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STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2015AP000366-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY J. MADAY, JR.,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and Denial of the Postconviction Motion Entered in the Columbia County Circuit Court, the Honorable W. Andrew Voight, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

I. Was The Social Worker's Testimony That There Was No "Indication that [K.Z.L.] Was Not Being Honest During Her Interview" Impermissible Vouching For the Credibility Of A Crucial Witness?

The circuit court held: The social worker's testimony was admissible because the videotaped interview was offered to impeach K.Z.L.'s live testimony.

II. Was Irrelevant, Prejudicial Evidence of Mr. Maday's Training in Weapons and Use of Force Erroneously Admitted?

The circuit court held: The evidence was not relevant, because there was no evidence that K.Z.L. knew about that training. It was prejudicial to the defense.

III. Was Mr. Maday Deprived of His Right to Effective Assistance of Counsel by His Attorney's Failure to Object to Admission of the "Honesty" Testimony and the Training in Weapons and Use of Force?

The circuit court held: The "honesty testimony" was admissible. The weapons training evidence was erroneously admitted, and the error was prejudicial to Mr. Maday. However, it was not "sufficiently prejudicial" to warrant a finding of ineffective assistance of counsel.

IV. Should this Court Order a New Trial in the Interest of Justice Because the Real Controversy Was Not Fully Tried?

The circuit court held: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Maday does not request publication because this case requires application of the law to the specific facts of the case. He would welcome oral argument if it would be helpful to the court.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Stanley J. Maday, the father of a sixth-grade daughter, was charged with sexually assaulting his daughter's 11-year-old friend, K.Z.L., on three occasions in 2011. K.Z.L. reported that Mr. Maday had touched her breasts and vagina on November 11, 2011, in October, and during the summer. Each time she was staying overnight with her best friend, Mr. Maday's daughter. (1). As a result, he was charged with three counts of sexual assault of a child. (1).

Mr. Maday denied the allegations and the case went to trial. As the state noted in opening, the trial turned on the credibility of Mr. Maday and K.Z.L. There was no DNA or medical evidence. (71:110-11).

Trial

K.Z.L. testified that on November 11, 2011, she stayed overnight with Mr. Maday's daughter. They watched television in bed, and fell asleep. She said she woke to Mr. Maday rubbing her vagina, eventually penetrating it with his finger. (71:130). He also put his hand under her bra and rubbed her breast, she said, before he left the room. (71:131-32). She had her eyes closed and pretended to sleep, but she was sure it was Mr. Maday who touched her. (71:131, 133). The next morning the girls made breakfast and went to a park.

K.Z.L. did not say anything about the alleged assault until two or three days later, when she wrote her mother a letter. (71:134-36). The letter said it had happened twice before. (71:136-37).

K.Z.L. also testified that the first incident happened in June, and the second was in "July about probably." (71:138). One time he rubbed her breast, the other time he rubbed her vagina. (71:140, 144).

K.Z.L. testified that she pretended to be sleeping because she was afraid Mr. Maday would hurt her. (71:131). However, K.Z.L. agreed that Mr. Maday had never threatened her or suggested that he would hurt her. (71:137).

K.Z.L. had been interviewed by a social worker soon after she reported the alleged assault. When K.Z.L. could not remember contradictory statements she had made during the social worker interview, defense counsel used a recording of the interview to point out inconsistencies. (71:148, 156-57). Asked if her testimony at trial or during the interview was true, K.Z.L. said her trial testimony was "more true because [she had] been having to think about it more." (71:157).

The defense called social worker Katherine Gainey to testify that she had been trained to use a highly structured interview with children, so as "to not conduct leading interviews of children." She agreed that poor interview procedures can lead to false allegations. (71:190-91). She also agreed that there was no way, when conducting an interview, to know whether previous questioning had influenced a child's memory. (71:192).

