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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2016AP2414 CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN W. FORGUE,

Defendant-Appellant.

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Appeal from a Judgment of Conviction  
Entered in the Circuit Court for Dane County,  
the Honorable Stephen Ehlke Presiding  
Circuit Court Case No: 2016CF29

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BRIEF AND APPENDIX OF  
DEFENDANT-APPELLANT

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## STATEMENT OF THE ISSUES

- I. Was Mr. Forgue entitled to present certain evidence the victim's prior violence and turbulence in support of his self-defense claim under *State v. McMorris*?

**Trial Court Answered: No.**

- II. Was Mr. Forgue entitled to present other acts evidence relating to her motive, intent, and plan to falsely accuse Forgue of domestic violence?

**Trial Court Answered: No.**

- III. Was the trial court's restitution order supported by sufficient evidence?

**Trial Court Answered: The court ordered restitution.**

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue in this case involves the application of well-settled law to the facts of this case, therefore neither oral argument nor publication is requested.

## STATEMENT OF THE CASE

This is an appeal from the Judgment of Conviction entered on July 7, 2016, in the Circuit Court for Dane County, the Honorable Stephen Ehlke presiding, wherein the Court entered judgments on a jury verdict finding Shawn Forgue guilty of one count of battery (domestic abuse) contrary to Wis. Stat. § 940.19(1) and one count of disorderly conduct

(domestic abuse) contrary to Wis. Stat. § 947.01(1). (46; App. 101-02.)

Before trial, Forgue moved the court to admit evidence of the alleged victim, T.S.'s, prior violent conduct towards Forgue to show the reasonableness of Forgue's actions in self-defense. (16.) Forgue also sought admission of evidence regarding other criminal acts of T.S. in order to show her motive, intent, and plan for falsely accusing Forgue of attacking her. (23.) After a hearing on the motions, the court excluded evidence of some of the acts of violence against Forgue, and all of the other acts evidence (63; App. 103-116.)

Forgue was also charged with strangulation and suffocation, false imprisonment, substantial battery, and pointing firearm at another, all as acts of domestic violence. (1.) At trial, the jury acquitted Forgue of each of these counts. (40, 41, 42, 43.)

The court withheld sentence on the two misdemeanor convictions, and ordered Forgue to two years of probation on each count, concurrent. (46; App. 101-02.)

A restitution hearing was held on October 28, 2016, at which Forgue challenged both the amount of restitution requested and his ability to pay. (70:3-4; App. 118-19.) On November 2, 2016, the court issued an order granting restitution in the amount of \$1269.50. (56, 58; App. 125, 126.)

Forgue filed a timely notice of appeal. (59.) This appeal addresses whether the circuit court erred by excluding *McMorris* evidence and other acts evidence, and whether the restitution order is supported by sufficient evidence.



## STATEMENT OF FACTS

This case arises out of a physical altercation between Forgue and his then-girlfriend, T.S., in the early morning hours of March 27, 2015. T.S. sustained a broken nose and ruptured eardrum. (67:9-11.) The key issue at trial was who initiated the altercation. T.S. claimed that Forgue initially attacked her and she fled the house to KWIK Trip. Forgue claimed that T.S. initiated the attack by hitting, punching, and kicking him, and that he struck at T.S. to defend himself.

### Pre-Trial Rulings

Forgue maintained that he acted in self-defense, and as part of this defense moved to introduce evidence of prior acts of T.S. that tended to establish her turbulent and violent character under *State v. McMorris*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973). Specifically, Forgue sought to introduce testimony regarding four events: (1) T.S. rushed towards Forgue with the skateboard held over her head as if she was going to hit him then slammed the skateboard down on a wooden bannister, injuring herself (16:2); (2) T.S. became angry with Forgue while she was driving and he was a passenger. T.S. began driving erratically with “road rage,” causing Forgue to fear for his safety in the car, (*id.* at 3); (3) During an argument while Forgue was driving, T.S. took off her shoe and struck Forgue in face with it three times, knocking out one of his teeth, (*id.* at 4); (4) During Forgue and T.S.’s relationship from early 2012 through March 2015 there were approximately five to ten additional incidents of domestic violence by T.S. against Forgue in which T.S. would become enraged and physically assault Forgue, usually by striking him in face or on side or back of head. (*Id.*)

Forgue also sought to admit other acts evidence of T.S.’s conduct in two areas. (23.) First, Forgue sought to

admit evidence of a prior domestic violence offense committed by T.S. against a previous boyfriend. (23:2-3.) Second, Forgue sought to introduce evidence that he had discovered that T.S., an employee of the United States Postal Service, had possession of other people's mail at his house, apparently without the consent of those people or USPS. (*Id.* at 4.) Forgue sought to offer this evidence to show T.S.'s motive, intent, and plan to falsely accuse D of domestic violence. (*Id.*)

The circuit court addressed Forgue's motions during a hearing on April 8, 2016. (63; App. 103-116.) Regarding Forgue's proposed *McMorris* evidence, the court ruled that it would allow testimony regarding the skateboard incident and the incident in which T.S. hit Forgue with a shoe while he was driving. (*Id.* at 15-16; App. 10304.) However, the court would not admit evidence regarding the incident in which T.S. was driving erratically, or testimony regarding T.S.'s pattern of domestic violence incidents against Forgue. (*Id.* at 15-17; App. 103-05.) The court denied Forgue's other acts motion entirely. (*Id.* at 24, 32; App. 109, 115.)

