STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP2738-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

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

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE RICHARD J. SANKOVITZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

JOHN S. GREENE
Assistant Attorney General
State Bar #1002897

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3936
(608) 266-9594 (Fax)
greenejs@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

STATEMENT OF THE CASE

The State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Defendant-appellant Beverly Holt was the occasional babysitter of two young brothers, JMP and JWP, who at the time she began watching them, were approximately three and four years old, respectively. The two children independently reported a variety of sexual abuse by Holt, including sucking their penises. JWP also related that Holt had forced him to touch her breasts and her vaginal area, and that Holt had charged money to other women so that they could also molest JWP.

The brothers' statements led to the State charging Holt with four counts of sexual assault of a child, and then later adding one count of child trafficking (2; 25). The first sexual assault count involved the younger brother, JMP; on the remaining counts, JWP was the victim (2).

A jury convicted Holt on all counts, and the court sentenced her to the mandatory minimum period of incarceration—twenty-five years (37). *See* Wis. Stat. § 939.616(1r).

On this direct appeal, Holt makes two claims. First, she contends that the trial court erred by admitting into evidence the video recording of the police interview of the younger victim, JMP. Second, Holt challenges the sufficiency of the evidence to sustain any of the counts.

Holt's claims fail.

I. The Trial Court Properly Admitted Into Evidence the Videotape of JMP's Interview By the Police.

After receiving the reports of the alleged sexual abuse of JWP and JMP, the police conducted interviews of each of them separately (75-Exh. 1; 75-Exh. 6). Holt did not object to the admission of JWP's interview, but sought to preclude admission of JMP's recorded interview (16:3; A-Ap. Exh. A:3-8).[1] In that interview JMP described the assault that formed the basis for count one, in which Holt had sucked on his penis (2:2).

Holt assigns three errors to the admission of the recording: 1) the evidence did not establish that JMP understood the importance of telling the truth; 2) JMP's videotaped interview lacked sufficient indicia of reliability to support its trustworthiness; and 3) JMP was not "available" to cross-examine at trial because of his inability to answer questions about his prior statements. None of these claims has merit.

A. Applicable Legal Principles and Standard of Review.

A statutory hearsay exception authorizes the admission at a criminal trial of audiovisual recordings of a child witness' statement, provided certain conditions are met. Wis. Stat. § 908.08(1). Those prerequisites include the availability of the child to testify at trial and the provision of prior notice by the party offering the recorded statement. Wis. Stat. §§ 908.08(1) and (2)(a).

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[1] Holt's appendix is not paginated, making it difficult to cite. When referencing a document in Holt's appendix, the State will identify the appendix exhibit containing the cited material and, if the document is a transcript, the page number appearing on the bottom of the transcript page (which is the original page number from the transcript).

When the child witness is under age twelve at the time of trial, the court must admit the recording upon finding, among other things:

> That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth [and]
>
> That the time, content and circumstances of the statement provide indicia of its trustworthiness.

Wis. Stat. § 908.08(3)(c) & (d).

This court normally reviews a trial court's determination whether to admit a videotaped recording under Wis. Stat. § 908.08 for an erroneous exercise of discretion. *State v. Tarantino*, 157 Wis. 2d 199, 211, 458 N.W.2d 582 (Ct. App. 1990). However, this court has reviewed de novo a trial court's determination that a child witness understood that false statements are punishable and that telling the truth is important, pursuant to Wis. Stat. § 908.08(3)(c). *State v. Jimmie R.R.*, 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 606 N.W.2d 196. The court reasoned that where the only evidence relevant to the finding of fact is contained in the recording, the appellate court is in as good a position as the trial court to evaluate the evidence. *Id.*

B. The Trial Court Properly Determined That JMP Sufficiently Understood the Importance of Telling the Truth.

Holt asserts that the circuit court erred when it found that JMP understood the importance of telling the truth, as required by Wis. Stat. § 908.08(3)(c) (Holt's brief at 14-16). But the record supports the circuit court's finding that the recording satisfied this criterion.

Holt contends that "there is no evidence that [JMP] could even distinguish between a truth and a lie . . ." (Holt's brief at 14). To support her thesis, she cites several obvious errors JMP made in answering questions (Holt's brief at 14-15), but these isolated fragments do not establish that JMP did not demonstrate an ability to understand the importance of telling the truth.

Certainly JMP answered some simple questions incorrectly, but viewing the totality of the exchange between Officer Trisha Klauser and JMP, his statements and demeanor provided ample reason to conclude he understood the importance of telling the truth.

At the time of the March 2010 interview, JMP was four years old (51:77; A-Ap. Exh. E:77; 75-Exh. 6 at 16:50:20). As the circuit court properly recognized, JMP's age played a major part in his ability to convey information in response to questions (46:4; A-Ap. Exh. B:4).

