STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2018AP186-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

FREDERICK EUGENE WALKER, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, AND ORDER DENYING POSTCONVICTION RELIEF, THE HONORABLE JEFFREY A. WAGNER PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

Snider-Smith-Miller line of cases is not applicable to this case.

The State's reliance on *State v. Snider*, 2003 WI App 172, 266 Wis.2d 830, 668 N.W.2d 784, *State v. Smith*, 170 Wis.2d 701, 490 N.W.2d 40 (Ct. App. 1992), and *State v. Miller*, 2012 WI App 68, 341 Wis.2d 737, 816 N.W.2d 331 is misplaced. This line of cases deals with a specific factual circumstance not present in this particular case. The *Snider-Smith-Miller* line of cases deals with situations where a detective's statements are offered to explain the circumstances or course of conduct of a pre-trial investigation or interrogation. In *Snider*, the defense, through cross-examination, offered a detective's testimony that from the start of the investigation he believed the victim over the defendant, to show that the detective was biased throughout the investigation. See *Snider*, 2003 WI App 172 at ¶¶25-26. In *Smith*, the State offered the testimony of a detective that he did not believe the defendant's story to explain why he continued on with the interrogation. See *Smith*, 170 Wis.2d at pp.718-719. In

Miller, the State showed a video which depicted a detective telling the defendant that he was lying to demonstrate the context of the interrogation and the technique used by the detective in interrogating the defendant. See *Miller*, 2012 WI App 68 at ¶11. In each of these cases, the testimony or statements from the detectives are retrospective in nature and concern circumstances as they existed at one point in an investigation or interrogation. The testimony or statements served to explain why the detectives did what they did in the investigation, particularly, why they refused to accept denials, why they continued with the interrogation in the face of denials, and why they accused a defendant of lying. In this regard, the *Snider-Smith-Miller* line of cases is distinguishable from this case. Here, we do not have testimony from a detective which is offered to explain past circumstances that existed during an investigation or to explain an interrogation technique. In this situation, we have the testimony of a mother whose testimony served to enhance the credibility of her daughter's trial

testimony. The State did not need NS's testimony to present TCB's allegations. Indeed, the State called TCB as a witness to describe her specific allegations against Walker. 73:19-33. TCB likewise offered testimony which gave context to the allegations and which described her reporting of the allegations. 73:34-35. The only purpose NS's testimony actually served was to bolster TCB's trial testimony. As part of NS's testimony, NS told the jury that she was "[s]till kind of numb about the situation. But (T.C.B.) don't lie." 72:83; Ap.106-108. Notably, NS's testimony about her being "numb" and TCB's truthfulness is in the present tense. Such testimony as such undercuts the State's argument that NS's testimony "was not offered to prove that the jury should believe TCB's testimony, but offered to show NS's then-existing emotional state when TCB first disclosed the allegations." See State's brief at p.15. Contrary to the State's argument, NS's testimony depicted her state of mind *at the time of trial*. Indeed, N.S. specifically stated that "[s]he's *still* kind of numb about the situation." 72:83; Ap.106-108. Italics added. Of course, NS

concluded such testimony by informing the jury, "[b]ut (T.C.B.) don't lie." 72:83: Ap.106-108. Such affirmation of TCB's truthfulness not only speaks to NS's belief in TCB's pre-trial statements, meaning the original disclosures, but in TCB's trial testimony. Nonetheless, even if this court disagrees and concludes that NS's testimony served some other purpose than to bolster TCB's own trial testimony, this court must recognize that whatever the intended purpose of NS's testimony, the testimony had the effect of bolstering TCB's testimony. Indeed, it is hard to conceive of a more specific and direct buttress of the truthfulness of another witness's testimony, than an affirmation that the witness "don't lie." In this regard, the State's argument that "Walker has not identified any settled law in which the court has applied the *Haseltine* rule to the circumstances here," State's brief at p.16, falls flat. In *Romero*, witnesses testified that the victim was an honest person, *Romero*, 147 Wis.2d at 267-268, and in *Tutlewski*, a witness testified that she "(didn't) think it is within (the alleged victims') capabilities to lie or be deceitful,"

Tutlewski, 231 Wis.2d at 383. The prohibited testimony in *Haseltine* was from a psychiatrist who testified that "there was no doubt whatsoever" that the complaining witness was an incest victim. *Haseltine*, 120 Wis.2d at 96. This court deemed such testimony to be an improper opinion that the complaining witness was telling the truth. *Id.* In this case, we have an even more pronounced or explicit opinion by one witness of the truthfulness of another. NS's testimony instruction to the jury that TCB "don't lie," specifically and expressly vouched for the truthfulness of TCB's trial testimony much the same was as the improper bolstering exhibited in *Romero* and *Tutlewski*. Well-settled law existed as to the impropriety of NS's testimony. Trial counsel should have relied on such law to object to NS's testimony and seek a mistrial because of it.

Finally, Walker has already addressed the applicability of Rule 906.08(1)(b) in his brief-in-chief. The State's assertion that trial counsel "repeatedly broadly (sic) attacked TCB's truthfulness throughout his opening statement," State's brief at

p.18, mischaracterizes the record. As discussed in Walker's brief-in-chief, *according to Eugenio*, rehabilitative evidence under Rule 906.08(1) is only appropriate where an attack on the witness involves the assertion "that the witness is not only lying in this instance, *but is a liar generally." Eugenio,* 219 Wis.2d at 402. Trial counsel's assertions during opening statement did not fall into this category.

State's reliance on ***State v. Dunlap,*** *2002 WI 19, 250 Wis.2d 466, 640 N.W.2d 112 is misplaced.*

The State refers this court to *State v. Dunlap* in regards to the curative admissibility doctrine. While *Dunlap* may be informative as to the law, it does not help the State on the facts. *Dunlap* is easily distinguishable from the situation before this court. In *Dunlap*, the court specifically determined that because the testimony complained of by the defense was admissible as *Jensen* evidence, it did not "open the door" to the defendant's profferred evidence. See *Dunlap*, 2002 WI 19 at ¶40-41. The court

similarly concluded that the testimony was not offered as "substantive proof" that the alleged victim had been sexually assaulted. Id. In this case, TCB's testimony about being sexually active and using birth control, was not admissible under a well-established doctrine such as "*Jensen* testimony." In fact, it was plainly inadmissible under Sec. 972.11. Also, TCB's testimony about birth control and being sexually was offered as "substantive proof" that she was sexually assaulted by Walker. According to the State, the State elicited the testimony regarding TCB's use of birth control to explain why TCB would not know if Walker "finished" and to "show precautions taken by the Defendant." 51:11; 72-26. Such testimony was probative of whether a sexual assault occurred or not. Evidence of semen on clothing or linen would be probative that an assault occurred. The lack of semen would also be probative of whether an assault occurred or not. The State therefore relied upon TCB's use of birth control to explain away the absence of semen or physical evidence which may have proved sexual contact between TCB and Walker. By introducing this

testimony by TCB to address a substantive proof issue, the State "opened the door." Under the curative admissibility doctrine, Walker was entitled to respond by asking follow-up questions to the State's line of inquiry regarding TCB's use of birth control and prior sexual activity. The court erred in not allowing Walker to do so.

CONCLUSION

For all the reasons stated in this brief as well as the brief-in-chief, Walker requests that this court vacate the judgment of conviction and remand the case to the trial court for a new trial.

Dated this _____day of June 2018.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 1429 words.

Dated this ___day of June 2018

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CERTIFICATION 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 s. 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 upon all opposing parties.

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