STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP000648

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

ANTON R. DORSEY,

Defendant-Appellant

On appeal from the Circuit Court for Eau Claire County,

The Honorable Paul J. Lenz, presiding

REPLY BRIEF OF THE DEFENDANT-APPELLANT

ANTON R. DORSEY

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A. The use of other acts evidence to show a *generalized* motive to commit a criminal act requires that the *generalized* motive be an element of the charged crime.

The State in its brief writes that Mr. Dorsey asserts that "unless motive is an element of the crime charged, other acts evidence is inadmissible." (State's Brief, p. 12). This is a mischaracterization of Dorsey's argument. Mr. Dorsey merely asserts that the law concerning the admission of other acts evidence to establish motive is as stated in *State v. Cofield*, 2000 WI App 196, ¶ 12, 238 Wis.2d 467, 618 N.W.2d 214, wherein this court held that "[o]ther crimes evidence may be admitted to establish motive for the charged offense *if there is a relationship between the other acts and the charged offense*, see e.g., *Holmes v. State*, 76 Wis.2d 259, 268–69, 251 N.W.2d 56 (1977), *or if there is a purpose element to the charged crime*, see *State v. Friedrich*, 135 Wis.2d 1, 22, 398 N.W.2d 763 (1987)." (Emphasis added).

Wisconsin laws make a distinction between *specific* motive and *generalized* motive. Other acts evidence which demonstrates a linkage between the other acts and the charged offense, are certainly admissible to show a *specific* motive to commit the charged crime, regardless of whether motive or purpose are an element of the crime. In this case, however, the State never argued any linkage between the acts testified to by R.K. and the crimes alleged by C.B. Rather, the State argues that in cases of domestic abuse it is unnecessary to show any *specific*

relationship between the other acts and the charged offense, but rather that it is sufficient to merely demonstrate the existence of a *generalized* motive on the part of the defendant to control the women with whom he is in a domestic relationship.

Unless motive is an element of the crime charged, other acts evidence which merely demonstrates a "generalized motive as oppose to a specific motive to commit a particular crime" is inadmissible. *State v. T. M. Johnson*, 121 Wis.2d 237, 255, 358 N.W.2d 824 (Ct. App. 1984), see also *State v. Cartagena*, 99 Wis.2d 657, 299 N.W.2d 872 (1981). A motive or purpose to control persons with whom one is in a domestic relationship is not an element of any of the crimes for which Mr. Dorsey was charged.

The Wisconsin Supreme Court (in cases involving the sexual abuse of children and other serious sex crimes) has made it abundantly clear that other acts evidence showing a generalized motive or purpose is admissible only if the motive or purpose is an element of the crime. A review of those cases will show this to have always been the case.

In 1984, the Wisconsin Supreme Court in *State v. Fishnick*, 127 Wis.2d 247, 260-61, 378 N.W.2d 272, 279 (1985), affirmed the admission of other acts evidence consisting of a prior attempt by Fishnick to entice a minor, even though, that prior act had no specific relationship to the crime with which he was charged. The Court wrote that:

> Here, the motivation for Fishnick's interaction with C.S. was sexual gratification. His attempted interaction with D.F. was also, arguably, sexual

> gratification. Whether the defendant acted with the purpose of becoming sexually aroused or gratified by the sexual contact is an element of the crime with which Fishnick was charged. Section 940.225(1)(d) and (5)(a), Stats. Other-acts evidence is admissible when probative of the elements of a crime, subject to the general rule excluding character evidence. *Hough v. State*, 70 Wis.2d 807, 813, 235 N.W.2d 534 (1975). Because the purpose of the sexual contact is an element of the crime, and because the defendant's motive impacts upon his purpose for committing the crime with which he is charged, other-acts evidence which tends to show Fishnick's motive is properly admissible.