Holt cites four statements by JMP that provide the basis for her claim that he could not distinguish the truth from a lie:

1) he incorrectly deemed the statement "the floor . . . is red" as the truth, when it was actually blue;

2) he shook his head "no" when asked if he would tell the truth;

3) he stated that the assault happened "yesterday"; and

4) he said that Holt was white, when she actually was black.

(Holt's brief at 14-15).

Holt's selective presentation does not provide a complete or accurate picture of the interview.

First, JMP's erroneous statement that "the carpet is red" was the truth, reflected obvious—but momentary—confusion. This is clear from his body language and expression, and the fact that when the question was repeated he emphatically gave the correct answer, ten seconds after he misspoke (75-Exh. 6 at 16:51:10 - 51:24).

And immediately after this exchange, JMP correctly identified two true statements ("my pants are black" and "you are a boy") (75-Exh. 6 at 16:51:26 - 51:35).

Officer Klauser then asked "what happens to kids if they tell a lie and they get caught?" and JMP responded: "put on the wall" (75-Exh. 6 at 16:51:36 - 51:45). Asked what that meant, JMP said: "they bad" (75-Exh. 6 at 16:51:46 – 51:50). When asked "what happens at school if you tell a lie?" JMP responded: "put me in a chair" (75-Exh. 6 at 16:51:51 - 51:56).

Officer Klauser continued by asking whether it is important to tell the truth, to which JMP nodded affirmatively (75-Exh. 6 at 16:51:59 – 52:03).

And when asked whether he promised to tell her the truth, JMP alternated between nodding his agreement and shaking his head and saying "no." (75-Exh. 6 at 16:52:06 – 52:20). After JMP said "no" when asked whether he would promise to tell the truth, Officer Klauser asked "why?" (75-Exh. 6 at 16:52:21). JMP did not respond. She then asked "do you know what I'm talking about, do you know what I'm asking?" and JMP shook his head "no" (75-Exh. at 16:52:29 – 52:31).

Officer Klauser then asked JMP whether he promised to tell her "the right thing . . . what happened?" His response was clear and direct: "I did" (75-Exh. 6 at 16:52:32 – 52:36). When Officer Klauser followed up with "you did what?" and he replied: "tell you the right things" (75-Exh. at 16:52:36 – 52:39).

As for JMP's statement that the assault happened "yesterday" (75-Exh. 6 at 16:44:20), the inability to accurately order events and establish a chronology is a hallmark of young children. As the State's expert in this trial, Liz Ghilardi, testified, young children have difficulty in placing events in time (51:35, 37-38). Officer Klauser, who interviewed JMP, agreed. She testified that children as young as JMP are not expected to provide accurate date information, and frequently misuse terms like yesterday, today and tomorrow (50:109).

The case law bears out this principle. The courts have recognized that young children cannot be held to an adult's ability to comprehend and recall dates and other specifics. As this court has noted:

> Some liberality must be permitted in this area because of the age of the prosecutrix. A person should not be able to escape punishment for such a . . . crime because he has chosen to take carnal knowledge of an infant too young to testify clearly as to the time and details of such . . . activity.

State v. Fawcett, 145 Wis. 2d 244, 249-50, 426 N.W.2d 91 (Ct. App. 1988) (citations omitted); *see also State v. Hurley*, 2015 WI 35, ¶ 42, 361 Wis. 2d 529, 861 N.W.2d 174, *reconsideration denied*, (June 25, 2015) (holding it was unrealistic to expect six-year-old to "particularize the dates or the sequences in which the assaults occurred").

Nor does JMP's inaccurate description of Holt as looking "white" (75-Exh. 6 at 16:54:05) demonstrate he was lying, as opposed to being confused or making a mistake. It certainly is insufficient to undermine all of the other indicia that JMP understood the importance of telling the truth.

The trial court aptly attributed JMP's "obvious errors" to his age, and concluded that JMP's recognition that telling the truth is important and there are punishments associated

with lying "means he is willing to take his duty seriously (46:4; A-Ap. Exh. B:4). This conclusion is consistent with the recording, as this court can see for itself.

To support her argument Holt cites a single case, *Jimmie R.R.* (Holt's brief at 14). But that case actually reinforces the circuit court's decision in this case. In *Jimmie R.R.*, this court upheld the admission of videotaped testimony of a child victim against a claim that "the State did not establish that the victim understood that 'false statements are punishable' as required by [Wis. Stat. § 908.08(3)(c).]" 232 Wis. 2d 138, ¶ 2.

As in this case, in *Jimmie R.R.* it was undisputed that one of the two prongs of that statutory requirement—i.e., understanding that telling the truth is important and understanding that false statements are punishable — were met. But the situation in *Jimmie R.R.* was the converse of that in this case. Here Holt does not challenge JMP's understanding that false statements are punishable, but claims only JMP did not understand the importance of telling the truth.

In *Jimmie R.R.*, the factors were reversed. It was undisputed that the child understood the importance of telling the truth; the defendant asserted there was no indication the child understood that false statements are punishable. 232 Wis. 2d 138, ¶ 41.

