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State of Wisconsin
Court of Appeals
District 2
Appeal No. 2016AP001923 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Adam M. Zamora,

Defendant-Appellant.

On appeal from a judgment of the Kenosha County Circuit Court, The Honorable Chad Kerkman, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

Whether the circuit judge properly exercised his discretion under § 907.02, Stats., at a so-called *Daubert* hearing, permitting the state's expert witness to testify by merely taking "judicial notice" that the witness had been recognized as an expert by other judges in the county.

Answered by the circuit court: Yes.

Summary of the Argument

The admission of expert testimony is a matter left to the discretion of the circuit court. The court, however, must exercise its discretion consistent with its gatekeeper obligation under § 907.02(1), Stats. One purpose of the gatekeeper function is to prevent to admission of so-called expert testimony on the issue of witness credibility.

The circuit court erroneously exercises its discretion if the decision is not based upon facts in the record, and upon the

proper legal standard. Here, there were no facts in the record at the *Daubert* hearing. Instead, the court purported to take "judicial notice" of the rulings of other circuit judges permitting Julianne McGuire to testify. Thus, the circuit court here erroneously exercised its discretion.

The error in admitting McGuire's testimony was not harmless. Most of McGuire's testimony was plainly intended to bolster the credibility of the child witness, Samantha. As such, it was not properly admissible.

Statement of the Case

I. Procedural History

On December 19, 2013, the defendant-appellant, Adam M. Zamora (hereinafter "Zamora"), was charged with three counts of first degree sexual assault of a child arising out of a single incident that allegedly occurred in the City of Kenosha on September 2, 2013. (R:1) The complaint alleged that Zamora had sexual contact with "Samantha"[1] on her breasts, on her vagina, and that he prompted Samantha to touch his (Zamora's) penis.

Zamora waived a preliminary hearing (R:44-5), he was

[1] For clarity, the victim, STS, will be referred to by the pseudonym "Samantha". Obviously, this is not her real name.

bound over for trial, and he then he entered not guilty pleas. *Id.*

On January 13, 2015, the state filed a notice and summary of expert testimony. (R:13; App. B) The notice indicated that the state intended to call Julie McGuire, MSW[2] to "testify about common and uncommon reporting behaviors of child victims of sexual assault including, but not limited to, delayed and piece-meal disclosures, recantation, along with the Step-Wise interview protocol utilized by Children's Hospital. Julie McGuire may also testify to the common and/or uncommon features of child sexual abuse including the difficulties of children molested in a similar fashion over a long period of time in being able to specifically recall individual acts or incidents, the fact that the child sexual abuse frequently goes undetected and why, the commonalities of perpetrators being entrusted family members or friends, the fact that other family members are frequently in the home and unaware of the conduct when abusive conduct is ongoing . . . " Attached to the notice was a *curriculum vitae* of Ms. McGuire.

Zamora orally objected to the McGuire testimony, and asked the court to set the matter for a hearing on the admissibility of the expert testimony (a so-called "*Daubert* hearing") (R:53-3) The matter was then set for a hearing.

At the outset of the hearing, Zamora made his objection to McGuire's testimony more explicit. He said, "It is our position

[2] Masters of Social Work

that even though she [McGuire] has testified previously as to *Daubert*, and has been qualified as an expert in different area under *Daubert*, in this particular area I believe that she is not, per se, an expert because she has never been peer reviewed as to what her degree of accuracy is, nor is she relying on any subject matter in this particular tight little area that has also be peer reviewed. In essence, what she will be doing is testify [sic] and will be almost using self-authentication." (R:54-3)

The state argued that no hearing was necessary because McGuire, in the past, has "been thoroughly vetted not only by this Court but by other Courts in the circuit. I filed today and I previously provided to Mr. Barth a written decision-- or transcripts rather-- of oral ruling issued by Judge Milisauskas . . . . and Judge Michael Wilk . . ." (R:54-4) in other cases. Significantly, the state did not provide the court with a transcript of McGuire's testimony at the hearing, nor a summary of the issues that were present in each of the cases.

