STATE OF WISCONSIN

COURT OF APPEALS—DISTRICT III

Case No. 2020AP0983-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUAN J. CASTILLO,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

TRISTAN S. BREEDLOVE
Assistant State Public Defender
State Bar No. 1081378

ELLEN J. KRAHN
Assistant State Public Defender
State Bar No. 1085024

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8384
breedlovet@opd.wi.gov

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

ARGUMENT

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

The state begins its argument by noting that it does not dispute Dr. Thompson, Mr. Castillo's proffered expert witness, has the credentials to be considered an expert and that the principles he relied upon were reliable. (State's Br. at 14).

Nonetheless, the state argues that the circuit court was correct in excluding Dr. Thompson's testimony. The state claims first that Dr. Thompson did not adequately apply the principles of memory science to the facts of the case. The state then argues that Dr. Thompson's testimony had to be excluded because any application of the science to the victim here would implicate her credibility and would thus be a *Haseltine*[1] violation. The two walls of the state's argument seemingly leave no room for any defense expert to ever testify.

The state focuses on the fact that Dr. Thompson told the trial court that certain things *may* have affected GIV's memory rather than saying they necessarily *did* affect her. But what Dr. Thompson did and said was actually entirely appropriate. His testimony was about the science of memory and how certain things like repeated interviewing or types of interview questions could alter a child's memory and thus affect the reliability

---

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

of her story. He applied those principles to the facts of this particular case. In so doing, he did not opine on whether the interviewing or other occurrences actually did affect GIV's story because that decision would be one for the trier of fact to make and to make a direct assertion about GIV's trustworthiness would be a *Haseltine* violation. (29:2; 84:24, 31, 60, 67). He was correct about this. Expert testimony is used to assist the jury in understanding complex issues beyond the knowledge of the average juror. *State v. Whitaker*, 167 Wis. 2d 247, 255, 481 N.W.2d 649 (Ct. App. 1992). But an expert is not permitted to speak to a victim's veracity. *Haseltine*, 120 Wis. 2d at 96. And, saying here that repeated interviews, interview techniques, and more, necessarily affected the victim would be to opine on GIV's veracity. The state has argued this type of testimony would be impermissible but yet also says it is required. Those two positions cannot co-exist.

The state first argues that Dr. Thompson's testimony did not "fit" the facts of Mr. Castillo's case. (State's Br. at 16). In other words, that Dr. Thompson discussed the science of memory but did not apply it to the facts of the case. The state relies on *State v. Dobbs*, 2020 WI 113, 246 Wis. 2d 67, 629 N.W.2d 698, to describe the "fit" requirement.

Despite discussing the concept of "fit," the Wisconsin Supreme Court in *Dobbs* began its discussion of expert testimony by concluding that an expert can testify in the form of exposition testimony, which would allow an expert to explain concepts to the jury without applying the principles they are explaining to the facts of the case. *Id.*, ¶42. In fact,

the expert would not even have to be aware of the facts of the case. *Id.*

While the *Dobbs* court affirmed the circuit court's decision to exclude expert testimony, the supreme court acknowledged that the circuit court could have found that there was a "fit" and allowed the testimony based on even a narrow overlap between the facts of the case and the expert testimony. *Id.*, ¶¶ 46-48.

Thus, *Dobbs* does not set out a rule that requires a specific level of match between the factors the expert would testify about and the facts of the case in order for the circuit court to rule that the testimony could be helpful to the jury. Here, unlike in *Dobbs*, Dr. Thompson tied together the science in his field and the facts of this particular case. He did that by examining the number of times GIV was questioned about the incident, reviewing GIV's interview and comparing the interview techniques to best practices, and in evaluating the outside factors that may have affected GIV's memory. But even if he had not tied the science to the specific facts, according to the court in *Dobbs*, he still could have been allowed to testify simply about the science of memory and what factors make memories less reliable as long as some of the factors matched those in existence in this case. This makes sense. Jurors are not experts on memory retrieval and reconstruction so testimony from an expert in that field on the existence of factors that can affect memory would be helpful to them. If the state was able to offer evidence that delayed reporting is a common phenomenon with children, why could the

defense not offer that repeated interviewing and faulty questioning affects memory?

The state also argues that Mr. Castillo's argument that *State v. Schmidt*, 2016 WI App 45, 370 Wis. 2d 139, 884 N.W.2d 510, is distinguishable from his case is unconvincing. (State's Br. at 17). However, in *Schmidt*, Dr. Thompson was unable to watch or review a transcript of the interviews of the witness in that case because they were not recorded. 2016 WI App 45, ¶ 61. Here, Dr. Thompson was able to review GIV's interview and again applied the science to the specific circumstances in the case. (29:2, 6-8).

