RECEIVED
06-22-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2018AP417-CR
Door County Case No. 16-CM-73

ERIC L. VANREMORTEL,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION, ENTERED ON 8/24/17, IN THE CIRCUIT COURT FOR DOOR COUNTY, IN WHICH VANREMORTEL WAS CONVICTED OF ONE COUNT OF DISORDERLY CONDUCT, AS A REPEAT CRIMINAL OFFENDER, CONTRARY TO §947.01 (1) AND 939.62 (1)(a), STATS., THE HONORABLE TODD EHLERS, PRESIDING.

BRIEF-IN-CHIEF AND APPENDIX

REBHOLZ & AUBERRY
JAMES REBHOLZ
Attorney for Eric L. Vanremortel
State Bar No. 1012144

P.O. ADDRESS:

1414 Underwood Avenue, Suite 400
Wauwatosa, WI 53213
(414) 479-9130
(414) 479-9131 (Facsimile)
jrebholz2002@sbcglobal.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

Statutes Cited:

Other Authorities Cited:

STATEMENT OF ISSUES

1. Whether the trial court's decision granting the State's motion to admit other act evidence at trial, pursuant to §904.04 (2), Stats., was erroneous and harmless?

The Circuit Court was not asked this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Vanremortel requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF CASE

A summons and complaint, filed 6/7/16, charged Eric L. Vanremortel (Vanremortel) with one count of disorderly conduct, as a repeat criminal offender, a Class B misdemeanor, contrary to §§947.01(1) and 939.62(1)(a), Stats. (R.1; 2).

On 6/28/17, the court commenced a jury trial in which the jury returned a verdict of guilty (R.26, pp. 182-183). The jury was polled (Id., pp. 183-84).

On 8/24/17, Vanremortel was sentenced to one year of probation, sentence withheld, and a 90-day term of confinement as a condition of probation in the Door County Jail with Huber release privileges.[1] This sentence included 0 days of sentence credit, pursuant to §973.155, Stats. (R.27, p. 11; R.10; A-101).

A Notice of Intent to Pursue Post-Conviction Relief was timely filed (R.12).

A Notice of Appeal was filed on 3/2/18 (R.13).

---

[1] A revocation order and warrant was signed 4/5/18 revoking Vanremortel's probation imposed in case 16-CM-73. At re-sentencing on 4/27/18, the court sentenced Vanremortel to 9 months of confinement in the Door County Jail with Huber release privileges, and 28 days of jail credit (Tr. 4/27/18, p. 11). Undersigned counsel was appointed to represent Vanremortel on both the sentencing after revocation and revocation itself on 5/22/18 by the State Public Defender (SPD).

The circuit court record was filed with the Court of Appeals on 4/10/18. Vanremortel's Brief-in-Chief and Appendix is due, by extension, on 6/22/18.

STATEMENT OF FACTS

The criminal complaint charged Vanremortel with boisterous and otherwise disorderly conduct alleging he caused a disturbance on 5/22/16. The complaint described an incident in which a female, S.Z., experienced a "frightening encounter with a male on South Neenah Ave. at the stop light by the freeway." (See incident report attached to criminal complaint; R.2).

At his initial appearance on 7/14/16, Vanremortel informed the court he remained "homeless" (R.20, p. 4).

On 11/14/16, the State filed a "motion regarding other acts evidence" pursuant to §904.04(2), Stats. (R.18; A-103). The motion sought introduction of "other acts" evidence for purposes of establishing "motive, intent, plan, knowledge and absence of mistake" (Id., p. 5).

The State sought to admit testimony involving four separate "other acts" incidents starting in 2013.

One, the motion sought to admit evidence of Vanremortel's conviction of "stalking" a Door County Sheriff's Investigator on 3/27/13 in Door County Case No. 2013-CF-51

(Id).

Two, the motion sought introduction of evidence of Vanremortel's alleged "stalking" of Sgt. Greg Zager on 5/1/16, an off-duty investigator in which no charges were filed[2] (R.18, p. 1).

Three, the State sought introduction of other act evidence from 1/12/16 in which Vanremortel was alleged to have been following an individual who was snowmobiling with friends on a trail in Door County. No charges were initiated (R.18, p. 2).

Finally, the State sought introduction of other act evidence claiming Vanremortel was following and "stalking" a Sturgeon Bay community service officer on 2/11/15 through various intersections when stopped by a police officer for this traffic conduct. After his stop, Vanremortel told the officer he was upset with the service officer for having "shined a friggen light on him" when Vanremortel had been parked in a State Park at 8:45 p.m. (R.18, pp. 2-3). In conclusion, the motion asserted the "proffered evidence demonstrates the defendant's pattern of stalking, harrassing, and aggressively approaching those who have been or are associated with law enforcement"

[2] This sheriff's investigator is the husband of the female identified in the incident report to the criminal complaint.

(Id., pp. 6-7).

