

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2015AP000921 CR

TONY PHILLIP ROGERS,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A DECISION
ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY,
HONORABLE TIMOTHY G. DUGAN PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

AMY C. SCHOLZ
Attorney for Defendant-Appellant
State Bar. No. 1078899

GRIEVE LAW, LLC
1305 N. Barker Road, Suite 8
Brookfield, WI 53045
(262) 786-7100

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Issues Presented

1. Did the Circuit Court err when it denied Mr. Rogers' claim of ineffective assistance of counsel?
2. Did the Circuit Court err when it denied Mr. Rogers' request to introduce other acts evidence at trial showing prior fabrication by the victim?

3. Did the Circuit Court err when it denied Mr. Rogers' motion for a mistrial after his jail issued wristband became visible to the jury?

Position on Oral Argument and Publication

Neither Oral Argument nor Publication is requested.

STATEMENT OF THE CASE

On October 4, 2012, a criminal complaint was filed in Milwaukee County wherein Mr. Rogers was charged with four counts of 1st Degree Sexual Assault of a Child - Sexual Contact with a Person Under the Age of 13, contrary to Wis. Stat. §948.02(1). R2. Mr. Rogers' daughter, D.A.R. DOB 09/25/1997, made allegations to her mother that Mr. Rogers had sexually assaulted her repeatedly between September 25, 2005 and September 25, 2009. R2:2. She made these allegations in the form of a letter written to her mother. Included in that letter were requests for additional freedoms at home, and mental health help due to her "hearing voices." Upon receiving the letter, DAR's mother contacted Milwaukee police who conducted an investigation which ultimately led to these charges.

On March 29, 2013, an amended information was filed that charged Mr. Rogers with the same four counts charged in the complaint, but added a fifth charge of Incest with a Child, contrary to Wis. Stat. §948.06(1). R8.

On April 29, 2013, a jury trial on this matter began in front of the Honorable David Borowski. A jury of 13 citizens from

Milwaukee County was selected. On April 30, 2013, a mistrial was declared as the result of the discovery of juror misconduct by two jurors, leaving the trial with only 11 jurors. The case was scheduled for a new trial set to begin on August 5, 2013. However, the defense requested an adjournment of that trial date due to the unavailability of a key witness. The Court granted the adjournment request.

On November 18, 2013, the case was again scheduled to begin trial. However, the Court was continuing a trial that had previously begun, and therefore was unable to hear Mr. Rogers' trial. Milwaukee County Circuit Court branch 10, the Honorable Timothy G. Dugan presiding, agreed to accept the case and conduct the trial. Following three days of trial, Mr. Rogers was found guilty of all five counts charged in the amended information. The Court ordered a pre-sentence investigation. R24.

On January 29, 2014, Mr. Rogers was sentenced to serve 40 years in the Wisconsin State Prison System, bifurcated as 25 years of initial confinement followed by 15 years of extended supervision on each count. All five counts were ordered to run concurrently. R30.

On February 9, 2015, Mr. Rogers filed a motion for post-conviction relief. R37. On March 2, 2015, the State filed a response Mr. Rogers' motion. R39. Mr. Rogers filed a reply to the State's response on April 2, 2015. R41. On April 9, 2015, the Court issued a written decision and order denying Mr. Rogers' motion for post-conviction relief. R42. Mr. Rogers appeals the decision denying his motion for post-conviction relief.

ARGUMENT

I. THE COURT ERRED WHEN IT DENIED MR. ROGERS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The United States Supreme Court established a two prong test for ineffective assistance of counsel. *Strickland v. Washington*, 466 US 668, 104 S.Ct. 2052 (1984). The defendant must show that counsel's performance was deficient and that counsel's errors were prejudicial. *Id.* Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense. *State v. Johnson*, 153 Wis.2d 121, 449 N.W.2d 845

(1990). Deficient performance requires "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 US at 687, 104 S.Ct at 2064.

