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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

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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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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I. MR. ROGERS' MET THE BURDEN  
FOR SHOWING BOTH DEFICIENT  
PERFORMANCE AND PREJUDICE

The State argues that Mr. Rogers failed to show that his trial counsel was ineffective. The State cites the standard for obtaining an *in camera* inspection of a

victim's medical records as stated in both *State v. Shiffra* and *State v. Green*. State's Br. at 4. An *in camera* inspection will be granted if the defendant can make a preliminary showing that the information will be "necessary to a determination of guilt or innocence." *State v. Green*, 253 Wis.2d 356, 381, 646 N.W.2d 298 (2002).

This case did not involve any physical or forensic evidence. The State's case relied exclusively on the testimony of witnesses, and specifically on the testimony of DAR, the alleged victim. Therefore, the credibility of the witnesses was a crucial factor in the outcome of the trial. Admission of evidence showing that DAR was suffering from a mental illness at the time she made the allegations would have had a great impact on the jury's determination of guilt or innocence.

Trial counsel attempted to introduce evidence of DAR's mental health at the time she made the allegations. However, his attempts were denied as the result of a lack of an adequate foundation to explain DAR's hospitalization. R55:2-6. Therefore, the jury did not hear evidence that DAR received

mental health treatment after she made the accusations in this case.

DAR's mental health status was necessary to make a determination as to guilt or innocence. A jury would certainly take into consideration the potential for falsehood or mistake in an accusation made by a person who is mentally ill and "hearing voices". However, the extent of that mental illness, and the effect it had on the person making the accusation, would weigh heavily on the witness's credibility. Therefore, information regarding DAR's mental health would have been necessary to a determination of guilt or innocence.

Because Mr. Rogers' trial counsel could have met the preliminary requirements for an *in camera* inspection of DAR's mental health records, a *Shiffra/Green* motion would not have been meritless. Therefore, trial counsel's failure to file such a motion and request an *in camera* inspection constitutes deficient performance. Additionally, because the trial court denied trial counsel's attempt to introduce evidence of DAR's mental health due to a lack of foundation, Mr. Rogers was prejudiced by this deficient performance. Had

trial counsel followed proper procedure and obtained the mental health records, a proper foundation could have been laid to allow admission of the mental health evidence. Therefore, Mr. Rogers' trial counsel was deficient, and he was prejudiced by that deficient performance.

II. MR. ROGERS' MET THE  
REQUIREMENTS TO ADMIT  
OTHER ACTS EVIDENCE AT  
TRIAL

The State argues that Mr. Rogers failed to show that the evidence he sought to admit as other acts evidence meets the requirements for admissibility and is not merely extrinsic character evidence shown through specific conduct. The State is wrong.

Mr. Rogers sought to introduce two specific instances where DAR fabricated serious allegations in attempt to gain some benefit for herself. The accusations she made in this case included a specific request that she be given less responsibility at home. This conduct is identical in both motive and

form to the conduct Mr. Rogers sought to introduce at trial.

The State argues that the prior conduct, even if admissible for a proper purpose (like motive or modus operandi), was not relevant, and therefore is inadmissible. The test for relevancy of evidence is whether the evidence "has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. §904.01. The State argues that, because the prior conduct does not involve DAR making accusations that Mr. Rogers had previously committed sexual assault against her, it is not relevant. This reading of the relevancy statute is far too narrow.

DAR has previously made serious, false accusations in an attempt to gain some benefit for herself. Mr. Rogers asserted throughout the trial that the allegations were fabrications by DAR. In the letter in which DAR made the allegations, she asked for benefits for herself, specifically, fewer responsibilities at home. Because there was no physical evidence in this case, the credibility of the witnesses was crucial to the State's case. Evidence that DAR had



previously made serious, false allegations to gain benefit for herself is directly relevant to whether she fabricated the allegations against Mr. Rogers. Evidence that she had previously engaged in remarkably similar behavior certainly has a tendency to make a fact of consequence (whether DAR fabricated the allegations) more or less probable than it would be without that information.

Not only did Mr. Rogers establish that the other acts evidence he sought to admit were for a proper purpose, but he also showed that the evidence is relevant to the determination of guilt or innocence. The Court erred when it denied the admission of the other acts evidence.

### III. THE COURT ERRED WHEN IT DENEID MR. ROGERS' MOTION FOR A MISTRIAL.

The State argues that, because the Court found that "no particular attention was drawn to the jury" when the wristband was displayed, Mr. Rogers was not prejudiced by it. State's Br. at 11. However, both the State and the

trial court failed to provide any basis upon which the Court could make such an assertion.

The trial court is in a unique position relative to a jury. While a trial judge has likely been present for numerous jury trials and has certainly seen hundreds (if not more) defendants, most jurors have not. Therefore, it is unrealistic for a trial judge to determine where a jury's attention was or was not drawn at any particular point in time during a trial. The Court's determination that "no particular attention" was drawn to the jury does not ensure that no juror saw the wristband. If it is possible that any juror saw the wristband, the risk of prejudice is too great to allow the error to go unresolved. Here, the only acceptable resolution was to declare a mistrial and select a new jury. 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 this 9<sup>th</sup> day of November, 2015.

Respectfully Submitted,

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**FORM AND LENGTH CERTIFICATION**

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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 reply brief conforms to length limitations set forth in Wis. Stat. 809.19(8)(c) as it is 10 pages.

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**CERTIFICATION OF ELECTRONIC FILING**

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

Respectfully Submitted,

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