STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP002653-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY J. SMITH,

Defendant-Appellant.

On Appeal From a Judgment of Conviction and Order Denying Postconviction Relief Entered in Walworth County, the Honorable David M. Reddy, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Larry Smith deprived of the effective assistance of counsel, warranting a new trial, when trial counsel elicited testimony that the lead investigator believed the complainant, V.M.H., was telling the truth, and failed to elicit testimony that this investigator knew V.M.H. prior to the investigation?

   The trial court answered: No.

2. Was Social Worker Paula Hocking's testimony about behaviors of child sexual assault victims admissible under ***Daubert***?

   The trial court answered: Yes.

3. Is a new trial in the interest of justice warranted?

   The trial court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Smith would welcome oral argument if it would be helpful to the court. Smith also requests publication in light of the second issue presented, which is the admissibility of the social worker's testimony in light of ***Daubert***.

STATEMENT OF THE CASE

This case is an appeal from a judgment of conviction and order denying postconviction relief entered in Walworth County, the Honorable David M. Reddy, presiding.

The state charged Larry J. Smith with the repeated sexual assault of a child, and sexual assault of a child, in a criminal complaint filed on June 7, 2011. (10). According to the criminal complaint, V.M.H. told police that Smith had been "molesting" her for a number of years. (10:2).

Before trial, the state gave notice it intended to call Paula Hocking as a witness at trial. According to the state, Hocking, a social worker, would testify that child victims of sexual assault often delay in their disclosure of assaults, and describe the range of behaviors that child sexual assault victims may demonstrate. (80:4-5; App. 126-27).

Smith objected to Hocking's testimony on two grounds. First, he argued that the state had not complied with the court's pretrial scheduling order because it had not provided a summary of Hocking's testimony. (80:17-18; App. 121-22). Second, Smith argued Hocking's testimony would not qualify under the ***Daubert*** standard.[1] (80:18; App. 122).

The court held two hearings on the issue of Hocking's testimony and its admissibility. (80; 81). Hocking did not appear at either hearing, nor did the state offer a report of her testimony. The state offered this explanation of Hocking's expected testimony:

> Ms. Hocking will testify regarding reactive behaviors common among child abuse victims. These matters include, but are not limited to child development, use of language, recantation, delayed disclosure, progressive disclosure, disclosure to a trusted person, recall, and minimization by the victim. Ms. Hocking will testify

[1] ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993).

> about reasons for these reactive behaviors based on her training and experience.

(28:8-9).

Judge Reddy ruled that Hocking could testify, and concluded her testimony was admissible under ***Daubert***.

> …[I]t's clear to me that she's not developed these opinions simply to testify in this case. That this is an area that has been developed over the years. And she's not testifying about this case at all, even it's about the general area of—not the general area. Let me use different terminology. I'd say, the field of delayed disclosure, progressive disclosure, and disclosure to trusted persons. It's, again, definitely also an area that has been recognized by our appellate courts pre-*Daubert*, but by the federal courts, post *Daubert*.
>
> So I believe that the proposed testimony is the product of reliable principles and methods based upon its general acceptance. And that based upon the proposed testimony of the witness, will apply the principles and methods reliably to what is at issue in this case or the facts in this case.

(81:25; App. 147).

The case proceeded to jury trial, and the jury convicted Smith of two counts of repeated sexual assault of a child, and one count of second degree sexual assault of a child. (41, 42, 43).

Smith subsequently filed a motion for postconviction relief, seeking a new trial based on a claim of ineffective assistance of trial counsel, or in the interest of justice. (63). Smith argued he was deprived of the effective assistance of counsel relating to counsel's handling of a key state's witness, Investigator Lori Domino. (63:2-11).

Judge Reddy held a hearing on the motion at which trial counsel testified. Judge Reddy denied Smith's postconviction motion, and Smith filed a timely notice of appeal. (67, 68).

STATEMENT OF FACTS

The state charged Larry J. Smith with the sexual assault of V.M.H. V.M.H.'s parents are divorced. (84:74). V.M.H., who was 16-years-old at the time of trial, lived with her mother, Jennifer, a sister and a brother, and her mother's boyfriend, Larry Smith. (*Id.*). V.M.H.'s father, Scott, lived with his wife, Camille, and Camille's daughter, Erica.

The Trial

V.M.H. testified that Smith moved in with her mother when V.M.H. was 11-years-old. (84:75). She testified that Smith repeatedly sexually assaulted her for years, until May of 2011, when she disclosed the alleged assaults to her stepsister, Erica. The two girls reported the information to Camille, V.M.H.'s stepmother, leading to police investigation and the charges against Smith.

A family argument about V.M.H.'s boyfriend immediately preceded V.M.H.'s statement to Erica that Smith was assaulting her. At that time, V.M.H. was dating a 17-year-old boy, John. (84:116). V.M.H.'s parents disapproved of the relationship, and forbade her from seeing John. (84:117). Despite the disapproval, V.M.H. continued to date John, and on May 27, 2011, either Smith or Jennifer confronted V.M.H. about the boy. (84:118). They also contacted V.M.H.'s father, Scott. Scott, Larry, and Jennifer argued with V.M.H. (84:119). V.M.H. testified they were all upset with her, and that she was very upset and crying. (*Id.*).

Scott called John's mother and warned her to keep John away from V.M.H. Erica testified the adults threatened to call the police if V.M.H. did not stop seeing John, and that John would be charged with a crime. (84:171). After this argument, V.M.H. told Erica that Smith had been sexually assaulting her. (84:171-72).

Before trial, the state advised it intended to call Paula Hocking as a witness to testify about characteristics of child victims of sexual assault. Hocking had no personal knowledge of V.M.H. Rather, her testimony was offered to explain a child victim's reactive behaviors. Trial counsel, Jenelle Glasbrenner, objected, citing ***Daubert***. The trial court ruled that Hocking's testimony was admissible.

Hocking works as the "child advocacy manager and forensic interviewer" for the Children's Hospital of Milwaukee. She testified she had interviewed "over a thousand children" who were alleged to have been physically abused, sexually abused, or neglected. (84:199; 201). Hocking has a bachelor's degree in social work, and testified she has received extensive training in the area of child abuse. (84:202). On direct examination, the state asked Hocking if she had seen "common themes or common threads in children that have been abused and neglected." (84:203). Hocking agreed that she had seen such "common threads." (84:203). For example, she testified:

> Um, well, there's certain behaviors that we see in victims. You know, I can talk about delayed disclosure.
>
> It's very common for children not to talk about the abuse right away. Sometimes it takes days, sometimes weeks, months, sometimes years. It's very common that sometimes people don't disclose until they're adults. That is a characteristic that I've seen often in working with victims.