Rejecting the defendant's argument, this court emphasized that the two prongs of the statute "are very much interrelated," such that an understanding of the importance of telling the truth implies that negative consequences flow from lying. *Id.* ¶ 42. The court observed that the interviewer had used the word "lie" with the victim, which evoked the possibility of punishment for bad conduct, and also noted the extraordinary nature of the interview in the child's life: "[t]he solemnity and importance of such a moment would not be lost on a young child." *Id.* ¶¶ 43-44. Despite the absence of an express statement of the

understanding required in the statute, based upon "the entire interview, the language employed and the surrounding circumstances," the court found that the statutory requirement was satisfied. *Id.* ¶ 45.

The rationale of *Jimmie R.R.* applies even more strongly here. By not challenging admission of the recording on the understanding-of-punishment prong of the statute, Holt tacitly acknowledges that JMP's statements satisfy this requirement. Holt argues only that the recording did not adequately establish that JMP understood the importance of telling the truth (Holt's brief at 14-16).

But understanding that one can be punished for lying inherently reflects an understanding that telling the truth is important—since punishments are for bad conduct—even more than the opposite proposition. While arguably a child could understand that telling the truth is important without necessarily recognizing that lying brings punishment, the reverse is not true. Logic dictates that avoiding punishment is important to a child, even if the child does not fully grasp the moral justifications for telling the truth.

As in *Jimmie R.R.*, there is "nothing in the facts surrounding the interview" that suggest JMP did not associate the fact that lying can carry punishment with the fact that telling the truth is important. 232 Wis. 2d 138, ¶ 42. The interview as a whole adequately demonstrates that JMP could in fact differentiate truth from falsity, and coupled with the indicia of reliability—examined below—it sufficiently established this prong of the statutory test.

Holt also asserts that the circuit court should have rescinded its admission of the recording based upon JMP's trial testimony. According to Holt, in its questioning of JMP the State managed only to establish JMP's "ability to determine the correct color of certain objects, and not the ability to determine the veracity of a statement" (Holt's brief at 16). Holt is wrong.

In the first place, Holt never moved to strike admission of the recording based upon JMP's trial testimony. She thus forfeited any objection. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727.

But even if not forfeited, Holt's claim lacks merit. The trial transcript reflects that JMP correctly answered "truth" or "lie" to a series of questions not only about colors but including a question about whether JMP was a boy (50:117-18; A-Ap. Exh. D:117-18). Moreover, JMP reflected his understanding of the importance of telling the truth by stating that God wants us to tell the truth, and that when kids tell lies they get in trouble (50:118; A-Ap. Exh. D:118). He stated that when this happens at school kids "go to the office," which is a "bad" thing (50:118; A-Ap. Exh. D:118).

After confirming that telling lies is a bad thing, JMP made a "pinkie promise" with the prosecutor to tell the truth (50:119; A-Ap. Exh. D:119). Holt's counsel neither objected to JMP testifying nor questioned him at this juncture about his understanding of truthfulness (50:120).

In sum, both the recorded interview and JMP's trial testimony adequately established that he understood the importance of telling the truth, thereby satisfying the requirements of Wis. Stat. § 908.08(3)(c).

C. The Recorded Interview Contained Sufficient Indicia of Reliability to Warrant Admission.

Holt next asserts that JMP's recorded interview did not satisfy Wis. Stat. § 908.08(3)(d) because it did not contain sufficient indicia of trustworthiness under the

criteria for reliability enunciated in *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988) (Holt's brief at 16-19).[2]

In summary, those factors include:

> [T]he child's age, ability to communicate and familial relationship with the defendant; the person to whom the statement was made and that person's relationship to the child; the circumstances under which the statement was made, including the time elapsed since the alleged assault; the content of the statement itself, including any signs of deceit or falsity; and the existence of other corroborating evidence.

State v. Snider, 2003 WI App 172, ¶ 17, 266 Wis. 2d 830, 668 N.W.2d 784 (citing *Sorenson,* 143 Wis. 2d at 245-46). This list of factors is not exclusive and no single factor is dispositive. *Sorenson,* 143 Wis. 2d at 245-46.

Holt's claim that JMP's statements in the interview are unreliable focuses on three grounds: 1) JMP's young age; 2) the year-and-a-half delay between the sexual assault and the interview; and 3) the allegation that there was "no corroborating evidence to support the statement" (Holt's brief at 17-18). Her argument fails.

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[2] In *Sorenson* the supreme court was not applying the fairly recently enacted Wis. Stat. § 908.08, but was deciding whether the recorded testimony of a child sexual assault victim at the preliminary hearing was properly admitted at trial under the residual hearsay exception, Wis. Stat. § 908.03(24). 143 Wis. 2d 266, 242-43, 421 N.W.2d 77 (1988). Wis. Stat. § 908.08 was enacted "to make it easier" to admit video recorded statements of children in criminal cases. *State v. Snider*, 2003 WI App 172, ¶ 13, 266 Wis. 2d 830, 668 N.W.2d 784.

