WISCONSIN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

Milwaukee County
Case No. 10-CF-004596
Appeal No. 2013AP000913-CR

BRIAN J. ANDERSON,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY
THE HONORABLE DENNIS R. CIMPL,
THE HONORABLE JEFFREY A. CONEN, AND
THE HONORABLE ELLEN R. BROSTOM, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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CASES CITED

I. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING A SUBSTANTIAL PORTION OF ANDERSON'S *McMORRIS* EVIDENCE

There is no question but that when a trial court looks at *McMorris v. State*, 58 Wis.2d 144, 205 N.W.2d 559 (1973) evidence, it must exercise its sound and reasonable discretion in making its determination. Ordinarily, the trial courts have considerable discretion in their decisions to admit or exclude evidence. *State v. Pharr,* 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). Discretionary decisions are upheld as long as trial courts do not erroneously exercise their discretion. *Brookfield v. Milwaukee Sewerage Dist.*, 171 Wis.2d 400, 423, 491 N.W.2d 484, 493 (1992). Discretion contemplates a logical process of reasoning based on the facts of record and the proper legal standards. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). Trial court's discretionary decisions also must have a reasonable basis in the record. *Littmann v. Littmann*, 57 Wis.2d 238, 250, 203 N.W.2d 901, 907 (1973). Whenever the trial court's decision affects a litigant's constitutional right to present a defense, however, the matter is reviewed *de novo. State v. Pulizzano,* 155 Wis.2d 633, 648, 456 N.W.2d 325, 331 (1990).

While the State argues that the defense has not articulated the basis for its objections to the *McMorris* rulings, the fact is that the court failed to articulate, to any degree, its reasoning or basis for its ruling other than in a summary fashion.

The court made the following ruling:

> . . . the prior homicide from 1984, 1985, set forth in A and B, is too remote in time. I'm taking into consideration that the victim had no weapon involved and so I am not going to allow it.
>
> (R-50: 69)

The court listed no criteria and no basis is stated as to why this is too remote. It just is.

The court then allowed the use of testimony as to the victim, Joseph Hall's, (hereinafter referred to as "Hall") taking of medication 30-45 days prior.

As to the lifting up of Hall's son's car and the threat of slashing of the throat, the court ruled these are not allowed because they are "too remote in time" and "the victim having no weapon." (R-50: 69) Again, there is no explanation as to why they were remote or why Hall not having a weapon is appropriate or necessary consideration in this circumstance. The State's brief does not explain the criteria the court used to make this decision because the court did not state its criteria.

As to the statement by Hall that God would forgive a few murders, it was denied because the court found it "sort of a philosophical question, not an expression of philosophy." (R-50: 69) Since when does a statement by someone that God will forgive a few murders, which naturally implies that the person had committed a few murders, go from a factual statement to a philosophical question? That was a credibility determination, not a decision on admission of evidence.

As to Hall using a knife at Dunkin Donuts, that was denied because even though the defendant, Brian J. Anderson (hereinafter referred to as "Anderson"), heard Hall make these statements, Anderson could not use it because the court stated that Hall was not specific enough. (R-50: 70) Yet this goes towards Hall promoting how violent he is.

The court did not allow evidence of the stealing of jewelry 14-15 years ago apparently due to the remoteness, but also because Hall had no weapon. (R-50: 70)

The court did not allow testimony of Hall's recent threat to kill a property

manager and a family and a threat to shoot Hall's brother-in-law. The State argues that it was remote because it had to have happened over ten years prior. Their reasoning is because Anderson had known Hall for ten years and Hall told him of the incident during that time; but the issue is what Anderson knew of Hall and his character for violence. If someone brags to someone else about the violent acts he/she has executed during their life, is that evidence automatically inadmissible just because it is somewhat dated? Hopefully not. If the court is going to exclude that evidence, it has to state a justifiable basis and reason. Just saying that it is "too remote" is not sufficient.

As to Hall's threat to kill his boss, the court determined that was hyperbole:

> There is a lot of us who have said that they are going to kill their boss and not really mean it; it is vague and it is not specific, so I'm not going to allow it."
>
> (R-50: 70)

It is not clear why the trial court is now making a factual determination that this was not a real threat by Hall and why that is not an appropriate consideration.

The court set some arbitrary time line that it imposed without setting forth why that was appropriate or necessary. Further, the court set forth criteria in many instances that Hall had to have a weapon. Having violent tendencies and being scared of a person is not limited to the person always being armed with a weapon. Ask any victim who has been beaten with fists. Again, the court's rationale was not clear in the least. The court never made clear why the lack of Hall stating he had a weapon was an appropriate criteria to use to deny admission.

The State argues that the trial court's decision on Anderson's credibility, while not appropriate if used to weigh the *McMorris* evidence, was not really directed at

that evidence. Yet, it is clear that it was. The court questioned whether Hall really had disclosed some of the history within the last 30-45 days. While the court did not mention its issue with Anderson's credibility, it is clear from the court's comments this was a factor the court considered in disallowing some of the evidence. That was wrong.

Clearly the court used some sort of yard stick that was not clear and arbitrarily picked time limits and criteria and used that to exclude the most important parts of Anderson's *McMorris* evidence. As Anderson's trial counsel indicated, the ruling cut the heart out of Anderson's defense and it was wrong.

