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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP000366-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

STANLEY J. MADAY, JR.,

Defendant-Appellant.

On Review of a Decision of the Court of Appeals, District IV, Reversing an Order Entered in the Columbia County Circuit Court, the Honorable W. Andrew Voigt, Presiding

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RESPONSE BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. At trial, the social worker who interviewed K.Z.L. about Maday's alleged sexual assaults testified that there was no "indication that [K.Z.L.] had been coached in any way during her interview" and no "indication that [K.Z.L.] was not being honest during her interview." (71:196-197; App. 107-08). Did this testimony impermissibly vouch for K.Z.L.'s credibility?

   The circuit court held that this testimony did not impermissibly vouch for K.Z.L.'s credibility because a recording of the interview about which the social worker testified was introduced solely to impeach K.Z.L.'s in-court testimony.

   The court of appeals held that the social worker's testimony impermissibly vouched for K.Z.L.'s credibility.

2. Was the evidence introduced about Maday's training in weapons and use of force irrelevant and thus inadmissible?

   The circuit court held that evidence about Maday's training record was irrelevant.

   The court of appeals did not address this issue.

3. Considering that Maday's attorney raised no objection to the social worker's vouching testimony and withdrew his objection to the admission of irrelevant

evidence regarding Maday's training record, did Maday receive ineffective assistance of counsel?

The circuit court held that although Maday's attorney performed deficiently by withdrawing his objection to the irrelevant training record evidence, this deficiency was not "sufficiently prejudicial to warrant a finding of ineffective assistance of counsel …." (74:30).

The court of appeals held that Maday's attorney performed deficiently by failing to object to the social worker's vouching testimony and that Maday was prejudiced by this deficiency. Accordingly, it held that Maday received ineffective assistance of counsel and granted him a new trial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this court.

STATEMENT OF THE CASE AND FACTS

Stanley J. Maday Jr. was charged with sexually assaulting K.Z.L., an 11-year-old girl, on three occasions. (1). Maday denied K.Z.L.'s allegations and the case proceeded to a two-day jury trial. (71; 72). As the State made clear in its opening statement, there was no physical or DNA evidence against Maday; the trial was a pure credibility contest. (71:110).

K.Z.L. was the first to testify. (*Id*. at 120-61). She described three different incidents in which Maday allegedly assaulted her. (*Id.* at 130-32, 140, 144).

On cross-examination, defense counsel verified that K.Z.L. was interviewed by social worker Katherine Gainey shortly after she reported the assaults. (*Id.* at 147). K.Z.L. confirmed that she told Gainey "what happened to the best of [her] memory." (*Id.*). However, K.Z.L. was unable to recall or explain contradictions between her testimony at trial and statements she made during her interview with Gainey. (*Id.* at 147-48). To call attention to these contradictions, defense counsel introduced part of a recording of Gainey's interview with K.Z.L. (*Id.* at 156).

Later on, defense counsel called Gainey to testify about her interview methods. (*Id.* at 190; App. 101). Gainey testified that she has specialized training in cognitive graphic interviewing and that she conducted a cognitive graphic interview of K.Z.L. (71:191; App. 102). She explained that this interviewing technique avoids "conduct[ing] leading interviews of children." (71:191; App. 102). She confirmed that "poor interview procedures can lead to false allegations" and that there is no way to know during an interview "whether or not previous interviews or questioning ha[ve] influenced [a] child's memory." (71:191-92; App. 102-03).

On cross-examination, the State asked for more information about the benefits of using the cognitive graphic interviewing technique with children. (71:193; App. 104). Gainey stated that "[t]he technique is [intended] to make sure the child fully understands the difference between truth and lies" and understands that "there are consequences for lies." (71:193; App. 104). Gainey further stated that the technique helps "to make sure that there is consistency between what they are telling me or have told other people." (71:193-94; App. 104-05).

The State then requested more information about leading questions. (71:195; App. 106). Gainey explained what leading and non-leading questions are and confirmed that cognitive graphic interviews employ non-leading questions to "make[] answers more reliable." (71:195-96; App. 106-07). She also confirmed that she had previously interviewed children who had been "prompted by an adult to give a certain type of answer" and that such prompting "become[s] apparent when you use the proper interview techniques." (71:196; App. 107). The State and Gainey then had the following exchange:

> Q. So using these interview techniques is a way to insure that a child who has been coached does not continue with the false allegations during the interview?
>
> A. Yes.
>
> 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.

(71:196-97; App. 107-08).

Defense counsel raised no objection to this testimony.

On the second day of trial, Maday testified. (72:31-56). He flatly denied touching K.Z.L. inappropriately and stated that he felt "shocked" when he learned of K.Z.L.'s allegations. (*Id.* at 32-33).

Maday also testified about the long hours he worked as a sergeant at Columbia Correctional Institution during the period of time he had allegedly been assaulting K.Z.L. (*Id.* at 33-38). Defense counsel introduced an exhibit listing Maday's work hours during the relevant timeframe. (*Id.*).

On cross-examination, the State asked Maday to testify about a part of his training record that was attached to the work hours exhibit. (*Id.* at 53). Defense counsel objected, arguing that Maday's training record was irrelevant unless K.Z.L. was aware of it. (*Id.*). Then, before the court could rule on the objection, he abruptly withdrew it. (*Id.* at 54).