At a status conference on 3/10/17, at which the defendant appeared *pro se*, the court inquired of Vanremortel whether he had an opportunity to be in contact with his new lawyer, Jonathan Gigot. The defendant told the court he had not been in contact with his new lawyer because Vanremortel did not have a phone or address for his lawyer to contact him because Vanremortel remained homeless (R.23, p. 3). The court acknowledged Vanremortel's difficulties in meeting with his lawyers and how their only conferences with Vanremortel occured at the justice center when the lawyers were in Sturgeon Bay (Id., pp. 4-5). Vanremortel then asked the court to have the case dismissed which the court declined to address (Id).

At a status conference on 4/17/17, counsel appeared without his client and waived his appearance. Counsel informed the court Vanremortal wished the matter re-scheduled for a jury trial given counsel's appointment (R.24, p. 3). Substitute counsel informed the court his client remained homeless (Id).

The court then addressed the State's motion to admit "other act" evidence at trial. The court first determined it would permit proceeding without Vanremortel, whose new attorney

was unable to "get in touch with him," as the hearing was not "evidentiary" (R.24, p. 3). The defense told the court it was "a little bit tough for me to argue against most" of the evidence sought to be admitted, with the exception of the other acts from 1/12/16, involving an individual who was snowmobiling (incident 3) with friends given a "real question of identification there" (Id., pp. 4-5). The prosecution argued for its admissability because it followed his "whole pattern over years" (Id., p. 6).

The court found the third "other act" was too "far-fetched" while "incident one and incident four" exhibited a "system of criminal activity" by Vanremortel "with law enforcement officers" with whom Vanremortel "has issue" and "stalks them" (Id., p. 7). The court stated incident two, involving Sgt. Zager, "isn't even other acts," and is "kind of part of the context of Vanremortel's alleged criminal behavior in this matter following Sgt. Zager's wife" (Id., pp. 7-8). The court explained it was rejecting the third claim of "other acts" evidence as a "private dispute" in that Vanremortel was "not following a law enforcement officer" (Id., p. 8).

In ruling on the "other act" motion, the court stated it had

"considered the *Sullivan*[3] factors" and granted the State's motion to admit other acts one, two, and four identified in the pre-trial motion. The court said it was admitting evidence of incident two as "context" of "criminal activity" and would admit incidents one and four "in terms of getting into confrontations" (Id., p. 8).

On 6/12/17, the defense informed the court that it would be proceeding to the jury trial scheduled for 6/28/17. The prosecution told the court the defense was "unwilling to stipulate to any of the facts or convictions" so there would be a need to present witnesses to testify to the other acts evidence (R.24, p. 3).

Prior to the jury selection process on the morning of trial, the court informed the parties he would not allow the jury to be informed Vanremortel was "convicted of stalking" involving the single incident in which Vanremortel was convicted (R.26, pp. 8-9). The court also informed the prosecution the other act evidence was not admissible as an "intent crime," but only for "motive . . . preparation or plan . . . or background" (Id., p. 10). Nor, the court said, would it allow the other act evidence to be submitted as evidence of

---

[3] State v. Sullivan, 216 Wis. 2d 768, 576 N.W. 2d 30 (1998)

"opportunity" (Id., p. 11). When the court commented to the parties he hoped "all 32" of the scheduled jurors would show up, the defendant commented he hoped "none of them show up" (Id., pp. 13-14).

During *voir dire*, defense counsel asked the panel whether they had a friend, relative, or knew someone who they would consider to be a "bit eccentric or odd" (Id., p. 52). At the conclusion of the *voir dire* process, the court provided the jury with the preliminary instructions (Id., p. 55).

Neither of the parties had any objection to the jury selection process (Id. pp. 67-68).

Based upon the stipulation of the parties, the court stated it would receive testimony by telephone from Deputy LaViolette, who had a family medical emergency (Id., p. 69).

In opening statement, the prosecution described the evidence the State would present, including the testimony from three other witnesses regarding their own experiences with Vanremortel. The prosecutor told the jury her purpose in introducing some of this other conduct by Vanremortel was "just to put things in context for you as to why [S.Z.] had the feelings she had, why she responded the way she did" (Id., p. 78).

The defense told the jury this was a case about a

young, homeless man who was living "out of his car and, quite frankly– some mental issues." Counsel expained this "yelling and waving his arms in a wild manner" was conduct which "has happened before" and is conduct which was "normal for him" and Vanremortel is an individual who is "known to law enforcement" (Id., p. 80).

Gregory Zager testified he was previously employed as an investigator with the Sturgeon Bay Police Department before leaving to become employed as an "insurance claim tech" for a truck company. He described how he, his wife and children were tending to their horses on a Sunday afternoon when he and his wife left their barn to return home (Id., pp. 83-84). Zager described how he turned right out of his driveway to avoid Vanremortel, who was driving in front of him on Neenah Road from Zager's right to his left. Zager believed Vanremortel had been leaving the Ahnapee trail parking lot north on Neenah Road. Zager told the jury he was concerned when he saw his wife exit their driveway and turn left, resulting in her driving behind Vanremortel's vehicle and phoned her to tell her to "keep her distance" (Id., pp. 86-86).

