STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2017AP165-CR

Charles A. Page,

Defendant-Appellant.

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ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR CLARK COUNTY, THE HONORABLE JON M. COUNSELL PRESIDING

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# BRIEF OF PLAINTIFF-RESPONDENT

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## ISSUES PRESENTED

I. Whether the proposed testimony of Chief John Anderson and the testimony of Charles Page regarding prior poaching incidents is other acts evidence.

The circuit court answered yes.

II. Whether the proposed testimony of Chief Anderson was properly excluded under the circumstances.

The circuit court answered yes.

III. Whether the circuit court superseded its authority by asking clarifying questions of Page during his testimony.

Not raised in the circuit court.

## STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State of Wisconsin does not request oral argument or publication. The parties present all the issues in their briefs, and the case can be resolved by applying well established principles of law.

## STANDARD OF REVIEW

A reviewing court examines a circuit court's decision to exclude evidence under an erroneous exercise of discretion standard. See *State v. Sullivan*, 216 Wis.2d 768, 780-81, 576 N.W.2d 30 (1998). A circuit court's exercise of discretion will not be disturbed if it reasonably applied the proper law to the relevant facts. *Id*.

Questions of judicial authority, statutory interpretation, and constitutional issues are reviewed de novo. *State v. McClaren*, 2009 WI 69, ¶ 14, 318 Wis.2d 739, 767 N.W.2d 550.

## ARGUMENT

### I. THE CIRCUIT COURT PROPERLY IDENTIFIED PAGE'S PROPOSED EVIDENCE AS OTHER ACTS EVIDENCE UNDER WIS. STAT. § 904.04(2).

The use of testimony related to other crimes, wrongs, or acts as evidence is governed by Wis. Stat. § 904.04(2)(a), which states, in pertinent part, "… evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."

Page challenges the circuit court's identification of two pieces of evidence as other acts evidence: Chief John Anderson's proposed testimony that Page previously reported poachers and Page's testimony that regarding a previous encounter with poachers. Both involve testimony related to Page's prior conduct. Defense counsel indicated she only intended to ask Chief Anderson whether Page previously reported suspected poachers (R45 19:5-11). This testimony was not being offered as opinion or reputation testimony. Rather, it was simply offered to show that Page was behaving consistently with how he may have behaved on a previous occasion – an impermissible use according to Wis. Stat. § 904.04(2)(a).

Additionally, Page was not prejudiced by the circuit court's determination that his own testimony related to prior poaching experiences qualified as other acts evidence. Upon hearing the testimony, the court sent the jury out (R45 145:18-146:2). The jury did not hear the discussion related to the other acts testimony, and the testimony was never stricken from the record. Whether the court was correct in its determination or not, the evidence was still presented to the jury for consideration.

Both pieces of evidence clearly align with the language in Wis. Stat. § 904.04(2)(a), as they involve Page using a prior act to show that he was acting in conformity with the prior behavior on this occasion. As such, the circuit

court was correct when it determined that each fell into the category of other acts evidence.

## II. THE CIRCUIT COURT PROPERLY EXCLUDED CHIEF ANDERSON'S PROPOSED TESTIMONY.

### A. The circuit court conducted a proper analysis before it excluded Chief Anderson's testimony.

The admissibility of other acts evidence depends upon the trial court, within the proper exercise of its discretion, satisfying itself that the evidence meets a three-step analysis. First, the evidence must be offered for a permissible purpose under Wis. Stat. § 904.04(2). Second, the evidence must be relevant. Third, the probative value of such evidence must not be substantially outweighed by the danger of unfair prejudice. *State v. Sullivan*, 216 Wis.2d 768, 772-73, 576 N.W.2d 30 (1998).

