STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 93-2486-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LOUIS M. MAINIERO,

Defendant-Appellant.

Appeal From The Judgments Entered In The Circuit Court For Waukesha County, The Honorable Kathryn W. Foster, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

1. Whether the trial court denied Mr. Mainiero due process and committed reversible error in refusing to disclose the complainant's exculpatory psychiatric records.

The Circuit Court reviewed the records in camera but denied numerous defense requests for disclosure of the records. The Court likewise denied several defense motions for a mistrial based on the failure to disclose.

2. Whether the trial court committed reversible error in permitting the state to present irrelevant and unfairly prejudicial "bad character" evidence.

The Circuit Court admitted the evidence over defense objection and denied the defendant's motions for a mistrial on this ground.

3. Whether the trial court committed reversible error in permitting the state to submit evidence of prior consistent hearsay statements of the complainant in violation of Wis. Stat. §§908.01(4)(a)2 & 908.02.

The Circuit Court overruled the defendant's objections to the hearsay evidence and denied his motions for a mistrial on this ground.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near-frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a). At such time as counsel for appellant have had sufficient opportunity to review the state's brief, it may be that the briefs fully present and meet the issues on appeal, rendering oral argument technically unnecessary under Wis. Stat. (Rule) 809.22(2)(b). Until such time, however, appellant wishes to preserve his right to request oral argument.

Appellant does not request publication of the decision in this case. Mr. Mainiero's entitlement to the requested relief is mandated by well-established and controlling precedent which cannot reasonably be questioned or qualified in any relevant way. See Wis. Stat. (Rule) 809.22(b)1 & 3.

STATE OF WISCONSIN

COURT OF APPEALS

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Appeal No. 93-2486-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LOUIS M. MAINIERO,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

Nature Of The Case

Defendant-Appellant, Louis M. Mainiero, appeals from the whole of the judgments of conviction and sentence originally entered February 25, 1993, and amended March 19, 1993. This appeal is pursuant to Wis. Stat. §808.03 and Wis. Stat. (Rule) 809.30(2)(h).

Procedural History Of The Case

By criminal complaint filed on April 15, 1992, Mr. Mainiero was charged with two counts of sexual contact

with a person under 16 years of age in violation of Wis. Stat. §948.02(2) (Count 1 -- contact with breasts; Count 2 -- contact with vagina), and one misdemeanor count of trespass to a dwelling in violation of Wis. Stat. §943.14 (Count 3). (R1).* Following a preliminary hearing on May 13, 1992, the court bound Mr. Mainiero over for trial (R28:9-10), and arraigned him on an Information alleging the same three charges (id.:10-11; see R2).

The case proceeded to jury trial on January 19, 1993, before the Honorable Kathryn W. Foster, Circuit Court Judge (R32-33). The jury returned verdicts on January 21, 1993, finding Mr. Mainiero guilty of the sexual assault and trespass charges alleged in Counts 1 and 3 and not guilty on the sexual assault charged in Count 2 (R18; R32:722).

On February 25, 1993, Judge Foster sentenced Mr. Mainiero to six years incarceration on Count 1 and a consecutive two year term of probation on the misdemeanor trespass (R34:29-30). The Court entered judgments of conviction on the same date (R22; R23; App. 2-3). On March 19, 1993, the Court amended the trespass judgment (R24; App. 4).

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* Throughout this brief, reference to the record will take the following form: (R__:__), with the "R__" reference denoting the record document number and the following ":__" reference denoting the page number of the document. Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as "App. __."

Mr. Mainiero timely filed his notice of intent to pursue post-conviction relief on February 26, 1993 (R25). He timely filed his Notice of Appeal on September 17, 1993 (R27), this Court having extended the time to file that notice by order of the same date (R26).

Statement Of Facts

Up until March of 1992, Lou Mainiero led a fairly typical middle class life. He was married to Sharon Banaszewski, lived in the suburbs, and had two young daughters, Alexandra and Samantha (R32:403-04; R33:52-53). Both Sharon and Lou worked at General Electric Medical Systems in Waukesha, Wisconsin, Sharon as a software development manager and Lou as a systems engineer (R32:404; R33:53). Mr. Mainiero had a master's degree in electrical engineering from Marquette University, and at the time of trial was working on a cancer detection and therapy treatment program at GE (R32:404, 417-18).

On occasion, either Lou or Sharon would have to be out of town for work either overnight or for longer periods. They would then hire a baby-sitter to provide extra help with the kids. (R33:55, 57). The baby-sitters would also help prepare meals and clean up (R33:85-86). Occasionally, it was most convenient for the baby-sitter to spend the night at the Mainieros' (R32:299-300).

In 1987, Lou and Sharon took a course together in Swedish "deep muscle" massage (R32:407; R33:58). Mr.

Mainiero also received training in acupressure massage (R32:408-09). After that, he often performed massages for other people (R33:60). These included "full body massages," in which the subjects are either clothed or unclothed with a sheet draped over them. The masseur then massages each portion of the body, undraping that portion of the body as he is going along, until he has completed all of the body's muscle groups (R32:409-10; R33:60-61, 64). The full body massage is not a sexual practice (R33:62). Mr. Mainiero provided such massages to both men and women, including the Mainieros' baby-sitters and their mothers (R32:413-15, 533; R33:61-62, 63-64).

The complainant, J.M., began baby-sitting for the Mainieros in September, 1991 (R33:68-69). Her parents, Cynthia M.-Thomas and Peter Thomas, were friends of the Mainieros (R32:294-95; R33:70).

J.M. baby-sat for the Mainieros on several occasions between the fall of 1991 and the end of February, 1992 (R32:225; R33:69). On March 14, 1992, however, J.M. failed to appear for a scheduled baby-sitting job at the Mainieros' (R33:81).

On March 17, 1992, Mr. Mainiero received a call from Detective LaPaz, who said he wanted to speak with him concerning allegations made regarding J.M. and Mr. Mainiero (R32:428-29). Fearing that J.M. was in trouble and knowing that her mother, who also worked at GE, was

not at work that day, Mr. Mainiero went to their home (id.:429, 432).

When he arrived, it was obvious someone was home, but they did not respond to his ringing the doorbell or knocking (id.:432-35). Finding the door unlocked, and believing they just could not hear him, he went inside (id.:437-38).

Mr. Mainiero called out but no one answered. He then saw that the phone was off the hook and began to worry something might be wrong (id.:439, 441, 442-44). He investigated, looking throughout the house. He ended up in the basement when Cynthia suddenly jumped out at him, extremely angry and almost hysterical. She yelled at him to get out of her house. He could not get her to calm down, so he left. (Id.:442-46).

It turns out that, on March 12, 1992, J.M. had claimed that Mr. Mainiero had been touching her inappropriately over a period of about five months. Mr. Mainiero had not been told of these allegations at the time he went to Cynthia M.-Thomas' home on March 17 (id.:430).

According to the complainant's trial testimony, Mr. Mainiero began touching her breasts while giving her massages sometime in October or November, 1991 (R32:224), and subsequently began touching her buttocks and vagina with his hands and kissing her breasts (id.:225; see id.:226-30, 251-52). She also claimed that Mr. Mainiero

touched her inappropriately on February 9, 1992, while his wife was away and J.M. was baby-sitting. As they were lying on the floor watching the Olympics, according to J.M., he began rubbing her back and later her breasts and vagina with his hand. He also licked and kissed her breasts a couple of times. (Id.:234-36).

On March 12, 1992, the social worker at J.M.'s high school asked J.M. to come to her office because other students were concerned about her (id.:203, 205-06, 238). When she arrived, J.M. looked scared and unhappy (id.:206) and she claimed to be suicidal (id.:239).

Cynthia M.-Thomas testified that she had no particular problems with her daughter in 1991-92, although she did notice a change in her behavior. J.M. started to care less about her appearance and seemed withdrawn, fearful and upset. (Id.:291-93).

J.M. had said nothing to her mother about her allegations prior to March 12, 1992 when Cynthia was called to the school. J.M. was crying and upset at that time, and Cynthia decided to take her to the Waukesha Memorial Hospital psychiatric unit. (R32:300-02).

Cynthia testified that she did not consent to Mr. Mainiero's entry into her home on March 17, 1992 and that, after she once yelled at him to leave, he came back into the house (R32:312-13).

Mr. Mainiero specifically denied J.M.'s allegations of sexual contact (R32:405, 448). The only two

teenaged baby-sitters who had worked for any length of time for the Mainieros both testified to their excellent opinions of Mr. Mainiero's character trait for sexual morality with regard to baby-sitters in his home (R32:497, 504). Dorothy Green, who had known Mr. Mainiero for 12 years, testified to her opinion that he is a truthful and honest person (R32:544, 545).

Additional facts will be stated as necessary in the argument.

ARGUMENT

I.

THE TRIAL COURT'S REFUSAL TO DISCLOSE THE COMPLAINANT'S EXCULPATORY PSYCHIATRIC RECORDS DENIED MR. MAINIERO DUE PROCESS AND A FAIR TRIAL.

The trial court allowed the state to present evidence of the complainant's emotional problems and psychiatric hospitalization and to claim that these were caused by the alleged sexual assaults. The court nonetheless denied Mr. Mainiero's motion for disclosure of the complainant's psychiatric records necessary to rebut those claims. Failure to disclose those records, which remain sealed as part of the record on appeal (R37), denied Mr. Mainiero due process and a fair trial. He therefore asks that this Court review those records and grant him a new trial.