Dr. Thompson's proffered testimony and opinion would have provided 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. (29). The state attacks Dr. Thompson's testimony in all six areas. Regarding repeated interviewing, the state focuses on the fact that Dr. Thompson stated he did not know exactly how many times GIV had been interviewed. What the state omitted is that Dr. Thompson was sure that GIV was questioned on at least four occasions, as is outlined in his report. (29:4). He testified that each and every time a child is questioned that questioning has the potential to further inaccurate memories and noted that GIV was questioned by her mother who had no forensic interviewing training and likely asked her suggestive questions. (29:3; 84:25-27)

Dr. Thompson testified and reported on how external influences could affect the reliability of a person's memory. Specifically, he discussed how a child hearing negative stereotypes about a defendant could decrease memory reliability. (84:28). He noted that AS, GIV's mom, reported having trust issues with Mr. Castillo which could have been communicated to GIV. (84:31). The state argues that no evidence was presented that AS's trust issues with Mr. Castillo were reported to GIV. However, such testimony may have been by elicited by the trial attorney had Dr. Thompson been allowed to testify. It would have been relevant and admissible. In fact, the circuit court ruled pre-trial that the defense could ask questions about whether AS disliked Mr. Castillo at trial and such a discussion would likely have included whether she trusted him. (87:6-7). The state also ignores the part of Dr. Thompson's report that states that it was highly unusual for a child GIV's age to use the word "rape" and that "[t]his strongly suggests the presence of external influences…" (29:5).

In terms of inappropriate interviewing techniques, the state focuses on the fact that Dr. Thompson did not code any question as "suggestive." But what it fails to point out is that "suggestive" is one of four categories of question types Dr. Thompson used to evaluate and that questioning could still be problematic even if no one question was coded as "suggestive." Dr. Thompson clearly took issue with some of the interview techniques employed by the person who conducted the forensic interview of GIV. On page 7 of his report, Dr. Thompson charted the times that interviewer diverged from best interviewing practices and created a bar chart

showing the same. (29:7). He explained that divergence from best practices, as occurred here, can result in less reliable statements from children. (29:8). He also stated that these questions have to be viewed in context, saying "The use of a directive and option choosing questioning style under such circumstances is likely to contribute to decreased reliability of the child's memory and statements." (29:8).

Interviewer bias occurs when an interviewer assigns greater weight to statements that confirm her preconceived idea of what happened. (29:8). The state is correct that Dr. Thompson did not identify interviewer bias here.[2] But this is only one of the six areas that can affect memory. The state says Dr. Thompson found no evidence of therapy effects because GIV was not in psychotherapy. But what Dr. Thompson actually said is that therapy can affect memory because therapeutic techniques can change child recollections and that such an effect could have occurred in this case because GIV was referred for therapy. (84:43-44). Such information would have been useful for the jury to hear in assessing GIV's testimony at trial.

Finally, the state addressed misattribution errors. Dr. Thompson explained to the circuit court

[2] Undersigned counsel inadvertently indicated Dr. Thompson identified interviewer bias in Mr. Castillo's original brief believing that making attempts to test alternative hypotheses showed bias. Dr. Thompson's testimony and report actually indicate the opposite and the interviewer here did make attempts to test alternative hypotheses. (29:8; 84:40)

that children especially often identify the incorrect source of a memory. (29:9; 84:45-49). He noted that GIV and her brother had engaged in sex play and that language GIV used indicated a knowledge of sexual matters unusual for a child her age. (29:9-10; 84: 32, 49). The state said this was insufficient because evidence regarding sex play with GIV's brother was deemed inadmissible. However, Dr. Thompson still could have talked about misattribution errors as they related to sexual knowledge GIV had from seeing her mother and her boyfriend engaging in sex acts in a hotel room and from watching mature TV shows with sexual content with her cousin, Lorena. (92:183-84, 192). Such a discussion would have been relevant and helpful to the jury.

Next, the state argues that Dr. Thompson's testimony was properly excluded because it could have confused the jury. (State's Br. at 23-24). The state compares the reasoning of the circuit court in this case to the reasoning that the circuit court used in *Schmidt*. However, there was a much greater risk of confusing the jury in *Schmidt* because no recordings or transcripts of the child interview existed in that case. 2016 WI App 45, ¶ 61. Thus there was a greater risk that the jury would speculate about what interview techniques were used. Here, Dr. Thompson could have testified about his review of the interview and could have acknowledged what interview techniques were and were not present. Memory testimony from Dr. Thompson would not have confused the jury any more than testimony about delayed reporting would and the state was allowed to introduce that evidence.

Finally, the state argues that admitting Dr. Thompson's testimony would have violated *Haseltine*, 120 Wis. 2d 92. (State's Br. at 24-26). The state argues that "Thompson's testimony would amount to an opinion on whether GIV falsely reported that Castillo sexually assaulted her." (State's Br. at 25). But, that conclusion does not follow from the testimony Dr. Thompson gave at the hearing on the admissibility of his expert opinion. Even the quotes from Dr. Thompson that the state cites in its brief do not demonstrate that he would have given an ultimate opinion on whether GIV was telling the truth or not. Rather, Dr. Thompson acknowledged that credibility "*may be* informed by information concerning the reliability" of the witness. (29:1)(emphasis added). Dr. Thompson also acknowledged that the factors he identified "can *either increase or decrease* that credibility." (84:68)(emphasis added). Dr. Thompson was clear that the ultimate question of whether GIV was telling the truth would be left to the jury.

