WISCONSIN COURT OF APPEALS
District IV

STATE OF WISCONSIN,

Plaintiff-Respondent

v. Appeal No. 2017AP000165 CR
Circuit Court Case No. 2015CM000204

CHARLES A. PAGE,

Defendant-Appellant.

On appeal from Judgment of Conviction
in the Circuit Court for Clark County,
the Honorable Jon M. Counsell, Circuit Judge, presiding.

DEFENDANT-APPELLANT'S BRIEF and APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER MATERIALS

WISCONSIN STATUTES

ISSUES PRESENTED

1. Whether, under the circumstances of this case, the testimony of defendant's witness constituted other-acts evidence and, if so, was it inadmissible because defense counsel had failed to file an other-acts motion.

Answered by the trial court: Yes, the testimony was other-acts evidence, because the defendant was offering it to show he acted in conformity on the night in question with his conduct on a prior occasion. Also, because defense counsel had not filed a motion seeking to admit the witness's testimony it was inadmissible for that reason too.

2. Whether, under the circumstances of this case, evidence of the defendant's past experiences with hunters poaching deer was inadmissible other-acts evidence.

Answered by the trial court: Yes, because defendant offered it to show motive and intent.

3. Whether, under the circumstances of this case, the trial court crossed the line of permissible judicial interrogation and thereby began advocating for a conviction.

Answered by the trial court: Not answered.

STATEMENT ON ORAL ARGUMENT

Because the briefs should fully cover the issue in this case, oral argument is not recommended.

STATEMENT ON PUBLICATION

Because this case involves special examination of a unique set of facts, publication is not recommended.

STATEMENT OF THE CASE

This Clark County case began on October 13, 2015 with the filing of a criminal complaint in *State of Wisconsin v. Charles A. Page*. The complaint alleged that on the night of September 26, 2015, defendant had unlawfully shined deer in contravention of § 29.314(3)(a), Stats. and thereafter that he had obstructed the warden who investigated that crime contrary to § 29.951, Stats.[1]

At his initial appearance in February 2016 defendant stood mute and, thus, the circuit court entered not guilty pleas on his behalf. (R41:2). Because Mr. Page had several surgeries scheduled the court did not set the matter for trial until August 2016. (R40). In the meantime, Page remained free on bond. (R37:3).

The morning of August 31st, prior to the start of Page's trial, the court heard two motions filed by the State. The first was a motion to admit evidence that Page had been convicted of prior crimes. (R12). Although defense counsel argued that the crimes were too remote in time to be relevant (R45:5), the court disagreed. Furthermore, said the court, the prior crimes involved intent and, hence, they went to Page's credibility at this trial. (R45:7). Thus, if Page did testify the State could ask him if he had been convicted of any crimes and, if so, how many times. (R45:8).

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[1] **29.314(3) SHINING DEER, ELK, OR BEAR WHILE HUNTING OR POSSESSING WEAPONS PROHIBITED.**

(a) *Prohibition.* No person may use or possess with intent to use a light for shining deer, elk, or bear while the person is hunting deer, elk, or bear or in the possession of a firearm, bow and arrow, or crossbow.

29.951 RESISTING A WARDEN. Any person who assaults or otherwise resists or obstructs any warden in the performance of duty shall be subject to the penalty specified in s. 939.51(3)(a).

The second motion was an other-acts motion. What the State wanted to do was to admit evidence of some citations Page had recently received for obtaining four deer tags under false pretenses. (R13). The prosecutor told the court that the DNR warden who had accused Page of shining deer uncovered these four deer tags during his investigation in this case. (R45:8). These four tags were farmer tags or tags available only to persons owning and actively farming a farm. (R131). During the course of the warden's investigation, Page allegedly said that he was part owner of two farms, which turned out not to be true. (R13). This false information, together with other false information Page provided, helped support the obstructing charge in this case. (R45:8). Although the citations involved Jackson County cases, the false information was provided during the investigation of the shining charge. (R45:9). The investigation of this case, said the State, was so blended with the investigation of the Jackson County cases it would be difficult for the warden to testify about events giving rise to the obstructing charge without mentioning these citations. (R45:9).

Defense counsel opposed the motion, arguing that the citations were being offered as character evidence, *to wit*, to show that if Page lied to obtain these tags he also purposely lied to the warden in this case. (R45:10). Furthermore, said counsel, the complaint alleged that Page had obstructed the warden on Saturday, September 26, 2015, not a couple of days later when the warden asked him about these farmer tags. (R45:15-16). According to the complaint, the obstructing charge arose from Page giving the warden false names on the night in question. (R45:15; R2). Any misrepresentation associated with these farmer tags was not relevant to the crime charged in the complaint. (R45:15).

After hearing argument from both sides, the trial court granted the State's motion. (R45:18). According to the court, the citation evidence provided context, background, and went to absence of mistake. (R45:16-17). Here, said the court, there is a plan. (R45-17). And then the obstructing comes about.

(R45:17). There is a plan to give a wrong name to cover up activities that come to light later. (R45:17). In this situation we are looking at how and why are all of these things happening and that is part of the context or background. (R45:18). This evidence provides information about the intent the defendant had and whatever plan he had. (R45:18). It is not character evidence in the pure sense. (R45:18). It has to do with the facts and circumstances taking place. (R45:18). Thus, the court granted the motion allowing evidence of the citations to come in.