(84:203-04).

Hocking testified that the "best education" she had received in learning about the "reactive behaviors" of child victims was working with victims for over 24 years, and "watching how they disclose." (84:204). She testified it is rare for children to disclose immediately, that often children will tell a close friend and tell the friend not to tell anyone else. (84:205). She testified it is common for children to tell a family member, or somebody the child is close to. (84:206).

Hocking testified a "triggering event" can be the final straw in causing a child to disclose abuse, and that an argument can be such a triggering event. (84:207-08).

The state also called Lori Domino as a witness. Domino, an investigator with the Bloomfield Police Department, interviewed V.M.H. within days of V.M.H.'s accusation of Smith. (84:240). In her trial testimony, Domino described her interview this way:

> [V.M.H.] was very distant, um, appeared upset. Based on her nervousness, when she started speaking, there was a sense of like a weight starting to be lifted; and you can just sense that when you start talking to a victim; when they start disclosing what's been happening to them, you can just see this arua around them just lifting that they're able to tell me what happened to them. And that's what happened with [V.M.H.].

(84:240).

On cross-examination, trial counsel asked Domino about the "weight" lifting off of V.M.H.'s shoulders, and then asked Domino whether V.M.H. was telling the truth about the alleged assaults:

Q: …you testified under direct examination yesterday that you—it appeared that the weight of the world was being lifted off of her; is that correct?

A: Yes.

Q: You don't know whether she's telling the truth or not, do you?

A: I know she's telling the truth.

Q: You know she's telling the truth?

A: Yes.

Q: You were there that night?

A: I was not there.

Q: You were there each and every Tuesday night she alleges this happened?

A: No.

Q: Then how could you be so sure that she's telling the truth?

A: Based on the statements she gave me.

Q: Okay, so if I told you I broke my leg but you can't see my feet, does that mean I broke my leg?

A: Based on how you direct it at me and how you tell me, yes, I will base it on if it's the truth or a lie.

Q: So you can read someone's mind?

A: I can't read their mind.

Q: Have you ever applied to the FBI?

A: I have gone through their schooling.

Q: But have you ever applied for the FBI?

A: No.

Q: So you're sitting here today saying: I know she's telling the truth?

A: Yes.

Q: And what is that based on? What she's told you?

A: Based on what she's told me.

…..

Q: That's because you're going to blanketly believe everything that a child victim says?

A: No.

Q: Well, you did in this case, correct?

A: Because she was telling me the truth.

Q: And how do you know she was telling you the truth?

A: Based on how she was telling me.

Q: And how was she telling you?

A: The first words out of her mouth was that she said "Larry was molesting me."

(85:23-25).

Neither the state nor defense counsel played the videotape of Domino's interview with V.M.H. for the jury.

The jury convicted Smith of all charges.

Postconviction

Smith filed a motion for postconviction relief pursuant to Wis. Stat. § 809.30(2)(h), seeking a new trial based on a claim of ineffective assistance of counsel, or in the interest of justice. (63). The motion alleged that trial counsel was ineffective when she elicited testimony from Investigator Domino that Domino believed V.M.H. was telling the truth, failed to elicit testimony that Domino had known V.M.H. for years before investigating this case, failed to make a copy of the Domino interview for trial preparation and impeachment, failed to play the Domino interview of V.M.H. for the jury, and failed to impeach Domino on her use of the Stepwise protocol in interviewing V.M.H. (63).

Judge Reddy held a hearing on the postconviction motion, at which Attorney Glasbrenner testified about her handling of Lori Domino's interview of V.M.H. (88). Glasbrenner's testimony fell into four main categories. She testified that she did not get the Domino interview transcribed, nor did she obtain a copy of the interview to prepare for and use at trial. (88:7). She testified she did not think it would be useful to present evidence that Lori Domino had known V.M.H. for some six years before the interview. (88:9-11). Counsel testified that officers in small communities often have close relationships with families in their communities, so she did not believe that was a fact the jury needed to hear. (88:9-10). Trial counsel testified she considered and rejected the idea of playing the recorded interview for the jury. (88:13-14). And, she testified why she chose to ask Lori Domino the questions about believing V.M.H. (88:16-17). Counsel testified she wanted to show that Domino "just blanketly believed" what V.M.H. said. (88:16).

Judge Reddy denied Smith's postconviction motion. The court rejected Smith's argument that the jury should have seen the video of Domino's interview, reasoning that the video shows minimal detail. (88:49; App. 101). Further, the court noted that trial counsel testified she had a strategy in not playing the video. (88:50; App. 102).

The court rejected Smith's argument that the jury should have been made aware that Domino and V.M.H. knew each other, stating that information was of limited value. (*Id.*).

The court also rejected Smith's claim that trial counsel performed deficiently in her cross-examination when she elicited testimony that Domino believed V.M.H. was telling the truth. The court stated counsel had a strategic reason for this line of questioning, which was to show that Domino "blanketly" believed everything V.M.H. said. (88:51; App. 103). The court also rejected the idea that trial counsel needed to have a transcript of the Domino interview, or a copy of the interview recording, to use in preparing for trial. (88:52; App. 104).

Finally, the court concluded that even if trial counsel had performed deficiently, the evidence was sufficiently strong that it would not have made any difference. (88:53; App. 105). The court thus denied the motion on both the ineffective assistance of counsel ground, and also in the interest of justice. (*Id.*).

Smith now appeals.

ARGUMENT

I. Larry Smith Was Deprived of the Effective Assistance of Counsel, Warranting a New Trial, When Trial Counsel Elicited Testimony That the Lead Investigator Believed V.M.H. was Telling the Truth, and Failed to Elicit Testimony That This Investigator Knew V.M.H. Prior to the Investigation.

Larry Smith was deprived of a fair trial because his trial attorney elicited evidence from the chief state's investigator, Lori Domino, that Domino was certain V.M.H. was telling the truth about being assaulted by Smith. After Domino testified on direct examination that she was experienced in determining a person's truthfulness, trial counsel then elicited testimony from Domino that V.M.H. was telling the truth. In addition, counsel failed to elicit testimony that Domino had known V.M.H. for several years before this interview. In order to assess both the testimony of Domino and V.M.H., the jury needed to know that the two had been acquainted for years. Where, as here, the credibility of the defendant and the complainant are critical, trial counsel's eliciting of testimony that Domino was certain V.M.H. was telling the truth, and counsel's failure to elicit testimony that Domino and V.M.H. had known each other for years, constituted deficient performance that prejudiced Smith.[2]

[2] In his postconviction motion, Smith argued that trial counsel was ineffective for failing to play the interview video for the jury, and also for failing to impeach Domino on her use of the Stepwise protocol. Smith does not pursue those claims on appeal.

