STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1923-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADAM M. ZAMORA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE CHAD G. KERKMAN, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY 1

ARGUMENT 1

The circuit court properly exercised its discretion in admitting Julie McGuire as an expert witness, and her testimony did not impermissibly vouch for the victim's testimony. In any event, any error was harmless because the jury was able to hear and evaluate the credibility of the witnesses for themselves. 1

I. Summary of State's argument. 1

II. The circuit court did not erroneously exercise its discretion in allowing McGuire to testify as an expert. 3

A. The legal standard. 3

B. Under this standard, McGuire was properly designated as an expert witness. 6

C. McGuire's testimony did not impermissibly vouch for S.T.S. 11

III. Alternatively, if the circuit court erred by allowing McGuire to testify as an expert, that error was harmless. 13

CONCLUSION 17

Page

TABLE OF AUTHORITIES

Cases

Daubert v. Merrell Dow Pharmaceuticals Inc.,
509 U.S. 579 (1993) 3, 4, 5

In re Commitment of Watson,
227 Wis. 2d 167, 595 N.W.2d 403 (1999) 4

Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137 (1999) 4, 5, 6

McCormick v. Herndon,
67 Wis. 648, 31 N.W. 303 (1887)..... 8

Perkins v. State,
61 Wis. 2d 341, 212 N.W.2d 141 (1973) 8, 9

State v. Chitwood,
2016 WI App 36, 369 Wis. 2d 132, 879 N.W.2d 786..... 3, 4

State v. Christian,
142 Wis. 2d 742, 419 N.W.2d 319 (Ct. App. 1987)..... 7, 9

State v. Dye,
215 Wis. 2d 281, 572 N.W.2d 524 (Ct. App. 1997)..... 9

State v. Gary M.B.,
2004 WI 33, 270 Wis. 2d 62, 676 N.W.2d 475..... 17

State v. Giese,
2014 WI App 92, 356 Wis. 2d 796,
854 N.W.2d 687 ..... 3, 4, 5, 6

State v. Harvey,
2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189..... 13

State v. Haseltine,
120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984)..... 2, 11

State v. Hunt,
2014 WI 102, 360 Wis. 2d 576, 851 N.W.2d 434..... 14

State v. Jenkins,
168 Wis. 2d 175, 483 N.W.2d 262 (Ct. App. 1992)..... 4

Page

State v. Jensen,
147 Wis. 2d 240, 432 N.W.2d 913 (1988) 11

State v. Krueger,
2008 WI App 162, 314 Wis. 2d 605,
762 N.W.2d 114 12

State v. LaPaen,
247 Wis. 302, 19 N.W. 2d 289 (1945) 8, 9

State v. Redmond,
203 Wis. 2d 13, 552 N.W.2d 115 (Ct. App. 1996)..... 9

State v. Robinson,
146 Wis. 2d 315, 431 N.W.2d 165 (1988) 6

State v. Snider,
2003 WI App 172, 266 Wis. 2d 830,
668 N.W.2d 784 ..... 11, 13

State ex rel. Mengel v. Steber,
158 Wis. 309, 149 N.W. 32 (1914)..... 8

State ex rel. Van Hout v. Endicott,
2006 WI App 196, 296 Wis. 2d 580, 724 N.W.2d 692..... 9

United States v. Markum,
4 F.3d 891 (10th Cir. 1993) 6

United States v. Mikos,
539 F.3d 706 (7th Cir. 2009) 5

Statutes

2011 Wis. Act. 2 4

Wis. Stat. § (Rule) 809.19(3)(a)2 1

Wis. Stat. § (Rule) 809.86 1

Wis. Stat. § 902.01(6)..... 9

Wis. Stat. § 907.02 .....2, passim

Wis. Stat. § 907.02(1)..... 3, 4, 7

Page

Rules

Fed. R. Evid.702 .... 4, 5

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will present additional facts in the "Argument" portion of its brief.