In 1987, the Court in *State v. Friedrich*, 135 Wis.2d 1, 22, 398 N.W.2d 763, 772 (1987), reaffirmed its holding in *Fishnick*, writing:

> As in *Fishnick*, the motivation for defendant's touching the complainant was sexual gratification. There was obviously a similar motive present in the prior incidents with M.A. and J.H. One of the elements of the charged crime was that the Defendant had the purpose of sexual arousal or gratification. Other acts evidence is admissible when probative of the elements of a crime, subject to the general rule excluding character evidence. *Hough v. State*, 70 Wis.2d 807, 813, 235 N.W.2d 534 (1975)
>
> Because the purpose of the sexual contact is an element of the crime, and because the Defendant's motive is related to his purpose for committing the crime with which he is charged, other-acts evidence which tends to show Defendant's motive is properly admissible. *Fishnick*, 127 Wis.2d at 260–61, 378 N.W.2d 272. Thus the other-acts evidence consisting of the testimony of M.A. and J.H. is relevant since it illuminates Defendant's motive, which in turn is related to his purpose for committing the crime—sexual gratification—which is an element of the charged offense.

Again in 1992, in *State v. Plymesser*, 172 Wis.2d 583, 593, 493 N.W.2d 367, 372 (1992), the Court wrote that:

> In *Friedrich*, we concluded that a circuit court properly exercised its discretion by admitting evidence of uncharged sexual assaults. *Id.* at 25, 398 N.W.2d 763. We determined that evidence of the prior assaults was relevant to motive "[b]ecause the purpose of the sexual contact is an element of the crime, and because the Defendant's motive is related to his purpose for committing the crime with which he is charged...."

(Citations omitted). Twice in the year 2000, the Court held that the admission of other acts evidence was permissible to show a generalized motive or purpose of

sexual gratification when sexual gratification was an element of the crime. First in *State v. Davidson*, 2000 WI 91, ¶ 57, 236 Wis.2d 537, 613 N.W.2d 606, wherein the Court wrote that "[o]ur cases establish that when the defendant's motive for an alleged sexual assault is an element of the charged crime, other crimes evidence may be offered for the purpose of establishing motive." (Citations omitted). And again in *State v. Hammer*, 2000 WI 92, ¶ 27, 236 Wis.2d 686, 613 N.W.2d 629 wherein the Court held that "testimony was properly admitted to prove motive because purpose is an element of sexual contact, and motive is relevant to purpose." Further in 2003, the Court in *State v. Hunt*, 2003 WI 81, ¶ 60, 263 Wis.2d 1, 666 N.W.2d 771, held that "other-acts evidence was properly admitted to prove motive because purpose is an element of sexual assault, and motive and opportunity are relevant to purpose." And most recently in 2015, the Court in *State v. Hurley*, 2015 WI 35, ¶ 72, 861 N.W.2d 174 held that:

> "When a defendant's *motive* for an alleged sexual assault is an element of the charged crime, we have held that other crimes evidence may be offered for the purpose of establishing ... *motive*." *Hunt*, 263 Wis.2d 1, ¶ 60, 666 N.W.2d 771 (emphasis added); *see also Davidson*, 236 Wis.2d 537, ¶ 57, 613 N.W.2d 606 ("Our cases establish that when the defendant's *motive* for an alleged sexual assault is an element of the charged crime, other crimes evidence may be offered for the purpose of establishing *motive*.").

(Emphasis in the original).

Against this lengthy line of Wisconsin Supreme Court cases,[1] and this court's decision in *Cofield*, the State would present as contrary authority this court's decision in *State v. Normington*, 2008 WI App 8, 306 Wis.2d 727, 744 N.W.2d 867. (State's Brief p. 12). In fact, *Normington* found no such conflict with *Cofield*, and a closer examination of the decision provides greater support for Mr. Dorsey's position than for the State's. In *Normington* this Court wrote:

> In *Cofield* we stated that "[o]ther crimes evidence may be admitted to establish motive for the charged offense if there is a relationship between the other acts and the charged offense, or if there is a purpose element to the charged crime[.]" *Id.*, ¶ 12 (citations omitted). We concluded there was not a purpose element to the sexual assault charged and there was no connection between the evidence of the prior sexual assaults and the charged sexual assault, no evidence that the prior assaults provided a reason for committing the charged assault, and no other link between them. *Id.* In this case, in contrast, the motive of sexual arousal or gratification is an element for the second-degree sexual assault. In addition, the evidence that Normington viewed pornography showing the insertion of objects into persons' anuses is connected to the charged offense because it provides a reason why he would insert the toilet plunger into Bob's anus.

