STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2013 AP 558-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent

v.

JOEL HURLEY,

Defendant-Respondent-Cross-Appellant

APPEAL FROM AN ORDER VACATING A JUDGMENT OF CONVICTION AND GRANTING A NEW TRIAL, AND ON CROSS-APPEAL FROM AN ORDER DENYING CERTAIN CLAIMS FOR POST-CONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MARINETTE COUNTY, THE HONORABLE DAVID G. MIRON, PRESIDING

REPLY BRIEF OF DEFENDANT-RESPONDENT-CROSS-APPELLANT

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The Defendant-Respondent-Cross-Appellant, Joel Hurley (Hurley), hereby replies to the cross-response brief of Plaintiff-Appellant-Cross-Respondent, State of Wisconsin (State):

ARGUMENT

I. THE CHARGING DOCUMENTS ARE UNCONSTITUTIONALLY VAGUE

The State employs some new math in an effort to fortify the charging documents in this case.

A. The Complaint Cannot Be Read To Allege 26 Acts of Sexual Assault

The State alleges, for the first time on this appeal, that the complaint in this matter actually charges at least 26 instances of sexual intercourse and/or contact, rather than the "estimated five [assaults]" argued by Hurley. (C.R. Brief at 15, 20-24; C.A. Brief at 19). The State gets to this number by adding the allegations in the complaint that Hurley weighed M.C.N. naked "in excess of 20 times," and the single instance in which M.C.N. alleged that Hurley had her "touch" him, to the approximate five instances of finger-to-vagina intercourse alleged. (Cross-Resp. at 20-21).

The argument that a sexual assault occurred when M.C.N. "touched" Hurley should be dispatched with quickly. The complaint does not allege where Hurley supposedly had MCH "touch" him. Absent a specific allegation that M.C.N. touched an intimate part of Hurley's body at his direction, there is insufficient information in the complaint to count this "touching" as a sexual assault.

The bulk of the State's new math centers on the argument that the allegations of Hurley weighing M.C.N. naked are reasonably interpreted as instances of unlawful sexual contact of M.C.N.'s "intimate parts" under Wis. Stats. §§ 948.01(5)(a), 939.22(19). (C.R.

Brief at 21-23). The complaint, however, is simply insufficient to support such a tortured interpretation, as the State's own argument tacitly admits.

The State concedes that the complaint does not allege, in any way, that Hurley touched an intimate part of M.C.N. during these episodes. (C.R. at 22). Nevertheless, the State urges that the complaint sufficiently alleges sexual contact during these instances because "it would have been a near physical impossibility for him *not* to have touched one or more of the child's intimate parts with his shoulders and neck while M.C.N. was riding on his shoulders." (Id.) (emphasis in original). The "near physical impossibility" could potentially be true, but only if you assume the existence of the same important detail the State does to make this point: that M.C.N. was "riding on [Hurley's] shoulders." The complaint, however, says no such thing; rather, the complaint only states that Hurley "put her on his shoulders." (4:2). There is no basis in the complaint to infer that M.C.N was "riding" on Hurley's shoulders instead of in some other fashion, e.g., slung over his shoulders like a sack of potatoes.

The State surmises that Hurley "may object that this contact was not for the purpose of either sexual arousal or gratification or the degradation or humiliation of the child." (C.R. Brief at 22). Indeed he does. Given the lack of details surrounding the instances of weighing, the complaint provides no context to support an inference that Hurley weighed her (assuming he touched M.C.N.'s intimate parts in the process) for the purpose of sexual arousal, gratification, or degradation of M.C.N..

Not only does the plain language of the complaint itself not support the State's new interpretation thereof, neither do the proceedings that unfolded in this matter.

At the preliminary hearing, the State elicited no testimony from M.C.N. about the instances of weighing; instead, he asked only about the allegations of

intercourse[1]. (59:3-7). At trial, the Court instructed the jury that it had to determine whether Hurley had committed at least three acts of sexual intercourse with M.C.N. (63:69-70; 64:43-44). The State argued to the jury in closing that it had proved its case on the basis that Hurley had committed sexual intercourse with M.C.N., not sexual contact during the instances of weighing. (64:22). And finally, during post-conviction proceedings in the trial court, with the number of assaults alleged in the complaint squarely before it, the State did not claim, allege, or argue that the complaint alleged 26 instances of assault to include those where Hurley weighed M.C.N. naked, rather than only the estimated five instances of sexual intercourse.

