97-2737

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 97-2737-CR
(Walworth County Case No. 96-CF-6)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD A PEMBLE,

Defendant-Appellant.

Appeal From The Judgment and Order Entered In The Circuit Court For Walworth County, The Honorable Robert J. Kennedy, Circuit Judge, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court's order, concealing from the jury evidence of a crucial state witness' history of mental illness and treatment, was error and denied the defendant his rights to confrontation, to due process, and to present a defense.

Based upon its *in camera* review of the witness' mental health records, records which were not disclosed to counsel, the circuit court granted the state's *in limine* motion and held that the defense could not elicit evidence of the witness' mental or emotional condition, multiple personality disorder, hospitalization, treatment or medication. That court reaffirmed its holding in denying Pemble's post-conviction motion.

2. Whether the circuit court denied Pemble due process in refusing to disclose the exculpatory psychiatric records of a crucial state witness.

The circuit court disclosed only limited portions of the records directly demonstrating her biases and desire to make her mother (the defendant's wife) suffer.

3. Whether the circuit court's exclusion of relevant, admissible expert character evidence to the effect that the defendant had no diagnosable sexual disorder and thus was unlikely to commit acts of child molestation, was error and denied the defendant his rights to due process and to present a defense.

The circuit court excluded such evidence, holding that the absence of any diagnosable sexual disorder is relevant *only* if the absence of such a disorder would render it impossible that Pemble committed the charged offense. That court reaffirmed its holding in

denying Pemble's post-conviction motion.

4. Whether the trial court committed reversible error and denied Pemble due process when it disqualified for cause two members of the venire panel based solely upon their misdemeanor probationary status, without first conducting a voir dire to determine whether they in fact would be able to act impartially.

The circuit court summarily excused the two potential jurors without questioning them, over defense objection that they were not *per se* disqualified. That court reaffirmed its holding in denying Pemble's post-conviction motion.

5. Whether the trial court committed reversible error and denied Pemble due process when it refused to strike for cause a juror who acknowledged her concern that she would not be able to give an honest judgment in this case due to the fact that she was raped as a child.

The trial court denied Pemble's request to remove the juror for cause. That court reaffirmed its holding in denying Pemble's post-conviction motion.

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).

Publication likely is not justified under Wis. Stat. (Rule) 809.23, however, as the relief sought by the appellant is required by well-established principles of law and precedent which cannot reasonably be questioned or qualified.

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STATEMENT OF THE CASE

S.F. and his grandpa, Richard Pemble, love each other (R73:192; R74:83).[1] S.F. can't see his grandpa any more. however. After S.F.'s last visit with his grandparents on January 2. 1996, he spoke with his mother and came to believe that his grandpa had intentionally touched S.F.'s "private spot," i.e., his penis (*see* R73:186-92). The core issue at trial was whether S.F. in fact was assaulted or whether, due to conduct by the boy's mother. Kathleen

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

Fraher, and others, S.F. came to misinterpret the perfectly innocent acts of zipping up the boy's fly and tucking in his shirt.

On January 9, 1996, Pemble was charged by criminal complaint with one count of sexual contact with a person under 13 years of age, in violation of Wis. Stat. §948.02(1) (R1). Following the preliminary examination (R66), the state filed an information adding a misdemeanor charge of intimidation in violation of Wis. Stat. §940.44(1) (R4).

Trial began October 14, 1996, in the Walworth County Circuit Court, Hon. Robert J. Kennedy, Circuit Judge, presiding (R73-R76), and the jury returned guilty verdicts on both counts on October 17, 1996 (R29, R30, R76:81-82).

On December 20, 1996, the circuit court, Hon. Robert J. Kennedy, presiding, sentenced Pemble to 10 years of probation on the felony and a concurrent term of 2 years probation on the misdemeanor. As conditions of probation, Pemble was ordered, inter alia, to spend 6 months in jail with work release, perform 500 hours of community service, register as a sex offender, and have no contact with his grandson (R78:36-39). The court entered judgment on December 26, 1996 (R40; App.1-2),[2] and subsequently stayed the jail term pending appeal (R80; R48:2; App. 2).

Pemble timely filed his motion for post-conviction relief under Wis. Stat. (Rule) 809.30(2)(h) (R51; R54). The parties briefed the issues raised on that motion (R53; R56). Judge Kennedy heard arguments and denied that motion on August 22, 1997 (R83; App.

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[2] The circuit court subsequently amended the judgment on three separate occasions (R46; R48). The most recent judgment, dated November 3, 1997, nunc pro tunc December 20, 1996, is included in the Appendix (App. 1-2).

44-59). The circuit court entered an order denying the motion on September 3, 1997 (R58; App. 3), and Pemble filed his Notice of Appeal on September 12, 1997 (R62).

STATEMENT OF FACTS

S.F. was five in January, 1996, and was six at the time of trial (R73:183, 200). He testified that, when he last visited his grandparents, he sat with grandpa in his chair and that grandpa unzipped S.F.'s pants and touched S.F.'s "private spot," i.e., his penis, inside his underwear. Grandpa then said to practice playing with himself while grandpa walked the dog. Grandpa said it was their secret. (R73:186-92). S.F. also testified that he loved and missed his grandpa (*id.*:192). Grandma was nearby in her chair when this happened (*id.*:196-97).

S.F.'s mother, Kathleen Fraher, testified that her mother, Joanna Pemble, and step-father, Richard Pemble, babysat for S.F. and his younger sister on January 2, 1996. When she returned that evening, S.F. was very quiet. According to Fraher, S.F. told her of the incident on the drive home. (R73:202-05, 215-18). Fraher said nothing to her mother about the incident when they met the next day (*id.*:227-28). She admitted that she did not like Mr. Pemble or the fact he married her mother (*id.*:220-21), and that she may have told a counselor about two weeks before the charged incident that she wanted to punish her mother and make her suffer (*id.*:231).

Susan Olson, S.F.'s preschool teacher, testified that S.F.'s ability to perceive, interpret, recall, and describe events is appropriate for his age (R73:240), and that she observed no difference in S.F.'s

behavior before and after January 2, 1996 (*id.*:253).

Paula Hocking, a child abuse/neglect investigator, testified that some of S.F.'s behavior was consistent with that of child victims (R73:254, 263). She also conceded, however, that questioners must be very careful with children and that the videotape of the police interview with S.F. on January 4, 1996 (R14:Exh.4) reflectes that at least some of S.F.'s statements were in response to leading questions (R74:38-39).

Investigator Wolfgang Nitsch interviewed S.F. on January 4, 1996, and authenticated the videotape of that interview (R74:24-27). He also conceded that S.F. several times responded one way during that interview, only to change his statements upon further questioning (*id.*:32-33).

Richard Pemble testified that he was a retired educator, and that he had been married to Joanna Pemble, Fraher's mother, for 4 1/2 years (R74:49-50). He explained that, on January 2, 1996, Fraher left S.F. and his younger sister with the Pemble's because the children had colds (*id.*:52-53). After lunch, the children watched television until about three p.m., when the kids wanted to sit on their laps. S.F. sat with Richard, while his sister sat with Joanna, and both children fell asleep. (*id.*:53-54). Richard's and Joanna's chairs were right next to each other (*id.*:73-74).

S.F. eventually woke up and went into the bathroom. When his sister awoke some time later and had to go, he was still there. Richard told him to come out and, when Richard asked what he had been doing, S.F. replied that he had been playing with himself. (*id.*:54-60). When asked, S.F. admitted that his mother had told him

not to do that. He appeared frightened, so Richard told him not to worry, they could keep it a secret between themselves. Because S.F. has problems snapping his pants, Richard zipped and snapped them for him, and tucked his shirttail in. Joanna was seated right next to them during this conversation (*id.*: 71-73, 84-85). Richard then returned to reading in his chair, and S.F. sat beside him, until the dog needed to be walked (*id.*:76-77).

Pemble flatly denied that he opened S.F.'s pants, fondled his penis, or told him to practice rubbing himself (R74:75, 77, 82).

Joanna Pemble testified that they babysat for S.F. and his sister while the children were sick on January 2, 1996 (R74:92), and that, after lunch, the children watched cartoons a while until she took them to the kitchen for medicine. The children then sat with the adults and went to sleep until S.F. awoke at about 4:30 and went to the bathroom. When his sister awoke and had to go, she found the door locked and started yelling and kicking it. Richard yelled at S.F. to unlock the door and, when he did, asked what S.F. was doing. S.F. responded that he was playing with himself and admitted that his mother had told him not to. Richard told him not to make a practice of it, zipped and snapped S.F.'s pants, and shoved his shirt in. Joanna was right next to them while this took place. (*id.*:110-17). Joanna stated that she was with her husband all afternoon and never saw him undo S.F.'s pants, stick his hands inside S.F.'s underwear, or tell him to practice rubbing himself (*id.*:117-18, 122, 127).

The defense also called several witnesses attesting to both Pemble's good character for truthfulness and his sexual morality with children (R74:147-67; R75:44-48). Pemble sought to introduce

additional evidence, as discussed in the Argument, but the court prevented him from doing so.

SUMMARY OF ARGUMENT

A number of the trial court's rulings in this case reflect a basic misunderstanding of the evidentiary concept of relevance. Wisconsin law provides that evidence is relevant if it has "any 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. The constitutional rights to due process and to present a defense invoke a similar standard. *E.g.*, *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990). Several of the trial court's rulings, however, reflect a much more restrictive standard, resulting in the exclusion of evidence crucial to Pemble's defense.

This appeal addresses three of these errors. First, in reviewing the records of Kathleen Fraher's lengthy mental health treatment for exculpatory evidence, the court limited its review to a determination of whether the records contained information reflecting a motive to lie and evidence that she was "unable to perceive reality" or that she "could not understand the difference between truth and falseness" (R69:42-43; App. 6-7), thus substituting an absolute standard for the tendency standard required by Wisconsin and constitutional law.

Second, the trial court applied a similarly restrictive standard in excluding any and all evidence of Kathleen Fraher's lengthy history of mental illness, her treatment for that illness (including her hospitalization within 60 days prior to the trial), her medications, or

her diagnosis for multiple personality disorder. Again, these restrictions were contrary to Wisconsin law and Pemble's rights to confront the witnesses against him and to present a defense.

Third, the trial court applied an impermissibly absolute standard in excluding defense expert testimony of Dr. Charles Lodl to the effect that Pemble had no diagnosable sexual disorder and thus was unlikely to commit acts of child molestation. While such evidence plainly had a tendency to make Pemble's commission of the charged offense less probable, the trial court found it "irrelevant" and chose to exclude it because Dr. Lodl was unable to testify in absolute terms that a person cannot commit a sexual assault unless he has a diagnosable sexual disorder (R72:25-27; R83:17-18; App. 10-12, 57-58).

Finally, the trial court committed reversible error by summarily disqualifying for cause two members of the venire panel based solely upon their misdemeanor probationary status, without first conducting a voir dire to determine whether they in fact would be able to act impartially, and by refusing to excuse for cause a juror who acknowledged her concern that she would not be able to give an honest judgment in this case due to the fact that she was raped as a child.

ARGUMENT

I.

THE CIRCUIT COURT'S REFUSAL TO DISCLOSE KATHLEEN FRAHER'S MENTAL HEALTH RECORDS, AND ITS ORDER BANNING REFERENCE TO HER HISTORY OF MENTAL ILLNESS AND TREATMENT, WAS ERROR AND DENIED PEMBLE HIS RIGHTS TO CONFRONTATION, TO DUE PROCESS, AND TO PRESENT A DEFENSE

Prior to trial, Pemble sought *in camera* review of Kathleen Fraher's mental health records (R9; R69:2-44). In support of that motion, Joanna Pemble testified that her daughter has had perceptual and reliability problems most of her life (R69:32, 35. 38-39), tended to be manipulative (*id.*:36). has had "psychiatric problems one after another, very depressed, not speaking correctly at times" ever since her last marriage (*id.*:33), was receiving Social Security disability for those problems (*id.*:35), was diagnosed at one point with multiple personality disorder (*id.*:34), was hospitalized for her mental problems (*id*:37-38, 40), and had attempted to kill herself (*id.*: 40). She further testified that her daughter "is very, very paranoid when it comes to anything sexual. Absolutely paranoid," and that Fraher has problems remembering and relating past events accurately "when she gets into this depression and she doesn't know exactly what she's saying" (*id.*:37).

While the circuit court made factual findings and held that this kind of history mandated *in camera* review of the psychiatric treatment records (R69:41-44; App. 5-8), it also held that its review was limited:

> . . . I will be looking at these records myself since I think that's the appropriate thing to do to start, with the idea of determining if there is any medical confirmation that she is unable to perceive reality. And I'll test that by either medical opinions to that effect or information in the medical records that indicate that she has falsely given information, and then the medical records confirm that the information was false and there is a suggestion that it was false because she did not understand, she could not understand the difference between truth and falseness.
>
> If I don't find any of that, then I will conclude that there is no exculpatory evidence of the type that the defense is seeking and will not reveal any portion of it. If I do find that, then I will convene both parties to talk about what I find and even let them look at it independently.

(R69:42-43; App. 6-7).

The state produced the records, which are included in the appeal record as sealed exhibits (R22), and the court reviewed them and disclosed limited portions of them relating to Fraher's biases against Pemble and her mother (R22; R71; R84). It subsequently was learned that Fraher was hospitalized for approximately four weeks in August of 1996 (R72:30-31), those records were produced (R22), and the court reviewed those as well (R73:6).

Just before voir dire, the state moved to preclude any reference at trial to Fraher's mental illness. Over defense objection, the court granted the motion, barring any reference to Fraher's illness, treatment, hospitalization, medications, or diagnosis of multiple personality disorder. (R73:6-15; App. 17-26). The court appears to have based this ruling on its conclusion that nothing in the undisclosed medical records reviewed *in camera* indicates that, based on

her mental illness, "she cannot recall" (R73:10, 14; App. 21, 25).

Defense counsel noted that an investigator had observed Fraher as "obvious[ly] . . . mentally ill" just the week before; "that she appeared to be a zombie when he tried to serve her with the papers," and that "everyone in the apartment complex that he spoke to told him that she was mentally ill" (R73:12; App. 23). The court held that the jury could consider such information in weighing her credibility, but only if she appeared that way when she testified; the defense could offer no evidence in that regard (R73:12-13; App. 23-24).

