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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2653-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY J. SMITH,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

STATEMENT OF THE CASE AND FACTS 2

INTRODUCTION 2

ARGUMENT 3

I. Smith has not demonstrated that his trial counsel's cross-examination of Domino amounted to ineffective assistance of counsel. 3

A. Applicable law and standard of review 3

B. Glasbrenner had reasonable strategies for asking Domino whether she knew if VH was telling the truth and not asking whether she knew VH before the investigation. 5

C. Smith failed to show that he was prejudiced by Glasbrenner's cross-examination of Domino. 10

II. The circuit court did not erroneously exercise its discretion in admitting Hocking's expert testimony about characteristics of child sexual abuse victims. 12

A. Standard of review and applicable law 12

B. The circuit court properly exercised its discretion in admitting Hocking's testimony. 15

1. Additional facts. 15

2. The circuit court reasonably exercised its discretion. 17

Page

3. None of Smith's arguments demonstrate that the circuit court erroneously admitted Hocking's testimony. 22

C. If the court erred in admitting Hocking's testimony, it was harmless error. 27

III. Smith is not entitled to a new trial in the interest of justice 28

CONCLUSION 30

Cases

Bourdon v. State,
2002 WL 31761482 (Alaska Ct. App. 2002) 22

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 2, 13, 14, 19, 25

Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137 (1999) 14, 19

Mentek v. State,
71 Wis. 2d 799,
238 N.W.2d 752 (1976) 29

Michel v. Louisiana,
350 U.S. 91 (1955) 4

Newkirk v. Commonwealth,
937 S.W.2d 690 (Ky. 1996) 24

People v. Spicola,
947 N.E.2d 620 (N.Y. 2011) 21, 24

State v. Balliette,
2011 WI 79, 336 Wis. 2d 358,
805 N.W.2d 334 5

Page

State v. Burns,
2011 WI 22, 332 Wis. 2d 730,
798 N.W.2d 166 28

State v. Carter,
2010 WI 40, 324 Wis. 2d 640,
782 N.W.2d 695 8

State v. Delgado,
2002 WI App 38, 250 Wis. 2d 689,
641 N.W.2d 490 26

State v. Edelman,
593 N.W.2d 419 (S.D. 1999) 22

State v. Erickson,
227 Wis. 2d 758,
596 N.W.2d 749 (1999) 4

State v. Foret,
628 So.2d 1116 (La. 2003) 21

State v. Giese,
2014 WI App 92, 356 Wis. 2d 796,
854 N.W.2d 687 .... 12, 13, 14

State v. Harris,
2008 WI 15, 307 Wis. 2d 555,
745 N.W.2d 397 27

State v. Haseltine,
120 Wis. 2d 92,
352 N.W.2d 673 (Ct. App. 1984) 19

State v. Hicks,
202 Wis. 2d 150,
549 N.W.2d 435 (1996) 28

Page

State v. J.Q.,
599 A.2d 172 (N.J. Super. Ct. App. Div. 1991)........... 21

State v. Keith,
216 Wis. 2d 61,
573 N.W.2d 888 (Ct. App. 1997)................................. 12

State v. Kinney,
762 A.2d 833 (Vt. 2000) 22

State v. Maloney,
2004 WI App 141, 275 Wis. 2d 557,
685 N.W.2d 620... 4, 5

State v. Maloney,
2005 WI 74, 281 Wis. 2d 595,
698 N.W.2d 583... 4

State v. Manuel,
2005 WI 75, 281 Wis. 2d 554,
697 N.W.2d 811... 12, 20, 23

State v. Mayo,
2007 WI 78, 301 Wis. 2d 642,
734 N.W.2d 115... 29

State v. Pettit,
171 Wis. 2d 627,
492 N.W.2d 633 (Ct. App. 1992)................................. 10

State v. Provo,
2004 WI App 97, 272 Wis. 2d 837,
681 N.W.2d 272... 10

State v. Rizzo,
2002 WI 20, 250 Wis. 2d 407,
640 N.W.2d 93... 20

Page

State v. Robinson,
146 Wis. 2d 315,
431 N.W.2d 165 (1988) 18, 19

State v. Salazar-Mercado,
325 P.3d 996 (Ariz. 2014) 22

State v. Snider,
2003 WI App 172, 266 Wis. 2d 830,
668 N.W.2d 784 .... 7, 9

State v. Swinson,
2003 WI App 45, 261 Wis. 2d 633,
660 N.W.2d 12 3

State v. Thiel,
2003 WI 111, 264 Wis. 2d 571,
665 N.W.2d 305 4

State v. Torkelson,
2007 WI App 272, 306 Wis. 2d 673,
743 N.W.2d 511 26

State v. Wirts,
176 Wis. 2d 174,
500 N.W.2d 317 (Ct. App. 1993) 12

Strickland v. Washington,
466 U.S. 668 (1984) 3, 4, 9

United States v. 14.38 Acres of Land Situated in
Leflore County, Mississippi,
80 F.3d 1074 (5th Cir. 1996) 25

United States v. Alzanki,
54 F.3d 994 (1st Cir. 1995) 21

United States v. Bighead,
128 F.3d 1329- (9th Cir. 1997) 21, 24

Page

United States v. Simmons,
470 F.3d 1115 (5th Cir. 2006)................................ 16, 19

United States v. Smith,
1998 WL 136564 (6th Cir. 1998) 21

Statutes

Wis. Stat. § (Rule) 809.19(3)(a)2. 2

Wis. Stat. § 907.02 ....2, passim

Rules

Fed. R. Evid. 702
advisory committee note (2000) 14, 18, 19, 20, 25

Other Authorities

John E.B. Myers,
Myers on Evidence of Interpersonal Violence,
§ 6.20 (5th ed. 2011)... 24

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

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APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established legal principles.