A. Although Allowing The State To Present Evidence Of J.M.'s Hospitalization, The Trial Court Deprived The Defendant Of Evidence Necessary To Rebut The Prejudicial Effect Of That Evidence.

Prior to trial, Mr. Mainiero moved for in camera review by the Court of the psychiatric records from Waukesha Memorial Hospital relating to the treatment of the complainant. Mr. Mainiero requested disclosure of such records to the extent they were either exculpatory, see, e.g., Pennsylvania v. Ritchie, 480 U.S. 39 (1987), or reflected prior statements of the complaining witness, see Wis. Stat. §971.24. (R4). The state consented to in camera review of those documents (R31:7) and provided them to the court (R37).

Mr. Mainiero also filed a motion in limine to bar the state from introducing evidence concerning the complainant's hospitalization in a psychiatric unit. Mr. Mainiero objected that such evidence is irrelevant and unfairly prejudicial, improperly appealing to the jury's sympathy and provoking its instinct to punish. (R5).

The parties argued the motions, with others, at the beginning of the trial (R32:11-14, 16-17). Defense counsel observed that evidence of the hospitalization was irrelevant and unfairly prejudicial if offered merely to show where certain interviews with the complainant took place. He similarly pointed out that, to the extent the

state claimed the hospitalization to have been caused by the alleged sexual assault, denial of the psychiatric records would deprive him of a fair opportunity to challenge that allegation. (Id.:11-14).

The state argued that the complainant's hospitalization was relevant because it was caused by the sexual assault, and thus bolstered the complainant's credibility. It also argued, however, that the psychiatric records should not be released because the complainant had asserted her doctor-patient privilege and because release of those records would "disturb" the complainant. (Id.:16-17).

The trial court denied the motion in limine and, after reviewing the psychiatric records in camera, refused to disclose any part of them to the defense. (Id.:18-20; App. 6-8).

Mr. Mainiero then moved for a mistrial on the grounds that allowing the state to present such a cause and effect argument while denying the defendant access to any information concerning the validity of that claim would deny him a fair trial (id.:21). The court denied the mistrial motion, but granted Mr. Mainiero a continuing objection to the court's ruling (id.:21-22).

The state subsequently presented evidence that the complainant's behavior changed in the winter of 1991-92 (R32:292-93); that she began caring less about her appearance and acting withdrawn, fearful and upset (id.);

that other students were concerned about her mental state (id.:205-06); that she looked scared and unhappy when she went to speak with the school social worker (id.:206, 208); that she felt confused and even suicidal about what had happened (id.:239); that she was crying and very upset on March 12, 1992 (id.:300); that she checked into the Waukesha Memorial Hospital Psychiatric Unit after speaking with the school social worker on that date (id.:242, 301-02); and that she was still receiving counseling at the time of trial (id.:360). The state also emphasized the complainant's psychiatric hospitalization both in its examination of defense witnesses (id.:453-54; 475, 517), and in its closing argument. According to the state,

> the fact that this caused her so many problems when she talked about it, and she ended up at Waukesha Memorial Psych Ward shows you that something was definitely bothering this fifteen year old girl. And what was bothering her was that for a long period of time, she was going over there baby-sitting and Mr. Mainiero had been sexually assaulting her.

(Id.:640). It "[d]rove this girl to a psychiatric unit at Waukesha Memorial Hospital" (id.:688; see id.:689, 691; see also id.:639, 644 (alleging complainant's suicidal thoughts caused by sexual assaults)).

According to the state, therefore, the complainant's emotional and psychiatric problems, culminating in her hospitalization, could be explained only by the claimed sexual assaults. The trial court concurred in

this theory that the complainant's psychiatric problems and hospitalization were circumstantial, corroborating evidence supporting her allegations of sexual assault (id.:628).

Mr. Mainiero renewed his request for disclosure of the psychiatric records and his objection to admission of the evidence of the complainant's hospitalization throughout the trial. He continually advised the court of the obvious: that it is fundamentally unfair to permit the state to rely upon an inference of causation while denying the defendant any opportunity to challenge the basis for that inference. Mr. Mainiero also moved for a mistrial at various times when his objections and requests were overruled. (Id.:21-22, 286-87, 713-15; R33:93-94).

At some point during the trial, the court dictated its statement of reasons for denying production of the psychiatric records (R32:613-15; App. 10-12). That decision was dictated in chambers, and was not released to the parties until it was transcribed, after trial, along with the rest of the trial transcripts, for purposes of this appeal (see id.:615).

Although that decision does not detail what is contained in the records, it does reflect that the complainant was hospitalized for "suicidal ideations," and that she was diagnosed as being depressed and suffering from post-traumatic stress disorder. Although the records apparently rely primarily upon the complainant's allega-

tions of sexual assault as the activating cause, they also apparently reflect that she was grieving the death of a friend from leukemia during the month of January, 1992. (R32:613-14; App. 10-11). The friend's illness and death thus occurred at about the same time as the alleged sexual assaults, as well as the beginning of the complainant's emotional and psychiatric problems and behavioral changes relied upon by the state as corroborating her claims of sexual assault.

B. Permitting Evidence Of The Complainant's Hospitalization, While Denying Mr. Mainiero Access To The Complainant's Psychiatric Records, Denied Him Due Process And A Fair Trial.

The trial court's refusal to disclose the complainant's psychiatric records, especially in light of its decision permitting evidence of the complainant's hospitalization and the state's cause and effect argument, denied Mr. Mainiero his rights to due process and a fair trial in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution. See, e.g., State v. Maday, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App.), rev. dismissed, ___ N.W.2d ___ (1993).

Due process requires that the prosecution not suppress evidence favorable to the accused or discrediting to its own case. E.g., United States v. Bagley, 473 U.S.

667 (1985); Brady v. Maryland, 373 U.S. 83 (1963). Constitutional error occurs, requiring reversal, where the state withholds such evidence which is "material in the sense that its suppression undermines confidence in the outcome of the trial." Bagley, 473 U.S. at 678. Evidence is material

> if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 682 (plurality opinion); see id. at 685 (White, J., concurring).*

If the withheld evidence is material in this sense, then the state has a duty to disclose it. Failure to disclose it in a timely manner prejudices the defendant and violates due process. See id. at 678; United States v. Agurs, 427 U.S. 97, 108 (1976). Of course, where the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. Id. at 113.

When a criminal defendant makes a plausible showing that confidential records may contain information material and favorable to his defense, he is entitled to

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* The defendant need not, of course, prove that a different result is more likely that not absent the concealment of exculpatory information. See Strickland v. Washington, 466 U.S. 668, 693 (1984), the decision relied upon for the "reasonable probability" standard in Bagley. 473 U.S. at 682.

the trial court's in camera review of those records. Ritchie, 480 U.S. at 58 & n.15; State v. Shiffra, 175 Wis. 2d 600, 499 N.W.2d 719, 721 (Ct. App. 1993); In re K.K.C., 143 Wis. 2d 508, 422 N.W.2d 142, 144 (Ct. App. 1988). The purpose of the in camera review of a privileged record, consistent with the Bagley standard for materiality, is

> to determine whether it contains information that probably would have changed the outcome of [the defendant's] trial. If it does, he must be given a new trial.

Ritchie, 480 U.S. at 58.

Due process is violated regardless whether the suppression of material, exculpatory evidence is caused by the prosecutor or by the court:

> Where defendant is denied access to requested materials, the issue of their relevance as to guilt or punishment presents a constitutional question, irrespective of whether that denial resulted from prosecutorial suppression or trial court ruling.

Bergenthal v. State, 72 Wis. 2d 740, 242 N.W.2d 199, 203 (1976).

Although this Court generally must defer to the factual findings of the trial court in the absence of clear error, Shiffra, 499 N.W.2d at 721, the relevant facts here are the psychiatric records. When the evidence is in documentary form, this Court may interpret it for itself. Zurbuchen v. Teachout, 136 Wis. 2d 465, 402 N.W.2d 364, 368 (Ct. App. 1986). The Court then must

independently review the sealed documents and apply the constitutional principles already discussed to those facts. See State v. Turner, 136 Wis. 2d 333, 401 N.W.2d 827, 832 (1987); cf. State v. Groh, 69 Wis. 2d 481, 230 N.W.2d 745, 748 (1975) (Supreme Court independently reviews witness statements to determine whether nondisclosure harmless).

Defense counsel was denied access to the requested materials and thus is at a distinct disadvantage in arguing the extent to which they were exculpatory and material. E.g., United States v. Burr, 25 Fed. Cas. 187, 191 (No. 14694) (C.C.D. Va. 1807) (Marshall, Ch. J.). Obviously, however, those records contain prior statements of the complainant concerning her allegations of sexual assault,* as well as other potential causes for her psychological and emotional problems. Given the closeness of the case, any inconsistencies, either direct or by omission, between her statements in court and those reflected in her psychiatric records would be material. So would be any fact, or diagnoses or opinions of her treating professionals, inconsistent with the state's cause and effect theory or suggesting the possibility of an alternative cause or causes for the psychiatric problems.

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* J.M. testified, for instance, that a note she had written and given to the school social worker concerning her allegations probably was in the hospital records (R32:239).