A. The Trial Court's Exclusion of Relevant Evidence Concerning the Mental State of a Crucial State Witness Was a Misuse of Discretion and Denied Pemble His Rights to Confrontation and Due Process.

While the extent and scope of cross-examination generally rests within the sound exercise of trial court discretion, *Rogers v. State*, 93 Wis.2d 682, 287 N.W.2d 774, 777 (1980), the court misuses that discretion where, as here, the decision rests upon an error of law or lacks a reasonable basis, *State v. Peters*, 166 Wis.2d 168, 479 N.W.2d 198, 200 (Ct. App. 1991). Such limitations likewise may deny the defendant is rights to due process and confrontation where, as in this case, they have the effect of concealing relevant, exculpatory evidence from the jury. *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

The United States Supreme Court has noted that "[t]here are few subjects, perhaps, upon which the [federal courts] have been more nearly unanimous than in their expressions of belief that the

right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). Violation of a defendant's right to confrontation is not limited to those circumstances involving denial of all rights to cross-examine. *See, e.g., Davis v. Alaska*, 415 U.S. 308 (1974); *Smith v. Illinois*, 390 U.S. 129, 131 (1968). The right of confrontation involves not merely *some* cross-examination, but rather requires the opportunity for *effective* cross-examination. *Davis*, 415 U.S. at 318; *United States v. DeGudino*, 722 F.2d 1351, 1354 (7th Cir. 1983). As the court observed in *DeGudino*,

> [i]n order for a cross-examination to be effective, defense counsel must be permitted to expose the facts from which the fact-finder can draw inferences relating to the reliability of the witness. Counsel must be able to make a record from which to argue why the witness might be biased ... [W]hen reviewing the adequacy of a cross-examination, the question is whether the jury had sufficient information to make a discriminating appraisal of the witness's motives and bias.

722 F.2d at 1354 (citations and footnote omitted).

According to the United States Supreme Court:

> a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness."

Van Arsdall, 475 U.S. at 680, *quoting Davis*, 415 U.S. at 318.

Contrary to the circuit court's apparent belief, the absence of

evidence in a witness' psychiatric records to the effect that her mental illness absolutely prevents her from accurately perceiving or recalling events does not render evidence of her illness irrelevant. Rather, relevant evidence is that which has a tendency to make a fact in issue more or less probable. Wis. Stat. §904.01. "The proper standard for the test of relevance on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." *Rogers*, 287 N.W.2d at 777.

Evidence that the witness has long suffered from a debilitating mental illness, resulting in paranoia about anything sexual, an attempted suicide, recent psychiatric hospitalization, an apparent inability accurately to remember and relate past events, and reversion to a zombie-like state within a week of the trial, easily meets that standard.

The courts have long recognized the relevance of evidence that a crucial witness suffers from mental or emotional problems. *See, e.g., Sturdevant v. State*, 49 Wis.2d 142, 181 N.W.2d 523, 526 (1977); *United States v. Hiss*, 88 F. Supp. 559, 559-60 (S.D.N.Y. 1950). As the Supreme Court explained in *Sturdevant*:

> Witnesses may be questioned regarding their mental or physical condition where such matters have bearing on their credibility.
>
> "*As a general rule, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.*" 98 C.J.S. Witnesses §460, p.323.

> "A witness may be cross-examined to test his intelligence, this rule applying although the court has held him competent to testify; and, as bearing on the question of the credibility of his testimony, he may be cross-examined as to his mental condition at the time of testifying, or at the time to which his testimony referred, his physical condition at that time, and his mental attitude toward the case."
>
> * * *
>
> "The mental capacity of a witness is proper to be considered as bearing on his credibility. Thus the impaired condition of the mind either from a temporary cause, . . . or other infirmities, is deemed a proper subject of inquiry for the consideration of the jury in determining the credibility of a witness. So it may be shown that the witness has a mind or memory impaired from disease or other cause; but mere mental impairment, without more, is not sufficient to affect credibility . . ..

181 N.W.2d at 526 (emphasis in original).

See also Chapin v. State, 78 Wis.2d 346, 254 N.W.2d 286, 290-91 (1977):

> Evidence of mental disorder or impairment may be relevant as affecting the credibility of a witness when it shows that his mental disorganization in some way impaired his capacity to observe the event at the time of its occurrence, to communicate his observation accurately and truthfully at trial, or to maintain a clear recollection of it in the meantime.

(Citation omitted); *Johnson v. State*, 75 Wis.2d 344, 249 N.W.2d 593, 601 (1977) ("Inquiry into the existence of and treatment for mental affliction is proper where it appears that a connection exists between the affliction and the reliability of the witness's testimony").

Many other courts have reversed criminal convictions based upon suppression or exclusion of such evidence. In *United States v. Partin*, 493 F.2d 750, 762-65 (5th Cir. 1974), *cert. denied*, 434 U.S. 903 (1977), the Court of Appeals reversed a conviction because the trial court excluded medical records offered as a predicate for cross-examination and would not let the jury hear the expert opinion of a psychiatrist called by the defendant. Judge Coleman, speaking for the Court, explained the applicable general principle in these terms:

> The readily apparent principle is that the jury should, within reason, be informed of all matters affecting a witness's credibility to aid in their determination of the truth... . It is just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth.

Id. at 762 (citation omitted). *See also United States v. Society of Independent Gasoline Marketers*, 624 F.2d 461, 466-69 (4th Cir. 1979) (following *Partin* and reversing convictions), *cert. denied, sub nom. Kayo Oil Co. v. United States*, 449 U.S. 1078 (1980); *Chavis v. North Carolina*, 637 F.2d 213, 224 (4th Cir. 1980) (granting habeas corpus relief); *Greene v. Wainwright*, 634 F.2d 272, 276 (5th Cir. 1981) (abuse of discretion to prohibit cross-examination into a witness' recent mental illness "within the same general time period" as the crime). *See generally United States v. Lindstrom*, 698 F.2d 1154, 1159-68 (11th Cir. 1983).

This court likewise recognized in *State v. Shiffra*, 175 Wis.2d 600, 499 N.W.2d 719, 724 (Ct. App. 1993), that psychiatric difficulties such as those suffered by Ms. Fraher "might affect both her

ability to accurately perceive events and her ability to relate the truth." In *State v. Munoz*, 200 Wis.2d 391, 546 N.W.2d 570 (Ct. App. 1996), that court similarly distinguished between situations in which witness manifests "reality problems," such as those suffered by Ms. Fraher, from those in which witness simply received counseling for prior assaults.

This plainly is not a case in which the circuit court rationally determined that the evidence of mental illness was irrelevant. Even the trial court recognized that the jury properly could consider Fraher's mental illness in assessing her credibility, but *only* if she appeared mentally ill at the time she testified (R73:12-13; App. 23-24). The court stated no reason, and counsel can conceive of none, justifying concealment of relevant evidence from the jury merely because it would have to be elicited from witnesses.

Nor is this a case in which the defense sought to elicit "'mere mental impairment, without more.'" *Sturdevant*, 181 N.W.2d at 526 (citation omitted). To the contrary, the history of mental illness, the recent hospitalization, the intermittent inability accurately to remember and relate past events, the recent zombie-like state, and the other evidence discussed above all would have assisted the jury in properly judging her credibility and reliability. To conceal that evidence from the jury only served to distort its assessment of the relevant facts and deny Pemble a fair trial. As the Supreme Court explained:

> 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.

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

Because the trial court deprived the defense of relevant, exculpatory evidence impeaching a critical prosecution witness, based upon an erroneous view of the law and without a reasonable basis, that court misused its discretion and denied Pemble his rights to due process and confrontation. *E.g., Van Arsdall, supra; Greene, supra.*

B. Exclusion of the Impeachment Evidence Was Not Harmless.

Where, as here, the court has cut off proper cross-examination, the inquiry becomes "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684; *see State v. Dyess*, 124 Wis.2d 525, 370 N.W.2d 222, 231-32 (1985) (state must demonstrate harmless beyond reasonable doubt).

The error here cannot reasonably be considered harmless because Fraher's testimony was crucial to the state's case and "[a] reasonable jury might have received a significantly different impression of [Fraher's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." *Van Arsdall*, 475 U.S. at 680.

A fair opportunity to impeach Kathleen Fraher was critical to

Pemble's defense. The core of that defense was that S.F. may well have testified to what he honestly believed to be true, but that he had in fact misconstrued Pemble's innocent acts of zipping S.F.'s pants and tucking in his shirt, either at the time they happened or, more likely, later when he was questioned about it by his mother. It is well recognized that the manner of questioning a young child can have a direct effect on what the child "remembers" about an event. *See, e.g.*, Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 Ariz. L. Rev. 927, 933 (1993); Coleman and Clancy, *False Allegations of Child Sexual Abuse: Why Is It Happening? What Can We Do?*, Criminal Justice, Fall 1990, at 14, 46; Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash. L. Rev. 705, 721 (1987).[3] Even Ms. Hocking acknowledged that special care is required when questioning children and that leading questions are inappropriate (R74:37-39).

Kathleen Fraher is S.F.'s mother, and was the first person to question him about what happened at the Pembles' home. As such, she was in the best position, intentionally or not, to distort or

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[3] Even with adult witnesses, the courts have recognized the danger that the mode of questioning may supply a false memory for the witness, and that the suggestive nature of the question may take any of several forms:

> "The tenor of the desired reply can be suggested in any number of ways, as, for example, by the form of the question, by emphasis on certain words, by the tone of the questioner or his non-verbal conduct, or by the inclusion of facts still in controversy."

State v. Barnes, 203 Wis.2d 132, 552 N.W.2d 857, 859-60 (Ct. App. 1996) (quoting 3 *Weinstein's Evidence* ¶611-77, 78 (1995).

manipulate his perceptions of that incident. At trial, she denied asking any leading questions, claiming that S.F. wanted to tell her what happened after they left the Pemble's home, and that all she did was sit quietly and listen, occasionally asking "then what happened?" (R73:215-17).

Of course, this allegation is inconsistent with Joanna Pemble's perception that Fraher was extremely paranoid concerning sexual matters, but the court's order denied that evidence to the jury. That order likewise denied the jury additional information going directly to Fraher's credibility and reliability, instead leaving it with the mistaken impression that Fraher was simply a concerned mother, with no apparent reason for fabrication or unreliability, whose dislike for her new step-father was confirmed by this incident.

From the sentencing transcript, moreover, it is clear that some adult (most likely Fraher) in fact did attempt to manipulate S.F. regarding this case. While S.F. expressed deep affection for Pemble and a concern that he not get into trouble, the sentencing court noted that the Victim's Statement, "apparently aided by some unknown adult" purports to reflect the contrary and a desire to put Pemble in jail, a claim that the court found incredible (R78:35-36; App. 42-43).

In addition to bolstering the likelihood that the charges arose from false memories rather than fact, the impeachment likewise could have influenced the jury's assessment of other damaging portions of Fraher's story which conflicted with the Pembles' testimony, such as her claims that S.F. never needed help with his pants and that Pemble refused to look her in the eye when she returned to pick up the children (R73:204, 219-20; *compare* R74:72, 79,116), as well as her

account of the substance of S.F.'s statement to her.

The case against Pemble was far from overwhelming, even without the excluded impeachment evidence. The defense case, moreover, was strong, with both Richard and Joanna having witnessed the acts S.F. came to misconstrue as a "bad touch," and with several witnesses attesting to Richard's honesty and sexual morality. Under these circumstances, the state cannot meet its burden of demonstrating beyond a reasonable doubt the harmlessness of concealing such important evidence from the jury charged with assessing Fraher's testimony and, with it, Pemble's guilt or innocence.

C. The Trial Court Erred By Denying Disclosure of Fraher's Exculpatory Psychiatric Records.

The trial court's refusal to disclose all but a minimal portion Kathleen Fraher's psychiatric records denied Pemble 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. 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).[4] Under *Bagley*, material evidence includes information which impeaches the credibility or reliability of state witnesses, as well as evidence which goes directly to bias, interest or to the ultimate question of guilt or innocence.

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). 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 the trial court's *in camera* review of those records. *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 & n.15 (1987); *Shiffra*, 499 N.W.2d at 721; *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

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[4] 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.

> 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), *overruled on other grounds, State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994).

Defense counsel was denied access to the requested psychiatric 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.). Pemble therefore asks that this Court independently review the sealed documents, and apply the constitutional principles already discussed to the facts in this case. *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 (Supreme Court independently reviews witness statements to determine whether nondisclosure harmless), *cert. denied,* 423 U.S. 986 (1975).

The standard of review of this issue is somewhat unclear. This Court held in *State v. Mainiero*, 189 Wis.2d 80, 525 N.W.2d

304, 307 (Ct. App. 1994), that application of the materiality standard is reviewed *de novo*. The Wisconsin Supreme Court recently suggested, however, that the circuit court's determination of materiality on *in camera* review is reviewed for misuse of discretion. *State v. Solberg*, 211 Wis.2d 372, 564 N.W.2d 775, 781 (1997). That Court, however, cited no case on point. In fact, that standard is directly contrary to the *de novo* standard applied to review of such issues by the United States Supreme Court in *Kyles v. Whitley*, 514 U.S. 419 (1995), as well as that applied by virtually every federal court of appeals. *See, e.g., United States v. Cuffie*, 80 F.3d 514, 517 (D.C. Cir. 1996); *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995), *cert. denied,* 116 S.Ct. 1056 (1996); *United States v. Ramos*, 27 F.2d 65, 67 (3d Cir. 1994); *United States v. Green*, 46 F.3d 461, 464 (5th Cir.), *cert. denied,* 515 U.S. 1167 (1995); *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991), *cert. denied,* 504 U.S. 930 (1992); *Cornell v. Nix*, 976 F.2d 376, 382 (8th Cir. 1992), *cert. denied,* 507 U.S. 1020 (1993); *United States v. Bracy*, 67 F.3d 1421, 1428 (9th Cir. 1995); *United States v. Molina*, 75 F.3d 600, 602 (10th Cir.), *cert. denied,* 116 S.Ct. 2510 (1996); *United States v. Mejia*, 82 F.3d 1032, 1036 (11th Cir.), *cert. denied sub nom., Lopez v. United States*, 117 U.S. 188 (1996).[5]

Solberg's deferential standard is especially odd since that Court applies a *de novo* standard to the same materiality determina-

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[5] Only the Seventh Circuit, *see United States v. Boyd*, 55 F.3d 239, 242, 245 (7th Cir. 1995), and perhaps the First, *see United States v. Perkins*, 926 F.2d 1271, 1276 (1st Cir. 1991) (decision concerning materiality of evidence "will ordinarily be accorded deference," but reviewing more closely where constitutional issue involved), appear to apply a deferential standard.

tion in ineffective assistance of counsel claims. *See State v. Sanchez*, 201 Wis.2d 219, 548 N.W.2d 69, 76 (1996).

