STATE OF WISCONSIN

SUPREME COURT

Case No. 2015AP366-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

STANLEY J. MADAY, JR.,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT IV,
REVERSING A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR COLUMBIA COUNTY,
W. ANDREW VOIGT, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT-PETITIONER

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ISSUE PRESENTED

Was a social worker's testimony that there was no indication that the victim had been coached or was not being honest a permitted description of objective behavioral manifestations of the victim's credibility rather than a

prohibited subjective opinion that the victim was telling the truth?

This issue was raised in the circuit court on the motion for postconviction relief filed by the defendant-appellant, Stanley J. Maday, Jr., claiming that his attorney was ineffective for failing to object to the testimony of the social worker. This was the primary issue raised and briefed by both parties in the court of appeals.

The court of appeals held that the testimony of the social worker effectively advised the jury that the child was being truthful when she stated that the defendant sexually assaulted her, and therefore amounted to vouching for the credibility of another witness.

STATEMENT OF THE CASE

Nature Of The Case

This is an appeal from a judgment of the Circuit Court for Columbia County, W. Andrew Voigt, Judge, convicting Maday of three counts of first-degree sexual assault of a child, and from an order of the circuit court denying Maday's motion for postconviction relief.

The court of appeals reversed the judgment and order, and ordered a new trial, because it found that Maday's attorney was ineffective for failing to object to testimony that the court considered to improperly vouch for the credibility of the victim.

A decision by the supreme court will help develop and clarify the law by applying settled principles of law to a factual situation that is significantly different from those presented in

previous cases, thereby making more distinct the "nuanced" line between permissible testimony describing objective behavioral manifestations of a child's credibility and impermissible testimony expressing subjective beliefs about the credibility of the child. *See* Wis. Stat. § 809.62(1r)(c)2. (2013-14).

Statement Of Facts

The eleven-year-old victim, KL, was best friends with Maday's daughter (71:120, 125).

KL testified at the trial that on three occasions when she was spending the night at Maday's house, he touched her breasts and vagina while she pretended to be asleep (71:123, 130-32).

During his cross-examination of KL, Maday's attorney played a video recording of KL's interview with a social worker in an effort to impeach her testimony with inconsistent statements she made during the interview (71:147-49, 156).

Defense counsel later called the social worker, Katherine Gainey, as a witness (71:190). Gainey testified on direct examination by the defense that she conducted what she characterized as a highly structured cognitive graphic interview with KL (71:191).

On cross-examination by the prosecutor, Gainey testified that the interview techniques she used are designed to make sure the child fully understands the difference between truth and lies, and understands that there are consequences for making things up and lying (71:193-94). The child is put under a sort of oath where she is asked to promise to tell the truth (71:194).

The interview avoids leading questions so as not to introduce information that was not offered by the child (71:195). The questions just open the door for the child to say what may have 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 kinds of 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).

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

Maday's attorney did not object to any of this testimony.

The jury found Maday guilty of all three counts of first-degree sexual assault of a child with which he was charged (23; 72:146).

Maday's postconviction motion alleging that his attorney was ineffective for failing to object to Gainey's testimony was denied (45; 53; 54; 74:27-32). Although the circuit court found that Gainey's testimony came very close to the line separating permissible comment from impermissible vouching, it did not cross that line (74:28-29, Pet-Ap. 102-03).

Maday appealed (56).

Decision Of The Court Of Appeals

In a per curiam decision, the court of appeals correctly recited the well settled, but "nuanced," law regarding the recurring problem of one witness commenting on the credibility of another witness.

Relying on *State v. Krueger*, 2008 WI App 162, 314 Wis. 2d 605, 762 N.W.2d 114, a case that pulls together and harmonizes previous cases, the court traced the line that has been drawn between permissible and impermissible testimony. *State v. Maday*, No. 2015AP366-CR, slip op. ¶ 10 (Ct. App. Oct. 29, 2015) (Pet-Ap. 111-12).

Testimony regarding objective, observable behavioral manifestations of external influences or events that have an impact on the victim is permitted. Slip op. ¶ 10 (Pet-Ap. 111-12). Testimony that goes beyond observable facts to a subjective opinion that the victim is telling the truth is not permitted. Slip op. ¶ 10 (Pet-Ap. 111-12). An express assertion that the victim is truthful is not necessary. Comments that are "tantamount" to an opinion on truthfulness are equally forbidden. Slip op. ¶ 10 (Pet-Ap. 111-12).

The court of appeals acknowledged that this is a "nuanced" area with "subtle" distinctions, where it is sometimes difficult to determine whether the line has been crossed but, unlike the circuit court, found that it was crossed in this case. Slip op. ¶ 13 (Pet-Ap. 113-14).

