STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,
Plaintiff- Respondent,

vs.

Appeal No. 2018AP002419 CR

Case No. 2016CF003679

ANGEL MERCADO,
Defendant- Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. JEFFREY A. CONEN, PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. JEFFREY A. CONEN, PRESIDING

BRIEF OF DEFENDANT- APPELLANT

Esther Cohen Lee
Attorney for Defendant- Appellant
State Bar No. 1002354

759 N. Milwaukee St., Suite 410
Milwaukee, WI 53202

Tel. No. (414) 273-2001

TABLE OF CONTENTS

	Page
Table of Authorities……..	i
Statement of the Issues…….	ii
Statement of Oral Argument and Publication……..	ii
Statement of the Case- Procedural ……..	1
Statement of the Case- Factual…….	5
Argument:	
POINT I: The Court erred in receiving into evidence the audiovisual forensic interviews that the three alleged young victims had with the police and, therefore, the defendant is entitled to have his convictions reversed and a new trial ordered……	15
Conclusion…….	30
Certificate as to Form and Length……...	31
Certificate of Electronic copy of the Appellant's Brief……	32

TABLE OF CONTENTS OF APPENDIX

		Record	Appendix
1.	Criminal Complaint, filed August 19, 2016……	R1	A1
2.	Information, filed September 2, 2016…….	R6	A4
3.	Notice of intent to offer video statement of female victim, OEG, dated October 19, 2016……	R9	A6
4.	Notice of intent to offer video statement of female victim, LAG, dated October 19, 2016……	R8	A7
5.	Notice of intent to offer video statement of female victim, NLG, dated October 19, 2016……	R7	A8
6.	Jury Notes, dated January 26, 2017……	R30	A9
7.	Verdict Sheets, dated January 26, 2017…….....	R31	A12
8.	Written Explanation of Determinate Sentence, filed April 12, 2017…….	R35	A15
9.	Judgment of Conviction, filed April 12, 2017……	R37	A16
10.	Notice of Intent to pursue Postconviction Relief, filed April 26, 2017……..	R39	A18
11.	Decision and Order Denying Postconviction Motion, filed Dec. 13, 2018…	R64	A19
12.	Notice of Appeal, dated December 18, 2018…….	R65	A24
13.	Order Assigning Counsel, dated December 21, 2018……	R---	A26
14.	Certification of Requirements of Appendix, February 23, 2019……	R---	A27

TABLE OF AUTHORITIES

Page

State Cases

1. *State v. Dwyer,* 149 Wis. 2d 850, 440 N.W.2d 344 (1989)……. 17
2. *State v. Hansen,* 149 Wis. 2d 474, 439 N.W.2d 133 (1989)…… 17
3. *State v. James,* 2005 WI App 188, 285 Wis. 2d 783, 703 N.W. 2d 727……. 25
4. *State v. Jimmie R.R.,* 2000 WI App 5, 232 Wis. 2d 138, 606 N.W. 2d 196…..... 18
5. *State v. Marinez,* 2010 WI App 34, 324 Wis. 2d 282, 781 N.W.2d 511……. 24
6. *State v. Ruiz-Valez,* 2008 WI App 169, 314 Wis. 2d 724, 762 N.W. 2d 449….. 23
7. *State v. Snider*, 2003 WI App 172, 266 Wis. 2d 830, 668 N.W. 2d 784……. 21
8. *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988)…… 20

Statutes

1. §885.42 Wis. Stats……. 23, 24
2. §906.01 Wis. Stats……. 17
3. §906.13 Wis. Stats……. 19
4. §908.01 Wis. Stats……. 19
5. §908.03 Wis. Stats……. 21
6. §908.08 Wis. Stats……. 17, 18, 20, 25, 27

Supreme Court Rules

1. SCR 71.01……. 23, 24

STATEMENT OF ISSUES PRESENTED

1. Q. Did the Court err in receiving into evidence the audiovisual forensic interviews that the three alleged young victims had with the police and, therefore, was the defendant entitled to have his convictions reversed and a new trial ordered?

   A. The Circuit Court answered no.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

It is not requested that this appeal be published and oral arguments are not necessary because the issues in this matter may be decided on established principles of law in the State of Wisconsin.

STATEMENT OF THE CASE- PROCEDURAL

1. This action commenced on August 19, 2016 with the filing of a Criminal Complaint in the Circuit Court of Milwaukee County. (Record 1, pp. 1-3; Appendix, pp. A1-A3). It charged two counts of Sexual Assault of a Child in the first degree (sexual intercourse with a child under the age of 12), relating to NLG and LAG, a Class B felony, with a mandatory minimum sentence of 25 years. It also charged one count of Sexual Assault of a Child in the first degree (sexual contact with a child under the age of 12), relating to OEG, a Class B felony, with no mandatory minimum sentence. All three counts had a maximum sentence of 60 years. The initial appearance was held on August 20, 2016. (R67, pp. 1-10).

2. A Preliminary Hearing was held on August 26, 2016, after which the Court found that there was probable cause to believe that the defendant had committed a felony and it bound him over for trial. (R68, pp. 1-15). An Information was then filed on that date, charging the same three Counts that had been charged in the Criminal Complaint. (R6, pp. 1-2; App. pp. A4-A5). The defendant was arraigned on the Information on September 27, 2016, and entered a plea of not guilty, with the assistance of a Spanish interpreter. (R69, pp. 1-5).

3. On October 19, 2016, the state filed three Notices that it intended to offer into evidence three video-recorded statements of the three young, female victims in the case; OEG, age 7, LAG, age 5, and NLG, age 4. (R9, pp. 1-3; App. pp. A6-A9). On November 8, 2016, a hearing was held in the Circuit Court of Milwaukee County, the Hon. Jeffrey A. Conen, presiding, to determine the admissibility of those three video-recorded statements. (R71, pp. 1-28). The Court reserved decision on the state's motion. In the end, the Court allowed the video-recorded statements and the transcripts of those statements to be received in evidence at the trial and shown to the jury. This will be discussed in detail below.

