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COURT OF APPEALS

STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II

Case No. 2019AP2350-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MARKELL HOGAN,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED BY THE SHEBOYGAN COUNTY CIRCUIT
COURT, THE HONORABLE REBECCA L. PERSICK,
PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUES

1. Did the circuit court erroneously exercise its discretion in admitting experience-based expert testimony from Detective Tamara Remington as to the methods employed by human traffickers?

This Court should affirm the circuit court's decision admitting Detective Remington's testimony.

2. If the circuit court erroneously admitted Detective Remington's testimony, was the error harmless?

This Court should affirm the judgment of conviction and find any error to be harmless.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary, as the issue on appeal can be addressed adequately in the parties' briefs. While the State believes that this case is governed by well-established law governing the standards used to admit experience-based expert testimony, publication may be warranted to the extent no published case has directly addressed the admissibility of an expert testimony concerning the methods of operation of human traffickers.

INTRODUCTION

Hogan claims that his conviction for human trafficking as a repeat offender should be vacated, alleging the circuit court erroneously allowed Detective Remington to provide expert testimony concerning human trafficking methods and commonalities. Hogan claims that Remington's testimony was inadmissible under Wis. Stat. § 907.02(1) because it did not satisfy the indicia for reliability of science-based expert testimony set forth in *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

Hogan's arguments are legally erroneous and ignore the limited scope of Detective Remington's expert testimony at trial. The arguments fail for two reasons: (1) the court properly admitted Remington's expert testimony; and (2) any error was harmless.

First, while all expert testimony must be assessed for reliability under *Daubert*, the four indicia of reliability *Daubert* used to assess science-based expert testimony are not applicable to experience-based experts. Detective Remington's expert testimony was properly admitted because it was based on her vast personal experience investigating human trafficking cases, her experience training law enforcement officials on human trafficking, her participation in a federal human trafficking task force, and generally accepted trends noted in the professional literature in her field. Her testimony satisfied the criteria for experience-based expert testimony set forth in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), *Seifert v. Balink*, 2017 WI 2, ¶¶ 89–96, 372 Wis. 2d 525, 888 N.W.2d 816, and *State v. Smith*, 2016 WI App 8, ¶ 9, 366 Wis. 2d 613, 874 N.W.2d 610.

Second, even if the circuit court erred in admitting the expert portion of Detective Remington's testimony, any error was harmless. Remington did not opine that Hogan was a trafficker or improperly vouch for the credibility of any witness. Her testimony was general in nature. Detective Remington's testimony concerning her criminal investigation into Hogan—including statements from the victim, Hogan, and witnesses—was far more damaging to Hogan's case than the limited nature of her expert testimony. It was undisputed that Hogan was called to bring a female to a party for males to have sex with for \$100, that Hogan brought "Megan"¹ to the party, that she was supposed to perform oral sex on one of the

¹ The State uses the pseudonym "Megan" to refer to the victim identified as "MVC" in the complaint.

people present, despite not wanting to, and that Hogan waited outside a bedroom door while Megan performed sexual acts and then obtained use of the client's vehicle. Police determined that Hogan's cell phone number belonged to an adult escort agency. The fact that the jury acquitted Hogan of two of the charges belies any notion that Remington's expert testimony improperly swayed the jury.

This Court should affirm Hogan's conviction for human trafficking as a repeat offender.

STATEMENT OF THE CASE

Hogan appeals following his conviction for human trafficking as a repeater. (R. 174:1.) A jury convicted Hogan for trafficking Megan in August 2015 in the City of Sheboygan. (R. 238:203.) The jury acquitted Hogan in a count related to strangling and suffocating Megan later in September 2015. (R. 238:202–03.) The jury also acquitted Hogan in a count related to trafficking a child victim, "Cynthia,"² in August 2015. (R. 238:202–03.) Hogan's appeal pertains to Detective Remington testimony as an expert witness concerning human trafficking.

Complaint. The State charged Hogan with one count of human trafficking as a repeater, one count of trafficking a child, as party to a crime and a repeater, and one count of strangulation and suffocation as a repeater. (R. 2:1–3.) Count one of the complaint alleged that Hogan trafficked Megan in August 2015. (R. 2:1, 4–5.) The complaint further alleged that on August 23, Hogan and Megan attempted to convince Cynthia, a minor, to get in a vehicle with them by offering to give her "a ride" and "smoke" (marijuana) with her; Megan told Cynthia, "My man really likes you" and "You'll be safe with us." (R. 2:1–3.) The complaint also alleged that on

² The State uses the pseudonym "Cynthia" to refer to the minor victim identified as "CY" in the complaint.

September 2015, Hogan strangled and suffocated Megan. (R. 2:2, 4–5.)

The complaint alleged that when interviewed by Detective Remington, Megan accused Hogan of causing her multiple physical injuries, said he was “very controlling,” and described an incident where he twisted her into a pretzel and choked her by bending her neck backwards. (R. 2:4–5.) Megan further told Remington that the night before she propositioned Cynthia, she (Megan) and Hogan were at a party and Hogan offered her to another man for sex in exchange for use of the vehicle they later used. (R. 2:5.) Megan also relayed past instances in which Hogan drove her to have sex with men in exchange for money while he waited outside the door; the men always paid Hogan. (R. 2:5.)

Megan explained that Hogan threatened her with violence and told her she would “have to sell pussy” if she didn’t “get that bitch”, in reference to Cynthia. Hogan told Megan, “she’ll be my bitch, she’ll get me money She’ll do what I say, ‘cause if she don’t I’ll fuck her up.” (R. 2:5.)

Pretrial Motion. Before trial, the State moved to admit expert testimony from Detective Tamara Remington of the Sheboygan Police Department “concerning the methods employed by people engaged in human trafficking or trafficking a child.” (R. 83:1.) The motion explained that “[s]ince the above captioned case consists of a single charge of both offenses and the methods employed by traffickers is beyond the general knowledge and experience of most citizens, the testimony would assist the jury in understanding the evidence.” (R. 83:1.)

