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STATE OF WISCONSIN

COURT OF APPEALS—DISTRICT III

Case No. 2020AP983-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUAN J. CASTILLO,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Circuit Court for Outagamie County,
the Honorable John A. Des Jardins, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Did the circuit court err when it did not allow the defense's expert on the reliability of the complainant's statements to testify on *Daubert* grounds?

The trial court ruled the testimony was not admissible.

II. Did the circuit court err when it denied Mr. Castillo's motions for mistrial when the victim, GIV, and Mr. Castillo's sister violated the circuit court's motion in limine rulings?

The circuit court concluded that striking the testimony was a sufficient remedy and a new trial was not necessary.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because it is anticipated that the briefs will adequately address all relevant issues. Publication may be warranted to help clarify the law on when expert testimony is allowed in cases involving sexual assault of minors.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Periodically during the summer of 2017, Juan Castillo stayed with his mother, Sandra Castillo, and as many as twelve other people in a home in Oneida, WI. He was arrested the following fall, three days before his 18th birthday, suspected of sexually assaulting a family member in that home.

State's Theory of the Case

According to the state, a month before his arrest Mr. Castillo's then-6-year-old second cousin (GIV) told her mom (AS) that Mr. Castillo sexually assaulted her. (92:127). In response, AS took GIV to be interviewed at a child advocacy center. (92:139). During the forensic interview, GIV alleged that during the summer when she was 5 years old, she was staying at her aunt Shelbie's house. (2:2). GIV alleged that one night Mr. Castillo picked her up from the bed where she was sleeping near other family members and took her to his room. (2:2; 92:50). In the room, he asked her to suck his private part and he attempted to have penetrative sex with her. (92:50). The state used GIV's report to initiate charges against Mr. Castillo. (2).

Defense's Theory of the Case

According to the defense, nothing improper ever happened. (92:56). The state presented no physical evidence. The state's case relied heavily on the non-corroborated testimony of five-year-old GIV. (93:57). Nobody reported seeing anything out of the ordinary between GIV and Mr. Castillo. (93:59).

The defense suggested that GIV sometimes struggled to tell the truth; she lied about her age in her child advocacy center interview, and then immediately denied lying. (93:62). She also first alleged that the assault happened in the summer of 2015 when Mr. Castillo was incarcerated at Lincoln Hills Correctional Center. (92:100; 93:38). When this impossibility was brought to her attention, she changed her story to say it occurred during a more recent summer. (87:12; 92:100; 34).

GIV also had a motive to make a false accusation. (93:62). At the time, AS had financial difficulties and spent significant periods of her life away from her six children. (93:62-63). GIV and her siblings would frequently spend long periods at Shelbie's house, a home already full of people. (93:11). GIV likes her mom and wanted to live with her. (92:85). She had also encountered sexually explicit material that provided her with sexual knowledge and vocabulary unusual for a five-year-old. (93:63). She watched a TV show about child sexual assault with Mr. Castillo's sister, and had caught her mom and her boyfriend engaging in sexually explicit acts with each other. (*Id.*). The defense argued that when faced with another potential long-term separation from her mother, she accused Mr. Castillo of sexually assaulting her so as not to have to leave her mom and return to Sandra's house. (93:62-63). She did not seem to understand the consequences of the accusation beyond the outsized amount of attention she received from her mom.

Pre-Trial Proceedings

Two motions in limine and a *Daubert*[1] hearing regarding the defense's proposed expert are relevant to this appeal.

Before trial, trial counsel filed motions in limine to preclude reference to certain information at trial. The court granted the defense's request that any reference to Mr. Castillo's prior arrests, warrants probation, convictions, electronic monitoring or incarceration be excluded. (86:9; App. 109) The court also granted trial counsel's request to exclude any reference to allegations Mr. Castillo engaged in illegal activity at any point other than as alleged in the criminal complaint involving GIV, including but not limited to claims that Mr. Castillo sexually assaulted GIV's sister, DAV. (86:9-10; App. 109-110). Initially, GIV's sister also claimed to have been sexually assaulted by Mr. Castillo. However, she immediately recanted in her own child advocacy center interview. (86:10; App. 110).

Additionally, trial counsel proposed to offer at trial the expert testimony of Dr. David Thompson, a clinical and forensic pathologist. (31). Dr. Thompson reviewed the recording of GIV's interview and the transcript of that interview from which he composed a written report containing his findings. (29).