Further, as discussed above, if this court accepts the state's argument that Dr. Thompson's testimony would violate *Haseltine* while also accepting the state's argument that Dr. Thompson needed to more conclusively state that the factors "fit" the facts of the case, defendants seeking to admit expert testimony will almost never be able to do so. Either the expert will be weighing in on credibility or the expert will not be weighing in enough to fit the facts of case.

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

Two statements the jury heard – one regarding Mr. Castillo assaulting other girls and one regarding Mr. Castillo's incarceration – were prejudicial and warranted the trial court ordering a mistrial. The trial court recognized the prejudicial effect of comments such as these and that is why it prohibited any evidence alluding to any other allegations of assault and any reference to Mr. Castillo being incarcerated. (23:1; 86:9; 87:2). Unfortunately, the statements were made in spite of that order.

The state says that instructions from the court that the jury disregard were sufficient and attempts to minimize the importance of each statement. (State's Br. at 35).

First, the state says that the victim's statement that Mr. Castillo had assaulted three other little girls was of little import because the jury likely understood that a child "might blurt something out" when testifying. (State's Br. at 28). But this was not just any child witness, this was the victim in a he said/she said case where there were no eye witnesses and there was no corroborating evidence. Further, it was not a child blurting just anything out, it was the victim in the case indicating to the jury that Mr. Castillo had sexually assaulted other girls. Such a comment would have been enough to make jurors believe that Mr. Castillo was not only guilty in this case but also a serial offender.

Second, the state attempts to minimize the importance of Mr. Castillo's sister, Lorena, saying she and Mr. Castillo talked on the phone about him getting a job "if he gets out." (92.199-200). The state focuses on the comment not being prejudicial because Lorena did not say where Mr. Castillo was "getting out" of. (State's Br. at 29). But it is hard to imagine any other place Mr. Castillo, or anyone else, would be "getting out" of other than a jail or prison.

The state also says that the reference to incarceration here is different than the jury seeing the defendant in jail garb because the jury did not necessarily know Lorena was referring to jail calls made while Mr. Castillo was awaiting trial in this case. (State's Br. at 29). The trial transcript indicates otherwise. The state asked Lorena questions specifically about the time period after Mr. Castillo was charged and was preparing for trial. (92:198-200). The state tries to distinguish jurors seeing a defendant in jail garb and jurors hearing testimony indicating the defendant is in custody. But the problem is the same in both instances – the knowledge or belief that a defendant is currently in custody is prejudicial to the defendant in that it impairs the presumption of innocence. *State v. Grinder*, 190 Wis. 2d 541, 551, 527 N.W.2d 326, 330 (Ct. App. 1995).

Finally, the state argues that the effect of hearing Mr. Castillo was in pre-trial custody was minimal because the jurors had already heard about his prior record, scheduled visits with him, and that his calls were recorded. (State's Br. at 29). But those facts actually add to the prejudice. If the jurors had

heard only about Mr. Castillo's prior record, they may have been able to separate those prior acts from the charge at hand. But when reference was made to Mr. Castillo being held in custody it would have signaled to the jury that the court believed he was guilty or at least dangerous enough to warrant more than a year and a half of pre-trial custody. Such information would have led jurors to believe that Mr. Castillo's past actions were not behind him and that he was guilty in this case. The situation is made further problematic by the fact that the jury also heard the inappropriate allegation from GIV that Mr. Castillo had assaulted three other little girls. The coupling of those two statements may well have led the jury to believe Mr. Castillo was currently serving a sentence for sexually assaulting another.

Some evidence is too problematic to cure with a simple instruction and cannot be unheard by the jury. The statements here were of that kind and as such trial counsel's requests for a mistrial should have been granted.

CONCLUSION

For the reasons set forth above, as well as those in the brief-in-chief, Mr. Castillo respectfully requests that this court reverse the judgment of conviction and remand to the circuit court for a new trial.

Dated and filed this 2nd day of December, 2020.

Respectfully submitted,

Electronically Signed by
Tristan S. Breedlove

TRISTAN S. BREEDLOVE
Assistant State Public Defender
State Bar No. 1081378

ELLEN J. KRAHN
Assistant State Public Defender
State Bar No. 1085024

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8384
breedlovet@opd.wi.gov

Attorneys for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

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

The length of the brief is 2,811 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 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 and filed this 2nd day of December, 2020.

Signed:

Electronically Signed by
Tristan S. Breedlove

TRISTAN S. BREEDLOVE
Assistant State Public Defender