STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I

Case Nos. 2014AP002614-CR, 2014AP002615-CR,
2014AP002616-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY TYSON BELOW,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Kevin E. Martens, Presiding, and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Circuit Court Erred in Denying the Request for Severance.

The State argues that Below ignores the question of "other-acts evidence." (Response at 22-29). But Below recognizes that where evidence would be admissible in separate trials, "the risk of prejudice arising because of joinder is generally not significant." (Below Initial Brief at 26)(citing ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). Instead, he focuses on prejudice both because (1) this is not a typical case; and (2) the ***Sullivan*** test for other acts evidence itself requires consideration of whether the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice." ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). (Initial Brief at 24-29).

The State argues that Below "speculates rather than proves" prejudice, yet also faults Below for assessing the circuit court's decision denying severance based in part on what actually happened at trial. (Response at 25-27).[1] Of course, the circuit court would not have been able to predict every permutation that would result, but the risks of unfair prejudice were nevertheless before the circuit court when it denied the request for severance. At the motion hearing, defense counsel explained:

> The State has already acknowledged the problems that it has with many of the charged crimes. There's issues of mis-identification. There's delayed reporting or no reporting at the time of the incidents. There's

[1] The State then tries to disprove prejudice by citing the fact that the jury acquitted Below on twelve counts. By the State's own logic, however, the circuit court also would not have known that when it denied severance request.

> inconsistencies and even a number of lies in the reporting of the incidents.
>
> There's credibility problems with a number of the alleged victims, and a number of the alleged victims have motives to fabricate their testimony or give their testimony.
>
> And I think these problems were acknowledged by the district attorney in some of his statements to the media. And in looking at these cases, it's clear that the State issuing the number of charges, the number of incidents, in an attempt to get the jury to look at things in the cumulative.

(10/5/10:55-56). Given the number of alleged victims, number of charges, over five-year time frame of events, and credibility issues, the circuit court erred in denying the motion for severance.

II. Below Was Denied the Effective Assistance of Counsel.

A. Defense counsel performed deficiently by failing to object to multiple hearsay statements.

Statements Not Made for the Truth of the Matter Asserted: The State asserts that many of the statements were not admitted for their truth of the matter. (Response at 30-34). While Below maintains that these statements *were* admitted for their truth, even if a statement is admitted for some other reason, that other reason still has to be relevant to the issues at trial.

The State, for example, argues that LW's[2] testimony that she told A[] about her sexual assault because A had told her that the "same thing happened to her" was not hearsay because it was "offered to explain why she disclosed to A[]."

[2] In light of the newly-created Wis. Stat. (Rule) 809.86, Below now refers to the women using their initials.

(Response at 31). But "why she disclosed to A[]" was not relevant to any issue at trial. Without being relevant to establish anything else, the only conclusion left is that the statement *was* admitted for the truth of the matter. Similarly, the State argues that CA's testimony that AV was at the hospital with her because the "same thing" happened to her was offered to explain AV's conduct of visiting CA in the hospital. (Response at 32). But why AV was visiting CA in the hospital was not relevant for any purpose other than establishing that the women talked with each other about what Below allegedly did to them.

The State also asserts that SM's testimony that everyone in the neighborhood knew that Below was "bad business" and abused women was not hearsay because it was used to show "its effect on SM." (Response at 31). The record refutes this argument. The question from the State which prompted this testimony was "how do you know this person, how do you know him by the name Jeff?" (140:36). This was not a question designed to establish any effect which these rumors had on SM. The State seems to acknowledge as much, indicating that this testimony was "not directly elicited." (Response at 19).[3]

These statements served no other relevant purpose, and were accordingly improperly admitted hearsay statements. But even if this Court should conclude that these statements were admissible for a purpose other than their truth, Below was nonetheless denied the effective assistance of counsel. Without objection to these statements, counsel did not hold the State to explaining *what* other purpose these statements had and did not request a limiting instruction to make clear to the jury that it could not use these statements for their truth.

[3] But even if this statement had been made for some non-truth but otherwise-relevant purpose, it still would have been objectionable as other acts evidence, as the danger of unfair prejudice from this sweeping statement would have grossly outweighed any probative value.

State of Mind Exception: The State asserts that the state of mind hearsay exception set forth in Wisconsin Statute § 908.03(3) applied to MM's sister's testimony that MM was scared to not return to the bar where she alleged Below had held and assaulted her, as well as Officer Court's testimony that CR told her that she was afraid of Below. (Response at 30-34). A statement that someone is afraid of someone else may be admitted under this exception *if* it is the fear itself that needs to be established. ***State v. Kutz***, 2003 WI App 205, ¶ 59, 267 Wis. 2d 531, 671 N.W.2d 660 (discussing ***State v. Jackson***, 187 Wis. 2d 431, 435-36, 523 N.W.2d 126 (Ct. App. 1994)("it was her fear the State sought to prove, not the acts of the defendant that led to her fear"). This rule does not serve "to admit a declarant's statements of the cause of those feelings to prove certain events occurred." ***Id.***, ¶¶ 60-62. But here, the only relevance of the testimony was to show that it was more likely than not Below had assaulted them. Thus, these statements were not admissible under this exception.

