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

REPLY BRIEF FOR PLAINTIFF-RESPONDENT-PETITIONER

BRAD D. SCHIMEL
Wisconsin Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

TABLE OF CONTENTS

Cases

Page

Page

Statutes

Other Authorities

STATE OF WISCONSIN

S U P R E M E C O U R T

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

REPLY BRIEF FOR PLAINTIFF-RESPONDENT-PETITIONER

ARGUMENT

I. Maday failed to prove his attorney was ineffective for failing to object to the testimony of a social worker that there was no indication that the victim was coached or not being honest.

A. Counsel did not perform deficiently by failing to object because the social worker did not vouch for the credibility of the victim.

Maday agrees with the state that an expert may properly testify about typical signs of whether a child has been coached, and whether there is any indication that the complainant child has been coached. Brief for Defendant-Appellant at 13-15. Maday agrees that this testimony concerns behavioral manifestations of external influences or events impacting the complainant rather than the complainant's credibility. Brief for Defendant-Appellant at 15.

However, Maday contends that there must be testimony about the signs of coaching before there can be testimony whether a child exhibits signs of coaching.

Although it may be a good idea for an expert on interviewing children to apprise the jury of the typical signs of coaching before offering testimony on whether there is any indication that a particular child has been coached, that is not a necessary predicate for the admission of the expert's testimony.

It has long been the rule in Wisconsin, now codified, that an expert may testify in the form of a conclusion without first disclosing the facts or data that underlie the conclusion, unless required by the court or by the opposing party on cross-examination. *Rabata v. Dohner*, 45 Wis. 2d 111, 133, 172 N.W.2d 409 (1969); Wis. Stat. § 907.05 (2013-14).

It is a good idea for an expert on interviewing children to apprise the jury of the typical signs of coaching before testifying whether a particular child exhibits signs of coaching because that enhances the probative value of the expert's testimony. Explaining why the child does not exhibit signs of

coaching is more persuasive than merely saying that the child does not exhibit signs of coaching.

But an expert's failure to testify about the typical signs of coaching before testifying about whether a child exhibits signs of coaching does not change the critical fact that the expert's testimony nevertheless concerns behavioral manifestations of external influences or events impacting the complainant rather than the complainant's credibility.

While no one required the social worker who interviewed KL to testify about the typical signs of coaching, Gainey did testify that prompting becomes apparent when the proper interview techniques are used (71:196). So the jury was informed that Gainey's testimony that there was no indication that KL had been coached (71:196-97) was based on signs of coaching that an expert can look for during an interview.

Maday argues that Gainey's further testimony that there was no indication that KL was not being honest (71:197) was not admissible under any circumstances. Brief for Defendant-Appellant at 18.

Maday contends that while an expert can testify about coaching because the behavioral manifestations of coaching will ordinarily be outside the scope of a lay juror's knowledge, the behavioral manifestations of dishonesty will not ordinarily be outside the scope of that knowledge.

But that is not necessarily correct. An internet search for the topic "signs a child is lying" brought up numerous articles on the subject including, for example, Vanessa Van Edwards, *How to tell when your child is lying*, Huffpost Parents (updated June 12, 2013), http://www.huffingtonpost.com/vanessa-van-edwards/how-to-tell-when-your-chi_b_3060890.html; Leah Rocketto, *How to tell if your child's lying*, POPSUGAR Moms

(Oct. 18, 2015), http://www.popsugar.com/moms/10-Signs-Your-Child-Lying-27332955; Terri Akman, *How to tell if your child is lying*, MetroKids (July 2011), http://www.metrokids.com/MetroKids/July-2011/Kids-Often-Signal-When-Theyre-Lying/; and Kathleen Coulborn Faller, *Is the child victim of sexual abuse telling the truth?*, South Eastern Centre Against Sexual Assault & Family Violence (updated May 25, 2015), http://www.secasa.com.au/pages/is-the-child-victim-of-sexual-abuse-telling-the-truth/.

The prevalence of such articles strongly suggests that it may not be all that obvious to lay persons when a child is lying or telling the truth. So it may well be that in some cases, an expert forensic interviewer should be permitted to testify whether there is any indication that a child is being dishonest.

There is no reason to address that question as a discrete issue in this case, though, because it is clear that when Gainey testified that there was no indication that KL was not being honest, she was just giving the flipside of her immediately preceding testimony that there was no indication that KL had been coached (71:196-97).

The prosecutor's questions just before this testimony concerned coaching. The prosecutor asked if Gainey had experiences where children were prompted by an adult to give certain answers, if it became apparent whether a child was prompted to give certain answers when proper interview techniques were used, and whether using the proper interview techniques 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 was just saying that there was no indication that KL was being untruthful because she had been coached to make false statements. Therefore, the only question that should

be expressly addressed in this case is whether an expert forensic interviewer should be able to testify that there is no indication during an interview that a child has been coached.

