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 & APPENDIX OF PLAINTIFF-RESPONDENT

NICHOLAS P. GRODE
Assistant District Attorney
Door County, Wisconsin
State Bar No. 1088007

1215 South Duluth Avenue
Sturgeon Bay Wisconsin, 54235
Tel. 920-746-2284
Fax 920-746-2381
Nicholas.grode@da.wi.gov

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STATEMENT OF THE ISSUE

Whether the trial Court's decision granting the State's motion to admit other acts pursuant to Wis. Stats. §§ 904.04(2) and 904.03 was erroneous and harmless.

The Circuit Court was not asked this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-respondent, the State of Wisconsin ("State") requests neither oral argument nor publication. This case can be resolved on the briefs by applying well-established legal principles to the facts presented.

STATEMENT OF THE CASE

On May 1, 2016, Greg Zager, then a Sergeant Investigator with the Sturgeon Bay Police Department, was leaving his property on Neenah Avenue in the City of Sturgeon Bay, Door County, Wisconsin. R.25: App. 116. Greg was off duty and heading home when he noticed a car following him. *Id.* While Greg wasn't sure at the time, he believed the car belonged to Eric Vanremortel, the appellant. R.25: 90-91; App. 116-117.

Greg decided to pull into the nearby parking lot of the Sawyer Park boat landing to observe what this suspicious vehicle would do. R. 25: 91; App. 117. Greg felt that if the vehicle didn't belong to the appellant it would simply keep driving; however, if the vehicle did belong to Vanremortel the encounter would be captured on the park security system. *Id.* The appellant not only followed Greg into the Sawyer Park lot, but followed Greg as he drove through and pulled out of the parking lot. R.25: 91-92; App. 117-118.

The appellant continued to follow Greg as he left the lot and turned onto the nearby Oregon Street Bridge. R.25: 92; App. 118. Upon crossing the bridge, Greg immediately turned right onto First Avenue. *Id.* At trial, Greg noted that this was not the most direct route to his home and that he took this route to see how far the appellant would follow him. *Id.* The appellant continued to parallel Greg until Greg arrived home. *Id.* Once home, Greg shared this experience with his wife, S.Z., so that she could "keep an eye out" for the appellant. R.25: 92-93; App.118-119.

The appellant came into contact with Greg and S.Z. again on May 22, 2016. R.25: 82; App. 108. Greg and S.Z. were, again, at their property on Neenah Avenue. R.25:84; App. 110. Greg left the property at approximately 4:40 p.m. when he observed the appellant drive by "really slowly" from Greg's right and through to

Greg's left. *Id*. While Greg would normally go left to head home, he decided to take a right to avoid the appellant. R.25: 85; App. 111.

While on the road, Greg checked his rear-view mirror to see if he could determine if the appellant would continue following him, and instead observed his wife, S.Z., leaving the property by turning left. R. 25: 86; App.112. Greg became concerned and called his wife to alert her that the appellant was in front of her and warn her to keep her distance; however, Greg soon lost sight of S.Z. R.25: 87; App. 113.

S.Z. had never met the appellant, had been informed about him and his past history of "stalking" her husband. R.25: 104; App. 130. By the time Greg called S.Z., she had already made the decision to turn left and decided to continue on, and did so, staying three car lengths behind the appellant. *Id.*

S.Z. soon came to a red light and watched as the appellant, despite the wide berth she had left him, exited his vehicle and came toward her. R.25: 105 App.131. S.Z. would later note that she was terrified as the appellant began shouting at her. *Id.* As soon as the light turned green, the appellant got back into his vehicle and drove on. *Id.* S.Z. continued on, across the intersection, to find that the appellant had pulled onto a side street. R.25: 105-106; App.131-132. As S.Z. passed, she observed the appellant again left his vehicle and yelled at her as she drove by. *Id.*