Even without full disclosure of the psychiatric records, the limited disclosures contained in the trial court's in chambers decision themselves demonstrate that concealment of those records violated Mr. Mainiero's rights to due process and a fair trial. The trial court apparently failed to grasp the significance of the information concerning the death of the complainant's friend, and denied the defendant that important exculpatory information concerning an alternative basis for the complainant's change in behavior, depression, and hospitalization. That information would have significantly discredited the state's argument that the complainant's depression and hospitalization necessarily were caused by the alleged sexual assaults and thus corroborated her otherwise uncorroborated allegations. The illness and eventual death of a friend, especially from a disease such as leukemia, cannot help but have had a dramatic impact on the life and psychological well-being of a teenaged girl.

The materiality of the suppressed information is not lessened merely because the complainant's treating professionals apparently took her claim of sexual assault at face value and did not cite the friend's death as a primary cause for J.M.'s depression (R32:614; App. 11). The issue of causation is for the jury. Indeed, given the state's reliance upon the conclusions of those professionals on the issue of causation, the revelation of information concerning an alternative cause corresponding in time

to the onset of the complainant's depression would have entitled Mr. Mainiero to an independent psychiatric examination of the complainant on this point, see Maday, supra, or exclusion of her testimony, Shiffra, 499 N.W.2d at 724.

This Court has recognized a defendant's due process rights to "'a fair opportunity to defend against the State's accusations.'" Maday, 507 N.W.2d at 369, quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973), and that "[p]roviding a defendant with meaningful pretrial discovery underwrites the interest of the state in guaranteeing that the quest for the truth will happen during a fair trial." Id. This Court likewise has quoted language from the United States Supreme Court directly applicable here:

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."

Id. at 370, quoting United States v. Nobles, 422 U.S. 225, 230-31 (1975).

In Maday, this Court held that a defendant in a sexual assault prosecution is entitled to a pretrial psychological examination of the complainant when the

state gives notice that it intends to introduce evidence generated by a psychological examination of the complainant by the state's experts. The Court held that

> [a] defendant who is prevented from presenting testimony from an examining expert when the state is able to present such testimony is deprived of a level playing field. "[A] State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."

Maday, 507 N.W.2d at 370-71, quoting Ake v. Oklahoma, 470 U.S. 68, 79 (1985). Once the state has put the complainant's behavior into issue through such testimony, "[f]undamental fairness requires that [the defendant] be given the opportunity to present relevant evidence to counter this evidence from the state." Id. at 371.

The fundamental fairness rationale of Maday and Nobles is directly on point here. The state chose to place into issue the complainant's psychological and emotional problems, her psychiatric hospitalization, and their alleged cause (the claimed sexual contact) as corroborating the complainant's otherwise uncorroborated allegations of sexual assault. The state having done so, "[f]undamental fairness requires that [Mr. Mainiero] be given the opportunity to present relevant evidence to counter this evidence from the state." Maday, 507 N.W.2d at 371. The trial court's refusal to disclose the psychiatric records, and in particular the alternative

basis for the complainant's depression, denied Mr. Mainiero his right to challenge the state's evidence on a level playing field.

Failure to disclose the psychiatric records cannot be deemed harmless or immaterial. As the record stands, the jury was led to believe that the only plausible explanation for the complainant's depression and hospitalization was the alleged sexual assaults by Mr. Mainiero. The jury was denied evidence of a reasonable and non-incriminating alternative cause for that depression.

Even without proper disclosure, this was a very close case, as is shown by the jury's inconsistent, and apparently compromise, verdicts on the sexual assault charges. The complainant's story did not fit well with her actions and was uncorroborated. Indeed, Detective LaPaz testified that this was the first sexual assault case, in more than 25 which he has investigated, which is purely one person's word against another's (R33:24).

Mr. Mainiero's credibility, on the other hand, was corroborated by evidence concerning both his good character for truthfulness and honesty (R32:545) and his excellent character for sexual morality with regard to teenaged baby-sitters in his home (id.:497, 504). The Supreme Court has held that such good character evidence alone may create a reasonable doubt as to a defendant's

guilt. Edgington v. United States, 164 U.S. 361, 366 (1896); see also 2 Louisell & Mueller, Federal Evidence §137 at 142-45 (1985) ("Louisell & Mueller") & cases cited.

Under these circumstances, the failure to disclose important exculpatory evidence necessarily undermines confidence in the outcome of the trial and was reversible error.

II.

IMPROPER ADMISSION OF BAD CHARACTER EVIDENCE MANDATES REVERSAL.

The trial court erred by allowing cross-examination of Mr. Mainiero and admission of extrinsic evidence concerning wholly irrelevant and highly prejudicial other acts, the sole purpose of which was to suggest the defendant's bad character. This error was not harmless, and thus mandates reversal of the resulting convictions and a new trial.

A. Factual Background.

During its cross-examination of Mr. Mainiero, the state asked him whether he had an "open" or sexual relationship with Susan Saliga (R32:470-71). Defense counsel requested a sidebar (id.:471), at which he objected that the evidence and questions were irrelevant and unfairly prejudicial (see id.:526-27). The court allowed the state to proceed, however, and Mr. Mainiero denied having a

sexual relationship with Mrs. Saliga (id.:471).

Over the state's objection (R6; see R32:23-28, 174-78; R33:94-101), the defense was allowed to present character evidence of two women who, as teenagers, baby-sat for the Mainieros under circumstances very similar to those in which J.M. had sat for them. In so holding, the court emphasized the similarities in the girls' ages and the context of their contacts with Mr. Mainiero (R32:399-401).

Laura Gehring testified that she began sitting for the Mainieros in 1988, when she was 16 years old, and sat for them for about three years (R32:489). She had a good relationship with the Mainieros and there was nothing improper or out of the ordinary in Mr. Mainiero's physical contacts with her (id.:490-92). There were occasions when Ms. Gehring spent time at the Mainieros' when only Mr. Mainiero and the children were present, including times when she slept over in the children's room as part of her baby-sitting job (id.:494-95).

Ms. Gehring received hundreds of massages from Mr. Mainiero, including massages during which she was draped but otherwise partially or almost entirely unclothed (id.:492). There were times when no one else was present for these massages (id.:494). Yet, none involved any improper or sexual contact (id.:493, 497).

Based upon her dealings with Mr. Mainiero, Ms.

Gehring was "able to form an opinion as to his character for sexual morality in dealing with baby-sitters in his house" (id.:497). Specifically:

> It is excellent, nothing out of the ordinary. He is a very friendly man and he is a very equal man. He doesn't discriminate or -- it is excellent.

(Id.).

Danica Vanasse began baby-sitting for the Mainieros in 1988, when she was 15, and sat for them until she was 18 (id.:499-500). Ms. Vanasse's testimony was similar to that of Ms. Gehring (id.:499-505), except that Vanasse could not remember ever spending the night at the Mainieros' (id.:501, 505).

Ms. Vanasse likewise had a high opinion of Mr. Mainiero's "character trait for sexual morality in dealing with baby-sitters in the household" (id.:504). She found him to be "a very trustworthy person, someone easy to talk to, very honest, very open" (id.).

In "rebuttal," the state offered the testimony of Susan Saliga. Mrs. Saliga also worked at General Electric and had met Mr. Mainiero there in about 1979 (id.:594). Over the next several years, Mrs. Saliga and her husband developed a close friendship with the Mainieros (id.:598).

Mrs. Saliga claimed that, sometime between 1984 and 1986, Mr. Mainiero told her that he had "an open relationship" with Sharon so that they did not need a marriage certificate and that he could love more than one

woman at a time (id.:597). She also claims that Mr. Mainiero began touching her inappropriately sometime during the mid-1980's (id.:598-99). She related two specific instances: one in which Mr. Mainiero allegedly starting touching her breasts while the couples were on a camping trip (id.:599), and one in which Mrs. Saliga went with Mr. Mainiero to his home for lunch when he began touching her breasts and genitals and both of them ended up naked (id.:600-01, 605). According to Mrs. Saliga, when she tried to end the supposed affair, Mr. Mainiero refused and kept trying to contact her, blaming her own "hang-ups" as causing her problems with the relationship (id.:601-02).

At the time of these incidents, Mrs. Saliga was married (id.:593) and in her late 20's or early 30's (id.:600, 604). All of the incidents took place prior to 1988 (id.:606).

The state offered this evidence solely to counter the baby-sitters' character testimony:

> Basically, the only reason I would call her would be because the testimony that has now come in from the baby-sitters indicating that he or basically, on the issue of sexual morality. Her testimony would be that she does not have the opinion that he would be this pillar in the community of sexual morality; that he doesn't know his boundaries, and in fact, she felt that she was in a relationship with him where he took advantage of her... . I think it only goes to the issue of sexual moral-

> ity. Again, when I started this case, I didn't feel it would be relevant at all, and I did not anticipate calling her, but I think because the testimony has come in about sexual morality, that it is relevant for that limited purpose.

(Id.:555-56).

Mr. Mainiero objected that such evidence of general sexual morality was irrelevant and improper, given the limited nature of the defense character evidence, and unfairly prejudicial (id.:557-59). The trial court nonetheless overruled the objection and Mr. Mainiero's resulting mistrial motion (id.:559-61, 598; App. 14-16).

The state then presented Mrs. Saliga's testimony and emphasized it as its final argument in summation:

> Susan Soliga [sic], was her testimony relevant then? I guess I would have to throw in the towel on that one, but why was she presented as a witness before you then? Because there was all the testimony of sexual morality and that he was a pillar in the community. The fact of the matter is he was to some people and some people might have felt that way about him, but let's face it, there are other people that didn't feel that way about it.

