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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2012AP000186 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL K. ROGERS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
AND SENTENCE ENTERED IN THE
CIRCUIT COURT FOR WOOD COUNTY
THE HONORABLE TODD P. WOLF PRESIDING

REPLY BRIEF

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C O U R T O F A P P E A L S
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The trial court erroneously exercised its discretion in admitting other crimes evidence.

1. Even on the state's new theory, the testimony about the choking incident would not have been admitted for an acceptable purpose.

The purpose of Wis. Stat. § 904.04(2) is to keep evidence from the jury that the accused is a bad person and so is disposed to commit the crime alleged. ***State v.***

Sullivan, 216 Wis.2d 768, 782–83, 576 N.W.2d 30 (1998). However, § 904.04(2) does allow the State to introduce evidence of other bad acts for certain limited purposes.

On appeal, the state introduces a new theory for admitting testimony regarding an alleged choking incident that occurred nearly four months after a alleged sexual assault. The state now claims that choking incident is "part of panorama evidence."(State's brief at 4).[1]

Context, i.e., completing the story, is one appropriate purpose for introduction of other bad acts. However, when other acts evidence is offered to provide context,

> The cases strongly suggest that the other act should be integral to the key events such that it would be misleading or confusing not to hear the "complete" story...The test, then, is whether the other act evidence is not only helpful in understanding what happened, but whether the evidence is necessary to complete the story by filling in otherwise misleading or confusing gaps.

7 Daniel D. Blinka, Wisconsin Practice: Evidence §404.7 (3d ed.2008).

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[1] The state cites ***State v. Dukes***, 2007 WI App 175, 303 Wis. 2d 208, 736 N.W.2d 515, for the notion of "panorama evidence." ***Dukes*** cites Jason M. Brauser, Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b), 88 N.W. U.L.REV. 1582, 1606 (1994). Brauser does not mention "panorama evidence" in his article but the section to which ***Dukes*** refers discusses evidence needed to "complete the story." It appears to be the same type of evidence that Blinka refers to as giving "context."

That was not the case, here. Testimony that Rogers choked DeVries nearly four months after the alleged sexual assault charge did not complete the story of the assault. The state has not suggested that had that evidence been excluded the jury would have been misled or confused in any way.

Further, even assuming excluding the choking testimony had rendered the story slightly less complete, that does not justify bypassing the rule prohibiting character and propensity evidence.

As the DC circuit explained when it applied the federal version of § 904.04(2), in ***United States. v. Bowie***, 232 F.3d 923, 929 (D.C. Cir., 2000)

> **…**all relevant prosecution evidence explains the crime or completes the story. The fact that omitting some evidence would render a story slightly less complete cannot justify circumventing Rule 404(b) altogether. Moreover, evidence necessary to complete a story--for instance by furnishing a motive or establishing identity--typically has a non-propensity purpose and is admissible under Rule 404(b). We see no reason to relieve the government and the district court from the obligation of selecting from the myriad of non-propensity purposes available to complete most any story.

The state's new claim that this is "panorama evidence" that is somehow "inextricably intertwined with the crime" (State's brief at 3) is simply a pretext for putting in evidence that led the jury to believe Rogers is the kind of person who would choke the mother of his children. From that, they could have concluded that he is also the kind of person who would sexually assault her, as well. Thus, its probative value was outweighed by the unfair prejudice it caused.

2. The testimony regarding the choking incident was not consciousness of guilt evidence.

While arguably testimony that Rogers asked DeVries to lie would have been admissible as evidence of consciousness of guilt, the choking testimony was nothing more than attempt to show Rogers was a bad guy who - if nothing else - attacked DeVries in June and therefore should be punished whether he committed the sexual assault or not. However, the choking incident was not relevant to the sexual assault.

DeVries gave two stories about the choking. In the states case-in-chief, DeVries testified that in June, Rogers came to her and asked her to lie about what happened, when she agreed to do so, he choked her to the point of being unconscious.(34:77). If that story were true, Rogers choked DeVries even after she agreed to lie for him. Thus, the choking, in itself, was not an attempt to get her to lie.

On rebuttal DeVries testified that Rogers choked her in June when he found out she had not lied for him.(34:171). However, since DeVries had testified about the sexual assault at the preliminary hearing on April 19, 2010(29: 5-16), where Rogers was present(29:3), and she had given no further testimony before Rogers was charged with strangling DeVries,[2] Rogers could not have choked DeVries in June because he just became aware that she did not lie for him since he would have been aware of that fact on April 19, 2010,

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[2] See ***State v. Daniel Rogers***, 2010 CF 239 (Wood County Circuit Court) wherein the state alleged Rogers choked Andrea DeVries on June 15, 2010.(13.)

when he was bound over for trial.

Whichever version of the choking incident one believes, that incident, if it occurred, was not relevant to the sexual assault charge.

CONCLUSION

For the reasons stated above and in his brief-in-chief, Daniel K. Rogers asks this court to reverse his conviction and remand to the trial court for a new trial.

Dated: July 16, 2012

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of the brief is 1386 words.

_____
Patricia A.FitzGerald

I hereby certify that with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19 (2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Patricia A. FitzGerald

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date .A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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Patricia A. FitzGerald

cc: Wisconsin Department of Justice
Daniel K. Rogers