The State presented no evidence suggesting that K.Z.L. knew about Maday's training record. Nevertheless, after defense counsel withdrew his objection, the State asked Maday to "list off the trainings that you took part in I believe in 2011." (*Id.*). Maday testified as follows:

> The top line is weapons requalification, rifle. It's one hour course of training. Date of training was June 21st, 2011. Next line, one hour training weapons requalification for shotgun, also June 21st, 2011. Following that, two hours of training on June 21st, 2011 was weapons use of force test 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.

(*Id.* at 54-55).

On redirect examination by defense counsel, Maday testified that he had neither used force on K.Z.L. nor "demonstrate[d] any of these techniques to her." (*Id.* at 55).

The State's closing argument highlighted both Gainey's testimony that she observed no indications of coaching or dishonesty and Maday's testimony about his training record. (*Id.* at 98-100). Regarding the former, the State argued as follows:

> You [] got to hear from a social worker who was specially trained to conduct these interviews. She told you there was nothing that she saw that indicated that [K.Z.L.] had been coached or that she was lying. Neither of these things were present during her interview with [K.Z.L.]
>
> In fact, one of the purposes of that specific interview technique that she uses is to remind the child there are consequences for lying.… [A]nd again, there was nothing to indicate that [K.Z.L.] was making anything up. That's called reliability, and it makes [K.Z.L.'s] account more credible.

(*Id.* at 98-99).

Regarding Maday's training record, the State commented that although K.Z.L. wanted to report Maday's assaults, "[s]he was scared. She knew that [Maday] had weapons and that he knew how to use them." (*Id.* at 100). The State further commented that Maday had testified to "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." (*Id.*).

The jury found Maday guilty of all three counts. (*Id.* at 146; 23; 29). He was convicted and sentenced to 33 years of imprisonment. (29).

Maday filed a postconviction motion requesting a new trial on the grounds that he received ineffective assistance of counsel. (45). The motion asserted that Maday's trial attorney

was ineffective for two reasons: First, he failed to object when Gainey impermissibly vouched for the credibility of a witness. (*Id.* at 10-12). Second, he improperly withdrew his objection to the training record evidence, which was both irrelevant and prejudicial. (*Id.* at 12-14).

In the alternative, Maday's postconviction motion requested a new trial in the interest of justice. (*Id.* at 15).

At the postconviction motion hearing, Maday's trial attorney testified that he could not recall why he did not object to Gainey's impermissible vouching testimony. (74:11). He stated: "I'm not sure I perceived it as being vouching because of the way the question was phrased." (*Id.*). He also testified that he could not recall a strategic reason for withdrawing his objection to the training record evidence, commenting: "I still don't know why I would think [] the training record would be relevant []." (*Id.* at 12-13).

The circuit court denied Maday's request for a new trial. (*Id.* at 32; 54). It first held that Maday's trial attorney was not ineffective for failing to object to Gainey's testimony because Gainey did not vouch for K.Z.L.'s credibility. (74:28-29). It explained this conclusion as follows:

> [T]his is about as close as I can [] envision to the line of what is permissible versus impermissible as the State could have gotten…. But the Court finds that it was not impermissible vouching for [K.Z.L.] largely because the question dealt [] with the videotaped interview….
>
> By that I mean … we talked about [the video coming into evidence] … solely for the purpose of impeaching [K.Z.L.'s] direct testimony….

(*Id.*).

The court then held that evidence regarding Maday's training record was irrelevant (because "there is insufficient evidence to support the conclusion that [K.Z.L.] knew anything about the specifics of it") and prejudicial (because "evidence offered by the State is offered on purpose to be prejudicial to the Defendant, or they wouldn't bother to offer it"). (*Id.* at 30). Nevertheless, the court determined that defense counsel's withdrawal of his objection to the irrelevant training record evidence was not "sufficiently prejudicial to warrant a finding of ineffective assistance …." (*Id.*).

The court also denied Maday's request for a new trial in the interest of justice. (*Id.* at 32).

Maday appealed, and the court of appeals reversed. ***State v. Maday***, No. 2015AP366-CR, unpublished slip op. (Wis. Ct. App. Oct. 29, 2015). The court of appeals concluded that Gainey impermissibly vouched for K.Z.L.'s credibility, and that Maday's trial attorney was deficient for failing to object. ***Id.***, ¶¶12-13, 19. It further concluded that the deficiency was prejudicial, as credibility was the dispositive issue in the case. ***Id.***, ¶¶19-20. Accordingly, it held that Maday received ineffective assistance of counsel and granted his request for a new trial. ***Id.***, ¶21.

SUMMARY OF ARGUMENT

By testifying that there was no "indication that [K.Z.L.] had been coached in any way during her interview" and no "indication that [K.Z.L.] was not being honest during her interview," Gainey vouched for K.Z.L.'s credibility. (71:196-97; App. 107-08); *see* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Maday's trial attorney should have objected to this impermissible vouching testimony. Instead, he allowed

Gainey to usurp the jury's role as "the lie detector in the courtroom." *See* ***Haseltine***, 120 Wis. 2d at 96. This was deficient performance.

