STATE OF WISCONSIN

COURT OF APPEALS

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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REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

The state's brief invites the court to apply a simplistic, inaccurate legal analysis to the admissibility of the social worker's testimony in this case. It construes the opinion in ***State v. Krueger***, 2008 WI App 162, 314 Wis. 2d 605, 762 N.W. 2d 114, as prohibiting subjective or personal opinions about honesty, but permitting opinions about honesty that are based on "objective observations of behavior." It also criticizes the defense as arguing for "magic words." (Brief, p. 5).

The state's argument focuses on the language in ***Krueger,*** ¶ 19***,*** that opinion testimony "may not cross the line by including a subjective determination as to the credibility of the complainant." It then draws the erroneous inference that an "objective" determination of credibility is admissible.

The legal question is not, as the state suggests, whether a witness's opinion about another witness's honesty is based on "subjective" or "objective" factors. Rather, no opinion about honesty is admissible. The use of the "subjective determination" of credibility language in ***Krueger*** merely applies and emphasizes the principle that no witness can determine, using objective criteria or not, that another witness is telling the truth. ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W. 2d 673 (1984).

In ***Haseltine,*** a psychiatrist properly testified about the "pattern of behavior exhibited by incest victims." However,

when he testified that in his opinion, the complaining witness was an incest victim, the court held that the testimony went "too far." The court noted that the purpose of expert testimony, set forth at Wis. Stat. § 907.02 is to testify to specialized knowledge that "will assist the trier of fact to understand the evidence or to determine a fact in issue." The psychiatrist had specialized knowledge about patterns of behavior of incest victims, but the determination of the complaining witness's credibility, was "something a lay juror can knowledgeably determine without the help of an expert opinion." ***Id.,*** ¶ 96.

Haseltine was followed by the decision in ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W. 2d 913 (1988), in which a school counselor testified about behavior typically exhibited by sexually abused children, and testified that the complainant's behavior was consistent with the behavior patterns of sexually abused children. ***Id.,*** 245. He did ***not*** testify that because of the consistent behavior patterns, he concluded the complainant's allegations were truthful. His more limited testimony was admissible.

In ***Jensen***, the expert rejected any suggestion that his testimony allowed him to determine credibility. When he was asked if he concluded . . ., he interrupted the question to say: "Not conclude, suspicion and belief." Further, he conceded that similar behaviors occur in children who had not been sexually abused. ***Id.,*** 247-48.

The court in ***Jensen*** recognized the risk that "behavior consistent with" testimony could cause jurors to infer that the witness believed the complainant was truthful. Therefore, the court's holding was carefully limited to allow expert witness testimony describing "the behavior of the complainant and then to describe that of victims of the same type of crime, if

the testimony helps the jury understand a complainant's reactive behavior." However it concluded that an opinion whether a complainant's behavior was consistent with that of victims of the same type of crime "only if" the testimony would assist the trier of fact. In many cases, the court noted, the jury was capable of drawing its own comparisons between the complainant's behavior and that of victims of the same type of crime. ***Id.,*** 256-257.

It was in this context that the court in ***Krueger*** considered the previously unanswered question whether an expert could testify whether the child's testimony and behavior "exhibit signs of coaching or suggestion." ***Id.***, ¶ 14. The court concluded that "signs of coaching or suggestion could fall into the realm of knowledge that is outside that of a lay-person jury." ***Id.***, ¶ 15. Therefore, it concluded that "testimony about a child's consistency, when coupled with testimony regarding the behavior of like-aged children," could be admissible. ***Id.,*** ¶ 15.

However, the court in ***Krueger*** concluded the expert-interviewer's testimony went too far when she testified that the complainant did not demonstrate a level of sophistication that would allow her to maintain consistency "unless it was something that she had experienced." That testimony, even though it was couched in terms of objective criteria of sophistication and consistency, crossed the line into an opinion about truthfulness.

Here, Ms. Gainey's testimony more obviously crossed the line into an opinion about honesty. Ms. Gainey had testified to "specialized knowledge" about suggestibility and coaching. However, she had no "specialized knowledge" of symptoms or indications of dishonesty. Nevertheless, she was specifically asked about honesty by the prosecutor –

whether there was "any indication" that the complainant was "not being honest during her interview with you."

As in ***Haseltine*** and ***Krueger***, the witness's opinion used objective language. But no matter how the answer to a question about honesty is couched with "objective" signs, indications or behaviors, it violates the holding in ***Haseltine***: "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."

The state also complains that the defense argues for magic words in referring to "consistent with" testimony. (Brief, p. 5). It argues, without citation that the witness does not have to testify that the behavior of a particular child was consistent with the behavior of other children. ***Id.***

The state is wrong. The decisions in ***Jensen*** and ***Krueger*** urge a careful presentation of expert testimony, designed to avoid the risk that the expert's opinion invades the fact-finding province of the jury. In fact, in a concurring opinion in ***Krueger,*** Chief Judge Richard Brown specifically wrote that "prosecutors must be careful in how they present it [evidence regarding coaching.]" He said "questions must be objectively tailored and designed to elicit objective answers" such as nonleading questions about a child's "ability to supply peripheral details," and whether the child's use of language is appropriate to the child's developmental level. "What the prosecutor cannot do," he wrote, "is cross the line by inviting the expert to give her or his opinion about whether the child was coached. In sum, be careful." ***Id.,*** ¶ 21.

