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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REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. Smith was Deprived of the Effective Assistance of Counsel Because Counsel's Implementation of Trial Strategy was Deficient and Prejudicial.

Smith's trial counsel's strategy for cross-examining Lori Domino, the primary investigating officer in the case, was to demonstrate that Domino "blanketly" believed everything V.M.H. told her. The state misses the mark when it argues that Attorney Glasbrenner's strategic choice was "unassailable." (State's brief: 5). As argued in Smith's first brief, the strategy may have been sensible, but counsel's implementation of that strategy was deficient. Counsel failed to elicit evidence of the preexisting connection between Domino and V.M.H. and gave Domino the opportunity to strengthen her testimony by talking about her investigative process and her reasons for concluding that V.M.H. was telling the truth.

Domino's recorded interview with V.M.H. begins with Domino commenting that she has known V.M.H. since she was "knee high to a grasshopper," and that she had always known V.M.H. "to be truthful." (72:3-4; App. 156-57). Counsel should have brought these comments to the attention of the jury because they show familiarity and bias toward believing V.M.H. before she said a single word about Smith.

Next, where the direct testimony showed that Domino did follow-up investigation to corroborate V.M.H.'s complaint, trial counsel erred by suggesting on cross-examination that Domino did no additional investigation after getting V.M.H.'s statement. Domino then repeated her testimony from the previous day, that in fact she had collected

physical evidence and interviewed other witnesses. (85:21). It makes no sense to elicit testimony of follow-up investigation when the goal is to prove the investigator was so biased that she did not fairly investigate a case.

Third, counsel asked Domino *how* she knew V.M.H. was telling the truth, which led Domino to explain that she could tell V.M.H. was telling the truth "based on what's she's told me." (85:24). Nothing helpful could possibly have come from this question. Having established that Domino believed V.M.H., there was no reason to invite her to respond that she believed V.M.H. based on her statements and Domino's judgment of how a person makes a statement. (85:24). The risk was obvious; Domino had testified on direct examination that she had training in determining whether someone is telling the truth.

The state contends that Smith's argument "strips the jury of its common sense." It assumes jurors know that "no person can know for sure if another person is telling the truth just from speaking to them." (State's brief: 8). The state's argument is directly contrary to the prohibition expressed in ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." As the court said in ***State v. Krueger***, 2008 WI App 162, ¶9, 314 Wis. 2d 605, 762 N.W.2d 114, "[a]n opinion that a complainant was sexually assaulted or is telling the truth is impermissible." If it was "common sense" that jurors understood that no person can tell whether another is telling the truth, there would be no need for the rule expressed in ***Haseltine*** and ***Krueger***.

Similarly, the state argues that the jurors "would not be surprised" that a police officer might already know a complainant in a small community. (State's brief: 10). The court should reject this argument. Jurors are instructed that they can assess a witness's credibility by considering a number of factors, including "bias or prejudice, if any has been shown." WIS JI-CRIMINAL 300. A juror needs evidence upon which to conclude that bias or prejudice exists. Here, counsel had evidence in the form of Domino's comments to V.M.H. before she took her statement, but failed to use it.

Finally, the state mischaracterizes Smith's argument regarding ***State v. Snider***, 2003 WI App 172, 266 Wis. 2d 830, 668 N.W.2d 784. It incorrectly recasts Smith's claim as an argument that impeaching a law enforcement officer for having "tunnel vision" is reasonable only if counsel establishes the officer was already biased before conducting the interview. (State's brief: 9). This is incorrect. Smith's argument is that the investigative bias claim is stronger here than it was in ***Snider*** because trial counsel had an additional claim: that Domino believed the complainant *before* the investigation even began. Investigative bias could arise, as in ***Snider***, upon hearing the complainant's version of events. Here, it is stronger because the detective believed the complainant before the interview even began.

II. The Trial Court Erroneously Exercised its Discretion When it Admitted Hocking's Testimony.

In ***Giese***, this court noted that a trial court's gate-keeper function under ***Daubert***[1] and the newly revised Wis. Stat. § 907.02 is "flexible but has teeth." ***State v. Giese***,

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

2014 WI App 92, ¶19, 356 Wis. 2d 796, 854 N.W.2d 687. This court has the opportunity here to give courts guidance as to the "teeth" required by the new standard. Smith's argument on this point is simple. To give the new standard teeth, trial courts must engage in a meaningful analysis of reliability before allowing experts to testify. The trial court in this case did not do so.[2]

The state focuses on the flexibility trial courts have in applying the ***Daubert*** standard and mischaracterizes Smith's reliability argument as saying that Hocking's testimony is inadmissible because it does not meet any of the five ***Daubert*** factors. (State's brief: 22, 25). Smith is not arguing that the new Wis. Stat. § 907.02 should be applied rigidly, nor that Kentucky's per se rule excluding evidence like Hocking's should be extended to Wisconsin.[3] (*Cf* State's brief: 24).