The report delineated six factors that can affect the reliability of child memory. Those factors include repeated interviewing, external influences that can affect a child's report, inappropriate interviewing

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

techniques, interviewer bias, therapy effects, and source misattribution errors. (29). Dr. Thompson's report set forth research findings supporting each of the six factors. (29). Trial counsel also proposed that Dr. Thompson testify generally about the acquisition, storage and retrieval of memories and how certain influences can affect those memories and how they are reported. (31).

The State objected to Dr. Thompson testifying arguing such testimony would "usurp the role of the jury and is an improper commentary on the believability of a witness." (32:1). The court held a *Daubert* hearing regarding the testimony. (84).

At the hearing, Dr. Thompson noted that he would not be willing or able to offer an opinion as to whether GIV was telling the truth but could identify factors that would either increase or decrease reliability of memory. (84:19). In fact, Dr. Thompson testified at the hearing that he watched GIV's interview several times to analyze it for potential interviewer bias. He created a spreadsheet to code each utterance by the adult interviewer so that the interviewer's questioning techniques could be compared to best practices. (84:17). Moreover, Dr. Thompson would be able to describe a variety of factors present in this case that research has shown affect reliability of a child's statements. *(*84:19).

The court found Dr. Thompson to be qualified but excluded his testimony because it believed that Dr. Thompson essentially "extrapolates from his assumptions, and it is just too speculative to say with any kind of certainty that these opinions are reliable

enough for the jury to consider." (86:8; App. 108). The court excluded Dr. Thompson from testifying. (86:8; App. 108).

Trial

The trial took place over two days. Because of the lack of physical evidence, the case rested on the relative credibility of witness testimony.

On the first day of trial, the state called GIV to testify. Her testimony was mostly consistent with her forensic interview. However, contrary to her interview, where she testified that Mr. Castillo carried her into the bedroom from her aunt Shelbie's room, GIV testified that she was in the living room and Mr. Castillo told her to come into the bedroom. (92:67-68). At the conclusion of GIV's testimony, the state asked, "Is there anything else you'd like us to know?" to which GIV replied "he did it to three other little girls." (92:75; App. 118). The defense objected. (*Id.*). The court struck the testimony and instructed the jury to disregard it. (*Id.*).

The state also called GIV's mother, AS, to testify. AS confirmed that her daughter GIV stayed with her mom and aunt for a period of time a couple of years ago. (92:126). AS explained that at some point when GIV returned home, GIV told her what happened. AS stopped a phone call she was on to listen to GIV and then took GIV to the hospital. (92:129).

The state called Officer Matthew Anderson, a sensitive crimes investigator. (92:148). Prior to taking the stand, the state requested the ability to ask the officer whether delayed reporting is common in child

sexual assaults. (92:149). The defense objected, citing lack of notice and that the defense was not allowed to bring in similar expert testimony. (92:149-150). The court nonetheless granted the state's request, stating that the defense had opened the door by questioning previous witnesses about GIV's delay. (92:151). The court concluded that Officer Anderson would qualify not as a "scientific expert, but a lay expert." (92:151).

The jury also heard from Lorena Castillo, Mr. Castillo's sister. Ms. Castillo described her mother's home, where GIV came to stay. (92:176-177). Ms. Castillo explained that there were six children and four adults, including her, living in the home at the time. (92:178). She explained that her mother and aunt were providing the day-to-day care for GIV. (92:178). The state asked Ms. Castillo about her conversations with her brother prior to trial. (92:198-200). When asked what they talked about, Ms. Castillo responded, "We talked about him getting a job if he gets out." (92:200; App. 122). The defense objected. (*Id.*). The court struck Ms. Castillo's answer and instructed the jury to disregard it. (*Id.*).

On the second day of trial, Mr. Castillo's mother, Shelbie Castillo, and Mr. Castillo both testified. (93). Ms. Castillo explained that the house was crowded and that Mr. Castillo was seldom present when GIV was living there. (93:28). One bedroom was mainly used for storage and people slept in the remaining bedrooms, the living room and sometimes a camper outside. (93:11, 26). GIV normally slept in a room with her grandmother. (93:29).