It was at this point in the hearing that defense counsel said *in light of the court's ruling* she felt compelled to bring to the court's attention that she intended to call Fairchild Police Chief, John Anderson, as a witness at trial. (R45:18-19). Page's defense to the shining charge was that he was not shining deer to poach them on September 26th, but rather, he was out that night investigating whether others were poaching. (R45:22). Chief Anderson would testify that a few days prior to that night Page had contacted Anderson to report poachers in this same area. (R45:19). The Chief's testimony, she said, could be construed as other-acts evidence going to Page's intent, offered to show he had a history of investigating or turning in poachers and the jury could infer he was out that night intending to do the same thing. (R45:19). Because it could possibly raise an objection during the Chief's testimony she thought she would raise the issue ahead of time. (R45:23).

The court held that defense counsel's request was not timely. (R45:23). She had filed no motion and therefore her request to offer this testimony was denied. (R45:23). Immediately following this ruling, Page's trial to a twelve-person jury began.

The State called only Adam Hanna, a DNR warden. Hanna is the individual that witnessed Page allegedly shining deer and who conducted the investigation of that crime. (R45:81-123, 137-39).

The defense called Charles Page and Melvin Rupnow. Rupnow is the individual that allegedly contacted Page on the night in question to report possible poachers near his property. (R45:128-32).

At the close of evidence the jury returned a guilty verdict on both counts. That is, it found Charles Page guilty of using a light to shine deer in violation of § 29.314(3)(a), Stats. and it found him guilty of obstructing a warden in the performance of his duties contrary to § 29.951, Stats.

On September 8, 2016, the circuit court sentenced Page as follows:

> On Count One (shining deer) it sentenced him to six months in the county jail to begin September 15th, fined him $1,000, and revoked his hunting/fishing privileges for three years. (R44:7, 11).
>
> On Count Two (obstructing) it withheld sentence and placed Page on probation for two years consecutive to the jail term on Count One. As a condition of probation it ordered him to surrender all of his hunting/fishing equipment to a third person within 10 days of sentencing. The hunting items introduced as evidence at trial he would forfeit (hat, crossbow, flashlights). (R44:8-9).

Page promptly filed a notice of intent to pursue postconviction relief, together with a motion for release pending appeal. (R26; R25). The court granted the motion for release contingent upon Page complying with all other requirements set out in his Judgment of Conviction. (R27). Page surrendered his hunting equipment and on January 28, 2017 he filed his notice of appeal. (R30; R50).

STATEMENT OF FACTS

Charles Page testified at trial that on September 26, 2015, after spending the day packing for a hunting trip, he received a late-night call from a neighbor, Melvin Rupnow. (R45:142, 144). Although he and Rupnow are not related,

Page refers to Rupnow as "grandpa." (R45:144). On this night, Rupnow told Page that he had spotted a suspicious looking vehicle near his property and suspecting it might belong to hunters poaching deer he asked Page to investigate. (R45:140-41). Page said he and Rupnow had caught some poachers near Rupnow's property a couple of days before that and at that time Page told Rupnow to call him the next time Rupnow saw a suspicious vehicle. (R45: 144). So Page went to investigate as Rupnow had asked. (R45:144).

Page drove to the area Rupnow described and upon arrival spotted a white truck parked suspiciously. (R45:145). After making an unsuccessful attempt to obtain the truck's license number, Page drove to the top of a nearby hill in hopes of obtaining cellular service to call the Clark County Sheriff's Department. (R45:150). This too was unsuccessful as no service was then available. (R45:151).

En route to the top of the hill Page had spotted some figures or objects off to his left in a field. (R45:151). Wanting to identify whether those figures were hunters or deer, Page returned to that spot. (R45:151). Unable to make out exactly what they were, Page hoisted his crossbow and rested it on the open window of his vehicle. (R45:151). This particular crossbow was equipped with a night vision scope which allows any light source, no matter how minimal, to magnify what you see. (R45:151-52). Page used a small light in the bill of his cap, which he told the jury was more than enough light to allow the scope to magnify the figures. (R45:156). He identified the figures as deer and realizing the figures were not poachers he turned out the light and put down the bow. (R45:156). At no time was the bow loaded or cocked. (R45:158). At no time did the light from his cap illuminate the deer. (R45:157).

At this point Page took off in search of the truck he had seen earlier. (R45:158). According to him he did not get more than 50 yards down the road when he was pulled over by Warden Hanna. (R44:158). As it turned out, the suspicious

white truck belonged to Hanna who on this night also was out looking for hunters poaching deer. (R45:82-83).

According to Hanna he was in this area to investigate a recent complaint, as the area had a long history of complaints and that he had apprehended several poachers in this area in the past. (R45:82-83).

He testified further that he had seen Page point his crossbow out the driver's side window and he had seen the three deer that Page also had seen. (R45:91). The reason he saw the deer, he said, is because Page had shined a light on them. (R45:91). The light could not have been the tiny light beneath the bill of Page's cap, but more likely the light mounted on his crossbow, which was a much brighter light. (R45:93).

After asking Page various questions, Hanna searched Page's Jeep. (R45:89). Believing that Page had unlawfully shined deer he placed him under arrest and confiscated Page's crossbow with the night-vision scope, Page's cap with the two lights attached, and two other lights. (R45:94).

The next day Hanna continued his investigation. As he told the jury, a records check revealed that on September 26th, all totaled Page was then in possession of ten deer tags. (R45:99-100). Of those ten tags, four were farmer tags, or tags available only to persons owning and actively farming farms. (R45:99-100). When Hanna questioned Page about any farms he owned Page supposedly told Hanna he was part owner of a farm in Eau Claire County and part owner of the farm owned by Melvin Rupnow in Clark County. (R45:100-01). After neither story proved to be true, Hanna confiscated two the farmer tags and made Page surrender the other two. (R45:100-01).

