STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2019AP2350 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

MARKELL HOGAN,

Defendant-Appellant

On appeal from the Circuit Court for Sheboygan County,
The Honorable Rebecca Persick, presiding

REPLY BRIEF OF THE DEFENDANT-APPELLANT MARKELL HOGAN

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A. The circuit court cannot abdicate its role as gatekeeper by failing to adopt *any* factors by which assess the reliability of the proffered expert's opinions.

In ***Seifert v. Balink***, 2017 WI 2, ¶91, 372 Wis.2d 525, 888 N.W.2d 816, the Wisconsin Supreme Court wrote, when reviewing a circuit court's admission of expert testimony, that: "Once satisfied that the circuit court applied the appropriate legal framework, an appellate court reviews whether the circuit court properly exercised its discretion in determining which factors should be considered in assessing reliability, and in applying the reliability standard to determine whether to admit or exclude evidence under Wis. Stat. § 907.02(1)." "Once the circuit court selects the factors to be considered in assessing reliability, the circuit court measures the expert evidence against these factors. The circuit court also determines whether the witness faithfully and properly applied the reliability principles and methodology to the facts of the case." ***Id***. at ¶ 91. "[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***. at ¶ 92

Nonetheless, "this discretion does not allow the circuit court to abdicate its role as gatekeeper in performing the reliability analysis." ***Id.*** at ¶ 236 (Gableman, J., concurring) *citing*, ***Kumho Tire Co. v. Carmichael,*** 526 U.S. 137, 158-59, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (Scalia, J., concurring) ("[T]he discretion [the Court] endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function. ... Rather, it is discretion to choose among reasonable means of excluding

expertise that is fausse and science that is junky."). That is to say, the circuit court has wide discretion in what factors it chooses to evaluate the reliability of the proffered expert's opinion testimony. And yes, the circuit is not limited to the factors identified in ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), or those identified the Federal Rules Advisory Committee. ***Seifert***, 2017 WI 2, at ¶ 62. The factors identified in those authorities are not exhaustive. *Id.* The circuit may adopt about all, some, or none of these factors. It may even offer its own factors which indicate the reliability of the proffered evidence. *Id.* at 65. But what the circuit court cannot do, is to fail to adopt *any* factors by which to evaluate the reliability of the proffered expert's testimony.

The State argues that Detective Remington's testimony was "experience-based" and that "trying to assess experience-based expert testimony or testimony based on social science under the traditional four ***Daubert*** factors is a futile effort." (State's Br. 17). But the State and the circuit court offer no factors, ***Daubert*** or otherwise, other than an invocation of Detective Remington's "experience" in human trafficking cases, by which to assess the reliability of her testimony. While ***Seifert*** does not mandate which factors the circuit court adopts, it does demand that the circuit court adopt some factor(s) by which to measure reliability. "Experience" may be an adequate foundation upon which an expert can claim expertise in a particular field, but it is not a factor by which the reliability of an expert's particular field of expertise can be assessed. It is the reliability of an expert's underlying "principles and methods" which much be proven, and that is not establish by simply invoking the expert's experiences in an otherwise unproven field. The

testimony of a psychic does not become reliable by attending a hundred séances. Likewise, the State cannot simply rely on Detective Remington's years "experience" in investigating crime of human trafficking, to validate the reliability of her opinions. Those opinions must be "based on sufficient facts or data," and must be "the product of reliable principles and methods." ***In re Commitment of Jones***, 2018 WI 44, ¶29, 381 Wis.2d 284, 911 N.W.2d 97. Further, it must be demonstrated "the witness has applied the principles and methods reliably to the facts of the case." *Id.* None of these requirements were demonstrated in this case.

The State argues that "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." (State's Br. 24). But that is simply another way of saying Detective Remington had no principles or method for reaching her opinions. Detective Remington's testimony was certainly not scientific. Nonetheless, to be admissible it still had to be the product of some reliable discipline, it still had to be the product of reliable methods and principles. Having no principles or methods for reaching her conclusions, Detective Remington could not reliably apply those principles or methods to the facts and data she had gathered. Her testimony consisted nothing more that an anecdotal retelling of war stories; it was nothing more than` *ipse dixit* ('because I said so"). "The trial court's gatekeeping function in regard to experience-based testimony, ... `requires more than simply 'taking the expert's word for it.' " ***Seifert***, 2017 WI 2, at ¶74. To simply reduce the inquiry to an

invocation of "experience," is to bankrupt the internal structure of the ***Daubert*** reliability standard.

