STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,
Plaintiff- Respondent,

v.

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

REPLY BRIEF OF DEFENDANT- APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

POINT I

THE COURT ERRED IN RECEIVING INTO EVIDENCE THE AUDIO-VISUAL FORENSIC INTERVIEWS OF THE THREE YOUNG VICTIMS, AND THEREFORE, THE DEFENDANT IS ENTITLED TO HAVE HIS CONVICTIONS REVERSED AND A NEW TRIAL ORDERED.

A. The Court's failure to make a finding, required by §908.08(3), that the children's statements had been made with an understanding that it was important to tell the truth and that false statements would be punishable.

It was noted by the appellant that §908.08(3)(c) Wis. Stats. provides that an "audio-visual video recording of an oral statement of a child who is available to testify may only be admitted if the court finds that the child's statement was made under oath or upon the child's understanding that false statements are punishable and of the importance to tell the truth. This is a different test than the test for receiving the child's live testimony and in this case, the Court appeared to confuse the two tests.

In regard to the youngest victim, NLG, who was only four years old at the time of the forensic interview, the Court held that the child could testify in person at the trial as long as she could testify about what happened to her. The Court also improperly held, that she could testify before the video was shown. The Court also held that if NLG did not say anything, there would be no opportunity to cross-examine her and that then, the video could not be used.

The state conceded that NLG had stated that she did not know the difference between the truth and lie and that she had even become confused in answering questions about her surroundings. However, the state argued, her statements in the video had satisfied the statute and were admissible.

The problem with that argument is that the Court had never made a finding, as required by the §908.08(3)(c), that NLG understood that false statements would be punishable and that it was important to tell the truth. During the forensic interview, NLG was asked by the

interviewer, “So let me ask you something… do you know what the truth is and a lie is?” She answered, “No.” (Transcript of forensic interview of NLG, August 15, 2015, pp. 4-5). When she was asked, “Do you think it’s important to tell what’s right?”, she did not answer the question. (Id. at p, 7). Also, when she was asked, “… so what happens when somebody says something that’s wrong and an adult finds out about it?” She replied that she did not know. Id. at pp. 7-8.

There was nothing in that interview that satisfied the test set forth in statute for the admission of it. And the Court never made a finding that the interview had met that test. For that reason, the video of the interview should not have been received in evidence and shown to the jury.

B. The improper finding that the audio-visual videos of the three victims could be received in evidence as prior inconsistent statements.

It was argued by the appellant that the forensic interviews of the three victims could not be received in evidence as prior inconsistent statements. The state argued that the interview of NLG could be received as a prior inconsistent statement because she had testified that she did not know the interviewer and had not talked to him about things that had happened in the basement with Viego.

The state argued that her testimony allowed the video to be received as a prior inconsistent statement because in the video, she had described what had happened with Viego. The state argued that it was admissible under §908.08(7) as an exception to the hearsay rule. The Circuit Court held that the video regarding NLG was admissible as a prior inconsistent statement, pursuant to §908.01(4)(a)(1).

Section 908.01(4)(a)1 provides that, a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination about it, and the statement is inconsistent with the declarant's testimony.

However, audio-visual recordings of the statements of children must meet the requirements of §908.08 to be admitted into evidence. The state argued that subdivision (7) of that statute provides that at a trial, the court could admit an audiovisual recording of a child's oral statement which is admissible as an exception to the hearsay rule. The state further argued that since a prior inconsistent statement constitutes an exception to the hearsay rule, then any such statement would be admissible.

However, there are restrictions to the admission of prior inconsistent statements as exceptions to the hearsay rule. Section 906.13(2)(a) provides that a prior inconsistent statement by a witness is not admissible unless the witness had an opportunity to explain or deny the statement, the witness has not been excused, or the interests of justice require it.

The state argued that all three of these conditions had been met in this case. However, due to the Court's failure to abide by the statute dealing with the order in which the evidence was to be received, the first two conditions could not be met. Instead of having the video played first and then having the witness testify, as required by the statute, the Court had the victim testify and then played the video. As a result, when the witness denied that she had met with the interpreter and that she did not remember telling him about what had happened, she had no opportunity to explain or deny her prior statement. She, therefore, would not have been able to give further testimony upon cross-examination.