It is clear, however, that the trial court misused its discretion in any event. "[A] trial court misuses its discretion if it makes an error of law." *Mainiero*, 525 N.W.2d at 313 (citation omitted). The trial court here erred as a matter of law when it limited the target of its review of the materials to "medical confirmation that she is unable to perceive reality" (R69:42-43; App. 6-7). Once again. the court applied a legally indefensible view of relevance.

II.

THE TRIAL COURT ERRED BY EXCLUDING RELEVANT, EXCULPATORY EXPERT TESTIMONY

Prior to trial, Pemble sought an order permitting him to present expert testimony of Dr. Charles Lodl to the effect that (1) Lodl could find no evidence that Pemble suffered from any diagnosable sexual disorder and (2) it is unlikely that a person with no diagnosable sexual disorder would molest a child (R19; R72:3-27). The motion was based upon state law and the constitutional right to present a defense (R19; R72:3-4).

The report of Dr. Lodl's examination of Pemble. and the doctor's conclusions, are contained in the record (R33). That report concludes

> Mr. Pemble's sexual history and his responses to specific testing about his sexual behavior, did not show any evidence of any diagnosable sexual disorder. . . . While it is not possible for a psychological evaluation to establish a person's guilt or innocence, based on the information which was available, I would offer that a

> careful investigation of this case is warranted before further legal proceedings occur.

(R33 (Lodl Evaluation) at 7).

Ruling on the in limine motion, the trial court set out two prerequisites to admission of the evidence: Dr. Lodl would have to have a professional opinion, first, that commission of this type of offense would require the presence of a sexual disorder, and second, that Pemble has no sexual disorder. The court concluded that, if such a showing were made, then the evidence would be admissible as showing a pertinent character trait under Wis. Stat. §904.04(1)(a). Absent that showing, the court held, the evidence would not be relevant. (R72:25-27; App. 10-12). Defense counsel had objected to the first of these requirements, when proposed by the state, on the grounds that relevance under Wis. Stat. §904.01 requires only that the evidence tends to make a fact of consequence more or less probable (R72:24).

When defense counsel sought reconsideration at trial, the court initially cut him off and reiterated its prior holding (R75:10-13; App. 37-40), but then allowed him to complete his objection that the court's absolute standard conflicted with the standard for relevance (R75:22-25).

The parties informed the court that Dr. Lodl could not meet the first prerequisite set by the court, and the court therefore barred him from testifying (R75:5-6; R76:2). Pemble raised the issue again in his post-conviction motion (R54; R53:5-10), but the court persisted in its initial ruling (R83:15-18; App. 55-58).

Dr. Lodl testified at Pemble's sentencing, explaining in detail

why Pemble presented minimal, if any, risk of reoffending even if, as the doctor was required to assume following conviction, Pemble was guilty of this offense (R77:4-40). Dr. Lodl testified that, to a reasonable degree of professional certainty, Pemble has no diagnosable sexual disorder (*id.*:17, 31). He explained that this does not mean he could not commit a sex offense, but only that the risk of him doing so was very low (*id.*:17-18, 31-32, 36-37), even assuming he in fact committed this offense (*id.*:23-25). The trial court specifically noted that it found this testimony very believable (R78:42).

Exclusion of Dr. Lodl's testimony at trial 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). Application of the rules of evidence to undisputed facts is a question of law reviewed *de novo*. *Id.*, 479 N.W.2d at 200-01.

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.

Opinion testimony is a permissible method 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.

Wis. Stat. §904.05. Such opinion evidence, moreover, may be provided by an expert. *E.g.*, *King v. State*, 75 Wis.2d 26, 248 N.W.2d 458, 464-65 (1977). Indeed, in some circumstances, the evidence *must* be provided by an expert. *E.g.*, *State v. Pulizzano*, 155 Wis.2d 633, 456 N.W.2d 325, 335-36 (1990) (whether defendant's suffering of sexual abuse as child made it more likely she committed charged abuse falls under Wis. Stat. §904.04(1)(a), but requires expert testimony).

In *King v. State*, 75 Wis.2d 26, 248 N.W.2d 458 (1977), the defendant was convicted of murder but claimed the shooting was accidental. In support of that claim, he presented evidence of two /experts to the effect that he had a "passive-aggressive personality" and that persons having that trait "typically responded to stress by avoidance or nonresponse rather than by overt hostile acts." 248 N.W.2d at 462-63, 464.

The Court held that this evidence was properly admitted:

> In offering the expert testimony of the psychologist, as it related to the defendant's character, the defendant was properly relying upon the provisions of sec. 904.04(1)(a), Stats., and sec. 904.05(1) . . .. Thus in this first-degree murder case, the defendant was entitled to place into evidence not only opinion testimony but expert opinion testimony concerning his general character trait of nonhostility and nonaggressiveness.

248 N.W.2d at 464-65.[6]

Pemble does not here challenge the trial court's requirement that Dr. Lodl use a specific formula in stating his opinion that Pemble had no diagnosable sexual disorder. Although that ruling plainly was incorrect, *see, e.g., Castaneda by Correll v. Pederson*, 176 Wis.2d 457, 500 N.W.2d 703, 710 (Ct. App. 1993) ("[A]n expert witness need not use any specific language in giving an opinion, as long as his or her testimony is not speculative"), *rev'd on other grounds*, 185 Wis.2d 199, 518 N.W.2d 246 (1994), Dr. Lodl could meet that requirement (*see* R33 (Lodl Evaluation at 7; R77:17) and it was not the basis for exclusion in any event.

Rather the claim here rests upon the trial court's transmogrification of the principle of relevance into a requirement of absolute exclusion. Dr. Lodl was prepared to testify that the absence of diagnosable sexual disorder made it unlikely that one would commit the type of sexual assault alleged here (R33 (Lodl Evaluation) at 7; R77:4-40). According to the trial court, however, evidence that Pemble had no diagnosable sexual disorder would be relevant *only* if the absence of such disorder absolutely prevented him

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[6] While holding that the defense evidence was admissible, the Court rejected the defendant's challenge to the state's use of extrinsic evidence in rebuttal. 248 N.W.2d at 465-68.

In subsequent cases, the Court has found it unnecessary to address the issue raised in this case. *See Pulizzano*, 456 N.W.2d at 335-36 (unnecessary to decide if "battering parent syndrome" evidence admissible under §904.04(1) because state failed to present expert testimony); *State v. Friedrich*, 135 Wis.2d 1, 398 N.W.2d 763, 766-770 (1987) (Court need not decide whether expert testimony that defendant charged with sexually assaulting his 14-year old niece failed to match profile of incestuous sex offenders should have been admitted under §904.04(1)(a) and *King* because counsel did not raise that theory in trial court).

from committing this type of offense (R72:25-27; App. 10-12). That simply is not the law.

Pursuant to Wis. Stat. §904.01, evidence is relevant if it has "any 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." To be relevant, therefore, an item of proof need not prove a matter by itself; it need only be a "single link in the chain of proof." *State v. Brewer*, 195 Wis.2d 295, 536 N.W.2d 406, 412 (Ct. App. 1995); *cf. Lasecki v. State*, 190 Wis. 274, 280, 208 N.W. 868 (1926) (reasonable doubt re premeditation arises from intoxication evidence showing either "an inability to form *or an improbability that there was formed* a premeditated design" to kill (emphasis added)). *See also McKoy v. North Carolina*, 494 U.S. 433, 440 (1990):

> "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any 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.'"

(quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985)).

Evidence of a defendant's good character is admissible, not because good people never commit crimes, but because good character evidence is circumstantial evidence that the defendant is unlikely to have committed the act charged. 2 *Weinstein's Federal Evidence* §404.11[2][a] at 404-22 (2d Ed. 1997).[7] Similarly, evidence that Dr. Lodl could find no evidence of any diagnosable

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[7] *See also* Advisory Committee Notes to Fed. R. Evid. 404, quoted in 2 *Weinstein's Federal Evidence* §404App.01[2] at 404 App.-2.

sexual disorder in Mr. Pemble is relevant and admissible, not because the absence of such a disorder absolutely precludes one from committing this type of crime, but because it renders that outcome unlikely. *See also* Mueller & Kirkpatrick, *Modern Evidence* §4.12 at 293 (1995) (Federal equivalent of §904.04(1)(a) invokes "historic exception" to rule against admission of character evidence, permitting the accused to "offer evidence of a pertinent trait of his character to support an inference that he was unlikely to have committed the charged offense").

The fact that the evidence is presented by an expert, moreover, does not alter the standard of relevance. Pursuant to Wis. Stat. §907.02, testimony of a qualified expert is admissible if specialized knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." No one questioned Dr. Lodl's expertise; indeed, the state has asked him to testify in "sexual predator" cases to the effect that a particular individual likely will engage in future acts of sexual violence, using the same risk factors he used to find it unlikely that Pemble would commit a sex offense (R77:38-39). *See* Wis. Stat. §980.02(2)(c).

In any event, experts regularly are permitted to testify in terms of likelihoods and probabilities short of absolute certainty. *See, e.g.*, *State v. Peters*, 192 Wis.2d 674, 534 N.W.2d 867, 873 (Ct. App. 1995) (affirming admission of DNA, statistical probability evidence). The absence of absolute certainty goes only to the weight of that evidence, not its admissibility. *Id.*, 534 N.W.2d at 873.

Because the proffered evidence was highly relevant to Pemble's defense, the exclusion of that evidence violated not only

state rules of evidence, but his constitutional rights to due process and to present a defense as well. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 40 (1987) (recognizing criminal defendant's "right to put before the jury evidence that might influence the determination of the guilt"); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). *See also* Advisory Committee Notes to Fed. R. Evid. 404, quoted in *2 Weinstein's Federal Evidence*, §404App.01[2] at 404App.-2 (rule permitting character evidence to show that guilty is unlikely "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions . . .").

The exclusion of Dr. Lodl's testimony was not harmless beyond a reasonable doubt. *Dyess, supra*. Again, this was a close case, calling on the jury to assess whether S.F. misconstrued (at that time or later) Pemble's conduct as a sexual assault. Central to that assessment is not only S.F.'s age and susceptibility to suggestion, but also Pemble's own credibility and character.

Dr. Lodl was prepared to testify that Pemble had no diagnosable sexual disorder and thus was unlikely to molest a child. Even though that evidence would not have absolutely excluded the possibility of guilt, the jury easily could have accepted it, along with the testimony of the other defense witnesses and the evidence of susceptibility and opportunity for suggestion infecting the state's case, as raising a reasonable doubt. Indeed, the jury showed a desire for expert evidence on just this point, asking one defense character witness whether he had any educational training in determining if someone has a sexual interest in children (R74:121).

III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUMMARILY DISQUALIFYING TWO PROSPECTIVE JURORS, WITHOUT VOIR DIRE, BASED SOLELY ON THEIR PROBATIONARY STATUS

Just before voir dire was to begin on the first day of trial, the court granted the state's request summarily to disqualify two members of the jury panel on the grounds that they were on misdemeanor probation:

> THE COURT: . . . There are two jurors in the jury panel which I have instructed the clerk not to seat over the objection of Mr. Koch. One of those jurors is Sevick, S-E-V-I-C-K. The other is Beall, B-E-A-L-L.
>
> Those two particular jurors are on probation at the present time. The, the state is an adversary party in the sense that either one of them can be called on a probation review and the state will be on the opposite side. It is for that reason I'm excusing them.
>
> * * *
>
> The Court's basic ruling is, nobody should be seated on the jury in a criminal case where the opposing district attorney is an adversary party of them in an ongoing proceeding. Persons on parole have the district attorney as the representative of the state being their opponent.
>
> Oftentimes the DA comes up and argues cases in regard to the Department of Corrections on motions for review or much less sentencing after revocation.
>
> And under those circumstances, I think it would be just as improper as to have a party for instance who was opposed to the defendant in a case who had a

> judgment against him and still owes the defendant money. I don't think that a juror for instance should be on the, on the jury either.
>
> Given those circumstances, that's my ruling. I have instructed the clerk to make sure both of those individuals do not get seated; that they stay in the pool in the back, and eventually will be excused. . . .

(R73:3-6; App. 14-17).

Defense counsel objected that the individuals' probationary status did not necessarily preclude them from sitting on the jury, and that he was entitled to voir dire to determine whether they in fact could be fair and impartial despite that status (R73:4-5; App. 15-16), but to no avail. Pemble raised this issue again in his post-conviction motion (R54; R53:4-5), again without success (R83:5-13; App. 45-53).

The circuit court established a per se rule that individuals on probation are never eligible to serve on a jury in a criminal case, regardless whether they are actually biased against either party. That is not the law.

The legal qualifications of jurors in Wisconsin are set by statute:

> Every resident of the area served by a circuit court who is at least 18 years of age, a U.S. citizen and able to understand the English language is qualified to serve as a juror in that circuit unless that resident has been convicted of a felony and has not had his or her civil rights restored.

Wis. Stat. §756.02. A person who meets these qualifications is disqualified to sit only if he or she "is a party to any action triable by

jury at that time." Wis. Stat. §756.025. Otherwise, "[a]ll qualified persons shall have an equal opportunity to be considered for jury service in this state and the obligation to serve as jurors when summoned . . . for that purpose." Wis. Stat. §756.001(4).

