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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2020AP6-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD L. PRINGLE,

Defendant-Appellant.

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

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Is Defendant-Appellant Richard L. Pringle entitled to discretionary reversal on the grounds that a social worker impermissibly testified about the ability of people with mental disabilities to lie?

The circuit court answered "no."

This Court should answer "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because this appeal can be decided based on the briefs and well-established legal principles.

INTRODUCTION

A jury convicted Pringle of second-degree sexual assault of a person who suffers from a mental illness or deficiency. On a postconviction motion, he moved to vacate the conviction on the basis that the expert testimony by Developmental Disabilities Program Manager Cindy Zellner-Ehlers was improperly admitted because it impermissibly vouched for the truthfulness of the victim, MKO. The circuit court denied the motion. On appeal, Pringle argues that this Court should grant him a new trial in the interest of justice because the real controversy was not fully tried. To this end, Pringle first argues that the expert testimony in question was improper because it did not satisfy the requirements in Wis. Stat. § 907.02. Second, Pringle argues that the expert testimony was impermissible vouching for the victim's credibility.

This Court should affirm because this case is not an exceptional one that warrants discretionary reversal. This Court should conclude that Pringle forfeited his argument under Wis. Stat. § 907.02 because he did not raise it in his postconviction motion. Even so, the expert testimony in

question was admissible under that statute. Additionally, the testimony was not improper vouching for MKO's credibility because vouching was not the purpose or effect of the testimony, and the jury was able to come to its own conclusions about the case. Even if the testimony was problematic, Pringle is still not entitled to relief because the testimony did not cause the jury to abdicate its role as factfinder, and the jury still decided Pringle's guilt on its own. The real controversy was fully tried.

STATEMENT OF THE CASE

Between April and June of 2015, Pringle sexually assaulted MKO, who suffered from a mental deficiency. (R. 1:1.) When MKO returned home from work, Pringle approached her and asked her to come to his apartment to show her something. (R. 1:3.) After entering his apartment, Pringle pressed his body up against MKO and began to kiss her, and then he placed one hand down her pants and began to rub her. (R. 1:3.) Pringle then asked her to follow him to his bedroom, but MKO declined and left. (R. 1:3.)

The State charged Pringle with two counts of sexual assault and later amended the charge to one count of second-degree sexual assault of a person who suffers from a mental illness or deficiency under Wis. Stat. § 940.225(2)(c). (R. 1:1; 87:20.)

The case went to trial. The State's witnesses included Cindy Zellner-Ehlers (hereafter "Ehlers"), a Developmental Disabilities Program Manager for the Department of Human Services. (R. 87:165–66.) Ehlers has worked for the Department of Human Services for 35 years, where she oversees programs that provide services for adults with developmental disabilities. (R. 87:165–66.) She is a licensed social worker with an emphasis on psychiatric social work. (R. 87:166.) Ehlers testified about her relationship with MKO, MKO's cognitive and developmental disability, and the

behaviors of individuals with such disabilities more generally. (R. 87:165–75.)

At trial, the State asked Ehlers, "What about [MKO's] level of sophistication as it relates to concocting a story or conspiring to present a lie, to tell a lie, create some sort of false story?" (R. 87:175.) Ehlers responded that people with developmental disabilities often lack the cognitive ability to concoct a story:

> "[o]ne thing about people with developmental disabilities . . . they lack the sophistication to be cunning and conspire or feign a situation. I'm not saying it doesn't happen, but it's very rare that it happens. Particularly with people who have cognitive limitations.
>
> . . . if 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 or create 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. 87:175–76.) Pringle did not object to this testimony.

The State also presented several witnesses who corroborated MKO's accusation against Pringle. Carla Boyer, MKO's friend, testified that MKO confided in her that Pringle had asked MKO to come to his room to see something, and that when she did, Pringle pinned her up against the wall, started kissing her, and feeling her. (R. 87:199.) Carla also testified that a paper posted around the apartment—which warned of recent knocking on doors and asked residents to tell management if they see something—had prompted MKO to tell Carla about the assault. (R. 87:198.)

