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COURT OF APPEALS OF WISCONSIN
DISTRICT NO. I

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CASE NO. 2014AP002773-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

Vs.

DAVIS KEVIN LEWIS,

Defendant-Appellant,

APPEAL FROM A JUDGMENT OF CONVICTION FROM THE
CIRCUIT COURT, MILWAUKEE COUNTY,
THE HONORABLE DAVID BOROWSKI PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statement on Oral Argument and Publication	ii
Statement of the Case	1
Statement of the Facts	1
Argument	1
I. THE DEFENSE SHOULD HAVE BEEN PERMITTED TO CALL JULIE BRADLEY AS A WITNESS	1
II. THE COURT SHOULD NOT HAVE PERMITTED THE JURY TO VIEW THE ACCUSER'S STATEMENT TO LAW ENFORCEMENT MORE THAN ONCE	5
Conclusion	7
Certification	
Certificate of Compliance With Rule 809.19(12)	

TABLE OF AUTHORITIES

<u>State v. Anderson</u> , 291 Wis.2d 673, 717 N.W.2d 74 (2006)	6
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STATUTES

904.03	1, 2, 4, 5, 7
906.07	2
906.07(2)	2,3

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant submits that the legal issues are clearly set forth in the Briefs, and the factual situation is properly reflected in the Statements of Fact and Briefs. Therefore, oral argument and publication are not necessary, but would be welcome if the Court so decides.

STATEMENT OF THE CASE

The Defendant-Appellant relies on the Statement of the Case in his Brief-in-Chief for purposes of this reply brief.

STATEMENT OF THE FACTS

The Defendant-Appellant relies on the Statement of Facts in his Brief-in-Chief for purposes of this reply brief.

INTRODUCTION

Recognizing that this Honorable Court disfavors the use of Reply Briefs to merely restate arguments presented in the Brief-in-Chief, Mr. Lewis submits this limited reply to address specific contentions within the State's Brief about the Court's barring Julie Bradley's testimony and permitting the Jury more than one viewing of the accuser's statement to law enforcement.

ARGUMENT

I. THE DEFENSE SHOULD HAVE BEEN PERMITTED TO CALL JULIE BRADLEY AS A WITNESS.

In its Brief the State argues that the circuit court properly excluded Julie Bradley's testimony because, pursuant to Wis. Stats. Sec. 904.03, the evidentiary value of Ms. Bradley's testimony was "substantially outweighed by the

danger of unfair prejudice.”¹ Wis. Stats. Sec. 904.03. To wit: That the State would be permitted to inquire of Ms. Bradley whether she did a background check on Mr. Lewis before hiring him as a caregiver, and that the State’s revelation via Ms. Bradley’s testimony that Mr. Lewis was a convicted sex offender would be highly prejudicial to the jury.²

The State is certainly permitted to impeach the credibility of a defense witness under certain circumstances pursuant to Wis. Stats. Sec. 906.07. See Wis. Stats. Sec. 906.07. The State argues in its Reply Brief that the court was correct in its decision to permit the State, on cross, to ask Ms. Bradley whether she ever did a background check on Mr. Lewis to see if he was a sex offender because (presumably pursuant to Wis. Stats. Sec. 906.07(2) which states “Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her

¹ Plaintiff-Respondent’s Br. at 6.

² Id.

character for truthfulness or untruthfulness." Wis. Stats. Sec. 906.07(2)) Ms. Bradley might have been inclined to testify favorably for the defense to try to shift liability away from herself and her company regarding the alleged assault on the victim.³ Wis. Stats. Sec. 906.07(2). The defense does not believe this argument to be persuasive as the criminal proceedings against Mr. Lewis were by no means a secret at the time of his trial. The accuser and his family certainly knew who employed Mr. Lewis and what the accusations leveled by the accuser were. Whether Ms. Bradley knew about Mr. Lewis' past or not, the accusation had been made that Mr. Lewis assaulted a patient while in the employ of Ms. Bradley's company. The damage was done, so to speak, and the defense does not believe that Ms. Bradley had a reason to "side" with Mr. Lewis in her testimony. As such, Ms. Bradley testifying about her knowledge of Mr. Lewis' past was a minor point from the stance of liability and posed a grave problem for the defense, as the State being permitted to inquire about her knowledge of Mr. Lewis' past effectively prohibited her from testifying.