The State of Wisconsin later charged the appellant with one count of Disorderly Conduct. R.2: 1-3; App. 139-140. Prior to trial the State submitted a motion to allow for the introduction of four other acts of the appellant. The first of these other acts took place on March 27, 2013 and involved a situation where the appellant "stalked a retired Door County Sheriff's Investigator, Randall Tassoul, while Mr. Tassoul was in his private vehicle." See attached *State's Motion Regarding Other Acts Evidence*, Filed Nov. 14, 2016. R-App. 141-147. The second other act involved the appellant's actions from May 1, 2016 where the appellant followed Greg Zager through Sturgeon Bay. *Id.* at App. 141. The third other act stemmed from a January 12, 2016 incident where the appellant followed a L.H. as L.H. was snowmobiling with friends on the a trail near the Bayview Bridge in Nasewaupee, Door County. *Id.* at R-App. 141-142. The fourth, and final other act stemmed from a February 11, 2015 incident where the appellant followed a former Sturgeon Bay Community Service Officer, M.R., after M.R. observed the appellant sitting at the parking lot of the Ahnapee Trail and, as the appellant stated, "shined a friggin' light on him." *Id.* at R-App. 142-143.

The Court heard the other acts motion on May 17, 2017. R.18: 1-11; App. 148-158. When the Court inquired as to the defense's position as to the admission of these other acts, the appellant's attorney, Jonathan J. Gigot, stated "it's a little bit

tough for me to argue against most of this. The only one I really would have an issue with would be with the other acts dated…January 12, 2016…however, I think the other instances, … it's hard for me to argue against." R. 18: 4-5; App. 151-152.

The Court echoed Atty. Gigot's sentiments. First, by holding the January 12, 2016 act involving Mr. Hackendorff to be "too far-fetched" and thus inadmissible. R.18: 6; App. 153. Second, by allowing in the three other instances to be admitted into evidence. R.18: 7; App. 154.

In holding the other three acts admissible, the Court noted that he had considered the *Sullivan* factors and considered acts one and four to be evidence of a "system of criminal activity" on behalf of the defendant. R.18: 7; App.154. The Court further noted that the second act was part of the context of the appellant's alleged criminal behavior, and thus not an "other act". *Id.* However, the Court also held act two to be evidence of a system of criminal activity. *Id.*

On the day of trial the Court further limited what the State would be able to introduce by ensuring that the State's witnesses would only be able to describe the appellant's past behaviors, with no mention of the fact that the defendant was convicted of stalking as a result of act one. R.25: 9; App.101. The Court also took this opportunity to state that it allowed the other acts to come in for the purposes of motive, preparation or plan and context or background of the offense. R.25: 11; App.103.

The trial commenced soon thereafter. During opening statements, the State spoke about the other acts evidence the jury would hear during the trail, stating "the purpose of introducing some of this other conduct of the defendant is just to put things into context for you as to why S.Z. had the feelings she had, why she responded the way she did." R.25: 78; App.104.

The Defense opened his case by stating that "… this case is about a young homeless man that is living out of his car and, quite frankly, has - - has some mental issues." R.25: 78; App. 104. The Defense went on to state, while speaking about the other acts "… pay close attention to those incidents and those fact patterns as they are important." R.25: 78-79; App. 104-105. The Defense goes on to state, after discussing the facts of the case, "(n)ow, what you are going to hear from the other officers as well is that this conduct has happened before. Mr. Vanremortel is known to do this. This is something he does. This, if you will, is normal for him." R.25: 80; App.106.

As the trial progressed, both the State and the Defense asked the witnesses questions relating to the other acts. During closing arguments the State noted "(t)he defendant knows the kind of reaction he gets out of people…." R.25: 171; App. 133.

The defense argued that the appellant's conduct should not be considered disorderly because, to those who know the appellant, this is normal conduct. R.25: 172-175; App. 134-137.

The appellant now appeals on the basis that that Court improperly applied the *Sullivan* analysis and that doing so was not harmless to the appellant. The State disagrees and addresses each of these issues in turn.

