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COURT OF APPEALS

# The Wisconsin Court of Appeals District III

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20-AP-1746-CR

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State of Wisconsin,  
Plaintiff-Respondent

v.

Joseph M. Marks  
Defendant-Appellant

Appeal from The Circuit Court of Barron County  
The Honorable James C. Babler, presiding

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Brief of Appellant Joseph M. Marks

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### **Statement of the Issues**

Wisconsin Statute §908.08 allows the audiovisual recording of a child to be admitted into evidence if certain conditions are met. Mr. Mark's appeal centers on the admission of the forensic interview of R.F.:

1. The recording must be accurate, free from excision, alteration, and distortion. When the original recording suffered from the audio portion "cutting in and out throughout" may the the State "merge" a separate audio recording to the video?
2. Did the circuit court err in finding R.F. understood the difference between a truth and a lie, false statements are punishable, and it is important to tell the truth?
3. Did the circuit court err in concluding the time, content, and circumstances of the interview provided indicia of its trustworthiness.

### **Statement on Oral Argument and Publication**

Oral argument and publication are not requested.

### Statement of Facts and the Case

Mr. Marks began to date E.F. in November of 2017.

(R.113:123). Mr. Marks moved in with E.F. that month.

(R.113:123). E.F. lived with her three children from a previous marriage. (R.113:124). At the time, R.F. was four years old.

(R.113:124). E.F. and her husband A.F. had divorced previously; from November 2017 to January of 2018 the children spent every other weekend with their father, and his new wife S.F.

(R.113:125). In January 2018, the children began to spend every other week with A.F. and S.F. (R.113:126).

In late November, Officer Greg Chafer was informed Mr. Marks was in violation of his sex offender registry requirements. (R.72:7-8). Mr. Marks was arrested, and subsequently released on bond. (R.100:9).

On March 19, 2018, S.F. called the police alleging R.F. had told her she saw Mr. Marks' genitals, and Mr. Marks had told her to touch herself. (R.113:249). S.F. and A.F. would then receive full-custody of the children, and S.F. is "especially upset" E.F. was not charged with any crimes. (R.100:4). R.F.'s pre-kindergarten teacher Holly Schramski also called the police as R.F. told her to pull down her pants and touch herself. (R.63). Ms. Schramski testified this conversation happened on March 20, 2018, but her written statement is dated 4/18/18. (R.113:109; R. 63).

On March 22, 2018, R.F. was brought to the Cumberland Police Station where Officer Chafer and Martha Moyer conducted an interview of R.F. (R.113:165-166). On April 20, 2018, a

criminal complaint was issued, charging Mr. Mark with first degree child sexual assault and exposing genitals in violation of Wis. Stat. §§948.02(1)(e) and 948.10(1) respectively.

On February 6, 2019, the circuit court held a hearing to determine if the forensic interview of four year old R.F. would be admitted. After hearing testimony on the State's alterations of the video to fix issues with the audio recording, the court viewed the forensic interview in its entirety. (R.108:26). Mr. Mark's attorney raised objections regarding the alterations to the video and R.F.'s ability to understand the differences between a truth and a lie, and the consequences for lying. The court found the video was free from alteration and video audio distortion. (R.108:32). The court also found R.F. demonstrated a "clear understanding of false statements and that they are punishable". (R.108:34). Lastly, the court found from the time, the content, and circumstances of the statement, there's an indicia of trustworthiness. (R.108:34).

The case proceeded to trial on October 3, 2019. R.F. testified she did not remember the interview taking place, she did not remember ever telling Mr. Schramski anything about Mr. Marks, she did not remember telling S.F. Mr. Marks had shown her his genitals, or instructed her to pull down her pants. (R.113:240-245).

After three and a half hours of deliberations, the jury returned a verdict of guilty as to both counts. (R.115:87). The court sentenced Mr. Marks to twelve years of confinement and eight years of supervision in count one and 18 months

confinement and two years supervision in count two to be served consecutively. (R.116:17).

Mr. Marks filed a timely notice of intent to pursue post-conviction relief on December 19, 2019. (R.80). A post-conviction motion alleging counsel was ineffective was filed on August 17, 2020. (R.88). Trial counsel had requested a respected psychologist review the interview of R.F. (R.88:4).

Unfortunately, Dr. Jurek's report was not submitted until after the motion hearing regarding the admissibility of the forensic interview. Dr. Jurek's report concluded the interview failed to establish R.F. understood the difference between a truth and a lie, and the interview was littered with errors and irregularities which limit the trustworthiness of the interview. (R.88:29-30). Despite this, this circuit court denied Mr. Marks' motion for post-conviction relief stating a reasonable lawyer would not have brought a portion for reconsideration, the court would not have changed its ruling, and the child testified at trial and "gave information"<sup>1</sup>. (R.117:18)

A timely notice of appeal was filed on October 12, 2020, and this appeal follows. (R.91).