(Id.:653).

B. Allowing Both Cross-Examination And Extrinsic Evidence Concerning Mrs. Saliga's Allegations Was Reversible Error.

Allowing this cross-examination and admission of Mrs. Saliga's testimony was reversible error on several grounds. The cross-examination was both irrelevant to any

legitimate issue in the case and unfairly prejudicial. The extrinsic character evidence likewise was not relevant to the limited character trait placed in issue by the defendant or any legitimate trial issue. Its at best minuscule probative value also was far outweighed by its unfairly prejudicial effect. Moreover, even if some character evidence of this general type would have been admissible, it was not admissible in the form of testimony concerning specific instances of conduct, as opposed to proper opinion or reputation evidence.

1. **The Saliga cross-examination and extrinsic evidence were irrelevant.**

Mrs. Saliga's allegations were totally irrelevant to any legitimate issue in this case and therefore were inadmissible as a matter of law. It is well settled that only relevant evidence is admissible at trial. See Wis. Stat. §904.02. To be relevant, evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. §904.01.

Because Mr. Mainiero on direct examination never claimed total sexual fidelity to his wife, the cross-examination was wholly irrelevant to his veracity. Compare State v. Sonnenberg, 117 Wis. 2d 159, 344 N.W.2d 95, 98-99

(1984).* Also, allegations of the defendant's sexual advances to an adult woman are totally irrelevant to the claim that he sexually molested a young girl some five or more years later. E.g., State v. Friedrich, 135 Wis. 2d 1, 398 N.W.2d 763, 774 (1987) (abuse of discretion to admit evidence of child sexual assault defendant's sexual advances to adult woman; such evidence not probative of scheme, plan or motive to obtain sexual gratification from young girls); Sonnenberg, 344 N.W.2d at 100-03 (defendant's unwelcomed solicitation of sexual favors from 25-year old woman irrelevant to charge of sexual assault on 14-year old girl some 14 months earlier). Mrs. Saliga's allegations simply did not have any legitimate tendency to make the complainant's allegations more probable than they would have been without Saliga's testimony.

While the state conceded as much at trial (R32:556, 653), it nonetheless asserted (id.:555-56), and the trial court agreed (id.:559-61; App. 14-16), that Mrs. Saliga's allegations were relevant to rebut the baby-sit-

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* Admission of Saliga's testimony likewise is not supportable as impeaching Mr. Mainiero's testimony that he did not have a sexual relationship with her. See Sonnenberg, supra. "Specific instances of conduct of a witness, for the purposes of attacking or supporting the witness's credibility, other than conviction for crimes ... may not be proved by extrinsic evidence." Wis. Stat. §906.08(2). Moreover, such irrelevant extrinsic evidence is not made relevant merely because it is offered to rebut a negative response to the state's equally irrelevant question on cross-examination. In any event, the testimony was not offered on this ground.

ters' character evidence. The law is to the contrary.

Pursuant to Wis. Stat. §904.04(1)(a):

> (1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> > (a) Character of accused. Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same.

(Emphasis added.) Such character evidence "is received to show that the person acted a certain way on a certain day because that was his or her nature." Fine's Wisconsin Evidence §904.04(1) at 49 (1992).

The trial court properly allowed Mr. Mainiero to present opinion evidence concerning his excellent character for sexual morality in relation to baby-sitters in his home. Wis. Stat. §§904.04(1)(a), 904.05(1); see, e.g., People v. McAlpin, 53 Cal.3d 1289, 283 Cal. Rptr. 382, 812 P.2d 563, 575 (1991) (opinion testimony, based upon personal perception, that defendant "is not a person given to lewd conduct with children" relevant to charge of sexual molestation of child); State v. Blake, 249 A.2d 232 (Conn. 1968) (exclusion of evidence of indecent assault defendant's good character for sexual morality and decency reversible error); Knorr v. State, 748 P.2d 1 (Nev. 1987); Thomas v. State, 669 S.W.2d 420, 423-24 (Tex. App. 1984)

(exclusion of testimony child sexual assault defendant had good reputation "for being a moral person and for the safe and proper treatment of young children" reversible error).

"The accused has a right to introduce evidence of a pertinent trait of his character which is well-nigh absolute." 2 Louisell & Mueller §137 at 137 (emphasis in original), citing, e.g., Michelson v. United States, 335 U.S. 469, 476 (1948).

The defendant's presentation of evidence of a specific character trait, however, does not open the door for an all out assault on his character. "[T]he State's introduction of character evidence is limited to that which rebuts the character trait being established," State v. Brecht, 143 Wis. 2d 297, 421 N.W.2d 96, 106 (1988), which in this case was the defendant's good character in the limited area of sexual morality with underage baby-sitters in his home.

> [T]he accused may to a limited degree control the breadth of rebuttal evidence and cross-examination by the prosecution simply by confining the areas of his character that he puts in evidence. He does not open up his whole character by introducing evidence which pertains only to a particular aspect thereof.
>
> ... [T]he defense evidence does not open the whole matter of the character of the accused, nor even all aspects of his character which may be germane, but only those aspects of his character which the accused himself has put in evidence.

2 Louisell & Mueller §137, at 133-35. See, e.g., United

States v. Curtis, 644 F.2d 263, 268 (3d Cir. 1981); United States v. Bright, 588 F.2d 504, 511-12 (5th Cir.), cert. denied, 440 U.S. 972 (1979); United States v. Lewis, 157 U.S. App. D.C. 43, 482 F.2d 632, 637-38 (1973).

See also United States v. Fox, 154 U.S. App. D.C. 1, 473 F.2d 131, 135 (1972):

> [A] defendant in offering evidence of good character may limit that evidence to a specific character trait... . And when the defendant so limits his offer, the prosecution is likewise limited in its response.

(Citations omitted).

The character trait placed in issue by Mr. Mainiero was carefully limited to that for sexual morality in dealing with young baby-sitters in his home. As already demonstrated, Mrs. Saliga's allegations were wholly irrelevant to that character trait. See Friedrich, supra; Sonnenberg, supra. Admission of those allegations, and permitting cross-examination concerning them, thus was error. Brecht, 421 N.W.2d at 106.*

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* Introduction of the allegations also is not rendered relevant, as suggested by the trial court (R32:560; App. 15), based upon loose language in a proposed defense jury instruction. That instruction was not given by the court and thus was not before the jury (see R15; R32:631-32). Accordingly, there was nothing for the state to rebut. Nor, likewise, are allegations of the defendant's supposed sexual advances toward an adult woman relevant to "rebut" the opinion testimony of Dorothy Green concerning her opinion of Mr. Mainiero's character for truthfulness and honesty (see R32:545). See, e.g., United States v. Reed, 700 F.2d 638, 643-46 (11th Cir. 1983) (evidence of marijuana use irrelevant to character trait for veracity).

FOOTNOTE CONTINUED ON NEXT PAGE

2. The Saliga cross-examination and testimony were inadmissible as unfairly prejudicial.

Even if the state's cross-examination of Mr. Mainiero was not totally irrelevant to any legitimate issue in the case, "such a question is always subject to the objection that the prejudicial effect outweighs the possible probativeness in the particular case." Sonnenberg, 344 N.W.2d at 99 (footnote omitted). The extrinsic evidence is subject to the same objection. See, e.g., Friedrich, 398 N.W.2d at 774.

Pursuant to Wis. Stat. §904.03:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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* FOOTNOTE CONTINUED FROM PREVIOUS PAGE

Mrs. Saliga's allegations likewise were irrelevant to rebut the non-character testimony of Joan Vanasse, Danica's mother (see R32:529-36). Mrs. Vanasse did not offer character testimony under Wis. Stat. §904.04(1)(a). Rather, her testimony was offered simply to provide background to the effect that she knew Mr. Mainiero and knew Danica was receiving neck and back massages from him while baby-sitting (R32:533). Mrs. Vanasse also testified that she received full body massages from Mr. Mainiero (id.), thus rebutting a possible argument by the state that Mr. Mainiero limited provision of such massages to under-age girls. Finally, her testimony concerning Mr. Mainiero's involvement in the breast cancer program at General Electric (R32:534-35) demonstrated not his good character for sexual morality, but rather the fact that every touching of an intimate body part is not necessarily sexual.

"[U]nfair prejudice means a tendency to influence the outcome by improper means." State v. Mordica, 168 Wis. 2d 593, 484 N.W.2d 352, 357 (Ct. App.) (citation omitted; emphasis in original), rev. denied, 490 N.W.2d 23 (1992):

> [U]nfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Id. (citation omitted). In cases such as this, "the type of legal prejudice with which we are concerned is the potential harm in a jury's concluding that because an actor committed one bad act, he necessarily committed the crime with which he is now charged." Friedrich, 398 N.W.2d at 774 (citation omitted).

