STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP0983-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUAN J. CASTILLO,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE JOHN A. DES JARDINS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

This case is about a young girl who was sexually assaulted by her 16-year-old cousin. A jury convicted Juan J. Castillo of first-degree sexual assault of a child after hearing the victim—GIV[1]—testify that Castillo lay down behind her on a bed, removed her pants, and tried to stick his "private part" in her "bottom." When he was unsuccessful, he rolled over and told her to "suck my private part."

Before trial, Castillo proffered the testimony of David D. Thompson, who was prepared to testify about memory formation and various factors that *could* affect the "reliability" of a child's memory. He stated that his testimony would "help them [the jury] assess credibility of witnesses during trial." However, for each factor that he identified as a possible influencer, he also admitted either that he did not know whether that factor was present in this case or how it would have affected the victim's memory. The court excluded the proposed testimony.

At the trial, there were two unprompted errant comments from witnesses. First, GIV blurted out that Castillo had assaulted other girls. The court immediately struck the remark and denied Castillo's motion for a mistrial. Second, the court again denied a mistrial after Castillo's own witness began to describe his plans for when he "gets out." The court struck the remark and gave several limiting instructions to the jury.

Castillo appeals his conviction based on these discretionary rulings.

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[1] The victim is referred to either as "GIV" or "GVS" in the record. Consistent with Castillo's brief, the State refers to the victim as GIV.

STATEMENT OF THE ISSUES

1. Did the circuit court err in excluding Thompson's testimony?

   The circuit court excluded the proposed testimony as not being sufficiently tied to the facts of the case, likely to confuse the jury, and as improper opinion testimony concerning witness credibility.

   This Court should affirm.

2. Did the circuit court err in denying Castillo's motions for mistrial after two unprompted errant comments from witnesses?

   The circuit court concluded that a mistrial was not warranted because neither remark was caused by prosecutorial misconduct, the court immediately struck the remarks and told the jury to disregard, and it planned to issue cautionary instructions.

   This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are warranted. This case involves the application of well-settled legal principles to the facts of record.

STATEMENT OF THE CASE[2]

Criminal charges

On December 2, 2017, the State charged Castillo with first-degree sexual assault of GIV, a child under the age of 12, on or about June 1, 2016. (R. 2:1.) The Complaint alleged that GIV was staying at her aunt's house at that time, along with several other children and Castillo. (R. 2:2.) GIV said that one evening in the summer after making s'mores when everyone else was asleep, Castillo picked her up, carried her to bed, put his "private part" in her "butt" and placed his "private part" in her mouth after telling her to "suck it." (R. 2:2.) GIV disclosed the incident to her mother, Anne,[3] in August 2017, and was taken to the hospital for evaluation. (R. 2:2.) At the time of the assault, GIV was five years' old. (R. 2:2.)

The State filed a corresponding Information, but later amended the charge to first degree sexual assault—sexual contact with a child under age 13. (R. 5; 58.)

Proposed expert testimony

Castillo submitted a report by David Thompson, Ph.D., in which he proposed to opine as to the "ways in which the interviews of the alleged victim[ ] and other associated factors may have either strengthened or weakened the reliability of the statements by the [victim] in the above matter." (R. 29:1.) According to his report, while he was not offering an opinion on credibility per se, "[t]he credibility of statements may be

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[2] Castillo presents the Court with a narrative based on the "Defense's Theory of the Case." (Castillo's Br. 2–3.) However, Castillo relies almost entirely upon his closing statement to the jury, as opposed to citing actual testimony to support his "theory." (Castillo's Br. 2–3.) The State's presentation of the case is based on the evidence admitted at trial.

[3] Pursuant to Wis. Stat. § 950.02(4)(a)2., GIV's mother constitutes a "victim" and therefore the State uses the pseudonym "Anne" to reference GIV's mother pursuant to Wis. Stat. § 809.86.

informed by information concerning the reliability of the investigation process" as well as factors that "affect[ ] the reliability of a child's statement." (R. 29:1–2.) After discussing general concepts behind how memories are formed and retrieved, Thompson identified several factors that *may have* affected the reliability of GIV's statements: (1) repeated interviewing[4] by her mother and social workers; (2) external influences; (3) inappropriate interview techniques; (4) interview bias; (5) therapy affects; and (6) source misattribution error. (R. 29:3–10.)

According to Thompson, "[t]o the extent that the girl's mother used suggestive or leading questions" when asking GIV about the assault, her memories "may be tainted from that point forward." (R. 29:3.) Thompson likewise said that GIV's initial interactions with the physician's assistant and CPS worker before GIV's forensic interview "may have been irreparably tainted from the outset." (R. 29:4.) However, Thompson stated that "[i]t is not possible for me to opine concerning the extent to which that actually occurred, as I have no reports or recordings upon which to base such an assessment." (R. 29:4.)

As to external influences, Thompson's report explained that a child's memory can be influenced by the biases of adults in the household. Thompson noted that GIV's mother told police she had "trust issues" with Castillo, but that it was "unclear as to whether or not these concerns had been communicated to the children." (R. 29:5.) Thompson also suggested that GIV may have obtained sexual knowledge through interactions with her brother. (R. 29:5.)

[4] Thompson uses the term "interview" to denote any instance in which the victim is asked to recall the events in question, whether a formal investigative interview or colloquial conversation. (R. 29:3.)