In regard to the interests of justice, the state argued that since the state could not prove its case against the defendant in regard to NLG without the admission of the video, it was allowed

to be received on that ground alone. The only statute that provides for the use of an interest of justice excuse for the admission of an audio-visual recording of a statement of a child is §908.08(3) which deals with children of a certain age. The statute provides that, "In determining whether the interests of justice warrant the admission of an audiovisual recording of a statement of a child who is at least 12 years of age but younger than 16 years of age…", the Court is to consider certain factors. There is no such statute allowing for the admission of videos in the interest of justice for children under the age of 12.

For these reasons, none of the three conditions for the admission of prior inconsistent statements as exceptions to the hearsay rule have been met in this case so the video of NLG was not allowed to be received as a prior inconsistent statement.

C. The improper finding that the videos of the forensic interviews could be received under the residual hearsay exception, pursuant to §908.08(7).

The state argued that the videos could be received pursuant to §908.08(7). It was conceded by the state that this argument had not been made by the state during the trial. Section 908.08(7) provides that, "At a trial… a court… may also admit into evidence an audiovisual recording of an oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule." The Circuit Court held that all three of the victims' statements were admissible under this section.

The state argued that one hearsay exception is the "residual hearsay exception", pursuant to §908.03(24). That section provides that the following is not excluded by the hearsay rule: "(24). A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."

In *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988), the Supreme Court set forth five factors that the Court had to consider in order to allow a child's statement to be received under §908.08(7) and the residual hearsay exception. Id. at 245-246.

The state argued that there were no signs of deceit or falsity and there had been corroborating evidence in the form of statements that had been made to other people. However, in order to be admissible under the residual hearsay exception, at a minimum, the statute requires the hearsay evidence must have a "circumstantial guarantee of trustworthiness".

As it was pointed out by the appellant, OEG, who was 7 years old, seemed to be confused during the interview, insisting that the incidents 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, stating that the defendant had touched her in her "private part" over her underwear, not under her underwear. (Forensic interview of OEG, August 16, 2017, pp. 15-16, 18.) Yet she also testified that when he touched her private part, he touched her under her clothes. Id. at p. 14. 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 had happened in regard to the defendant but when she testified at the trial, she admitted that her mother and another person, as well as her sisters, had told her what to say.

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

The statements made by the three victims during their forensic interviews disproved any finding that there were circumstantial guarantees of trustworthiness about them, and for that reason, they could not be received in evidence under §908.08(7) or the residual hearsay exception under §908.03(24).

D. The improper findings that the jurors could be given uncertified copies of the transcripts of the forensic interviews and that it had not been necessary to include the transcripts of the interviews in the record of the trial .

The appellant argued that the only transcripts of the three forensic interviews of the victims in this case had been prepared by the District Attorney's office and that there had been no certification attached to them that they had been prepared by a certified court reporter. It was also noted that none of the interviews had been included by the court reporters in their certified transcripts of the court proceedings.

The statutes and rules about these matters have changed over time but in the end, they still require that any transcript of an interview be certified before it is received in evidence and shown to the jury. Further, the official transcript of the trial that is certified by the court reporter must include the interview. The current statute in regard to these matters is §885.42(4). It states that, "At trial, videotape depositions shall be reported unless accompanied with a certified transcript submitted in accordance with SCR 71.01(2)(d). SCR71.01(2) provides that, all proceedings in the circuit court shall be reported, except :(d) videotaped depositions when accompanied with a certified transcript, or (e), audiovisual recordings that are played during the proceeding, marked as an exhibit and offered into evidence.

The Circuit Court held that since the videos had not been required to be transcribed, they had been admissible. The state argued that since the videos were played at the trial, the transcripts of those videos could be received in evidence.