Hanna also told the jury that Page had been less than truthful with him in other ways during his investigation. For example, Page allegedly told Hanna that "grandpa" had called him about the suspected poachers on the night in

question, implying that the caller and Page were related. (R45:96-97). However, when Hanna asked for "grandpa's" real name Page first told him Arthur and only later confessed that "grandpa" was the name he used when referring to Melvin Rupnow, who was no relation to him. (R45:97-99).

Hanna also told the jury that on the night in question, although Page insisted he had not shined any deer, he later admitted that he used four different lights to illuminate the deer in the field. (R45:87, 95).

When it was Page's turn to testify, he clarified his remarks to Hanna. According to Page, on the night in question Hanna asked him about all four lights he found in Page's Jeep, the two on Page's cap as well as two other flashlights. (R45:164-66). He wanted to know what Page used each of them for and so Page told him the reason he carried each of them. (R45:164-66). According to Page, Hanna wanted to know what he used the lights for, generally, not whether he used the lights to shine the deer. (R45:164-66).

As for trying to confuse Hanna about "grandpa," Page said Hanna questioned him about his family, where it was from, who they were, etc. (R45:167). Page said he wanted to know my brothers' names, my sisters' names, my aunts' and uncles' name, including my grandfather's name. (R45:166). Page said he told him the truth, as Arthur Page is his grandfather's name. (R45:166). He never tried to confuse him that Melvin Rupnow was his grandfather. (R45:167).

As for being in possession of the farmer tags, Page explained that farmer tags were new in 2015 and even the game wardens he had talked to were confused about them. (R45:168). As far as he knew it was not improper for him to have them. (R45:168). As he understood the rules the new tags were issued according to a hierarchy – if this person did not apply, then the next person was eligible. (R45:168). If that person failed to apply, then the next person was eligible. (R45:168). Further, it was unclear whether you applied for one of these tags in the county where you live or in the county

where you intended to hunt. (R45:168-69). So he applied for both because he lived in Eau Claire County, but intended to hunt on Melvin Rupnow's farm in Clark County. (R45:168-69).

ARGUMENT

Pursuant to statute, a person casting rays of light on a field frequented by wild animals is presumed to be shining deer. Wis. Stats. § 29.314(2). An accused may introduce evidence to rebut this presumption. *Id.*

In this case, Charles Page wanted to rebut the presumption by convincing the jury that on the night in question he was not shining deer to poach them, but was actually looking for other hunters poaching. This was his defense. He wanted to introduce evidence that he had experience catching poachers and also introduce evidence that a few days before the night in question he had contacted law enforcement about poachers on Melvin Rupnow's property.

In this appeal he contends he did not get a fair trial because the circuit court derailed his defense in several ways. First, it erroneously classified his key witness's testimony as other-acts evidence and then struck the witness because defense counsel had failed to file an other-acts motion prior to trial. Consequently, the jury never heard important testimony that would have bolstered his defense.

Second, the court prohibited him from testifying about his prior efforts and experiences in catching poachers, again incorrectly believing that these past efforts were inadmissible other-acts evidence. Clearly they were not. Prohibiting him from sharing this evidence with the jury frustrated his efforts to put on a meaningful defense.

Finally, he complains that the court unfairly assumed the role of prosecutor at trial by taking over his cross-examination and laying out a new theory of guilt for the jury to consider. This he contends was very prejudicial not only

because it gave the jury a new way to find him guilty, but because the judge's questioning made him look guilty.

As to the first and second issue, whether a particular piece of evidence constituted other acts evidence presented itself several times during the trial of *State v. Page.* The first was the morning of trial. At that time, the circuit court heard the State's motion to present evidence of the civil forfeitures associated with the illegal farm tags. (R45:13).

The State argued to the court that Warden Hanna had uncovered these illegal tags as part of his investigation of the shining incident. (R45:8). The State contended that when questioned about these tags Page had deliberately misled Hanna about his right to possess them by falsely maintaining that he was part owner of two farms. (R13). Accordingly, the State wished to offer the forfeiture evidence to prove obstruction, stating that the forfeitures were just one of several instances of Page deliberately impeding Hanna's investigation. (R45:8).

Defense counsel saw the forfeiture evidence as wholly irrelevant. The forfeitures were nothing more than impermissible other-acts evidence being used to prove character. (R45:10). In other words, it was being offered to show Page was a liar and if Page had lied to get the farmer tags in the forfeiture cases, he is probably lying in this case too. (R45:10).

The circuit court had no problem with the State offering the forfeiture evidence to prove obstruction, as the court saw it as providing context and background for the obstruction charge – a charge that arose out of Page's misrepresentations about "grandpa." (R45:12, 18). Page, said the court, was simply making Hanna's job more difficult and the forfeitures were probative of this point. (R45:17-18). So the evidence was allowed and Hanna could (and did) testify about them. (R45:18).

In light of the court's ruling on the forfeiture evidence, it was at this point during the hearing that defense counsel thought it prudent to tell the court that she intended to call the Fairchild police chief to testify. (R45:19). The chief would testify that a week or so prior to the night in question Page had called the chief to report poachers in this same area. (R45:19). Given that Page's defense to the shining charge was that he was out looking for poachers, not shining deer to poach them, the chief's testimony would bolster Page's claim that he was a protector of deer, not a poacher. But in light of the court's earlier ruling, defense counsel said, it may be that the court would see this evidence as other-acts evidence and, thus, a ruling on its admissibility may be necessary. (R45:19).

The court would not allow the evidence simply because Page had no motion to that effect before the court. (R45:23). Following that denial, trial began. The Fairchild police chief never testified so the jury never heard about Page's history of reporting poachers.