Smith asserts that trial courts must address whether and how the ***Daubert*** factors apply, discuss additional factors that are relevant to the court's reliability analysis, and making a decision with a "rational basis…made in accordance with accepted legal standards in view of the facts in the record." ***Giese***, 356 Wis. 2d 796, ¶16. As Blinka explained in his primer, courts must "determine which factors should be considered in assessing reliability in the first instance. Once

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[2] This court should reject the state's assertion that "it is not obvious that the ***Daubert*** analysis should strictly apply to Hocking's testimony." (State's Brief: 18-19. 26). Wisconsin Statute § 907.02 unequivocally applies to all expert testimony. The state quotes a single passage from the advisory committee note out of context. (*Id.* at 18, *quoting* Fed. R. Evid. 702 advisory committee note (2000 amendment)). Even that quote acknowledges the trial court's responsibility to analyze reliability.

[3] *See* ***Newkirk v. Commonwealth***, 937 S.W.2d 690 (Ky. 1996).

those factors are selected, the judge decides whether the witness's principles and methods are reliable when measured against those standards." D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, 84 WIS. LAW. 14, 19 (March 2011). The trial court's failure to do so here was error.

The reliability analysis is a key difference between Wisconsin's old standard and its new one. It is well-established in the sentencing context that trial courts need to do more than utter the magic words when imposing a sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶37, 270 Wis. 2d 535, 678 N.W.2d 197. Likewise, trial courts must do more than list the factors and use the word "reliable" as part of the reliability analysis under the new standard.

The state argues that the trial court "properly applied the measures of reliability it determined were relevant" because it found Hocking's testimony reliable based on her qualifications and prior case law in Wisconsin and other jurisdictions. (State's brief: 20-21). This court should not accept that reasoning as sufficient; to do so would amount to a per se rule that this type of evidence is admissible without a meaningful, case-by-case analysis of reliability. Smith acknowledged in his brief-in-chief that Wisconsin allowed this type of testimony pre-*Daubert* and that other jurisdictions allow the type of testimony offered by Hocking. That does not mean Hocking's testimony was per se reliable or admissible.

First, Hocking is a social worker who testified based her experience interviewing children *alleging* abuse. Hocking's qualifications and the reliability of her testimony are intertwined. "Under amended section 907.02, the qualification element should speak to the reliability of the witness's principles and methods and their application to the

facts." Blinka at 18. In ***Simmons***, the expert was a psychologist who specialized in sexual violence and sexual victimization. ***United States v. Simmons***, 470 F.3d 1115, 1122 (5th Cir. 2006). One can readily see how that background might lead to objective knowledge of research regarding behavior of sexual assault victims. In contrast, the record shows Hocking's experience is purely subjective; her conclusions regarding behaviors common to child sexual assault victims are based on her observations of children whose stories she has decided are true.

Contrary to the state's assertion that the "widespread acceptance of such testimony" "supports a finding that it is based on established and accepted principles in the field of social work," (State's brief: 21-22 n.3), proponents of this type of testimony are not always social workers. Only two cases cited in footnote 3 of the state's brief involve a social worker as an expert. Of those, one testified regarding investigation and interview techniques. ***Bourdon v. State***, 2002 WL 31761482, 5, 8 (Alaska Ct. App. Dec. 11, 2002). The other testified about the "range of behaviors that are associated with child victims of child sexual abuse," but the social worker explicitly testified that the behaviors he listed were not intended to diagnose sexual abuse. ***People v. Spicola***, 947 N.E.2d 620, 629-30 (N.Y. 2011). The social worker in ***Spicola*** also explicitly referred to scholarly research grounding his testimony. ***Id.*** Neither case is analogous to this one.

It is not enough to say, as the trial court did here, that because Hocking had substantial experience interviewing children alleging sexual abuse and because her testimony is similar to testimony admitted in other cases, Hocking could testify here. That is because in order for expert testimony to be helpful to the jury, as required by both the old and the new

standard, an expert must be able to do more than regurgitate basic principles relied on in other cases. Like the social worker expert in ***Spicola***, experts relying solely or primarily on experience "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); (Supp. App. 105). This requirement limits the risk of the jury inappropriately using testimony like Hocking's to conclude that since V.M.H. exhibited certain characteristics that are common to victims of child sexual assault, V.M.H. must have been assaulted. Here, Hocking's testimony did not match her expertise.

Additionally, although other jurisdictions allow this type of testimony, not all jurisdictions have reached the same conclusion. One of the cases cited by the state notes that "[p]ost ***Daubert,*** it appears that there is less clarity throughout the country regarding the admissibility of expert testimony about children's accusations of child abuse." ***Bourdon***, 2002 WL 31761482, at 8. Wisconsin deserves a more thorough analysis of this issue than the one in this case. As outlined in Smith's brief, skepticism about the use of this type of therapeutic research in a forensic setting—even by an objective expert—is warranted. (Smith's Brief: 32-34).

Finally, the state argues that Smith forfeited his argument that Hocking's testimony improperly vouched for V.M.H.'s credibility when the court limited her testimony to behaviors which matched those of V.M.H. First, although Smith did not explicitly object to the limitation, he did object to the admissibility of all of Hocking's testimony on the proper basis—that it was inadmissible in light of ***Daubert*** and the newly amended Wis. Stat. § 907.02. (28:2). Furthermore, even if this court believes the argument was forfeited, it has

the discretion to address it. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶17, 273 Wis. 2d 76, 681 N.W.2d 190. This court should exercise that discretion because this case provides an opportunity for guidance regarding the use of this type of testimony in future cases.

