State of Wisconsin
Court of Appeals
District 1
Appeal No. 2018AP000159-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Marco A. Lopez, Sr.,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Jeffrey Wagner, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

Whether the circuit court erroneously exercised its discretion in permitting the State to introduce other acts evidence suggesting that Lopez sexually assaulted to children in addition to the two children alleged in the complaint.

Answered by the circuit court: No. The other acts was offered for a permissible purpose, the evidence is relevant, and the unfair prejudice of admitting the evidence does not outweigh the probative value.

Summary of the Argument

The central factual dispute at trial was *whether Lopez did the things that are alleged in the complaint.* If Lopez actually did those things, his motive was crystal clear. He intended to be sexually gratified. Thus, the state had literally *no need* to present other acts evidence to establish Lopez's motive and intent. As such, the other acts evidence has, quite literally, no

probative value. The unfair prejudice of admitting the other acts evidence, though, is massive. In a trial where the question was *whether* Lopez sexually assaulted his children as alleged in the complaint, the State was permitted to introduce evidence that virtually guaranteed that he would be found guilty because, considering the other acts evidence, he appears to be the sort of person who would do such things.

For this reason, the circuit court erroneously exercised its discretion in permitting the state to use the other acts evidence.

Statement of the Case

I. Procedural History

On April 25, 2015, the State filed a criminal complaint against the defendant-appellant, Marco A. Lopez, Sr. (hereinafter "Lopez"), charging him with four counts of sexual assault of a child[1]. Count one alleged that between January 1, 1992 and December 31, 1994, Lopez sexually assaulted MAL; and count two alleged that Lopez sexually assaulted MAL again sometime between January 1, 1996 and December 31, 1998. Count three alleged that Lopez sexually assaulted OBL between January 1, 1996 and December 31, 1998; and count four alleged that he again sexually assaulted OBL between

[1] The complaint alleges two counts involving MAL, and two counts involving OBL. Both MAL and OBL are Lopez's children.

January 1, 2001 and December 31, 2002. (R:1)

Lopez waived his preliminary hearing, and then entered not guilty pleas to all counts. (R:59-3)

Shortly thereafter, on June 1, 2015, the State filed a motion seeking a preliminary ruling on the admissibility of other acts evidence. (R:6). In a nutshell, the motion proffered as other acts evidence the facts as alleged in a criminal complaint filed in Milwaukee County in 1986, naming Lopez as a defendant, and charging him with sexually assaulting his neice. (R:6) According to the motion, "In that case, the Defendant began sexually assaulting a juvenile female, TR, his niece, beginning when she was age 5 until she was about 12 years-old and began her menstrual cycle." *Id.* Additionally, "TR reported that the defendant would take her into an attic at his house and engage in sexual intercourse with her hundreds of times in multiple different ways . . ." *Id.*

Lopez filed a written brief in opposition to the State's other acts motion. (R:13)

The court conducted a hearing into the motion on June 12, 2015. After hearing the arguments of the parties, the court ruled that the proffered other acts evidence was admissible. (R:61-10, 11)

Thereafter, on July 20, 2015, the State filed a second motion for a preliminary ruling on additional other acts evidence. (R:17) This time, the motion proffered as other acts

evidence that Lopez sexually assaulted his biological daughter, SLL. SLL was alleged to be the sister of the victims in this case. The motion claimed that, after Lopez had already been charged in the present case, a Milwaukee police detective interviewed SLL, who claimed that her father (Lopez) began to sexually assault her when she was about 7 or 8 years old and continued to abuse her until she was 10 years old. According to the motion, "The abuse occurred when she lived with the father, her mother, and two sisters at her grandmother's house in the City and County of Milwaukee. . . . . She recalled waking up in her bed to her father touching her on her vaginal area over her clothing. During that incident, her father also took her pajamas and her underwear off, and laid on top of her, grinding his clothed penis on her body." *Id.*

Once again, Lopez filed a written memorandum opposing the motion. (R:18)[2]

Significantly, it does not appear that the court ever conducted a hearing into the State's second other acts motion; nor did the court ever make a ruling on the motion. Nevertheless, as will be set forth below, the state presented the evidence at trial.[3]

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[2] The document, R:18, which is the defendant's objection to the State's second other acts motion, is dated "this 29th day of July, 2015." However, in comparing R:18 with Lopez's first objection to other acts evidence (R:13), the substance of the documents appears to be the same. In other words, defense counsel apparently copies the first objection, and redated it to July 29, 2015.

