STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 17-AP-670-CR

vs.

Trial No. 14-CF-1059

DeANDRE D. ROGERS,

Defendant-Appellant.

---

Appeal from a judgment of conviction entered October 13, 2014
in the Circuit Court of Milwaukee County,
Honorable M. Joseph Donald, Judge, presiding

---

# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

---

JOHN T. WASIELEWSKI
Bar ID No. 1009118
Attorney for Defendant-Appellant

Wasielewski & Erickson
1429 North Prospect Avenue
Suite 211
Milwaukee, WI 53202

(414) 278-7776
jwasielewski@milwpc.com

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



## STATEMENT OF ISSUES

1. Whether trial court committed prejudicial error by admitting evidence that the Jeep on which Mr. Rogers' fingerprint was found was stolen.

2. Whether the trial court committed prejudicial error by allowing argument purporting to show mathematical odds of Mr. Rogers being misidentified.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are requested in this appeal.

## STATEMENT OF THE CASE

### Procedural history

A criminal complaint dated March 23, 2014 charged Defendant-Appellant with nine criminal counts arising from five separate incidents in Milwaukee.

Counts 1 and 2 charge misdemeanor retail theft in violation of Wis. Stat. §943.50(1m)(b) and bail jumping in violation of Wis. Stat. §946.49(1)(b) from an incident on March 7, 2014 at a Speedway gas station.

Counts 3 and 4 charge armed robbery in violation of Wis. Stat. §943.32(2) and bail jumping in violation of Wis. Stat. §946.49(1)(b) from an incident on March 10, 2014 involving victim T.J.

Counts 5 and 6 charge robbery in violation of Wis. Stat. §943.32(1)(a) and bail jumping in violation of Wis. Stat. §946.49(1)(b) from an incident on March 11, 2014 involving J.M.

Counts 7 and 8 charge armed robbery in violation of Wis. Stat. §943.32(2) and bail jumping in violation of Wis. Stat. §946.49(1)(b) from an incident on March 13, 2014 involving T.R.

Counts 9 charges misdemeanor operating vehicle without owner's consent as a passenger in violation of

Wis. Stat. §943.23(4m) from an incident on March 20, 2014 involving victim S.N.

On June 13, 2014 Mr. Rogers resolved three of the nine charges by entering guilty pleas before Judge M. Joeseph Donald to count 1 (retail theft) and count 9 (operating without consent); count 2 (bail jumping) was dismissed.

On June 23-26, 2014 the remaining six counts were tried to a jury. The jury convicted on counts 3, 4, 7 and 8 and acquitted on counts 5 and 6.

On October 9, 2014 Judge Donald imposed sentence on count 3 (armed robbery) of 15 years imprisonment consisting of 10 years initial confinement and 5 years extended supervision, and a consecutive sentence on count 4 (bail jumping) of 6 years consisting of 3 years initial confinement and 3 years extended supervision. These sentences aggregate 21 years imprisonment consisting of 13 years initial confinement and 8 years extended supervision. The sentences on the remaining counts were concurrent with this 21-year aggregate sentence.

**The offenses**

Regarding the bail jumping charges, Mr. Rogers

offered to accept the State's proposal to stipulate to his status of being released on bond on the dates of the offenses being tried. 67: 4-5. The court addressed Mr. Rogers directly to insure that he wanted to stipulate, that he had discussed it with his attorney, and that he understood that the stipulation would relieve the State of having to prove his bond status. 67: 5-7. The court and counsel further discussed how the stipulation would be presented to the jury. 67: 35-37. Then, immediately before the State rested in front the jury, the court read the stipulation to the jury. 67: 41-42. Thus, the only issue remaining for the jury to decide with respect to each bail jumping count is whether Mr. Rogers violated his bond by committing a new offense.

*Counts 3 and 4*

On March 10, 2014 about 2:00 p.m., T.J. was walking home from work on Ruby Street when he was approached by an ash gray Jeep Cherokee with five or six persons inside. 65: 32-33. While still in the Jeep, one of the occupants said T.J. was the person who had fought his cousin. 65: 33. The occupants of the Jeep all got out and approached T.J., and one of them demanded he empty his pockets while holding his hand in a pocket as if holding a

gun. 65: 33. T.J. was surrounded and had no chance to get away. 65: 33. T.J. gave up his cell phone. 65: 34. Some of the occupants fought with T.J., and struck him in the face. 65: 34.