ARGUMENT

The circuit court properly exercised its discretion in admitting Julie McGuire as an expert witness, and her testimony did not impermissibly vouch for the victim's testimony. In any event, any error was harmless because the jury was able to hear and evaluate the credibility of the witnesses for themselves.

I. Summary of State's argument.

Following a jury trial, Zamora stands convicted of three counts of first degree sexual assault of a child. Zamora's convictions stem from an assault perpetrated against S.T.S.,[1] an eleven year old girl who lived with Zamora, her mother, and her aunt. S.T.S. did not report the

[1] In accordance with Wis. Stat. § (Rule) 809.86 and Zamora's opening brief, the State will refer to the victim (who is also a minor) as S.T.S.

assault immediately, but rather delayed for several months and then initially recanted when questioned by her mother and aunt. As a result, the State sought to introduce Julie McGuire as an expert witness to help explain these actions under *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

The circuit court's admission of State's witness McGuire as an expert under *Haseltine* was not error. As an experienced child social services interviewer who had appeared before the instant circuit court before as well as several other courts in Kenosha County, and whose qualifications easily met the *Daubert* standard, the circuit court was entirely within its discretion to designate her as an expert witness under Wis. Stat. § 907.02. Her testimony was entirely appropriate in this case given S.T.S's age and the complex family and social dynamics at issue in this case, including the fact that Zamora was S.T.S's *de facto* uncle and lived in the house with S.T.S., and that S.T.S. delayed for a significant period of time before reporting the abuse to her friend and swearing her to secrecy. Thus, McGuire's testimony that explained why some children engage in the counterintuitive behavior of delaying reporting and may even initially recant their claims was relevant and helpful to the jury.

McGuire's general testimony about these concepts did not in any way impermissibly vouch for the credibility of S.T.S's live, in-person testimony because McGuire was not asked to and did not express any opinion about the truth or falsity of S.T.S's statements. In addition, S.T.S. and Zamora both testified before the jury without limitation and with substantial cross-examination as to their truthfulness. Thus, if the circuit court erred in admitting McGuire as an expert, that error was harmless because it did not affect the jury's

ability to evaluate S.T.S.'s and Zamora's credibility as the circuit court instructed.

II. The circuit court did not erroneously exercise its discretion in allowing McGuire to testify as an expert.

A. The legal standard.

Recently amended in 2011, Wisconsin Stat. § 907.02 governs the admissibility of expert evidence:

> 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.

Wis. Stat. § 907.02(1).

This so-called *Daubert*[2] standard requires the circuit court to act as a gatekeeper to ensure that the expert's opinion has a reliable foundation and is relevant to the material issues. *State v. Giese*, 2014 WI App 92, ¶¶ 17–18, 356 Wis. 2d 796, 854 N.W.2d 687.

Appellate courts review a circuit court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard. *Giese*, 356 Wis. 2d 796, ¶ 16 (applying erroneous exercise of discretion standard to a *Daubert* ruling); *State v. Chitwood*, 2016 WI App 36, ¶ 30,

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[2] *Daubert v. Merrell Dow Pharmaceuticals Inc.,* 509 U.S. 579 (1993).

369 Wis. 2d 132, 879 N.W.2d 786. A circuit court's discretionary decision will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record. *Giese*, 356 Wis. 2d 796, ¶ 16; *Chitwood*, 369 Wis. 2d 132, ¶ 30. If the record supports the trial court's evidentiary decision, an appellate court "will not reverse even if the trial court gave the wrong reason or no reason at all." *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted).

The language inserted in 2011 in § 907.02 tracks 2000 Rule 702, Federal Rules of Evidence (Federal Rule 702). 2011 Wis. Act 2. Prior to that amendment, old Wis. Stat. § 907.02 required that expert testimony assist the trier of fact to understand the evidence or to determine a fact in issue and that a witness be qualified as an expert. *See In re Commitment of Watson*, 227 Wis. 2d 167, 186–91, 595 N.W.2d 403 (1999).

