FILED
04-20-2021
CLERK OF WISCONSIN
COURT OF APPEALS

The Wisconsin Court of Appeals District III

2020AP1746-CR

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

Reply Brief of Appellant Joseph M. Marks

Steven Roy
Attorney for the Defendant-Appellant
Wisconsin State Bar No. 1115155
1310 O'Keeffe Ave. #315
Sun Prairie, WI 53590
608.571.4732
Steven@stevenroylaw.com

Table of Contents

Argument....................3
I. Standard of Review....................3
II. The Recorded Interview Is Not Free From Excision, Alteration, or Distortion....................3
III. R.F. Was Unable To Distinguish Truths and Lies....................5
IV. The Content and Circumstances of the Forensic Interview Indicate It Is Not Trustworthy....................10
V. Dr. Jurek's Report Provided New Relevant Evidence; It Was Unreasonable for Trial Counsel To Fail To Request the Trial Court To Reconsider It's Decision To Admit the Audiovisual Recording....................11
Conclusion....................13
Certifications....................14

Table of Authorities

State v. Breitzman..12
2017 WI 100 ¶39, 378 Wis. 2d 431
Kochel v. Hartford Accident & Indemnity Co..............................11
66 Wis. 2d 405, 418, 225 N.W.2d 604 (1975)
State v. Huntington..6
216 Wis. 2d 671, 687-688, 575 N.W.2d 268
State v. Mercado..3, 4, 5, 6, *passim*
2021 WI 2, 395 Wis.2d 296
State v. Sorenson..6, 8
143 Wis. 2d 226, 242, 421 N.W.2d 77 (1988)
State v. James..3
2005 WI App 188, ¶8, 285 Wis. 2d 783
State v. Jimmie R.R..3
232 Wis. 2d 138, 158, 606 N.W.2d 196 (1999)
Industrial Risk Insurers v. American Engineering Testing, Inc....6
2009 WI App 62, ¶25 318 Was, 2d 148.
Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd..11
2004 WI App 129 ¶44, 275 Wis. 2d 397, 685 N.W.2d 853.
State v. Pettit..4
171 Wis. 2d 627, 646-47, 492 N.W.2d 633
State v. Snider..5
2003 WI App 72, 266 Wis. 2d 830, 668 N.W.2d 784 (2003)
Wis. Stat. §908.08..3, 4, 5
Wis. Stat. §908.03..6

Argument

I. Standard of Review

The State submits appellate courts are to review a circuit courts decision to admit a recorded interview under Wis. Stat §908.08 "for an erroneous exercise of discretion". (State's Br. 8). The State cites to *State v. James*, for this proposition. *State v. James,* 2005 WI App 188, ¶8, 285 Wis. 2d 783 (Overruled in part by *State v. Mercado*, 2021 WI 2, 395 Wis.2d 296). The *James* court did not address whether the video recording of the forensic interview was admissible, but dealt with the trial court's determination it would not allow the video to be admitted prior to the child's testimony. *State v. Mercado*, 2021 WI ¶51. *James* is limited to the circuit courts discretion to control the order and presentation of evidence at trial. *James* 2005 WI App ¶8; *Mercado*, 2021 WI ¶52-53. The standard of review for the admission of video recorded forensic interviews stated in *State v. Jimmie R.R.* is still controlling law; 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*. *State v. Jimmie R.R.,* 232 Wis. 2d 138, 158, 606 N.W.2d 196 (1999).

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

The State does not contest the recording of the forensic video was "reconstructed". (State's Br. 10). Rather, the State argues the purpose of Wis. Stat. §908.08(3)(b) is to ensure the fact finder sees an acquire representation of what happened

during the interview, and asks this court to accept the reconstructed video under the alleged purpose of the statute[1].

This Court cannot accept the State's position. "Statutory interpretation begins with the language of the statute. If the plain language is clear, we stop the inquiry". *State v. Mercado*, 2021 WI ¶43, *citing State ex rel. Kalal v. Circuit Court for Dane City.*, 2004 WI 58, ¶45, Wis. 2d 663, 681 N.W.2d 110. Statutory language is given its common ordinary and accepted meaning, excepting technical, or specially-defined words or phrases. *Id.* Only when the statutory language is ambiguous are courts allowed to go beyond the plain language of the statute. *Id.*

The statutory language of Wis. Stat. §908.08(3)(b) is clear. The recording must be accurate *and* be free from excision, alteration and visual or audio distortion. Wis. Stat. §908.08(3)(b). Accepting a video which had its original audio excised and replaced due to audio distortion ignores the plain language of the statute. This Court is not free to ignore the additional requirements set by the legislature simply because the State has asserted admission of of the video satisfies some purpose. The video is not free from excision; it is not free from alteration; and it was not free from audio distortion. Under the plain language of Wis. Stat. §908.08(3)(b) the video is inadmissible. The circuit court was wrong in its conclusions, and this court must correct this error.