Zager identified Exhibit 1 (R. 6) which was a Google Map and depicted his rental property, where he kept their animals, and Ahnapee Trail which is a county park (Id., pp. 88-

89).

Zager was then asked about another incident involving Vanremortel from 5/1/16 when Zager noticed a vehicle following him in his personal vehicle after leaving the Sawyer Park boat landing and he noticed Vanremortel's vehicle both behind him, and then "parallelling" Zager on an adjoining street until Zager reached home (Id., pp 91-92). Zager indicated Vanremortel's driving behind him in this incident caused him concern (Id., p. 93). He said he told his family to keep alert when they were at the barn (Id).

On cross-examination, Zager described how, during his law enforcement duty in Sturgeon Bay, he would see Vanremortel "sometimes a couple times a day when I was driving around" and sometimes he would go all week without seeing him (Id., pp. 94-95). Zager described how Vanremortel would follow him and then, a short time later, would stop at the police department to complain how he had followed Vanremortel (Id., p. 95). The officer claimed he did not know why Vanremortel would engage in this behavior but it had become routine where he "would follow me and other officers." Zager agreed Vanremortel was "known to most all" of the (Sturgeon Bay) officers due to his behavior in "following and complaining about us following him and acting very erratic" (Id.,

pp. 95-96). He described telling his wife about Vanremortel and, while he had "never seen Eric get violent," he wanted to protect his family so they did not have to "deal with him" (Id., p. 97). Zager said he was aware Vanremortel lived "out of his car" (Id).

On redirect examination the Zager described an incident in which Vanremortel had gone to the Sturgeon Bay Police Department to complain about "Zager watching him," when Zager said he had not even seen Vanremortel that day. Zager also described an earlier event when Vanremortel drove his pickup truck through an alley behind Zager's house and how the pickup truck drove in front of Zager's house "real slow."

S.Z. testified she was married to Greg Zager and how she was at the barn on Neenah Road when she and her husband left in separate vehicles later in the afternoon that day. She said her husband called her after he saw Vanremortel drive northerly on Neenah Road before Zager entered Neenah Road. He told her he had turned right in order to stay away from Vanremortel and told her to "stay away from him." She said she had never met Vanremortel, but knew he slept across the street in the county park in his vehicle and had a past history of stalking her husband (Id., pp. 103-104). S.Z. said she "wasn't overly concerned" as she drove behind

Vanremortel and stopped several lengths behind him at the red light. She said she was “really scared” when this “really dirty, unkept, and scary looking individual” left his vehicle and began shouting at her when she was not even sure of what he was saying. (Id., p. 105).

She described how, after he shouted at her, she said “excuse me” to him. She said he then returned to his vehicle when the light turned green and shot across the intersection. She said she observed him then turn left into Sawyer School and, when she passed the road going into Sawyer School, saw Vanremortel had parked his vehicle and was screaming at her as she drove by.

On cross-examination, S.Z. explained she did not turn right and follow her husband because she did not think Vanremortel would “do anything to her” (Id., p. 107). She described how she elected not to turn down any side streets to avoid Vanremortel because she did not feel “he was a threat.” She explained she did not turn right onto 52-57 to get away from Vanremortel because he had turned left off the roadway and it “was probably safe to go home” (Id., p. 109).

Sgt. Marcus Tassoul, an officer with the Sturgeon Bay Police Department, testified he was on duty on 5/22/17 at about 4:40 p.m., in the afternoon when he was contacted by

Greg Zager (Id., p. 113). After interviewing both of the Zagers, the sergeant tried to locate Vanremortel and saw him drive by the police department parking lot. When the sergeant asked Vanremortel for an explanation for his conduct, Vanremortel told the sergeant he could not talk to him because there was a "gag order." The sergeant then had Officer Mielke deliver the citation to Vanremortel because Mielke "had a little better rapport" with Vanremortel (Id., p. 115).

On cross-examination, the sergeant said he had encountered Vanremortel previously without "any issues." He characterized Vanremortel's behavior as "a little strange" because he had never seen anything like that previously from Vanremortel (Id., pp. 124-25).

Matthew Rollin, a community service officer with the Sturgeon Bay Police Department, testified he was employed to enforce local city ordinances, helping the city stay clean, and make sure nobody is in the parks after they close (Id., pp. 127-128). He described doing a check at the Ahnappe Trail rest stop at about 8:45 p,m., on South Neenah Road, when he saw a vehicle sitting in the dark. He recalled pulling "along side" because the license plate was obstructed by snow. When he flashed the mounted light on his vehicle into the parked car, Vanremortel got out of his vehicle and approached Rollin. At

that point, the witness said he made the "decision to avoid the situation and just leave." He said he had been warned, during his training, about Vanremortel and how he had a history with "run-ins with officers and he's not always friendly" (Id., p. 131). He described Vanremortel then following him in his vehicle, asking him at a stoplight "if I had any problems." At a stop sign in Sturgeon Bay, Vanremortel pulled up next to the witness and demanded the witness pull over to the side of the road, which the witness "did not" and contacted dispatch (Id., p. 132). Rollin agreed this encounter was his "last engagement with Vanremortel" (Id., p. 133).