Maday's trial attorney also performed deficiently by withdrawing his objection to the evidence admitted about Maday's training record.[1] This evidence was irrelevant, as no one averred that K.Z.L. was aware of Maday's training record, and thus inadmissible under Wis. Stat. § 904.02. It also cast Maday in an unfairly negative light.

The deficient performance of Maday's trial attorney was undoubtedly prejudicial. K.Z.L.'s credibility was improperly bolstered by Gainey's vouching testimony and Maday was improperly portrayed as dangerous and intimidating by irrelevant evidence about his training record. Gainey's vouching testimony and the irrelevant training record evidence clouded the issue of who was telling the truth, which was the sole question the jury was tasked with deciding. "It was simply [K.Z.L.'s] word against [Maday's], a one-on-one battle of credibility." *See* ***State v. Romero***, 147 Wis. 2d. 264, 279, 432 N.W.2d 899 (1988).

Under these circumstances, Maday was deprived of his constitutional right to effective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). He is therefore entitled to a new trial. *See, e.g.*, ***State v. Jenkins***, 2014 WI 59, ¶¶9, 68, 355 Wis. 2d 180, 848 N.W.2d 786.

[1] The State's brief is silent on this issue, despite the fact that it was argued in Maday's postconviction motion, ruled on in the circuit court, briefed in the court of appeals, and addressed in Maday's response to the State's petition for review.

ARGUMENT

I. Gainey Impermissibly Vouched for K.Z.L.'s Credibility by Testifying That There Was No "Indication That [K.Z.L.] Had Been Coached in Any Way During Her Interview" and No "Indication That [K.Z.L.] Was Not Being Honest During Her Interview."

A. Standard of review.

The question of whether a witness has improperly vouched for another witness's credibility is a question of law subject to this court's independent review. ***State v. Huntington***, 216 Wis. 2d 671, 697, 575 N.W.2d 268 (1998).

B. Governing case law.

The foundational case governing impermissible vouching testimony is ***Haseltine***. In ***Haseltine***, the defendant's 16-year-old daughter testified at trial that her father had repeatedly had sexual intercourse with her. ***Haseltine***, 120 Wis. 2d at 95. Later on, a psychiatrist testified that he had "'no doubt whatsoever' that [the defendant's] daughter was an incest victim." ***Id.*** at 96. The court of appeals held that this expert opinion testimony should not have been admitted, stating: "The opinion that [the defendant's] daughter was an incest victim was an opinion that she was telling the truth.… No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** The court of appeals further held that admitting expert opinion testimony about a witness's credibility, "with its aura of scientific reliability, creates too great a possibility that the jury [will] abdicate[] its fact-finding role …." ***Id.***

Subsequent case law has consistently reiterated both the substance of the anti-vouching rule set forth in ***Haseltine*** and the importance of leaving credibility determinations to the jury.[2] For example, in ***Romero***, this court granted the defendant a new trial in the interest of justice because two witnesses had testified that the child complainant was being truthful in her accusations against the defendant. ***Romero***, 147 Wis. 2d at 277-80. The ***Romero*** court stated that this testimony "was not helpful to the jury. Rather, it tended to usurp the jury's role." ***Id.*** at 278.

By contrast, in ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988), this court held that a guidance counselor did not impermissibly vouch for the child complainant's credibility when he testified that her conduct "was 'consistent' with the behavior of children who were victims of sexual abuse." ***Jensen***, 147 Wis. 2d at 242. The court explained that "the reactions and behavior of sexually

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[2] *See, e.g.*, ***State v. Kleser***, 2010 WI 88, ¶¶98-107, 328 Wis. 2d 42, 786 N.W.2d 144 (expert testimony that echoed the defendant's account of what happened impermissibly vouched for the defendant's credibility and "invade[d] the province of the fact-finder as the sole determiner of credibility"); ***State v. Pittman***, 174 Wis. 2d 255, 271-74, 496 N.W.2d 74 (1993) (because "an expert's conclusion as to witness credibility does not assist the jury [in] evaluating] credibility," the State was appropriately barred from eliciting expert testimony that would have conveyed to the jury that the expert did not believe the complainant); ***State v. Romero***, 147 Wis. 2d. 264, 277-80, 432 N.W.2d 899 (1988) (rather than helping the jury, expert testimony that the child complainant "was truthful in her accusations" usurped the jury's role and was therefore impermissible); ***State v. Tutlewski***, 231 Wis. 2d 379, 383, 389-91, 605 N.W.2d 561 (Ct. App. 1999) (expert testimony that it was not within the complainants' capabilities to lie crossed the ***Haseltine*** line and "'usurped' the jury's role as fact finder because the jury was no longer free to decide the [complainants'] credibility").

abused children are not ordinarily matters of common knowledge and experience" and thus "the witness's specialized knowledge in this area" may have aided the jury in assessing the child complainant's credibility. ***Id.*** at 246. The court also made clear that unlike the testimony in ***Haseltine*** and ***Romero***, the guidance counselor's testimony allowed the jury to draw its own conclusions about the complainant's credibility and thus did not impinge on the jury's fact-finding role. ***Id.*** at 255.