Next, Thompson's report included a section on "best practices for forensic interviewers" in which he coded each "utterance" used by the person who conducted GIV's forensic interview (invitations, directives, option-posing, and suggestions) and compared those percentages to the "best practices" averages. (R. 29:6–7.) Thompson concluded, "None of the queries posed by Ms. Bayer met the strict criteria for coding as suggestive." (R. 29:7.) Thompson also addressed interviewer bias and concluded that he "did not find evidence that suggested that the interviewer was biased." (R. 29:8.) Thompson's also addressed "therapy effects" but concluded that he "did not find any specific evidence that the children were involved in psychotherapy." (R. 29:8.)

Finally, Thompson addressed potential "source misattribution error" and concluded that GIV's interactions with her mother and brother "may well serve as the basis for a source misattribution error" and that it would be important for the jury to be aware of "the potential impact" of any such error. (R. 29:9.)

Pretrial motions

The State objected to Thompson's proposed testimony on several grounds, including improper commentary on the believability of a witness under *Haseltine*,[5] even though couched in terms of "reliability" rather than "credibility." (R. 32:1.) The State also objected that the testimony did not satisfy the standards under Wis. Stat. § 907.02 because it was based on unreliable assumptions and assumptions "not borne out by the evidence," and was unrelated to the facts of the case. (R. 32:1.)

[5] *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

At the *Daubert*[6] hearing, Thompson testified consistent with the contents of his report. (R. 84:7.) However, a few additional details are noteworthy. During his direct examination, Thompson admitted that the purpose of his testimony was to "help them [the jury] assess credibility of witnesses during trial." (R. 84:51.)

Thompson clarified his belief that a child's memory could be altered "even if we ask a child to simply think about a particular event over a period of time." (R. 84:26, 57.) As to GIV, Thompson admitted that he did not know how much GIV discussed the assault with her mother or sister and therefore "can't tell you if that clearly affected this particular child or not." (R. 84:25, 61.) He said: "I don't know." (R. 84:60.) Likewise, Thompson was not aware of the frequency or extent to which GIV discussed the assault with the social worker or physician's assistant at the hospital. (R. 84:66–67.)

When asked what effect external influences may have had on GIV's memories in this case, Thompson stated: "I can't tell you exactly what the effects were because . . . that's the job for the trier of fact" and he did not have specific information about whether GIV's mother's alleged "trust issues" with Castillo had actually been communicated to the children. (R. 84:30–31.) Thompson also noted that GIV could have been exposed to sexualized behavior by other sources but "[s]o in this particular situation, um, I don't know exactly if that was the case." (R. 84:32.) Thompson said there "may have been external influences" on the victim, "[b]ut how that would have formally affected her or specifically affected her memory and her reports, I can't say." (R. 84:33.) He also admitted that he could not tell whether the victim's interactions with her brother were normal or affected her ability to recall the

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

assault, saying "[w]e don't know if in this specific case it did or not." (R. 84:62.)[7]

As to the techniques used during GIV's forensic interview, Thompson said that "there are specific techniques that this interviewer could have used to elicit more information" but admitted that the interviewer "did not ask any suggestive questions." (R. 84:63–64.) With respect to the potential for therapy suggestions to affect GIV's memory, Thompson admitted that he did not know if GIV actually participated in psychotherapy, and also admitted that even if she did "it wouldn't affect the [forensic] interview itself because she was referred at the end." (R. 84:64–65.) As to potential source misattribution error from GIV's reported interactions with her brother, Thompson admitted he did not even know whether a sexualized interaction actually occurred. (R. 84:66.)

In conclusion, Thompson agreed that his proposed testimony amounted to things that "could have affected the victim but we don't know if they did." (R. 84:67.) And he admitted that he had "limited information available to him" to draw conclusions with respect to this case. (R. 84:67.)

The circuit court determined that Thompson's testimony should be excluded for several reasons. First, Thompson's proposed testimony was not sufficiently tied to the facts of the case. (R. 86:4.) The court explained that Thompson simply was extrapolating from general principles and "in this particular case there are only hunches and guesses about what could have happened . . . it's speculative and it needs to match up with the particular incident."

[7] As discussed later, the Court separately excluded any evidence that GIV had engaged in "sexual play activity" with her brother under the rape shield law.

(R. 86:4.)[8] The court continued: "There's nothing scientifically reliable to suggest that that affected this child's memory." (R. 86:4.) Further, the court indicated that "[w]e don't have any evidence about most of the things that Dr. Thompson concludes. He simply speculates and then creates a hypothesis based on that speculation." (R. 86:8.) Accordingly, the court determined that Thompson's testimony was not sufficiently reliable. (R. 86:8.)

Additionally, the court explained that without a foundation based on case-specific facts "a lot of [Thompson's] analysis would be confusing to the jury." (R. 86:8.) Finally, the court concluded that if allowed, Thompson's testimony would violate the *Haseltine* rule and "interfere with the jury being the primary determiner of the credibility of the witnesses." (R. 86:8.)

In addition to ruling on Thompson's testimony, the court addressed several motions in limine. It granted unopposed defense motions to preclude evidence (1) that Castillo had a history of being arrested, convicted, and incarcerated—unless he testified, (2) that he was presently serving a sentence, and (3) that he engaged in other illegal activity, including allegedly assaulting GIV's sister, among other things. (R. 86:9–10.) The court excluded evidence that GIV's mother had been sexually assaulted as a child under Wis. Stat. § 904.03 and evidence that GIV allegedly[9] engaged in "sexual play activity" with her brother under the rape

[8] In addition to the reasons discussed, the court made some comments to the effect that Thompson was not applying reliable scientific principles, only personal opinions. (R. 86:4, 7.) The State does not pursue this argument on appeal.