Two police officers also testified regarding their investigation of the assault. Former Officer Gregory Zager testified that when he arrived at Pringle's residence to question him, Pringle immediately knew why he was there. (R. 88:36.) Zager testified that Pringle acknowledged he knew

MKO and began asking why Zager was talking to him about something that happened so long ago, although Zager did not tell him why he was there or why he needed to talk about MKO. (R. 88:36.) Additionally, Officer Michelle Snover (formerly Weigand) testified that MKO could distinguish between the two incidents with Pringle—the first happening much earlier than the assault in question. (R.88:65.) Officer Snover also testified that MKO told her of the 2015 assault, in which Pringle pushed MKO against the wall, kissed her, and touched her. (R. 88:65.)

The jury found Pringle guilty. (R. 88:153.) The circuit court later sentenced him to five years of initial confinement followed by five years of extended supervision. (R. 73:28.)

Pringle subsequently filed a postconviction motion for a new trial. (R. 64.) In this motion, Pringle argued that Ehlers's testimony (block quoted above) impermissibly vouched for MKO's credibility, so he was entitled to a new trial in the interest of justice because the real controversy was not fully tried. Pringle did not argue in his postconviction motion that this testimony was inadmissible under Wis. Stat. § 907.02. The circuit court denied the postconviction motion after a hearing. (R. 68; 90.)

Pringle appeals from the judgment of conviction and the order denying the postconviction motion. (R. 70.)

STANDARD OF REVIEW

"Appellate courts review a circuit court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard." *State v. Giese,* 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 854 N.W.2d 687. "A circuit court's discretionary decision will not be reversed if it has a rational basis and was made in accordance with accepted legal [principles]." *Id.* This Court independently determines whether to grant a new trial in the interest of justice. *State v.*

Williams, 2006 WI App 212, ¶ 12, 296 Wis. 2d 834, 723 N.W.2d 719. When a circuit court declines to reverse in the interest of justice, this Court reviews that decision for an erroneous exercise of discretion. *Id.* ¶ 13.

ARGUMENT

The real controversy was fully tried because the evidence in question was admissible.

A. This Court can reverse in the interest of justice only in an exceptional case.

Under Wis. Stat. § 752.35, this Court may grant discretionary reversal or order a new trial if it appears that (1) "the real controversy has not been fully tried"; or (2) "it is probable that justice has for any reason miscarried." Wis. Stat. § 752.35; *State v. Jones*, 2010 WI App 133, ¶ 43, 329 Wis. 2d 498, 791 N.W.2d 390. Pringle relies on the first of those two grounds.

For this Court to reverse on the grounds that the real controversy has not been fully tried, the defendant must show 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. Burns*, 2011 WI 22, ¶ 25, 322 Wis. 2d 730, 798 N.W.2d 166 (citation omitted). This discretionary reversal is reserved for exceptional cases. *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258. In exercising discretionary reversal, this Court must engage in an analysis that sets forth the reasons that the case may be characterized as exceptional. *Id.*

For the following reasons, the contested expert testimony was admissible and, even if inadmissible, did not cloud a crucial issue or prevent the real controversy from being fully tried.

B. Pringle forfeited his argument that Ehlers's testimony at issue was inadmissible under Wis. Stat. § 907.02, and that argument has no merit.

Pringle argues, for the first time on appeal, that Ehlers's testimony at issue was inadmissible under Wis. Stat. § 907.02, which governs the admissibility of expert testimony. (Pringle's Br. 3–5.) This Court should decline to consider that argument because Pringle did not raise it in the circuit court.

This Court has "the discretionary power to reverse judgments where *unobjected-to error* results in either the real controversy not having been fully tried or for any reason justice is miscarried." *Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990) (emphasis added). If Pringle's lack of an objection were the only reason why he forfeited this argument, then this Court should review it under the interest-of-justice framework.

