STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP365-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID E. HULL,

Defendant-Appellant.

APPEAL FROM A NON-FINAL ORDER, ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY, THE HONORABLE KENDALL M. KELLEY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established legal principles.

STATEMENT OF THE CASE AND FACTS

As Respondent, the State exercises its option not to include separate statements of the case and facts. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. Any necessary information will be included where appropriate in the State's argument.

INTRODUCTION

Defendant-Appellant David E. Hull appeals a non-final order denying his motion to dismiss an information charging him with one count each of first-degree sexual assault of a child under sixteen years old by use or threat of force or violence and second-degree sexual assault of a child under sixteen years old (16; 23; 30). The State accused Hull of sexually assaulting then fourteen-year-old SJH in a Green Bay hotel room where she, her father, and Hull all spent the night in February 2011 while SJH's father and Hull were attending a taxidermy conference (2). SJH did not report the assault to law enforcement until January 2012 (2:1-2; 13). A court commissioner bound Hull over for trial after a preliminary hearing, and the State filed the information (16; 40; 41; 42, *specifically* 42:23-24; 43:2).

SJH did not testify at the preliminary hearing. Instead, the State introduced her statement to police describing the assault under Wis. Stat. § 970.038, which permits the introduction of hearsay at preliminary hearings (41:7-11). Wis. Stat. § 970.038(1). As also allowed by § 970.038, the commissioner relied on SJH's hearsay statement in finding probable cause that Hull had committed a felony (42:23-24). Wis. Stat. § 970.038(2).

Hull's motion to dismiss the information reasserted three grounds that he had previously raised before and during the preliminary hearing (23; 27). Specifically, Hull argued that: (1) Wis. Stat. § 970.038 unconstitutionally infringed on his rights to confrontation, cross-examination, compulsory process, the right to the effective assistance of counsel, and due process; (2) § 970.038 violated the prohibition on ex post facto laws because Hull's crimes were alleged to have occurred before the statute took effect; and (3) the court commissioner improperly quashed his subpoena to have SJH testify at the preliminary hearing (23; 27). The circuit court denied Hull's motion (30).

On appeal Hull renews the latter two arguments, acknowledging that the supreme court recently rejected claims identical to the first in *State v. O'Brien*, 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8 (Hull's brief at 2 n.1). This court should affirm. Hull has failed to carry his burden of proving that Wis. Stat. § 970.038 is an unconstitutional ex post facto law. Further, because the only reason Hull wanted to have SJH testify at the preliminary hearing was to challenge her credibility, the court commissioner properly quashed his subpoena.

ARGUMENT

I. HULL HAS NOT DEMONSTRATED THAT WIS. STAT. § 970.038 IS AN EX POST FACTO LAW AS APPLIED TO HIM.

A. Standard of review and applicable law.

Article I, § 10 of the United States Constitution provides that "[n]o state shall … pass any … ex post facto law." Similarly, art. I § 12 of the Wisconsin Constitution states that "[n]o … ex post facto law … shall ever be passed."

Laws are presumed constitutional, and a defendant claiming a law violates the ex post facto clauses of the United States or Wisconsin Constitutions must prove this beyond a reasonable doubt. *See State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶ 9, 353 Wis. 2d 520, 846 N.W.2d 820 (*citing Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 76, 350 Wis. 2d 554, 835 N.W.2d 160, and *Chappy v. LIRC*, 136 Wis. 2d 172, 184–85, 401 N.W.2d 568 (1987)); *State v. Post*, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995). This court must indulge every presumption favoring the statute's validity. *Post*, 197 Wis. 2d at 301. This court reviews challenges to the constitutionality of a statute *de novo*. *Id*.

Hull's brief explains that he is challenging Wis. Stat. § 970.038 under the ex post facto clause of the United States Constitution because he believes that the Wisconsin Constitution's ex post facto clause would not prohibit applying § 970.038

to him (Hull's brief at 6). But as this court has noted, in interpreting the Wisconsin Constitution's ex post facto clause, it looks to United States Supreme Court decisions interpreting the United States Constitution's ex post facto clause. *Singh*, 353 Wis. 2d 520, ¶ 9. Thus, if Hull proves a violation of the federal clause, he likely will have shown a violation of the state clause as well.