### **Evidence at Trial**

At trial, T.S. testified that she and Forgue had been in a relationship for four years. (*Id.* at 84.) She had lived with Forgue at his parents' house for two years. (*Id.* at 88-89.) On the night of the incident, she and Forgue had spent the evening at a bar until around 1:45 a.m. (67:22.) T.S. admitted that she had a substantial amount to drink that night. (66:91.) During the drive home, Forgue became upset with T.S. for her behavior at the bar, called her names and told her he wanted her to leave. (*Id.* at 92-93.)

T.S. testified that when they arrived home, she walked to KWIK Trip to purchase cigarettes. (67:26.) After she

returned home, she went into the basement to smoke. (66:95-96.) When she tried to leave the basement, she found that the basement door was locked. (*Id.* at 97.) She used a mop handle to pry the door open and break the lock, a hook on the other side of the door. (*Id.* at 98.)

T.S. testified that when she came out of the basement, Forgue lunged toward her and grabbed her. (*Id.* at 101.) He took T.S. into the bedroom and pinned her down on the bed. (*Id.* at 101-02.) Forgue then struck T.S. in the face multiple times with his fist. (*Id.* at 103). Forgue hit her nose, then when T.S. turned her face to the side, he hit her left ear. (*Id.* at 104-05.)

T.S. testified that Forgue then got off of her and she rolled off the bed onto the floor. (*Id.* at 105.) She heard the sound of a gun being cocked, and looked up to see Forgue pointing a gun at her. (*Id.* at 105-07.) T.S. testified that Forgue threatened her while pointing the gun at her, but she was somehow able to freely leave the bedroom and go into the living room. (*Id.* at 107, 111-12.)

In the living room, T.S. attempted to message several friends to pick her up. (*Id.* at 116-118.) The message, sent at 2:17 a.m. read, “Hey, can someone pick me up, Kwik Trip in Marshall? I know it’s late but not really my fault.” (*Id.* at 118; 67:39-41.) T.S. testified that Forgue then entered the living room and took her phone from her, threatening that if she came in the bedroom he would shoot her. (66:118.)

T.S. denied that Forgue told her to leave the house and that she threatened to report domestic violence against Forge and to kill Forgue in his sleep at that time. (67:44, 46.) Forgue returned to the bedroom, and T.S. left the house through the front door. (66:118-19.)

T.S. testified that she walked towards KWIK Trip to get help. (*Id.* at 119.) Forgue followed in his car, and came upon her in the parking lot of the old KWIK Trip location, which was abandoned and dark. (*Id.*) T.S. testified that she got into Forgue's car because she did not know whether he had a gun with him. (*Id.* at 122.)

T.S. testified that Forgue drove her home, where he got out of the car then reached into the passenger side and strangled T.S., then pulled her by her hair out of the vehicle. (67:6-7.) T.S. then fled while screaming for help. (*Id.* at 8.) T.S. hid near another house nearby, then ran to KWIK Trip and asked an employee to call 911. (*Id.* at 11-13.)

Eric Everson testified that he was working at KWIK Trip on March 27, 2015, when T.S. walked into the store around 4:00 a.m. (66:48-49, 76.) T.S. approached Everson and asked him to call 911 because someone had beaten her up. (*Id.* at 48-49.)

Marshall Police Officer Joseph Nickel testified that on March 27, 2015, he was dispatched to KWIK Trip to assist EMS and arrived around 4:00 a.m. (*Id.* at 80.) When he arrived, he observed T.S. crouching towards the end of the counter, crying, with bleeding and swelling on her face. (*Id.* at 80-81.) T.S. reported that Forgue assaulted her. (*Id.* at 81.)

After police arrived, T.S. was transported to the hospital where she was told that she sustained a broken nose and a ruptured eardrum. (*Id.* at 15.) Doctor Matthew Lochen was working as an emergency room physician during the early morning hours of March 27, 2015, and treated T.S. (68:5.) Ultimately, T.S. was diagnosed with a ruptured eardrum and a "nondisplaced nasal bone fracture," meaning the bone was cracked but still well-aligned. (*Id.* at 9-11.)

Nickel also went to the hospital to take a statement from T.S. and photograph her injuries. (67:83, 87-88.)

T.S. denied ever having been violent towards Forgue in the past. (*Id.* at 53.) Specifically, she denied hitting Forgue in the face with a shoe and stated she did not know that she knocked out one of his teeth. (*Id.* at 53-54.) She also denied trying to hit Forgue with a skateboard while intoxicated. (*Id.* at 54.)