1. That Holt's sexual assault victim was only three years old does not preclude prosecution.

Holt first suggests that JMP's statements in the recorded interview are not reliable because he was four at the time of the interview and only three at the time he alleged Holt sexually assaulted him (Holt's brief at 17).

Surely Holt is not suggesting that three-year-olds are fair game for sexual predators because of their age and their inability to relate facts in the same manner as adults. The recognition that children are different is, of course, the very reason the legislature enacted Wis. Stat. § 908.08. To the extent Holt suggests that age alone is a reason not to rely on a child victim's statements, the court should reject it out of hand. It is what JMP said, and how he said it, that governs the reliability of his statements.

2. Delayed reporting by child victims of sexual assault is common and does not render their statements unreliable.

Holt also points to the delay of more than sixteen months between the crime and JMP's interview as additional grounds not to believe JMP's statements (Holt's brief at 17). Again, this blanket assertion is contrary to settled law recognizing the reality of delayed reporting by child victims.

That child victims delay reporting sexual abuse is very common. As the State's expert, Liz Ghilardi, testified, "[c]hildren almost never tell immediately after something happens. A delay can be a week, a delay can be a month, a delay can be several months, a delay can be several years" (51:30). Another expert the State presented, Debra Donovan, a sexual assault nurse examiner, concurred (52:40). She testified that delay in reporting by child sexual abuse

victims is common, and that a delay of several months or more makes it extremely unlikely that there will be observable evidence obtained through a physical examination of the child (52:40-41).

The courts recognize the realities of delayed reporting by child victims:

> The child may have been assaulted by a trusted relative or friend and not know who to turn to for assistance and consolation. The child may have been threatened and told not to tell anyone. Even absent a threat, the child might harbor a natural reluctance to reveal information regarding the assault. These circumstances many times serve to deter a child from coming forth immediately. As a result, exactness as to the events fades in memory.

Fawcett, 145 Wis. 2d at 249.

Further, "[t]he vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance. . . . Such circumstances ought not prevent the prosecution of one alleged to have committed the act." *Id.* at 254 (citations omitted).

Contrary to these accepted principles, under Holt's theory, many sexual abuse cases could not be prosecuted simply because of delayed reporting. If Holt means to say that the delay in reporting in itself suffices to discredit the victim's statements, her argument is foreclosed by the principle that "no single factor [can] be dispositive of a statement's trustworthiness." *Sorenson*, 143 Wis. 2d at 246.

3. Although not required, there was corroboration of significant aspects of JMP's statements.

Holt's remaining basis for her claim that JMP's statements in the interview were unreliable is her allegation that there was no corroborating evidence to support JMP's statement (Holt's brief at 18). Not so.

True, there were no other witnesses to Holt's assault of JMP, and no physical evidence of the assault. But this is hardly uncommon in child sexual abuse cases, particularly when there is delayed reporting of the assault. *See Fawcett*, 145 Wis. 2d at 249 ("Often there are no witnesses except the victim.").

And while four-year-old JMP was not, in the words of the circuit court, the most "intelligent historian" (46:4; A-Ap. Exh. B:4), nonetheless there was corroboration of key aspects of his statement.

First, JMP was emphatic that there was one assault and that it occurred not at Holt's residence but at his own (75-Exh. 6 at 16:43:37 – 43:47; 16:44:00 – 44:08; 16:44:25 – 44:37; 16:45:11 – 45:17). At trial, the victims' mother corroborated this part of JMP's statement by testifying that on a single occasion Holt babysat at the victims' home, which at that time was on West Garfield Street (51:86-87; A-Ap. Exh. E:86-87).

Second, when asked whether anyone else was present, JMP shook his head to indicate "no" (75-Exh. 6 at 16: 53:21 – 53:27). This is consistent with the victims' mother's testimony that on that single instance when Holt babysat in their home, JWP was not there (52:12; A-Ap. Exh. F:12).

Third, in trying to establish a timeframe for the assault, Officer Klauser asked JMP whether it was warm or cold outside when it happened. JMP said, "cold" (75- Exh. 6 at 16:45:26 – 45:35). This is consistent with the mother's

testimony that the single occasion when Holt babysat at her house was in September or October (52:11-12; A-Ap. Exh. F:11-12).

Fourth, in the recorded statement JMP plainly expresses, both verbally and nonverbally, profound embarrassment and discomfort about what he experienced. At one point, when asked how the assault made him feel, JMP said "mad" (75-Exh. 6 at 16:53:38 – 53:44). This is also consistent with the testimony of JMP's mother, who stated that JMP "screamed not to go" to Holt's house (52:21-22).

