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WISCONSIN SUPREME COURT

STATE OF WISCONSIN,
Plaintiff- Respondent- Petitioner,

v. Appeal No. 2018AP2419-CR

ANGEL MERCADO,
Defendant- Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. JEFFREY A. CONEN, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS OF APPENDIX

TABLE OF AUTHORITIES

Page

State Cases

Statutes

United States Supreme Court Cases

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; Supplemental Appendix, pp. SA1-SA3). 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 bound the defendant over for trial. (R68, pp. 1-15). An Information was filed on that date, charging the same three Counts that had been charged in the Criminal Complaint. (R6, pp. 1-2; Supp. App., pp. SA4- SA5). The defendant was arraigned on the Information on September 27, 2016 and entered a plea of not guilty. (R69, pp. 1-5).

3. On October 19, 2016, the state filed three Notices that it intended to offer into evidence of three video-recorded statements of the three young, female victims, OEG, age 7, LAG, age 5, and NLG, age 4. (R9, pp. 1-3; Supp. App., pp. SA6- SA8). 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 the three video-recorded statements. (R71, pp. 1-28; App. pp. A174-A189). The Court reserved decision of 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.

4. On November 9, 2016, the jury trial commenced in this matter in the Circuit Court of Milwaukee County, the Hon. Jeffrey A. Conen, presiding. (R72, pp. 1-6; App. pp. A190-194). On November 10, 2016, the Court declared a mistrial in order to have the video-recorded statements of the three victims transcribed for the interpreters to use in interpreting them for the defendant.

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 23, 2017, a conference was held off the record. The Clerk noted in the CCAP account of the case that, after both sides had rested, the state had 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." (Supp. App. pp. SA9- SA10).

7. The next day, January 26, 2017, the jury rendered its three verdicts, finding the defendant guilty of all three Counts given to it for its consideration. (R31, pp. 1-3; Supp. App., pp. SA14-SA16).

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 each for his convictions under Counts 1 and 3, Sexual Assault of a Child in the first degree (sexual contact of a child less than 12 years old), relating to NLG and OEG, with 10 years of initial confinement and 3 years of extended supervision for each count;

b. 32 years for his conviction under Count 2, Sexual Assault of a Child in the first degree (sexual intercourse of a child less than 12 years old), relating to LAG, with 25 years of initial confinement and 7 years of extended supervision;
c. 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; Supp. App. SA17). A Judgment of Conviction was filed on April 12, 2017. (R37, pp. 1-2; Supp. App. SA18- SA19).

10. On April 26, 2017, a Notice of Intent to pursue Postconviction Relief was filed on behalf of the defendant. (R39, p. 1). On May 30, 2017, an Order Appointing Counsel was issued, appointing Esther Cohen Lee to represent the defendant on appeal.

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 a new trial ordered. (R49, pp. 1-18; App. pp. 156-173). On November 9, 2018, the state filed a Response to the Postconviction Motion. (R58, pp. 1-8; App. pp. 148-155). 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. A143- A147). A Notice of Appeal was filed on December 18, 2018. (R65, pp. 1-2). An Order Appointing Counsel was issued on December 21, 2018, assigning Esther Cohen Lee as counsel to represent the defendant in the Court of Appeals.

13. On February 26, 2019, the Appellant's Brief and Appendix was filed on behalf of the defendant in the Court of Appeals, District I. The Respondent's Brief was filed by the state on May 14, 2019. A Reply Brief was filed on behalf of the defendant on May 29, 2019. On February 4, 2020, the majority of the Court of Appeals, District I, issued a Decision reversing the

Judgment and Order, and remanding the case to the Circuit Court. (App. pp. A101-A122). A dissent was also issued. (App. pp. A123- A142).

14. On March 5, 2020, the state filed a Petition for Review in the Supreme Court of Wisconsin. A Response to the Petition was filed on behalf of the defendant on March 17, 2020. The Supreme Court issued an Order on May 19, 2020, granting the Petition for Review. On June 12, 2020, an Order Appointing Counsel was issued, appointing Esther Cohen Lee to represent the defendant in the Supreme Court. (Supp. App., SA20).

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 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 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 caretaker, helping him with his meds, appointments, phone calls, showers, and household duties. (R77, p. 14). The apartment in which they lived 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." C.C. asked her 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 she answered, "Yes." CC. asked her, "Who, Viego?" 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. Lanack 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, the records showed that she had asked her "why are you here today?" She said that the records showed that she 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 "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 C.C. had testified at the trial, the state called Officer Trish 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 as a witness. 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 to the basement and licked her private parts, she was also 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 parts 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 had also been 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. 43). 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 that 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 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 and it 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 it 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 of 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, p. 38). 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 and 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. (R78, 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 to 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 th girls to the basement, that he had ever lifted any of them onto a table, or that he had 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 send 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 deliberations 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, p. 58).