[3] It is not fair to say that Lopez waived or forfeited his objecting to this evidence. He filed a written objection. The most logical way to address this situation is to assume that,

Nevertheless, the case came to trial starting on April 25, 2016. SLL testified at the trial concerning the other acts involving her father. (R:68-4 *et seq.*)

The jury returned verdicts finding Lopez guilty on all counts. (R:70-68)

The court sentenced Lopez to ten years on count one, twelve years on court two, ten years on count three, and twelve years on count four. The sentences were ordered to run consecutive. (R:71-27)[4]

II. Factual Background

In approximately 2014, OBL, who is Lopez's daughter, reported to police that, many years earlier, when she was a child, Lopez took her into the basement, lay her on a blanket, and took her pants down. (R:67-26, 27) However, on that occasion, they heard a sound, and Lopez pulled her pants back up. *Id.*

OBL[5] claimed, though, that there were a number of incidents that occurred between her and Lopez, in which he would "give me oral sex" (R:67-31), and he would rub his penis on her. (R:67-32). OBL claimed that this abuse began when she was five years old, and continued until she was about 12

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since the court admitted the evidence, the court's ruling on the second set of other acts evidence would have been the same as on the first set of other acts evidence.

[4] The were "old law" sentences; and, therefore, they were not bifurcated. Lopez is eligible for discretionary parole after serving ⅓ of the total sentence; and he must be granted mandatory parole after service ⅔ of the total sentence.

[5] OBL is alleged to be the victim in counts three and four of the information

years old. (R:67-35)

OBL claimed that what motivated her to finally go to the police was that she discovered that Lopez had done same thing to her brother and sister. (R:67-40)

MAL also testified at the trial.[6] He was 29 years old at the time of the trial. (R:67-60) MAL claimed that there was an occasion when he was a child that Lopez was playing hide-and-seek with him, and he found his father in bed. (R:67-62) MAL said he "dove in bed", and Lopez made MAL perform oral sex on him. (R:67-63). MAL believed that this incident occurred when he was about five or six years old. (R:67-65) According to MAL, Lopez threatened to shoot MAL's mother if MAL told anyone about the incident. (R:67-66) MAL testified that this sort of thing continued until he was about eight years old. (R:67-67) Other incidents occurred in the middle of the night in the basement, where Lopez would have anal intercourse with him. (R:67-70) This caused MAL to bleed from his anus. (R:67-72) MAL said this happened two to three times per week. (R:67-73)

SL also testified.[7] She told the jury that Lopez is her father (R:68-4), however, while she was growing up, she did not live in the same house with her half-brother and half-sister (the alleged victims in this case). (R:68-5) SL claimed that while she

[6] MAL is alleged to be the victim in counts one and two of the information

[7] SL is the subject of the state's second other acts motion. Lopez objected to her testimony, but the court never held a hearing on the state's motion, nor did the court make a ruling on the admissibility of SL's testimony concerning other acts.

was living at her grandmother's house, Lopez would come into her bedroom and take off her clothes. (R:68-8,9). This occurred when she was about ten or eleven years old. *Id.* According to SL, Lopez would then rub his penis on her "private part". (R:68-10)

Finally, TR, who was the subject of the state's first other acts motion and who is Lopez's niece, testified that from the time she was in kindergarten until she was 12 years old (R:68-36), Lopez would take her into the basement and have penis-vagina sex with her. (R:68-35) According to TR, this would happen a couple of times per week. (R:68-41)

The State called Milwaukee Police Detective Sarah Blomme, who told the jury that the State was unable to pursue charges against Lopez for the incidents with SL because it was beyond the statute of limitations. (R:68-62)

Lopez called several witnesses who testified that, after these alleged incidents had occurred, Lopez's children allowed him to babysit for them (i.e. babysit for Lopez's grandchildren). (R:69-9 to 33)

Lopez also testified. He flatly denied that he ever had sexual contact with any of the children who testified. (R:69-53 to 56)

Argument

I. The circuit court erroneously exercised its discretion in admitting the State's other acts evidence. The unfair prejudice of admitting the evidence grossly outweighs to minimal probative value.

