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

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REPLY BRIEF OF DEFENDANT-APPELLANT

ROBERT R. HENAK
SHELLOW, SHELLOW & GLYNN, S.C.
222 E. Mason Street
Milwaukee, Wisconsin 53202-3668
(414) 271-8535

Counsel for Defendant-Appellant

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ARGUMENT

I.

THE REFUSAL TO DISCLOSE MS. FRAHER'S MENTAL HEALTH RECORDS, AND THE ORDER BANNING REFERENCE TO HER HISTORY OF MENTAL ILLNESS AND TREATMENT, WERE REVERSIBLE ERROR

A. The Exclusion of Evidence Concerning Ms. Fraher's Mental Problems Was a Misuse of Discretion and Denied Pemble His Rights to Confrontation and Due Process.

The state's assertion that there is no "nexus" between such things as Kathleen Fraher's history of perceptual and reliability problems, manipulativeness, and paranoia about anything sexual, on

the one hand, and Pemble's defense that Fraher had intentionally or unintentionally distorted S.F.'s perception and recollection of what happened at his grandparent's home, State's Brief at 10-12, is wrong.

It is that very illness and paranoia about all things sexual which explains why Ms. Fraher would not have merely sat and listened as S.F. disclosed what happened (R73:215-17). It is also that illness and paranoia which explains why she might misconstrue a description of the simple act of zipping the boy's pants and tucking in his shirt as revealing a sexual assault, and why she might intentionally or unintentionally impress that misperception onto her child.

"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." *Johnson v. State*, 75 Wis.2d 344, 249 N.W.2d 593, 601 (1977). It was the accuracy and reliability of Ms. Fraher's perceptions and recollections of the "disclosure" which her particular history of mental illness drew into question, and which were central to the jury's evaluation of Pemble's defense. With that evidence suppressed, Fraher was able to pass herself off to the jury as simply a concerned mother with no reason to misperceive what S.F. was telling her, to misstate or misremember what happened during the discussion with S.F., or to intentionally or unintentionally distort S.F.'s perception and recollection of the incident with his grandfather.

Ms. Fraher's admission to being in some undefined form of "therapy" did not render harmless the suppression of this evidence. State's Brief at 11-12. People can be in "therapy" for any number of reasons, mental and physical, and not just the kind of serious mental

problems, such as those suffered by Ms. Fraher, which distort one's memory and perceptions.

The state's argument suffers from the same lack of a nexus which it attributes to Pemble's claim. It is not the simple fact that Fraher had some unspecified "mental problems" which is relevant; rather, it is her *specific* perceptual and reliability problems, manipulativeness, paranoia and the like which are relevant. The mere reference to "therapy" would not invoke the extent or nature of her specific mental problems relevant to this case, and the substitution of that refererence thus cannot serve to render exclusion harmless beyond a reasonable doubt. *State v. Dyess*, 124 Wis.2d 525, 370 N.W.2d 222, 231-32 (1985) (state must demonstrate harmlessness beyond reasonable doubt).

The trial court, moreover, expressly instructed the jury *not* to use that evidence in the manner suggested by the state:

> THE COURT: Ladies and Gentlemen, the witness, Joanna Pemble, without being asked, stated that Kathleen Fraher was in therapy. I am instructing you that whether or not Kathleen Fraher was in therapy has absolutely nothing to do with her credibility, her honesty, her ability to perceive reality, or her motives and/or bias in this case.
>
> An individual can be in therapy for a number of reasons. Whether or not Kathleen Fraher might have been in therapy is entirely irrelevant to any issue in this case.

(R74:109-10). The jury presumably followed that instruction. *See State v. Lukensmeyer*, 140 Wis.2d 92, 409 N.W.2d 395, 403 (Ct. App. 1987).

The evidence of Fraher's dislike for Pemble and her desire to

punish her mother for perceived failures in the past likewise could not pass as a legally sufficient substitute for the excluded mental health evidence. These are two different types of evidence invoking different types of impeachment.

Fraher's bias toward her mother and step-father permitted an inference that she would follow up on her desire to punish her mother by lying about her step-father. The excluded evidence of her particular mental problems, on the other hand, would have permitted the jury inference that, even if she would not go so far as perjuring herself, her account of the facts (and, therefore, that which S.F. came to believe) could not be credited as reliable. The inferences from the two lines of impeachment, one that she had reason to lie and the other that there was serious reason to believe she was mistaken, thus were not cumulative but complementary.