Mr. Castillo answered questions about the rooms in the house and explained that only the bathroom has a door while the rest of the room are only separated by curtains. (93:9). Mr. Castillo explained that he was back and forth between friends' houses during 2016 and was not living at his mother's house. (93:9). Mr. Castillo testified that when he returned to his mother's house, he never slept in the same room as GIV. (93:12). When asked if he had ever had sexual contact or intercourse with GIV, he responded, "absolutely not." (93:12).

Motions for Mistrial

During the trial, Mr. Castillo's attorney moved for a mistrial on two occasions. Both motions related to evidence that was presented to the jury in violation of the court's rulings with regard to motions in limine. (86).

First, the defense argued that the court should declare a mistrial after GIV testified that "he did it to three other little girls." (92:75, 106; App. 118, 120). The court denied the request. The court believed that the jury was capable of disregarding the comment and stated that it would "be a different situation if the question elicited this comment…" (92:107; App. 121). The court did acknowledge the that the comment was "prejudicial" but stated that taken in the context of the way the question was asked and the age of the child the court believed that the jury would give great deference to the court's instruction not to consider the testimony. (92:107; App. 121).

The defense also moved for a mistrial after an inappropriate reference to Mr. Castillo being in custody. Specifically, Mr. Castillo's sister responded

to a question about talking with Mr. Castillo prior to trial by saying "we talked about him getting a job if he gets out." (92:200; App. 122). Trial counsel objected based upon the court's prior ruling that any reference to Mr. Castillo's incarceration should be excluded.

The court denied the request for a mistrial. The court believed that the testimony "could have been interpreted a number of different ways." (92:208; App. 123). Additionally, the court believed that the testimony "was not specifically elicited by the question" and that telling the jurors to disregard it would be sufficient. (92:208; App. 123).

The jury found Mr. Castillo guilty of one count of sexual assault of a minor in violation of Wis. Stat. § 948.02(1)(e). (93:78-79). The parties returned to court for sentencing on April 11, 2019. The court, the Honorable John Des Jardins presiding, sentenced Mr. Castillo to five years of initial confinement and five years of extended supervision. (94:25).

Mr. Castillo now appeals. (75).

ARGUMENT

I. The Court Erred in Excluding Expert Testimony on Memory and Interview Techniques

The state's case relied heavily on old memories from a 5-year-old. Those memories changed over the course of the investigation. Therefore, it was essential to the defense that jurors understand the associated reliability concerns of those memories. "The ability of a witness to accurately perceive persons, objects and events, and then to correctly recall and relate those perceptions at trial[,] is relevant to the credibility of that witness' testimony," *Hampton v. State*, 92 Wis. 2d 450, 455–56, 285 N.W.2d 868 (1979). Mr. Castillo's expert, Dr. Thompson, was denied the ability to testify about either the ability for a child to recall memories accurately, or about child forensic interview techniques.

Appellate courts review a circuit court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard. *State v. Shomberg*, 2006 WI 9, ¶ 10, 288 Wis. 2d 1, 709 N.W.2d 370. A trial court's decision on the admission or exclusion of expert evidence "is an erroneous exercise of discretion when it rests upon a clearly erroneous finding of fact, an erroneous conclusion of law, or an improper application of fact to law." *Seifert v. Balink,* 2017 WI 2, ¶ 90, 372 Wis. 2d 525, 888 N.W.2d 816.

A. The *Daubert* Standard

In January 2011, the Wisconsin legislature amended Wis. Stat. § 907.02, governing the admissibility of expert testimony, to comport with the federal *Daubert* standard. *See State v. Giese,* 2014 WI App 92, 356 Wis. 2d 796, ¶ 17, 854 N.W.2d 687 (2014). The statute provides:

> If scientific, technical, or otherwise 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 methods reliably to the facts of the case.