The decision in Friedrich is instructive. The defendant there was convicted of sexually assaulting his 14-year old niece while she was babysitting his children. 398 N.W.2d at 766. In addition to "other acts" evidence concerning Friedrich's molestation of other children, the state presented testimony of K.K., an adult woman employed as a bartender at Friedrich's tavern. She testified that Friedrich, on several occasions, made sexually provocative remarks to her and tried to make sexual advances. Id. at 774. The Supreme Court held that admission of K.K.'s

testimony was an abuse of discretion because it was irrelevant to any legitimate issue in the case and was more prejudicial than probative. Id.*

As in Friedrich, the trial court erroneously exercised its discretion by admitting Mrs. Saliga's allegations. See id. Whatever minimal probative value which may accrue from evidence that the defendant, at some time distant from the charged allegations of child sexual assault, may have made improper sexual advances toward an adult woman, such value is vastly outweighed by the probability that the jury will misuse that evidence. Id. That evidence asked the jury to convict Mr. Mainiero, not because he committed the charged offenses, but because he is a "bad man" whose past sexual misconduct makes more probable his guilt of the charged offenses.

Especially given the vast difference in age between Mrs. Saliga and J.M. and the other baby-sitters, the totally different circumstances, and the remoteness of Saliga's allegations, allowing the cross-examination and Saliga's testimony was an erroneous use of the trial court's discretion. Id.; see Sonnenberg, 344 N.W.2d at 102 ("Because of the remoteness of time [14 months] between the alleged molestation of T.L. and the conduct of

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* The Court nonetheless found, without explanation or discussion of the facts of the case, that the error was harmless. 398 N.W.2d at 774.

Cathy Herman, the right to bring out the Herman incident, even on cross-examination, is suspect").

3. Saliga's testimony consisted of inadmissible, extrinsic evidence of specific instances of conduct.

The trial court also erred in admitting Mrs. Saliga's testimony to rebut Mr. Mainiero's character evidence because that testimony consisted not of proper reputation or opinion testimony, but of specific instances of conduct.

Wis. Stat. §904.05 governs the permissible methods for proving character:

> **904.05 Methods of proving character.** (1) REPUTATION OR OPINION. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (2) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

Mr. Mainiero's character witnesses properly testified to their opinions concerning his character for sexual morality with baby-sitters in his home. Mrs. Saliga, however, did not testify in the form of reputation or opinion, but rather testified only concerning specific

instances of conduct.

Mrs. Saliga's testimony violated §904.05 because the character trait at issue was not "an essential element of a charge, claim, or defense." Rather, such character evidence is offered as circumstantial evidence of innocence:

> The reason for the admission of such character evidence is not because a person of previous good character for sexual morality and decency might not, or could not, in a given situation, commit a crime such as that charged, but because it is less probable that he would commit such a crime than if he had previously had a bad character with respect to such traits.

Blake, 249 A.2d at 235 (citation omitted).

Offering such evidence thus does not authorize rebuttal by specific instances of conduct under §904.05(2).

> By offering proof of good character, the accused has not made it an "element" of the defense: His defense is "innocence," not "law abidingness," he merits acquittal if he did not commit the crime, and not simply because he is generally "law abiding."

2 Louisell & Mueller, §138 at 156.

Under §904.05, therefore, the state should have been "strictly confined to reputation or opinion testimony." Blinka, Wisconsin Practice--Evidence, §405.1 at 136 (1991). It was not. Admission of Mrs. Saliga's testimony thus was error on this ground as well.

4. The error in allowing the Saliga testimony and cross-examination mandates reversal.

The trial court's error in admitting Mrs. Saliga's testimony and permitting the state to cross-examine Mr. Mainiero concerning her allegations was not harmless. See State v. Dyess, 124 Wis. 2d 525, 370 N.W.2d 222, 231-32 (1985). Prejudicial proof of bad character and misconduct inevitably interferes with the jury's ability to deliver a fair and impartial verdict on the evidentiary facts. Mulkovich v. State, 73 Wis. 2d 464, 243 N.W.2d 198, 203 (1976) (citations omitted). Evidence of specific instances of misconduct is especially prejudicial because "[p]roof of this sort is 'the most convincing' kind" and "is usually excluded because it is so sensational and expansive (possessing 'the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time')." 2 Louisell & Mueller, §150 at 334.

As was already discussed in Section I,B, supra, the evidence here was far from overwhelming, even with the erroneously admitted evidence. Essentially, the issues boiled down to whether the jury should believe Mr. Mainiero or the complainant.

The impermissible other acts evidence, however, "metastasized [Mr. Mainiero's] credibility," State v. Goldsmith, 122 Wis. 2d 754, 364 N.W.2d 178, 180 (Ct. App. 1985), and, while totally irrelevant to the charged

offense, brought before the jury highly prejudicial allegations of sexual infidelity and impropriety which the jury would have been hard pressed to disregard. Moreover, the state fully exploited the prejudicial potential of the erroneously admitted evidence in its summation (R32:653).

Even with the improper character evidence, the jury "split the loaf," rendering what is obviously a compromise verdict. Accordingly, the state cannot possibly meet its burden of proving harmlessness beyond a reasonable doubt. See Dyess, 370 N.W.2d at 231-32.

III.

IMPROPER ADMISSION OF PRIOR CONSISTENT STATEMENTS MANDATES REVERSAL.

The trial court initially rejected the state's attempts to bolster the complainant's credibility by eliciting her inadmissible prior consistent statements concerning the alleged assaults (R32:301). However, it subsequently allowed the state to elicit such evidence, over objection, on redirect examination of the complainant's mother:

> Q: What did you [sic] daughter tell you about the sexual assaults that occurred to her?
>
> MR. GLYNN: Objection, improper redirect.
>
> THE COURT: Overruled.
>
> THE WITNESS: Can you say the question again?

MRS BLASIUS:

Q: What did your daughter tell you with respect to the sexual assault committed against her by Mr. Mainiero?

A: You mean the details that she said happened to her?

Q: Yes.

A: That he licked her breasts.

(R32:353, lines 6-16).

Defense counsel then requested a sidebar conference and more fully stated his objection that the complainant's statements to her mother were improper hearsay, which did not fall within the limited exception for prior consistent statements, and requested a mistrial (id.:353-54, 356-57).

The trial court overruled the objection, holding that defense counsel had "opened the door" by asking the mother a question concerning whether the complainant had alleged that she had intercourse with Mr. Mainiero (see R32:332-33). The court inferred from that one question that the complainant at some point made inconsistent statements, despite the mother's negative response. (R32:355-58; App. 18-21).

The state then proceeded to elicit the details of the complainant's alleged statements to her mother:

Q: On March 12th, 1992, did your daughter tell you about the sexual assault that was committed against her by Mr. Mainiero?

A: Yes, she did.

Q: What did she tell you in Mary Schultz's office?

A: That he licked her breasts and rubbed her vagina.

Q: Is there anything else that was told to you on that date?

A: No, she didn't give a whole lot of detail to me.

Q: On March 12th, is that correct?

A: Yes.

Q: Following March 12th, did your daughter talk to you about this sexual assault committed against her?

A: Yes.

Q: What information did she provide to you with respect to what Mr. Mainiero had done to her?

MR. GLYNN: And may I just have a continuing objection, so I don't have to keep interrupting, Your Honor?

THE COURT: Certainly, so noted. You may answer the question.

THE WITNESS: She told me that he assaulted her. He rubbed her body with oil while she was naked and licked her and kissed her and touched and fondled her body.

MRS. BLASIUS: Did she indicate to you where she had been fondled?

A: Yes.

Q: What did she say?

A: Her breasts and her vagina area.

Q: Did she indicate to you at all where she had been kissed?

A: Yes.

Q: What did she say?

A: Her breasts and her belly area.

(R32:358-60).

The court denied Mr. Mainiero's subsequent mistrial motion based upon the erroneous admission of this testimony (id.:392-94; App. 23).

Admission of the prior consistent statements and denying Mr. Mainiero's mistrial motion was a misuse of the trial court's discretion. A trial court misuses its discretion if it makes an error of law. State v. Peters, 166 Wis. 2d 168, 479 N.W.2d 198, 200 (Ct. App. 1991), rev. dismissed, 482 N.W.2d 108 (1992). Application of hearsay rules to undisputed facts is a question of law reviewed de novo by this Court. Id., 479 N.W.2d at 200-01.

A witness's prior consistent statements are inadmissible hearsay, see Wis. Stat. §§908.01(3) & 908.02, unless "offered to rebut an express or implied charge against [the declarant] of recent fabrication or improper influence or motive." Wis. Stat. §908.01(4)(a)2.

Mr. Mainiero did not allege that the complainant's allegations were the result of recent fabrication or improper influence or motive, and the trial court did not rely on such grounds in admitting the prior state-

ments.* Rather, the Court relied upon what it perceived as an allegation, implicit in the question to the complainant's mother, that the complainant at some point had made a statement inconsistent with her testimony (R32:355-58; App 17-21).

The context of counsel's cross-examination, however, makes clear that it was the mother's credibility, not the complainant's, which was being attacked by the mother's prior inconsistent statements (see R32:332-33). The fact that the complainant did not tell her mother that she had intercourse with Mr. Mainiero (id.), merely set the stage for impeachment of her mother, who nonetheless had told others at the time that Mr. Mainiero would be charged with an intercourse offense (see R32:511-14).

In any event, where no recent fabrication or improper influence or motive is alleged, prior consistent statements are neither admissible nor relevant.

> The mere charge that a witness may be lying is an insufficient foundation for the admission of a prior consistent statement. Rather, the "allegation must be that the fabrication is recent or based upon an improper influence or motive."

