STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2016AP002414-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SHAWN W FORGUE,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 15, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

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TABLE OF AUTHORITIES

CASES CITED **PAGE(S)**

STATUTES CITED

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

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 FACTS

The defendant's statement of facts is comprehensive and accurate. The state will refer to several additional facts in the argument portion of this brief, with citations to the record.

ARGUMENT

I. THE TRIAL COURT APPROPRIATELY EXCLUDED CERTAIN MCMORRIS EVIDENCE.

A. Legal principles and standard of review

The rules applicable to the admission of evidence of the victim's "character for violence" are set forth in McMorris v. State, 58 Wis.2d 144 (1973), Werner v. State, 66 Wis.2d 736 (1975), and their progeny.

In McMorris, the Wisconsin Supreme Court addressed the admissibility of evidence of prior specific acts of violent behavior of the victim when self-defense is at issue. Id at 144. The court held:

> When the issue of self-defense is raised in a prosecution for assault or homicide and there is a factual basis to support such defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident.

Id. at 152.

Such evidence may enlighten the jury regarding the defendant's state of mind at the time of the incident and assists the jury in deciding whether the defendant acted

as a reasonably prudent person would under similar beliefs and circumstances. *See* State v. Daniels, 160 Wis.2d 85, 94 (1991), *citing* McMorris, 58 Wis.2d at 151.

In Werner, the Wisconsin Supreme Court clarified that under McMorris, a defendant who claims self-defense may testify about prior specific acts of violence by the victim only when this specific conduct was "within his knowledge to show his state of mind" at the time of the alleged offense. *Werner,* 66 Wis.2d 736, 744. Thus, "[e]vidence of prior specific conduct may not be used to prove that the victim acted in conformity with that conduct." *Id*. In other words:

> The purpose in allowing such testimony is not to support an inference about the victim's actual conduct during the incident; rather, the testimony relates to the defendant's state of mind, showing what his beliefs were concerning the victim's character. Such evidence helps the jury determine whether the defendant 'acted as a reasonably prudent person would under similar beliefs and circumstances' in the exercise of a privilege of self defense.
>
> Id. at 743 (footnote omitted).

In McAllister v. State, 74 Wis.2d 246 (1976), the Wisconsin Supreme Court further explained Werner and

McMorris. The Court held that although a defendant claiming self-defense may testify about specific instances of violence by the victim, testimony by other witnesses is inadmissible to prove that the victim acted in conformity with that conduct, but a defendant may "produce supporting evidence to prove the reality of the particular acts of which he claims knowledge, thereby proving reasonableness of his knowledge and apprehension and the credibility of his assertion." McAllister, 74 Wis.2d at 250-51.

The admissibility of evidence proffered to show the reasonableness of the self-defense claim is within the court's discretion. State v. Head, 2002 WI 99, 255 Wis.2d 194 (2002). As with any "other acts evidence," the evidence is subject to the application of the balancing test involving the weighing of probative value against the danger of unfair prejudice, and considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Wis. Stat. § 904.03. Assuming its probative value outweighs such considerations, courts have in previous cases established the defendant's right to put on such evidence once a factual basis has been set

forth for a self-defense claim, and also established the court's responsibility to vet the evidence prior to its admission. See, e.g., McAllister, 74 Wis.2d 246.

When corroborating evidence of the victim's prior specific violent acts is cumulative, courts have excluded it on grounds that it surpassed the legitimate purpose of establishing what the defendant believed to be the victim's character, and instead demonstrated the victim's violent propensity. See Id. at 251; Daniels, 160 Wis.2d at 106-07.

B. Testimony regarding the victim's alleged "road rage" incident and the victim's "five to ten additional incidents of domestic violence was properly excluded.

The circuit court considered the arguments of the parties at a motion hearing on April 8, 2016 and declined to let the jury hear about the "road rage" incident. The court noted that the victim's behavior in that incident "may be unwise conduct. It may be turbulent… [b]ut I don't think it really goes in my opinion to the reasonableness of whether someone would then need to strike someone." (63:15, 16; A-Ap. 103-104). The court further explained its reasoning: "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." (63:16; A-Ap. 104). The court's observation that the victim's conduct was not violent behavior specifically directed at the defendant takes this evidence outside the purview of McMorris, and the exclusion of the evidence therefore reflected a proper exercise of discretion.

The circuit court also excluded evidence of "5 to 10 additional incidents of domestic violence." The court found that "[i]t's just not specific enough. It's this general statement that, you know, she has engaged in conduct numerous times without any specific detail or facts. I think that is not specific enough, and it I think could lead to some more confusion about the exact role that McMorris evidence plays in the jury's deliberations." (63:16, 17; A-Ap. 104-105). As this evidence was vague and tended to bleed into propensity rather than specifically bolster the defendant's self-defense claim, it was also properly excluded.