While the boys initially indicated to their mother that they did not like going to Holt's house because her husband was mean to them (52:22), this could well have been a mask for the real reason—namely that Holt had sexually abused them. The State's expert, Liz Ghilardi, explained that children may express that they do not want to go to an abuser's house, but be unwilling or unable to directly explain the real reason (51:33-34). Certainly if JMP had eagerly and happily gone to Holt's house this would have weakened the claim of abuse. But his strongly expressed desire not to return to Holt's house is wholly consistent with his subsequent report of Holt's conduct.

Not only does Holt's analysis of the select *Sorenson* factors she focuses on not withstand scrutiny, but she neglects to address the numerous factors which support the circuit court's conclusion that JMP's statements were sufficiently reliable.

Although the silent premise of Holt's argument is that JMP fabricated the allegations against Holt, she never suggests any motive for fabrication—either on the part of JMP or his mother, to whom Holt "was like a sister" and who characterized her relationship with Holt as "wonderful" before the abuse (51:80).

And the demeanor of JMP throughout the interview speaks volumes about whether he was merely spinning a tall tale or was telling the truth. His shame and embarrassment was palpable. JMP plainly did not want to talk about the details of the assault, and referred to body parts or sexual contact as "nasty" (75-Exh. 6 at 16:43:18 – 43:28; 16:47:02 – 47:05). When Officer Klauser pointed to nipples on a drawing of a boy and asked what they were, JMP said "private" (75-Exh. 6 at 16:56:12 – 56:17).

As JMP was being interviewed, he frequently hesitated in describing the sexual contact, covered his face in his hands, and exhibited other behaviors that reflect extreme discomfort and embarrassment, bolstering the reliability of his statement. And what happened when Officer Klauser left the room near the end of the interview? JMP immediately began crying, and experienced extreme distress.

JMP's demeanor throughout the interview is simply not consistent with merely spinning a false story about Holt. Quite the opposite, it infuses his accusations with reliability.

Another relevant factor the court recognized in *Sorenson* was whether the child's statement "reveals a knowledge of matters not ordinarily attributable to a child of similar age." 143 Wis. 2d at 246. This factor is prominent in this case.

A four-year-old cannot be expected to have knowledge of adult sexual matters like "humping" or oral sex, much less to concoct a tale featuring things that obviously cause great embarrassment to the child. Holt offers no explanation for how JMP could have known about the things he was describing other than by experiencing them through Holt's assault of him.

Another factor Holt ignores is that in the interview JMP was speaking to a police officer whom he did not know, as opposed to a parent or other person with whom he had a

close relationship. *Id.* at 245. There is no suggestion of any improper coaxing or slanted questioning, as the video plainly shows.

Finally, the court in *Sorenson* observed that the "opportunity or motive of the defendant[] should be examined for consistency with the assertions made in the statement." 143 Wis. 2d at 246. As noted above, JMP's mother confirmed that Holt had access to JMP during one babysitting session at JMP's residence, when no one else was present (51:86-87; A-Ap. Exh. E:86-87; 52:12; A-Ap. Exh. F:12). And sadly, the sexual gratification that was the clear motive for Holt's assault of JMP is reflected in JMP's statements regarding the assault.

Thus there are abundant indicia of reliability of JMP's statements. Holt has pointed to nothing that undermines the circuit court's conclusion that the recorded interview satisfies the requirements of Wis. Stat. § 908.08(3)(d).

D. JMP Was Available to Holt For Cross-Examination.

Holt next argues that the admission of JMP's recorded interview was erroneous because JMP was not "available to testify," as required by Wis. Stat. § 908.08(1) (Holt's brief at 19-20). She asserts that this deprived her of her right to cross-examine JMP (Holt's brief at 20). Holt is wrong.

Holt did not preserve this claim for appeal. Her counsel neither objected to JMP's trial testimony nor moved to strike it or the video recording, thereby waiving the claim. *Huebner*, 235 Wis. 2d 486, ¶ 10. *See also State v. Boshcka*, 178 Wis. 2d 628, 642, 496 N.W.2d 627 (Ct. App. 1992) (unobjected to errors, both evidentiary and constitutional, are generally considered waived).

Even had Holt preserved this claim for appeal, it lacks merit.

Holt relies upon Wis. Stat. § 908.04(1)(c), which defines "unavailability as a witness" for purposes of the hearsay statutes to include "situations in which the declarant . . . [t]estifies to a lack of memory of the subject matter of the declarant's statement." Holt contends that this standard was met because although JMP took the stand at trial, he stated he could not remember being at Holt's house, "where he alleged that the conduct occurred" (Holt's brief at 19).

Holt has the essential facts wrong. JMP said during his interview that the assault occurred not at Holt's residence but at his own home (75-Exh. 6 at 16:43:37 – 43:47; 16:44:00 – 44:08; 16:44:25 – 44:37).