4. On November 9, 2016, a jury trial commenced in this matter in the Circuit Court of Milwaukee County, the Hon. Jeffrey A. Conen, presiding. On November 10, 2016, the Court declared a mistrial in that case because the video- recorded statements had not been transcribed and it was too difficult for the interpreters to interpret from the videos without having a transcription of them to read from. The Court ordered that all of the video-recorded statements be transcribed in English and copies given to the interpreters. The Court then declared a mistrial and ordered a new trial.

5. The second jury trial began on January 23, 2017 in the Circuit Court of Milwaukee County, the Hon. Jeffrey A. Conen, presiding. The state was represented by Michael C. Schindhelm, Assistant District Attorney. The defendant was represented by Ann T. Bowe. The defendant was assisted by Spanish interpreters throughout the trial.

6. During the trial, on January 25, 2017, in the afternoon, after both the state and the defense had rested, the Court excused the jurors for the day and advised counsel that it had prepared instructions for them to examine. The Court asked counsel to let him know in the morning if there were any changes to be made. Then, for some reason, the Court stated that it was going off the record. The trial transcript does not record the conference that took place off the record. However, the Clerk noted in the CCAP account of the case the discussion that occurred at that point – which was very important. In the CCAP account (page 6), the Clerk noted that after the state and the defense had rested and the jury had left the box, the state amended Counts #1 and #3 to "1st Degree Sexual Assault- Contact, §948,02(1)(e)." The Clerk also noted that the time frame under Count #2 was amended to read, "August 2, 2015 to August 2, 2016."

7. The trial continued the next day, on January 26, 2017, at which time the jury rendered its three verdicts, finding the defendant guilty of all the three Counts given to it for its consideration: two counts of Sexual Assault of a Child in the first degree, (sexual contact of a child less than 12 years old), relating to NLG (Count 1) and OEG (Count 3), and one count of Sexual Assault of a Child in the first degree (sexual intercourse of a child less than 12 years old), relating to LAG (Count 2). (R31, pp. 1-3; App. pp. A12- A15).

8. On April 12, 2017, the defendant appeared in the Circuit Court of Milwaukee County, the Hon. Jeffrey A. Conen, presiding, for sentencing. (R81, pp. 1-46). The state was represented by Mr. Schindhelm and the defendant was represented by Ms. Bowe. At that time, the Court sentenced the defendant as follows:

a. 13 years for his conviction under Count 1, with 10 years of initial confinement and 3 years of extended supervision;

b. 32 years for his conviction under Count 2, with 25 years of initial confinement and 7 years of extended supervision;

c. 13 years for his conviction under Count 3, with 10 years of initial confinement and 3 years of extended supervision;

d. with all of the sentences to run concurrently. (R81, pp. 41- 42).

9. A Written Explanation of Determinate Sentence was filed on April 12, 2017. (R35, p. 1; App. p. A15). A Judgment of Conviction was filed on April 12, 2017. (R37, pp. 1-2; App. pp. A16- A17).

10. On April 26, 2017, a Notice of intent to pursue Postconviction Relief was filed on behalf of the defendant. (R39, p. 1; App. p. A18). On May 30, 2017, an Order Appointing

Counsel was issued, appointing Esther Cohen Lee as appellate counsel to represent the defendant in regard to the appeal of this matter.

11. On August 3, 2018,a Postconviction Motion was filed in the Circuit Court of Milwaukee County on behalf of the defendant, requesting that his convictions be vacated and that a new trial be ordered. (R49, pp. 1-18). On November 9, 2018, the state filed a Response to the Postconviction Motion. (R58, pp. 1-8). A Reply to that Response was filed on behalf of the defendant on December 4, 2018. (R62, pp. 1-11).

12. On December 13, 2018, a Decision denying the Postconviction Motion was filed by the Circuit Court of Milwaukee County, the Hon. Jeffrey A. Conen, presiding. (R64, pp. 1- 5; App. pp. A19- A23). A Notice of Appeal was filed on December 18, 2018. (R65, pp. 1-2; App. pp. A24- A25). An Order Appointing Counsel was issued on December 21, 2018, assigning Esther Cohen Lee as appellate counsel to represent the defendant in the Court of Appeals, District I. (R---; App. p. A26).

STATEMENT OF THE CASE- FACTUAL

A. The Allegations of the Three Young Sisters and the Reporting of these Allegations

C.C., age 40, was the mother of five children: a son, age 18, and four daughters, JG, age age 14, OEG, age 8, LAG, age 5, and NLG, age 4. From June- August, 2016, she said, she lived at 1558 S. 24th Street, Apartment 5, in Milwaukee. She lived there with her four daughters (her son was living with his father at a different address) and the defendant. The defendant was then 59 years old (date of birth 2/17/57). Her daughters were then the following ages: JG, age 13, OEG, age 7 (date of birth 1/23/09), LAG, age 4-5 (date of birth 8/2/11), and NLG, age 3-4 (date of birth 7/25/12). (Trial Transcript, Jan. 24, 2017, a.m. - R77, p. 14).

C.C. said that when she lived with the defendant, she was his care-taker, helping him with his meds, appointments, phone calls, showers, and household duties. (R77, p. 14). The apartment they lived in was the defendant's one bedroom apartment, which had a basement with steps that led down from the apartment. (R77, p. 16).

On August 11, 2016, C.C. drove to the Dollar Store with NLG, the youngest child. On the way back from the store, C.C. was playing a song on the radio from a group known as "Silk" and the song was called "Freak Me". (R77, p.23). C.C. began singing along with this song, and she began singing, "I want to lick you up and down." (R77, p. 24). All of a sudden, NLG piped up and said, "Yes, that's what he does!" (R77, p. 24). C.C. asked NLG to repeat what she had said and NLG once again said the same thing. C.C. asked her, "Who?" and NLG said, "Viejo", who she identified as being the defendant. (Viejo is Spanish for "old man". (R77, p. 24).