Excited Utterance Exception: The State argues that Steiner's testimony that MM at some point "within the past few years" told him "that he was beating her and hitting her and made her cut her hair off," was admissible as an excited utterance. (Response at 30-34). Steiner testified this happened in 2005; the State elicited no other testimony about when this statement was made. (140:21-22). The State also asked whether "she ever disclosed any other information regarding her interactions with Below specifically that was concerning to you," and Steiner answered "[j]ust that he would threaten her and make her do stuff, and if she didn't do it she would get beat up." (140:21-22). The State did not establish when these statements were made.

Wisconsin Statute § 908.03(2) provides an exception to the hearsay rule for "[a] statement relating to a startling event or condition *made while the declarant was under the stress of excitement caused by the event or condition*." Wis. Stat. § 908.03(2)(emphasis added). The State failed to present

evidence to establish that MM's statements to Steiner were made while she was still under the stress of any alleged assault. The statements accordingly do not fall under the exception. The same is true of MM's sister's testimony that MM told her that Below "threatened to start her on fire": Shelley testified that MM had at one point been in the hospital "due to him beating her up, cutting her hair off," and that "[a]t the time she said that he threatened to start her on fire." (139:92). This still did not establish *when* MM told that to her sister.

Statements for Purpose of Medical Treatment and Diagnosis: The State asserts that Nurses Meyer and Schutkin's testimony relaying what CA and LR said fell within Wis. Stat. § 908.03(4)'s exception as they went to CA and LR's "*psychological* treatment." (Response at 33). That statute provides an exception for "[s]tatements made for purposes of medical diagnosis or treatment…or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Wis. Stat. § 908.03(4). Contrary to the State's argument, statements such as Nurse Meyer's testimony that CA reported that her assailant had also strangled her friends was not *at all* reasonably pertinent to CA's diagnosis or treatment.[4]

[4] The State also notes that Below "cannot properly complain about alleged hearsay his lawyer deliberately and explicitly elicited," and at one point asserts that "Below omits the fact that defense counsel did not object to the admission of those records." (Response at 31, n.17, 32. n.18, and 33, n.20). On the contrary, Below's very argument is that counsel *performed deficiently* by failing to object to, and at times eliciting, prejudicial hearsay. (Initial Brief at 30-35).

B. Defense counsel performed deficiently by failing to object to prejudicial testimony about Below's rumored HIV status.

The State asserts that the testimony about Below's unproven but rumored HIV status occurred during counsel's "valid" questioning. (Response at 34-36). The State argues that AV's testimony that police told her that Below might be HIV positive was relevant to "challenge A.V.'s memory of her report of her assault." (Response at 35). But specific testimony about Below's rumored HIV status was not at all necessary to accomplish this goal. The State argues that Nurse Meyer's testimony that CA told the nurse that AV told her that Below told everyone that he was HIV-positive was relevant to poking "holes in Meyer's medical report." (Response at 35). But this did not poke any holes in the report; instead, it suggested that Below knew that he was HIV positive while having sex with the women.

C. Defense counsel performed deficiently by failing to object to repeated references to the women as "victims," and even making such references themselves.

Mr. Below cites over forty improper uses of the term "victim" at trial.[5] The State disputes most of these, but nevertheless acknowledges that thirteen of the cited references involved arguably objectionable uses of the term. (Response at 36-39). The State discounts many of the other uses of that term on grounds that they were "generic" references. (Response at 36-38). But this term was used in describing how others—the police for example—interacted with or addressed the women involved. That creates the very

[5] The State notes that five of the pages Below cites (148:24,37,79,94, 95) do not contain the term "victim." (Response at 36). In his initial brief, Below incorrectly cited the transcript of the morning of February 28, 2011, when these instances occurred in the afternoon. *See* (149:24,37,79,94,95).

prejudice the motion in limine sought to avoid. The State argues that the thirteen instances which it does not attempt to discount were insufficient to create prejudice in this large trial. This Court, however, considers the cumulative weight of counsel's errors. ***State v. Thiel***, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305. And indeed, the risk of prejudice in the repeated use of the term "victim" was significant enough for trial counsel to file—and the circuit court to grant—a motion in limine to preclude its use.

D. There is a reasonable likelihood that, but for the cumulative weight of counsel's errors, the jury would not have convicted Below of every one of the twenty-nine counts for which it found him guilty.