The prejudice standard as set forth in *Strickland* states that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. Counsel's choices are deficient if they are mistakes, rather than the part of a reasoned, deliberate defense strategy. *State v. Moffett*, 147 Wis.2d 343, 353, 433 N.W.2d 572, 576 (1989). Secondly, they must be so serious as to deprive the defendant of a fair trial whose result is reliable. *Id.*

Mr. Rogers asserts that he received ineffective assistance of counsel when his trial counsel failed to obtain the victim's mental health treatment records for use at trial. The victim's mental health was called into question when she drafted a letter to her

mother indicating that she was "hearing voices" and needed mental help. This admission of hearing voices came in the same letter that accused Mr. Rogers of the crimes with which he was charged. DAR also testified that she was hearing voices at the time she wrote the letter. R57:84-86. With such an obvious question as to DAR's mental health, it cannot be said that the failure to obtain her mental health records was part of any reasoned, deliberate strategy. Instead, this failure to obtain records was the result of a mistake.

While it is exceedingly difficult to obtain mental health records of a victim in a case due to privacy laws and other laws aimed at protecting victims of crime, counsel could have filed a motion requesting an *in camera* review of the records to determine whether DAR was diagnosed with any mental health issue that could undermine her credibility as a witness at trial. Credibility determinations are left to the trier of fact. *Johnson v. State*, 55 Wis.2d 144, 148, 197 N.W.2d 760 (1972). The Wisconsin jury instructions provide guidance on what factors should be used to determine the credibility of a witness:

"In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors: whether the witness has an interest or lack of interest in the result of the [proceeding]; the witness' conduct, appearance, and demeanor on the witness stand; the clearness or lack of clearness of the witness' recollections; the opportunity the witness had for observing and for knowing the matters the witness testified about; the reasonableness of the witness' testimony; the apparent intelligence of the witness; bias or prejudice, if any has been shown; possible motives for falsifying testimony; and all other facts and circumstances which tend either to support or to discredit testimony." Wis. JI-Criminal 300.

Information that DAR was suffering from a mental illness would have provided the jury with additional information that affects the credibility of a witness. While it is true that the jury heard the portion of the letter wherein DAR indicates she was in need of mental health help, no explanation for her request for that help was ever provided. The jury was not given the opportunity to

determine whether, at the time she made the allegations, DAR was suffering from a mental illness that would make it more likely that she had fabricated or misremembered the events Mr. Rogers was accused of. Because the jury was not provided with this information, Mr. Rogers' case was prejudiced.

In its order denying Mr. Rogers' motion for post-conviction relief, the Court indicated that it agreed with the State's analysis. R42:2. The State argued that Mr. Rogers' counsel was not ineffective because he did, in fact, attempt to introduce evidence of the victim's mental health during the trial. R39:3. The State points to two occasions on which trial counsel attempted to introduce evidence of a mental health issue. First, trial counsel responded to the State's motion *in limine*. The Court did not issue a ruling, but instead requested that the parties reach an agreement regarding the issue. R54:7-8. Trial counsel again attempted to introduce evidence of the victim's mental health during trial. R55:2-6.

The Court denied trial counsel's request to introduce evidence that the victim had been hospitalized for a mental health issue. The Court stated that an adequate foundation did

not exist to explain the hospitalization, and the lack of foundation would allow the jury to make unacceptable speculations regarding that hospitalization. R55:2-6. Trial counsel's failure to obtain medical records created the opportunity for the Court to find a lack of proper foundation. The medicals records would have provided a the Court with information regarding why the victim was hospitalized, and would have therefore provided a foundation upon which the Court could have ruled that evidence of the victim's hospitalization should have been introduced.

While trial counsel did make several attempts to introduce important evidence of the victim's mental health, his own failure to obtain relevant medical records caused the Court to deny the admission of significant pieces of evidence that, when combined with the evidence that was admitted, would have cast serious doubt on the credibility of the victim.

Additionally, in its decision and order denying Mr. Rogers motion for post-conviction relief, the Court ruled that Mr. Rogers failed to make the required showing for an *in camera* review of DAR's medical records. R42:2. The Court fails to address the main issue -

specifically that trial counsel never attempted to obtain an *in camera* review of the medical records. The deficient performance lies not in the failure to obtain an *in camera* review, but rather in the failure to try.

Mr. Rogers' trial counsel's conduct meets both prongs of the *Strickland* test, and was therefore ineffective. The failure to obtain and introduce evidence of the victim's mental health was a mistake, and not a reasoned trial strategy, and it prejudiced Mr. Rogers case because the inclusion of this information would have affected DAR's credibility as a witness.