T.J. identified the person who spoke to him while seated in the rear seat of the Jeep as Mr. Rogers. 65: 34, 36, 48-49. After the men got out of the Jeep, T.J. said Mr. Rogers just stood by, and did not put his hands on T.J. or threaten T.J. with a weapon. 65: 37, 43.

Officer Telly Kemos testified that he prepared a photo array containing Mr. Rogers' photo and showed it to T.J., who identified Mr. Rogers as being the person in the right-rear seat of the Jeep. 65: 56-61.

*Counts 5 and 6*

On March 11, 2014 J.M. drove her GMC Yukon to her daycare provider on 103rd and Silver Spring. 66: 18. She was going there both to pick up her child and to pick up a sewing machine the daycare provider was giving to J.M. 66: 18-19. Upon arriving, J.M. opened her tailgate and was knocked to the ground, causing her to drop her keys. 66: 19. J.M. initially thought the tailgate had fallen on her until she saw a person reach for the keys she had dropped and realized the person had hit her. 66: 19-20.

When the person got in the driver's seat of the Yukon, J.M. ran to the passenger door and got a "good look" at the person; she saw the person smile and give her "the finger" as the person backed out of the driveway. 66: 21.

J.M. then swore, had a "temper tantrum, a meltdown, kicked my feet. . . ." 66: 21.

J.M. later viewed photographs, saw the person who had robbed her and told the officer which person that was. 66: 22. The photo she picked is of Mr. Rogers. 66: 38. J.M. admitted that Mr. Rogers' photo stood out because it showed "enhanced teeth," a "grill." 66: 29-30. While only Mr. Rogers' photo revealed gold teeth, J.M. resisted the suggestion that this was why she picked out Mr. Rogers' photo. 66: 41-44.

Officer Christopher Fritz testified that he showed J.M. photos at J.M.'s home; J.M. picked out Mr. Rogers' photo. 66: 48-51. While Officer Fritz testified that J.M. was "very certain" in her identification, he acknowledged that in his report he wrote that she was "fairly certain," but that she later said she was very certain. 66: 51, 53.

*Counts 7 and 8*

On March 13, 2014 T.R. returned home with her 10-year-old son V.R., pulled into her garage, and started

unloading groceries. 66: 60-61. When she saw two men run toward the garage, T.R. froze with her hands raised. 66: 61-62. One of the men pointed a gun at T.R. and asked where is her money; she told him her wallet is in the house. 66: 62. One of the men ordered T.R. to the ground and struck her in the back with a gun while she was attempting to comply. 66: 62. One of the men snatched T.R.'s keys, and the men searched her car and trunk before fleeing with the keys. 66: 63, 64. After viewing photos with police and in court, T.R. identified Mr. Rogers as the man who robbed her. 66; 63-64.

V.R. also testified. He recalled helping his mother with groceries when two dudes came up and told her to get on the ground. 66: 76-77. He saw one of the men, and he viewed photos and told police which guy it was. 66: 77. However, he did not see anyone in court that was there that night, and no one in the photos he viewed in court was familiar. 66: 78.

Officer Edward McCrary testified that he showed a photo array to two victims, and that both T.R. and V.R. picked Mr. Rogers' photo. 66: 82-85.

**Stolen Jeep**

On June 10, 2014 Mr. Rogers filed a document

entitled "Defendant's motion in limine (other cases – other acts)" 14: 1-2 (capitalization omitted). In this document Mr. Rogers sought to exclude "any mention or evidence relating to 'other acts' and other cases" and further specified that the motion encompassed any other acts outside of the crimes charged in counts 3 through 8 in the complaint. 14: 1.

On June 13, 2014 Mr. Rogers filed a "motion to exclude evidence" which sought to exclude evidence of the alleged theft of a 2000 Jeep Cherokee. 18: 1. The motion notes that alleged victim T.J. claimed to have been robbed on March 10, 2014 by persons in an older gray Jeep Cherokee, and that later that same day police found a stolen 2000 Jeep Cherokee and recovered Mr. Rogers' fingerprint from the rear passenger door. 18: 1. The motion argued that the sole effect of admitting evidence that the Jeep was stolen would be to implicate Mr. Rogers in an uncharged crime (auto theft) so as to make him look bad in the eyes of the jury. 18: 2.

On June 20, 2014 counsel addressed the motion in a colloquy with the court, and the court rendered a decision denying the motion. Apx. 101-115; 63: 6-20.

