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CLERK OF WISCONSIN
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STATE OF WISCONSIN
IN SUPREME COURT
Appeal No. 2019AP2350 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

MARKELL HOGAN,

Defendant-Appellant-Petitioner

**PETITION FOR REVIEW AND APPENDIX
OF THE DEFENDANT-APPELLANT-PETITIONER
MARKELL HOGAN**

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III. Statement of issues presented for review.

This petition presents the following issue for review:

Did the circuit court err in admitting testimony of the lead investigator as an expert in “the methods employed by people engaged in human trafficking”?

The circuit court found that “the methods employed by people engaged in human trafficking” was a form of specialized knowledge that would assist the jury in understanding the evidence, and that the lead detective was a qualified “human trafficking” expert. The Court of Appeals affirmed.

IV. Statement of Rule 809.62 Criteria Relied Upon For Review.

Mr. Hogan believes that there are special and important reasons for this Court to exercise its discretion to review the decisions of the circuit court and the Court of Appeals. The question of whether “the methods employed by people engaged in human trafficking” is a reliable form of specialized knowledge for which expert testimony may be received, and what qualifications are to be expected of a “human trafficking” expert, is a question that had not previously been addressed by a Wisconsin appellate court before this case.¹ Thus, this petition

¹ The matter has been taken up by a number the federal appellate courts, with most courts finding the admission of such expert testimony was not an erroneous exercise of discretion under the circumstances presented in those cases. See, *United States v. E.L. Anderson*, 851 F.2d 384 (D.C. Cir. 1988); *United States v. G. Anderson*, 560 F.3d 275 (5th Cir. 2009); *United States v. Bryant*, 654 Fed. Appx. 807 (6th Cir. 2016); *United States v. Carson*, 870 F.3d 584 (7th Cir. 2017); *United States v. Evans*, 272 F.3d 1069 (8th Cir. 2001), but see *United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009) (finding that portions of the expert’s testimony in that case had invaded the province of the jury); *United States v.*

addresses a question which “is a novel one, the resolution of which will have statewide impact,” as per § 809.62(1r)(c)2, Wis. Stats.

V. Statement of Case and Facts.

A. Proceedings below.

On January 24, 2018, Markell Hogan was convicted, after a jury trial, of one count of Human Trafficking, as a repeater. (R.174:1; Appx. 23). He was sentenced on April 20, 2018, in the Sheboygan County Circuit Court, the Honorable Rebecca L. Persick, presiding, to a thirty-year prison sentence, consisting of twenty years of initial incarceration followed by ten years of extended supervision. *Id.*

Prior to trial, the circuit court held a *Daubert*² hearing to assess reliability, relevancy, and witness qualifications of proffered testimony from Sheboygan Police Department detective Tamara Remington, into the “methods employed by people engaged in human trafficking or trafficking a child.” (COA Decision ¶8; Appx. 4-5). Judge Persick permitted Remington to testify as an expert on human trafficking at trial, and the jury found Hogan guilty on one count of human trafficking. (COA Decision ¶¶15-16; Appx. 8-9). The jury also found Hogan *not* guilty on one count of trafficking a child and one count of strangulation and suffocation. *Id.*

Hogan appealed his conviction, challenging Judge Persick’s admission of expert opinion testimony from detective Remington. (COA Decision ¶17; Appx. 9). The Court of Appeals ruled that the circuit

Delgado, 677 Fed. Appx. 84 (3rd Cir. 2017) (affirming a trial court finding that expert testimony was not helpful); *United States v. Taylor*, 239 F.3d 994 (9th Cir. 2001); and *United States v. Brinson*, 772 F.3d 1314 (10th Cir. 2014).

² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

court did not err in finding this expert's testimony reliable, and affirmed. (COA Decision ¶2; Appx. 2).

B. Facts of the case.

On September 8, 2015, Markell Hogan was charged with one count of Human Trafficking,³ with a repeater enhancer⁴; one count of Trafficking of a Child,⁵ as a party to the crime,⁶ also with a repeater enhancer; and one count of Strangulation and Suffocation,⁷ again with a repeater enhancer. (R.2:1-2). The basic allegations of the complaint were that on the morning of August 23, 2015, “Cathy,”⁸ a child under the age of fifteen years, was walking down a street in Sheboygan, Wisconsin, when she saw a white Cadillac drive past her, turn around suspiciously, then pull up next to her beside the curb. *Id.* at 2-3. The driver of the white Cadillac was an African-American male, later identified as Markell Hogan. *Id.* at 3. There was also a passenger, described as a white female with brown or blond hair, and later identified as “Mary,” the alleged victim of Counts 1 and 3 of the criminal complaint. *Id.* at 4. The female passenger allegedly tried to persuade Cathy to get into the Cadillac, telling her, “my man really likes you; do you want to smoke? ... Come on, you'll be fine, let's go smoke ... You'll be safe with us, let's go

³ Wis. Stats. § 940.302(2)(a). All citation to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

⁴ Wis. Stats. § 939.62(1)(c).

