STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2020AP6-CR
Door County Case No. 17-CF-28

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

RICHARD L. PRINGLE,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR DOOR COUNTY, THE HONORABLE DAVID L. WEBER PRESIDING.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Should a new trial be ordered on the ground that the real controversy was not fully tried, when credibility was the sole issue at trial, and an expert witness testified, without scientific foundation, that the accuser was cognitively unable to fabricate the accusation?

The circuit court answered: NO. It declined to find that the real controversy had not been fully tried, opining that this was not a case of improper vouching because the expert had not testified specifically that the accuser could not lie or that she was a victim. (R:90, 25-34; A.21-30).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Pringle does not request oral argument or publication, as the issue may be decided using established law of the State of Wisconsin.

STATEMENT OF THE CASE AND FACTS

Mr. Pringle was convicted, after a jury trial, of second-degree sexual assault of a person who suffers from a mental illness or deficiency, under §940.225(2)(c), Wis. Stats. (R.59). According to the criminal complaint (R.1), Mr. Pringle and the accuser, MKO, lived in the same apartment building in Door County in 2015. MKO is an adult woman with a cognitive disability. MKO reported that one day in the summer of 2015, she was getting off of the elevator in the apartment building when Mr. Pringle asked her to come to his apartment, which she did. He then pushed her against a wall and put his hand in her pants. (R:1; A:3). Mr. Pringle denied this and posited at trial that the story had been fabricated by MKO's friend Carla, to get revenge on him for publicly humiliating her. (R.87, 116-117). There was no evidence, outside of MKO's testimony, that an assault took place, and Mr. Pringle had no defense other than his denial; the case was decided completely on a credibility contest between Mr. Pringle and MKO.

At trial, an expert witness testified that MKO had cognitive disabilities (R.87:168; A.11), and that people with cognitive disabilities are unable to fabricate an accusation such as the one against Mr. Pringle. (R.87:175-176; A.18-19). Mr. Pringle was found guilty. (R.59). After trial and sentencing, Mr. Pringle, through counsel, filed a motion for a new trial, asserting that the expert's testimony that MKO could not fabricate the accusation resulted in the real controversy not having been fully tried, as there was a substantial risk that the jury would have relied on the expert's opinion regarding credibility. (R.64). The circuit court denied the motion. (R.68; A.20).

ARGUMENT

A New Trial Should be Ordered Because the Real Controversy Was Not Fully Tried

A. Principles of law and standard of review

This court may grant discretionary reversal if the real controversy was fully tried, or if it is probable that for any reason justice has miscarried. §752.35, Wis. Stats.

Mr. Pringle asserts that the real controversy has not been fully tried. For this court to reverse on that standard, it must be shown that either (1) the jury was not given the opportunity to hear important testimony, or (2) the jury had before it evidence not properly admitted, which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *State v. Hicks*, 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996). *State v. Wyss*, 124 Wis. 2d 681, ¶31 (1981).

Mr. Pringle appeals under the second situation enumerated. Specifically, he asserts that the jury had before it evidence not properly admitted, in the form of improper vouching of MKO's truthfulness by an expert witness. That evidence clouded a crucial issue – the only issue in the case – whether MKO was telling the truth.

Regarding improper vouching, the standard under Wisconsin law is that neither expert nor lay witnesses are permitted to give an opinion that another witness is telling the truth. *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

B. The expert testimony that MKO could not be fabricating was improper because it did not meet the standard for expert testimony under Wis. Stats. §907.02.

Expert testimony is governed by Wis. Stat. §907.02:

> 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 … 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.

This standard is commonly referred to as the "Daubert standard," because it was set forth in Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993), and its line of cases. *Siefert v. Balink*, 2017 WI 2, ¶51, 372 Wis. 2d 525, 888 N.W.2d 816. *Daubert* provided that expert testimony should be evaluated for admission or exclusion after considering (1) whether the methodology can be and has been tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error of the methodology; and (4) whether the technique has been generally accepted in the scientific community. *Id*. at 592-93.