The state's undeveloped suggestion that the evidence could have been excluded as well to avoid what it terms "harassment" of Ms. Fraher, State's Brief at 8-9, 12, may be rejected summarily. *State v. Pettit*, 171 Wis.2d 627, 492 N.W.2d 633, 642 (Ct. App. 1992). It also fails on the merits, regardless whether it is merely an offshoot of the state's misplaced relevance argument, or an implied analysis under Wis. Stat. §904.03 never made by the trial court. The evidence was highly probative regarding the reliability of the most crucial witness against Pemble, and whatever limited "harassment" which might have flowed from providing the jury the information necessary to judge the reliability of her testimony pales next to the harassment of an unfair felony conviction.

B. Denying Disclosure of Fraher's Exculpatory Psychiatric Records was Error.

The state agrees that this Court should review Fraher's psychiatric records *de novo* to determine whether they contain "information that probably would have changed the outcome of [the defendant's] trial." *Pennsylvania v. Ritchie,* 480 U.S. 39, 58 (1987). State's Brief at 4-7. The standard here is one of "reasonable probability," *Ritchie*, 480 U.S. at 57, and Pemble need not prove that a different result is more likely than not. *E.g., Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Contrary to the state's suggestion, State's Brief at 7, Ms. Fraher's credibility and reliability were crucial to the jury's assessment of whether S.F. had been misled, intentionally or not, into believing that his grandfather had sexually assaulted him. Fraher, after all, was an eyewitness to the supposed "disclosure" and *the* person in the best position to distort S.F.'s perception or recollection of what actually happened. *See* Pemble's Brief at 16-19.

II.

THE TRIAL COURT ERRED BY EXCLUDING RELEVANT, EXCULPATORY EXPERT TESTIMONY

The state concedes that the exclusion of Dr. Lodl's testimony as irrelevant was wrong. State's Brief at 14. Also tellingly, the state does not defend the exclusion of Dr. Lodl's testimony on alternative grounds that an expert cannot provide "character" evidence. *Id.* at 14-17. The state thus effectively concedes that point as well, as indeed it must in light of *State v. Pulizanno*, 155 Wis.2d 633, 456

N.W.2d 325, 335-36 (1990), and *King v. State*, 75 Wis.2d 26, 248 N.W.2d 458, 464-65 (1977).

Instead, the state attempts to meet its burden of proving the erroneous exclusion of Dr. Lodl's expert testimony to be harmless beyond a reasonable doubt under *Dyess*, *supra*. State's Brief at 17-19. That argument relies upon what the jury "may have assumed" about the instruction on expert testimony and how it "might have construed" the lay testimony of Dr. Jon Carlson, *id.* at 18, which follows in its entirety:

Q What is your name?

A Jon Carlson.

Q What is your address?

A Home address or work address?

Q Where do you reside, sir?

A N2680 South Como, Lake Geneva, Wisconsin

Q And what is your profession?

A I'm, I'm a psychologist.

Q Do you know Mr. Pemble?

A I do.

Q How long have you known Mr. Pemble?

A Since January of this year.

Q For approximately ten months?

A Approximately.

Q How often have you seen Mr. Pemble?

A Maybe a dozen or so times.

Q Do you have an opinion concerning Mr. Pemble's character traits for sexual deviancy with children?

A I do.

Q What is that opinion?

A I do not believe that he has the characteristics that sexual abusers, pedophiles, have.

(R75:44-45).

In denying its motion to strike that testimony, the trial court rejected the same argument made here, that allowing Carlson's testimony in effect was permitting expert testimony in disguise (R45:53-54).

> THE COURT: . . . I do not agree that he telegraphed he was the treating psychologist. He did certainly telegraph that he was a psychologist, not that he was testifying necessarily as an expert, although there is a danger that some jurors might so construe it. But he was testifying in a way that suggests that, "I'm a psychologist and my opinion is."
>
> Since he had already been allowed to testify that he was a psychologist and I allowed it as part of his background information and that goes to the weight to give his opinion, he did not step out of line. He came very close. I wish that he had not used the word "pedophile." It would make me more comfortable. But he, but he did not cross the boundary of what I had outlined, and therefore I will not grant your motion.

(R45:55-56). That finding is not clearly erroneous.

