STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019 AP 520-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD A. BOIE,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

MILLER APPELLATE PRACTICE, LLC
Attorneys for the Defendant-Appellant
By Steven L. Miller #1005582
P.O. Box 655
River Falls, WI 54022
(715) 425-9780

On appeal from the Circuit Court of Clark County,
Hon. Jon M. Counsel and Hon. Thomas W. Clark,
Circuit Judges, presiding.

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019 AP 520-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD A. BOIE,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

ISSUES FOR REVIEW

1. Did the circuit court erroneously exercise its discretion when it admitted a testimonial video without applying at least two of the criterion for admissibility under Wis. Stat. § 908.08: whether the declarant was available to testify and whether the defendant would be deprived of a fair opportunity to meet the allegations in the prior statement?

The Trial Court Answered: "No."

2. Was Boie denied the effective assistance of counsel when trial counsel failed to move for a mistrial after B.E.H. testified she could not remember any of the sexual assault allegations she made in the video played to the jury?

The Trial Court Answered: The court did not address this issue. Boie's postconviction motion was denied pursuant to Wis. Stat. § 809.30(2)(i).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication is not requested.

STATEMENT OF THE CASE[1]

Blake Boie obtained overnight and weekend visits with his daughter, B.E.H. (d.o.b. 10/22/2008) in June of 2013 after a long and contentious custody dispute with B.E.H.'s mother, Paige Heath. (204:249, 252, 257, 266, 291). Even then, Paige only partially complied with the agreement, forcing Blake to obtain an additional court order in December of 2013. (204:295, 297, 307). During overnight visits, Blake's grandparents, Carol Boie and the defendant, Richard Boie, provided occasional childcare for B.E.H. when Blake was working. (204:234).

On January 29, 2015 B.E.H.'s maternal grandmother, Therese Heath, asked B.E.H. if she was "excited" to see "Grandma Carol" and "Grandpa Rich"[2] in an upcoming visit. B.E.H. answered "no." (190:115, 116). When Therese asked why, B.E.H. stated grandpa "kisses me hard." (190:117). Therese asked B.E.H. what else grandpa does and she answered, "you know," gesturing towards her pelvic area. (190:117-118). Therese then asked her to color a picture showing what she and grandpa do. B.E.H. drew a picture of her and Boie in bed with Boie's pants down. (190:119-121; 106).

Therese reported this conversation to her daughter Paige. (190:124). On January 30, 2015, Paige contacted the Thorp Police Department. (190:4). Paige had not noticed any behavioral changes in B.E.H. prior to the allegations. (204:318).

---

1 The Statement of the Case and the Statement of Facts are combined.

2 While Boie is often referred to as "Grandpa Rich," he is actually B.E.H.'s great grandfather.

The police arranged for B.E.H. to be questioned by Michelle Harris, a forensic interviewer with the Chippewa Valley Child Advocacy Center. The video-recorded interview took place on February 3, 2015 (192: 182, 208-244). Police did not participate directly in the interview but observed it and provided questions. (191:17; 204:158-159). There is no dispute the interview is testimonial.

B.E.H. told Harris her Grandpa Rich "does stuff that isn't appropriate." (192:218). This occurs at Grandpa Rich's house, in his bedroom and sometimes upstairs. (192:218, 222). He takes off his pants and makes her take off her pants. (192:220, 233). He "wiggles" his "butt," which she described as his front, on her "whole body" and on her "butt," which she described as where she goes potty. She said it felt "squirmy," and sometimes it hurt. (192:221, 222, 224, 225, 231). He also kissed her on the lips and "inside" her "butt," and puts his hand inside her "butt." (192:225, 226, 228)

B.E.H. did not give a timeframe or identify the number of occasions. It did not happen every visit, only "sometimes." (192:238). "More than once." (192:213, 232).

On February 5, 2015, B.E.H. was examined by Kristen Iniguez, a physician in the child advocacy center at the Marshfield Clinic. (192:128). A full medical examination with testing showed no evidence of trauma or anything else indicative of sexual assault. (192:132, 150, 151, 162, 169-170). B.E.H. had no difficulty concentrating, remembering, or making decisions. (192:144).

Boie was charged more than a year later. On June 27, 2016, the State filed a complaint alleging one count of repeated sexual assault of a child, contrary to Wis. Stat. § 948.025(1)(d), during the period of February 25, 2013 to December 21, 2014. (2).

On February 8, 2017, the State sought admission of the February 3, 2015 interview pursuant to Wis. Stat. § 908.08[3]. (13:1 A:8)). The statutory criterion were met, the State alleged, because:

---

3 Wis. Stat. § 908.08 states in relevant part:

Audiovisual recordings of statements of children.

(1) In any criminal trial or hearing, juvenile fact-finding hearing under s. 48.31 or 938.31 or revocation hearing under s. 302.113 (9) (am), 302.114 (9) (am), 304.06 (3), or 973.10 (2), the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child *who is available to testify*, as provided in this section.

(2) (a) Not less than 10 days before the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the statement before the hearing under par. (b).

(b) *Before the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner 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 or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in s. 885.44 (12).

(3) The court or hearing examiner shall admit the recording upon finding all of the following:

(a) That the trial or hearing in which the recording is offered will commence: 1. Before the child's 12th birthday; or

….

(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, if the child's developmental 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.