Daubert Hearing. The court held a *Daubert* hearing in conjunction with several other pretrial motions. (R. 233.) Detective Remington testified that she had been employed for 12 years with the Sheboygan Police Department and previously worked for 10 years for the San Jose Police

Department. (R. 233:77–78.) Remington said her area of expertise is human trafficking and gangs. (R. 233:95.) She participated in a gang-related human trafficking operation when in California and began formal training in human trafficking in 2013. (R. 233:96.) Her training included attending presentations by the Department of Justice and Department of Homeland Security focusing on human trafficking and a Department of Justice Amber Alert conference on sex trafficking victims, which included presentations by national leaders on human trafficking investigations. (R. 233:96–97.)

Remington joined a federal task force on human trafficking in 2013, which includes representatives from law enforcement agencies in southeastern Wisconsin, as well as members from the Federal Bureau of Investigation (FBI), Wisconsin Division of Criminal Investigations, Department of Homeland Security, and several assistant United States Attorneys. (R. 233:97–99.) The task force meets regularly to discuss pending cases, key players in human trafficking, trends, geographical overlap of trafficking operations, and case debriefings. (R. 233:99–100.) Through her involvement with the federal task force, she has participated in dozens of case reviews and case studies. (R. 233:104.)

Remington later became a member of a work group at Wisconsin Department of Children and Family Services that developed an indicator tool to identify children at high risk for human trafficking that is used throughout the state. (R. 233:100–01.)

Remington has also presented at federal task force conferences on human trafficking. (R. 233:98.) She spoke at the International Organized Crime and Terrorism group and gave a human trafficking presentation to representatives from local law enforcement, FBI personnel, and law enforcement agencies around the world. (R. 233:100.)

In the course of her professional experience, Remington interviewed at least 80 victims of human trafficking for cases and another 50 relating to her work with victim support groups. (R. 233:102–03.) She has interviewed at least 20 suspected traffickers in her case work. (R. 233:103.)

Remington explained that there are certain trends or commonalities regarding victims of human trafficking and perpetrators. (R. 233:104.) Professionals in the community write articles and stories that “deal with these trends and observations of human trafficking.” (R. 233:108.) Specifically, these trends and observations are reflected in annual DOJ reports to Congress and part of the information compiled as part of the federal task force on human trafficking. (R. 233:108–09.) Trends are also reflected in the “A21” report and Department of Homeland Security “Blue Campaign” articles and information. (R. 233:109.) There is no disagreement in the professional literature concerning the common trends and methods employed by human traffickers and common characteristics of their victims; these commonalities are “generally accepted by law enforcement.” (R. 233:109–10.)

Remington explained that, in general, human traffickers fall into two categories, either “Romeo” or “Gorilla” pimps—the former using gifts, “grooming,” and pretense of romance to control their victims and the latter employing force and violence. (R. 233:107.) Traffickers prey upon high risk individuals and use coercion to control them, including providing or withholding drugs and, recently, trying to impregnate their victims. (R. 233:105–06.)

Remington interviewed Hogan and Megan. (R. 233:78, 86–87.) Remington testified that in her opinion, Hogan and Megan’s relationship was a “textbook” example of a human trafficker using coercive methods to control an individual. (R. 233:105–06.) Remington was aware that Hogan was attempting to impregnate several of the people he trafficked

in order to exert more control over them. (R. 233:106.) According to Remington, Hogan's behavior was consistent with the methods employed by human traffickers discussed in the literature she referenced. (R. 233:109–10.) Remington identified Hogan a gorilla pimp—"very violent, very controlling," but at the very beginning he tries to charm his victims. (R. 233:108.)

Hogan did not challenge Remington's qualifications, training, education, sources of training, or bases for the trends she identified. (R. 233:111–13.) Instead, he asked about other trials in which she testified, the distinction between prostitutes and victims being trafficked under a pimp, and whether Megan had a history of prostitution. (R. 233:112.) Remington explained that most prostitutes are actually being trafficked and that it is "more rare than you would believe" for prostitutes to be operating independently. (R. 233:112–13.)

In an oral ruling, the circuit court granted the State's motion to admit Detective Remington's testimony. The circuit court noted that social-science expert testimony has "inherent limitations" which means that "other indicia of reliability are considered under *Daubert* including professional experience, education, training, and observations." (R. 235:13.) Relying on the Wisconsin Supreme Court's decision in *Seifert*, the circuit court ruled that Detective Remington's experience, education, and training was sufficient to pass the *Daubert* reliability analysis for experience-based experts. (R. 235:13.) And the court concluded that Remington "would be able to apply her knowledge" in a manner that would assist the jury. (R. 235:14–15.)

Jury Trial. During opening statements, the State explained that it planned to show that Hogan trafficked Megan and other women and forced Megan to perform commercial sex acts in exchange for payment to himself. (R. 236:128–133.) It planned to show that Hogan used Megan

to attempt to recruit Cynthia as her replacement and that Hogan tried to strangle Megan on another occasion. (R. 236:129–138.) Hogan’s counsel told the jury that Hogan simply was having a disagreement with his girlfriend, Megan, because she was a prostitute, and that Megan called out to Cynthia for some unknown reason. (R. 236:138–141.) According to Hogan, Detective Remington invented the trafficking allegations to “bolster her career and advance her resume.” (R. 236:139.)