Carlson's brief and unsupported statement of a lay opinion, moreover, cannot reasonably substitute for fully developed expert testimony. Consistent with the fact that he was testifying as a lay witness, Carlson did not state his background or expert qualifications, did not discuss the tests and considerations which those experts in the field would employ in assessing one's potential deviancy with

children, did not testify regarding his application of those factors to Mr. Pemble, and did not state the underlying scientific bases for his conclusions. Perhaps most importantly, he did not testify, as Dr. Lodl would have, to the expert conclusion which would have tied all of this evidence together, i.e., that it is unlikely that a person with no sexual disorder would molest a child.

The state made the most of this very point in its closing argument, emphasizing that lay witnesses do not really have the experience to determine whether someone has a sexual interest in children. It expressly emphasized that Carlson, as a lay witness rather than an expert, fit into this category. (R76:21-24).

Finally, the state's suggests an alternative harmless error argument, asserting that Dr. Lodl's testimony would have been "canceled" by his acknowledgment that the absence of a sexual disorder, while making child molestation unlikely, did not render it impossible. State's Brief at 19. The jury, however, easily could have credited Dr. Lodl's testimony, as did the trial court at sentencing (R78:42). Because a reasonable jury could find his testimony, in combination with the Pembles' testimony, the other character evidence, and the inherent weakness of the state's case, to create a reasonable doubt, its exclusion cannot be deemed harmless beyond a reasonable doubt. *See State v. Glass*, 170 Wis. 2d 146, 488 N.W.2d 432, 434 (Ct. App. 1992) (counsel ineffective for failing to use exculpatory evidence: "Whether or not the strength of that evidence later might have been diminished, Glass was entitled to have the jury hear it").

The state emphasized, both in voir dire and in closing, the

inability of lay witnesses to recognize if someone has a sexual interest in children (R73:73-80, 98-102, 131; R76:21-24). The jury, therefore, was very interested in receiving some kind of expert guidance, having specifically asked one of Pemble's character witnesses whether he had any special training on this point (R74:151-52). Yet, it was just this guidance which the exclusion of Dr. Lodl's testimony denied the jury.

III.

THE SUMMARY DISQUALIFICATION OF TWO PROSPECTIVE JURORS, WITHOUT VOIR DIRE, DUE TO THEIR PROBATIONARY STATUS, WAS REVERSIBLE ERROR.

The state asserts that, although a police officer is not *per se* ineligible on grounds of implied bias to serve on a criminal jury in the jurisdiction where he or she works, *see State v. Louis*, 156 Wis.2d 470, 457 N.W.2d 484 (1990), *cert. denied,* 498 U.S. 1122 (1991), individuals on misdemeanor probation are ineligible. State's Brief at 21-25. The state's theory appears to be that, because the prosecutor's office "may again be the juror's adversary in the event of a probation review," the probationer might possibly be biased against the state or in favor of the state, although it cannot tell which. *Id.* at 23. Such speculation about the possibility of bias. however, does not constitute the high "probability of bias" necessary to imply bias and exclude a juror as a matter of law. *See State v. Gesch*, 167 Wis.2d 660, 482 N.W.2d 99, 102 (1992).

The state, moreover, concedes that bias is not implied merely from the fact of a prior conviction. State's Brief at 23. Yet, that is

exactly the basis on which it seeks to imply bias on the part of misdemeanor probationers. *Id.* The state's attempt to suggest "an ongoing adversarial relationship" in the later circumstance overlooks the fact that adversarial proceedings against the prospective jurors were over. Only if they violated the rules imposed on them by society would the enter into a new adversary relationship with the state, and that is a potential risk which exists for everyone, not just probationers.

The state's alternative suggestion that other reasons might have justified removal of these jurors for cause, State's Brief at 24-25, ignores the fact that the jurors were never questioned on those points as required by Wis. Stat. §805.08(1). Thus, there was no reason to believe that these potential sources of bias in fact had produced it.

Finally, the state relies on non-Wisconsin cases to assert that Pemble must prove that prejudice resulted from the error in removing the jurors. State's Brief at 25-28. Under Wisconsin law, however, it is the beneficiary of the error which must prove harmlessness beyond a reasonable doubt. *Dyess, supra.* The state has not even attempted to do so.