"Criminal defendants are guaranteed the right to effective counsel by the United States and Wisconsin Constitutions." ***State v. Jenkins***, 2014 WI 59, ¶34, 355 Wis. 2d 180, 848 N.W.2d 786. In assessing whether trial counsel's performance satisfied this constitutional standard, Wisconsin courts apply the two-part test outlined in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). In order to establish that he was denied effective representation, Smith must demonstrate both that counsel's performance was deficient and that counsel's errors or omissions were prejudicial to his defense. ***Id.*** The "benchmark" for assessing counsel's conduct is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Jenkins***, 355 Wis. 2d at 194, ¶34. Whether counsel's performance was deficient and prejudicial are questions of law subject to independent review. ***Pitsch,*** 124 Wis. 2d at 634.

Effective counsel must be a "prudent lawyer" who is "skilled and versed in the criminal law." ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) An attorney's level of experience is not the criterion for determining whether counsel was effective in a particular case. ***Id.*** at 499. When the court examines counsel's conduct in a particular case, the court does not ratify it merely because the attorney had a trial strategy. ***Id.*** at 502. Rather, counsel's decisions "must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied." ***Id.*** at 503. The court "will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is based upon caprice rather than upon judgment." ***Id.***

To establish prejudice, the defendant must show that, but for trial counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. ***State v. Roberson***, 2006 WI 80, ¶29, 292 Wis. 2d 280, 717 N.W.2d 111. "A reasonable probability is one sufficient to undermine confidence in the outcome." ***Id.*** However, the focus of the prejudice inquiry is not the outcome of the trial by itself, but rather, the reliability of the proceedings. ***Id.*** In this case, trial counsel performed deficiently, and that deficient performance prejudiced Larry Smith. Accordingly, Smith is entitled to a new trial.

The state's witnesses consisted of the complainant, V.M.H., and her stepsister and stepmother, a crime lab analyst, Officer Aaron Henson who assisted in the investigation, social worker Paula Hocking, and Investigator Lori Domino. After the allegations surfaced, Domino interviewed V.M.H.[3] On direct examination, Domino testified she has been a police officer for over 19 years, and was a member of the "Multi-jurisdictional Sexual Assault Task Force Team." (84:237-238). She testified she has training in interviewing children, as well as training in "deception and interrogation." (84:237). She explained she has specialized training in interviewing alleged sexual assault victims. (84:238-239).

Domino testified she arranged to interview V.M.H. the day after the allegation was made, and she described V.M.H.'s demeanor, as she perceived it, during the interview. (84:240). She testified that V.M.H. was distant, very upset and nervous at the outset of the interview, but that as she

[3] That interview is in the record at 66 and 72, and was transcribed for purposes of postconviction proceedings. The transcript is reproduced in the appendix at 154-182.

continued to talk to Domino, a "weight" appeared to lift off of her. (84:240).

The next day, trial counsel cross-examined Domino. Counsel asked Domino about her training in interviewing child witnesses and victims. (85:17-18). Under counsel's questioning, Domino testified she had interviewed hundreds of children. (85:18). Counsel asked Domino why she did not ask V.M.H. in what bed she slept, eliciting testimony that Domino did not believe that information was important. Counsel asked: "You're just there to take what she says down and do nothing further, correct?" (85:20). Domino answered: "It depends how the interview is going." (85:21). Counsel then asked: "Okay, so truly, in this case, that's all you did, is you wrote down what she said, audio recorded what she said too, correct?" (85:21). Domino answered "Yes." (85:21). Counsel suggested Domino had done no further investigation, prompting Domino to explain that she had taken the sheets off of V.M.H.'s bed for analysis, cushion covers off of the couch for analysis, and interviewed Erica, V.M.H.'s stepsister, and the person to whom V.M.H. disclosed the allegations. (85:21).

Counsel then asked Domino whether she interviewed V.M.H.'s sister with whom she shared a bedroom and bunk-bed, and elicited testimony that Domino believed V.M.H. was telling the truth:

Q: So you didn't think it was important to ask which bed she slept on?

A: No.

Q: So you weren't there to verify whether she was telling you the truth or not; you were just there to collect what she was telling you?

A: Who was telling me the truth?

Q: [V.M.H.]. You did nothing more than write down what [she] said to you; you didn't do any further investigation other than collecting the evidence that you've stated?

A: Well, I collected the evidence that she told me in her statement to me, which corroborated what she told me.

Q: Okay, but no other—you didn't question her on, on whether it could have happened or couldn't have happened; you just took, took what she said as being the truth?

A: Yes.

Q: But you don't—I mean, you testified under direct examination yesterday that you—it appeared that the weight of the world was being lifted off of her; is that correct?

A: Yes.

Q: You don't know whether she's telling the truth or not, do you?

A: *I know she's telling the truth.*

Q: *You know she's telling the truth?*

A: *Yes.*

Q: You were there that night?

A: I was not there.

Q: You were there each and every Tuesday night she alleges this happened?

A: No.

Q: Then how could you be so sure that she's telling the truth?

A: Based on the statements she gave me.

Q: Okay, so if I told you I broke my leg but you can't see my feet, does that mean I broke my leg?

A: Based on how you direct it at me and how you tell me, yes, I will base it on if it's the truth or a lie.

Q: So you can read someone's mind?

A: I can't read their mind.

Q: Have you ever applied to the FBI?

A: I have gone through their schooling.

Q: But have you ever applied for the FBI?

A: No.

Q: So you're sitting here today saying: I know she's telling the truth?

A: Yes.

Q: And what is that based on? What she's told you?

A: Based on what she's told me.

…..

Q: That's because you're going to blanketly believe everything that a child victim says?

A: No.

Q: Well, you did in this case, correct?

A: *Because she was telling me the truth.*

Q: *And how do you know she was telling you the truth?*

A: *Based on how she was telling me.*

Q: And how was she telling you?

A: The first words out of her mouth was that she said "Larry was molesting me."

(85:22-25, emphasis added).

Trial counsel performed deficiently when she elicited testimony from Lori Domino that Domino believed V.M.H. was telling the truth about Smith. Prudent defense counsel would not elicit testimony from the investigating officer—who interviewed the alleged victim—that the victim was telling the truth.

