STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2016AP2414 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN W. FORGUE,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

Shawn Forgue appeals his convictions of battery and disorderly conduct, both as domestic abuse, on the basis that the trial court erroneously prevented him from presenting evidence of the alleged victim, T.S.'s, prior violent conduct towards Forgue to show the reasonableness of Forgue's actions in self-defense, and evidence of other criminal acts of T.S. in order to show her motive, intent, and plan for falsely accusing Forgue of attacking her.

Forgue also appeals the restitution ordered after sentencing because it is not supported by sufficient evidence. The State concedes this argument and agrees with Forgue that, should this court affirm Forgue's conviction, the case should be remanded to the circuit court for a further restitution hearing. (Resp. Br. at 10.)

ARGUMENT

The key issues in this case were who was the aggressor in the physical altercation that occurred between Forgue and T.S. on March 27, 2015, and whether Forgue's actions were reasonable self-defense.

Forgue's theory of defense was that, contrary to T.S.'s testimony that he was the aggressor, it was T.S. who initiated physical contact by grabbing, punching, and hitting Forgue. (68:41-48.) Forgue, out of a reasonable fear for his safety, struck back at T.S. (*Id.*) When Forgue then told T.S. to leave the house and threatened to report her for stealing mail, T.S. threatened to (falsely) report Forgue for domestic violence. (*Id.* at 52.) T.S. later provided police with a false story about the events of that night by stating that Forgue had attacked her. It was Forgue's theory of defense that his actions in self

defense were reasonable and 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. As detailed below, the evidence kept out by the trial court was relevant, proper, and necessary for Forgue's right to present a full defense.

I. FORGUE WAS ENTITLED TO PRESENT *MCMORRIS* EVIDENCE REGARDING T.S.'s "ROAD RAGE" INCIDENT IN SUPPORT OF HIS SELF-DEFENSE CLAIM

To succeed at his self-defense claim, Forgue had to show that T.S. was the aggressor and that his response was reasonable. ***McMorris v. State***, 58 Wis. 2d 144, 149, 205 N.W.2d 559 (1973). When determining whether the victim was an aggressor and whether the defendant's apprehension of danger and resulting reaction were reasonable, a defendant's knowledge of the victim's "turbulent or dangerous character" is relevant evidence. ***Id.*** The court erred in not allowing Forgue to present evidence regarding an incident in which T.S. reacted to a verbal disagreement by driving so erratically that Forgue threatened to call police and chose to exit the vehicle on the side of the road rather than continue as T.S.'s passenger. T.S.'s turbulent and dangerous actions caused Forgue to fear for his safety; therefore the incident was relevant to his self-defense claim.

While the trial court has discretion to exclude evidence that would be unduly prejudicial, cumulative, or unreasonably complicated, a court should "admit [*McMorris* evidence] as it would any other relevant evidence." ***State v. Head,*** 2002 WI 99, ¶ 129, 255 Wis.2d 194, 648 N.W.2d 413. This evidence

was not unduly prejudicial, cumulative, or unreasonably complicated; therefore, it should not have been excluded.

The State argues the evidence was property excluded because it is cumulative. (Resp. Br. at 4.) Here, the evidence could not be cumulative, because the court excluded all testimony regarding the incident. "[T]estimony is not merely cumulative when it tends to prove a distinct fact not testified to at the trial, although other evidence may have been introduced by the moving party tending to support the same ground of claim or defense to which such fact is pertinent." ***Wilson v. Plank***, 41 Wis. 94 (1876). In the context of ***McMorris***, evidence is cumulative where it invlolves "[t]he accumulation of evidence as to a *particular* violent act of the victim." ***State v. McAllister***, 74 Wis. 2d 246, 251, 246 N.W.2d 511 (1976) (not error to exclude hospital records regarding prior act about which multiple witnesses testified) (emphasis added).

The State argues that the court observed that T.S.'s conduct was not violent behavior specifically directed at Forgue, therefore taking it out of the purview of ***McMorris***. (Resp. Br. at 5.) Actually, the court simply noted, "she herself was in the car. She's putting both of them in jeopardy." (63:15; App. 103) This turbulent behavior that put Forgue in jeopardy certainly falls within the purview of ***McMorris***, regardless of whether T.S. may have also been endangering herself. ***McMorris***, 58 Wis. 2d at 149 (evidence of "turbulent and dangerous character" of victim is relevant to determine whether victim or accused was the aggressor, and whether defendant's apprehension of danger was reasonable).

Instead, the court seems to have based its decision on its opinion 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 ("I don't think it really goes…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.").) This is a misapplication of ***McMorris***, which holds that past incidents are relevant to determine the reasonableness of the defendant's state of mind *at the time of the charged crime*. ***McMorris***, 58 Wis. 2d at 151 (Evidence "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."). The question under ***McMorris*** is whether the road rage incident supported Forgue's defense that on March 27, 2015, his fear of T.S. was reasonable and his actions in self-defense were justified – not whether he may have been justified in acting in self-defense during the past incident.

The court's exclusion of this evidence is not supported by facts in the record and should be reversed. ***State v. Daniels***, 160 Wis. 2d 85, 105, 465 N.W.2d 633 (1991) (circuit court's discretion to refuse to admit *McMorris* evidence will be upheld only when a reasonable rationale exists that is supported by facts in the record). Because evidence of the road rage incident was relevant and necessary to Forgue's claim of self-defense, and it was not otherwise unduly prejudicial, cumulative, or unreasonably complicated, it should have been admitted.