Holt also claims that JMP could not "testify with any accuracy" as to the subject of the recorded statement; that JMP stated Holt did not "suck on his wee wee;" and that he could not remember the interview (Holt's brief at 19). But Holt ignores other testimony by JMP, including that he told his mother the truth about what Holt did (51:11-12; A-Ap. Exh. E:11-12).

More importantly, Holt was not deprived of her right to cross-examine JMP. Like many witnesses, JMP gave some inconsistent answers, but he responded to the questions put to him. Holt's counsel cross-examined JMP on a variety of topics, and was free to explore any aspect of JMP's recorded statement he wished (51:13-19, 22-23; A-Ap. Exh. E:13-19, 22-23). That Holt's counsel chose not to do so did not make JMP unavailable for purposes of cross-examination.

Settled law dissolves Holt's claim. This court has held that "a witness's claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the Confrontation Clause under *Crawford,* so long as the witness is present at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination." *State v. Rockette*, 2006 WI App 103, ¶¶ 26-27, 294 Wis. 2d

611, 718 N.W.2d 269. The court concluded that "despite [the witness'] purported memory loss, he appeared at trial, thus removing any issue under the Confrontation Clause." *Id.* ¶ 27. *See also United States v. Owens,* 484 U.S. 554, 556 (1988).

That is precisely the scenario here. JMP took the stand and answered the questions put to him. Holt was free to attack JMP's credibility and use his inability to remember against him. The right of confrontation requires no more. *Id.* at 559-60.

E. The Trial Court Was Not Required to Provide a Transcript of the Recorded Interview.

Holt further claims the circuit court erred by refusing to require preparation of a transcript of JMP's recorded statement (Holt's brief at 20-23).[3] She relies on *State v. Ruiz-Velez*, 2008 WI App 169, 314 Wis. 2d 724, 762 N.W.2d 449. In that case, this court required transcription of a recording admitted under Wis. Stat. § 908.08, based upon a statute that provided that "[a]t trial, videotape depositions *and other testimony* presented by videotape shall be reported." *Id.* ¶ 4 (quoting Wis. Stat. Rule 885.42(4)) (emphasis added). Reinforcing the court's conclusion was SCR 71.01(2), which required the reporting of all circuit court proceedings. *Ruiz-Velez,* 314 Wis. 2d 724, ¶ 5.

Holt's argument seems unassailable but for one problem—it is based entirely upon laws that no longer exist. A backlash against the holding of *Ruiz-Velez* resulted in a

[3] Holt seeks to somehow parlay a missing transcript into a remand for a new trial (Holt's brief at 22-23). The authority for this non-sequitur is not explained. At most, if a transcript should have been prepared after trial, it could be done so now for purposes of postconviction and appellate matters.

petition to the supreme court to alter the two applicable rules.[4] The court obliged.

Through S. Ct. Order 10-06, filed November 5, 2010, the court narrowed the scope of Wis. Stat. Rule 885.42(4) by deleting the phrase "and other testimony" from the rule, thereby limiting mandatory transcription to videotape depositions only. And it made the transcription of other types of recordings discretionary with the court, under § 885.42(2).[5] S. Ct. Order 10-06 at 2-3. The court also simultaneously modified SCR 71.01(2), enlarging the exception in subsection (e) to cover video as well as audio recordings. *Id.* at 2. The rules changes took effect on January 1, 2011, a year before the trial in this case. *Id.*

The change in the law eviscerates Holt's argument that the circuit court had a mandatory duty to require transcription of JMP's recorded interview. Instead, that decision was left to the court's discretion. Holt offers no reason to question the court's discretionary decision not to require the reporter to transcribe the recorded interview.

II. Ample Evidence Supported the Jury's Guilty Verdicts On All Counts.

Holt's second assault on the judgment of conviction is to claim that there was insufficient evidence to support convictions on any of the five counts (Holt's brief at 23-33). She contends that there was insufficient evidence of sexual intercourse or sexual contact to support the verdicts on counts one through four, and insufficient evidence of intent to support the convictions on counts three and four. As to

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[4] The petition that induced the rule changes, petition 09-05, can be found online at https://www.wicourts.gov/supreme/docs/0905petition.pdf.

[5] S. Ct. Order 10-06 can be found at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=56527.

count five, child trafficking, Holt claims there was insufficient evidence to establish that the offense occurred after the effective date of the statute, April 3, 2008.

To succeed on its challenge to the sufficiency of the evidence, Holt faces a daunting standard:

> The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true. . . . The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted. . . .

State v. Poellinger, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990) (quoted sources omitted).

The jury's verdict here easily clears this hurdle. The evidence supported the verdict on all counts.

A. The Jury Reasonably Found JMP's Testimony Credible.

Holt's essential contention seems to be that JMP's testimony "was inherently and patently incredible and, in some instances, demonstrably false" (Holt's brief at 27).