[9] The State noted that there was no evidence that this ever occurred and was simply an allegation made by Castillo. (R. 87:9–10.)

shield law. (R. 87:4–10.) These rulings are not at issue on this appeal.

Trial

GIV was eight years old by the time of trial. (R. 92:64.) While GIV now lived with her mother, she previously lived with her aunt Shelbie and her cousin, Castillo (aka "Nitto"), along with her brothers and her grandmother. (R. 92:66–67, 85.) GIV described how Castillo sexually assaulted her at her aunt's house in the summer when she was five years old. (R. 82:67–75.)

GIV described how Castillo took her into his bedroom, told her to lay down on the bed on her side; Castillo then lay down behind her, pulled down her white pants with red hearts, "hugged" her, and tried to put his "private part" in her "bottom" by "[g]oing back and forth." (R. 92:68–71, 122.) GIV was "scared" and "embarrassed" to describe the incident in the courtroom, saying "[t]here's so much people." (R. 92:71–72, 121.) Castillo tried to put his "private part" in her "bottom"—the part where you "poop"— for about a minute and then turned over and said "suck my private part." (R. 92:73–74, 77.)

GIV was scared when this was happening. (R. 92:74.) Afterwards, Castillo warned GIV that if she told anybody, "he would kill me." (R. 92:75.) As a result, GIV was scared to tell people about what happened. (R. 92:75, 93.)

Towards the end of her direct testimony, the prosecutor asked: "Is there anything else that you remember about what happened that you think we should know?"; GIV responded: He did it to three other little girls." (R. 92:75.) The prosecutor immediately asked that the comment be struck; the court did so and instructed the jury to disregard the comment. (R. 92:75.)

Castillo moved for a mistrial. (R. 92:106.) The prosecutor opposed the motion, stating that the remark "was short, general, non-specific, and it was immediately struck from the record" and that the court could give an instruction telling the jury to disregard stricken testimony. (R. 92:106.) The court agreed that the jury was "capable of disregarding the comment." (R. 92:107.) The court also explained that the prosecution did not elicit the comment, that the jury would understand that an eight-year-old child "might blurt something out," and that given the age of the victim, "the jury will give great deference to the Court's requirement that they not consider it, and I don't believe they will." (R. 92:107.)

Castillo attempted to discredit GIV by eliciting testimony that she saw "ghosts" in the basement of the house. (R. 92:83–84.) Additionally, GIV couldn't remember the year the assault occurred or talking to her mom or going to the hospital. (R. 98–100, 108–09.)

Anne testified that GIV disclosed the assault to her in 2017, when they were living together. (R. 92:126.) Anne was laying in the bed and "spooning" with GIV, trying to get her to go to sleep, and GIV told her "I have to tell you before I forget." (R. 92:127.) GIV told her Castillo "put his private parts in her bottom." (R. 92:129–30.) When GIV disclosed the assault, she was "embarrassed," "ashamed," and "looked like she was lost." (R. 92:128.) Anne said she hadn't "ever seen her like that before." (R. 92:129.) Anne took GIV to the hospital to get a physical examination. (R. 92:129.) When the police arrived, she told them that she "didn't necessarily trust" Castillo. (R. 92:166.)

Based on the fact that Castillo raised the issue of delayed reporting in the trial, Officer Matthew Anderson, a sensitive crimes investigator, testified that delayed reporting of sexual assaults was common in children. (R. 92:148–152, 156.) Anderson further testified that he was dispatched to investigate a possible sexual assault after a nurse contacted

the Appleton Police Department when GIV came in to be examined. (R. 92:157–58.) He then turned the investigation over to the Oneida Police Department. (R. 92:159.)

Officer Stacy Prevost took over the investigation. (R. 92:142.) She took GIV to the Child Advocacy Center to undergo a forensic interview. (R. 92:143–44.) Prevost watched the entire interview from an adjacent room and later reviewed a video of the interview. (R. 92:144.) Prevost was not in the courtroom when GIV testified; however, she explained to the jury the details of what GIV told to the interviewer, which were identical to what GIV testified to in court. (R. 92:144–46.)

Castillo's sister, Lorena, testified on his behalf. (R. 92:175.) She described the layout of the house that GIV was living in when the assault occurred. (R. 92:176–82.) She also relayed that GIV told her that she (GIV) had onetime observed her mother in a hotel room under the covers with her boyfriend. (R. 92:192–93.)

During cross-examination, the State elicited admissions from Lorena that she spoke with Castillo frequently, including the night before the trial. (R. 92:197.) She admitted that she was aware that her phone calls with Castillo were recorded and that she was under oath. (R. 92:198.) When asked what they discussed, she stated "when its our visits, we talk about what we want out of this." (R. 92:198.) When asked, "What did you talk about," she responded: "We talked about him getting a job if he gets out." (R. 92:200.) Castillo's counsel objected, and the court admonished, "[T]he jury should disregard the part about getting out and I'll strike that from the record." (R. 92:200.)

Castillo moved for a mistrial based on the errant comment, stating "I think [it] was pretty explicit that she was talking to Juan when Juan was in custody." (R. 92:208.) The court disagreed, stating, "Well, it could have been interpreted

a number of different ways." (R. 92:208.) Castillo's counsel conceded the point: "It could have been." (R. 92:208.) The court also noted that Lorena was a defense witness who was very hostile to the prosecutor, and the fact that it immediately cautioned the jury; accordingly, it denied the motion. (R. 92:208–09.)

Castillo, who was now 19 years old, testified in his own defense and admitted that he had 15 prior adjudications of juvenile delinquency. (R. 93:6, 11, 14.) He denied having sexual contact with GIV or taking off his clothes in her presence saying, "That is gross." (R. 93:12.) He said he had "a lot of problems" with Anne. (R. 93:14.)