STATEMENT OF THE CASE AND FACTS

As Respondent, the State exercises its option not to include separate statements of the case and facts. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. Relevant information will be included where appropriate in the State's argument.

INTRODUCTION

Defendant-Appellant Larry J. Smith appeals a judgment of conviction, entered on a jury's verdicts, for two counts of repeated sexual assault of the same child and one count of second-degree sexual assault of a child (55:2-3). Smith also appeals the circuit court's order denying his motion for postconviction relief (67). The jury convicted Smith of his crimes for his repeated sexual assaults of VH, the daughter of his girlfriend, between March 2008 and May 2011 (55:2).

Smith raises three claims on appeal. First, he argues that his trial counsel Janelle Glasbrenner was ineffective for asking questions of Village of Bloomfield Police Department Investigator Lori Domino that resulted in her testifying that she knew VH was telling the truth, and for failing to elicit testimony from Domino that she had known VH for years before the investigation (Smith's brief at 11-21). Second, Smith contends the circuit court erred by admitting testimony from social worker Paula Hocking that described behaviors of child sexual assault victims because it did not satisfy the requirements of Wis. Stat. § 907.02 and the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), that the statute incorporates (Smith's brief at 22-40). Third, Smith asks this court to grant him a new trial in the interest of justice based on these two claims (Smith's brief at 40-42).

This court should affirm. Glasbrenner's questioning of Domino was based on reasonable trial strategies and Smith has failed to prove any prejudice from her actions. Further, the circuit court reasonably exercised its discretion in admitting Hocking's testimony under Wis. Stat. § 907.02 and *Daubert*. Finally, because Smith's first two claims fail, this court must also reject his request for a new trial in the interest of justice.

ARGUMENT

I. Smith has not demonstrated that his trial counsel's cross-examination of Domino amounted to ineffective assistance of counsel.

A. Applicable law and standard of review.

In order to prove that counsel was ineffective, a defendant must establish both that trial counsel's performance was deficient and that this performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To show deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In proving that counsel was deficient, the defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *State v. Swinson*, 2003 WI App 45, ¶ 58, 261 Wis. 2d 633, 660 N.W.2d 12 (citation omitted).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Thus, the defendant must demonstrate that his attorney made serious mistakes that

could not be justified in the exercise of objectively reasonable professional judgment, deferentially considering all the circumstances from counsel's contemporary perspective to eliminate the distortion of hindsight. *See Strickland*, 466 U.S. at 689-91.

Put another way, in order to overcome the presumption that counsel acted within professional norms, the defendant must show that counsel's actions were not a "'sound trial strategy.'" *Id*. at 689 (*quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). A trial court's determination that counsel had a reasonable trial strategy is "virtually unassailable in an ineffective assistance of counsel analysis." *State v. Maloney*, 2004 WI App 141, ¶ 23, 275 Wis. 2d 557, 685 N.W.2d 620. "Judicial scrutiny of an attorney's performance is highly deferential." *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583 (citing *Strickland*, 466 U.S. at 689).

To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. *Strickland*, 466 U.S. at 687. A defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The critical focus is not on the outcome of the trial but on "'the reliability of the proceedings.'" *State v. Thiel*, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoted source omitted).

An ineffective assistance of counsel claim presents this court with a mixed question of fact and law. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Under this standard of review, the trial court's findings of fact will not be disturbed unless they are clearly erroneous.

Id. The ultimate issue of whether counsel was ineffective based on these facts is subject to independent appellate review. *State v. Balliette*, 2011 WI 79, ¶¶ 18-19, 336 Wis. 2d 358, 805 N.W.2d 334.

B. Glasbrenner had reasonable strategies for asking Domino whether she knew if VH was telling the truth and not asking whether she knew VH before the investigation.

Smith's primary complaint about Glasbrenner is that when cross-examining Domino, she engaged in a line of questioning that included her asking Domino, "You don't know whether [VH is] telling the truth or not, do you?" and Domino replying, "I know she's telling the truth" (Smith's brief at 11-22; 85:23). While acknowledging that Glasbrenner said at the *Machner* hearing that her strategy in asking these questions was to attempt to show that Domino "blanketly believed anything [VH] said" and did not conduct an adequate investigation, and that this can be a reasonable approach, Smith contends that her plan ultimately failed, and thus, amounted to deficient performance (Smith's brief 11-20; 88:16).

The circuit court held that Glasbrenner's strategy was reasonable (88:51-52). Because this conclusion is "virtually unassailable," this court should reject Smith's ineffective assistance claim. *Maloney*, 275 Wis. 2d 557, ¶ 23.

Glasbrenner explained at the *Machner* hearing that her strategy was:

> It was my goal to basically establish for the jury that [Domino] walked into this interview and essentially took what – what [VH] had said as being the gospel and did not do basically any other investigation

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

(88:9, 16). When asked why she asked Domino if she believed VH, Glasbrenner further said:

> It just became, in my opinion, so apparent that she –that – that no matter what [VH] would have said, she would have believed it. And at some point, I thought it was going to be an effective one of cross-examination, you know, whereby this case had everything to do with Inves – Investigator Domino's stopping her investigation into whether or not this had occurred by [VW's] words and [VW's] words alone.

(88:26).