(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*

> …this trial will likely come before the child's twelfth birthday. The State submits that the videotape is accurate and free from excision, alteration and visual or audio distortion. A copy is being filed with the Clerk of Court's Office. The interviewer issued an age-appropriate oath to ensure the victim court differentiate between the truth and a lie. The interview was conducted within five (5) days of disclosure, and just over one month after the last date in the charging period. Therefore the time, content and circumstances of the statement provide indicia of its trustworthiness. The defendant's attorney was provided a copy of the videotape on or about August 4, 2016. Clearly there would not be unfair surprise.

(13:1 (A:8)). The State did not allege B.E.H. would be "available" to testify pursuant to Wis. Stat. § 908.08(1) & Wis. Stat. § 908.04(1)(c)[4],

---

> *deprive any party of a fair opportunity to meet allegations made in the statement.*
>
> ….
>
> (5) (a) If the court or hearing examiner admits a recorded statement under this section, the party who has 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 or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.
>
> (am) The testimony of a child under par. (a) may be taken in accordance with s. 972.11 (2m), if applicable.
>
> ….
>
> (7) At a trial or hearing under sub. (1), a court or a hearing examiner 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.

(emphasis added)

4 Wis. Stat. § 908.04(1): "'Unavailability as a witness' includes situations in which the declarant:

….

(c) Testifies to a lack of memory of the subject matter of the declarant's statement;…."

or that Boie would have a fair opportunity to meet the allegations made in the statement as required by Wis. Stat. § 908.08(3)(e).

Boie objected to the video because he would not have a fair opportunity to meet the allegations in the statement. (17:7 (A:16)). Boie anticipated B.E.H. would testify "she doesn't remember or can't recall the specifics of the alleged sexual assaults," or would "refuse to submit to cross-examination," or would "clam-up" on the stand. (*Id.*). Cross-examination is critical, Boie argued, because the allegations in the video are vague. The interview does not disclose what occurred when or where; nor does it allege how many times these alleged incidents occurred. (17:8 (A:17)).

The State did not file a response. In an order dated May 4, 2017 the court granted the state's motion. The court found B.E.H. would be: less than 12 years old at the time of trial; the video is accurate and free from excision, alteration or distortion; the interviewer used age appropriate questions to demonstrate the child understood the importance of telling the truth; there was sufficient indicia of trustworthiness based on the content, circumstances and timing of the interview; and because a copy of the interview was provided to the defense, "there is no undue or unfair *surprise* that would prevent defendant from evaluating and responding to the statement." (emphasis added) (26:1-2). The court did not address whether B.E.H. would be "available" to testify concerning the allegations in the video or whether Boie would have a fair opportunity to meet the allegations made in the statement.

The State sought to play the video during Michelle Harris' testimony. A discussion ensued regarding whether B.E.H. would have to testify immediately after the video was played or whether Harris could continue her testimony first. (192: 193-208). The court noted that once the video is played, the statute required the child to testify "immediately" after the statement is shown to the trier of fact, although immediately did not necessarily mean the same day but "when the trial next resumes." (192:195, 198, 199). Shortly before the video was played the State told the court B.E.H. was "present and available"

without any further elaboration. (192:198, 207). The approximately one-hour video interview was played to the jury. (192:208-244). Court proceedings were then recessed for the day. (192:245).

The next morning, B.E.H. took the stand. The state began with a short direct examination without asking any questions concerning the sexual assault allegations. (204:17). Defense counsel then cross-examined. She began by asking general questions. At one point, she asked B.E.H. if she remembered the video-recorded interview. B.E.H. answered that she did. (192:25). Defense counsel then showed B.E.H. a transcript of the interview and started by asking general questions. Eventually, defense counsel began asking B.E.H. about her "Grandpa Rich." She asked if Grandpa Rich gave her kisses. B.E.H. first answered she didn't remember, then stated he had. (204: 334-35). Defense counsel asked when this happened, and B.E.H. answered:

A When I was in the middle of it.
Q Middle of what?
A When he was doing it.
Q Doing what?
A (no response)
Q I know it's a hard question, but I need you to answer it, B[].

(204:35). B.E.H. then asked if she "could have a minute." The court agreed and B.E.H. left the courtroom. (*Id*.) In a few minutes she was back on the stand. According to B.E.H.'s father, B.E.H. met alone with the prosecutor during this time. Neither parent was permitted to be present. (178:6 (Postconviction Motion, p. 6) (A:29)).

When B.E.H. returned to the stand, her cross-examination continued. She repeatedly and consistently failed to remember any significant details concerning the sexual assault allegations:

Q When was the last time you were at Grandma Carole's and Grandpa Rich's?
A I can't remember.
….
Q Okay. And do you know how often you were there in

2015?
A No.
Q Do you know how many times you were at grandpa and grandma's, Rich and Carol's house total?
A No.
Q Is it because you don't remember?
A I don’t remember.

(204:36-37).

Q Okay. Now, when I asked you about whether grandpa ever gave you a bear hug or a kiss, and you said I don't remember, then you said he never kissed me except when we were doing it?

A I kind of forgot--
….
A I forgot.

Q I'm sorry. Let me ask that question again. When I said you were doing it, what does that mean, you said I forgot?
A Yeah. I can't remember right now.
Q I guess I am a little confused. Can I ask you a couple questions on that?
A Yes.
Q You said he only kissed me when we were doing it?
A Yeah. I can't remember what I said. I can't remember.
Q But you said when we were doing it, right?
A Yeah.
Q You just don't now remember what doing it is?
A No.
Q Okay. You have no idea?
A I forgot.
Q Did you talk to the DA and your mom?
A Yes.
Q About what was happening when you were doing it?
A No.