In Mr. Pringle's case, expert Cindy Ehlers, MKO's case manager and counselor through the Department of Human Services, was called as a witness. (R.87:165; A.8-19). There was no Daubert hearing, presumably because Ms. Ehlers' qualifications and expertise were never in question, nor was the utility of expert testimony with respect to MKO's diagnosis and daily functioning. It was necessary for the jury to determine whether or not MKO was a person who suffers from a mental illness or deficiency under §940.225(2)(c), Wis. Stats; testimony from Ms. Ehlers could have helped the jury with that question. However, the questioning of Ms. Ehlers by the state then went into an area that defense counsel could not have anticipated. The following exchange took place between the state and Ms. Ehlers on direct examination:

> Q: What about [MKO's] level of sophistication as it relates to concocting a story or conspiring to present a lie, tell a lie, create some sort of false story?"

> A: …[P]eople with developmental disabilities…lack the sophistication to be cunning and conspire or feign a situation….[I]f you're going to conspire, you have to have some kind of thought process that is convoluted enough to be able to concoct a story. That takes sophistication. That takes thinking skills that are oftentimes far beyond a level that a person with cognitive limitations can master."

(R.87:175-176; A.18-19).

Truthfulness of MKO was not a proper topic for expert testimony, as it was not based upon "sufficient facts or data," as required. §907.02, Wis. Stats. Nor was it "the product of reliable principles and methods," and it was not shown that Ms. Ehlers "applied the principles and methods reliably to the facts of the case." *Id*. Therefore, the expert testimony was improperly before the jury.

C. The expert testimony that MKO could not be fabricating was improper because a witness may not vouch for the credibility of another witness.

The seminal case in Wisconsin for the rule that a witness may not vouch for the credibility of another witness is *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). There, the defendant was convicted of incest after an expert witness testified at trial that there "'was no doubt whatsoever' that Haseltine's daughter was an incest victim," based on patterns of behavior of incest victims. *Id*. at 96. The court remanded for a new trial, holding that it was improper for an expert witness to vouch for the truthfulness of another witness: "[T]he credibility of a witness is ordinarily something a lay juror can knowledgeably determine without the help of an expert opinion. '[T]he jury is the lie detector in the courtroom.'" *Id*., *citing United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973).

Importantly, the *Haseltine* court did not simply find the expert's opinion problematic because he opined that the

daughter was an incest victim. Instead, the problem for the court was that in giving this opinion, the expert was improperly vouching for the credibility of the accuser, as Ms. Ehlers did at Mr. Pringle's trial. "The opinion that Haseltine's daughter was an incest victim is an opinion that she was telling the truth…No witness, expert or otherwise, should be permitted to give an opinion that another physically and mentally competent witness is telling the truth." *Id*. at 96.

The prohibition against one witness vouching for the credibility of another is well-established and without question. Wisconsin courts have reversed on this issue, and this court should do so now.

D. Specific wording is not required for testimony to be improper vouching.

At Mr. Pringle's postconviction hearing, the trial court stated that Ms. Ehlers' testimony was not an opinion on the credibility of MKO, because she did not specifically say that MKO was telling the truth, that MKO "can't lie," or that MKO was a victim of sexual assault. (R:90:28-31; A.24-27) However, such a mechanistic analysis is not in keeping with precedent: "We are not persuaded that the vouching rule becomes inapplicable simply because a witness does not use specific words such as 'I believe X is telling the truth,'… A requirement that specific words be used would permit the rule to be circumvented easily." *State v. Kleser*, 2010 WI 88, ¶102, 328 Wis. 2d 42, 86–87, 786 N.W.2d 144, 166.

The context of Ms. Ehlers' testimony is telling. The state asked directly whether MKO would be able to concoct a story *or to lie*, and Ms. Ehlers' testimony that people with developmental disabilities "lack the sophistication to be cunning" was in direct response to that question. (R.87:175; A.18). There is no possibility that the jury saw this as anything other than an expert witness vouching for the credibility of the accuser.

This standard of requiring particular words, stated directly, in order to find impermissible vouching, is not reasonable and not in the spirit of prevailing law in Wisconsin.

There is no doubt that the expert testimony served to vouch for the truthfulness of MKO. Therefore, this testimony was improper under *Haseltine*, and this case should be remanded for a new trial.