The issue of other-act evidence presented itself a second time once trial got underway. It occurred right before trial resumed following the lunch break, when this exchange took place between the court and defense counsel, Christine Kyczynski:

> THE COURT: All right. Anything else before we bring our jurors back in?
>
> I guess I will comment on one more thing about there was this issue of previously on one occasion contacting somebody to report poachers, I guess. Is that what your issue was earlier today?
>
> MS. KUCZYNSKI: Yes. Mr. Page, that was what we were trying to bring in, your honor.
>
> THE COURT: And I guess I am going to go back to what I said earlier about I don't know – part of the reason that this is such an issue is that without a filing, without a factual outline and all the other things, the court has no way to compare what the

> facts and circumstances were leading to that incident, that alleged incident, compared to this alleged incident.
>
> In other words, did this originate with Mr. Page? Did it originate with Mr. Rupnow I guess his name was. Did it originate somehow with somebody else? What was observed that led to that call versus this call or this – facts were observed to lead to all of that and basically those types of things? So the more I heard, I guess, the more the court, when it looks at it, without the factual basis, concludes that without knowing what exactly the similarities would be or dissimilarities, the court is unable to say that the prerequisites for admission can be satisfied. So bring the jurors back in.
>
> (Jury returned to the courtroom at 1:07 p.m.)

(R45: 135-37).

Other acts came up a third time during Page's testimony when Page was recalling the events of the night of September 26th. Page said:

> A When I got there, there was this truck that was parked very suspiciously. And in that specific area, we have actually witnessed where somebody down the road is gutting out a deer. And after it gets gutted out, he uses a walkie-talkie to call the truck who is with their partner, come, throw the animal in the truck, and they drive off. And that's exactly what I thought I had just run into.

(R45:145-50).

Right at this point the court interrupted and then this exchange occurred between Page, defense counsel Kuczynski, and the court:

> THE COURT: Can we take a break for a moment? Take the jurors out, please.
>
> (Jury excused at 1:18 p.m.)
>
> THE COURT: So while the state has not raised an objection, the court does have an interest in making sure this doesn't turn into

a three-day trial. Just how many other acts matters are you going to go into?

MS. KUCZYNSKI: We are not going into any specific acts.

THE COURT: Talking about things he has done in reaction and other things he has done on other nights and why and how and these are all other acts matters.

MS. KUCZYNSKI: Your honor, it is only being presented for the purpose of what his thoughts were and what his intentions were that night. We are not going into any details.

THE COURT: That's intent. Okay? That's motive. When you are dealing with other acts to prove intent and motive, that requires an other acts motion, correct?

MS. KUCZYNSKI: I mean I think this goes straight to what the defense is and the theory of the defense and presenting that what he was thinking.

THE COURT: It does, intent. Okay? Other acts statute. If you want to prove intent, knowledge, things of that nature and you are going to use other acts evidence, you file a motion. There has never been such a motion.

MS. KUCZYNSKI: Your honor, I would disagree that's what it is specifically for.

THE COURT: Then what is it for?

MS. KUCZYNSKI: The other acts motion is for an acceptable way of introducing character evidence. We are not introducing character evidence here. It is Mr. Page testifying about what he thought on that given night, what his rationale was for why he was doing certain actions. We are not going into any details of any other specific acts. That was him saying what he thought was happening. I don't know, maybe he changed the language had done that exactly before. I didn't know what was going to come out. But it is what his testimony was supposed to be why he did what he did, what he was thinking. I think that's all relevant. It does not require an other acts motion. It is just based on what he was thinking that's what his thought process was. That's what he is testifying to is his thought process.

THE COURT: Why do you get a pass on other acts evidence when the state doesn't get a pass on other acts evidence?

MS. KUCZYNSKI: I disagree it is other acts evidence. I think he should be allowed to testify that's what he thought he was doing – that's what he thought was happening that Warden Hanna or some poacher was out there gutting a deer while waiting for the radio back to the other car. I don't think that's an other acts, maybe the way he worded it was, but I don't think that's an other acts issue.

THE COURT: So why aren't you trying to prove he acted in conformity with his previous actions? That's character.

State take a position on this? Maybe the state doesn't care.

MS. STUMBRIS: I mean I agree that it is acting in conformity with something that he has done in the past. At this point, it has already been said, so I don't know.

THE COURT: I guess I raised the issue. If the state wants to object, they can object. If they don't, they don't. We will see where it goes.

MS. KUCZYNSKI: Just to clarify, your honor, I think there would be no objection that Mr. Page just said that's what he thought was going on and he thought there was a poacher that was possibly gutting out a deer while radioing back. I don't think that's going into any sort of other acts or going into character.

THE COURT: When someone says on this date, I did this and this happened, so I did this and this. And now on this day the same thing happened, so I do this and this. That's you are trying to prove character. This is what I always do when something like this comes about. And you are trying to prove one event by virtue of another event. It is one thing to say I thought there was a poacher and therefore I went out there and took a look.

MS. KUCZYNSKI: I think that came out in how he was explaining in his testimony. But the reason I think he was giving that answer was just to explain what he thought was going on. Maybe he did go into that a little bit, but that's not I don't think what the intent was. The intent was just to show what his thought process was.

THE COURT: Tread carefully. I guess I don't want to turn this into a trial within a trial on what happened on ten different days.

> MS. KUCYNSKI: That was never the intent, your honor. The intent was just to have Mr. Page explain what his thought process was and why he was out there and what he was thinking. I think that is not character evidence. That's what happened this night. That's giving detail about -- that's giving testimony about the actual night in question.
>
> THE COURT: If you want to bring the jurors in, go ahead.
>
> (Jury returned to the courtroom at 1:24 p.m.)

