

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

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State of Wisconsin,

Plaintiff-Respondent,

v.

Adam M. Zamora,

Defendant-Appellant.

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

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**Defendant-Appellant's Reply Brief**

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## Argument

### I. The state's attempt to distinguish *State v. Christian* fails.

As Zamora pointed out in his opening brief, the circuit court is not permitted to take judicial notice of its records in another case. For this proposition, Zamora cited, *State v. Christian*, 142 Wis. 2d 742, 746, 419 N.W.2d 319, 321 (Ct. App. 1987).

Naturally, in its brief, the state is anxious to distinguish *Christian*. In doing so, the state takes us on an historical tour of the rule beginning in 1887 and ending 1973. The gist of this trip is to establish that if the proponent of the evidence fails to provide the court with the pertinent documents from the other case, the court may not take judicial notice of the information contained in the other court file. Here, the state says, the state provided the circuit court with the transcripts from the other cases, and, therefore, the court properly took judicial notice of it.

Zamora has no beef with this proposition. But the proposition does not help the state.

Nowhere does the state acknowledge that the circuit court in this case was never provided with the transcript of McGuire's *testimony* in those other cases. Instead, the state writes, "a wealth of case law supports the circuit court's reference to

McGuire's *testimony* before it and other circuit courts in Kenosha County . . ." (emphasis provided; Respondent's brief p. 10)

But the circuit court here was not provided with McGuire's *testimony*. It was only provided with the *rulings* of the other judges. These rulings are not *evidence* of McGuire's expertise. The rulings are only evidence that a judge in another case believed there was a sufficient foundation to permit McGuire to render an expert opinion under the circumstances of that other case.<sup>1</sup> The other rulings certainly do not establish that McGuire is an expert witness for all purposes where the charge is sexual assault of a child.

**II. The admission of McGuire's testimony without a proper foundation, and where the testimony bore upon the credibility of the child witness, is not harmless error merely because STS testified convincingly.**

In his opening brief, Zamora anticipated that the state would argue that if it was error to admit McGuire's testimony, the error was harmless. Thus, Zamora attempted to address whether the error was harmless.

The state, of course, was undeterred. The state takes the

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<sup>1</sup> Sometimes the decision of the court in the other case is important; for example, where the defendant is claiming that a prior adjudication bars the present prosecution under principles of double jeopardy. Here, though, the fact of the other court's decision is not relevant. What is relevant is the testimony presented concerning McGuire's expertise. That testimony was not presented to the circuit judge in this case.

harmless error argument one step further. The state argues that even if it were error to admit McGuire's testimony, and even the testimony improperly vouched for STS, the error is still harmless because, "the jury was able to discern for itself whose testimony was more credible between STS and Zamora, and because STS's trial testimony conformed to her early statements to investigators . . ." (Respondent's brief p. 14)

This is a bridge too far.

It is difficult to imagine a situation in which improperly admitted expert testimony concerning the truthfulness of a another witness would be harmless. As the court in *State v. Romero*, 147 Wis.2d 264, 432 N.W.2d 899 (1988)<sup>2</sup>, observed, "There is a significant possibility that the jurors, when faced with the determination of credibility, simply deferred to witnesses with experience in evaluating the truthfulness of victims of crime." *Id.* at 279, 432 N.W.2d at 905.

The state's unsubstantiated claim that, "at that time of trial, [STS] testified convincingly before the jury" does not make it true. (Respondent's brief p. 14) Zamora may just as easily claim that he testified convincingly before the jury.

Curiously, the state made no effort to address the significant possibility that the jurors, when faced with the

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<sup>2</sup> *Romero* has received negative treatment in other decisions, but the disagreement concerned whether the testimony in question amounted to an opinion on the truthfulness of another witness. See, e.g. *State v. Jensen*, 147 Wis. 2d 240, 250, 432 N.W.2d 913, 917 (1988) The *Romero* court's statements about the harmful nature of testimony vouching for the credibility of another witness has never been criticized.

conflicting testimony, simply deferred to Julie McGuire, a person who claims to have experience in evaluating the truthfulness of child victims of sexual assault.

Similarly, the state made no effort to specifically explain how McGuire's testimony did not vouch for the credibility of STS. This is, apparently, because McGuire did not come right out and say, "I find STS to be a more truthful person." See, Respondent's brief p. 13

Understandably, the state meticulously avoids addressing McGuire's actual testimony. McGuire was asked whether "this technique [the Step-Wise 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.*

The state made no effort to explain how this testimony is not an opinion that STS-- who, after all, was interviewed using the Step-Wise technique-- was telling the truth.

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of March, 2017.

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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 985 words.

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Dated this \_\_\_\_\_ day of March, 2017:

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Jeffrey W. Jensen