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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REPLY BRIEF OF DEFENDANT-APPELLANT

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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 state concedes that this Court must review J.M.'s psychiatric records and, presumably, that Mr. Mainiero is entitled to a new trial if that review discloses material, exculpatory information. State's Brief at 4. The state quibbles somewhat with the scope of the constitutional definition of materiality, however. Id. at

6-8.[1]

Whether particular information is "material" turns on the facts of the specific case. Where, as here, the evidence is very close and the state's case turns entirely on a single witness of questionable veracity, evidence which would impeach that witness or undermine the strength of supposedly corroborating evidence is much more significant than it otherwise might be. See United States v. Agurs, 427 U.S. 97, 113 (1976) (where verdict already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt). Also, the defendant need not prove that a different result is more likely than not absent the concealment of exculpatory information. Strickland v. Washington, 466 U.S. 668, 693 (1984). The issue is one of probability, not certainty.

Contrary to the state's suggestion, State's Brief at 6-7, impeachment material such as prior inconsistent statements fall squarely within the definition of "material." E.g., United States v. Bagley, 473 U.S. 667 (1985); Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985) (failure to disclose prior inconsistent statements denied defendant

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[1] The state also quibbles with the standard of review. State's Brief at 5. The "facts," however, are the words and information actually contained in the written psychiatric records, not the interpretation or "spin" which J.M.'s doctors or the trial court might place on those facts. Accordingly, no deference is required here. State ex rel. Sieloff v. Golz, 80 Wis. 2d 225, 258 N.W.2d 700, 705 (1977).

due process). "The idea behind this kind of impeachment is that a witness who takes conflicting positions on a single factual issue ... undercuts his own credibility, and raises doubts about the truthfulness of both statements." 3 Louisell & Mueller, Federal Evidence §356 at 545 (1979) ("Louisell & Mueller").

Moreover, inconsistency is not limited to statements directly in conflict; "if the prior statement omits a material detail, which under the circumstances would probably have been included in the statement if true, then the prior statement is inconsistent with testimony at trial which includes this detail." 3 Louisell & Mueller, §356 at 550 (1979) (footnote omitted); see 7 Blinka, Wisconsin Practice (Evidence) §801.401 at 426 (1991) ("Blinka"); McCormick, Evidence §34 at 75 (3d ed. 1989). See also United States v. Ayotte, 741 F.2d 865, 870-71 (6th Cir.), cert. denied, 469 U.S. 1076 (1984); United States v. Standard Oil Co., 316 F.2d 884, 891-92 (7th Cir. 1963) (error to disallow defense cross-examination concerning prior statement by witness which omitted matters to which witness testified at trial).

The state's suggestion that information concerning the death of a close friend during the same time frame as the alleged assaults would not be material "if the psychiatric records conclude that this factor did not contribute, or contributed only slightly, to the victim's depression and suicidal ideations," State's Brief at 8, is

wholly incredible. See Mainiero's Brief at 15-19. As the state elsewhere concedes, "it may well be that more than one reasonable inference could be drawn from the evidence" contained in the psychiatric records. State's Brief at 5. It is thus for the jury, not the trial court or some psychiatrist, to determine whether J.M.'s claimed depression in fact corroborates her story, or whether it has an alternative cause. See State v. Leist, 141 Wis. 2d 34, 414 N.W.2d 45, 47 (Ct. App. 1987).

Finally, the fundamental fairness rationale of State v. Maday, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App.), rev. dismissed, 510 N.W.2d 139 (1993), is directly on point. Mainiero's Brief at 17-20. If anything, the unfairness is even greater here than in Maday.

True, the state did not offer expert testimony of J.M.'s treating psychiatrist. Mainiero could have cross-examined such a witness concerning the bases for any opinion that the alleged assaults caused J.M.'s depression and whether any possible alternative causes existed. See Wis. Stat. §907.05. Instead, the state relied upon assumptions and innuendo about the significance of J.M.'s depression and hospitalization. See Mainiero's Brief at 9-11. By using J.M.'s hospitalization in this manner, the state prevented any possibility of Mainiero and the jury learning of the defective logic of its causation argument. This is exactly the type of unfair strategic advantage which Maday found to violate due process.

II.

IMPROPER ADMISSION OF BAD CHARACTER EVIDENCE MANDATES REVERSAL.

The trial court did not err in allowing Mainiero's character witnesses to provide a foundation for their opinion testimony concerning his excellent character for sexual morality in dealing with teenaged babysitters in his home. E.g., People v. McAlpin, 812 P.2d 563, 575-76 (Cal. 1991). Lay opinion testimony is admissible only if "rationally based on the perception of the witness." Wis. Stat. §907.01. Also, "[s]ince a jury is not likely to give much weight to an unsupported opinion or conclusion by a witness, the proponent of the lay opinion evidence should buttress it with specifics designed to add to the opinion's probative value." Blinka § 701.01 at 346. In the absence of such a foundation, the opinion testimony here properly could have been excluded. See Pattermann v. Pattermann, 173 Wis. 2d 143, 496 N.W.2d 613, 616 (Ct. App. 1992).[2]

Improper Cross-Examination -- The state rationalizes its improper cross-examination as either impeachment of a statement Mainiero made to J.M. or as somehow rebutting his good character for sexual morality with

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[2] The alleged "specific instances" evidence also was admissible on the alternative ground that it demonstrated Mainiero's habit of treating his teenaged babysitters in a respectful and non-sexual manner. Wis. Stat. § 904.06(1). Evidence of specific instances of conduct are admissible to prove such a habit. Id. § 904.06(2).

teenaged babysitters. State's Brief at 19-24. It was neither.