The prosecutor recounted the facts: On March 9,

2014 between 3 and 6 p.m., M.B.'s gray 2000 Jeep Cherokee was stolen from 5172 North 108th Street. Apx. 102; 63: 7. Police recovered the vehicle at 9:00 p.m. on March 10, 2014 at 5172 North 108th Street, and Mr. Rogers' fingerprint is found on the outside of the rear passenger door of the Jeep. Apx. 102-103; 63: 7-8. In the interim, a robbery was committed using a gray older model Jeep Cherokee at 4648 West 78th Street, which the prosecutor asserted was "pretty much midway between where it's taken and where it's recovered." Apx. 102-103; 63: 7-8.

In response, defense counsel argued that Mr. Rogers was "being slandered in some respect as an auto thief by being involved with a stolen vehicle without even being charged because they didn't have enough evidence. All they had was a single fingerprint." Apx. 104; 63: 9.

The prosecutor clarified that she sought only to use the fingerprint to connect Mr. Rogers with the Jeep:

> I don't think its other acts. I am not saying he stole the car. I am not saying he knew the car was stolen. I am saying he was in a gray Jeep Cherokee.

Apx. 106; 63: 11. Thus, the prosecutor asserted that the purpose of the evidence is identification. Apx. 106; 63: 11.

In response to the Court's inquiry about references to the Jeep being stolen, the prosecutor offered to remove those references as unnecessary. Apx. 106-107; 63: 11-12.

In reaching an initial decision, the court noted that the State is "not even going to make reference to the fact that [the Jeep] was stolen." Apx. 107; 63: 12. The court initially concluded: "So the court will allow the State to at least make reference to the fact that the fingerprint was removed from a gray Jeep Cherokee, but not reference the fact that the vehicle was stolen." Apx. 108; 63: 13. The court found that if the State was not seeking to admit reference to the Jeep being stolen, no *Sullivan* other acts analysis would be necessary. Apx. 108; 63: 13.

The prosecutor then asked the court to "go through the analysis," indicating times and locations of the taking of the Jeep, the robbery and the recovery of the Jeep strengthens the prosecution case. Apx. 108-109; 63: 13-14. The prosecutor asserted she did not believe it is other acts. Apx. 109; 63: 14. Defense counsel asked if the prosecutor was backtracking, noting it sounds like the prosecutor seeks introduce through the back door that the Jeep was stolen. Apx. 109; 63: 14.

As the prosecutor requested, the Court did a

*Sullivan* analysis. Apx. 112-115; 63: 17-20. The court first found the evidence was offered for acceptable purposes: identity, preparation or plan, and providing context and background. Apx. 112-113: 63: 17-18. Second, the evidence was relevant to identity. Apx. 113-114: 63: 18-19. Third, the evidence is not unfairly prejudicial since the defense may cross-examine regarding how the fingerprint might have gotten on the Jeep and how long it might have been there. Apx. 114; 63: 19. Thus, the court denied the defense motion. Apx. 115; 63: 20.

During the trial, the stolen Jeep first arose in the prosecutor's opening statement. After explaining how T.J. said he was robbed by persons in an older gray Jeep Cherokee, the prosecutor continued:

> Now another detail that I think is going to be important – and this one is the more detail heavy of the three cases you will hear – is a short time later an older model Jeep Cherokee, which had been taken the day before, was recovered. And when it was recovered, the officers took photos. They went through the car and dusted all these different areas, areas that they felt prints might be.
>
> And on the rear passenger exterior door of this order model gray Jeep Cherokee was a recoverable fingerprint, and the fingerprint belonged to Deandre Rogers.

65: 19-20.

After T.J. testified regarding being robbed by persons in an ash gray Jeep (as summarized above, Counts 3 and 4), Officer Kelly Kemos testified to a Jeep he found. 65: 53-69. When Officer Kemos first stated the Jeep was stolen, the Court sustained a defense objection:

> Q In doing your follow-up, were you made aware of a possible vehicle description?
> A Yes.
> Q And what was that description?
> A It was described as a later model Jeep Cherokee.
> Q And did you have a color on that?
> A Yeah, the Jeep Cherokee was stolen on March 10th.
> MR. VOSS [defense counsel]: Objection, hearsay, irrelevant. No foundation, not responsive.
> THE COURT: The objection is sustained.