(204:37-39).

Q Okay. So when you stayed there, you stayed slept

upstairs with your dad, right?
A Yeah.
….
Q Okay. But when you would sleep in, sometimes did you get up, though, before your dad?
A No. I would crawl in by my dad.
Q You would crawl in bed with your dad. Did you ever come down and hop into bed with grandma and grandpa?
A No, I don't remember.
Q So could you have and you just don't remember or you know you didn't?
A I don't remember.
Q Do you remember laying in bed watching TV with grandma and grandpa?
A No.

(204:40-41).

Q Okay. I want to go to line 211 [of the video transcript]. Can you see that? Are you ready?
A Yeah.
Q Okay. So I want you to think about the very last time that ever happened. Where were you?
A I was at my grandpa's house.
Q Tell me about the last time that happened from beginning to the middle to the end?
A He just turned around.
Q Do you remember saying that?
A No.
Q Do you remember what you meant by he just turned?
A No.
Q You have no idea?
A No.
Q Okay. I am going to go on from there.
A Okay.
Q Uh-hum (indicating yes).
A And I don't know. He started kissing me, but I didn't like it and I stopped.
Q Hm, then what happened? And then what happened?
A And then I just went out of the door.

(204:50)

Q Okay. Do you remember when I started asking you questions?
A Today?
Q Yep.
A I think so.
Q Yeah. And I asked you if you remember if grandpa ever hugged or kissed you?
A Yes.
Q And you said he never kissed except when we were doing it?
A Yeah.
Q Okay. So you do remember some things that happened?
A Some things.
Q Okay. Got it.
A Not it all.
Q So when you said you don't remember saying he kissed me and I didn't like it, but you remembered it earlier when I was asking you, right?
A A little.

(204:51-52)

Q Okay. Do you remember-- let me ask you this. And I am sorry I have to kind of bring this up again. But you had said he only kisses you when we are doing it, but you don't remember what doing it is?
A No.
Q Do you remember anything when this is being done?
A No.
Q Like who is wearing what clothes, what's happening?
A No.
Q Okay. Do you remember what you are wearing?
A No.
Q Do you remember what you used to wear to bed when you would go visit by grandma and grandpa's?
A No.

(204:56-57)

Q If I asked you what a butt is, would you be able to answer that?
A No.
Q You don't know what a butt is?
A I do. It is a part of your body.
Q Okay. So when I asked you to answer it-- let me back up. Okay. So what part of the body is the butt?
A The bottom.
Q Is it on the front side or the back side?
A Back.
Q Do you remember saying that his butt would wiggle?
A No.
Q So you don't recall any of that?
A No.
Q Okay. And I am sorry to ask you this. But when you are doing it, you don't remember whether someone is wearing clothing or anything?
A No.

(204:57-58)

Q Do you remember saying a lot of times when Michelle asked you what was he doing and you would say not really good stuff or yucky stuff. Do you remember saying that?
A No.
Q Okay. Do you remember telling Michelle that he did certain things with his hands?
A No.
Q Do you remember now anything about him doing things with hands?
A No.
Q Do you remember him touching your hands with his hands?
A No.

(204:59-60)

Q Okay. But you are saying he was doing it. Do you know when it started like what year?
A No.
Q Okay. And you don't know how many times?

A Uh-uh (indicating no), no.
Q No idea?
A No.
Q I'm sorry?
A No.
Q Okay. So it could be just once?
A I have no idea.

(204:61)

Q Okay. You don't know how many times this happened?
A No.
Q Right? And you don't know for how long it happened, right?
A Yes, right.

(204:62).

The State did not re-direct. Apart from the initial report to Therese Heath and some derivative testimony concerning the interview, the video was the only substantive evidence against Boie.

The jury found Boie guilty as charged. (203:155). On July 11, 2018, the court sentenced Boie to 17 years with 5 years of initial confinement and 12 years of extended supervision. (202:161; 181 (A:1)).

Boie filed a postconviction motion on January 9, 2019. (178 (A:24-33)). The circuit court did not respond to the motion or schedule a hearing. On January 21, 2019, Boie filed a letter asking the court to schedule a hearing. Again, there was no response. On March 12, 2019, the clerk entered an order denying the postconviction motion per Wis. Stat. § 809.30(2)(i). (184 (A:6-7)). Boie now appeals. (185)

ARGUMENT

I. THE COURT ERRED WHEN IT ADMITTED A VIDEO OF COMPLAINANT'S PRIOR TESTIMONY WITHOUT ANY EVIDENCE, ALLEGATION OR FINDING B.E.H. WAS "AVAILABLE" TO TESTIFY, OR THAT BOIE WOULD NOT BE DEPRIVED OF A FAIR OPPORTUNITY TO MEET THE ALLEGATIONS MADE IN THE STATEMENT.