⁵ Wis. Stats. § 948.051(1).

⁶ Wis. Stats. § 939.05.

⁷ Wis. Stats. § 940.235(1).

⁸ In accordance with Wis. Stat. (Rule) § 809.86. The Court of Appeals referred to the victims by the pseudonyms “Cathy” and “Mary”. Hogan has adopted the same pseudonyms for this petition.

smoke ... [and] let us give you a ride.” *Id.* at 3. The only thing Cathy could recall the driver saying was “come on, let’s go.” *Id.* Cathy then contacted the police and told them that she had the feeling that the two individuals in the Cadillac were trying to traffic her. *Id.* Hogan was ultimately acquitted on the charge of Trafficking of a Child. (R.167:2).

Hogan was also accused of trafficking Mary, the female passenger in the white Cadillac. (R.2:4-6). According to the criminal complaint, Mary initially denied any knowledge of an encounter with a young girl. *Id.* at 4. But then, over a course of interviews with law enforcement, Mary’s story changed. *Id.* at 4-6. Mary admitted to encountering Cathy, but denied knowing that the girl was underaged. *Id.* at 4. Then she admitted that “obviously she’s 15,” but denied intending to take her to a bar or anything like that, because she was so young. *Id.* In an interview with Detective Tamara Remington, the detective asked about circular bruises she observed on Mary’s upper arm; bruises similar to those that may be caused by someone grasping her upper arm very tightly. *Id.* Mary told Detective Remington that Hogan had caused the bruises, and showed the detective other injuries that Hogan allegedly caused, including a large bruise on her back, a half-inch scab on her left forehead, and bruises on her legs. *Id.* Mary accused Hogan of causing all these injuries, said he was very controlling, and told the detective that she wanted to get away from Hogan. *Id.* She described a particular incident in which he bent her neck backward, “twisting her like a pretzel,” so that she could not breathe. *Id.* at 4-5. Hogan was ultimately acquitted on the charge of Strangulation and Suffocation. (R.167:3).

According to the criminal complaint, Mary claimed the twisting had occurred when she was trying to leave Hogan. *Id.* at 5. She stated

that Hogan had told her that she would have to pay him \$2,500 if she wanted to leave, his reasoning being that he could get money for Mary because she was so beautiful. *Id.* In one interview, Mary gave further details concerning the encounter with Cathy. *Id.* She claimed that earlier Hogan had taken her to a party where they met the owner of the Cadillac. *Id.* An arrangement was allegedly struck where she and Hogan were lent the use of the Cadillac in exchange for her having sex with its owner. *Id.* As it was, the owner of the Cadillac was unable to gain an erection due to drug use, but followed through with his side of the bargain and lent them the Cadillac. *Id.* During the same interview, Mary claimed that Hogan had driven her to other locations, at other times, where she had sexual intercourse with men for money. *Id.* She claimed not to know how much money was paid for her services, because the customers always paid Hogan, not her. *Id.* Anyway, after leaving the party, Mary claimed that she and Hogan saw Cathy walking along the road. *Id.* Hogan allegedly exclaimed "Hey, hey, get that bitch." *Id.* Mary then supposedly asked him, "You want me to get that bitch?" to which Hogan said, "Hell yeah, she'll be my bitch, she'll get me money." *Id.* M.C claimed that Hogan told her, "She'll do what I say, 'cause if she don't I'll fuck her up." He also supposedly told Mary, "I'll bust you in your shit [Mary] right now if you don't." *Id.* When Cathy declined to get into the Cadillac, Mary supposedly asked Hogan if he was going to make the girl get into the car. *Id.* Hogan responded by telling Mary, "Nah, let's go, [Mary]." *Id.*

Prior to trial, the State filed a notice indicating that it intended "to elicit 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 and R.84). The State claimed that “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). The motion further claimed that “Detective Remington has expert knowledge on the topic based on her education through trainings and extensive work history investigating human trafficking cases,” and a copy of her curriculum vitae was attached to the motion. (R.83:7 and R.84).

Hearings on the motion began on August 8, 2017. (R.227:5-10). The State argued that “there could be many misconceptions about whether a person is merely a prostitute or is the victim of human trafficking”; and that “it may appear outwardly that a victim is able to leave and do what he or she wants when in reality when a person understands human trafficking, that's not the case.” (R.227:5). Counsel for Hogan objected to the admission of expert testimony on human trafficking, taking particular exception to the use of the primary investigative detective as the expert witness, which counsel felt created a risk of confusion for the jurors given the dual roles being taken on by the detective. (R.227:6-8). Counsel also questioned Detective Remington’s specific qualifications. *Id.* The trial court reserved judgment on Detective Remington’s qualifications, but ruled that “whether it's offered through Officer Remington or some other expert, is necessary to the trier of fact here because, as the State pointed out, human trafficking is outside the realm of standard juror knowledge.” (R.227:8). The court explained that “the issue of human trafficking is something that is so complicated and it's always evolving, and as the

State indicated there may be an issue about whether the victim here is actually a victim of human trafficking or whether she's a prostitute, ... I think an expert would be necessary to assist the jury in making that determination.” (R.227:9).

