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 REPLY BRIEF

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

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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.

Boie argues the circuit court erroneously exercised its discretion when it admitted the video without considering two statutory requirements: 1) the child was "*available to testify*" pursuant to Wis. Stat. § 908.08(1) and Wis. Stat. § 908.04(1)(c); and, 2) 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)). See Brief-in-Chief, p. 19-24.

The State responds by arguing this issue was forfeited. Trial counsel did not explicitly argue BH was unavailable to testify under Wis. Stat. § 908.08(1) and Wis. Stat. § 908.04(1)(c). (State's Brief, pp. 18-20). The State, however, does not address the second ground under Wis. Stat. § 908.08(3)(e). This ground was clearly raised. In his pre-trial brief, Boie specifically identified the issue in a headnote:

> 9. Admission of the statement will deprive the defense of a fair opportunity to meet the allegations made in the statement.

(emphasis original) (17:7 (A:1-2)). Under this headnote, Boie argued he would not have a fair opportunity to meet the allegations in the statement because he anticipated B.E.H.: 1) "will testify on cross examination that she doesn't remember or can't recall the specifics of the alleged sexual assaults"; 2) "may refuse to submit to cross examination…."; and 3) "may 'clam up' on the stand." (17:7). Boie concluded: "If B.E.H. doesn't submit to cross examination the defense won't have a fair opportunity to cross-examine B.E.H. on the specifics." (17:7-8). At a minimum, the second ground was preserved for appeal.

Boie also believes the first ground was implicitly raised. See *State v. Agnello*, 226 Wis. 2d 164, 174, 593 N.W.2d 427 (1999) ("[a]ll that we have required of a party is to object in such a way that the objection's words or context alert the court of its basis"). Whether BH had "memory *of the subject matter* of the declarant's statement" per Wis. Stat. § 908.04(1)(c) is directly relevant to whether Boie could "*meet the allegations in the statement*" per Wis. Stat. § 908.08(3)(e). (emphasis added). The availability requirement is meant to assure cross-examination on the prior allegations, which in turn assures a fair opportunity to meet those allegations. Trial counsel adequately raised the issue when she argued Boie would not be able to meet the allegations in the prior statement *because* BH either lacked memory, would claim she lacked memory, or would otherwise refuse to discuss the substantive allegations on cross-examination—*i.e.* BH was not

"available to testify" per Wis. Stats. §§ 908.08(1) & 908.04(1)(c). (17:7-8).

The State does not address either ground on the merits. Assuming one or both were preserved, the State concedes the video was admitted in error. See *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp*., 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

Alternatively, Boie argues trial counsel was constitutionally ineffective if one or both of these grounds were not preserved for direct appeal. (See Brief-in-Chief, Section III, pp. 33-34).

Again, the State responds by focusing exclusively on the "availability" ground per Wis. Stat. § 908.08(1) while ignoring the "fair opportunity" ground per Wis. Stat. § 908.08(3)(e).

As to whether trial counsel was ineffective for failing to raise the "availability" argument, the State argues there is "no clear law or duty required counsel" to raise this "novel" argument. (State's Brief, p. 25). While conceding that neither Wis. Stat. § 908.08 nor Chapter 908 define the word "available" or the phrase "available to testify," the State complains that Boie fails to "explain why section 908.04(1)'s phrase 'unavailability as a witness' necessarily covers section 908.08(1)'s phrase 'available to testify.'" Because these are "different words," it's "not obvious the two must be interpreted together." (State's Brief, pp. 25, 26). Further, the State argues, the focus of Wis. Stat. 908.08 is production of the witnesses for cross-examination, and in this case, BH was "thoroughly cross-examined." *Id*.

Chapter 908 covers the admissibility of hearsay, which includes Wis. Stat. § 908.08. The only statute in Chapter 908 which defines what availability means is Wis. Stat. § 908.04. Wis. Stat. § 908.04 is entitled: "Hearsay exceptions; declarant unavailable; definition of unavailability." Under this section, "Unavailability as a witness" includes when the declarant:

….

> (1)(c) Testifies to a lack of memory of the subject matter of the declarant's statement;….

Wis. Stat. § 908.04(1)(c). See also *Schemenauer v. Travelers Indemnity Co.*, 34 Wis.2d 299, 309-10, 149 N.W.2d 644, 648 (1967). (claimed memory loss made party unavailable for cross-examination).

The State's semantic argument is unconvincing. A child who is *not* "available to testify" as a witness is *unavailable* to testify as a witness. There's no difference. A person is unavailable to testify as a witness if he or she "[t]estifies to a lack of memory of the subject matter of the declarant's statement." Wis. Stat. § 908.04(1)(c). Both Wis. Stats. §§ 908.08(1) & 908.04(1)(c) are from the same chapter covering the same category of evidence. Competent trial counsel should be intimately familiar with Chapter 908.