Because of the need for Ms. Bradley to testify for the defense outweighed the need for the State to inquire about

³ Id.

her knowledge of Mr. Lewis' past, the circuit court should have simply instructed the State that it was not permitted to inquire about Mr. Lewis' criminal history in its cross examination of Ms. Bradley, pursuant to Wis. Stats. 904.03. See Wis. Stats. Sec. 904.03. Mr. Lewis' own prior convictions were available to impeach him should he take the stand in his own defense, which, in fact, occurred. (46:102). The defense did not give any indication that it was going to ask questions that would "open the door" to the State inquiring about Mr. Lewis' criminal history with Ms. Bradley. (44:3-5). The defense did, however, establish by offer of proof to the circuit court that Ms. Bradley would present evidence relevant to Mr. Lewis' theory of defense: That he (Mr. Lewis) was a good and competent caregiver and that the allegations put forth by the accuser were not credible. Id. By permitting the State to ask Ms. Bradley about Mr. Lewis' criminal history, the circuit court effectively prohibited the defense from calling Ms. Bradley as a witness, and thus the jury never heard from a neutral source (Mr. Lewis' employer) as to Mr. Lewis' job performance: A fact highly relevant to both Mr. Lewis' credibility and that of the accuser. Pursuant to Wis. Stats. Sec. 904.03 the circuit court had every ability to prohibit the State from inquiring as to Mr. Lewis' background because of its highly prejudicial nature while still

permitting Ms. Bradley to testify as to Mr. Lewis' work history. See Wis. Stats. Sec. 904.03. Mr. Lewis' subsequent testimony at trial permitted the State to inquire as to his criminal history without using Ms. Bradley's testimony to accomplish the same. (45:102). For all of the above-referenced reasons, and those contained in Mr. Lewis' Brief-in-Chief, Ms. Bradley should have been permitted to testify at Mr. Lewis' trial.

II. THE COURT SHOULD NOT HAVE PERMITTED THE
JURY TO VIEW THE ACCUSER'S STATEMENT TO LAW
ENFORCEMENT MORE THAN ONCE.

The State argues that the circuit court appropriately permitted the jury to view the accuser's statement to law enforcement more than once, despite the defense argument at trial and in its Brief-in-Chief that doing so would be prejudicial by placing too much emphasis both on the accuser's statement and his (the accuser's) cognitive delays.⁴

The State first indicates that the defense Brief-in-Chief misstated the record when it stated that the accuser "denied that Mr. Lewis assaulted him when [the accuser] testified before the jury."⁵ The defense contends that this is not a misstatement of the record. The accuser did, in

⁴ Plaintiff-Respondent's Br. at 9.

⁵ Id.

fact, answer "no" when asked by the State at trial whether Mr. Lewis' mouth ever came anywhere near his (the accuser's) body. (45:35). This is a clear denial of the accusation that Mr. Lewis performed oral sex on the accuser. The defense does not deny that the accuser later answered in the affirmative when asked (in a leading fashion) by the State whether Mr. Lewis placed his (Mr. Lewis') mouth on the accuser's penis. (45:40). The defense does contend that the first answer is a clear denial of the conduct which Mr. Lewis was accused, and asserting the same is not a misstatement of the record on the part of the defense.

The State then proceeds to argue in its Brief, citing Anderson that the circuit court was correct in permitting the jury to hear the accuser's interview with law enforcement a second time because it properly concluded that due to the accuser's cognitive delays and the quality of the audio, the repetition of the recording would aid the jury in its consideration of the case.⁶ See State v. Anderson, 291 Wis.2d 673 ¶27. The defense contends that the circuit court erred in its analysis of permitted the jury to hear the recording a second time. While hearing the tape a second time may have helped the jury for purposes of clarity, that

⁶Plaintiff-Respondent's Br. at 9.

aid was outweighed by the highly prejudicial nature of the tape, which only served to further accentuate the accuser's cognitive delays. As Wis. Stats. Sec. 904.03 permits the exclusion of evidence when it is deemed too prejudicial, so here should the circuit court have declined to play the accuser's recorded statement a second time. See Wis. Stats. Sec. 904.03.

CONCLUSION

For all the reasons stated herein and the arguments set forth in support thereof, Defendant-Appellant David Lewis respectfully asks that this Honorable Court vacate the conviction, or in the alternative, order a new trial, or grant such relief as the Court deems appropriate.

Dated this 23rd day of July, 2015.

Respectfully Submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using a monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on the left side and 1 inch margins on the other 3 sides. The length of this brief is 7 pages.

Dated: 07-23-15.

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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 s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with this paper copies of this brief filed with the court and served on all opposing parties.

Dated: 07-23-15.

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