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STATE OF WISCONSIN
IN SUPREME COURT

APPELLATE CASE NO. 2015AP002328-CR
WAUKESHA COUNTY CASE NO. 2013CF001206

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAUN M. SANDERS,

Defendant-Appellant-Petitioner.

ON REVIEW OF AN OPINION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE LEE S. DREYFUS, JR., PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

In addition to the following reply, Sanders reaffirms the arguments presented in his brief-in-chief.

I. SANDERS' COUNSEL DID RENDER DEFICIENT PERFORMANCE ENTITLING SANDERS TO A NEW TRIAL

As Sanders argued in his brief-in-chief, trial counsel was ineffective on several levels all relating to his failure to file motions and make objections relating to the court's ability to proceed with prosecution of Count One based on the age of the defendant at the time that crime allegedly occurred. These failures ultimately resulted in prejudicial testimony being entered into the record which affected the outcome of the remaining counts. Sanders maintains that the error had a domino like effect and prejudiced the defense in several respects.

A. THE COURT DID NOT HAVE COMPETENCY TO HEAR THE CASE

The State argues in its brief that the court "unquestionably had competency" to hear the charges against Sanders, including those in count one. (R. brief p. 16). If that were the case, the circuit court would not have raised the issue and this court would not have accepted this case for review.

There are no cases or statutes which specifically address whether or not a circuit court still maintains competency over an adult individual for conduct they engaged in before the age of ten.

The State relies primarily on statutory interpretation for its stance that the court has competency. While it concedes there are three different courts within the circuit court with competency to adjudicate violations of the criminal law—the juvenile court for "juvenile[s] [ ] under 10 years of age" who "commit[ ] a delinquent act," Wis. Stat. § 938.13(12), the juvenile court for "juvenile[s] 10 years of age or older who [are] alleged to be delinquent," id. § 938.12(1), and the court of criminal jurisdiction for defendants not within the competency of either juvenile court, id. § 753.03—it also argues that "the age of the defendant at the time the State files charges determines which court has competency over a given charge, as opposed to the defendant's age when he committed the relevant misconduct." (R. brief p. 16).

The State makes this statement without any cite to any statute or any caselaw that explicitly says this. It goes on to argue this is true because the statutes in question use "present tense" and also based on its interpretation of caselaw where the cases have significant differences from the one at hand.

The State argues, "[t]he text of Section 938.13(12) and Section 938.12(1) uses the present tense, indicating that the defendant must presently be a juvenile in order to fall within the juvenile court's competency." It also argues "other portions of the Juvenile Justice Code only logically operate if the age of the defendant at the time of charging determines the appropriate court." (R. brief p. 17). It specifically references Wis. Stat. § 938.12(2), which enables the juvenile court to retain competency over juveniles who turn 18 before a juvenile-delinquency case is resolved and argues "this is a meaningless provision if the defendant's age at the time of his misconduct is operative." (R. brief p. 17). It also references the statutory purpose of Wis. Stat. § 938.01(2) which states that the Juvenile Justice Code is meant to "prevent further delinquent behavior . . . in the juvenile offender," a purpose that excludes adult offenders from its scope. (R. brief p.17). And finally, the State relies on *State v. Annala*, 168 Wis. 2d 453, 484 N.W.2d 138 (1992), for the proposition that "this Court reached an identical conclusion when considering an adult defendant charged in adult criminal court for misconduct committed as a 15-year old." (R. brief p. 17). The State asserts "since no principle distinguishes *Annala* from Sanders' case—an adult defendant charged in adult criminal court for misconduct he committed when

he was under 10 years old—*Annala* forecloses his claim here."

The State's argument and assessment is incorrect. First, Sanders is not arguing the juvenile court still maintains competency here, which is what a good portion of the argument is spent on. Rather, Sanders is arguing the circuit court no longer has competency because the case would have been properly initiated as a CHIPS matter had the allegations come forward while Sanders was *still* under the age of ten. At this point, no court has competency to proceed because the offense occurred before Sanders could be prosecuted as either a juvenile *or* an adult. This interpretation is consistent with both the ages outlined in the statutes, the Supreme Court caselaw as outlined in the brief-in-chief, and the application of this court's precedent in *Annala.*

Annala was twenty years old and was charged with crimes committed when he would have been fifteen years old. *Id.* at 458. As Sanders argued in his brief-in-chief, the difference between this case and *Annala* is that here, the alleged crimes occurred before even the juvenile court had jurisdiction, when it would have been a CHIPS action. This distinction is important because of the differences outlined by Sanders relating to the purposes of the criminal code versus the CHIPS code, the difference age plays in brain development and the ability to understand the consequences of ones actions

as acknowledged by the Supreme Court in *Miller v. Alabama,* 567 U.S. 460 (2012), and the differing focuses of the statutes in relation to rehabilitation versus punishment.