But Pringle also forfeited this argument by not raising it in his postconviction motion. (R. 64.) Except for a challenge to the sufficiency of evidence at trial, a claim is forfeited on appeal if it was not raised in a postconviction motion, unless it was previously raised in the circuit court. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 677–78 & n.3, 556 N.W.2d 136 (Ct. App. 1996). "The party alleging error has the burden of establishing, by reference to the record, that the error was raised before the trial court." *Young v. Young*, 124 Wis. 2d 306, 316, 369 N.W.2d 178 (Ct. App. 1985). Pringle has not identified where he raised a section 907.02 argument in the circuit court. "Courts generally will not consider an issue raised for the first time on appeal because had the issue been raised below, the opposite party might have addressed the situation by way of . . . additional proof." *State v. Divanovic*, 200 Wis. 2d 210, 226, 546 N.W.2d 501 (Ct. App. 1996). This Court should enforce that rule here because, had Pringle raised a section 907.02 argument in his postconviction

motion, the State could have introduced more evidence to show why Ehlers's testimony in question was admissible.

In any event, Ehlers's testimony was admissible under Wis. Stat. § 907.02.

In Wisconsin, a witness may testify about his or her "specific, technical, or other specialized knowledge" if: (1) the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue"; (2) "the witness is qualified as an expert by knowledge, skill, experience, training, or education"; (3) "the testimony is based upon sufficient facts or data"; (4) "the testimony is the product of reliable principles and methods"; and (5) "the witness has applied the principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1). The Wisconsin Legislature adopted this *Daubert* standard in 2011. *Giese*, 356 Wis. 2d 796, ¶ 17; *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). The goal of this flexible standard is to prevent the jury from hearing conjecture disguised as expert opinion. *Giese*, 356 Wis. 2d 796, ¶ 19. Some relevant factors include whether the specific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific field. *Id.* ¶ 18. The trial judge is tasked with ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. *Daubert*, 509 U.S. at 594.

The *Daubert* factors are flexible, and witness testimony does not need to satisfy all factors to be admissible. For example, in *State v. Smith*, the defendant filed a motion to exclude testimony from one of the State's witnesses because the testimony did not meet the requirements of Wis. Stat. § 907.02 and *Daubert*. *State v. Smith*, 2016 WI App 8, ¶ 3, 366 Wis. 2d 613, 874 N.W.2d 610. The State proffered that the witness would testify "regarding reactive behaviors common among child abuse victims." *Id.* ¶ 6. This Court held that

although the testimony did not neatly satisfy all five statutory factors, the expert testimony was admissible. *Id.* ¶ 3. This Court reasoned that the statutory *Daubert* test for admissibility of expert evidence is flexible, and even without satisfying all the factors, the witness there had "sufficient knowledge, skill, experience, training or education, in order to qualify her as an expert." *Id.* ¶¶ 3, 7. The Court further reasoned that trial courts should have "'considerable leeway' in determining the admissibility of expert testimony with the objective of ensuring the reliability and relevancy of such testimony in light of the facts of the particular case." *Id.* ¶ 7 (citation omitted).

Here, Ehlers's testimony met the flexible standard for Wis. Stat. § 907.02, as it is not required to strictly meet all five factors in the statute. First, her testimony would assist the jury in understanding common behaviors of individuals with disabilities. Second, the witness is qualified by 35 years of experience as the Developmental Disabilities Program Manager for the Department of Human Services, and she is a licensed social worker with the State of Wisconsin with an emphasis on psychiatric social work. (R: 87:166.) Third, her opinion testimony was based on facts, as she was speaking from her many years of experience working with people with developmental disabilities. Fourth, Ehlers's testimony was based on reliable principles and measures, through direct experience and social work. Fifth, Ehlers applied the principles to the facts in the case by speaking to her personal experience with MKO as well as what her experience has shown her about the behavior of similar individuals. Even if any of these factors are in doubt, the standard is flexible and not all factors need to be satisfied, as was the case with similar testimony in *Smith*, 366 Wis. 2d 613, ¶ 3.