Testimony concerning Detective Remington’s qualifications as an expert in human trafficking was received on January 8, 2018. (R.233:95-113). At the hearing Detective Remington identified her curriculum vitae and specified human trafficking and gangs as her particular areas of expertise. (R.233:95). She testified to her involvement in an investigation by the San Jose Police Department into Asian gangs involved in international human trafficking. (R.233:96). As a school resource officer in Sheboygan, she began attending conferences on human trafficking in 2013, and was soon after invited to join a Federal Human Trafficking Taskforce for Eastern Wisconsin. (R.233:96-97). She testified to attending conferences on human trafficking sponsored by Department of Justice, and to watching a webinar by the Department of Homeland Security. (R.233:97). Later she became a presenter at other conferences. (R.233:98). She testified to giving a presentation on human trafficking at the International Conference on Transnational Organized Crime and Terrorism in Orlando Florida. (R.233:100 and R.84:5). She also testified to giving multiple presentations for Department of Children and Families, and to working on an indicator tool for identifying children at high-risk for human trafficking. (R.233:100-02). She testified to having participated in interviews of over eighty victims, and approximately twenty suspects, of human trafficking. (R.233:102-03). She testified that as a member of the southeastern Wisconsin

taskforce she has been involved in thirty-three case studies of human trafficking. *Id.*

Detective Remington testified that through her work and training she came to find that there are some consistent behaviors that are employed by human traffickers. (R.233:104-05). The victims are often vulnerable, high-risk individuals, either through being runaways or juveniles engaged in adverse behaviors. *Id.* Drug addiction is frequently present in the victims, and Detective Remington stated that drugs are often used by traffickers to entice or recruit their victims. *Id.* Conversely, the withholding of drugs may be used to coerce victims into performing commercial sex acts. *Id.* She also spoke of a growing practice by traffickers of impregnating their victims, “because once you have a baby with someone, you really have more control [over] that person.” (R.233:106). She stated that in her experience the threat or use of force is not always involved in human trafficking, that often it can start off by the trafficker “grooming” the potential victim, notably, by providing gifts and making false professions of love. (R.233:107). She referred to such traffickers as “Romeo” pimps. *Id.* Hogan, however, she characterized as violent or “gorilla” pimp. (R.233:108). She noted that human traffickers are intelligent, “master manipulators,” and often use social media to recruit their victims. *Id.* She testified that it is possible for some people to be prostitutes without a trafficker, but observed that such people are rare. (R.233:112-13). Prostitutes are often targeted by traffickers, who offer to provide them with protection. *Id.*

Detective Remington testified that there is literature and articles published on the topic of human trafficking. (R.233:108). She noted that the Department of Justice produces annual reports to Congress, which

she has read. *Id.* She was unaware of any literature which contradicted the opinions and observations she had just testified to. (R.233:109). The detective admitted that she had not published any articles herself in the area of human trafficking. (R.233:111). Though the taskforce she works with does compile information for the annual reports prepared by the Department of Justice. (R.233:108-09). She acknowledged that she has testified as an expert in only a few cases, once at a ***Daubert*** hearing in Sheboygan County, and once at a jury trial in Brown County. (R.233:112).

On January 17, 2018, the trial court made an oral ruling on the admissibility of Detective Remington's testimony as an expert witness in human trafficking. (R.235:12-15; Appx. 25-28). The Court cited Wisconsin Statutes section 907.02, and acknowledged that "that there are inherent limitations of social science research," but observed that the Wisconsin Supreme Court in ***Siefert v. Balink***, 2017 WI 2, 372 Wis.2d 525, 888 N.W.2d 816, held that experience-based evidence can surpass the ***Daubert*** reliability requirement. (R.235:12; Appx. 25). As to qualifications, the Court found that Detective Remington had knowledge on the topic of human trafficking based on her education through trainings, her attendance at conferences on human trafficking, her extensive work history investigating human trafficking cases, and through her contacts with the victims and perpetrators of human trafficking. (R.235:13; Appx. 26). The Court did not find the fact that Detective Remington has not published an article on human trafficking to be "particularly persuasive," stating that "because the nature of human trafficking is always changing ... By the time the article is published, it may not even be relevant anymore." (R.235:14; Appx. 27).

The Court further found that Detective Remington's testimony "would be useful to the jury and the Court in understanding the issue at hand, ... her anticipated testimony will concern a lot of aspects about human trafficking including how sex traffickers lure people into sex trafficking by manipulating them and exploiting their vulnerabilities." (R.235:14-15; Appx. 27-28).