Glasbrenner also explained why she thought this questioning had value to the defense:

> I believed that it was um, – you know, especially when – in, when Investigator Domino essentially offered up that, you know, she can tell by the way somebody says something. I am paraphrasing. But essentially I would call it, basically, she could, you know, read people's minds and determine whether or no they were truth telling or not. I, obviously, disagree with that, but that was something that I believed the jury could see that, you know -- she was just so emphatic, I believed her, I believed her, I believed her. That I believe that it was effective in establishing that, you know, it started and stopped there.

(88:27).

Glasbrenner's cross-examination of Domino confirms her explanation. She asked Domino if she "just … took what [VH] said as being the truth" (85:23). Domino said "Yes"

(85:23). Domino also insisted in response to Glasbrenner's questions that she knew VH was telling the truth, even though she was not present for any of the assaults (85:23-24). Domino said she was sure VH was truthful based on her statements, and that she can tell whether someone is being truthful from how a statement is directed at her, though she admitted she cannot read a person's mind (85:24). Three times, Domino insisted she knew VH was telling the truth based on how or what VH told her (85:24-25).

In *State v. Snider*, 2003 WI App 172, ¶¶ 25-28, 266 Wis. 2d 830, 668 N.W.2d 784, this court held that counsel's eliciting testimony from a detective that he believed the victim's story and not the defendant's during the investigation to try to show "that he came to a premature conclusion regarding what had occurred, and thereafter pursued a one-sided investigation" was a reasonable strategy. This is what Glasbrenner did here. She wanted to show that Domino believed whatever VH said and did not view her statement with any skepticism. Domino admitted repeatedly that she believed what VH told her based just on what VH said. This allowed the defense to discredit Domino by showing that she was biased in favor of VH and against Smith. Glasbrenner was not deficient.

Smith argues that Glasbrenner's explanation at the *Machner* hearing that she was trying to attack Domino for believing VH during the interview and not doing an adequate follow-up investigation was unreasonable because Domino did, in fact, conduct additional investigation after the interview by collecting physical evidence from the house where VH claimed Smith assaulted her, interviewing VH's sister, and getting a DNA sample from Smith (Smith's brief at 18).

This court should reject this argument. Counsel's post-trial explanation of her strategy must be viewed in light of what actually happened at trial. *See State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695 (court must evaluate challenged conduct from counsel's perspective at time actions taken to eliminate the "distorting effects" of hindsight). Contrary to Smith's argument, Glasbrenner did not ignore Domino's additional investigation; her attempt to show that Domino believed whatever VH said was premised on Domino not doing anything "other than collecting the evidence" she had already testified that she had gathered (84:240, 243, 245, 248-51; 85:17, 21-23). And even though Glasbrenner took the additional investigation into consideration in her questioning, she also repeatedly elicited testimony from Domino that she believed VH based only on what she said during the interview (85:24-25). These actions were reasonable.

Next, Smith argues that although, as a general matter, establishing that an investigator had "tunnel vision" can be a reasonable defense strategy, Glasbrenner's execution here was lacking (Smith's brief at 19). He contends that because Domino was an experienced law enforcement officer with training in interviewing child sexual assault victims and detecting deception, the jury would have believed her when she said VH was telling the truth (Smith's brief at 19; 84:237-38). This argument strips the jury of its common sense. Jurors understand that, even if trained in detecting deception, no person can know for sure if another person is telling the truth just from speaking to them. This is why Glasbrenner's eliciting the testimony from Domino was effective assistance. Glasbrenner was able to suggest to the jury that Domino arrogantly thought she knew exactly what happened to VH even though she did not witness the crimes.

Smith also suggests that *Snider* holds that "tunnel vision" impeachment of a law enforcement officer is a reasonable strategy only if counsel establishes that the officer was already biased before conducting the interview, rather than becoming biased during it (Smith's brief at 19-20). Smith does not explain why this is a meaningful distinction, and it is not. There are countless ways for counsel to provide effective assistance. *See Strickland*, 466 U.S. at 689.

And, this case is more like *Snider* than Smith acknowledges. There, the detective interviewed Snider after interviewing the victim. *Snider*, 266 Wis. 2d 830, ¶¶ 3-4. Snider argued the detective was biased against him during the latter interview because the detective had already heard the victim's side of the story and tried to fit the evidence into it. *Id.* ¶ 28. That is precisely what Glasbrenner was trying to show Domino did here.

Finally, Smith contends that if Glasbrenner wanted to establish that Domino "blanketly believed" VH, then she should have introduced evidence that Domino and VH knew each other before the investigation (Smith's brief at 20-21). At the beginning of the interview, Domino mentioned to VH that they had known each other for six or seven years (72:3). Domino also told VH that she had always known her to be truthful, and asked her to tell the truth during the interview (72:4). Glasbrenner testified at the *Machner* hearing that she was aware of this portion of the interview, but said that she did not think the jury needed to hear the information because officers tend to have close relationships with people in small communities like Bloomfield (88:9-10).

Smith has not demonstrated that Glasbrenner was deficient. All Smith has shown is that Domino knew VH for six or seven years and thought her to be truthful. He has

presented no evidence explaining the extent of their relationship – such as why they knew each other or how close they were – that would be relevant to showing that Domino was biased. Further, Glasbrenner was correct that the jury would not be surprised that a police officer might already know a crime victim in a small community. Finally, introducing this evidence might have backfired on the strategy of showing that Domino "blanketly believed" VH just because of the interview. If the jury knew that Domino and VH knew each other for years and Domino considered her to be truthful, it might be more inclined to believe Domino's testimony that VH was telling the truth than if they knew that Domino reached this conclusion based only on her interview. Counsel's cross-examination of Domino did not amount to deficient performance.