At the postconviction hearing, trial counsel testified she had a strategy for this line of questioning. Counsel testified she did not believe Domino had done a thorough investigation, and her goal was to establish for the jury that Domino "walked into this interview and essentially took what—what [V.M.H.] had said as being the gospel and did not do basically any other investigation." (88:9). She explained:

> I wanted to show the jury that Investigator Domino just blanketly believed anything [V.M.H.] said, that she didn't interview the other child in…the bedroom, didn't interview other people in the household. That that was basically, um, she believed and, therefore, it was.

(88:16).

The trial court accepted trial counsel's explanation, saying: "the court is evaluating the line of questioning from

the perspective of Ms. Glasbrenner at the time and believes that it was reasonable." (88:52; App. 104).

This court should reject the trial court's conclusion for two reasons. First, trial counsel's strategy of attacking Domino's lack of investigation is not reasonable because in fact Domino did do some additional investigation. And second, assuming the strategy was reasonable, counsel's execution of that strategy was deficient. Rather than undercut Domino's investigation, counsel repeatedly elicited testimony that Domino believed V.M.H. was telling the truth. Repeatedly asking the lead investigator whether she "knew" V.M.H. was telling the truth was an ineffective way to show the jury this investigator did a poor job.

Domino testified she interviewed V.M.H., her stepsister, Erica, and Smith. (84: 240, 248; 85:21). Based on V.M.H.'s interview, Domino went to the home and photographed different rooms in the house. (84:243). Domino also collected cushion covers and sheets to search for evidence of sexual assaults, took a DNA sample from Smith, and seized Smith's computer and hard drive. (84:245, 249, 250). She also took a DNA sample from V.M.H. (84:251). In light of this testimony, counsel could reasonably attack Domino's lack of skepticism when she interviewed V.M.H., but she could not reasonably argue that Domino did not do any additional investigation.

In addition, trial counsel's execution of her stated strategy was deficient. Assuming the strategy of attacking Domino's investigation was reasonable, counsel's cross-examination of Domino, in which she elicited testimony that Domino believed V.M.H. to be telling the truth, was deficient.

When trial counsel cross-examined Domino, the jury had already heard Domino testify she had been in law enforcement for over 19 years, that she was a member of a task force on sexual assault cases, that she was trained in the forensic interviewing of children, and also trained in deception and interrogation. (84:237-38). As such, the jury would have viewed Domino as an expert in interviewing children in sexual assault cases, and an expert in determining deception. Given this testimony about Domino's apparent expertise, eliciting testimony from her that she "knew" V.M.H. was telling the truth constituted deficient performance.

A strategy of establishing a detective had "tunnel vision" in investigating a crime can be a reasonable strategy, but it must be properly carried out. In ***State v. Snider***, 2003 WI App 172, ¶26, 266 Wis. 2d 830, 668 N.W.2d 784, trial counsel attempted to undermine a detective's credibility by demonstrating that the detective was biased against the defendant before even interviewing that defendant. There, counsel's goal was to convince the jury that, when the detective questioned the defendant, he was trying to "sell" the defendant the victim's story rather than find out the defendant's version of what happened. ***Id.*** (Quotation marks in original). The court determined that the trial transcript bore out that strategy. ***Id.***

Here, however, counsel did not establish that Domino was biased in favor of V.M.H. before she even began the interview. Instead, counsel elicited testimony that Domino believed V.M.H. "based on the statements she gave [her]." (85:24). Unlike in ***Snider***, defense counsel did not seek to establish bias *before* the investigation began. Rather, defense counsel established that the lead detective came to believe the

complainant *in the course of her investigation*. These are two completely different outcomes.

In addition, if defense counsel's intention was to establish that Domino simply "blanketly" believed V.M.H., she should have introduced evidence that Domino knew V.M.H. before this investigation, and had already formed an opinion about V.M.H.'s truthfulness. A jury cannot assess credibility when evidence highly relevant to credibility is not presented. The jury never heard the evidence that Domino knew V.M.H. and was going to believe whatever she said.

In ***State v. Jeannie M.P.***, 2005 WI App 183, ¶11, 286 Wis. 2d 721, 703 N.W.2d 694, the court recognized that a strategy may be reasonable, but that implementation of the strategy is not. There, the court concluded that counsel's omissions constituted deficient performance. ***Id.*** Likewise, here, counsel's failure to demonstrate Domino's bias through her knowledge of V.M.H. constituted deficient performance.

When Domino began the interview with V.M.H., instead of administering an oath, she said: "So,…you and I have known each other for about six, seven years, since it's been?" (72:3; App. 156). "As you know, there's no secrets in here, okay? You and I have known each other. I've always known you to be truthful, and I would like you to stay that way today. So I just want you to make a promise to me that whatever you speak about today is the truth." (72:4; App. 157). If trial counsel wanted to demonstrate to the jury that Domino "blanketly" believed everything V.M.H. said, counsel should have shown the jury that Domino had known V.M.H. for six or seven years, and was inclined to believe her before she said one word.

Counsel could have accomplished that through the use of the interview transcript, if necessary. This is precisely why

trial counsel should have had the Domino interview transcribed, both for use at trial and in trial preparation. Without the transcript, counsel could not adequately impeach Domino. If counsel's strategy was to impeach Domino's investigation, counsel should have given the jury a well-founded reason for the lack of investigation: that this investigator knew the complainant, and apparently knew her quite well. Instead, the jury had the impression that Domino believed V.M.H. based solely on the statements she made in their interview.

Counsel's performance prejudiced Smith's defense because it so clearly bolstered V.M.H.'s credibility. Where, as here, there were no witnesses to Smith's alleged assaults, and the jury had to decide whether to believe V.M.H.'s accusations or Smith's denial, Domino's testimony tipped the scales against Smith. Domino's testimony vouched for V.M.H., and prejudiced Smith's defense. In a credibility battle, counsel's conduct which bolstered the complainant's credibility was clearly prejudicial.

The issue here is not one of second-guessing strategy. Eliciting improper and highly prejudicial testimony for the "strategic" purpose of establishing Domino did no significant investigation was no strategy at all because Domino, in fact, did a significant investigation and counsel knew that. Pointing out to the jury that Domino approached the investigation with a preconceived bias was a legitimate strategy, but its execution in allowing Domino to repeatedly simply vouch for V.M.H.'s credibility was so inept and damaging as to fall below any objective standard of reasonableness, and was prejudicial in a case which turned on credibility.

II. Paula Hocking's Testimony About Behaviors of Child Sexual Assault Victims Was Inadmissible in Light of ***Daubert***.