Similarly, the acceptance by certain federal courts of other witnesses claiming to be experts in human trafficking does not establish that Detective Remington's opinions were the product of reliable principles or methods. As an initial matter, a decision of a federal court, even "[a] decision by the United States Supreme Court interpreting a federal rule of evidence is persuasive—not binding—authority in connection with our construction of that rule's Wisconsin counterpart. ***State v. Blalock***, 150 Wis. 2d 688, 702–03, 442 N.W.2d 514, 519–20 (Ct. App. 1989) (citations omitted). More to the point, however, irrespective of what may have happened in other cases, in other jurisdictions, involving other witnesses, it was still incumbent on the circuit court in this case to determine independently that *Detective Remington's* opinions were the product upon reliable principles and methods. Detective Remington's testimony had to be something more than her anecdotal impression of pimps she had met. That entailed the circuit courts using some factor(s), independent of Detective Remington's say so, to establish that her principles and methods were reliable. That did not happen here. Detective Remington's testimony, being simply her subjective opinions, had no basis in reliable principles and methods, and consequently should not have been admitted into evidence.

B. The admission of Detective Remington's opinion testimony was not harmless error.

The test for determining whether and error was harmless was explicated by the Supreme Court of Wisconsin in ***State v. Dyess***, 124 Wis.2d 525, 541-42, 370 N.W.2d 222 (Wis., 1985), wherein the Court wrote:

> when error is committed, a court should be sure that the error did not affect the result or had only a slight effect. ...
>
> The only reasonable test to assure this result is to hold that, where error is present, the reviewing court must set aside the verdict unless it is sure that the error did not influence the jury or had such slight effect as to be de minimus.

(citations omitted). *See also,* ***State v. Rocha-Mayo***, 2014 WI 57, ¶23, 355 Wis. 2d 85, 848 N.W.2d 83 ("Our harmless error analysis requires us to determine whether the error in question affected the jury's verdict. ... Therefore, we ask, 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' ").

The error here was not harmless. The case against Hogan was not built from the courtroom testimony of the witnesses, but rather from their pre-trial statements to law enforcement. The witnesses to Hogan's alleged acts of human trafficking, M.C., Kevin Johnson, Trista Windorski, Renee Davidson and Allison Mink, all to one degree or another, failed to substantiate at trial the statements they had previously made to law enforcement, variously claiming that they lacked recollection (e.g. R.236:194-97 and 200; R.237:26, 28-36, 37-38, 40-41, 42, 44, 45, 64-65, 68-69, 75-76, 116, 118, 119, 120, 127, 128, 150, 155 and 156); that they lacked personal knowledge (e.g. R.237:118, 120, 129, 155 and 156); or that they were flat out lying. (e.g. R.237:64, 68-69, 73, 75-

76, 94, 152 and 158). M.C. specifically denied that Hogan made her perform sexual acts for money. (R.237:84-85).

Detective Remington's expert testimony was carefully tailored to minimize the courtroom testimony given by the other witnesses, by characterizing Hogan as a "master manipulator." Her expert testimony was that all these denials and recantations could be disregarded because all human traffickers are "master manipulators," who can gain such a psychological hold upon their victims that it can take months to break. (R.238:24-25, 40, and 43). The inference was clear, the courtroom testimony of the witnesses was not to be believed because Hogan, being a "human trafficker" and a "master manipulator," had convinced all the witnesses into perjuring themselves at trial. This was a rationalization for disregarding the witnesses' trial testimony, and its effect cannot be regarded as de minimus.

IV. Conclusion.

Wherefore, Mr. Hogan respectfully requests that this Court vacate his conviction and remand this case to the circuit court for a new trial.

Respectfully submitted July 29, 2020.

This brief has been electronically signed by:

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V. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1565 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

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 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.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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 July 29, 2020.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by priority mail on July 29, 2020. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: July 29, 2020.

Signature: _____