But inconsistent testimony does not render a witness' testimony incredible. A factfinder can accept some portions of a witness' testimony and not other portions. In *Ruiz v. State*, 75 Wis. 2d 230, 249 N.W.2d 277 (1977), the supreme court held that:

> Even though there be glaring discrepancies in the testimony of a witness at trial, or between his trial testimony and his previous statements, that fact in itself

> does not result in concluding as a matter of law that the witness is wholly incredible. Rather, the question is whether the factfinder believes one version rather than another or chooses to disbelieve the witness altogether. Only a question of credibility, which in the instant case was resolved in favor of believing the testimony proving guilt, is raised. That question was one for the jury.

Id. at 232.

This is settled law. "[E]ven where a witness is inconsistent and where some of his testimony is incredible and contradictory, the jury is entitled to believe some, all, or none of his testimony." *Penister v. State*, 74 Wis. 2d 94, 103, 246 N.W.2d 115 (1976). Stated another way, "[i]nconsistencies and contradictions in a witness' testimony are for the jury to consider in judging credibility and the relative credibility of the witnesses is a decision for the jury." *Kohlhoff v. State*, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978) (citation omitted). Thus, it is up to the factfinder to determine how, if at all, inconsistency in a witness' testimony bears on credibility.

Holt does not deny that numerous times JMP clearly stated that Holt had "sucked my wee wee" or words to that effect. It was up to the jury to evaluate all of JMP's statements and to determine which it found credible and which not. That is exactly what the jury did.

The video recording of JMP alone provided sufficient evidence that Holt committed sexual assault against JMP. That JMP, at other times, shied away from repeating the allegations or instead denied them, does not preclude a reasonable jury from believing his allegations. The jury reasonably could have concluded that there were reasons for JMP's reluctance on the witness stand or his lack of memory that did not nullify his essential allegations.

Holt reiterates her claims that the State was required to provide corroboration of JMP's statements and that it failed to do so (Holt's brief at 30). But as shown above,

neither proposition is true. Corroboration is not required, but in any event there was ample corroboration and other indicia of reliability to render a jury's acceptance of JMP's statements reasonable.

Finally, it was entirely reasonable for the jury to evaluate JMP's demeanor, both during the recorded interview and at trial, and to find credible his statements that Holt had sucked his penis. Holt has offered no basis for concluding that no reasonable jury could have found JMP credible.

B. Holt Offers Neither Facts Nor Argument Impugning the Credibility of JWP.

Holt's brief overwhelmingly focuses on JMP; there is scant mention of JWP or the four counts relating only to him. She observes that the only evidence of sexual contact or intercourse came from JMP and JWP, and specifically attacks the credibility of JMP, using examples from his trial testimony (Holt's brief at 27-29).

By contrast, Holt cites nothing specific to impugn JWP's testimony, instead merely lumping the brothers together in the conclusory allegation that their testimony was "inherently and patently unreliable evidence" (Holt's brief at 30-31).

The court should disregard this undeveloped and inadequately briefed argument. *See State v. O'Connell,* 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993).

C. The State Presented Evidence Establishing All of the Elements of the Sexual Assault Offenses.

Holt caps off her sufficiency-of-the-evidence challenge with respect to counts one through four with cursory assertions that there was insufficient evidence to establish elements of those offenses, specifically the commission of sexual assault or sexual contact, the intent to sexually

gratify Holt in connection with the sexual contact counts, and the establishment of the timing of the offenses (Holt's brief at 30). The record readily refutes those conclusory claims.

First, Holt claims that even if the victims' testimony were credible there was insufficient evidence of either sexual intercourse or sexual contact (Holt's brief at 30). Counts one and two required sexual intercourse, which includes fellatio. Wis. Stat. §§ 948.02(1)(b) & 948.01(6). The circuit court's instruction to the jury was faithful to the pattern jury instruction: "sexual intercourse includes fellatio which is oral contact with the penis" (53:9). *See* Wis. JI-Criminal 2101B (Rel. No. 48—5/2010).

Both JMP and JWP reported that Holt had oral contact with their penises. At the beginning of his videotaped interview, JMP plainly stated "TT Bev sucked my wee wee" (75-Exh. 6 at 16:42:18). He later identified a penis as a "wee wee" (75-Exh. 6 at 16:56:35 – 56:38). JMP then demonstrated how Holt sucked on his penis, using a doll Officer Klauser provided (75-Exh. 6 at 16:59:28).

JWP likewise directly testified at trial that Holt had sucked his "private part," which he later identified through a doll as the male genitals (50:34-35, 39-40; A-Ap. Exh. D:34-35, 39-40).

As for counts three and four, the sexual contact element consisted of Holt placing JWP's hand on her breast (count three) and pelvic or vaginal area (count four) (25:2). *See* Wis. Stat. § 948.01(5)(a)2. The State established this element when JWP testified that Holt had touched his hand to her bare "boob" (50:28-29, 44-45; A-Ap. Exh. D:28-29, 44), and to her "private" (50:57). His trial testimony was consistent with his recorded interview, during which he demonstrated how Holt forced his hand to touch both her breast and her pelvic or vaginal area (75-Exh. 1 at 17:14:53 – 15:10).