Nor could it. As the Supreme Court explained in *State v. Chosa*, 108 Wis.2d 392, 321 N.W.2d 280, 285-86 (1982), the arbitrary removal of a group of potential jurors, without examination, inherently deprives the defendant of a substantial right.[1] *See also Thiel v. Southern Pacific, Co.*, 328 U.S. 217 (1946) (exclusion of wage-laborers reversible error); *United States v. Salamone* 800 F.2d

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[1] The decisions cited by the state are not to the contrary. *See* State's Brief at 26. Each found either that removal was proper, or involved removal of individual jurors rather than groups of people.

1216 (3rd Cir. 1986).

In holding that the arbitrary exclusion of all NRA supporters was "presumptively prejudicial," the *Salamone* court explained:

> To require appellant to adduce *proof* of what *could* have happened puts the defendant in the predicament referred to in *Peters [v. Kiff*, 407 U.S. 493 (1971),] of providing proof that "is virtually impossible to adduce." This leaves the defendant without an effective remedy for improper conduct in the selection process and provides incentive for such conduct to recur.

Id. at 1227-28 (emphasis in original).

IV.

THE REFUSAL TO STRIKE A PROSPECTIVE JUROR WHO DOUBTED HER IMPARTIALITY MANDATES REVERSAL.

The state admits that Ms. Kerhin expressed doubts about her ability to be impartial in light of the fact she had been raped as a child. State's Brief at 29. It claims, however, that her later responses to the effect she would listen to both sides and would require the state to prove its case beyond a reasonable doubt (R73:120-21) negated her expressions of self-doubt. State's Brief at 30-33. The state is wrong.

Nothing in Ms. Kerhin's statements asserts that she could "lay aside . . . her opinion and render a verdict based on the evidence presented in court." *Compare State v. Sarinske*, 91 Wis.2d 14, 280 N.W.2d 725, 733-34 (1979). She admitted that the prior incident *could* affect her ability to give an "honest judgment," even though she thought she could listen to the case:

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.

(R73:119 (emphasis added)). She thus acknowledged that someone can listen to both sides of an issue and still be affected by prior experiences in judging between them. A finding "beyond a reasonable doubt" likewise is based on one's judgments on the facts, judgments which Ms. Kerhin conceded may be tainted as well by her experience as a child rape victim. *Cf. Sullivan v. Louisiana*, 508 U.S. 275 (1993) (constitutionally defective instruction on reasonable doubt cannot be harmless).

Ms. Kerhin's subsequent statements thus were not inconsistent with her acknowledgement of doubt concerning her ability to give an honest judgment in this case. Indeed, the trial court readily granted the state's request to excuse another juror who likewise stated he could listen to all of the evidence and require proof beyond a resonable doubt, but expressed doubts similar to Kerhin's (R73:92-94).

It is an error of law not to excuse a prospective juror who, as here, admits that she might not be able to be fair. *E.g., State v. Zurfluh*, 134 Wis.2d 436, 397 N.W.2d 154 (Ct. App. 1986).[2] The

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[2] The closer "temporal connection" between the trial and the source of the challenged juror's bias in *Zurfluh*, State's Brief at 32-33, is irrelevant. What makes a potential juror excusable for cause is the existence of bias at the time of the trial. Wis. Stat. §805.08(1). One who currently is biased, or who states that she might not be able to be fair, thus must be excused regardless whether the source of that existing bias is recent or resides in the distant past.

state's request for "deference" under such circumstances is in fact a plea that this Court abdicate its proper appellate role.

CONCLUSION

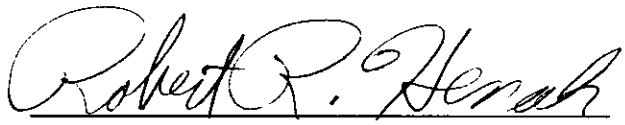
For these reasons, as well as for those set forth in his opening brief, Pemble respectfully asks that this Court reverse the judgment of conviction and remand for a new trial.

Dated at Milwaukee, Wisconsin, March 20, 1998.

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
Milwaukee, Wisconsin 53202
(414) 271-8535

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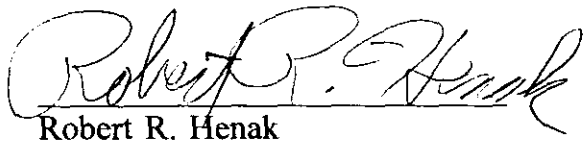
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,990 words.



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