After the defendant and Officer Klauser had testified, the Court instructed the jury. Both the prosecutor and defense counsel then gave their closing arguments. After the jury had been sent to the jury room, a conference was held off the record, during which 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), as opposed to sexual intercourse of a child. That Count did not require a mandatory minimum of 25 years imprisonment. (Supp. App., pp. SA9- SA10).

The next day, while the jury was deliberating, it sent out three notes. The first note asked to see the charging document but the Court told the jurors that the charges had been set forth in the instructions. (R30, p. 1; Supp. App., p. SA11). The second note asked, "Can we see the comments that all 3 girls said to the medical staff during their exam?" The Court replied, "You must rely on your collective memory." (R30, p. 2; Supp. App. p. SA12). Finally, the third note asked, "Can we see the transcripts for OEG's interview?" The Court again responded, "You must rely on your collective memory." (R30, p. 3; Supp. App., p. SA13).

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; Supp. App. pp. SP14- SP-16).

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 the defendant be sentenced to the mandatory minimum of 25 years imprisonment for his conviction under Count 2, and 5 years of imprisonment each for Count 1 and Count 3, to run consecutively.

Defense counsel recommended that all three sentences be run concurrently, due to the mandatory minimum required for Count 2. She noted that the defendant himself had been the victim of sexual assault as a child and that he 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 made numerous 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 and that, although Dr. Dickey had made a finding in the presentence report that he had a low risk to offend, it did not necessarily agree with that. (R81, p. 32). The Court stated that it had given the defendant for agreeing to undertake sex offender treatment. (R81. pp. 38-39).

The Court then sentenced the defendant to 32 years for his conviction under Count 2, with 25 years of initial confinement and 7 years of extended supervision. It also sentenced him to concurrent sentences under Count 1 and Count 3, as set forth above. (R81, p. 42; Supp. App. p. SA17). In imposing those sentences, the Court noted it was imposing the 25 year sentence of imprisonment under Count 2 because it was required to "handle this" that way. (R81, p. 42).

POINT I

THE COURT ERRED, FOR NUMEROUS REASONS, IN RECEIVING INTO EVIDENCE THE AUDIOVISUAL FORENSIC INTERVIEWS THAT THE THREE YOUNG VICTIMS HAD HAD WITH THE POLICE FOR NUMEROUS REASONS AND, THEREFORE, THE DEFENDANT WAS DENIED A FAIR TRIAL.

A. The Court failed to make a finding, pursuant to §908.08(3)(c) that the victims' statements had been made with the understanding that it was important to tell the truth and that false statements would be punishable.

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; Supp. App. pp. SA 6- SA8).

1. The discussion of the forensic interviews of NLG and LAG at the pretrial hearing.

On November 8, 2016, a pretrial hearing was held before the Hon. Jeffrey A. Conen to discuss the three Notices regarding the audiovisual statements of LAG and NLG. (R71, pp. 1-28; App. pp. A174-A189). At the hearing, Ms. Bowe specifically objected to the introduction of both of their statements. She argued that NLG "evinces in this interview… zero ability to be able to tell the truth and a lie, and I believe, therefore, her forensic interview should not be admissible." (R71, pp. 7-8; App. pp. A175-A176).

She also noted that the investigator who had interviewed NLG had specifically warned that NLG had been "unable to articulate the difference between the truth and lie or right or wrong… and she did not understand that there were consequences for telling lies and could not say whether it was important to tell the truth." (R71, p. 9; App .p. A177).

The Court, noting that they were dealing with §908.08(3)(c) stated that, "You're talking about a four-year-old where the argument is being made that she is too young to really

understand what it means to tell the truth or to lie and is unable to really communicate that." (R71, p. 9; App. p. A177). The Court and counsel also dealt with the same problems with LAG. The Court noted that NLG and LAG may have a problem on cross-examination in that they would not respond." (R71, p. 11; App. p. A179). Mr. Schindhelm told the Court that he did not believe NLG would be able to answer questions. (R71, p. 12; App. p. A180).

Ms. Bowe noted that they would have the same problem with LAG. (R71, p. 13; App. p. A181). She noted that the report stated that, "She seemed to have difficulty understanding if it was important to tell the truth and if she could promise to tell the truth." ((R71, p. 14; App. p. A182).

