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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 Reply Brief

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Argument

I. The State's supposed prerogative to prove a charge by any means it chooses is not a rule of evidence, and it has nothing to do with the probative value of the other acts evidence. Thus, the state concedes that the proffered other acts evidence has no probative value.

In arguing that the unfair prejudice in this case grossly exceeded the probative value, Lopez relied upon *State v. Payano*, 2009 WI 86, ¶ 81, 320 Wis. 2d 348, 400, 768 N.W.2d 832, 857, where the court made explained that, "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?"

On this point, Lopez argued, since there was no dispute, nor could there be a dispute, about a man's motive for putting his penis in a child's mouth, or for pulling a child's pants down in the basement, there was utterly no need for the other acts evidence to prove motive. Thus, the proffered other acts evidence had nearly zero probative value. This being the case, it does not take much unfair prejudice to outweigh the negligible probative value.

The State responds, "Lopez's counsel asks how the State can claim the other acts evidence is 'reasonably necessary' to establish motive when motive, intent, and plan are not in dispute . . . *The simple answer is that it is for the State to decide how it will prove its case*."[1] (emphasis provided; State's brief p. 12)

The state's answer entirely misses the mark. The prosecutor's subjective reason for presenting certain evidence (i.e. "how it will prove its case") is not a rule of evidence, and it has nothing to do with whether or not the evidence in question is admissible. Whatever strategic reasons a prosecutor may have for offering certain evidence, the evidence must nevertheless be *admissible.* Inadmissible evidence does not become admissible simply because the prosecutor subjectively decides she wants to use it to prove her case.

The defendant in a criminal case, who actually has a constitutional right to present a defense, may not present his defense using irrelevant or unfairly prejudicial evidence. *See, e.g.*, *State v. Morgan*, 195 Wis. 2d 388, 432, 536 N.W.2d 425, 441–42 (Ct. App. 1995) "Morgan had no constitutional right to present this irrelevant evidence."

Thus, the State's "simple answer", that it is for the State to decide how it will prove its case, in reality answers nothing.

[1] Not surprisingly, the State offers no citation of law for this proclamation. Only later in the paragraph does the acknowledge the obvious, "That [the admissibility of evidence] is the province of the court to determine." *Id.*

The state utterly fails to explain why it was in any way important to introduce other acts evidence to establish Lopez's motive, when the motive in this case is singular and obvious.

By failing to respond, the state concedes that the other acts evidence has almost no probative value. *See United Coop. v. Frontier FS Coop.,* 2007 WI App 197, ¶ 39, 304 Wis.2d 750, 738 N.W.2d 578 (the failure to respond to an argument made in the opposing party's brief may be taken as a concession)

II. The error here is not harmless.

Perhaps sensing the weakness of its position, the state also argues that, "If the Court disagrees with the foregoing, it should nonetheless conclude that any error in admitting the evidence was harmless." (Resp. brief p. 17) According to the state, "Error is harmless if the reviewing court can determine beyond a reasonable doubt that a rational jury would found the defendant guilty absent to error."

Finally, the State says, it "[P]resented compelling direct evidence to support the jury's verdict, even in the absence of the other acts evidence." (Resp. brief p. 17)

This, of course, is not the correct measure of harmless error where the error is the improper admission of other acts evidence.

Where the error is the improper admission of other acts evidence, "The burden of proving no prejudice is on the beneficiary of the error, here the State. The State must establish that there is no reasonable possibility that the error contributed to the conviction." *State v. Sullivan*, 216 Wis. 2d 768, 792–93, 576 N.W.2d 30, 41 (1998)

So, the question is not whether there was sufficient other admissible evidence to sustain the conviction. The question is whether there is a reasonable possibility that the improperly admitted other acts evidence *contributed* to the conviction.

Here, it is practically impossible to imagine how the improperly admitted other acts evidence could not have contributed to the conviction. Not only did the evidence establish that Lopez may be just the sort of person who would do such things; the state further informed the jury that Lopez was not prosecuted for the alleged earlier sexual assaults.

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

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Jeffrey W. Jensen