II. THE COURT ERRED WHEN IT
DENIED MR. ROGERS' REQUEST
TO INTRODUCE OTHER ACTS
EVIDENCE AT TRIAL SHOWING
PRIOR FABRICATION BY THE
VICTIM.

During the trial, Mr. Rogers' theory of defense was that DAR had fabricated these allegations. While the reason for the fabrication was not explicitly clear, several overlapping theories were expressed. One theory was that DAR had made these allegations in an attempt to obtain more freedom and less responsibility at home. R57:71-73. Another

theory was that she had told this lie to get attention and sympathy from her friends. Lastly, it was expressed that DAR had fabricated these allegations as a means to get what she wanted at home by pitting her biological father against her step-father. R57:90-93, R58:24-26, R58:34-37. Throughout the trial, Mr. Rogers' defense focused on the idea that DAR had several reasons for accusing him of these crimes, and that none of those reasons were because the abuse had actually occurred.

Mr. Rogers sought to introduce evidence of other acts committed by DAR to show that she had fabricated these allegations. R57:4-32. Wis. Stat. §904.04(2) governs the admission of such "other acts" evidence.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The *Sullivan* court clarified the criteria necessary to admit evidence of "other acts":

1. Is the other acts evidence offered for an acceptable purpose under Wis. Stat. §904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
2. Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. §904.01. The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
3. Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

State v. Sullivan, 216 Wis. 2d 768, 772-773, 576 N.W.2d 30 (1998)

Specifically, Mr. Rogers sought to introduce evidence that DAR had previously told authority figures that she had personally

witnessed a friend being molested by another person. However, the alleged victim in that allegation indicated that the assault had never occurred, and that DAR had fabricated the entire incident. Additionally, DAR had previously made allegations that her mother had physically abused her. Those allegations were also unfounded. Mr. Rogers sought to introduce this evidence to show motive, lack of mistake, and a modus operandi on the part of DAR. Her motive for making these false allegations was to use her status as a victim to get something she wanted. In the case of the allegation involving her friend, she sought attention. R57:4-32. The allegations made against her mother were for the purpose of having restrictions lifted from her. And the letter she wrote to her mother making the allegations with which Mr. Rogers was charged included several requests for reduced responsibility at home and increased freedoms. The Court denied Mr. Rogers request to introduce this evidence, stating that it was inadmissible character evidence.

The Court of Appeals has previously addressed this issue. In *State v. Johnson*, the Court overturned the conviction on the grounds that the trial court erred when it

ruled evidence of prior acts of the victim inadmissible character evidence. *Johnson*, 184 Wis.2d 324, 516 N.W.2d 463 (1994). In that case, the defense sought to introduce evidence of the victim's prior false accusations of abuse. The defense theory was that the victim made the false allegations in an attempt to obtain the defendant's property while he was incarcerated. The trial court ruled that evidence of other acts by the victim was inadmissible character evidence. However, the Court of Appeals ruled that the evidence was properly admissible to show motive on the part of the victim. *Id.*

"Other acts evidence is admissible if it's relevance hinges on something other than the forbidden character inference proscribed by §904.04(2) and the proponent of the evidence uses it for that purpose." *Id.* citing *State v. Rutchik*, 116 Wis. 2d 61, 341 N.W.2d 639 (1984). These cases indicate that other acts evidence is admissible to show motive on the part of the victim. Here, Mr. Rogers intended to introduce other acts evidence of DAR's prior fabrications to further his theory of defense that DAR had made these allegations in an attempt to receive more freedom and less responsibility

at home. This is a proper purpose under §904.04(2) and the evidence should have been admitted.

A trial court's decision should not be overturned "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *State v. Martinez*, 331 Wis.2d 568, 584, 797 N.W.2d 399, 409. In its decision denying Mr. Rogers' post-conviction motion, the Court stated that the other acts were not offered for an acceptable purpose, the other acts were not relevant to the crime charged, and the probative value was outweighed by the danger of unfair prejudice.