Fine's Wisconsin Evidence, §908.01(4)(a)1, 2, 3 at 235-36 (1992), quoting Peters, 479 N.W.2d at 201. This is because, "the prior consistent statements must pre-date

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* The defense position was that any fabrication by the complainant predated March 12, 1992 when she first alleged sexual assault (R32:14-15).

the alleged recent fabrication or improper influence or motive before they have probative value." Peters, 479 N.W.2d at 201. Despite the natural reaction of jurors, "a string of similar statements infected by the same motive is probative of nothing but loquacity." Fine's Wisconsin Evidence, §908.01(4)(a)1, 2, 3 at 235.

Allowing the complainant's mother to testify concerning the details of the complainant's prior allegations thus was error. Peters, supra. Moreover, the inadmissible testimony substantially bolstered the complainant's credibility. Because the statements necessarily skewed the core determination of the relative credibility of the complainant and the defendant in a very close case, their admission was reversible error. See Peters, 479 N.W.2d at 202-03. See also Pocquette v. Carpiaux, 261 Wis. 340, 52 N.W.2d 787, 789-90 (1952).

CONCLUSION

Although Mr. Mainiero is not entitled to a perfect trial, he is entitled to a fair one. He has not yet received that.

For the reasons stated in Section I, the trial court denied Mr. Mainiero his rights to due process and to a fair trial when it refused to disclose the exculpatory information necessary to rebut the state's accusations. this Court, therefore, should review the sealed psychiatric records pursuant to Pennsylvania v. Ritchie. Follow-

ing such review, the Court should reverse Mr. Mainiero's convictions and remand the case for a new trial.*

For the reasons stated in Sections II and III, the trial court committed reversible error by allowing the state to present inadmissible and prejudicial evidence to the jury which likewise denied Mr. Mainiero a fair trial. Mr. Mainiero therefore respectfully asks that this Court reverse the judgment of conviction against him and grant him a new trial.

Dated at Milwaukee, Wisconsin, January 24, 1994.

Respectfully submitted,

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* The Court should note that the complainant apparently has not waived her doctor-patient privilege concerning the psychiatric records beyond permitting in camera review of those records (see R32:16-17, 19). This is her right. See Wis. Stat. §905.04. Her exercise of that right may, however, affect the substance of what may properly be disclosed in this Court's written decision following its review of those records.

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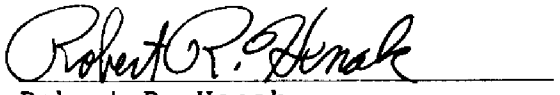
RULE 809.19(8)(d) CERTIFICATION

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 mono-spaced font. The length of this brief is 42 pages.



Robert R. Henak

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 93-2486-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LOUIS M. MAINIERO,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT

Record No.	Description	App.
R21	Judgment of acquittal (Count 2)	1
R22	Judgment of conviction (Count 1)	2
R23	Judgment of conviction (Count 3)	3
R24	Amended judgment of conviction (Count 3)	4
R32:18-20	Oral decision re psychiatric records	5-8
R32:613-15	In chambers oral decision re psychiatric records	9-12
R32:559-61	Oral decision re Saliga testimony	13-16

Record No.	Description	App.
R32:355-58	Oral decision re hearsay statements	17-21
R32:394	Oral decision re mistrial motion based upon admission of hearsay statements	22-23

1234p

STATE OF WISCONSIN CIRCUIT COURT Waukesha COUNTY

☒ State of Wisconsin
☐ _____ County
☐ Municipality: _____

-vs-

Louis M. Mainiero

JUDGMENT OF ACQUITTAL

Case No. 92 CF 205

The ☐ court ☒ jury found the defendant not guilty of the following offense(s):

Offense(s) Charged	Statute Number	Other Information Identifying Original Offense Charged
CTS 1&3- See other judgement CT 2- 2nd degree sexual assault	948.02(2)	

IT IS ADJUDGED THAT the defendant is not guilty.

IT IS ORDERED THAT the defendant is discharged and any bond posted is to be returned.

FILED
CRIMINAL / TRAFFIC
DIVISION

MAR 1 1993

WAUKESHA COUNTY, WISCONSIN
CYNTHIA S. ERNST, CLERK

BY THE COURT:

CIRCUIT COURT, WAUKESHA COUNTY, WISCONSIN

Circuit Judge/Clerk of Circuit Court

KATHRYN W FOSTER
Name Typed

2/25/93 np
Date

CIRCUIT BRANCH # 12 : Waukesha COUN

State of Wisconsin, Plaintiff
-vs-
Louis M. Mainiero, Defendant
4/11/55
Defendant's Date of Birth

TYPE OF CONVICTION (Select One)
xxx Sentence to Wisconsin State Prisons
___ Sentence Withheld, Probation Ordered
___ Sentence Imposed & Stayed, Probation Ordere

COURT CASE NUMBER 92 Cf 205

The defendant entered plea(s) of: [ ] Guilty [xx] Not Guilty [ ] No Contest
The [ ] Court [xxx] Jury found the defendant guilty of the following crime(s):

CRIME(S)	WIS STATUTE(S) VIOLATED	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
CT 1- 2nd Degree sexual assault	948.02(2)	F	C	2/9/92
CT 2- See Judgement of Acquittal				
CT 3- See other judgement of conviction				

BEST COPY AVAILABLE

IT IS ADJUDGED that the defendant is convicted on 1/21/93 as found guilty and:

[xx] on 2/25/93 is sentenced to prison for 6 years, forthwith
[ ] on _____ is sentenced to intensive sanctions for _____
[ ] on _____ is sentenced to county jail/HOC for _____
[ ] on _____ is placed on probation for _____

FILED
CRIMINAL / TRAFFIC DIVISION
MAR 1 1993
WAUKESHA COUNTY, WISCONSIN
CYNTHIA S. ERNST CLERK

CONDITIONS OF SENTENCE/PROBATION

Obligations: (Total amounts only)

Fine (Includes jail assessments; drug assessments; penalty assessments) $ _____

Court costs (Includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees) $ 20.00

Attorney fees $ _____

Restitution $ to be determined

Other $ _____

Mandatory victim/witness surcharge(s)
felony 1 counts $ 50.00
misdemeanor _____ counts $ _____

Jail: To be incarcerated in the county jail/HOC for _____

Confinement Order For Intensive Sanctions sentence only - length of term: _____

Miscellaneous

Restitution may be in excess of $25,000 because of treatment and loss of wages.

IT IS ADJUDGED that -0- days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of Waupun, Dodge Correctional Institute

NAME OF JUDGE Kathryn W. Foster
DISTRICT ATTORNEY Debbie Blasius, ADA
DEFENSE ATTORNEY Steven Glynn

CIRCUIT COURT, WAUKESHA COUNTY, WISCONSIN

BY THE COURT: _____
Circuit Court Judge/Clerk/Deputy Clerk

2/25/93
Date Signed

DEPARTMENT OF CORRECTIONS
DOC-20 (Rev. 02/92)

Wisconsin Statutes, Sections 939.50, 939.51, 972.13 & Chapter 973
JUDGMENT OF CONVICTION AND SENTENCE

WISCONSIN | CIRCUIT BRANCH # 12 | Waukesha COUNTY

State of Wisconsin, Plaintiff
-vs-
Louis M. Mainiero, Defendant
4/11/55
Defendant's Date of Birth

BEST COPY AVAILABLE

TYPE OF CONVICTION (Select One)
___ Sentence to Wisconsin State Prisons
XXX Sentence Withheld, Probation Ordered
___ Sentence Imposed & Stayed, Probation Ordered

COURT CASE NUMBER 92 CF 205

The defendant entered plea(s) of: [ ] Guilty [xx] Not Guilty [ ] No Contest
The [ ] Court [xxx] Jury found the defendant guilty of the following crime(s):

CRIME(S)	WIS STATUTE(S) VIOLATED	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
CTS 1&2 - See other judgements				
CT 3- Criminal trespass to dwelling	943.14	M	A	3/17/92

IT IS ADJUDGED that the defendant is convicted on 1/21/93 as found guilty and

FILED
CRIMINAL / TRAFFIC
DIVISION
MAR 1 1993
WAUKESHA COUNTY, WISCONSIN
CYNTHIA S. ERNST, CLERK

[ ] on _____ is sentenced to prison for _____
[ ] on _____ is sentenced to intensive sanctions for _____
[ ] on _____ is sentenced to county jail/HOC for _____
[xx] on 2/25/93 is placed on probation for 2 years consecutive to prison sentence in CT. 1

CONDITIONS OF SENTENCE/PROBATION

Obligations: (Total amounts only)

Fine (Includes jail assessments; drug assessments; penalty assessments) $ _____

Court costs (Includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees) $ _____

Attorney fees $ _____

Restitution $ to be determined

Other $ _____

Mandatory victim/witness surcharge(s)
felony _____ counts $ _____
misdemeanor 1 counts $ 30.00

Jail: To be incarcerated in the county jail/HOC for _____

Confinement Order For Intensive Sanctions sentence only - length of term: _____

Miscellaneous Defendant to engage in any treatment deeme necessary by DOC and any follow through on on any treatment.
Restitution may be in excess of $25,000 because of treatment and loss of wages.
Defendant to have no contact with the M[redacted]-Thomas family nor any female minors.

