STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2364-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DAVID GUTIERREZ,

Defendant-Appellant.

ON PETITION TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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I. The Court of Appeals erred when it disagreed with the trial court's discretionary decision to exclude evidence having little probative value on balance with its potential to confuse and unfairly prejudice the jury.

Gutierrez insists that the trial court constitutionally erred when it excluded evidence that the DNA of three unidentified males was found on an oral swab of the outside of the victim's mouth obtained 24 hours after the assault (Gutierrez's Br. 23–25), because this evidence would have "counter[ed] the State's assertion that Mr. Gutierrez's DNA was washed off" by her after the assault (Gutierrez's Br. 20).

A. Gutierrez no longer challenges the exclusion of the unidentified male DNA found on the victim's underwear.

An important point to note at the outset: Gutierrez does not refute the State's argument that the purple pair of underwear the victim said she wore when assaulted by Gutierrez on November 1, 2012, was likely never recovered and tested for DNA. (State's Br. 21–23.) Gutierrez has implicitly conceded the point by not addressing it in his brief. *E.g., Moran v. Wis. Dep't of Justice*, 2019 WI App 38, ¶ 21 n.9, 388 Wis. 2d 193, 932 N.W.2d 430; *United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶ 39, 304 Wis. 2d 750, 738 N.W.2d 578.

In conceding the point, Gutierrez reasonably acknowledges the trial court's legitimate concerns about implicating the protections of the rape shield law had it allowed in evidence that unidentified male DNA was found on a pair of underwear collected 48 hours after the assault and likely not worn by the victim when assaulted. Wis. Stat. § 972.11(2)(b). (State's Br. 23–25.) Even so, the trial court allowed Gutierrez to introduce evidence that his DNA and

semen was not found on the two non-purple pairs of underwear that were recovered and tested. This was a windfall for him. (State's Br. 22.)

B. Evidence that the DNA of three unidentified males was recovered from a swab of the outside of the victim's mouth 24 hours after the assault proves nothing with regard to Gutierrez's guilt or innocence.

Gutierrez's lone remaining argument, that the trial court should have allowed him to prove that the DNA of three unidentified males was found on a swab of the victim's mouth 24 hours after the assault, ignores the impact of the passage of time on the evidence's already-limited probative value. (State's Br. 18–21.)

Gutierrez argues that because his DNA was not present on A.R.'s face and the DNA of three unidentified males "had not been removed" in the intervening 24 hours, it is less likely that he assaulted A.R. (Gutierrez's Br. 18.) He argues further, "there is absolutely no evidence that the disputed DNA evidence was not on A.R. at the time of the alleged assault. There is no evidence whatsoever that it came to be on A.R. only sometime after the alleged assault." (Gutierrez's Br. 23.)

Gutierrez's argument is not only directly contrary to A.R.'s testimony (R. 117:184–86), it defies common sense and reality. Even an adolescent will normally wash her face and rinse her mouth at some point in a 24-hour period. There is no evidence that A.R. had poor hygiene habits.

Gutierrez relies entirely on this unreasonable evidentiary theory for admissibility: the DNA of three unidentified males was present 24 hours before the swab was obtained; despite her testimony to the contrary, the victim did not clean herself at any point in the intervening 24 hours; and she could not have both (a) cleaned her face and mouth after

the assault, and (b) had direct or indirect contact with the touch DNA of other males in the 24 hours thereafter. The trial court could, in its discretion, reasonably reject this unreasonable theory for admissibility.

The only reasonable theory is that the victim washed her face and mouth after the assault but also had direct or indirect contact with male touch DNA in the next 24 hours. If that was the case, then the presence of the unidentified male DNA on the outside of her mouth proves little or nothing with regard to whether or not Gutierrez sexually assaulted her 24 hours earlier. Even so, the trial court allowed Gutierrez to prove that his DNA and semen was not found on the swab. This enabled Gutierrez to argue to the jury, "that the absence of his DNA made it less likely that he was guilty of the alleged assaults." (Gutierrez's Br. 18.) The court of appeals erred in second-guessing the trial court's thorough and reasonable exercise of discretion.