Lieutenant John Nault testified that he arrested Forgue at his residence at 3:25 p.m. (68:19.) Nault had the opportunity to see Forgue's hands when he came out of the house, and did not recall seeing any injuries on his hands. (*Id.* at 20.) Forgue contacted the Marshall Police Department to request photos taken of his hands and scratches on his body, which was done on March 30, 2015. (67:100-02.)

Forgue testified that at the time of the incident, he was unemployed and received disability due to his inability to make fists or apply a tight grasp with either of his hands. (68:30-31.) This testimony was corroborated by expert witness Dr. Elizabeth Poi. (*Id.* at 110-20.) Poi had been Forgue's primary care physician since 2008, and diagnosed Forgue with a condition called Diabetic Hand Syndrome (Diabetic Cheiroarthropathy). (*Id.* at 112.) Symptoms of this condition are a loss of range of motion, initial puffiness and joint swelling, and an eventual inability to fully extend or flex the hands. (*Id.* at 112-13.) Forgue had been seeking treatment for the condition since 2008 when it caused him to leave a job due to his loss of hand function. (*Id.* at 113.) Despite seeing specialists and having surgery on his hands, Forgue's hands were not restored to a full normal range of motion. (*Id.* at 116.) It was Dr. Poi's expert opinion that Forgue did not have the ability to fully flex or to make a fist (*Id.*)

Forgue testified that, over the years of knowing and living with T.S., he formed the opinion that she is an extremely violent person, based on incidents in which T.S. was violent or aggressive towards him. (*Id.* at 35.) In 2012, T.S. had been out late and came home drunk and belligerent. (*Id.* at 35.) When Forgue tried to express his concern about her drinking, T.S. became defensive. (*Id.* at 36.) T.S. grabbed a skateboard and came at Forgue with it in a lunging motion. (*Id.*) T.S. turned away from Forgue and hit the skateboard on a bannister with enough force that it sprung back and smacked her in the head, cutting her above her eyebrow. (*Id.* at 36-37.) While T.S. was coming at him with the skateboard, Forgue feared he would be hit and crouched with his hands up to protect himself. (*Id.* at 88.) At the time, Forgue believed he was going to be injured and was afraid he could be killed. (*Id.* at 89.)

In 2013, T.S. called him late at night asking him to give her a ride home, as she was drunk. (*Id.* at 37.) During the ride home, Forgue expressed concern regarding her extreme drunkenness. (*Id.*) She became angry with Forgue and the way he was driving. (*Id.*) T.S. took off her shoe and hit him in the face with it three times, causing one of Forgue's teeth to fall out. (*Id.* at 38.) This incident was corroborated by Forgue's friend, Jeff Ossola. (*Id.* at 90-92.) Ossola recalled a camping trip with Forgue and T.S. in the late summer of 2013, during which he noticed that Forgue was missing a tooth. (*Id.* at 91.) Ossola asked T.S. about Forgue's tooth and she told him that she had struck Forgue with a shoe causing his tooth to fall out, while Forgue was driving. (*Id.*) Ossola described T.S.'s attitude while telling the story as unapologetic and dismissive. (*Id.* at 92.)

Forgue testified that on the night in question, he had been drinking but was not intoxicated when he left the bar.

(*Id.* at 39.) Based on his past experiences with T.S., Forgue believed that she was very drunk. (*Id.*) When they arrived home, T.S. became angry that Forgue would not drive to buy cigarettes. (*Id.* at 40.) She slammed the door and took a walk, while Forgue went into the house. (*Id.*)

Forgue testified that he went immediately to bed, and was there when T.S. returned. (*Id.* at 41.) T.S. then came directly into the bedroom and sat on the bed. (*Id.*) She was still upset about having to walk to the store, and was in an angry state. (*Id.*) Forgue questioned T.S.'s drinking and told her she needed to calm down. (*Id.* at 41-42.)

T.S. hit Forgue in the back of the head with her hand hard enough that he felt pain. (*Id.* at 42.) Forgue attempted to get off the bed to get away from T.S.; T.S. grabbed him from behind and restrained him forcefully with her arms across his chest. (*Id.* at 42-43.) Forgue pleaded with T.S. to let him go and attempted to push back on her hip with his hand, but she would not let go. (*Id.* at 43.)

Forgue was concerned based on previous behavior of T.S. in similar circumstances and was having problems breathing. (*Id.*) He jerked his arm back quickly and his elbow hit T.S. in the nose. (*Id.* at 43-44.) Forgue's intent in doing so was to get T.S. off of him and to get away for his own safety. (*Id.* at 43-44.)

T.S. let him go, and Forgue got off the bed and tried to get away from T.S., still concerned for his safety. (*Id.* at 44.) T.S. then became extremely violent and came off the opposite side of the bed, coming around the bed swinging and kicking and attacked Forgue at the foot of the bed. (*Id.* at 45-47.) Forgue was in a gap between the bed and the wall; the door was not accessible to him. (*Id.* at 48.) T.S. swung at and hit Forgue with her fists. (*Id.*) As T.S. punched towards Forgue's

face, he jerked his arm up quickly to block it, and his palm made contact with T.S.'s left ear. (*Id.* at 48.)