When they got home, C.C. had NLG remain on the porch and she went inside to find LAG, the second oldest daughter. C.C. then asked LAG, "Has anybody been touching you?" and LAG answered, "Yes." C.C. asked her, "Who, Viejo?" and she answered, "Yes." (R77, p. 26).

C.C. continued to wait on the porch for OEG, the second oldest daughter, who had been with the defendant. OEG arrived home at 7:30-8:00 p.m. C.C. then asked OEG, "Has he been touching you?" and she answered, "Yes, he does." (R77, p. 31). C.C. asked her, "When was the last time he touched you?" and she answered, "The day before yesterday." (R77, p. 31). That very day, C.C. took them to the E.R. at the Aurora Sinai Medical Center in Milwaukee.

Susan Kanack, a registered nurse at the Aurora Sinai Medical Center, testified that she had examined all three girls on August 11, 2016. She said that she examined each girl individually. (TT. Jan. 25, 2017, a.m., R78, p. 43). The medical records of all three girls were received in evidence at the trial. (Trial Exhibits, 13, 14,and 15). R78, p. 45). Ms. Kanack testified that, according to these medical records, she had asked NLG why she was there and that NLG had answered that, "Viejo keeps licking me on my butt, I hate him." (R78, p. 49). Upon examining NLG, Ms. Kanack said, she did not find any injuries or anything "abnormal". (R78, p. 51).

When she was examining LAG, Ms. Kanack said, the records showed that she had asked her why she was there and LAG answered, "To see if I'm okay. Viejo has been touching me everywhere." (R78, p. 53). There were also no injuries noted on LAG, she said. (R78, p. 56).

Finally, when she was examining OEG, Ms. Kanack stated that the records showed that she had asked her "why are you here today?" She said that OEG answered, "Viejo has been touching me in my private parts. His real name is Angel." (R78, p. 54). When Ms. Kanack asked her asked her "what does he touch you with?", she answered, "his hands, he touched me yesterday." (R78, p. 55). Again, she said, there were no injuries noted on OEG. (R78, p. 56).

B. The Forensic Interviews of the Three Alleged Victims and Their Trial Testimony

After the mother of the three alleged young victims had testified at the trial, the state called Officer Trisha Klauser as a witness. She testified that she had conducted separate forensic interviews with LAG and OEG on August 16, 2016 at the Child Advocacy Center. (R77, p. 57). A video was taken of the interview with LAG and it was offered and received in evidence at the trial. (Trial Exhibit 10). (R77, p. 60). A transcript of that interview had been prepared by the District Attorney's office and it was also offered and received in evidence. (Trial Exhibit 4). (R77, pp. 61-62).

After the video had been played, LAG was called ot the witness stand. She said that she was five years old but that she did not know her birthday. (TT, Jan. 24, 2017, p.m., R75, p. 12). She testified that Viejo was an old man and that he had been taking her into the basement, pulled down her pants, and licked her in her private parts. (R75, p. 16). She said that he licked her in three places: the area around her heart, the area below her waist, and her butt." (R75, p. 18). She said that he did this after putting her on a table. (R75, p. 19).

LAG admitted that after she had told her mother about this, her mother had helped her with what to say at the trial. (R75, p. 24). She also said that the prosecutor had talked to her about what to say at the trial. (R75, pp. 24-25, 28). And she said that she had talked to her sisters about what she was going to say in court during the trial. (R75, p. 27). She also admitted that when she said that the defendant had taken her in the basement and licked her private parts, she was saying that because someone had told her to say it. (R75, p. 28). Then she was asked if it was true that the defendant had licked her private part in the basement and she answered, "Yes." (R75, p. 28).

Officer Kauser testified that she had also conducted a forensic interview with OEG on August 16, 2016. (R77, p. 64). A video recording was also made of that interview, she said. (R77, p. 64). That video was offered and received in evidence. (Trial Exhibit 12). (R77, p. 65). A transcript of that interview was also prepared by the District Attorney's office and was offered and received in evidence. (Trial Exhibit 5). (R77, p. 65). A copy of the transcript was given to each juror and then the video of the interview was played. (R77, pp. 66, 68).

After the transcripts had been given to the jury, and after the video had been shown, OEG testified. OEG said that she was eight years old. OEG testified that she and her sisters had lived in foster homes for three months before they had been reunited with their mother- which had been a few months before they had all gone to live with the defendant. (R75, pp. 41-42).

OEG testified that she knew that a lie meant that you were not telling the truth and that she was telling the truth at the trial. (R75, p. 31). OEG, however, never testified to anything about the defendant's conduct towards her. She identified the defendant and stated that she was mad at him for the things that she had told the officer about. (R75, p. 44). Nothing further was said on direct or cross-examination about what she had talked to the officer about.

Finally, when the youngest alleged victim, NLG, was about to be called as a witness, defense counsel moved to disallow her from testifying at the trial because she was not a competent witness. (R75, p. 45). After some arguments about that issue, which will be discussed below, the Court had NLG take the witness stand, outside the presence of the jury.

The Court asked her various questions about whether she knew the difference between the truth and a lie. Although she promised to tell the true story, she said that she would not promise not to lie- but then changed her mind and said that she would promise not to lie. (R75, p. 52). Finally, she said that she did not think it was important to tell the truth and that she did

not know the difference between something that was real and something that was not real. (R75, p.52).

Defense counsel again asked the NLG not be allowed to testify. After hearing further arguments, which will be discussed below, the Court held that it would allow her to testify if she could testify about what happened. (TT, Jan. 25, 2017, a.m., R78, p. 11). If she did not say anything, the Court held, there would be no opportunity to cross-examine her and then the video could not be used. (R78, pp. 12, 14). The Court also held that she should testify first and then the video would be played. (R78, p. 15).

NLG was then called to testify before the jury. At that point, the Court asked her if she could tell what a lie was and she said, "No". (R78, p. 18). She said that she understood that she had to tell the truth and she promised to do so. (R78, p. 19). She then testified that she was four years old and that she had five cats. (R78, p. 20). She was asked if she had seen Dan before – Dan being Danilo Cardenas, the man who had conducted the forensic interview with her- and she said no. She also said that she had not talked to him about problems she had had or about things happening in the basement with Viejo. (R78, p. 22).

