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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP366-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY J. MADAY, JR.,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR COLUMBIA COUNTY,
W. ANDREW VOIGT, JUDGE

# BRIEF FOR PLAINTIFF-RESPONDENT

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## ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

## ARGUMENT

### I. Maday's attorney was not ineffective for not objecting to a social worker's testimony that there was no indication the victim was not being honest during an interview.

It was well established long before the trial in this case that "no expert should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *State v. Krueger*, 2008 WI App 162, ¶ 9, 314 Wis. 2d 605, 762 N.W.2d 114 (citing *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984)).

But this proscription has never foreclosed all testimony relevant to whether a witness is telling the truth.

Still permitted is testimony about the typical behavior of child sexual assault victims, and whether this behavior is exhibited by the child in a particular case. *Krueger*, 314 Wis. 2d 605, ¶ 11 (citing *State v. Jensen*, 147 Wis. 2d 240, 257, 432 N.W.2d 913 (1988)).

Also permitted is similar testimony about the typical signs of whether a child is suggestible or has been coached, and whether or not these signs are exhibited by the child in a particular case. *Krueger*, 314 Wis. 2d 605, ¶¶ 14, 19. An expert may offer an opinion that the child exhibits few or no signs of having been coached or manipulated. *Krueger*, 314 Wis. 2d 605, ¶ 19.

Although this sort of testimony may border on an opinion about truthfulness, it is appropriate as long as it is limited to objective behavioral manifestations of a child's credibility, and leaves the jury free to draw its own inferences and conclusions regarding the child's actual credibility in part

from the expert's observations of the child's behavior. *Krueger*, 314 Wis. 2d 605, ¶¶ 13-15 & nn.9, 10 (citing *Jensen*, 147 Wis. 2d at 255).

Testimony crosses the line into the kind prohibited by *Haseltine* when it strays into a subjective recitation of the expert's own beliefs regarding the credibility of the child, or an opinion that the child's allegations are not in fact the product of coaching or suggestion. *Krueger*, 314 Wis. 2d 605, ¶¶ 12, 16, 19.

In this case, the testimony of Katherine Gainey, the social worker who interviewed the victim, KL (71:190-91), always stayed on the proper side of the line.

Gainey testified that she conducted a highly structured cognitive graphic interview with KL (71:191).

Gainey said there is no way to determine whether previous interviews or questioning have influenced a child's memory (71:192). However, the technique of the interview Gainey conducted is designed to make sure there is consistency between what the child told other people and what the child is telling the interviewer (71:193-94).

The interviewing technique is also designed to make sure the child fully understands the difference between truth and lies, and understands that there are consequences for lying and making things up (71:193). The child is put under oath, and asked to promise to tell the truth (71:194).

The interview avoids leading questions so as not to introduce information the child has not offered (71:195). The questions just open the door for the child to say if something happened to her (71:195-96).

Gainey said that the techniques she uses to conduct an interview make the answers more reliable (71:196). She said that using the proper interviewing techniques makes it apparent when a child has been prompted to give certain answers, and is a way to insure that a child who has been coached does not continue to make false allegations during the interview (71:196).

Gainey stated there was no indication during the interview that KL had been coached (71:196-97).

She further stated there was no indication that KL was not being honest during the interview (71:197).

The statement regarding the absence of any indication of coaching is specifically permitted. *Krueger*, 314 Wis. 2d 605, ¶ 19.

The statement regarding the absence of any indication of dishonesty is also within the limits of permissible commentary on credibility.

Gainey did not say that she personally believed KL was being honest. Gainey simply indicated that the interview techniques she used, which were designed to detect dishonesty, did not expose any dishonesty. Gainey simply indicated that the behavior she observed did not objectively indicate that KL was not being honest.

The prosecutor characterized Gainey's testimony in this way, stating in her closing argument that Gainey said "there was nothing she saw that indicated that [KL] had been coached or that she was lying" (72:98).

This testimony did not cross the line into the kind prohibited by *Haseltine* by straying into a subjective recitation

of the expert's own beliefs regarding the credibility of the child, or an opinion that the child's allegations were not in fact the product of coaching or suggestion.

