

COURT OF APPEALS
OF WISCONSIN
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appellate Case Nos. 2016AP2315-CR,
2016AP2316-CR AND 2106AP2317-CR
Milwaukee County Case Nos. 13-CF-3481,
13-CF-5185 and 14-CM-108

ANGUS MURRAY McARTHUR,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A MILWAUKEE COUNTY
JUDGMENT OF CONVICTION,
ENTERED ON JULY 15, 2014,
AND THE POST-CONVICTION DECISION AND ORDER,
DATED NOVEMBER 1, 2016,
DENYING POST-CONVICTION RELIEF,
THE HONORABLE JEFFREY WAGNER, PRESIDING,
ALL IN MILWAUKEE COUNTY.

DEFENDANT-APPELLANT'S
REPLY BRIEF

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ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN ADMITTING “OTHER ACTS” EVIDENCE AGAINST McARTHUR AT TRIAL.

C. The Circuit Court Erroneously Exercised Its Discretion in Admitting the Testimony of McArthur’s Prior Girlfriends Regarding Other Acts He Allegedly Committed Against Them.

McArthur relies on the law cited and arguments made in his Brief-in-Chief.

D. The Circuit Court Erroneously Exercised Its Discretion in Admitting the Testimony of KMW Regarding Other Acts McArthur Allegedly Committed Against Her Prior to the Charged Offenses.

In its Response, the State argues KMW’s testimony regarding McArthur’s prior acts of threats and violence against her were not truly “other acts” requiring the trial court to undertake a *Sullivan*¹ analysis; but rather, “panorama evidence” in order to completely describe and explain the crime that occurred (Response, p. 17). McArthur does not concede KMW’s testimony merely constituted “panorama evidence.”

The State cites to State v. Johnson, 184 Wis.2d 324, 350, 516 N.W.2d 463 (Ct. App. 1994); State v. Dukes, 2007

¹ State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (1998).

WI App 175, ¶28, 303 N.W.2d 208, 736 N.W.2d 515; and State v. Jensen, 2011 WI App 3, ¶81, 331 Wis.2d 440, 704 N.W.2d 482, in support of its position KMW's testimonial claims of McArthur's prior alleged acts of threats and violence against her were not "other acts" subject to a *Sullivan* analysis; but rather, merely panorama evidence (Response, p. 17). However, those cases are distinguishable from McArthur's.

In *Johnson*, the theory of defense was the alleged victim of the defendant's battery manufactured the allegations in order to misappropriate the defendant's property after he was arrested and went to jail. The defendant sought to introduce evidence from witnesses who would testify the victim approached them days after Johnson's arrest and attempted claim property they were storing for Johnson as her own. The trial court excluded this evidence as inadmissible character evidence. In reversing the trial court, the appellate court majority undertook an "other acts" analysis and found it was improperly excluded, primarily because the evidence was highly probative of Johnson's theory of defense. Johnson, pp. 338-39.

In *Dukes*, the defendant was charged, among other things, with Possession of a Controlled Substance and Keeping a Drug House. At trial, the State introduced evidence

through a law enforcement officer that, one month prior to the defendant's arrest, he and other officers witnessed an individual enter and shortly thereafter leave the apartment building where Dukes was arrested. Further, he testified officers conducted a traffic stop of this individual during which they recovered drugs. In finding this to be admissible and not "other acts" evidence, the reviewing court noted the officer's testimony regarding the individual's possession of drugs after leaving the defendant's apartment building was not introduced as character evidence against the defendant; but rather, tended to establish the apartment building was a drug house and, thus, was relevant to prove the defendant was keeping a drug house. Dukes, ¶30.

In *Jensen*, the State sought to introduce evidence that, prior to killing his wife, the defendant left pornographic photographs around the house in order to harass his wife and punish her for a prior affair and that law enforcement found pornography on the defendant's computer consistent with those photographs. In ruling the evidence admissible, the appellate court found this evidence could be considered panorama evidence to provide context for the bitter relationship between the defendant and his wife and went toward establishing his motive to kill her. Jensen, ¶¶81-85.

In the instant case, save KMW's testimony regarding the rules McArthur set out for having a relationship, the evidence of McArthur's prior alleged acts of threats and violence against KMW did not provide (1) context for the events of July 13th through the 14th; (2) a motive for McArthur committing the alleged criminal acts against KMW; (3) evidence in support of an element or elements of the charged offenses; (4) an explanations for why KMW would recant her allegations; and (5) make KMW's version of the events of July 13th and 14th more credible than McArthur's. KMW's testimony regarding McArthur's prior alleged acts of threats and violence against her were truly "other acts," which required the trial court undertake a *Sullivan* analysis.

In its Response, the State asserts McArthur's claim the trial court did not undertake a *Sullivan* analysis before admitting KMW's testimony regarding McArthur's prior transgressions against her is "indisputably false." (Response, p. 19). In support of this assertion, the State cites to the prosecutor's *restatement* of the trial court's *Sullivan* analysis. However, as evidenced by the entirety of the trial court's ruling on this issue, it never stated on the record what the prosecutor characterized in her after-the-ruling justification for the admissibility of this testimony (See Brief-in-Chief, A-108-11).