On cross examination, the social worker described her interview techniques in more detail. (71:190-195). She testified that in her experience, it became apparent to her

when children had been prompted by an adult to give certain answers to questions. She agreed that the interview techniques she had learned helped to insure that a child who had been coached did not continue with false allegations during her interview. (71:196). The prosecutor then asked:

> Q. Was there any indication that [K.Z.L.] had been coached in any way during her interview?
>
> A. No.
>
> Q. Was there any indication that [K.Z.L.] was not being honest during her interview with you?
>
> A. No.

(71:196-197; App. 111-12).

Mr. Maday's attorney did not object to the testimony.

Mr. Maday told an investigating detective that K.Z.L. did stay overnight with his daughter on November 11, 2011, and he checked on the girls after they had fallen asleep, but he did not touch K.Z.L. (71:171-72). When the detective suggested that DNA evidence might be helpful, Mr. Maday twice agreed to provide a sample. (71:174).

Mr. Maday testified, and flatly denied that he had improperly touched K.Z.L. (72:33). He was shocked by the allegations. (72:33, 40). He said K.Z.L. never seemed afraid of him, and would often ask to come over to his house to play with his daughter. (72:47).

Mr. Maday introduced an exhibit showing that from June 14 to November 19, he had worked long hours as a sergeant at Columbia Correctional Institution. He often worked overtime after his usual 2:00 p.m. to 10:00 p.m. shift. (72:34-38).

On cross examination, the state asked Mr. Maday to testify about a part of his training record that was attached to his work hours exhibit. Defense counsel objected that the training record was irrelevant. When the court asked to view the record in question, defense counsel withdrew the objection. (72:53-54; App. 113-14). The court stated it would allow questions, saying "whether or not [K.Z.L.] was aware of these specific trainings, I think it is probably true she was generally aware of how her mother was trained. And there was some suggestion she works there [Columbia Correctional Institution] also." (72:54; App. 114).

The state asked Mr. Maday to read the list of his trainings in 2011. He read:

> The top line is weapons requalification, rifle. It's a one hour course of training. Date of training was June 21st, 2011. Following that, two hours of training on June 21, 2011 was weapons use of force based on 722 of Wisconsin Administrative Code, Security Internal Procedure no. 22, use of force. Following that weapons requalification, handgun, one hour, August 4th, 2011. And the last one was eight hours of POSC or Principles of Subject Control, ERU Emergency Response Unit, room clearing.

72:54-55; App. 114-15.

Mr. Maday agreed that he was well-trained in weapons and use of force, and said that he had not used force on K.Z.L. or demonstrated any techniques to her. (72:55; App. 115).

Mr. Maday's daughter testified that K.Z.L. stayed overnight often. K.Z.L. never seemed angry at her dad, and never seemed afraid of him. (72:29). The last time K.Z.L. stayed overnight, she testified, the girls went together to wake

him up, then they went to play. (72:27-29). Mr. Maday's son testified that he was at his dad's home often during the summer of 2011, and that K.Z.L. was a regular visitor at the house. (72:59). K.Z.L. asked to come over, and never acted afraid of Mr. Maday, he said. (72:60). He also testified that his father was a truthful man. (72:61).

K.Z.L.'s mother testified to receiving a letter from K.Z.L. saying that Mr. Maday had sexually assaulted her. She also described K.Z.L.'s demeanor when she talked to her about the letter. (71:163-168). She and Mr. Maday used to work together, she said.

The prosecutor argued K.Z.L.'s honesty in closing, specifically arguing:

> You also got to hear from a social worker who was specially trained to conduct these interviews. She told you there was nothing she saw that indicated that [K.Z.L.] had been coached or that she was lying.

72:98; App. 116.

The prosecutor continued:

> In fact, one of the purposes of that specific interview technique that she uses is to remind the child there are consequences for lying. There are consequences if you make up stories, and again, there was nothing to indicate that Kayla was making anything up. That's called reliability, and it makes Kayla's account more credible.

72:98-99; App. 116-17.