On cross-examination, Rollin stated Vanremortel had nothing with him "apart from his clothes" when Rollin approached the vehicle in the county park (Id., p. 136).

The court conducted a colloquy with Vanremortel regarding his election not to testify on his own behalf (Id., pp. 140-142). The court accepted the waiver conditionally (Id., p. 143).

Robert LaViolette, a patrol officer with the Door County Sheriff's Department, was working the afternoon shift on 2/11/15, when he was dispatched to assist Community Service Officer Rollin, who was being followed by Vanremortel (Id., p 147). When the officer stopped Vanremortel in his vehicle,

Vanremortel explained he followed the officer to find out "why the officer had shined a light in his car" (Id., p. 148). The officer described contacting "after-hours probation" to see if they wanted to "put a hold on Eric," and stated he then let Vanremortel go so he could "report for jail," before the defense objected (Id., p. 148). The court was not asked to make any specific ruling, and made none.

On cross-examination, LaViolette said he had known Vanremortel previously as a deputy in the Door County Jail for a number of years (Id., pp. 149-150). He characterized Vanremortel's demeanor during the officer's investigation as "agitated" (Id., p. 150).

The State then rested. The defense informed the court they would not be calling any witnesses. (Id., p. 151).

The court conducted the jury instruction conference and explained the reasons for its redaction of WisJI-Criminal 1900, the disorderly conduct instruction (Id., pp. 141-52). There were no objections to the instructions to be read to the jury (Id., p. 156). The jury was also instructed regarding "other conduct . . . for which the defendant is not on trial"[4] (Id., p. 164).

In closing argument, the prosecutor told the jury how

[4] WisJI-Criminal 275

Vanremortel "has done this in the past." (Id., p. 168). She said Vanremortel's behavior was not just "odd or eccentric" but was "threatening" (Id., p. 170). She argued S.Z. may have been "somewhat more prepared" for Vanremortel's behavior, but that didn't make it "less of a crime" (Id., p. 171). She also said Vanremortel has "frightened" other individuals over a two-year period (Id).

The defense argued S.Z. was aware of "what Vanremortel is capable of" and "what he does" and, because the other witnesses knew what to expect as they saw Vanremortel often, the behavior was only "bizarre" (Id., p. 173). Counsel argued the "circumstances" (from WisJI-Criminal 1900) surrounding Vanremortel's conduct included witness familiarity with this conduct and their law enforcement training addressing conduct presented by an "individual like Mr. Vanremortel" (Id., p. 174).

In closing, defense counsel told the jury any encounter with an individual who behaves like Vanremortel is "practically normal" for the officer in his everyday duties (Id., p. 172). He also argued, while his client had exhibited "bizarre behavior," this sort of behavior is what the officer "had come to expect . . . when you see them everday" (Id., p. 173). Counsel argued a police officer is required to conduct himself appropriately in

encounters with "individuals like Vanremortel" and is trained to do so (Id., p. 174). Finally, counsel conceded his client was disorderly in his encounters with various individuals but he had not provoked a disturbance and the State had not, therefore, proven Vanremortel guilty beyond a reasonable doubt.

In rebuttal, the prosecutor argued Vanremortel's conduct, while "normal" for him, was not normal for the community and it actually "could have been fatal" (Id., p. 177).

The jury returned its verdict of guilty of disorderly conduct as charged in the criminal complaint. The jury was polled (Id., pp. 182-84).

At sentencing, the defense argued any jail sentence recommended by the prosecution would cause Vanremortel to "lose his social security disability benefits" (R.27, pp. 4-5). The State informed the court Vanremortel had been revoked three times while serving a period of probation (Id., pp. 7-8).

The defendant told the court the police treated him like a "joke" and probation agents seemed determined to "harass," stalk and threaten him and make him look like a "bad person" at the police department.

The court said it would "give probation another try" and placed Vanremortel on probation for a period of one year with the condition he serve 90 days in the county jail with Huber

release privileges (Id., p. 11). No jail credit was available (Id., p. 12).

ARGUMENT

I. THE TRIAL COURT'S DECISION GRANTING THE STATES MOTION TO ADMIT "OTHER ACTS" EVIDENCE AT TRIAL, PURSUANT TO §904.04 (2), STATS., WAS ERRONEOUS.