As Sanders has argued, it is illogical to punish a fully formed adult for an act he allegedly committed long before he was so, like in this case where he was only eight or nine years old. The court of appeals has basically given the State *carte blanche* to prosecute individuals who have allegedly committed offenses dating back to infancy as long as the statute of limitations has not run and absent any claim of intentional or negligent delay. The statutory schemes must be harmonized to avoid this absurd result which the State is arguing is the accurate interpretation of the law. *See Johnston v. Masters*, 2013 WI 43, 347 Wis.2d 238, 830 N.W.2d 637**.**

B. THE ARGUMENT AND OBJECTION TO THE COMPETENCY OF THE COURT IS NOT A "NOVEL ARGUMENT" AND IT WAS DEFICIENT TO FAIL TO RAISE IT

The State then argues that even if this Court should find that the adult criminal court does not have competency under these circumstances, it must still hold that Sanders' counsel was not deficient. It argues that the competency argument is a "novel legal argument" that's "contrary to longstanding law" and that counsel is not required to raise it. (R. brief p. 33).

It again makes a blanket statement that "the circuit court's competency over count one was clearly proper under settled law," a proposition that Sanders has demonstrated is incorrect.

Whether or not a court has jurisdiction or competency to proceed is not a novel argument. One of the first and most basic steps in assessing a case is determining whether the court overseeing the case has the authority to do so.

Here, even the court itself recognized there was a problem with prosecuting an adult for conduct that allegedly occurred before the defendant was ten years old. Counsel should have been aware from the moment he received the criminal complaint that jurisdiction (or competency, depending on how you frame the issue) was a major issue that needed to be raised through pretrial motions. Yet, counsel did nothing. It was not until after the State had already rested its case that the court had any notice as to whether the prosecution of count one was proper, and counsel did nothing to try to limit the testimony beforehand, such as filing a motion in limine.

This failure on behalf of trial counsel allowed prejudicial testimony to enter the record. The court itself said that if prosecuting count one were improper, it would have "affect[ed] the testimony and evidence that was

presented" in the trial. (R. 55:95). So counsel's failure to raise it at any number of steps along the way as outlined in the brief-in-chief was deficient performance.

II. SANDERS WAS PREJUDICED BY COUNSEL'S DEFICIENT PERFORMANCE

The State argues that even if it was deficient performance, the outcome of the case would have remained the same and Sanders was not prejudiced. The State maintains that all evidence admitted to prove count one was either directly admissible to prove the remaining charges or admissible under Wisconsin's "other acts" rule of evidence. (R. brief p. 34). Moreover, it argues the jury would have still convicted Sanders on all other charges even without the evidence related to count one. (Id.) Sanders maintains that the admission of the testimony concerning count one was unduly prejudicial, did not contain admissible information, and it did result in a constitutionally unfair trial.

a. THE EVIDENCE RELATING TO COUNT ONE IS NOT RELEVANT TO THE OTHER COUNTS FOR AN REASON LEGALLY PERMISSIBLE

The State first argues this testimony was relevant to prove count one. Sanders agrees that if the court had jurisdiction and competency to proceed on count one, this was relevant evidence to count one. However, as Sanders

has argued the court lacked competency and therefore, this evidence should only be assessed as it applies to the other counts. The circuit court acknowledged that if prosecuting count one were improper, it would have "affect[ed] the testimony and evidence that was presented" in the trial. (R. 55:95). The court was referencing the use of the evidence for count one as it relates to counts two through four.

The State argues this evidence was relevant to these other counts because the testimony as it relates to count one explained that "peeks" were an act of illicit sexual contact. (R. brief p. 36). The State argues it is relevant to show what Sanders did to H.S. during the time period underlying counts two through four because the same term "peek" is used to describe those events as well. The State argues that *McGowan,* 2006 WI App 80, ¶17, 291 Wis.2d 212, 715 N.W. 631 supports its contention that the passage of time is irrelevant here, however, the court there specifically noted that, "Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult." Id., ¶20 (quoting *State v. Barreau*, 2002, WI App. 198, ¶38, 257, Wis.2d 203, 651 N.W.2d 12). In this case, we are

talking about events that occurred when H.A.S. was only six or seven years old versus the later counts when she was significantly older (five or six years later). It is not strictly about the lapse in time between the events like the State argues, but has to do with the maturity of H.A.S. and her ability to recount what actually occurred when she was that age and with the passage of time. Therefore, the evidence relating to count one lacks relevancy as it relates to counts two through four.