Ehlers's testimony is expert testimony because it was undisputed that she was an expert, and Pringle has not adequately developed an argument to the contrary. Indeed,

Pringle concedes that "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 mental illness or deficiency." (Pringle's Br. 4.) Further, the circuit court has considerable discretion in determining expert testimony admissibility, and the court in this case said, "I really think Cindy Ehlers really sort of testified as an expert . . . [she] said that she worked in social work for 35 years, she was familiar with these sorts of folks with disabilities, and she gave a number of opinions that I think would be considered expert opinions." (R. 88:23.) The defense attorney agreed, saying, "[i]t came off sounding more like expert testimony." (R. 88:23.) Finally, Pringle does not advance a developed argument to the contrary, stating only that there was no *Daubert* hearing, likely because Ms. Ehlers was presumed to be an expert and because Pringle did not raise a *Daubert* objection. Thus, Ehlers is an expert witness and her testimony was permissible expert opinion.

C. Ehlers's testimony in question was not improper vouching for the victim's credibility.

Witnesses, expert or otherwise, may not vouch for the credibility of another witness. This standard has been examined and narrowed in the years since its inception. Two factors fleshed out by courts apply to Pringle's case: (1) whether the purpose and the effect of the expert testimony were to attest to the truthfulness of the witness; and (2) whether the expert testimony created too great a possibility that the jury abdicated its role as factfinder to the witness and did not independently decide the defendant's guilt. Applying these factors here shows that Ehlers's testimony was admissible and that case law on which Pringle relies is distinguishable.

1. Under *Haseltine*, no witness may give an opinion that another mentally and physically competent witness is telling the truth.

Expert witness testimony that vouches for the credibility of another witness is impermissible. *See State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). This Court in *Haseltine* held that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." *Id.* There, this Court found that a psychiatrist impermissibly testified that Haseltine's daughter presented a typical case of intrafamilial sexual abuse and she was an incest victim. *Id.* at 95. The *Haseltine* rule is intended to prevent witnesses from interfering with the jury's role as factfinder and lie detector in the courtroom. *Id.* at 96.

A *Haseltine* analysis must go beyond just the witness's words, and a violation is reversible error only if the defendant is prejudiced by the violation. *State v. Patterson*, 2010 WI 130, ¶ 58, 329 Wis. 2d 599, 790 N.W.2d 909. Two important considerations in this analysis have been clarified since *Haseltine*: (1) testimony does not amount to an opinion about a witness's truthfulness if neither the purpose nor the effect of the testimony was to attest to the witness's truthfulness; and (2) improper vouching does not result in reversible error unless it creates too great a possibility that the jury abdicated its factfinding role to the witness and did not independently find the defendant's guilt. *Patterson*, 329 Wis. 2d 599, ¶ 58; *State v. Smith*, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992).

2. Neither the purpose nor the effect of Ehlers's testimony was to attest to MKO's truthfulness.

As just noted, one of the factors to consider in analyzing a witness statement for impermissible vouching is whether the purpose and effect of the testimony are to attest to the truthfulness or credibility of another witness. When applying this factor, a court decides what the jury would interpret a statement to mean. To be improper vouching, specific wording is not required, but the implications of the testimony would still need to invade the province of the factfinder as the sole determiner of credibility. *See State v. Kleser*, 2010 WI 88, ¶¶ 102–04, 328 Wis. 2d 42, 786 N.W.2d 144. Ehlers's testimony was proper under this standard.