The trial court erroneously exercised its discretion when it misapplied the legal test under Wis. Stat. § 908.08. The court admitted the video without any consideration of, or finding that, the child was "*available to testify*" pursuant to Wis. Stat. § 908.08(1) and Wis. Stat. § 908.04(1)(c), or that admission of the statement would not deprive Boie *"of a fair opportunity to meet allegations made in the statement.*" (emphasis added). Wis. Stat. § 908.08(3)(e). (26:1-3 (A:3-5))

Shortly after disclosure police arranged for B.E.H. to be questioned by Michelle Harris, a forensic interviewer with the Chippewa Valley Child Advocacy Center. The interview took place on February 3, 2015 (192:208). Police did not participate directly in the interview but were observing it and providing questions. (191:17; 204:158-159). There is no dispute the interview was video-recorded for the purpose of preserving B.E.H.'s testimony in the event charges were brought and the case went to trial. The State moved to admit the video based solely on Wis. Stat. § 908.08. (13:1 (A:8)).

Admission of a testimonial video is governed by Wis. Stat. § 908.08. *State v. James*, 2005 WI App 188, ¶23, 285 Wis.2d 783, 703 N.W.2d 727 (Wis. Stat. § 908.08 "deals specifically with the admissibility and presentation of videotaped statements by child witnesses" and therefore "controls over…more general statutes regarding the court's authority to control the admission, order, and presentation of evidence."). The purpose of Wis. Stat. § 908.08 is "to permit the evidentiary use of videotapes of children if a variety of

safeguards are followed." *State v. Williquette*, 180 Wis.2d 589, 603, 510 N.W.2d 708 (Ct. App. 1993).

Evidentiary decisions are generally reviewed under the erroneous exercise of discretion standard. Discretion is erroneously exercised if an incorrect legal standard is applied. *State v. Tarantino*, 157 Wis.2d 199, 208, 458 N.W.2d 582 (Ct. App. 1990); *State v. Plude*, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. In addition, the application of a legal standard to undisputed facts is a question of law reviewed de novo. *Johns v. County of Oneida*, 201 Wis. 2d 600, 605, 549 N.W.2d 269 (Ct. App. 1996). In this case, the relevant underlying facts are of record and undisputed.

Among the requirements for admission under Wis. Stat. § 908.08, the State must show the child "*is available to testify.*" Wis. Stat. § 908.08(1). Availability has two components. First, the witness must be physically available to take the stand. Wis. Stat. § 908.08(5). Second, the witness will *not* testify "to a lack of memory of the subject matter of the declarant's statement;…." See Wis. Stat. § 908.04(1)(c). In addition, the court must determine whether admission of the statement will "*deprive any party of a fair opportunity to meet allegations made in the statement.*" (emphasis added). Wis. Stat. § 908.08(3)(e). If these criteria are met, the video "shall" be admitted into evidence if it meets the additional requirements of Wis. Stat. § 908.08(2) & (3).[5] *State v. Snider*, 2003 WI App 172, ¶12, 266 Wis.2d 830, 668 N.W.2d 784.

---

5 The additional criteria are as follows: the hearing in which the recording is offered will commence before the child's 12th birthday (Wis. Stat. § 908.08(3)(a)); "the recording is accurate and free from excision, alteration and visual or audio distortion." (Wis. Stat. § 908.08(3)(b)); "the child's statement was made upon oath or affirmation or, if the child's developmental 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." (Wis. Stat. § 908.08(3)(c)); and, "the time, content and circumstances of the statement provide indicia of its trustworthiness." (Wis. Stat. § 908.08(3)(d)).

Boie does not dispute B.E.H. was physically available to take the stand.[6] At issue is whether B.E.H.'s availability included "memory of the subject matter of the declarant's statement;…." (Wis. Stat. § 908.08(1) & Wis. Stat. § 908.04(1)(c)); and, 2) that admission of her prior statement "will not … deprive" Boie "of a fair opportunity to meet allegations made in the statement." (emphasis added). Wis. Stat. § 908.08(3)(e).

In this case, the question of whether B.E.H. had "memory of the subject matter of the declarant's statement" and the question of whether Boie had a "fair opportunity" to "meet the allegations in the [prior] statement" is for the most part the same. A defendant cannot fairly "meet the allegations made in the statement" if the declarant doesn't remember any of them—especially when the video contains vague allegations without reference to time, place or specific activity. While *California v Green*, 399 U.S. 149 (1970), was a confrontation case, its rationale is illustrative. Admission of a prior statement is premised on the lack of any "crucial" difference between cross-examination at the time the statement was made and cross-examination at trial. *Green*, at 159. For that to be true, a defendant must be "assured *full and effective* cross-examination" at trial." (emphasis added). *Id*. See also, e.g. *Crawford v. Washington*, 541 U.S. 36, 59, n.9 (2004) (confrontation clause bars admission of prior statement unless the declarant is present at trial *to defend or explain it*.") (emphasis added). Cross-examination at trial of a witness who professes no memory of her previous allegations is not only "crucially" different from what it would have been at the time the statement was made, it makes "meeting the allegations made in the statement" an impossible task. See e.g. *State v. Lenarchick*, 74 Wis. 2d 425, 444, 247 N.W.2d 80

---

6 The State did not allege B.E.H. was "available" physically or otherwise in its motion to admit the video. The court had no information on this question at the time the admissibility decision was made. The State did tell the court B.E.H. was "present and available" just prior to the video being played to the jury. (192:198, 207).

(1976) (reversal may be required if the court concludes the "apparent lapse of memory so affected ... [the] right to cross-examine as to make a critical difference in the application of the Confrontation Clause ...."). See also *James*, at ¶¶22, 24 (circuit court acknowledges link between whether child witness may be "disinclined" to testify and whether allowing a videotaped statement into evidence would 'deprive any party of a fair opportunity to meet allegations made in the statement.'").

