STATE OF WISCONSIN

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

DISTRICT I

Case No. 2014AP002675-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA J. FELTZ,

Defendant-Appellant.

On Notice of Appeal From a Judgment of Conviction and
From a Postconviction Order Denying Relief,
Entered in Milwaukee County Circuit Court,
the Honorable Ellen R. Brostrom, Presiding.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Evidence Was Insufficient to Prove Count 2 Beyond a Reasonable Doubt.

The State acknowledges the "problem" in this case in sorting out the sexual acts to which Tamara S. testified into two separate charging periods. (State's brief at 4-5). The State's solution to the "problem," however, proposes a series of "ifs," and suggests that the jury could have resorted to a series of faulty inferences to find Joshua Feltz guilty as charged in Count 2. (State's brief at 4-6).

However, jury verdicts must be based on evidence, not "conjecture and speculation." ***Herbst v. Wuennenberg****,* 83 Wis. 2d 768,774, 266 N.W.2d 391 (1978). "Speculation cannot be the basis for proof in the civil context much less the basis for proof beyond a reasonable doubt." ***U.S. v. Groves*****,** 470 F.3d 311, 324 (7th Cir. 2006).

While facts can be established by reasonable inferences as well as direct evidence, an inference is reasonable only if it can fairly be drawn from the facts in evidence. ***In re Paternity of A.M.C.***, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988). A proper inference is one drawn from logic and proper deduction. *Id.* And, while "a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation." ***Piaskowski v. Bett***, 256 F.3d 687, 693 (7th Cir. 2001); ***Yelk v. Seefeldt*****,** 35 Wis. 2d 271, 280-81, 151 N.W.2d 4 (1967).

The State carries the burden of proving all facts necessary to establish the elements of the offenses it charges. Here, the State chose to amend the initial single charge and

instead proceed with two separate counts of repeated sexual assault, separating the initial time frame into two distinct time periods. (2; 12; 13). Then, at the close of evidence at trial, the prosecutor amended the time frames for the two charges, to modify Count 1 to May 6, 2003 through September 1, 2004 [which included the summer months both before and after Tamara S. was in first grade], and Count 2 to September 2, 2004 through May 5, 2006 [which included Tamara S.'s second and third grade years]. (70:9-13). The court instructed the jury using these amended time frames. (70:13-14,51). The State was therefore required to prove that three sexual acts occurred during each one of the separate time periods it charged.

The State points out that Tamara S. asserted that sexual acts "happened pretty much every time that Josh would come to visit" his grandparents (67:30), and notes that Joshua and his grandmother (Mary Ann Feltz) testified that he visited his grandparent's home on 55th Street "maybe four times" per year during the time period from 2003 to 2006 (69:92-93, 109-110). From these "guesstimates," the State asserts that Joshua Feltz visited his grandparents "more than six times" in the charging period from September 2004 to May 2006, and claims that he "could have sexually assaulted TS more than six times, but at least three times" during that time frame. (State's brief at 6).

The State's claim fails to acknowledge, however, that Tamara S. testified that while she thought something might have happened to her while she was in the second grade, she also thought that it ended sometime during second grade, and she did not think that anything happened during third grade. (67:13-14). Tamara S.'s third-grade year would have included the period from September 2005 through May 2006, the latter part of the Count 2 time frame of September 2004 to

May 2006. (67:28-29). Consequently, as the State's calculations regarding the number of times Joshua Feltz might have assaulted Tamara S. are based upon this entire time period, including the third-grade year in which Tamara S. testified no sexual assaults occurred, its assertion that Mr. Feltz "could have" assaulted Tamara S. at least three and perhaps more than six times during the entire Count 2 time frame fails.