Wis. Stat. § 907.02(1).[2]

Daubert analysis imposed two requirements of expert testimony: (1) that "[t]he subject of an expert's

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[2] Wisconsin's Judicial Council Committee's Note of 1974 contends "With such a test expert testimony will usually be admissible and will only be excluded if superfluous and a waste of time." Such an approach was approved in *State v. Johnson,* 54 Wis. 2d 561, 196 N.W.2d 717 (1972); *Rabata v. Dohner,* 45 Wis. 2d 111, 124, 172 N.W.2d 409 (1969); *Jacobson v. Greyhound Corp.,* 29 Wis. 2d 55, 138 N.W.2d 133 (1965); *Kreyer v. Farmers' Co-op. Lumber Co.,* 18 Wis. 2d 67, 117 N.W.2d 646 (1962); *Anderson v. Eggert,* 234 Wis. 348, 291 N.W. 365 (1940). Note that this was the standard prior to 2011, but still informs the policy expressions of the state.

testimony must be 'scientific ... knowledge'"[3]; and (2) that "the evidence or testimony [must] assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*, 509 U.S. at 589–91. The requirements are set to exclude ipse dixit testimony, 'because I am an expert, if I say so, it is correct.' The court offered a non-exhaustive list of questions for the lower courts to consider when making these determinations: 1.) whether evidence can be tested; 2.) whether the theory or technique has been subject to peer review; 3.) known or potential error rates; 4.) the maintenance of standards controlling the technique's operation; and 5.) the degree of acceptance within the relevant scientific community. *Id.* In this way, the court acts as a gatekeeper.[4] The quality standards of admission of evidence vary based on the type of evidence at issue and the purpose for which it is offered.

B. Dr. Thompson's Proffered Testimony Met the *Daubert* Standard.

A trial court's discretionary decision to admit or exclude a witness as an expert will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in

[3] The Court later held that *Daubert's* general principles were not limited to "scientific" knowledge, and that the analysis applies to all expert testimony. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147–48 (1999).

[4] *See State v. Giese,* 2014 WI App 92, ¶ 18, 356 Wis. 2d 796, 854 N.W.2d 687 ("The court's gate-keeper function under the *Daubert* standard is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." (citing *Daubert.))*

the record. *Giese*, 356 Wis. 2d, 796, ¶ 16. However, the court's ruling to exclude Dr. Thompson was an inappropriate exercise of discretion because Dr. Thompson's testimony met the required *Daubert* standard.

Here, the court is guided by the standard set forth in *Daubert* and the court is to determine whether or not there is scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue. Wis. Stat. § 907.02(1). The court should allow an expert's testimony if it 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. *Id*.

First and foremost, Dr. Thompson was well-qualified to testify as an expert witness and the state stipulated to that fact. (84:13). Second, Dr. Thompson's proffered testimony and opinion would have provided specialized information regarding six factors that can affect the reliability of child memory. Those six factors being repeated interviewing, external influences that can affect a child's report, inappropriate interviewing techniques, interviewer bias, therapy effects, and source misattribution errors.

For example, Dr. Thompson indicated that repeated interviewing can result in creating a memory trace for a non-event and a child will report information and a memory that did not occur. (84: 23). Second, research on external influences shows that there are a number of things that can affect

what a child has to say and what a child has to recall. (84:27). Negative stereotype induction is an example, where an individual is exposed to information about a person or reports or descriptions of a person that suggests that person fits the specific stereotype. (84:28). Another example is the effect of parents and parents' reports or descriptions on children. (84:28).

Third, research indicates that the use of appropriate interviewing techniques helps to obtain reliable information from a child without tainting it and inappropriate techniques could have the opposite effect. (84:33). Open ended questions allow for more accurate responses while more focused questioning decreases reliability of what a child is going to tell you. (84:33-34). Fourth, as for interviewer bias, research indicates that bias can affect what a person reports in an interview and the interviewer communicates bias very subtly through gestures such as body language, facial expressions, and tone of voice. (84:39-40).

Fifth, as to therapy effects, the research shows that an individual is subjected to repeated rehearsal of a traumatic event. (84:42-43). Finally, as for source misattribution errors, which are simple memory errors when a person is attributing a source of a particular memory incorrectly, research indicates that children can be very susceptible to them. (84:45-49).

Here, Dr. Thompson's testimony would have informed the jury as to the research findings in general and that would have assisted in an explanation of how the research findings on interviewing could be applied to the evidence in this

case. Additionally, lay jurors would not know this information without the help of an expert witness. So, this information would have been helpful to the determination of guilt or innocence of Mr. Castillo.

Dr. Thompson's report and testimony were supported by sufficient facts and reliable scientific methods. In his report and testimony during the *Daubert* hearing, Dr. Thompson cited academic articles and set forth research findings that supported each of his propositions. There was ample scientific research as to what Dr. Thompson would have testified to and that would have satisfied the *Daubert* standard. Evidence like this has been found admissible in *State v. Smith* and *State v. Maday*.

