STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1265

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
TIMOTHY GREGORY,
Defendant-Appellant.

ON APPEAL OF A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE RACINE COUNTY COURT, THE HONORABLE ALLAN B. TORHORST PRESIDING

REPLY BRIEF OF RESPONDENT-APPELLANT

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Timothy Gregory, the defendant-appellant, replies to the State's brief as follows:

1. The evidence of prior bad acts was prohibited propensity evidence.

The State cannot avoid that the evidence of a prior crime was propensity evidence. The State asserts, evidence of a prior child sexual assault "is probative of the defendant's desire to seek sexual gratification from children." (State's brief at 11; citing ***State v. Tabor***, 191 Wis. 2d 482, 494-95, 529 N.W.2d 915 (Ct. App. 1995)). "The prior bad act all but eliminates the probability that a like result with another prepubescent child is the product of 'mere chance.'" ***Id.*** In other words, the evidence creates an "overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts." That is one of the reasons that character evidence is inadmissible in criminal trials. *See e.g.,* ***Whitty v. State***, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967).

Gregory's defense was not that the offense was committed due to "mere chance" but that Gregory did not commit the crimes. The State twice cites to ***State v. Veach***, 2002 WI 110 ¶77, 255 Wis. 2d 390, 648 N.W.2d 447, for the principle that "Other-acts evidence is admissible to prove the elements of the charged offenses, even when those elements are not in dispute." (State's brief at 10 and 13). Therefore, the State concedes that evidence of Gregory's motive is not particularly relevant. Nonetheless the State wants this court to adopt its argument that the evidence, which has little probative value, is not more prejudicial than probative despite that the evidence is highly prejudicial propensity evidence. The State can only make this claim with a straight face by pressing down on the scales of probability and lifting up on

the scales of prejudice. This court should not do the same. The evidence had no proper evidentiary value, and was extremely prejudicial.

2. The reasons for applying the greater latitude rule do not apply in this case.

The greater latitude rule listed in ***State v. Davidson***, 2000 WI 91, 236 Wis. 2d 537, ¶36, 613 N.W.2d 606, exists because of "the difficulty sexually abused children experience in testifying and the difficulty prosecutors have in obtaining admissible evidence in such cases." Those reasons do not exist here. The State has not refuted Gregory's claim that, "The witnesses, who by the time of trial were aged 18 and 15 had no difficulty in testifying." The State's only response is to claim, "It was still difficult for them to testify about these very personal and humiliating acts inflicted on them as children…" without any citation to the record. (State's brief at 14). On the contrary, the complainants testified without difficulty at trial (113:158-97; 114:16-92).

3. Testimony that Gregory sexually assaulted "somebody else's child" was extremely prejudicial.

Nothing that the State says could be farther from the truth than its claim that evidence of a supposed prior sexual assault of another child which the court ruled was not admissible but came in through the testimony of a rogue witness "caused little prejudice." (State's brief at 18). On the contrary, once the jury heard a prior victim's mother testify that she "found out later that there had been somebody else's child who didn't or couldn't testify so it didn't go to court" (114:107) Gregory could not get a fair trial.

The State concedes that this testimony was prejudicial and does not dispute that the court properly excluded it. Its

only argument is that the court properly exercised its discretion when giving a curative instruction rather than granting a mistrial. The law provides that a court, when exercising its discretion whether to grant a mistrial must examine "whether the claimed error is sufficiently prejudicial to warrant a mistrial." ***State v. Ford***, 2007 WI 138, ¶29, 306 Wis. 2d 1, 742 N.W.2d 61, *citing* ***State v. Nienhardt***, 196 Wis. 2d 161, 166, 537 N.W.2d 123 (Ct. App. 1995).

In addition to conceding that the evidence was improper and prejudicial, the State also concedes Gregory's claim that some information is so prejudicial that a curative instruction is not sufficient. It does so because it does not refute it. *See* ***Charolais Breeding Ranches v. F.P.C. Sec. Corp.***, 90 Wis. 2d 97, 109, 279, N.W.2d 493 (Ct. App. 1979)(arguments not refuted are deemed admitted). The State has not disputed Gregory's claim that, "The general assumption relied upon by the Court that the jury will follow cautionary instructions… does not hold where the improper information is so highly prejudicial to the core issue at trial." (Gregory's brief at 24) The improper evidence led the jury to believe that Gregory was guilty of repeated prior sex offenses similar to the offenses alleged here. That was not true. Given the extreme impact of such a claim, it simply is not true as claimed by the State that the improper evidence "caused little prejudice" or that the curative instructions were sufficient to remove any prejudice. (State's brief at 18).

4. The Court denied Gregory the right to present a defense.

The parties agree that Gregory has a constitutional right to present relevant evidence whose probative value is not substantially outweighed by its prejudicial impact. Even so, the State wrongly argues that the court properly ruled that

Gregory could not try to prove that the girls and their father had a motive to falsely accuse Gregory. The State's argument rests on the notion that it is "far-fetched" to believe that because the girls' father was angry with the Gregorys and had vowed vengeance on them and the pastor they supported, and that the girls' somehow became biased towards Gregory because of this anger. The State argues that it would not be rational or reasonable for the father to be angry at Gregory for failing to tell him about his wife's affairs and for that anger to somehow influence his daughters. That may be true but anger is not always a rational emotion. Whether the State believes Gregory's claim that the girls had a motive to falsely accuse him is far-fetched is not the question. The question is whether evidence of a motive to falsely accuse Gregory is relevant. It clearly is.