65: 53-54. Officer Kemos explained that fingerprints were found and processed. 65: 54-55. When the issue of the Jeep being stolen recurred, the Court initially sustained, then overruled, a defense objection:

> Q And you mentioned the vehicle had been reported stolen, correct?
> A Yes.
> Q And when had that been reported?
> A March 9th.
> MR. VOSS: Objection, hearsay.

> THE COURT: The objection is sustained.
>
> MS. HAMMOND [prosecutor]: Judge, we're not offering it for the truth of the matter asserted, but we're offering it as we had in our pretrial discussions.
>
> THE COURT: All right.
>
> MR. VOSS: Can we have a sidebar?
>
> (Whereupon, there was discussion held off the record at the bench.)
>
> THE COURT: All right. At this time the Court will overrule the objection, given it's not being offered for the truth of the matter asserted.

65: 55-56. After Officer Kemos' testimony concluded, the court recounted the sidebar:

> The court also had a sidebar concerning an objection with respect to the motions in limine, the issue of testifying whether or not the Jeep Cherokee was, in fact, stolen. This witness, Kemos, started going into more information other than the fact that it was a stolen vehicle. At that time an objection was made, I sustained the objection – that the information was being sought was not offered for the truth of the matter in connection with the Court's previous rulings as to the motions in limine. Then I indicated I would overrule the objection and that the witness could continue to testify.

Apx. 116; 65: 71.

In closing argument, the prosecutor referred to the stolen Jeep:

> What [the defense] did not address is how

> Deandre Rogers' fingerprint was lifted and was found on the rear, passenger door of that stolen vehicle.

67: 83-84.

**Prosecution rebuttal argument**

The prosecutor introduced a mathematical formula in her closing rebuttal argument purporting to determine the odds of misidentification by the witnesses, and the defense objected:

> One of the things I do need to address, however, is defense counsel's reading of the reasonable hypothesis instruction. Read that carefully, that word that I keep saying that gets lost in all this is "reasonable." They're saying their reasonable hypothesis is mistaken identity. Now, I'm not a math person, luck I have a partner here who is. Four victims, each looked at photo arrays separately, three of the four on completely different dates. One of the four is a ten year old kid. Four different people looked at photo arrays with six people in each photo array. The odds of misidentification by all four of those individuals – I have it written down – is 1 in 1,296.
>
> MR. VOSS: I'm going to object, there's no testimony of basis for that at all.
>
> MS. HAMMOND: if you could do the math –
>
> THE COURT: The objection is overruled, it's argument.

Apx. 117-118; 67: 104-105

## ARGUMENT

### I. The trial court committed prejudicial error by admitting evidence that the Jeep on which Mr. Rogers' fingerprint was found was stolen

Introduction: clarification of issues

Mr. Rogers' trial counsel filed and argued motions and made objections seeking to preclude the introduction of evidence that Mr. Rogers' fingerprint was found on a stolen Jeep Cherokee. Viewed in retrospect, trial counsel argued three separate issues, although these sometimes overlapped and were not always clearly delineated in proceedings below.

First, trial counsel sought to preclude the fingerprint evidence due to the weak probative value of the evidence. Mr. Rogers will not pursue this issue.

Second, trial counsel asserted that evidence that Mr. Rogers' fingerprint was found on a stolen Jeep was improper other acts evidence. Mr. Rogers will address this in subsection *A* below.

Third, trial counsel asserted that evidence that Jeep was stolen constituted inadmissible hearsay. Mr. Rogers will address this in subsection *B* below.

### *A. The evidence that the Jeep was stolen was improper other acts evidence*

Generally, evidence of bad acts, other than those charged, may not be presented to impugn the character of the defendant or to show that the defendant acted in conformity with the bad acts; however, such bad acts may be admitted for another proper purpose:

> [E]vidence 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. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Wis. Stat. §904.04(2)(a).

The list of permissible purposes listed in §904.04(2)(a) is illustrative, and not exhaustive; thus, evidence which "'furnishes part of the context of the crime' or is necessary to a 'full presentation' of the case" may be admitted for that purpose. *State v. Shillcutt*, 116 Wis.2d 227, 237, 341 N.W.2d 716 (Ct. App. 1983) (citation omitted).

The "seminal decision" regarding other acts evidence is *Whitty v. State*, 34 Wis.2d 278, 149 N.W.2d

557 (1967). *State v. Sullivan*, 216 Wis.2d 768, ¶17, 576 N.W.2d 30 (1998). The court in *Whitty* identified the dangers of admitting other acts evidence, which include the tendency to believe a defendant is guilty of the charge merely because he is a person likely to do such acts, and the tendency to condemn a defendant not due to guilt, but because he has escaped punishment from other offenses. *Whitty*, 34 Wis.2d at 292. Thus, the *Whitty* court admonished use of caution in seeking to admit other acts evidence:

> Evidence of prior crimes or occurrences should be sparingly used by the prosecution and only when reasonable necessary. Piling on such evidence as final "kick at the cat" when sufficient evidence is already in the record runs the danger, if such evidence is admitted, of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence. The use of such evidence under the adopted rule will normally be a calculated risk.

*Whitty*, 34 Wis.2d at 297.

The *Sullivan* decision sought to reaffirm the vitality of *Whitty*. *Sullivan*, ¶18. Thus, the court in *Sullivan* set forth a three-step method to evaluate proffered other acts evidence:

> Whether other acts evidence should be admitted requires the application of a three-part test: (1) is the other acts evidence offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) is the other acts evidence relevant; that is, is the evidence of consequence to the determination of the action, and does it have probative value; and (3) is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.

*State v. Cofield*, 2000 WI App 196, ¶9, 238 Wis.2d 467, 618 N.W.2d 214, citing *Sullivan*, 216 Wis.2d at 772-773. Thus, the three requirements might be abbreviated as: 1. acceptable purpose; 2. relevance; and, 3. probative value not outweighed by unfair prejudice.

*1. Acceptable purpose*

In Mr. Rogers' case, the prosecutor cited a single acceptable purpose for admission of evidence that Mr. Rogers' fingerprint was found on a stolen Jeep: identification. Apx. 110; 63: 15.

The court accepted identity as an acceptable purpose. Apx. 112; 63: 17. The court also, *sua sponte*, found two other purposes not asserted by the prosecutor:

"preparation or plan" and "the general catch-all to give context or background." Apx. 112-113; 63: 17-18. Thus, the court initially found three proper purposes to admit the evidence. However, the jury instruction given by the court addressed only two purposes:

> [E]vidence has been presented that the defendant's fingerprint has been recovered from a stolen vehicle. If you find that this conduct did occur, you should consider it only on the issues of identity and context or background.

67: 71. Thus, the court abandoned plan or preparation as a purpose. The only proper purposes available for the jury to consider were "identity" and "context or background."

*2. Relevance*

The court's relevancy analysis fails to mention or show any consideration that the fingerprint was found on a *stolen* Jeep; the court found the evidence relevant

> because it relates to the identification of the defendant's involvement with respect to the armed robbery, or the robbery, and that the victim identified the defendant alighting or stepping out of a gray Jeep Cherokee at the time of the offense.

Apx. 113; 63: 18. The court further explained that the fact that the victim described a particular vehicle, and the fact that defendant's fingerprint was found on a vehicle of that

type within a short time span, while possibly coincidental, had probative value. Apx. 113-114; 63: 18-19.

Thus, the court's analysis of relevancy addressed only the purpose of identify. It explained perfectly well a connection between a victim robbed by persons in a gray Jeep Cherokee and Mr. Rogers' fingerprint being found on a similar vehicle a short time later, might tend to show identity. However, whether the Cherokee was *a stolen vehicle* played no role in this connection, and the Court found none. The court simply ignored the stolen-vehicle aspect in its analysis.

Yet the distinction should not have been overlooked. Mr. Rogers' counsel made clear, only moments before the Court's decision, that it was the *stolen-vehicle* aspect that made other acts analysis necessary. Defense counsel argued:

> If they are going to put into evidence that it was reported stolen at a particular time, that is other acts. If they just say the police happened upon a vehicle that was perhaps illegally parked or drew their attention or curiosity, they fingerprinted it for some reason or another, that's fine. But those are two different things. So if they want to get into the stolen aspect of the vehicle, that implicates the other acts evidence rule.

Apx. 110-111; 63: 15-16. Yet the court, in its relevancy analysis ignored the stolen-vehicle aspect, for it adds nothing to the probative value of the evidence as to identity.

The court also makes no analysis of how the stolen-vehicle aspect adds to context or is necessary to a full presentation of the case. However, cases relying on context to admit other acts evidence show why the evidence is necessary and why the State's case would appear incomplete or confusing in the absence of such evidence. Thus, in a case involving soliciting prostitutes and keeping a place of prostitution, the relationship between the defendant and a witness, which included earlier solicitations for prostitution and physical abuse, was "necessary to fully understand the context of the case." *State v. Shillcutt*, 116 Wis.2d 227, 237, 341 N.W.2d 716 (Ct. App. 1983). In a case involving 6 charges of sexual assault occurring in a continuous 3-hour episode, admission of addition uncharged sexual contacts from the same 3-hours period was appropriate where limiting the evidence to the charged conduct "would leave the jury with an incomplete understanding of the incident." *State v. Chambers*, 173 Wis.2d 237, 256, 496 N.W.2d 191 (Ct.

App. 1992).

In Mr. Rogers' case, T.J. testified he was robbed by persons in a gray Jeep Cherokee, and a short time later, police found Mr. Rogers fingerprint on the exterior of a gray Jeep Cherokee. This is relevant to identity. The status of the Jeep Cherokee being owned, borrowed, rented leased or stolen could add nothing to this connection. Evidence that the Jeep was stolen has no probative value to showing identity, and unlike in *Shillcutt* or *Chambers*, the jury would not be left without a complete understanding if evidence of the Jeep being stolen were omitted. The jury heard that police following up on a robbery report had a description of a Jeep Cherokee and that they found such a vehicle. 65: 53-54. The situation called for no additional and prejudicial "context" by adding that the Jeep was stolen.

Since the evidence that the Jeep was stolen is not probative of identity or necessary for context, the Court erroneously exercised discretion in admitting the evidence, as it fails the second part of the *Sullivan* test. No further analysis is necessary. *Sullivan*, ¶¶59-60. For completeness, Mr. Rogers will nonetheless address the third part of the *Sullivan* test.

*3. Probative value and unfair prejudice*

Mr. Rogers was charged with three theft-type offenses (two armed robberies and one robbery), and three additional counts of bail jumping which were based on committing the three theft-type offenses while on bail. Robbery differs from theft only in that it adds an element of force, and theft is a lesser included offense of robbery. *State v. Johnson*, 207 Wis.2d 239, 558 N.W.2d 375 (1997). The Court allowed evidence of an uncharged fourth theft-type offense: that the Jeep was stolen. This resulted in unfair prejudice.

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

*Sullivan*, ¶62. Or, as restated more simply, unfair prejudice results when "jurors would be so influenced by the other acts evidence that they would be likely to convict the defendant because the other acts evidence showed him to be a bad man." *Sullivan*, ¶62.

The jury was allowed to conclude that since Mr.

Rogers fingerprint was on a *stolen* vehicle, he is more likely to steal, and is thus more likely to have committed the theft-type offenses with which he was charged. The stolen-vehicle aspect of this evidence had no probative value toward the purported proper purposes. The probative value was thus necessarily outweighed by the danger of unfair prejudice.

### *B. The evidence that the Jeep was stolen was improper hearsay*

Apart from whether evidence about the Jeep being stolen is a separate issue regarding how it was introduced. In pretrial proceedings, defense counsel noted that if reference were made to the Jeep being stolen, "the owner would have to come to court [and] tell the jury that his vehicle was stolen." Apx. 107; 63: 12. The owner of the jeep never testified.

Reference to the Jeep being stolen was introduced through the testimony of Officer Kemos. When Officer Kemos first mentioned in his testimony that the Jeep "was stolen on March 10th," the court sustained the objection to this testimony. When Officer Kemos again mentioned that the Jeep was "reported stolen" on "March 9th," the court initially sustained an objection and then, after holding

sidebar, overruled the objection. (This is recounted in detail above at pages 11-12.)

The basis for the objection was hearsay.

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Wis. Stat. §908.01(3). Hearsay is generally not admissible. Wis. Stat. §908.02. Exceptions to the general rule exist. Wis. Stat. §908.03, §908.045. These exception, however, are not at issue. Rather, the case turns on whether the statements that the Jeep was "stolen", or "reported stolen," are hearsay as defined in §908.01(3). The statement at issue was admitted on the prosecutor's assertion and the Court's finding that the statement was not being introduced to prove the truth of the matter asserted.