Defense counsel then argued that she would have no meaningful opportunity to cross-examine NLG, and that NLG could not even remember the interview. (R78, p. 27). The Court ruled that it would allow the video to be played and then have the witness called again so that defense counsel could cross-examine her about the video. (R78, p. 27).

At that point, Officer Danilo Cardenas testified that he had conducted a forensic interview of NLG on August 16, 2016 at the Child Protective Center. (R78, p. 32). He said that the interview was recorded. That video recording was offered and received in evidence. (Trial Exhibit 11). (R78, p. 11). A transcript of the video was also prepared by the District Attorney's

office and that transcript was offered and received in evidence. (Trial Exhibit 6). (R78, pp. 35-36).

He testified that NLG stood during the entire interview and that she was "scared or standoffish or uncomfortable." (R78, p. 37). He said that her vocabulary was very limited and that she did not seem to understand some of the questions that he had asked her. Also, he had to redirect her numerous times to get back on the topic. She was hard to get "focused", he said. (R78, p. 38).

After he had completed his testimony, a copy of the transcripts was given to each juror and the video was played. (R78, pp. 39-40). NLG was not then recalled as a witness to answer any questions about the video.

C. The Defendant's Testimony at the Trial

The defendant testified in his own behalf at the trial. He said that he was then 59 years old, that he had been born in Puerto Rico, that he had lived in Milwaukee for 30 years, that he had only gone to school through the fourth grade, and that he did not know how to read or write. (TT, Jan. 25, 2017, p.m., R79, pp. 4-5). He said that he had done maintenance work for the Hyatt Regency Hotel for eight years and that he suffered from chronic back pain and heart problems for which he took meds. (R79, p. 7).

He said that C.C. and her daughters had lived with him for three months but then left after the daughters had been taken into foster care by the state due to their mother's "habit". (R79, p. 9). Then they all lived with him again from June- August, 2016, in a larger apartment. (R79, p. 10).

He also testified that C.C. was "drugged up" all of the time and that she had asked him for money. He said he refused to give it to her because he knew she would use it to buy drugs. (R79, pp. 14-15). C.C. used to pay him $200 a month for rent, he said, and she would help him with his medical appointments and his meds. She also helped him with his banking, he said, but then he learned that she had been taking cash out of his account. (R79, p. 15).

In regard to the allegations made by C.C.'s daughters, he said, he had never taken any of the girls in the basement, and had never touched the privates of any of the girls. (R79, p. 16). He said that he had never licked or put his mouth on any of their butts or any of their bare skin. (R79, p. 16). He noted that DNA tests that had been done had not implicated him in any way with having touched any of the girls. (R79, p. 17).

On cross-examination, he again vehemently denied that he had ever carried any of the girls to the basement, that he had ever lifted any of them onto a table, or that he ever touched or licked any of them. (R79, pp. 31-32). The defendant also testified that when he heard that a complaint had been filed against him, he immediately turned himself into the police. (R79, p. 12).

As a rebuttal witness, Officer Trisha Klauser testified that samples had been taken from the three alleged victims by Ms. Kanack at the hospital and had been sent to the lab. Officer Klauser testified that no "useful results" had been found from any of the samples. (R79, pp. 39-40).

E. The Jury's Notes during its Deliberation and the Verdicts

After the state had rested its direct case, defense counsel moved to dismiss the charges on the ground that the statements of the witnesses and the videos had been insufficient to prove that

the defendant was guilty beyond a reasonable doubt. (R78, p. 57). The state objected. (R78, , p. 58). The Court held that this was an issue of credibility and that a prima facie case had been made. It, therefore, denied the motion to dismiss. (R78, -58).

The defendant then testified and the state called Officer Klauser in rebuttal. The Court then instructed the jury and both the prosecutor and defense counsel gave their closing statements. After the jurors had been sent to the jury room, a conference was held off the record. At that time, the state moved to amend Count 1 to Sexual Assault of a Child in the first degree (sexual contact of a child less than 12 years old), rather than sexual intercourse of a child less than 12 years old. The amended count, therefore, did not require a mandatory minimum of 25 years imprisonment. (See CCAP, p. 6).

The next day, the Court instructed the jury and then excused the jury to deliberate. During its deliberations, the jury sent out three notes. The first note asked to see a copy of the charging document. The Court sent a back a written response, stating, "The charges you are to make a decision on are set forth in the instructions." (R30, p. 1; App. p. A9). The second note asked, "Can we see the comments that all 3 girls said to the medical staff during their exam?" The Court again sent back a written response, stating, "You must rely on your collective memory." (R30, p. 2; App. p. A10). Finally, the third note asked, "Can we see the transcripts for OEG's interview?" The Court sent back a written response, stating, "You must rely on your collective memory." (R30, p. 3; App. p. A11).

The jury then rendered its verdicts, finding the defendant guilty of all three Counts that the Court had given to the jury for its consideration. (TT, Jan. 26, 2017, R80, p. 63; App. pp. A12- A14).

F. The Sentencing of the Defendant

On April 12, 2017, the defendant appeared in the Circuit Court of Milwaukee County, the Hon. Jeffrey A. Conen, presiding, for sentencing. (Sentencing Transcript, R81, pp. 1-46). The state was represented by Mr. Schindhelm and the defendant was represented by Ms. Bowe. The state recommended that although Dr. Dickey had made a finding in the presentence report that had been filed with the Court that the defendant had a low risk to reoffend, it requested that the Court sentence the defendant to 25 years of initial confinement for his conviction under Count 2, which was the mandatory minimum sentence for that offense, and 5 years each of initial confinement for the convictions under Counts 1 and 3, all to run consecutively. (R81, p. 12-13).