Without requiring McGuire to testify at the *Daubert* hearing, the court ruled that her testimony would be permitted at trial. (R:54-10) The court said, "I take judicial notice of the decisions of Judge Wilk and Judge Milisauskas. I take note in the decisions that have been provided to the Court, I take note in the decision of Judge Wilk. He states that Ms. McGuire has been qualified as an expert in front of Judge Milisauskas and Judge Warren and he believed Jude Wagner as well. She's

also been qualified as an expert in this court." (R:54-9, 10) The judge then went on to make "findings" consistent with the findings made by the other judges. *Id.*

Beginning on May 11, 2015, the matter was tried to a jury. At the conclusion of the evidence, the jury returned verdict finding Zamora guilty of all three counts (R:23, 24, 25)

The court sentenced Zamora to nineteen years in prison on each count, concurrent to each other, bifurcated as nine years initial confinement and nine years of extended supervision. (R:57-27)

Zamora timely filed a notice of intent to pursue postconviction relief. There were no postconviction motions. Instead, Zamora filed a notice of appeal.

II. Factual Background

At the time of the incident, Zamora was living with his fiancee, Lori[3] and her four children (who also happen to be Zamora's nieces and nephew; Lori was previously married to Zamora's brother). Around that time, Lori's sister "Nancy"[4] moved in with her three children, including Samantha, after a breakup with a boyfriend. (R:55-83) Zamora was the stay-at-home dad in this situation, as he was unemployed and on supervision. (R:55-87)

[3] Not her real name. For clarity, the girlfriend will be called "Lori"
[4] Not her real name. For clarity, the sister will be called "Nancy"

One night in September of 2013, when Nancy and Lori were gone, Zamora was watching the children. The girls had been making fun of Samantha for a boy she liked, and she was upset about it. Samantha went to one of the bedrooms on the ground floor to watch a movie by herself. (R:55-87, 88) After some time, Zamora came into the bedroom and told her not to worry, that she was pretty, and that someday she would find a boy who liked her. (R:55-89)

Zamora left, but then he returned a little while later, and asked Samantha if she trusted him. He left again, during which time Samantha fell asleep. Later, she woke up to find Zamora in her bed. According to Samantha's testimony, Zamora pulled up her shirt and put his mouth on her breast; he also put his hand down her pants. (R:55-121 to 123) He tried to pull her hand toward his groin but she resisted and ran to the bathroom, where she locked herself in (R:55-125).

Later, when she got out of the room, he told her that his life depended on her not telling anyone. She did not tell anyone until approximately two months later when she wrote a note to a friend at school. (R:55-96; 153) Samantha and her friend told the school counselor later that day at lunch. The counselor initiated an investigation and recommended Samantha tell her mother. Samantha did, but Lori and Nancy, according to Samantha, did not believe her. (R:55-137) This caused Samantha to recant and to change her statement several times.

Ultimately, though, she testified that it did happen and that she was just afraid to tell anyone.

Julianne McGuire was called by the state as an expert witness at trial. McGuire is employed by Children's Hospital of Wisconsin in Kenosha as a forensic interviewer. She works at the Child Advocacy Center and has for about fifteen years. (R:56-23) She has a masters degree in social work, but she has no degrees in psychology. (R:56-37)

After describing the "Step-Wise" method of questioning children, McGuire was asked whether "this technique increases the reliability of the information." (R:56-27) McGuire said, "Absolutely." *Id.* Additionally, the prosecutor asked, "Have you found these techniques to give you reliable, credible information from these children?" (R:56-28). Again, McGuire agreed. *Id.* On the other hand, the prosecutor also asked, "Do you ever see situations in which a child will fabricate an abusive event to get revenge on an adult that they're mad at?" (R:56-31, 32) McGuire said that it was possible, but, "I don't in my practice see that. I have, you know, in the 3,000 interviews I've done I can't recall that that is any kind of common theme whatsoever in those interviews. Typically, if a child lies, to use a better word, they're going to lie to get out of trouble . . ." (R:56-32)