The prosecutor closed her argument with a reminder that "Kayla is telling the truth and that is supported by the other testimony." (72:105; App. 119). On rebuttal, the prosecutor returned to the theme of credibility:

> Do you believe her? Do you believe Kayla's testimony today, a year ago on video?
>
> You should believe Kayla's testimony. It is reliable, it is credible. . .

72:125-26; App. 122-23.

The prosecutor also argued Mr. Maday's weapons and use of force training in closing, saying:

> [K.Z.L.] had to report the sexual assault. She was scared. She knew that Stan had weapons and that he knew how to use them. She knew this because Stan worked with her mom. She knew the kind of things that her mom knew. She knew what these guards at the prison do.
>
> And Stan himself today told you all the training he went through, rifle, shotgun, use of force. He is trained in all those things so [K.Z.L.]'s worry he might do something to her was very real to her. It was very real to her.

72:100; App. 116.

> [K.Z.L.]'s fear of him, as I said before, is very real in her mind. You heard him testify to rifle training, shot gun training, handgun training, use of force training. This is the kind of person that he was, and she knew that.

72:123; App. 120.

The jury found Mr. Maday guilty of all three counts. (72:146). He was sentenced to the mandatory minimum term of incarceration of 25 years on Count 1, with 8 years of extended supervision. On the other two counts, the court imposed concurrent sentences of 23 years, including 15 years of initial confinement. (29).

Postconviction Proceedings

Mr. Maday filed a postconviction motion alleging that the social worker's testimony that there was no indication that K.Z.L. "was not being honest during her interview with you," was erroneously admitted evidence because it was impermissible vouching for the truth of K.Z.L.'s testimony. (45:10). Additionally, the motion alleged that evidence of Mr. Maday's weapons and use of force training was erroneously admitted because it was irrelevant and highly prejudicial. (45:13).

The postconviction motion alleged that defense counsel provided ineffective assistance for failing to object to the testimony about K.Z.L.'s honesty and Mr. Maday's weapons training. (45:9). Alternatively, it sought a new trial in the interest of justice. (45:16).

At the postconviction motion hearing, trial counsel testified that he did not recall a reason for his failure to object to the question of the social worker regarding K.Z.L.'s honesty, adding "I'm not sure I perceived it as being vouching because of the way the question was phrased." (74:11). He also testified that he did not recall a strategic reason to withdraw his objection to evidence of Mr. Maday's firearms training, and he "still [doesn't] know why I would think that this was the training record would be relevant though." (sic). (74:12-13).

The court denied the postconviction motion. It found that the social worker's testimony was permissible although "this is about as close as I can personally envision to the line of what is permissible versus impermissible as the State could have gotten under the circumstances." However, the court said "largely because the question dealt specifically with the

videotaped interview" which was offered to impeach K.Z.L.'s live testimony, it was not impermissible. (74:28-29; App. 106-07).

As to Mr. Maday's weapons training, the court concluded that the evidence was inadmissible because it was irrelevant and prejudicial to Mr. Maday's defense. However, the court concluded that the evidence was not "sufficiently prejudicial to warrant a finding of ineffective assistance of counsel." (74:30; App. 108).

The court also concluded that a new trial in the interest of justice was not warranted. (74:31-32; App. 109-10). Mr. Maday appeals from the judgment of conviction and denial of the postconviction motion.

ARGUMENT

I. The Social Worker's Testimony That There Was No "Indication that [K.Z.L.] Was Not Being Honest During Her Interview" Was Impermissible Vouching For the Credibility Of A Crucial Witness.

A. Introduction and standard of review.

"No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W. 2d 673 (1984). This rule is well accepted in Wisconsin. The issue in this case is whether the social worker's testimony was inadmissible opinion testimony that K.Z.L. was telling the truth.

That question whether a witness has improperly testified as to the credibility of another witness, is a question of law which the appellate court reviews independently.

State v. Tutlewski, 231 Wis. 2d 379, 605 N.W. 2d 561 (1999).