There is no statutory exception for misdemeanor probationers. Rather, "[t]he *sine qua non* of whether a person is qualified to serve as a juror is whether he or she can be fair and impartial." *State v. Louis*, 152 Wis.2d 200, 448 N.W.2d 244, 246 (Ct. App. 1989), *aff'd*, 156 Wis.2d 470, 457 N.W.2d 484 (1990), *cert. denied*, 498 U.S. 1122 (1991). See, e.g., *Smith v. Phillips*, 455 U.S. 209 (1982) (no *per se* exclusion of juror who had pursued employment with the office of the prosecutor involved in the case); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (juror who can "render a verdict based on evidence presented in court" not disqualified despite "existence of any preconceived notion as to the guilt or innocence" of the defendant); *State v. Louis*, 156 Wis.2d 470, 457 N.W.2d 484 (1990) (police officers not *per se* ineligible to serve on criminal jury); *McGeever v. State*, 239 Wis. 87, 96-97, 300 N.W. 485 (1941) (past employment as a dance hall inspector under supervision of the local district attorney and sheriff did not *per se* disqualify person from jury service on criminal case).

"Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias." *Louis*, 457 N.W.2d at 487 (citations omitted). "The question of whether a prospective juror is biased and should be dismissed from the jury panel for cause is a matter of the circuit court's discretion," although "[t]he circuit court must be satisfied that it is more probable than not

that the juror was biased." *Id.* at 488.

Wis. Stat. §805.08(1) provides that

> "[t]he court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

The trial court did not "examine on oath" the two individuals to determine whether they in fact had any bias or prejudice in the case. Rather, it simply assumed that they would. This was error. *Louis, supra.*

The Supreme Court addressed a similar situation in *State v. Chosa*, 108 Wis.2d 392, 321 N.W.2d 280 (1982). There, the defendant, a Chippewa Indian, was charged with killing his half-brother. Nine of the 91 potential jurors summoned for the case were Native Americans residing on the same small reservation on which both the defendant and the victim had lived. After questioning three of those nine jurors, and receiving responses to the effect that they knew the parties and "had some personal fear" about the case, 321 N.W.2d at 282, the trial court asked all nine if they wished to be excused. When they said that they did, the court excused them all. *Id.*

The Supreme Court reversed the resulting conviction on this ground, despite defense counsel's failure to object. The Court held that the exclusion of the Native Americans without individual voir dire as to their qualifications not only violated the Equal Protection Clause, *id.* at 282-83, but also was an abuse of discretion. *id.* at 283-86. As the Court explained:

> The error in the exclusion of Native Americans as potential jurors in this case is that it was done as a result of the judge's presumption that all members of the class would be incompetent to serve due either to prior knowledge they might have of the parties or the crime or a fear to act. *This judgment was not permissible absent individual examination to determine the specific knowledge or attitude each juror possessed.*

321 N.W.2d at 283 (emphasis added).

The Court concluded. moreover, that the error mandated reversal, without regard to whether the jury ultimately impaneled in fact was fair:

> The issue is not whether the jury panel was representative of a fair cross-section of the community, but rather whether the deliberate removal of a class or group by the trial judge for "cause" without examination of individuals in the group deprived the defendant of a substantial right. We conclude that it did. The exclusion of the nine Native Americans from service as potential jurors without any established reason stigmatized the entire class and was an abuse of discretion. The trial court did not conduct any *voir dire* of six of the nine Native Americans, and even those who were questioned did not provide a sufficient basis for exclusion for cause. The defendant's substantial rights were affected and the appropriate remedy is reversal and a new trial.

Id. at 285-86.

Here, as in *Chosa*, the trial court's presumption that a particular class of individual would be incompetent to serve on the jury, without individual examination to support that presumption, was an abuse of discretion and reversible error.

Finally, "misdemeanor probationers" do not fall within that limited class of statuses in which "the mere probability of bias is so high that in order to assure a defendant the fundamental fairness to which the defendant is entitled, [the Court] must imply bias and exclude the juror as a matter of law." *See State v. Gesch*, 167 Wis.2d 660, 482 N.W.2d 99, 102 (1992).

Both the United States Supreme Court and the Wisconsin Supreme Court have been reluctant to exclude groups of persons on the basis of "implied bias." *Gesch*, 482 N.W.2d at 102; *Louis*, 457 N.W.2d at 488 (and cases cited therein). The potential juror's probationary status is not a good candidate to overcome that reluctance.

The trial court's concerns here were wholly speculative. The state's proffer did not suggest that either probationer in fact was involved in pending litigation against the prosecutor's office. Rather, it indicated only that they had been involved in such litigation in the past, resulting in their probationary status, and the possibility that they might be again in the future *if* they were charged with a probation violation (*see* R73:3-4; App. 14-15). In that sense, they were no different than anyone else who possibly might be charged with a crime someday. After all, courts presume probationers will follow the rules, or they would not have placed them on probation in the first place.

It likewise is speculative to assume that a probationer necessarily would be biased against state. It is just as likely someone in that position would want to be on the state's good side, *e.g.*, *Thompson v. State*, 300 So.2d 301, 303 (Fla. App. 1974), or to be scrupulously fair.

A simple likelihood of partiality toward the state is not a sufficient basis for implied bias, as is shown by decisions such as *Smith*, *Louis*, and *McGeever*. *See also United States v. Wood*, 299 U.S. 123, 149 (1936) (Government employees not impliedly biased). Accordingly, a similar possibility of prejudice against the state likewise should not be sufficient.

IV.

THE TRIAL COURT'S REFUSAL TO STRIKE FOR CAUSE A PROSPECTIVE JUROR WHO EXPRESSED CONCERN ABOUT HER ABILITY TO GIVE AN HONEST JUDGMENT DUE TO THE FACT SHE WAS RAPED AS A CHILD MANDATES REVERSAL.

During voir dire, prospective juror Kerhin requested a chambers conference at which she disclosed that she had been raped as a young child (R73:115-17). When questioned, she could not say whether the experience would cause her to lean one way or the other in the case (*id.*:116-17, 118). Although she thought that she could listen to the case and the defense, she admitted that she would have a difficult time giving an honest judgment:

> MR. KOCH: Why are you hesitating when you say you don't know?
>
> PROSPECTIVE JUROR KERHIN: Well, sometimes when I read stuff in the paper I always say,

"Hang the guy," you know, but that's, I mean, you know --

MR. KOCH: Okay. And so you think it'd be difficult for you to listen to this case?

PROSPECTIVE JUROR KERHIN: No, I think I could listen to it, *just I don't know if I could give an honest judgment on it.* I don't know.

MR. KOCH: You'd have difficulty in doing that?

PROSPECTIVE JUROR KERHIN: Think so.

MR. KOCH: Have difficulty in having us present a defense to this type of an offense and believing that defense?

PROSPECTIVE JUROR KERHIN: I don't know, I don't know for sure. I can't say.

(R73:119 (emphasis added)). Ms. Kerhin further admitted that her "mind does sway" toward thinking a person is guilty simply because he was arrested (R73:119-20).

The trial court acknowledged that additional questions would have been helpful, but nonetheless denied defense counsel's request to strike Ms. Kerhin for cause:

> This juror is apparently, as far as I can see, going to try to be as fair and honest as possible. I was waiting to see if anybody would ask some more questions that might have helped a little bit; but as far as I can see, this is an impartial juror. It's -- she's going to do the very best; she's going to listen to both: she requires the state to prove its case beyond a reasonable doubt. I will not excuse this juror, at least not for cause.

(R73:122-23; App. 34-35). Pemble accordingly was forced to use a peremptory strike to remove her (R26). The court denied Pemble's post-conviction motion for a new trial on this ground (R83:14-15; App. 54-55; *see* R54; R53:4-5).

Pursuant to statute, the court must examine a juror to determine if the juror is aware of any bias or prejudice in the case. "If a juror is not indifferent in the case, the juror shall be excused." Wis. Stat. §805.08(1).

"Whether to dismiss a juror for cause rests with the discretion of the court." *State v. Zurfluh*, 134 Wis.2d 436, 397 N.W.2d 154 (Ct. App. 1986); *see State v. Ramos*, 211 Wis.2d 12, 564 N.W.2d 328, 330 (1997); *State v. Nienhardt*, 196 Wis.2d 161, 537 N.W.2d 123, 125 (Ct. App. 1995). This Court will find an erroneous exercise of discretion on appeal if the trial court's decision is based on an error of law. *Ramos*, 564 N.W.2d at 330.

"A juror who believes he or she cannot decide the case fairly on the evidence should be excused." *Zurfluh*, 397 N.W.2d at 155, citing *Nyberg v. State*, 75 Wis.2d 400, 249 N.W.2d 524, 526 (1977). In addressing a motion to strike a prospective juror for cause, the trial court "must honor challenges for cause whenever it may reasonably suspect that circumstances outside the evidence may create bias or appearance of bias." *Nyberg*, 249 N.W.2d at 526. In light of §805.08(1), failure to excuse for cause a juror who states that she "might not be able to be fair" is reversible error. *Zurfluh*, 397 N.W.2d at 155. The failure to follow the statutory mandate under §805.08(1) is an error of law and thus an abuse of discretion. *Id.*

This Court's decision in *Zurfluh* is directly on point. The

Court there held that the trial court abused its discretion when it failed to strike for cause a potential juror "after she openly doubted her ability to be impartial." 397 N.W.2d at 154. The facts in that case are strikingly similar to those here:

> On voir dire, Hollander said she felt she "might not be able to be fair." When the court explained to her the duties of a juror, Hollander said she understood. The court then asked Hollander whether she would have a problem in making a fair and impartial determination of the evidence. She replied: "I don't know. I might. I'm afraid I might. I wouldn't want to have; but I'm afraid I might. I'm just being honest."

Id. at 155.

Like the juror in *Zurfluh*, Kerhin candidly stated her concern that, although she could listen to the evidence, her experience of being raped as a small child would make it difficult for her to give an honest judgment in this case. As in *Zurfluh*, therefore, disqualification was required as a matter of law. 397 N.W.2d at 155.

It is true that a juror who expresses an opinion or bias may still serve on the jury if the person "can lay aside his or her opinion and render a verdict based on the evidence presented in court." *State v. Sarinske*, 91 Wis.2d 14, 280 N.W.2d 725, 733-34 (1979). However, the juror must be excused for cause "[i]n the absence of further clarification of her doubts." *Zurfluh*, 397 N.W.2d at 155. As in *Zurfluh*, the court here did not resolve the matter by further examination. 397 N.W.2d at 155.

Like the juror in *Zurfluh*, Kerhin did not share the court's opinion of her ability to be fair. She did not waiver from her admission that she would listen to both sides but would have a

difficult time giving an honest judgment, stating instead only that she "hope[d]" she would not identify with either side (R73:121). The trial court's refusal to excuse Ms. Kerhin for cause, therefore, was an error of law and a misuse of discretion. *Zurfluh*, 397 N.W.2d at 155.[8]

Where, as here, the trial court erroneously fails to strike a juror for cause, so that the defendant must use a peremptory challenge to remove that juror, reversal for a new trial is mandatory. *Ramos*, 564 N.W.2d at 329 ("[T]he use of a peremptory challenge to correct a trial court error is adequate grounds for reversal because it arbitrarily deprives the defendant of a statutorily granted right").

CONCLUSION

Mr. Pemble is entitled not to a perfect trial, but to a fair one. Because the trial court's errors deprived of both a fair trial and his statutory rights, he respectfully asks that this Court reverse the judgment of conviction and remand for a new trial.

Dated at Milwaukee, Wisconsin, December 19, 1997.

---

[8] The court's refusal to excuse Ms. Kerhin for cause is especially troubling given it's summary disqualification of two prospective jurors with no showing of any inability to act impartially, *see* Section III, *supra*, as well as its decision just moments earlier to excuse another juror for cause, and over defense objection, for stating concerns similar to those of Ms. Kerhin (R73:87-94).

Respectfully submitted,

RICHARD A. PEMBLE, Defendant-Appellant

SHELLOW, SHELLOW & GLYNN, S.C.

Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

222 East Mason Street
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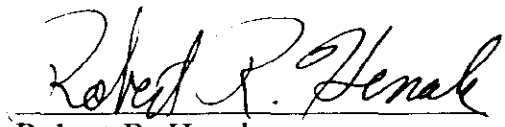
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,928 words.



Robert R. Henak

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 97-2737-CR
(Walworth County Case No. 96-CF-6)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD A PEMBLE,

Defendant-Appellant.

APPENDIX
OF DEFENDANT-APPELLANT

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Counsel for Defendant-Appellant

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 97-2737-CR
(Walworth County Case No. 96-CF-6)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD A PEMBLE,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT

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State of Wisconsin, P ill 3RD AMENDED
-vs- (**see over)

Richard A. Pemble, Defendant
02-21-28
Defendant's Date of Birth

TY . CONVICTION (Select One)
___ Sentence to Wisconsin State Prisons
X Sentence Withheld, Probation Ordered
___ Sentence Imposed & Stayed, Probation Ordered

COURT CASE NUMBER 96CF00006

The [ ] Court [X] Jury found the defendant guilty of the following crime(s):

CT.	CRIME(S)	WIS STATUTE(S) VIOLATED	PLEA	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
IRST DEGREE SEXUAL ASSAULT OF A CHILD - Ct. #1 of Information		948.02(1)	not guilty	F	B	01/02/96
NTIMIDATION OF VICTIMS; MISDEMEANOR - Ct. #2 of Information		940.44(1)	not guilty	M	A	01/02/96

IT IS ADJUDGED that the defendant is convicted on 10-17-96 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 12-20-96 is placed on probation for Ct. #1-ten(10) years and on Ct. #2-two(2) years CONCURRENT

CONDITIONS OF SENTENCE/PROBATION

Obligations: (Total amounts only)

Fine (includes jail assessments; drug assessments; penalty assessments) $ none

Court costs (includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees) $ 166.00

Attorney fees $ none

Restitution See Cond. #6 over $ "0"

DNA Anal. Surcharge See Cond. #5 over $ 250.00

Other $ none

Mandatory victim/witness surcharge(s)
felony one(1) counts $ 70.00
misdemeanor one(1) counts $ 50.00

Jail: To be incarcerated in the county jail/HOC for Count #2 - six(6) months with work release for any treatment only to commence on 1-10-97 @ 8:00 am. Court delays the commencement if*

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

Miscellaneous

*at end of three(3) weeks(by 1-10-97 @ 8:00 am) there are medical reports that tell court the jail sentence would be life threatening and contrary to medical advice. Court may consider confinement at home under bracelet program. DA can ask for a hearing if doctor reports indicate this

SEE OVER FOR CONDITIONS OF PROBATION AND FOR FURTHER INFORMATION

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
Hon. Robert J. Kennedy

DISTRICT ATTORNEY
Daniel R. Goglin, Asst. District Attorney

DEFENSE ATTORNEY
Robert R. Henak

WINNEBAGO COUNTY CIRCUIT COURT NOV 3 1997 Clerk of Courts, Winnebago Co.