Mr. Rogers sought to introduce two very specific instances of lies the victim told in an effort to obtain something for herself. She sought to obtain attention in one instance, and sought to have restrictions lifted from her in a second instance. This evidence was offered not to show the victim's propensity to lie, but rather to show that she makes serious, false allegations against members of her family in order to obtain some benefit to herself. In this instance, she made a serious, false allegation against her father in order to be relieved of

responsibilities at home. One of the instances of prior acts by the victim was a serious, false allegation of physical abuse by her mother that was made for the purpose of having restrictions lifted at home. That act contains the same motive and modus operandi on the part of the victim as the crime charged in this case.

The prior acts are sufficiently similar to the act alleged in this instance to be admissible. The probative value of the evidence is not outweighed by the risk of the unfair prejudice. Therefore, no reasonable judge could have found, under the same facts and relevant law, that the other acts evidence was inadmissible.

III. THE COURT ERRED WHEN IT
DENEID MR. ROGERS' MOTION
FOR A MISTRIAL AFTER HIS
JAIL ISSUED WRISTBAND
BECAME VISIBLE TO THE
JURY.

Mr. Rogers moved for a mistrial during his second trial because the bailiffs had failed to remove his jail-issued wristband, and that wristband became visible to the jury. R57:33-35. The decision whether to grant a motion for a mistrial lies within the sound

discretion of the trial court. *State v. Pankow*, 144 Wis. 2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *Id.* A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process. *State v. Bunch*, 191 Wis.2d 501, 529 N.W.2d 923 (1995), citing *Schultz v. Darlington Mut. Ins. Co.*, 181 Wis. 2d 646, 656, 511 N.W.2d 879, 883 (1994).

In this case, the visibility of Mr. Rogers jail wristband was sufficiently prejudicial to require a new trial. It is well established that any indication that a defendant is in custody is prejudicial to the defense. As such, exceptional measures are regularly taken to ensure that a jury is oblivious to the defendant's custody status. Here, the visibility of the jail wrist band served as an indication to the jury that Mr. Rogers was in custody. His status as an incarcerated inmate makes it more likely that the jury would convict him based on his

custody status and not on the evidence presented at his trial.

In its decision and order denying Mr. Rogers' motion for post-conviction relief, the Court stated that "a jail wristband does not necessarily indicate incarceration." R42:4. This is patently untrue. By its nature, a *jail* wristband is indicative of *jail*. The jury should not be in the position to speculate about the meaning of a wristband. That speculation detracts from the issues in the case, and would cause the jury to consider other factors (such as incarceration) besides the facts in determining guilt or innocence.

Additionally, the Court indicated that it believed Mr. Rogers actions caused the issue. There is no evidence to determine whether the jury saw the wristband prior to Mr. Rogers' request that it be cut off. The Court cannot know whether any members of the jury saw the wristband at all. The bailiffs erred when they failed to remove the wristband, and the Court had a duty to correct that error in an appropriate manner. Here, because the wristband was on Mr. Rogers and visible at a time when the jury was present, the necessary remedy was to declare a mistrial. The Court erred when it failed to do so.

CONCLUSION

For all the foregoing reasons, the Circuit Court made errors prejudicial to Mr. Rogers. Therefore, Mr. Rogers respectfully asks this Court to reverse the decision of the Circuit Court and remand this case with an order vacating the judgement of conviction and ordering a new trial.

Dated at Brookfield, Wisconsin this 6th day of July, 2015.

Respectfully Submitted,

AMY C. SCHOLZ
Attorney for Defendant-Appellant
State Bar. No. 1078899

GRIEVE LAW, LLC
1305 N. Barker Road, Suite 8
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(262) 786-7100

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FORM AND LENGTH CERTIFICATION

I hereby certify this brief conforms to the rules contained in section 809.19(8)(b) of the Wisconsin Statutes for a brief and appendix produced with a monospaced font. This brief conforms to length limitations set forth in Wis. Stat. Rule 809.19(8)(c) as the brief is 20 pages.

Respectfully Submitted,

AMY C. SCHOLZ
Attorney for Defendant-Appellant
State Bar No. 1078899

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify, pursuant to Rule 809.19(12)(f), that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Respectfully Submitted,

AMY C. SCHOLZ
Attorney for Defendant-Appellant
State Bar No. 1078899

Grieve Law, LLC
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