The proponent of the evidence has the burden of showing that evidence of prior acts is relevant to one or more of the purposes enumerated in the statute. *Sullivan*, supra at 772 and *State v. Speer*, 176 Wis. 2d 1101, 1114, 501 N.W.2d 429 (1993); *see also State v. Hunt*, 2003 WI 81, ¶ 53, 263 Wis.2d 1, 666 N.W.2d 771. If relevant, the evidence is admissible under Wis. Stat. § 904.03, unless its probative value is substantially outweighed by the danger of unfair prejudice. *Sullivan*, supra at 772-73 and *Speer*, 176 Wis.2d at 1114. "[E]vidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant." *State v. Tabor*, 191 Wis.2d 482, 497, 529 N.W.2d 915 (Ct.App.1995) (citing *United States v. Dobbs*, 506 F.2d 445, 447 (5th Cir.1975).

Assessing relevancy, probative value, and unfair prejudice is within the trial court's discretion. *Speer*, 176 Wis.2d at 1116. A reviewing court examines whether the circuit court followed the proper legal standard, not whether it would have admitted the other acts evidence. *State v. Payano*, 2009 WI 86, ¶ 51, 320 Wis.2d 348, 768 N.W.2d 832. The appellate court will not disturb the trial court's discretionary determination if it applied the proper legal

standards to the facts of record and reached a reasonable decision. *Id*. *See also State v. Mink*, 146 Wis.2d 1, 13, 429 N.W.2d 99 (Ct. App. 1988). "The reasons stated in the record need not be exhaustive. 'It is enough that they indicate to the reviewing court that the trial court undertook a reasonable inquiry and examination of the facts and the record shows that there is a reasonable basis for the … court's determination.'" *Payano*, 2009 WI 86, ¶ 51 (citing *State v. Jeske*, 197 Wis.2d 905, 912, 541 N.W.2d 225 (Ct.App. 1995).

In the present case, the circuit court was presented with Page's proposed other acts evidence the morning of trial (R45 18:23-19:23). Defense counsel indicated she intended to call Chief Anderson as a witness to testify that Page had previously reported poachers, but no pretrial motion had been filed. The court had previously ordered the parties to file any motions by July 1 or they would be barred (R39 2:14-16). The court stated the trial testimony would be barred because no motion had been filed (R45 23:14; 23:24), but it actually undertook an analysis on the admissibility of the proposed evidence based on the limited information it was presented that morning by asking questions that would point to the purpose, relevance, and potential probative value of the testimony.

As the proponent of the evidence, Page was required to show that the evidence was (1) being offered for a permissible purpose under the law and (2) was relevant. At that point, the burden would have shifted to the state to argue its case on the issue of prejudice versus probative value. The court inquired as to the purpose of the evidence. Defense counsel explained Chief Anderson's testimony was being offered to prove motive and intent – to show that Page was not intending to illuminate deer but was looking for poachers (R45 19:15-23). Motive and intent are both proper exceptions enumerated in the statute.

The circuit court then looked to address the relevance of the proposed testimony. At this point, the *Sullivan* analysis failed. Page did not file a motion to admit any other acts evidence, so the court had no background information related to the prior act being proposed. The court asked whether

Page reported poaching on the night in question (R45: 21:1-2), how the prior reporting situation is similar to the present case (R45 21:12-15), and why Page did not act in the same manner as he acted during the previous situation (R45 21:18-19). In its determination as to admissibility, the court indicated:

> … the reason the court has this difficulty is that it starts asking questions, how and why is this the same? It doesn't have any paperwork to evaluate, any outline of what's transpired to compare events, to compare circumstances, to compare the details of what happened on one particular occasion to another. So its hands are tied in trying to evaluate that and apply the appropriate analysis.

(R45 24:4-12).

The circuit court undertook a reasonable inquiry based on the information it had. It followed the accepted legal standards and examined the facts that were available, and it even allowed defense counsel to argue for admission in spite of its previous order barring any motions not filed by July 1. Page, the proponent of the evidence, failed to meet his burden of showing that his evidence was relevant. The court properly exercised its discretion when it excluded Page's other acts evidence.