C. Smith failed to show that he was prejudiced by Glasbrenner's cross-examination of Domino.

This court should also determine that Smith was not prejudiced. Smith limits his prejudice argument to one paragraph, claiming that Domino's testimony "so clearly bolstered [VH's] credibility" (Smith's brief at 21). He also contends that the case was a credibility battle between him and VH, and Domino's testimony tipped the scales in her favor (Smith's brief at 21).

This conclusory and undeveloped argument is inadequate to show prejudice. *See State v. Provo*, 2004 WI App 97, ¶ 15, 272 Wis. 2d 837, 681 N.W.2d 272 (defendant alleging that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (this

court does not address undeveloped arguments). Smith does not specifically address Domino's testimony in relation to the other evidence introduced at trial or the relative strengths and weaknesses of the parties' cases. He has not given this court what it needs to determine whether he was prejudiced, and this court should decline to consider his argument.

Further, Smith suffered no prejudice. He does not address VH's repeated and consistent disclosure of the assaults to her stepsister, father, her father's wife, and Domino (84:157, 166-68, 186; 85:135-38). Smith also fails to acknowledge the DNA evidence found on the couch where VH said he committed some of the assaults. Biological material found on the couch contained DNA from at least two people (85:69). One was Smith in the form of his semen (85:65-68, 72). An analyst from the State crime lab testified that VH was a possible contributor to the other DNA profile, though her mother, Smith's girlfriend, was not (85:72-75). The analyst further testified that the probability of a randomly selected and unrelated individual other than VH contributing to the sample was one in 866 (85:75). This evidence strongly suggested that Smith assaulted VH on the couch.

In addition, it is unlikely that the jury would have been more inclined to believe that VH was truthful because Domino said she was. Even if Domino had not testified that VH was telling the truth, the jury would probably have thought that Domino believed this. Domino was the lead investigator on the case. A reasonable jury would assume that Domino had to find VH's story credible in order for the State to eventually charge Smith with his crimes. Smith would not be prejudiced by Glasbrenner eliciting testimony that essentially mirrored the jury's assumption.

Finally, Smith has shown no prejudice from Glasbrenner's failure to ask Domino about her relationship with VH. Smith has shown only that the two knew each other for six or seven years. The nature of their relationship beyond the length of time is completely unknown. Without such additional information, any finding of prejudice based on the relationship would be inappropriately speculative. *See State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). This court should affirm the circuit court's order denying Smith's ineffective assistance of counsel claim.

II. The circuit court did not erroneously exercise its discretion in admitting Hocking's expert testimony about characteristics of child sexual abuse victims.

A. Standard of review and applicable law.

This court reviews the circuit court's decision to admit expert testimony under the erroneous exercise of discretion standard. *State v. Giese*, 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 854 N.W.2d 687. This court will uphold a circuit court's discretionary decision if it has a rational basis and was made in accordance with accepted legal standards in view of the facts of record. *Id.* The question is not whether this court, ruling initially on the admission of the evidence, would have admitted it, but whether the circuit court exercised its discretion. *State v. Manuel*, 2005 WI 75, ¶ 24, 281 Wis. 2d 554, 697 N.W.2d 811. This court owes no deference to the circuit court's application of legal principles, and this court may reverse a discretionary decision based on an erroneous view of the law. *State v. Keith*, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997).

The admission of expert witness testimony is governed by Wis. Stat. § 907.02, which provides:

> (1) 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.

The legislature amended Wis. Stat. § 907.02 in 2011, creating the above-quoted version. *Giese*, 356 Wis. 2d 796, ¶ 17. The purpose of the amendment was to make Wisconsin law consistent with the *Daubert* reliability standard embodied in Federal Rule of Evidence 702. *Id*. Under *Daubert*, the circuit court engages in a gatekeeping function to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues. *Id*. ¶ 18, citing *Daubert*, 509 U.S. at 589 n.7. The focus of this inquiry is whether the principles and methods the expert used have a reliable foundation in the knowledge and experience of the expert's discipline. *Id.,* citing *Daubert*, 509 U.S. at 592, 595.

"The standard is flexible but has teeth." *Giese*, 356 Wis. 2d 796, ¶ 19. Its ultimate goal "is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Id*.

Daubert listed several factors that courts can consider in applying the standard, including whether the expert's approach can be objectively tested, whether it has been subject to peer review and publication, the known or potential error rate, the existence and maintenance of standards of control, and its general acceptance in the scientific community. *Daubert*, 509 U.S. at 593-94.

This is a non-exclusive list. *See* Fed. R. Evid. 702 advisory committee note (2000).[1] "No attempt has been made to 'codify' these factors," and "*Daubert* itself emphasized that the factors were neither exclusive nor dispositive." *Id.*; *Daubert,* 509 U.S. at 593. Not all of the factors can apply to every type of expert testimony. *See* Fed. R. Evid. 702 advisory committee note (2000). A trial court may consider one or more of the specific factors when doing so will help determine whether the expert's testimony is reliable. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). But the *Daubert* test is meant to be flexible, and the list of factors "neither necessarily nor exclusively applies to all experts or in every case." *Id.*

The *Daubert* analysis should be applied reliably where the expert purports to apply principles and methods to the facts of the case. *See* Fed. R. Evid. 702 advisory committee note (2000). Yet, in some cases, it might be important for an expert to educate the factfinder about general principles without ever applying them to the facts of the case. *Id.* *Daubert* did not "alter the venerable practice" of using experts to convey such information. *Id.* To admit this kind of testimony, Rule 702 "simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony 'fit' the facts of the case." *Id.*

---

[1] The 2000 amendment to Fed. R. Evid. 702 was created in response to the *Daubert* decision and cases applying *Daubert's* standard. This court should consider the committee's note explaining the amendment highly persuasive authority in interpreting Wis. Stat. § 907.02, which was specifically adopted to mirror the federal rule and *Daubert*. *Giese*, 356 Wis. 2d 796, ¶ 17.