Then McGuire was asked to describe the "common patterns" of child molesters. McGuire told the jury, "It's most often exactly the opposite of Chester the Molester, this violent

person who's going to come out of the woods and attack children. It's much more often someone who will gain the trust of the child. Oftentimes a perpetrator wants an ongoing relationship with the child . . . It's someone that is gaining the trust of that child, treating the child special, and you know, befriending the child." (R:56-34, 35)

McGuire claimed that one reason children delay disclosure is because of the perpetrator threatening the child with things like, "If you tell anyone, I'll kill your pet fluffy. If you tell anyone . . . you don't want me to go to jail or something like that." (R:56-35)

Zamora also testified at trial. He flatly denied that he had any sexual contact with Samantha. (R:56-67) According to Zamora, on the night that Samantha went to bed early because she was crying, he did go into the room and he kissed her on on the forehead, and nothing else happened. (R:56-66)

Argument

I The circuit court erroneously exercised its discretion in allowing McGuire to testify at trial based only upon a review of transcripts of decisions in other cases; and, moreover, the error is prejudicial because the testimony offered at trial bore almost exclusively on the credibility of the child witness.

The admission of expert testimony is a matter left to the discretion of the circuit court. The court, however, must exercise its discretion consistent with its gatekeeper obligation under § 907.02(1), Stats. One purpose of the gatekeeper function is to prevent to admission of so-called expert testimony on the issue of witness credibility.

The circuit court erroneously exercises its discretion if the decision is not based upon facts in the record, and upon the proper legal standard. Here, there were no facts in the record at the *Daubert* hearing. Instead, the court purported to take "judicial notice" of the rulings of other circuit judges permitting McGuire to testify. Thus, the circuit court here erroneously exercised its discretion.

The error in admitting McGuire's testimony was not harmless. Most of McGuire's testimony was plainly intended to bolster the credibility of the child witness, Samantha. As such, it was not properly admissible.

A Standard of Appellate Review

Admissibility of expert testimony is governed by § 907.02, Stats which codifies the so-called *Daubert* standard. § 907.02(1) provides in relevant part:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

The court's gatekeeper function under *Daubert* "is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *State v. Giese,* 2014 WI App 92, ¶ 18, 356 Wis.2d 796, 854 N.W.2d 687. "The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Id.,*

"[W]hether to admit or exclude expert testimony is reviewed under an erroneous exercise of discretion standard." *State v. Chitwood,* 2016 WI App 36, ¶ 30, 369 Wis.2d 132, 879 N.W.2d 786. "A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record." *State*

v. Jackson, 2014 WI 4, ¶ 43, 352 Wis. 2d 249, 272–73, 841 N.W.2d 791, 802

B Admissibility of expert testimony in child sexual assault cases

Testimony concerning a witness's ability to perceive events, and to recount the events, is not proper expert testimony. *State v. Wilson*, 179 Wis.2d 660 (1993); *State v. Friedrich,* 135 Wis. 2d 1 (1987). Similarly, "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *State v. Haseltine,* 120 Wis. 2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). However, in *Haseltine*, the court did caution that:

> Although we reverse Haseltine's convictions, we do not hold that psychiatric or other expert testimony is inadmissible in incest cases. Depending on the case, the testimony of an expert might aid the jury. For example, an incest victim may not immediately report the incest, or may recant accusations of incest. Jurors might reasonably regard such behavior as an indication that the victim was not telling the truth. An expert could explain that such behavior is common among incest victims as a result of guilt, confusion, and a reluctance to accuse a parent. *Id.* 657 P.2d at 1217–21.

Haseltine, 120 Wis. 2d at 96-97.

Consequently, in *State v. Jensen*, 141 Wis. 2d 333, 415 N.W.2d 519 (Ct. App. 1987) the court of appeals found that the

circuit court judge did not erroneously exercise his discretion in admitting expert testimony under the circumstances of that case. There, a guidance counselor was permitted to offer an opinion that, based on his experience, the "acting out" behavior of the victim in school was consistent with the behavior of children who were the victims of incest. A close reading of *Jensen,* though, reveals that the holding is hardly *carte blanche* for the admission of such testimony in all sexual assault cases. Firstly, the legal standard for the admission of expert testimony has changed significantly since the *Jensen* court held that the circuit judge did not erroneously exercise his discretion under the legal standard that then existed. Secondly, the court in *Jensen* recognized that such testimony may easily step over the boundary established by *Haseltine*.[5] The lower courts were admonished to look carefully at the purpose for which the testimony was being offered.