Even if Page had timely filed a motion with supporting documentation as to the admissibility of his proposed other acts evidence, the testimony he was seeking to admit was simply not relevant. The Wisconsin Court of Appeals considers evidence of noncriminal behavior offered to negate criminal behavior to be generally irrelevant. *Tabor*, 191 Wis.2d 482, 497; *State v. Woppert*, 2010 WI App 84, ¶ 13, 326 Wis.2d 264, 787 N.W.2d 59. The State intended to object to Chief Anderson's testimony on the basis of relevance, but defense counsel raised the issue in the framework of other acts before the state had the opportunity to voice its objection. The type of testimony offered would not have been relevant in the trial because it involved the use of noncriminal conduct to rebut the state's criminal charges.

B. The circuit court has the authority to determine what evidence is admissible at trial.

Under Wis. Stat. § 906.11, the court is granted the authority to control the mode and order of the presentation of evidence in a trial. The court's authority under § 906.11 to exercise reasonable control over the presentation of evidence has been extended to allow the court to order pretrial disclosure of certain evidence for the purpose of obtaining a ruling on admissibility to avoid wasting time during a trial. *State v. McClaren*, 2009 WI 69, ¶ 26, 318 Wis.2d 739, 767 N.W.2d 550.

In *McClaren*, the defendant challenged the circuit court order requiring pretrial disclosure of evidence the defendant intended to use at trial in support of his self-defense claim – an order that was issued so that a pretrial determination of admissibility could be made. *McClaren*, 2009 WI 69, 318 Wis.2d 739, 767 N.W.2d 550. The circuit court raised concerns about "using jurors' time effectively and avoiding unfair prejudice to either party." *Id*., ¶ 18. Although *McClaren* involved self-defense evidence, the court likened it to other acts evidence and indicated the circuit court has a responsibility to review the evidence prior to admission. *Id*., ¶ 21. "It enables more effective presentation of evidence, avoids needless waste of time while a jury is waiting, and gives a circuit judge the time to consider all the arguments and research the case law prior to making a ruling." *Id*., ¶ 27. Page cites *McClaren* when he argues that the circuit court should have considered less extreme sanctions than exclusion of the proposed testimony. In the present case, as in *McClaren*, the circuit court set a motion deadline and indicated any motions not filed by July 1 would be barred (R39 2:14-16). The state met that deadline when it filed its motion to admit other acts evidence (R13). Page filed no such motion.

While *McClaren* suggests that less extreme sanctions must be considered, the exclusion of Page's proposed evidence was proper in this case. Although defense counsel indicated she did not consider Chief Anderson's testimony to be other acts evidence requiring a motion (R45 18:23-19:14),

the state similarly felt its proposed evidence was not necessarily other acts, rather part of the overall investigation of the incident (R45 9:6-9; 9:19-25; 11:19-12:8), so it filed a motion in advance in case the circuit court might view it otherwise. While defense counsel's failure to file a motion may not have been willful, neither the circuit court nor the state learned of Page's proposed other acts testimony until the morning of trial, after the jury pool had already arrived. Because Page failed to file an other acts motion, the state had no opportunity to investigate and/or rebut Page's other acts evidence, and the circuit court was not provided with facts or documentation in advance that would allow it to properly consider the other acts evidence and make a pretrial ruling on its admissibility. In its decisions related to Page's testimony, the circuit court discussed a concern that discussions of other acts evidence as they occurred during trial would cause delays and lengthen the trial (R45 146:4-6). Fairness, efficiency, and a desire to avoid wasting resources and the jury's time required the circuit court to exclude the proposed evidence.

The present case can be distinguished from *McClaren* in another key way. The circuit court's decision to exclude Chief Anderson's testimony was not based on the fact that a motion had not been filed. As previously discussed, the court undertook a brief but sufficient *Sullivan* analysis based on the information it had available and determined that exclusion was proper. Because its decision was based on that analysis, the court should not have been required to consider lesser sanctions as described by the *McClaren* court.

Page further contends that exclusion of Chief Anderson's proposed testimony infringed on his ability to present his defense. As he states in his brief, Page intended to use Chief Anderson's testimony that Page previously reported poachers to show that on the night in question, Page was again investigating poachers. However, Chief Anderson's testimony was irrelevant to Page's defense. Page testified that he was looking for poachers. He also called a witness to corroborate his defense – Melvin Rupnow testified that he contacted Page about a suspicious vehicle in the area (R45 128:19-25). Seeking to admit Chief Anderson's testimony was simply an impermissible attempt to bolster Page's

credibility when he already had a relevant witness in Rupnow.

### C. Even if this court concludes the testimony should have been admitted, exclusion was harmless error.

"This court will not disturb a circuit court's decision to admit or exclude evidence unless the circuit court erroneously exercised its discretion." *Weborg v. Jenny*, 2012 WI 67, ¶ 41, 341 Wis.2d 668, 816 N.W.2d 191 (citing *State v. Ringer*, 2010 WI 69, ¶ 24, 326 Wis.2d 351, 785 N.W.2d 448). "A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record." *Id*. (citing *Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶ 22, 339 Wis.2d 493, 811 N.W.2d 756). "[A] circuit court's erroneous exercise of discretion does not warrant a new trial if the error was harmless." *Id*., ¶ 43 (citing *State v. Harris*, 2008 WI 15, ¶ 85, 307 Wis.2d 555, 745 N.W.2d 397). Where a trial court erroneously excludes testimony but there exists overwhelming evidence of a defendant's guilt, a reviewing court may conclude the error was harmless. See *State v. Nelson*, 2014 WI 70, ¶ 52, 355 Wis. 2d 722, 849 N.W.2d 317.

If this court concludes the circuit court erroneously excluded Chief Anderson's testimony, the error was harmless, as the trial produced overwhelming evidence of Page's guilt. Warden Hanna was able to see a light emanating from Page's vehicle and illuminating deer in a field (R45 85:1-15). The jury saw video from Warden Hanna's squad camera which clearly showed a light coming from the vehicle (R45 114:16-21; 115:9-13). Page testified that he was using the light on his hat to provide enough illumination to allow his night vision scope to work (R45 211:9-15), but in his contact with Warden Hanna on the night in question, he claimed to have used a number of different lights (R45 92:11-14). The jury asked to see the hat light during deliberations (R45 271:6-8), presumably to examine the light and determine whether it was comparable to the light they saw in the video and whether it was strong enough to illuminate the deer so that Warden Hanna was able to see the deer.

The jury heard a number of inconsistencies throughout the trial. Page's trial testimony did not align with the statements he provided to Warden Hanna during the initial investigation. During his contact with Warden Hanna, Page said he was at that location because his grandpa asked him to come look for poachers (R45 96:18-20; 97:1-2). When asked who his grandpa was, Page explained it was Arthur Page (R45 97:15-18). When Warden Hanna learned that Arthur Page did not exist in any records (R45 97:20-23), Page provided the name Arthur Rupnow (R45 98:18-23). Then Page indicated it was actually Melvin Rupnow who was his mother's father (R45 99:1-5). When Warden Hanna spoke to Melvin Rupnow, Rupnow indicated Page was not his grandson (R45 214:19-21), and Rupnow did not call Page to come look for poachers on the night in question (R45 215:3-6).

Page testified that he is not related to Rupnow but calls him "grandpa" anyway (R45 189:6-10). Page called Rupnow as a witness at trial. When Rupnow was asked what Page calls him, he initially said "uncle," then corrected himself by saying "grandpa" (R45 128:15-16) – a suggestion that Page asked him to testify and he initially could not remember what he was supposed to say. Additionally, Page was confronted with his own written statement in which he stated he knew there were deer in the field, then testified that he did intend to illuminate the deer in the field or thought he was looking at something other than deer. The jury ultimately determined that Page was not credible and found him guilty of Illegal Shining of Deer and Obstructing a Conservation Warden (R20).

Because enough other facts exist upon which the jury found Page guilty, the result would not have been different had Chief Anderson been permitted to testify. Therefore, any error the circuit court may have made in excluding the testimony was harmless. Thus, Page is not entitled to a new trial.

## III. THE TRIAL JUDGE'S QUESTIONING OF PAGE WAS NOT IMPROPER AND DID NOT HAVE A SUBSTANTIAL PREJUDICIAL EFFECT ON THE JURY.