The State also asserts that it can be inferred that Mr. Feltz visited his grandparents exactly four times from September 2004 to September 2005, and suggests that the jury could have reasonably inferred that Mr. Feltz sexually assaulted Tamara S. three of four times during that one-year time frame, based upon the testimony that the assaults occurred "pretty much every time" he visited. (State's brief at 6). Again, however, the State's math is faulty, given Tamara S.'s testimony that the sexual contact *ended* "sometime" when she was in second grade - which would have been the school year period from September 2004 through May or June of 2005. (67:13-14). Thus, given this testimony, there is no basis to believe that any sexual contact occurred in the months *after* the second grade school year ended in May or June of 2005.

In addition, given the lack of specificity regarding *when* during that second grade school year the contact ended, there is simply no factual basis on which the jury could have relied to reasonably infer that Mr. Feltz sexually assaulted Tamara S. at least three times sometime between September 2004 and September 2005. Thus, rather than permissible inferences, the State's proposed "ifs" in reaching its conclusions regarding how the jury might have concluded that Mr. Feltz was guilty of Count 2 amount to mere

speculation, requiring a leap of logic that no reasonable jury should have been permitted to take.

II. Officer Young's Testimony That Tamara S. Appeared to be Truthful Was Impermissible Opinion Testimony, and Trial Counsel Was Ineffective For Eliciting it in Cross-Examination.

The State asserts that Officer Young's repeated testimony that Tamara S. "appeared to be truthful" was not a comment on her truthfulness, as it "did not mean that what she said was necessarily true." (State's brief at 9). The State also asserts that Officer Young's testimony that she believed the information that Tamara S. provided was truthful did not violate ***Haseltine***[1] because the officer was referring to the truthfulness of Tamara S.'s statement to Officer Young, rather than commenting on whether Tamara S. was telling the truth at trial. (State's brief at 9). To the contrary, however, there is no requirement that a witness's opinion testimony refer only to another witness's truthfulness at trial. *See* ***State v. Romero***, 147 Wis. 2d 264, 432 N.W.2d 899 (1988).

In ***Romero*****,** the Wisconsin Supreme Court specifically applied the ***Haseltine*** prohibition on testimony regarding a witness's truthfulness to a police officer's testimony about his interview of the complaining witness. In ***Romero,*** as here, a police officer testified regarding his experience in investigating sexual assaults, offering his opinion that the alleged victim "was being totally truthful with us" during two interviews with police. ***Romero***, 147 Wis. 2d at 268-69. The Supreme Court found that this testimony violated ***Haseltine***, as it usurped the jury's role in deciding the credibility of the witnesses, and there was a "significant possibility that the

[1] ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984)

jurors, when faced with the determination of credibility, simply deferred to witnesses with experience in evaluating the truthfulness of victims of crime." ***Romero***, 147 Wis. 2d at 278-79. The Court also found a social worker's testimony violated ***Haseltine***, based on the worker's testimony that the victim "was honest with us from the time of the first interview through my subsequent contact with her." ***Romero***, 147 Wis. 2d at 268. Thus, contrary to the State's claim, it is clear from ***Romero*** that the Supreme Court has applied the ***Haseltine*** prohibition on witness testimony regarding another witness's truthfulness to a police officer's testimony regarding what he believed during his investigation.

This court recently applied the ***Haseltine*** prohibition to a detective's testimony regarding his belief in a witness's truthfulness during investigation in ***State v. Charles C.S., Jr.,*** Appeal No. 2014AP1045 (unpublished opinion issued 2/11/2015)(Supp. App. 101-104). This court, noting the factual similarities of the case to ***Romero***, particularly the "battle of credibility" and the lack of independent evidence linking the defendant to the charged crimes, found that the detective's testimony that a witness was "being honest with me" during police interviews was an impermissible opinion that the witness was telling the truth. ***Id.*** at ¶¶3,12-16.

This court also applied ***Haseltine*** to the improper admission of testimony from a bus company safety director that, based upon her prior work contacts with the defendant, he stuttered when he lied. ***State v. Echols***, 2013 WI App 58, 348 Wis. 2d 81, ¶¶24-28, 831 N.W.2d 768.