Detective Remington testified on the third day of Hogan's jury trial. (R.238:6-126). At the trial she testified that human trafficking was her specialty within the Sheboygan Police Department. (R.238:10). She again testified to being involved in an international human trafficking case while with the San Jose Police Department, to attending conferences and training in human trafficking, and to giving presentations. (R.238:12-15). She told the jury she was a member of a federal taskforce addressing human trafficking in southeastern Wisconsin. (R.238:15-18). She testified that the taskforce has monthly or quarterly meeting during which they hear debriefings about traffickers who have been arrested, and victims who have been recovered. *Id.* She testified to having participated in fifty to sixty debriefings. (R.238:23). She discussed her work on an indicator tool for children at high-risk of being trafficked. (R.238:18-20). She stated that since joining the Sheboygan Police Department she had closed or resolved twelve human trafficking cases, and had over twelve cases open at the present. (R.238:21).

She told the jury that most recruitment happens via social media, but that they have had cases where children had been recruited near libraries, schools, fast food restaurants, and city parks. (R.238:21-23). She testified that victims of human trafficking are vulnerable

individuals, often runaways or homeless children and adults. (R.238:24). She stated that traffickers will often recruit in homeless shelters, or even in jails. (R.238:24-25). She mentioned persons recently incarcerated, with “nowhere to go, not a dollar to their name,” as being especially vulnerable. *Id.* Other trends, she noted, were the recruitment of persons with cognitive or physical disabilities, persons with mental illnesses, and persons with addiction issues. (R.238:26). She stated that she was aware of instances of grooming and recruitment outside of, or even inside, drug rehabilitation clinics, referring to a specific instance in Florida where a clinic was directly participating in the recruitment of victims for a human trafficking ring. (R.238:26-27). She observed that not all victims of trafficking possess these particular risk factors, but they all exhibit some vulnerability. “That's the common denominator,” she said. (R.238:27-28).

She told the jury that human traffickers were intelligent and “master manipulators.” (R.238:24-25). She testified that traffickers are willing invest considerable time in the recruitment a victim because the return on the investment is so lucrative. (R.238:25-26). “They can only sell a drug once. They can only sell a gun once. However, if they do get you, a human being, they can sell that human being over and over, ten times a night, 30 times a night. It's very lucrative.” *Id.* She described the recruitment process as one of “grooming” the prospective target of the trafficker. (R.238:28). She told the jury that there are three types of traffickers, the finesse or “Romeo” pimp, the violent or “gorilla” pimp, and the business model or “CEO” pimp. (R.238:30). According to Detective Remington, the majority of pimps are Romeo pimps; they will shower their victims with gifts and false professions of love. (R.238:29).

Later as the relationship progresses they will ask the victim to engage in commercial sex acts, as an expression of love for their trafficker. *Id.* The gorilla pimp may also start with professions of love, but will ultimately use threats of violence, acts of violence, and physical abduction in order to coerce their victim into performing commercial sex acts. (R.238:30-31). The CEO pimp, on the other hand, will approach the victim from the perspective that they are in business together. *Id.*

In most cases, Detective Remington testified, the trafficker will use drugs, both in the provision and the withholding, to coerce their victims into performing commercial sex acts. (R.238:31). Romeo pimps will often make false promises of marriage to their victims, or promises to buy a house, or raise a family with their victims. (R.238:32). She said the promises can be especially effective on persons who are homeless. *Id.* The gorilla pimp, on the other hand, will engage in threats of a psychological nature, such as, “I’m going to kill your family. I’m going to kill your favorite dog. I’m going to kill your baby. I’m going to kill your mom who you’re so close to if you don’t do what I say.” (R.238:31). Detective Remington told the jury that one recent trend that she was seeing was the recruitment of young women with children, or the impregnation of victims by their traffickers, who will then use their control of the baby as a means for controlling the mother. (R.238:33-35). Similarly, she said that she has noticed that the victims of trafficking will often wish to “numb” themselves with drugs after having a child taken into custody by social services. (R.238:35-36).

Leaving a trafficker is often difficult for the victim, Detective Remington told the jury. (R.238:36). Victims are often under constant supervision. *Id.* But more important, the psychological pressures placed

upon the victims will convince them that they cannot escape. (R.238:36-38). “The pimp lets them know, hey, I've got my people, and you will be tracked down, and there will be hell to pay. If you do try to get away, I will get you. My people will get you.” (R.238:38). One trend she noted was that of traffickers taking away the victim’s phone, and replacing it with another phone which has spyware or GPS tracking. *Id.* Also, the trafficker will often try to convince the victim that they are the “troublemaker.” (R.238:39). “You're the kid that always ran away or you're the truant or you're the one with a criminal history or drug problem.” *Id.* But even outside of the fear, she said many victims genuinely come to believe that they are in love; that they actually have a genuine relationship with their trafficker. (R.238:40-41). “It's the norm where even when we revisit a survivor eight months later, years later, they come and they say, I'm so embarrassed. I hope this doesn't sound weird, but I love him.” (R.238:40).