This Court has held that testimony does not amount to an opinion about a witness's truthfulness if "neither the purpose nor the effect of the testimony was to attest to [the witness's] truthfulness." *Smith*, 170 Wis. 2d at 718. When the Court finds a legitimate purpose for testimony, it may hold that the testimony was not improper vouching. *See id.* This principle requires a determination of whether the testimony was an attempt to "bolster [the witness's] credibility" and whether "the purpose [or] the effect of the testimony was to attest to [the witness's] truthfulness." *Id.* Several cases exemplify this concept.

Smith involved the testimony of a police detective who had interviewed the defendant's accomplice in an arson case. *Id.* The detective testified that the accomplice denied involvement at first, but later changed his story to reflect what the detective "felt was the truth," which was that the defendant and the accomplice had committed arson. *Id.* This Court held that the purpose of the statement was not to vouch for the credibility of the witness, but to explain the circumstances of the accomplice's interrogation. *Id.* It further held that the effect of the testimony was not to attest to the

accomplice's truthfulness, and that the jury would have received the same inference from other witness testimony. *Id.*

When the purpose and effect of expert testimony are to give opinions on the consistency of a complainant's behavior with the behavior of victims of the same type of crime, it will not be considered impermissible vouching if it will help the factfinder understand the evidence or determine a fact in issue. *See State v. Jensen*, 147 Wis. 2d 240, 257, 432 N.W. 2d 913 (1988). In *Jensen*, an 11-year-old girl alleged her stepfather sexually assaulted her. *Id.* at 243. At trial, the victim's school guidance counselor testified as an expert about the behavior exhibited by sexually abused children, answering affirmatively when asked if the victim's kinds of acting-out behavior were consistent with children who were victims of sexual abuse. *Id.* at 245–47. The defendant argued that this testimony amounted to an expert opinion that the complainant was telling the truth about the assault. *Id.* at 248–49. The court held that this was not improper vouching, reasoning that the testimony provided information about behavioral characteristics of child sexual abuse victims that may have been outside the jurors' common experience. *Id.* at 252. The court also reasoned that whether an expert's opinion should be admitted into evidence is largely a matter of the circuit court's discretion. *Id.* at 246.

Similarly, this Court distinguished *Haseltine* in *State v. Morales-Pedrosa*, where a forensic interviewer testified that it is "commonly understood that approximately 90 percent of reported cases [of child sexual abuse] are true." *State v. Morales-Pedrosa*, 2016 WI App 38, ¶ 12, 369 Wis. 2d 75, 879 N.W.2d 772. There, this Court held that the *Haseltine* rule was not violated because the expert was giving a generalized confirmation based on her training and experience, and this did not constitute an opinion that the victim was being truthful in her accusations. *Id.* ¶ 23.

Here, neither the purpose nor the effect of Ehlers's testimony was to attest to the truthfulness of MKO. Ehlers's testimony largely centered on MKO's level of competency and the extent of her cognitive disabilities. Ehlers worked with MKO as a case manager, connected her to services, and was a point of contact when issues would arise. (R. 87:167.) Ehlers described MKO's high ability to function and awareness of her disability, as well as MKO's attitude towards her disability. (R. 87:171.) Ehlers's testimony served as evidence that MKO suffered from a mental deficiency at the time of sexual contact, not as evidence that she could not lie. Ehlers disclaimed that she was not a psychiatrist or psychologist, and that a psychologist had performed the testing of MKO at their department, which Ehlers then used to help gauge the work she did with MKO. (R. 87:170.) From this, it was clear to the jury that Ehlers was not testifying with concrete scientific data, but rather years of personal and professional experience with MKO and other individuals with similar disabilities.