A. Standard of Review

In State v. Sullivan, the court stated the applicable standard for reviewing a circuit court's admission of other acts evidence is whether the court exercised appropriate discretion. State v. Sullivan, 216 Wis.2d 768, 780, 576 N.W.2d 30 (1998), (*citing* State v. Pharr, 115 Wis.2d 334, 342, 349 N.W.2d 498 (1983))**.** The *Sullivan* court stated an appellate court should sustain an evidentiary ruling if it found the circuit court examined the relevant facts; applied a proper standard of law; and, in using a demonstrative rational process, reached a conclusion a reasonable judge could reach. Sullivan, pp. 780-81.

In reviewing the circuit court's ruling, the appellate court must only look at the facts proffered to the court at the time of its ruling, rather than the facts elicited at the trial. State v. Marinez, 2011 WI 12, ¶28, 331 Wis.2d 568, 707 N.W.2d 399.

Evidence in the trial court record should demonstrate

"discretion was in fact exercised and the basis of that exercise of discretion should be set forth." State v. Payano, 2009 WI 86, ¶51, 320 Wis.2d 348, 768 N.W.2d 832. The *Sullivan* court held further that a circuit court's failure to delineate the factors which influenced its decision constitues an erroenous exercise of discretion. Sullivan, p. 781. However, appellate courts independently review the record to determine, when a circuit court fails to set forth its reasoning, whether the record provides a basis for the circuit court's exercise of its discretion. Sullivan, p. 781; Pharr, p. 343.

B. Law Regarding Admission of "Other Acts" Eevidence.

In Wisconsin, the admissibility of "other acts" evidence is governed by Rule 904.04(2), Stats., which precludes proof an accused committed some other act for purposes of showing a corresponding character trait and the accused acted in conformity with that trait. Sullivan, p. 782.

One of the reasons for this rule is the "fear that an invitation to focus on an accused's character magnifies the risk jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." Id., p. 783-83. Additionally, there are concerns the jury will (1) condemn not because of the defendant's actual guilt in the instant case

but because he may have escaped punishment for previous acts and (2) the confusion of issues which may result from the introduction of other crimes evidence. Whitty v. State, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967). Thus, the general policy trial courts should take in assessing the admissibility of "other acts" evidence is one of exclusion. State v. Scheidell, 227 Wis.2d 285, 294, 595 N.W.2d 661 (1999) (long-standing policy such evidence should be allowed "sparingly").

In *Sullivan*, the Wisconsin Supreme Court took the opportunity to address concerns the *Whitty* presumption against admission of "other acts" evidence in criminal prosecutions had been "chipped away" over the years and reaffirmed its *vitality*. Sullivan, pp. 774-75.

In addressing these concerns, the Court established a three-step analytical framework trial courts must follow in assessing and ruling on the admissibility of "other acts" evidence. That framework is as follows:

1. Is the other acts evidence offered for an acceptable purpose under Rule 904.04(2), Stats.?

2. Is the other acts evidence relevant, considering two facets of relevance set forth in Rule 904.02, Stats.? First, does the other acts evidence relate to a fact or proposition that is of consequence to the determination of the action? Second, does the evidence have probative value so as to make the consequential fact or proposition more

probable than it would be without the evidence?

3. Is the probative value of the other acts evidence 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? *See* Rule 904.03, Stats.

Sullivan pp. 772-73.

The Court also required the proponent of the "other acts" evidence to clearly articulate its reason for seeking admission of the evidence and found the proponent had the burden of persuading the circuit court the three-step inquiry was satisfied. Id., p. 774. However, this requirement was later modified to shift the burden of establishing the third prong to the opponent of the "other acts" evidence. Marinez, ¶19.

In addressing the first prong for admissibility of "other acts" evidence, the proponent of the evidence and the court must articulate at least one permissible purpose for admission of the evidence. Marinez, ¶25.

In addressing the second prong regarding the relevance and probative value of the "other acts" evidence, the proponent of the evidence must articulate the fact or proposition the evidence is offered to prove and, in assessing the probative value of that evidence, the court must address and consider the "nearness in time, place and circumstances

to the alleged crime or to the fact or proposition sought to be proved." Sullivan, pp. 786-87. This is especially true when the proponent of the "other acts" evidence is offering it to establish the defendant's identity as the perpetrator of the crime charged. State v. Kuntz, 160 Wis.2d 722, 749, 467 N.W.2d 531 (1991); State v. Fishnick, 127 Wis.2d 247, 262, 378 N.W.2d 272 (1985) (to prove identity "there should be such a concurrence of common features and so many points of similarity between the other acts and the crime charged that it can reasonably be said that the other acts and present act constitute the imprint of the defendant"). *See also* Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence, p. 190 (3d Edition, 2008) (if other acts used to identify defendant as perpetrator, there must be a signature-like quality to other acts and instant case).