In addition, Officer Young's testimony in this case was not simply an explanation of her "thought process" or her method in conducting the interview of Tamara S., as the

Court of Appeals found with the detectives' testimony in ***Snider*** and ***Ware***, the cases cited by the State. (State's brief at 9). See ***State v. Snider,*** 2003 WI App 172, 266 Wis. 2d 830, ¶27, 668 N.W.2d 784; ***State v. Ware***, 2015 WI App 13, ¶¶24-27 (unpublished opinion issued 12/30/2014). While Officer Young discussed the interview technique she generally uses, her testimony went beyond any mere "thought process" or explanation of her interview technique, to repeatedly state her belief that Tamara S. gave "truthful" information and appeared to be "truthful." (68:40-41). Officer Young's testimony interfered with the jury's role by assessing the credibility of the complaining witness, violating ***Haseltine***.

The court's modified instruction to the jury on determination of witness credibility is not, as the State attempts to paint it, the equivalent of an order striking the testimony and telling the jury to disregard it. (State's brief at 10). The court's instruction merely told the jury that "[r]egardless of Officer Young's impression of [Tamara S.]," the witness's truthfulness was a matter for the jury to decide. The court had not, however, stricken the testimony or ordered the jury to disregard it, so the jury was free to consider Officer Young's testimony in assessing the credibility of the witnesses. As this case was, like ***Romero*** and ***Charles C.S., Jr.,*** a "battle of credibility," Mr. Feltz was prejudiced by this testimony.

III. The Prosecutor Improperly Linked Tamara S.'s Parochial Schooling to Her Credibility, and Trial Counsel Was Ineffective In Acquiescing to a Variation Of That Argument and Failing to Move For a Mistrial.

The State acknowledges that the record is barren of any direct evidence supporting its claim that Tamara S. received "moral guidance" in the religious schools she

attended. (State's brief at 13). Nonetheless, the State again engages in speculative inferences in an attempt to cobble together a factual underpinning for the prosecutor's closing argument that linked Tamara S.'s credibility to her religious school attendance.

The State claims that it is within the average juror's "common knowledge and common sense" that "moral guidance is provided at religious schools, and was provided to TS at the religious schools she attended." (State's brief at 13). This broad generalization of diverse, independent religious schools of many different faiths and their varied curriculum is breathtaking. The State points to nothing to support its claim that parochial school education is something that many or most people in the community are familiar with, such that they would have intimate knowledge of each institution's curriculum. Moreover, the State offers nothing to indicate specifically what "moral guidance" jurors would understand is commonly provided at all religious schools that is relevant to truthfulness, much less what the schools Tamara S. attended instilled in its students in terms of "moral guidance" relevant to truthfulness.

The State's additional suggestion (State's brief at 13-14) that jurors could reasonably infer that Tamara S. must have attended religious schools in the interim from second to eighth grade, simply because she attended one her first two years and another one in the last three years is mere conjecture. *See* ***Herbst,*** 83 Wis. 2d at 774. This speculative claim fails to account for the changes that occurred in Tamara S.'s life in that interim period, including a "difficult family time" because of her brothers' behavior while her mother was still alive, and then, after her mother's death in 2010, Tamara's move to live with her aunt and uncle, who became her guardians. (66:77-79,104; 67:68-69). There is simply

no reasonable basis on which jurors in this case could have made such a logical leap without engaging in pure speculation. Such speculation is insufficient to establish the State's burden to prove guilt beyond a reasonable doubt. *See* ***Groves***, 470 F.3d at 324.

CONCLUSION

As argued here and in his initial brief, Mr. Feltz asks this court to find the evidence insufficient on Count 2 and to reverse this conviction, with a remand to the circuit court with directions that a judgment of acquittal be entered as to that count. As to the issues raised in Sections II and III, Mr. Feltz requests a new trial, or asks that this court order a remand, with directions that a ***Machner*** hearing be held.

Dated this 27th day of April, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. §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 2,145 words.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §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. §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 27th day of April, 2015.

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SUPPLEMENTAL APPENDIX

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