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<sup>1</sup> R.F.'s testimony is located at R.113:239-245. R.F. did not provide any testimony about the alleged conduct, and could not remember any of her alleged disclosures.

## Argument

### I. Standard of Review

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. Amends. VI, XIV; Wis. Const. art. I §7; *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). To find counsel was ineffective, the defendant must show that trial counsel's representation was deficient and the defendant must demonstrate he was prejudiced by the deficient performance. *Strickland*, 446 U.S. at 687.

To demonstrate the deficient performance was constitutionally prejudicial, the defendant must show that there is a reasonable probability the result of the proceeding would have been different had counsel not performed deficiently. *State v. Thiel*, 2003 WI 111 ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (2003). The focus of this inquiry is not on the outcome of the trial, but the reliability of the proceedings. *Thiel*, 2003 WI at ¶20.

A claim of ineffective assistance of counsel is a mixed question of law and fact. *Thiel* at ¶21. Appellate courts are to uphold the circuit court's finding of facts unless clearly erroneous, but the question of whether a deficient performance led to prejudice rising to the level of undermining the reliability of the proceeding is reviewed de novo. *Id.* ¶¶21, 24.

A determination of whether a child can differentiate truth from lies, and that providing false statements is punishable is a question of fact. *State v. Jimmie R.R.*, 232 Wis. 2d 138, 158, 606



N.W.2d 196 (1999). Since the only evidence on this particular question is the recorded interview itself, appellate courts are in the same position as the circuit court, and the question is reviewed *de novo*. *Jimmie R.R.*, at 158.

## II. The Recorded Interview Is Not Free From Excision, Alteration, or Distortion

Wis. Stat. 908.08(3) contains the criteria the video of the forensic interview must meet to be admissible.<sup>2</sup> To be admissible, the recording must be accurate and free from excision, alteration and visual or audio distortion. *Wis. Stat.* §908.08(3)(b). While the recording of the interview may have been an accurate recording of what was said, the original admittedly suffered from audio distortion.

Q: And you later discovered that the original copy that you had had audio distortion problems?

A: Yes

(R.108:12)

To solve the problem of the audio distortion, the Wisconsin State Crime Lab engaged in a process which is “really quite complex”.

(R.108:17). There were “a lot of system files” and the audio and video tracks “were splintered” and “parsed out it chunks”.

(R.108:17). The crime lab then merged all the files, and

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<sup>2</sup> An audio video statement of a child may also be admitted via Wis. Stat. §908.08(7) if an applicable hearsay exception exists. *State v. Snider*, 2003 WI App 72, ¶16, 266 Wis. 2d 830, 668 N.W.2d 784 (2003). The State has not advanced an alternate theory of admissibility. Admission under the “catchall” provision of Wis. Stat. §908.03(24) would be guided by the factors listed in *State v. Huntington*, which deal primarily with the attributes of the child, and the circumstances of the interview. *State v. Huntington*, 216 Wis. 2d 671, 687-688, 575 N.W.2d 268. Should this court consider admission via §908.03(24), it should find the interview inadmissible for the same reasons the interview fails §908.08(3)(c) and §908.08(3)(d).

converted them into a single continuous file. (R.108:18). The next step involved taking an audio file from a separate device, and imported the files into another program and stacked the files “one on top of another”. (R.108:18-19).

It is truly unfortunate Officer Chafer did not check to make sure the recording equipment in the police department interview room worked. (R.108:5). His mistake does not change the requirements of Wis. Stat. §908.08(3)(b). The recording must be free from audio distortion and alteration to be admissible. The recording of the interview contains both distortions and alterations. As such it is plainly inadmissible under Wis. Stat. §908.08(3)(b).

### III. R.F. Was Unable To Distinguish Truths and Lies

Wis. Stat. §908.08(3)(c) requires the child understand that false statements are punishable and the importance of telling the truth. *Wis Stat.* 908.08(3)(c). These are closely interrelated concepts, and it is not necessary to use the precise words of the statute. *Jimmie R.R.*, 232 Wis. 2d at 159. Implicitly stated in this requirement is the child must know the difference between truth and lie.

Wisconsin case law is clear child victims must be able to distinguish between true and lies to permit recordings of their forensic interviews. In *State v. Mercado*, this court reviewed the recordings of interviews of L.A.G. and N.L.G. and concluded neither child demonstrated a firm understanding of the truth, and so it was an error to admit the videos. *State v. Mercado*, 2020 WI App 14, ¶44, 391 Wis. 2d 304, 941 N.W.2d 835 (2020)

(Review Granted). L.A.G. had just turned five, but told the officer she was four even when confronted with her birthday. *State v. Mercado*, 2020 WI App ¶8. L.A.G. answered “I think that’s the truth” when asked if it was true if someone told them a pair of black pants were red. *Id.* L.A.G. also did not know if it was important to tell the truth, and would not promise to do so during the interview. N.L.G.’s interview was much the same; N.L.G. was asked if a pillow was called a wall, and she said that was not wrong. *Id.* at ¶12.