Even if the proponent of the "other acts" evidence meets the first two requirements of the *Sullivan* test, the trial court must exercise reasonable discretion in weighing the probative value of the "other acts" evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury, or consideration of undue delay, waste of time or needless presentation of cumulative evidence. Sullivan, p. 789. Unfair prejudice results when the proffered evidence has a tendency

to influence the outcome by improper means or it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes the jury to base its decision on something other than the established propositions in the case. Sullivan, pp. 789-90; Payano, ¶89.

C. The Circuit Court Erroneously Exercised Its Discretion in Admitting "Other Acts" Eevidence.

In *Sullivan*, the court took the opportunity to "first comment" that, although the prosecutor, the proponent of the evidence, and the circuit court may have referred to the three-step framework required for analyzing other act evidence, they also must employ the "3-step framework" and relate the specific proffered facts to the analytical framework. If the court and prosecutor had *carefully* done so, in this case, they would have appreciated how the "other act" evidence "involving stalking" of law enforcement officers was irrelevant to whether the defendant was "disorderly" in a spontaneous traffic encounter between Vanremortel and a *citizen* whom he had never met and a citizen who had never seen him (Id., p. 153). If they had done so, the "circumstances" of Vanremortel's conduct described in the other acts proffer would have clearly established it was not proximate to Vanremortel's conduct on

5/22/16. Sullivan, pp. 786-87.

If the court and prosecutor had carefully considered the "3-step framework," they would also have appreciated how none of the permissible purposes for admission of "other acts" evidence applied, in this case, given the proffer's description of Vanremortel's "disorderly" conduct only toward law enforcement officers with whom, as the court stated, Vanremortel long "had issue" (R.16, pp. 6-7). While the court appreciated the difference between admission of this evidence involving law enforcement officers and a private citizen when it rejected "other acts" evidence involving a private citizen (other act number 3), it failed to carefully apply this distinction to the aggrieved individual in the instant prosecution who was also a private citizen without any of the authoritarian indicia worn by law enforcement which, apparently, gave Vanremortel "issues."

In finding Mr. Zager's other act incident was permissible for purposes of "context," in addition to motive and plan, the court wholly failed to distinguish between his potential testimony in describing his involvement in the incident of 5/22/16, with his testimony describing his personal experiences with Vanremortel years earlier. In other words, a limited description of his observation of Vanremortel on 5/22/16, and

telephone call to his wife, could have been presented without his exhaustive history and prejudicial comments against Vanremortel.

While the court did not articulate its reasoning for its overbroad "context" finding, it may have been the court believed S.Z. to be a surrogate law enforcement officer (as Zager's wife) and Vanremortel was arguably harassing Zager through his wife. However, there was no evidence proffered pre-trial to support this finding because the State knew Vanremortel did not know S.Z.; did not know the woman he encountered at the stop light was Zager's wife; or have any idea why Vanremortel exited his vehicle at the stop light to harangue the driver of the vehicle behind him. No one knew, pre-trial, even why Vanremortel exited his vehicle because S.Z. did not know what Vanremortel was shouting to her on Neenah Road (Id., p. 105). The court did not inquire regarding these critical facts as they affected its other act ruling and these critical facts were not presented by the prosecution to the court for its consideration. The prosecution only made these concessions in closing argument, long after the jury had heard the State's impermissible character evidence to convict Vanremortel in violation of §904.04(2), Stats. (Id., p. 169). In this respect, the court failed to examine the relevant facts.

Sullivan, pp. 780-81.

When neither the prosection nor the court addressed the significant difference between evidence of Vanremortel's *following*, or "stalking," law enforcement officers with whom Vanremortel "had issue" and the encounter on 5/22/16, they missed how the proffer established there was no "stalking," and it was actually S.Z. who was behind and "following" Vanremortel to the stop light before the brief encounter. In all of this, neither the court nor the prosecutor discussed how any determination of admissablility of "other acts" evidence should be governed by the long-standing policy this type of evidence should be used "sparingly." *See* State v. Scheidell, 227 Wis.2d 285, 294, 595 N.W.2d 661 (1999) (long-standing policy such evidence should be allowed sparingly).[5]

Two, the *Sullivan* court said both the prosecutor and the court also needed to carefully explore the probative value of the other act evidence. While the prosecutor argued in the pre-trial motion (Id., p. 5) the "other acts" evidence was related to intent, plan, motive and purpose, it also argued it

[5] The State, instead, argued outdated case authority prior to *Sullivan* when it said the court's evaluation must apply "neither a presumption of exclusion nor a presumption of admissibility" when determining admissibility. (Motion, p. 5, citing State v. Spear, 176 Wis.2d 1101, 1114, 501 N.W.2d 429 (1993)).