The holding in *Jensen* is merely that, in admitting the expert testimony in that case, the circuit judge did not erroneously exercise his discretion. This is evident by the fact that the court began its analysis by writing, "A trial court has broad discretion in determining whether a witness has sufficient knowledge, skill, experience, or training to qualify as an expert." *Jensen,* 141 Wis. 2d at 336-37. Under the version of Sec.

[5] The boundary being that if the testimony is offered to bolster the credibility of the child witness, then it is not admissible.

907.02, Stats. that was in effect at the time *Jensen* was decided, the judge was not obliged to act as a gatekeeper for expert testimony. Thus, *Jensen* is of little help in deciding whether McGuire's testimony was properly admissible in this case.

In any event, "[T]he expert's opinion must focus on the complainant's conduct. Both the court and counsel should take steps necessary to ensure that the expert's opinion is not used for an impermissible purpose." *Jensen,* 141 Wis. 2d at 340.

C The circuit court did not properly exercise its "gatekeeper" function by making a preliminary ruling that McGuire's testimony was admissible based only on the state's proffer and transcripts of rulings made in other cases.

In this case, prior to trial, the court conducted a so-called "*Daubert* hearing" concerning the admissibility of McGuire's testimony. As mentioned, the purpose of such a hearing is to permit the court to exercise its obligatory "gatekeeper" function. Although the law does not provide much guidance as to the method of conducting such a hearing[6], it stands to reason that

[6] For example, the court of appeals recently quoted the 5th Circuit Court of Appeals with approval where the court wrote, "The trial court, in performing its "gatekeeping" function, has discretion to choose the manner in which the reliability of an expert's testimony is appraised. However, the trial court has no discretion to abandon its role as gatekeeper. When a party objects to an expert's testimony, the court must adequately demonstrate by specific findings on the record that it has performed its duty. *State v. Cameron*, 2016 WI App 54, ¶ 13, 370 Wis. 2d 661, 671, 885 N.W.2d 611, 615

the court must receive sufficient evidence, proffers, and argument from the parties to permit the court to properly make a ruling. In many cases, if not most cases, this requires the expert to testify at the *Daubert* hearing. *See, e.g. State v. Giese,* 2014 WI App 92, ¶ 11, 356 Wis. 2d 796, 802, 854 N.W.2d 687, 689*, review denied,* 2015 WI 24, ¶ 11, 862 N.W.2d 602, where the expert testified at the *Daubert* hearing where the issue was whether a toxicologist would be permitted to testify to retrograde extrapolation.

Here, though, the "hearing" consisted of the prosecutor merely filing transcripts of oral rulings made by other judges in Kenosha County concerning the admissibility of McGuire's testimony. The state did not provide the transcript of McGuire's testimony at either of the prior hearings. These other judges found that, in the context of the case before them, McGuire's testimony was admissible.

The judge in Zamora's case purported to take "judicial notice" of the rulings of these other judges permitting McGuire to testify, and ordered that McGuire would be allowed to testify in the present case.

Even though the procedure to be followed at a *Daubert* hearing may be flexible, the procedure followed here is woefully inadequate to permit the court to exercise its gatekeeper function.

Firstly, the court may only take judicial notice of facts that

are not subject to reasonable dispute and which are generally known or capable of accurate and ready determination. *See,* § 902.01(2), Stats.

Here, the fact that Judge Wilk and Judge Milisauskas ruled that McGuire would be permitted to testify in the case that was pending before each of them is a matter that is capable of ready determination (that is, that each judge made such a ruling). McGuire's testimony in that case, and Judge Wilk's evaluation of that testimony in the context of the other case, though, is certainly subject to reasonable dispute[7], and may not even be relevant to Zamora's case.

