzing whether the evidence was sufficient to support a guilty verdict is whether the evidence presented at trial court was "sufficient to prove the defendant's guilt beyond a reasonable doubt." *State v. Sharp*, 180 Wis. 2d 640, 658-59, 511 N.W.2d 316, 324 (Ct. App. 1993). This standard is the "same in either a direct or circumstantial evidence case." *State v. Poellinger*, 153 Wis. 2d 493, 501, 453 N.W.2d 752, 754 (1990). It is the State's burden, at trial, of proving every element of the offense charged beyond a reasonable doubt in order for the defendant to be convicted. *Id.* If the evidence presented at trial, viewed in the light most favorable to the prosecution, is of such insufficient probative value and force that, as a matter of law, no trier of fact could have reasonably found guilt beyond a reasonable doubt, then the appellate court may reverse the conviction. *Id.*

It is the duty of the jury, relying on their own life experiences and common knowledge, to weigh the evidence

produced by the State to determine whether that evidence supports a guilty verdict. *Poellinger* at 508, 451 N.W.2d at 758. If the evidence consists of witness testimony, it is up to the jury to determine the credibility of each witness and the weight given to their testimony. *Sharp* at 659, 511 N.W.2d at 324. Courts will generally not substitute their judgment for the jury's, but may reverse the jury's verdict if the "testimony supporting and essential to the verdict is inherently and patently incredible." *Id.; see also, State v. Tarantino*, 157 Wis. 2d 199, 218-19, 458 N.W.2d 582, 590 (Ct. App. 1990).

A. Sexual assault of a child (Counts 1-4)

Holt was convicted of two counts of sexual assault (Counts 1 and 2) in violation of Wis. Stat. § 948.02(1)(b). (R54:4). Wisconsin Statutes Section 948.02(1)(b) states: "Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony."

"Sexual intercourse" means vulvar penetration, cunnilingus, fellatio or anal intercourse between the defendant and the complainant, "or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the

defendant or upon the defendant's instruction." Wis. Stat. § 948.01(6).

Holt was also convicted of two counts of sexual assault (Counts 3 and 4), both to Javari, pursuant to Wis. Stat. § 948.02(1)(e). (R54:5). Wisconsin Statutes Section 948.02(1)(e) states: "Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony."

"Sexual contact" is defined as "intentional touching, whether direct or through the clothing, if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." Wis. Stat. § 948.01(5)(a). This can be in the form of the defendant touching the complainant, or vice versa. *Id.*

In order to find Holt guilty of sexual assault, two elements must be proven: 1) That the complainants were under the age set forth in the statute, and that 2) Holt had either "sexual intercourse" or "sexual contact" with them, as defined above. The State must also prove that, in the context of sexual assault under the "sexual contact" section, that the touching was done with the intent to become sexually aroused or gratified, or that it was done

for the purpose of sexually degrading or humiliating the complainant. Wis. Stat. § 948.01(5)(a)

It is clear from the testimony that Jewlien and Javari were both under the age of 12 and 13 as required by Sections 948.02(1)(b) and (e), respectively. (R51:77). Therefore, Holt concedes that the State proved the first element of sexual assault (age of the victim) beyond a reasonable doubt for all counts charged. The issue in this case, however, is that the State did not produce sufficient evidence to prove the second element beyond a reasonable doubt for any of the first four counts.

The State produced seven witness: Jewlien and Javari, the two officers who conducted the forensic interviews, two experts, and the mother, Michele. (R50:2, R51:2). The only evidence the State produced at trial regarding the alleged conduct, or the sexual contact or intercourse (the second element), was the testimony of Jewlien and Javari.

The only testimony regarding sexual contact in this case, specifically Jewlien's, was inherently and patently incredible and, in some instances, demonstrably false.

When asked whether Holt had ever touched him with something besides her hand, or with some other part of her body, Jewlien replied "No." The prosecutor then asked him: "Did she ever do anything to you with her mouth?" to which

he again replied "No." Then, just before the court took a break, Jewlien offered, without being asked, "and she did something to my mother." There was no evidence ever produced that Holt did anything to Jewlien's mother.