Defense counsel recommended that all three sentences run concurrently due to the mandatory minimum required for Count 2. She noted that the defendant himself had been the victim of sexual violence as a child and did not have a prior criminal record. (R81, pp. 16, 20). She also noted that he had been diagnosed with a major depressive disorder, for which he had been hospitalized, and that he had between 35-40 attempts at suicide. She also noted that he had heart problems, prostrate surgery, and chronic back pain. (R81, pp. 24-25). The defendant was then 60 years old. (R81, p. 16).

The Court noted the seriousness of the offenses, especially Count 2 which the legislature had required to be a mandatory minimum sentence of 25 years. (R81, p. 29). The Court said that it had a problem with Dr. Dickey's finding that he was not likely to reoffend in the future. (R81, p. 32). The only thing that the Court mentioned about rehabilitation was that the defendant was willing to go to sex offender treatment, for which it gave him credit, it said. (R81, pp.38-39).

The Court then sentenced him to 32 years for his conviction under Count 2, with concurrent sentences for his convictions under Counts 1 and 3, as set forth above. (R81, p. 42). In imposing those sentences, the Court stated:

> It's not what I want to do, it's what I believe is the right thing to do at the under the circumstances having my hands tied. I just want the record to reflect that this is not the way I would like to handle this, but this is the way in my mind in order to be fair that I am required to handle this. (R81, p. 42).

POINT I

THE COURT ERRED IN RECEIVING INTO EVIDENCE THE AUDIOVISUAL FORENSIC INTERVIEWS THAT THE THREE ALLEGED YOUNG VICTIMS HAD WITH THE POLICE AND, THEREFORE, THE DEFENDANT IS ENTITLED TO HAVE HIS CONVICTIONS REVERSED AND A NEW TRIAL ORDERED.

A. The state's motion that it would offer into evidence the audiovisual forensic interviews of the three alleged young victims with the police

On October 19, 2016, the state filed three Notices indicating that it would offer into evidence at the trial the recorded audiovisual statements of the three alleged victims made to the police during forensic interviews on August 15 and 16, 2016 at the Child Advocacy Center. (R9, pp. 1-3; App. pp. A6- A9). On November 8, 2016, a pretrial hearing was held in the Circuit Court of Milwaukee County, the Hon. Jeffrey A. Conen, presiding. Mr. Schindhelm represented the state and Ms. Bowe represented the defendant. Ms. Bowe objected to the interviews of LAG and NLG being received in evidence at the trial. (R71, pp. 7-8, 13).

She noted that NLG showed "zero ability" to be able to tell the difference between the truth and a lie. (R71, p. 7). The Court noted that in her report, Officer Klauser agreed with that assessment and also noted that NLG did not understand that there were consequences for not telling the truth. (R71, p. 9). For that reason, Ms. Bowe argued, NLG's forensic interview should not be admitted. (R71, p. 8).

The Court also noted that NLG and LAG might not respond to questions on cross-examination. (R71, p. 12). Ms. Bowe argued that LAG was not able to understand that it was important to tell the truth and that she would not promise to tell the truth. (R71, p. 14). The Court stated that it would watch "the first few minutes" of the videos of NLG and LAG. (R71, p. 19).

After the first trial had ended by the declaration of a mistrial, the Court ordered that all three of the forensic interviews be transcribed in English so that the interpreters could interpret them for the defendant as they were played. The District Attorney's office then transcribed the three videos. No certification as to the authenticity of the transcripts was filed in regard to any of them.

When NLG was about to testify at the second trial, Ms. Bowe moved to disallow her from testifying at the trial because she was not a competent witness. (R75, p.6). After the Court had questioned her outside the presence of the jury, Ms. Bowe resumed her argument that NLG should not be allowed to testify because she could not tell the difference between the truth and a lie and because she did not know the consequences for lying. (R75, pp. 54-55). The Court held that NLG would be allowed to testify in person because it was up to the jury to determine her credibility and it was not for the Court to determine that she was unable to testify because she was incompetent. (R78, p. 11). However, the Court stated that first she would have to show that she was able to testify about what happened. (R78, pp. 11-12).

Turning to the issue of whether the video would be admissible, the Court held that NLG was to testify first and that if she was not able to say anything, there would be no opportunity to cross-examine her and in that case, the video could not be used. (R78, pp. 14-15). As noted, NLG testified but was never asked any questions about what had happened and indicated that she had never talked to the officer about what happened. (R78, pp. 21-22). Then the Court allowed the video to be played, over objection by Ms. Bowe, indicating that defense counsel would have the opportunity to cross-examine her after the video had been played. (R78, pp. 24, 27-28). NLG was never recalled as a witness after the video had been played.

There were many reasons why the Court should not have allowed the videos of any of the three alleged victims to be played to the jury. In making a determination as to whether the audio-visual recordings of statements of children who are available to testify, the Court is required to follow the mandates set forth in 908.08 Wis. Stats. In this case, those mandates were not followed by the Court before it allowed the videos of the three alleged victims to be received in evidence, and those errors are as follows:

B. The Court failed to make a finding, based on the facts presented, pursuant to §908.08(3), that the children's statements were made with an understanding that it was important to tell the truth and that false statements would be punishable.

Section 908.08(3)(c) requires that the Court find that

> …the child's statement was made upon oath or affirmation or, if the child's developmental level is in appropriate for the admission of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

In this case, the Court confused the requirements for allowing a child under twelve to testify and the requirements for allowing the child's audiovisual statement to be received in evidence.

Defense counsel had made a motion to disallow the NLG from testifying in person because she was not a competent witness. §906.01 provides that, "Every person is competent to be a witness except as otherwise provided in these rules." In *Sta*te v. *Hanson,* 149 Wis. 2d 474, 482, 439 N.W. 2d 133 (1989), the Wisconsin Supreme Court held that, under that statute,

> Competency is no longer a test for the admission of a witness' testimony except as provided in the rules. The only question is credibility which will be resolved when the case is submitted on the merits.