Most disturbing is the fact that the state provided transcripts of only the *decisions* of the judges, not of McGuire's testimony in those *Daubert* hearings. Where the records are not provided, "[A] circuit court cannot take judicial notice of its own records in another case. [internal citation omitted]" *State v. Christian,* 142 Wis. 2d 742, 746, 419 N.W.2d 319, 321 (Ct. App. 1987).

Thus, at the *Daubert* hearing in this case, there was utterly no evidence presented as to McGuire's qualifications, her opinions, and there was no argument concerning how her opinions would assist the jury. For these reasons, the circuit court erroneously exercised its discretion in ordering that McGuire would be permitted to testify. The decision was not

[7] As the transcripts of those hearing show, the defense lawyers vehemently disputed the admissibility of McGuire's testimony. (R:15)

based on facts in the record.

D *The circuit court's error was not harmless because McGuire's testimony at trial was focused almost entirely on the credibility of the child witness.*

Where the circuit court erroneously exercises its discretion in admitting evidence, the burden is on the beneficiary of the error-- here, the state-- to demonstrate that the error was harmless. "When a court has improperly admitted evidence, reversal is not warranted "unless an examination of the entire proceeding reveals that the admission of the evidence has 'affected the substantial rights' of the party seeking the reversal." *Jackson*, 2014 WI 4, ¶ 87, 352 Wis. 2d 249, 289, 841 N.W.2d 791, 810

It is a virtual certainty that the state will argue that the circuit court's error at the *Daubert* hearing is harmless, so Zamora will address this issue. If, during the course of McGuire's trial testimony, she testified to facts and opinions which, if they had been presented during the *Daubert* hearing, would have been sufficient to support the circuit court's discretionary ruling permitting her to testify, then the error at the *Daubert* hearing is harmless.

Here, though, the error is not harmless. McGuire's "opinions" stepped way over the boundary established by *Haseltine* and *Jensen*. *Jensen* permits the state to introduce

testimony by an expert that will explain and describe the behavior of a child who has been sexually assaulted. As mentioned above, though, the *Jensen* recognized that it is entirely inappropriate for an expert to be called to bolster the credibility of the child witness. Thus, the court admonished the courts to be cognizant of the purpose for which such expert testimony is offered.

Remarkably, McGuire's testimony barely touched upon the behavior of children who have been sexually assaulted. Instead, McGuire testified in some detail about the "Step-Wise" protocol for questioning children, and offered the opinion that this technique increases the *credibility* of the information given by the child. (R:56-27) Additionally, McGuire offered the self-serving opinion-- and an opinion that cannot be tested in any meaningful way-- that over the course 3000 interviews of children that she's done, there were so few instances of a child lying that she could not even identify any sort of "pattern" when this occurs.

The balance of McGuire's testimony was dedicated to demonstrating that Zamora fit the profile of a child molester. In other words, that Zamora's conduct is proof that the assault occurred. That is, he attempted to develop a relationship with Samantha, and then he warned her not to tell anyone what happened, or it would ruin his life.

As the *Jensen* court cautioned:

> The line drawn between the two considerations in *Haseltine* is not always readily perceived and, under the best of cases, the danger that the jury will regard a complainant's conduct as proof of an assault is always present. In order to minimize this danger and keep the *Haseltine* considerations clearly distinguished, we suggest that such opinion testimony be elicited in the form of a hypothetical question coupled with a cautionary instruction to the jury.1 The instruction should warn the jury that the complainant's conduct may not be used as evidence that an assault has occurred and that if the hypothesis is infirm, the expert's opinion is equally infirm.

Jensen, 141 Wis. 2d at 339.

For these reasons, the admission of McGuire's testimony was not harmless.

Conclusion

For these reasons, it is respectfully requested that the court reverse Zamora's conviction, and remand the matter for a new trial with instructions that the circuit court properly exercise its discretion concerning the admissibility of Julianne McGuire's testimony.

Dated at Milwaukee, Wisconsin, this _____ day of December, 2016.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4492 words.

This brief was prepared using *Google Docs* word processing software.The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of December, 2016:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 2
Appeal No. 2016AP001923 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Adam M. Zamora,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal
B. Excerpt of oral decision

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 s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 ____ day of December, 2016.

_____

Jeffrey W. Jensen