Wis. Stat. 908.08(5) mandates the video be played before the child testifies. As this Court has acknowledged, the mandated sequence could very well result in a mistrial. *James*, at ¶¶12, 13. A circuit court will never know for certain whether a child witness will testify or has "memory of the subject matter of the declarant's statement" until after the video has been played and the child takes the stand. In fact, the issue in *James* was whether the circuit court violated Wis. Stat. § 908.08 when it insisted the witness testify before the video was played because it was concerned the child witnesses would "clam up" on the stand, causing a mistrial. *Id*., at ¶¶4, 5, 12. While the court of appeals acknowledged the circuit court's concern about a potential mistrial, it reversed, holding the directive in Wis. Stat. § 908.08 is mandatory. *Id*., at ¶¶14, 25.

Admissibility must be decided prior to trial. Wis. Stat. 908.08(2)(b). The circuit court must apply the statutory criteria and "satisf[y] itself that certain prerequisites have been met." *James*, at 20. Among other things, the circuit court must also "discern whether, given what it knows *at the time* it assesses admissibility, allowing a videotaped statement into evidence would 'deprive any party of a fair opportunity to meet allegations made in the statement.'" (emphasis original). *Id*., at 24.[7]

---

7 In *James*, the circuit court's concern that "one or both children will 'clam up' on the stand" was nothing more than a "hypothetical possibility[.]" *Id*., at ¶22. The State:

What the court knows "at the time" of its admissibility determination will depend primarily on the parties. As the proponent of the evidence, the State has the burden of showing the statutory criteria are met. *State v. Leighton*, 2000 WI App 156, ¶47, 237 Wis. 2d 709, 616 N.W.2d 126 ("…burden is on the proponent of the evidence to show why it is admissible"). In addition, the State has a singular burden to disclose the declarant's "inclination" to testify as it will nearly always be the only party with knowledge of whether the declarant is, in fact, willing and able to testify concerning the subject matter contained in the video. See e.g. *State v. Williams*, 2016 WI App 82, ¶16, 372 Wis. 2d 365, 888 N.W.2d 1 ("[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue."). Under these circumstances, the State had an obligation to show that B.E.H. would testify to the allegations in the prior statement.

Instead, it said nothing. The State's motion made no allegations concerning whether B.E.H. would be "available to testify" pursuant to Wis. Stats. §§ 908.08(1) and 908.04(1)(c); or whether Boie would be deprived "of a fair opportunity to meet allegations made in the statement." Wis. Stat. § 908.08(3)(e). (13:1 (A:8)).

Boie objected to the State's motion, arguing, among other things, that he would not have a "fair opportunity to meet the allegations in the statement" because he anticipated B.E.H.: 1) would testify she doesn't remember or can't recall the specifics of the alleged sexual assaults; 2) would refuse to submit to cross-examination; or 3) would "'clam up' on the stand." (17:7 (A:16)). As such, Boie would

---

> …promised to produce the children for cross-examination upon James request. *Nothing in the record demonstrates that either girl is disinclined to testify* ***or that the State has in bad faith made an empty promise.*** *The notion that James cannot expect a full and exacting cross-examination lacks any factual basis.*

(emphasis added) *Id*., at ¶22.

be deprived of his right to fairly and effectively cross examine B.E.H. on the contents of the video statement.[8] *Id*. The State provided no response to Boie's objections.

The circuit court nonetheless granted the State's motion in a written decision and order. (26). The circuit court erred because it failed to apply the statutory criteria under Wis. Stats. §§ 908.08(1), (5); 908.04(1)(c) and 908.08(3)(e). The court did not address nor make any finding that B.E.H. would be "available to testify" concerning the allegations in the prior statement, or that Boie would have a "fair opportunity to meet allegations made in the statement." The court's failure to apply these criteria and "satisf[y] itself" they were met constitutes an erroneous exercise of discretion. There is nothing in the record, moreover, that would support such findings.

The error was not harmless. The video should not have been admitted. B.E.H.'s lack of recall on the subject matter of her prior statement demonstrated she was, in fact, unavailable pursuant to Wis. Stats. §§ 908.08 and 908.04(1)(c) and as a result, deprived Boie of an opportunity to meet the prior allegations. Other than two relatively vague statements to family members admitted as prior consistent statements,[9] the video was the state's only substantive evidence. There were no eyewitnesses. There was no physical evidence. (191:20). The video was not cumulative to any other State evidence. Without the video, the State effectively had no case.

---

8 Boie believes this issue was preserved for appeal and should be decided on the merits. To the extent it wasn't, he argues trial counsel was ineffective for failing to adequately raise it. See Section III., pp. 33-34, *infra*.

9 See testimony of Therese Heath (190:115-121); and Kay Weih (190:86-87).

II. ALTERNATIVELY, BOIE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO MOVE FOR A MISTRIAL AFTER B.E.H. TESTIFIED SHE COULD NOT REMEMBER ANY OF THE SEXUAL ASSAULT ALLEGATIONS SHE MADE IN THE VIDEO.