As a basic legal premise, out-of-court statements may be introduced for a reason other than to prove the truth of the out-of-court statement. *State v. Hilleshiem*, 172 Wis. 1, 19, 492 N.W.2d 391 (Ct. App. 1992). In *Hilleshiem*, an officer testified to threats against the testifying officer conveyed by the defendant to other officers. However, this was not deemed hearsay, as it was admitted to show why the testifying officer used an alias.

A court need not accept the State's assertion that testimony was for a purpose other than proving the truth of the matter asserted. *State v. Britt*, 203 Wis.2d 25, 38-41, 553 N.W.2d 528 (Ct. App. 1996). In *Britt*, the victim was allowed to testify that an anonymous caller offered a bribe in exchange for the victim's refusal to testify. The State asserted this was not hearsay because it was not offered to show the caller would have actually paid the bribe, "'but only to show that an attempt to bribe the victim had been made.'" *Britt*, 203 Wis.2d at 39. The court in *Britt* pinpointed the error in the State's asserted rationale:

> The State seems to contend that because the telephone call revealed an intent to bribe, as opposed to an actual bribe, the statements by the nontestifying declarant were not hearsay. However, evidence of an intent, or an attempt, to bribe is just as substantive as a bribe itself. Thus, the hearsay statement was not offered to merely establish that the telephone call was made. It was offered to show an attempted bribe and, as such, bolstered Cook's credibility, who had previously testified to the same effect. The State fails to grasp this distinction.

*Britt*, 203 Wis.2d at 40 (footnote 9). The court in *Britt*, identified what caused it to conclude that the statement was improperly admitted to prove the matter asserted: "Here, the disputed evidence did not serve to explain any

prior, concurrent or subsequent conduct or belief by any person." *Britt*, 203 Wis.2d at 41.

In Mr. Rogers' case one may search the record in vain for any direct assertion of why evidence that the Jeep was "stolen" or "reported stolen" was admitted, other than to show the Jeep was in fact stolen or reported stolen.

When the prosecutor responded to the defense hearsay objection, she stated:

> Judge, we're not offering it for the truth of the matter asserted, but we're offering it as we had in our pretrial discussions.

65: 55. The court then held an unrecorded sidebar. 65: 55. When the court later recounted the sidebar, the Court agreed with the prosecutor "in connection with the Court's previous rulings as to the motions in limine." Apx. 116; 65: 71. Thus, one must search the pretrial proceedings for a rationale. Apx. 101-115: 63: 6-20.

One possible rationale was to show proximity; in pretrial proceedings, the prosecutor suggested that the robbery occurred midway between the sites of the taking of the Jeep and the recovery of the Jeep. Apx. 102-103, 110; 63: 7-8, 15. However, the prosecutor never attempted to introduce evidence of these locations, even though

Officer Kemos testified and apparently had been involved in the Jeep's recovery. 65: 53-54.

The Court's pretrial ruling is on the issue of other acts, not hearsay. Apx. 112-115; 63: 17-20. Thus, it cannot support the Court's decision to overrule the defense's repeated hearsay objections to testimony that the Jeep was stolen or reported stolen. Such testimony served to prove nothing other than that the Jeep was, in fact, stolen, or reported stolen.

The error was not harmless. It implicated Mr. Rogers in a crime, auto theft, even though he was never charged with that crime. It was not merely cumulative. Cf. *Britt*, 203 Wis.2d at 42 (noting the importance to the Court's harmless error finding that the bribery evidence was cumulative to other properly admitted evidence of bribery.)

## II. The trial court committed prejudicial error by allowing argument purporting to show mathematical odds of Mr. Rogers being misidentified

The United State Supreme Court long ago recognized that prosecutors perform a role in the legal system which differs from other litigants, and that therefore prosecutors have special responsibilities:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, *especially, assertions of*

> *personal knowledge are apt to carry much weight against the accused when they should properly carry none.*

*Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added). Thus, a prosecutor may not urge a jury to base a decision on information known to the prosecutor but not presented at trial. *Jordan v. Hepp*, 831 F.3d 837, 846 (7th Cir. 2016) (citing *Berger*).

Arguments on matters not in evidence are improper. *State v. Albright*, 98 Wis.2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980). Thus:

> The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence.

*State v. Draize*, 88 Wis.2d 445, 454, 276 N.W.2d 784 (1979). As a corollary, a prosecutor may not argue based upon experience in other cases, since such experience is outside the record. *United States v. Wright*, 625 F.3d 583, 611 (9th Cir. 2010).