The amended language of new Wis. Stat. § 907.02 added that expert opinion must now also (1) be based upon sufficient facts or data, (2) be the product of reliable principles and methods, and (3) feature a witness who has applied the principles and methods reliably to the facts of the case. Wis. Stat. § 907.02(1).

Federal Rule 702 envisions a "flexible" inquiry by the trial judge, who is charged with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 594, 597. Indeed, the list of factors the *Daubert* Court mentioned was meant to be helpful, not definitive. *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 151 (1999); *see also* Fed. R. Evid. 702 advisory committee note (2000 amendment) (Rule 702 committee note) ("No attempt has been made to 'codify' [the]

factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive.").

Thus, under the new § 907.02, the circuit court performs a "gate-keeper function . . . to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Giese*, 356 Wis. 2d 796, ¶ 18. The court must focus on the principles and methodology the expert relies upon, not on the conclusion generated. *Id.*; *see also Daubert*, 509 U.S. at 595. The standard envisions a "flexible" inquiry "to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Giese*, 356 Wis. 2d 796, ¶ 19. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. Fed. R. Evid. 702 advisory committee note (2000 amendment) (Rule 702 committee note).

First, the circuit court found that McGuire "has been peer reviewed as far as her interviewing children techniques and she has peer reviewed others. [Defense counsel] may be correct that she has not been peer reviewed as far as her opinions on how many children are truthful and whether children recant. I don't know that she's been peer reviewed on those issues. But that's just one factor." (54:10.) *Cf. Giese*, 356 Wis. 2d 796, ¶ 16 (peer review one factor but not dispositive). And as the Seventh Circuit has pointedly observed, "Publication is not a *sine qua non* of expert testimony." *United States v. Mikos*, 539 F.3d 706, 711 (7th Cir. 2009) (citing *Daubert*, 509 U.S. at 593).

Second, the text of Federal Rule 702 and Wis. Stat. § 907.02 expressly contemplates that an expert may be qualified on the basis of experience and training alone, and McGuire had that in spades. "No one denies that an expert

might draw a conclusion from a set of observations based on extensive and specialized experience." *Kumho Tire*, 526 U.S. at 156; "Experience alone can qualify a witness to give expert testimony." *United States v. Markum*, 4 F.3d 891, 896 (10th Cir. 1993). Indeed, the Wisconsin Supreme Court has also held the same in this very context. *See State v. Robinson*, 146 Wis. 2d 315, 332–35, 431 N.W.2d 165 (1988) (Sexual assault advocate with six years' experience and dealings with 70 to 80 victims qualified as an expert.) As the United States Supreme Court observed in *Kumho Tire Co.*, "the law grants a [circuit] court the same broad latitude when it decides *how* to determine reliability [under *Daubert*] as it enjoys in respect to its ultimate reliability determination." 526 U.S. at 142.

B. Under this standard, McGuire was properly designated as an expert witness.

A circuit court's discretionary decision to admit a witness as an expert will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record. *Giese*, 356 Wis. 2d 796, ¶ 16. The circuit court's ruling here reflected an appropriate exercise of discretion.

Under Wis. Stat. § 907.02 as amended, McGuire easily qualifies as an expert witness in clinically interviewing possible victims of child sexual assault because she has conducted over 3,000 interview over 15 years' time, and has advanced coursework (an M.S. in social work and courses completed in psychology) in relevant fields. (56:24, 28.) Her expertise was relevant to the facts of the case, which involved a victim who did not report Zamora's assault until a significant period of time had passed, when she gave her school friend a note explaining what had happened. (55:89–92, 95–100.) S.T.S. testified that she was "upset because I knew I would go through this [testifying at trial]"

and "sad" because "[I] didn't know if [my mother and aunt believed me" and then initially recanted when confronted by her mother. (55:99–100.)