Kevin Johnson testified that in 2015 he owned a white Cadillac Deville and was having problems with drugs and alcohol. (R. 236:181–82.) On August 22, he was at party, drinking alcohol and consuming drugs. (R. 236:186–87, 190.) One of the individuals at the party mentioned getting some females to come over, and Hogan (known to Johnson as “Boo”) brought Megan over with the understanding that it would cost \$100 to have sex with her. (R. 236:189–95.) Johnson went in a bedroom with Megan, but could not recall if they engaged in sexual activity; afterwards, Johnson said he “loaned” his Cadillac to Hogan, purportedly in the hope of selling it. (R. 236:194–96, 203–04.)

Officer Jeffrey Mares from the Sheboygan police department testified that he was involved in the investigation and contacted Johnson. (R. 236:206–07.) Mares obtained Hogan’s cell phone number from Johnson; when Mares researched the number, he discovered it was listed to an adult escort service. (R. 236:207–08.)

Megan testified she was kicked out of her parents’ home when she was 17, that in 2015 her parents had custody of her baby because Megan had just been released from jail, and that she was homeless at that time. (R. 237:8–13.)³ Megan had

³ Megan testified that she had a “bad memory” and couldn’t remember some of her interactions with Hogan at trial (R. 237:30),

thoughts of committing suicide. (R. 237:18.) Megan then met Hogan but did not want a relationship with him; however, she relented after he continued to pursue her. (R. 237:19–21.)

When Megan started to date Hogan, he was nice initially, bought her gifts and clothes, and found her a place to stay. (R. 237:24–26.) However, Hogan then became “a[n] asshole” and “started treating [her] like a regular-ass bitch.” (R. 237:26.) Hogan repeatedly threatened Megan and physically abused her, including threatening to burn down her parents’ house with her baby inside and kill her dog. (R. 237:27–32, 40–41.) Megan tried to get away from Hogan, but he physically restrained her and chased after her when she ran from his vehicle on one occasion. (R. 237:32–33.) Another time, Hogan bent her over and cracked her neck. (R. 237:36–37.) Hogan would not let Megan go anywhere unless he accompanied her and refused to let her go to the job center. (R. 237:46.) Megan said that she stayed with Hogan because she had nowhere else to go, as her parents had changed the locks on their house. (R. 237:43–44, 50.) Megan stated she was scared of Hogan when she was with him. (R. 237:81.)

When asked about her and Hogan’s activities on the night they borrowed Johnson’s white Cadillac, Megan testified that Hogan drove her to the house where Johnson (“the white man”) was and she “was gonna suck his dick for the car, but he didn’t get hard.” (R. 237:50–51.) Megan admitted that Hogan drove her to the party, even though no one called her to request her services. (R. 237:98.)

so the State played several audio recordings of her interviews with Detective Remington in front of the jury in order to refresh her recollection on several occasions (R. 237:21).

Megan previously told Detective Remington that Hogan drove her to the house and told her that if she had sexual relations with Johnson, they would be able to use his car for two days. (R. 237:54–55.) Megan told Detective Remington that she was glad Johnson could not complete the act because she “did not want to fuck the ugly-ass man.” (R. 237:53.) Megan said that Hogan would be mad if she didn’t complete the act because he wanted to use the car; Hogan waited outside the door when her and Johnson were in the bedroom. (R. 237:55–56.) Megan admitted to performing fellatio on Johnson. (R. 237:56.)

Megan later admitted that Hogan’s roommate “T” would drive her and Hogan around to places where she would have intercourse with men for money and then give it to Hogan. (R. 237:74.) Megan admitted she told Detective Remington that Hogan used her to have sex with men in exchange for money paid to Hogan, but then said her statement “was a lie.” (R. 237:65–68.) Megan admitted that she told Detective Remington that she had to pay Hogan \$2,500 before she could leave, but said that was also a lie. (R. 237:74–75.) Megan said that Hogan finally “let [her] go” because she threatened to commit suicide if she wasn’t allowed to leave. (R. 237:75–76.) On cross-examination, Megan denied that Hogan made her a prostitute. (R. 237:84–85.)

When asked about Megan and Hogan’s interactions with Cynthia while inside the white Cadillac, Megan claimed that she and Hogan were arguing and she was “holler[ing] at” Cynthia because she wanted to be her girlfriend; Megan denied she was trying to recruit Cynthia for Hogan. (R. 237:60–61.) She also recanted the statements she previously made to Remington about Hogan encouraging her to recruit Cynthia. (R. 237:64.)

Cynthia testified that on the night in question a man and woman in a white Cadillac stopped her while she was

walking down the street and attempted to convince her to get inside by asking her to come “smoke” with them and “have fun.” (R. 236:148, 156–163.) However, Cynthia was only 50 percent positive of the identity of the driver and 25–30 percent positive of the identity of the female passenger. (R. 236:160–61.) According, to Cynthia, the female “did most of the talking” and the man said only “come on, you’ll have fun.” (R. 236:168.)

Megan was later charged with a felony relating to her interaction with Cynthia but ultimately pleaded to a misdemeanor. (R. 237:80–81.) While she was in jail, Megan told a cellmate she was going to “tell the truth about [Hogan] pimping her,” but then later told her cellmate it was a lie. (R. 237:131.)

Megan’s sister confirmed that Hogan threatened to burn down her house and kill her dog and that she had seen bruises on Megan that Megan said Hogan caused. (R. 237:136–140.)

T.W. (“Tammy”) testified that she was friends with Hogan and knew Megan, whom she met in July 2015. (R. 237:142–44.) She recalled a time when Hogan asked her to give her and Megan a ride to an apartment; Megan went in and came out 15 minutes later with money. (R. 237:147.) Although she initially told Detective Remington that Hogan was “pimping girls,” she claimed at trial that her statement was a lie. (R. 237:151–54.)