The distinction between impermissible ***Haseltine*** testimony and permissible ***Jensen*** testimony was revisited in ***State v. Huntington***, 216 Wis. 2d 671, 575 N.W.2d 268 (1998). In that case, a doctor testified that the child complainant's "failure to report the abuse for a lengthy period of time" and "inability to recount the exact number of times she had been sexually abused" were "consistent with other victims of sexual abuse." ***Id.*** at 697-98 (internal quotation marks omitted). This court held that the doctor's testimony did not impermissibly vouch for the child complainant's credibility and thus did not violate ***Haseltine***. ***Id.*** at 698. Rather, in accordance with ***Jensen***, the doctor had properly "offered her expert opinion that the facts of [the] case are what would be … consistent with[] facts surrounding other victims of childhood sexual abuse." ***Id.***

More recently, in ***State v. Krueger***, 2008 WI App 162, ¶14, 762 N.W.2d 114. 314 Wis. 2d 605, the court of appeals applied the principles set forth in ***Haseltine*** and ***Jensen*** to expert testimony about whether a child's "testimony and behavior exhibit signs of coaching or suggestion." The defendant in ***Krueger*** was charged with sexually assaulting a

child, S.B., who had been interviewed about the assault by a social worker, Holly Mason. ***Id.***, ¶2. Mason testified at trial and had the following exchange with the State:

> Q. Now, when you interviewed [S.B.], did you utilize any methods to determine whether or not she was a product of coaching or suggestibility on anyone's part?
>
> A. …. [J]ust, you know, getting some history in the beginning …. I might come to it later in a different style of question [] to sort of get a sense of whether I was getting the same kind of responses, and that's sort of how I test out whether children can maintain [] consistency.
>
> Q. All right. Based upon that, did you form an opinion as to whether or not [S.B.] was the product of any suggestibility or any coaching?
>
> A. I did not—Yes. I did not get that.
>
> Q. What is that opinion?
>
> A. 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 …. She did not appear to me to be highly sophisticated so that she could maintain that kind of consistency [] unless it was something that she had experienced.

Id., ¶5.

In deciding whether Mason impermissibly vouched for S.B.'s credibility, the court of appeals first considered the broader question of whether an expert may properly testify about "typical signs of whether a child has been coached or

evidences suggestibility and whether the complainant child exhibits such signs." ***Id.***, ¶14. The court held that "both logic and precedent support extending ***Jensen***" to permit such testimony. ***Id.*** (internal quotation marks omitted). Nevertheless, the court deemed Mason's testimony improper, stating: "Mason testified that S.B. had to have experienced the alleged contact …. Th[is] testimony was tantamount to an opinion that the complainant … was telling the truth." ***Id.***, ¶16. The court then reiterated what this court has repeatedly made clear: "The fact-finder jury is as capable as the expert of reaching a conclusion about the complainant's truthfulness, and thus, the jury is solely entrusted to do so." ***Id.***, ¶19.

The governing principles that emerge from this body of case law are threefold. First and foremost, a witness may not testify to the credibility of another competent witness. ***Haseltine***, 120 Wis. 2d at 96. In the context of a child sexual assault case, that means an expert witness may not present testimony with the purpose or effect of conveying to the jury whether he or she believes the child complainant. *See id.*; *see also* ***State v. Tutlewski***, 231 Wis. 2d 379, 388, 605 N.W.2d 561 (Ct. App. 1999) (explaining that courts review the "purpose and effect" of expert testimony to determine whether it violates ***Haseltine***). In contrast, an expert witness *may* offer relevant testimony "about the consistency of a complainant's behavior with the behavior of victims of the same type of crime." ***Jensen***, 147 Wis. 2d at 257. Such "consistency testimony" does not cross the ***Haseltine*** line. ***Id.*** at 255-57. Similarly, an expert witness may offer relevant testimony "on typical signs of whether a child has been coached … and whether the complainant child

exhibits such signs." ***Krueger***, 314 Wis. 2d 605, ¶14. Like the "consistency testimony" permitted by ***Jensen***, this "coaching testimony" concerns "behavioral manifestations of external influences or events impacting upon the complainant" rather than the complainant's credibility. ***Id.*** Thus, it does not run afoul of ***Haseltine***.

Most other jurisdictions handle vouching testimony in child sexual assault cases in much the same way as Wisconsin.[3] However, a substantial minority bar both ***Haseltine***-style vouching testimony and ***Jensen***-style

[3] *See, e.g.*, ***Richardson v. State***, 43 A.3d 906, 909-11 (Del. 2012) (an expert's testimony that "it's very apparent when you talk with a child … whe[ther] they are being truthful," in conjunction with the introduction of the expert's videotaped interview of the child, constituted improper vouching and justified a new trial); ***Hitchcock v. State***, 636 So. 2d 572, 573-74 (Fla. 1994) (expert testimony recounting the child complainant's allegations "improperly bolstered the victim's credibility" and necessitated a new trial); ***Hoglund v. State***, 962 N.E.2d 1230, 1237-38 (Ind. 2012) (testimony from two expert witnesses that there was no "indication that [the child complainant] may have fabricated [her] story" constituted impermissible vouching); ***People v. Peterson***, 537 N.W.2d 857, 859 (Mich. 1995) (an expert may not vouch for a child complainant's credibility but may testify "regarding typical and relevant symptoms of child sexual abuse for the [] purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim"); ***State v. Hicks***, 768 S.E.2d 373, 376-79 (N.C. Ct. App. 2015) (a witness may not vouch for another witness's credibility but "an expert witness may testify, upon proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith" (internal quotation marks omitted)).