B. The circuit court properly exercised its discretion in admitting Hocking's testimony.

1. Additional facts.

The State gave notice that it would be calling Hocking as an expert witness to testify about "reactive behaviors common among child abuse victims," including "child development, use of language, recantation, delayed disclosure, progressive disclosure, disclosure to a trusted person, recall, and minimization by the victim" (27:1). The State said that Hocking would be testifying about the reasons for these behaviors based on her training and experience (27:1).

Hocking's curriculum vitae showed that she received a Bachelor of Science degree in social work in 1988, and had been working in the field since that time (27:3). Since 2009, Hocking had been employed as the director of the Walworth County Child Advocacy Center (27:3). From 1989 until 2009, she had worked for the Walworth County Department of Human Services in child protective services and as a juvenile court intake worker (27:3). Her CV also indicated that she engaged in extensive ongoing training in the area of child maltreatment, and trained others in this area (27:3).

Smith moved to exclude Hocking's testimony, arguing that it did not satisfy the standards of Wis. Stat. § 907.02 and *Daubert* (28). After briefing by the parties (29; 30; 31; 32), the circuit court allowed Hocking to testify.

In making its decision, the circuit court noted that the State had the burden under *Daubert* to show that Hocking's proposed testimony about assault-victim behaviors was both relevant and reliable (81:4). Glasbrenner conceded that Hocking's testimony would be relevant because she was

going to question VH about the manner in which she disclosed the assault (81:3-4). As a result, the court focused its decision on whether the testimony was reliable (81:4).

The court relied in part on *United States v. Simmons*, 470 F.3d 1115 (5th Cir. 2006), in assessing the reliability of Hocking's proposed testimony (84:12-13). In *Simmons*, the Fifth Circuit affirmed the district court's admission, over a *Daubert* challenge, of expert testimony about sexual assault victim behavior, including not reporting the assault to police and feelings of shame, humiliation, and self-blame. *Id.* at 1122. The defendant argued that this testimony did not satisfy *Daubert* because it relied on scientifically suspect methods and did not satisfy the *Daubert* factors. *Id.* The Fifth Circuit rejected this argument noting, among other reasons, that the behaviors shown by sexual assault victims and the stigma related to the crime "may preclude ideal experimental conditions and controls" and indicia of reliability other than the *Daubert* factors should be considered. *Id.* at 1123. These include professional experience, education, training, and observations. *Id.* The circuit court pointed to this specific portion of *Simmons* in its decision (81:12-13).

Finding that Hocking could testify, the court stated:

> What I need to do is look at Ms. Hocking in terms of whether she's a witness qualified as an expert by either knowledge, skill, experience, training or education. And I am going to rely heavily upon that – those facts, those past findings, the testimony that she's provided before, as well as her resume in finding that she does have sufficient knowledge, skill, experience, training or education, in order to qualify her as an expert, including the fact that she has some specialized knowledge; scientific, technical, or otherwise.

(81:18). It later added:

> . . . [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 if it's about the general area of – not the general area. Let me use different terminology. I'd say the field of expertise about 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).

At trial, Hocking said she had interviewed more than 5,000 children in her career, half of whom were victims of sexual assault (84:202, 210). She testified she has received training in understanding and investigating sexual abuse, including the Step-Wise interviewing protocol (84:203). Hocking also said she received training in reactive behaviors of child abuse victims and trained others on the behaviors as well (84:204). She also testified, "The best education I have in that area is working with victims over 24 years and watching how they disclose. There's a lot of similar characteristics that I have found in victims" (84:204). Hocking did not interview VH or testify that her behaviors were consistent with any of these characteristics.

2. The circuit court reasonably exercised its discretion.

This court should affirm the circuit court's decision admitting Hocking's testimony because it was a proper exercise of its discretion. The court relied on the facts of

record and applied the correct legal principles in deciding to admit Hocking's testimony.

Initially, it is not obvious that the *Daubert* analysis should strictly apply to Hocking's testimony. Hocking only testified generally about the behaviors of child sexual assault victims (84:199-09). She did not apply them to the facts of this case. The advisory committee note to Fed. R. Evid. 702 explains that when an expert testifies to general principles without applying them to the case's facts, the rule "simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony 'fit' the facts of the case." Fed. R. Evid. 702 advisory committee's note (2000). Because the legislature modeled the new Wis. Stat. § 907.02 on the federal rule, these requirements should likewise govern the admission of expert testimony that does not purport to apply to the facts of the case in Wisconsin.

The circuit court's decision complies with these requirements. The court found Hocking qualified as an expert based on her experience, training, knowledge, education, and skill, as well as her testifying in the past as an expert on the behaviors of child sexual assault victims (81:18). Hocking's CV supports the court's finding (27:3).