C. This Court should not reach Gutierrez's constitutional challenge.

For the first time in his response brief, Gutierrez argues that the trial court's evidentiary ruling denied him the rights to confront his accusers and to present a defense. (Gutierrez's Br. 23–25.) He did not present a developed constitutional argument to the trial court or the court of appeals. "Gutierrez frames his argument as erroneous exercise of the trial court's discretion. He does not suggest that his constitutional rights were violated, except for the inclusion of one sentence about the fundamental right of a criminal defendant to present a defense in his reply brief." *State v. Gutierrez*, 2019 WI App 41, ¶ 8 n.4, 388 Wis. 2d 312, 933 N.W.2d 133. By not raising a constitutional challenge in the lower courts, Gutierrez

forfeited his right to present it here. *See generally State v. Pinno*, 2014 WI 74, ¶¶ 55–66, 356 Wis. 2d 106, 850 N.W.2d 207.

Rather than cabin its ruling within the arguments presented by the parties, the court of appeals sua sponte considered whether the trial court's ruling violated Gutierrez's right to present a defense arising out of the Sixth Amendment's rights to confrontation and to compulsory process. *Gutierrez*, 388 Wis. 2d 312, ¶ 8 n.4. The court ruled that the trial court erred, "[r]egardless of whether this issue is framed as an erroneous exercise of the circuit court's discretion or as a violation of Gutierrez's constitutional rights." *Id.*

It was error for the Court of Appeals to gratuitously address a constitutional issue never presented to it and not necessary for the outcome. *E.g., Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 51, 376 Wis. 2d 147, 897 N.W.2d 384*; see City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, ¶ 65, 302 Wis. 2d 599, 734 N.W.2d 428 (Bradley, J., dissenting) ("I believe that it is unwise for this court to sua sponte raise and decide constitutional issues without the benefit of briefs and arguments.").

In any event, Gutierrez has no constitutional right to present irrelevant and unduly prejudicial evidence. Trial judges have broad latitude to exclude relevant evidence after engaging in precisely the sort of balancing of probative value versus the potential for prejudice and confusion that the trial court engaged in here. *Sarfraz v. Smith*, 885 F.3d 1029, 1037 (7th Cir. 2018). "Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (citation omitted). The desire to avoid jury confusion and "unfairly embarrass[ing]

the victim" are valid reasons for keeping out such extrinsic evidence. *Id.* at 511.

The Sixth Amendment only guarantees the right to present relevant evidence whose probative value is not substantially outweighed by its prejudicial impact. *State v. Jackson*, 216 Wis. 2d 646, 656–57, 575 N.W.2d 475 (1998). "Simply put, an accused has no right, constitutional or otherwise, to present irrelevant evidence." *State v. Scheidell*, 227 Wis. 2d 285, 294, 595 N.W.2d 661 (1999).

"With increased sensitivity, more DNA can be located at crime scenes and more of it can be from innocent sources." Mary Graw Leary, *Touch DNA and Chemical Analysis of Skin Trace Evidence: Protecting Privacy While Advancing Investigations*, 26 Wm. & Mary Bill Rts. J., 251, 274 (2017). Evidence that unidentified male DNA was on the outside of the victim's mouth proves nothing with regard to whether Gutierrez sexually assaulted her 24 hours earlier, yet it points the finger at three innocent persons. It proves nothing in this case where the assailant's identity was not in issue: either Gutierrez assaulted his stepdaughter, or she was lying and no one assaulted her. Gutierrez could and did use the absence of his DNA to argue that she was lying.