Smith is also entitled to a new trial because the trial court erred when it allowed Paula Hocking to testify as an expert on the typical behaviors of child victims of sexual assault. At trial, the state elicited testimony about behaviors of child victims of sexual assault, and tied them directly to V.M.H.'s characteristics.

Hocking's testimony in this case was inadmissible under ***Daubert*** for several reasons. First, it does not meet the reliability standards set forth in ***Daubert*** and its progeny. Second, Hocking—a social worker with experience interviewing children alleging sexual assault—did not have the necessary expertise to testify and be cross-examined about behaviors exhibited by sexual assault victims. Finally, Hocking's testimony impermissibly vouched for V.M.H.'s credibility.

Appellate courts review a circuit court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard. ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687. A circuit court's discretionary decision must have a rational basis and be made in accordance with accepted legal standards in view of the facts in the record. ***Id.*** Here, the trial court erred in the exercise of discretion because the court did not consider Wis. Stat. § 907.02 and the ***Daubert*** factors, and made its decision without the benefit of facts.

Wisconsin Statute § 907.02, titled "Testimony by experts," reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Wisconsin Statute § 907.02, updated by 2011 Wis. Act 2, requires judges to act as gate-keepers "to ensure that an expert's opinion is based on a reliable foundation and is relevant to the material issues." ***Id.***, ¶18. Prior to 2011 Wis. Act 2, the court's role was simply to determine whether "the witness is qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." ***State v. Kandutsch***, 2011 WI 78, ¶26, 336 Wis. 2d 478, 799 N.W.2d 865. Thus, prior to 2011 Wis. Act 2, issues of reliability of testimony were left to cross-examination and the jury. Now, post-2011 Wis. Act 2, trial court judges must make the findings required by Wis. Stat. § 907.02 before letting testimony go to a jury. *See* D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, 84 WIS. LAW. 14, 18 (March 2011). "Any opinion that relies on specialized knowledge of any type is subject to the new strictures of section 907.02." *Id.* at 17.

The current version of Wis. Stat. § 907.02 mirrors the federal rule, Federal Rules of Evidence Rule 702, which was based on the United States Supreme Court's decision in ***Daubert***. Blinka at 15. The ***Daubert*** court enumerated five factors that courts may consider when looking at the reliability of scientific testimony:

(1) Whether the expert's technique or theory has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;

(2) Whether the technique or theory has been subject to peer review and publication;

(3) The known or potential rate of error of the technique or theory when applied;

(4) The existence and maintenance of standards and controls; and

(5) Whether the technique or theory has been generally accepted in the scientific community.

Fed. R. Evid. 702 advisory committee note (2000 amendment); *see also* ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 593-94 (1993). No factor is meant to be dispositive, and the list is not meant to be exhaustive. Fed. R. Evid. 702 advisory committee note; *see also* ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137, 151-52 (1999). Blinka lists the factors the court should consider as "relevance, qualifications, and helpfulness;" "opinions and exposition;" "sufficient facts and data;" and "reliable principles and methods." *Id*. at 18.

"An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist." Fed. R. Evid. 702 advisory committee note (2000 amendment) (citing ***Watkins v. Telsmith, Inc.***, 121 F.3d 984, 991 (5th Cir. 1997)). Furthermore:

> The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded.

Fed. R. Evid. 702 advisory committee note (2000 amendment). As such, the fact that testimony is based on "soft science" does not relieve the trial court of its Wis. Stat. § 907.02 duty to look at the ***Daubert*** factors and make a meaningful inquiry into whether a particular type of evidence is reliable enough to be admitted as evidence in court.

Contrary to Wis. Stat. § 907.02 and ***Daubert***, the record in this case fails to establish Hocking's testimony would present a theory that has been tested, subject to peer review and publication, or has a potential error rate, that standards and controls exist and are maintained, or that her testimony lay within a theory generally accepted in the community. Instead, the court relied on Hocking's pre-***Daubert*** experience testifying as an expert and ***United States v. Simmons***, 470 F.3d 1115 (5th Cir. 2006) to find her testimony admissible. The court thus erred in the exercise of its discretion.

A. The trial court's decision to allow Hocking's testimony did not have a rational basis supported by the record.

Despite holding two hearings and briefing related to Smith's ***Daubert*** objection, the trial court made its decision without the benefit of Hocking's testimony or even a report about her proposed testimony. This is because the state failed to produce a report or compel Hocking's appearance at the

pre-trial hearings even after the trial court ordered it to do so.[4] (26).

The state also failed to directly address the ***Daubert*** factors or any others it felt were relevant to a reliability determination at either of the ***Daubert*** hearings. When asked at the first hearing "what principle, method or theory is [Hocking] setting forth to support her characteristics," the state responded simply that her testimony "may not lend itself to objective standards of scientific experimentation." (80:8-9). Then, as the court went through each factor, the state admitted that it could not speak to any of them other than general acceptance. (80:11-16). The state did assert that Hocking's testimony was generally accepted in the scientific community. (80:16). However, when pressed as to the basis for that assertion, the state responded: "I guess, just in talking with Paula Hocking and taking this testimony from her in working in this area. That certainly she—this is something that she believes and something that she's been allowed to testify about." (80:16; App. 120). Eventually, the trial court asked for further briefing and scheduled another hearing. (80:20).

At the second ***Daubert*** hearing, the trial court told the parties it had read ***Simmons***, and wanted to discuss Hocking's testimony with ***Simmons*** in mind:

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[4] The trial court first requested that the state produce a written report from Hocking at the August 20, 2012, motion hearing. (79:9.) On October 2, 2012, the court held the first ***Daubert*** hearing and noted that it had not received a report. (80:3.) The court also noted Hocking's absence and asked why she was not present. (80:7.) Ultimately, the court scheduled further briefing and another hearing. The state again failed to provide a report and Hocking was not available for questions. (80:5.)

> I came across a case, … ***Simmons***, that I provided to both parties. I think that's where I want to start discussing that. The reason I want to start there, is that in our discussion at the last hearing, there was a lot of talk about the factors under ***Daubert*** and the fact that this sort of proposed testimony…was not amenable to the five factor test under ***Daubert***.
>
> And ***Simmons*** seems to say, at least in federal court…that this sort of soft science, and particularly the type of testimony that's being proposed by the State has been allowed before.

(81:2; App. 124).

Even with this guidance, the state failed to articulate any basis under Wis. Stat. § 907.02 or ***Daubert*** to allow Hocking's testimony. Nevertheless, the court ruled Hocking's testimony was admissible in light of ***Simmons***. The court erred, however, in applying ***Simmons*** because the finding of reliability of the expert in ***Simmons*** does not mean Hocking's testimony was admissible here.