demonstrated the defendant's "pattern of stalking . . law enforcement"; corroborated the victim's statement; and established Vanremortel's conduct was "deliberate." (Id., pp. 6-7). However, none of the proffered evidence was probative because it did not address whether (a) Vanremortel's conduct was disorderly, although it was surely boisterous; or (b) it tended to provoke a disturbance within the circumstances presented and described by S.Z. It was not probative because it did not have a tendency to make the existence of Vanremortel's conduct on 5/22/16 more or less probable it was "disorderly" or "disturbing" in evaluating, as the prosecutor told the jury, "why S.Z. had the feelings she had, why she responded the way she did." (Id., p. 78). *See* §904.01, Stats. When the State conceded in closing argument it had no idea why Vanremortel left his vehicle (Id., p. 169), it effectively conceded the other act evidence was irrelevant to intent, plan, motive, and purpose, and was necessarily proffered in order to convict Vanremortel with character evidence and establish his propensity for this type of conduct as precluded by §904.04, Stats.[6]

[6] Professor Blinka explains how character is rarely at issue in the criminal law and modern law defines a criminal offense in terms of conduct, circumstances, and results, and rests squarely on "what happened [act] and defendant's state of mind." Blinka, p. 190.

The only way the State could have arguably met its burden to establish the purpose of Vanremortel's other act evidence was probative under step two of the three-step analysis, was to proffer Vanremortel knew S.Z. personally or knew she was Zager's wife and was targeting Zager at the stop light. However, Vanremortel did not know S.Z. It could be reasonably argued the "context" from Zager's telephone call to S.Z. on 5/22/16 actually caused her to be less frightened or provoked, as she was aware Vanremortel was really only a boisterous annoyance who slept in the park near the family barn. The proffer wholly failed to establish the probative value of the "other acts" when Vanremortel's encounters were only with law enforcement personnel. The State failed to establish pre-trial how these encounters were probative of a spontaneous traffic "dust-up" in which Vanremortel behaved rudely and inappropriately.

While evidence of other acts may be admitted if it tends to undermine an innocent explanation for an accused charged with criminal conduct, the court never inquired, for example, as a part of its analysis, whether there was any defense strategy to present an innocent explanation for the defendant's charged criminal conduct. Rather, had the court inquired, it would have been told the defense strategy was to tell the jury

Vanremortel's conduct was "bizarre" and could not be the basis for convicting the him of disorderly conduct beyond a reasonable doubt. Sullivan, p. 784. Vanremortel asserts this defense of characterizing his conduct as "bizarre" precludes the admissibility of any proffer of "other acts" evidence.

Three, the holding in *Sullivan* also addressed the necessity of carefully weighing the probative value of other act evidence against the danger of unfair prejudice. The court stated both the prosecutor and the court must carefully consider and articulate the balance of the probative value and unfair prejudice. Sullivan, pp. 773-74. The *Sullivan* court held unfair prejudice results when the proffered evidence has a tendency to influence the outcome, *inter alia*, provokes a jury's instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. The *Sullivan* court held the danger of unfair prejudice from other acts evidence "was that the jurors were so influenced by the other acts evidence that they would be likley to convict the defendant because the other act evidence showed him to be a bad man." Sullivan, pp. 789-90. The court refined the "legal prejudice" of its analysis by defining it as the "potential harm in a jury's concluding that because an actor commited one bad act, he necessarily committed the crime

with which he is now charged." Sullivan, Id, n. 19 (*citing* State v. Fishnick, 127 Wis.2d 247, 261-62, 378 N.W.2d 272 (1985)).

While the "other acts" evidence in this case was frequently and prejudicially characterized by the prosecutor as "stalking," there was no hint of stalking in Vanremortel's encounter with S.Z. either before, at the stop light, or after he drove into the school parking lot and S.Z. drove by.[7] Even describing Vanremortel's conduct as "stalking" is, *per se,* unfairly prejudicial because it mischaracterizes his conduct on 5/22/16, and because it makes his behavior appear far more frightening and likely to provoke a disturbance.

While the prosecutor argued in the pre-trial motion the other act evidence was related to intent, plan, motive, and purpose, the prosecutor's closing argument indicated the evidence was actually aimed at the defendant's character and propensity to commit a crime. The prosecutor reminded the jury early in her closing argument that the testimony from the officers established "Vanremortel has done this in the past." (Id., p. 168). The prosecutor went on to argue it was not "just S.Z. that was frightened by the defendant . . . the evidence of

[7] **Stalk 2**: to pursue or approach game, an enemy, etc., stealthily as from cover; **3**: to walk or move along stealthily or furtively. *Webster's New World Dictionary Second College Edition.*

all of these other acts, over a two year period before this, [it] provides a context and background for you to consider when looking at the conduct of the defendant of May 22nd of last year" (Id., p. 171). In rebuttal, the prosecutor reprised her argument to influence the jury "by improper means" by stating the "circumstances of the defendant's behavior" included the fact that "it has been going on for a long time." (Id., p. 175); Sullivan, pp. 789-90.