On the other hand, the trial court was rightly concerned that this evidence might cause the jury to speculate about the irrelevant fact whether the victim had sexual contact with three, five, or more unidentified males at some unspecified time before or in the 24 to 48 hours after the assault. *See Sarfraz*, 885 F.3d at 1037–38 (upholding the exclusion of otherwise relevant evidence under Wisconsin's rape shield law). The introduction of this inconclusive touch DNA evidence by Gutierrez risked unnecessarily prejudicing the jury against the victim and leading it astray from determining *his* guilt or innocence. *See* Leary, *supra*, at 277–78. Given that Gutierrez denied sexually assaulting A.R. and introduced

evidence that his DNA was not found on the victim's face or in her underwear, "the incremental impact of the excluded evidence would have been slight." *Sarfraz*, 885 F.3d at 1038.

D. Any error was harmless.

Both Gutierrez and the court of appeals insist that this was harmful error. (Gutierrez's Br. 35–37.) *Gutierrez*, 388 Wis. 2d 312, ¶¶ 11–12.

Given the low probative value of this evidence, given that Gutierrez used it to prove that his DNA and semen was not present on the tested items, enabling him to argue that it proves he did not assault A.R., and given that the purple underwear worn by A.R. was likely never tested, leaving in contention only the DNA evidence from the oral swab, "it is clear beyond a reasonable doubt that a rational jury would have found [Gutierrez] guilty absent the error." *State v. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362 (citation omitted).

II. The trial court properly exercised its discretion when it allowed A.R. to testify that Gutierrez began sexually assaulting her when she was six years old.

The court of appeals properly upheld the trial court's discretionary decision pretrial to allow the State to introduce the victim's testimony that Gutierrez began sexually assaulting her when she was six years old. *Gutierrez*, 388 Wis. 2d 312, ¶¶ 13–15. The trial court properly held that the evidence was relevant to show the context of their relationship, along with his motive and intent; it was at age six that Gutierrez began grooming his stepdaughter for escalated sexual activity later on. (R. 110:29–35; 105:51–54.)

Consistent with the trial court's pretrial ruling, A.R. testified at trial that when she was "little," Gutierrez took her

into a closet, offered her candy, and molested her, but he stopped when she began to cry. (R. 116:154.) On cross-examination, A.R. recalled that the closet incident occurred when she was six years old, but she could not recall in what city or state it happened. (R. 116:181.) A.R. also told a Sexual Assault Nurse Examiner that the November 1, 2012, assault by Gutierrez was not the first one. Gutierrez began sexually assaulting her when she was "little." (R. 117:188–89.) A licensed psychotherapist and expert on child sexual assault testified that it is difficult for a child A.R.'s age to remember the date and location of an assault that occurred when she was six years old. (R. 117:161.)

As fully explained at pages 26–32 of the State's opening brief, the evidence of Gutierrez's sexual assault of A.R. at age six was properly offered for several permissible purposes, it was relevant and probative, and its "great probative value" was not outweighed by its prejudicial impact. *State v. Hurley*, 2015 WI 35, ¶ 87, 361 Wis. 2d 529, 861 N.W.2d 174. Gutierrez failed to prove that its high probative value was substantially outweighed by the danger of *unfair* prejudice, especially given the court's instruction limiting the jury's use of this evidence to establish motive, intent and context. *Id.* ¶¶ 58, 89–90; *State v. Payano*, 2009 WI 86, ¶¶ 80, 88–89, 320 Wis. 2d 348, 768 N.W.2d 863. (R. 118:91–92.)

III. Gutierrez failed to prove that trial counsel was ineffective for: (a) not calling A.R.'s grandmother as a witness; and (b) not exercising a peremptory strike against an allegedly biased juror.

As explained at pages 32–39 of the State's opening brief, Gutierrez failed to prove that trial counsel performed deficiently and prejudicially for not calling A.R.'s grandmother to testify at trial about a supposed recantation by the child, and for not exercising a peremptory strike against a prospective juror who said in voir dire that she

might have difficulty remaining impartial because she works with children.

A. Counsel made a sound strategic decision not to call A.R.'s grandmother because he reasonably believed that her testimony would have hurt more than helped the defense.