Ehlers did not mention the specific ability of MKO to lie, and instead testified about the behavior of individuals with developmental disabilities. The prosecutor asked Ehlers, "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?" (R. 87:175.) Despite the question centering on MKO, Ehlers's answer focused on the broad ability of people with developmental disabilities to be "cunning and conspire or feign a situation," and their ability to "concoct a story," not MKO's ability to tell a lie. (R. 87:175–76.) Ehlers did not mention MKO in her answer despite being asked specifically about MKO, which shows that Ehlers did not have the purpose to attest to MKO's truthfulness. Further, the effect of this testimony was to give the jury a sense of the broad behavior of those with developmental and cognitive disabilities. Much like the permissible testimony in

Jensen, this information is likely be outside the common knowledge of the jury. *Jensen*, 147 Wis. 2d at 252. As the court opined in *Morales-Pedrosa*, generalized testimony based on training and experience does not equate to an opinion that a victim is being truthful, and thus Ehlers's broad testimony about individuals with cognitive limitations is not an opinion about MKO's truthfulness. *Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 23.

Ehlers's testimony neither had the purpose nor the effect to attest to MKO's truthfulness. Her testimony—that the level of sophistication and thinking skills it takes to "concoct a story" and be "cunning" is often higher than individuals with cognitive disabilities possess—was a broad testimony about the generalized behavior of such individuals. The testimony did not mention MKO, nor did it definitively opine that all individuals with disabilities behave the same.

3. The expert testimony did not create too great a possibility that the jury would abdicate its role as factfinder to the witness and not independently decide the defendant's guilt.

Whether expert testimony would have prevented the jury from doing its job as lie detector and factfinder is a necessary component to examining testimony for impermissible vouching. *See Patterson,* 329 Wis. 2d 599, ¶ 58. This analysis looks at the inferences the jury would need to make, whether the testimony left room for discretion, and the totality of the evidence in the trial. Discussion of these factors shows that Ehlers's expert testimony did not abdicate the jury's role as factfinder and did not decide the case for itself.

A factor that must be considered in determining whether testimony impermissibly vouched for credibility is whether the testimony created too great a possibility that the jury abdicated its factfinding role to the witness and did not

independently find the defendant's guilt. *Id*. In *Patterson*, the defendant argued that he was denied due process when the prosecutor referred to another witness's statements or testimony during four questions. *Id.* ¶ 57. The court found that the fourth question, which asked a witness, "Do you believe [the witness] was being truthful when she gave that information to you?" was a violation of *Haseltine*. *Id.* ¶ 62. However, the court held that this did not warrant a new trial because the single *Haseltine* violation did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* ¶ 58 (citation omitted). This analysis shows that impermissible vouching does not necessarily require reversal.

Pringle relies on *State v. Romero* as his key example of impermissible vouching. In *Romero*, a police officer said, "In my opinion, [the victim] was being totally truthful with us," and a social worker said that the victim "was honest with us from the time of the first interview through my subsequent contact with her." *State v. Romero*, 147 Wis. 2d 264, 268–69, 432 N.W.2d 899 (1988). The court reversed the conviction because this testimony was impermissible opinions that the victim's accusations were true and not simply opinion of character or truthfulness. *Id.* at 277. The court also reasoned that the egregiousness of the statements was bolstered by the closing argument where the prosecutor further vouched for the social worker's and police officer's credibility. *Id.*

Ehlers's testimony did not create too great a possibility that the jury abdicated its role as factfinder. The contested testimony did not definitively state the ability of individuals with cognitive and developmental disabilities to lie, nor did it mention MKO. For the jury to abdicate its role as factfinder, the testimony would need to convince the jury, in its words or implications, that MKO could not lie and thus could not have lied on the stand. However, Ehlers's testimony would require the jury to make several inferences in order to conclude that

MKO was not lying on the stand. First, the jury would have to believe that MKO had a cognitive or developmental disability. Second, the jury would have to believe that telling a lie on the stand is equated to being "cunning," to "conspire or feign a situation," or to "concoct . . . or create a story." (R. 87:175–76.) Third, the jury would have to believe that MKO "lack[s] the sophistication to be cunning and conspire or feign a situation" and that her thinking skills were not at a level to be "convoluted enough to be able to concoct a story or create a story." (R. 87:175–76.) This would be a difficult inference to make, as Ehlers testified that MKO is very high functioning and aware of her disability and was always trying to work on and compensate for her disability. (R: 87:171–72.) The jury would need to draw these inferences on its own because Ehlers' brief testimony at issue did not tell the jury to reach these inferences.