Beginning with *Calder v. Bull*, 3 U.S. 386, 390 (1798), the Supreme Court recognized that the ex post facto clause prohibits four types of criminal laws. *See Carmell v. Texas*, 529 U.S. 513, 522 (2000). They are laws that: (1) make actions criminal that were innocent when done, and punishes those actions; (2) aggravate a crime or make it greater than it was when committed; (3) change the punishment and inflict a greater punishment for a crime than when it was committed; and (4) alter the legal rules of evidence and receive less or different testimony than the law required at the time of commission of the offense in order to convict the defendant. *Id.* (citing *Calder*, 3 U.S. at 390).

Hull maintains that Wis. Stat. § 970.038 falls within the fourth type of law prohibited by the ex post facto clause (Hull's brief at 7-9). Additional legal principles establishing why this is not the case will be discussed in the next section.

B. Wisconsin Statute § 970.038 is not an ex post facto law because it did not change the law to allow Hull to be convicted on less or different evidence than the law required at the time he allegedly assaulted SJH.

This court should conclude that Hull failed to meet his burden of proving beyond a reasonable doubt that applying Wis. Stat. § 970.038 at his preliminary hearing was an ex post facto violation.

Hull argues that both the court commissioner and the circuit court erred by concluding that Wis. Stat. § 970.038 did not fall under the fourth type of ex post facto law when they determined that because the law only made changes involving the admission of evidence at preliminary hearings, it did not change the legal requirements necessary to convict him of a crime at trial (Hull's brief at 7-8; 30:4-5; 41:4-6). Specifically, Hull contends that nothing in the fourth *Calder* category limits its application to trials, and notes that in order to eventually convict a defendant, the State needs to first show at a preliminary hearing that there is probable cause to believe that the person committed a crime (Hull's brief at 7-8).

This argument is inadequate to establish an ex post facto violation beyond a reasonable doubt. The court commissioner and the circuit court were correct when they concluded that Wis. Stat. § 970.038 did not change what the law required the State to prove in order to convict Hull of the

sexual assault charges. A finding of probable cause at a preliminary hearing is not an element of the crimes of which Hull is accused. A "preliminary hearing as to probable cause is not a preliminary trial or a full evidentiary trial on the issue of guilt beyond a reasonable doubt." *State v. Schaefer*, 2008 WI 25, ¶ 34, 308 Wis. 2d 279, 746 N.W.2d 457 (citation omitted). The change allowing the admission of hearsay at a preliminary hearing has nothing to do with what the State will have to prove to a fact-finder to convict Hull should he go to trial or the rules that will apply at that proceeding. Or, at least Hull has not pointed to anything establishing such a connection, and he has failed to carry his burden of proving an ex post facto violation.

Further, even assuming that Wis. Stat. § 970.038 has some connection to what the State must do to convict Hull, the statute still is not an ex post facto law because it does nothing more than make a certain type of evidence admissible at a preliminary hearing that had not previously been allowed. The Supreme Court has held that such statutes applied in the trial context do not violate the prohibition on ex post facto laws and similar changes involving preliminary hearings also do not present any constitutional problem.

For example, in *Hopt v. Utah*, 110 U.S. 574 (1884), *limited on other grounds as recognized in Illinois v. Allen*, 397 U.S. 337, 342-43 (1970), the territory of Utah passed a statute making felons competent witnesses in criminal proceedings after the defendant committed his crime, but before his trial. *Id.* at 587-88. The Supreme Court rejected the defendant's argument that the statute was an ex post facto violation, stating "[s]tatutes which

simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage." *Id*. at 589. This is so because:

> they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

Id.

The Court further stated there was no ex post facto violation because the crime with which the defendant was charged, the punishment for that crime, and the degree of proof needed to convict him all remained the same as when he violated the law. *Id*. at 589-90. It concluded:

> Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but — leaving untouched the nature of the crime and the amount or degree of proof essential to conviction — only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested

> right, and which the state, upon grounds of public policy, may regulate at pleasure.