The State argues that Anderson has not specified why the court's ruling cut the heart out of the defense. One only has to look at what was allowed and was excluded to see the effect this had on Anderson's defense. As the State indicated, it allowed only three instances of prior violet acts by Hall while excluding nine instances of violent acts and statements. The State notes that the court subsequently partially opened the door to one instance only if the State used Anderson's statement, which never happened.

The court allowed only evidence that Hall took medication to control his anger, that Hall threatened to kill his property manager and that Hall once threatened to kill one of his sons.

The trial court denied Anderson the ability to disclose that: Hall previously killed his former drug partner and the reason he did so; Hall threatened to kill his son Chris; Hall slashed another person's throat during a robbery; Hall asked Anderson if he thought God would forgive a few murders; and Hall threatened some children with a knife who he felt mocked his wife. Anderson was also personally aware of other rage based violence by Hall which he was denied the ability to disclose such as Hall

threatened to kill his employer and Hall threatened to kill a friend of his son over some jewelry.

What Anderson was left with were a couple of instances of alleged threats and that Hall took medication. Anderson was denied the ability to discuss any specific conduct. The heard of Anderson's basis for being fearful of Hall was cut out.

II. THE ADMISISSION OF THE OTHER ACTS EVIDENCE BY THE COURT WAS IMPROPER

This issue relates to the decision by the trial court to allow the State to introduce evidence of an incident that occurred three weeks prior to the incident charged in the complaint. As discussed that "other" incident related to the allegation that three weeks prior Anderson went to his fiancés home and beat up some men he felt were disrespectful toward his fiancé. In the State's brief, they point out the legal standard that applies which is not in dispute.

The common thread between the beating incident and the shooting three weeks later is Anderson issues with the men whom he felt were disrespectful to or having an affair with his fiancé; however, the men themselves have no contention. There is no evidence that the victims of the beating had any knowledge of or connection to the men who lived in Anderson's home.

As stated before, the issue with this "other acts" evidence is that, while it had some probative value, the prejudice to Anderson far outweighed that probative value and, thus, should not have been admitted.

While it is clear from the record that Anderson might have been upset with

Hall because he thought Hall was covering for his friend Marshall Provost (hereinafter referred to as "Provost"), the evidence shows that Anderson's plan on the day of the shooting was to confront Provost. He did not have any issues with Hall, nor did he have a plan to confront him. Hall just happened to show up at the wrong time and come in on Anderson.

The State notes that there is evidence that Anderson realized after the shooting that Hall was devious; but it is also noted that Anderson denied it was the reason he shot Hall. Anderson came to that realization after the shooting. The State seeks to claim that Anderson contradicted himself when he testified that it was not until Hall walked in the door and "reacted like he did" that Anderson knew what Hall knew. This does not contradict Anderson's first statement. Anderson is clearly stating that when thinking about what happened and how Hall reacted, he realized that Hall knew about his girlfriend. Anderson's statement to his father is similar. In thinking about why Hall came after him, he realized that Hall may have been covering up for his friend. None of this can be used to stay that Anderson shot Hall because Anderson thought at the time that Hall was in on it.

The evidence of the beating three weeks before the shooting had nothing to do with Hall and provided no insight into the confrontation between Hall and Anderson at time time of the shooting. The fact that Anderson was jealous of his fiancé was clear from the record. The beating incident was not needed to prove that. The evidence of the beating however was brutal and highly prejudicial to Anderson while at the same time having little to do with the subsequent confrontation between Hall and Anderson. This

created a high degree of prejudice to Anderson that was grossly unfair and should not have been allowed.

III. SUMMARY

Anderson is entitled to a new trial. The State's position is not sustainable, nor correct.

First, the trial court erroneously exercised its discretion in refusing Anderson the ability to disclose the most serious facts of which he was aware that made Anderson afraid of Hall at the time of the shooting.

Second, the trial court erroneously exercised its discretion when it allowed the State to introduce evidence of a beating three weeks prior to the shooting that did not involve Hall or Provost.

For all of the above reasons, we request that the court vacate the judgment in this matter and remand the case for a new trial.

Respectfully submitted,

HART LAW OFFICE

/s/

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Richard H. Hart
State Bar No. 1017217
Attorney for the Defendant-Appellant

Dated: December 19, 2013

CERTIFICATION OF FORM
AND LENGTH OF APPELLATE REPLY BRIEF

I certify that this reply brief conforms to the rules contained in secs. 809.19(8)(b) and (c) Stats., for a reply brief produced using the following font:

> Proportionate font; 12 characters per inch; double-spaced; 1.5-inch margin on left side and 1-inch margins on the other 3 sides. The length of this reply brief is 1,960 words, not including the Table Of Contents and the reply brief certification.

HART LAW OFFICE

/s/

_____

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Dated: December 19, 2013

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)
ELECTRONIC FILING OF REPLY BRIEF

I hereby certify that:

I have submitted an electronic copy of this reply brief, excluding the appendix, if any which complies with the requirements of s. 809.19(12). I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

HART LAW OFFICE

/s/

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Date: December 19, 2013