STATE OF WISCONSIN

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

DISTRICT II

Case No. 2015AP001072-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ESEQUIEL MORALES-PEDROSA,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Postconviction Relief,
Entered in the Kenosha County Circuit Court,
the Honorable S. Michael Wilk Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

ARGUMENT

I. Mr. Morales-Pedrosa is Entitled to a New Trial Because He Was Denied His Constitutional Right to Effective Representation of Counsel.

A. Trial counsel was ineffective for failing to object to social worker Julie McGuire's testimony that 90% of child sexual assault accusations are true.

The State's attempt to argue that the law in this area is unsettled, and therefore counsel was not deficient for not objecting, is unavailing. (State's response at 5). The rule against vouching for another witness' credibility is well-established and long-standing. ***State v. Haseltine***, 120 Wis. 2d 92, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). "Such testimony invades the province of the fact-finder as the sole determiner of credibility." ***State v. Kleser***, 2010 WI 88, ¶104, 328 Wis. 2d 42, 786 N.W.2d 144 (2010). An attorney is expected to research and become familiar with all relevant, established law in preparation for trial. ***State v. Domke***, 2011 WI 95, ¶¶ 41-44, 337 Wis. 2d 268, 805 N.W.2d 364.[1]

[1] The State discusses a lawyer's "limited right to be wrong," and for support, cites to three cases, none of which have anything to do with ineffective assistance of counsel. ***State v. Jeske***, 197 Wis. 2d 905, 541 N.W.2d 225 (Ct. App. 1995) discusses the *circuit court's* exercise of discretion. ***Heien v. North Carolina***, 135 S.Ct. 530 (2014) and ***State v. Houghton***, 2015 WI 79, 44, 2015 WL 4208659 both involve a *police officer's* erroneous understanding of a statute.

A reasonably prudent attorney would have correctly recognized that Social Worker McGuire's testimony in this case was vouching for the alleged victim's credibility and would have objected. Such testimony "provide[s] a mathematical statement approaching certainty about the reliability of the victim's credibility and truthfulness." ***United States v. Brooks***, 64 M.J. 325, 329 (C.A.A.F. 2007) (holding that an expert should not be allowed to testify that false accusations occur about 5% of the time).

The State's back-up argument—that the testimony was an "invited response"—is also unpersuasive. The State argues that because the defense theory was that B.M. was not telling the truth, and defense counsel asked the social worker whether she considered that possibility, that the 90% figure was fair game. The logical extension of this argument is that in *any* sexual assault where the defendant claims the alleged victim isn't telling the truth, an expert should be allowed to testify to the statistical occurrence rate of false accusations. Such a rule would completely obviate the ***Haseltine*** rule against vouching.

The State cites to an un-citable case, ***State v. Hernandez***, 192 Wis. 2d 251, 256, 531 N.W.2d 348 (Ct. App. 1995) to support its claim that the testimony was not improper. ***Hernandez*** was overruled, which the State acknowledges. Nevertheless, the State has *twice* cited the case in postconviction and appellate proceedings—at the trial court and in this court. This is a violation of ***Blum v. 1st Auto & Casualty Ins. Co.***, 2010 WI 78, 326 Wis.2d 729, 786 N.W.2d 78.

Regardless, ***Hernandez*** is distinguishable. In ***Hernandez***, the defense put on his *own* expert witness during his case-in-chief who testified that "many" children falsify

sexual assaults. ***Hernandez***, 192 Wis. 2d 251, 257, fn. 1. Here, there was no defense expert. Instead, defense counsel merely questioned Ms. McGuire on her investigation of this case—asking her whether she considered "alternative hypotheses" that could include the possibility that B.M. was not telling the truth. This questioning simply related to Ms. McGuire's methodology for investigating accusations of sexual abuse.

The State brushes off Mr. Morales-Pedrosa's argument that the testimony was also improper and objectionable because it was unreliable, claiming that reliability is an issue for the jury. (State's response at 9, fn. 2). The State is wrong. Trial courts have the duty to act as "gatekeeper" for expert testimony. As the Wisconsin Supreme Court has held:

> The court's gate-keeper function under the ***Daubert*** standard is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues. ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 589 n. 7, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The court is to focus on the principles and methodology the expert relies upon, not on the conclusion generated. ***Id.*** at 595, 113 S.Ct. 2786. The question is whether the scientific principles and methods that the expert relies upon have a reliable foundation "in the knowledge and experience of [the expert's] discipline." ***Id.*** at 592, 113 S.Ct. 2786. Relevant factors include whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community. ***Id.*** at 593–94, 113 S.Ct. 2786.