On cross-examination, Castillo admitted to speaking with his sister frequently about the trial. (R. 93:21–22.) He said he needed to prove his innocence because if he went to jail, "that would break my heart and break my family's heart. My friends' heart. My community's heart." (R. 93:22.)

Castillo's mother, Shelbie (GIV's aunt), testified on his behalf. (R. 93:23–24.) She described the layout of her house and general sleeping arrangements. (R. 93:24–30.) She testified that GIV and her siblings were living with her because Anne had abandoned her kids. (R. 93:32–33.) She said that after GIV moved back with her mother, GIV reported Castillo's assault around the same time that Anne was in danger of being evicted. (R. 93:33–34.) She admitted she had three prior convictions. (R. 93:30–31.)

On cross-examination, Shelbie said that at the time of the alleged assault, Castillo was 16 and only stayed at her house once in a while; she did not know where he was living. (R. 93:34–35.) When Castillo did stay the night, she did not watch over him and GIV and therefore didn't know if they were ever alone. (R. 93:36–37.)

After the close of evidence, the court instructed the jury to disregard all stricken testimony and any question that

implied an answer that the court did not allow. (R. 93:45.) The court also instructed the jury that evidence of witnesses' prior crimes could only be used to evaluate their truthfulness. (R. 93:48.) The court issued an additional instruction with respect to Castillo's prior delinquency adjudications, telling them they could only be used for credibility. (R. 93:48.)

The jury returned a guilty verdict after deliberating for less than an hour. (R. 93:78–83.) The court sentenced Castillo to five years' imprisonment and five years' extended supervision. (R. 65.) Castillo appeals.

STANDARD OF REVIEW

Decision to exclude expert testimony

"The decision whether to admit or exclude expert testimony is reviewed under an erroneous exercise of discretion standard." *State v. Chitwood*, 2016 WI App 36, ¶ 30, 369 Wis. 2d 132, 879 N.W.2d 786. This Court will uphold a circuit court's discretionary ruling if it "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." *Id.* (quoting *Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698).

This determination is "highly deferential." *Id.* This Court does not consider whether it "would have permitted the evidence to come in or whether [it] agree[s] with the circuit court's ruling, but whether, in fact, appropriate discretion was exercised." *Id.* And when reviewing a discretionary determination, an appellate court is required to "search the record for reasons to sustain the circuit court's exercise of discretion." *State v. Dobbs*, 2020 WI 64, ¶ 48, 392 Wis. 2d 505, 945 N.W.2d 609 (citation omitted).

Denial of mistrial

A circuit court's ruling on a motion for mistrial likewise is reviewed only for an erroneous exercise of discretion. *State*

v. Bunch, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The question before an appellate court is whether no reasonable court could have determined that, in the light of the entire proceeding, the pertinent event is not sufficiently prejudicial to warrant a new trial. *State v. Jeske*, 197 Wis. 2d 905, 912–13, 541 N.W.2d 225 (Ct. App. 1995).

ARGUMENT

I. The circuit court properly excluded Thompson's proposed testimony as not fitting the facts, likely to confuse the jury, and violating the *Haseltine* rule.

Castillo argues that the circuit court erred in excluding his expert's proffered testimony under *Daubert* and *Haseltine*. On appeal the State does not challenge Thompson's credentials as an expert or the reliability of the general principles he relied upon. However the circuit court properly excluded the testimony on the basis that it did not fit the facts of the case, its limited probative value was substantially outweighed by the danger of confusing the jury, and, if allowed, it would have violated the *Haseltine* rule.

A. To be admissible, expert testimony must: (1) be helpful to the jury; (2) relate to a matter of consequence; and (3) must not usurp the role of the jury.

Admission of expert testimony is governed by Wis. Stat. § 907.02. The statute states that "[i]f scientific, technical, or other specialized knowledge *will assist the trier of fact* to understand the evidence or to determine a fact in issue," then "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise," provided that "the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness

has applied the principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1) (emphasis added).[10]

The test for whether expert testimony will "assist the trier of fact" is "whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject." *State v. Swope*, 2008 WI App 175, ¶ 27, 315 Wis. 2d 120, 762 N.W.2d 725 (citation omitted).

Moreover, in addition to meeting the requirements of section 907.02, expert testimony must be relevant to be admissible. *State v. Schmidt*, 2016 WI App 45, ¶ 75, 370 Wis. 2d 139, 884 N.W.2d 510. "Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable." *Id.* ¶ 76 (citing Wis. Stat. § 904.01). In other words, the proposed testimony must "fit" the facts of a particular case. *Dobbs*, 392 Wis. 2d 505, ¶¶ 43–47. "Fit" is "a matter of circuit court discretion." *Id.* ¶ 48.

Section 907.02 also provides courts with "flexibility to limit otherwise relevant and reliable expert testimony that, if given in the form of an opinion, would invade the prerogative of the finder of fact." *Id.* ¶ 36 n.17. Specifically, an expert may not "vouch" for the credibility of a witness or testify a witness is not telling the truth. *State v. Haseltine*, 120 Wis. 2d 92, 95–96, 352 N.W.2d 673 (Ct. App. 1984). That is because such testimony "invades the province of the fact-finder as the sole determiner of credibility." *State v. Kleser*, 2010 WI 88, ¶ 104, 328 Wis. 2d 42, 786 N.W.2d 144.