The issue in ***Simmons*** was the testimony of a psychologist who specialized in sexual violence and sexual victimization. ***Simmons***, 470 F.3d at 1122. The expert testified about "rape-victim" behavior. ***Id.*** The defendant challenged the testimony on several grounds. Simmons argued the psychologist's research was unreliable because it was developed for therapeutic rather than forensic purposes and her opinions went to the ultimate credibility of the complaining witness. ***Id.*** He also argued the testimony relied on "scientifically suspect methodology." Ultimately, the ***Simmons*** court upheld the circuit court's decision to admit the testimony, concluding that the limitations pointed out by

the defendant did not make the expert's testimony inadmissible. ***Id.*** at 1122-23.

Judge Reddy in this case relied on ***Simmons*** to conclude Hocking's testimony was admissible, saying "I think we can rely upon prior courts' holdings when deciding whether it's reliable enough to allow for the court in its gatekeeping function to allow it in." (81:13; App. 135).

As such, the court misapplied one of the ***Daubert*** factors, which is objective testing of the theory at issue. The court substituted the ***Simmons*** court reliability finding for its own, saying:

> THE COURT: I look at the first factor; whether the expert's technique or theory can or has been tested. I think it's clear that it has, because the cases that we're talking about were published. So it was tested, at least, in those cases; that is, the federal cases that are noted in ***Simmons***.
>
> ….
>
> Don't you think the experts were subject to cross-examination, and that's not a method of testing. And then if in this—those cases, then the people—the defendant was not satisfied, that they brought it to the appellate court, and that's why it got published?

(81:26; App. 148).

The court's admission of the psychologist's testimony in ***Simmons*** does not mean that Hocking's testimony was also admissible. That is, because the ***Simmons*** court allowed "rape victim" testimony does not also mean that Hocking's testimony about common behaviors of child sexual assault victims has been "tested" under ***Daubert***. *See* ***Daubert***, 509 U.S. at 593 (explaining what it means to be tested:

"Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." (quoted source omitted)).

Not only does the record fail to establish that Hocking's testimony involved "tested" theory, it fails to demonstrate that it had been peer reviewed or published. *See* ***Id.*** at 593. As noted above, Hocking did not appear at the ***Daubert*** hearings, and thus did not testify that her beliefs about child victims had been peer reviewed, or were published in journals. Likewise, there was no testimony regarding a known or potential error rate, the existence and maintenance of standards and controls, or that Hocking's theories were generally accepted in the scientific community. All the court had to rely on was that a different court, under different facts, had admitted theoretical testimony of a similar kind.

A reliability analysis under ***Daubert*** and the updated Wis. Stat. § 907.02 requires more than a finding that similar testimony by a different expert was allowed in another case. Although an evidentiary hearing is not required in every case, the court must engage in some meaningful analysis of reliability based on the ***Daubert*** factors and/or others it deems relevant.

In addition, the trial court's reliance on ***Simmons*** ignores the fact that circumstances and science change over time. *See, e.g.,* ***State v. Hicks***, 202 Wis. 2d 150, 152-54, 549 N.W.2d 435 (1996) (reversing a conviction in the interest of justice because DNA evidence showed hairs did not belong to defendant after expert testified that they "could have" come from defendant); ***State v. Armstrong***, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98 (reversing a conviction in

the interest of justice because DNA evidence excluded the defendant as the donor of physical evidence that had been used to convict him). That a particular line of testimony was deemed reliable in a particular case involving a particular expert in 2006 does not mean it is reliable in this case, involving this expert, today. *See* M. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. Cin. L. Rev. 867, 892-93 (Spring 2005).

Further, while many jurisdictions allow syndrome evidence like that in ***Simmons*** and here, not all courts have come to the same conclusions as the court in ***Simmons*** regarding admissibility of "syndrome" testimony.[5] For example, in ***Newkirk v. Commonwealth***, 937 S.W.2d 690 (Ky. 1996), the Kentucky Supreme Court addressed whether a psychiatrist could testify about recantation in child abuse cases for "the limited purpose of explaining the psychological dynamics surrounding a recantation following an accusation of sexual abuse." Similar to this case, the psychiatrist testified that he had not seen the child and had no opinion as to whether the particular child involved in the case had been abused.

Applying the ***Daubert*** standard, the ***Newkirk*** court held the psychiatrist's testimony was inadmissible because it lacked relevancy and invaded the province of the jury by expressing an opinion on the ultimate issue of guilt or innocence. The court observed that "every person accused of committing a crime is entitled to the presumption of

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[5] *See*, *e.g.*, ***State v. Black***, 537 A.2d 1154, 1157 (Me. 1988), ***Hadden v. State***, 690 So.2d 573, 580–81 (Fla. 1997), ***Blount v. Commonwealth***, 392 S.W.3d 393 (Ky. 2013), ***Goodson v. State***, 566 So. 2d 1142, 1146 (Miss. 1990), ***Commonwealth v. Dunkle***, 602 A.2d 830, 832 (Pa. 1992), ***State v. Cressey***, 628 A.2d 696, 700 (N.H. 1993); ***State v. Ballard***, 855 S.W.2d 557, 561 (Tenn. 1993).

innocence…. The admission of theoretical expert evidence which presumes guilt from the very fact of the accusation is contrary to our most fundamental rights." ***Newkirk***, 937 S.W.2d at 695 (Ky. 1996). In other words, evidence of "typical" behaviors of abused children is unreliable and inadmissible when the evidence, as in this case, is based on the assumption that those alleging abuse are victims of abuse.

The court went on to explain that although it was sensitive to the difficult nature of child sexual assault prosecutions, it feared that the admission of this type of testimony would lead to the admission of testimony that would make such prosecutions more difficult because evidence that a child did not exhibit certain behaviors could be used to show no abuse had occurred. ***Id.*** Finally, the court expressed its confidence in the jury's ability to sort between defendants whose denials and explanations might be "facile" and an accusing child who might be "timid and halting" to arrive at a proper verdict. ***Id.*** at 696.

Based on the trial court's over-reliance on precedent and the lack of record as to Hocking's qualifications and her proposed testimony, the trial court's decision to admit Hocking's testimony was not made in accordance with accepted legal standards in view of the facts in the record. *See* ***Giese***, 56 Wis. 2d 796, ¶16. And, the trial court's lack of analysis is compounded by the state's failure to give a report of Hocking's proposed testimony or produce the witness for a pretrial hearings. Because the state failed to establish Hocking's testimony met ***Daubert*** and Wis. Stat. § 907.02, this court has no record upon which it can independently conclude Hocking's testimony was admissible.