Upon hearing Ms. Bowe's concerns about both NLG and LAG, the Court indicated that the state might not even be able to prove the charges relating to NLG and LAG. (R71, p. 17; App. p. A185). The Court specifically indicated that the problem related to both "the four-year-old and the five-year-old". (R71, p. 18; App. p. A186).

2. The discussion of the forensic interviews of LAG and NLG at the first jury trial.

Prior to the jury selection at the first trial, the Court began by noting that it had had discussions with the prosecutor and defense counsel the day before, both on the record and in chambers, about the audiovisual recordings and whether the witnesses were required to understand the importance of telling the truth. (R72, pp. 3-4; App. pp. A191- A192).

The Court noted that it had, by then, reviewed the "relevant portions" of the interviews with NLG and LAG and that it felt that both witnesses were competent to testify. (R72, pp. 4-5; App. pp. A192- A193). The competency of the witnesses to testify did not resolve the issues relating to the admission of the audiovisual recordings. Therefore, Ms. Bowe reminded the Court that she had objected to the receipt into evidence of the audiovisual recordings because, as

to NLG, she was "unable to articulate the difference between truth and lie or right and wrong." (R72, p. 6; App. p. A194). She further argued that NLG "did not understand consequences for telling lies and could not say whether it is important to tell the truth. I believe that is on the CD interview, and I believe that the witness should not be allowed to testify." (R72, p. 6; App. p. A194).

The Court then made a very specific ruling about her objection. The Court stated, "Well you made your record. I disagree, and your objection is overruled at this point. (R72, p.6; App. p. A194). A mistrial was then declared so that the recordings could be transcribed.

3. The discussion of the forensic interviews of LAG , NLG and OEG at the second trial.

At the second jury trial, on January 24, 2017, Officer Trisha Klauser testified about she had conducted forensic interviews of LAG and OEG on August 16, 2016. She first interviewed LAG, who was five years old. The DVD of LAG's forensic interview, and the transcript of it, were offered and received as evidence. (R77, pp. 58-59). Although Ms. Bowe did not object to LAG's forensic interview being received, as noted above, she had already voiced her objections to it during the pretrial hearing and the first trial.

That afternoon, LAG testified and although she gave details about what had allegedly happened between her and the defendant, she also stated that her mother, her sisters, and other people had helped her say what she should say. (R75, pp. 23-24, 27).

After LAG finished testifying, the audiovisual recording of the interview of OEG was played and the jurors were given transcripts of it. When OEG testified, she did not testify to anything that had happened between her and the defendant but just stated that she had talked to the officer. (R75, p. 36). Upon cross-examination, she refused to discuss anything about the defendant because, she said, she was scared. (R75, pp. 38-40). She even refused to recognize a

picture of the defendant. (R75, p. 43). The only evidence introduced at the trial in regard to OEG's allegations was the audiovisual recording she had made with the officer.

Then, NLG, who was four years old, was to be the next witness. Before she testified, Ms. Bowe objected to her testifying because of the "truth and lack-of -truth issue." (R75, p. 45). The Cout stated that if NLG could not take the oath and could not agree to tell the truth, she could still testify/ Ms. Bowe argued that she should not be allowed to testify if she could not take the oath or agree to tell the truth. (R75, p. 46).

NLG was then called as a witness. In its preliminary interview of her, when the Court asked her if she knew "the difference between the truth and a lie", she answered, "No." She also said that she did not believe "bad stuff" would happen to a child if she told an adult "something that's wrong or not true." She said that a child would not get in trouble if she told her mom something that was not true. She also said that she did not know the difference between something that was real and unreal. (R75, pp. 51-52).

At a sidebar at that point, Ms. Bowe argued that a child should not be allowed to testify unless she had made a showing of some ability to tell the difference between the truth and a lie and the consequences for not telling the truth. She then asked the Court not to allow NLG to testify. (R75, pp. 54-55). The Court had not yet determined whether the audiovisual recording of NLG was admissible except that it had determined that it was only be admissible if there was a "reasonable opportunity to cross-examine" her as a competent witness. (R75, p. 58).

On January 25, 2017, Ms. Bowe argued that even if NLG could be considered a competent witness, she still had to testify under oath or promise to tell the truth. (R78, p. 6). The Court held that, "if there's the slightest bit that will indicate that this child is going to be able to understand what she is going to testify about and that that's what happened, then she will be

allowed to testify." (R78, p. 11). The Court also said that is she refused to say anything and there was no meaningful opportunity for cross-examination, then the video could not be used. (R78, pp. 13-14). The Court then ordered that NLG testify first and then the video could be played. (R78, p. 14).