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[10] The statute, as amended in 2011, adopted the federal framework for assessing expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. *Seifert v. Balink*, 2017 WI 2, ¶¶ 50–51, 372 Wis. 2d 525, 888 N.W.2d 816.

B. The excluded testimony about how factors *may* have affected GIV's memory was not helpful to the jury because Thompson admittedly could not relate this testimony to the facts of the case.

1. Expert testimony is unhelpful and does not fit if an expert is unable to connect general principles to the actual facts of the case at hand.

The circuit court properly excluded Thompson's testimony because Thompson had not "applied the principles and methods [he relied upon] reliably to the facts of the case." Wis. Stat. § 907.02(1). As explained recently by the Wisconsin Supreme Court in *Dobbs*, 392 Wis. 2d 505, ¶ 42, this requirement involves both "fit" and "helpfulness." In other words, "[g]eneralized expert testimony that is factually disconnected from the case is inadmissible because it does not assist the jury in rendering a verdict based on the material facts in issue." *Id.* ¶ 44 (citation omitted).

For instance, in *Dobbs*, the defendant sought to introduce expert testimony about false confessions during police investigations. The expert was prepared to testify about various factors that might make an innocent person falsely confess in order to "assist[ ] the jury in assessing the truthfulness of [his] confessions to police." *Id.* ¶¶ 46–47. However, the defendant did not demonstrate that any of the factors that might make an innocent person confess were actually present in the case; accordingly, the circuit court excluded the testimony. *Id.* ¶ 45. The Wisconsin Supreme Court affirmed, finding the circuit court properly exercised its discretion in determining that the proposed testimony did not fit the facts of the case. *Id.* ¶ 51.

Another case involving "fit" was *State v. Schmidt*, 2016 WI App 45, 370 Wis. 2d 139, 884 N.W.2d 510, which coincidentally, involved the same expert as this case—Dr.

Thompson. This Court ruled that the circuit court properly excluded Thompson's testimony about factors affecting the reliability of children's memories because he could not connect his general principles to the facts of the case. That is, like here, "Thompson purported to offer insight gleaned through his knowledge of various studies concerning how certain interview techniques and external factors can subtly influence a child's beliefs." *Id.* ¶ 78. And, like here, Thompson "could only testify about such matters at a high level of generality and could not tie these concepts in any meaningful way to the particular circumstances surrounding [the child's] statements to police." *Id.* This Court recognized that Thompson's testimony was helpful to the trier of fact only if the factors he identified were, in fact, present in this case—"a matter on which Thompson could not testify." *Id.*

Castillo tries to distinguish this case from *Schmidt*, by arguing that here, "Thompson indicated specific issues with GIV's interview statements, with the forensic interview, and indicated suggestive interview techniques occurred." (Castillo's Br. 17.) He claims that Thompson identified "interview bias" and "identified external influences" that affected GIV's testimony. (Castillo's Br. 17.)

None of these assertions are factually accurate. Put simply, Thompson admitted that for each factor he identified that *could* or *may* have affected GIV's testimony, he had no evidence that such factors were present, or that they actually influenced her statement, or to what effect. This is evident both in Thompson's report and his testimony at the *Daubert* hearing.

2. Thompson agreed he did not know if any of the factors he identified actually affected GIV.

Thompson's report identified six factors that *could have* affected GIV's statement to police: (1) repeatedly interviewing

by her mother and social workers; (2) external influences; (3) inappropriate interview techniques; (4) interview bias; (5) therapy affects; and (6) source misattribution error. (R. 29:3–10.) But at the *Daubert* hearing, Thompson agreed that his proposed testimony amounted to things that "could have affected the victim but we don't know if they did." (R. 84:67.) And he admitted that he had "limited information available to him" to draw conclusions with respect to this case. (R. 84:67.)

a. Thompson admitted he was not aware of how often GIV's mother "interviewed" her or what effect, if any, it had on her statements.

Addressing the first factor, Thompson's report stated: "To the extent that the girl's mother used suggestive or leading questions" when asking GIV about the assault, her memories "may be tainted from that point forward." (R. 29:3.) Thompson likewise said that GIV's initial interactions with the physician's assistant and CPS worker before GIV's forensic interview "may have been irreparably tainted from the outset." (R. 29:4.) However, the report also stated, in no uncertain terms: "*It is not possible for me to opine concerning the extent to which that actually occurred*, as I have no reports or recordings upon which to base such an assessment." (R. 29:4 (emphasis added).)

At the *Daubert* hearing, Thompson admitted that he did not know how much GIV discussed the assault with her mother or sister and therefore "can't tell you if that clearly affected this particular child or not." (R. 84:25, 61.) He said: "I don't know." (R. 84:60.) Likewise, Thompson was not aware of the frequency or extent to which GIV discussed the assault with the social worker or physician's assistant at the hospital. (R. 84:66–67.)

Therefore, by Thompson's own admission, was unable to reliably apply the general principles about the effects of repeated interviewing to the facts of this case. The same is true for all the other factors he identified.

b. Thompson admittedly could not opine that any "external factors" affected GIV.

As to external influences, Thompson's report explained that a child's memory can be influenced by the biases of adults in the household. Thompson noted that GIV's mother told police she had "trust issues" with Castillo, but that it was "unclear as to whether or not these concerns had been communicated to the children." (R. 29:5.) Indeed, while Castillo presented evidence that GIV's mother did not trust him, he presented no evidence that Anne communicated her personal opinion to GIV.

When asked at the hearing how external influences may have affected GIV's in this case, Thompson stated: "*I can't tell you exactly what the effects were* because . . . that's the job for the trier of fact" and he did not have specific information about whether the victim's mother's reported "trust issues" with Castillo had actually been communicated to the children. (R. 84:30–31 (emphasis added).)