Thus, the circuit court correctly observed that the jury needed help to understand that behavior and why some sexual assault survivors engage in it (54:9–10) and it properly exercised its discretion in designating McGuire as an expert witness. *See* Wis. Stat. § 907.02, "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. . . .") Given that Zamora's trial counsel's aggressively cross-examined S.T.S. regarding the delay (*see* 55:102–103, 120–123, 127–130) and her semi-recantation when she told her mother and aunt (55:132–137), there is no doubt that McGuire's testimony "assist[ed] the trier of fact to understand the evidence or to determine a fact in issue. . . ." Wis. Stat. § 907.02(1).

Thus, the circuit court found that the jury needed help to understand why a sexual assault victim might delay reporting and/or recant, that McGuire had substantial experience in that very field, and that her work on the subject was based upon reliable principles and methods, as her C.V. made clear. That is in lockstep with the process as contemplated in Wis. Stat. § 907.02.

The balance of Zamora's complaint with the circuit court's admission of McGuire as an expert stems the fact that the court took judicial notice of the finding of McGuire as an expert witness by other judges in Kenosha County. Zamora's Br. 11–17.

In support of his claim, Zamora cites *State v. Christian*, 142 Wis. 2d 742, 419 N.W.2d 319 (Ct. App. 1987) for the proposition that the circuit court erred in taking judicial notice of other judges' decisions admitting McGuire as an expert because a "circuit court cannot take judicial notice of its own records in another case." *Id.* At 746, *citing Perkins v. State*, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973).

A closer look at the rule of law in question shows it does not support Zamora's position.

The rule has its genesis in *McCormick v. Herndon*, 67 Wis. 648, 31 N.W. 303 (1887), a land dispute case in which the plaintiff claimed she and the defendant had already settled the question in a prior action and asked the circuit court to take judicial notice of that alleged fact. *McCormick*, 67 Wis. At 306. The Wisconsin Supreme Court rejected that claim because "no such former adjudication was either pleaded or proved, [and] we do not regard the question before us for consideration." *Id.* As such, "[w]e fail to find in the record any such admission, or that the court took such judicial notice; besides, we are not aware of any rule authorizing such judicial notice. If the plaintiff relied upon such former adjudication, she should, at least, have proved it as a fact in the case. It seems that, at common law, a verdict and judgment in ejectment were not conclusive." *Id.*

That conclusion was reinforced by *State ex rel. Mengel v. Steber*, 158 Wis. 309, 149 N.W. 32 (1914), in which the Wisconsin Supreme Court again concluded that a circuit court could not just take notice of a judgment of another judgment in another case simply because the trial judge presiding was the same: "A Court may take such notice in an action of any order, judgment or proceeding in such action in such court; but that rule does not extend to any other action." *Steber*, 158 Wis. at 309.

The Wisconsin Supreme Court applied the principle to criminal cases in *State v. LaPaen*, 247 Wis. 302, 19 N.W. 2d 289 (1945), holding that a defendant advancing a double jeopardy claim could not prove up his claim merely relying upon the minutes sheets from the alleged plea hearing. *LaPaen*, 247 Wis. at 307–08. The court again more broadly restated the rule in *Perkins v. State*, 61 Wis. 2d 341, 345–47, 212 N.W.2d 141 (1973), another double jeopardy case in which the defendant alleged he had already been convicted of the crime charged but there were no records before the circuit court to support his claim. Finally, this Court in *Christian*, citing *Perkins*, held that "a circuit court cannot take judicial notice of its own records in another case." *Christian*, 142 Wis. 2d at 746 (citation omitted).

These cases fail to support Zamora's claim that the circuit court erred by taking judicial notice of properly authenticated records in other circuit courts in Kenosha County in which McGuire was also designated as an expert witness. Here the prosecutor presented the circuit court with copies of transcripts of official court proceedings in other branches of Kenosha County in which McGuire had been designated an expert witness regarding child sexual assault interviews and issues. (*See* 15.) The animating issue in the cases relied on by Zamora—whether the records were properly before the court or easily subject to verification—is not present here.

