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State of Wisconsin
Court of Appeals
District 1
Appeal No. 2017AP000075-CR, 76, 77

State of Wisconsin,

Plaintiff-Respondent,

v.

Lee Vang,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Stephanie Rothstein, presiding

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Defendant-Appellant's Reply Brief

Law Offices of Jeffrey W. Jensen
735 W. Wisconsin Avenue, Suite 1200
Milwaukee, WI 53233

414.671.9484

Attorneys for the Appellant

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Argument

I. Officer Anderson's hearsay testimony about JV's statements to him were not properly offered to rebut a claim of recent fabrication; and if it was proper to admit the statements under the rule of completeness, then defense counsel's performance was deficient for opening the door.

The state suggests that Officer Anderson's testimony concerning JV's statements to him were, in fact, offered to rebut a claim of recent fabrication. (Resp. brief p. 8-9) As proof, here is what the state says is a claim of recent fabrication by Vang: ""So if Officer Anderson . . . has anything in his report that is different than what you testified to today, you are testifying off of your recollection from June 14, 201[4], correct?" (R. 57:164.)" *Id.*

The state's explanation as to how this amounts to a claim of recent fabrication by Vang is perplexing, at best. Perhaps this is because precisely the opposite is true. The question plainly establishes that JV's trial testimony was based on what she claims to have seen at the time of the incident. This, then, is the very definition of not being offered to rebut a claim of recent fabrication.

Undeterred, though, the state proceeds with the theory that JV had one story in mind when the incident happened, she

then told Officer Anderson her story, but, then, at trial, JV testified from her memory of original version[1]. Thus, the state concludes, the state was permitted to introduce at trial, through Officer Anderson, *JV's entirely consistent statements*.

Perhaps recognizing that this borders on pretzel logic[2], the state switches gear.

Instead of being offered to rebut a claim of recent fabrication, the state writes, Officer Anderson's hearsay statements were actually offered under the rule of completeness. (Resp. brief p. 10-11)

Unlike the state's dogged unwillingness to simply admit that Vang never made a claim of recent fabrication, there actually is something to this argument. But it does not really help the state.

As the state points out, in *State v. Sharp*, 180 Wis. 2d 640, 656, 511 N.W.2d 316, 323 (Ct. App. 1993) the court of appeals recognized that where, on cross-examination, defense counsel suggests that the witness may have given prior inconsistent statements, simple fairness demands that opposing counsel be permitted to introduce the prior statements so that the jury can determine whether the prior statements were, in fact, inconsistent.[3]

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[1] Evidently as opposed to her recollection of what she told Officer Anderson

[2] One wonders why the state simply did not concede that the statements were not offered to rebut a claim of recent fabrication

[3] For this proposition, the *Sharp* court quoted with approval, *United States v. Pierre,* 781 F.2d 329, 333 (2d Cir.1986)

Defense counsel's cross-examination of JV does, indeed, seem to imply that JV gave inconsistent statements to Officer Anderson.

This, of course, begs the question of why defense counsel would ask such a foolish question when she knew, or should have known, that JV's statements to Officer Anderson were entirely *consistent* with her trial testimony?

And this is why the rule of completeness does not help the state's position. It matters not whether defense counsel's performance was deficient because she failed to object to Officer Anderson's testimony of the grounds of hearsay, or because defense counsel asked a foolish question that opened the door-- under the rule of completeness-- to Anderson being permitted to recite JV's statement to him. The bottom line is that, if defense counsel's performance had not been deficient, JV's hearsay statements would not have been admitted through Officer Anderson.

Dated at Milwaukee, Wisconsin, this _____ day of June, 2017.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Avenue
Suite 1200
Milwaukee, WI 53233

414.671.9484

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Dated this _____ day of June, 2017:

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Jeffrey W. Jensen