Therefore, there was no factual foundation for Thompson's proposed testimony about the possible effects of external influences.

c. Thompson could not identify any "improper" interview techniques and admitted the forensic interview did not involve suggestive questions.

As to the techniques used during GIV's forensic interview, Thompson said that "there are specific techniques

that this interviewer could have used to elicit more information" but he admitted that the interviewer *"did not ask any suggestive questions*." (R. 84:64 (emphasis added).) While he prepared a chart that purportedly showed that the frequency of certain *types* of questions deviated slightly from what he determined were "best practices," (R. 29:7), Thompson did not identify any questions that were *improper*. His report even states: "None of the queries posed by Ms. Bayer met the strict criteria for coding as suggestive." (R. 29:7).

Accordingly, there was no evidence that the forensic interviewer employed *improper* interviewer techniques or how or to what extent GIV's statement *actually was* affected.

d. Thompson admitted there was no evidence of interviewer bias.

Castillo states "Dr. Thompson indicated interview bias" because the forensic interview suggested "alternative hypotheses" to GIV. (Castillo's Br. 17.) This assertion is demonstrably false.

Thompson's report states, in black and white, that he "did not find evidence that suggested that the interviewer was biased." (R. 29:8.) While it is true that Thompson criticized the interviewer because she "considered alternative hypotheses," he immediately followed that statement by indicating, "I did not find evidence in this case that the interviewer was biased." (R. 84:41.) And, more importantly, Thompson did not explain how the "alternative hypotheses" affected GIV's statement.

Therefore, there was no factual basis to suggest that GIV's statement was affected by interviewer bias.

e. There was no evidence of "therapy effects."

Thompson's report also addressed "therapy effects" as something that *could* affect GIV's memory, but he concluded that he "did not find any specific evidence that [GIV was] involved in psychotherapy." (R. 29:8.) At the *Daubert* hearing, Thompson admitted that he did not know if GIV actually participated in psychotherapy, and also admitted that even if she did "it wouldn't affect the [forensic] interview itself because she was referred at the end." (R. 84:64–65.) Therefore, there was no evidence that GIV's memory was affected by the fact that she was recommended to therapy.

f. Thompson could not identify any "source misattribution errors" that actually existed.

Finally, Thompson addressed potential "source attribution error" and concluded that GIV's interactions with her mother and brother "may well serve as the basis for a source misattribution error." (R. 29:9.) But again, absolutely no evidence of any such "source misattribution error" existed.

As to potential source misattribution error from GIV's reported interactions with her brother, Thompson admitted he did not even know whether a sexualized interaction actually occurred. (R. 84:66.) And the circuit court expressly excluded any evidence of GIV allegedly sitting on top of her brother, as inadmissible under the rape shield law (R. 87:4–10)—a ruling which Castillo does not challenge on appeal. In any event, Thompson admitted that he could not tell whether the victim's interactions with her brother were normal or affected her ability to recall the assault, saying "[w]e don't know if in this specific case it did or not." (R. 84:62.)

And, to the extent that Castillo suggested that GIV may have gained sexual knowledge from her mother, all he could show was that GIV reported that one time she observed her

mother and her boyfriend *under* bedsheets. (R. 92:186.)[11] There is absolutely no evidence of any other "external source" where GIV may have gained knowledge of a male trying to insert his "private part" in her "bottom," where she goes "poop," by "moving back and forth." (R. 92:77, 122.) Likewise, there was zero evidence presented that could account for GIV's being told to perform fellatio. (R. 92:73.)[12] Even assuming, *arguendo*, that such evidence existed (which it certainly did not), Thompson admitted he was unable to say how any such external influences "affected her [GIV] or specifically affected her memory and her reports," saying "we don't know." (R. 84:33, 62.)

* * * * *

In summary, the circuit court was correct that "in this particular case there are only hunches and guesses about what could have happened . . . it's speculative and it needs to match up with the particular incident." (R. 86:4.) Like his rejected testimony in *Schmidt*, 370 Wis. 2d 139, ¶ 78, here, Thompson "could only testify about such matters at a high level of generality and could not tie these concepts in any meaningful way to the particular circumstances surrounding [GIV's] statements." Thompson even agreed that his proposed testimony amounted to things that "could have affected the victim but we don't know if they did." (R. 84:67.)

In short, the record contains ample evidence that supports the circuit court's discretionary decision to exclude

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[11] Lorena relayed this story but admitted she was "guessing" if GIV saw anything improper. (R. 92:187–92.)

[12] Castillo tried to tie this to a crime show GIV watched on television, but GIV expressly denied that the show involved a scenario where "the person had the kid suck the private part." (R. 92:96.) Lorena likewise denied that the show gave GIV sexual knowledge. (R. 92:184.)

Thompson's testimony under section 974.02(1) for not fitting the case.

C. The circuit court did not erroneously exercise its discretion when excluding Thompson's proposed testimony under Wis. Stat. § 904.03.

Even if proposed expert testimony is proper under section 974.02(1), the circuit court retains discretion to exclude such testimony under section 904.03 if it concludes that the probative value of such testimony is outweighed by the danger of unfair prejudice or confusion of the issues. *Schmidt*, 370 Wis. 2d 139, ¶ 86. Here, as an alternative basis for its ruling, the circuit court explained that without a foundation based on case-specific facts Thompson's testimony was merely "speculative" (i.e. lacking in probative value) and that "a lot of [Thompson's] analysis would be confusing to the jury." (R. 86:8.)