Arguments which include vouching for witnesses are also improper, in part because the basis for the voucher may be outside the evidence at trial:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

*United States v. Young*, 470 U.S. 1, 18-19 (1985).

Finally, arguments utilizing mathematical formulas are strongly disfavored; after a review of authority regarding arguments using a per diem formulas to calculate damages, the Wisconsin Supreme Court found the authority disapproving use of formulas to be more persuasive: "The use of a mathematical formula is pure speculation by counsel, which is not supported by the evidence and presents matters which do not appear in the record." *Affett v. Milwaukee & ST Corp*., 11 Wis.2d 604, 612, 106 N.W.2d 274 (1960).

In Mr. Rogers' case the prosecutor argued:

> They're saying their reasonable hypothesis is mistaken identity. Now, I'm not a math person, luck I have a partner here who is. Four victims,

> each looked at photo arras separately, three of the four on completely different dates. One of the four is a ten year old kid. Four different people looked at photo arrays with six people in each photo array. The odds of misidentification by all four of those individuals – I have it written down – is 1 in 1,296.

Apx. 117-118; 67: 104-105. Mr. Rogers counsel objected; the court overruled the objection, with the rationale: "it's argument." Apx. 118; 67: 105.

This argument is improper in several respects.

First, the argument relies of evidence from a source outside the record, the prosecutor's "partner." Who this person is and the person's qualifications are nowhere in the record. The term "partner" is ambiguous; is this partner another prosecutor or someone in the prosecutor's office, the prosecutor's significant other, or perhaps the officer assisting in the prosecution?

Second, the prosecutor vouches for the reliability of this partner, stating she is lucky to have such a partner as the partner, unlike the prosecutor, is a "math person." Thus, the prosecutor encourages the jury to rely in this partner and accept as true the formula she is introducing in her argument.

Third, the prosecutor purports to introduce

mathematical certainty to the issue of misidentification. Without explaining the steps to the formula, she asks the jury to accept that the odds that all four witnesses misidentified Mr. Rogers are 1 in 1296.

This analysis is flawed in logic. It is based on the assumption that identification from a photo array is a random occurrence, like the toss of a coin. Since a coin has two sides, flipping a coin carries odds of "heads" of 1 in 2. Apparently, the logic of the partner is based on the assumption that an identification from a photo array is a similarly random occurrence. However, a photo array has 6 photos, and thus 6 possible outcomes. If photos were selected randomly, the chance of picking the defendant's photo is 1 in 6. The chance that this happens in a second case with a second witness is also 1 in 6. However, the odds that *both* of these witnesses *randomly* selecting the defendant's photo becomes 1 in (6 x 6) or 1 in 36. Carried out to four witnesses, this becomes 1 in 1296 (6 x 6 x 6 x 6).

But witness identification of subjects in photo arrays is not random. Every photo is unique. Faces are unique. The degree of a witness' certainty varies. A witness is not asked to pick one of six photos at random.

Thus, calculating the odds of a witness identification or misidentification is not possible. The formula of the prosecutor's partner takes no account of these variables.

The prosecutor's argument was correct in one respect: Mr. Rogers' defense was misidentification. The prosecutor knew this in advance, and prepared her improper argument in advance: "I have it written down." Apx. 118: 67: 118. Her purportedly mathematical rebuttal was based upon information nowhere in the record. It relied on credibility of the prosecutor and her partner. It improperly asked the jury to accept these purported odds as evidence. It wrongly asked the jury to reject the possibility of misidentification based on a formula which was not explained, but which should nonetheless be accepted because it came from the prosecutor's partner who is a "math person" who the prosecutor is "lucky" to have. It was thus highly prejudicial and unfairly prejudicial to the defense. The trial court, by overruling the defense objection, told the jury it could consider the argument. No cautionary instruction limited or constrained the jury from accepting the prosecutor's purported odds as correct in reaching its verdicts.

## CONCLUSION

DeAndre D. Rogers prays that this court vacate his convictions and sentences and remands the case for a new trial.

Respectfully submitted,

_____

John T. Wasielewski
Attorney for
DeAndre D. Rogers

## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 7470 words.

_____

John T. Wasielewski

## APPENDIX CERTIFICATION

I hereby certify that I filed with this brief, an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

_____

John T. Wasielewski
Attorney for
DeAndre D. Rogers

## CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

_____
John T. Wasielewski

## APPENDIX CONTENTS