When the trial continued, Jewlien was called back to the stand to give more testimony. In that testimony, he stated that he did not remember telling his mom that Holt (whom he knew as "TT Bev") used her mouth on his private. Jewlien maintained this even while the prosecutor asked leading questions: "Did her mouth touch on your wee wee?" "No." "What did her mouth do with your wee wee?" "Nothing." Jewlien testified that he did not remember making a videotape of an interview with the police officer, even after the officer had been identified and he stated that he recognized her.

On cross-examination, Jewlien testified that he did not remember ever staying at Holt's house. Defense counsel followed up on Jewlien's allegation that Holt hit him. Jewlien then testified that Holt had never hit him. Defense counsel asked again: "Never hit you?" Jewlien responded "Nope." Jewlien then testified that Holt poured beer down his mother's throat "a few days ago" (meaning a few days before his testimony). He then testified that he had not seen her do it, but he knew about it because it was

what his brother had told him. Jewlien went back and forth a number of times as to whether Holt slapped or hit him. Additionally, Jewlien testified that Holt was black at trial, where in the forensic interview he stated that she was white.

It is not as if the jury had no guidance on the proper weight to give the forensic interviews and the testimony of Jewlien and Javari. The State called Liz Ghilardi as an expert to explain the purposes of forensic interviews of children and some of the inherent difficulties with this type of evidence. (R51:23-24). With regard to timing, Ghilardi informed the court that timing issues are particularly troublesome because sometimes children can't remember exactly, especially with delayed reporting, when something happened. (R51:57). Additionally, Ghilardi acknowledged that if a child, as was this precise case here, changes his story from 16 people molesting him to 3 people molesting him, that child would have no way of knowing which of his statements was true due to the fact that a child's memory shifts so drastically through time. (R51:60). Ghilardi informed the court that what is needed in those situations is corroboration. (R51:60).

Ms. Ghilardi acknowledged that the purpose of those interviews is to get as much information as possible to the

investigators, not to ascertain truth, and as such the statements made by the child being interviewed must be corroborated by the investigators. (R51:71). The two police officers who conducted the interviews acknowledged that they could not obtain any corroborating evidence in this case in order to confirm the allegations contained in the interviews. (R50:11-14, R50:105-06). In this case, it appears that the jury accepted the interviews as proof of guilt beyond a reasonable doubt, and completely ignored the fact that none of the allegations made by the two alleged victims were corroborated by any evidence.

Even if the testimony is given weight and credibility, there is insufficient evidence to show that the second element of sexual assault was satisfied in Counts One through Four. Additionally, there is no evidence to prove the intent requirement of Counts Three and Four, that the touching was done with the intent to either degrade Javari or sexually gratify Holt. Lastly, there is no possible way to determine beyond a reasonable doubt when the alleged conduct occurred from the testimony given at trial.

The only evidence that can be said to support the second element of sexual assault, that anything of that nature ever even occurred, was the testimony of Javari and Jewlien. This testimony was, therefore, essential to the

verdict. The State's evidence, and the conviction that resulted, were therefore based entirely on inherently and patently unreliable evidence. Even if the testimony is viewed in light most favorable to support the verdict, and it is given weight and credibility, it does not establish all of the elements of sexual assault beyond a reasonable doubt. Specifically, the testimony at trial does not establish that "intercourse" with Jewlien ever occurred, or where and when any of the conduct ever occurred. For these reasons, the Court should reverse the guilty verdict on the basis that the evidence was insufficient to support it.

B. Trafficking of a child

Holt was also convicted of trafficking of a child in violation of Wis. Stat. § 948.051, which was Count 5 of the Amended Information. Section 948.051(1) states: "Whoever knowingly recruits, entices, provides, obtains, or harbors, or knowingly attempts to recruit, entice, provide, obtain, or harbor, any child for the purpose of commercial sex acts . . . or sexually explicit performance is guilty of a Class C felony."

"Child" is defined by Wis. Stat. § 948.01(1) as "a person who has not attained the age of 18 years." "Commercial sex act" is defined by Wis. Stat. § 940.302 "sexual contact for which anything of value is given to,

promised, or received, directly or indirectly, by any person."