Detective Remington also went into some detail about the internal dynamics of the trafficker with their “stable” of victims. (R.238:41-45). She noted that traffickers will often, but not always, have a number of victims working for them. (R.238:41 and 44). There will typically be one victim who is a head girl or boy, who is called the “bottom bitch,” and acts as a sort of “vice-pimp.” (R.238:42). The trafficker basically pits his victims against each other, with each victim striving to be the “bottom bitch.” *Id.* The position of “bottom bitch” comes with certain perks, such as, sitting in the front passengers seat and doling out some of the beatings to the other victims. (R.238:42-43). According to Detective Remington, the “bottom bitch” is responsible for recruiting new victims into the “stable.” *Id.* Ironically, it is the “bottom bitch” who often

receives the worse beatings. *Id.* Yet, they are also the most fiercely loyal to their trafficker, and it usual takes months of trauma therapy before they will break their bond with the pimp. (R.238:43).

Other insights provided by Detective Remington were that pimps are often referred to by their victims as “Daddy,” or “Papi” (which is Spanish for Daddy). (R.238:45-46). Other victims in the stable may be referred to by the victims as “my wifies, or my wife-in-laws.” *Id.* According to the detective, this is all part of the dynamic of the relationship; the pimp is, in a sense, the head of the family, the one who makes the rules, and most traffickers do have rules. *Id.* Regarding drug use, she spoke of one case where the trafficker was using methamphetamine as a stimulant, to keep his victims working, up to thirty men a night. (R.238:47-48). In other cases, traffickers have used heroin as means to “shackle the brain,” keeping the victim so high that they seem to be “like zombies,” unable to escape their trafficker. (R.238:48). Sometimes the trafficker will keep a supply of Narcan on hand, in order to stimulate their victims “back to life.” *Id.* On the other hand, some traffickers, she noted, will have actually have a no drugs rule, or a marijuana only policy, “to keep you chill, to keep you mellow so that you can service customers.” *Id.*

Detective Remington also discussed a practice of “debt bondage,” where the trafficker will tell the victim that she “owes” him, and that to leave him requires her paying off the “debt.” (R.238:49). The debt is often rationalized by telling the victim that she “owes” her trafficker for gifts he gave her, for shopping trips, for providing a roof over her head. *Id.* Detective Remington said the going rate for the “debt” is twenty-five hundred to thirty-five hundred dollars. (R.238:49). In practice, however,

the rules are rigged such that the “debt” can never be paid off. (R.238:50). Traffickers will also sometimes tell their victims, if they want to leave, they must find the trafficker a replacement. *Id.*

The jury found Hogan guilty of human trafficking with regard to Mary; but not guilty of trafficking of a child, as a party to a crime, with regard to Cathy; and not guilty of strangulation and suffocation of Mary. (R.167:2-3 and COA Decision ¶9; Appx. 9). Hogan appealed. The sole issue on appeal was whether the trial court erred in admitting Remington's expert testimony. (COA Decision ¶17; Appx. 9). The Court of Appeals discussion began by tracing the evolution of the standard in federal courts and explained how several recent Wisconsin cases fit within the ***Daubert*** framework. (COA Decision ¶¶15-23; Appx. 9-13). The Court of Appeals rejected any argument that the study of human trafficking cannot ever form the basis of expert testimony under ***Daubert***. (COA Decision ¶28; Appx. 17). None of the “***Daubert*** factors” fit Remington's testimony, however, relying heavily on ***Siefert***, the Court of Appeals held that this does not mean the testimony is inherently unreliable; that other considerations may guide the reliability analysis. (COA Decision ¶¶29-30; Appx. 17-18). The Court of Appeals wrote:

... for those gaining hands-on expertise in sociology, criminology, and similar fields, the “methodology” underlying the expert's conclusions is part and parcel of the expert's qualifications, and may be nothing more than rigorous participation in all of the various activities, trainings, and experiences available to that individual. Thus, Hogan is incorrect when he argues, for example, that Remington “offers no methodology or process” by which she has determined that traffickers are “master manipulators.” Remington's “methodology” was working with numerous traffickers and victims as a detective, regularly discussing regional trafficking cases with her work group, reading publications on human trafficking, and volunteering with victims. From all these sources of experience, Remington was able to reach a generalized conclusion about common behavioral and personality traits of traffickers.

(COA Decision ¶30; Appx. 18-19). Hogan now petitions this Court to review the decisions of the circuit court and the Court of Appeals.

VI. Argument

A. **The circuit court failed in its gatekeeping role by admitting the testimony of the lead investigator as an expert in “the methods employed by people engaged in human trafficking.”**

1. Standard of Review.

The standard for reviewing a circuit court’s gatekeeping determination under Wis. Stats. § 907.02(1), requires that the appellate court examine the circuit court’s ruling both independently as a question of law, and also under the erroneous exercise of discretion standard. *Siefert*, 2017 WI 2, at ¶¶ 87-88. This court decides independently of the circuit court whether it applied the proper legal standard under Wis. Stat. § 907.02(1), while benefiting from its analysis. *Id.* at ¶89 (citations omitted).

“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).” *Id.* at ¶90 (citations and footnotes omitted). “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 (footnote omitted). “[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 (footnote omitted). “A trial court’s decision on admissibility or exclusion of expert evidence is an erroneous exercise of discretion when a decision rests upon a clearly erroneous finding of fact, an erroneous conclusion of law, or an improper application of law to fact.” *Id.* at ¶93 (footnote omitted). “[T]his 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*, ***Daubert***, 509 U.S. at 158–59, 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*.”).