In *State v. Smith*, the court approved expert testimony of a social worker regarding reactive behaviors common among child abuse victims. *State v. Smith*, 2016 WI App 8, 366 Wis. 2d 613, 874 N.W.2d 610. There, the court found that the expert had sufficient knowledge, skill, experience, and training to qualify as an expert in behaviors exhibited by child victims. Moreover, the court found that the proffered testimony was generally accepted within the witness' discipline and was not the product of ungrounded speculation. *Id*. at ¶ 9.

Additionally, in *State v. Maday*, the Wisconsin Supreme Court concluded that "a jury could benefit from an expert's assistance when interpreting and identifying the indications bearing on the independence of a child's allegations of abuse[.]" *State v. Maday*, 2017 WI 28, ¶ 33, 374 Wis. 2d 164, 892 N.W.2d 611. There, the Court addressed the admissibility of expert testimony pertaining to

forensic interview techniques that are common in child sexual assault cases. The Court further discussed possible indications of coaching or dishonesty and concluded that these indications fell outside the realm of common knowledge. *Id*. at ¶ 29.

Maday is consistent with other Wisconsin caselaw on expert witness testimony in sexual assault cases. *See State v. Jenson*, 147 Wis. 2d 240, 257, 432 N.W.2d 913 (1988) (approving expert testimony about behaviors common to sexual assault victims); *State v. Krueger*, 2008 WI App 162, ¶ 14, 314 Wis. 2d 605, 762 N.W.2d 114 (extending *Jenson* to allow expert testimony on typical signs of whether a child has been coached or evidences suggestibility).

Here, Dr. Thompson's proffered testimony would have been the same type of evidence as was discussed in *Smith*, *Maday*, *Jenson*, and *Krueger*. Like *Smith,* Dr. Thompson's proposed testimony was based on a reliable scientific foundation in his discipline and was relevant to the material issues. Moreover, like *Maday*, Dr. Thompson's expert testimony on child interviews would have helped the jury "more accurately assess the credibility of a child's allegations." *Maday*, 2017 WI 28, ¶ 40. Dr. Thompson would have brought in specialized knowledge regarding cases such as this one and his qualified and scientifically based knowledge on memory and how memory works would have helped the jury assess GIV's credibility as a witness by knowing the kinds of factors that play into memory.

On the other hand, this case is unlike *State v. Schmidt*, where Schmidt sought to offer testimony by the same Dr. Thompson regarding the reliability of

statements by a child witness. *State v. Schmidt*, 2016 WI App 45, ¶ 54, 370 Wis. 2d 139, 884 N.W.2d 510. Dr. Thompson was excluded from testifying in that case because Dr. Thompson offered no testimony that the victim's forensic interview was in fact conducted improperly, that the victim's interview statements were in fact the product of the phenomena Dr. Thompson discussed in his report, or that any suggestive interview techniques had in fact occurred. *Id*. at ¶¶ 66, 80.

However, here, Dr. Thompson indicated specific issues with GIV's interview statements, with the forensic interview, and indicated suggestive interview techniques occurred. (29). The testimony from Dr. Thompson has two distinct components—(1) testimony regarding interviewing techniques and (2) testimony regarding how child memory functions.

For example, Dr. Thompson indicated GIV was interviewed multiple times and discussed how multiple interviews could result in creating a memory trace for a non-event and a child will report information and a memory that did not occur. (84:23). Additionally, Dr. Thompson identified external influences that may have had an effect on GIV's memory such as interviewers and their biases as well as GIV's mother, AS, and her biases in regard to Mr. Castillo. (84:27-28, 39-40).

As for the suggestive interview techniques, Dr. Thompson indicated that the CAC interviewer had fallen below best practices in questioning techniques. (84:38). Also, Dr. Thompson indicated interview bias in that the CAC interviewer suggested alternate hypotheses to GIV. (84:41).

Dr. Thompson's specialized knowledge and proposed testimony would have provided information that is outside the realm of common knowledge and that knowledge would not have confused the jury nor would it have misled them. The information would have aided the jury in its determination by giving additional information regarding interviewing techniques and how memory functions.

Thus, Dr. Thompson should have been able to testify as his testimony would have been helpful to the jury and because it met the *Daubert* requirements.