BY THE COURT:

Robert J Kennedy
Circuit Court Judge

November 3, 1997 nunc pro tunc
December 20, 1996
Date Signed

DEPARTMENT OF CORRECTIONS cc: Shf. Dept.;Prob. Dept.
DOC-20 (Rev. 08/96)

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

[redacted]

IT IS ORDERED THAT THE WALWORTH COUNTY SHERIFF'S DEPARTMENT HAS THE AUTHORITY TO TRANSFER THE DEFENDANT'S HUBER/WORK RELEASE WITHIN THE STATE.

Huber/work release may be revoked/reinstated by the jail after appropriate suspension per 303.08(10)/973.09(4) stats. without court order for reporting late or with alcohol or controlled substances in or on body.

CONDITIONS OF PROBATION:

1) No contact with child victim or mother or sibling or father of victim.
2) Go through counseling including sex offender treatment as agent requires - not to be D Carlson.
3) No contact with minors except in presence of their parents or a social gathering of ad where children are commonly present, i.e. church services, church rummage sale.
4) Register as a sex offender.
5) Submit DNA sample and pay surcharge.
6) Pay restitution for any counseling costs for victim - hold open for six(6) months.
7) Perform five hundred(500) hours of community service work on Count #2 consistant with restriction of no contact with minors - can do community service work in jail.
8) Pay costs - set up payment plan with agent.

**1/29/97 AMENDMENT: Court Orders defendant's jail time to commence on 2/12/97 @ 8:00 a.m. and must serve the sentence in the main jail (not the huber dorm). Defendant to be released with suitable transportation arranged by defendant for any doctor visits and treatment. Court Orders the jail that if at any time they determine because of changes in defendant's medical condition they cannot provide suitable and safe medical assistance, defendant will have to be released immediately to home care and Court so advised.

**2/11/97 AMENDMENT: Court grants stay of jail time and balance of sentence remains in effect pending appeal. Court sets $5,000 signature bond.

WALWORTH COUNTY CIRCUIT COURT State of Wisconsin

State of Wisconsin)SS
County of Walworth)
I, [illegible], Clerk of the Circuit Court of Walworth County, Wisconsin, and keeper of the records and files thereof, do hereby certify that foregoing is a true and correct copy of the original document as it appears in the files in my office.
Given this 7th day of Oct 1997
[signature]
Clerk of Courts

**11/03/97 AMENDMENT: Conditions of Probation #3 modified to add "If pre-approved by the Probation Agent". As to condition #2, STAYED as of 11/2/97 pending appeal.

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

RICHARD PEMBLE,

Defendant.

FILED
CIRCUIT COURT
OCT 03 1997
WALWORTH CO.
BY SENTA HOLMES

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Case No. 96-CF-6

The above referenced matter having come on for a hearing on the defendant's motion for a new trial on the 22nd day of August, 1997, the State appearing by Assistant District Attorney Daniel R. Goglin, and the defendant appearing in person and by his attorneys, Seymour, Kremer, Nommensen, Morrissy & Koch, by Steven A. Koch, and the court having reviewed the file, reviewed the motion and memorandum of law, and heard the arguments of the parties, and being fully advised in the premises,

NOW THEREFORE, it is hereby ordered:

1. That for the reasons stated on the record, the defendant's motion for a new trial is hereby denied.

Dated this 3 day of September, 1997.

BY THE COURT:

Robert J. Kennedy

Honorable Robert J. Kennedy

Attorney Steven A. Koch
Seymour, Kremer, Nommensen, Morrissy & Koch
23 N. Wisconsin Street
P. O. Box 470
Elkhorn, WI 53121
414-723-5003

STATE OF WISCONSIN CIRCUIT COURT, BRANCH I WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

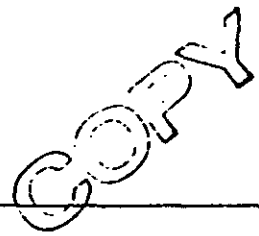
v.

RICHARD PEMBLE,

Defendant.

MOTION HEARING

CASE NO. 96-CF-06



TRANSCRIPT OF PROCEEDINGS

Transcript of proceedings in the above-entitled action before the Honorable Robert J. Kennedy, Circuit Judge, Walworth County Circuit Court, Elkhorn, Wisconsin, on April 15, 1996.

APPEARANCES

Assistant District Attorney Daniel R. Goglin, Elkhorn, Wisconsin, on behalf of the plaintiff.

SEYMOUR, KREMER, NOMMENSEN, MORRISSY & KOCH, by Steven A. Koch, Elkhorn, Wisconsin, on behalf of the defendant.

The defendant in proper person.

Janet Kronwall
Court Reporter

"Well, why are you so late?" "Oh, I had a flat tire." And then we accept that. And then later on something would come up and it would be retalking about that same day, and I'd say, "I thought you had a flat tire?" "Oh, no, it wasn't that day. I had the flat tire another day."

So I mean, these are the kinds of things that keep popping up. I can't write it down, sir, and tell you exactly the day or the time or what it is. It's just constant falsehoods. And when she's mad it's twice as bad.

MR. GOGLIN: I have no further questions.

THE COURT: Any further?

MR. KOCH: No, your Honor.

THE COURT: All right. You may step down.

Well, I'm going to rule.

As I say, it's a close case. But there is enough here to say there's more than a mere possibility. I'm not saying any more than that.

Given that there is more than a mere possibility that she might be unable to perceive reality, I think it is incumbent upon the Court to order that she be willing to -- and I don't order her to do it -- I require though that the state provide us with records. And they'll have to get waivers and provide those records, and then I'll have to review them. And I know the problem that presents for the state.

But I do think under these circumstances with this history, that the case law requires me, given the finding as I see it, that I review these records in camera.

I have always preferred a system -- not always, but more recently always -- preferred a system where both attorneys look at the records, which I'm not going to do in this particular case, but it may come to that.

The reason I say I want to mention it is, it's always very difficult for a court to understand exactly what is exculpatory because the attorneys on the two files, the opposing sides, understand their cases much better than the Court does. The Court usually has a complaint and what it's heard in various argument, whereas the attorneys know all sorts of stuff that the Court doesn't even know at all.

But I will be looking at these records myself since I think that's the appropriate thing to do to start, with the idea of determining if there is any medical confirmation that she is unable to perceive reality. And I'll test that by either medical opinions to that effect or information in the medical records that indicate that she has falsely given information, and then the medical records confirm that the information was false and there is a suggestion that it was false because she did not understand, she could not understand the difference between truth and falseness.

If I don't find any of that, then I will conclude that

there is no exculpatory evidence of the type that the defense is seeking and will not reveal any portion of it. If I do find that, then I will convene both parties to talk about what I find and even let them look at it independently.

There is, as I say, an advantage to having the defense counsel and the state look at those together. And I think I'm -- if I find something where it's really debatable in my mind, then I may have the two attorneys look at that and argue whether it is exculpatory or not and whether it fits into the criteria I've been talking about.

That's going to be my ruling on that particular matter.

MR. GOGLIN: Pardon me, your Honor, I understand the Court's ruling, but to assist us on this matter -- and I don't -- trying not to be offensive, but could -- which is real difficult for me not to be offensive -- but could the Court make some findings of fact --

MR. KOCH: No objection.

MR. GOGLIN: -- as to what evidence there is that there is more than a mere possibility that this person has a psychiatric disorder or illness that affects her ability to distinguish reality or to relate the truth?

THE COURT: First of all, there is the testimony of the mother, which I have now heard in detail, which

suggests that she has had a mental illness problem for some time. And that as a part of that mental illness, she will report facts to her mother and then later on change the story and, and talk to her mother inconsistently, give inconsistent historical information.

She has told her mother that she has a -- has been diagnosed as having a multiple personality disorder. Mr. Goglin is probably right; I'm too much of a neophyte to understand what that means, and he has his own opinion of it, but it does suggest to me that there is some inability or may be some inability to understand reality.

Who she is, for instance, is part of that reality. And if she has a multiple personality disorder and she has reported that that's how she's been diagnosed, then at least in one of those personalities I believe she is distorting reality and is unable to perceive it.

That coupled with the history of treatment and the medication, although that's somewhat vague, it is enough to raise it above mere possibility that she may not be able to perceive reality and thus requires, for the protection of the defendant's rights, for the Court to look to see if in fact there is further confirmation of that within those medical records.

MR. GOGLIN: As to the, the -- I'm sorry, is the Court finished?

STATE OF WISCONSIN CIRCUIT COURT, BRANCH 1 WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff, MOTION HEARING

v. CASE NO.96-CF-06

RICHARD A. PEMBLE,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Transcript of proceedings in the above-entitled action before the Honorable Robert J. Kennedy, Circuit Judge, Walworth County Circuit Court, Elkhorn, Wisconsin, on October 1, 1996.

APPEARANCES:

DANIEL GOGLIN, Assistant District Attorney, P.O. Box 1001, Elkhorn, Wisconsin, on behalf of the plaintiff.

STEVEN A. KOCH, Attorney at Law, Elkhorn, Wisconsin, on behalf of the defendant.

The defendant in proper person.

Sandra S. Elderbrook

Court Reporter

MR. KOCH: It doesn't explicitly state that in there, your Honor. But Dr. Lodl, having done thousands of examinations in sexual predator cases and other types of cases, I believe, will reach that type of an opinion. I -- I would need to discuss that with him.

THE COURT: Well, all right. Here's what I'm going to do. I'm going to semi rule against the State, not necessarily finally.

First, it seems to me that in order for this to be, um, relevant testimony on a character -- a pertinent character trait, there must be some showing that Dr. Lodl would have a professional opinion, first of all, that the absence of a sexual disorder or -- excuse me -- that it would require the presence of a sexual disorder even to commit this type of offense. Not saying that he'd testify to that before the jury, but at least he would have to have that because otherwise I don't see how it's relevant. The fact that he doesn't have a sexual disorder if a -- if a person sexually assaults a child, and Lodl can still say he doesn't have a sexual disorder, then it's not relevant. Do you follow what I'm saying?

MR. KOCH: I'm sorry, your Honor.

THE COURT: I'll try it again. If Lodl says that a person can sexually assault a child and not have

a sexual disorder, then I don't see how his testimony could ever be relevant because it doesn't mean anything then. It does not mean that the absence of a sexual disorder means it's less likely he committed a sexual assault. So starting it out, Lodl is going to have to be able to testify outside the presence of the jury that he has an opinion that if a person does not have a diagnosable sexual disorder, um -- Excuse me. Let me put it a different way.

He's got to be able to testify that if Mr. Pemble sexually assaulted this child, he would have a diagnosable sexual disorder. If he can't do that, then it doesn't make any difference; the fact that he doesn't have a sexual disorder wouldn't make any difference. If that first, um -- um, hurdle is left, then he would also have to be asked in the presence of the jury --

MR. GOGLIN: You mean, outside the presence?

THE COURT: No, it would be in the -- Oh. Excuse me. Outside -- Again, outside the presence of the jury, "Do you have an opinion to a reasonable degree of professional certainty as to whether or not the defendant has a sexual disorder?" And again, if he says "No", that ends it. If he says, "Yes," then the next question is, "What is your opinion?" If he says that "My opinion is that he does not have a sexual disorder,"

then we've completed the, um -- the showing that you need; and we can go before the jury and ask the last two questions before the jury again, not the first question.

All right. So it's granted if those are met. Check with Mr. Lodl and make sure that he can say that. If he can't --

MR. KOCH: I'll advise the Court and Mr. Goglin.

THE COURT: Okay. And I'm finding, by the way, if he can say all those things, um, then it would be a pertinent character trait under Section 904.04(1)(a).

THE CLERK: Wait a minute. 904 what?

THE COURT: .04(1)(a). I'll say it again. 904.04(1)(a).

MR. KOCH: May I provide the Court with a copy of Dr. Lodl's report? That's mine.

THE COURT: I think it's necessary. We should make it a part of the record.

MR. GOGLIN: Judge, could I ask for some clarification on a, um, prior Order of, um, disclosure of records of the child's mother?

THE COURT: You can try. I'll try and call to memory what you're talking about.

MR. GOGLIN: The Court had ordered that the

COPY

STATE OF WISCONSIN CIRCUIT COURT, BRANCH I WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

RICHARD A. PEMBLE,

Defendant.

JURY TRIAL, DAY 1

CASE NO. 96-CF-06

COPY

TRANSCRIPT OF PROCEEDINGS

Transcript of proceedings in the above-entitled action before the Honorable Robert J. Kennedy, Circuit Judge, Walworth County Circuit Court, Elkhorn, Wisconsin, on October 14, 1996.

APPEARANCES

Assistant District Attorney Daniel R. Goglin, Elkhorn, Wisconsin, on behalf of the plaintiff.

SEYMOUR, KREMER, NOMMENSEN, MORRISSY & KOCH, by Steven A. Koch, Elkhorn, Wisconsin, on behalf of the defendant.

The defendant in proper person.

Janet Kronwall
Court Reporter

PROCEEDINGS

(Discussion off the record)

(8:08 AM, in chambers)

THE COURT: We're on the record on State of Wisconsin vs. Richard A. Pemble, P-E-M-B-L-E. This is 96-CF-6.

Attorney Koch and the defendant appear; so does Mr. Goglin for the state.

Two things to start off with. There are two jurors in the jury panel which I have instructed the clerk not to seat over the objection of Mr. Koch. One of those jurors is Sevick, S-E-V-I-C-K. The other is Beall, B-E-A-L-L.

Those two particular jurors are on probation at the present time. The, the state is an adversary party in the sense that either one of them can be called on a probation review and the state will be on the opposite side. It is for that reason I'm excusing them.

However, there are more reasons that Mr. Goglin wishes to put on the record which I myself might not consider enough, but collectively it certainly strengthens my ruling.