At no time did Mainiero claim total sexual fidelity to his wife. Nor does the state explain how allegations of sexual improprieties with Ms. Saliga legitimately could be relevant to the meaning of Mainiero's statement to J.M. years later. The allegations in no way contradicted Mainiero's testimony nor even made it less likely true.

According to the state, Mainiero's claimed sexual conduct with Saliga corroborates J.M.'s allegations because it shows him to be prone to sexual misconduct, and therefore the kind who would have an affair with a woman in Arizona and molest a teenaged girl. See State's Brief at 20-21. The only value of this examination, however, arises from the "bad man" inference specifically barred by Wis. Stat. § 904.04. Moreover, the unfair prejudice far outweighed any minimal legitimate probative value of these allegations. Mainiero's Brief at 30-31.[3]

The state correctly notes that Mainiero limited his character evidence to the trait most directly relevant here to prevent the state from introducing Saliga's irrelevant and highly prejudicial allegations. State's Brief at 23. It fails to cite authority, however, for its ad-

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[3] The state's response on this point is conclusory at best and properly disregarded by this Court. State v. Pettit, 171 Wis. 2d 627, 492 N.W.2d 633, 642 (Ct. App. 1992).

mittedly novel assertion that such a limitation is somehow improper, id. at 2, 21-23, and this Court accordingly may disregard that claim. E.g., Pettit, 492 N.W.2d at 642. More importantly, the state is just wrong, as the courts consistently have recognized. See Mainiero's Brief at 28-29 & cases cited therein.

Limiting a defendant's character evidence to a pertinent character trait, as authorized by Wis. Stat. §904.04(1)(a), does not act to exclude relevant evidence. State's Brief at 22. To the contrary, defense evidence of a pertinent character trait is highly relevant and permits the state to present proper rebuttal evidence not otherwise relevant or admissible. See id. All that is excluded is irrelevant or unfairly prejudicial evidence, such as the Saliga allegation, which does not legitimately rebut the defendant's character trait and would be inadmissible in any event. See State v. Brecht, 143 Wis. 2d 297, 421 N.W.2d 96, 106 (1988).

Nor does opinion evidence on a limited pertinent character trait necessarily open the door to evidence rebutting any more general trait which may be germane to the case. State's Brief at 22. The same warped logic used by the state here would transmogrify defense evidence of non-violence, for instance, into a general character for law-abidingness, which would open the door to rebuttal by evidence of any criminal conviction or conduct. This is the exact result rejected in Brecht, supra.

Extrinsic Evidence -- The state's assertion that Saliga's testimony was admissible to rebut Mainiero's character evidence, State's Brief at 24-25, fails because (1) that testimony is totally irrelevant to the limited character trait placed into evidence by Mainiero, Mainiero's Brief at 26-29; (2) any possible probative value of that testimony is far outweighed by its unfairly prejudicial effect, id. at 30-33; and (3) such extrinsic evidence of specific instances of conduct is patently inadmissible, id. at 33-34; see Wis. Stat. § 904.05.[4]

The state's "fairness" theory ignores the fact that Mainiero's character evidence merely provided a proper foundation for the witnesses' opinion testimony. See supra. But, even if Mainiero had presented some minimal amount of improper "specific instance" evidence, the state was not unfairly prejudiced by it. The only "prejudice" complained of by the state, State's Brief at 18, was that inherent in the proper opinion evidence and permitted by §904.04(1)(a); the evidence showed that Mainiero was not the kind of man who would sexually assault a teenaged babysitter. The jury necessarily would have reached the same inference in light of the proper foundation evidence and the babysitters' opinion testimony. "Fairness" accordingly did not require admission of Saliga's irrelevant

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[4] The state's failure to cite any authority for its novel request that this Court ignore the rules of evidence, State's Brief at 25, should be reason enough to reject that request. Pettit, 492 N.W.2d at 642.

and prejudicial allegations.

The assertion that Saliga's allegations were relevant as somehow making it more probable that Mainiero would attempt to obtain sexual gratification from children such as J.M., State's Brief at 25-26, is exactly that rejected in State v. Friedrich, 135 Wis. 2d 1, 398 N.W.2d 763, 774 (1987), and State v. Sonnenberg, 117 Wis. 2d 159, 344 N.W.2d 95, 100-03 (1984). Given the significant legal, moral and common sense differences, a defendant's sexual overtures to an adult woman simply have no relevance to a claim that he would seek sexual gratification from a child. Indeed, the state admitted as much at trial (R32:556, 653).

