

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2013AP002738 CR

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

Defendant-Appellant's Brief in Reply

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INTRODUCTION

Defendant-Appellant Holt respectfully submits the following in way of reply to the Brief of Plaintiff-Respondent pursuant to Wis. Stat. § 809.19(4).

I. THE TRIAL COURT ERRONEOUSLY ADMITTED THE AUDIOVISUAL RECORDING OF JMP'S STATEMENT AND JMP'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.

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.* (emphasis added). 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 videotaped statement in this case does not meet the statutory requirements for admissibility under Wis. Stat. § 908.08, and is inadmissible as hearsay.

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

Plaintiff-Respondent relies on Officer Klauser's ability to rehabilitate JMP during the "importance of telling the truth" and "ability to distinguish a truth and lie" portions of the interview. However, the fact that JMP

gave numerous contradicting answers during this inquiry is evidence that, at the time of the interview, he truly did not understand the difference between the truth and a lie. Plaintiff-Respondent acknowledges the contradictory responses (Brief of Plaintiff-Respondent at p. 6).

Plaintiff-Respondent argues that, because JMP understood he could be punished for telling a lie, it logically follows that he could distinguish between a truth and lie. Holt respectfully submits that, while these factors are somewhat intertwined, the inconsistent responses during this portion of JMP's recorded interview and testimony are precisely the situation that the law seeks to avoid. This safeguard was not met in this case.

B. JMP'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 audiovisual recording 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.

Plaintiff-Respondent makes an inaccurate and, quite frankly, incendiary summarization of Holt's argument with

respect to this factor. Holt has never argued that the trial court should have excluded JMP's videotape simply due to his age. Nowhere in Holt's previous argument was it even suggested 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."

Defendant-Appellant's argument with respect to this factor is concentrated on the "context under which the statement was made" (Brief of Defendant-Appellant at p. 17). The circumstances of the interview, which produced the State's most important evidence, were that JMP had lived a third of his life between the time of the alleged acts and the date of his interview. This is the only reason JMP's age was ever mentioned.

Holt raised these issues because, as described above, trial courts are specifically required to consider them when exercising their discretion to admit audiovisual recordings into evidence.

Defendant-Appellant took issue with the court's finding that JMP's inability to articulate the truth was merely the "poise of somebody that young." (R46:4). It is true, as the Plaintiff-Respondent points out, that the law does not hold children to an adult's standard for the purposes of testimony. However, the court did not

adequately reflect for the record why, under these specific circumstances, the videotaped testimony of the child in this case was competent.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT RENDERED

The trial court reasoned 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).

The evidence produced by the State is insufficient to prove the elements of the offenses charged proven beyond a reasonable doubt, and the convictions must therefore be vacated. 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).

ARGUMENT

Holt does not argue that corroboration is required to support a jury’s determination of the credibility of witnesses. Rather, Holt has pointed to the fact that the lack of corroborating evidence provided the jury with no basis to believe one of JMP’s stories over any other. When faced with inconsistent and contradictory statements, there must be a rational basis to believe one statement and not believe another. Plaintiff-Respondent appears to concede that JMP’s testimony was entirely inconsistent.

Plaintiff-Respondent describes Holt’s arguments with respect to sufficiency of the evidence as “conclusory.” However, it is not Holt’s burden to prove that evidence does not exist. It is the State’s burden to prove, with credible evidence, all of the elements of the crime(s) beyond a reasonable doubt.

With respect to the timeframe of the child trafficking charge, it has been previously demonstrated that the testimony with respect to dates and times was entirely inconsistent. The State points to the mother’s testimony as reason to uphold the jury’s finding that the alleged acts

occurred on or after April 3, 2008. Holt did not challenge the allegations of the Information. Instead, Holt challenges the sufficiency of the evidence to prove an element of the crime. A guilty verdict with respect to the child trafficking charge requires that the State prove beyond a reasonable doubt that the act occurred after April 3, 2008. The mother's testimony, which was entirely inconsistent with respect to dates and times, and the other trial testimony does not prove this element beyond a reasonable doubt.

This Reply is aimed at specific issues raised by the Plaintiff-Respondent, seeks to avoid making arguments previously raised, and is no way intended as a waiver of any arguments made in Defendant-Appellant's principal brief and not raised here.

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 JMP'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 and in the principal Brief of Defendant-Appellant.

Dated this 21st day of August, 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 10 pages, produced in monospaced font.

Dated this 21st day of August, 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 21st day of August, 2015.

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