The State also argues trial counsel was not ineffective because: "the record conclusively demonstrates that counsel made a strategic decision to not object to BH's testimony…." (State's Brief, p. 28). As Boie's counsel clearly did object to the video's admissibility, this argument has no merit. (See e.g. 17:1-9). See also p. 6, *supra*.

Both the "availability" and the "fair opportunity" arguments should have been made by trial counsel. Alternatively, as the State fails to address the "fair opportunity" argument, it has conceded Boie's counsel was ineffective for failing to preserve it (assuming she failed to preserve it). *Charolais,* at 109.

The video was the heart of the State's case. Boie was prejudiced because the video should not have been admitted. See also pp. 13-14, *infra*.

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. Trial Counsel was deficient for failing to move for a mistrial.

Trial counsel was deficient for failing to move for a mistrial after it became clear BH would not, or could not, testify to the actual sexual assault allegations for the following, alternative reasons: 1) the video should not have been admitted because BH's lack of memory (or refusal to testify) concerning the sexual assault allegations denied Boie a fair opportunity to meet the allegations from the prior statement per Wis. Stat. § 908.08(3)(e); 2) Boie was denied his state and federal constitutional right to confrontation; and 3) the video should not have been admitted on due process grounds as the State likely failed to disclose information relevant to the circuit court's admissibility determination.

As to all three arguments, the State asserts that trial counsel was not deficient because the record "conclusively demonstrates" counsel "made a strategic decision to not…move for a mistrial." (State's Brief, p. 28). Rather, "counsel made a reasonable strategic decision when she decided to emphasize BH's limited memory…." (State's Brief, p. 29). The State points to comments in counsel's closing argument as evidence of this alleged decision. *Id*.

Without a *Machner* hearing, the State's argument is pure guesswork. There is no evidence that trial counsel considered and rejected a motion for mistrial and instead decided to focus on arguing BH was not credible because of her lack of memory. Without testimony from trial counsel—the very purpose of a *Machner* hearing—there's simply no way to know. The State cannot argue a

Machner hearing is unwarranted by relying on hypothetical *Machner* evidence the State speculates a hearing would have produced.

Passing up a potential mistrial, moreover, is difficult to imagine. Few, if any, criminal trial lawyers would turn down the opportunity. A mistrial opens the door to new plea negotiations. With witness testimony on record, a retrial allows for a more informed strategy, new evidence, better cross-examination, and in this case, the distinct possibility the case would be tried without the video. The lack of memory defense the State hangs it hat on would still be there, if not improved, since all witnesses including BH would be subject to cross examination on their earlier testimony.

The State does not address whether BH's lack of memory or refusal to testify deprived Boie of a fair opportunity to meet the allegations from the prior statement per Wis. Stat. § 908.08(3)(e) and thus warranted a mistrial. This argument, therefore, is conceded. *Charolais*, at 109. See *State v. James*, 2005 WI App 188, ¶¶22, 24, 14 285 Wis.2d 783, 703 N.W.2d 727 (this Court acknowledged that requiring the video be played before the child testifies could result in a mistrial if the child "clams up" on the stand.)

The State next argues that Boie's confrontation argument is a "non-starter" and therefore could never supply grounds for a mistrial. (State's Brief, p. 27-28). The State cites *State v. Rockette*, 2006 WI App 103, ¶22, 294 Wis. 2d 611, 718 N.W.2d 269 for the proposition that no amount of memory loss, whether real or feigned, implicates confrontation, as long as the witness takes the stand, takes the oath, and answers the question put to him or her. (State's Brief, p. 28).

Wisconsin's interpretation of the state and federal confrontation clauses, however, is not quite so categorical.

An out-of-court statement satisfies confrontation when the declarant testifies in court and "the defendant is assured of full and effective cross-examination…." *California v Green*, 399 U.S. 149, 159 (1970); *Crawford v. Washington*, 541 U.S. 36, 59, n.9 (2004)

("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. When a witness is present in court but claims a loss of memory, reversal may be required if 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 ...." . *State v. Lenarchick*, 74 Wis. 2d 425, 444, 247 N.W.2d 80 (1976). In *Lenarchick*, confrontation was satisfied because the witness' loss of memory was selective and entirely favorable to the defense. The lack of cross-examination also appeared to be strategic on the part of defense counsel. *Id*., at 444. See also *State v. Vogel*, 96 Wis.2d 372, 392, 291 N.W.2d 838 (1980) (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).

Rockett likewise involved a "selective memory loss" helpful to the defense. The witness was quite particular in failing to remember statements he made to the police implicating the defendant. *Id*., at ¶7. There was also evidence he tried to cut a deal with the State for his testimony, and when that didn't work out, told the defendant to have his lawyer contact him because "I'm going to make sure that you come home to your family." *Id*., at ¶12. The defendant's cross-examination effectively called into question the witness's credibility. *Id*., at ¶26.