B. Maday failed to prove he was prejudiced by his attorney's failure to object to testimony that there was no indication that the victim was coached or not being honest.

Even assuming that Maday's attorney might have performed deficiently by failing to object to Gainey's testimony that there was no indication that KL was coached or not being honest, Maday failed to prove he was prejudiced by any error.

To meet his burden to prove prejudice it is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not erred. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999); *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). When the defendant alleges that his attorney was ineffective for failing to take some action, he must show with specificity what that action would have accomplished if it had been taken, and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477; *Flynn*, 190 Wis. 2d at 48.

Maday relies on three cases where the courts have found prejudice because of "vouching," but the facts in those cases were significantly different from the facts in this case. None of those cases involved a situation where a witness testified that there was no indication during an interview that the victim was coached or not being honest.

In *State v. Romero*, 147 Wis. 2d 264, 277, 432 N.W.2d 899 (1988), a witness testified that in his opinion the victim was being totally truthful. This testimony was exacerbated by the prosecutor's statement in closing argument that all the witnesses believed that the victim was telling the truth about being sexually assaulted, *Romero*, 147 Wis. 2d at 277, in contrast to the prosecutor's statement in this case that "Gainey did not *observe indications* that K.Z.L. 'was lying.'" *See* Brief for Defendant-Appellant at 26 (emphasis added).

In *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), a psychiatrist testified that there was no doubt whatsoever that Haseltine's daughter was an incest victim, which was an opinion that she was telling the truth.

In *State v. Krueger*, 2008 WI App 162, ¶ 5, 314 Wis. 2d 605, 762 N.W.2d 114, the prosecutor asked the person who interviewed the victim whether she had formed an opinion as to whether the victim's statements were the product of suggestibility or coaching. The witness answered that she formed an opinion, which was that she did not get the sense the child was sophisticated enough to maintain a fabricated story. *Krueger*, 314 Wis. 2d 605, ¶ 5. This testimony was tantamount to an opinion that the victim was telling the truth. *Krueger*, 314 Wis. 2d 605, ¶ 16.

Moreover, in only one of those cases, *Krueger*, 314 Wis. 2d 605, ¶ 5, was the jury actually shown a recording of the victim's interview with the witness who gave an opinion on the victim's credibility during that interview.

By simply relying on other cases with significantly different facts, Maday has not shown with specificity what an objection would have accomplished if it had been made in his case, and how its accomplishment would have probably altered the result of the proceeding where he was found guilty.

Maday asserts that the state's discussion of prejudice in its opening brief is not persuasive. Brief for Defendant-Appellant at 26.

But it is Maday, not the state, who has the burden of persuasion on the issue of 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; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). Even assuming for the sake of argument that Maday is correct, it is not permissible to draw a negative inference that his argument must be persuasive because the state's is not. *See State v. Nichelson*, 220 Wis. 2d 214, 223-24, 582 N.W.2d 460 (Ct. App. 1998) (discussing negative inferences).

Maday's failure to affirmatively prove prejudice dooms his claim of ineffective assistance.

II. Maday failed to prove that his attorney was ineffective for withdrawing his objection to testimony that Maday was trained in the use of weapons because he failed to prove that he was prejudiced by this testimony.

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).

Even assuming that counsel performed deficiently by withdrawing his objection, any error would have been harmless because the question regarding weapons training just elicited information the jury would have known anyway.

The evidence showed that Maday was a correctional officer 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 keep order in a prison filled with dangerous criminals by 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), indicating that Maday had to have periodic weapons training to qualify to do his job.

Maday has not shown how he might have been prejudiced by evidence of the obvious fact that prison guards are trained to use 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 the weapons give KL any reason to fear that he would use the weapons he had to hurt her.

There was no evidence that KL knew Maday was trained in the use of weapons. 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. And 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.

Besides, even if KL knew that her mother and Maday worked together at the prison, there was no evidence that KL knew her mother had training in the use of weapons in connection with 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 to hurt an innocent person than those who are not trained in the use of weapons. If anything, just the opposite would seem to be true since weapons training usually includes schooling to use weapons responsibly.

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 a frightening person. Brief for Defendant-Appellant at 21.

But if that was what the prosecutor intended to do, she did not succeed 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.

CONCLUSION

The decision of the court of appeals should be reversed.

Dated: April 12, 2016.

BRAD D. SCHIMEL
Wisconsin Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

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 2,467 words.

Dated this 12th day of April, 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 12th day of April, 2016.

_____

Thomas J. Balistreri
Assistant Attorney General