It has further been held that as long as the witness "is able to tell what happened to her", there is no justification for "not allowing her to testify and for not allowing the jury to determine credibility." *State v. Dwyer,* 149 Wis. 2d 850, 856, 440 N.W. 2d 344 (1989). In this case,

applying those rules to the testimony of NLG, the Court held that it was going to allow her to testify in person, over the objection of defense counsel, as long as she could testify about what happened to her. (R78, p. 11).

However, the determination as to whether a video of a forensic interview with a child is allowed to be received in evidence is required to be made in accordance with §908.08(3)(c). In *State v. Jimmie R.R.,* 2000 WI App 5, 232 Wis. 2d 138, 157, 606 N.W. 2d 196, the Court held that the conditions set forth in that statute are required to be met before the video may be received in evidence. In this case, NLG, who was four years old, could not be administered the oath. She showed during the forensic interview that she did not understand that false statements were punishable or the importance of telling the truth. And during the trial, when the Court questioned her outside the presence of the jury, she stated that she would not promise not to lie, although she then changed her mind and said she would promise not to lie. (R75, p. 52). She also said that it was not important to tell the truth and that she did not know the difference between something that was real and something that was not real. (R75, p. 52).

In the end, the Court ruled that it would allow her to testify- before even showing the video- but only if she could testify about what happened. (R78, p. 11). At no time, however, did the Court ever make a finding, as required by §908.08(3)(c), that she understood that a false statement would be punishable of the importance of telling the truth.

In its Decision denying the Postconviction Motion, the Court held that all three interviews, including the interview with NLG, "demonstrated the requisite understanding of the importance of telling the truth and that false statements were punishable." (R64, p. 4; App. p. A22). As the facts of the interview show, that was clearly not the case in regard to NLG. In fact, in the end, when she did testify, she did not tell the truth. She stated that she had never even met

Dan, the man who had conducted the interview, and had never talked to him about anything that happened in the basement with the defendant.

The Court had failed to make a finding that she understood that false statements were punishable and the importance of telling the truth, as required by the statute, and, for that reason, whatever ruling it wanted to make about her ability to testify at the trial, it was not allowed to rule that the video of her forensic interview was admissible at the trial.

C. The videos were not admissible as a prior inconsistent statement

In its Response to the Postconviction Motion, the state argued that since NLG testified that she had never seen the interviewer, known as Dan, and had never discussed anything about the defendant with him, the video of her forensic interview with Dan was admissible as a prior inconsistent statement. In its Decision denying the Postconviction Motion, the Court agreed with that argument, holding that, pursuant to §908.01(4)(a)1, the video was admissible as a prior inconsistent statement of NLG. (R64, p. 1; App. p. A22). That holding was incorrect.

First, there is nothing in Section 908.08, which deals with audiovisual recordings of statements of children, that indicates that such a recording may be admissible as a prior inconsistent statement. Specifically, the subdivision cited by the Court as the basis for its holding only involves the issue of whether a video may be admitted in the interests of justice in cases where the child is at least 12 years old but younger than 16. It has nothing to do with a video involving a four year old child, and nothing to do with prior inconsistent statements.

Second, prior inconsistent statements are used to impeach the testimony of a witness and in this case, the witness did not testify at all about the information she had given in the interview. Section 906.13(2)(a) provides that, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable:

1. The witness was so examined while testifying as to give the witness an opportunity to explain or deny the statement;
2. The witness has not been excused from further testimony in the action;
3. The interests of justice otherwise requires.

None of those provisions is applicable in this case. The witness, NLG, did not testify at the trial about what happened to her so there was no statement that could be used to impeach her. The video of her forensic interview was simply not admissible under the rules allowing prior inconsistent statements to be received in evidence at a trial.

D. The videos could not be received under the residual hearsay exception, pursuant to §908.08(7)

In its Response to the Postconviction Motion, the state argued that even if the videos of the forensic interviews of all three alleged victims could not be received pursuant to §908.08(3)(c) or as prior inconsistent statements, they could be received under the residual hearsay exception, pursuant to §908.08(7). That section provides that an audiovisual recording of an oral statement of a child who is available to testify may be received, as hearsay, if it is "admissible under this chapter as an exception to the hearsay rule."

The state noted in its Response that this argument had not been made by the state at the trial. In its Decision denying the Postconviction Motion, the Court agreed with that argument and held that, "all three victims' statements were admissible under section 908.08(7) and the residual hearsay exception." (R64, p. 5; App. p. A23).

In *State v. Sorenson*, 143 Wis.2d 226, 421 N.W. 2d 77 (1988), the Supreme Court held that in order to allow this hearsay exception to be used, especially as it applies in regard to prior, out-of-court statements made by children in sexual assault cases, certain factors must be present.

This is required in order to satisfy the requirements of the defendant's constitutional rights under the Confrontation Clause. The factors that the Court must consider, the Court held, are:

> (1) the attributes of the child, including her ability to "communicate verbally, to comprehend the statements or questions of others, to know the difference between the truth and falsehood, and any fear of punishment, retribution or other personal interest…;
>
> (2) the person to whom the statement had been made, "focusing on the person's relationship to the child";
>
> (3) the circumstances under which the statement was made…;
>
> (4) the content of the statement, particularly whether there was "any sign of deceit of falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age";
>
> (5) any corroborating evidence, "such as physical evidence of assault, statements made to others, an opportunity or motive of defendant…".
> Id. at 245-246.

In *Sorenson*, the Court allowed the statement that had been made by a child to a social worker to be received in evidence at the trial. Further, in *State v. Snider*, 2003 WI App 172, 266 Wis. 2d 830, 668 N.W. 2d 784, a forensic interview of a child was allowed to be received under the residual hearsay exception pursuant to the factors set forth in *Sorenson* even though the requirements for its admission under §908.08(3) had not been met.

As the state pointed out, §908.03(24) requires, at a minimum, that hearsay evidence must have a "circumstantial guarantee of trustworthiness". In this case, however, there were numerous factors that could not guarantee the trustworthiness of the victims' statements in their respective forensic interviews.