The prosecutor in this case ignored Judge Brown's admonition, asking not only whether "there was any indication" that the complainant had been coached, but going a step further to ask if the expert saw any indications of

dishonesty. That question and answer "crossed the line" into an impermissible opinion testimony that K.Z.L. was telling the truth, and defense counsel performed deficiently when he failed to object to the question and answer.

Finally, the state argues that admission of the testimony vouching for K.Z.L.'s honesty was not prejudicial because the jury could have inferred from the fact of prosecution, that prosecution witnesses believed K.Z.L. was telling the truth. Such a presumption by the court assumes that the jury would disregard the the fundamental principle that the "law presumes every person charged with commission of an offense to be innocent." WIS JI-CRIMINAL 140.

In this case, as in ***Haseltine*** and ***Krueger***, the verdict turned on the credibility of the defendant, Mr. Maday and the complainant, K.Z.L. There was no other evidence of a sexual assault. As in ***Haseltine*** and ***Krueger***, the improper testimony vouching for the complainant's honesty created the risk that the jury "abdicated its factfinding role" to the expert, and did not independently determine guilt.

Additionally, the prosecutor's closing argument shows that the prosecutor believed that the honesty testimony was important, and helped to prove the state's case. The prosecutor argued K.Z.L.'s honesty in closing, saying "nothing she [Ms. Gainey] saw indicated that K.Z.L. had been coached or that she was lying." The prosecutor argued further that because of the interview techniques, K.Z.L.'s story was "more credible" than Mr. Maday's account. "You should believe [K.Z.L.]'s testimony. It is reliable, it is credible…." (72:98-99, 125-126; App. 116-17, 122-23).

Therefore, as in ***Haseltine*** and ***Krueger,*** the admission of the honesty testimony was prejudicial, and Mr. Maday should be granted a new trial.

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

The state agrees with the court and Mr. Maday that the evidence of his training in weapons was "completely irrelevant." (Brief, p. 10). Unlike the trial court, which found admission of the evidence to be prejudicial to Mr. Maday's defense, however, the state argues that the evidence was "innocuous," or even proved that he was "a person of good character." ***Id.***

The state's arguments are entirely divorced from the context of this case. Perhaps in a theoretical world, there are people who believe prison correctional officers carry weapons and who believe trainings entitled "weapons use of force," and "principles of subject control" are signs of good character.

In this case, however, K.Z.L. testified that she was afraid of Mr. Maday. She said she was afraid "he's going to hurt me or he's going to hurt somebody in my family." (71:136). She later testified that she knew Mr. Maday "has guns and knives and stuff," and she was afraid if she told someone, "he was going to hurt me." (71:160).

In the context of this trial, therefore, in which a 12-year-old girl was testifying that she was afraid to tell anyone that a grown man had molested her, training in "weapons use of force" and "principles of subject control," suggest that she had reason to be afraid, not that he was a man of good character.

In fact, the state used Mr. Maday's trainings in closing argument to suggest that K.Z.L. was reasonably afraid of Mr. Maday – not that he was a man of good character. The prosecutor argued: "She was scared. She knew that Stan had weapons and that he knew how to use them." The prosecutor continued:

> 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.

The prosecutor used Mr. Maday's training as a prison guard to suggest a negative character. In a case such as this, in which the verdict turned solely on whether the jury believed K.Z.L. or Mr. Maday, character was an important factor. Therefore, the admission of irrelevant evidence of Mr. Maday's training was prejudicial.

III. The Cumulative Effect of Counsel's Deficient Performance Caused Prejudice to Mr. Maday's Defense.

Mr. Maday has argued above that each instance in which counsel rendered deficient performance by failing to object to inadmissible testimony, resulted in prejudice to Mr. Maday's defense.

However, 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.

The state's argument on this point is that because the evidence regarding K.Z.L.'s honesty was properly admitted, and because the improperly admitted evidence of Mr. Maday's weapons training was "superfluous," he is not entitled to a new trial in the interest of justice.

For the reasons set forth above, the evidence about K.Z.L.'s honesty, and Mr. Maday's weapons training, was erroneously and improperly admitted. That evidence so clouded the crucial issue in this case – the credibility of K.Z.L. and Mr. Maday – that the real controversy was not fully tried. ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W. 2d 745 (1985).

Therefore, Mr. Maday should be given a new trial in the interest of justice.

CONCLUSION

For the reasons set forth in this brief and the brief-in-chief, Mr. Maday should be given a new trial because he was denied his right to effective assistance of counsel. Alternatively, Mr. Maday should be given a new trial in the interest of justice.

Dated this 13th day of July, 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 2,079 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 13th day of July, 2015.

Signed:

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