NLG was then called to testify. When asked by the prosecutor if she remembered talking to Danny, who was the officer who had interviewed her, she said that she had never seen him before but she remembered talking to him. She said that he did not ask her anything about what happened between her and the defendant. When Ms. Bowe asked her if she had ever talked to Danny about anything about the defendant, she said, "No.". (R78, pp. 21-22).

Ms. Bowe argued that she did not have a meaningful opportunity to cross-examine NLG because she did not even remember the interview. (R78, p. 24). The Court held that it was still going to play the video because it felt that the defense had had a meaningful opportunity to cross-examine her. The Court overruled her objection. (R78, p. 27).

Then, Offficer Danilo Cardenas was called as a witness. He testified that he had interviewed NLG on August 16, 2016. The DVD and the transcript of that interviewed were offered and received as evidence, without objection at that point. (R78, p. 34). However, Ms. Bowe had made all of her objections beforehand, on the record, and they were overruled by the Court. The video was played to the jurors, who were all given copies of the transcript. (R78, p. 39). NLG was not then recalled as a witness. (R78, p. 58).

4. The preservation of the issue relating to whether the Court had failed to make a finding, pursuant to 908.08(3)(c) that the victims had understood the importance of telling the truth when their statements had been made.

Section 901.03(1) provides that, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context…

In this case, the dissent conceded that the issue regarding the admission of NLG's forensic interview had been properly preserved for review on appeal. (App. pp. A138). However, the dissent argued that the issue regarding the admission of LAG's forensic interview, as well as that of OEG, had not been preserved and that, therefore, that issue in regard to them should be considered forfeited. (App. p. A123).

The majority, on the other hand, held that the forensic interviews in regard to all three victims should not have been received in evidence, and that issues regarding a lack of objection should not be considered forfeited because "these videos were essentially the only evidence against Mercado. In fact, the State concedes that 'it likely would not be able to prove' its case against Mercado with regard to NLG without her video." (App. p. A112).

The Court further held that, "Therefore, based on those circumstances, we choose not to apply the rule of forfeiture here." The Court cited as is authority to do so the holding set forth in *State v. Kaczmarski*, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W. 2d 702. It should be noted that it has recently been held that, "The forfeiture rule is a rule of judicial administration, and thus a reviewing court may disregard a forfeiture and address the merits of an unpreserved issue in an appropriate case." *State v. Counihan,* 2020 WI 12, 390 Wis. 2d 172, 185, 938 N.W.2d 530. See also, *State v. Coffee,* 2020 WI 1, 389 Wis. 2d 627, 643, 937 N.W.2d 579.

Further, the Court pointed out, the State had not argued forfeiture "in response to the Postconviction Motion, so the issue was not addressed by the trial court in its denial of that motion." (App. p. A112).

The admission of the forensic interview of OEG will be discussed below since that involves different issues. However, the issue as to the error in the admission of the forensic interview of LAG on the ground that the Court had failed to find that, pursuant to §908.08(3)(c), she had understood the importance of telling the truth when she made her statements, had been clearly preserved by defense counsel at the pretrial hearing and the first trial. Her concerns and objections to receiving LAG's forensic interview on that ground are set forth in detail above.

In order to preserve the issue of the receipt into evidence of an audiovisual recording, it is not required that defense counsel raise those objections again, in the presence of the jury that determines the case. *State v. Kutz*, 2003 WI App 205, 267 Wis. 2d 531, 553, 671 N.W.2d 660. If the issue regarding the admissibility of evidence is objected to by defense counsel at a pretrial hearing, and the Court rules on the admissibility of that evidence prior to trial, the issue is preserved for appeal.

In this case, at the pretrial conference, Ms. Bowe had specifically objected to the introduction of the audiovisual recording of both NLG and LAG (R71, pp. 7-8, 14). And the Court had specifically ruled that after reviewing portions of the interviews of both of those victims. "it was going to allow all of that in". (R72, p. 5). Therefore, the issue regarding not only the forensic interview of NLG but also of LAG was preserved for appellate review.

5. The majority's ruling regarding the merits as to the impropriety of admitting the audiovisual recordings of LAG and NLG because the Court had failed to make a finding, pursuant to §908.08(3)(c), that these victims had understood the importance of telling the truth when the statements were made.