Again, *Schmidt* is insightful. There, this Court said that Thompson's testimony bore a significant risk of confusing the jury and unduly prejudicing the State, explaining: "What minimal probative value Thompson's testimony may have had regarding D.R.'s credibility was easily outweighed by the very real potential that Thompson's testimony would mislead or confuse the jury by requiring them to speculate about what had occurred during the police interviews and elsewhere." *Schmidt*, 370 Wis. 2d 139, ¶ 86. This Court further explained that "if Thompson's testimony were admitted into evidence, it is entirely probable the jury would conclude, based solely on the fact he was testifying, that suggestive interview techniques had been used with D.R. despite the absence of any evidence to that effect." *Id.*

The same analysis holds true here. Without any admissible evidence showing that GIV was exposed to any external factors that affected her memory or ability to recall,

Thompson's testimony would have invited the jury to guess that such factors were present, simply because Thompson discussed them at a generalized level.

Therefore, even if this Court concludes that the circuit court erroneously exercised its discretion by excluding Thompson's testimony under section 974.02(1), it should nonetheless conclude that the circuit court acted within its discretion by excluding it under section 904.03.

D. The circuit court correctly excluded Thompson's testimony under *Haseltine*.

The circuit court articulated a third basis for excluding Thompson's testimony—that if allowed, Thompson's testimony would violate the *Haseltine* rule and "interfere with the jury being the primary determiner of the credibility of the witnesses." (R. 86:8.) If this Court does not affirm the circuit court's decision under section 974.02(1) or section 904.03, then it should affirm on the basis of *Haseltine*.

a. *Haseltine* prevents opinion testimony as to whether another witness's testimony is truthful.

It is black-letter law that "[i]t is the function of the jury to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony"—not an expert. *State v. Gomez*, 179 Wis. 2d 400, 404, 507 N.W.2d 378 (Ct. App. 1993). Accordingly, *Haseltine* holds 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." *Haseltine*, 120 Wis. 2d at 96. Specifically, *Haseltine* held that it was improper for a psychiatrist to express "his opinion that there 'was no doubt whatsoever' that Haseltine's daughter was an incest victim." *Id.* at 95–96. The court explained that "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." *Id.* at 96.

b. Thompson's testimony was credibility testimony in disguise.

The Wisconsin Supreme Court recently re-affirmed the vitality and importance of the *Haseltine* rule in *Dobbs*. In *Dobbs*, the Wisconsin Supreme Court held that it would have been improper to allow an expert to opine whether the circumstances surrounding the defendant's confession "could have resulted in Dobbs falsely confessing." *Dobbs*, 392 Wis. 2d 505, ¶ 36 n.18. The court explained: "Dr. White . . . would be giving an opinion on whether or not Dobb's dispositional factors combined with the police interrogation techniques could have resulted in Dobbs falsely confessing. . . . [S]uch an opinion . . . would invade the province of the factfinder as the sole determiner of credibility." *Id.*

The same is true here. While cloaked in terms of addressing the "reliability" of GIV's memory and her forensic interview, Thompson admitted that the purpose of his testimony was to "help them [the jury] assess credibility of witnesses during the trial." (R. 84:51.) Thompson's report even states that credibility "may be informed by information concerning the reliability" of the witness. (R. 29:1.) Thompson explained further that the factors he identified "can either increase or decrease that credibility." (R. 84:68.)

In other words, Thompson's testimony would amount to an opinion on whether GIV falsely reported that Castillo sexually assaulted her. That is prohibited by *Haseltine*. *See Dobbs*, 392 Wis. 2d 505, ¶ 36 n.18. In fact, Thompson admitted that his testimony in this case was similar to testimony that certain factors can produce a false confession. (R. 84:69.) In *Dobbs*, the Wisconsin Supreme Court stated in no uncertain terms that such testimony violates *Haseltine*. *Id.*

This Court should likewise rule that Thompson's proposed testimony would have violated the *Haseltine* rule because it amounted to an improper opinion concerning the credibility of the victim. "[S]uch an opinion . . . would invade the province of the factfinder as the sole determiner of credibility." *Dobbs*, 392 Wis. 2d 505, ¶ 36 n.18.

II. The court did not erroneously exercise its discretion when denying Castillo's motions for mistrial because it struck the improper testimony and issued limiting instructions.

Castillo next argues that he is entitled to a new trial based on the statements that were made by GIV about Castillo "doing it" to other girls and Castillo's sister's statement about when he "gets out." (Castillo's Br. 24–29.) However, Castillo's arguments ignore the highly deferential standard of review that this Court must employ; and he cannot overcome the legal presumption that the multiple limiting instructions issued by the court cured any prejudice.

A. This Court reviews the circuit court's decision denying a mistrial for an erroneous exercise of discretion, and the circuit court's decision is entitled to great deference.

As noted above, a circuit court's ruling on a motion for mistrial likewise is reviewed for an erroneous exercise of discretion. *Bunch*, 191 Wis. 2d at 506. The question before an appellate court is whether no reasonable court could have determined that, in the light of the entire proceeding, the pertinent event is not sufficiently prejudicial to warrant a new trial. *Jeske*, 197 Wis. 2d at 912–13; *Bunch*, 191 Wis. 2d at 506. It is not enough that a reasonable judge could have concluded differently than the trial court did here. *Jeske*, 197 Wis. 2d at 912–13. On appeal, this Court is obliged to independently review the record, and must uphold the trial court's

discretionary determination if the record provides a basis for the trial court's decision. *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

Moreover, if a motion for a mistrial is not based on prosecutorial misconduct, this Court affords the circuit court's decision "great deference." *Bunch*, 191 Wis. 2d at 507. This is because the circuit court "is in the best position to determine" whether a mistrial is warranted. *State v. Seefeldt*, 2002 WI App 149, ¶ 14, 256 Wis. 2d 410, 647 N.W.2d 894, *aff'd*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822.