By comparison, the court considered the situation in *Krueger* where the witness said she "did not get a sense" that the victim would be able to maintain a fabricated story. This comment was held to be tantamount to an opinion that the victim was telling the truth. Slip op. ¶ 11 (Pet-Ap. 112-13).

Here, the court found that by testifying that her techniques would insure that no false allegations were made, that there was no indication of coaching, and that there was no indication of dishonesty, the social worker effectively told the jury that the victim was being truthful when she accused Maday of sexually assaulting her. Slip op. ¶¶ 13-18 (Pet-Ap. 113-15).

The court found that Maday was prejudiced by the deficient performance of his attorney for failing to object to the prohibited vouching testimony because credibility was the critical issue in this case. Slip op. ¶¶ 19-20 (Pet-Ap. 116).

Because the court reversed Maday's conviction on the ground that his attorney was ineffective for failing to object to prejudicial evidence of vouching, it did not reach the issue of whether counsel was also ineffective for failing to object to the prosecutor's closing argument. Slip op. ¶ 21 (Pet-Ap. 117).

ARGUMENT

The social worker's testimony that there was no indication that the victim had been coached or was not being honest was not a prohibited subjective opinion that the victim was telling the truth, but a permitted description of objective behavioral manifestations of the victim's credibility.

The overarching issue on this appeal is ineffective assistance of counsel, which requires proof of both deficient performance and prejudice. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. A claim of ineffective assistance fails if the defendant fails to prove either one. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d

719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893.

In this case, the issue of deficient performance is dispositive.

An attorney does not perform deficiently by failing to object to evidence when there is no reason to object because the evidence is admissible. *See State v. Mayo*, 2007 WI 78, ¶ 63, 301 Wis. 2d 642, 734 N.W.2d 115; *State v. Ewing*, 2005 WI App 206, ¶ 18, 287 Wis. 2d 327, 704 N.W.2d 405; *State v. Jimmie R.R.*, 2004 WI App 168, ¶ 38, 276 Wis. 2d 447, 688 N.W.2d 1. So the decisive question is whether Gainey's testimony was inadmissible evidence that vouched for the credibility of another witness to which counsel should have objected.

The court of appeals erred by holding that Gainey's testimony was tantamount to an opinion that KL was telling the truth. The reason the court erred is that the line between permissible descriptions of objective behavior bearing on the credibility of a witness and impermissible subjective opinions that the witness is credible has not been defined with sufficient precision.

It is well established that "no expert should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *Krueger*, 314 Wis. 2d 605, ¶ 9 (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.

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. *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.

Although this line is conceptually comprehensible, it is not always easy to determine the side on which any testimony falls. As the court of appeals said, "[t]his has become an exceedingly nuanced area of the law in Wisconsin." Slip op. ¶ 13 (Pet-Ap. 113-14).

Professor Blinka, whose treatise was cited by the court of appeals, has written that courts have "struggled with the admissibility of expert testimony on the credibility of witnesses." 7 Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence § 608.3 at 484-85 (3rd ed. 2008). This is because "[a]lthough an expert witness cannot offer an opinion that another witness is telling 'the truth,' the ingenuity of counsel and the elasticity of the rules present other

opportunities." Blinka at 485. "The distinctions are subtle, yet often determinative of admissibility." Blinka at 486.

In this case, the testimony of the social worker who interviewed the victim sallied into the nuances but stayed on the acceptable side of the conceptual line.

Immediately following a series of questions about her interview techniques, Gainey stated in answer to the prosecutor's next two questions that during her interview with KL, there was "[n]o" "indication that [KL] had been coached," and "[n]o" "indication that [KL] was not being honest"(71:196-97).

Gainey did not say she personally believed KL was not coached and was not dishonest. Gainey simply indicated that the interview techniques she used, which were designed to detect coaching or dishonesty, did not expose either. Gainey simply indicated that the behavior she observed did not objectively indicate that KL had been coached or was not being honest.

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

Critically, Gainey left open the possibility that KL had been coached. She left open the possibility that KL was not being honest. There could have been coaching or dishonesty. She just did not see signs of it.

Although Gainey did not utter the magic words "consistent with" in her testimony, there is no requirement that a witness incant any codified formula to comply with *Haseltine*. Blinka at 487. The witness does not always have to testify that

the behavior of a particular child was "consistent with" the behavior of a child who was actually the victim of a sexual assault.

Substance matters more 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.

In substance, the word "indication" provided the same sort of limitation as the phrase "consistent with."

