STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2015AP457-CR

DANIEL L. SCHMIDT,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE ST. OCONTO COUNTY CIRCUIT COURT
HONORABLE MICHAEL T. JUDGE, PRESIDING

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

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Argument in Reply

I. EXCLUSION OF THE CHILD PSYCHOLOGIST'S TESTIMONY WAS PREJUDICAL CONSTITUTIONAL ERROR.

A. Relevance

Respondent State first contends Dr. Thompson's expert testimony was irrelevant, claiming because there were no facts presented at the pretrial hearing of inappropriate interviewing techniques, his opinions could not be properly related to the facts of the case as required by the now *Daubert* consistent rule, §907.02, *Wis. Stats.* Respondent's Brief at 18, hereinafter RB. (The State also claims the doctor could not give any opinion on "Donavan's credibility" but he explicitly disavowed

any intention to do so. See (160:21 [line 5: "Absolutely not."]) His opinions were to be directed to "factors that might impact the reliability of his testimony." (160:21 [lines 16-20]).)

Wisconsin's concept of relevancy of expert testimony has never been as narrow as the State maintains. In *Hampton v. State*, 92 Wis.2d 450, 285 N.W.2d 868 (1979), the defendant complained his expert's testimony on the reliability of the State's eyewitness' testimony was improperly restricted because the circuit court refused to allow the expert to comment specifically on whether or not, applying the proper psychological factors, the witness was reliable. 92 Wis.2d 454-455.

Finding it was proper to allow the expert to testify generally about factors which could affect eyewitness reliability (while endorsing the restriction on applying the factors to the specific witness), the supreme court held §907.02 should be interpreted consistently with F.R.E. 702. See 92 Wis.2d at 459, quoting 59 Wis.2d R207-208 (" 'The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.' ") This is exactly what the doctor planned to do here: "I will not specifically say whether I believe his testimony is reliable or is not reliable, but I think that it's important for the jury to know what factors could affect that." (160:21 [lines 17-20]).

After the amendment to rule "907.02 to make Wisconsin law on the admissibility of expert testimony consistent with 'the *Daubert* reliability standard in Federal Rule of Evidence 702, ' " *State v. Giese*, 2014 WI App 92, ¶17, 356 Wis.2d 796, 854 N.W.2d 687, it seems abundantly clear federal interpretation of the federal rule guides Wisconsin courts in interpreting rule 907.02. See *Siefert v.*

Ballink, 2015 WI App 59, ¶16, ___ Wis.2d ___, ___ N.W.2d ___ (2014AP195, publication recommended), following *State v. Poly-America, Inc.*, 164 Wis.2d 238, 246, 474 N.W.2d 770 (Ct.App.1991)(interpretation of state statute modeled after federal rule, is guided by federal interpretation of federal rule).

It is similarly clear the federal courts follow the advisory committee notes discussed in Appellant's Brief at 8 (hereinafter AB), endorsed in *Hampton*, 92 Wis. 2d at 459, by holding an expert may testify to general principles without necessarily applying them to the specific facts of the case. See, *e.g.*, *U.S. ex rel. Miller v. Bill Herbert Int'l Const.*, 608 F.2d 871, 894-895 (D.C. Cir. 2010)(refusal to exclude broad, generic expert testimony affirmed following advisory committee notes); *In Re Heparin Products Liability Litigation*, 803 F.Supp.2d 712, 745 (N.D. Ohio 2011)(denial of exclusion of expert testimony on "background information" following committee notes).

Therefore, Dr. Thompson's proposed testimony on reliability factors was relevant and admissible under rule 907.002 and should have been admitted to help the jury understand child interviewing techniques, "a subject with which a lay juror may be unfamiliar." *State v. Kirschbaum*, 195 Wis.2d 11, 25, 535 N.W.2d 462, 467 (Ct.App.1995).

B. Right to Present a Defense

The State argues the expert doctor's testimony was not necessary to the defense because Donavan "was neither a victim nor an eyewitness" RB 25. The record belies this claim. Under the law, as a child of a murdered parent, Donavan was a victim, see §950.02(4)(a)4.a., *Wis. Stats.* (family member of deceased victim is a victim), and the court below treated him as such. (24:16-17 [over objection, Donavan allowed to remain in court after prelim testimony because he was a victim]).

As there were no eyewitnesses to the crime, Donavan could not have been such, but, in an almost entirely circumstantial case, he did witness much that incriminated Mr. Schmidt. He testified his mother and Mr. Schmidt had arguments and Mr. Schmidt slapped her during one such argument. (155: 18-19). Most crucially, he told the jury he believed the couple arguing with his mother the night before the killings included Mr. Schmidt's wife and this, combined with his testimony he saw a truck looking like Mr. Schmidt's (155:21-22), supported the inference Mr. Schmidt was present at the scene, arguing with his mother the night before she was killed.

The state supreme court has repeatedly held, " 'Information is necessary to the defense if it tends to support the theory of defense which the defendant intends to assert at trial.' " *State v. Schaefer*, 2008 WI 25, ¶74, 308 Wis.2d 279, 746 N.W.2d 457 quoting 113 Wis.2d at 423 with approval. Here, the defense was identity so any evidence tending to cast doubt on the State's contention he was the killer was necessary to support his theory. As Dr. Thompson's testimony would assist the jury in evaluating the reliability of Donavan, a key State's witness, it seems clear it was necessary to the defense.