In reliance on its new math, the State concludes that "Given the large number of alleged assaults, the length of the alleged period of time was not unreasonable in relation to the number of criminal acts alleged." (C.R. Brief at 23). Once the State's new math falls apart, as it has above, the conclusion does as well.

B. The Alleged Assaults Occurred 5-11 Years Before Charging

As the State points out, the court of appeals has recognized that "it is evident" that the passage of time between the alleged crimes and the arrest/indictment of the defendant factor into the test to "address the possibility that the defendant may not be able to sufficiently recall the allegations *or reconstruct the history regarding the allegations*." (C.R. at 24-25, citing *State v. Miller*, 2002 WI App 197, ¶ 35, 257 Wis.2d 124, 650 N.W.2d 850) (emphasis added to highlight portion of the quote left out of the State's brief). The inability to reconstruct the history regarding the allegations goes straight to the heart of the ability to prepare a defense, such as, for example, the ability to

[1] M.C.N.'s preliminary hearing testimony described the number of times the finger-to-vagina intercourse occurred as follows: "A few" (59:6); "more than once" (59:6); "[approximately five times] sounds right" (59-6-7); "could have been [less than five]" (59:20).

identify and locate exculpatory witnesses, or to recall an alibi and be able to locate proof in support thereof.

The State claims that "five or six years passed between the alleged period for the crime and the filing of the criminal complaint." (C.R. at 25). The State's version, however, is only a best-case scenario. In reality, the charging delay is somewhere between 5 and 11 years. The complaint alleged an estimated 5 assaults between 2000 and 2005. (1:1). Hurley was charged on June 10, 2011. Based on M.C.N.'s complete inability to specify or narrow the time period in which any alleged assault occurred, evident both from the complaint and her preliminary hearing testimony (59:11), the alleged assaults could have stopped soon after they supposedly started in 2000, making the delay 11 years.

The State concedes that "a delay of [5-6 years between the allegations and charging] would appear to weigh in favor of Hurley's claim." (C.R. at 25, citing *State v. R.A.R.* 148 Wis.2d 408, 435 N.W.2d 315 (Ct. App. 1988)). The State waves away this difficulty by claiming that circumstances existed that served to "deter a child from coming forth immediately," thereby making the delay constitutionally insignificant. (C.R. at 25, citing *State v. Fawcet*, 145 Wis.2d 244, 253, 426 N.W.2d 91 (Ct. App. 1998)). But the State fails to point out that the *Fawcett* court, in the same breath that it pointed to the difficulties children have in recalling details and coming forward, took pains to emphasize that these issues do not dissolve bedrock constitutional principles:

> However, no matter how abhorrent the conduct may be, a defendant's due process and sixth amendment rights to fair notice of the charges and fair opportunity to defend may not be ignored or trivialized.

Fawcett, 145 Wis. at 250. Further, the court in *R.A.R.*, which was decided after *Fawcett* and took its principles into account, held that the 4-5 year delay between the allegations and the defendant's arrest "weigh[ed]

heavily in favor of" the conclusion that the charges were unconstitutionally vague. *R.A.R.*, 148 Wis.2d at 412. The 5-11 year delay in this case weighs even heavier.

C. The Complete Inability Of M.C.N. To Particularize Any Details Requires Dismissal

The State does not dispute that M.C.N. is totally unable to particularize any details whatsoever regarding the time of the alleged assaults within the 6-year span of the charging documents. In response to this damning fact, the State returns to its "new math" to assert that a pattern of conduct existed making it "understandable" that M.C.N. would have no ability to particularize the timing of the alleged assaults. (Id). As pointed out above, however, the State's new math is without support, and any argument relying thereon should be rejected.

The State makes two attempts to distinguish *State v. R.A.R.* The State's first asserted distinction relies on an unfounded assumption. The State claims that *R.A.R.* dealt with older children (11 and 14), who would be more likely able to particularize details than M.C.N. (C.R. at 26). The State makes this claim by asserting that "M.C.N. was only six when the assaults began, and 11 when they ended." (Id.) As pointed out above, however, there is no support for this assertion as fact. M.C.N. has demonstrated no ability to identify when the alleged assaults began or ended. According to her, the "maybe five…or less" alleged assaults could have all happened when she was six, all happened when she was 11, or sprinkled sporadically throughout those years. If the unknown number of alleged assaults happened when she was 11, then she is in the same position as one of the children in *R.A.R.*, where the court found that the charges were unconstitutional. The State's distinction on this point cannot be persuasive.