T.S. stopped attacking Forgue. (*Id.* at 49.) Forgue told T.S. to leave, and she left the bedroom for the living room. (*Id.*) After some time had passed, Forgue went into the living room and saw that T.S. had unfolded a futon and made a bed there. (*Id.* at 50.) Forgue again asked T.S. to leave the house, telling her that he did not feel safe with her there. (*Id.* at 52.)

Forgue testified that T.S. responded very angrily to his request that she leave, telling him that if he made her leave she would falsely accuse him of domestic violence. (*Id.*) T.S. also threatened Forgue that she would shoot him in his sleep. (*Id.* at 53.) Forgue was able to record T.S. repeating her threat to kill him, which was played for the jury. (*Id.* at 53-56.) After this, T.S. did leave the residence by walking out the front door while Forgue was still in the living room. (*Id.* at 57-58.)

In rebuttal testimony, T.S. denied that the recording containing her threat to kill Forgue in his sleep had been made on the night of the incident, claiming it was recorded during an argument between the two in January 2014. (*Id.* at 128-29.) She also denied ever throwing a skateboard in Forgue's direction. (*Id.* at 131.) Instead, T.S. claimed purposefully tried to break the skateboard out of her frustration that Forgue had broken some of her things. (*Id.* at 130.) Regarding the incident in which Forgue's tooth fell out, T.S. testified that she was upset with the way Forgue was driving and smacked him over the head with her flip flop. (*Id.* at 131.) This action caused Forgue's tooth to fly out the window of the car. (*Id.* at 132.)

The jury acquitted Forgue of the counts of strangulation and suffocation, false imprisonment, substantial



battery, and intentionally pointing a firearm at T.S. (*Id.* at 256-57; 40; 41; 42; 43.) The jury found Forgue guilty of misdemeanor battery and disorderly conduct. (68:257; 44; 45.)

On July 7, 2016, the court withheld sentence and ordered Forgue to complete two years of probation. (46; App. 101-02.)

### **Restitution**

On August 12, 2016, the state submitted a proposed restitution order requesting \$6,243.99 in restitution to T.S. and the Department of Justice Crime Victim Compensation. (51.) Forgue requested a hearing on restitution. (52:2.)

A hearing was held on October 28, 2016, at which Forgue contested both the amount of restitution requested and his ability to pay restitution. (70:2-4; App. 117-19.) Regarding the amount of restitution requested, Forgue argued that a causal nexus had not been shown, and that some of the costs itemized in the state's request had not been incurred by T.S. (*Id.* at 3-4; App. 118-19.) Additionally, Forgue presented evidence of his limited income due to his inability to work due to disability. (*Id.* at 4; App. 119.) The state did not contest the evidence of Forgue's inability to pay. (*Id.* at 5; App. 120.) T.S. did not testify and the state did not present any evidence regarding the itemized expenses or how they were caused by Forgue's actions.<sup>1</sup> (*Id.* at 2-9; App. 117-124.)

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<sup>1</sup> During the hearing, the State referenced that it "ha[d] submitted documentation that I think meets our burden for the Crime Victim Compensation Request." (70:2; App. 117.) However, this documentation was not made part of the record, nor is there any indication that the court relied on any such documentation in making its restitution determination. (*See* 56; App. 125.)

The court issued a written decision on November 2, 2016, granting restitution in the amount of \$1269.50. (56; App. 125.) The court's order incorrectly stated that Forgue did not dispute the amount of restitution sought, only his inability to pay due to his chronic medical disability. (*Id.*) The court lowered the total amount of restitution based on Forgue's reduced ability to pay. (*Id.*) Finding Forgue had the ability to pay restitution in the amount of \$25 per month, the court restitution to T.S. in the amount of \$269.50 and to Crime Victim Compensation in the amount of \$1000. (*Id.*; 58; App. 126.)

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED BY NOT ALLOWING FORGUE TO PRESENT CERTAIN *MCMORRIS* EVIDENCE IN SUPPORT OF HIS SELF-DEFENSE CLAIM**

Forgue sought to enter evidence of a series of incidents during his relationship with T.S. during which she acted violently and turbulently towards him, causing him to fear for his safety. This evidence was key to showing the jury that his fear on the night in question was reasonable and his actions in defending himself from T.S.'s attack were legally justified. The court allowed two incidents to be prevented to the jury, but excluded others, thus preventing Forgue from fully presenting his defense to the jury.

#### **A. Legal Principles and Standard of Review**

Where there is a sufficient factual basis for a claim of self-defense, a defendant may, in support of the defense, establish what he believed to be the victim's violent character by presenting evidence of the victim's specific prior violent acts known to him at the time of the crime. *McMorris v.*

*State*, 58 Wis. 2d 144, 151, 205 N.W.2d 559 (1973). The defendant's knowledge of the victim's turbulent or dangerous character is relevant to determining whether the victim was an aggressor and whether the defendant's apprehension of danger and resulting reaction were reasonable. *Id.* at 149.