State v. Giese, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687.

Trial counsel was ineffective for failing to object to Ms. McGuire's testimony that 90% of sexual assault accusations are true, and a new trial is necessary.

B. Trial counsel was ineffective for failing to object to other acts evidence that Mr. Morales-Pedrosa had sex with his wife when she was the same age as the alleged victim.

The State's response to this argument is two-fold. First, the State points out that B.M.'s mother said she was 13 when she "met" Mr. Morales-Pedrosa, not when they first had sex. Mr. Morales-Pedrosa believes this to be distinction without a difference, given that the couple had a child together approximately one year later. The prosecutor asked Pauline how old she was when she met the defendant and then immediately asked her what the ages of her children were. (119:31).

The State next opines that the issue is really whether the prosecutor made an improper closing argument. Mr. Morales-Pedrosa does not disagree. *Both* the introduction of the evidence and the prosecutor's closing argument were objectionable. In closing, the prosecutor argued the evidence three times.

1. The "[f]irst charged incident is in 2008 when B.M. was 13 years old, about the same age her mom was when the defendant and her mother got together." (121:106-07).

2. "[I]n August of 2010, B.M. was 14 years old, the exact same age as her mother when her mother had [B.M.'s brother]." (121:110-11).

3. "[Y[ou know that Pauline got together with the defendant when she was only 13 or 14 years old." (121: 115).

The State does not argue that the prosecutor's closing argument was proper. Instead, the State maintains that it was simply an unpersuasive argument. (State's response at 15). Just because the State believes that the assistant district attorney's argument was a poor argument does not mean there isn't a reasonable probability that it had a prejudicial effect on the jury. Just because the State is not disturbed by an older teenage boy having sex and impregnating a 13 year old girl does not mean the jury wouldn't have been.

After all, such a relationship is illegal in Wisconsin and is punishable by up to 40 years imprisonment. Wis. Stat. § 948.02(2) (whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony); *See also* ***State v. Zeise***, 2009 WI App 1, 315 Wis. 2d 770, 762 N.W.2d 864.

In fact, the State *did* charge Mr. Morales-Pedrosa with second-degree sexual assault of a child based on his relationship with B.M.'s mother, in Kenosha Case No. 2012CF1197 (CCAP). The case was dismissed on the prosecutor's motion after Mr. Morales-Pedrosa was convicted and sentenced on the instant case.

The State describes the sexual relationship between Mr. Morales-Pedrosa and B.M.'s mother as "consensual sex." (State's response at 16). A child under 16 is incapable of consenting to sexual contact and intercourse. *See* ***State v. Olson***, 2000 WI App 158, 238 Wis. 2d 74, 616 N.W.2d 144 (victim's consent is not a defense to a charge of sexual assault of a minor under age of sixteen).

Evidence and argument concerning B.M.'s mother's age when she began having sex with Mr. Morales-Pedrosa and conceived his children was improper and trial counsel was ineffective for failing to object.

II. Mr. Morales-Pedrosa is Entitled to a New Trial Because his Right to Confront His Accuser was Violated when B.M. was Excused from Trial before the Introduction of Her Testimonial Hearsay Statements.

After B.M. testified and was excused by the court, the State presented witnesses who testified about what B.M. disclosed to them. The State argues that none of this testimony violated the Confrontation Clause. First, as to Julie Ortiz, the State argues that she did not testify about any statements B.M. made to her. (State's response at 17). This is incorrect. Ms. Ortiz testified that B.M. told her that her family had problems and needed therapy. (118:200-201).

Second, as to Gary Vargas, the State argues that B.M.'s statements to him were not testimonial. (State's response at 18). The State relies on ***Ohio v. Clark***, 135 S. Ct. 2173 (2015). In ***Clark***, the declarant was a 3-year-old girl. Here, B.M. was 15 years old. The ***Clark*** court emphasized the importance of age as a factor in its analysis. A 15-year-old has a more sophisticated understanding of the criminal justice system and the ramifications of disclosing sexual abuse than a 3-year-old. Moreover, in this case, before making her disclosure to him, B.M. asked Mr. Vargas "what do I have to do to get away from my family?" (118:168). The purpose of B.M.'s statement to Mr. Vargas was retrospective— to prove past events—and B.M. knew that the consequences of her statement would be Mr. Morales-Pedrosa's arrest and prosecution. *See* ***Davis v. Washington***,

547 U.S. 813, 823 (2006) (a statement is testimonial when its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution.).

