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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2020AP6-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

RICHARD L. PRINGLE,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND
ORDER DENYING POSTCONVICTION RELIEF, ENTERED
IN THE CIRCUIT COURT FOR DOOR COUNTY, THE
HONORABLE DAVID L. WEBER PRESIDING.

REPLY BRIEF OF
DEFENDANT-APPELLANT

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**I. Clarification regarding expert testimony
complained of.**

Mr. Pringle agrees that the expert's credentials are not in question, nor is the utility of expert testimony relating to MKO's disability in general. The argument in Mr. Pringle's opening brief was not intended to challenge the expert testimony on any issue other than MKO's ability to fabricate or concoct a story.

**II. There is no waiver issue because Mr. Pringle's
reference to §907.02 was not a claim of error
under that section.**

The state argued that Mr. Pringle waived any claim of error under §907.02, Wis. Stats., because it is raised for the first time on appeal. (Response Brief, p. 6). However, Mr. Pringle is not arguing a claim of error under §907.02. He noted the expert

testimony in question would have been excluded under that section; this argument tangentially supports the claim that the testimony caused the real controversy not to be fully tried. Mr. Pringle does not claim that there should be a reversal under §907.02, per se.

III. Vouching was the purpose and effect of the expert testimony at issue.

The state argues that the expert testimony in question was not improper vouching for MKO's truthfulness as to her story because vouching was not the purpose or effect of the testimony. Mr. Pringle disagrees on both counts.

A. Vouching was the purpose of the testimony.

Vouching was certainly the state's purpose in asking the question of Ms. Ehlers: "What about [MKO's] level of sophistication as it relates to concocting a story or conspiring to present a lie, tell a lie, create some sort of false story?" (R.87:175). The question asked was directly about MKM's ability to fabricate the story. To claim that the state at trial asked this question, in a trial where the entire case was based upon MKO's story and the entire defense is that she fabricated the story, for any purpose other than to vouch for her credibility is not reasonable. The state does not offer any alternative reason for the question to be asked, presumably because it strains logic, reason, and common sense to argue that there is one.

The purpose of Ms. Ehlers's testimony as a whole was to speak to MKO's disability, because the fact that she had a disability was an element of the offense that the state had to prove. To that end, Ms. Ehlers testified about MKO's cognitive functioning, her IQ, and how she functions in life and at work. (R.87: 169-174). Testimony about MKO's ability to fabricate a story had no such reasonable purpose.

The state attempts to strip Ms. Ehlers's testimony of all context, claiming that "Ehlers did not mention MKO in her answer despite being asked specifically about MKO, which

shows that Ehlers did not have the purpose to attest to MKO's truthfulness." (Response Brief, p. 13). Ms. Ehlers is an educated professional. The fact that she provided an answer when asked a question at a trial should reasonably lead to the conclusion that she was answering the question posed: whether or not MKO could fabricate a story. In addition, the prosecutor, upon hearing the answer, did not rephrase the question, as a reasonable lawyer would do if his or her witness did not answer the question asked. The question was whether MKO could fabricate a story, and the answer was that someone with her disabilities generally does not have the sophistication to do so. An argument that this answer does not vouch for the truthfulness of MKO's story strains the bounds of logic and common sense.

When discussing the purpose of the testimony, the state focuses on the expert's purpose in making the statement and ignores the prosecutor's purpose in asking the question. The purpose of the prosecutor in eliciting the testimony was clearly to have the expert witness vouch for the truthfulness of MKO's story.

B. Vouching was the effect of the testimony.

MKO's testimony included details and a step-by-step timeline of the alleged sexual assault, spanning five transcript pages. (R.87 127-132). It was a story. Whether true or false, it was a story, with a beginning, a middle, and an end. Because this was a story, and the only issue in the case was whether this story was true or false, it can be said that a statement from an expert that people with disabilities such as MKO cannot generally concoct a story would have the effect of vouching.

The state in its brief relied on *State v. Morales-Pedrosa* for the proposition that generalized testimony based on training and experience does not equate to an opinion that a victim is being truthful. *State v. Morales-Pedrosa*, 2016 WI App. 38, ¶12, 369 Wis.2d 75, 879 N.W.2d 772. (Response Brief, p. 12). The testimony of the expert in *Morales* was general testimony that 90% of reports of child sexual assault are true. In contrast, the expert testimony in Mr. Pringle's case was specific to

MKM. The question was about her ability to concoct a story. The answer was that people with her disability are generally not able to do that. This was not “generalized testimony;” it was about MKO.