Next, by finding the testimony about these behaviors relevant, based in part on Glasbrenner's concession, the court implicitly determined the testimony addressed a subject matter that could assist the factfinder (81:3-4). Wisconsin courts reached the same conclusion about testimony like Hocking's under the earlier version of Wis. Stat. § 907.02, which admitted expert testimony if it "assists the trier of fact in understanding the evidence or a fact at issue." *See e.g. State v. Robinson*, 146 Wis. 2d 315, 332-35,

431 N.W.2d 165 (1988); *State v. Haseltine*, 120 Wis. 2d 92, 96-97, 352 N.W.2d 673 (Ct. App. 1984).

Further, the court determined that Hocking's testimony was reliable by recognizing that it was in "an area that has been developed over the years" and one that was recognized by Wisconsin courts before *Daubert* (81:25). *Robinson*, 146 Wis. 2d at 332-35; *Haseltine*, 120 Wis. 2d at 96-97.

Finally, Hocking's testimony fit the facts of the case because Glasbrenner said she intended to ask VH about the manner in which she disclosed (81:3-4). Hocking's testimony was thus relevant to explain why the behavior of sexual assault victims, such as delaying disclosure of the assaults, might not conform to commonly held expectations of how a victim reacts to a sexual assault and to rebut Smith's argument that VH was not credible because she did not act in accordance with those expectations. The circuit court's decision is consistent with Fed. R. Evid. 702's requirements for admitting expert testimony that does not purport to apply itself to the facts of the case.

Even if the *Daubert* analysis applies, though, this court must still affirm the circuit court's decision as a reasonable exercise of discretion under that standard. The court recognized the factors listed in *Daubert* for assessing the reliability of a proposed expert's testimony did not clearly apply to what the State wanted Hocking to say (81:12-13). Instead, relying on *Simmons*, the court determined that it needed to assess Hocking's reliability in a different way (81:12-13). *Simmons*, 470 F.3d at 1123. This was consistent with *Daubert*, which describes its standard as "flexible" and said that the factors were not a "definitive checklist." *Daubert*, 509 U.S. at 593-94; *see also Khumo Tire*, 526 U.S. at 141 (*Daubert* factors "neither necessarily nor

exclusively appl[y] to all experts or in every case"). The court's decision also comports with the 2000 committee note to Fed. R. Evid. 702. The note emphasizes the flexibility of the standard and the need to apply different measures of reliability depending on the evidence at issue.

And the court properly applied the measures of reliability it determined were relevant. It appropriately found Hocking's testimony reliable, in part, based on her experience, training, education, and skill. Hocking had more than twenty years of experience as a social worker, and had interviewed 2,500 child sexual assault victims (84:202, 210). The court reasonably concluded that this would give her a basis for explaining various behaviors of those victims that she observed while they were disclosing assaults, even apart from the specific training she received on the behaviors (84:204).[2]

The circuit also properly found that Hocking's testimony was reliable because it involved an "area that has been developed over the years" and correctly noted that Wisconsin courts routinely admitted this type of evidence under the old version of Wis. Stat. § 907.02 (81:25). As noted, Wisconsin has long approved the [practice of providing juries with information about commonly-observed behaviors of child sexual assault victims to rebut defense arguments that the victim's behavior is inconsistent with having been assaulted. *See State v. Rizzo*, 2002 WI 20, ¶ 68, 250 Wis. 2d 407, 640 N.W.2d 93 (Sykes, J., concurring) (noting that admission of *Robinson*-type expert testimony has "become

[2] Although this information came out at trial rather than during the pretrial hearings at which the court decided to admit Hocking's testimony, this court must search the record for reasons to sustain a circuit court's discretionary decision. *State v. Manuel*, 2005 WI 75, ¶ 24, 281 Wis. 2d 554, 697 N.W.2d 811.

relatively routine in sexual assault cases"). Even though courts previously admitted this evidence under a different standard, their decades-long approval of it as an appropriate topic of expert testimony supports a conclusion that the reactive behaviors of child victims are established, documented, and accepted in the field of social work.

Finally, the circuit court appropriately relied on the fact that federal courts have admitted testimony about reactive behaviors under *Daubert* (81:25). The court specifically pointed to *Simmons*, but other federal courts have approved of this and similar evidence. *See United States v. Smith*, 1998 WL 136564 at 1-2 (6th Cir. 1998) (discussing rape trauma syndrome; cited in *Simmons*); *United States v. Bighead*, 128 F.3d 1329-30 (9th Cir. 1997) (approving of expert testimony about "delayed disclosure" and "script memory" in child sexual abuse victims based on expert's years of experience in interviewing many victims of such abuse); *United States v. Alzanki*, 54 F.3d 994, 1006 (1st Cir. 1995) (expert's testimony based on her research and interaction with non-sexual abuse victims properly admitted to establish that victim's behavior was consistent with those of abuse victims in general; also cited in *Simmons*). The circuit court properly exercised its discretion when it admitted Hocking's testimony.[3]

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[3] Testimony like Hocking's is also allowed in most states. *See State v. J.Q.*, 599 A.2d 172, 183 (N.J. Super. Ct. App. Div. 1991) (stating that testimony about Child Sexual Abuse Accommodation Syndrome has received "nearly universal judicial approval" and listing cases); *People v. Spicola*, 947 N.E.2d 620, 635 (N.Y. 2011) (noting that a majority of states permit expert testimony to explain delayed reporting, recantation, and inconsistency, citing 1 Myers on Evidence § 6.24 at 416-422, which notes that Kentucky, Pennsylvania, and Tennessee are only apparent exceptions). And some courts have admitted this evidence under *Daubert*. *See State v. Foret*, 628 So.2d 1116, 1125 (La. 2003) (permitting CSAAS evidence to explain victim behavior under *Daubert*,

3. None of Smith's arguments demonstrate that the circuit court erroneously admitted Hocking's testimony.

Smith makes several arguments to support his claim that the circuit court erred by allowing Hocking to testify. This court should reject all of them.