The statement regarding the absence of any indication of dishonesty was appropriately limited to objective behavioral manifestations of KL's credibility, and left the jury free to draw its own inferences and conclusions regarding the child's actual credibility from Gainey's observations of the child's behavior. *Krueger*, 314 Wis. 2d 605, ¶¶ 13-15 & nn.9, 10 (citing *Jensen*, 147 Wis. 2d at 255).

Maday faults Gainey for not uttering the magic words "consistent with" in her testimony. Brief for Defendant-Appellant at 12-13. But there is no requirement in any case law that a witness incant any particular formula to comply with *Haseltine*. The witness does not have to testify that the behavior of a particular child was consistent with the behavior of other children.

Substance matters rather than form. The witness must avoid any personal opinions of credibility, and limit her testimony to objective observations of behavior bearing on credibility, which is what Gainey did.

Use of the word "indication" does not suggest that Gainey had some scientific way of measuring honesty, as Maday asserts. Brief for Defendant-Appellant at 13.

In common usage, an "indication" is nothing more than a sign, something that serves to indicate, i.e., give grounds for supposing or inferring the existence or presence of something else. The American Heritage Dictionary of the English Language 918-19 (3d ed. 1996); Webster's Third New International Dictionary 1150 (unabridged ed. 1986). *See State v. Williquette*, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986)

(common, ordinary and accepted meaning of words explicated in recognized dictionary). There is nothing scientific about it.

What this word suggests here is that Gainey did not observe any behavior that would give grounds for supposing or inferring the existence of dishonesty in KL's interview.

Maday's attorney did not perform deficiently by not objecting to Gainey's testimony because there was nothing legally objectionable about it. *See State v. Ewing*, 2005 WI App 206, ¶ 18, 287 Wis. 2d 327, 704 N.W.2d 405.

Nor was Maday prejudiced by his attorney's declination to object.

Deficient performance is prejudicial when the result of a proceeding would probably have been different if the attorney had done better. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305.

But the result of Maday's trial would have been exactly the same if his attorney had objected to Gainey's statement because any objection would have been overruled, and the evidence would have been admitted anyway (74:28-29).

Moreover, even if an objection had been sustained and the testimony regarding the absence of any indication that KL was dishonest had been struck, the result of the trial would have still been the same.

Even without such direct testimony, the jury could have inferred that there was no indication KL was lying from the absence of any testimony that she was lying. Because the interview was designed to detect whether a child was lying, Gainey surely would have testified that there was an indication

of deception if there had been any. Gainey's silence on the subject would have inevitably suggested that there was none.

Indeed, the very fact that Maday was charged with sexually assaulting KL based on her word alone strongly suggested that no one involved in the prosecution of this case saw any indication that KL was lying, because otherwise the case would have not been brought.

In any event, the accusatory portion of the recorded interview was played for the jury (71:156). The jurors were able to see and judge for themselves whether there was any indication that KL was not being honest in the interview. Since jurors are perfectly capable of assessing credibility for themselves, *Krueger*, 314 Wis. 2d 605, ¶ 9, it is not likely that they would have simply deferred to the opinion of someone else when they could actually see the witness giving the testimony whose credibility they were to judge, at least in the absence of any evidence of some esoteric behavior that experts would be more adept at assessing.

Maday's attorney was not ineffective for not objecting to Gainey's testimony that her observations of KL's behavior during an interview did not indicate any sign of dishonesty.

## II. Maday's attorney was not ineffective for withdrawing his objection to testimony that Maday was trained in the use of weapons.

Maday's attorney objected at first to the introduction of evidence that Maday was trained in the use of weapons (72:53). But on second thought, counsel withdrew the objection and acquiesced in the fact that Maday had weapons training (72:54).

Counsel did not perform deficiently by withdrawing his objection because the question regarding weapons training just elicited information the jury would have known anyway.

The evidence showed that Maday was a correctional officer with the rank of sergeant at the Columbia Correctional Institution (72:31). So of course he had to be trained in the use of weapons to do his job of guarding prison inmates. No one would think that correctional officers were expected to quell disturbances by dangerous criminals using nothing more than their bare hands.

