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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

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

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

Mr. Rogers challenges the admission of evidence that the Jeep on which his fingerprint was found was stolen or reported as stolen. As grounds, he asserts that evidence that the Jeep was stolen was improper "other acts" evidence, and relied upon the three-part analysis required by *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998). The State agrees that *Sullivan* provides the proper framework to analyze the issue and reviews the three *Sullivan* steps: 1. Proper or acceptable purpose (State's br. 11-12); 2. Relevance (State's br. 12-16); and, 3. Probative value not outweighed by unfair prejudice (State's br. 16-17). Mr. Rogers replies accordingly.

1. Acceptable purpose

As the State points out, Mr. Rogers concedes that the State pointed to an acceptable purpose: identity. This is among the acceptable purposes listed in the statute. See

Wis. Stat. §904.04(2)(a). The trial court, in its decision allowing in the stolen Jeep evidence, also cited two additional reasons: preparation or plan, and providing context and background. Apx. 112-113; 63: 17-18.

Mr. Rogers pointed out that the court abandoned plan or preparation as a ground for admitting the stolen Jeep evidence, as the court instructed the jury it could consider this evidence "*only on* the issues of identity and context or background." 67: 71 (emphasis added). While the State contends this court may nonetheless rely on plan or preparation to uphold admission of the evidence (State's br. 15), it does not explain how this court could find the evidence properly admitted for a purpose the jury was instructed it could not consider.

In any event, only one proper purpose is need be cited, and admission turns on the second and third steps of the *Sullivan* analysis.

2. Relevance

The State asserts that the stolen Jeep evidence is relevant to proving all three purposes cited by the trial court: identity, context and background, and plan and preparation. State's br. 13-14.

The State first argues that the stolen Jeep evidence

helps prove identity:

> Based on the State's proffered evidence, the jury could have reasonably inferred that the robbers used a stolen Jeep and that Rogers' fingerprint got onto the Jeep during the brief period during which it was stolen.

State's br. 13. This argument raises precisely what Mr. Rogers feared: that the jury would connect and implicate him with the theft of the Jeep, even though he was not charged with that theft.

Furthermore, the State could get the full value of the evidence without mentioning the aspect that makes this other acts evidence. The State could and did bring forth T.J.'s testimony that he was robbed by persons in an ash gray Jeep Cherokee; that police discovered such a Jeep about seven hours later; and that police found Mr. Rogers' fingerprint on an outside door of this Jeep. The State could and did argue from these facts that the circumstances suggest Mr. Rogers was one of the 5 or 6 men in the Jeep at the time T.J. was robbed.

The additional fact that the Jeep was *stolen*, however, added nothing to the question of the robbers' identity. It merely implicates Mr. Rogers' in an uncharged vehicle theft.

Regarding context and background, the State makes the remarkable assertion that telling the jury the Jeep was stolen was *beneficial* to the defense, because it would explain to the jury why police checked the Jeep for fingerprints. State's br. 13-14. This is based on the notion that if the jury not been told that the Jeep was stolen, Mr. Rogers would somehow be unable to argue that there may have been two different Jeeps, and that the one with the fingerprints was not the one used to rob T.J. State's br. 14. This logic is elusive. Nothing prevented Mr. Rogers from making such an argument. But, even if the Jeep with Mr. Rogers' fingerprint was the same Jeep used in the robbery, this does not conclusively connect Mr. Rogers to the robbery. Determining the time when the fingerprint was placed on the Jeep was beyond the forensic expert's ability; the fingerprint could have been from an inadvertent touch and could have been there for a year. 66: 9.

In any event, all this is beside the crucial question: how is the fact that the Jeep was *stolen* relevant to context and background? The State claims that the evidence explains "why police checked a Jeep for fingerprints." State's br. 13. This is not relevant, any more than what the

officer who checked for prints had for breakfast that morning. The crucial facts are that police came upon a Jeep, checked for prints and found Mr. Rogers' print. Whether police checked the Jeep because it was abandoned, or obstructing traffic, or reported stolen, simply adds nothing of consequence to the State's case. As argued in the next subsection, however, telling the jury the Jeep was stolen was unfairly prejudicial to Mr. Rogers.

Finally, the State argues that the stolen Jeep evidence was relevant to plan and preparation because it "could have helped the State prove that T.J. was robbed." State's br. 14. However, T.J. testified he was robbed. 65: 32-34. On cross-examination, Mr. Rogers never challenged that T.J. was robbed, but only T.J.'s identification of the robbers. 65: 36-48. Thus, suggesting that the State needed to prove preparation and planning by showing that the Jeep was stolen is not correct. T.J. was robbed. His credibility on that point was not challenged. Evidence that he might have been robbed by persons in a Jeep that had been *stolen* is thus cumulative, not probative.