OEG, who was 7 years old, seemed to be rather confused during the interview, insisting that the incidents with the defendant had happened when she was 4 and 7 years old, even though she had not lived with the defendant when she was 4 years old. She also contradicted herself

several times as to what exactly happened, stating at times that the defendant had touched her under her clothes and, at other times, over her clothes. When she testified at the trial, she refused to testify at all about what happened in regard to the defendant.

LAG, who was 5 years old, during the interview, gave rather detailed accounts of what happened in regard to the defendant but when she testified at the trial, she admitted that her mother had told her what to say and that someone else told her what to say. She also said that she had talked to her sisters about what to say.

Finally, NLG, who was 4 years old, stated during the interview, after a great deal of coaxing, that the defendant had taken her clothes off and licked her on her back, hand and butt. However, at the trial, she insisted that she had never talked to the interviewer and had never told him anything that had happened to her in regard to the defendant.

There were, in other words, problems with the information given in the forensic interviews, especially comparing them with the statements the victims testified to at the trial, and they were neither reliable nor trustworthy. For these reasons, none of the three forensic interviews should have been admitted at the trial and, as the state pointed out in its Response, they had not, in fact, been admitted in evidence under this provision of §908.08.

E. The transcripts of the three forensic interviews had not been prepared by court reporters and had not been certified, and further had not been recorded in the record of the trial, and, therefore, had been improperly received in evidence at the trial

In the Postconviciton Motion, it was noted that the three forensic interviews of the three alleged victims had been prepared, by order of the Court, by the District Attorney's office. There was no certification attached to any of these transcripts that they had been prepared by a certified court reporter or that the information in them accurately reflected the words in the

audiovisual recordings. It was also noted that §885.42(4) provides that, "At trial, videotape depositions shall be recorded unless accompanied by a certified transcript…".

It was argued that in *State v. Ruiz-Valez,* 2008 WI App 169, 314 Wis. 2d 724, 727, 762 N.W. 2d 449, the Court had held that if an audiovisual recording of a forensic interview under §908.08 is received in evidence, §885.42(4) applies because the oral statement of a child who is available to testify constitutes "the testimony of that child", whether she is sworn or not. The Court also held that since the official court reporter at the trial had not transcribed the audiovisual recordings that had been received in evidence and played to the jury, the defendant was entitled to have his convictions reversed.

It should also be noted that when the statute was enacted, the Judicial Council Notes stated that, "This subdivision establishes that matters presented by videotape at trial are made part of the trial record in anticipation of a possible appeal."

In this case, there is no record in the trial transcripts of any of the words of the witnesses during the three forensic interviews. In its Response to the Postconviction Motion, the state argued that after *Ruis-Velez* had been decided, the legislature amended §885.42(4) to read that, "At trial, videotape depositions shall be reported unless accompanied with a certified transcript submitted in accordance with SCR 71.01(2). That rule provides that, "All proceedings in the circuit court shall be reported, except for the following:

> (d) If accompanied with a certified transcript, videotape depositions offered as evidence during any hearing or other court proceeding.
>
> (e) Audio and audiovisual recordings of any type, in not submitted under par.(d), that are played during the proceeding, marked as an exhibit, and offered into evidence…. The court may direct a party or the court reporter to prepare the transcript of a recording submitted under this paragraph.

The state also argued that in *State v. Marinez*, 2010 WI App 34, 324 Wis. 2d 282, 781 N.W. 2d 511, the Court stated that the statute "no longer requires video statements played during the proceeding to be reported." Id. at footnote 4. In its Decision denying the Postconviction Motion, the Court held that it agreed with the state's arguments and held that since §885. 42 (4) did not require that the videos be transcribed, then, in accordance with *Marinez*, it had not been improper to receive the transcripts in evidence at the trial. (R64, p. 5; App. p. A23). Besides, the Court noted, defense counsel had not objected to their receipt in evidence on that ground and, in any event, no showing had been made that the transcripts had been inaccurate. (R64, p. 5; App. A23).

Actually, both the state and the Court in this matter misinterpreted the new rule regarding the transcriptions of video recordings that are received in evidence at a trial. When the new Rule 71.01(2) was ordered by Wisconsin Supreme Court, the Court also required that "the Committee of Chief Judges and District Court Administrators collaborate with appellate practitioners and other interested parties to evaluate whether amendments to Wis. Stats. §885.42(4) may be warranted. *Marinez*, at footnote 4.

In response to that Order, the legislature amended §885.42(4) to read that, "At trial, videotape depositions shall be reported unless accompanied with certified transcripts submitted, in accordance with SCR 71.01(2)(d). The new statute did **not** include both subdivisions (d) and (e) of Rule 71.01(2). It only stated that the videotapes be reported unless accompanied by certified transcripts. The new statute did not provide for allowing videotapes to be received under subdivision (e) of Rule 71,01(2)(e), which allows them to be received and played as long as they were marked as exhibits and offered into evidence.

Therefore, since the audiovisual recordings of the three forensic interviews were not accompanied with certified transcripts, they were not allowed to be received in evidence. It was not fair to allow the jurors in this case, who were all given transcripts of the three interviews which had been prepared by an unknown and uncertified person, and which had not been authenticated, to consider them to be reliable transcripts of the interviews.

The receipt of them into evidence and the failure to record them into the record of the trial cannot be considered harmless error. Since two of the victims never even testified at the trial as to what had happened to them, it had been on the basis of the interviews and the uncertified transcripts that had been provided to the jurors that the defendant had been convicted of the crimes in regard to all three victims. For all of these reasons, the transcripts of the three forensic interviews should not have been received in evidence and given to the jurors.

F. The procedures used by the Court in regard to the receipt into evidence of the audio-visual recording of the forensic interview of NLG and her trial testimony was in complete violation of §908.08(5) and entitles the defendant to a new trial.

In the Postconviction Motion, it was argued that the Court had erred in regard to the admission of the recording of the forensic interview of NLG and the taking of her trial testimony. Section 908.08(5) provides that,

> If the court… admits a recorded statement under this section, the party who offered the statement into evidence may nonetheless call the child to testify immediately **after** the statement is shown to the trier of fact. Except as provided in par. (b), if that party does not call the child, the court… upon request by either party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.