Detective Remington was the final witness. (R. 238:6.) She testified to her training and experience in human trafficking, as she had described at the *Daubert* hearing, and her resume was introduced as an exhibit. (R. 236:6–20, 51; 152.) Remington elaborated that she had attended 12 separate training seminars on human trafficking and conducted 118 trainings on human trafficking herself. (R. 238:14–15.) Remington explained that since joining the

Sheboygan Police Department, she had handled 24 human trafficking cases, including cases involving interstate trafficking. (R. 238:21.) Remington estimated that she has been involved in 50–60 human trafficking case debriefings in her career. (R. 238:23.) Remington has testified as an expert witness in four trials, including this one. (R. 238:51.)

Remington explained that in her experience, there are common features among human traffickers and their victims. (R. 238:23–24.) She explained that traffickers prey on vulnerable people—people without money, who just got out of jail, and have no place to go, as well as people with mental health issues and substance abuse problems. (R. 238:24, 26–27.) She also repeated that in her experience, traffickers are “master manipulators.” (R. 238:25.) Remington provided specific examples from her training and experience to illustrate these common features, including a trafficking operation focusing on jails, homeless shelters, and drug rehab clinics. (R. 238:25–28.)

Remington further explained that traffickers generally go through a “grooming” process to bring in their victims, which “makes it very difficult for a victim to even self-identify as a victim because they see this person maybe even as a good friend or a boyfriend because they’ve been brainwashed.” (R. 238:28.) Remington explained the general classification of traffickers into “Romeo pimp[s],” “Gorilla pimp[s],” and a new type of “CEO pimp” that has emerged recently, as well as their methods—finesse/false romance, violence, and business propositions. (R. 238:29–30.) With respect to “Romeo pimps,” Remington explained how they use their victim’s desire for love and safety to exploit them. (R. 238:33.) Remington described how it is common for prostitutes to refer to their pimps as “Papi” or “Daddy.” (R. 238:45–46.)

But, regardless of the general categorization, Remington elaborated, all traffickers use some combination of false promises, threats, violence, and coercion to maintain

control over their victims, including threatening their children, withholding or providing drugs, promising a relationship or shelter, and taking or tracking their cell phone. (R. 238:31–32, 38.) Additionally, the federal task force Remington is part of has noticed a recent trend, originating with the Russian mafia out of California, of traffickers impregnating their victims in order to exert further control over them. (R. 238:33.)

Remington explained that through this process of intimidation, manipulation, and coercion, trafficking victims will go “on automatic,” and are powerless to leave their abusers, again referencing examples from her cases. (R. 238:37–39.) And, despite (or because of) this process of manipulation, it is not uncommon for victims to have a “trauma bond” with their abusers and have feelings of love for them. (R. 238:40.) Finally, Remington explained that it is common for traffickers to employ a type of “debt bondage” and require their victims to “buy” their way out and/or find a replacement. (R. 238:49–50.) Remington said the going buyout rate was between \$2500–\$3500, but pimps made sure a prostitute could never pay that. (R. 238:49.)

Next, Remington explained her involvement in the present case, including her interviews with Megan, Cynthia, and Johnson. (R. 238:53–56.) Remington recounted that in her interviews with Megan, Megan initially minimized Hogan’s abuse, but slowly opened up and described the threats he made to her and her family, his physical abuse (showing her marks and bruises left by Hogan), and the fact that he would not let her leave. (R. 238:59–64, 68.) She also said Hogan threatened to steal her child. (R. 238:113.) Eventually, Megan described the places Hogan made her travel to in order to have intercourse with men in exchange for money, including two occasions when he took her to a place known as “crack manor” to service clients. (R. 238:68, 107.)

And, she told Remington that she called Hogan “Papi.” (R. 238:81.)

Remington also described her interview with Tammy, in which Tammy told Remington that she would drive Hogan and Megan to places where Megan would service clients and then bring money back to Hogan, and that she (Tammy) knew that Hogan was “pimping [Megan] out.” (R. 238:78–82, 87.) Tammy described that Hogan would “showcase” multiple girls to potential clients and “then arrange sex acts.” (R. 238:82, 87–88.) She also described how Megan owed Hogan money and was unable to pay him off. (R. 238:81–82.)

Detective Remington also interviewed Hogan. (R. 238:88.) Hogan acknowledged threatening to burn down Megan’s parents’ home and “[i]n his own words repeatedly he said she’s vulnerable.” (R. 238:96–97.) He also acknowledged physically abusing Megan and chasing her when she tried to run away. (R. 238:98–99.) According to Remington, Hogan admitted to taking Megan to the party with Johnson and told her “go see what that white guy--he says, he seems sexually interested in you. . . . go check it out.” (R. 238:100–01.) Hogan admitted to Remington that Megan then had sexual contact with Johnson and that Johnson allowed them to use his vehicle—although Hogan claimed he was able to use it because “he’s [Megan’s] boyfriend.” (R. 238:101.) Hogan also denied being a pimp. (R. 238:101.)

Importantly, Detective Remington did not provide any opinion to the jury as to whether Hogan was, in fact, trafficking Megan or other women, what category of pimp she believed him to be in, and she did not provide any opinion as to whether the stories told by any of the witnesses she interviewed were consistent with human trafficking operations.

Hogan elected not to testify and did not present any evidence in his defense. (R. 238:127, 130.) The court denied Hogan's motion for a directed verdict. (R. 238:131–32.)

The jury found Hogan guilty of human trafficking, as alleged in count one. (R. 238:203.) The jury found him not guilty of trafficking a child as party to a crime, as alleged in count two, and not guilty of strangulation and suffocation, as alleged in count three of the information. (R. 238:202–03.)

Sentence and Appeal. The court sentenced Hogan to 20 years' initial confinement and 10 years' extended supervision. (R. 174:1.) Hogan appeals. (R. 203.)