Where those concerns are not at issue, courts have recognized that a court may take judicial notice of documents from another case filed in the case before it, *State v. Dye*, 215 Wis. 2d 281, 288, 572 N.W.2d 524 (Ct. App. 1997), of a person's past appearances in that court, *State ex rel. Van Hout v. Endicott*, 2006 WI App 196, ¶ 2, 296 Wis. 2d 580, 724 N.W.2d 692, and of court records in other court files involving the same person, *State v. Redmond*, 203 Wis. 2d

13, 16, 552 N.W.2d 115 (Ct. App. 1996). Circuit courts have the discretion to take judicial notice at any point during a proceeding. Wis. Stat. § 902.01(6).

Thus, since *Christian* does not stand for the broad proposition advanced by Zamora, and a wealth of case law supports the circuit court's reference to McGuire's testimony before it and other circuit courts in Kenosha County, the circuit court did not err in taking judicial notice of McGuire's admission elsewhere as an expert witness.

Moreover, the circuit court did not just base its decision upon the bare fact that McGuire had been admitted as an expert elsewhere. Indeed, the circuit court noted that McGuire had appeared before it as an expert regarding the very same subject matter before (54:10), casting doubt on Zamora's seeming contention that the circuit court just admitted McGuire as an expert just because other circuit courts had done so. The circuit court was already familiar with McGuire's qualifications and experience as it noted, "She's also been qualified as an expert in this Court." (54:10.) Indeed, it began the *Daubert* hearing by stating, "I'm not quite sure why we set this for a *Daubert* hearing. I believe Ms. McGuire has testified to these issues in this court in the past." (54:2.) The court could take notice of McGuire's past appearances before it in the same capacity.

The circuit court also had McGuire's *curriculum vitae* (13:3–7), which detailed her extensive experience in interviewing possible child sexual assault victims, and her education that prepared her for those interviews. Having all of those documents before it, and already being familiar with McGuire's background and experience, the circuit court made a proper determination as directed by Wis. Stat. § 907.02. (*See* 54:9–10.)

C. McGuire's testimony did not impermissibly vouch for S.T.S.

Zamora contends that McGuire impermissibly vouched for the credibility of S.T.S in her testimony, violating the rule that "[n]o 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 (Ct. App. 1984). "The *Haseltine* rule is intended to prevent witnesses from interfering with the jury's role as the 'lie detector in the courtroom.'" *State v. Snider*, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784 (quoting *id.*). McGuire's testimony did not violate the *Haseltine* rule.

In a case such as this, where a young person has been victimized by an adult male whom she views as an uncle and with whom she already lives, such testimony was not only relevant and admissible, but necessary to clarify counterintuitive behavior by the victim. As this Court observed in *Haseltine*:

> 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.

Haseltine, 120 Wis. 2d 92, 96–97. *See also State v. Jensen*, 147 Wis. 2d 240, 256, 432 N.W.2d 913 (1988) (expert witness may give an opinion about the consistency of a complainant's behavior with the behavior of victims of the same type of crime if the testimony will assist the trier of

fact to understand the evidence or to determine a fact in issue).

What a witness may not do is testify that a child witness is telling the truth. For example, in *State v. Krueger*, 2008 WI App 162, 314 Wis. 2d 605, 762 N.W.2d 114, a social worker testified that the child witness did not possess the "level of sophistication" to fabricate such a story on her own and that she "could [not] maintain that kind of consistency throughout unless it was something that she had experienced." *Krueger*, 314 Wis. 2d 605, ¶ 5. Given this testimony, which specifically referred to the child witness and her interview and trial testimony and its truthfulness, this Court concluded that the social worker's testimony was "tantamount to an opinion that the complainant had been assaulted—that she was telling the truth." *Krueger*, 314 Wis. 2d 605, ¶ 16.