1. Legal Standards

The circuit court took no action on Boie's postconviction motion. At Boie's request, the Clark County Clerk of Courts signed and filed an order denying the motion pursuant to Wis. Stat. § 809.30(2)(i). As ineffective assistance of counsel claims require an evidentiary hearing, and no hearing was held, the Court must determine whether Boie's motion alleges facts that, if true, would entitle him to relief. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The defendant may not rely on conclusory allegations but must support them with objective factual assertions that allow the reviewing court to meaningfully assess his claim. Id. at 313-14. This presents a question of law, which is reviewed de novo. *Id*. at 310. If the motion meets this standard, the Court must remand for an evidentiary hearing. *Id*. See also *State v. Scherreiks*, 153 Wis. 2d 510, 516, 451 N.W.2d 759 (Ct. App. 1989) (Court must review the record to determine whether the defendant is entitled to any relief.)

As to the ineffective assistance of counsel claims, Defendant argues he was denied his right to effective assistance of counsel under the 6th Amendment of the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution. *Strickland v. Washington*, 466 U.S. 688 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711 (1985). Wisconsin uses a two-prong test to determine whether trial counsel's actions constitute ineffective assistance of counsel. *State v. Littrup*, 164 Wis.2d 120, 135, 473 N.W.2d 164, 170 (Ct.App. 1991). The first half of the test considers whether trial counsel's performance was deficient. *Id*. Trial counsel's performance is deficient if it falls outside "prevailing professional norms" and is not the result of "reasonable professional judgment." *Strickland,* 466 U.S.

at 690. Trial counsel has a duty to be fully informed on the law pertinent to the action. *State v. Felton*, 110 Wis.2d 485, 506-507, 329 N.W.2d 161, 171 (1983). Counsel's performance cannot be based on an "irrational trial tactic" or "caprice rather than judgment." *State v. Domke*, 2011 WI 95, ¶ 49, 337 Wis.2d 268, 805 N.W.2d 364

If counsel's performance is found to be deficient, the second half of the test considers whether the deficient performance prejudiced the defense. *Felton*, at 506-507. The defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Harvey*, 139 Wis.2d 353, 375, 407 N.W.2d 235, 246 (1987). The Strickland test is not outcome determinative. The defendant need only demonstrate the outcome is suspect. He need not establish the final result of the proceeding would have been different. *State v. Smith*, 207 Wis.2d 258, 275-276, 558 N.W.2d 379, 386 (1997).

A defendant is prejudiced when trial counsel's deficient performance "undermined confidence in the outcome of the case, given the totality of the evidence that was adduced at … trial." *State v. Thiel*, 2003 WI 111, ¶80, 264 Wis. 2d 571, 665 N.W.2d 305.

2. Trial counsel should have moved for a mistrial when Boie was denied a fair opportunity to meet the allegations made in the statement.[10]

When B.E.H. took the stand, she repeatedly claimed she had no memory of the alleged offenses. She either would not, or could not, testify about the subject matter of her prior statement. As such, she was not "available to testify" pursuant to Wis. Stats. §§ 908.08(1) and 908.04(1)(c). The videotape's admission caused Boie unfair prejudice

10 See Postconviction Motion, p. 8 (178:8 (A:31))

as he did not have a "fair opportunity to meet allegations made in the statement." Wis. Stat. § 908.08(3)(e).

James recognized that Wis. Stat. § 908.08(5)'s mandate requiring the video be played before the child testifies could result in a mistrial if the child "clams up" on the stand. *James*, at ¶14 ("We appreciate the trial court's concern with administering justice in a fair and efficient manner and its desire to do so proactively without waiting until it is too late to avert prejudice.").

In this case, the video was played and B.E.H. took the stand. B.E.H. did not remember any of the sexual assault allegations made in the video. B.E.H., therefore, did exactly what the circuit court feared would happen in *James*. She was not "available to testify" as required by Wis. Stat. § 908.08(1) & 908.04(1)(c). Boie was deprived of a fair opportunity to address the allegations in the video under Wis. Stat. § 908.08(3)(e). The video did not meet the criteria for admissibility under Wis. Stat. § 908.08, should not have been admitted, and its admission prejudiced Boie.

Trial counsel was deficient when she did not move for a mistrial after B.E.H. failed to testify concerning the prior statement's sexual assault allegations and it became obvious the criterion for admissibility were not met.

Trial Counsel's deficiency prejudiced Boie as the video, which should not have been admitted, was the State's primary if not sole inculpatory evidence. Without it, the State had no case. There is a reasonable probability that but for the video the result of the proceeding would have been different. Boie was also prejudiced as he was denied his right under Wis. Stat. § 908.08(3)(e) for a fair opportunity to meet the allegations in the prior statement. B.E.H.'s prior statement was both vague and inconsistent at to what happened, when it happened, where it happened and how many times it happened. Boie was unable to address whether the statutory elements of Wis. Stat. § 948.025(1)(d) were in fact met. With B.E.H.'s lack of

memory, moreover, Boie was denied any opportunity to challenge the credibility of her allegations.

3. Alternatively, trial counsel should have moved for a mistrial when Boie was denied his state and federal constitutional right to confrontation.[11]

Alternatively, trial counsel should have moved for a mistrial because B.E.H.'s lack of memory denied Boie his state and federal right of confrontation. B.E.H. could not or would not answer any questions concerning the sexual assault allegations she made in the video. As a practical matter, B.E.H. was not "present at trial to defend or explain" her video statement. *Crawford v. Washington*, 541 U.S. 36, 59, n. 9 (2004).