C. *Daubert* Misapplied

The trial court erred when it excluded Dr. Thompson's testimony because it determined his opinions were too speculative. The court stated Dr. Thompson could only identify factors in the interview that risk leading to unreliable memory recall in children and had not interviewed GIV himself. But *Daubert* applies to all experts. Expert testimony is admissible when there is an accepted methodology for identifying risk factors. "Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement." *Daubert* 509 U.S. at 590. Further, "in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method." *Id.* Again, other experts in Dr. Thompson's field have reviewed his work and

found his application of methods scientifically credible under peer review standards of scientific journals.

The dispute reduces to a professional disagreement between an expert and the court about whether and how questioning & elapsed time affects memory, and whether those relevant considerations are at play in this case. Still, "*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance." *Ruiz-Troche v. Pepsi Cola Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998). Such disputes are best left to the jury. The accuracy of the facts upon which the expert relies, and the ultimate determinations of credibility and accuracy are not the courts prerogative. *See Lapsley v. Xtek, Inc.*, 689 F.3d 802, 805 (7th Cir. 2012). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596; *Giese*, 356 Wis. 2d 796, ¶ 28.

This court has addressed Dr. Thompson's psychiatric testimony regarding influences that could affect a child's memory in the past. *State v. Schmidt*, 2016 WI App 45, ¶ 54, 370 Wis. 2d 139, 884 N.W.2d 510. However, as noted previously, in evidentiary decisions, circuit court rulings are highly contextual. In *Schmidt*, Dr. Thompson's testimony had a key difference: Dr. Thompson never reviewed the law enforcement interviews of the victims. There was no record of the interviews to review. In *Schmidt*, this court said: "For these reasons, we conclude that even if Dr. Thompson's proposed testimony satisfied the

requirements of Wis. Stat. § 907.02(1), the circuit court nonetheless properly excluded the testimony on relevance grounds." *Schmidt*, 370 Wis. 2d 139, ¶ 76. The court repeatedly stressed the lack of review was the cause of the denial. Here, Dr. Thompson offers specific analysis of each utterance made by the interviewer and how they comport with generally accepted practices in child forensic interviewing, which would make the *Schmidt* result inapplicable.

D. Dr. Thompson's Testimony Would Not Have Violated *Haseltine*

The court believed that Dr. Thompson's testimony would have violated the *Haseltine* rule. That rule indicates 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." *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Here, Dr. Thompson's testimony would not have violated the *Haseltine* rule.

For a case such as this, where GIV has been allegedly victimized by an adult male, testimony laying out the factors that can affect the reliability of her memory would not only be relevant and admissible, but necessary to understand the way interviewing techniques affect a child's memory or statements and how memory functions in general. Dr. Thompson was brought in to testify about factors that *affect* memory but did not, in his report or his testimony at the *Daubert* hearing, ever opine on whether GIV was actually telling the truth. (29; 84). In fact, he repeatedly stated his intention was to avoid making such a claim. (84:18-19). Dr. Thompson

indicated that his job is to simply identify factors that would either increase or decrease reliability, not offer an opinion as to GIV and her credibility. *Id*.

Therefore, Dr. Thompson's analysis would have been confined to rendering an opinion as to the factors that affect memory and would not have indicated whether GIV was or was not telling the truth. The opinion would have left the determination up to the jury as Dr. Thompson did not speak to the truth or falsity of GIV's statements. Thus, the court's discretion to exclude Dr. Thompson was an erroneous exercise of discretion.

E. The Trial Court's Exclusion of Dr. Thompson's Testimony Was Not Harmless Because it Was Based Upon the Testimony of a Child Witness in a Credibility Case

Mr. Castillo's verdict must be set aside, and a new trial ordered if there was a reasonable probability that the error contributed to the conviction. *State v. Grant*, 139 Wis. 2d 45, 53, 406 N.W.2d 744 (1987). But an error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Harvey*, 2002 WI 93, ¶ 46, 254 Wis. 2d 442, 647 N.W.2d 189.

In *Krueger*, this Court noted that when the prosecution failed to present any corroborating evidence, the sexual assault conviction depended entirely on the credibility of the alleged victim's statement. *Krueger*, 314 Wis. 2d 60, ¶ 18. In such a case, an error related to the credibility of a victim will

give rise to the reasonable probability that, but for the error, the jury would have had reasonable doubt as to the defendant's guilt. *Id*.