---

[1] The State fails to cite *any* authority which states the statute's purpose. This Court does not consider arguments unsupported by legal authority. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

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

As Mr. Marks has argued from the outset of this appeal, R.F. failed to identify statements as truths or lies, and her understanding of the consequences of lying is mixed. 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). Implicitly stated in this requirement is the child must know the difference between truth and lie. Wis. Stat. §908.08(3) contains a five part test; only when all five parts are fulfilled shall the circuit court admit the recording. As demonstrated in the opening brief, Wisconsin case law supports the proposition R.F. did not understand the difference between a truth and a lie[2].

After Mr. Marks submitted his initial brief, the Wisconsin Supreme Court issued its decision in *State v. Mercado*. The Court of Appeals had held the video recordings of the forensic interviews were not admissible under §908.08(3)(c) because the two of the children did not demonstrate they understood the difference between a truth and a lie. As noted above, Wis. Stat. §908.08(3)(c) requires all of the factors to be met for the video to be admissible under §908.08(3)(c). However, a video recording 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). Admission under the

---

[2] The *Mercado* Court specifically declined to address whether the circuit court correctly determined N.G.'s interview satisfied §908.08(3)(c) as it found the video was admissible under the residual hearsay exception. *State v. Mercado*, 2021 WI n.18.

"catchall" provision of Wis. Stat. §908.03(24) would be guided by the factors listed in *State v. Huntington*, and Sorenson, 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; *State v. Sorenson*, 143 Wis. 2d 226, 242, 421 N.W.2d 77 (1988). In *Mercado* the Court of Appeals conducted a *Sorenson* analysis and concluded the interview was not admissible under the catchall provision as the children did not demonstrate they understood the difference between truths and lies. The Supreme Court of Wisconsin held this conflates the first *Sorenson* factor with the requirement of §908.08(3)(c). *Mercado* 2021 WI ¶65.

At no time has the State advanced alternate theories of admissibility for the recoding of R.F.'s forensic interview. This Court does not abandon its neutrality to develop arguments for a party. *Industrial Risk Insurers v. American Engineering Testing, Inc.*, 2009 WI App 62, ¶25 318 Was, 2d 148.

Should this court address the hearsay catchall *sue sponte*, it should find E.F. statements distinguishable from the Supreme Courts analysis in *Mercado* and find the recording does not have the requisite circumstantial guarantees of trustworthiness.

Like *Mercado*, the first *Sorenson*[3] factor weighs towards admission. R.F. was the same age as N.G., four years old. While

[3] 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.

each child was confused and less than responsive regarding their ability to differentiate between a truth and a lie, there is not a showing of deliberate falsity. While Mr. Marks lived with R.F. for approximately four months, N.G. had lived Mercado for at least a year. *State v. Mercado*, 2021 WI ¶58.

The second *Sorenson* factor, to whom the child made the statement and their relationship, begins to weigh against admission. In *Mercado* the statement was given to a single police officer, and the Court stated it detected no motive to have her fabricate her assertions. *Mercado* ¶59. In this case, R.F. was interviewed by both Officer Greg Chafer, and social worker Martha Moyer. Dr. Jurek noted in his report how it is better for the child to have a single interviewer, and the presence of law enforcement in an interview has been discouraged. (Appendix 114). While there were not openly coercive interview techniques used, the interview was littered with inappropriate interviewing techniques. (App. 113-124). Over 90% of the questions asked were structured, leading questions. (App. 121). Additionally there is strong evidence of interview bias: only three hypothesis testing questions were asked, and the social worker participated in the interviews of A.F., S.F., E.F., and even attempted to interview Mr. Marks. (App. 124-125). As Dr. Jurek noted, "such pervasive involvement in a pending legal case seems [to] go beyond the role of facilitating a child victim's honest self-disclosure in a forensic interview". *Id.*

The third factor is primarily neutral, but leaning against admission. The statement was given in a relatively

contemporaneous time to the alleged occurrence. The contemporaneity and spontaneity of statements are not as crucial in young victims. *Mercado*, ¶60. In *Mercado*, the children were taken to the Sojourner Family Peace Center; this was a neutral location. *Mercado*, ¶¶8, 60. The Family Peace Center is one of the largest nonprofit provider of domestic violence prevention and intervention services in Wisconsin and is one of the first centers in the nation to co-locate child advocacy and family violence.[4] In comparison, R.F. was taken to the local police station and interviewed in a normal interview room. (R. 108:5). If a center designed to advocate for child victims is neutral, a police interview room is logically less than neutral.