Indeed, the answer to the prosecutor's question was phrased in terms of "weapons requalification" (72:54-55), showing that Maday had to have periodic weapons training to qualify to do his job.

Maday was not prejudiced by the introduction of evidence of the obvious fact that a prison guard had to be trained in the use of weapons.

KL testified that she was afraid Maday would hurt her because "he ha[d] guns and knives and stuff" (71:160).

But the mere fact that Maday had weapons gave KL no reason to fear that he would use those weapons to hurt her, especially in light of evidence that he never threatened her, and that she never exhibited any indication of being afraid of him (71:137; 72:28, 47, 60).

Nor did the fact that Maday was trained in the use of weapons give KL any reason to fear that he would use his weapons to hurt her.

To begin with, there was no evidence in this case that KL knew Maday was trained in the use of weapons. Indeed, there

was no evidence that KL even knew Maday was a prison guard.

Although there was evidence that Maday used to be employed where KL's mother worked (71:164), there was no evidence that KL knew that Maday worked at the same place as her mother.

But even if KL knew about this mutual employment, there was no evidence that KL's mother ever worked at the prison. So there was no evidence that KL knew Maday worked at the prison.

It could not be inferred that KL knew anything about Maday's job because of anything she might have known about her mother's employment.

Besides, even if KL's mother and Maday had worked together as prison guards and KL knew that, there was no evidence that KL knew her mother had training in the use of weapons as part of her job. So it could not be inferred from any knowledge KL might have had about her mother's job that she knew Maday was trained in the use of weapons.

In any event, those who are trained in the use of weapons are no more likely to use weapons they have to hurt an innocent person than those who are not trained in the use of weapons they possess. If anything, just the opposite would seem to be true since people with training would seem to be more responsible.

Maday argues that the prosecutor's argument that Maday's training in weapons showed the kind of person he was deliberately suggested that he was dangerous and threatening. Brief for Defendant-Appellant at 19.

But if that was what the prosecutor intended to do, she failed miserably because what Maday's training in weapons as a correctional officer, and a sergeant no less, actually showed was that he was a person of good character who held a highly responsible job guarding dangerous incarcerated criminals where he was trusted to possess and be trained in the use of weapons.

In any event, the jurors were instructed that they should base their decision solely on the evidence, that the arguments of the attorneys in this case were not evidence, and that the jurors should disregard any arguments that suggested facts that were not in evidence (72:126, 133-35). *See State v. Jeannie M.P.*, 2005 WI App 183, ¶ 15 n.4, 286 Wis. 2d 721, 703 N.W.2d 694 (assertions by attorney not evidence).

It is presumed that juries follow admonitory instructions. *State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399; *State v. Searcy*, 2006 WI App 8, ¶ 59, 288 Wis. 2d 804, 709 N.W.2d 497; *State v. Pitsch*, 124 Wis. 2d 628, 644 n.8, 369 N.W.2d 711 (1985). Such instructions are presumed to erase any prejudice unless the record suggests that the jury disregarded the admonition. *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894; *State v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983).

The evidence about Maday's training in weapons was completely irrelevant and innocuous. Since this superfluous evidence could not possibly have contributed to the result of the trial, its exclusion could not possibly have changed the result.

Maday's attorney was not ineffective for withdrawing his objection to testimony that Maday was trained in the use of weapons.

## III. A new trial is not required in the interest of justice since the real controversy was fully tried the first time.

This is not a case where the real controversy was not fully tried because of the erroneous introduction of inadmissible evidence that clouded any issue in the trial.

Evidence that there was no indication that KL was not being honest was properly admissible, and did not cloud anything because its admission was harmless anyway.

Evidence that Maday was trained in the use of weapons did not cloud anything because it was completely superfluous.

The jury saw both competing witnesses, KL and Maday, testify. The jury heard properly admitted evidence bearing on the respective credibility of these two witnesses. The jury had proper bases for deciding that KL was more credible.

A new trial is not required in the interest of justice since the real controversy was fully tried the first time.

## CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

Dated: June 26, 2015.

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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 2,540 words.

Dated this 26th day of June, 2015.

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Thomas J. Balistreri
Assistant Attorney General

## 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 26th day of June, 2015.

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