consistency testimony,[4] and a smaller minority allow expert testimony that clearly constitutes impermissible vouching under Wisconsin law.[5] The State's reliance on cases from jurisdictions in which the law differs substantially from Wisconsin's, like Texas, is unavailing. *See* Plaintiff-Respondent-Petitioner's Brief at 11. Judicial opinions from other states are persuasive in the present case only insofar as they interpret or apply legal principles that align with the governing law in Wisconsin.

C. Gainey's impermissible vouching testimony.

Gainey's testimony that there was no "indication that [K.Z.L.] had been coached in any way during her interview" and no "indication that [K.Z.L.] was not being honest during her interview" crossed the ***Haseltine*** line, conveying to the

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[4] *See, e.g.*, ***State v. Favoccia***, 51 A.3d 1002, 1023 (Conn. 2012) ("[W]e conclude that our concerns about indirect vouching … require us to limit expert testimony about the behavioral characteristics of child sexual assault victims … to that which is stated in general or hypothetical terms, and to preclude opinion testimony about whether the specific complainant has exhibited such behaviors."); ***State v. Jaquez***, 856 N.W.2d 663, 665-66 (Iowa 2014) ("We allow an expert witness to testify generally that victims of child abuse display certain demeanors[,]" but "when an expert testifies that a child's demeanor or symptoms are consistent with child abuse, the expert crosses that very thin line and indirectly vouches for the victim's credibility …."); ***Commonwealth v. Quinn***, 15 N.E.3d 726, 731 (Mass. 2014) ("[A]n expert may not opine that the child's behavior or experience is consistent with the typical behavior or experience of sexually abused children.").

[5] *See, e.g.*, ***Hobgood v. State***, 926 So. 2d 847 (Miss. 2006) (expert's testimony that she found the child complainant credible because his story was consistent was properly admitted); ***Perez v. State***, 925 S.W.2d 324, 328 (Tex. Ct. App. 1996) (expert testimony that the child complainant "was not fantasizing … [and] was not making [the assault] up" was permissible).

jury Gainey's opinion about the veracity of K.Z.L.'s allegations. By expressing her opinion about whether K.Z.L. was telling the truth (the fundamental issue being tried), Gainey improperly invaded the fact-finding province of the jury.

There are two aspects of Gainey's testimony that render it impermissible. First, Gainey did not testify about the typical indications that a child has been coached before testifying that there was no indication that K.Z.L. had been coached. ***Krueger*** permits the latter only in conjunction with the former. ***Krueger***, 314 Wis. 2d 605, ¶¶14-15. The rationale for admitting such testimony, after all, is that educating lay jurors about the objective signs of coaching and whether the child complainant exhibits such signs will assist the jury in evaluating the child complainant's credibility. ***Id.*** Untethered to background information about the typical signs of coaching, an expert's statement that a child displays no such signs does little to assist the jury and runs an unacceptable "risk that the jury could interpret the testimony as an opinion that the complainant is being truthful about the assault …." ***Jensen***, 147 Wis. 2d at 256.

A recent Indiana case cited in the State's brief provides a helpful counterexample. *See* Plaintiff-Respondent-Petitioner's Brief at 11. In ***Sampson v. State***, 38 N.E.3d 985, 987 (Ind. 2015), a child reported being molested by the defendant and was subsequently questioned about the molestation by a forensic interviewer. The State called the interviewer as a witness at trial and asked her a series of questions about coaching, including what observable signs of coaching "might lead [her] to believe that a witness or child ha[s] been coached" and whether she had observed "any signs that [the child complainant] had been coached." ***Id.*** at 988-89. In response, the interviewer enumerated the typical signs that

an individual has been coached and then confirmed that she did not observe any such signs while interviewing the child complainant. ***Id.*** This is precisely the sort of testimony ***Krueger*** deems admissible. *See* ***Krueger***, 314 Wis. 2d 605, ¶14. It is not the sort of testimony Gainey provided.

The second and more fundamental problem with Gainey's testimony is that by asking Gainey whether there was any "indication that [K.Z.L.] was not being honest," the State indisputably elicited Gainey's views on K.Z.L.'s truthfulness—precisely what ***Haseltine*** prohibits. ***Krueger*** held that expert testimony about whether a child exhibits indications of *coaching* comports with ***Haseltine*** so long as that testimony is supported by an explanation of what such indications are. ***Id.***, ¶14. ***Krueger*** did not open the door to expert testimony about whether a child exhibits indications of *dishonesty*, regardless of whether that testimony is supported by an explanation of what such indications are.