II. FORGUE WAS ENTITLED TO PRESENT OTHER ACTS EVIDENCE TO SHOW T.S.'s MOTIVE, INTENT, AND PLAN TO FALSELY ACCUSE HIM OF DOMESTIC VIOLENCE

The court erred in denying Forgue's motion to present evidence that T.S. was charged with domestic violence of a previous boyfriend and that Forgue had discovered T.S. had committed mail theft. The evidence was being offered for an appropriate purpose under Wis. Stat. § 904.04(2) was relevant to Forgue's argument that T.S. had knowledge and incentives to falsely report that he attacked her. The evidence was not unfairly prejudicial; therefore it should have been admitted. ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998); ***State v. Johnson***, 184 Wis. 2d 324, 338-39, 516 N.W.2d 463 (Ct. App. 1994).

Evidence of a domestic violence offense committed by T.S. against a previous boyfriend was offered 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.) Evidence that Forgue discovered T.S. possessed stolen mail at his residence and his threat to report T.S. was offered to show her motive to falsely report that Forgue was the aggressor during their physical fight. (*Id.* at 4.)

The evidence was relevant to show T.S. had a motive to preempt any report of her activities to police by Forgue by first telling police that he attacked her. This evidence is similar to that in ***State v. Echols***, in which the Court of Appeals vacated the defendant's conviction after the trial court excluded evidence of alleged victim's history of school disciplinary problems resulting in her being placed on a

behavioral contract providing that subsequent violations would lead to her expulsion, and that the alleged victim misbehaved shortly before accusing the defendant of assault. 2013 WI App 58, ¶ 1, 348 Wis. 2d 81, 831 N.W.2d 768. The court of appeals found this evidence relevant to show the alleged victim's knowledge that she was in danger of expulsion for her conduct and her motive to point a finger at defendant's alleged wrongdoing in order to divert attention from her own; therefore, the defendant was entitled to use it to prove his theory of defense. ***Id.*** at ¶¶ 19-20.

Although the court allowed Forgue to cross-examine T.S. regarding her knowledge of police procedures in domestic violence cases and her likelihood of fabricating a story to avoid another arrest (Resp. Br. at 7-8), as in ***Echols***, Forgue was prevented from delving into her motive for making the false report, which was the key to his defense. 2013 WI App 58, ¶ 20.

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.

III. THE STATE HAS FAILED TO PROVE THAT ERRORS WERE HARMLESS

Error is not harmless when there is a reasonable possibility that the error contributed to the conviction. ***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 verdict. ***Id.*** at 541-42. As the beneficiary of the error, the State has the burden of proving no prejudice. ***State v. Mayo***, 2007 WI 78, ¶ 47, 301

Wis. 2d 642, 734 N.W.2d 115 (2007) (citing ***Chapman v. California***, 386 U.S. 18, 24, 87 S.Ct. 824 (1967)).

The State argues that the exclusion of the ***McMorris*** was harmless because Forgue was "fully develop a base of support for his self-defense claim," (Resp. Br. at 5-6), through his testimony regarding two other instances of T.S.'s violent behavior towards him. But the State offers nothing to meet its burden of showing that Forgue's inability to testify about his full knowledge of T.S.'s violent behavior towards him did not impact the jury's verdict beyond a reasonable doubt.

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. ***State v. Boykins***, 119 Wis. 2d 272, 279-80, 350 N.W.2d 719 (Ct. App 1984). 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.; Daniels***, 180 Wis. 2d at 109. 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.

The State also argues that Forgue was allowed to imply that he owned a firearm because of the victim's violent behavior. (Resp. Br. at 9-10; 68:87 ("[The firearm] was for home safety, um, because [T.S.] on many occasions, well, throughout our relationship - ").) It is not at all clear from this

testimony that the jury could have inferred anything other than the fact that Forgue kept a firearm for home safety during his relationship with T.S. Further, the court sustained the State's objection to this testimony, and once testimony was closed, the trial court instructed jurors to disregard questions to which objection had been sustained, not to speculate on possible answers or imply any facts from such questions, and not to consider it as evidence. (68:87, 187) Juries are presumed to follow the court's instructions. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Thus, the court should not presume that this half-sentence of testimony benefitted Forgue in any way, let alone made the trial court's exclusion of evidence harmless.

Likewise, the court's error in excluding the other acts evidence was not harmless. 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." ***Johnson***, 184 Wis. 2d at 340. The State fails to show beyond a reasonable doubt that the other acts evidence could not have influenced and assisted the jury's resolution of this question. ***Id.***; ***Echols***, 2013 WI App. 81 ¶ 21. Prohibition of evidence that was central to Forgue's case undermines confidence in the trial's outcome. ***Id***. The jury cannot search for the truth if the trial court erroneously prevents the jury from considering relevant admissible evidence on a critical issue in the case. ***State v. Cuyler***, 110 Wis.2d 133, 327 N.W.2d 662, 667 (1983).

Finally, the State argues that because the jury aquitted Forgue of the felony charges, Forgue was able to fully and effectively present his defense. (Resp. Br. at 10.) But Forgue *was* convicted of the misdemeanor counts, and potentially because of these errors. The State has failed to show the trial court's errors were harmless beyond a reasonable doubt.

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 10th day of April, 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 10th day of April, 2017.

Signed:

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