STANDARD OF REVIEW

A circuit court's decision to admit expert testimony under Wis. Stat. § 907.02(1) using the standards set forth by *Daubert* and its progeny is reviewed for an erroneous exercise of discretion. *Seifert*, 372 Wis. 2d 525, ¶¶ 89–96. “[A] circuit court has discretion in determining the reliability of the expert's principles, methods, and the application of the principles and methods to the facts of the case.” *Id.* ¶ 92. This Court will sustain the circuit court's evidentiary ruling admitting expert testimony unless it “rests upon a clearly erroneous finding of fact, an erroneous conclusion of law, or an improper application of law to fact.” *Id.* ¶ 93.

Whether an alleged trial error is harmless in a particular case is a question of law. *State v. Harrell*, 2008 WI App 37, ¶ 37, 308 Wis. 2d 166, 747 N.W.2d 770.

ARGUMENT

I. The circuit court did not erroneously exercise its discretion in admitting experience-based expert testimony concerning the methods of human traffickers.

Hogan argues that Detective Remington's testimony was inadmissible because it failed to satisfy the traditional test for reliability of science-based expert testimony under *Daubert*. (Hogan's Br. 28–32.) Hogan's argument is fundamentally flawed because experience-based expert testimony, while still subject to the overall *Daubert* reliability standard, is not assessed with the same factors used to assess the reliability of science-based expert testimony. Detective Remington's testimony was properly admitted when examined under the flexible reliability framework for experience-based expert testimony, as set forth in *Kumho Tire*, 526 U.S. 137, *Seifert*, 372 Wis. 2d 525, and *Smith*, 366 Wis. 2d 613.

A. Non-scientific, experience-based expert testimony is evaluated under the flexible reliability standard set forth in *Kumho Tire*, *Seifert*, and *Smith*.

Wisconsin Stat. § 907.02(1) governs the admission of expert testimony and incorporates the reliability standard set forth in *Daubert*. *Seifert*, 372 Wis. 2d 525, ¶¶ 50–51. The statute states that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” then “a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise,” provided that “the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness

has applied the principles and methods reliably to the facts of the case.” Wis. Stat. § 907.02(1) (emphasis added).

The legislative history of section 907.02(1) unequivocally shows intent to align Wisconsin’s expert witness statute with the corresponding federal rule when it was amended in January 2011. The amendment began as Senate Bill 1⁴ in a special legislative session in January 2011. But it was amended by Senate Amendment 1.⁵ A legislative council memorandum to the amendment explained the purpose was so the “language is identical to the language of Rule 702 of the Federal Rules of Evidence.” Wis. Leg. Council Amend. Memo.⁶

In *Seifert*, the Wisconsin Supreme Court expressly adopted the reliability standard used by federal courts under *Daubert*, 509 U.S. 579, and its progeny, including *Kumho Tire*, 526 U.S. 137. *Seifert* noted that in *Daubert*, the United States Supreme Court provided a “non-exhaustive list of factors that make *scientific evidence* sufficiently reliable for admission” in order to “guide the reliability analysis.” *Seifert*, 372 Wis. 2d 525, ¶ 62 (emphasis added) (footnote omitted). These factors look to: (1) if the methodology can and has been tested; (2) if the technique has been subjected to peer review and publication; (3) the known or potential rate of error of the methodology; and (4) if the technique has been generally accepted in the scientific community. *Id.* (citing *Daubert*, 509 U.S. at 592–93).

However, the court in *Seifert* cautioned that “[c]onsidering the broad range of cases in which expert

⁴ The bill is available at https://docs.legis.wisconsin.gov/2011/related/proposals/jr1_sb1.pdf.

⁵ The amendment is available at https://docs.legis.wisconsin.gov/2011/related/amendments/jr1_sb1/jr1_sa1_sb1.pdf.

⁶ The legislative council memo is available at https://docs.legis.wisconsin.gov/2011/related/lcamendmemo/jr1_sb1.pdf.

evidence arises, courts have not been constrained by the listed [*Daubert*] factors.” *Id.* ¶ 64. Therefore, depending on the type of case and type of expert involved, “the trial court may consider some, all, or none of the factors [*Daubert*] listed to determine whether the expert evidence is reliable.” *Id.* ¶ 65.

Hogan argues that Detective Remington’s testimony did not satisfy *Daubert*’s four-factors for determining the reliability of science-based expert opinions. (Hogan’s Br. 30.) But Hogan ignores that Detective Remington did not offer scientific opinions; rather, she was relaying specialized, experience-based knowledge concerning the methods employed by human traffickers. This type of testimony, while still analyzed under *Daubert* for reliability, is not assessed using the same specific factors that *Daubert* applied to science-based opinion testimony.

In *Kumho Tire*, 526 U.S. at 141, the United States Supreme Court explained that “*Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.” As explained by the Wisconsin Supreme Court in *Seifert*, 372 Wis. 2d 525, ¶¶ 65–70, the four factors listed in *Daubert* do not mechanically apply to “experience based” expert testimony. In cases involving such testimony, “the relevant reliability concerns will focus on *personal knowledge or experience*.” *Seifert*, 372 Wis. 2d 525, ¶ 69 (quoting *Kumho Tire*, 526 U.S. at 150) (emphasis added).

As the court in *Seifert* recognized, “The point, according to *Kumho Tire*, is to ensure that an expert, ‘whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.’” *Id.* ¶ 72 (quoting *Kumho Tire*, 526 U.S. at 152). Thus, an experience-based expert may provide expert testimony by explaining “how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the

facts.” *Id.* ¶ 73 (quoting Federal Advisory Committee Note to the 2000 Amendments to Fed. R. Evid. 702). As the Wisconsin Supreme Court recognized in *Seifert*, 372 Wis. 2d 525, ¶ 73, “expert evidence based on personal experiences can meet the reliability test.”