IT IS ADJUDGED that _____ days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of _____

NAME OF JUDGE	Kathryn W. Foster
DISTRICT ATTORNEY	Debbie Blasius, ADA
DEFENSE ATTORNEY	Steven Glynn

CIRCUIT COURT WAUKESHA COUNTY WISCONSIN

BY THE COURT:
Kathryn W. Foster
Circuit Court Judge/Clerk/Deputy Clerk

2/28/93 np
Date Signed

DEPARTMENT OF CORRECTIONS
DOC-20 (Rev. 02/92)

Wisconsin Statutes, Sections 939.50, 939.51, 972.13 & Chapter 973
JUDGMENT OF CONVICTION AND SENTENCE

AVAILABLE ... WAUKESHA COUNT

State of Wisconsin, Plaintiff
-vs-
LOUIS M. MAINIERO, Defendant
4-11-55
Defendant's Date of Birth

TYPE OF CONVICTION (Select One)
___ Sentence to Wisconsin State Prisons
XX Sentence Withheld, Probation Ordered
___ Sentence Imposed & Stayed, Probation Ordered

COURT CASE NUMBER 92 CF 205

The defendant entered plea(s) of: [ ] Guilty [XX] Not Guilty [ ] No Contest
The [XX] Court [ ] Jury found the defendant guilty of the following crime(s):

CRIME(S)	WIS STATUTE(S) VIOLATED	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
Cts. 1 & 2 - See other judgments				
Ct. 3 Criminal trespass to dwelling	943.14	M	A	3-17-92

FILED
CRIMINAL/TRAFFIC
DIVISION

IT IS ADJUDGED that the defendant is convicted on 1-21-93 as found guilty and:

[ ] on ___ is sentenced to prison for ___
[ ] on ___ is sentenced to intensive sanctions for ___
[ ] on ___ is sentenced to county jail/HOC for ___
[X] on 2-25-93 is placed on probation for two (2) years consecutive to prison sentence in Ct. 1.

WAUKESHA COUNTY, WISCONSIN
CYNTHIA S. ERNST, CLERK

CONDITIONS OF SENTENCE/PROBATION

Obligations: (Total amounts only)

Fine (Includes jail assessments; drug assessments; penalty assessments) $ ___

Court costs (Includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees) $ ___

Attorney fees $ ___

Restitution $ To be determined

Other $ ___

Mandatory victim/witness surcharge(s)
felony ___ counts $ ___
misdemeanor one counts $ 30.00

Jail: To be incarcerated in the county jail/HOC for ___

Confinement Order For Intensive Sanctions sentence only - length of term: ___

Miscellaneous Defendant to engage in any treatment deemed necessary by D.O.C. and any follow through on any treatment.
Restitution may be in excess of $25,000 because of treatment and loss of wages.
Defendant to have no contact with any female minors other than his own children. Defendant to have no contact with the M[redacted]-Thomas family.

IT IS ADJUDGED that -0- days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of ___

NAME OF JUDGE	Kathryn W. Foster
DISTRICT ATTORNEY	Debbie Blasius, Ass't. D.A.
DEFENSE ATTORNEY	Steven Glynn

BY THE COURT: Kathryn W. Foster
Circuit Court Judge/Clerk/Deputy Clerk

CIRCUIT COURT, WAUKESHA COUNTY, WISCONSIN

Original: 2-25-93 Amended 3-10-93
Date Signed

DEPARTMENT OF CORRECTIONS
DOC-20 (Rev. 02/92)

Wisconsin Statutes, Sections 939.50, 939.51, 972.13 & Chapter 973
JUDGMENT OF CONVICTION AND SENTENCE

[redacted]

ORAL DECISION
RE PSYCHIATRIC RECORDS
R32:18-20

state, do you wish to respond?

MR. GLYNN: My position remains the same, Your Honor.

THE COURT: Very Well. The court did first of all review the satement of Ms. Schrader since that was included for whatever reason with medical record packet. I assume the state wanted me to review them by filing them and so I did read them since they were apparently taken in the context referred to by Mr. Glynn in the oral argument; that is, at the hospital facility. I would note that at the outset as Mr. Glynn has already argued this morning this clearly is a case of credibility which is certainly not unusual given the nature of the charges before this court today. As such I think there are several issues, although the law is clearly that victim is not on trial, but we know as a practical matter that may be very difficult and her state of mind, her motive in bringing forth these charges and so on, I have no doubt will clearly be brought into question if not by the state, clearly by the defense. And It is apparent that we have a situation where there has been a delay in the reporting will need to be resolved by the trier of fact in this case, the jury. Having said that, I think that the context in which this incident came to the light; that is, that it was ultimately reported to the authorites will no doubt

encompass a portion of the states case and having said that it appears to the court based at least on my limited knowledge from reading the criminal complaint and the report of the social worker, Ms. Schrader, as well as the psychiatric information that that is a very much intertwined and part of that scenario. And as such the court is not going to require the state in effect to tiptoe around that issue. I also interpret the argument of Mrs. Blasius this morning to infer that there will be an invocation of patient-Doctor privilege which clearly psychiatric care providers are included under the statute 905. And obviously the court must weigh that statutory right afforded to a patient in this case the alleged victim versus the constitutional right of the defendant to adequately be able to confront his accusers. Setting that framework and having reviewed the psychiatric testimony with the PENNSYLVANIA VS RICHIE criteria if you will in mind, I am satisfied first of all and I may in fact elaborate in chambers if informed of In Camera finding regarding those documents and let me indicate at the outset here that the court does not intend at this point to turn over any portion of those pyschiatric documents based on my review bgiven my knowledge of this case at this juncture that here if anything of exculpatory in

those documents that there is nothing at this point that the court would find reasonable or necessary to a fair presentation of this case or of defense. That, In my estimation may be subject to change as the testimony develops if somebody testifies to the contrary and there may as develops be a prior inconsistent statement embodied in those documents, but at this point I do not see that and that is the intital ruling of the court. I believe having done so in terms of whether or not I guess something may become relevent will in my estimation depend if the state opens the door so to speak and whether or not there is a waiver of patient-doctor priviledge in the course of J[redacted] testimony or any other individual involved with the investigation or presentation of this case. So at the outset the courts ruling is to deny point two of the Motion In Limine of the defense and first of all not restrict the state from introducing evidence of the context of the taking of the statements, the state of mind of J[redacted] and at this point to deny a request intrinsic in that portion of the motion to release the psychiatric records. And in my estimation that dispenses with point two of the defenses Motion In Limine and I believe we still have to resolve point three regarding other acts evidence.

IN CHAMBERS ORAL DECISION
RE PSYCHIATRIC RECORDS
R32:631-15

extent and based on the offer of proof. that that would be the nature of Dr. Johnson's testimony: that on that basis, the court will not permit the testimony of the Doctor either by phone or in person. I will accept for filing. based on the agreement of the parties, the credentials of the Doctor. as outlined in the curriculum vitae. The request to offer that surrebuttal testimony is denied. Mr. Glynn. is there to be a request for any other surrebuttal testimony?

MR. GLYNN: What I would like to do, Your Honor, is just take two minutes and go through my notes. I don't think so.

THE COURT: I would like to keep us in session just because, if you don't, I want to go directly to jury instruction conference, and so just stay put. The audience is free to leave then.

(The following is the decision of the court regarding the Waukesha Memorial Hospital Reports.)

THE COURT: The court has now received and reviewed the psychiatric reports pertaining to the hospitalization of the alleged victim J[redacted] M[redacted] occurring in the later part of March and into April of 1992 at Waukesha Memorial Hospital. I would note that certain portions of those materials were to me, illegible. but as best I could decipher or subsequently transcribed into typed reports contained within the file. This court's review of all of that information would be

somewhat summarized as follows: That Miss McNeil was hospitalized for attempted suicide or suicidal ideations; that she was ultimately diagnosed as number one, being depressed, and number two, as suffering from post-traumatic stress disorder. The overall theme of the reports deals with her treatment with that depression, self-respect issues and so on, and the only cause that is recited in those reports pertains to the allegations of sexual assault made against Mr. Mainiero. There is reference in the report that Miss M[redacted] may also have been sad or grieving the death of a friend from leukemia during the month of January, 1992, but the primary focus of the reports again deals with the sexual assault allegations and her inability to cope with the ramifications of that event. Of specific note to the court, was that there was no evidence of any delusional thinking, any hallucinations, anything that would indicate inability to discern reality from fiction or any sort of mental illness in that category. It is further the court's review of those documents that in reference to the sexual assault, the court was not aware of any contradictory statements from the information I gleaned in the criminal complaint and the nature of the charges. Based on that review of the documents, it is the court's opinion that there is nothing contained therein that would be reasonable and necessary for a presentation of the defense's case or cross examination of Miss M[redacted] That

is. therefore. the basis for the court's finding. The record should not be made available to defense counsel in anticipation of trial.

(The foregoing decision was dictated to the reporter in chambers. outside the presence of the parties.)