The appellant argued that the words in the videos had to be reported in the transcript of the trial because the transcripts of the videos had not been certified as to their authenticity. The fact that the videos had been played during the trial, marked as exhibits and offered into evidence did not mean that the videos did not have to be reported in the trial transcripts because under the amended §885.42(4), the only exception for not reporting them was under subdivision (d) which required a certified transcript of the videos. Subdivision (e) was not included in the amended statute as being an exception to that reporting rule.

The state argued that since the forensic interviews had not been made under oath, the new rule did not apply to the requirement that they be reported. Forensic interviews are never made under oath – they are part of a police interrogation procedure. It was noted in the Judicial Council Notes when the statute was enacted, 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, due to the fact that the videos were never recorded and due to the fact that the transcripts of them had never been certified, there is no trial record of any of these videos.

The state further argued that there was no objection made to the receipt into evidence of the uncertified transcripts. However, in *State v. Ruiz-Valez,* 2008 WI App 169, 314 Wis. 2d 724, 762 N.W.2d 449, no such objection had been made. Nevertheless, the Court held that since the official court reporter had not transcribed the audiovisual recordings, the defendant was still entitled to a reversal of his conviction.

Nor could this be considered harmless error, as argued by the state. Since two of the victims never even testified at the trial as to what happened to them, it had been solely on the basis of the forensic interviews and the uncertified transcripts provided to the jurors that they had found the defendant guilty. The error in failing to provide the jurors certified transcripts of the

interviews and in failing to record the words of those interviews in the court's record were not harmless.

E. The failure of the Court to review the entirety of the audiovisual recordings as required by §908.08(2) before making its determination as to the admissibility

The appellant argued that §908.08(2)(b) requires that after the state has given notice that it intends to introduce audio-visual recordings of statements of children at a trial, the Court is required to view the statements to determine their admissibility. 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).

In this case, the Court stated that it would only watch the first few minutes of the videos of NLG and LAG. The Court did not make any findings required by the statute and, instead held that they were admissible. In denying the Postconviction Motion, the Court stated that it had reviewed "all relevant portions of the videos necessary to make its ruling on their admissibility… and it noted that it had viewed all of the videos in their entirety during the trial.

The state argued that since the Court stated that it had viewed the relevant portions of the videos, it had not been necessary to view all of the parts of the videos. However, the statute is very clear. The legislature was obviously aware of the extreme importance of these videos. It would completely alter the intention of the legislature to allow the Court to state, after the videos had been shown to the jury, that it had not found any problems with them. For that reason, the Court's failure to review the videos before they had been shown to the jury could not be considered harmless error.

F. The Court's insistence that NLG testify before the video of her forensic interview was shown to the jury, contrary to §908.08(5), resulted in defense counsel's

inability to cross-examine her.

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." It has been held in *State v. James*, 2005 WI App 188, 285 Wis.2d 783, 790, 703 N.W. 2d 727, that the statute is mandatory and requires the videos to be shown first and then the live testimony be presented.

It was argued by the appellant that the Court completely failed to abide by that statute in regard to NLG. The Court insisted that she testify before the video was played and then she would be called to testify a second time so she could be cross-examined. However, when she testified, she made it clear that she had no recollection of speaking with the interviewer so there was no use in attempting to cross-examine her.

The state argued that the defendant had not objected to this procedure so he had not preserved the error. In any case, the state argued, the error had been harmless. The Circuit Court held that it had followed this procedure in order to prevent prejudice to the defendant in case her testimony led to the exclusion of the video.

However, the statute removed the Court's authority to make that decision. The legislature specifically did not want a situation, as proposed by the Court, that would require the victim to testify twice. In *James*, the defendant did not raise an objection to the procedure directed by the Court to have the victim testify first and then the video would be shown. Nevertheless, the Court ordered the defendant's convictions reversed. Further, the Court's directive in this case could not be considered harmless error because by requiring the victim to testify first, it became clear that she could not testify about what had happened so there had been no opportunity for defense counsel to cross-examine her.

For all of these reasons, 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 and order a new trial.

Dated: May 24, 2019
Milwaukee, Wisconsin

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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 Reply Brief, excluding the signature portion, contains 2,995 words.

Dated: May 24, 2019

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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: May 24, 2019

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