For instance, in *Smith*, 366 Wis. 2d 613, ¶ 9, this Court upheld admission of experience-based expert testimony from a county social worker about common behaviors exhibited by child sexual assault victims. Even though the proffered testimony did not “neatly fit the *Daubert* factors,” this Court found that the testimony was nonetheless reliable because the expert had “more than two decades of experience working with child victims” and her conclusions were “generally accepted within her discipline and not the product of ungrounded speculation.” *Id.* This Court also noted that such testimony “was similar to what had been allowed in federal courts already subject to the *Daubert*.” *Id.*

Indeed, trying to assess experience-based expert testimony or testimony based on social science under the traditional four *Daubert* factors is a futile effort and amounts to little more than trying to fit a square peg in a round hole. “Social science ‘research, theories and opinions cannot have the exactness of hard science methodologies’ and ‘expert testimony need not be based on statistical analysis in order to be probative.’” *United States v. Joseph*, 542 F.3d 13, 21 (2d Cir. 2008) (citation omitted). Thus, it makes no sense to talk of whether Detective Remington’s “methodology can and has been tested,” whether her “technique has been subjected to peer review and publication,” whether there is a “known or potential error rate of the methodology,” or if “the technique has been generally accepted.” *Seifert*, 372 Wis. 2d 525, ¶ 62.

By definition, experience-based expert testimony does not involve a scientific “method” or a “technique” and cannot be “tested,” or assessed with reference to a “error rate of the methodology.” Instead, as *Kumho Tire*, *Seifert*, and *Smith*

teach, such testimony is analyzed in terms of whether the expert has a sufficiently reliable background and experience in the subject-matter and is able to relate that experience in a reliable manner. Ultimately, a circuit court has “discretion in determining which factors should be considered in assessing reliability.” *Seifert*, 372 Wis. 2d 525, ¶ 90.

B. Experience-based expert testimony concerning the characteristics and methods employed by human traffickers is routinely admitted in federal courts.

Hogan is correct that no published Wisconsin decision has squarely addressed admission of expert testimony concerning the methods of human traffickers (Hogan’s Br. 1). But this Court does “not write on a blank slate” because “Wisconsin Stat. § 907.02(1) mirrors Federal Rule of Evidence 702 as amended in 2000, and [a court] may look for guidance and assistance in interpreting and applying § 907.02(1) . . . and to federal and state cases interpreting the text of Rule 702 or an analogous state law.” *Seifert*, 372 Wis. 2d 525, ¶ 55; *see also* Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, Wis. Lawyer (Mar. 1, 2011) (noting that “[f]ederal precedent is helpful” when applying section 907.02).⁷

Expert testimony about human trafficking methods and commonalities routinely survives *Daubert* challenges in federal courts across the country. For instance, in *United States v. Kidd*, 385 F. Supp. 3d 259, 263 (S.D.N.Y. 2019), the court rejected the very same arguments Hogan makes here. In *Kidd*, the defendant argued that expert testimony concerning the “psychology of the pimp-prostitute relationship” should have been excluded because the expert

⁷ Professor Blinka’s primer is available at <https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=84&articleid=2348>.

cited no “studies or empirical data” and the testimony could not be assessed by “objective standards.” *Id.* The court rejected these arguments, noting that “case law quite commonly upholds this type of testimony against *Daubert* challenges.” *Id.* at 263–64 (collecting cases). The court explained that the expert’s opinion was reliable based on her “expertise, training, and background” and that expert testimony grounded in personal experience and social science, by its nature, “cannot have the exactness of hard science methodologies and . . . need not be based on statistical analysis in order to be probative.” *Id.* at 264 (quoting *Joseph*, 542 F.3d at 21).

Likewise, in *United States v. Jackson*, 299 F.R.D. 543, 547 (W.D. Mich. 2014), the court admitted expert testimony from an FBI agent concerning the means used to recruit and control child victims of sex trafficking over a defense objection that such testimony did not involve specialized knowledge and was not reliable. In ruling that the agent’s testimony was properly admitted, the court stated that “use of expert testimony in child sex trafficking cases is not uncommon” and that the agent had considerable experience concerning the lifestyles, rules, vernacular, and methods of operation of the sex-trafficking community, which are not matters commonly known to lay people. *Id.* at 546–47. The court concluded that the agent’s testimony could help the jury understand and evaluate inconsistencies between the behavior of trafficking victims and the claims in the case and could explain the “means used to recruit and control child victims.” *Id.* at 547.

Several other decisions have reached similar results.⁸ Indeed, even Hogan admits that “[t]he matter has been taken

⁸ See, e.g., *United States v. Willoughby*, 742 F.3d 229, 239, (6th Cir. 2014) (no abuse of discretion in admitting expert testimony from law enforcement agent that “pimps manipulate their victims by posing as their boyfriends, by giving them gifts,

up by a number [of] federal appellate courts, with most courts finding the admission of such expert testimony was not an abuse of discretion.” (Hogan’s Br. 1, n.1.) Importantly, consistent with *Kumho Tire*, none of the decisions upholding admission of such testimony evaluate the reliability of the proffered testimony under the rubric for assessing scientific testimony used in *Daubert*, as Hogan proposes.⁹

C. Detective Remington’s testimony was properly admitted because it was based on reliable application of her education, experience, and knowledge that is generally accepted by professionals in her field.¹⁰

In cases involving experience-based testimony, “the relevant reliability concerns will focus upon *personal knowledge or experience*.” *Seifert*, 372 Wis. 2d 525, ¶ 69 (quoting *Kumho Tire*, 526 U.S. at 150) (emphasis added). Here, Detective Remington explained the common characteristics of trafficking victims and methods of operation of traffickers. Her testimony was based on her extensive training and experience and she made reference to case studies and professional literature validating her observations.

and by beating them when they disobey”); *United States v. Sutherland*, 191 F. App’x 737, 740 (10th Cir. 2006) (upholding admission of police sergeant who “testified concerning general characteristics of prostitute recruitment and retention”).