B. The testimony that there was no indication K.Z.L. was not being honest in her interview, was impermissible vouching for K.Z.L.'s credibility.

In ***State v. Krueger***, 2008 WI App 162, 314 Wis. 2d 605, 762 N.W. 2d 114, the court addressed "the precise question of the admissibility of expert opinion testimony about whether the child's testimony and behavior exhibit signs of coaching or suggestion." The legal question and the facts of this case are very similar to the facts in ***Krueger***. Therefore, it is summarized and discussed at length in this argument.

Mr. Krueger was charged with sexually assaulting a seven-year-old girl, S.B. ***Id.***, ¶ 2. She was questioned by a social worker in a videotaped interview. ***Id.,*** ¶ 3. At trial, defense counsel suggested during opening argument that S.B.'s mother may have influenced S.B. to falsely accuse Mr. Krueger. S.B. was the first witness at trial, and the interview videotape was played. ***Id.,*** ¶ 5.

In ***Krueger***, the state then called the social worker, Holly Mason, to testify. She explained that her "Step Wise" approach included evaluating the possibility that the child had been coached or subjected to leading interviews prior to the videotaped interview. ***Id.,*** ¶ 5. This testimony is similar to Ms. Gainey's testimony in Mr. Maday's case, that her "cognitive graphic" approach was designed "to insure that a child who has been coached does not continue with the false allegations during the interview." (71:196; App. 111).

Ms. Mason then testified in ***Krueger***:

> If they were coached to say something, it would be very difficult for most children to be able to maintain that through a series of questions around a particular issue . . . . Generally those children [five to ten years old] don't have the sophistication to be able to maintain sophisticated fabrication of something. So we do look for that, and there have been times where I've interviewed children and they've made inconsistencies in their statements and they've not been able to continue through various questions and maintain a particular disclosure that they've made.

Id., ¶ 5.

In ***Krueger***, the prosecutor then directed questioning specifically to the interview with S.B., asking if the interviewer formed an opinion as to whether or not S.B.'s accusation "was the product of any suggestibility or any coaching." The interviewer responded that she had formed an opinion and "did not get that" from S.B. Asked to elaborate, she stated:

> I did not get a sense from this child that she demonstrated a level of sophistication that would be able to maintain some sort of fabricated story, for lack of a better way of describing it. She did not appear to me to be highly sophisticated so that she could maintain that kind of consistency throughout unless it was something that she had experienced.

Id., ¶ 5.

This answer, the court concluded, was tantamount to an opinion that S.B. had been assaulted and was telling the truth. ***Id.***, ¶ 16. The testimony was inadmissible.

The court's reasoning and explanation of its opinion in ***Krueger*** provides the analysis that demonstrates the inadmissibility of Ms. Gainey's testimony in Mr. Maday's trial. ***Krueger*** carefully analyzed ***Haseltine, supra,*** 120 Wis. 2d 92, and ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W. 2d 913 (1988). It concluded:

> While opinion testimony regarding the typical signs, symptoms or behavior of a child who is not being coached or manipulated along with testimony that the child in question exhibits none or few of those signs or symptoms may be permissible, under Wis. Stat. § 907.02, *Haseltine* and *Jensen* make clear that opinion testimony as to a particular child may not cross the line by including a subjective determination as to the credibility of the complainant.

Krueger, supra, ¶ 19.

The interviewer in ***Krueger*** gave specific testimony about the general pattern of behavior of young children. In Mr. Maday's case, the only "typical" behavior testimony was Ms. Gainey's agreement that her interview was designed to insure that a child who has been coached "does not continue with the false allegations during the interview." (71:196).

In both ***Krueger*** and Mr. Maday's case, the prosecutors failed to formulate the correct "consistent with" question, by asking if S.B. or K.Z.L.'s interviews were consistent with those of children who had not been coached. In ***Krueger,*** the social worker's "consistent with" testimony went too far, into a direct opinion that S.B. could not have maintained consistency in her interview unless she had experienced the assault. ***Id.***, ¶ 16.