This case is like *Haseltine* and *Jensen*, not *Krueger*. McGuire was brought in to testify about the counterintuitive behavior sexual assault victims may engage in, including delaying reporting and sometimes even recanting when confronted with an adult. (*See* 54:5–9.) That is exactly what she testified about (56:28–34), and it was entirely permissible because of the undisputed fact that S.T.S. delayed in reporting Zamora's crime and then initially recanted when confronting an adult. At no point did McGuire testify that S.T.S. was telling the truth despite the delayed reporting and initial recantation when S.T.S. told her mother and aunt. She did not provide the kind of testimony that *Haseltine* prohibits.

McGuire's testimony was a far cry from vouching for anything S.T.S. testified to, and did not usurp the jury's role as judges of credibility. Unlike in *Krueger*, McGuire's testimony was in general terms, and described her process

and why that process was best at eliciting answers from child witnesses who might be too scared or limited verbally to explain what happened to an adult. Significantly, she did not vouch for S.T.S's credibility or *even mention S.T.S's statements during the interview* at any point in her testimony. (56:23–52.) She simply explained why her open-ended style of questioning, without leading the child, was preferential because in her experience that led to more truthful and complete answer. (56:25–28.) It was S.T.S, not anyone else, who testified that she lied and told the interviewer nothing happened in her recorded interview because "before I told them that they kept on asking me over and over again if it was true. And that just made me feel sad because it felt like they didn't really believe me. So I thought they wouldn't ask me anymore if I told them that [nothing happened]." (55:100, *see also* 55:101, "[b]ecause I just felt that it would be over and done with.")

Ultimately then, there is nothing in McGuire's testimony even remotely suggesting that S.T.S. was telling the truth, and that is the line the State must not cross: "The *Haseltine* rule is intended to prevent witnesses from interfering with the jury's role as the 'lie detector in the courtroom.'" *Snider*, 266 Wis. 2d 830, ¶ 27 (citation omitted.) Because McGuire did not speak to the truth or falsity of S.T.S's testimony, her testimony came nowhere close to violating the *Haseltine* rule.

III. Alternatively, if the circuit court erred by allowing McGuire to testify as an expert, that error was harmless.

An error is harmless if "it [is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Harvey*, 2002 WI 93, ¶ 46, 254 Wis. 2d 442, 647 N.W.2d 189. Harmless error also applies to a circuit court's evidentiary decisions. *See*

State v. Hunt, 2014 WI 102, ¶ 21, 360 Wis. 2d 576, 851 N.W.2d 434.

If this Court concludes that the circuit court erred in admitting McGuire as an expert, or that her testimony impermissibly vouched for S.T.S. in some way, those errors were harmless because the jury was able to discern for itself whose testimony was more credible between S.T.S. and Zamora, and because S.T.S's trial testimony conformed to her early statements to investigators, as the jury also heard.

As discussed above, S.T.S., 12 at the time of trial, testified convincingly before the jury. (55:83–152.) She directly and repeatedly addressed the delay in reporting Zamora's assault, explaining that she was "upset and happy [to tell someone about the assault] . . . happy because I actually told someone and upset because I knew that I would go through this." (55:99–100.) When she told her mom and aunt, S.T.S said they "kept on asking me if it was the truth" (55:100) which made her "[a] little upset because I didn't know if they believed me or not." (*id.*) Thus S.T.S. testified she recanted initially "[b]ecause before I told them [that it didn't happen] they kept on asking me over and over again if it was true. And that just made me feel sad because it felt like they didn't really believe me. So I thought they wouldn't ask me anymore if I told them [it didn't happen]." (*id.)* And when later aggressively cross-examined by defense counsel, S.T.S. did not recant, relent, or alter her story. Instead, she affirmatively testified that "I know that he was pulling my shirt up" (55:121), that Zamora put his mouth "on my boob[]" (55:122), and that Zamora "put his hands . . . [a]t the lower part of my body." (55:123.) Finally, S.T.S. testified that Zamora "lifted up my hand and started like pulling it towards [his groin]." (55:125.) After this, S.T.S. left the room and locked herself in the bathroom. (*id.*)

The jury learned about S.T.S.'s recantations not only from her, but also by viewing a recording of S.T.S's forensic interview, conducted shortly after S.T.S. first revealed the incident, which was not conducted by McGuire but by Kenosha County Social Services' Paula Hocking. (55:93.) In that video, S.T.S. initially denies (*see* 55:100) that Zamora assaulted her.