b. THE EVIDENCE RELATING TO COUNT ONE IS NOT ADMISSIBLE "OTHER ACTS" EVIDENCE

First, the evidence relating to count one is not admissible other acts evidence. Under Wis. Stat. § 904.04(2)(a), "evidence of other crimes, wrongs, or acts" is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Such evidence is not admissible, however, "to prove the character of a person in order to show that the person acted in conformity" with that character. Id.; *State v. Hurley*, 2015 WI 35, ¶¶ 55–57, 361 Wis. 2d 529, 861 N.W.2d 174. Other-acts evidence is admissible if it (1) "is offered for a permissible purpose pursuant to Wis. Stat. § 904.04(2)(a)," (2) "is relevant under . . . Wis. Stat. § 904.01," and (3) "its probative value is not substantially outweighed

by the risk or danger of unfair prejudice under Wis. Stat. § 904.03." Hurley, 361 Wis. 2d 529, ¶ 57.

The State argues that here, "the testimony about the count-one time period—which established that Sanders created the term "peek," and that a "peek" involved Sanders engaging in illicit sexual contact with HA.S.—would have been admissible as other-acts evidence. Wis. Stat. § 904.04(2)(a)." (R. brief at 37). The State argues that it shows "opportunity," "plan," and "absence of mistake," and argues that it is unduly prejudicial. The State also argues the testimony on count one "established that Sanders had engaged in sexual contact with H.A.S. before and that Sanders gave this contact a particular name, "propositions" the State would then use to show that Sanders had the "opportunity" and "plan" to repeat this abuse." This, however, is a merely roundabout way of admitting it's being used to show propensity. The State cannot use a backdoor to enter inadmissible evidence, which is what they are trying to do here. They are trying to demonstrate that he did it once, so he's more likely to have done it again in counts two through four.

Here, even if there was any probative evidence relating to count one for purpose of opportunity or plan, it is outweighed by the danger of unfair

prejudice. Evidence that the defendant committed repeated acts of incest against his sister is likely to arouse the jury's sense of horror and provoke its instincts to punish. The fact that this alleged behavior began at such a young age (the alleged incidents in count one) only further increases this risk of improper prejudice to the defendant.

c. WITHOUT EVIDENCE RELATING TO COUNT ONE, THE JURY WOULD NOT HAVE CONVICTED SANDERS ON THE OTHER COUNTS

Finally, the State argues that even without the evidence of count one, the jury would have still convicted Sanders on the other remaining counts. It asserts that it "presented powerful evidence of Sanders' guilt for counts two through four, even without the testimony from the count-one time period." (R. brief p. 43). However, the testimony relating to count one played a direct role in establishing evidence as it relates to counts two through four and acted to bolster to that evidence. Without Sanders' admission to the "peeks" and explanation of what they were and Detective Weber's testimony relating to the same, the only evidence for counts two through four was the testimony from H.A.S. and her boyfriend's testimony about what she told him about the alleged incidents and him hearing the word "peek."

As argued in the brief-in-chief, the credibility of H.A.S. was called into question based on her changing testimony. The jury heard evidence through H.A.S. that Sanders allegedly began to touch H.A.S. sexually when he was as young as eight or nine years old, which is a full year younger than what was originally alleged in the complaint. Trial counsel admitted at the *Machner* hearing that his defense of Sanders was largely rooted in credibility, that is, H.A.S. was simply not a credible witness. (57:20, 35-36). Trial counsel conceded that the evidence of count one hurt Sanders' defense because it made H.A.S. more believable than it would have had the evidence not been introduced (57:35-37). Moreover, the testimony from Detective Weber regarding the word "peeks" having sexual overtimes is significant because it arguably corroborated H.A.S.' testimony that the use of the word "peeks" was the equivalent of a code word used by Sanders to initiate sexual contact with her during the charging periods alleged in counts two through four. Furthermore, the admission of Sanders' statement through Detective Weber essentially forced Sanders to take the stand to explain the earlier contact with his sister from when he was under the age of ten. Sanders may not have felt compelled to take the stand and testify if this evidence had been properly excluded on jurisdictional grounds in the first place.

There was a very real danger the evidence of count one would make the jury more likely to believe Sanders' later alleged sexual contact with H.A.S. in the second charging period was more probable than not, (i.e. propensity evidence), and it therefore, not including the evidence would have affected the outcome of the trial.

CONCLUSION

For the reasons stated above and those in his brief in chief, Sanders respectfully requests that this court reverse the decision of the Court of Appeals which affirmed the decision of the trial court and remand the matter for a new trial.

Respectfully submitted this 30th day of October, 2017.

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional serif font. The brief contains 2,717 words.

Electronically signed by Craig M. Kuhary

_____

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Attorney for Defendant-Appellate

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 30th day of October, 2017.

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