The prosecutor's first question in Mr. Maday's case was arguably a "consistent with" question, although the sparse foundation on signs of coaching may have left the jury wondering what "indications" Ms. Gainey was looking for.

The second question, however, undoubtedly went too far:

> Q. Was there any indication that [K.Z.L.] was not being honest during her interview with you?
>
> A. No.

71:196-197; App. 111-12.

Ms. Gainey had no special expertise in detecting honesty. She had testified to no "typical pattern of behavior" regarding honesty, and could provide no "consistent with" testimony. Indications of coaching and indications of honesty are not the same thing. A suggestible child may have been led by coaching or leading questions to honestly believe the revised version of events. When Ms. Gainey's testimony crossed the divide between suggestibility and honesty, she moved away from her field of expertise and testified to the credibility of K.Z.L.

This is exactly the kind of testimony the court found impermissible in ***Haseltine, supra.*** Jurors "are the sole judges of the credibility" of witnesses. Ms. Gainey's "honesty" testimony was impermissible vouching.

Additionally, using the phrase "any indication" rather than "in my opinion," suggests the false notion that Ms. Gainey had an objectively scientific way through her structured interview of measuring honesty. Determining and weighing credibility is a subjective process, left to the

judgment of the jury. Cloaking Ms. Gainey's testimony with an "aura of scientific reliability" increases the likelihood that the jury would abdicate its factfinding role to the expert, just as the court concluded in ***Haseltine, supra***, 120 Wis. 2d at 96.

On postconviction motion, the court distinguished ***Krueger*** on the ground that K.Z.L.'s videotape testimony had been introduced for the purpose of impeachment. Because the social worker was vouching for the impeachment portion of K.Z.L.'s testimony, the court concluded that the vouching should help, rather than harm, the defendant, the court held. (74:28-29; App. 106-07). There are two flaws in this reasoning.

First, although the purpose was impeachment, the jury was not instructed that the testimony was offered only for the purpose of impeachment and should be considered only for that purpose. As a result, the videotaped testimony was part of K.Z.L.'s substantive testimony, and Ms. Gainey vouched for the truth of that portion of her substantive trial testimony.

Second, the impeachment value of the videotaped interview was limited to discrepancies from which the defense could, and did, argue that K.Z.L.'s credibility was brought into question by the different versions of her story.

However, some aspects of K.Z.L.'s story did not change from her videotaped interview to her live testimony, and Ms. Gainey's testimony was not limited to the discrepancies. She testified that K.Z.L. was honest throughout the interview. Therefore, she vouched not only to K.Z.L.'s honesty in the videotaped statement, but also to her honesty in her live testimony, to the extent that the two statements were consistent. That vouching harmed, rather than helped, Mr. Maday.

For these reasons, Ms. Gainey's impermissible vouching for K.Z.L.'s testimony was erroneously admitted into evidence.

II. Irrelevant, Prejudicial Evidence of Mr. Maday's Training in Weapons and Use of Force Was Erroneously Admitted.

The court correctly concluded at the postconviction hearing that evidence of Mr. Maday's weapons and use of force training was irrelevant, and was erroneously admitted. (74:30; App. 108).

At trial, defense counsel initially objected on the ground of relevance to admission of Mr. Maday's training in weapons and use of force, arguing that without evidence that K.Z.L. was aware of the training, it was irrelevant to her testimony that she was afraid of Mr. Maday. (72:53; App. 113).

However, defense counsel withdrew his objection. The court allowed introduction of the evidence reasoning that [K.Z.L.] was probably aware of these types of training because there was some suggestion that her mother also worked at Columbia Correctional Institution. (72:54; App. 114).