S.T.S.'s testimony was in substantial conformance with the other witnesses for the State, including Detective Warren DenHartog, who first became involved when a counselor from S.T.S's school contacted him. (56:6–7.) Detective DenHartog also testified that S.T.S. initially denied that Zamora had assaulted her, but, following further conversations with her and one of S.T.S.'s friends, L.G.,[3] S.T.S. admitted that she had written a note to L.G. and that Zamora had done the things she described in it. (56:7–9.) Through Detective DenHartog, the State introduced the note S.T.S. had written to L.G. when she first confided in her (56:20), and the note included the same details S.T.S. had just testified to at trial:

> Put it on your life that you won't tell. It's about the bad touch. I was sleeping in the back room and I was watching movies and my uncle[4] came and laid by me and said do you trust me and I said yes because I didn't know what he was talking about. So I feel asleep, he came back and did something very bad to me and I'm very, very shy and nervous to tell you what happened. . . . He put his mouth on my -- and there's a drawing and underneath the drawing says the word 'boob' -- and he put his hand . . . under my -- and then there's a drawing and then in pencil it

[3] L.G. is a minor so the State will only refer to her by her initials.
[4] Though Zamora was engaged to marry S.T.S.'s mother, he had previously been married to S.T.S.'s mother's sister. (56:59–60.) Thus, the "uncle" description of Zamora.

> looks like it says panties. It says he tried to put my hand by his part, but I pulled away.

(56:20.)

L.G. testified previously, confirming the chronology of the note after the assault (55:154–155) and that the note S.T.S. wrote said "not to tell anyone and . . . that her uncle touched her." (55:154.) L.G. testified without contradiction that she then gave the note to a school guidance counselor because S.T.S. was too "afraid, shy, and nervous" to do so herself. (55:155.)

All of this took place before the jury: S.T.S's testimony, and those syncing up her statements (including L.G. and Detective DenHartog), compared to Zamora's own testimony which admitted that he had been there the night of the assault but denied that it took place. (56:74.) The jury was therefore able to discern for itself whom it found more credible, just as they were instructed:

> You jurors are the judges of the credibility of the witnesses and the weight of the evidence. . . .
>
> It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the affect (sic) of the evidence as a whole. You are the sole judges of the credibility, that is the believability, of the witnesses and of the weight to be given to their testimony.

(56:96.)

The jury was also instructed about expert testimony (*see* 56:97–98), including the clear directive that "[o]pinion evidence was received to help you reach a conclusion; however, you are not bound by any expert's opinions." (56:98.)

Jurors are presumed to follow the instructions as given. *State v. Gary M.B.*, 2004 WI 33, ¶ 33, 270 Wis. 2d 62, 676 N.W.2d 475. And because McGuire's testimony did not in any way speak to the truth or falsity of S.T.S.'s statements, the jury was not asked to "add" an unfair weight which tipped the scales toward the State. Instead, the jury simply had to decide who was more credible: S.T.S. or Zamora. By virtue of their verdicts, the jury found S.T.S. more credible.

In view of all of this live testimony by the victim, defendant and disinterested fact witnesses, McGuire's testimony was harmless because a rational jury would have convicted Zamora even without her testimony.

CONCLUSION

For the foregoing reasons, this Court should affirm Zamora's judgment of conviction.

Dated this 1st day of March, 2017.

Respectfully submitted,

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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 4,794 words.

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Robert G. Probst
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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 1st day of March, 2017.

_____
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