STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2019AP000194CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

THOMAS A. NELSON, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE FAYE M. FLANCHER PRESIDING.

DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

Reply to State's arguments regarding Kadamian's evaluation and report.

The State argues that "the primary purpose of Kadamian's evaluation of M.D. was to medically diagnose and treat the traumatized victim, not to gather evidence against Nelson." See State's brief at page 12. This court should reject such argument for the following reasons.

First, the title of Kadamian's report, "Child Advocacy and Protection Services Sexual Abuse Evaluation," 43:1, indicates that the primary purpose her evaluation of M.D. was not medical diagnosis and treatment. The title depicts that the primary purpose of Kadamian's assessment of M.D. was to evaluate sexual abuse. The term "sexual abuse" is germane more to legal and criminal justice proceedings than to medical proceedings. If the purpose of Kadamian's assessment was indeed primarily to diagnose and treat, the nomenclature of the report would have more reflected such medical orientation.

Second, the characterization of the "chief complaint" as "Concern For Sexual Abuse," 43:1, further supports that the primary purpose of Kadamian's assessment was not the diagnosis and treatment of a medical condition or injury but the evaluation and documentation of evidence as to whether M.D. was sexually assaulted. The verbage, "Concern For Sexual Abuse," does not pertain to a medical condition, ailment or injury. Rather, it pertains to unlawful conduct of a sexual nature. If the purpose of Kadamian's assessment was indeed primarily to diagnose and treat, it would have identified the "chief complaint" in medical rather than legal terms.

Third, the fact that Children's Advocacy Center staff were present in the room during the evaluation, 43:4, belies the notion that Kadamian's evaluation of M.D. was primarily for diagnosis and treatment. If such were truly the case, there would be no need or reason for child protective services staff to be present in the evaluation.

Fourth, Kadamian's evaluation was not done at the request of the patient or some other medical professional, but at the request of the police and child protective services. 43:1.

Fifth, the results of Kadamian's evaluation were not confidentially maintained between the patient and health care provider, but copied and provided to the police and child protective services. 43:6.

Sixth, the State concedes that the evaluation was part of the "protocol" for child sexual assault victims. See State's brief at page12. As part of the "protocol," it was part and parcel of the SANE nurse examination process rather than distinct from it.

Seventh, the fact that Kadamian's findings and report were introduced at trial supports Nelson's position that the primary purpose of the evaluation was to collect and document evidence for trial. It was not coincidental or fortuitous that Kadamian's findings and report were presented as evidence. It was by design and purpose.

For the above reasons, while Kadamian's assessment may have had some medical purpose, this court cannot fairly find that medical diagnosis and treatment of M.D. was the *primary* purpose of the assessment.

Finally, in response to the State's arguments as to harmless error, Nelson has already discussed at pages 23 to 24 of his brief-in-chief, why the admission of Kadamian's findings and report through Cahill were prejudicial.

Reply to State's arguments regarding prosecutor's remark during closing statement.

The State cites *State v. Cameron*, 2016 WI App 54, 370 Wis.2d 537, 613 N.W.2d 606 and *Embry v. State*, 46 Wis.2d 151, 174 N.W.2d 521 (1970) for the proposition that "during closing arguments, a prosecutor is entitled to comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." See State's brief at pages 17-18. Nelson does not take

issues with such proposition. Nelson does disagree that such proposition applies in this case. Here, the prosecutor did not state or argue that the "evidence convinces her and should convince the jurors." Instead, the prosecutor expressed her belief in Nelson's guilt. Her remarks as such were impermissible under the authorities cited in Nelson's brief-in-chief rather permissible under *Cameron* and *Embry*.

Next, while Nelson agrees that a prosecutor's argument must be viewed in context, see *State v. Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d 49 (Ct. Ap. 1995), the context here does not salvage the prosecutor's remark. The prosecutor's argument did of course involve a summary of the evidence. But then the prosecutor departed from a discussion about the evidence and expressed her own belief in Nelson's guilt. By stating, "I *firstly* believe that he did," the prosecutor herself drew a distinction between her own belief in Nelson's guilt and the evidence. Arguably, by using the phrase, "I *firstly* believe that he did," the prosecutor attached higher significance to what she believed than

what the evidence reasonably showed. And that is the precise danger articulated in *U.S. v. Brown*, 508 F.3rd 1066, 1075 (D.C. Circuit 2007), that the comment "can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges," and that "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."

Finally, this court should interpret what is acceptable argument under SCR 20:3.4 in such a way as to promote adherence to the rule rather than reward gamesmanship to skirt it. Toward that end, this court should regard the prosecutor's remark as improper, if not highly improper, under *Zeidler v. State*, 189 Wis. 44, 45, 206 N.W. 872 (1926) and SCR 20:34. The court should similarly deem the remark to have engendered the dangers countenanced in *U.S. v. Brown*, and to have so infected the proceeding with unfairness as to make the resulting conviction a denial of due process.

Conclusion

For the above reasons and those given in Nelson's brief-in-chief, this court should vacate the judgment of conviction and remand the case for a new trial.

Respectfully submitted this _____day of July 2019.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

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

A copy of this certificate has been served upon all opposing parties.

Dated this ___ day of July 2019.

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 1081 words.

Dated this ___day of July 2019.

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