The central factual dispute at trial was *whether Lopez did the things that are alleged in the complaint.* If Lopez actually did those things, his motive was crystal clear. He intended to be sexually gratified. Thus, the state had literally *no need* to present other acts evidence to establish Lopez's motive and intent. As such, the other acts evidence has, quite literally, no probative value. The unfair prejudice of admitting the other acts evidence, though, is massive. In a trial where the question was *whether* Lopez sexually assaulted his children as alleged in the complaint, the State was permitted to introduce evidence that virtually guaranteed that he would be found guilty because, considering the other acts evidence, he appears to be the sort of person who would do such things.

For this reason, the circuit court erroneously exercised its discretion in permitting the state to use the other acts evidence.

A. Standard of appellate review

In, *State v. Payano*, 2009 WI 86, P40-P41 (Wis. 2009), the Supreme Court reiterated the standard of appellate review

for issues concerning the admission of other acts evidence. The Supreme Court wrote:

> This case requires us to determine whether the circuit court erroneously exercised its discretion when it allowed the admission of other acts evidence against Payano. (internal citations omitted)
>
> In these circumstances, we are to determine whether the circuit court "reviewed the relevant facts; applied a proper standard of law; and using a rational process, reached a reasonable conclusion." (internal citations omitted). If, for whatever reasons, the circuit court failed to delineate the factors that influenced its decision, then it erroneously exercised its discretion. (internal citations omitted). However, "[r]egardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion."

B. The proffered other acts evidence should not have been admitted because the purpose for which it was admitted is not a contested matter, and, therefore, the unfair prejudice greatly exceeds the probative value.

"Evidence of prior crimes or occurrences should be sparingly used by the prosecution *and only when reasonably necessary.* Piling on such evidence as a 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." (emphasis provided) *Whitty v. State,* 34 Wis. 2d 278, 297, 149 N.W.2d 557,

565 (1967)

If this admonition by the Wisconsin Supreme Court is to have any meaning, then Lopez's convictions in this case must be reversed.

§ 904.04(2)(a), Stats., states that "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. 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." In sexual assault cases, especially those involving assaults against children, the court must afford greater latitude to the analysis of whether evidence of a defendant's other crimes was properly admitted at trial. *State v. Davidson*, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606. "The effect of the rule is to permit the more liberal admission of other crimes evidence in sex crime cases in which the victim is a child." *Id.*

The analysis the court must follow under § 904.04(2), Stats. for the admission of "other acts" evidence is presumably well-known to the court. Lopez will therefore spare the court the tedium of wading through yet another cut-and-paste string of legal citations spelling out the so-called "Sullivan analysis." In a nutshell, in order to be admissible, the evidence must be offered for a permissible purpose under the statute, it must be

relevant, and the unfair prejudice in admitting the evidence must not outweigh the probative value. *See, State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998)

Here, the state claimed that the *purpose* in introducing evidence that Lopez sexually assaulted two other children in his family was supposedly to "to prove that the Defendant's motive for his actions in this case were for purposes of sexual arousal or gratification." (R:7-4) The State correctly pointed out that "when the defendant's motive for an alleged sexual assault is an element of the charged crime, other crimes evidence may be offered for the purpose of establishing motive." *Id.*

The other acts evidence in this case, then, was at least nominally offered for a permissible purpose, and the evidence is seemingly relevant; that is, the evidence *has some tendency* to make it more likely that Lopez acted with the purpose of obtaining sexual gratification, which is an element of the offense.

This is not the problem with admitting the evidence, though. The problem, of course, is that the miniscule probative value of this evidence is dwarfed by the monumental unfair prejudicial effect. Thus, under § 904.03, Stats.[8], it is not admissible.

[8] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Evidence is “relevant” if it has, “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” § 904.01, Stats. This, however, is not a value determination concerning the evidence. In other words, evidence is relevant if has *any tendency*, no matter how small, to make a fact that is of consequence to the action more or less probable.