B. Hocking's testimony about typical behaviors of child sexual assault victims was inadmissible in light of ***Daubert*** and Wis. Stat. § 907.02.

As argued above, the court failed to properly exercise its discretion when it allowed Hocking's testimony about typical behaviors of child victims of sexual assault. Smith contends that, given the lack of scientific rigor of this type of testimony at least at present, such behavioral testimony should be inadmissible under ***Daubert*** and Wis. Stat. § 907.02.

Hocking's testimony, relating to the behavior of child sexual assault victims, is part of a category of expert testimony known as "syndrome" evidence, used to explain the behavior of complaining witnesses that might otherwise impeach their credibility. *See* M. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867 at 868. This type of evidence includes battered woman syndrome evidence, child sexual assault accommodation syndrome evidence, and rape trauma syndrome evidence to name a few. *See id.* Although this type of evidence has frequently made its way into courtrooms in recent decades, its admission remains controversial. *See generally* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 7:11 (4th ed. 2014) ("Courts across the country, including federal courts, have increasingly admitted syndrome and framework evidence, beginning in the 1980s and continuing into the 21st century. Yet there remain doubts on the question whether such evidence really constitutes science that can satisfy the *Daubert* standard or its state counterparts, and doubts remain as well on the question whether juries need help from experts.").

Given the legislative change in creating Wis. Stat. § 907.02, more must be required than that such behavioral testimony has been previously allowed. As argued above, ***Daubert*** and Wis. Stat. § 907.02 do not exclude the social sciences from the testing envisioned in ***Daubert***. Whether it is social science theory or other type of science, the testimony must be subject to testing, peer review, analysis of facts and data, and must be based on reliable principles and methods. Without that, the enactment of Wis. Stat. § 907.02 would be irrelevant.

Admission of syndrome testimony has also been criticized by legal scholars and social scientists for its lack of reliability in the courtroom setting. In fact, the American Psychiatric Association's own Diagnostic and Statistical Manual of Mental Disorders (DSM) warns against using this type of evidence for forensic purposes. *See* Brodin, 73 U. CIN. L. REV. at 883 (citing DSM-IV xxxii-xxxiii (4th ed. Text Revision 2000).

Most syndrome evidence is based on theories developed for treatment purposes based on the assumption that the person being treated has been abused, which makes it unreliable and inappropriate for use in a case where the fact of abuse is at issue. *Id.* at 882-83. Furthermore, researchers have questioned the existence of a list of reactions common to child victims of sexual abuse. *Id.* at 884 n.77. (citing D. Gaffney, *PTSD, RTS, and Child Abuse Accommodation Syndrome: Therapeutic Tools or Fact-Finding Aids*, 24 Pace L. Rev. 271, 284 (2003) ("Research findings related to Child Abuse Accommodation Syndrome are limited and do not support sexual abuse syndrome or a CSAAS. These syndromes are [explanatory] and meet neither ***Frye*** nor ***Daubert***." (further citations omitted)).

Thus, if the trial court had engaged in a more thorough analysis of reliability based on the proper legal standards, it would have discovered that syndrome evidence should not be accepted as reliable for forensic purposes. For that reason, it is not helpful to the jury in determining guilt and should not have been admitted under the ***Daubert*** standard to bolster or rehabilitate V.M.H.'s credibility.

C. Hocking did not have the necessary knowledge or experience to testify as an expert regarding behavior of child sexual assault victims.

In addition to her testimony being unreliable, Hocking did not have the necessary expertise to testify about behaviors common to sexual assault victims under ***Daubert***. The only information about Hocking's proposed testimony came from the state's description:

> Ms. Hocking will testify regarding reactive behaviors common among child abuse victims. These matters include, but are not limited to child development, use of language, recantation, delayed disclosure, progressive disclosure, disclosure to a trusted person, recall, and minimization by the victim. Ms. Hocking will testify about reasons for these reactive behaviors based on her training and experience.

(28:8-9). When pressed as to the basis for her knowledge, the state said Hocking would testify based on her experience working with children. (80:6-7; App. 110-111). Pressed further, the state said "she routinely talks to other human service workers and forensic interviewers, and they discuss their observations of child sexual assault victims…. I know she's attended seminars and trainings, and she's presented on these types of topics in the past." (80:7; App. 111).

Hocking's resume divulges little more. She is a social worker with a BS in social work and she has been working with children alleging various forms of abuse since 1989. She has had "ongoing" continuing education in "child maltreatment" and she has provided trainings on "child maltreatment, interviewing children, sexualized behaviors and mandated reporting." (40:S18). At trial, she testified that she had interviewed somewhere around 5,000 children in her career and that approximately half of those alleged some form of sexual abuse. (84:202, 210). The record is silent as to the type or extent of training Hocking has received specific to the theories of disclosure she testified about.[6] So presumably, the sole basis for her expertise is her substantial experience interviewing children alleging abuse.

According to the Fed. R. Evid. 702 advisory committee note, experience alone or in conjunction with training may provide a sufficient foundation for expert testimony. However, "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 advisory committee note (2000 amendment). The trial court must do more than "tak[e] the expert's word for it." ***Id.***

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[6] The only indication we have that Ms. Hocking has *any* training specific to these issues is in her testimony, when she says she has had special training in the area of reactive behaviors. (84:204). When asked to elaborate, she stated that she does a "statewide training where we provide information to law enforcement, and social workers, and victim advocates; and we talk about how children disclose and…the way that they do disclose. *The best education that I have in that area is working with victims over 24 years and watching how they disclose.*" (84:204). (emphasis added).

Neither Hocking nor the state ever articulated how Hocking's experience interviewing children who have alleged sexual abuse qualified her to draw conclusions about behaviors "typical" of sexual assault victims. *See* Blinka p. 6. Wisconsin Statute § 907.02 requires the court to do more than infer that Hocking's experience qualifies her to testify as to her conclusions; there must be a record as to *how* her experience is a sufficient basis for her to draw reliable conclusions. Hocking's background as a social worker also sets her apart from the expert in the lone case cited in the trial courts decision, ***Simmons***. The ***Simmons*** expert's formal education—a licensed psychologist with a Ph.D. who "specializ[ed] in sexual violence and sexual victimization"—related to the syndrome evidence presented. ***Simmons***, 470 F.3d at1122.