"Counsel's decisions in choosing a trial strategy are to be given great deference. Indeed, the Court in *Strickland* went so far as to say that 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *State v. Balliette*, 2011 WI 79, ¶ 26, 336 Wis. 2d 358, 805 N.W.2d 334.

Counsel reasonably decided, after much deliberation and after interviewing her before trial, not to call A.R.'s grandmother as a witness. (R. 120:14–17, 27–28, 31.) This was a reasonable strategic call for counsel to make because, given the poor quality of her postconviction testimony, the grandmother likely would have harmed more than helped the defense. (R. 120:34–52.) Gutierrez failed to prove either deficient performance or prejudice. (State's Br. 32–34, 36–37.)

B. Counsel reasonably decided not to exercise a peremptory strike against the equivocating prospective juror.

Counsel reasonably decided to keep the equivocating juror, Rita Golz, on the final panel. Golz honestly answered defense counsel's question to the entire panel whether anyone would have difficulty remaining fair and impartial as follows: "I don't know if I could be impartial. I work with kids. I drive school bus, so I deal with kids all the time, and I just, I don't know if I can be impartial." (R. 116:69.)

Before Attorney Haase questioned Golz toward the end of voir dire, the trial court had already struck for cause a person who stated he worked at the jail and knew Gutierrez while he was incarcerated and would "have a hard time" remaining fair and impartial (R. 116:44–45); a close friend of defense counsel who stated that he might not be impartial (R. 116:45–47); a person whose stepson was a sexual assault victim and for that reason was unlikely to be fair and impartial (R. 116:52–54); a person who held religious beliefs against passing judgment on another (R. 116:63–64); and a person who said his "mind [was] made up" due to the nature of the crimes (R. 116:67–68). Juror Golz's equivocal "I don't know" pales in comparison.

The trial court implicitly determined that Gutierrez failed to prove that Juror Golz was subjectively or objectively biased. That factual determination was not clearly erroneous. *State v. Tobatto*, 2016 WI App 28, ¶ 17, 368 Wis. 2d 300, 878 N.W.2d 701. Although he had the burden of proving that Golz was biased, Gutierrez did not bother to call her to testify at the postconviction hearing or even obtain an affidavit from her. *See State v. Koller*, 2001 WI App 253, ¶ 15, 248 Wis. 2d 259, 635 N.W.2d 838.

Moreover, Juror Golz did not have to unequivocally declare that she would be fair and impartial so long as she was honest about her equivocation. *Tobatto*, 368 Wis. 2d 300, ¶ 22. Because Juror Golz's answer did not "unequivocally reveal[ ] subjective bias," trial counsel was not ineffective for failing to remove her from the jury with a peremptory strike. *Id*.

Gutierrez's reliance on *State v. Carter*, 2002 WI App 55, 250 Wis. 2d 851, 641 N.W.2d 517, is misplaced. There, during voir dire before a sexual assault trial, a prospective juror said he would be biased against the defendant because his brother-in-law was sexually assaulted and, when asked whether that

would influence his ability to remain fair and impartial, he answered, "yes." *Id.* ¶ 3. Trial counsel was ineffective for not striking the admittedly biased juror. *Id.* ¶¶ 8, 15. Juror Golz never said she would be biased against Gutierrez.

The record supports trial attorney Haase's postconviction testimony, and the trial court's finding, that he likely kept Juror Golz on the panel because he believed she would be impartial and because he had exhausted his allotted peremptory strikes on others he did not want on the panel. Because Gutierrez did not overcome the presumption that trial counsel reasonably decided not to strike Golz, the trial court properly held that counsel made a sound strategic decision to keep her on the final panel. (R. 127:9.) Gutierrez failed to prove either deficient performance or prejudice. (State's Br. 34–35, 37–39.)

CONCLUSION

This Court should reverse the decision of the court of appeals and reinstate the conviction.

Dated this 27th day of January, 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,873 words.

Dated this 27th day of January, 2020.

_____
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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 27th day of January, 2020.

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