2. Detective Remington’s testimony failed to demonstrate that her opinions were the product of reliable principles and methods.

“The admissibility of expert testimony is governed by Wis. Stats. § 907.02.” *In re Commitment of Jones*, 2018 WI 44, ¶6, 381 Wis.2d 284, 911 N.W.2d 97. This statute was amended in 2011 to read, in relevant part, as follows:

Testimony by experts. (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if 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. Stats. § 907.02. The 2011 amendment to Wis. Stat. § 907.02(1) changed the law to mirror Federal Rule of Evidence 702, which codified

the federal rule established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993) and its progeny.⁹ “This statute requires that circuit courts make five determinations before admitting expert testimony:

- (1) whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
- (2) whether the expert is qualified as an expert by knowledge, skill, experience, training, or education;
- (3) whether the testimony is based upon sufficient facts or data;
- (4) whether the testimony is the product of reliable principles and methods; and
- (5) whether the witness has applied the principles and methods reliably to the facts of the case.

Siefert, 2017 WI 2, at ¶51. “The last three determinations derive from *Daubert*, and are often referred to as the “reliability standard.” *Siefert*, 2017 WI 2, at ¶7. “The trial court must be satisfied that the testimony is reliable by a preponderance of the evidence.” *Id.* at ¶58.

“The court’s role with regard to the admissibility of evidence is often described as that of a gatekeeper. ... In this role, courts seek to ensure that the evidence submitted to the factfinder is of the requisite quality.” *Jones*, 2018 WI 44, at 31.¹⁰ “The standard is flexible but has

⁹ The federal rule effectively codified a reliability test that grew out of a trilogy of cases: *Daubert v. Merrell Dow Pharm. Inc.*, *General Electric Co. v. Joiner*, and *Kumho Tire Co. v. Carmichael*.” Blinka, D.D., *Elements of expert opinion testimony under Wis. Stats. § 907.02*, 7 Wis. Prac., Wis. Evidence § 702.403 (4th ed.) (footnotes omitted).

¹⁰ Citing as examples, *State v. Fischer*, 2010 WI 6, ¶40, 322 Wis. 2d 265, 778 N.W.2d 629 (Ziegler, J., concurring) (“The judge, as gatekeeper, has the capacity to determine whether certain evidence is admissible.”); and *State v. Wilson*, 2015 WI 48, ¶99, 362 Wis. 2d 193, 864 N.W.2d 52 (Ziegler J., concurring) (“The trial court remains the gatekeeper in determining what evidence is admissible and why.”).

teeth. The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion.” *State v. Giese*, 2014 WI App 92, ¶19, 356 Wis.2d 796, 854 N.W.2d 687.¹¹ “The heightened standard under the amended Wis. Stat. § 907.02 does not change this gatekeeping function. It does, however, require more of the gatekeeper. Instead of simply determining whether the evidence makes a fact of consequence more or less probable, courts must now also make a threshold determination as to whether the evidence is reliable enough to go to the factfinder” *Jones*, 2018 WI 44, at ¶32. “The days of relatively easy admission of expert testimony into Wisconsin courtrooms are over.” *Siefert*, 2017 WI 2, at ¶75 (Ziegler, J., concurring).

The reliability standard “applies not just to scientific evidence, but to all expert opinions, ‘whether the testimony reflects scientific, technical, or other specialized knowledge.’” *Id.* at ¶60, quoting, *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999). To guide the reliability analysis, the *Daubert* court provided a non-exclusive list of factors by which to evaluate the reliability of the proffered expert testimony:

- (1) whether the expert’s technique or theory can be or has been tested---that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
- (2) whether the technique or theory has been subject to peer review and publication;

¹¹ Citing, *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 671 (6th Cir.2010) (“ ‘[N]o matter how good’ experts’ ‘credentials’ may be, they are ‘not permitted to speculate.’ ” (citation omitted)); and Blinka, D.D., *The Daubert Standard in Wisconsin: A Primer*, WISCONSIN LAWYER, March 2011,; Fine, R.A., FINE’S WISCONSIN EVIDENCE 34 (Supp. 2012) (“Under Daubert, the testimony of the witness [is to be] ‘more than subjective belief or unsupported speculation.’ ” (quoting *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786)).

- (3) the known or potential rate of error of the technique or theory when applied;
- (4) the existence and maintenance of standards and controls; and
- (5) whether the technique or theory has been generally accepted in the scientific community.

Fed. R. Evid. 702, advisory committee notes to 2000 Amendments.¹²

To this list, the Federal Rules Advisory Committee added five more factors as guides to assist the court in decisions about reliability:

- (1) Whether experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.”¹³
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.¹⁴
- (3) Whether the expert has adequately accounted for obvious alternative explanations.¹⁵
- (4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.”¹⁶

¹² *Citng, Daubert*, 509 U.S. at 593-94; *see also, Siefert*, 2017 WI 2, at ¶62.