In *State v. James*, 2005 WI App 188, 285 Wis. 2d 783, 790, 703 N.W.2d. 727, the Court held that the statute required the court to present the videotapes first and then the live testimony

would come after that. The Court held that the language of that statute was "couched in mandatory terms and unambiguously requires the videotape to precede direct and cross-examination." Id. at 793.

In this case, the Court completely failed to abide by that statute. The Court insisted that NLG testify in person first and then have the video recording played to the jury after that. The Court contemplated having her called a second time as a witness to be cross-examined by defense counsel. By insisting that she testify before the video had been played, it became clear that there was no use in attempting to cross-examine her about the video because she testified that she had no recollection of having even talked to the interviewer.

In *James,* the Court held that if the trial court failed to abide by the procedure mandated by the statute, the defendant was entitled to have his conviction reversed and a new trial ordered. Id. at 802-803. In its Response, the state argued that the statute is "extremely rigid and would strictly control the presentation of evidence by the state." That was precisely the argument that the state had made in *James.* In response to that argument in *James,* the Court held that the legislature has the ultimate authority to spell out the procedure to be used in a child sexual assault case when the state wishes to present an audiovisual recording of the child's forensic interview. Id. at 800.

The Court held that the statute controls over other statutes that give the court authority to control "the admission, order, and presentation of evidence." Id. at 801. The Court concluded that the trial court had "exceeded its discretion in refusing to obey [the statute] and for that reason, it reversed the defendant's conviction and ordered a new trial. Id. at 803.

In this case, the Court also refused to obey the statute. In denying the Postconviction Motion, the Court stated that "it stands by its ruling" in having NLG testify first and then having

the video played. (R64, p. 5). The court stated that it found it "appropriate to have NLG testify first in order to prevent prejudice to the defendant should her testimony lead to the exclusion of the video." The Court continued, "the court offered the defendant an opportunity to cross-examine NLG after the video was played, which he waived. There was nothing improper about this procedure." (R64, p. 5).

Actually, the statute removed the authority of the Court to decide whether to have the witness testify first and then have the video played, and the legislature had good reason for requiring the video to be played first. The procedure used by the Court was entirely improper, especially since it would have subjected NGL to have to testify twice if defense counsel had decided to cross-examine her about her statements in the video- which was exactly what the statute was meant to prevent. In accordance with *James,* the defendant is entitled to a reversal of his convictions and a new trial ordered.

G. The Court failed to review the entirety of the audiovisual recordings of the three forensic interviews, as required by §908.08(2), before making its determination as to their admissibility, and therefore, the defendant is entitled to have his convictions reversed and a new trial ordered.

It was argued in the Postconviction Motion that §908.08(2)(b) requires that after the state has given notice that it intends to introduce audiovisual recordings of statements of children at the trial, the Court is required to view the statements. Then the Court is to make a determination as to whether the statements would be admissible. In making that determination, the Court is required to find that the recording is "accurate and free from excision, alteration and visual or audio distortion." §908.08(3)(b).

The Court must also make a finding that, "the time, content and circumstances of the statement provide indicia of trustworthiness." §908.08(3)(d). It was argued that in this case, the

Court did not view the videos and instead stated that it would only watch the first few minutes of the videos of NLG and LAG. The Court did not make any of the findings required by the statute and, instead, held that they were admissible.

In its Response, the state argued that the statute did not require that the Court view the entire statement in the forensic interview before making its determination to admit it. In its Decision denying the Postconviction Motion, the Court held that it had reviewed "all relevant portions of the videos necessary to make its ruling on their admissibility, including the end of the interview with NLG." The Court also noted that it had viewed all three videos in their entirely during the trial and that there had not been anything in them "which altered the court's view of their admissibility." The Court concluded that it was standing by its ruling in the matter. (R64, p. 4; App. p. A22).

The problem with that ruling is that it would not have been possible for the Court to make a finding that the audiovisual was free from excision, alteration or distortion until it had viewed the entire video. And the statute does not envision a backward determination of the admissibility of the videos after they had already been received in evidence and shown to the jury. Since the Court failed to abide by the procedure set forth in the statute and received the videos without viewing them in their entirety before the trial, as required by the statute, the Court's determination that they were admissible had been made in error. The defendant is, therefore, entitled to have his convictions reversed and a new trial ordered.

It should be noted that all of these rules and regulations for the admission of audiovisual forensic interviews of children at the trial of the defendant are meant to protect the defendant's constitutional right to Confrontation. All of these interviews are hearsay, and in a case such as this, where the witness herself did not even testify during the trial about what happened, the jury

was making its determination of the defendant's guilt solely on the basis of hearsay. At the very least, the defendant is entitled to the protections set forth in the various statutes for the admission of the interviews at the trial.

CONCLUSION

The defendant respectfully requests that this Court reverse the denial of the Postconviction Motion by the Circuit Court of Milwaukee County and reverse the defendant's convictions for two counts of Sexual Assault of a Child in the first degree (sexual contact of a child less than 12 years old) and one count of Sexual Assault of a Child in the first degree (sexual intercourse with a child less than 12 years old) and order a new trial.

Dated: February 23, 2019
Milwaukee, Wisconsin

Esther Cohen Lee
Attorney for Defendant- Appellant
State Bar No. 1002354

759 N. Milwaukee Street, Suite 410
Milwaukee, Wisconsin

Tel: (414) 273-2001

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) Wis. Stats. for a brief produced with a proportional serif font.

The brief contains 9,183 words.

Dated: February 23, 2019

_____

Esther Cohen Lee
Attorney for Defendant-Appellant

CERTIFICATION AS TO 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 §809.19(12) Wis. Stats. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with paper copies of this brief filed with the court and served on all opposing parties.

Dated: February 23, 2019

Esther Cohen Lee
Attorney for Defendant- Appellant
State Bar No. 1002354

759 N. Milwaukee St. #410
Milwaukee, Wisconsin 53202

Tel. No. (414) 273-2001