In the majority opinion in this case, the Court noted that in regard to §908.08(3)(c), "we are unable to conclude that the finding required in (c) could be made with regard to LAG and NLG. In their respective forensic interviews, neither child demonstrated a firm understanding of the difference between the truth and a lie, or that there were negative consequences for telling a

lie; indeed this issue was specifically noted in the report of the officer who interviewed NLG." (App. pp. A16- A17). The majority further held that,

> Moreover, although the trial court engaged in a colloquy with each child upon being called to testify to establish this requirement, under Wis. Stat. §908.(3) this finding was to be made *before* ruling that the videos were deemed admissible, based on the statements in the videos- not at trial while taking the children's testimony. (App. p. A17).

As a result, the Court held, the trial court had not complied with the requirements of §908.08(3) in admitting the videos of the three victims. (App. p. A17).

The dissent never reached the merits of the issue. Instead, it stated that the issue in regard to the forensic interview of LAG had been forfeited. (App. p. A137). As set forth above, that issue in regard to LAG had not been forfeited. In regard to the forensic interview of NLG, the dissent stated that it did not feel it needed to reach that issue because it felt that her statements were admissible on a different ground- that they constituted prior inconsistent statements. (App. p. A137). That was also not the case, as will be discussed below.

The determination of the majority in regard to the failure of the trial court to make the findings required by §908.08 (3)(c) is clearly in compliance with the statute and the caselaw interpreting it. Section 908.08 (1) provides, "In any criminal trial… the court… may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section." Section 908.08(3), provides that,

> The court… shall admit the recording upon finding all of the following: …
> (c) That the child's statement was made upon oath of affirmation, or, if the child's development level is inappropriate for the administration 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 *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, when the Court first asked LAG , who was the five years old, "do you know what it means to tell the truth?", she answered, "No." Then when she was asked, "do you know what a lie is?", she answered, "by not telling the truth." (R75, pp. 11-12). However, then she said that she did not know when her birthday was and that she was in the fifth grade. (R75, pp. 12, 14). As noted, she also stated that her mother, sisters, and other persons had told her what to say at the trial. (R75, pp. 24, 27-28).

NLG, who was then four years old, as set forth above, repeatedly made it clear during the forensic interview and during the trial, when the Court questioned her outside the presence of the jury, that she did not understand the difference between the truth and a lie or that false statements would be punishable. (R75, p. 52).

The Court never made a finding, as required by §908.08(3)(c), that either LAG or NLG understood that false statements are punishable or the importance of telling the truth. The majority's finding that the Court had, therefore, failed to "make all of the requisite findings" as required by the statute was clearly in compliance with the statute.

It should also be noted that the majority's ruling carries out the policy reasons for the statute. Allowing an audiovisual recording of a young victim, who is not even speaking under oath at the time of the recording and who is not subject to cross-examination at that time, to be used in evidence at the trial of the defendant is hearsay and is in contradiction of the Confrontation Clause.

The legislature has enacted a very precise statute in §908.08 that was meant to protect the defendant's constitutional right to confrontation and yet allow young victims to have the fact-finder consider their allegations against the defendant even if they are unable to speak about

those allegations in open court. In order to carry out those two protections, as the majority in this case has held, the trial court must be required to comply with the strict provisions of that statute.

B. Before making its determination that the audiovisual recordings of the three victims could be received in evidence at the trial, the Court failed to abide by §908.08(2)(b) that requires the Court to view the oral statements of the children.

Section 908.08 deals with the admission into evidence of "the audiovisual recording of an oral statement of a child who is available to testify". Section 908.08(2)(b) provides that,

> Before the trial… in which the statement is offered and upon notice to all parties, the court shall conduct a hearing on the statement's admissibility. At or before the hearing, the court shall view the statement. At the hearing, the court… shall rule on objections to the statement's admissibility in whole or in part."

Section 908.08(3) further provides that, if (a) the trial is held before the child's 12th birthday, the court "shall admit the recording upon finding all of the following":

> (b) That the recording is accurate and free from excision, alteration and visual or audio distortion.
> (c) That the child's statement was made upon oath or affirmation or… upon the child's understanding that false statements are punishable and of the importance of telling the truth.
> (d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.
> (e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations in the statement.

In this case, the Court stated, in a conference held in the first trial, before the jury trial had begun, that it had "reviewed portions" of the forensic interviews of NLG and LAG. (R72, p. 4; App. pp. A192). At no time did the Court ever indicate that it had reviewed any portion of the interview of OEG before the trial. After having reviewed only portions of the interviews of NLG and LAG and none of the interview of OEG, the Court held that it was going to "let all of that in". (R72, p. 5; App. p. A193). Then, in its Decision denying the Postconviction Motion, the Court stated that, "… the court viewed all three videos in their entirety when they were played

for the jury at the trial, and there was nothing in them which altered the court's view of their admissibility." (R64, p.4; App. p. A146).