On postconviction motion, the court acknowledged its error, and found that admission of the evidence was prejudicial. The court agreed that there was no evidence that K.Z.L. know anything at all about Mr. Maday's weapons and use of force training. Mr. Maday's training was irrelevant to any issue in the case. (74:30; App. 108).

III. Mr. Maday Was Deprived of His Right to Effective Assistance of Counsel by His Attorney's Failure to Object to Admission of the "Honesty" Testimony and the Training in Weapons and Use of Force.

A claim of ineffective assistance of counsel requires Mr. Maday to show that his counsel's actions constituted deficient performance and that the deficiency caused him prejudice. ***Krueger, supra***, 314 Wis. 2d 605, ¶ 7, citing ***State v. Love***, 2005 WI 1116, ¶ 30, 284 Wis. 2d 111, 700 N.W. 2d 62, and ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Here, defense counsel Charles Kenyon's failure to object to the "honesty" testimony, and his withdrawal of objection to the weapons training was deficient performance because it fell below an objective standard of reasonableness. As he testified at the postconviction hearing, Mr. Kenyon did not have a strategic reason for either decision. He admitted in the postconviction hearing that he could not think of a valid argument that the weapons training records were relevant. (74:12-13). His withdrawal of the relevance objection was therefore deficient performance.

As to the honesty testimony, Mr. Kenyon said, "I'm not sure I perceived it as being vouching because of the way the question was phrased." (74:11). The court held in ***Krueger, supra***, that failure to object to honesty testimony based on a view that it was legally admissible, is a decision based on an incorrect interpretation of law. Because it is well established that an expert witness cannot testify to the credibility of another witness, and because the ***Krueger*** decision is directly on point, Mr. Kenyon's failure to object was unreasonable, and his performance was deficient. ***Id.,*** ¶ 17.

To prove prejudice, Mr. Maday must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Krueger, supra,*** ¶ 7, quoting ***Strickland v. Washington***, 466 U.S. at 694.

As the state said in its opening statement, this trial turned on the credibility of Mr. Maday and K.Z.L. There was no DNA or medical evidence. (71:110-11). No one else witnessed the alleged contact.

Therefore, in this case as in ***Haseltine***, the "conviction depended on the jury believing the [complainant]'s testimony," and "her account of the sexual assault was not corroborated by independent evidence." ***Id.,*** 120 Wis. 2d at 96. Under those circumstances, the court concluded that admission of the opinion testimony was prejudicial because of the possibility that the "jury abdicated its factfinding role to the psychiatrist and did not independently decide Haseltine's guilt." ***Id.*** It reversed his conviction.

The same result was reached in ***Tutlewski, supra***, 231 Wis. 2d 379, ¶ 22, in which the complaining witness's account of a sexual assault was not corroborated by an independent witness, and the court reversed the conviction. Finally, the court concluded in ***Krueger, supra,*** that the defendant had proved the prejudice prong of his ineffective assistance of counsel claim, explaining: "Significant to our determination of performance and prejudice is the fact that S.B.'s account of the sexual assault was not corroborated by independent evidence and, as such, the issue at trial was one of credibility." ***Krueger, supra,*** 314 Wis. 2d 605, ¶ 18.

Here, the evidence of honesty was not only admitted at trial, but it was repeatedly argued by the state in closing. The prosecutor reminded the jury that the social worker "who was specially trained to conduct these interviews" testified that nothing she saw indicated that K.Z.L. "was lying." (72:98; App. 116). The prosecutor discussed the interview technique of reminding the child of the consequences of lying and said, "again, there was nothing to indicate that Kayla was making anything up." (72:98-99; App. 116-17).

The prosecutor specifically spelled out the connection between the honesty evidence and the jury decision on credibility, saying: "That's called reliability, and it makes Kayla's account more credible." (72:99; App. 117). At the close of both the closing and the rebuttal, the prosecutor again reminded the jury that "Kayla is telling the truth, and her testimony is credible." (72:105, 126; App. 119, 123).