(R45:145-150).

Finally, the other acts issue came up at the end of the trial, after the jury left the courtroom to deliberate. At that time this exchange occurred:

> MS. KUCZYNSKI: Your honor, I just realized that before we started the official trial today, I just wanted to note if I can just do an offer of proof that had Chief Anderson been allowed to testify, his testimony put on the record he just would have testified that on September 15th, 2015, that Charles Page had made a report to him that there were poachers that he had run across on his land they had followed him. And that would be what he would have testified to.
>
> THE COURT: On his land?
>
> MS. KUCZYNSKI: Charles' land, yes.
>
> THE COURT: That's one more reason why this issue when the court gets to the sum and substance of it and finds out more facts about why it is irrelevant, it has nothing to do with why he might be three miles away on somebody else's land.
>
> MS. KUCZYNSKI: I misspoke. It was on Mr. Rupnow's land.
>
> THE COURT: And that's why we need to get this done beforehand, because I have heard a lot of testimony today. There is no way to reconcile it all. Someone will have to decide if somebody is lying. And my point of that is without having that ability ahead of time was it on that land or now it is on somebody else's land, then hearing different things just like I have been hearing all day from all different types of people.
>
> I don't know if anybody is lying. I don't have to decide that. It doesn't really matter to me because I am not the fact-

> finder today. All I am saying is there are things that can't be reconciled. And that's the whole point of going into that fashion whether there is some factual background information available.
>
> It goes back to, as well, going back to the ruling on the citations. Well, I will leave everything else stand. We are adjourned until they have something for us.
>
> MS. KUCZYNSKI: Thank you, your honor.

(R45:269-70).

Page contends that the Fairchild police chief's proffered testimony was not other acts evidence, nor was Page's own testimony about his prior experience with poachers. Accordingly, he argues in this appeal that the police chief's testimony should not have been barred and Page should have been allowed to share with the jury his prior experiences with poachers.

STANDARD OF REVIEW

The question of whether particular evidence constitutes other acts is a question of law which courts review *de novo. United States v. Williams*, 291 F.3d 1180, 1189 (9th Cir. 2002).

Wis. Stats. § 904.04(2) governs the admissibility of other acts evidence. Evidence of other crimes, wrongs or acts is not admissible as character evidence to show that the defendant acted in conformity therewith, but is admissible for other relevant purposes. *State v. Alsteen*, 108 Wis.2d 723, 729, 324 N.W.2d 426 (1982).

However, merely because an act may be factually classified as different in time, place or manner from the act complained of does not mean it constitutes other-acts evidence. *State v. Bauer*, 2000 WI App 206, ¶7 n.2, 238 Wis.2d 687, 617 N.W.2d 902. When evidence is admitted for a purpose other than showing a similarity between the other act and the alleged act, it is not other-acts. *Id.*

The first question that the circuit court needs to ask is "what is the purpose for admitting the evidence?" *Id.* If the evidence is part of the panorama of evidence that directly bolsters a defendant's defense, then it is not impermissible other-acts evidence. *State v. Johnson*, 184 Wis.2d 324, 348-49, 516 N.W.2d 463 (Ct.App. 1994) (Anderson, P.J., concurring).

I. The circuit court erroneously ruled that two pieces of Page's evidence was other-acts evidence.

A. The Fairchild police chief's testimony was not other-acts evidence, but part of the panorama of evidence helpful to Page's defense.

At trial, Page was attempting to convince the jury that on the night of September 26, 2015, he was not engaged in unlawful behavior. To the contrary, based on the tip from Melvin Rupnow regarding a suspicious truck near Rupnow's property, Page wanted the jury to believe that he was out investigating whether others were unlawfully poaching deer on Rupnow's property. (R45:145). Page's suspicions were based, in part, on having had personally observed poaching activities occur in this area before. (R45:145). Page's testimony in this regard was consistent with Warden Hanna's testimony that he too was out there because the area had a long history of poaching complaints and that he had actually apprehended poachers there in the past. (R45:82). Page's claim also was consistent with Rupnow's testimony that hunting violations had occurred near his property in the past. (R45:130).

The Fairchild police chief, John Anderson, had he been allowed to testify, would have said that Page had contacted him on September 15th, or eleven days before the night in question, to report poachers in this same area. (R45:19, 269). The importance of the chief's testimony was two-fold.

First, it gave credibility to Page's claim that he, himself, was not a poacher; that, to the contrary, he was a person who turned poachers into law enforcement. After all, it is one

thing for Page to tell the jury he turns in poachers but quite another for a police chief to vouch for him. In other words, the chief's testimony supported Page's theory of defense and, in part, helped rebut the presumption that those in possession of a crossbow while illuminating deer are presumed to be violating the statute.[2]

Second, it would have allowed the jury to consider that if Page had actually intended to poach deer near Rupnow's property that night, as the State wanted it to believe, the last thing he probably would do is forewarn law enforcement that there were poachers in this area, let alone go out to this very area late at night while in possession of a crossbow outfitted with a night-vision scope. (R45:9). Unfortunately, the jury never heard the chief's testimony and therefore quite likely never considered how improbable it would be for Page to be out there intending to shine deer after first calling the chief.

The chief's testimony, standing alone, was not smoking-gun evidence, but as part of the panorama of Page's evidence it lent credibility to his story as to why he was doing what he was doing on the night in question. This is why Chief Anderson's testimony was so important as it helped rebut the presumption that persons casting rays of light in a field while in possession of a crossbow are presumed to be shining.