The other act evidence was also unfairly prejudicial given S.Z.'s description of her relatively unconcerned reaction to Vanremortel's presence on Neenah Road, both before and during the stop light encounter. It was unfairly prejudicial because the prosecutor used the "other acts" evidence from her husband's testimony to appeal to "the jury's sympathies" with *his* fears for his wife and family in avoiding Vanremortel. State v. Sullivan, pp. 789-90. Moreover, it cannot reasonably be argued the cumulative impact of the other act evidence, over years of Vanremortel's "disorderly" behavior, toward law enforcement, was actually limited by the generic instruction regardless whether jurors are assumed to follow the court's instructions.

The Vanremortel court submitted a precautionary instruction (WisJI-Criminal 275) to the jury addressing the

other act evidence presented at trial. Sullivan, p. 791 (*citing* State v. Mink, 146 Wis.2d 1, 17, 429 N.W.2d 99 (Ct. App. 1988). However, as in *Sullivan*, the cautionary instruction was too broad and its cautionary effect was "significantly disminished" because it never specifically distinguished between Vanremortel's "stalking" conduct toward law enforcement, whose authority over Vanremortel while he lived homeless on the streets apparently gave him "issue," and the traffic incident with S.Z.

In a case with scant evidence whether Vanremortel's disorderly conduct provoked a disturbance, it cannot be said the impact of the "other acts" evidence was anything but an attempt to insure Vanremortel was convicted with ample evidence of the law enforcement community's aggravation (particularly investigator Zager) with Vanremortel's complaints and his occasional, but onging, expressions of his negative attitude toward law enforcement.

D. The Courts Decision in Admitting "Other Acts" Evidence Was Not Harmless.

Introduction of the other acts evidence into Varemortel's trial was not harmless error. State v. Dyess 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985). The *Sullivan* court reiterated a conviction based on evidence erroneously admitted must be

reversed unless the court is certain the error did not influence the jury. Sullivan, p. 792.

The admission of the "other acts" evidence was not harmless for several reasons.

One, it improperly conflated a disparate act, on 5/22/16, into a course of behavior over a "two-year period" which affected not only S.Z., but law enforcement officers and, by inference, the entire community, unfairly making Vanremortel a "bad man."

Two, the other act evidence was not harmless because it effectively made police officers the co-victims of Vanremortel's conduct. Making law enforcement officers co-victims in this prosecution predictably appealed to the jury's sympathies and provoked its (community) instinct to punish. Sullivan, pp. 789-90; Payano, ¶ 89.

Three, the evidence was not harmless because it diverted the jury's attention, without any effective limitation from the cautionary instruction, from considering whether Vanremortel's conduct on 5/22/16 provoked a disturbance, rather than whether his conduct over a "two-year period" required conviction of disorderly conduct beyond a reasonable doubt.

Four, the evidence was not harmless because it

deprived Vanremortel of an effective defense. He was deprived of an effective defense because defense counsel was required by the other act evidence to explain and defend his client's behavior with law enforcement over a "two-year period," rather than focusing on whether the evidence of his client's shouts at S.Z. provoked a disturbance. Counsel summed up the defense by telling the jury the case was "really" about a young, homeless man living out of his car, with some mental issues, which police knew was "normal for him." (Id., p. 80; 172-74).

CONCLUSION

For the reasons stated, this Court should vacate the judgement of conviction and remand to the circuit court for findings not inconsistent with this ruling.

Dated at Wauwatosa, Wisconsin, this 20th day of June, 2018.

Respectfully submitted,

REBHOLZ & AUBERRY

_____

JAMES REBHOLZ
Attorney for Eric Vanremortel
State Bar No. 1012144

P.O. ADDRESS:
1414 Underwood Avenue, Suite 400
Wauwatosa, WI 53213
(414) 479-9130
(414) 479-9131 (Facsimile)
jrebholz2001@sbcglobal.net

CERTIFICATION

I certify this Brief conforms to the rules contained in §§809.19(8)(b) and (c), Stats., for a Brief prepared using the following font:

> Proportional sans serif font: 12 characters per inch, double spaced; 2 inch margins on the left and right sides and 1 inch margins on the other two sides. The length of this Brief is 6831 words.

Dated: June 20th , 2018

JAMES REBHOLZ

E-FILING CERTIFICATION

Pursuant to §§809.19(12)(f) and 809.32(fm), Stats., I hereby certify the text of the electronic copy of the Brief is identical to the text of the paper copy of the brief filed.

Dated at Wauwatosa, Wisconsin, this 20th day of June, 2018.

JAMES REBHOLZ

APPENDIX CERTIFICATION

I hereby certify that filed with this Brief, either as a separate document or as part of this Brief, is an appendix which complies with §809.19(2)(a) of the Wisconsin Statutes, and contains:

(1) a table of contents;

(2) the findings or opinions of the trial or post-conviction court; and

(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial or post-conviction court's reasoning regarding those issues.

I further certify that, if this Brief is 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 using first names and last initials 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.

Signed:

JAMES REBHOLZ

APPENDIX TABLE OF CONTENTS