Id. at 590.

Similarly, in *Thompson v. Missouri* 171 U.S. 380 (1898), the Court rejected an ex post facto challenge to a statute allowing the admission of evidence comparing handwriting samples. *Id*. at 381-88. The law had not been in place when the defendant committed his crime, or at the time of his first trial. *Id*. at 381-82. The defendant was convicted at his first trial, but the Missouri Supreme Court reversed because it determined that handwriting sample comparison evidence had been improperly admitted against him. *Id*. at 380-82. The Missouri legislature then passed a law authorizing the admission of this evidence. *Id*. at 382. At the defendant's second trial, the State again submitted evidence comparing handwriting samples, and the defendant was convicted. *Id*. at 381-82.

The Court disagreed with the defendant that the new statute was an ex post facto law. It acknowledged that the defendant's argument had "apparent support in the general language" used to define ex post laws, specifically, the passage of *Calder* which prohibits "'every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.'" *Id*. at 382 (quoting *Calder*, 3 U.S. at 390. Nonetheless, the Court found no violation in *Thompson* because it could not "perceive any ground upon which to hold a statute to be ex post facto which does nothing more than admit evidence of a particular kind in a criminal case

upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed." *Thompson*, 171 U.S. at 387.

Applying *Hopt* and *Thompson*, Hull's ex post facto challenge must fail. Even assuming Wis. Stat. § 970.038 has any impact on what the State must do to convict Hull, the statute, like those in *Hopt* and *Thompson*, permits the State to rely on a type of evidence to meet its burden at a preliminary hearing that it was not allowed to use when Hull allegedly committed his crimes. This does amount to an ex post facto violation because § 970.038 did not lessen the State's obligation to show probable cause at the preliminary hearing or increase the consequences Hull faced upon a successful bindover. As in *Thompson*, while Hull's argument has apparent support in the language of the fourth *Calder* category, upon examination, § 970.038 does nothing more – and because proof beyond a reasonable doubt is not at issue, quite possibly less – than the statutes the Supreme Court approved of in *Hopt* and *Thompson*. This court must reject Hull's ex post facto argument.[1]

[1] Hull also argues that before the passage of Wis. Stat. § 970.038, SJH would have had to testify at a preliminary hearing for the State to show probable cause and this somehow makes the statute as applied to him an ex post facto law (Hull's brief at 8). The State disagrees. While, given the facts of the case, SJH would perhaps have had to testify at the hearing before § 970.038 took effect, there is no categorical requirement that an alleged crime victim testify at a preliminary hearing such that it is a requirement for the State to convict a defendant. For example, a victim's statement might be admitted pursuant to a hearsay exception or another witness to the crime could testify to establish probable cause.

II. HULL WAS NOT ENTITLED TO SUBPOENA SJH TO TESTIFY AT THE PRELIMINARY HEARING BECAUSE HE WANTED TO ASK HER QUESTIONS ADDRESSING THE CREDIBILITY, NOT THE PLAUSIBILITY, OF HER ACCUSATIONS.

Hull also argues that he should have been allowed to subpoena SJH to testify at the preliminary hearing and the court commissioner erroneously "stopped the preliminary hearing after finding he had heard enough evidence to make a probable cause finding" (Hull's brief at 9). Both the court commissioner and the circuit court held that Hull was not entitled to subpoena SJH to testify at the preliminary hearing (30:5-7; 42:20-24). Because Hull's offer of proof about why he wanted SJH to testify revealed that he would have only questioned the credibility of her accusations rather than their plausibility, there was no error in quashing his subpoena.