In contrast, the four year old victim in *State v. Holt* was able to correctly identify several statements as truths or lies, corrected himself when incorrect, identify consequences to lying, and promised to tell the truth. *State v. Holt*, 2016 WI App 34, ¶¶31-32, 369 Wis. 2d 71, 879 N.W.2d 808 (2016)(unpublished opinion). The *Holt* court came to the correct and obvious conclusion the truthfulness prong of §908.08(3)(c) was satisfied. Likewise the court in *State v. Jimmie R.R.*, found the truthfulness prong satisfied when the five year old victim correctly identified a statement claiming a green shirt to be purple was a lie, and how important telling the truth was.

At the time of the interview, R.F. was unable to establish she knew the difference between a truth and a lie. Dr. Jurek, the retained expert offered his opinion, stating:

At 2 minutes and 49 seconds, Ms. Moyer introduces the idea that there will be rules for the interview. As part of this exercise, at 2 minutes and 52 seconds, Ms. Moyer reassures RF that it is acceptable for her to say “I don't Know” when she is uncertain how to respond to an inquiry. Ms. Moyer follows this up with the question “(RF) what

color is my house? What's something you could say?" RF responds, "I don't know" to this. While this might suggest that RF understands that she can say "I don't know" when she does not know the answer to a particular question, over the next two minutes, while attempts were made to establish RF's ability to distinguish the truth from a lie, she says "I don't know" or shrugs in response to five out of seven initial inquiries made of her.

At 3 minutes and 35 seconds Ms. Moyer initiates the formal assessment of RF's ability to distinguish the truth from a lie with the following exchange:

Ms. Moyer: can you tell me the difference between a truth and a lie?

RF: if you lie, you will get in trouble. If you tell the truth you will not get in trouble.

RF is, however, unable to identify either of two statements offered by Ms. Moyer as being either the truth or a lie, as for example, when Ms. Moyer refers to RF by an incorrect name. Furthermore, although she had already demonstrated that she understood that there might be negative consequences for a child who is not honest, when Ms. Moyer just a short time later asks her, "So what happens if a kid were to tell something that wasn't true, what might happen?" RF responded, "I don't know." Thus, the assessment of RF's ability to tell the difference between the truth and a lie ended without her having articulated that truthful statements are based on factual events that had actually occurred, without her having identified sample statements provided to her as being either true or lies, and without her having identified specific consequences that children might encounter if they are dishonest.

(R.88:16-17).

R.F. failed to identify statements as truths or lies, and her understanding of the consequences of lying is mixed. This Court should review the forensic interview, and reach the only possible conclusion: R.F. does not understand the difference between a lie and the truth.

#### IV. The Content and Circumstances of the Forensic Interview Indicate It Is Not Trustworthy

To be admissible, the audiovisual recording must have indicia of trustworthiness. *Wis Stat.* §908.08(3)(d). In *State v. Sorenson*, the Wisconsin Supreme Court considered the admissibility of videotaped statements under the residual hearsay exception, and enumerated several factors for courts to consider when determining whether a statement has circumstantial guarantees of trustworthiness. *State v. Sorenson*, 143 Wis. 2d 226, 242, 421 N.W.2d 77 (1988). The factors include: (1) the child's age, ability to communicate, and familial relationship with the defendant; (2) the person to whom the child made the statement and their relationship to the child; (3) the circumstances surrounding the statement, including the elapsed time since the assault; (4) the content of the statement; (5) other corroborating evidence. *Sorenson* 143 Wis. 2d at 245-246.

In *State v. Kevin L.C.*, the five year old victim was interviewed by an experienced social worker with specialized training in interviewing young children. *State v. Kevin L.C.*, 216 Wis. 2d 166, 181, 576 N.W.2d 62 (1997). The court noted how A.R. was able to understand the questions asked and the answers given, and the statement A.R. gave described multiple sexual acts with more detailed information than the disclosure to her mother. *Kevin L.C.*, 216 Wis. 2d at 182. When a young child relates a particularly detailed account, it is indicative they likely experienced the abuse. *Id.* The court concluded A.R. was likely telling the truth when the statement was made. *Id.* at 183.

The interview in *State v. Holt*, contains many similar indications of trustworthiness. The four year old victim described the sexual abuse in detail, and then demonstrated mouth to penis oral sex vividly with a doll. *Holt*, 2016 WI App ¶36.