Third, as to the police witnesses, the State argues that there was no confrontation violation because Mr. Morales-Pedrosa could have re-called B.M. to the stand. (State's response at 22). This argument fails. First, the United States Supreme Court has ruled that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defense to bring those adverse witnesses into court." ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009). Second, after the court excused B.M., trial counsel did not know where she went and the prosecutor did not disclose that information.

The State dismisses the cases cited in Mr. Morales-Pedrosa's brief-in-chief—which stand for the proposition that the Confrontation Clause can be violated when a witness is prematurely excused from trial—because they are a "couple old cases." (State's response at 22). Actually, the cases cited include cases from 2011, 1997, 1993 and 1984. (*See* brief-in-chief at 17-18).

In addition, the State claims that the majority of jurisdictions disagree with Mr. Morales-Pedrosa's position.[2] However, the primary case cited by the State, ***State v. Tompkins***, 859 N.W.2d 631 (IA 2015), is distinguishable. In

[2] The ***Tompkins***' court asserted that "the majority of courts from other jurisdictions that have addressed this issue have reached similar conclusions, although there are several outliers." ***Id.*** at 640. Given the court's caveat that the holdings were "similar," but not the same, this Court should not assume that the listed cases are persuasive authority. The State did not discuss the holdings of the string-cited cases (except for ***Nelis***, which is discussed below).

Tompkins, defense counsel did not object on Confrontation grounds, the witness was still available, and defense counsel did not attempt to re-call her. "[T]he record established that even after the court initially dismissed A.H. from the witness stand, she remained under the State's subpoena and near the courthouse at all times until the close of evidence. The State admonished her to remain within five minutes of the courthouse at all times until the close of evidence." ***Id.*** at 636. Moreover, "Tompkin's counsel did not ask the State to recall A.H. or attempt to have A.H. testify." ***Id.*** at 636.

By contrast, in the instant case, defense counsel *did* object and *did* attempt to recall B.H.; however, he did not know where B.M. was and the State did not disclose her whereabouts. The court told counsel, "I'm going to - - There's nothing to prevent her from being called by you. I don't see - - she has been here. I don't think that it's a specific confrontation issue. I'm going to overrule the objection." (118:183). However, defense counsel responded, "I don't know where she is." (118:184).

In fact, the ***Tompkins*** court explicitly limited its holding by noting that the outcome could have been different had defense counsel attempted to recall the witness.

> Once the district court admitted Officer Jurgensen's testimony regarding A.H.'s out-of-court statements, the issue became *whether counsel should have either requested that the State recall A.H. so she could be cross-examined or recalled her during the defense case-in-chief*. That issue has not been raised in this appeal, and we do not decide it. However, nothing in our opinion precludes Tompkins from raising it in subsequent postconviction relief proceedings.

State v. Tompkins, 859 N.W.2d 631 (IA 2015).

State v. Nelis, 2007 WI 58, 300 Wis. 2d 415, 733 N.W.2d 619 (Bradley, J. and Abrahamson, J. concurring) is likewise distinguishable. In ***Nelis***, the defendant was told he could "step down," but the record did not show that he was thereafter unavailable. This fact was a central part of the court's holding. ***Id.*** ¶48.[3]

In the instant case, B.M. was told she was "excused" and her whereabouts were thereafter unknown; therefore, unlike the defendant in ***Nelis***, the record shows that B.M. was unavailable for subsequent examination.

The State mistakenly asserts that B.M. was subject to cross-examination on all of her statements to police. This is untrue. For instance, the first time anyone claimed that B.M. said she waited for years to disclose the abuse because she was afraid of Mr. Morales-Pedrosa was through Officer Hamilton. (119:19-20). The defense had no opportunity to cross-examine B.M. on this highly prejudicial statement.

Mr. Morales-Pedrosa was denied his constitutional right to confrontation, and his convictions cannot stand.

[3] "The record is utterly silent as to where [the declarant] was after the circuit court told him that he could step down. We note that there is no indication that he was excused from testifying." (Bradley, J. concurrence).

CONCLUSION

For the reasons stated above and in the brief-in-chief, Mr. Morals-Pedrosa respectfully asks this court to vacate the judgment of conviction and remand the case for a new trial.

Dated this 21st day of October, 2015.

Respectfully submitted,

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,399 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 21st day of October, 2015.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant