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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ARGUMENT

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

Clark County is a one-judge county and therefore the Clark County District Attorney is undoubtedly familiar with this one judge's peculiar view of the other-acts evidence rule. The DA confesses that even though she did not believe the evidence she wanted to admit was other-act evidence, she filed an other-acts motion just the same. (Resp. Br. at 7). Ostensibly, she knew from experience how broadly the judge interprets the rule.

The court's unique view is this:

> 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. (R45:149)

This is not a correct statement of the law. Just 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*, 200 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.*

Such is the case with Page's testimony that he had on a prior occasion witnessed poaching activity on Melvin Rupnow's property. (R45:145). He was not trying to show a similarity between his conduct on that previous occasion and his conduct on the night Warden Hanna confronted him. To the contrary, he was only attempting to explain why he was at the Rupnow property – he was looking for poachers and he

thought he had stumbled upon them based upon his past experience with how they operated. (*Id.*).

Page assumed the burden of rebutting the presumption that he was unlawfully shining deer. Wis. Stats. § 29.314(2). His testimony was offered for that purpose – to explain why he was doing what he was doing on the night in question. It was not other-acts evidence at all. Page should have been allowed to offer it.

The state says Page suffered no prejudice by the court curtailing his testimony because the limited testimony Page did give was never stricken and the court never told the jury to disregard it. (Resp. Br. at 2). While this is true to a degree, we will never know how much more background and context information Page had to offer. After the interruption the court told Page and defense counsel to *tread carefully* and so they did. (R45:145-50). They never mentioned Page's history of run-ins with poachers again.

But to rebut the presumption Page needed to convince the jury that he was telling the truth about his activities the night of September 26th. If he had more testimony about other encounters and other times he had scared off poachers or had turned them in, it may have had enough convincing power to create reasonable doubt as to his guilt on the shining charge.

The important point here is this: an accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made. *State v. Scheidell*, 220 Wis.2d 753, 767, 584 N.W.2d 897 (Ct. App. 1998) *rev'd on other grounds by* 227 Wis.2d 285, 595 N.W.2d 661 (1999). In this instance the circuit court, on the basis of an erroneous interpretation of the other-acts evidence

rule, deprived Page of the opportunity to put on a meaningful defense. Page deserves a new trial.

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

The state argues that the court struck Chief Anderson as a witness after first conducting a proper *Sullivan* analysis. (Resp. Br. at 3). This is hardly the case. The court struck the chief for one reason and one reason only – that defense counsel had failed to bring a timely other-acts motion regarding the chief. (R45:23, *It is not timely. It is denied.*).

Granted, after striking the chief as a witness the court did express the difficulty in attempting to undertake an other-acts analysis without a formal motion being filed. (R45:24). But its complaint in this regard was hardly a *Sullivan* analysis. In fact, the court's complaint was that it could not do a proper analysis because it lacked the information to do one. (*Id.*). So it was not a case where the chief failed the relevancy prong of the *Sullivan* analysis. (Resp. Br. at 4). The court never got that far given that it struck the chief based on defense counsel's failure to file a proper motion.

Even so, says the state, even if Page had filed a proper motion regarding the chief's testimony, the chief's testimony was not relevant. (Resp. Br. at 5). This is because evidence of noncriminal behavior offered to negate criminal behavior is generally not relevant. (*Id.*). The state cites to the *Tabor* case for this proposition. (*Id.*).

In *Tabor* the defendant, a man charged with sexually assaulting a child, wished to offer the testimony of another child whom he had not assaulted. *State v. Tabor*, 191 Wis.2d

482, 486, 529 N.W.2d 915 (Ct. App. 1995). In upholding the circuit court's decision to exclude the non-assaulted child's testimony the court of appeals said evidence of noncriminal conduct to negate the inference of criminal conduct is generally not relevant. *Id.* at 496-97. And in the *Tabor* context Page would agree with the court of appeals, as the testimony of a hundred un-assaulted children means nothing.

But Page wanted to offer the Chief's testimony not to directly negate the shining charge, but instead to bolster his credibility as it related to his overall defense, which was that he was not shining deer, but looking for poachers. The Chief's testimony accomplished this in two ways. First, it was one thing for Page to tell the jury he had contacted the Chief on one or more occasions to report poachers in the area of the Rupnow farm. But it was quite another for the Chief to vouch for him in front of the jury. The Chief's testimony would go a long way to enhance Page's credibility that he was a law-abiding man.

Second, Page wanted the jury to know how improbable it would be for a poacher to contact a police chief to say that the poacher had seen other poachers in the very area the poacher, himself, intended to poach. No rational person would alert law enforcement that he or she was about to commit such a crime. But the jury never heard this testimony from either Page or the Chief because the court struck it on account of defense counsel had not timely filed a motion.

Again, the chief's testimony was not other-acts evidence to begin with. Rather, it was part of the panorama of evidence that lent credibility to Page's story as to why he was doing what he was doing on the night in question.

The state closes this section of its brief by stating that even if the court improperly excluded Page's testimony and the Chief's testimony, doing so was harmless error. (Resp. Br. at 8-9). The reason therefore, says the state, was that it had produced *overwhelming* evidence that Page was guilty of illegally shining deer and further, that the jury just did not find Page credible. (*Id.*).

As to the first claim, that the state had presented overwhelming evidence of Page's guilt, this contention is debatable. It offered one witness, the accusing officer Warden Hanna, who testified that in his opinion Page had used a light to unlawfully shine deer. That was it; one witness who observed Page from sixty yards away, at night, with the help of a pair of binoculars, for a second. (R45:85). One would hardly call this overwhelming evidence.

As to the second claim, that the jury did not find Page credible, well, this is mere speculation on the state's part. The state was not in the jury room and it has no idea whether the jury found Page credible. But even assuming the jury did not, the reason why hardly would be surprising. Most of the evidence that went to his credibility was stricken by the trial court. Everything that the police chief had to say and much that Page had to say was quashed because the court had a strange take on the other-acts evidence rule.

"Harmless error" is not a sufficiency of the evidence test. *Hannemann v. Boyson*, 2005 WI 94, ¶58, 282 Wis.2d 664, 698 N.W.2d 714. The test is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *State v. Weed*, 2003 WI 85, ¶29, 263 Wis.2d 434, 666 N.W.2d 485.

In this case the error complained of is that the circuit court struck the police chief, a key witness who could have bolstered Page's claim that he had a history of turning poachers into law enforcement. This testimony, coupled with Page's own testimony about his past experiences confronting poachers, which the court cut off, may have been enough to convince the jury that on the night in question Page was engaged in lawful behavior just as he said. But because so much of Page's defense was excluded it is difficult to say with any certainty that these errors did not contribute to the jury's finding of guilt.

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

One of the charges in this case was that on September 26, 2015, in Clark County, Wisconsin, the defendant did use or possess with intent to use a light for shining deer while hunting deer or in possession of a crossbow. (R45:29). In opening statements, the state argued to the jury that the light Page had used was the one attached to his crossbow. (R45:76). Warden Hanna testified accordingly. (*Id.* at 91-92). But Page said the only light he ever used was the tiny one on the brim of his cap, which provided enough light to illuminate the deer when the same were viewed through his night vision scope. (*Id.* at 198). It was not until the end of Page's testimony that the court, taking over cross-examination for the prosecution, suggested to the jury that the small light on the brim of Page's cap technically did shine on the deer, even if that light was not visible to the naked eye. (*Id.* at 209-12).

In this appeal Page contends that the circuit court crossed the fine line of acceptable judicial interrogation. He contends the court assumed the role of prosecutor. Not only

that, but the court laid out a new theory of guilt for the jury to consider, namely that even if the tiny light was all that Page had ever used, the tiny light nonetheless was a light that shined on deer.

The state responds by defending the court, saying the court was only clarifying the testimony. (Resp. Br. 10-11).

In reply, Page still says there was no legitimate point to the court's line of questioning. Up to this point the state had been contending that Page had shined deer with the flashlight mounted on his crossbow. (R45:76; R2 (*I observed him point a crossbow from the window of his vehicle toward three deer that were illuminated with a flashlight*). This is what the state was trying to prove. So the court's questions about the light on the brim of Page's cap "technically" shining on deer a hundred yards away clarified nothing about the evidence, at least up to this point in the trial. Up until the court took over the questioning the state had not even suggested that Page had used his brim light to shine the deer.

So when the court began its examination of Page what it really was doing was laying out a new theory of culpability, namely that Page could be guilty of violating the shining statute with something as tiny as this little light on the brim of his cap.

It may be okay for the court to clarify the testimony, but it should never be okay for the court to introduce and develop new theories of guilt, which is what the court did in this case.

CONCLUSION

For the foregoing reasons, and for the reasons argued in its first brief, Charles Page respectfully asks this court to

reverse his conviction on the illegal shining charge and to remand his case for a new trial.

Further, he asks the court to modify his sentence for the following reason: On the shining charge, the court sentenced Page to six months in the county jail, which he has now served, and it revoked all of his Chapter 29 hunting privileges for three years. (R44:7). Assuming this Court reverses his conviction on the shining charge, the sentence revoking his hunting privileges would be vacated at the same time.

But on the obstructing charge, which Page did not appeal, the circuit court withheld sentence and placed Page on two years' probation consecutive to the sentence on the shining charge. As a condition of probation the circuit court ordered Page not to be in possession of any hunting or fishing equipment and to surrender the same in ten days, which he did. (R44:8).

Because the restoration of his hunting privileges under the shining charge is a hollow victory if for the next two years Page cannot possess any hunting equipment under the obstructing charge, he respectfully asks this Court to modify his sentence on the obstructing charge by restoring his right to possess hunting equipment.

Dated this _____ day of July 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 2,274 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding appendix, if any, which complies with the requirements of s. 809(19)(12). I further certify that:

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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 July 2017.

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