Since the Court had not viewed the entire statements of the three alleged victims prior to making its decision to allow all of the audiovisual recordings to be received in evidence at the trial, the Court had been completely unable to make the determinations required by §908.08(3). The majority of the Court of Appeals in this case held that the procedure described in the statute "suggests that a complete review of the video is required under §908.08(2)(b)." (App. p. A114). The majority also held that, "… we are not persuaded that Wis. Stat. §908.(2)(b) allows the trial court to view only the 'relevant portions' of a video prior to ruling on its admissibility." (App. p. A115).

The Court also noted that, "The trial court did not explain on the record what it meant by 'relevant portions'. " Further, the Court noted that since the trial court had stated in its Decision denying the Postconviction Motion that it had "viewed all three videos in their entirety when they were played for jury at the trial", that implied that "the court had not viewed the videos in their entirety prior to ruling that they were admissible." (App. p. A115).

Since the trial court had only viewed the "relevant portions" of the videos of LAG and NLG, "with no explanation of what that entailed", the majority held that, "the court did not satisfy the statutory requirement to 'view the statements' prior to admitting them into evidence." (App. p. A115). The Court further noted that it was not applying the forfeiture rule involving the trial court's "failure to comply with the statutory requirements of §908.08 in admitting the videotaped statements of all three children in this case" since "the videos were essentially the only evidence against Mercado." (App. p. A112).

The dissent argued that the defendant had forfeited his right to appeal this issue. (App. p. A129). Even if the issue had been preserved, the dissent argued, the trial court had complied with the statute and was not required to view the entire recording before making a determination that it was admissible. (App. pp. 131, 133).

The rule requiring the Court to review the oral statement of the child before receiving it in evidence relates to the protection the legislature put in place to protect the defendant's constitutional right to Confrontation. If a defendant is going to be convicted of a crime solely on the basis of an audiovisual recording of the child witness, which was the case here involving the accusations of both NLG and OEG, or if he is going to be convicted of a crime in good part on the basis of the recording, as was the case with LAG, the least that was called for by the legislature was that the trial court review the complete oral statement of the child before it is played to the jury. As noted, at a minimum, it would allow the Court to determine whether it had been altered or distorted and whether it bore indicia of trustworthiness. The requirements of the statute are clear and the trial court, as found by the majority, failed to comply with them.

C. The audiovisual recording of NLG was not admissible as a prior inconsistent statement.

At the pretrial hearing on November 8, 2016, after Ms. Bowe had objected to the introduction of the audiovisual recordings of LAG and NLG due to their inability to understand the importance of telling the truth, the Court noted that both LAG and NLG "may have a problem on cross-examination if they would not respond." (R71, p. 11. Mr. Schindhelm told the Court that he did not believe NLG would be able to answer the questions. (R71, p. 12). The Court also noted that it believed that if the video was shown first, and NLG did not respond to cross-examination, the video would not be admissible. (R71, p. 12). Ms. Bowe stated that they would have the same problem with LAG. (R71, p. 13).

Upon hearing Ms. Bowe's concerns, the Court indicated that the state might not even be able to prove the charges relating to NLG and LAG. (R71, p. 17). Mr. Schindhelm then argued that even if the audiovisual recording regarding NLG did not meet the requirements of §908.08(3)(c), he felt they could still be admitted as a prior inconsistent statement, "assuming the victims testify and are cross-examined before they are admitted." (R71, p. 18). The Court stated, "That's assuming they testify." The Court also stated that it felt the state could "probably do that." (R71, p. 18).

Ms. Bowe argued that that was "assuming if they are able to be cross-examined." (R71, p. 19). The Court stated that that was "correct" and that if they were not admissible at that point, the state would have to do direct examination on them. (R71, p. 19).

At the trial, the preliminary examination of NLG by the Court before she testified, and what happened when she was called as a witness to testify before the video had been played, as well as the playing of the video and the testimony of Officer Danilo Cardenas, who had interviewed NLG, are all set forth above.

In its Response to the Postconviction Motion, the state argued that since NLG had testified that she had never before seen the interviewer, known as Dan, and but remembered talking to him, and since she said she had never discussed anything about the defendant with him, her audiovisual recording with Dan was admissible as a prior inconsistent statement. It should be noted that the state had never offered that video as evidence at the trial as a prior inconsistent statement and it was never received as such.