Whether the use of a child's recorded statement violates a defendant's right to confrontation is a question of constitutional fact subject to de novo review. *State v. Pulizzano*, 155 Wis.2d 633, 648, 456 N.W.2d 325 (1990).

An out-of-court statement satisfies confrontation in two circumstances: 1) when the witness is unavailable *and* the defendant had a prior opportunity to cross-examine; or, 2) the declarant testifies in court and "the defendant is assured of full and effective cross-examination…." *Green*, 399 U.S. at 159; *Crawford*, at 59, n. 9 ("The Clause does not bar admission of a statement so long as the declarant is present at trial *to defend or explain it*." (emphasis added)). Generally, confrontation is satisfied when the witness is present in court and subject to cross-examination. A mere face to face encounter, however, is not always enough. Defendant has a right to "meaningful" cross-examination. *Lenarchick*, 74 Wis. 2d. at 441. Meaningful cross-examination is denied when a witness claims the fifth amendment or refuses to testify. *State v. Vogel*, 96 Wis.2d 372, 390, 291 N.W.2d 838 (1980). When a witness is present in court but claims a loss of

11 See Postconviction Motion, p. 9 (178:9 (A:32))

memory, reversal may be required if the court concludes the "apparent lapse of memory so affected ... [the] right to cross-examine as to make a critical difference in the application of the Confrontation Clause ...." *Lenarchick*, 74 Wis. 2d at 444. In *Lenarchick*, confrontation was satisfied because the witness' loss of memory was selective, entirely favorable to the defense, and the lack of cross-examination appeared to be strategic on the part of defense counsel. *Id*., at 444. See also *Vogal*, at 392 (partial lack of memory favorable to defense, and apparent strategic decision to limit cross-examination, did not deny confrontation); *Robinson v. State*, 102 Wis. 2d 343, 350, 306 N.W.2d 668 (1981) (selective memory which substantiated defendant's testimony did not offend confrontation).

B.E.H.'s testimony did not show a selective memory favorable to the defense, nor did defense counsel limit her cross-examination for strategic reasons. B.E.H. was either unable or unwilling to answer any questions concerning the sexual assault allegations. She could not, or did not, "defend or explain" her statement. *Crawford*, 541 U.S. at 59, n.9. Boie had no means to confront, test, or examine any of the allegations made in the video, nearly all of which were vague and lacking coherence as to time, place and activity. Her loss of memory, therefore, made a "critical difference in the application of the Confrontation Clause." *Lenarchick*, at 444. Boie's right to confrontation was denied. Trial counsel's performance was deficient when she failed to move for a mistrial. Boie was prejudiced because a mistrial based on a denial of confrontation should have been granted.

4. Alternatively, trial counsel should have moved for a mistrial when it became evident the State likely failed to disclose information relevant to the circuit court's admissibility determination.[12]

The due process clause of the Fourteenth Amendment guarantees a defendant in a criminal case a trial that is fundamentally

12 See Postconviction Motion, p. 4 (178:4 (A:27))

fair. *State v. Disch*, 119 Wis. 2d 461, 477, 351 N.W.2d 492 (1984); *Jordan v. Hepp*, 831 F.3d 837, 846 (7th Cir. 2016) (due process requires fair legal procedures). The State's withholding of information relevant to the court's video admissibility determination violated Boie's due process right to a fair trial.

Trial counsel should have moved for a mistrial when it became evident the State probably withheld information concerning whether B.E.H. would be able to address the sexual assault allegations she made in the video.

The State had an independent duty to disclose relevant information bearing on admissibility for at least three reasons. First, as the proponent of the evidence, the State has the burden to show the statutory criteria for admissibility are met. *Leighton*, at ¶47. Second, the State is uniquely situated as it will nearly always be the party with knowledge of whether the declarant is, in fact, willing and able to testify concerning the subject matter contained in the video. See e.g. *Williams*, 2016 WI App 82 at ¶16 ("[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue."). Third, Wis. Stat. § 908.08 implicitly requires the State to disclose information relevant to admissibility as that is the only way the circuit court can fairly determine, pretrial, whether the declarant will be "available" to testify at trial on the subject matter of the prior statement. *James*, at ¶24.

In addition, the State's obligation to disclose facts relevant to admissibility would fall under *Brady v. Maryland*, 373 U.S. 83 (1963), especially if the State is aware of facts that would undermine the statutory criteria. See e.g. *State v. Harris*, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737 ("Evidence is favorable to an accused, when, 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'"). A defendant has a due process right to any favorable evidence "material either to guilt or to punishment" that is in the State's possession, including any evidence which may impeach one of the State's witnesses. *Brady*, 373 U.S. at 87; *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). A

Brady violation has three components: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material. Evidence is material under *Brady* when there is a reasonable probability that the suppressed evidence would have produced a different verdict. *State v. Wayerski*, 2019 WI 11, ¶¶35-36, 385 Wis. 2d 344, 922 N.W.2d 468.

Boie presumes the State withheld information in its exclusive possession relevant to admissibility. One would rightly expect the State to meet with key witnesses before they testify. B.E.H. agreed she spoke with both the witness coordinator and the prosecutor prior to trial. B.E.H. answered "[y]es" when asked if she "talked with anyone regarding what you are going to say." (204:24). When asked who she spoke with, she identified "Chelsea," the victim/witness coordinator, and the prosecutor. (204:24-25). Concerning the prosecutor, she testified:

> Q. Did you talk with the DA, the woman right here?
> A. Oh, yeah.
> Q. And what did she tell you to say?
> A. She just showed me and told me to say yes and no and what's true and to like put my right hand up.
> Q. Okay. So did she tell you how to answer certain questions?
> A. Yes.