The fourth factor weighs against admission. While a young child is unlikely to fabricate a graphic account of a sexual experience, R.F. does not give a graphic account. *Sorenson*, 143 Wis. 2d at 249. R.F. stated Mr. Marks told her to pull her pants down, she saw his penis, he touched my[R.F.'s] "penis". (R.32 at 6:48). While young young children are unlikely to fabricate a graphic account as it is beyond the realm of their experience, R.F. had been introduced to the word "penis" and the concept of good touch/bad touch by her mother, and her siblings would yet about touching each other's "no-no spots" while playing. (R.113:154-156). Thus, the presumption this statement is beyond R.F.'s experience simply does not exist as she had clearly been introduced to such basic concepts.

[4] FPC, Sojourner, https://www.familypeacecenter.org/fpc (last visited Apr 14, 2021)

The fifth factor relates to "other corroborating evidence". In comparison to *Mercado*, this factor weighs heavily against admission. Like N.G., R.F. did disclose the alleged abuse to multiple people unprompted. However, in *Mercado*, there were two other children who acknowledged Mercado had abused all three of them. Neither of R.F.s siblings acknowledged any inappropriate conduct. R.F.'s mother, E.F. did not initially believe the alleged abuse occurred. (R. 113:159). E.F. believed if this had occurred, R.F. would have told her older sister, A.F., or her grandmother. (R.113:157). Officer Chaffer and Martha Moyer pressured E.F., threatening to deprive her of the custody of her children; at that point E.F. submitted to their desire for a conviction and began to help the state build it's case by looking for any day in which it would have been possible for Mr. Marks to have unsupervised contact with R.F. (R.113:159-160). Unlike *Mercado*, where the spontaneous disclosure was supported by two addition disclosures, R.F.'s disclosure is unsupported, and the person closest to her found it to be non-credible.

Weighing the five *Sorenson* factors leads to a simple conclusion, the recorded video lacks the requisite circumstantial guarantees of trustworthiness. This court should not address this issue as the State has never advanced this theory, but if this court chooses to address this issue, it should find the video to be non-admissible.

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

The State asserts Mr. Mark's argument regarding trustworthiness is forfeited. (State's Br. 13). The State's reliance on the doctrine of forfeiture is misplaced.

The State argues the issue of trustworthiness was not raised at the motion hearing. While this is correct, this appeal is taken from a denial of a post-conviction motion where the issue of trustworthiness was raised. While Mr. Mark's post-conviction motion does not include a specific heading regarding trustworthiness of the recording, many of the irregularities noted above are argued in the motion. ("[I]ncluding Officer Chafer in the interview was unusual and the general option is it is better for the child to have a single interviewer", "92.5% of the questions were structured, leading questions"; "[Regarding Martha Moyer] such pervasive involvement in a pending legal case seems to go beyond the role of facilitating)(R.88:4-6).

As the issue of trustworthiness of the video was raised in the post-conviction court, applying the doctrine of forfeiture is inappropriate. ("[A]ppellate courts may revers unobjected-to errors in the interest of justice or due to ineffective assistance of counsel. *Mercado*, 2021 WI ¶37).

V. Dr. Jurek's Report Provided New Relevant Evidence; It Was Unreasonable for Trial Counsel Fail 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.

The State argues Dr. Jurek's report could have been produced for the February 6, 2019 motion hearing, and if was not possible, "counsel could have asked for a continuance". (State's Br. 18.). In a letter dated February 5, 2019, trial counsel for Mr. Marks requested a continuance for the February 6 hearing given that two video interviews had not been provided, and "it is important that we are given ample time to apply through the Public Defender's Office for an expert to analyze the District Attorney's interview of the minor in this case". (R. 25:1). Not only did counsel ask for a continuance, it appears the State Public Defender still had not approved an expert evaluation. Thus the State's argument claiming the report was not new

evidence must fail. 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.

In rejecting Mr. Mark's post-conviction motion, the circuit court determined it would not have granted a motion for reconsideration, and the report "gave us almost no information". (R.117:18). A determination there was no prejudice to the defendant is reviewed *de novo*. *State v. Breitzman,* 2017 WI 100 ¶39, 378 Wis. 2d 431. The circuit court's determination no reasonable lawyer would have filed a motion for reconsideration based upon the new evidence is also reviewed *de novo*. *Breitzman*, 2017 WI ¶38. Given the motion to reconsider the admissibility of a videotaped interview is also revived with no difference to the trial court, Mr. Marks incorporates his arguments regarding the admissibility of the video into his arguments regarding counsel's deficient performance in failing to ask the circuit court to reconsider it's decision based on the new evidence provided in Dr. Jurek's report.

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: Thursday, April 15, 2021
Respectfully submitted,
Electronically Signed:

Electronically Signed:
Steven Roy

Steven Roy
Attorney for the Defendant
Wisconsin State Bar No. 1115155

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 2701 words.

Signed: Steven Roy
Electronically Signed:

Electronically Signed:
Steven Roy

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.

Signed Steven Roy
Electronically Signed

Electronically Signed:
Steven Roy