Relevant evidence "means evidence having 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. Evidence is relevant "if it tends to show that the complainant has a motive to falsely accuse a defendant…." ***State v. Vonesh***, 135 Wis. 2d 477, 493, 401 N.W.2d 170 (Ct. App. 1986). Furthermore, "The credibility of a witness is always relevant when the facts are in dispute.... Evidence that a witness has a motive to lie is therefore admissible, subject to limitations imposed on its use and the discretion of the [circuit] court." ***Id.*** at 492.

The Sixth Amendment to the United States Constitution and Article 1, §7 of the Wisconsin Constitution guarantee a criminal defendant "a meaningful opportunity to present a full defense." ***State v. St. George***, 2002 WI 50, ¶13, fn. 8, 252 Wis. 2d 499, 643 N.W.2d 777, *citing* ***California v. Trombetta***, 467 U.S. 479 (1984). The ***St. George*** standard

says that a defendant may present relevant evidence only where it is not "outweighed by the State's compelling interest to exclude the evidence."

Applying this standard, this court must determine that Gregory had a right to present the evidence, because the State has never identified any way in which the State had a compelling interest to exclude the evidence of motive to falsely accuse Gregory. Whether compelling or not, the evidence simply was not prejudicial to the State, and the State has never said that it was.[1]

On the other hand trial counsel testified clearly that the court's exclusion of evidence regarding the girls' possible motive to falsely accuse Gregory hamstrung the defense severely. According to her:

> The problem was the Court had shut down pretty much all of my opportunities to [prove bias or fabrication] and I had to shift my theory of defense from having a very strong motivation or bias component to having that as a much smaller component of the theory and had to rely primarily more on the fact that one of the allegations, I believe, wasn't even physically possible for Mr. Gregory to do, and then to rely heavily on the fact that Mr. Gregory was never alone with these children and therefore could not have committed these assaults. So I had to shift away from motivation and bias based on the Court's rulings. It

[1] The State argues in part that, "For his part, Gregory inexplicably refused to identify those men even in the face of trial, conviction, and a lengthy prison sentence." (State's brief at 22). Without citation to the record, Gregory cannot respond to this made-up and unsupported claim, and this court should ignore it. The record also does not support the claim that, "It is important to note that the victims parents did not coax these allegations out of their daughter." (State's brief at 23). That is exactly the evidence that the court disallowed.

> pretty much took away any ability that I had to go into that.

(119:32).

In other words, denying admission of evidence that the girls had a motive to lie prejudiced the defense greatly but admission of that evidence would not have prejudiced the State. Because the court incorrectly balanced the interests involved, it violated Gregory's constitutional right to present a defense when it disallowed such evidence.

5. The court erred in excluding the photographs because Gregory complied with the court's pretrial order.

Gregory complied with the pretrial discovery order regarding the photographs. The State agrees that the order required that "Physical evidence shall be **identified** to opposing counsel and made available for inspection." (State's brief at 24) (10:18, emphasis added). The State argues that the court disallowed the photographs "because it determined that they were not disclosed by defense counsel to the State before trial in violation of the pretrial order." (State's brief at 25). However that is not what the court found. The court said:

> I suspect that Mr. Jones' recollection is isn't (sic) probably far off. He probably did say something to the effect they have some photographs. I'm also satisfied that they were never physically displayed, were never provided to the District Attorney's office.

(114:9-10). According to the court's finding of fact, this court must reverse. The court found that the photographs were identified to the State prior to trial, which is what the pretrial order required. Nothing in the order required that Gregory physically display them. Thus Gregory complied with the court's order.

A court misuses its discretion when it applies the wrong law to the facts before it, ***Oostburg State Bank v. United Sac. & Loan Ass'n***, 130 Wis. 2d 4, 11-12, 386 N.W.2d 53 (1986), and that is exactly what the court did here. The court's ruling misapplied its own pretrial order. The State does not spend much time belaboring this claim, because it is an argument it cannot win. Gregory **identified** the photographs to the State prior to trial.

The error in excluding the photographs was not harmless. It is true that the court allowed testimony regarding friendly contacts following the alleged assaults, but that testimony was no substitute for direct visual confirmation. As stated by the Wisconsin Supreme Court, "[T]ruth rings loudly in the oft-used phrase 'a picture is worth a thousand words.'" ***County of Kenosha v. C&S Mgmt***, 223 Wis. 2d 337, 412, 588 N.W.2d 236 (1999) (ordinance regulating obscenity was not overly broad). The photos were more compelling evidence which the court should not have excluded.

6. The State concedes that counsel was ineffective for failing comply with the discovery order and for failing to discover the videotape timely.