THE COURT: The court recalls the matter of State of Wisconsin versus Louis Mainiero noting all parties earlier present are again present at this time. The record should reflect that at the close of the last recess. the court and both counsel spend some considerable time discussing the proposed instructions, and the court has had the benefit of some argument. we'll, of course, make a record since there are several instructions that are in dispute. What I propose to do at this time is to go through. since I know some have been added. so everybody has got the same packet. and go through as of the moment, what I intend to give as instructions in the case and I will invite argument from both counsel. Opening Instruction 100 followed by 103. Evidence Defined. 115 One Defendant Three Count followed by reading of the Information. The Information itself. will not go into the jury room. Instruction 145. Information Not Evidence. The first requested instruction of the defense. Trial Only on Specific Charge. I believe there will be an objection from the State on that and I will hear that in a moment. That will be followed by the substantive instruction 2105 regarding second degree

ORAL DECISION
RE SALIGA TESTIMONY
R32:559-61

criminal complaint posted around the building. There are letters that were sent by the witnesses husband to the defendant and to the defendant's dance group and to a church, all relating to those allegations which have been the subject of handwriting analysis, all of which has been submitted to CE and so I would want to call those people because they will relate the bias of the witness we are talking about here, Judge. So, I mean it is sort of--it is the sort of--it is the sort of significance which, even if it had marginal relevance, I submit, should be excluded under 904.03 so those are as brief in a nutshell because of the time, my objections. If the court wants me to expand on them, I will, but I think there is an awful lot of impeachment that would come out of this and that I submit, I would be entitled to because, to the extent that this person attempts to assert that this is anything other than as I described before, a consensual relationship, it would require a significant amount of impeachment and I just think that what we do is we confuse the jurors and we go into issues that don't have anything to do with this lawsuit. So, that's--those are my objections.

THE COURT: Thank you, Mr. Glynn. The court in allowing the testimony of the young ladies today and in making my decision earlier this morning, relied on 904.04(1)(a) which reads in part, that evidence of a pertinent trait of an accused or offer by an accused or by the prosecution to rebut

the same. Clearly, the statute envisions such a circumstance as we have here. I think that even though there may have been some tailoring as far as babysitting, I direct my attention to the proposed jury instruction of the defense in the case, that makes reference to other witnesses now, who have also testified, Dorothy Green and also to a certain extent, I believe, Mrs. Vanasse regarding her experiences in a massage that clearly have called into play, the pertinent character trait of morality of the defendant. It is a precarious situation, but certainly, on in which the defense has chosen to trod and I think the State is entitled to rebut. This is not to say the other issues of 904 must not be met and that is the issue of relevancy, but based on the limited offer of proof available to this court at this time, the fact that this alleged relationship ended in 1987 within the same general time frame, close to a year, that Danica Vanasse began babysitting, that there is certainly a closeness to the time of sufficiency, in the court's estimation to meet the hurdle of relevancy. As far as adjournment to bring in other matters, it occurred to me, Mr. Glynn, that you obviously have a lot of information at your disposal, information that you certainly may be entitled to go into on cross examination of this witness, but I am sure, other extrinsic evidence. This is not going to become a mini-trial about this other issue. It is certainly an item that you are permitted to cross

examine on. I am sure you are, in essence, stuck with witnesses answers when it comes to this line of questioning because of the extrinsic nature of other information you have referred to in your argument. Based on that consideration, and offer of proof, the court will overrule the objection of defense, and the State will be permitted, if in fact they choose to--representation of apparently two other witnesses to present that particular evidence or testimony.

MR. GLYNN: Then I will move right now for a mistrial on the grounds that that evidence is so irrelevant and prejudicial that it would impact on the jury's ability to fairly determine the issues in the lawsuit, and that way, I won't have to repeat it in the presence of the jury, in the event that this testimony comes in. Is that okay?

THE COURT: In the event it comes in, I will then rule on your motion, Mr. Glynn. You reserved your right clearly, at this point. Is the State's next witness in the courtroom?

MRS. BLASIUS: Yes, I am prepared to proceed.

THE COURT: Just so you are advised, I will be re-advising her of her oath. Have the jurors brought in.

(The jury is returned to the courtroom.)

THE COURT: Record should reflect that all twelve jurors are again present in the courtroom. Mrs. Blasius, your next witness please.

MRS. BLASIUS: State would briefly call Cynthia M[redacted]

ORAL DECISION
RE HEARSAY STATEMENT
R32:355-58

assertions. It is certainly not the State's intention to elicit any response that would cause this emotion. I think that would be cruel. I am simply trying to prove my case. And I think it is ridiculous to suggest there should be a mistrial simply because this witness chooses to exhibit an emotion which I think is perfectly understandable. Secondly, with respect to the second objection, Mr. Glynn is one that asked this witness about whether she told--whether J[redacted] told her that she had sexual intercourse, and I think that he opened the door to my coming in and asking her what J[redacted] told her about the sexual contact.

THE COURT: Very well. First of all, on the motion for mistrial because of any emotion displayed by the witness, I think for purposes of this record the statement that this witness has cried at various portions of her testimony, first of all I do not deem it a ploy by either the prosecution or the witness, given the nature of this testimony, and the context in which it was given. Secondly, I don't find that any of the questions that may have evoked that response were in any way irrelevant to the issues of this case. Given the relationship of this witness to the victim or alleged victim, and so on, certainly some emotion is almost to be expected, and under the total scheme of things, Mr. Glynn. Your other objections whether she cried or didn't cry on cross examination may ultimately be factors for the jury to consider

in weighing the credibility of this witness, but I am not satisfied that under the total scheme of things, it is in any way grounds for a mistrial. The court will deny the mistrial motion on that basis, with little difficulty. As far as the other objection to the hearsay elicited, I am satisfied, as the State has argued, that the door is open. It may have been a crack, but it is definitely open based on the cross examination, and I am going to allow the witness to testify in specific response to the last question of the prosecution. My only concern at this point is to inquire, have you composed yourself so you can at least respond to questions? You must answer out loud.

THE WITNESS: Yes.

THE COURT: Thank you. Very well.

MR. GLYNN: Excuse me, Judge, I want to complete my record on this, this hearsay issue. I believe the questions that were asked were as the prosecutor has indicated, and that is the question about whether or not J[redacted] ever said to her that she had had intercourse with the defendant. The answer was no. That area was not pursued. It was never, and to the extent that a door is open and frankly, I don't understand the concept of opening a door to admission of otherwise inadmissible evidence when the evidence is admissible on hearsay grounds, not relevance grounds, and I understand the motion of opening a door to information that would otherwise

not be relevant, but I don't think that a question can somehow allow a prosecutor to prove by otherwise improper means, a certain fact. So, I say that with respect to opening the door, and with respect to saying, okay, let's assume the door was open, what is the door to? And I say the door is only to the question of whether or not there was a claim of sexual intercourse. And since the witness has already said no, and said since I have not pursued that area, I don't think it is appropriate to now have this witness reiterate at whatever I assume relatively great length, since the witness said, do you want me to tell you everything in detail? And the prosecutor said, "Yes", to reiterate what he daughter has told her. As I say, that's prior consistent statement and it is not admissible. And again, if we need to have an argument about the prior consistent statement, I would appreciate the court letting me know if that's the basis of its ruling. If its ruling is instead what has already been indicated; that is, I opened the door, then I have already made my comments on that and I don't need to say anything further. But, if the court is somehow saying it is not hearsay, because of some reason, I would like to know the reason because I'm not aware of any way it's not hearsay.

THE COURT: The court, in reviewing my notes, noting specifically that there was a question by defense counsel of this witness, whether or not the complainant or victim in the

matter had ever told her that she had sexual intercourse with the defendant, which--to which the witness responded, "No", however, there is certainly an inference, I think, to be drawn there was somehow inconsistent statement given to this witness by the victim and I think that issue having now been raised in the form of cross examination, albeit one question, in the court's interpretation that it clearly give rise to again an inference to be drawn that there was somehow inconsistent statement and I think for purposes of redirect the State is entitled to rehabilitate through this witness, the alleged victim, in terms of what that conversation was. So, I am going to overrule on the hearsay grounds, and because of the prior consistent statement, that I assume the State now intends to elicit from this witness. And the court will now direct that the jurors be brought back in.

(The jury is returned to the courtroom.)

THE COURT: The record should now reflect that all twelve jurors are again present in the courtroom. Mrs. Blasius, you may continue with your question. For the record, the court will overrule the objection of the defense. You may continue Mrs. Blasius.

MRS. BLASIUS:

Q On March 12th, 1992, did your daughter tell you about the sexual assault that was committed against her by Mr. Mainiero?

ORAL DECISION
RE MISTRIAL MOTION BASED UPON
ADMISSION OF HEARSAY STATEMENTS
R32:394

system, but I think that is what the Court of Appeals currently anyway, requires lawyers to do in a case. Therefore, in order to complete my record, I am adding that as a separate basis for mistrial.

THE COURT: All right. The court I believe obviously did rule in the hearsay issue as evidentiary matter. I believe you are correct that you did not interpose a motion for mistrial based on that ruling and we'll accept that motion at this time. But likewise, deny that motion feeling now also having had the benefit of Mrs. M[redacted]-Thomas' actual testimony in response to these inquiries that it was within the appropriate area of redirect. I think questions and answers did not particularly dwell on that, certainly not to the extent that the alleged victim did in her testimony yesterday. I would also like to augment the record to reflect that after we reconvened, Mrs. M[redacted]-Thomas was able to compose herself and at no time, at least to the court's observations, did she outwardly cry or tear during either the redirect or recross and I am satisfied that neither motion for or neither grounds is basis for a mistrial at this juncture, and those will be denied. Very well, I propose then we recess as well until one-thirty. Counsel it is certainly not looking optimistic that we will conclude this case today. I will still hope that we will conclude testimony. If that's not within possibility, certainly not. Mrs. Blasius, how many additional witnesses do