"[T]he preliminary examination is intended to be a summary proceeding to determine essential or basic facts as to probability." *Schaefer*, 308 Wis. 2d 279, ¶ 34 (quoting *State v. Dunn*, 121 Wis. 2d 389, 396-97, 359 N.W.2d 151 (1984)) (internal quotation marks omitted). The judge's responsibility is to determine the plausibility of the accusations and whether they support bindover, not to delve into their credibility. *Dunn*, 121 Wis. 2d at 397. "'A preliminary hearing is not a proper forum to choose between conflicting facts or inferences, or to weigh the state's evidence against evidence favorable to the defendant.'" *Schaefer*, 308 Wis. 2d 279, ¶ 34 (quoting *Dunn*,

121 Wis. 2d at 398). The hearing's purpose is to determine whether there is sufficient evidence for the charges to go forward. *Schaefer*, 308 Wis. 2d 279, ¶ 34 (citation omitted). Issues of the weight and credibility of evidence are matters for pretrial discovery and are outside the scope of a preliminary hearing. *O'Brien*, 354 Wis. 2d 753, ¶ 37 (citations omitted).

A defendant may introduce evidence at a preliminary hearing, including calling witnesses. *Schaefer*, 308 Wis. 2d 279, ¶ 35 (citing Wis. Stat. § 970.03(5)). A defendant is entitled to compulsory process to assure the appearance of such witnesses. *Id*. ¶ 34.

The defendant's right to call witnesses at a preliminary hearing is not unrestricted. *O'Brien*, 354 Wis. 2d 753, ¶ 37 (citing *State v. Knudson*, 51 Wis. 2d 270, 280, 187 N.W.2d 321 (1971)). While a defendant may subpoena witnesses for a preliminary hearing, the subpoena may be quashed if the defendant is unable to show the relevance of the testimony to rebut probable cause. *O'Brien*, 354 Wis. 2d 753, ¶ 37 (quoting *Schaefer*, 308 Wis. 2d 279, ¶ 37). Put another way, the defendant's right to call witnesses is limited to those who can rebut the plausibility of a witness's testimony and the probability that a felony has been committed. *Schaefer,* 308 Wis. 2d 279, ¶ 35 (citation omitted).

Hull argues that his explanation to the court commissioner in his response to the State's motion to quash his subpoena of SJH established that he was calling her to challenge the plausibility of her accusations, not their credibility (Hull's brief at 11-13). It does not. Instead, Hull's response

contained a list of questions relating to the credibility of SJH's accusations, and the court commissioner correctly quashed Hull's subpoena.

In his response, Hull recited SJH's allegations in the complaint, then asserted "[i]t is implausible that a victim of forcible sexual assault by a stranger would not run away from the scene of the crime and/or report the crime immediately" (9:4). Hull then listed a series of questions he wanted to ask SJH:

- Did she scream for help when assaulted;
- Did she run out of the hotel room after the assault and ask for help;
- Did she have her cell phone with her;
- Did Hull prevent her from calling for help, waking up her father, or leaving the room;
- Did she have semen on her or her clothes;
- Did she have marks or contusions from the assault;
- Were those marks visible to others;
- Did she show these marks to her father when he said he did not believe her when she said Hull touched her;
- Why did she allegedly tell her father that Hull touched her rather than telling him that Hull sexually assaulted her;

- Why did she wait for a year to report the assault?

(9:4-5).

These questions plainly relate to the credibility of SJH's accusations. Hull wanted to ask questions challenging whether SJH was telling the truth that Hull assaulted her, not whether her allegations and the reasonable inferences from them, if believed, supported a finding of probable cause. *See Dunn*, 121 Wis. 2d at 397-98. While the line between credibility and plausibility can often be fine, *see id*. at 397, Hull's proposed questions are classic examples of questions challenging credibility because they go directly to the trustworthiness of SJH's allegations. *See id*. (quoted source omitted). Hull wanted to poke holes in SJH's account, not to show that it was essentially not possible that the assaults occurred. The court commissioner properly bound Hull over for trial without allowing him to call SJH to testify, and the circuit court correctly upheld this decision.

CONCLUSION

Upon the foregoing, the State respectfully requests that this court affirm the circuit court's

order denying Hull's motion to dismiss the information.

Dated this 22nd day of September, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,180 words.

Dated this 22nd day of September, 2014.

_____

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 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.

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 22nd day of September, 2014.

_____

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