Here, the circuit court determined that neither of the improper comments were elicited due to prosecutorial misconduct. (R. 92:107, 208–09.) Indeed, the prosecutor moved to strike GIV's comment, even before Castillo objected. (R. 92:75.) And with respect to Lorena's comment, the circuit court correctly observed that Lorena was a defense witness who was extremely hostile during cross-examination. (R. 92:208–09.) And, in both instances, based on the court's observation of the jury and the effect of the comments, it determined that the jury would follow the court's instructions and disregard the statements. (R. 92:107, 208–09.) Therefore, this Court must give great deference to the circuit court's decision to deny Castillo's motions for a mistrial.

B. Castillo cannot overcome the legal presumption the jury adhered to the court's limiting instructions.

It is well-established that when assessing prejudice to a party due to improper evidence, an appellate court "should presume that the jury followed the instructions given to them by the trial court." *State v. Pharm*, 2000 WI App 167, ¶31, 238 Wis. 2d 97, 617 N.W.2d 163; *State v. Deer*, 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985). Furthermore, "the general rule in this state is that limiting and admonitory instructions are presumed to cure the prejudicial effect of

erroneously admitted evidence." *State v. Jennaro*, 76 Wis. 2d 499, 508, 251 N.W.2d 800 (1977).

Here, with respect to the outburst by GIV, the circuit court acted immediately, struck the comment, and instructed the jury to ignore it. (R. 92:75.) Likewise, when Lorena made a comment about what they planned to do when Castillo "gets out," the court immediately admonished: "[T]he jury should disregard the part about getting out and I'll strike that from the record." (R. 92:200.)

And after the close of evidence, the court issued multiple limiting instructions. The court instructed the jury that it should disregard all stricken testimony and any question that implied an answer that the court did not allow. (R. 93:45.) The court also instructed the jury that evidence of witnesses' prior crimes could only be used to evaluate their truthfulness. (R. 93:48.) The court issued an additional instruction with respect to Castillo's prior delinquency adjudications, telling them they could only be used for credibility. (R. 93:48.)

In sum, the court (1) immediately struck the comments at issue; (2) immediately instructed the jury to disregard them; and (3) issued limiting instructions to the jury at the close of evidence. Therefore, this Court must presume that the jury followed these instructions and that they cured any prejudice. *Pharm*, 238 Wis. 2d 97, ¶ 31; *Jennaro*, 76 Wis. 2d at 508.

Castillo has not overcome these presumptions. With respect to GIV's comment, Castillo simply says "the bell could not be unrung." (Castillo's Br. 25.) But Castillo ignores several mitigating factors. First, as the circuit court recognized, the jury was likely to understand that a small child testifying under these circumstances "might blurt something out." (R. 92:107.) Castillo even acknowledges GIV was "scared" while testifying. Second, no other evidence or

mention of "other girls" was made during the trial. Third, as noted, the court specifically instructed the jury that it could not infer guilt from evidence of other crimes. (R. 93:48.)

As to Lorena's statement, Castillo argues that it was prejudicial because "the jury heard reference to [him] being incarcerated during trial." (Castillo's Br. 25.) But this is not correct. The jury heard an offhand remark from Castillo's sister about him "getting a job if he gets out." (R. 92:200.) The circuit court observed that "it could have been interpreted a number of ways." (R. 92:208.) Castillo's counsel even conceded the point: "It could have been." (R. 92:208.)

And, even if the jury *could* have interpreted the remark as implying that Castillo was incarcerated, there is no suggestion that he was incarcerated pending trial in this case, as opposed to one of his other 15 delinquency adjudications that the jury was informed about. For this reason, the Castillo's reliance on case law involving the prejudicial effect a jury observing the defendant in prison garb or shackles is misplaced. (Castillo's Br. 26–27.) These cases are inapposite, as they involve the *visual* impact of seeing the defendant in clothing or circumstances that implies guilt. Castillo cites no case that holds that the prejudicial effect of the jury *inferring* that the defendant was incarcerated shortly before trial is the same.

Finally, any prejudicial effect of the jury inferring that Castillo was incarcerated at some point was diminished by the fact that the jury could have inferred the same thing from other, unobjected to statements. As noted, the jury knew that Castillo had 15 prior delinquency adjudications. (R. 93:14.) But more importantly, shortly before Lorena's contested statement, the prosecutor made explicit reference to her phone calls with Castillo being recorded. (R. 92:198.) Castillo made no objection to this reference. And Lorena also said "when its our visits, we talk about what we want out of this." (R. 92:198.) Again, Castillo did not object. Thus, the jury

already knew: (1) Castillo had multiple prior delinquency adjudications; (2) Lorena had scheduled "visits" with him; and (3) their phone calls during such "visits" were recorded. The jury could easily have inferred that Castillo was incarcerated before trial based on these unobjected-to statements alone. Given this context, the chance of any *additional* prejudice by hearing an offhand reference to him "get[ting] out" is nonexistent. In short, Lorena's objectionable comment was no more prejudicial than information the jury had already learned without objection.

For these reasons Castillo has not overcome the legal presumptions that juries are presumed to follow the instructions given by the court and that such instructions cure any prejudice.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 28th day of October 2020.

Respectfully submitted,

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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 8,304 words.

Dated this 28th day of October 2020.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 28th day of October 2020.

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