Holt thus is mistaken that the State failed to adduce evidence of the elements of sexual intercourse and sexual contact.

Holt next contends that there was no evidence of the intent element of counts three and four, namely sexual contact (Holt's brief at 30). The governing statute, Wis. Stat. § 948.02(1)(e), requires that the sexual contact occur "for the purpose of . . . gratifying the defendant." Wis. Stat. § 948.01(5)(a).

The jury reasonably inferred from the evidence that the touching was done to gratify Holt. The sexual touching JWP described was no accident. After all, according to JWP, Holt removed her bra before she held his hand to her breast (50:44-45; A-Ap. Exh. D:44). And the factual context included Holt kissing JWP, undressing him, and sexually abusing him in a variety of ways (50:33-45; A-Ap. Exh. D:33-44). Holt suggests no innocent explanation for the deliberate sexual contact described by JWP, and neither does the record.

Finally, Holt claims that "there is no possible way to determine beyond a reasonable doubt when the alleged conduct occurred from the testimony given at trial" (Holt's brief at 30). If Holt means to assert that the State could not convict her without proof of the precise date when the sexual assaults occurred, she is mistaken.

The precise date of a child sexual assault is not a material element of the offense and thus the State is not required to either allege or prove "an exact date." *State v. Fawcett*, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988). The circuit court properly instructed the jury, using the pattern jury instruction: "it is not necessary for the State to prove that the offense was committed on any specific date" (53:12). *See* Wis. JI-Criminal 255A (Rel. No. 38—4/2000). Holt suggests no authority to the contrary.

Holt did not challenge the sufficiency of the complaint or the information, which alleged that count one occurred between September 1, 2008, and October 31, 2008; that counts two, three, and four occurred between January 1, 2008, and January 31, 2010; and that count five occurred between April 3, 2008, and January 31, 2010 (25).[6]

The evidence of the assaults conformed to these time periods. JMP stated that Holt's assault of him occurred at his home (75-Exh. 6 at 16:44:00 – 44:08), and his mother testified that the only time Holt babysat at her house was in September or October 2008 (52:11-12; A-Ap. Exh. F:11-12). There was indeed evidence that the offense occurred during the range alleged in the information.

As for the remaining counts, Holt's husband, Kenneth Holt, testified that the earliest Holt babysat JMP and JWP at their house was in the summer of 2008 (52:66, 76). The victims' mother testified that the last time Holt watched her children was in January 2010 (52:11; A-Ap. Exh. F:11). Thus the evidence supported the fact that the offenses occurred during the timeframe alleged by the State.

D. The Evidence Adequately Established All of the Elements of the Child Trafficking Offense.

Holt's final argument is that the evidence was insufficient to establish two of the elements of child trafficking, embodied in count five, namely that Holt provided JWP for a commercial sex act, and that the act occurred on or after the effective date of the child trafficking statute, April 3, 2008 (Holt's brief at 32). Holt's argument lacks merit.

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[6] At trial, to make the time periods uniform for counts two through five, the court instructed the jury that the relevant offense period for those counts was April 3, 2008, through January 31, 2010 (52:88-89; 53:12-13).

First, JWP described in detail at trial how Holt, after taking money from two females, threw him in her bedroom, and how the females then proceeded to undress him and themselves and then molest him in multiple ways (50:46-56). This included "humping" him (50:48; A-Ap. Exh. D:48), and "sucking my private part" (50:53). This is child trafficking, in stark form, and Holt does not explain how it can be considered anything else.

Second, Holt's own witness, her husband, refutes her argument that the evidence was insufficient to demonstrate that the child trafficking episode occurred after April 3, 2008, when the statute took effect. On direct examination by Holt's counsel, Kenneth Holt testified that the babysitting stints at their house began in "the summer of '08 or maybe after the summer of '08" (52:66). He echoed this later in the direct examination:

> Q Okay. Now you do have a memory that [JMP and JWP] for some period of time were every now and then at your house and your wife was watching them; is that right?
>
> A Correct.
>
> Q And your recollection is that this started maybe in the summer or right after the summer in 2008?
>
> A Um-hum.
>
> Q Yes?
>
> A Yes.

(52:76-77).

Holt's own husband thus sank her argument by establishing that the trafficking incident could not have occurred prior to April 3, 2008.

In sum, the evidence presented at trial established all of the elements of the crimes of which Holt was convicted.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of the circuit court.

Dated this 23rd day of July, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

JOHN S. GREENE
Assistant Attorney General
State Bar #1002897

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3936
(608) 266-9594 (Fax)
greenejs@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,397 words.

Dated this 23rd day of July, 2014.

_____
John S. Greene
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 23rd day of July, 2015.

_____
John S. Greene
Assistant Attorney General