¹³ Fed. R. Evid., 702 advisory committee notes to 2000 Amendments; *quoting, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

¹⁴ *Id.*; *citing, General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”).

¹⁵ *Id.*; *citing, Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff’s condition). *And comparing, Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

¹⁶ *Id.*; *quoting, Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *And citing, Kumho*, 119 S.Ct. at 1176 (*Daubert* requires the trial court to assure itself that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”).

- (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.¹⁷

Siefert, 2017 WI 2, at ¶63.¹⁸

While these lists are not intended to be exhaustive of the factors a circuit court may consider in evaluating reliability, what is striking is that none of the factors listed above suggest that Detective Remington's testimony could be considered as reliable evidence. Officer Remington's opinions and theories were not, and cannot, be challenged in any objective sense. She claims to have spoken to many people, but she offers no methodology or process by which she draws her conclusions from her experiences. (R.233:102-03). Rather, her opinions appear to be subjective and conclusory. By way example, she claims that "pimps" can be placed into three categories, "Romeo pimps," "gorilla pimps," and "CEO pimps". (R.238:30). Why three? and not two or four? How were these three categories derived from her experiences? One is left guessing. Detective Remington, also claims that human traffickers are intelligent, that they are "master manipulators." (R.233:108). How does she know that? Were

¹⁷ *Id.*; citing, *Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1175 (1999) (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."), *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

¹⁸ The Court in *Siefert* wrote "[w]e do not write on a blank slate ... and we may look for guidance and assistance in interpreting and applying § 907.02(1) to the *Daubert* case and its progeny, to the Advisory Committee Notes to Federal Rule of Evidence 702, and to federal and state cases interpreting the text of Rule 702 or an analogous state law." *Id.* at ¶55.

they given intelligence tests, or is that just her own personal, subjective impression of the traffickers she has met?

The circuit court, and the Court of Appeals, relied heavily upon Detective Remington's "experience" in investigating, and attending debriefings of, human trafficking cases. (R.235:13 and COA Decision ¶30; Appx. 18-19 and 25). And indeed, personal experiences can meet the reliability test. *Siefert*, 2017 WI 2, at ¶73. However, "[i]f the witness is relying solely or primarily on experience, then the witness must explain 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.*¹⁹ "The trial court's gatekeeping function in regard to experience-based testimony, ... `requires more than simply 'taking the expert's word for it.' " *Id.* at 74.²⁰ "Coursing through *Daubert* lore is a palpable fear of *ipse dixit* ('because I said so') testimony." Blinka, D.D., *The Daubert Standard in Wisconsin: A Primer*, Wisconsin Lawyer, March 2011, at 60.²¹

There appear to be no standards or controls in Detective Remington's methodology, if any methodology exists, and she expressed no understanding of known or potential error rates for her conclusions.

¹⁹ Quoting, Fed. R. Evid., 702 advisory committee notes to 2000 Amendments.

²⁰ Quoting, Fed. R. Evid., 702 advisory committee notes to 2000 Amendments.

²¹ See also, *Siefert*, 2017 WI 2, at ¶ 75 ("An expert cannot establish that a fact is generally accepted merely by saying so. Trial courts do not have 'to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.' Such an application is unreliable because 'there is simply too great an analytical gap between the data and the opinion offered.'" quoting, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512 (1997); See also, *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999) ("A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant under the test set forth by the Supreme Court in *Daubert* ").

For example, she opined that human traffickers will often purchase gifts for their prospective victims. (R.233:107 and R.238:29 and 49). For Detective Remington, gift giving is an important indicator of human trafficking. But how often is this the case? And how often will this inference prove to be in error? Common sense tells us that it will rarely be the case that a man buying a gift for a woman carries an inference that she is the subject of an attempt at human trafficking. Detective Remington's testimony gave the jury no assistance in making the distinction between an innocent gift, and other more sinister activities. In short, she did not account for other obvious alternative explanations. Officer Remington admitted that she has not published in peer review journals. (R.233:111). And her experience cannot be considered independent research, such as may be done by a university or an independent think tank. Detective Remington is engaged in criminal investigations. Her "research," that is, the debriefings of human trafficking cases, is done in the context of criminal investigations by law enforcement agencies. (R.233:102-03 and R.238:23). Little wonder that their findings should produce the kinds of opinions that will support a criminal prosecutions. This does not give confidence in the reliability of her methods or results. And in her testimony, Detective Remington's did not demonstrate that her theories have been generally accepted by the scientific community. The field of "human trafficking" studies is one that appears to be unknown in the reported opinions of Wisconsin appellate courts, so it can hardly be said that her field of expertise is one known in Wisconsin for reaching reliable results for the types of opinions she gave.