Smith contends that the court erred because it did not find that Hocking's testimony satisfied any *Daubert* factors (Smith's brief at 25-31). Although he acknowledges that the list of factors is not meant to be exhaustive, Smith claims that the court erred because, when the court decided to admit Hocking's testimony, the State had not shown that the testimony satisfied any of the factors (Smith's brief at 26-29).

This court should reject these arguments for reasons that the State has already stated. To reiterate them briefly, *Daubert* is meant to be a flexible standard. The list of factors in *Daubert* for assessing scientific evidence does not neatly apply to all types of expert testimony, particularly testimony like Hocking's that is based largely on experience. Therefore,

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but not as proof victim was abused); *State v. Edelman*, 593 N.W.2d 419, ¶¶ 12-18 (S.D. 1999). But, regardless of the admissibility standard, the widespread acceptance of such testimony supports a finding that it is based on established and accepted principles in the field of social work.

In addition, states that have changed their expert admissibility standards to *Daubert* have concluded that this did not affect the admissibility of this testimony. *See Bourdon v. State*, 2002 WL 31761482 at 6-8 (Alaska Ct. App. 2002) (stating that Alaska's adaptation of *Daubert* would not "lead to dramatically different results" in admission of expert testimony about children's accusations of sexual assault); *State v. Salazar-Mercado*, 325 P.3d 996, 1000-1001 (Ariz. 2014) (declining to reconsider Arizona's past acceptance of testimony about CSAAS after State adopted *Daubert* standard); *State v. Kinney*, 762 A.2d 833, 840-42 (Vt. 2000).

that some, or even all, of the factors have not been met is not determinative. The flexibility of *Daubert* allows courts to apply measures of reliability that are specific to the evidence at issue. And here, the court properly relied on Hocking's education, training, and experience, as well as the widespread acceptance of testimony like she was going to give, in deciding to allow the State to present her as an expert witness. Further, this court must review the circuit court's decision in light of the entire record. *Manuel*, 281 Wis. 2d 554, ¶ 24. It is not limited to considering the arguments made at the hearings on whether to admit Hocking's testimony and the record as it existed at that time.

Smith also criticizes the court's reliance on *Simmons*, (Smith's brief at 26-29). He contends the court erred because it admitted Hocking's testimony based solely on the finding in *Simmons* that the expert in that case was reliable (Smith's brief at 27-28). Smith further argues that in *Simmons*, the expert testimony at issue involved "rape-victim behavior" not child sexual assault victim behavior, so it was not even correct for the circuit court to say that federal courts had recognized the admission of testimony like Hocking's (Smith's brief at 28).

This argument misrepresents the circuit court's reliance on *Simmons*. While the court did note that it was relying on the similarities in this case and *Simmons* to support its decision, it did not admit Hocking's testimony simply for that reason. Instead, the court found the discussion in *Simmons* of how to apply *Daubert* to "soft . . . social sciences, particularly in areas involving sexual . . . victimization" helpful to its decision (81:12). It was hardly erroneous for the court to look for guidance from a federal court decision addressing a similar situation, particularly when, as the court noted, there was little guidance from

Wisconsin courts on how to apply *Daubert* (81:20). And whatever the differences between the testimony here and in *Simmons*, the circuit court was ultimately right that federal courts have approved testimony like Hocking's. *Bighead*, 128 F.3d at 1330.

Smith also argues that the court's reliance on *Simmons* was error because science can change over time, and simply because a court found something reliable in 2006 does not mean it was reliable in 2012, when the court admitted Hocking's testimony (81; Smith's brief at 29-30). Smith is right that science can change, but he makes no attempt to show that any of the information or principles underlying Hocking's testimony have changed in recent years.

Next, Smith suggests that this court follow *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996), in which the Kentucky Supreme Court held that testimony about the behaviors of child sexual abuse victims was inadmissible under *Daubert* (Smith's brief at 30-31). This court should not do so. Most jurisdictions allow testimony explaining the behaviors of child sexual assault victims when used to rebut defense arguments that those behaviors make the victim's accusation not credible. *See People v. Spicola*, 947 N.E.2d 620, 635 (N.Y. 2011); John E.B. Myers, Myers on Evidence of Interpersonal Violence at 538-540, § 6.20 (5th ed. 2011). And, as argued, Wisconsin has long approved of this testimony.

Smith argues that, despite Wisconsin's endorsement of this type of expert evidence, the amendment of Wis. Stat. § 907.02 means that "more must be required than that such behavioral testimony has been previously allowed" (Smith's brief at 32-33). Citing several secondary sources, he claims that testimony about the behaviors of child sexual assault

victims is controversial, and because it is meant for treatment, it is not reliable for court proceedings under *Daubert* (Smith's brief at 32-33).

None of this shows that the trial court erred. Smith is essentially restating his argument that admitting Hocking's testimony was a mistake because it did not fit any of the *Daubert* factors (Smith's brief at 33). Further, Smith did not present the circuit court with any of these sources, so it is hard to see how they prove that it erroneously exercised its discretion (28; 30; 32; 80; 81). Finally, that testimony about the behaviors of child sexual abuse victims is controversial or meant to be used in treatment only does not make it unreliable under *Daubert*. "'The trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'" Fed. R. Evid. 702 advisory committee's note (2000), quoting *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). "As the Court in *Daubert* stated: 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" Fed. R. Evid. 702 advisory committee's note (2000), quoting *Daubert*, 509 U.S. at 595. That there might be some criticism of this type of testimony does not mean it was inadmissible.