However, Mr. Koch has also an objection. I'm going to hear Mr. Goglin briefly to expand his reasons, and then Mr. Koch to state his objection.

MR. GOGLIN: First, both of those jurors, Beall

and -- both Beall and Sevick are on probation in this county for offenses prosecuted by our office.

Mr. Beall was convicted of disorderly conduct and two bail jumpings from a total of three different files. There was also a physical abuse of a child that was dismissed and read in.

I believe there was a review this year, this spring, where the Court imposed as a probation review a jail sentence of sixty days and stayed it.

THE COURT: In addition to the original sentence?

MR. GOGLIN: Yes.

Mr. Sevick was prosecuted by myself for what started out as a felony drug case. There were a number of misdemeanors. He ultimately pled to three misdemeanors.

This was a very acrimonious prosecution from Mr. Sevick's perspective. He did not like the way the police handled it. He did not like the way the district attorney's office handled it. I required that he give a debriefing; he refused to give a debriefing. Accordingly, there was jail imposed as a condition of probation. He is still on probation. He was convicted in March of '95.

Mr. Beall was convicted in August of '95.

THE COURT: Mr. Koch, your response?

MR. KOCH: Your Honor, I don't believe that that information absolutely precludes these individuals from

sitting on the, on the jury.

I believe I have the right to have them put in the pool and potentially sat if I can voir dire them and determine that they are able to keep a fair and open mind regarding the facts and situations of this case and they are able to decide this case strictly on the facts and the law presented to them in this case.

THE COURT: The Court's basic ruling is, nobody should be seated on the jury in a criminal case where the opposing district attorney is an adversary party of them in an ongoing proceeding. Persons on parole have the district attorney as the representative of the state being their opponent.

Oftentimes the DA comes up and argues cases in regard to the Department of Corrections on motions for review or much less sentencing after revocation.

And under those circumstances, I think it would be just as improper as to have a party for instance who was opposed to the defendant in a case who had a judgment against him and still owes the defendant money. I don't think that juror for instance should be on the, on the jury either.

Given those circumstances, that's my ruling. I have instructed the clerk to make sure both of those individuals do not get seated; that they stay in the pool in the back,

and eventually will be excused.

I trust we won't excuse enough jurors for cause to have to even get down to them to have the danger of making some arrangements to make sure they're not called further. The reason I do that is not to embarrass them nor to let the other jurors even know about that particular matter which is of no concern to me. Okay.

MR. GOGLIN: A few others things.

THE COURT: Okay.

MR. GOGLIN: I don't know if these need to be on the record. I'm going to be moving around a bit, just in case the Court did want these on the record.

I know that the Court has received some additional mental health counseling records from Kathleen Fraher. The Court told us before we went on the record that it has reviewed these and there were minimal things that it would disclose.

Not knowing what the Court would ultimately rule and now finding out what the Court's ruling is, I think it's incumbent upon me to address a few things.

One, I think there should be no mention, I would ask that there be no mention by defendant or his counsel, either questioning any witness, that Kathleen Fraher has been hospitalized for mental and/or emotional problems, hospitalized. .

THE COURT: Any response?

MR. KOCH: Yes, your Honor. I believe that goes contrary to the case law in the State of Wisconsin. Sturdevant, S-T-U-R-D-E-V-A-N-T, vs. State, 49 Wis.2d 142, a 1970 decision, states:

> As a general rule, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.
>
> A witness may be cross-examined to test his intelligence, this rule applying although the Court has held him competent to testify; and, as bearing on the question of the credibility of his testimony, he may be cross-examined as to his mental condition at the time of testifying, or at the time to which his testimony referred ...

Few other things that aren't relevant but as to a witness's physical condition.

In addition, in Johnson vs. State, in citing the Sturdevant decision, 75 Wis.2d 344, 1976 decision, states: "Inquiry into the existence of and treatment for mental affliction is proper where it appears that a connection exists between the affliction and the reliability of the witness's testimony."

Some other decisions. Chapin, C-H-A-P-I-N, vs. State, 78 Wis.2d 346. And Hampton, H-A-M-P-T-O-N, vs. State, 92 Wis.2d 450.

This is not a situation where Ms. Fraher was hospitalized 25 years ago or ten years ago or five years ago. She was hospitalized less than sixty days ago, your Honor. She has serious -- apparently she has serious mental disorders, and I believe we have the right to cross-examine her because it goes directly to her ability to recall what happened.

THE COURT: How do you know that?

MR. KOCH: Well, I don't. I'm assuming it does. You haven't released the records to us so we can review that, your Honor.

THE COURT: You can assume it does not, counsel. There is nothing in those records, which I would have given you if there were, to suggest in any way that she has any problem with recall.

MR. KOCH: I think it goes directly to her credibility on this matter, your Honor.

THE COURT: So if a person's being treated for emotional conditions, that means she is more likely to be less credible?

MR. KOCH: I think it's something the jury can take into consideration when weighing the credibility of

the various witnesses' testimony, including their demeanor, including their appearance, including the other items that are listed in the jury instructions.

This is not a situation where someone has had a short period of counseling or is going once a month. This is hospitalization, your Honor. For a thirty-day period. Twice within the last three years.

THE COURT: Hmm, I wonder what would happen if the defendant was going to take the stand and had some emotional conditions like that, how you would argue the converse. But I'll hear from Mr. Goglin.

MR. GOGLIN: Yes, the starting point is, there is no evidence connecting her hospitalization or counseling to her ability to distinguish between reality, to properly recall and relate information, or even to tell the truth.

The Court has recognized that by refusing to disclose information from the counseling records.

Therefore, there is no evidence that he has.

The only thing that questioning on such a witness would do would bring up the general specter of counseling to play into prejudices and passions and so forth, on something that is -- has no relevance. And the prejudicial effect would sub- -- improper prejudicial effect, would substantially outweigh any probative value.

MR. KOCH: Your Honor, everything we're going to

bring up is going to be prejudicial to the state; I'm sure the Court is well aware of that. It's my understanding that she is still receiving psychotropic medication, which I don't know what they are because we haven't seen those records, but which the Court, when it takes a guilty plea from a defendant, questions them as to what medications they're taking so they understand what's going on and so they're able to comprehend the nature of the proceedings.

It's my client here who is facing a potential 40-year sentence, which for him will amount to a life term. I think that's the primary consideration this court should be considering here, and I believe it's -- goes directly to Miss Fraher's credibility in this case.

THE COURT: All right. The Court's ruling, as I have carefully reviewed these particular records, one may well be able to stretch incredibly distantly to come up with some claims that it might affect his [sic] credibility. But I don't see any connection at all in that regard. I have given the only matters that I believe would be a possible effect upon her credibility in regard to this matter.

MR. KOCH: I -- your Honor?

THE COURT: I -- excuse me, Mr. Koch, I heard your argument.

MR. KOCH: Just one -- we have certain records,

and it says where they came from, so I'm precluded from introducing the records that you gave us that you found to be relevant to this case?

THE COURT: Hold it, I'm just finishing my ruling on this case.

Okay. Continuing on, on this particular question, you can't go into her mental or emotional conditions. You cannot ask her for instance if she's been recently hospitalized, et cetera.

You may ask her, obviously, questions about how -- what her feelings are about her mother, her father, her brothers, et cetera. You can question her about whether she has any anger against her mother, et cetera.

And if she fails to answer honestly that she has for instance a situation in the past where she claims her mother beat her, abused her, if she denies that her, her father or brothers abused her, you can impeach her with the record you have on that. Otherwise there should be no need to mention whatsoever that she's on present ongoing emotional treatment.

Now going back, I recognize the cases you saw -- you cited. But I don't see any connection between her reliability and her treatment at all. And I think that's essential. The second case you cited and cited from states that appropriate rule. There's no connection.

The, the motion -- actually that's the motion of the state -- is granted, and no mention of her present emotional treatment or hospitalization, et cetera, except in the limited vein that I've suggested.

MR. KOCH: I guess for the record, your Honor, I spoke last Tuesday or Wednesday, I don't recall what day it was --

THE COURT: I know the records reflect you spoke to the doctor.

MR. KOCH: No, no, the doctor, that's not who I'm talking about.

THE COURT: Okay, go ahead.

MR. KOCH: I spoke with Robert Pierson, who the Court well knows is a private investigator. He had served Miss Fraher with process for a different law firm. And he advised her -- he advised me that she was -- it was obvious that she was mentally ill; that she appeared to be a zombie when he tried to serve her with papers. That everyone in the apartment complex that he spoke to told him that she was mentally ill.

THE COURT: Then she should apparently be so when she takes the stand.

MR. KOCH: But if she's not, I don't have the right to cross-examine her?

THE COURT: The fact that she's mentally -- what

do you mean, if she, if she's not? If she doesn't appear --

MR. KOCH: Correct.

THE COURT: -- mentally ill, there's no reason to. And if she appears mentally ill, the jury can weigh that in weighing her credibility, without going into the rest.

Okay, next point?

MR. GOGLIN: Could I ask for some clarification on your ruling?

You stated that she could be asked if she harbors any resentment towards her father and brother. Respectfully, judge, I don't understand what animosities towards her father and brother because of her victimization has to do with anything that's relevant. And even if it is relevant, the probative value is substantially diminished by the improper prejudicial effect.

THE COURT: You're re-covering an area we covered before. The idea that the defense had, as I understand it, is that she had a reason to be angry at her mother for failing to protect her.

MR. GOGLIN: Okay.

THE COURT: On that, therefore anger against her brother and father, as long as it's connected up with the anger towards the mother by questioning, is a suitable area

of inquiry. I've allowed it. And that's why I've given a lot of those records.

MR. GOGLIN: And you're going to allow him to inquire into why she is mad at them?

THE COURT: Yes.

MR. GOGLIN: Her own victimization by them?

THE COURT: Yes, I am.

MR. GOGLIN: Okay. In light of the -- or in line with my first motion, I want to make it very clear that there should be absolutely no mention of multiple personality disorder.

THE COURT: I agree with that.

MR. KOCH: And the Court's making a ruling that that has no bearing on her credibility?

THE COURT: No bearing on her credibility.

MR. GOGLIN: Given the lack of evidentiary connection.

THE COURT: That's the whole point. There's no connection between that and her reliability, her ability to recall. There's no suggestion in any of these medical records the fact that she has those means she cannot recall. She knows what every one -- I'll state this for the record to complete it -- she knows what every one of the personality says and remembers.

MR. KOCH: And that alone is not damaging towards

her credibility, your Honor?

THE COURT: No, it is not. No, it is not.

MR. GOGLIN: Seeking clarification on the two rulings that the Court has made, is the Court precluding the defendant -- and I'm asking that there be no mention that she's on medication for emotional and mental health problems, because I --

THE COURT: That's the same thing.

MR. GOGLIN: Okay.

THE COURT: Can't inquire into that.

MR. GOGLIN: Next, the child's father, Thomas Fraher, is in prison. He has been in prison for approximately five years as a result of sexually abusing the child's older stepsister, Katie. Katie is now 15 or 16, maybe 17. And he sexually abused Katie I think when she was 11 or 12.

I make a motion that there be no reference to the fact that Thomas Fraher is in prison or that he's in prison for sexually abusing the child's older stepsister Katie, because it's absolutely -- there is absolutely no relevance. If there were any relevance, the relevance is substantially outweighed by improper prejudice.

MR. KOCH: We don't intend to raise that issue, your Honor.

MR. GOGLIN: Okay.

COURT REPORTER: We have the call too.

THE COURT: Yeah, don't forget the criminal call.

MR. GOGLIN: He's my first witness; can I tell him to come back at one?

THE COURT: Between closing arguments and opening instructions and still Mr. Koch has to go, I can't conceive that we will finish before twelve and be ready for the first witness. So yes.

MR. GOGLIN: Okay, thank you.

THE COURT: All right. Are we all set otherwise?

MR. GOGLIN: Yeah. Can I swing through the restroom?

MR. KOCH: I'd like to do that also, your Honor, if I could.

THE COURT: I will too. I hope my clerk and court reporter take advantage.

(Discussion off the record)

(Prospective Juror Kerhin enters chambers)

THE COURT: All right, we're back on the record. Miss Kerhin, you indicated that you may have something you wanted to talk about confidentially?

PROSPECTIVE JUROR KERHIN: Well, I didn't know if I had to wait 'till you asked a direct question or not, you know, but I was raped as a little girl.

THE COURT: Okay.

PROSPECTIVE JUROR KERHIN: And my father took care of it, that's why I didn't say anything, you know, 45 years ago.

THE COURT: Okay, that's very appropriate for you to let us know. I'm going to let the two attorneys ask you some questions to see if that's important.

Go ahead, Mr. Goglin.

PROSPECTIVE JUROR KERHIN: Okay.

MR. GOGLIN: 45 years ago?

PROSPECTIVE JUROR KERHIN: Yes.

MR. GOGLIN: Your dad took care of it?

PROSPECTIVE JUROR KERHIN: (Nods head)

MR. GOGLIN: Do you -- and I tried to -- I sensed when you raised your hand that you possibly had been victimized, and I didn't want to pursue things any further.

Was that an experience that you think now that all those things should be handled that way, with the dads or the boyfriends?

PROSPECTIVE JUROR KERHIN: I don't know, I have no idea.

MR. GOGLIN: Okay.

JUROR KERHIN: It was just done that way at --

MR. GOGLIN: Having had that, is there something about that experience that would cause you to lean one way or the other to the parties in this case?

PROSPECTIVE JUROR KERHIN: I don't know, to be honest. I don't really know.

MR. GOGLIN: Could I ask how old you were when this happened?

PROSPECTIVE JUROR KERHIN: I was like first grade.

MR. GOGLIN: First grade. Was it a relative?

PROSPECTIVE JUROR KERHIN: It was just a tenant living in the house.

MR. GOGLIN: And they never reported it to the police?

PROSPECTIVE JUROR KERHIN: No.

MR. GOGLIN: Did you tell your dad right away?

PROSPECTIVE JUROR KERHIN: I -- the next day I think I told the whole family, you know.

MR. GOGLIN: Okay.

PROSPECTIVE JUROR KERHIN: But it left some scars for a while.