Furthermore, Hocking's testimony, based entirely on her experience, compounds the reliability concerns because the sole basis for her testimony was subjective—her experience interviewing children she believed to be telling the truth or not telling the truth about alleged abuse. This is precisely the type of *ipse dixit* testimony ***Daubert*** and the new Wis. Stat. § 907.02 is meant to avoid, and the trial court erroneously exercised its discretion when it qualified Hocking as an expert on this record.

D. The trial court impermissibly limited Hocking's testimony to characteristics exhibited by the complaining witness in this case.

When testimony regarding general characteristics of child sexual assault victims is admissible, courts still must not allow testimony to cross a line of impermissible vouching for the witness. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). For example, in

Commonwealth v. Deloney, 794 N.E.2d 613 (Mass. Ct. App. 2003), the Appeals Court of Massachusetts held that syndrome expert testimony at trial was improper when the expert listed eight specific characteristics of child abuse victims, creating a "vivid portrait" that "was, in essence, [the complaining witness]."

As in ***Deloney***, the testimony in this case crossed a line. First, the trial court limited Hocking's testimony to characteristics of child sexual assault victims present in this case. (81:30-31.) That meant that—similar to ***Deloney***—the jury heard an "expert" give a profile of sexual assault victims that matched V.M.H.

Even worse, the prosecutor asked several leading questions specific to the evidence at trial. Prior to Hocking's testimony, the jury heard testimony from V.M.H., the stepsister she first disclosed to, her stepmother, and an officer. V.M.H. and her stepsister testified that V.M.H. first disclosed to her stepsister after a fight involving her parents and Smith because V.M.H. was dating an older boy. (84:97-99, 155, 166). Specifically, the stepsister testified that V.M.H. asked her not to tell anyone. (84:166). When asked why she did not come forward sooner, V.M.H. said that she did not want her mother to be unhappy and that she worried she would have to move out of her house. (84:99). Her stepsister testified that V.M.H. told her about those concerns, as well. (84:166). Then, the prosecutor asked Hocking the following:

Q: And you testified that it's common for them to tell somebody that they—tell a family member?

A: They could.

Q: Or somebody that they're close to?

A: Yes. Or someone that they have trust in.

Q: And I believe you also testified that it's also common for children to say, "But don't tell anyone else"?

A: Yes.

Q: You've seen that?

A: Often.

….

Q: Is it common to see some sort of triggering event?

A: It—it could be, yes.

Q: Do you see that?

A: Yes.

….

Q: Have you seen children disclose during an argument?

A: Yes.

Q: And have you seen children come to you and—and say that they've waited because they didn't want to break a family up?

A: Yes.

Q: Do you think that's common?

A: Yes.

Q: What about worrying about financial finances?

A: Um, yes, that's very common….

(84:206-09.)

This line of questioning did more than elicit general characteristics of child sexual assault victims to help the juror understand otherwise self-impeaching behavior of the complaining witness; the prosecutor used the expert to create a profile of child sexual assault victims that matched the complaining witness's behavior exactly. It led to the jury hearing a portrait of a "typical" sexual assault victim that matched the complaining witness in this case exactly.

The state did not stop there. On redirect, the prosecutor asked questions regarding the percentage of children who lie about child sexual assault:

> Q.: In talking with those folks in your professional community, as part of your training and experience, seems to be generally rare that a child will lie about a sexual assault?
>
> A.: Correct.
>
> Q.: So it's not just what you've seen. It's when you peer review and your community of people that do this work. Yes?
>
> A.: That's correct.
>
> Q.: Are you able to even think of a percentage, say of the 5,000 children you've interviewed, of—of those that have come forward and told you a lie about being sexually assaulted?
>
> A.: I cannot give you a percentage. I just know it's very rare.

(84:218). Asking Hocking to give an estimate of the number of children who have lied to her was beyond the scope of her expertise and caused her to improperly vouch for V.M.H.'s credibility by stating that lies are "very rare." *See* ***People v. Peterson***, 537 N.W.2d 857, 869 (Mich. 1995) (improper

vouching to give percentage of children who lie about sexual abuse); ***State v. Kinney***, 762 A.2d 833, 252-53 (Vt. 2000) (improper to allow witness to testify that rate of false reporting for rape is only 2%).

Based on the above lines of questioning, the jury heard from an "expert" that (1) V.M.H.'s disclosure and behavior precisely matched patterns common to child sexual assault victims and (2) it is "very rare" for children to lie when disclosing sexual abuse. Together, they illustrate how the trial court erroneously exercised its discretion when it limited Hocking's testimony to common characteristics that were shown by the victim in this case.

III. A New Trial is Warranted in the Interest of Justice.

As an alternative claim for relief, Smith seeks a new trial in the interest of justice. This court has statutory authority to order a new trial in its discretion in the interest of justice when it concludes that the real controversy has not been fully tried. Wisconsin Statute § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statute or rules, as are necessary to accomplish the ends of justice.

As the court explained in ***State v. Hicks***, 202 Wis. 2d 150, 159, 549 N.W.2d 435 (1996), the court of appeals

possesses this authority even when the trial court has exercised its power to deny a new trial.

As ***Hicks*** explains, there are two types of scenarios in which a court may conclude that the real controversy was not fully tried: where the jury was erroneously not given an opportunity to hear important and relevant evidence; and the converse, when the jury "had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***Id.*** at 160.

In this case, the jury was erroneously not given an opportunity to hear important and relevant evidence, *and* the jury heard evidence not properly admitted which clouded the crucial issue in this case. As argued above, the jury should have heard evidence that Investigator Domino had known V.M.H. for six or seven years before the investigation of this case began, and that Domino had formed an opinion that V.M.H. was telling the truth about the alleged assaults before V.M.H. said one word to her. In order to determine the credibility of V.M.H. and Domino, the jury needed to know these two individuals had known each other for years.

In addition, the jury should not have heard testimony that Domino believed V.M.H. was telling the truth. Further, the jury should not have heard Paula Hocking's testimony because it was inadmissible under ***Daubert***. As argued above, Hocking's testimony was not based on procedures and methods, was not reliable, not supported by experience, and also vouched for V.M.H.'s credibility. Credibility was critical in this case. Domino's testimony that V.M.H. was telling the truth, together with Hocking's testimony about the reactive behaviors of child victims of sexual assault which matched V.M.H.'s circumstances, so clouded the credibility

issue that the real controversy in Smith's case was not fully tried.

CONCLUSION

For these reasons, Larry J. Smith respectfully requests that the court reverse the trial court's decision, vacate the judgment of conviction, and order a new trial.

Dated this 30th day of March, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,188 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 30th day of March, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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 issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 30th day of March, 2015.

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