The evidence should be probative of the defendant's beliefs in relation to his defense. *State v. Head*, 2002 WI 99, ¶ 129, 255 Wis.2d 194, 648 N.W.2d 413. “If the court determines that the evidence is relevant, the court should admit it as it would any other relevant evidence, excluding it only if its ‘probative value is 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.’” *Id.* (quoting Wis. Stat. § 904.03).

The right to present *McMorris* evidence is a constitutional right, and excluding testimony regarding defendant's knowledge of a victim's prior violent conduct was not only an abuse of discretion but was also error of a constitutional dimension. *State v. Boykins*, 119 Wis. 2d 272, 350 N.W.2d 719 (Ct. App 1984) (citing to Amendments w and XIV of the U.S. Constitution and Article 1, Section 7 of the Wisconsin Constitution).

The admission of *McMorris* evidence implicates the exercise of discretion by the circuit court. *State v. Head*, 2002 WI 99, ¶ 129, 255 Wis.2d 194, 648 N.W.2d 413. On review, this court looks to whether the circuit court properly exercised its discretion in accordance with the facts and accepted legal standards. *Id.* at ¶ 43. The issue of whether exclusion of evidence implicates a defendant's constitutional guarantee of a meaningful opportunity to present a complete defense is

reviewed de novo. *State v. Shomberg*, 2006 WI 9, ¶26, 288 Wis. 2d 1, 709 N.W.2d 370.

**B. Evidence of T.S.’s Turbulent Behavior Towards Forgue Should Have Been Admitted Because it Was Probative of Forgue’s Beliefs in Relation to His Claim of Self-Defense.**

In a criminal case where the defendant has raised the issue of self-defense, the defendant’s state of mind, including the reasonableness of his decision to use force to defend himself, is an issue for the jury. *See* Wis. Stat. § 939.48. For this reason, Forgue sought to present testimony regarding prior acts of T.S. to establish her “turbulent and violent character” known to him at the time of the incident. *McMorris*, 58 Wis. 2d at 152.

The circuit court denied Forgue the opportunity to present evidence regarding an incident in which T.S. became angry with Forgue and began driving erratically with “road rage,” while he was a passenger, causing Forgue to fear for his safety in the car. (63:15; App. 103). This incident ultimately resulted in T.S. letting Forgue out of the car to leave him roadside before peeling out as she made a rude gesture towards Forgue. (16:3.) In denying Forgue’s motion, the court stated:

[The incident] will not be allowed for the reason that she herself was in the car. She’s putting both of them in jeopardy. It’s maybe unwise conduct. *It may be turbulent.* I can understand why it would be described that way. But I don’t think it really goes in my opinion to the reasonableness of whether someone would then need to strike someone. I mean, somebody in the car isn’t thinking, “Oh, my God, she’s driving crazily, I

better hit her.” You know, that doesn’t seem to be a logical result of that.

(63:15-16; App. 103-04) (emphasis added).<sup>2</sup>

The court misapplied *McMorris* by holding that, despite being evidence of T.S.’s turbulent actions, her resorting to road rage while arguing with Forgue as her passenger is not the sort of conduct that would cause one to fear for their safety. The court based its decision on the fact that T.S. was also putting herself in danger, and that it would not be reasonable for Forgue to hit T.S. in self-defense *during the road rage incident*. (63:15-16; App. 103-04.)

Forgue’s defense was that at the time of the incident on March 27, 2015, his fear of T.S. was reasonable and his actions in self-defense were justified. In order to prove this to the jury, his defense relied on evidence of T.S.’s past instances of violence and aggression towards him. The question is not whether he may have been justified in acting in self-defense during the past incident, but whether his knowledge of that incident created a reasonable fear in his mind when he did act in self-defense. As explained by the court in *McMorris*,

The past conduct of a person markedly affects what others may reasonably expect from him in the future.

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<sup>2</sup> Forgue also sought to testify to the general pattern of abuse that he experienced during his relationship with T.S., which included five to ten incidents of domestic violence in which T.S. would become enraged when intoxicated and physically assault Forgue, usually by striking him in face or on side or back of head. (16:4.) Forgue was unable to remember specific details for each of these incidents (*id.*), and the court excluded the testimony on the basis that it was not specific enough to satisfy *McMorris*. (63:16-17; App. 104-05.) Forgue does not appeal this ruling.

When the accused maintains self-defense, he should be permitted to show he knew of specific prior instances of violence on the part of the victim. It enlightens the jury on the state of his mind at the time of the affray, and thereby assists them in deciding whether he acted as a reasonably prudent person would under similar beliefs and circumstances.

58 Wis. 2d at 151.

Further, under *State v. Head*, the standard for admission of *McMorris* evidence is that it “should be probative of the defendant’s belief’s in relation to her defense.” 2002 WI 99, ¶ 129. The trial court has discretion to exclude evidence that would be unduly prejudicial, cumulative, or unreasonably complicated. *Id.* The evidence that Forgue would have offered is not unduly prejudicial, cumulative, or unreasonably complicated; therefore, it should not have been excluded.

