STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2013AP002686-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS C. SALINAS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Brown County, the Honorable Marc A. Hammer, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Joinder of the Felony and Misdemeanor Cases Was Improper, Where A) the Felony Case (10-CF-542) Alleged Multiple Sexual Assaults of V.G. by Luis Salinas; B) the Misdemeanor Case (10-CM-1571) Alleged Victim Intimidation of V.G. and Her Mother, M.S., C) the Intimidation Case Arose From Sentencing in a *Separate* Domestic Abuse Case (09-CF-1267), Not the Sexual Assault Case; and D) Joinder Allowed the Jury to Hear 09-CF-1267's Allegations That a Knife-Wielding Mr. Salinas Had Threatened to Kill His Young Son, Who Was Standing Next to Mr. Salinas At The Time.

The facts of the joined cases are complex, and the timelines of the cases are intertwined. However, the problem with joining the cases is manifest in evidence relied on by the prosecution at trial but glossed over by the state on appeal: testimony that Mr. Salinas had held a knife while threatening to kill his small child, who was standing beside Mr. Salinas.

The state argues that the joined charges are of similar character, are connected together and are parts of a common plan. (State's brief at 4-8). In his brief-in-chief at 32-34, Mr. Salinas explains why that argument is flawed, and the cases were not properly joined. The intimidation charges arose from a strangulation / battery case that had already been adjudicated. (Appellant's brief at 33). The facts giving rise to the strangulation / battery case (09-CF-1267) were then presented to the jury as part of the state's case on the intimidation charges, effectively joining that case with the intimidation and sexual assault cases. (134:88-89, 114-115, 137-144). The state drew the jury's attention to the facts of

09-CF-1267 in both opening and closing. (134:55-56; 135:302-303). Jurors considering whether Mr. Salinas had sexually assaulted V.G. also heard – several times over – that Mr. Salinas had battered and strangled M.S., and had threatened to kill his nearby six-year-old child while brandishing a knife.

In its brief, at 4 and 7-8, the state asserts that the intimidation and sexual assault cases were properly joined, because "the charges all related to Salinas' abuse, threats and manipulation of V.G. and M.S." Described this broadly, the intimidation and underlying strangulation / homicidal threat testimony is tantamount to impermissible character evidence. This is particularly true of testimony and argument regarding Mr. Salinas' threat to kill his six-year-old son.

II. Joinder Was Highly Prejudicial, Because the Verdicts Turned on Credibility and the Jury Heard, Through the Intimidation Testimony, That Mr. Salinas Had Previously Strangled and Beaten M.S., and That He Had Made Homicidal Threats – to M.S. and Their Young Son – Which Were Unrelated to V.G.'s Sexual Assault Allegations.

The state argues that even if the cases were misjoined, the misjoinder was harmless. (State's brief at 8-14). In doing so, the state asserts that Mr. Salinas "has failed to explain how that evidence would have been impermissible for the State to introduce as other acts evidence." (*Id*. at 8). However, it is the state's burden to demonstrate that the proffered other acts evidence satisfies the three-part test required by ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). ***State v. Barreau***, 2002 WI App 198, ¶34, 257 Wis. 2d 203, 651 N.W.2d 12, *citing* ***Sullivan*** at 774. The ***Sullivan*** test for admitting other acts evidence under Wis. Stat. § 904.04(2) is

whether: (1) the other acts evidence was offered for an acceptable purpose; (2) the evidence is relevant under Wis. Stat. § 904.01; and (3) the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion or delay. ***Sullivan***, 216 Wis. 2d at 772-773.

In applying the three-part test to the intimidation evidence, the state makes a number of conclusory assertions: 1) "the intimidation evidence is relevant to [Mr. Salinas'] ongoing efforts to ensure V.G. did not tell anyone about the sexual assaults[;]" 2) the evidence would therefore be offered for "the permissible purpose of showing Salinas' plan, intent and knowledge[;]" and 3) the "probative value in demonstrating why V.G. did not report the abuse earlier, why she reported it when she did, and Salinas' ongoing abuse and manipulation of her would outweigh any undue prejudice to Salinas or confusion to the jury." (State's brief at 9).