(204:25). Given her complete lack of memory on the witness stand, the State must have known there was a problem.

This would explain why the State's motion to admit the video was utterly silent on B.E.H.'s availability to testify about the sexual assault allegations pursuant to Wis. Stat. § 908.08(1) & 908.04(1)(c), or whether Boie would be deprived "of a fair opportunity to meet allegations made in the statement." Wis. Stat. § 908.08(3)(e). (13:1 (A:8)). It would explain why the State did not ask B.E.H. any

questions concerning the alleged assaults when it called her to the stand after the video was played to the jury. (204:18-21).

In addition, just as defense counsel started asking specific questions about the sexual assault, B.E.H. asked "for a minute" and the proceedings were paused. (204:35). According to B.E.H.'s father, during this break B.E.H. met alone with the prosecutor. The prosecutor did not allow him or B.E.H.'s mother to attend the meeting. (178:6 (Postconviction Motion, p. 6) (A:29)). After the meeting, when B.E.H. re-took the stand, she repeatedly denied any memory of the alleged sexual assault. See pp. 13-18, *supra*. Again, this suggests the State knew B.E.H. lacked memory of the alleged assaults, or worse, instructed her to testify she could not recall. At best, the State willfully chose to remain ignorant.

Evidence the complaining witness is disinclined to testify or has no memory of the accusations is favorable to the accused because it undermines the video's admissibility. Had the State revealed B.E.H. did not remember the alleged sexual assault, the court would have had to deny admission of the video under Wis. Stat. § 908.08.

Once it became evident B.E.H. was either unable or unwilling to testify concerning the sexual assault allegations, trial counsel should have moved for a mistrial based on the State's failure to disclose evidence relevant to admissibility on due process grounds. Boie was prejudiced because the video, the State's primary inculpatory evidence, would not have been admitted had the State fully disclosed what it knew at the time admissibility was decided.

Without a postconviction hearing, Boie is unable to prove what the State knew or what information it may have withheld. The State's actions suggest it knew there was a problem and chose to remain silent about it. Boie is entitled to a hearing to determine whether the State failed to disclose evidence relevant to admissibility and deprived him of his due process right to a fair trial. Trial counsel was deficient for failing to pursue a motion for mistrial on this ground.

III. ALTERNATIVELY, BOIE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL TO THE EXTENT TRIAL COUNSEL DID NOT OBJECT TO THE STATE'S MOTION TO ADMIT THE VIDEO BASED ON UNMET STATUTORY CRITERIA.[13]

Alternatively, to the extent the issues addressed in Section I, *supra*, were not fully or adequately preserved for appeal, then trial counsel was deficient for failing to do so, and that deficiency prejudiced the Defendant.

Boie believes the issue raised in Section I was preserved by trial counsel. Trial counsel objected to the State's motion to admit the video for multiple reasons. Among those reasons, counsel challenged the video because Boie anticipated B.E.H.: 1) would testify she doesn't remember or can't recall the specifics of the alleged sexual assaults; 2) would refuse to submit to cross-examination; or 3) would "'clam up' on the stand." (17:7 (A:16)). As a result, Boie would be deprived of a "fair opportunity to meet the allegations in the statement." *Id*. Counsel thus made the argument B.E.H. would not be "available" to testify as defined by Wis. Stat. § 908.04(1)(c) without making specific reference to the statute. In these circumstances, compliance with Wis. Stat. § 908.04(1)(c) and Wis. Stat. § 908.08(3)(e) are effectively synonymous. One cannot "meet the allegations in the statement" without the declarant's "availability" as defined by Wis. Stat. § 908.04(1)(c). Therefore, the lack of compliance with Wis. Stats. §§ 908.08(1); 908.04(1)(c) and 908.08(3)(e) was raised. An evidentiary hearing is not needed.

To the extent these arguments were not adequately raised and preserved for appeal, they should have been. "Availability," including declarant's memory of the events alleged in the video, are threshold criterion for admissibility that weren't met. Counsel had no conceivable strategic or other reason for failing to make this argument when the defense strategy was to prevent the video's admission.

---

13 See Postconviction Motion, p. 8 (178:8 (A:31))

Admission of the video under these circumstances prejudiced Boie for the reasons previously argued. See pp. 24, 27, *supra*.

CONCLUSION

WHEREFORE, the Court should reverse the conviction and order a new trial.

Respectfully submitted this May 28, 2019.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(b)&(c)

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is:

Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line.

This brief contains 9574 words.

CERTIFICATE 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 with the paper copies of this brief filed with the court and served on all opposing parties.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, to the extent required: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that: I have submitted an electronic copy of this appendix, excluding the brief, which complies with the requirements of s. 809.19(13).
I further certify that: This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this May 28, 2019.

MILLER APPELLATE PRACTICE, LLC

By_____
Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on May 28, 2019. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this May 28, 2019.

MILLER APPELLATE PRACTICE, LLC

By_____

Steven L. Miller #1005582
Attorney for the Defendant-Appellant
P.O. Box 655
River Falls, WI 54022
715-425-9780

APPENDIX OF DEFENDANT-APPELLANT

INDEX TO APPENDIX