⁹ To be clear, the State is *not* arguing that the overall *Daubert* reliability standard is inapplicable to experience-based experts, only that the four specific indicia of reliability *Daubert* used to assess science-based expert testimony is not applicable to experience-based experts.

¹⁰ Hogan does develop separate arguments concerning whether Remington’s testimony was helpful to the trier of fact or whether Remington was sufficiently qualified; instead, Hogan’s sole focus is on the reliability of Remington’s testimony.

Specifically, Remington explained that her testimony was based on knowledge she had gained at a dozen training seminars she attended, 118 seminars she had presented at, the two dozen human trafficking cases she had personally handled, and 50–60 human trafficking case debriefings she had participated in while on the federal human trafficking task force. (R. 238:14–23.) Remington’s testimony was based on her police interviews with at least 80 victims of human trafficking and another 50 interviews relating to her work with victim support groups, as well as personal interviews with 20 suspected traffickers in her case work. (R. 233:102–03.)

With reference to her testimony as to how traffickers are manipulators who prey on the weak and vulnerable, Remington gave case specific examples of trafficking operations that focused on jails, homeless shelters, and drug rehab clinics, and recruitment. (R. 238:25–28.) She discussed how victims often form a “trauma bond” with their abusers and have feelings of love for them, and that they are often powerless to leave their abusers, again referencing examples from her cases. (R. 238:37–40.)

After describing the three main types of personas traffickers use to attract and retain their victims (Romeos, Gorillas, and CEOs), Remington explained that all traffickers use a combination of false promises, threats, violence, coercion to maintain control over their victims—including threatening their children, withholding or providing drugs, promising a relationship or shelter, and taking or tracking their cell phone. (R. 238:31–32, 38.) She provided examples (again from her work on the federal task force) of traffickers impregnating their victims and employing a form of debt bondage as means of exercising control over their victims. (R. 238:33, 49–50.)

Remington explained that through this process of intimidation, manipulation, and coercion, trafficking victims

will go “on automatic,” and are powerless to leave their abusers, again referencing examples from her cases. (R. 238:37–39.) And, despite (or because of) this process of manipulation, it is not uncommon for victims to have a “trauma bond” with their abusers and have feelings of love for them. (R. 238:40.)

Hogan complains that Remington did not utilize any “standards or controls” in her testimony. (Hogan’s Br. 33.) This criticism ignores that Hogan was relaying her personal knowledge and observation gained through first-hand experience and training; she did not purport to offer any form of formal scientific study. Likewise, Hogan’s criticism that Remington “expressed no understanding of known or potential error rates for her conclusions” (Hogan’s Br. 33), ignores that Remington was relaying her personal knowledge gained through experience and training and was not providing a statistical, scientific analysis.

Hogan also criticizes Remington because she “did not demonstrate that her theories have been generally accepted by the scientific community.” (Hogan’s Br. 34.) Again, Remington was not espousing scientific theories. Also, Hogan ignores that Remington expressly testified that there is no disagreement in the professional literature concerning the common trends and methods employed by human traffickers that she described; and she said these commonalities are “generally accepted by law enforcement.” (R. 233:109–10.) Specifically, Remington indicated that professionals in the community write articles and stories that “deal with these trends and observations of human trafficking” as she described them. (R. 233:108.) She explained that these trends and observations are reflected in annual DOJ reports to Congress and part of the information compiled as part of the federal task force. (R. 233:108–09.) The trends are also reflected in the “A21” report and Department of Homeland Security “Blue Campaign” articles and information.

(R. 233:109.) *See Smith*, 366 Wis. 2d 613, ¶ 9 (noting that the appropriate test for reliability is whether the principles being exposed are “generally accepted within her discipline and was not the product of ungrounded speculation.”) Therefore, Hogan’s assertion that Detective Remington’s testimony was mere *ipse dixit* falls flat. (Hogan’s Br. 32–33.)

Hogan also criticizes Remington for not having published any professional literature. (Hogan’s Br. 33.) However, *Daubert* teaches that “[p]ublication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability.” *Daubert*, 509 U.S. at 593.

Finally, in an attempt to undercut Remington’s testimony, Hogan poses a number of hypothetical and unanswered questions, such as why there are not more than three categories of pimps, how Remington knows what she knows, and how often the general trends she described hold true. (Hogan’s Br. 32–33.) But Hogan did not ask any of these questions of Remington, either at the *Daubert* hearing or at trial. (R. 233:111–113; 238:102–122). At trial, Hogan’s cross-examination of Remington focused mainly on the content of her interviews with the various witnesses. (R. 238:102–122.) In any event, these types of criticisms “are more appropriately directed to the testimony’s weight, rather than admissibility.” *Bayer ex rel. Petrucelli v. Dobbins*, 2016 WI App 65, ¶ 30, 371 Wis. 2d 428, 885 N.W.2d 173.

In summary, Detective Remington’s expert testimony concerning the common characteristics of trafficking victims and the methods utilized by human traffickers satisfies the *Daubert* standard for reliability for experience-based experts and was properly admitted under Wis. Stat. § 907.02. Remington described her experience, training, and resulting specialized knowledge; she explained her specialized knowledge to the jury with specific examples and references to professional literature and case studies; and she explained

that her observations and the knowledge she relayed are generally accepted in her field. Her experience-based testimony was reliable and admissible under the standards set forth in *Kumho Tire*, *Smith*, and *Seifert*.

II. Any error in admitting Remington's expert testimony was harmless because she did not offer an opinion on an ultimate issue and there was strong evidence that Hogan trafficked Megan.

The harmless error rule is codified in Wis. Stat. § 805.18 and made applicable to criminal proceedings via Wis. Stat. § 972.11(1); it prohibits reversal for errors not affecting a party's substantial rights. "An error affects the substantial rights of a party if there is a reasonable probability of a different outcome, meaning a 'probability sufficient to undermine confidence in the outcome.'" *State v. Kleser*, 2010 WI 88, ¶ 94, 328 Wis. 2d 42, 786 N.W.2d 144 (citation omitted).