Indeed, the circuit court when ruling that expert testimony in human trafficking would be admissible, whether through the testimony

of Detective Remington or some other expert, appears to have never considered whether the testimony of such experts should be considered reliable. (R.227:8-9 and R.235:12-15; Appx. 25-28). The court merely held that human trafficking was an issue outside the realm of ordinary experience and that an expert would assist the jury in making the determination of whether the victim in this case was actually a victim of human trafficking, or simply a prostitute. *Id.* The circuit court made no meaningful examination into whether Detective Remington's opinion were, in fact, the "product of reliable principles and methods." Wis. Stats. § 907.02(1). Similarly, the Court of Appeal opinion appears to be nothing more than the assertion that experience make the expert's opinions reliable, with no examination as to how those experiences are applied to produce those opinions. (COA Decision ¶30; Appx. 18-19). The reasoning for the courts below would appear to be, "I have experience; therefore, I am an expert." How is this not simply an *ipse dixit* assertion of authority? The heightened standard under Wis. Stat. § 907.02 requires more of the gatekeeper. It is not sufficient to merely find that testimony will assist the jury. The court must make "a threshold determination as to whether the evidence is reliable enough to go to the factfinder." *Jones*, 2018 WI 44, at ¶32. That did not occur here.

And the error was not harmless. Detective Remington's expert testimony was carefully tailored to portray Hogan as a human trafficker, and to minimize inconsistent testimony given by the other witnesses. The actual witnesses to Hogan's alleged acts of human trafficking, including Mary,²² all to one degree or another, failed to substantiate at

²² The other witness being Kevin Johnson, Trista Windorski, Renee Davidson and Allison Mink,

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). Mary specifically denied that Hogan made her perform sexual acts for money. (R.237:84-85). Detective Remington's expert testimony was that all these denials and recantations could be disregarded because human traffickers are "master manipulators," who can gain such a psychological hold upon their victims (and apparently non-victims) that it usually takes months of trauma therapy to break the bond between the trafficker and their victims. (R.238:24-25, 40, and 43). In a close case, providing such a rationalization for disregarding the witnesses' trial testimony can make all the difference between a guilty or not guilty verdict.

When the Supreme Court handed down the seminal case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, that decision and the changes to the rules of evidence which followed, were promised as a reliability revolution, one in which the courts were to now to exercise a gatekeeping role in order to keep junk science and unsupported conjecture from entering the courtroom. The *Daubert* reliability standard was supposed to apply equally to civil proceedings and criminal proceedings alike, to plaintiffs, to prosecutors and defendants.

Unfortunately, that does not appear to have been the case. Ever since the *Daubert* decision was handed down, a steady chorus of commentators have observed that what we appear to have instead is a double standard, one in which civil parties, especially plaintiffs, are

subjected to a rigorous analysis, while in criminal proceedings, unreliable evidence is routinely being admitted for the prosecution of criminal defendants.²³ This case should be the exception.

²³ Risinger, D.M., *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Alb. L. Rev. 99, 104-05 (2000) (“This article shows that, as to proffers of asserted expert testimony, civil defendants win their *Daubert* reliability challenges to plaintiffs’ proffers most of the time, and that criminal defendants virtually always lose their reliability challenges to government proffers. And, when civil defendants’ proffers are challenged by plaintiffs, those defendants usually win, but when criminal defendants’ proffers are challenged by the prosecution, the criminal defendants usually lose”).

Giannelli, P.C., *The Supreme Court’s “Criminal” Daubert Cases*, 33 Seton Hall L. Rev. 1071, 1073 (2003) (“What is also remarkable is that stricter admissibility standards would apply in civil cases than in criminal cases. ... How can federal courts demand stringent epidemiological studies in toxic tort cases and then accept such vacuous reasoning in criminal cases?”).

Dwyer, D., *(Why) Are Civil and Criminal Expert Evidence Different?*, 43 Tulsa L. Rev. 381, 381 (2007) (“Experience suggests that civil expert evidence is scrutinized more closely than that in criminal litigation, and that civil plaintiffs are scrutinized more than their defendants, but criminal defendants more than their prosecutors”).

Bernsteina, D.E. and Laskeraa, E.G., *Defending Daubert: It’s Time To Amend Federal Rule Of Evidence 702*, 57 Wm. & Mary L. Rev. 1, 10 (2015) (“Many commentators have bemoaned the “lackadaisical” approach that some courts have taken in screening out unreliable forensic evidence in criminal prosecutions”).

Garrett, B.L. and Fabricant, M.C., *The Myth of the Reliability Test*, 86 Fordham L. Rev. 1559, 1561-62 and 1559 (2018) “Surveying hundreds of state court cases, we find that courts have largely neglected the critical language concerning reliability in the Rule. Rule 702 states that an expert may testify if that testimony is ‘the product of reliable principles and methods,’ which are ‘reliably applied’ to the facts of a case.”).

VII. Conclusion.

Wherefore, Hogan respectfully requests that this Court grant review and reverse the decisions of the circuit court and Court of Appeals, vacate his judgment of conviction and remand this case to the circuit court for a new trial.

Respectfully submitted April 16, 2021.

Electronically signed by
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VIII. Certifications.

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the petition is 7995 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this petition 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, or appropriate pseudonym, 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 petition, 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 April 16, 2021.

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