Normington, 2008 WI App 8, ¶ 30. The admission of the other acts evidence in *Normington* was related to an element of the offense with which Normington was charged. In addition there was a specific relationship between the other acts evidence and the charged offense in *Normington* which went well beyond asserting a generalized motive to commit a particular kind of crime. Normington had a particular and unusual sexual fetish. He obtained sexual gratification from

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[1] Note, other than *Fishnick*, 127 Wis.2d at 257, all of these cases were decided under a standard of "greater latitude."

viewing the anal insertion of foreign objects into other persons. The crime with which Normington was charged involved the insertion of a toilet plunger into the victim's anus. This is an unusual crime, and an unusual fetish. The other acts evidence clearly went beyond an assertion of a "generalized motive to commit a particular kind of crime" and provided a very specific relationship between the rather unusual other acts in which Normington engaged and the particularly heinous crime with which he was charged. Additionally, the other acts evidence in *Normington* could have as easily been argued to show plan or identity, as well as motive.

No such relationship existed between the other acts and the crimes charged in Mr. Dorsey's case. The acts of domestic violence which Mr. Dorsey admittedly perpetrated upon R.K., and those which were alleged by C.B., are sadly all too common. R.K.'s testimony demonstrated no specific relationship between her experiences with Mr. Dorsey, and the crimes allegedly perpetrated upon C.B. The other acts evidence presented in Dorsey's case demonstrated nothing other than the possible existence of some generalized motive on the part of Dorsey to control those women with whom he is in a domestic relationship. That is exactly the sort of evidence that the other evidence rule in Wis. Stat. § (Rule) 904.04(2), and those

Wisconsin cases extending back to *Fosdahl v. State*, 89 Wis. 482, 62 N.W. 185 (1895), were intended to exclude.[2]

B. The admission of R.K.'s testimony cannot be justified on the grounds that it was relevant to impeach the credibility of Mr. Dorsey's testimony.

1. At the time R.K. testified, Mr. Dorsey had yet to testify, or even make a final decision regarding testifying, hence R.K.'s testimony at the time of admission could not possibly have been relevant to the issue of credibility.

The State asserts that R.K.'s testimony was relevant to the issue of credibility, writing "[t]his case, then, was about credibility. The jury was required to determine if Dorsey's or C.B.'s version of the events was more credible." (State's Brief p. 13). That particular argument was never made by the prosecutor at trial, and for good reason. The State overlooks that at the time R.K. testified Mr. Dorsey had not testified nor made a final decision as to whether he would testify. (See R.34:187-95 for R.K.'s testimony; R.34:216-256 for Dorsey's testimony; and R.34:197-199 for the colloquy regarding Dorsey's waiver of his right to remain silent). It's a somewhat obvious point to make, but at the time of the admission of R.K.'s testimony, her testimony could not possibly have been admitted on grounds that it impeached the credibility of Mr. Dorsey's testimony, because Dorsey had yet to testify. The State cannot submit testimony in anticipation to what the defendant might later testify. And the premature

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[2] Contrary to the State's assertion otherwise, the general rule in Wisconsin concerning other acts evidence continues to be one of exclusion. See, *State v. Scheidell*, 227 Wis.2d 285, 294, 595 N.W.2d 661, 667 (1999).

admission of R.K.'s Testimony for credibility purposes could not be harmless error as it would have affected Mr. Dorsey's decision to testify.

2. Even if the credibility of Mr. Dorsey's testimony had been at issue when R.K. testified, her testimony was not relevant to Mr. Dorsey's credibility as a witness, except through the drawing of an impermissible inference that Mr. Dorsey must be lying because he is a jealous, controlling and violent man with a propensity toward committing these sorts of crimes.