Mr. Salinas' brief-in-chief distinguishes the intimidation evidence from the sexual assault evidence, explaining why the two sets of allegations are not similar in character, nor are they parts of a common plan:

> There was no allegation that the recorded calls referenced any sexual assaults. Though Mr. Salinas said insulting and threatening things to M.S. in the recorded call excerpts read to the jury, none of those comments was directed at V.G. In one excerpt read to the jury, Mr. Salinas even said that he did not "blame" V.G. or M.S. (134:191).
>
> ….
>
> Mr. Salinas was not charged with victim intimidation related to the sexual assault allegations. And, Mr. Salinas' specific, lethal threats to M.S. were of an entirely different character than any attempts to

> manipulate V.G. to make a statement at sentencing in 09-CF-1267. V.G. did not allege that Mr. Salinas had threatened to kill her. M.S. testified that Mr. Salinas had made homicidal and suicidal threats to M.S., once while standing next to their son and holding a knife. There were no recorded jail calls in which Mr. Salinas was berating or threatening V.G. as he had M.S. Indeed, M.S. testified that she did not relay Mr. Salinas' telephone threats to V.G. (134:159). The homicidal threats to M.S. were horrifying, but they were not among the accusations in the sexual assault complaint, and were therefore not part of a common scheme or plan across the joined cases.
>
> Part of the inducement for V.G. to say something good about Mr. Salinas at sentencing was apparently the receipt of a phone card. (134:159-160). This sort of buying influence was not alleged as a modus operandi in the sexual assault case, i.e., it was not a scheme or plan employed in both the intimidation and sexual assault cases. V.G. did not tell police or the jury that Mr. Salinas had ever offered gifts to ensure V.G.'s silence with respect to the sexual assault allegations.

(Appellant's brief at 32-34).

The state's "permissible purpose" for offering the other acts evidence – plan, intent, knowledge – is impermissibly broad because it encompasses every bad act or statement attributed to Mr. Salinas, regardless of context, timing, the parties involved, or the type of bad act or statement alleged. By casting its net that wide, the state would seek to introduce not other acts evidence, but prohibited character evidence.

The probative value of the intimidation evidence with respect to the sexual assault charges is minimal. The last alleged sexual assault occurred *before* the strangulation

incident and subsequent intimidation charges related to the strangulation case. (*See* timeline in appellant's brief at 2-10). V.G. testified at length regarding the sexual assault charges and Mr. Salinas' contemporaneous behavior, which V.G. said included acts of violence and threats against reporting any assaults. (134:68-87). But in this testimony, V.G. did not allege that Mr. Salinas threatened to physically harm or kill V.G. or her family members.

Thus, the strangulation case, and the intimidation charges related to that case, had little probative value given V.G.'s own testimony. Further, in the strangulation case and jail phone calls, M.S. was the primary victim and the recipient of the calls. (Appellant's brief at 2-6, 8-10). And M.S. testified that she did not relay any threatening communications to V.G., further diminishing the low probative value of that evidence with respect to the sexual assault allegations. (134:159).

The state fails to provide support for its contention that the intimidation evidence was not unduly prejudicial. (State's brief at 9). Indeed, the state seems to rely almost exclusively on a misrepresentation of Mr. Salinas' prejudice argument.

More than once in its brief, the state alleges that Mr. Salinas has conceded that the evidence against him was "overwhelming." (State's brief at 8, 11). Mr. Salinas made no such concession. Here is the paragraph from which the state draws its erroneous conclusion:

> This extremely prejudicial information – Mr. Salinas' treatment of M.S., including threats to kill her and their son – was irrelevant to the sexual assault allegations made by V.G. *And the prejudicial effect was not negated by overwhelming evidence supporting the sexual assault charges. There was no physical evidence, and no third-*

> *party witnesses to any assaults. V.G. testified that she was sexually assaulted; Mr. Salinas denied the accusations.* A jury trying to decide who is telling the truth is not likely to credit a defendant who was said to be willing to kill his own child. That is why the improper joinder of 10-CF-542 and 10-CM-1571, which necessarily included 09-CF-1267, was not just presumptively but demonstrably prejudicial.

(Appellant's brief at 30) (emphasis added).