In its Decision denying the Postconviction Motion, the Court agreed with the state's argument, holding that, pursuant to §980.01(4)(a)1, the video was admissible as a prior inconsistent statement. ((R64 p.1; App. p. A146-A147). However, that subdivision 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.

Section 908.01(4) provides that, "A statement is not hearsay if: (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: 1. Inconsistent with the declarant's testimony." In this case, since NLG did not testify about anything she had said during the forensic interview, which she did not remember having, defense counsel was completely unable to cross-examine her about the contents of her statements in that interview. Further, there was, therefore, no testimony for her statements to be inconsistent with.

During the pretrial hearing on November 8, 2016, when the Court stated that NLG's audiovisual recordings could probably be introduced at the trial as prior inconsistent statements, the Court conditioned that ruling on two factors: first, that NLG would testify about what happened between her and the defendant, and second, that NLG could be cross-examined about that testimony. (R71, pp. 18-19). In fact, neither of those conditions had been met during the trial.

Further, the trial court's ruling contradicted the clear provisions of §906.13(2)(a), which 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 so require.

None of these provisions is applicable in this case. Since NLG did not testify at the trial about what happened to her, there was no prior statement that could be used to impeach her

testimony. Also, there is nothing in §908.08 that allows an audiovisual recording to be admitted as a prior inconsistent statement.

The majority in the Court of Appeals, the Court noted that the state had argued that NLG's video was a prior inconsistent statement and was admissible as a hearsay exception. However, the Court noted that §908.01(4)(a)1 specifically states that prior inconsistent statements are not hearsay. (App. p. A120).

Also, the Court held that since the trial court had failed "to make the requisite findings as set forth in§908.08(3)(c) regarding NLG's understanding of the difference between the truth and a lie", which the trial court should have made before she testified, it would render the requirements of §908.08 "superfluous". (App. p. A121).

The dissent argued that NLG's recorded statement was inconsistent with her trial testimony and that, it could, therefore, be considered as an prior inconsistent statement. (App. p. A138). It also argued that NLG was available for further testimony and that the statement had been relevant. (App. p. A139). It agreed with the majority that a prior inconsistent statement is not hearsay but it disagreed with the majority's finding that in order to be admissible, the statement would have to meet the provisions of §908.08. (App. p. A141).

It is well to remember that an audiovisual recording of a victim, who is not speaking under oath and where defense counsel is not present to cross-examine her, is clearly hearsay evidence. As a general rule, hearsay evidence, although allowed under certain exceptions to the hearsay rule which have other guarantees of its trustworthiness, is prohibited because it is in violation of the defendant's constitutional right, pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Constitution of the State of Wisconsin, "to be confronted with the witnesses against him." *Crawford v. Washington,* 541 U.S. 36, 38, 124 S.

Ct. 1354, 158 L Ed. 2d 177 (2004); *State v. Tomlinson*, 2002 WI 91, 254 Wis. 2d 502, 525, 648 N.W. 2d 367.

As a general rule, the Confrontation Clause requires that the defendant be given an opportunity to challenge his accuser " …in a face-to-face encounter in front of the trier of fact" who could then assess the witness' demeanor in order to determine the witness' credibility. *California v. Green*, 399 U.S. 149, 156, 90 S. Ct. 1930, 26 L.Ed.489 (1970); *State v. O'Brien*, 2013 WI App 97, 349 Wis. 2d 667, 677, 836 N.W.2d 840.

Hearsay rules that have been developed that allow evidence to be received even though it does not include a face-to-face contact between the defendant and his accuser have been created as exceptions to the hearsay rule and these rules have been found to "raise questions of compatibility with the defendant's right to confrontation." *California v. Green*, 399 U.S. at 156. The rule allowing audiovisual recordings of young victims was created by the legislature as an exception to the hearsay rule, and is included within the rules regarding the admission of hearsay evidence in §908.08.

Since the legislature enacted §908.08 in a very specific manner to allow audiovisual recordings of child witnesses to be received as an exception to the hearsay rule, their receipt into evidence under a statute dealing with prior inconsistent statements, which does not provide for the trustworthiness of those statements, would be completely inconsistent with both the provisions of §908.08 and the policy reasons behind it. That is particularly true when, as here, the recordings could not even be used to impeach nonexistent testimony. The ruling of the majority in this case that NLG's audiovisual recording could not be received as a prior inconsistent statement was correct.

D. The audiovisual recordings of all three victims were not allowed to be received under the residual hearsay exception to the hearsay rule, §908.03(24), since the facts of the case did not fulfill the five factors required for their admission and since the state had not offered them under this exception at the trial.