R.K. in her testimony never asserts that Dorsey is an untruthful man. (See, R.34:187-95 for R.K.'s testimony). Mr. Dorsey under cross examination did not deny the criminal acts to which R.K. had testified. (R.34:237-40; Appx. 98-101). R.K.'s testimony therefore had no relevance to the credibility of Dorsey's testimony; except in one sense. The jury could draw from R.K. testimony an impermissible inference that Mr. Dorsey must be lying because he is a jealous, controlling and violent man who has previously committed acts of domestic violence, and therefore has a propensity toward committing these sorts of crimes. R.K. testimony was an invitation to the jury to draw such an inference. The prosecutor at trial expressly asked the jury to draw a similar inference. (R.34:276-77; Appx. 116-17). That invitation was cloaked behind the word "motive," and now the State wishes to cloak that invitation behind the word "credibility." Both arguments, however, are based on the assertion of propensity. Let us be perfectly clear about what the State's argument is. When the State asserts that R.K.'s testimony was relevant to credibility, the State is arguing that Mr. Dorsey must have been lying, that he must have abused C.B. as he had previously abused R.K.,

because he has the propensity to commit these sorts of criminal acts. Her testimony had no other relevance to Dorsey's credibility.

As broad as the prosecutor's argument at trial was, the State's argument on appeal is positively frightening. To accept the State's argument that other acts evidence is admissible whenever the defendant's credibility is at issue is to suppress the defendant's right to testify. The State's position would place all future defendants in the untenable position of either: testifying and having their previous bad acts brought in to impeach their credibility; or to exercise their right to remain silent and thereby forfeit their right to tell their side of the story. Surely, this is not a result that was ever intended by the other acts evidence rule.

C. R.K.'s testimony was not admissible to undermine an innocent explanation of Mr. Dorsey's acts because no such explanation was ever offered.

In his brief Dorsey acknowledged that there is case law for the proposition that other acts evidence is admissible to "undermine the defendant's innocent explanation *for his act*." (Emphasis added). For this proposition Dorsey cited *State v. Roberson*, 157 Wis.2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990), and *State v. Evers*, 139 Wis.2d 424, 407 N.W.2d 256 (1987). Seizing on testimony by Mr. Dorsey that he had received a text in March of 2014 from C.B., informing him that she was going to the hospital because she had slipped in the shower, the State argues that R.K. testimony was admissible to negate "an innocent explanation for the injuries C.B. suffered in March of 2014." (State's Brief p. 14).

This is a twisting of the holdings in *Robertson* and *Evers*. These cases do not stand for the proposition that other acts evidence is admissible to negate an innocent explanation *for the victim's injuries*. These cases stand for the proposition that other acts evidence is admissible to negate an innocent explanation *for the defendant's acts*. This is a significant and fundamental distinction. *Robertson* and *Evers* dealt with the issue of when other acts evidence is admissible to prove a criminal intent, that is, the defendant's *mens rea.* Where defendants do not deny the criminal act, but deny the existence of a criminal intent, these cases have held that other acts evidence may be admitted to negate the innocent explanation *for his acts*. The reasoning is that:

> "... similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent."

Evers, 139 Wis.2d at 438-39.

But Dorsey never asserted that his acts toward C.B. were the result of an accident, inadvertence, self-defense, good faith or other innocent mental state.[3] He denied the very acts alleged by C.B. Offering an innocent explanation for the victim's injury, is not a denial of criminal intent, i.e. the *mens rea*, it is a denial of

[3] Nor did Dorsey ever suggested that R.K. may have slipped in the shower or offer any other innocent explanation for R.K.'s injuries.

the criminal act, the *actus reus*. Dorsey's statement did not offer an innocent explanation of his acts. He did not deny a criminal intent, he denied the criminal act. *Robertson* and *Evers* simply do not stand for the proposition which the State asserts, and do not support the admittance of other acts evidence for the purpose the State offers.

IV. Conclusion.

For reasons stated in his brief and this reply brief, Mr. Dorsey requests that this Court vacate his judgment of conviction and remand his case to the trial court for a new trial.

Respectfully submitted September 2, 2015.

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V. Certifications.

I hereby certify that this reply brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this reply brief is 3000 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this reply brief the same day it was filed with this court.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this reply brief. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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 September 2, 2015.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in:

- ☐ the United States mail for delivery to the Clerk of the Court of Appeals by express mail on _____.
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