Smith next contends that Hocking did not have the necessary experience or knowledge to testify about reactive behaviors (Smith's brief at 34-36). He claims that in order for an expert to testify based on her experience, the expert must specifically explain how that experience supports the conclusion reached, and claims Hocking did not do this (Smith's brief at 35-36).

The circuit court properly found Hocking to be qualified based on her experience, knowledge, and training. Hocking gave general testimony about behaviors she has observed when interviewing 2,500 child victims of sexual abuse over more than twenty years. Given this, her experience would necessarily be the primary means of assessing reliability, and it was not error for the court to rely on it. Further, Hocking did not reach any conclusions within the meaning of *Daubert* because she only gave general testimony. She did not testify that VH's behaviors were consistent with those she had observed. Hocking could not explain a conclusion she did not reach.

Finally, Smith argues that Hocking's testimony crossed the line into vouching for VH's credibility because the court limited what she could say to the specific behaviors VH displayed (Smith's brief at 36-40). This, he claims, essentially allowed Hocking to give a profile of a sexual assault victim that matched VH (Smith's brief at 37). He also complains that Hocking testified that it is rare that children lie about being victims of sexual assault (Smith's brief at 39-40).

This court should not address these arguments. Smith forfeited them by not objecting either at the motion hearing when the court limited Hocking's testimony or to the written order summarizing its decision (35; 81:30-31). *State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511 (failure to object when alleged error occurs amounts to forfeiture of right to raise issue on appeal). Smith also never objected to any of Hocking's testimony that he alleges created a profile of VH or her testimony that victims rarely lie (84:206-09, 218). A specific, contemporaneous objection in the circuit court is required to preserve a claim that the court improperly admitted testimony. *See State v. Delgado*, 2002 WI App 38, ¶¶ 11-12,

250 Wis. 2d 689, 641 N.W.2d 490. And Smith does not acknowledge that Hocking's testimony that it was rare for victims to lie was elicited by the State in response to his own questioning of Hocking on the topic (84:209-212, 215-16, 18). He should not be permitted to complain on appeal about testimony he opened the door to at trial.

C. If the court erred in admitting Hocking's testimony, it was harmless error.

Finally, even if this court determines that the circuit court violated Wis. Stat. § 907.02 in admitting Hocking's testimony, it should hold that this error was harmless.

An error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error did not contribute to the verdict obtained. *See State v. Harris*, 2008 WI 15, ¶ 42, 307 Wis. 2d 555, 745 N.W.2d 397. Alternatively stated, an error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *See id*. ¶ 43.

The State's case against Smith was strong. VH repeatedly and consistently disclosed Smith's assaults to her stepsister, father, her father's wife, and Domino (84:157, 166-68, 186; 85:135-38). And a mixture of DNA found on the couch where VH said Smith committed some of the assaults definitely contained Smith's sperm and most likely contained VH's DNA (85:69-75). This was not simply a credibility dispute between Smith and VH, though given VH's disclosures, the jury would have undoubtedly believed her even without Hocking's testimony.

Further, Hocking's testimony was not critical to the State's case. She gave only general testimony about the

behaviors of child sexual assault victims (84:199-09). She did not say that VH displayed any of those behaviors.

Finally, Smith did not have much of a defense. In his brief, Smith notes that VH disclosed the abuse after Smith and her mother had told her that she could not see her boyfriend anymore because he was too old (Smith's brief at 4-5). While it is true that Smith presented evidence of this at trial, Glasbrenner did not emphasize it during closing argument as a possible motivation for VH to falsely accuse him (85:201-08). If counsel did not think much of this defense, it is unlikely the jury found it persuasive either. In addition, although Smith testified and denied assaulting VH, his credibility was undermined by Domino's testimony that Smith asked her "how long would he be looking at" when she was collecting his DNA (84:250; 85:152-65). This statement shows consciousness of guilt. The jury would have convicted Smith even if it never heard Hocking's testimony.

III. Smith is not entitled to a new trial in the interest of justice.

Smith also asks for a new trial in the interest of justice, aggregating his ineffective assistance and *Daubert* claims to suggest that the real controversy was not fully tried (Smith's brief at 40-42). This court should deny his request.

Smith contends that the real controversy was not fully tried because the jury improperly heard some evidence from Domino and did not get the chance to hear other evidence from her. *See State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). Discretionary reversal on the grounds that the jury was denied the opportunity to hear evidence only applies when the circuit court errs in not admitting the evidence. *See State v. Burns*, 2011 WI 22, ¶ 45, 332 Wis. 2d

730, 798 N.W.2d 166. Here, counsel was responsible for the errors involving Domino's testimony that Smith alleges. His claim is limited to his ineffective assistance claim, and inappropriate for a request for a new trial in the interest of justice. *See State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115.

Further, Smith's *Daubert* claim does not warrant a new trial in the interest of justice because the circuit court properly admitted her testimony.

Finally, because both of Smith's claims fail on their merits, adding them together does not justify a new trial in the interest of justice. "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

CONCLUSION

The State respectfully requests that this court affirm the circuit court's judgment of conviction and order denying Smith's motion for postconviction relief.

Dated this 30th day of June, 2015.

Respectfully submitted,

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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 7,931 words.

Dated this 30th day of June, 2015.

____

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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 30th day of June, 2015.

____

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