Now Page cannot say whether the circuit court would have concluded this evidence was not other-acts evidence had it begun its analysis by first asking what purpose Page had for offering the chief's testimony. Had it asked this preliminary question it may have concluded that it was not other-acts evidence at all.

Or, had it concluded that Page's prior experience with poachers in this area went to Page's motive or intent for being

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[2] **29.314(2)** PRESUMPTION. A person casting rays of light on a field, forest or other area which is frequented by wild animals is presumed to be shining wild animals. A person may introduce evidence to rebut this presumption.

there on this particular night, it may have allowed the testimony for that legitimate purpose.

But it took neither approach. Instead, it just concluded that because Page had no motion before the court the chief's testimony would have to be excluded. (R45:23).

As discussed more fully below, Page submits that the trial court erroneously exercised its discretion when it barred the police chief's testimony for the reason given. At minimum, it should have engaged in the three-step *Sullivan* analysis. *State v. Volk*, 2002 WI App 474, ¶17, 258 Wis.2d 584, 654 N.W.2d 24 (*In assessing the admissibility of other acts evidence, the trial court must apply the three-step analytical framework set forth in Sullivan.*). Better yet, it should have asked why Page was offering the evidence, which in this instance was not to tell the jury that his behavior on September 26th conformed with his behavior on September 15th.

Had it had done any these things it may have correctly concluded that this was not other-acts evidence at all and let the chief testify. But because it did none of these things it erroneously excluded the chief's testimony.

B. Page's testimony about prior poaching incidents was not other-acts evidence, but also part of the panorama of evidence helpful to Page's defense.

The afternoon of trial Page took the stand in his own defense. (R45:140). He was explaining to the jury that he received the call from Melvin Rupnow about a suspicious truck in an area where Page had recently spotted poachers. (R45:144). At this point he tells the jury:

> A When I got there, there was this truck that was parked very suspiciously. And in that specific area, we have actually witnessed where somebody down the road is gutting out a deer. And after it gets gutted out, he uses a walkie-talkie to call the truck who is with their partner, come, throw the animal in

> the truck, and they drive off. And that's exactly what I thought I had just run into.

(R45:145).

It was at this juncture that the court interrupted the testimony, sent out the jury, and accused defense counsel of soliciting other-acts evidence without a pre-trial motion. (R45:145-50). Although counsel vehemently denied this was what she was doing, the court sternly disagreed. In its words:

> When someone says on this date, I did this and this and this happened, so I did this and this. And now on this day the same thing happened, so I do this and this. That's you are trying to prove character.

(R45:149).

Page respectfully disagreed at the time and still respectfully disagrees. (R45:145-50). He was not offering the explanation to prove character. He was offering the details to explain his story – to explain why on this night he had good reason to believe he might stumble upon some hunters poaching deer. (R45:245-50).

Just because an act can be factually classified as different in time, place, and manner than the act complained of, that act is not necessarily other-acts evidence. *State v. Bauer*, 2000 WI App 206, ¶7 n.2, 238 Wis.2d 687, 617 N.W.2d 902. This is the situation we have here. Page was not offering the evidence to suggest he was acting on this night like he acted on a previous night. To the contrary, his testimony told the jury his reason for being in the area of Melvin Rupnow's property the night of September 26th.

Page's testimony in this regard was no different than Warden Hanna's. Hanna told the jury he was out near Rupnow's property on this night because he too had heard rumors of poachers being there and he, himself, had caught poachers there in the past. (R45:82). It was background information that helped the jury understand why each of

them were in the area that night. But the court did not interrupt Hanna when Hanna gave his explanation, nor did it send the jury out and admonish the prosecutor for soliciting other-acts evidence from Hanna. Nor should it have.

As *Bauer* instructs, the first question the trial court should have asked is "why is Page offering this evidence?" If it is not to show a similarity between the other act and the alleged act, then it is not other-acts evidence. *Bauer*, 2000 WI App 206, ¶7 n.2. In this instance Page was not offering his explanation to show any similarity between past encounters with poachers and the alleged act of him shining deer the night of September 26th.

Page contends his background information was not other-acts evidence at all. Even if it was, at minimum, it was admissible for purposes of context, as it explained his presence in the area of Rupnow's property on that night.

Now, unlike the police chief's stricken testimony, it is difficult to state with any certainty what prejudice Page may have suffered from the court's challenge to Page's testimony. It was never stricken; the jury was never told to disregard it. (R45:145-50). When the State took no position in the debate the trial court merely told defense counsel to *tread carefully* and then it brought the jury back. (R45:149). Page continued on with his testimony albeit with no further mention of any prior run-ins with poachers. (R45:150). Whether he had additional testimony in this regard that would have helped convince the jury he would never unlawfully shine deer is, based on this record, mere speculation.

Nevertheless, this case boiled down to Page's credibility, namely whether he was out shining deer on September 26th as Warden Hanna said or whether he was out looking for others unlawfully poaching deer like he said. Where the trier of fact was erroneously not allowed to hear important evidence bearing on credibility this Court will often conclude that the real controversy has not been fully tried and remand the case for a new trial. *State v. Cuyler*, 110 Wis.2d

133, 142, 327 N.W.2d 662 (1983). The standard for determining whether excluded evidence is sufficiently important to require a new trial is evidence that goes directly to the crux of the case. *Id.*

The crux of this case was Page's story; that is, if he was not out there that night unlawfully shining deer then what was he doing? In other words, if he had any hope of overcoming the statutory presumption he needed to give the jury plausible evidence that he was really out there looking for poachers himself. His past experience with poachers helped show this. The details of those experiences operated to show this.