III. Smith Was Prejudiced by His Counsel's Deficient Cross-Examination of Domino, and the Error of Admitting Hocking's Testimony Was Not Harmless.

Counsel's deficient cross-examination of Domino and Hocking's inadmissible testimony both bolstered the V.M.H.'s credibility, which was critical to the state's case. Here, Domino's credibility was inextricably linked to that of V.M.H., in that she repeated V.M.H.'s assertion that Smith had assaulted her, and she vouched for V.M.H.'s credibility. Hocking's testimony further bolstered V.M.H.'s credibility by having an "expert" testify that her behavior was consistent with that of "typical" victims of child sexual assault.

V.M.H.'s testimony was not ironclad; she had a motive to falsely claim she had been assaulted. Just before V.M.H. made her accusation against Smith, her parents and Smith had confronted her about continuing to see a boyfriend whom she had been forbidden to see. (84:97). The state downplays this defense by arguing that trial counsel did not emphasize V.M.H.'s motive to falsely accuse Smith in closing and therefore must not have thought much of that defense. (State's brief: 28). But defense counsel did argue motive to falsely testify in closing. (85:206-07).

The state also argues Smith was not prejudiced and any error was harmless in light of the DNA evidence against him. (State's brief: 11). The DNA evidence in this case was far from conclusive.

V.M.H. testified Smith assaulted her on her bed and on the couch. The crime lab analyst testified that all of the stains on the bed sheets were negative for the presence of semen. (85:62). A small sample of a couch cushion revealed the presence of Smith's sperm. (85:68). In the non-sperm fraction of that stain, she found a mixture of DNA from *at least two* people. (85:68-69). When asked whether the "minor contributor" in the mixture was consistent with V.M.H.'s DNA profile, the analyst answered: "All of her types *but one* were present in that stain." (85:73). She said that the "minor contributor in this mixture was quite low level" and included V.M.H. as a possible contributor. (85:74).

This testimony does not prove that a sexual assault caused this mixture to be on the couch cushion. The jury could readily have concluded that the fact that one of V.M.H.'s "types" was missing from the profile meant she was not the source of that DNA profile. Further, the analyst could not testify that Smith and V.M.H. left their DNA at the same time in the course of a sexual assault. The DNA came from a couch in a public area of the home V.M.H. and Smith shared, so the possible presence of her DNA and Smith's is not remarkable. Given V.M.H.'s testimony that Smith assaulted her on a regular basis, the jury could reasonably have expected a great deal of DNA evidence, as opposed to the "lower level minor component" in this case. (85:75).

Finally, the state suggests that Smith's testimony that he did not sexually assault V.M.H. was weak because it "was undermined by Domino's testimony that Smith asked her 'how long would he be looking at' when she was collecting his DNA." (State's brief: 28). The state's argument that this shows consciousness of guilt is not persuasive. Anyone accused of sexually assaulting a child would be concerned

about the potential punishment. And any person would have valid reasons for concern that his DNA might be found on a couch in his home.

Specifically regarding prejudice, the state suggests Smith suffered no prejudice because "[e]ven if Domino had not testified that VH was telling the truth, the jury would probably have thought that Domino believed this." (State's brief: 11). The state reasons that the jury would conclude Domino believed V.M.H. because the state had decided to charge Smith, and as a result, trial counsel's cross-examination simply "mirrored the jury's assumption." (*Id.*). The assumption that an investigating officer wholeheartedly believes the complainant is groundless. In fact, the state repeatedly asks this court to make groundless assumptions—that the jury would not have been surprised that Domino and V.M.H. knew each other, that the jury would have assumed Domino believed V.M.H. because Smith was charged with a crime, or that jurors must know that "no person can know for sure if another person is telling the truth just from speaking to them." (State's brief: 10-11, 8).

Smith's argument, on the other hand, is non-speculative. Had counsel demonstrated that Domino knew V.M.H., she could have argued that it would have been very difficult for V.M.H. to recant her story given that Domino began her interview by commenting how long she had known V.M.H., and knew her to be truthful.

The state also has not met its burden to prove beyond a reasonable doubt that the admission of Hocking's testimony was harmless error. The state first suggests that "given VH's disclosures, the jury would have undoubtedly believed her even without Hocking's testimony." (State's brief: 27). This is another groundless assumption. Worse, this reasoning

amounts to saying that any error in a child sexual assault case is harmless so long as the child testifies. Such reasoning cannot stand.

The state also argues that any error in admitting Hocking's testimony was harmless because Hocking "did not say that VH displayed" any of the behaviors she testified about. She did not need to; the state did that for her in closing argument. (85:193, 210). Furthermore, as outlined in Smith's brief, the state questioned Hocking in a way that matched her testimony directly to V.M.H.'s testimony. (Smith's Brief: 36-40).

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 4th day of August, 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 2,962 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 4th day of August, 2015.

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