A trial court judge has the authority to question any witnesses called to testify at trial. Wis. Stat. § 906.14(2). "…the trial judge is more than a mere referee. The judge does have a right to clarify questions and answers and make inquiries where obvious important evidentiary matters are ignored or inadequately covered on behalf of the defendant and the state." *State v. Asfoor*, 75 Wis.2d 411, 437, 249 N.W.2d 529 (1976). To overturn a circuit court decision, a reviewing court "must be convinced that the cumulative effect of the trial court's questioning of witnesses and its general direction of the course of the trial had a substantial prejudicial effect upon the jurors." *Schultz v. State*, 82 Wis.2d 737, 742, 264 N.W.2d 245 (1978). The Wisconsin Supreme Court "is reluctant to hold that the trial court's involvement in the elicitation of testimony during a trial resulted in such prejudice as to require a new trial." *Id*.

In the present case, the circuit court was well within its authority to ask clarifying questions of Page. In fact, the court made clear on multiple occasions that its intent was to simply clarify Page's testimony as it related to the use of light in combination with a night vision scope and further allowed both parties to ask any follow-up questions or clarify the responses elicited by its inquiries:

> I want to clarify something about operation of your – you said it is a night vision scope that you were using, correct? (R45 209:6-8).
>
> Just wanted to make sure I understood how that works, because I don't remember if that ever got very clear. (R45 210:19-21).
>
> So any other questions people want to follow up? (R45 210:22-23).
>
> Since I started this whole process, maybe this will clarify. (R45 211:19-20).
>
> Does that answer for you? Go ahead. (R45 212:3-4).

Defense counsel made no objection to the circuit court's questioning of Page and added clarifying questions of her own to assist with presenting Page's defense.

Page contends the circuit court took over the role of the prosecutor by advocating for a conviction and presenting the jury with an alternate theory of guilt. Page testified that the light he used did not reach the deer or allow him to see them with the naked eye; rather it provided enough light to allow him to see the deer through his night vision scope (R45 211:9-15; 212:8). The court concluded its questioning by summarizing Page's position: "And maybe that's the best way to put it after all. You can see it with the scope, not with your eye. Any other questions?" (R45 213:6-8). The inquiries did not present a new theory of guilt, but simply clarified the testimony.

The circuit court's clarifying questions did not have a substantial prejudicial effect on the jury. Page argues that the state seized on the court's questioning regarding the use of light in conjunction with night vision when it stated "The fact that he is using any of the lights… to illuminate the deer is a violation of the statute" (R45 251:9-11). Page's brief ignores the full context of that argument by omitting the preceding statement: "Now, there was been a lot of discussion about which light was used whether it was one of the hat lights, a flashlight, the light on the crossbow, or, as Mr. Page's written statement indicated, whether he was seeing the deer with his automobile lights." (R45 251:4-8). The state was not referring to the court's inquiries, but to the inconsistencies in Page's story presented through Warden Hanna's testimony regarding his encounter with Page on the date of the incident, as well as the inconsistencies in Page's own trial testimony. Between Warden Hanna's testimony, Page's testimony, and the statements Page provided during the investigation, the jury heard multiple inconsistent statements and simply concluded that Page's version was not credible.

Given the nature of Page's testimony and the defense he presented, the jurors, with varying levels of knowledge as to the workings of night vision, needed the clarification the

circuit court provided with its questioning of Page. Important to note is that the court was not the proponent of the evidence; Page presented the use of lights to assist with night vision as his defense. Because the average person may not have understood that defense, the circuit court's clarifying questions benefitted all parties by ensuring the jury fully comprehended the evidence before it.

## CONCLUSION

Based on the foregoing reasons, the State of Wisconsin respectfully requests that this court affirm the defendant's conviction.

Dated this 3rd day of July, 2017.

Respectfully submitted,

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## CERTIFICATION

I certify 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 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 3,713 words.

Dated this 3rd day of July, 2017.

Kerra Stumbris
District 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 3rd day of July, 2017

Kerra Stumbris
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