Page submits that his testimony about prior experience with poachers, coupled with the police chief's stricken testimony, went directly to his ability to overcome the presumption. The stricken testimony took away his ability to present a viable defense.

II. The circuit court erred when it struck the police chief's testimony because defense counsel had not first filed a motion.

As stated above, the circuit court struck the police chief's testimony entirely because defense counsel had failed to file an other-acts motion in advance of trial. (R45:23). However, there is no rule or statute that requires counsel to file such a motion even had counsel thought the police chief's testimony constituted other act evidence under the statute. *See* Daniel Blinka, 7 Wisconsin Practice: Wisconsin Evidence § 404.6(c), *Procedural Incidents: Pretrial Notice, Makin the record, and the Judge's Power to Control Timing and Form* at 145 (2d ed. 2001). Of course, she thought no such thing and she argued vehemently at the pretrial hearing that the testimony went to her theory of defense – that Page was out there that night looking for poachers, which is something he had a history of doing. (R45:22).

In fact, she even conceded that if the court saw it as an other-act, then she would offer the chief's testimony to show Page's intent or motive for being out near Rupnow's property that night, which would be a permissible purpose under the statute. (R45-20).

Nevertheless, the court undertook no other-acts analysis before striking the testimony as it is required to do under *Sullivan*. *State v. Volk*, 2002 WI App 474, ¶17, 258 Wis.2d 584, 654 N.W.2d 24. If the trial court fails to apply the proper legal standard, which it did in this instance, then it erroneously exercises its discretion in admitting or striking evidence. *State v. LaCount*, 2008 WI 59, ¶83, 310 Wis.2d 85, 750 N.W.2d 780.

Now granted, § 906.11, Stats. empowers trial courts to require pre-trial disclosure of other-acts evidence whether offered by the prosecution or the defense. Wis. Stats. § 906.11. And in the court's defense, at the final pretrial conference the court said file any motions by July 1 or they are barred. (R39:2). So some argument can be made that defense counsel had fair warning. But three reasons militate against reaching this conclusion under the facts of this case.

The first is that defense counsel did not see the police chief's testimony as other-acts evidence, at least until she heard the court's other-acts analysis at the pretrial hearing.

Second, and as argued above, it was not other-acts evidence because Page was not offering it to prove character. Rather, he was offering it to show he had a history of reporting poachers to law enforcement.

Third, as the supreme court has instructed, where any pretrial orders involving other-acts evidence are violated, the trial court may exclude the proffered evidence only after considering less extreme sanctions first, and only where the breach was willful and motivated by a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence. *State v. McClaren*, 2009 WI 69, ¶¶47-50, 318 Wis.2d 739, 767 N.W.2d 550.

The record is clear here that the trial court did not consider any less extreme sanctions, nor did it consider whether defense counsel's violation of the pretrial order was willful and motivated by tactical advantage. Of course, it was not at all deliberate, as defense counsel only mentioned the chief's testimony after hearing the court's other-acts analysis. (R45:18). Until then it appears counsel never even considered that the chief's testimony could be seen as other-acts evidence. (R45:18-19).

Moreover, the State was not prejudiced by the police chief's testimony, as defense counsel had apparently forewarned the State that she was going to call Chief Anderson as a witness. (R45:18-19). Thus, this was not a case where defense counsel tried to obtain some tactical advantage that would have reduced the State's ability to effectively cross-examine the chief. The State apparently knew the chief was going to testify and raised no objection to his testimony. But these facts are neither here nor there, because the court did not even consider the reasons why counsel may have violated the court's order before it struck the testimony as untimely.

Because the trial court struck the police chief's testimony for the wrong reason, and because if failed to first undertake the *Sullivan* analysis, and because it failed to consider lesser sanctions, it erroneously exercised its evidentiary discretion, much to Page's prejudice. The jury never heard this important testimony that bolstered his defense – that he was not out there to shine deer.

III. The trial judge's cross-examination of Page crossed the line for judicial questioning such that he did not receive a fair trial.

Page's final claim of error is that the court impermissibly cross-examined him at trial and in doing so it crossed the line for judicial questioning much to his prejudice. Page submits the court's line of questioning advocated for a

conviction on the shining charge by introducing a new theory of guilt.

By way of background, in her opening statement the prosecutor told the jury that the evidence would show that Page used a light attached to his crossbow to illuminate the deer. (R45:76). This light would form the basis for the illegal shining charge. Warden Hanna, when he testified, said that he too thought the light mounted to the bow is the light Page used to shine the three deer. (R45:91-92). But Page testified that the only light he ever used was the tiny one attached to the brim of his cap which would be too small to illuminate the deer. (R45:156). It only provided enough light to activate his night vision scope. (R45:198). Hence, as the trial testimony came to a close there was a conflict in the evidence as it related to this shining charge – one that could have left the jury thinking that the State had not met its burden in proving that Page actually had shined a light on any deer.

It was at this point that the court, in the presence of the jury, overtook the questioning:

> THE COURT: I have a question for you sir.
>
> Q I want to clarify something about operation of your – you said it is a night vision scope that you were using, correct?
>
> A Yes.
>
> Q And you said it needs light to be able to operate, at least some, correct?
>
> A Correct.
>
> Q Not too much, correct?
>
> A Correct.
>
> Q And so you used, in essence, what's a flashlight mounted on the brim of your cap to shine out on the field to illuminate things enough for your night vision scope?
>
> A Yes.

Q Let me finish. To see what was out there. Is that correct?

A To see the specific area I wanted to look at, yes.

Q So to see what's out there, whatever is in that area, the light from your hat is going to provide enough light on whatever is out there for your night vision scope to then see what's there. Is that how you are saying it works?