Hogan argues that the admission of Remington's testimony was not harmless because it was "carefully tailored to portray Hogan as a human trafficker, and to minimize inconsistent testimony given by the other witnesses." (Hogan's Br. 35.) According to Hogan, Remington's testimony provided a "rationalization for disregarding the witnesses' trial testimony." (Hogan's Br. 35.)

However, Hogan's harmless error argument ignores the limited scope of the expert testimony provided by Detective Remington at trial. Contrary to what Hogan says, Remington did not opine that Hogan was a human trafficker. She did not opine that Hogan possessed the general characters of a human trafficker. Hogan did not opine that Megan or Cynthia were the victims of human trafficking or attempt to improperly bolster their credibility. Remington said nothing about the veracity of Megan and Tammy's attempts to walk-back the statements they provided to police.

Instead, as discussed above, the expert portion of Detective Remington's testimony focused solely on describing the general characteristics of human traffickers, human trafficking victims, and the methods used by human traffickers to recruit and control their victims. It was up to the jury to compare those general trends with the trial testimony and determine if what they heard matched the trends Remington discussed and whether that made it more likely that Hogan trafficked Megan.

Importantly, Remington did not repeat her testimony at the *Daubert* hearing expressing her opinion that Hogan and Megan's relationship was a "textbook" example of a human trafficker using coercive methods to control individuals. (R. 233:105–06.) Remington also did not repeat her *Daubert* testimony that Hogan's behavior was consistent with the methods employed by human traffickers discussed in the literature she referenced. (R. 233:109–10.) And Remington did not tell the jury her opinion that Hogan was a Gorilla pimp. (R. 233:108.)

Moreover, the fact that the jury acquitted Hogan of two of the charged offenses, including the child trafficking offense, demonstrates that the jury was not improperly swayed by Remington's expert testimony. To the contrary, their verdict shows that the jury played close attention to the evidence and case-specific facts.

Those facts establish a very strong case that Hogan trafficked Megan. Although Megan denied that Hogan trafficked her and claimed her statement to the police that he did was a lie (R. 237:65–68, 84–85), she made numerous admissions from which any reasonable person would have concluded that Hogan trafficked her.

When questioned about the night she and Hogan obtained the white Cadillac, Megan admitted that Hogan drove her to the party, even though no one ever called her and

asked her to come over. (R. 237:98.) She explained that the plan in advance was that she would perform fellatio on a man in exchange for use of his car. (R. 237:50.) Megan admitted that she was glad Johnson could not complete the act because she “did not want to” have sexual relations with him. (R. 237:53.) She also admitted that Hogan would be mad if she did not service Johnson because he wanted to use the car and that Hogan waited outside the door when she and Johnson were in the bedroom. (R. 237:55–56.) Megan later admitted that Tammy would drive her and Hogan around to places where she would have intercourse with men for money and then give it to Hogan. (R. 237:74.) Megan said that Hogan finally “let [her] go” because she threatened to commit suicide if she wasn’t allowed to leave. (R. 237:75–76.)

Thus, despite her attempts to minimize the nature of her relationship with Hogan, Megan admitted that he drove her to places to engage in commercial sexual activities and that at least on one occasion she did so, even though she didn’t want to, because Hogan would be upset if she didn’t. Hogan waited for her to finish servicing Johnson and then obtained the white Cadillac from him and used it to drive around with Megan.

In addition, Detective Remington’s fact-based testimony, concerning her interviews with Megan, Tammy, and Hogan was *far* more damaging to Hogan than Remington’s expert testimony. And given the specific allegations of forced prostitution that Megan and Tammy relayed to Detective Remington, the jury was well within their purview to find that their initial statements to the police were more credible than their trial testimony. *State v. Pankow*, 144 Wis. 2d 23, 30–31, 422 N.W.2d 913 (Ct. App. 1988) (“The function of the jury is to decide which evidence is credible and which is not, and how conflicts in the evidence are to be resolved.”)

And putting aside the inconsistencies between Megan and Tammy's trial testimony and statements for police, the jury heard Johnson testify that one of the individuals at the party mentioned getting some females to come over, and Hogan brought Megan over with the understanding that it would cost \$100 to have sex with her. (R. 236:189–95.) Johnson later gave Hogan's number to Officer Mares, who determined that it was listed to an adult escort service. (R. 236:206–08.)

And the statement Hogan gave to Remington created a strong and reasonable inference that he was engaged in trafficking Megan. According to Remington, Hogan admitted to taking Megan to the party with Johnson and told her "go see what that white guy--he says, he seems sexually interested in you. . . . go check it out." (R. 238:100–01.) Hogan admitted to Remington that Megan then had sexual contact with Johnson and that afterwards Johnson allowed them to use his vehicle. (R. 238:101.) And, Hogan acknowledged threatening to burn down Megan's parents' home and "[i]n his own words repeatedly he said she's vulnerable." (R. 238:96–97.) He also acknowledged physically abusing Megan and chasing her when she tried to run away. (R. 238:98–99.)

In short, while Megan and Tammy tried to recant their statements to the police, which indicted Hogan was engaged in commercial sex trafficking and trafficked Megan, the State presented strong circumstantial evidence that Hogan trafficked Megan. Given the totality of the evidence, as well as the limited scope of Detective Remington's expert testimony, there is not a "reasonable probability of a different outcome," *Kleser*, 328 Wis. 2d 42, ¶ 94, if the court had not allowed Remington to explain her specialized knowledge to the jury.

CONCLUSION

This Court should affirm Hogan's judgment of conviction for human trafficking as a repeat offender.

Dated this 9th day of June 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,299 words.

Dated this 9th day of June 2020.



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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.

Dated this 9th day of June 2020.



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