C. The error was prejudicial.

The test for harmlessness set out in *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985), has stood the test of time. An error, constitutional or not, is prejudicial if "there is a reasonable possibility that the error contributed to the conviction." *Id.* To show harmlessness the State must "establish" there is no such possibility. *Id.*

All the State has presented is its assertion the jury would have made the same decision had it heard Dr. Thompson's testimony. RB 26-28. But as Justice

Traynor pointed out, where errors deprive the accused of the opportunity to present evidence, they are "ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment." Roger J. Traynor, *The Riddle of Harmless Error* (1970) at 68. Counsel submits the State has not demonstrated "the withheld evidence would [not] have altered at least one juror's assessment" of the case. *Cone v. Bell*, 556 U.S. 449, 452, 129 S.Ct. 1769 (2009).

II. ADMISSION OF MR. SCHMIDT'S ALLEGED STATEMENT TO HIS WIFE WAS PREJUDICIAL ERROR.

A. Waiver of Marital Privilege

Relying heavily on *State v. Denis L.R.*, 2004 WI App 51, 270 Wis.2d 663, 678 N.W.2d 326, the State contends Mr. Schmidt waived his marital privilege by disclosing a "significant part" of the statement as provided in §905.11, *Wis. Stats.* See RB 31-33.

Counsel questions both the status of *Denis L.R.* as precedent on the "significant part" issue, and, if it is precedent, its usefulness for application here.

First, the State neglects to tell the Court that while *Denis L.R.* was affirmed by the state supreme court, that court explicitly did not address the waiver of privilege issue, *State v. Denis L.R.*, 2005 WI 110, ¶6, because it found there was no privilege to assert in the first place. *Id.* at ¶7. While the general rule the court of appeals follows is court of appeals holdings not specifically reversed remain binding, *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶44, 326 Wis.2d 729, 786 N.W.2d 78, the application of this rule in a given case is unclear, *State v. Byrge*, 225 Wis.2d 702, 594 N.W.2d 388, 394, n. 7 (Ct.App.1999)(not clear rule applies where supreme

court finds court should not have addressed issue in the first place) and the supreme court has not chosen to make the rule clear. *State v. Byrge*, 2000 WI 101, ¶77, 237 Wis.2d 197, 241, 614 N.W.2d 477 (conc. opn per Abrahamson, C.J.).

But, secondly, even if *Denis L.R.'s* waiver discussion at ¶17 – ¶19 remains binding, it seems clear it is distinguishable both on the facts and the law: distinguishable on the law because there is a strong, well established policy reason supporting the marital privilege, see AB 11, namely, marital confidences should be privileged to protect the value society places on the marital relationship while there is no similar policy supporting the counselor-patient privilege and distinguishable on the facts because the disclosure in *Denis L.R.* was by a third party to the protected relationship.

Beyond these considerations there is a further troubling aspect to these facts. The disclosure of the statement was first made to police by Mrs. Schmidt and then they confronted Mr. Schmidt with it during an interrogation. If the Court approves this situation as a waiver of the marital privilege, it will be tacit approval of circumvention of the marital privilege as a proper interrogation technique. This would be completely inconsistent with the policy of supporting strong marital relationships by keeping marital confidences protected.

B. Harmless Error

The State again presents its assertion the statement could not have contributed to the verdict. RB 33-34. But, this is a statement of an intent to kill by the accused a scant four days before the murder! It is disingenuous to suggest such a statement had no effect on the vote of a single juror.

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III. THE EVIDENCE MR. SCHMIDT KILLED LEONARD MARSH WAS INSUFFICIENT.

The State presents a lengthy summary of the evidence in the case, RB 6-12, but the only reference to any evidence connecting Mr. Schmidt to Mr. Marsh is "Schmidt complained to a friend that Rose's 'gay brother' (Leonard) was meddling in their affair." RB 6. As counsel pointed out at AB 13, the reason this is the only reference to such evidence is because it was the only such evidence presented to the jury.

The State seems to be claiming this evidence combined with the evidence linking Mr. Schmidt to Ms. Rose's killing provides the inference sufficient to link Mr. Schmidt to Mr. Marsh's killing. But, a conviction cannot be based on "inferences wholly unsupported by any evidence" because "the defendant cannot be convicted on mere suspicion or conjecture." *State ex rel. Kanieski v. Gagnon*, 54 Wis.2d 108, 117, 194 Wis.2d 813 (1972). The State's theory of Mr. Marsh's death, see RB 12, is nothing but conjecture. In *Kanieski, supra,* neither direct nor circumstantial evidence put the accused at the scene at the time of the crime. Here, other than showing Mr. Marsh was alive the night before and then deceased late the next morning, there is no direct or circumstantial evidence as to his time of death. The State showed Mr. Schmidt was present for 15 or so minutes that morning but never showed that was when Mr. Marsh was killed.

Mr. Marsh's death cannot be lumped together with his sister's death in the *res ipsa loquitur* fashion the State espouses. Mr. Schmidt's conviction for this death should be reversed.

Conclusion

Counsel respectfully submits the foregoing demonstrates the State's arguments are without

merit and prays the Court to reverse and remand the judgment for a new trial.

Dated: September 2, 2015

Respectfully submitted,

_____

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Appointed for Mr. Schmidt

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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 1,898 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated: September 2, 2015 So Certified,

Signature: _____

Timothy A. Provis

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CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on September 2, 2015. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: September 2, 2015 So Certified,

Signature: _____

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