The rationale for admitting coaching testimony helps clarify this distinction. Like the "behavioral manifestations" of child sexual assault, the "behavioral manifestations" of coaching will ordinarily be outside the scope of a lay jury's knowledge. ***Id.***, ¶15. Thus, just as consistency testimony can correct a lay jury's misconceptions about how children respond to sexual assault, coaching testimony can correct a lay jury's misconceptions about how children subject to coaching behave. ***Id.***, ¶¶14-15; ***Jensen***, 147 Wis. 2d at 252. In contrast, the "behavioral manifestations" of dishonesty will not ordinarily be outside the scope of a lay jury's knowledge—indeed, picking up on such signs is a lay jury's core function. It follows that expert testimony about signs of dishonesty and about whether a child displays them will

not disabuse jurors of any particular misconceptions. ***Krueger***, 314 Wis. 2d 605, ¶14. It will simply usurp their role as the sole determiner of witness credibility. ***Id.***, ¶19.

The State's brief contends that Gainey's testimony, including her statement about indications of dishonesty, was permissible coaching testimony under ***Krueger***. *See* Plaintiff-Respondent-Petitioner's Brief at 9-12. The core of the State's position seems to be that there is a legally significant difference between an expert's testimony that there is no *indication* a child was coached or was being dishonest and an expert's testimony that he or she *believes* a child was not coached or was not dishonest. *See id.* at 9. This argument misses the point on two fronts.

First, Gainey's testimony about coaching was not problematic because she expressly conveyed her belief about whether K.Z.L. had been coached; it was problematic because she implicitly conveyed that belief. Without testimony about what the indications of coaching are, Gainey's testimony that there was no indication of coaching during K.Z.L.'s interview amounted to an unexplained opinion that K.Z.L. had not been coached. This is especially true in light of Gainey's preceding testimony that she employs the cognitive graphic interviewing technique in part to ascertain whether a child has been coached. (71:191-95; App. 101-06). In essence, she testified "that she is an expert interviewer who … usually succeeds in getting[] reliable testimony from children" and that she believes she succeeded in getting reliable testimony from K.Z.L. ***Maday***, No. 2015AP366-CR, ¶14. Merely using the word "indication" did not transform Gainey's testimony into the kind that ***Krueger*** permits—testimony, to use the State's language, about "objective behavioral manifestations of coaching." *See id.* at 10. As the State's brief points out, "[s]ubstance matters more than form." *Id.*

Second, Gainey's testimony that there was no indication of dishonesty during K.Z.L's interview would have been impermissible even if it had been rooted in a discussion of the objective signs of dishonesty. Despite the State's attempt to shoehorn expert testimony about indications of dishonesty into the category of coaching testimony permitted by ***Krueger***, the two are not the same, and the former plainly violates ***Haseltine***. Further, were coaching testimony and dishonesty testimony the same, Gainey's dishonesty testimony would still fall short of fulfilling the requirements set forth in ***Krueger***. The State did not request, and Gainey did not provide, any background whatsoever on what the indications of dishonesty are.

In sum, Gainey's testimony that there was no "indication that [K.Z.L.] had been coached in any way during her interview" and no "indication that [K.Z.L.] was not being honest during her interview" impermissibly vouched for K.Z.L.'s credibility. Gainey "clearly communicated to the jury [her] own opinion as to the veracity of the witness. It was this effect that made the testimony improper." *See* ***State v. Pittman***, 174 Wis. 2d 255, 496 N.W.2d 74 (1993).

II. Evidence Regarding Maday's Training in Weapons and Use of Force Was Irrelevant and Thus Inadmissible.

Evidence is irrelevant if it has no "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Wis. Stat. § 904.01. Irrelevant evidence is inadmissible. *See* Wis. Stat. § 904.02. A circuit court's determination that

evidence is irrelevant and thus inadmissible is reviewed for an erroneous exercise of discretion. *See* ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771.

The State elicited testimony about Maday's training record in an effort to explain K.Z.L.'s delay in reporting Maday's assaults. (72:100-01, 123). The State argued in closing that K.Z.L. was afraid to come forward because Maday was a frightening person, as evidenced by his extensive weapons training. *Id.* However, it presented no evidence showing that K.Z.L. was aware of Maday's training record. This disconnect renders that record immaterial to the question of why K.Z.L. delayed reporting the assaults, and the State has cited no other reason for inquiring about it. Accordingly, the evidence introduced about Maday's training record was irrelevant and inadmissible. *See* Wis. Stat. §§ 904.01, 904.02. Given the State's use of this evidence in its closing argument, it was also prejudicial.

Maday's trial attorney initially recognized this problem, and objected on the basis of relevance when the State began questioning Maday about his training record. (*Id.* at 53). However, he promptly (and inexplicably) withdrew that objection. (*Id.* at 54). At the postconviction motion hearing, Maday's trial attorney implicitly conceded that evidence regarding Maday's training record was irrelevant and that he had erred by withdrawing his objection thereto. (74:13). The circuit court came to the same conclusion, correctly noting that the State failed to show that K.Z.L. was aware of Maday's training record. (*See* 74:30). The court of appeals did not disturb this factual determination. *See* ***Maday***, No. 2015AP366-CR, ¶20 n.3. This court should not do so either.

III. Because Maday's Trial Attorney Failed to Object to Gainey's Vouching Testimony and Withdrew His Objection to the Irrelevant Training Record Evidence, Maday Received Ineffective Assistance of Counsel. He Is Therefore Entitled to a New Trial.

A. Introduction and standard of review.

Under the state and federal constitutions, criminal defendants have the right to effective assistance of counsel. ***Jenkins***, 355 Wis. 2d 180, ¶34. A defendant is deprived of that right when defense counsel's conduct "so undermine[s] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.***

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland***, 466 U.S. at 687. Deficient performance is that which falls "below an objective standard of reasonableness." ***Id.*** at 688. A deficiency is prejudicial when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

Whether defense counsel performed deficiently and whether the deficiency was prejudicial constitute mixed questions of fact and law. *See* ***Jenkins***, 355 Wis. 2d 180, ¶38. This court will uphold the circuit court's findings of fact unless they are clearly erroneous, but will independently determine whether those facts "demonstrate that defense counsel's performance met the constitutional standard for ineffective assistance of counsel …." ***State v. Dillard***, 2014 WI 123, ¶86, 358 Wis. 2d 543, 859 N.W.2d 44. If they do, the defendant is entitled to a new trial. *See* ***State v. Thiel***, 2003 WI 111, ¶¶60-61, 264 Wis. 2d 571, 665 N.W.2d 305.

B. Maday's trial attorney performed deficiently by failing to object to Gainey's vouching testimony and by withdrawing his objection to the irrelevant training record evidence.

By failing to object to Gainey's vouching testimony and by withdrawing his objection to the irrelevant training record evidence, Maday's trial attorney performed deficiently. This conclusion is supported by the decision of the court of appeals and is consistent with the circuit court's findings of fact.[6]

At the postconviction motion hearing, Maday's trial attorney could not provide a strategic reason for his decision to remain silent when Gainey vouched for K.Z.L.'s credibility. He acknowledged that he is "familiar with the ***Haseltine*** rule," but stated that he was "not sure" he perceived Gainey's testimony as vouching "because of the way the question was phrased." (74:11). Deciding not to

[6] The court of appeals concluded that Maday's trial attorney was deficient for failing to object to Gainey's vouching testimony. ***State v. Maday***, No. 2015AP366-CR, unpublished slip op., ¶19 (Wis. Ct. App. Oct. 29, 2015). It did not reach the question of whether Maday's trial attorney was deficient for withdrawing his objection to the irrelevant training record evidence because it considered the vouching issue dispositive. ***Id.***, ¶20 n.3.

The circuit court, meanwhile, held that defense counsel was not deficient for failing to object to Gainey's testimony based on its incorrect legal conclusion that Gainey did not vouch for K.Z.L.'s credibility—not based on a factual determination that defense counsel had a strategic reason for remaining silent. (74:28-29). It further held that although defense counsel was deficient for withdrawing his objection to the irrelevant training record evidence, the deficiency was not prejudicial. (*Id.* at 30).

challenge Gainey's testimony based on the incorrect belief that she was not vouching for K.Z.L.'s credibility constitutes deficient performance. *See* ***Krueger***, 314 Wis. 2d 605, ¶17.

Maday's trial attorney also failed to provide a strategic reason for withdrawing his objection to the irrelevant training record evidence. He testified at the postconviction motion hearing that he did not know why he would have considered the training record relevant. (74:11, 13). As the circuit court correctly concluded, deciding not to challenge the introduction of evidence about Maday's training record based on the incorrect belief that it was relevant constitutes deficient performance. (*See* 74:30).

This is not a case in which defense counsel was pursuing some "strategic or tactical advantage," as Maday's trial attorney freely admitted. *See* ***Thiel***, 264 Wis. 2d 1, ¶38; (74:11, 13). Nor is it a case in which defense counsel's failure to "know or investigate the relevant law" can be adjudged reasonable, as neither the anti-vouching principle established by ***Haseltine*** nor the applicable evidentiary rules are "obscure or unsettled law as applied to the facts of the present case." *See* ***Dillard***, 358 Wis. 2d 543, ¶¶92-93; *see also* ***State v. Domke***, 2011 WI 95, ¶41, 337 Wis. 2d 268, 805 N.W.2d 364. This is a case in which defense counsel erred, plain and simple.

It was objectively unreasonable for Maday's trial attorney to allow an expert witness to bolster the credibility of the child whose story formed the basis of the charges against his client. It was also objectively unreasonable for Maday's trial attorney to allow the State to question Maday about his training record when that record was irrelevant and depicted Maday as threatening. Because defense counsel's

performance "fell below an objective standard of reasonableness," it was constitutionally deficient. *See* ***Strickland***, 466 U.S. at 688.

C. Maday was prejudiced by his trial attorney's deficient performance.

By failing to challenge Gainey's vouching testimony and by withdrawing his objection to the irrelevant training record evidence, Maday's trial attorney twice allowed the State to improperly undermine Maday's theory of defense—that K.Z.L. was lying. Particularly considering the absence of independent evidence corroborating K.Z.L.'s allegations, defense counsel's errors impeded the jury's ability to decide the all-important credibility issue and were therefore prejudicial.[7]

Several Wisconsin cases have addressed whether the admission of impermissible vouching testimony is prejudicial to a defendant whose trial is a pure credibility contest. Some have addressed that question in the context of harmless error review (*see, e.g.*, ***Romero***, 147 Wis. 2d at 279; ***Haseltine***, 120 Wis. 2d at 96), and some have addressed it in determining whether the defendant received ineffective assistance of counsel (*see, e.g.*, ***Krueger***, 314 Wis. 2d 605, ¶¶17-19). All have held that such testimony "undermines [] confidence in the reliability of the outcome" of the trial and thus that its admission prejudices the defendant. *See id.*, ¶20.