As in ***Haseltine***, ***Tutlewski*** and ***Krueger***, the issue at this trial was credibility. As in those cases, Ms. Gainey's impermissible, unobjected-to testimony as to K.Z.L.'s honesty went to that central issue, and therefore undermined confidence in the outcome.

As the trial court concluded, failure to object to the evidence of Mr. Maday's weapons and use of force training was also prejudicial. Although introduction of the evidence, alone, may not have caused sufficient prejudice to undermine confidence in the outcome of the trial, the prosecutor's closing arguments used the evidence in a way that multiplied its intrinsic prejudice.

Although K.Z.L. testified that Mr. Maday had never threatened her, the prosecutor used the training testimony in closing to suggest that Mr. Maday was a dangerous man:

> And Stan himself today told you all the training he went through, rifle, shotgun, use of force. He is trained in all those things so [K.Z.L.]'s worry he might to do something to her was very real to her. It was very real to her.

72:100.

> This is the kind of person that he was, and she knew that.

72:123.

By using the phrase, "[t]his is the kind of person that he was," the prosecutor used Mr. Maday's training as a prison guard to suggest a negative character. The portrayal of Mr. Maday as the "kind of person" who is dangerous and threatening raises sufficient questions to undermine confidence in the outcome of the trial.

Finally, in determining whether counsel's deficient performance was prejudicial, a court should consider the cumulative effect of the deficiencies. ***State v. Thiel***, 2003 WI 111, ¶ 49, 264 Wis. 2d 571, 665 N.W. 2d 305. Here, where the trial was a one-on-one credibility test, the social worker's vouching for K.Z.L.'s honesty, combined with the use of the irrelevant weapons training to portray Mr. Maday as a dangerous man, undermines confidence in the outcome of the trial.

IV. This Court Should Order a New Trial in the Interest of Justice Because the Real Controversy Was Not Fully Tried.

This court has the authority to order a new trial in the interest of justice when the real controversy was not fully tried. There are two factually distinct ways in which the controversy may not have been fully tried: (1) where the trier

of fact was erroneously not given the opportunity to hear important evidence and (2) where the jury had before it evidence not properly admitted which so clouded a crucial issue that it may fairly be said that the real controversy was not fully tried. ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W. 2d 745 (1985). The court need not find a substantial likelihood of a different result on retrial. ***State v. Harp,*** 161 Wis. 2d 773, 779, 781-82, 469 N.W. 2d 210 (Ct. App. 1991).

Here, the jury had before it inadmissible evidence that clouded the crucial issue of credibility at the trial. Specifically, there was impermissible vouching for K.Z.L.'s honesty, and irrelevant and highly prejudicial evidence of Mr. Maday's training in weapons and use of force. As a result of this improperly admitted evidence, the real controversy was not fully tried.

CONCLUSION

For the reasons set forth in this brief, the social worker's testimony that there were "no indications" that K.Z.L. was "not honest" in her testimony, was impermissible vouching for another witness's credibility, and was improperly admitted. It was highly prejudical because the only issue in this case was whether the jury believed K.Z.L. or Mr. Maday. The social worker's testimony with its "aura of scientific reliability" created a likelihood that the jury abdicated its factfinding role to the social worker. *See* ***Haseltine, supra,*** 120 Wis. 2d at 96.

Additionally, the trial court was correct when it found that evidence of Mr. Maday's weapons and use of force training was irrelevant and prejudicial.

Mr. Maday was deprived of his right to effective assistance of counsel because his lawyer performed deficiently by failing to object to the social worker's honesty testimony, or admission of Mr. Maday's weapons and use of force training. The evidence was so prejudicial as to undermine confidence in the outcome of the trial. Therefore Mr. Maday seeks a new trial based on denial of right to effective assistance of counsel.

Alternatively, Mr. Maday respectfully requests a new trial in the interest of justice.

Dated this 14th day of May, 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 4,817 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 14th day of May, 2015.

Signed:

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APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated this 14th day of May, 2015.

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