The state notes that Ms. Ehlers did not definitively opine that all individuals with disabilities behave the same. (Response Brief, p. 14). However, her testimony was very close to doing just that. The question was about MKO’s ability to concoct a story. The answer was that people with her disability are generally not able to do that, as it had the effect of a syllogism: MKO has certain disabilities; people who have these disabilities generally cannot concoct a story; therefore, (implied) MKO cannot concoct a story. This had the effect of vouching.

IV. This case is exceptional.

The state noted that the court of appeals may only apply its power of discretionary reversal under §752.35, Wis. Stats., to exceptional cases. (Response Brief, p. 5). This case is exceptional because there are no other issues upon which Mr. Pringle could have meritoriously appealed for a new trial, yet there are nevertheless grounds to find that the real controversy was not fully tried.

First, there could be no meritorious claim that the expert witness was not a true expert. She was one, and there was no dispute by any party relating to that issue.

Furthermore, there could be no meritorious claim that the expert’s testimony regarding MKO’s ability to concoct a story was improperly admitted, because that argument was waived when trial counsel did not object to it. However, there also could be no meritorious claim of ineffective assistance of counsel for failing to object, because many attorneys would have declined to object to the question, as doing so would highlight it. A claim of ineffective assistance of counsel was not viable.

There likewise would have been no merit to an appellate or postconviction claim that the testimony was improper under §972.02 and should be reversed on that basis. Trial counsel did not make this claim, and there was no Daubert hearing, so it would be waived for appeal. However, trial counsel was not ineffective for not raising this issue before trial, because there was no reason for him to believe or know, before trial, that testimony as to MKO's capacity to fabricate a story would be presented.

For the reasons argued in this brief and Mr. Pringle's opening brief, the contested expert testimony here was improper vouching, yet there was no meritorious issue that could be raised on appeal regarding it. Therefore, this is an exceptional case.

V. Mr. Pringle did not claim that the expert testified MKO "can't lie."

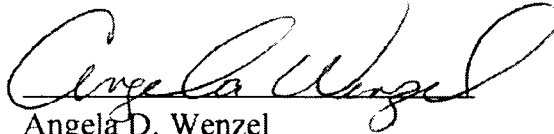
The state reminds this court that that Ms. Ehlers's testimony was largely centered on MKO's level of competency and the extent of her cognitive disabilities. (Response Brief, p. 13). Mr. Pringle agrees and finds nothing inappropriate there. However, the state continues by discussing the various ways that Ms. Ehlers went about testifying to MKO's level of competency and cognitive abilities, and then concluded that "Ehlers's testimony served as evidence that MKO suffered from a mental deficiency at the time of sexual contact, not as evidence that she could not lie." *Id.* This statement is problematic because it is a mischaracterization of Mr. Pringle's argument. He has never labeled Ms. Ehlers's testimony as an assertion that MKO "could not lie." There is an important difference between being able to lie and being able to concoct a story. Telling a lie can be a small one-sentence or even one-word statement that is not true. A child who says "no" when asked if he or she ate a cookie that was off limits has lied, but that requires no sophistication. Ms. Ehlers did not say that MKO could not do that, and Mr. Pringle did not say she did. Rather, Ms. Ehlers discussed MKO not having a "level of sophistication" to concoct a story. This distinction is not academic; it is very relevant because Mr. Pringle's defense was

that MKO concocted the story and presented it to police and then to the jury, the exact thing that Ms. Ehlers testified that people with her disability could not do.

CONCLUSION

Mr. Pringle was accused of sexual assault in a case in which there was no physical evidence. The sole determining factor was whether the jury would believe MKO or Mr. Pringle. With this being the case, expert testimony that someone with MKO's disability generally cannot concoct a story would have had the effect of improper vouching. A jury, not an expert, is to be the determiner of credibility in a criminal trial. Therefore, it can fairly be said that the real controversy was not fully tried. A new trial should therefore be ordered.

Respectfully submitted this 14th day of July, 2020.

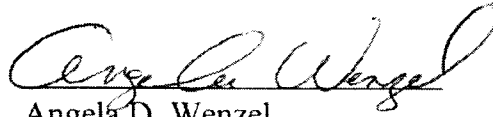


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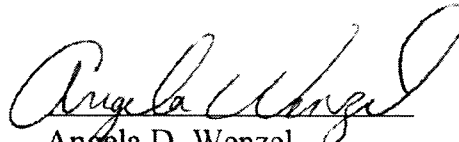
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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 1620 words.


Angela D. Wenzel**ELECTRONIC CERTIFICATION**

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.


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