It is important to note that the court did permit the defendant to develop two prior specific incidents of

McMorris evidence at trial. The court allowed the defendant to testify about an incident where the victim was intoxicated and went at him "with a lunging motion" and then injured herself when she struck a stairway banister with a skateboard. (68:36). The court also permitted the defendant to testify about a second incident where the victim took off her shoe and hit him in the face with it three times, causing him to lose a tooth. (68:38). The court further allowed an acquaintance of the victim to testify that the victim admitted she struck the defendant with her shoe and thereby knocked his tooth out. (68:91). Thus, the defendant was able to fully develop a base of support for his self-defense claim.

II. THE TRIAL COURT APPROPRIATELY EXCLUDED THE DEFENDANT'S PROFFERED OTHER ACTS

A. Legal Principles and Standard of Review

Other acts evidence is not admissible to prove the character of the person, but it may be 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). The well-established rule of admissibility in

Wisconsin consists of a three-step test: (1) Is the evidence offered for an acceptable purpose? (2) Is the evidence relevant? (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues for misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? State v. Sullivan, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998).

B. Both of the defendant's proffered other acts were irrelevant and invited confusion of the issues

As with the McMorris evidence, the court also heard arguments and denied the defendants other acts motion at a hearing on April 8, 2016. The first other act related to conduct between the victim and different man in 2008, in which she was filed with the boyfriend and was arrested after saying, "Well, if I have to go to jail, at least it was worth it." The circuit court stated, "I'm not gonna allow [the evidence] for the reasons I've just indicated. I just believe it really is more propensity. It would be too likely to confuse the issues here, I think." (63:24; A-Ap. 109). The defendant argued that this incident shows the victim was especially disposed to violence and she would know to fabricate a story to avoid

being arrested again, but the court pointed out that the victim could be effectively cross-examined about these attitudes without delving into the 2008 incident. (63:22, 24; A-Ap. 107, 109). For these reasons, the court properly exercised its discretion in disallowing evidence of a 2008 incident involving a different boyfriend.

The defendant also sought to introduce evidence that the victim, who was a postal carrier at the time, had other people's mail at the residence at the time of the incident. The defendant's narrative and theory of admissibility is rather convoluted: the two of them had an argument that led to the victim attacking the defendant; the defendant physically reacted in self-defense; the defendant told the victim to leave but she refused; the victim threatened that if the defendant kicked her out, she would report him for domestic violence; the defendant in turn threatened that if she reported him, he would report her for stealing people's mail; and so the defendant's belief that the victim stole other people's mail was relevant to reveal the victim's improper motive to falsely accuse him of domestic abuse. (63:27-29; A-Ap. 112). The court responded that by the

time the narrative gets to the point of the defendant threatening to report the stolen mail, “the cows are already out of the barn, so to speak, in terms of her motivation about making something up.” (63:32; A-Ap. 115.) That is, the defendant was permitted to plant the seed of improper motive by testifying that he threatened to kick the victim out of the house for her behavior. As the court observed, any mention of the mail “just goes down into an argument that’s more confusing than helpful.” (63:33, A-Ap. 116).

Finally, even if the court’s exclusion of the McMorris evidence and other acts evidence was erroneous, the error was harmless. The defendant testified about the incident with the skateboard as well as the incident where the victim knocked his tooth out with her shoe, all in support of the reasonableness of self-defense. Further, the defendant testified that the victim was “extremely violent” during their relationship. (68:91). The defendant even implied that he had to buy a gun to protect himself from the victim:

> Q Okay. And did you use the firearm frequently when you had it?
> A No.

> Q What were your plans for that firearm?
> A It was for home safety, um, because [the victim] on many occasions, well, throughout our relationship – (68:87).

The state then objected, but the testimony to that point was not struck. Thus, the defendant was permitted to fully develop what he claimed to be the basis for his fear or the victim. The effectiveness of the evidence is reflected in the verdicts; notwithstanding the victim's broken nose and ruptured ear drum, the defendant was acquitted on all of the felony charges.

III. THE STATE CONCEDES THE RECORD IS INSUFFICENT AS TO THE AMOUNT OF RESTITUTION.

The defendant correctly notes that this prosecutor failed to file supporting documentation regarding the amount of restitution in the case. The state agrees with the defendant that the case should be remanded to the circuit court for a further restitution hearing, where the court can take evidence regarding the basis for restitution. Once the court receives an itemized basis for the restitution, the court will also be in a position to determine whether there is a causal nexus between the defendant's crimes and the items of restitution requested by the victim and the Crime Victim Compensation fund.

CONCLUSION

This court should affirm the circuit court's decision to exclude evidence of the McMorris and other acts evidence, and deny the defendant's request for a new trial. This court should remand the case to the circuit court for a new restitution hearing.

Dated this 22nd day of March, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 11 pages.

Dated: _____.

Signed,

_____
Attorney

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 22nd day of March, 2017.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 22nd day of March, 2017.

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