E. The expert testimony clouded the crucial issue of credibility.

This court has the authority to grant discretionary reversal when the real controversy has not been fully tried. This not only requires a finding that there was improper evidence before the jury, but also that the improper evidence "clouded a crucial issue." *Hicks*, 202 Wis.2d 150. When an expert witness vouches for the credibility of an accuser, this standard is met. *See, e.g., State v. Romero*, 147 Wis. 2d 264, 432 N.W.2d 899 (1988).

In *Romero*, the defendant was accused of sexually assaulting his stepdaughter. A social worker and a police officer each testified at trial as to his or her belief that the child had been truthful about the accusations. On appellate review, the court found that there was, "a significant possibility that the jurors, when faced with the determination of credibility, simply deferred to witnesses with experience in evaluating the truthfulness of victims of crime." *Id*. at 279. For this reason, that court found that the real controversy had not been fully tried and remanded for a new trial. *Id*.

The *Romero*, court relied on a similar case, *Lorenz v. Wolff*, 45 Wis.2d 407, 426, 173 N.W.2d 129 (1970). *Lorenz* was a personal injury case. At trial, the defense lawyer vouched for the credibility of a witness by asserting personal knowledge that the witness was telling the truth. The court concluded that the improper vouching "prevented a fair trial of the factual issues of the case," and that these circumstances "cast doubts upon the credibility of the plaintiff." *Lorenz*, at 426. Credibility was crucial to the case, and as such, the court concluded that "there was a probable miscarriage of justice in that the jury had before it evidence not properly admitted in the trial." *Id*. Accordingly, the court held that "the judgment must be reversed in toto in the interest of justice." *Id*. The legal issues in these cases are strikingly similar to Mr. Pringle's. In

each, credibility was the key question at trial, and the remand was a result improper vouching by someone with authority.

This court has explained directly why it is so dangerous when an expert vouches for the credibility of another witness:

> [The] conviction depended on the jury believing the daughter's testimony… [H]er account of the sexual assault was not corroborated by independent evidence…Under these circumstances, the psychiatrist's opinion, with its aura of scientific reliability, creates too great a possibility that the jury abdicated its fact-finding role to the psychiatrist and did not independently decide Haseltine's guilt."

Haseltine, 120 Wis. 2d 92, 96.

The same is true in Mr. Pringle's case. His conviction depended on the jury believing the accuser's testimony. Her account of the sexual assault was not corroborated by independent evidence. The credibility of the accuser was the crucial issue of the case. An expert opinion that she was incapable of falsifying the story would necessarily carry great weight to the jury, given the extensive qualifications and expertise of Ms. Ehlers. She was highly qualified as a licensed social worker with the State of Wisconsin with an emphasis on psychiatric social work and had worked with MKO for 25 years in this capacity. (R.87:166-167; A.9-10). Her professional expertise and knowledge of MKO were well-established.

If MKO had been simply viewed by the jury and seen as more believable than Mr. Pringle, that would have been a proper exercise of the jury function. Likewise, if MKO's story had been simply evaluated by the jury as more plausible or more believable than that of Mr. Pringle, that also would have been an appropriate exercise of the jury function. Those things did not happen here. Instead, an expert told the jury that MKO was essentially incapable of fabricating these accusations. As a result, just as in *Haseltine*, "the [expert's] opinion, with its aura of scientific reliability, creates too great a possibility that the jury abdicated its fact-finding role to the [expert] and did

not independently decide [the defendant's] guilt." 120 Wis. 2d 92, 96. The clouding of the credibility issue in this case justifies reversal in the interests of justice because it resulted in the real controversy not being fully tried. See *Vollmer v. Luety*, 156 Wis.2d 1, 456 N.W.2d 797 (1990).

CONCLUSION

The sole determining factor for innocence or guilt in this case was whether the jury would believe Mr. Pringle or MKO. With this being the case, expert testimony that MKO could not have been lying was tantamount to the expert witness saying Mr. Pringle was guilty. A jury, not an expert, is to be the determiner of guilt or innocence in a criminal trial. Therefore, it can fairly be said that the real controversy was not fully tried. Mr. Pringle therefore requests that this court remand this matter for a new trial.

Respectfully submitted this _____day of May, 2020.

_____

Angela D. Wenzel
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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2375 words.

_____
Angela D. Wenzel, SBN 1053317

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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

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