### **C. The Court’s Error Was Not Harmless**

Error is not harmless when there is a reasonable possibility that the error contributed to the conviction. *See State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A conviction must be reversed, unless the court is certain that the error did not influence the jury. *Id.* at 541-42. The burden of proving no prejudice is on the beneficiary of the error, here the State.

Forgue asserts that the circuit court’s errors contributed to his conviction because, in excluding that evidence, the circuit prevented Forgue from presenting a full and complete defense, in violation of his constitutional due process rights, deriving from the Sixth and Fourteenth Amendments of the U.S Constitution and corresponding

provisions of the Wisconsin Constitution. *Boykins*, 119 Wis. 2d 272 at 279-80. The jury was denied the opportunity to evaluate Forgue's defense in light of all relevant evidence; it cannot be said that the jury's verdict was unaffected by the errors. *Id.* Exclusion of some of T.S.'s early prior violent acts known to Forgue prevented the jury from understanding how Forgue had perceived danger from T.S., although *McMorris* allowed such evidence. This deprivation of Forgue's fundamental due process right contributed to the conviction and is reversible error. *See Boykins*, 119 Wis. 2d 272 at 279-80; *Chambers v. Mississippi*, 410 U.S. 284 (1973) (criminal defendant has a fundamental right to present evidence).

Not only was Forgue constitutionally entitled by virtue of his assertion of self-defense to present the evidence, but because self-defense was the key issue in this case, whether or not Forgue acted reasonably was the critical question for the jury to decide. When the circuit court prohibited Forgue from accounting for all of his many reasons to fear T.S., it denied the jury the opportunity to fairly decide the controversy.

## **II. THE TRIAL COURT ERRED BY NOT ALLOWING FORGUE TO PRESENT OTHER ACTS EVIDENCE TO SHOW T.S.'s MOTIVE, INTENT, AND PLAN TO FALSELY ACCUSE HIM OF DOMESTIC VIOLENCE**

### **A. Legal Principles and Standard of Review**

While evidence of other crimes, wrongs, or acts may not be used to prove the character of a person to show that the person acted in conformity therewith, "other acts" evidence is admissible when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident. Wis. Stat. §

904.04(2); *State v. Sullivan*, 216 Wis. 2d 768 576 N.W.2d 30, 32-33 (1998). The rule is not limited solely to a defendant's acts; it is applicable to any "person." *State v. Johnson*, 184 Wis. 2d 324, 336, 516 N.W.2d 463 (Ct. App. 1994) (citation omitted).

In *Sullivan*, the Supreme Court established a three-part test to determine the admissibility of other acts evidence. 216 Wis. 2d at 772. First, a court must consider if the other acts evidence is being offered for a statutorily acceptable purpose under Wis. Stat. § 904.04(2), though this list is not exhaustive. *State v. Kaster*, 148 Wis. 2d 789, 797, 436 N.W.2d 891 (Ct. App. 1989). As long as the proponent identifies at least one acceptable purpose for admission of the evidence that is unrelated to the forbidden propensity inference, the first step is satisfied. *State v. Payano*, 2009 WI 86, ¶ 63, 320 Wis. 2d 348, 768 N.W.2d 832.

Second, the court must determine whether the other acts evidence is relevant under Wis. Stat. § 904.01. This requires a court to consider if: (1) the evidence is related to a fact or proposition that is of consequence to the determination of the action, and (2) whether the evidence had any tendency to make the consequential fact more or less probable. Wis. Stat. § 904.01.

Third, a court must consider whether the probative value of the evidence is "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." Wis. Stat. § 904.03. The standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by "improper means."



*Johnson*, 184 Wis. 2d at 340. A cautionary instruction to the jury can go far in limiting any unfair prejudice that may result from the admission of the other acts evidence. *Payano*, 2009 WI 86, ¶ 99.

The decision whether to admit other-acts evidence rests within the circuit court's sound discretion. *Sullivan*, 216 Wis. 2d at 780-81. Appellate courts look to whether the circuit court reviewed the relevant facts, applied a proper standard of law, and using a rational process, reached a reasonable conclusion. *Payano*, 2009 WI 86, ¶ 41.

**B. The Court Erred By Not Admitting Evidence of Other Acts by T.S. that Were Relevant to her Motive, Intent, and Plan to Falsely Accuse Forgue of Attacking Her**

The court denied Forgue's other acts motion entirely, despite the acts being offered for an appropriate purpose under Wis. Stat. § 904.04(2) and being relevant to Forgue's argument that T.S. had incentives to falsely report that he attacked her. The evidence was not unfairly prejudicial; therefore it should have been admitted.

Forgue's theory of defense was that T.S. physically assaulted him and successfully defended himself, after which a verbal argument ensued. (23:2.) During the argument, Forgue told T.S. to leave the house and threatened to report her for stealing mail. (*Id.*) T.S. did leave, then provided police with a false story about the events of that night by stating that Forgue had attacked her. (*Id.*) It was Forgue's theory that T.S. had the dual motives of self-preservation and vengeance – she wanted to preempt Forgue from reporting her to the police for domestic violence and mail theft, and she wanted revenge on Forgue for striking her in self-defense and kicking her out of the house. (*Id.*)

**Evidence of T.S.’s prior domestic violence offense and  
knowledge of police handling of domestic violence cases**

Forgue sought to admit evidence of a prior domestic violence offense committed by T.S. against a previous boyfriend for the purpose of showing her intent and motive in falsely reporting that Forgue committed domestic violence against her; to show her knowledge of how the police handle domestic incidents; and to show her willingness to risk criminal prosecution out of spite or malice. (23:2-3.)