Section 948.051 was included in 2007 Wisconsin Act 116 and 2007 Senate Bill 292, enacted on March 19, 2008 and published on April 2, 2008. Therefore, in this case, there is an additional requirement that the State must prove beyond a reasonable doubt that the alleged trafficking occurred, at the very earliest, on or after April 3, 2008.

In order for the jury to convict Holt of trafficking of a child in this case, it must have found beyond a reasonable doubt that she 1) knowingly provided Javari, 2) who was under 18 at the time, 3) for the purposes of a commercial sex act. Additionally, the jury must have found beyond a reasonable doubt that the alleged child trafficking occurred on or after April 3, 2008.

It is clear from the evidence that Javari was under the age of 18 as required by Sections 948.01(1). (R51:77). Therefore, Holt concedes that the State proved the first element (age of victim) of trafficking of a child. The issue in this case, however, is that the State did not produce sufficient evidence to prove the other elements beyond a reasonable doubt.

Again, the only evidence regarding the actual alleged conduct consisted entirely of Javari's testimony, which was

inherently incredible. For the same reasons described above, the conviction should be reversed. Notwithstanding, the testimony does not establish all of the elements of the crime beyond a reasonable doubt.

The additional issue here, however, is that there is no credible evidence of when the alleged conduct actually occurred. Javari's testimony is inconsistent at best on this issue. In order to prove that the alleged trafficking occurred after April 3, 2008, the State attempted to elicit more information from Michele, but was unsuccessful. Michele's testimony is inconsistent with respect to when Javari had spent time at the defendant's house. (R52:10-12). When asked whether Javari had spent time at the Holt's home in Fall of 2009 to Spring of 2010, Michele answered "I'm going to say no." (R51:91). If Michele's testimony is credible, it only establishes the last possible date that Javari would have been at the Holt's home would have been in January, 2010. There is no credible evidence in this case to establish beyond a reasonable doubt that the specific act of the alleged trafficking occurred on or after April 3, 2008.

CONCLUSION

For the reasons set forth herein, the Defendant-Appellant respectfully requests that the Court vacate

judgment of conviction, and remand this matter to the circuit court with instructions that 1) the audiovisual recording of Jewlien's forensic interview is not admissible as trial evidence or 2) that the court shall transcribe the audiovisual recordings to the official court record in the event the recordings are produced and published at trial. Alternatively, the Defendant-Appellant respectfully requests that the Court reverse the judgment of conviction for the reasons set forth above.

Dated this 8th day of April, 2015.

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FORM AND LENGTH CERTIFICATION - BRIEF

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8). The length of this brief is 34 pages, produced in monospaced font.

I further certify that filed with this brief is an appendix that complies with Wis. Stat. §809.19(2)(a)and that it contains 1) a table of contents, 2) the findings or opinion of the circuit court, 3) and 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 decisions.

Dated this 8th day of April, 2015.

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ELECTRONIC FILING CERTIFICATION - BRIEF

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of April, 2015.

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IN THE
WISCONSIN COURT OF APPEALS
District I

STATE OF WISCONSIN

Plaintiff-Respondent,

v. **Appeal No.: 2013AP000339 CR**
Circuit Court Case No. 2010CF001632

BEVERLY RESHALL HOLT, A/K/A BEVERLY R. MARSH

Defendant-Appellant,

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
) ss
MILWAUKEE COUNTY)

I, Mark A. Ruppelt, being first duly sworn, on oath deposes and states that I am an Attorney with the law firm of Ruppelt Law Office, LLC; that a true and accurate copy of the attached Defendant-Appellant's Brief and Appendix in the above-captioned matter was served upon legal counsel named below by depositing same postage paid in the U.S. Mail on April 8th, 2015.

Attorney Karen Ann Loebel
821 W. State Street
Milwaukee, WI 53233-1427

Dated at Glendale, Wisconsin, this 8th day of April, 2015.

/s/ Mark A. Ruppelt
Mark A. Ruppelt

Subscribed and sworn to before me
this 8th day of April, 2015.

_____
Notary Public, State of Wisconsin
My commission _____.