The key phrase, "and the prejudicial effect was not outweighed by overwhelming evidence," means that there was *not* overwhelming evidence to outweigh the prejudice. This is followed by "There was no physical evidence, and no third-party witnesses to any assaults." In other words, there was not evidence so strong as to render misjoinder harmless. There was a lot of testimony, but jurors weighing that testimony also improperly heard that Mr. Salinas, with his (and M.S.'s) son at his side, held a knife and said that he would kill the boy. That is *extraordinarily* prejudicial.

It is true that the trial court did not conduct a ***Sullivan*** analysis, because the intimidation charges were not offered as other acts. But given the nebulous permissible purpose suggested by the state, the low probative value of the intimidation evidence, and the extremely prejudicial nature of the strangulation / intimidation – related testimony, other acts admission would not have been a slam-dunk for the state.

The state suggests that the trial court would have leaned in the direction of admissibility. (State's brief at 10-11). What the trial court said was that it believed that the evidence met the first two prongs of the ***Sullivan*** test. (133:8-9; Appellant's app., 124-125). What the state does not mention is that the court went on to say, "Is it prejudicial? Sure, it is. But is it overly prejudicial? I'm not prepared to

conclude at this point in time that it is. [The prosecutor] hasn't filed a motion. She hasn't even asked about it." (*Id.* at 9; Appellant's app. 125). While the state is correct that the trial court was leaning toward admissibility regarding the first two prongs of ***Sullivan***, the court also said that it was not prepared to make a ruling regarding the third prong: whether the probative value was outweighed by undue prejudice. So even if the trial court was two-thirds of the way to (hypothetically) admitting the intimidation evidence as other acts, the court did not go on to weigh undue prejudice. Whether the evidence would ultimately have been admitted as other acts remains an open question, with the third prong of the test remaining a hurdle for the state. Therefore, there is insufficient support in the record for state's claim that "all of the intimidation evidence would have been presented to the jury at a sexual assault trial" had the charges not been joined. (State's brief at 11).

After summarizing the trial testimony, the state concludes that "Given all of this evidence, it is clear that the verdict would have been the same had the joinder not occurred: Salinas would still have been found guilty on all three sexual assault charges." (State's brief at 11-12). However, this assessment ignores the fact that the sexual assault evidence was he-said / she-said testimony, and the jury was charged with weighing the credibility of the accuser against the defendant. The jury, having heard testimony that Mr. Salinas had strangled M.S., and threatened to kill M.S. and their young son, would likely have concluded that Mr. Salinas was a very dangerous and bad person, and therefore discredit his testimony. It is not clear – contrary to the state's declaration – that the sexual assault verdicts would have been the same absent the intimidation evidence.

As a final matter, the state alleges that Mr. Salinas misrepresented the record in support of his statement that the trial court was initially skeptical of the earlier joinder ruling (by a different judge). (State's brief at 9-10). Here is the portion of the transcript from which Mr. Salinas drew that conclusion:

> THE COURT: Let me ask you, [assistant district attorney] Kate. You know, as I read Count 1, 2 and 3, I'm having a difficult time right now understanding how Counts 4 and 5, misdemeanor intimidation of a victim, are immediately relevant. I mean, a lot of it depends on what [defense counsel] Wimberger does at trial. If the issue as to motivation doesn't come up, then why would you even argue it? I mean, basically you have to prove that this guy committed repeated sexual assaults involving this child on three separate occasions. I read the probable cause so I have some idea what the evidence is going to show, although I don't know.
>
> If she gets up on the stand and testifies as to those events, and depending upon what he does in his cross, he doesn't raise an inference as to motivation, then I don't know it comes in. If he raises an inference as to motivation, then I think it arguably comes in. But how does it come in if he doesn't raise the inference?

(133:6-7; Appellant's app. 122-123).

The trial court said that it was "having a difficult time right now understanding how Counts 4 and 5, misdemeanor intimidation of a victim, are immediately relevant." That comment, and those that follow, show that the court was struggling to find the intimidation counts relevant. I.e., the court was expressing skepticism that the counts should be tried together.

Mr. Salinas stands by his assertion that the court "initially expressed skepticism" about trying the joined counts together.

CONCLUSION

For the reasons set forth above, and in his brief-in-chief, Luis Salinas respectfully requests that this court vacate his judgments of conviction and remand the case to the circuit court for separate trials: one for the two misdemeanor intimidation counts, and one for the three sexual assault counts.

Dated this 19th day of September, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,355 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 19th day of September, 2014.

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