Section 908.03 provides that certain evidence is "not excluded by the hearsay rule, even if the declarant is not available as a witness." Under §908.03(24), the statute provides that, "A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness" is one type of such evidence that is not excluded by the hearsay rule. This provision is known as the "residual hearsay exception".

Before allowing hearsay evidence, including a child's statement, to be received under this provision, it was held in *State v. Sorenson,* 143 Wis. 2d 226, 245-246, 421 N.W. 2d 77 (1988), that the trial court must first make a determination that five factors were present to establish the trustworthiness of the evidence. The issue on appeal in a case involving the residual hearsay exception is whether the trial court "applied the correct legal standard to the facts of the record and articulated a reasonable basis for its decision to admit the statement under the residual hearsay exception." *State v. Snider,* 2004 WI App 172, 266 Wis. 2d 830, 846, 668 N.W. 2d 784.

In *Sorenson,* supra, at 235-246, the Court held that there were five factors that the trial court must consider:

> (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 or 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…'.

Those five factors were reiterated in *State v. Huntington,* 216 Wis. 2d 671, 687, 575 N.W. 2d 268 (1998). The majority of the Court of Appeals in this case held that the videos in this case "do not meet all of these requirements". It noted that LAG and NLG did not demonstrate the first factor because they "did not demonstrate that they understood 'the difference between the truth and falsehood'. " Also, the majority held that "by not reviewing the videos in their entirety prior to admitting them, the trial court did not fully comply with the fourth *Huntington* factor relating to the content of the statement and whether there was indications that the information is false." (App. p. A118).

The Court, therefore, held that, "the videos were not admissible under the residual hearsay exemption". (App. p. A118). Further, the Court held that since "the videos were the key pieces of evidence – indeed, they were essentially the only evidence- in this case" because there were "no witnesses to the assault", there was "no DNA evidence located on any of the children", and the defendant had "no prior convictions", their receipt into evidence was not harmless error. (App. p. A119).

It should be noted that the state never made any attempt to offer the videos in evidence at the trial under the residual hearsay exception. As a result, the trial court never had an opportunity to make a determination as to whether the videos had complied with the five factors necessary for their admission into evidence. It should also be noted that the dissent did not address this issue. For all of these reasons, the videos of the three alleged victims was not admissible under the residual hearsay exception to the hearsay rule.

E. The trial court erred in requiring NLG to testify first and then play the audiovisual recording of her forensic interview because that procedure is in violation of §908.08)5.

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.

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

In this case, the trial court completely failed to abide by that statute. The Court ordered that NLG testify first and then the video would be played to the jury. The Court contemplated having her called at a second time, in order to be cross-examined. During her testimony, however, it became clear that there was no use in recalling her as a witness in order to cross-examine her, after the video had been shown, because she had testified that she had no recollection of having talked to Dan, the interviewer.

In *James*, the Court held that the legislature had the ultimate authority to spell out the procedure to be used in cases where the state wished to present the audiovisual recording of the child's forensic interview. Id. at 800. And the Court held that that statute controlled over other statutes that give the court authority to control "the admission, order, and presentation of evidence." Id. at 801. Since the trial court in that case had failed to follow the procedure set forth in the statute, the Court reversed the defendant's conviction and ordered a new trial. Id. at 803.

The majority in this case held that the trial court had failed to comply with the statute. It held that, "we also recognize that the legislature included specific requirements in the statute, couched in terms that mandate the trial courts' compliance." (App. p. A122). The dissent argued that this issue had been forfeited. (App. p. A134). The majority, however, held that since the videos had been the only evidence against the defendant, it chose not to apply the rule of forfeiture for failures to object to the admission of the videos. (App. p. A112).

It should be noted that the legislature had good reason for requiring the video to be played first and then having the child witness testify second. As shown by what occurred in this case, the trial court intended to have the NLG testify twice- before the video was shown and then again after it was shown, so that she could be cross-examined about it. Requiring this young witness to testify twice was exactly what the statute was meant to prevent. For these reasons, the majority was correct in holding that the trial court had erred in requiring NLG to testify before the video was shown and that the defendant was entitled to a reversal.

CONCLUSION

For all of these reasons, the defendant-appellant respectfully requests that the Decision of the majority of the Court of Appeals be affirmed, and that the defendant-appellant's convictions be reversed and a new trial ordered.

Dated: July 2, 2020
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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 brief contains 10,855 words.

Dated: July 2, 2020

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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.

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