In this case, Dr. Thompson would have provided information that was outside the realm of the jury's common knowledge and the jury could have used that information to more effectively judge GIV's credibility in relation to her memory. The trial court was wrong to deny Mr. Castillo the opportunity to present this information to the jury and by doing so contributed to Mr. Castillo being convicted.

Moreover, the only evidence of Mr. Castillo's guilt was through GIV's statement. There were no witnesses, other than the complainant, and no physical evidence linking him to the alleged incident. Additionally, there was testimony indicating Mr. Castillo was rarely at the house and that there were always several individuals in the home, which gives rise to the question, when could the alleged assault have occurred? Further, GIV's original date of when the alleged assault occurred and her testimony from her CAC interview, compared to what she stated on the stand, did not entirely match up.

In addition, the jury did hear testimony from Officer Anderson about delayed reporting in sexual assault cases, but did not hear the defense expert on the reliability of GIVs testimony. In *State v. St. George*, the court found that excluding an expert witness on child forensic interviews to be particularly problematic because - once the defendant's expert was excluded - the State was able to present unrebutted expert testimony bolstering the accuracy and reliability of the interview technique. *State v.*

St. George, 2002 WI 50, ¶ 52, 252 Wis. 2d 499, 643 N.W.2d 777. It violates basic principles of evidentiary fairness and likely impacted the outcome in this case to allow the state's expert testimony and not the defense's.

The key question in this case was whether GIV's disclosure of the sexual assault was reliable and Dr. Thompson's testimony would have outlined six factors that could have affected memory. Which, in turn, would have helped the jury in their determination of inappropriate interview techniques and memory functioning. Because expert testimony on this key question was improperly excluded, the error was not harmless and a new trial is appropriate.

II. The Court Erred in Declining to Declare a Mistrial After Several Inadmissible Statements Were Made Before the Jury.

Here, the trial court's decision to deny Mr. Castillo's motions for mistrial was an abuse of discretion because the jury heard two prejudicial statements – one regarding Mr. Castillo assaulting other girls and one regarding Mr. Castillo's incarceration. These statements directly contradicted the court's pretrial order prohibiting evidence alluding to any allegations that Mr. Castillo engaged in illegal activity at any point other than as alleged in the criminal complaint and any mention of the fact that Mr. Castillo had been incarcerated. (86:9; App. 109).

"An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton v.*

United States, 391 U.S. 123, 132 (1968). Mr. Castillo's trial contained statements that, while struck, could not be unheard by the jury. The prejudicial nature of the testimony was too great for the jurors to simply put it out of their minds. *See, e.g. Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) ("[I]f you throw a skunk into the jury box, you cannot instruct the jury not to smell it").

Much like the previous analysis, "[w]hether to grant a mistrial is a decision that lies within the sound discretion of the circuit court." *State v. Doss*, 2008 WI 93, ¶ 69, 312 Wis. 2d 570, 754 N.W.2d 150. A trial court addressing a motion for a mistrial "must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial." *State v. Ford*, 2007 WI 138, ¶ 29, 306 Wis. 2d 1, 742 N.W.2d 61. Its decision will not be reversed by an appellate court unless there has been a clear abuse of discretion. *State v. Davidson*, 44 Wis. 2d 177, 194, 170 N.W.2d 755 (1969).

A. GIV's Prejudicial Statement

The jury heard the first prejudicial statement during direct examination of GIV. GIV and the prosecutor engaged in the following exchange:

> *Q [prosecutor]:* And are you telling the truth about what happened?
>
> A [GIV]: Yes.
>
> *Q:* Is there anything else that you remember about what happened that you think we should know?
>
> *A:* He did it to three other little girls.

(92:75; App. 118).

Trial counsel objected and court ordered the testimony struck and that the jury disregard the comment. (92:75; App. 118). A curative instruction presumably erases the prejudice it was designed to address, and the law presumes that a jury followed the court's curative instruction. *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894; *State v. LaCount*, 2008 WI 59, ¶ 23, 310 Wis. 2d 85, 750 N.W.2d 780. But some statements are so prejudicial, they cannot be remedied by a curative instruction and cannot be unheard by the jury.