3. Probative value and unfair prejudice

The State acknowledges that the use of other acts evidence raises the danger of unfair prejudice by allowing

a jury to conclude that because an actor committed one bad act, he necessarily committed the crime being charged. State's br. 17. This is but one of the dangers of other acts evidence. *See State v. Whitty*, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967). Thus, the prosecution's use of other acts evidence "will normally be a calculated risk." *Whitty*, 34 Wis.2d at 297.

The State correctly notes that determining whether other acts evidence is unfairly prejudicial requires a balancing of probative value against prejudice. As indicated above, however, while the fingerprint-on-the-Jeep evidence had some probative value to the State, making this into fingerprint-in-the-*stolen*-Jeep evidence added nothing of consequence.

On the other side of the scale, the State unwittingly admits to the harm to Mr. Rogers: "The court said that [Mr.] Rogers could argue to the jury that his fingerprint had gotten onto the stolen Jeep in an innocent way." State's br. 17. In other words, Mr. Rogers must face evidence that his fingerprint was found on a stolen Jeep, but he was free to refute the implication he stole it. Thus, Mr. Rogers' jury was needlessly and pointlessly told that the Jeep was stolen.

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

The State asserts that the testimony that the Jeep was stolen, or reported as stolen, was not admitted to prove that the Jeep stolen, but for another purpose: "to explain the actions of investigating officers" and show "why the police checked [the Jeep] for fingerprints." State's br. 21. The State asserts that this is to Mr. Rogers' benefit:

> Without this important background testimony, the jury would have been misled into thinking that the police checked this Jeep for fingerprints because it *necessarily* was the same Jeep that T.J.'s robbers had used.

State's br. 21 (emphasis added). At best, this is a gross overstatement. Had Mr. Roger's jury heard no explanation of why police checked the Jeep for fingerprints, they may have concluded that police *suspected* (but did not know of) a connection between the Jeep described by T.J. and the Jeep police encountered. Indeed, establishing such a connection was the whole point of the fingerprint evidence. Telling the jury, in addition, that the Jeep was reported *stolen* added nothing of consequence; it was not relevant, and the reasons for the police checking for fingerprints were not at issue.

The Supreme Court of Kentucky has made clear that the reason for police actions cannot be used to circumvent the hearsay rule:

> Prosecutors should, once and for all, abandon the term "investigative hearsay" as a misnomer, an oxymoron. The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information ***and*** the taking of that action is an issue in the case. Such information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible ***only if*** there is an issue about the police officer's action.

Sanborn v. Com., 754 S.W.2d 534, 538 (Ky. 1988) (emphasis by the court).

In Mr. Rogers' case, the reason the police checked for fingerprints was not an issue. Police motives were not relevant. Thus, police testimony that the Jeep was stolen was relevant only to show that the Jeep was stolen. This makes the police testimony inadmissible hearsay.

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

The prosecutor, in closing argument, asserted that while she was not a math person, her partner was, and her partner calculated the odds that all 4 witnesses misidentified Mr. Rogers was 1 in 1296. Mr. Rogers objected to this argument when it was made. He now challenges the propriety of the argument on several grounds, and the State has sought to rebut these grounds.

The State first claims that the prosecutor "did not rely on *evidence* from her partner" in using this formula. State's br. 24 (emphasis in original). However, the Wisconsin Supreme Court, in disallowing damage arguments based on formulas, found such formulas "arbitrary" and had "no foundation in the record." *Affett v. Milwaukee & ST Corp.*, 11 Wis.2d 604, 612, 106 N.W.2d 274 (1960). While the purpose of the formula differs in Mr. Rogers' case, the same objections hold true.

The State also suggests that the argument is just simple math. This, however, is not where the problem lies.

Mr. Rogers does not dispute that the prosecutor (or, more accurately, her partner) correctly multiplied 6 x 6 x 6 x 6. The problem comes with the suggestion that this formula, or *any* formula, can accurately produce the probability of eyewitness misidentification. Yet the formula takes into account *none* of the factors normally considered in determining the fairness or suggestiveness of an identification procedure. Rather, the formula treats eyewitness identifications are random occurrences like rolls of the dice.

The formula argued by the prosecutor was in the rebuttal argument. It was one of the last things the jury heard before deliberations. The argument provided an unwarranted and improper mathematical certain to the issue of identification which prejudiced Mr. Rogers' defense. The error was not harmless.

CONCLUSION

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

Respectfully submitted,

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John T. Wasielewski
Attorney for
DeAndre D. Rogers

FORM AND LENGTH CERTIFICATION

I hereby certify that this reply 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 2190 words.

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John T. Wasielewski

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).

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John T. Wasielewski