These cases are dispositive of the prejudice issue in the present case. By effectively testifying that she believed K.Z.L. was being honest in her accusations against Maday,

[7] It is "the cumulative effect of counsel's deficiencies" that determines whether a defendant was prejudiced. ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305.

Gainey rendered an expert opinion with a misleading "aura of scientific reliability," inviting the jury to defer to her opinion on K.Z.L.'s truthfulness. ***Haseltine***, 120 Wis. 2d at 96. The State's closing argument amplified the improper influence of this expert opinion testimony by emphasizing that Gainey did not observe indications that K.Z.L. "was lying." (72:98-99). In other words, if there were any doubt about how the jury might interpret Gainey's testimony, the State's closing argument assured that it was taken as a testament to K.Z.L.'s truthfulness. Such credibility discussions are precisely what ***Haseltine*** and its progeny seek to avoid.

The detrimental effect of defense counsel's failure to object to Gainey's impermissible vouching testimony is sufficient, on its own, to support a determination that Maday was prejudiced by his trial attorney's deficient performance. *See* ***Krueger***, 314 Wis. 2d 605, ¶19. However, this was not his only error; he also erred by withdrawing his objection to the irrelevant training record evidence. The State's closing argument cited Maday's training record to support its argument that K.Z.L. feared Maday and thus struggled to come forward and report the assaults. (72:100, 123). In this way, the irrelevant training record evidence gave credence to K.Z.L.'s version of events and undercut Maday's account of what had happened, exacerbating the prejudicial effect of Gainey's impermissible vouching testimony.

The State's brief contends that this court need not reach prejudice because Maday's trial attorney did not perform deficiently. Plaintiff-Respondent-Petitioner's Brief at 12. However, it also alleges that even if Maday's trial attorney was deficient for failing to object to Gainey's vouching testimony, the deficiency was not prejudicial. *Id.* at 12-13. Its cursory arguments on this point are not persuasive.

The State begins by alleging that Gainey would surely have testified about indications of dishonesty if she had observed any. *Id.* at 13. Accordingly, the State asserts that if Gainey had remained silent instead of vouching for K.Z.L.'s credibility, the jury would still have inferred that she did not observe any indications of dishonesty. *Id.* There are two problems with this argument. First, an expert witness may not "convey[] to the jury the expert's own beliefs as to the veracity of another witness," regardless of whether the expert believes or disbelieves the witness. ***Pittman***, 174 Wis. 2d at 267. Second, the State's discussion of what the jury might have inferred from Gainey's silence on the subject of K.Z.L.'s honesty is pure speculation, unsupported by any authority.

The State next contends that the introduction of "[K.Z.L.'s] video recorded interview" made it unlikely that the jury "would have simply deferred to the opinion of someone else about the credibility of [K.Z.L.] …." Plaintiff-Respondent-Petitioner's Brief at 13. Setting aside the fact that the jury saw only a portion of the recorded interview, this argument overlooks the substantial body of case law barring expert testimony about the credibility of a witness even when the jury hears from that witness directly. *See, e.g.*, ***Haseltine***, 120 Wis. 2d at 95-96. As the State notes, "jurors are perfectly capable of assessing credibility for themselves …." Plaintiff-Respondent-Petitioner's Brief at 13. ***Haseltine*** stands for the proposition that they must be permitted to exercise that capacity free from the undue influence of expert opinion testimony. *See* ***Haseltine***, 120 Wis. 2d at 95-96.

D. Maday was deprived of his constitutional right to effective assistance of counsel and is therefore entitled to a new trial.

Because Maday's trial attorney performed deficiently and the deficiency was prejudicial, Maday was deprived of his constitutional right to effective assistance of counsel. *See* ***Jenkins***, 355 Wis. 2d 180, ¶¶34-35. Counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.***, ¶34. A new trial—one in which the jury can serve unimpeded as "the lie detector in the courtroom"—is therefore required. *See* ***Haseltine***, 120 Wis. 2d at 96; ***Thiel***, 264 Wis. 2d 571, ¶¶60-61 (discussing when an attorney's deficient performance will justify a new trial); ***Jenkins***, 355 Wis. 2d 180, ¶¶9, 68 (granting a new trial based on ineffective assistance of counsel).

CONCLUSION

For the foregoing reasons, Maday respectfully requests that this court affirm the decision of the court of appeals, which reversed the judgment of conviction and order denying postconviction relief and remanded the case to the circuit court for a new trial.

Dated this 31st day of March, 2016.

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM/LENGTH

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) 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 petition is 7,294 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated this 31st day of March, 2016.

Signed:

_____

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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; (3) a copy of any unpublished opinion Cited under s. 809.23(3)(a) or (b); and (4) 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 31st day of March, 2016.

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