Lastly, "and most importantly" from the State's perspective, *R.A.R.* was decided before the enactment of Wis. Stats. § 948.025, the repeated acts of sexual assault

of a child statute, in 1994. (C.R. at 26-27). This fact, the State asserts, renders *R.A.R.* largely inapplicable. The State, however, cites no authority that the enactment of Wis. Stats. § 948.025 vanquished a defendant's fundamental constitutional rights to fair notice of the charges and a fair opportunity to adequately prepare a defense, and defense counsel has found no such authority.

The State cites *State v. Nommensen*, 2007 WI App 224, 305 Wis.2d 695, 741 N.W.2d 481, but only to note that "Wisconsin Stat. § 948.025 was enacted to address the problem that often arises in cases where a child is the victim of a pattern of sexual abuse and assault but is unable to provide the specifics of an individual event of sexual assault." (C.R. at 27).

Of course, those considerations were recognized in *Fawcett* and *RAR*, but those courts found that constitutional notice requirements still existed. *Fawcett*, 145 Wis. at 250. This is quite obviously so. It is axiomatic that the legislative branch cannot wipe away rights granted by the constitution, those that are basic and fundamental to everyone, via the passage of a bill. The legislature may have indeed sought to "facilitate the prosecution of offenders [where a child is the victim of a pattern of abuse]," *Nommensen* at ¶ 15, but it cannot do so at the expense of a defendant's constitutional rights. In the absence of any authority to the contrary, the State's argument simply cannot prevail.

II. THE ADMISSION OF JANELL'S TESTIMONY WAS ERRONEOUS

First, the State concedes that the admission of Janell's testimony, if erroneous, was not harmless. (C.R. at 30). Accordingly, if this court determines that the circuit court erred in admitting the testimony, a new trial must be granted.

A. The State Does Not Convincingly Argue That The Circuit Court Admitted The Evidence For A Proper Purpose

The circuit court allowed Janell's testimony for the purpose of showing method of operation and opportunity. (61:34; RCA-App. 334). The State does not attempt to defend the circuit court's admission of the evidence for the purpose of showing "opportunity," implicitly admitting there was no basis for admission on this ground. (C.R. at 34).

The State claims the circuit court's ruling for method of operation was supported by the record, based on the supposed similarity between the conduct alleged by Janell, and that alleged by M.C.N. As Hurley discussed in his opening brief on this point, the similarities between the allegations of Janell and M.C.N are few and do not support a conclusion that Hurley has a "method of operation." (R.C.A. Brief at 27-33).

Even if the similarities were as abundant and striking as the State claims, those similarities alone would not support admission of Janell's testimony. "Proof of a distinctive modus operandi" does not…lead to automatic admissibility. Rather, the method of operation must be probative of issues such as intent, plan, or identity." DANIEL D. BLINKA, WISCONSIN EVIDENCE §404.7 at 211 (3rd. ed. 2008). Identity was not an issue in this case. In addition, the State acknowledges that intent is not in issue in this case. (C.R. at 37). Lastly, Janell's testimony would not be probative of any plan to assault M.C.N., as there could be no non-frivolous argument put forth that Hurley's alleged sexual conduct with Janell was a step in his goal to assault M.C.N. years later, long before M.C.N. was born. The admission of Janell's testimony as probative of Hurley's method of operation is simply unsupported by the record and nothing more than a poorly-veiled argument for the admission of propensity evidence.

The State has now asserted a new ground for the admission: motive. But in making the motive argument, the State is forced to acknowledge the most glaring problem with admitting Janell's testimony as other acts evidence: "Of course, Hurley's actions as an adolescent do not fully explain why, as an adult male, he sexually assaulted a young family member in his home." (C.R. at 36; R.C.A. at 31). This very point was made by *McGowan* in explaining why the other acts were not probative of his motive or intent. 2002 WI App at ¶20.

B. The State's Attempt To Distinguish *McGowan* On The Question Of Relevance Is Unpersuasive

Hurley largely relies on his opening brief in response to the State's unpersuasive efforts to distinguish *McGowan* in an effort to claim Janell's testimony was relevant, but wishes to highlight a significant deficit in the State's brief on this point.