The result in *Rockett* is thus consistent with the holding in *Lenarchick* based on the facts. Yet *Rockett* fails to acknowledge *Lenarchick* or its admonishment that reversal may be required when 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 this case, BH's loss of memory did make a critical difference in the application of the confrontation clause. Admission of a prior statement under the confrontation clause 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. Cross-examination at trial must be "full and effective." *Id*. BH could not *or would not* provide any testimony concerning the sexual assaults she alleged in her prior statement. BH's testimony did not show a selective memory favorable to the defense, nor did defense counsel limit her cross-examination for strategic reasons. Boie had no means to confront BH on the meaning, accuracy or truth of the allegations made in the video, nearly all of which were vague and lacking coherence as to time, place and activity. Her inability or refusal to testify 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. See Brief-in-Chief, pp. 28-29.

Finally, the State argues Boie could not have obtained a mistrial based on the State allegedly withholding evidence relevant to the circuit court's admissibility determination because: "Boie cannot show that the State actually withheld any information regarding BH's availability…." (State's Brief, p. 30).

Again, the State argues Boie is not entitled to a *Machner* hearing based on its guess as to what the evidence at such a hearing would be. The State's speculation takes advantage of the fact there was no postconviction hearing where Boie could have subpoenaed witnesses, including the prosecutor, to determine precisely what the State knew about BH's willingness or ability to testify at the time of admissibility, or at trial, either of which should have been shared with the trial court.

The State's conduct suggests it may have been withholding relevant information. In its written motion to admit the video, the

State made no allegations concerning BH's availability, capacity, or willingness to testify. (13:1). When the State called BH to the stand it asked no substantive questions about the sexual assault. (204: 18-21). During her cross examination, BH answered all the introductory questions asked of her but as soon as defense counsel began to ask specifically about the sexual assault allegations, BH began to cry and requested a break in the proceedings. (204:35). At that point BH met alone with the prosecutor, who would not allow either parent to attend the meeting. (178:6). When BH re-took the stand, she could not remember anything material to the previously made sexual assault allegations. See Brief-in-Chief, pp. 13-18. A postconviction hearing is the only means by which Boie can learn what the prosecutor knew and arguably withheld from the circuit court. If the State did withhold information relevant to the statutory criteria, the video may not have been admissible. Boie would have been entitled to a mistrial. See Brief-in-Chief, pp. 29-32.

2. Trial counsel's deficient performance was prejudicial to Boie.

The State argues Boie was not prejudiced by the lack of a mistrial for two reasons: 1) he received the cross-examination owed him under the Constitution; and 2) the video could have been admitted under any number of exceptions to the hearsay rule.

The first argument was already addressed. See pp. 10-12, *supra*. Also, the argument pertains solely to whether Boie would have been entitled to a mistrial based on a denial of confrontation, and does not address whether a motion for mistrial should have been made because: 1) BH was not "available to testify" pursuant to Wis. Stat. § 908.08(1) and Wis. Stat. § 908.04(1)(c); 2) Boie did not have a fair opportunity to meet the allegations from the prior statement per Wis. Stat. § 908.08(3)(e); or, 3) the State improperly withheld information material to admissibility contrary to due process.

The State next argues Boie was not prejudiced because the video could have been admitted under numerous exceptions to the

hearsay rule. (State's Brief, p. 31-35). This argument would presumably apply to all grounds for a mistrial.

First, the State's argument should be rejected because prejudice stems from the lack of a mistrial, not whether the video statement was potentially admissible under some other statutory provision.

Second, how the circuit court would have exercised its discretion applying some other statutory provision—under different and unpredictable circumstances—is speculative. The State cites no authority for the proposition that a new theory of admissibility requiring the exercise of trial court discretion can be retroactively applied by a reviewing court to avoid what should have been grounds for a mistrial.

Third, admission of a child's testimonial video is governed by Wis. Stat. § 908.08. See *James*, at ¶23 (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"). Under Wis. Stat. § 908.08(7) the circuit court may, "[a]t a trial…*under sub. (1)*…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). Wis. Stat. § 908.08(1) requires that a child be "available to testify[.]" Under Wis. Stat. § 908.04(1)(c), a child is not available to testify if she "[t]estifies to a lack of memory of the subject matter of the declarant's statement." As BH was demonstrably not "available to testify" under "sub. (1)[,]" Wis. Stat. § 908.08(7) would not permit admission of the video under any of the other exceptions to the hearsay rule.

CONCLUSION

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

Respectfully submitted this August 30, 2019.

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Dated this August 30, 2019.

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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 August 30, 2019. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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