A That's how it works, yes.

Q Whatever is there, deer, people, rocks?

A Yes.

Q Trees?

A Yes.

Q Boulders.

A Yes.

Q Okay. So the night vision scope needs some light. You said there wasn't enough light from the moon; and therefore, you had to use a light from your hat to make it work. And that light from the hat has to shine on something out there, whatever it is?

A In that direction.

Q In that direction to reflect back, and the night vision scope amplifies it?

A Correct.

(R45:209-10)

Now Page submits that what the court was doing at this point was not clarifying any evidence, but actually putting before the jury an alternate theory of conviction that the State had not even mentioned, at least up to this point. That is, that the light from the cap, no matter how slight, technically did shine on the deer actually making Page guilty of shining deer while in possession of a crossbow.

When the court had finished its questioning defense counsel immediately attempted to do damage control by getting Page to explain that insofar as the small light may have illuminated the deer enough for the scope to see them, it was not enough light for the human eye to see them. (R45:211-13). Unfortunately, by then the damage had been done. The court's new theory of the case could easily allow the jury to find Page guilty of shining deer.

Make no mistake judges are permitted to cross-examine witnesses. Wis. Stats. § 906.14(2). While a judge may question any witness, he must be careful not to function as a partisan or advocate. *State v. Asfoor*, 75 Wis.2d 411, 437, 249 N.W.2d 529 (1969). He should not take an active role in trying the case for either the state or the defense. *Id.* Potential prejudice lurks behind every intrusion a presiding judge makes into a trial. *United States. v. Slone*, 833 F.2d 595, 597 (6th Cir. 1987). For this reason the practice of judicial interrogation is a dangerous one. *Benedict v. State*, 190 Wis. 266, 272, 208 N.W.932 (1926). A fine line divides a judge's proper interrogation of witnesses and a judge's interrogation which may appear to a jury as partisanship. *Asfoor*, 75 Wis.2d at 411. A trial judge must be sensitive to this fine line. *Id.* A defendant does not receive a full and fair evidentiary hearing when the role of the prosecutor is played by the judge and the prosecutor is reduced to a bystander. *State v. Jiles*, 2003 WI 66, ¶39, 262 Wis.2d 457, 663 N.W.2d 798. In fact, it is suggested that the power to question a witness should be used only in the exceptional case. Judicial Council Committee's Note to Wis. Stat. § 906.14.

What makes the court's questioning so objectionable in this case is that at this juncture in the trial the court has taken the case over from the prosecutor. The court is advocating. It is introducing a new theory of culpability. It is eliciting testimony favorable to the State that suggests that this tiny light on the bill of Page's cap is sufficient to meet the charge of using a light to shine deer. (R45:233-34).

Otherwise, there was no other point to this questioning. The State's theory of the case was that the light mounted on Page's crossbow is the one he used to illuminate the deer. It never suggested to the jury that the tiny light on Page's cap, technically speaking, illuminated the deer. This theory belonged entirely to the court. Laying it out for the jury as the judge did in a carefully controlled cross-exam could not have been more harmful to Page. And it did not stop. Even after defense counsel tried to minimize the damage, the court continued to press on:

> MS. KUCZYNKSI: But what I am specifically asking is –
>
> THE COURT: Can I rephrase?
>
> MS. KUCZYNSKI: Sure.
>
> THE COURT: Since I started the whole process, maybe this will clarify. The light from your hat –
>
> THE WITNESS: Yes.
>
> THE COURT: Provides some minimal amount of illumination on whatever is out there, deer, rocks, boulders, trees, so the night scope can then pick it up.
>
> THE WITNESS: Yes.
>
> THE COURT: Does that answer for you. Go ahead.
>
> MS. KUSCZYNSKI: Was the light from the brim of your hat actually illuminating the deer?
>
> THE WITNESS: No, not with the naked eye.
>
> THE COURT: Then I am going to have another question. If it did not illuminate the deer, at least to some extent, how could the night vision scope work, because you said it won't work without at least some light, correct?
>
> THE WITNESS: Correct.
>
> THE COURT: So there had to be some light from your hat reaching deer, rocks, boulder, streets, people in order for the night vision scope to work, correct?

THE WITNESS: Correct.

(R45:211-12).

The damage from the court's questioning was huge. First, it offered an alternative theory of guilt, one the prosecutor seized upon in closing argument. (R45:252, *The fact that he is using any of the lights … to illuminate the deer is a violation of the statute.*).

Second, the judge's questioning likely gave the jury the sense that the judge was no longer impartial; that he had lost his "disinterestedness" and believed that Page was guilty of shining deer. *United States v. Fry*, 304 F.2d 296, 298 (7th Cir. 1962). If the judge no longer presumed Page was innocent it is quite likely the members of the jury did too.

The trial court is entrusted with the responsibility to conduct the trial in an atmosphere of perfect impartiality. *Glasser v. United States*, 315 U.S. 60, 82, 62 S.Ct. 457, 86 L.Ed. 680 (1942). It must never assume a position of advocacy, real or apparent. *State v. Delarosa*, 16 Conn.App. 18, 547 A.2d 47, 51 (1988). When it does, like it did in this case, the defendant is entitled to a new trial.

CONCLUSION

Page respectfully asks this Court to reverse his conviction of the shining charge. He did not get a fair trial on this charge. The trial court failed to maintain its neutrality and instead began advocating for a conviction on this charge. Furthermore, the court impaired his ability to defend himself against this charge by improperly classifying his evidence as other-acts evidence that could not be admitted without a pretrial ruling on its admission.

Dated this _____ day of March 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 8,953 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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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 _____ day of March 2017.

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