Moreover, any minimal legitimate probative value of this evidence is far outweighed by the resulting unfair prejudice. Mainiero's Brief at 30-33; see Friedrich, 398 N.W.2d at 766. Admission on these grounds also would have violated the rule that the plaintiff, in rebuttal, "may only meet the new facts put in by the defendant in his case in reply" except where "necessary to achieve justice." Rausch v. Buisse, 33 Wis. 2d 154, 146 N.W.2d 801, 808 (1966).

III.

IMPROPER ADMISSION OF PRIOR CONSISTENT STATEMENTS MANDATES REVERSAL.

The state does not deny that Cynthia M. Thomas's testimony detailing her daughter's hearsay allegations

about Mainiero was inadmissible hearsay. See State's Brief at 28. Nor could it reasonably do so. See Mainiero's Brief at 36-41. Rather, it attempts to shoehorn that testimony into a new theory of the "rule of completeness" conceived in State v. Sharp, 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App. 1993). Even if Sharp is good law,[5] the testimony here does not fit that new theory.

First, the "rule of completeness" has no reasonable application here because Mainiero did not introduce any portion of the conversation at issue. As this Court explained in Sharp, the "rule of completeness"

> "require[s] that a statement be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact, or to ensure a fair and impartial understanding of the admitted portion."

511 N.W.2d at 322 (citation omitted; emphasis added). It is the misleading use of a portion of a statement taken out of context which is addressed by the rule. See id., quoting Wis. R. of Evid., 59 Wis. 2d R23, Federal Advisory Committee's Note (1974). Because no partial or incomplete statement was introduced here, there was nothing to "complete" or to put into context by introducing J.M.'s inadmissible hearsay allegations.

Second, there was nothing misleading about the cross-examination of J.M.'s mother which the state be-

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[5] A petition for review is pending.

lieves justified full-scale admission of J.M.'s hearsay allegations:

> Q. Your daughter had not told you that Lou Mainiero had had sexual intercourse with her, had she?
>
> A. No.

(R32:332). Given both the structure of the question and the witness's response, no reasonable juror could conclude that J.M. in fact had claimed intercourse at one time. The leading question implied that J.M. made no such claim and the answer confirmed it.[6]

Compare Sharp, in which the cross-examination of the seven-year old complainant, together with her answers, implied that her testimony was influenced by others. 511 N.W.2d at 322. The Court upheld admission of the child's prior statements to four such "others" because "the statements, together with the child's testimony, provided the jury the opportunity to evaluate whether incompleteness or inconsistency within and among the interviews indicated improper influence on the child's testimony." Id. at 323-24. No such influence was implied here.

The state's alternative suggestion that the jury might infer that J.M.'s statements to her mother were general or misleading, State's Brief at 32, is likewise mis-

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[6] Even if the question reasonably could have been construed as implying a claim of intercourse, the answer negated any such inference. E.g., United States v. DeFillipo, 590 F.2d 1228, 1239 n.18 (2d Cir.) (questions are not evidence, answers are), cert. denied, 442 U.S. 920 (1979); Wis. J.I.--Crim. 103.

placed. The only evidence in the record is that J.M. made no statement to her mother claiming intercourse. Any inference that she nevertheless made such a statement would arise not from defense counsel's questions but from pure speculation.

IV.

THE EVIDENTIARY ERRORS WERE NOT HARMLESS.

Improper admission of Saliga's claims and the highly detailed hearsay allegations of J.M.'s mother cannot reasonably be deemed harmless, as the state suggests. State's Brief at 27, 32-35. This was an extremely close case. Even with the improper and prejudicial hearsay and other acts evidence, the jury acquitted Mainiero on the count most laymen would consider most serious -- touching J.M.'s vagina, while convicting on the "less serious" charges. Nothing in the record, and nothing in the state's brief, suggests any reasonable basis for this split other than a compromise.

Given the circumstances, it is clear that the jury did not entirely believe J.M.'s testimony, even with the improper corroborating evidence, nor did it entirely disbelieve Mainiero, despite the improper "other acts" evidence. Without the improper evidence, there is every reason to believe it would have given even less weight to J.M.'s testimony and more to Mainiero's. Either could tip the balance to acquittal. The state thus cannot show

harmlessness beyond a reasonable doubt. See State v. Dyess, 124 Wis. 2d 525, 370 N.W.2d 222 (1985); State v. Marty, 137 Wis. 2d 352, 404 N.W.2d 120, 125-26 (Ct. App. 1987).

CONCLUSION

Mr. Mainiero was denied a fair trial. Not only was he denied significant exculpatory information which may very well have led the jury to acquit him, but his jury was also exposed to inadmissible and highly prejudicial evidence which skewed the core issue of the relative credibility of J.M. and Mainiero. Mainiero is entitled to a fair trial; this Court should order one.

Dated at Milwaukee, Wisconsin, March 22, 1994.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced with a mono-spaced font. The length of this reply brief is 13 pages.

Robert R. Henak

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