Here, simply asking a jury to disregard a statement, coming from a scared 7-year-old girl on the witness stand, would not be enough to cure the defect. Given the prejudicial nature of the comment, the instruction was not sufficient to remedy the error and the evidentiary bell could not be unrung. Therefore, the court erred in failing to grant Mr. Castillo's motion for mistrial.

B. Lorena Castillo's Prejudicial Statement

As to the second prejudicial statement, the jury heard reference to Mr. Castillo being incarcerated during the trial. Specifically, the jury heard the following exchange occur during cross-examination of LC, Mr. Castillo's sister, by the prosecutor:

> *Q [prosecutor]:* So, you talked about how you and Mr. Castillo and your mom wanted him to not get in any trouble, right?
>
> A [LC]: No.

> *Q:* No. Well, you talked about the trial and you talked about how you can be valuable to him; is that true?
>
> *A:* No.
>
> *Q:* That's not true?
>
> *A:* That is not true.
>
> *Q:* What did you talk about?
>
> *A:* We talked about him getting a job if he gets out.

(92:199-200; App. 121-122).

The court did strike the testimony and ordered the jury to disregard it. (92:200; App. 122). Nonetheless, the curative instruction did not diminish the prejudice in this instance because statements regarding incarceration are inherently prejudicial especially when coupled with the previous error of letting in testimony from GIV indicating that Mr. Castillo assaulted other girls. The court acknowledged this prejudice by ruling that any mention of incarceration should be excluded at the motion in limine stage. (23).

The situation is comparable to jurors seeing a defendant in jail garb. It is well established that a defendant's right to a fair trial is violated when a jury views him wearing jailhouse garb. *State vs. Clifton*, 150 Wis. 2d 673, 443 N.W.2d 26, 28 (Ct. App. 1989). If a defendant goes to trial in identifiable jailhouse garb it impairs the presumption of innocence. The appearance of shackles may cause prejudice in the jury's mind when they view a man presumed to be innocent in chains. *State v. Grinder*, 190 Wis. 2d 541,

551, 527 N.W.2d 326, 330 (Ct. App. 1995). Thus, Wisconsin courts have held that such violations may lead to prejudice requiring reversal and a new trial. *State v. Champlain*, 307 Wis. 2d 232, 744 N.W.2d 889 (Ct. App. 2007).

For example, in *Champlain*, this Court held that given the numerous opportunities for observation of a Band-It electronic armband that the defendant was wearing, it could not say that any precaution taken was sufficient. *Id.* at ¶ 30. For example, the trial court took steps to prevent the jury from viewing the restraint when bringing Champlain to the witness stand outside the presence of the jury. However, this Court indicated that the isolated precaution was not sufficient and that Champlain's burden on the prejudice prong is not absolute certainty, but rather "to demonstrate 'a probability sufficient to undermine confidence in the outcome.'" *Id*. at ¶ 31.

Here, the same principle applies. While Mr. Castillo was not seen in jail garb, he nonetheless was prejudiced by the reference to previously being incarcerated. Additionally, the situation was made worse by the fact that the comment was coupled with GIV's prior inadmissible comment that Mr. Castillo had sexually assaulted three other little girls. The combined effect was Mr. Castillo was labeled as a bad and dangerous individual in the face of the jury.

In addition, jurors were put in the awkward position of partial knowledge, without anyone in the courtroom in the position to clarify the facts of the matter. The jurors were left to speculate whether the two struck statements were related. Taken together,

jurors could assume that Mr. Castillo had been incarcerated previously due to prior sexual assault convictions and that he is a serial child abuser. Taken in the requisite holistic view, justice demands Mr. Castillo be given another trial with jurors who have not been exposed to such an insinuation.

The consequence of the jury hearing the inadmissible statements was particularly problematic because this case involved a credibility battle between GIV and Mr. Castillo. It was thus particularly important that the jury not hear unduly prejudicial information which could, and most likely did, negatively impact its assessment of Mr. Castillo and his credibility. The trial court therefore erred by failing to grant Mr. Castillo's motion for mistrial.

CONCLUSION

For the reasons set forth above, Juan Castillo respectfully requests that this court reverse the judgment of conviction and remand to the circuit court for a new trial.

Dated and filed by U.S. Mail this this 25th day of August, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,496 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 and filed by U.S. Mail this 25th day of August, 2020.

Signed:

ELLEN J. KRAHN
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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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