The prosecutor may have attempted to “clean up” the trial court record on this issue, but McArthur’s assertion the trial court itself did not undertake a *Sullivan* analysis before admitting KMW’s testimony regarding prior acts of threats and violence he allegedly committed against her is indisputably correct.

The State also asserts McArthur offered no case authority in support of his argument there was an insufficient basis for the trial court to find McArthur actually committed the acts of threats and violence KMW claimed (Response, pp. 19-20). However, McArthur did cite to State v. Schindler, 146 Wis.2d 47, 54-57, 429 N.W.2d 10 (Ct. App. 1988), in which the reviewing court held a trial court must determine whether a reasonable jury could find, by a preponderance of the evidence, the defendant committed the other acts.

In *Schindler*, the State, the proponent of the other acts evidence, presented testimony from a medical doctor and other witnesses to corroborate the defendant caused other, but uncharged, injuries to the child homicide victim and those injuries were not consistent with an accident, which tended to establish the defendant intentionally caused the victim’s injuries resulting in death. Unlike the proponent in *Schindler*, the State did not present any evidence or witnesses,

independent of KMW's testimony, to corroborate her claims. While *Schindler* might not stand for the proposition the State had to present other *witnesses* to corroborate KMW's claims, it does require the State had to establish and the trial court to find a reasonable jury could find McArthur committed these acts by a preponderance of the evidence.

It is McArthur's assertion, due to questions regarding KMW's credibility (i.e., her admission she lied to police regarding the events of July 13th about her prior acquaintance of and encounter with "Mike") and the lack of any evidence to corroborate her allegations of McArthur's prior acts of threats and violence, the State did not establish, by a preponderance of the evidence, McArthur actually committed these acts and the court erroneously exercised its discretion in so doing.

E. The Trial Court's Error in Admitting the "Other Acts" Evidence from His Prior Girlfriends and KMW Was Not Harmless.

In its Response, the State asserts that, even if the court erred in admitting the alleged other acts McArthur committed against his prior girlfriends and KMW, the error was harmless because the evidence of McArthur's guilt was overwhelming (Response, pp. 30-31).

To the contrary, the evidence of McArthur's guilt of the charged offenses was based solely on the credibility of KMW,

who admittedly lied to police about (1) the plan to meet McArthur at a bar the night of August 13th; (2) her prior relationship with “Mike”; and (3) the amount of and what she had to drink that night at the bar with Mike and later at another bar. Additionally, she acknowledged lying to McArthur’s private investigator in order to make McArthur “lose” his first attorney because she was angry and wanted to punish McArthur. KMW was simply not a credible witness without strong corroboration of her accounts of McArthur’s prior acts against her or the acts which served as the bases for the charged offenses.

While there was certainly evidence to establish KMW was severely injured when she went to the hospital on August 14th, the medical records, the testifying medical providers and law enforcement did nothing to establish McArthur was the source of those injuries.

Finally, the testimony of McArthur’s roommate and the alibi witnesses further undercut KMW’s credibility identifying McArthur as the person responsible for injuries by establishing McArthur was not with KMW at the time she claimed he abducted, injured and sexually assaulted her and McArthur’s roommate, who was only feet away from where KMW claimed McArthur argued with and assaulted her in his bedroom, heard

nothing that night to support KMW's claims.

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

McArthur relies on the law cited and arguments made in his Brief-in-Chief that trial counsel was ineffective in failing to object to the prosecutor cross-examining defense witnesses regarding the "other acts" McArthur allegedly perpetrated against his former girlfriends and failing to object to the prosecutor having Detective Roberson read KMW's entire statement to the jury.

CONCLUSION

For all of the reasons set forth above, McArthur would ask this Court to vacate his convictions and remand the matter to the circuit court for a new trial or, in the alternative, remand the matter to the post-conviction court to conduct an evidentiary hearing in support of his post-conviction claims.

Dated at Wauwatosa, Wisconsin, this 10th day of July, 2017.

Respectfully submitted,

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CERTIFICATION

I certify this brief conforms to the rules contained in §§809.19(8)(b) and (c), Wis. Stats., for a brief prepared using the following font:

Proportional sans serif font: 12 characters per inch, double spaced, 2 inch margins on the left and right sides and 1 inch margins on the top and bottom. The length of this brief is 1542 words.

Dated: July 10, 2017

ANN AUBERRY

E-FILING CERTIFICATION

Pursuant to §§809.19(12)(f) and 809.32(fm), Stats., I hereby certify the text of the electronic copy of the Reply Brief is identical to the text of the paper copy of the Reply Brief filed.

Dated at Wauwatosa, Wisconsin, this 10th day of July, 2017.

ANN AUBERRY