Forgue sought to introduce testimony regarding a 2008 incident in which T.S., after a night of drinking, argued with her then-boyfriend and punched him approximately five times, causing a golf-ball-sized welt near his left eye, large scratches on right side of his neck, and a chipped tooth. (23:2.) When law enforcement arrived, T.S. admitted striking the victim “a couple of times,” and being “in raged” (sic) and stated, “if [I] have to go to jail, at least it was worth it.” (*Id.*) T.S. ultimately pled no contest to a criminal disorderly conduct charge and completed deferred adjudication agreement. (*Id.*)

The court excluded this evidence on the basis that “it really is more propensity. It would be too likely to confuse the issues here, I think.” (63:24; App. 109.) The court disagreed with Forgue’s argument that the evidence was relevant to T.S.’s motive to falsely accuse him of domestic violence and knowledge regarding police handling of domestic abuse cases, stating that the evidence seemed to contradict such an argument by suggesting that T.S. was willing to take a criminal charge. (*Id.* at 23; App. 108.)

However, whether the evidence tended to show a willingness to admit to her criminal behavior, or as argued by Forgue, a familiarity with what she would face if police knew

she was the aggressor, should have been left to the jury to determine. The evidence was relevant to show that T.S. knew she would very likely face criminal charges for her assault on Forgue, given that she had faced charges for a similar offense in the past. Thus, she had a motive to preempt any report by Forgue by telling police that he attacked her. *See State v. Echols*, 2013 WI App 58, ¶ 19, 348 Wis. 2d 81, 831 N.W.2d 768 (evidence of alleged victim's other acts relevant to show her knowledge that she faced danger of expulsion for her conduct and that she was trying to point a finger at defendant's alleged wrongdoing in order to divert attention from her own.)

Because the evidence was relevant to an appropriate purpose under Wis. Stat. 904.04(2) and not unfairly prejudicial, the court should have admitted the evidence, as it was highly probative to Forgue's theory of defense. *Johnson*, 184 Wis. 2d at 338-39; *Echols* 2013 WI App 58, ¶ 20.

#### **Evidence of T.S.'s mail theft**

The court also denied Forgue's request to admit testimony regarding the fact that T.S. had stolen mail, finding it "not particularly relevant" and that any relevance or probative value would be outweighed by a potential for confusion of the issues outweighs any probative value. (63:33; App. 116.)

Forgue's threat to T.S. to report the theft during the incident evidenced her motive to falsely report that Forgue was the aggressor during their physical fight. T.S. preempted Forgue's ability to report her theft by accusing him of domestic violence. This evidence was relevant to T.S.'s credibility and whether she had a motive to fabricate Forgue's role in the assault, therefore it should have been admitted. *Echols*, 2013 WI App. 81 ¶ 20.

### **C. The Court's Error In Excluding Other Acts Evidence Was Not Harmless**

The court's error in excluding the other acts evidence was not harmless. Because the evidence was improperly excluded, the jury was not given the opportunity to hear important testimony that bore on an important issue of the case - namely, whether T.S. did in fact have a motive for fabricating details of the assault. *Echols*, 2013 WI App. 81 ¶ 21. Here, as in *Johnson*,

Although other witnesses testified, this case essentially turned on the jury's assessment of the credibility issue drawn between [the victim] and [the defendant]. [Defendant's] proffered evidence, if believed, offered a plausible scenario as to why [the victim] might have falsely accused him. The jury's resolution of this credibility question might well have been influenced and assisted by this evidence. We observe that juries are many times required to address collateral events bearing upon the credibility of competing witnesses or their motives for testifying. And, the law provides instructions to assist in this task, including language which speak to the possible bias or prejudice of a witness and the possible motives for falsifying.

184 Wis. 2d at 340 (citation omitted). Prohibition of evidence that was central to Forgue's case undermines confidence in the trial's outcome. *Echols*, 2013 WI App. 81 ¶ 21.

### **III. EVIDENCE PRESENTED AT THE RESTITUTION HEARING WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE CIRCUIT COURT'S RESTITUTION ORDER**

After a hearing on restitution, the court ordered that Forgue pay restitution totaling \$1269.50 to T.S. and to the Department of Justice Crime Victim Compensation. (56, 58; App. 125, 126.) The court found that Forgue had not disputed the amount of restitution sought (56; App. 125.) The court further found that while Forgue did have a reduced ability to

pay restitution due to his chronic medical disability, he was not completely unable to pay restitution. (*Id.*) Forgue does not challenge the court's decision regarding his ability to pay restitution; rather, this appeal focuses on whether there is sufficient evidence to support a causal connection between Forgue's actions and the damages sought by T.S. and Crime Victim Compensation, and the amount of restitution sought.