In common usage, an "indication" is a sign, something that serves to give grounds for supposing or inferring the existence or presence of some other thing. The American Heritage Dictionary of the English Language 918-19 (3d ed. 1996); Webster's Third New International Dictionary 1150 (unabridged ed. 1986). *See generally State v. Williquette*, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986) (the common, ordinary and accepted meaning of words is found in recognized dictionaries).

By definition, therefore, saying there is an "indication" is not saying that something actually exists or is present. By using this word the speaker is simply saying there is a sign that gives grounds for supposing or inferring that something exists or is present.

So by saying that there was no indication of coaching or dishonesty, Gainey was not saying that there was no actual coaching or actual dishonesty. Rather, Gainey was saying only that she did not see any sign that would give grounds for supposing or inferring the existence or presence of coaching or dishonesty. She saw no objective behavioral manifestations of coaching or dishonesty in KL's interview.

Courts in other jurisdictions have admitted testimony by a person who interviewed a child that the interviewer saw no indication of coaching or untruthfulness. *People v. Sardy*, ___ N.W.2d ___, 2015 WL 9485072 at 12 (Mich. Ct. App. Dec. 29, 2015); *State v. Champagne*, 2013 MT 190, ¶¶ 34-36, 305 P.3d 61 (Mont. 2013); *Franklin v. State*, 459 S.W.3d 670, 678 n.4 (Tex. Ct. App. 2015); *Reynolds v. State*, 227 S.W.3d 355, 366 (Tex. Ct. App. 2007). *See also Sampson v. State*, 38 N.E.3d 985, 989-92 (Ind. 2015) (noting that some courts have allowed testimony that a child did not exhibit any signs or indicators of coaching, while other courts have allowed such testimony only when the defendant opened the door by suggesting that the child was untruthful at the interview).

Gainey's testimony is significantly different from the testimony found to be impermissible vouching in *Krueger*, the case to which the court of appeals compared Gainey's testimony.

In *Krueger*, the expert witness was specifically asked whether she had formed an opinion as to whether the victim was the product of any suggestibility or coaching. *Krueger*, 314 Wis. 2d 605, ¶¶ 5, 15. The witness specifically said that she had formed such an opinion, which was that she did not get the sense that the child had the sophistication to maintain a fabricated story, and could not maintain consistency throughout the interview unless it was something she had experienced. *Krueger*, 314 Wis. 2d 605, ¶¶ 5, 15.

The court of appeals held in *Krueger* that this testimony was tantamount to an opinion that the victim was telling the truth when she said she had been sexually assaulted. *Krueger*, 314 Wis. 2d 605, ¶¶ 16, 19.

Gainey's testimony, by contrast, 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).

This court should clarify the distinction between impermissible testimony expressing subjective opinions about the credibility of the child, i.e., the kind of testimony in *Krueger* about the personal sense impressions of a witness regarding the child's ability to lie, and permissible testimony describing objective behavioral manifestations of a child's credibility, i.e., the kind of testimony in this case about the lack of any indication by the child that she was lying.

A determination by this court that Maday's attorney did not perform deficiently by not objecting to Gainey's testimony because there was nothing legally objectionable about it would be dispositive since a claim of ineffective assistance fails if the defendant fails to prove deficient performance. *Williams*, 296 Wis. 2d 834, ¶ 18; *Taylor*, 272 Wis. 2d 642, ¶ 14.

But in this case, even if Gainey's testimony might have amounted to vouching, Maday would not have been prejudiced by his attorney's failure to object.

Deficient performance is prejudicial when it is so reasonably probable that the result of the proceeding would have been different without the error that a court cannot have

confidence in the reliability of the existing outcome. *Allen*, 274 Wis. 2d 568, ¶ 26; *Thiel*, 264 Wis. 2d 571, ¶ 20.

But the result of Maday's trial would have been exactly the same if his attorney had objected to Gainey's testimony.

Even without this testimony, the jury could have inferred that there was no indication KL was lying from the absence of any testimony that there was some indication of deception. 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 inevitably suggest that there was none.

Moreover, the video 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 coached or 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 about the credibility of KL during the interview when they could see for themselves whether KL was credible when she was interviewed by Gainey.

CONCLUSION

This court should correct the error of the court of appeals, and clarify the law by making more precise the "nuanced" line between permissible testimony describing objective behavioral manifestations of a child's credibility and impermissible testimony expressing subjective beliefs about the credibility of the child.

The decision of the court of appeals should be reversed, and the judgment of the circuit court should be reinstated and affirmed.

Dated: March 11, 2016.

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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 3,189 words.

Dated this 11th day of March, 2016.

_____

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 11th day of March, 2016.

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