The jury here would not have lost its factfinding role to the expert testimony, as it was clear from the testimony in question and the other evidence that the jury was free to make its own conclusions. In Ehlers's testimony about the ability of individuals with disabilities to concoct a story, she said, "I'm not saying it doesn't happen." (R: 87:175.) This would signal to the jury that it certainly is possible for these individuals to tell a lie and that MKO could be lying. Ehlers also prefaced her answer with, "That's a lesson I learned really early in my career is that that is one thing about people with developmental disabilities . . . ." (R. 87:175.) From this, the jury could believe that what Ehlers was about to say was based on her career working with such individuals on a personal basis, not a scientific one.

Additionally, and perhaps most importantly, there was plenty of evidence outside of the brief testimony in question to support MKO's accusation. The jury heard Carla testify that MKO had approached Carla with "tears in her eyes" and told Carla the same story the jury heard from MKO.

(R. 87:198–200.) The jury also heard from two police officers about their involvement in the case: former Officer Zager testified that when he first made contact with Pringle regarding the assault, Pringle knew what Officer Zager was there for, before Officer Zager had the chance to tell him (R. 88:36), and Officer Snover testified that she considered MKO to have a mental deficiency and that MKO had told her about the assault during several interviews. (R. 88:61.) The jury even heard MKO's own recalling of her assault, which matched the testimony by Carla and the officers. (R. 87:128–30.) The jury heard testimony from Pringle, where he denied having assaulted MKO on this occasion and stated that he believed the accusation was a result of a grudge over a parking dispute, which the jury was free to believe or disbelieve. (R. 88:82–84.) There was ample evidence outside of Ehlers' testimony in question that the jury could consider, and thus Ehlers's testimony did not cause the jury to abdicate its role.

Ehlers's testimony does not equate to the impermissible testimony given in *Romero*. In *Romero*, the testimony not only mentioned the specific victim, but it definitively described the victim as telling the truth. The officer in that case testified that in his opinion, "[E.B.] was being totally truthful," and the social worker said that the victim "was honest with us from the time of the first interview through the subsequent contact with her." *Romero*, 147 Wis. 2d at 268–69. Those two instances of vouching are a far cry from the testimony in Pringle's case, as Ehlers's testimony was a generalized statement about individuals with cognitive disabilities and their general capacity to tell lies; it did not outwardly say (or imply) that MKO was being truthful. Additionally, the *Romero* case was made more egregious by the prosecutor's impermissible vouching in the closing argument, which did not happen here. Even if Pringle's case involved impermissible vouching by Ehlers, the *Romero* case

demonstrates that there are other facts that may bring the vouching to a level where it must be reversed, i.e., if the prosecutor bolsters the witness's vouching in a closing argument.

Ehlers's expert testimony left plenty of room for the jury to use its factfinding role to determine Pringle's guilt or innocence. Even if the statements were problematic under *Haseltine*, they did not so cloud a crucial issue as to prevent the real controversy from being fully tried. *See Patterson*, 329 Wis. 2d 599, ¶ 58. Neither the purpose nor the effect of the testimony was to attest to MKO's truthfulness, and the statements did not cause the jury to abdicate its factfinding role and not independently decide the case. The totality of the evidence, the inferences the jury would be required to make, and the lack of specificity in the contested testimony itself allowed the jury to decide for itself whether Pringle was guilty.

CONCLUSION

This Court should affirm Pringle's judgment of conviction and the order denying postconviction relief.

Dated this 25th day of June 2020.

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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 5428 words.

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SCOTT E. ROSENOW
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 25th day of June 2020.

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SCOTT E. ROSENOW
Assistant Attorney General