MR. GOGLIN: Okay. We all come here with life experiences. One of the reasons we have jurors as opposed to computers is so that you bring your life, the common sense, your knowledge from the way the world operates from your life experiences.

PROSPECTIVE JUROR KERHIN: Sure.

MR. GOGLIN: And that's what we want with people

that are jurors -- common sense, knowledge about life, knowledge about human nature. To make decisions in a case like this.

And so we all come here with baggage. Is your experience such that you go beyond just using common sense?

PROSPECTIVE JUROR KERHIN: I don't think so.

MR. GOGLIN: Okay, thank you.

THE COURT: Mr. Koch?

MR. KOCH: How did you feel about what your -- how your dad handled it?

PROSPECTIVE JUROR KERHIN: I -- at the time I -- we never thought much about it, you know. I mean, years later I thought about it, and I thought it was sufficient to what he did, you know.

MR. KOCH: I'm assuming he threw the man out of the house and --

PROSPECTIVE JUROR KERHIN: He beat him up.

MR. KOCH: He beat him up. Okay. You said you didn't know if that would cause any feelings to lean one way or another?

PROSPECTIVE JUROR KERHIN: I -- no, I don't. To be honest with you, I really don't know.

MR. KOCH: Well, you're hesitating a little bit, ma'am.

PROSPECTIVE JUROR KERHIN: I do hesitate a little

bit. I don't really know the case you're bringing up or anything.

MR. KOCH: Why are you hesitating when you say you don't know?

PROSPECTIVE JUROR KERHIN: Well, sometimes when I read stuff in the paper I always say, "Hang the guy," you know, but that's, I mean, you know --

MR. KOCH: Okay. And so you think it'd be difficult for you to listen to this case?

PROSPECTIVE JUROR KERHIN: No, I think I could listen to it, just I don't know if I could give an honest judgment on it. I don't know.

MR. KOCH: You'd have difficulty in doing that?

PROSPECTIVE JUROR KERHIN: Think so.

MR. KOCH: Have difficulty in having us present a defense to this type of an offense and believing that defense?

PROSPECTIVE JUROR KERHIN: I don't know, I don't know for sure. I can't say.

MR. KOCH: When you read stuff in the paper, is that after people have been convicted or after they've been arrested?

PROSPECTIVE JUROR KERHIN: After they've been arrested.

MR. KOCH: So you think they did it because

they've been accused of it? Is that --

PROSPECTIVE JUROR KERHIN: No, I shouldn't say that. I just --

MR. KOCH: Well, I --

PROSPECTIVE JUROR KERHIN: My mind does sway that way.

MR. KOCH: Okay. And so you think -- so you read it in the paper that they've been arrested and you think, "Hang the guy," without hearing anything else?

PROSPECTIVE JUROR KERHIN: Right, I'm very protective of children now.

MR. KOCH: Well, we all try to be.

PROSPECTIVE JUROR KERHIN: I know.

MR. KOCH: Um, do you think you would identify with the, the child witness here?

PROSPECTIVE JUROR KERHIN: I don't think so.

MR. KOCH: Since it happened to you?

PROSPECTIVE JUROR KERHIN: No, I don't think so.

MR. KOCH: Do you think you'd be able to listen to the evidence that we would present on behalf of Mr. Pemble or --

PROSPECTIVE JUROR KERHIN: Yes.

MR. KOCH: -- would your mind go towards "hang him"?

PROSPECTIVE JUROR KERHIN: I would listen, yes, I

would listen.

MR. KOCH: And would you force the state to prove beyond a reasonable doubt?

PROSPECTIVE JUROR KERHIN: It definitely would have to prove beyond a reasonable doubt.

MR. KOCH: Okay, why do you say that?

PROSPECTIVE JUROR KERHIN: I don't know, it just -- I was in security there for a while, and I just want -- you know, I look for detail, I want all the detail.

MR. KOCH: As to what happened?

PROSPECTIVE JUROR KERHIN: Yes.

MR. KOCH: And so you'd listen to both sides' details, you wouldn't --

PROSPECTIVE JUROR KERHIN: I'd definitely listen to both sides.

MR. KOCH: You wouldn't solely identify with what the state would present?

PROSPECTIVE JUROR KERHIN: Hopefully not.

MR. KOCH: And what I would present?

PROSPECTIVE JUROR KERHIN: Hope not. I just want you to know my situation.

MR. KOCH: Sure, sure, and I appreciate you for coming forward, and I'm not trying to put you under the hot lamps here and grill you a little bit. I just want to ensure that Mr. Pemble has a fair and impartial jury here;

that's all I'm trying to do.

I guess that's all I have, your Honor.

THE COURT: Okay. I have no questions. Thank you, you may step back.

PROSPECTIVE JUROR KERHIN: Okay, sure.

(Prospective Juror Kerhin leaves chambers)

THE COURT: Are we ready to proceed?

MR. KOCH: I guess I'd move to strike for cause.

THE COURT: Mr. Goglin?

MR. GOGLIN: I think she's qualified to sit as a juror. Let's face it, in cases like this, there's somebody who knows somebody that's been sexually abused or had a personal experience.

This is a long time ago. The lady has said that she can be impartial. I think she was very candid and so forth.

THE COURT: The difference between her and the last juror is that the last juror didn't tell us 'till we confronted; whereas this juror did get a hold, like the last juror said he was going to, did get a hold of a bailiff and do it while Mr. Goglin was still questioning. So I don't see them in the same light there.

This juror is apparently, as far as I can see, going to try to be as fair and honest as possible. I was waiting to see if anybody would ask some more questions that might

have helped a little bit; but as far as I can see, this is an impartial juror. It's -- she's going to do the very best; she's going to listen to both; she requires the state to prove its case beyond a reasonable doubt. I will not excuse this juror, at least not for cause. Okay.

MR. GOGLIN: Can we swing through the restroom, judge?

THE COURT: Yes, please do.

Matter of fact, people, I'm going to take ten minutes before we come out to give the court reporter at least that. I should give fifteen, but I want to get going.

(Break had at 10:40)

(10:54 AM, in open court in the presence of the prospective jurors)

THE COURT: All right, at this time I'm going to excuse Juror Martin Thruman, and we'll ask that another juror be selected.

PROSPECTIVE JUROR THRUMAN: Thank you.

THE COURT: Thank you, sir.

(Prospective Juror Thruman leaves jury box)

THE CLERK: 3380, Mary Reed.

(Prospective Juror Reed enters jury box)

THE COURT: Mary, did you hear all the questions the Court had previously asked?

PROSPECTIVE JUROR REED: Yes.

COPY

STATE OF WISCONSIN CIRCUIT COURT, BRANCH I WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

RICHARD A. PEMBLE,

Defendant.

JURY TRIAL, DAY 3

CASE NO. 96-CF-06

COPY

TRANSCRIPT OF PROCEEDINGS

Transcript of proceedings in the above-entitled action before the Honorable Robert J. Kennedy, Circuit Judge, Walworth County Circuit Court, Elkhorn, Wisconsin, on October 16, 1996.

APPEARANCES

Assistant District Attorney Daniel R. Goglin, Elkhorn, Wisconsin, on behalf of the plaintiff.

SEYMOUR, KREMER, NOMMENSEN, MORRISSY & KOCH, by Steven A. Koch, Elkhorn, Wisconsin, on behalf of the defendant.

The defendant in proper person.

Janet Kronwall
Court Reporter

prejudice to you, since if they were going to testify the same way, they'd still both have to reach the threshold, and you'd know they couldn't.

But you don't know that Carlson won't claim he could.

MR. GOGLIN: And I don't know the basis of his knowledge.

THE COURT: Right.

Mr. Koch, that satisfies me about the prejudice. Although I have -- you haven't had anything to say yet. I was inquiring to see if there was prejudice and what his outline of prejudice was. But I still think regardless, you should make an offer of proof. Yesterday you didn't really tell me, other than that brief statement they're going to testify the same, what you wanted Carlson for.

MR. KOCH: And in thinking about this overnight, your Honor, I also believe that I should have made an offer of proof, and a couple other items I'd like to address also in addition to my argument.

THE COURT: Okay.

MR. KOCH: First of all, your Honor, I'm going to ask, also ask the Court here to reconsider the threshold question which the Court is requiring Dr. Lodl to answer, that someone must have a diagnosable sexual disorder in order to commit this type of an offense.

THE COURT: I'm -- unless you can make, give me

some case law or something right on point on that, I'm disinclined to just reargue the same thing.

MR. KOCH: I understand. I'd like, just like the opportunity to make a brief argument, your Honor, to the Court.

THE COURT: But you've made a rather extensive argument before at a hearing on the same point. And it isn't a case where we're caught by surprise there. Everyone had a chance to prepare and be ready.

MR. KOCH: I understand that, your Honor, but the Court has reconsidered several things throughout the course of this trial, including various objections that have been made, and evidence has come in, and the Court has stricken it. And I'd like the same consideration that had been given --

THE COURT: No.

MR. KOCH: -- character evidence, your Honor.

THE COURT: I'm going to stop you. I do not intend to reargue the same points, unless I invite reargument on it or unless somebody says: "Judge, we didn't know it, but here's a case right on point. You're wrong. You better reconsider."

That's a different story. But you're asking me to reconsider my discretion.

I'm going to restate briefly again before you go on

what my ruling was, because that stands. That is, Lodl has to be able to testify that if the defendant sexually assaulted the victim child, he would have a diagnosable disorder. If the answer to that is no, then Lodl's testimony isn't relevant since whether or not a person has a sexual disorder reference children in no way suggests whether he would or would not commit a sexual assault, and is thus not a pertinent trait of character.

Next, if the answer to that initial question is yes, then can Lodl say to a reasonable degree of scientific or professional certainty, based on an examination of the defendant and materials, that the defendant does not have a sexual disorder reference children?

If the answer to that is no, in short, that he has a sexual disorder, then defendant probably won't want to use Mr. Lodl because the sexual disorder reference children would be a pertinent character trait but would suggest greater likelihood of guilt.

And note the state of course could not use it under those circumstances under 904.04(1)(a).

So then we go, if the answer however is yes, that the defendant does not have a sexual disorder reference children, then Mr. Lodl would be asked his opinion, and this eventually would be before the jury.

In other words, does he have an opinion as to whether

the defendant has a sexual disorder reference children. If his answer was yes to that, then he would be allowed to be asked, "Does he have a sexual disorder or not, in your opinion?" And I presume his answer would be, "No, he does not."

And that could end it. There might be some subsequent questioning, which we didn't discuss much, about why that pertinent character trait makes it less likely that somebody would commit a sexual offense against a child.

That was my ruling, and I don't see any reason why I should deviate from that. I think it was well-reasoned then; I think it's well-reasoned now. I'm just not going to rehear that.

What I'm asking for is your offer of proof of what Dr. Carlson would testify to.

MR. KOCH: Your Honor, Dr. Carlson -- we would lay a foundation for Dr. Carlson obviously to come in and testify as to who he is and what he -- where he practices, and what he does and his background expertise, which I know the Court -- I believe the Court is familiar with, such as introducing his curriculum vitae and the degrees he holds, et cetera, et cetera. The articles he's written. The fellowships he holds. The books he's co-authored, the papers he's co-authored.

We'd continue to lay the foundation as to does he know

STATE OF WISCONSIN CIRCUIT COURT, BRANCH 1 WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

RICHARD A. PEMBLE,

Defendant.

CONTINUATION OF
SENTENCING HEARING
CASE NO.96-CF-06

TRANSCRIPT OF PROCEEDINGS

Transcript of proceedings in the above-entitled action before the Honorable Robert J. Kennedy, Circuit Judge, Walworth County Circuit Court, Elkhorn, Wisconsin, on December 20, 1996.

APPEARANCES:

DANIEL GOGLIN, Assistant District Attorney, P.O. Box 1001, Elkhorn, Wisconsin, on behalf of the plaintiff.

STEVEN A. KOCH, Attorney at Law, Elkhorn, Wisconsin, on behalf of the defendant.

The defendant in proper person.

Sandra S. Elderbrook
Court Reporter

victim, but there's nothing in the behavior of the victim that would be significant anyway.

I'm not supposed to look at the social/economic standing or background of the offender. It doesn't matter whether he's a bum or an outstanding person with -- a successful employment history as the defendant has. It doesn't matter. I don't consider that.

And whether there is lack of any corroborating evidence. It's often said, well, just that child's word against his. No, I don't consider that at all. That's what we mean when the jury resolves that by finding beyond a reasonable doubt.

The last thing I look to, but it's an extremely important one, is the victim's viewpoint. On the one hand, the child in the police interview and on the stand in the trial expressed deep love and affection for the defendant. On the other hand, in the Victim's Statement, apparently aided by some unknown adult, which was made before February 16, 1996, a long time ago, um, has the victim, in a form-type of impact statement, circling faces with sad and mad and scared and anger type of expression. And on the second page, the victim circled penalties; jail, fine, help from doctors or counselors, and stay away from kids. The adult assistant who was helping the child make this out quoted

the victim as saying, "Please put grandpa in jail because he did something bad to me - pretty pretty please - cops." But this is hard to understand, in light of the interview of February 3, 1996, only shortly before, which was actually played for the jury--and I saw it--where the child expressed concern about telling because he didn't want to get grandpa into trouble. There is nothing to suggest how the child feels at this time other than his trial statement of affection for the grandpa.

The victim's mother has declined any comment to my knowledge.

The victim's father makes a statement, but, respectfully, it is highly suspect. That young man's father was himself convicted of child molestation and he's now in prison. His statement, respectfully, sounds like he's trying to show how reformed he is, rather than how he personally feels about what happened to his son.

I have decided upon the following sentence as the best of a difficult world:

I'll get back to Count 2, but I'm going to start, obviously, with Count 1. On Count 1, I'm going to withhold sentence and place the defendant on ten years' probation.

Conditions of probation--and this is the flexible

STATE OF WISCONSIN CIRCUIT COURT, BRANCH 1 WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

RICHARD A. PEMBLE,

Defendant.

MOTION HEARING

CASE NO.96-CF-006

TRANSCRIPT OF PROCEEDINGS

Transcript of proceedings in the above-entitled action before the Honorable Robert J. Kennedy, Circuit Judge, Walworth County Circuit Court, Elkhorn, Wisconsin, on August 22, 1997.