Dr. Jurek's report details numerous factors which cast significant doubt to the trustworthiness of the interview of R.F.. Dr. Jurek first notes Officer Chafer's presence during the interview, and how it is unusual to have more than one person in attendance as it affects the ability of the child to establish rapport with. (R.88:15-16). R.F. failed to offer narrative accounts of past events, even though she was prompted on multiple occasions. (R.88:17).

After R.F. offered a disclosure with little to no details, the social worker announces she wants to have R.F. complete worksheets, rather than engaging in open-ended questioning regarding the disclosure. (R.88:18). R.F. was presented with two line drawings, a male and a female body. R.F. was unable to identify which picture looks most like her. (R.88:18). Dr. Jurek's concerns regarding the line drawings continue:

In most settings, such line drawings are used to establish the child's preferred vocabulary for sexual anatomy. Thus, it seems strange that no effort was made to query RF's use of the term "penis" as she employed that term to refer to her own and Mr. Marks' genitals in her initial description of alleged sexual misconduct offered just after the 6-minute mark in the interview on 03/22/2018. Her use of the term in that way is highlighted by the fact that at no other point in the interview does RF refer to her own genitalia using the term penis. Furthermore, in her original report to law enforcement, Stacy Feidt noted that the RF did not appear to have a term that she used to refer



to her own genitalia, but that she did refer to Mr. Marks as having a penis.

Another concern that I have about the use of the line drawings in the interview of 03/22/2018 is that, although Ms. Moyer initially told RF that she was going to proceed to name body parts on the male line drawing after having done so on the female line drawing, that never occurred. This would seem to be a significant oversight, again, given the subject's contradictory use of the word penis, but also because the allegations in the pending case include allegations that Mr. Marks exposed himself to RF. (R.88:19-20).

Dr. Jurek raised significant concerns regarding the manner of questions posed to R.F, and the role of Ms. Moyer in the overall investigation. Of the 108 questions posed to R.F., only eight questions were open-ended. (R.88:23). There was likely interview bias; the interview contained only three hypothesis-testing questions, all of which were posed by Officer Chafer. (R.88:26). Dr. Jurek also opined Ms. Moyer's failure to pursue questioning about R.F.'s unusual usage of the word penis, and the failure to establish R.F.'s preferred vocabulary of male sexual anatomy to be indicative of confirmation bias. Lastly, Dr. Jurek raised concerns that Ms. Moyer was a participant in the interviews with A.F., S.F., E.F., and even accompanied Officer Chafer in attempt to interview Mr. Marks. (R.88:27). "Such pervasive involvement in a ending legal case seems [to] go beyond the role of facilitating a child victim's honest self-disclosure in a forensic interview." (R.88:27).

The audiovisual recording of the forensic interview in this case is significantly different than the interviews in *State v. Holt* and *State v. Kevin L.C.* When the three are compared, it is clear,

the forensic interview of R.F. lacks the required indicia of trustworthiness to be admitted under Wis. Stat. §908.08 or §908.03(24).

V. Dr. Jurek's Report Provided New Relevant Evidence; It Was Unreasonable for Trial Counsel To Request the Trial Court To Reconsider It's Decision To Admit the Audiovisual Recording

The Wisconsin Supreme Court has encouraged litigants to request trial courts for motions for reconsiderations as a method of correcting errors. *Kochel v. Hartford Accident & Indemnity Co.*, 66 Wis. 2d 405, 418, 225 N.W.2d 604 (1975). To prevail on a motion for reconsideration the movant must present either newly discovered evidence or establish a manifest error of law or fact. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129 ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. A motion for reconsideration may not be used to introduce new evidence which was available at the time of the original decision. *Koepsell's* 2004 WI App ¶46.

Dr. Jurek's report was not available at the time of the original motion hearing. As noted above, Dr. Jurek's report provides detailed expert opinions on evidence related to the admissibility of R.F.'s interview. Had counsel filed the motion, Mr. Mark's case could have only benefitted, and the issues would be properly preserved for appellate review if the motion was denied. It was entirely unreasonable for counsel not to file a motion to reconsider given no harm could possibly come to Mr. Marks, and the cornerstone of the State's case could have been removed.



### Conclusion

The circuit court committed clear, reversible error when it allowed the audiovisual recording of R.F.'s forensic interview to be admitted into evidence. The recording was distorted, and subsequently altered. R.F. was unable to differentiate the difference between a truth and a lie, and there are few, if any indicia of trustworthiness in the recording. Mr. Marks respectfully request this Court overturn the lower court's ruling, and remand his case for a new trial.

Dated: Wednesday, January 13, 2021

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Steven Roy', is positioned above the printed name.

Steven Roy  
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**CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)**

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,360 words.

Signed: Steven Roy

Signature 

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (2)**

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 s. 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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I hereby certify that:

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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.

Signed Steven Roy

Signature 

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19 (13). I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Signed Steven Roy

Signature 