The most critical similarity between *McGowan* and this case is the fact that the other acts evidence involved sexual conduct with a child by the defendant when the defendant was also a child. As the *McGowan* court stated, borrowing from the court of appeals in another case:

> Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult.

State v. McGowan, 2006 WI App 80. ¶ 20, 291 Wis. 2d 212, 715 N.W.2d 631 (citing *State v. Barreau*, 2002 WI App 198, 257 Wis. 2d 203, 651 N.W.2d 12).

The State does not address this specific issue in its brief, beyond claiming only that Hurley (at the age of 12-14) would have been much closer to adulthood at the time of his childhood other acts than McGowan (age 10) at

the time of his. (C.R. at 40). The State's failure to take head-on this compelling similarity with *McGowan* undermines the rest of its efforts to distinguish that case.

C. Janell's Testimony Is Clearly Prejudicial

The State contends that Janell's testimony would not have "aroused the jury's sense of horror" or "provoked its instinct to punish" as the other acts did in *McGowan*. (C.R. at 44)(citing *McGowan*). The State argues that the sex acts described by Janell were not "of themselves, horrific and repulsive." (C.R. at 44). The State's distinction is unpersuasive.

Janell alleged that when she was approximately 8 years old, Hurley, her older brother by 4 years, would tell her to strip naked and put on a fur coat, meet him in their parents bedroom, tell her to do a striptease for him, and then they would engage in kissing, as well as mutual masturbation and mutual oral sex. It is difficult to imagine how the description of such acts between siblings of such a young age, at the supposed direction of the defendant, would not be considered "repulsive" or "horrific" by jurors, provoking their instinct to punish Hurley.

The State points to the cautionary instruction given by the court as sufficient to mitigate any prejudice, but that instruction cannot stand. First, the instruction told the jury to use Janell's testimony for a purpose—Hurley's opportunity to commit the crime against M.C.N.—that the State now abandons and concedes was erroneous. In addition, the second basis for which the jury was instructed to use the evidence—method of operation—was also erroneous for the reasons outlined above. A jury instruction that tells the jury to use evidence for an improper purpose does not cure any prejudice therefrom, it only exacerbates it.

III. The Prosecutor's Closing Argument Was Not Merely "Inartful"

Lastly, the State argues that the prosecutor's description of Hurley as "opportunistic" in closing, although "inartful," was an appropriate comment on the use of Janell's testimony as evidence of Hurley's method of operation. (C.R. at 46-47).

The State has adopted the circuit court's interpretation of this statement, claiming that the prosecutor was *really* commenting on Hurley's "method of operation" rather that what he *expressly* said, "[Hurley's] opportunity…to commit the crime." (Id.; C.R. at 47).

From the full context of the statement, which the State urges the court to review (C.R. at 47), it is clear that the prosecutor knew there were multiple purposes for which the jury had been told it could use Janell's testimony: "*one of the purpose* [sic] you can use Janell's testimony for is the defendant's opportunity, his opportunity to commit the crime." (64:30)(emphasis added). This is quite obviously not some slip of the tongue, or some mere "inartful" expression of method of operation as the State urges the remark should be interpreted. The prosecutor made no reference to method of operation. This was a calculated statement designed by the prosecutor to argue a character inference: that Hurley is "opportunistic."

The impact of this improper statement is made worse by the fact that it immediately followed a recitation of what was supposed to be a limiting instruction for the jury. By tying this improper comment on a character trait to the language of the limiting instruction, the prosecutor effectively undid whatever protections the jury instruction was theoretically supposed to provide to Hurley against this grossly prejudicial evidence.

The State calls the prosecutor's remark, "inartful" and "not the best word choice." Both those descriptions may

be true, but not to the exclusion of the best word choice: prejudicial.

CONCLUSION

For the reasons stated herein and in Hurley's opening cross-appellant brief, Hurley respectfully requests that this Court vacate the judgment of conviction and remand the case with directions to dismiss the case or for further proceedings deemed appropriate by the Court.

Dated this 30th day of January, 2014

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,985 words.

Dated this 30th day of January, 2014

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. (RULE) § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. (Rule) § 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.

Dated this 30th day of January, 2014

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