APPEARANCES:

DANIEL GOGLIN, Assistant District Attorney, P.O. Box 1001, Elkhorn, Wisconsin, on behalf of the plaintiff.

STEVEN A. KOCH, Attorney at Law, Elkhorn, Wisconsin, on behalf of the defendant.

The defendant in proper person.

Sandra S. Elderbrook

Court Reporter

With that said, we're now down to the motion for a new trial. I've read the, um, briefs of the parties on it. I'm gonna start dealing with or try to deal with issues basically one at a time and then collectively after that.

Um, the issues were developed in the notice in one chronological fashion, in the brief in another, the responses, et cetera, were I think slightly different. So what I'm going to do is just, um, take each one. And if I've missed any, gentlemen, let me know.

The first one was about Jurors Sevick--that's S-E-V-I-C-K--and Beall--B-E-A-L-L--which was basically the defense's position is the Court barred a class of people. At least that would be -- have to be the defense argument because they say in State v. Louis --there's a cite--the Court was barring policemen generally and that, um, the higher courts indicated that was error.

In this particular case, I've got two jurors that had, um -- that were presently ongoing, in effect, party opponents of the D.A. as I categorize them. I think that explains it adequately. I don't think that I should not remove for cause, Mr. Koch, somebody who is on the jury who happened to be a defendant in a civil suit you were bringing. I just don't think that. And,

um, I do not see that as a class of person in any -- in any sense that State v. Louis meant. I know you'd like to argue further about it, but I was just gonna rule.

MR. KOCH: If I could just have a couple minutes, your Honor.

THE COURT: All right.

MR. KOCH: Thank you. And I appreciate that.

THE COURT: All right.

MR. KOCH: Um, there's a statutory section that also governs qualifications of jurors, and the State's policy -- and although I cited -- I did cite those statutory sec -- are sections in my brief in support of our motion, um, Section 756.01 talks about the State policy which is,

> "All persons selected for jury service shall be selected at random from a fair cross section of the population of the area served by the court. All qualified persons shall have an equal opportunity, in accordance with this chapter, to be considered for jury service in the state . . . "

And it goes on with for some language I don't believe is relevant. Um, then you look at 756.01(1) which talks about qualifications, and it states,

> Persons who are U.S. citizens, who are electors of the state, who are possessed of their normal

faculties, who are not infirm, who are able to read and understand the English language, and who have not been summoned to attend for perspective service as jurors for the time periods applicable under another statute, shall be liable to be drawn as grand or petit jurors.

Finally your Honor, Section 805.08(1) --

THE COURT: By the way, you didn't cite these in your brief.

MR. KOCH: The statutory sections are cited, your Honor. There's direct reference to Section 756.01 and 805.08, your Honor.

THE COURT: Okay. I'm looking for it. I'm sure --

MR. KOCH: Page 4, um, first full paragraph after Roman Numeral 2.

THE COURT: Oh, there it is.

MR. KOCH: Section 805.08 quotes, quote. The court shall examine each person who is called as a juror to discover whether the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case.

What happened, your Honor, is that the Court did not allow any voir dire, and I -- I believe we have the right to voir dire these witnesses. They may have said, "Hey, I don't care about my prosecution. I think child molesters are terrible people. I think they should be hung. I think they should be strung up. I don't like child molesters, and I think he should go to jail for a long time."

The problem we -- I have is I do not even have the right to question these people as to their bias or -- or any bias. And Mr. Goglin was doing his job, and he did it very well, and he stated that these people have bias against them because they've been prosecuted. But I believe we have the right to bring out that bias.

THE COURT: Okay. I understand what you're saying --

MR. KOCH: Your Honor --

THE COURT: -- but I would allow you, had it gone the other way, to remove for cause any juror that was sitting on there without necessity of questioning if you were suing them for $100,000 because of an alleged auto accident. I mean, if you're a party opponent, it creates just such an obvious appearance, prima fascia appearance, that to my mind questioning at that particular point can only bring out that extra bias and

perhaps even affect the juror more.

If these jurors are questioned, and it turns out Mr. Goglin's prosecuting, and I can just see, "Yeah, well I don't think it's fair," et cetera, um, and the other jurors are all listening there and thinking, oh, maybe this prosecutor is not a nice guy; maybe he's unfair or something. That's not appropriate. They are party opponents. They are right now, even though they've been convicted--one's appealing as Mr. Goglin points out in his brief I believe, or there's some sort of post-conviction, probation review hearing or something, there's another that any time, they're going to move for modification, um, if they're gonna appeal, anything they're gonna do, um--guess who is gonna be on the other side? The State; the District Attorney. Um, to do that is just inherently wrong. And as I say, I would do it for the defense too. I don't think the defense should have to have jurors on who are self-evidently, um, opposed in a court of law to the other -- to an attorney or party.

MR. KOCH: And just --

THE COURT: And I realize you -- you'll probably say, "Well, then why not on the other juror?" And there's a very good reason, but -- And we'll come to that, but --

MR. KOCH: Just -- just two.

THE COURT: -- that's my decision.

MR. KOCH: Two things, your Honor. One, we could have been given voir dire in chambers as other jurors were, too, if this Court was concerned about bias infecting the rest of the jury panel. Number one. Um, and number two, it's not always the District Attorney who would be a party opponent. Occasionally it could be the Attorney General on appeal or for -- or, for example, a probation/parole officer. I just wish to make those points, your Honor.

THE COURT: Did you raise those at all? Show me in the transcripts where you raised those points.

MR. KOCH: No, I objected to the -- to the State making an oral motion to strike these two people; and I objected to it, Judge.

THE COURT: Did you ask for, "Judge, in lieu of that, can we have a, um -- a hearing with these jurors outside?" Did you ask for that?

MR. KOCH: At that point, no, I didn't, Judge.

THE COURT: If you had, I might have considered it. Um --

MR. KOCH: I responded the best I could with an oral motion without any notice.

THE COURT: Mr. Goglin, anything further, that you'd like to say?

MR. GOGLIN: Yes. As I recall, we visited this topic on the morning of trial even before the, um, case was put on the record. I believe that -- And there was certain things that I represented to the Court that I don't think are in this transcript.

THE COURT: I left the transcript --

MR. GOGLIN: Pardon me?

THE COURT: I'm sorry. I left the transcript. No, there's three big files. I'll go back and pick the right one. Thank you. Mr. Goglin, go ahead.

MR. GOGLIN: Could I see that transcript before I make a fool of myself?

THE COURT: You may. I'm handing you the transcript of Day 1.

MR. GOGLIN: I believe I made the sufficient record on that transcript about what was discussed before we went on the record, Judge.

THE COURT: We had a, um -- a preliminary discussion, indeed, off the record. We summarized on the record what had happened.

Um, I know Mr. Koch says that, um, he was responding to an oral motion, but, um, it appears that

at no time prior to the time of the selection of the jury or starting the selection when we also put stuff on the record, did you mention anything about, "Let's have that, um -- that hearing outside the presence of the jury."

I'm not even saying I would have granted it in all fairness, but I don't think you ever suggested it. And, um, I'm not sure that it isn't waived thereby. In fact, I think it would be. But, in any case, I still feel that I should not as matter of -- I don't think I'm prohibiting a class as such from, um, sitting on the jury.

For instance, if, hey, it's two policemen or two firemen, or it's two men, or two women, or it's, um, two, um, librarians, um, you know, because they're librarians, I would see your point; and I'd see State v. Louis. But the class of people that are directly opposed to the District Attorney where the District Attorney's been in court, um, you know, prosecuting them or in proceedings prosecuting them, and there's still the very likely potential that he's still going to be prosecuting them, that's a problem.

Now, if they had been prosecuted and their terms were up, they're all over, the D.A.'s not their party opponent, then -- then I would not excuse them for that

reason unless for some other reason they showed bias, and I'd allow examination; but not while they're ongoing. That just -- In fact we even have a question of the jurors which I always ask; does anybody have an ongoing -- Um, here. I'll quote the question I always ask. Does any juror have a pending case with the District Attorney? I always ask that. And if they do, that juror is excused. Um, I think that's the right decision. Um, I think that's an exercise -- appropriate exercise of discretion to make sure both sides have a fair trial.

I might add, the defense can be disadvantaged by that too, and that is they've got an on-going deal with the District Attorney, the prosecution, a juror may think twice before he finds somebody not guilty for fear they may incur the wrath of the District Attorney, who is his opponent with whom he would hope to negotiate favorably at other times. That's inherently a problem too. It's -- it's so fraught with dangers both ways that I just don't think it should be done. In any case, I deny it on that basis.

I now turn to the next basis. Bear with me. Well, maybe I didn't make a separate note on this, but I know we dealt with another juror.

MR. GOGLIN: Juror --

THE COURT: Where did you raise that in your brief?

MR. KOCH: Your Honor, it's in --

THE COURT: In the same paragraph, isn't it?

MR. KOCH: Yes, your Honor, on the following page, page 5.

THE COURT: Okay. Here it is. Um, and there, I thought my record was adequate; and I think the ruling should remain. The Juror Kerhin now, um, was not a party opponent of anybody. She was someone who had suffered a sexual assault in the past, um, and it had given her problems, and she fully and thoroughly discussed those problems. There was a full voir dire of her, and she said that she believed and she would -- she would do her best to, um, handle this case fairly and impartially and listen to all the evidence, et cetera. I won't go through the whole transcript of what she said, but I think it was adequate to convince the Court that there was no reason to dismiss her for cause.

Um, I don't think we can make any better record than that. Um, if, in fact, after reading the transcript and hearing your arguments, the Appellate Court says, "Oh, no, you should have knocked her off," then so be it. But I don't think that, um -- I don't think my ruling in that case is a violation -- not a

violation, is an abuse of discretion. I think I made a discretionary ruling there, and I think an appropriate one, and she was kept on.

I don't remember if you, um -- if you struck her anyway or not. Um, I'd have to look back at the list. Did you, by the way, strike her?

MR. KOCH: I don't remember either, your Honor --

THE COURT: Okay.

MR. KOCH: -- to be honest with you.

THE COURT: All right. The next issue was, um, reference Dr. Lodl. I've read the, um -- the case law, and I think the record's adequate for my ruling, and I think my ruling stands again.

What you have argued here--and I do not fault you in any way for it--is basically a restatement of the argument you made at trial. Um, what you're basically asking me to do on this one is not presenting any new stuff, but saying, "Judge, reconsider."

MR. KOCH: Right.

THE COURT: I don't think I should. I think my ruling was correct, so I'll stand on it.

MR. KOCH: Could I make one brief response to what Mr. Goglin said in his brief?

THE COURT: Sure.

MR. KOCH: Mr. Goglin argues that the evidence wouldn't be relevant in his brief on page 3, Roman Numeral four.

THE COURT: Excuse me. I'll interrupt you to say that was basically my ruling; it wouldn't be --

MR. KOCH: I understand. I believe, um, relevant evidence, as defines in Section 904.01, is evidence having any 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. I believe that Dr. Lodl's testimony, um, would tend to make the existence of a fact that Mr. Pemble actually committed the assault less probable than it would be without the evidence.

THE COURT: All right.

MR. KOCH: And -- and --

MR. GOGLIN: Could I respond to that, Judge?

THE COURT: No, there's no need.

MR. GOGLIN: I would like to -- to point something out because --

THE COURT: All right. Let me make sure Mr. Koch has a chance to finish because I'm not sure he finished.

MR. KOCH: Yes, I am done, your Honor.

THE COURT: Okay.

MR. GOGLIN: And I make this because I've seen this District Court of Appeals too often add things into the record that weren't in the record. I might get a sanction for that. But there was absolutely no factual showing or offer of proof from Mr. Koch or the defendant that Mr. -- or rather Dr. Lodl would testify that a person can't commit a sexual assault unless he has a diagnosable sexual disorder. And I want to make the record.

THE COURT: I think the record clearly shows exactly that. That's the reason that I ruled that it was not relevant.

Okay. The point I guess I'll stress -- No, I won't stress it again. The record's complete.

MR. KOCH: I guess my point was that that's an absolute standard, and relevant evidence is more probable or less probable; and a probable standard, not an absolute standard. And that's my point.

THE COURT: Well, that would be like saying, um, person -- again, persons who are homicidal maniacs can kill people. The defendant is not a homicidal maniac; therefore, that's evidence that he didn't kill somebody. That's the equivalent that I saw it as. I know you may disagree, but I saw no relevance whatsoever. A nonhomicidal maniac can kill people. A

non, um -- a person without a sexual deviancy can still sexually assault people. So the fact that he doesn't have a sexual deviancy is not relevant to suggest he did not do so.

All right. I think the next point was cross-examination of Mrs. Fraher. You wanted, of course, to cross-examine her and, in fact, gain more access to her records than, um, you had obtained originally and also, as I say, cross-examine her to show that she had been treated for a mental illness. Your obvious object was to suggest somehow she was not credible.

As I pointed out, I gave -- After an in-camera inspection, I gave you all the material that might possibly go towards, um, this particular case in terms of relevancy, credibility, et cetera. And the, um -- I don't think there was anything, um, that would have entitled you to cross-examine her as to just because she's been treated for a mental illness that that makes her less than credible. I just did not see that. And I think my ruling should stand, again, on the record.

MR. KOCH: And, again, briefly, your Honor. It's not just the fact that she had been treated for mental illness. If that happened five to ten years in the past, that would make a big difference. But it's

Mr. Pemble's position that the fact that she -- we believe she was actually hospitalized shortly before the trial goes directly towards her ability --

THE COURT: And I don't see that. Um, I don't. I guess it -- Basically, your argument is if somebody is hospitalized for a mental -- for a mental treatment that automatically that makes them fair game; that that somehow suggests they're less than credible. I don't agree. There are certain types of mental illness and certain types of things they might do that, suggest that, but not here and not under these circumstances. Main thing is not under these circumstances. There was nothing.

I want to be careful about even talking about this because I might talk about something I saw in-camera that I did not share that I should not share, so I'll just simply leave it at that.

Okay. And the next item raised is, um -- And this one I'm going to go into a little depth before I hear the argument of the people because it was -- it's an interesting problem. It is the testimony of Ms. Hocking, um, and specifically as to whether the child's testimony was consistent.

First of all, I note, with all due respect, the defendant's objection at the time that Ms. Hocking made