### **A. Legal Principles and Standard of Review**

Section 973.20 of the Wisconsin Statutes governs restitution in criminal cases. In determining whether to order restitution and the amount thereof, the court is required to consider: 1) the amount of loss suffered by a victim as a result of a crime considered at sentencing; 2) the financial resources of the defendant; 3) the present and future earning ability of the defendant; 4) the needs and earning ability of the defendant's dependents; and 5) any other factors which the court deems appropriate. Wis. Stat. § 973.20(13)(a).

An order for restitution must be supported by evidence in the record. *State v. Madlock*, 230 Wis. 2d 324, 332, 602 N.W.2d 104 (Ct. App. 1999). Before a court can order a defendant to pay restitution, "a causal nexus must be established between the 'crime considered at sentencing' . . . and the disputed damage." *State v. Canady*, 2000 WI App 87, ¶ 9, 234 Wis. 2d 261, 610 N.W.2d 147. The statutory term "crime considered at sentencing" means "any crime for which the defendant was convicted and any read-in crime." Wis. Stat. § 973.20(1g)(a).

A victim seeking restitution carries the burden of proving the amount of loss sustained as a result of the crime by a preponderance of the evidence. Wis. Stat. § 973.20(14)(a). In proving causation, a victim must prove that the crime considered at sentencing was a substantial factor in

causing damage. *Canady*, 2000 WI App 87, ¶ 9; *State v. Longmire*, 2004 WI App 90, ¶ 13, 272 Wis. 2d 759, 681 N.W.2d 534. “A mere possibility of . . . causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it become the duty of the court to direct a verdict for the defendant.” *Merco Distrib. Corp. v. Commercial Police Alarm Co.*, 84 Wis. 2d 455, 460, 267 N.W.2d 652, 655 (1978).

Determination of a request for restitution, including the calculation of the appropriate amount of restitution, is within a circuit court’s discretion. *State v. Madlock*, 230 Wis. 2d 324, 329, 602 N.W.2d 104 (Ct. App. 1999. Whether § 973.20 authorizes a circuit court to order restitution under a particular set of facts, however, is a question of law to be reviewed de novo. *See State v. Haase*, 2006 WI App 86, ¶ 5, 293 Wis.2d 322, 716 N.W.2d 526; *Lemke v. Lemke*, 2012 WI App 96, ¶ 28, 343 Wis.2d 748, 820 N.W.2d 470 (“Sufficiency of evidence is a question of law.”).

**B. The Restitution Order Is Not Supported By Sufficient Evidence**

The court’s written decision on restitution fails to satisfy Wis. Stat. § 973.20, because it is without support from the record as to the damages incurred by T.S. and Crime Victim Compensation, and any causal connection between Forgue’s crime and the damages.

The court’s written decision stated that Forgue did not challenge the amount of restitution. However, Forgue clearly argued at the hearing that the victims’ burden had not met with respect to the amounts and causation requirement:

[B]ut there are some issues with the amounts too because we don't really have an itemized list there. It's just one big lump sum for the hospital. And I was not the trial lawyer. Obviously, it was Mr. Welch. But, um, I think for some of the stuff there might not be a causal nexus. Even though he was convicted of a misdemeanor battery, for some of it I don't think that there is a causal nexus.

In addition, this victim is asking for bedding replacement for \$160, which the bedding was taken by the victim, but belonged to Mr. Forgue. He bought it with a charge card in 2013. And it just – I don't know why she's asking for it, but there is an issue there, and she's apparently not available.

(70:3-4; App. 118-19.)

During the hearing, the State referenced that it “ha[d] submitted documentation that I think meets our burden for the Crime Victim Compensation Request.” (70:2; App. 117.) However, this documentation was not made part of the record, nor is there any indication that the court relied on any such documentation in making its restitution determination. (See 56; App. 125.)

Thus, there is no evidence in the record to support proof of the amount of damages sustained by the victims by a preponderance of evidence. Likewise, evidence in the record is insufficient to support a causal connection between the misdemeanor crimes that Forgue was sentenced for and the damages sustained.

The purpose of restitution is to return the victims to the position they were in before the defendant injured them, no more, not less. See *Madlock*, 230 Wis. 2d at 332 (primary

purpose of restitution is not to punish the defendant, but to compensate the victim). Here, because the record does not provide a sufficient link between Forgue's conduct and the claimed damage, it is not clear that restitution has been limited to compensating for actual damages caused by Forgue.

### **CONCLUSION**

For the foregoing reasons, Forgue asks this Court to vacate the Judgment of Conviction and remand this case to the circuit court for a new trial. In the alternative, Forgue asks this Court to vacate the restitution order and remand this case to the circuit court for a new hearing on restitution.

Dated this 20th day of February, 2017.

Respectfully submitted,

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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 3,014 words.

## **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 by mail on all opposing parties.

Dated this 20th day of February, 2017.

Signed:

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## **CERTIFICATION AS TO APPENDIX**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of February, 2017.

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# **A P P E N D I X**

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