The State's only argument against the cumulative weight of counsel's errors is that the jury acquitted him of some of the charges. (Response at 40). But, if anything, the fact that this was a discerning jury heightens the prejudice of counsel's errors. Given the significant credibility problems concerning many of the allegations, the fact that the jury was not wholly convinced by the State's case suggests that—had the jury not been improperly inundated with hearsay statements bolstering the women's accounts of what occurred, repeated references to the women involved as "victims," and testimony suggesting that Below believed he was HIV positive while having unprotected sex with the women—there is a reasonable likelihood that the jury would not have convicted Below of each and every one of the twenty-nine charges for which it returned a guilty verdict.

III. The Circuit Court Erred in Denying the Defense Motion to Suppress Evidence Obtained From the Search Warrant, Including Below's DNA Sample.

The State asserts that the information contained in the search warrant affidavit "easily satisfied" the probable cause

standard. (Response at 41).[6] But while the search warrant affidavit set forth in detail information about the child assault and assault of CS, the warrant affidavit failed to provide sufficient facts to explain how this information linked to Below.

The affidavit asserted that Detective Carloni established a "possible link" between "at least three previously reported sexual assaults" which were "particularly violent" and involved a van. (14AP2615:15;Exh.A;Initial App.174-175). It asserted that one of the alleged victims in those other reported assaults gave a license plate number of a van registered to CR, and another "possible linked assault" listed Below as a suspect. (14AP2615:15;Exh.A;Initial App.174-175).

But all of this information simply offered the conclusions that *police* believed that possible links existed. This failed to provide the reviewing court with the facts to assess whether there were indeed sufficient links between the information involved in the unspecified other alleged assaults and the assaults of JD and CS.

Without those conclusory statements, the only information presented to link Below to the alleged assaults of

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[6] The State erroneously cites ***State v. Keith***, 216 Wis. 2d 61, 68, 573 N.W.2d 888 (Ct. App. 1997) to say that "[w]hether to grant or deny a motion to suppress evidence lies within the discretion of the circuit court." (Response at 15). First, ***Keith*** concerned a Chapter 980 trial and did not involve a motion to suppress. ***Keith***, 216 Wis. 2d 61. Second, whether to grant suppression is *not* left to the discretion of the circuit court. The State later correctly cites the two-step analysis this Court generally applies to suppression issues. (Response at 16). In this context, this Court must consider whether, objectively viewed, the record before the judge gave sufficient facts to establish probable cause; the circuit court judge's decision "will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding." ***State v. Marquadt***, 2001 WI App 219, ¶ 13, 247 Wis. 2d 765, 635 N.W.2d 188.

JD and CS was that police searched CR's van, which Below drove, and found a white rag, "possible blood stains" on the rag and van, and CR's allegation that Below had sexually assaulted her "in the past." (14AP2615:15;Exh.A;Initial App.174-175). These facts, though suggesting the possibility of a connection, failed to rise to the level necessary to create probable cause.

IV. The Circuit Court Erred in Denying the Defense Motion for an *In Camera* Review of CR's Treatment Records From the Date She First Accused Below.

The State discusses trial counsel's request for both CR's treatment records from the date she first told police that Below assaulted her *and* from the timeframe of when these assaults allegedly occurred. (Response at 46-52). To be clear, in his post-conviction proceedings and appeal, Below only argues that the circuit court erred in denying the defense request for CR's records from the date she first accused Below. (Initial Brief at 41-43;106:18; Initial App.138).

The State argues that this request "rested on nothing more" than the chronology of events—that she entered the mental health facility immediately after making the allegations. (Response at 49). The State argues that nothing in the defense motion indicated that her treatment "concerned any mental condition bearing on [her] truthfulness or perception," and that it was more likely that her treatment "concerned suicidal tendencies." (Response at 50).

Below does not dispute that CR was taken to receive mental health treatment following threats of self-harm. (*See* Initial Brief at 42). But this does not in turn mean that her treatment records would have no bearing on her truthfulness or perception.

The circuit court had before it information reflecting that CR, who had been in a long-term relationship, for the first time accused him of assaulting her during their

relationship and then immediately told police not to do anything with her accusation and had to get mental health treatment. Her psychological condition on that date would have been relevant to the veracity of her accusations. Where it is a "close call," the law makes clear that a court should generally provide *in camera* review, ***State v. Green***, 2002 WI 68, ¶ 35, 253 Wis. 2d 356, 646 N.W.2d 298, and the court should have done so here.

CONCLUSION

Below requests that this Court vacate his convictions and remand these matters for new trials, separated to address the charges against each of the eight women for which the jury returned guilty verdicts. He asks that this Court suppress the evidence derived from the search warrant, or, alternatively, that this Court remand this matter for a fact-finding hearing to determine whether the State would have had probable cause to obtain Below's DNA sample. Should this Court deny his request for new trials, he asks that this Court reverse and remand this matter for a ***Machner*** hearing and for an *in camera* review of CR's treatment records.

Dated this 10th day of July, 2015.

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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 2,986 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 10th day of July, 2015.

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