The term “probative value”, though, is, by definition, a value determination. As the Supreme Court explained, “The main consideration in assessing probative value of other acts evidence ‘is the extent to which the proffered proposition is in substantial dispute’; in other words, ‘how badly needed is the other act evidence?” *Payano*, 2009 WI 86, ¶ 81, 320 Wis. 2d at 400, 768 N.W.2d at 857

It is almost comical for the State to suggest that, if the description of Lopez’s behavior is true, that his motive, intent, plan, and modus operandi are in substantial dispute in this case. Is there some other motive, intent, or plan, other than for sexual gratification, for having a child suck on an erect penis? Is there some dispute about the meaning of Lopez allegedly taking children into the basement in the middle of the night, disrobing them, and then having anal intercourse with the child?

This behavior, if true, is subject to only one motive or plan, and everyone knows what it is. How can the State claim, with a

straight face, that this evidence was "reasonably necessary" to establish Lopez's motive?

The issue at the trial in this case was whether it is true that Lopez did the things that his children claimed he did. Lopez testified that it was not true. Lopez did not admit that what his children said was true, but claim that he was doing something other than seeking sexual gratification.

Thus, the *probative value* of the state's other acts evidence approaches zero. Lopez's motive, intent, and plan simply were not in dispute. Thus, there was literally *no need*-- much less a bad need-- for the other acts evidence.

Compare this, now, to the monumental prejudice of allowing the jury to hear evidence that Lopez allegedly sexually assaulted two children *in addition* to the children alleged in the complaint. Doesn't it seem like there is at least a chance that the jury found Lopez guilty simply because he appears to be the type of person who is likely to do such things? Lopez certainly thinks so.

This is precisely what is prohibited by § 904.04(1),Stats. "Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion." The central issue in this trial was whether Lopez did what was alleged in the complaint. Once the jury heard that Lopez had sexually assaulted two other children, the verdict was a

foregone conclusion.

Not only is it likely that the jury found Lopez guilty mainly because he appeared to be the sort of person who would do such things, the courts have characterized this tendency as being "overstrong." As the Supreme Court observed in *Whitty supra*, 34 Wis. 2d at 292, 149 N.W.2d at 563, other acts evidence is dangerous because of, "The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts."

In *Whitty*, the court also cautioned against the use of other acts evidence because the jury may have a, "tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses." *Whitty*, 34 Wis. 2d at 292, 149 N.W.2d at 563.

Here, the jury was not left to wonder whether Lopez may have escaped punishment for other offenses. A state's witness came right out and told them. Concerning SLL and TR, the State's two other acts witnesses, the following exchange took place at trial:

> Q Your knowledge of criminal law in Wisconsin as a police officer, police detective, were you able to pursue charges on behalf of [SLL]?
>
> A No.
>
> Q Why is that?
>
> A It was beyond the statute of limitations to charge anyone for those crimes.
>
> Q And that's because at some point in the early nineties the law

changed, right?

A Yes.

Q What did the law change to?

A The date range of when a crime is reported and how much time had passed between when the crimes occurred and when it was reported, to be able to prosecute.

Q So in the early nineties, it became a lifetime-- the lifetime of the victim. There was no bar to prosecution, correct?

A Correct.

Q Which didn't apply to [SLL], right?

A Correct.

Q Did the same situation, with the statute of limitations, have to [SLL] apply to [TR]?

A Yes.

(R:68-61, 62)

With the admission of the other acts evidence in this case, Lopez never had a chance of a fair trial. What happened here was not a *sparing use* of other acts evidence, designed to meet a compelling need by the state, not even under the "greater latitude rule." It was piling on.

Plainly, the unfair prejudice of admitting the State's other acts evidence is immense, and it therefore substantially outweighs the practically non-extant probative value. The circuit court erroneously exercised its discretion in admitting the evidence.

Conclusion

For these reasons, it is respectfully requested that the court of appeals reverse Lopez's convictions, and remand the matter to the circuit court for a new trial, with instructions that the State's other acts evidence is not admissible.

Dated at Milwaukee, Wisconsin, this _____ day of April, 2018.

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Certification as to Length and E-Filing

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Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No.

State of Wisconsin,

Plaintiff-Respondent,

v.

John Doe,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. (R:61) Excerpt of the transcript of the court's ruling on the other acts evidence

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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.

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