Gregory complied with the discovery order, but if this court finds that he did not, then the State has conceded that counsel was ineffective for failing to comply because it does not dispute it. *See* ***Charolais Breeding Ranches*** *supra*. Gregory's brief in chief argued in part that:

> Finally, if this court finds that counsel had failed to disclose the photos and that there was no good cause for failing to disclose the photos, then this court must reverse because counsel provided the ineffective assistance of counsel. Attorney Anderson testified that

> she had intended to introduce the photos, they were important to proving her theory of defense that the complainants lied, and she failed to get them in only because the court has found that she failed to comply with the discovery order. This is ineffective assistance of counsel.

(Gregory brief at 32-33).

Counsel said that she had two reasons to seek to introduce the photographs including proving that the claimants' actions were inconsistent with their claims, and to bolster the credibility of Gregory. (119:61). Given that this was her strategy, it was deficient to fail to comply with the discovery order and to fail to seek out and find the videotape timely. The error was not harmless. It was prejudicial.

7. The prosecutor's closing argument was improper.

Although the court admitted evidence of other prior acts, it was improper for the prosecution to say in closing that Gregory is the "type of a person to sexually assault a child, be sexually attracted to a child" because he has committed similar sexual assaults in the past. (115:117) That is pure propensity, and as such it is entirely improper. The Seventh Circuit Court of Appeals has said:

> Just as introducing evidence to show propensity is improper, so too is arguing to a jury that it should convict a defendant based on the defendant's propensity to commit a crime. This prohibition remains even when the court has admitted the Rule 404(b) evidence for some permissible non-propensity purpose—the government cannot later argue that the evidence shows the defendant's propensity to engage in criminal behavior.

United States v. Richards, 719 F.3d 746, 764 (7th Cir., 2013)(citations omitted) (Conviction reversed due to prosecution's closing propensity arguments).

The State argues that there was no basis to object (State's brief at 34) because the evidence was properly admitted motive evidence, *citing* ***State v. Tabor, supra***. However, ***Tabor*** does not counter the law in ***Richards***--that evidence admitted to prove motive or intent cannot be argued as propensity evidence in closing--and the State's brief itself highlights that the evidence was propensity. According to the State's brief, the prosecution could use the prior offense "to prove that [Gregory] also acted on his sexual attraction to eight-year-old Mary and twelve-year-old Susan under strikingly similar circumstances." (State's brief at 34-35).

The issue is simple: if this court believes the State made a propensity argument, then this court must reverse.

8. The court's improper instruction to disregard a missing witness argument.

The State's argument with respect to this issue is wrong. It incorrectly claims "Gregory cites no authority for his proposition that the jury was free to speculate about what someone who did not testify might have said if called to testify." (State's brief at 36). However, Gregory did cite supporting cases. For example, his brief cited ***State v. Saunders***, 2011 WI App 156, ¶¶25-26, 338 Wis. 2d 160, 807 N.W.2d 679 for the proposition that attorneys are free to "express skepticism about [their opponent's] uncorroborated version of events" by commenting on the absence of a witness who presumably would have corroborated the opponent's story if it were true. (Gregory brief at 38). He also cited ***Feldstein v. Harrington***, 4 Wis.2d 380, 388-390, 90 N.W.2d 566 (1958) for the proposition that it is proper for a party to

argue a "missing witness" issue when the opposing party does not call "a material witness within his control," and he cited ***Ballard v. Lumbermens Mut. Cas. Co***., 33 Wis.2d 601, 616, 148 N.W.2d 65(1967) for the law that failure by the trial court to give a "missing witness" instruction did not prejudice a party when it was permitted to argue the issue to jury.

Saunders, which the State tries to claim as support, (State's brief at 36) supports Gregory's position and not the State's. In ***Saunders***, this court found that the prosecutor's comments about a missing witness "were not improper" because they did not shift the burden of proof. ***Id.*** ¶27. Therefore, ***Saunders*** establishes that a party may note that a witness is "not here to testify." ***Id.*** at ¶14. ***State v. Sarinske,*** 191 Wis. 2d 14, 54 (1979), which the State also cites, was an older case involving the court giving a missing witness instruction where the testimony of the witness, a doctor, would have been "cumulative" to the testimony of two other experts. Because it was cumulative and an unfavorable inference was not warranted, the instruction was error. ***Id.*** Those facts and rationale do not apply here. It was error to instruct the jury to ignore the missing witness argument, and the error in denying a missing witness instruction was not harmless. It magnified the court's error in denying evidence regarding motive to falsely accuse Gregory, and it undercut counsel's credibility with the jury at the last important stage of the trial.

9. The State concedes a ground for discretionary reversal.

The State's argument itself identifies a ground for discretionary reversal. This court can reverse where the case was not fully and fairly tried, and the State has admitted the prosecution "emotionally, utilized the prior acts" involving

D.B." (State's brief at 39) That is as close to an admission that the trial was not fair as this court will likely ever find the State admitting. Given this admission and the errors at trial, this court should reverse.

For these reasons, Timothy Gregory, the defendant-appellant, respectfully requests that this court vacate his convictions and remand for a new trial.

Dated this 30th day of May, 2017.

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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 2,970 words and 11 pages.

Dated this 30th day of May, 2017.

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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 30th day of May, 2017.

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