ARGUMENT

I. STANDARD OF REVIEW

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, 36 (1998). Per *Sullivan*, an appellate Court should sustain an evidentiary ruling if it finds that the Circuit Court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *Id.* Appellate Courts should not disturb a Circuit Court's decision to admit or exclude other acts evidence unless the Circuit Court erroneously exercised its discretion. *State v. Jackson*, 2014 WI 4, ¶ 43, 352 Wis. 2d 249, 272, 841 N.W.2d 791, 802.

II. THE CIRCUIT COURT PROPERLY APPLIED THE SULLIVAN STANDARD IN DECIDING TO ALLOW IN THE OTHER ACTS EVIDECE.

In Wisconsin, the admissibility of other acts evidence is governed by Wis. Stats. 904.04(2) and 904.03. The seminal case of *State v. Sullivan* provides a three-prong to assist Courts in determining if evidence is properly admissible. 216 Wis. 2d 768, 780, 576 N.W.2d 30, 36 (1998).

The first prong of this test asks Courts to consider if the evidence is offered for a permissible purpose, such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. *Id.* at 772, 576 N.W.2d at 32. This list is not exclusionary but, rather illustrative of a few permissible purposes. *State v. Payano*, 2008 WI App 74, ¶ 14, 312 Wis. 2d 224, 235, 752 N.W.2d 378, 383–84, *rev'd*, 2009 WI 86, ¶ 14, 320 Wis. 2d 348, 768 N.W.2d 832. Other acts evidence is permissible to show the context of the crime and provide an explanation of the case. *Id.* at ¶ 18, 312 Wis. 2d at 236, 752 N.W.2d at 384. Further, the Wisconsin Supreme Court has broadly defined the "plan" exception of Wis. Stat. § 904.04(2), to include "a system of criminal activity" comprised of multiple acts of a similar nature, not all necessarily culminating in the

charged crime or crimes. *See State v. Friedrich*, 135 Wis.2d 1, 24, 398 N.W.2d 763 (1987).

The second prong of the test asks Courts to determine if the other acts evidence is relevant, considering the two facets of relevance set forth in Wis. Stat. § 904.01. *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30, 32–33 (1998) The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. *Id.*

The third, and final prong of this test asks if the probative value of the other acts evidence 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. *See* Wis. Stat. § (Rule) 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30, 33 (1998)

If the party seeking admission meets the first two prongs of the test, the burden shifts to the opposing party to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice. *State v. Marinez*, 2011 WI 12, ¶ 18, 331 Wis. 2d 568, 585–86, 797 N.W.2d 399, 410.

The law concerning the admissibility of other acts evidence creates neither a presumption of exclusion nor a presumption of admissibility. Rather, the admissibility of other crimes evidence is controlled by the Circuit Court's neutral application within its discretion of the well-established rules of evidence along with the *Sullivan* standard outlined above. *See State v. Speer*, 176 Wis. 2d 1101, 1116, 501 N.W.2d 429, 434 (1993). While *Speer* was decided before *Sullivan*, this logic has been used since the *Sullivan* holding, albeit in an unpublished decision. *See State v. Snider*, No. 01-3284-CR, 2002 Wi. App. WESTLAW No. 2002 WL 19693262 at 241, ¶8.

From the record it seems clear that the Court correctly applied the *Sullivan* standard. As outlined above, the Court held that acts one and four were admissible on the grounds that those acts were being introduced to prove that the appellant's actions were part of a system of criminal activity, or in the alternative that they showed his motive, preparation, or plan. As noted above, these have all been held to be acceptable purposes. The Court held the second act provides context to the case at hand. As noted above, context is also an acceptable purpose. Thus, the first step of the *Sullivan* analysis was complete and Court moved on to the second step.

The Court also properly applied the second step of the *Sullivan* analysis. On pages 6 and 7 of its pretrial motion, the State noted that the evidence "demonstrated that the defendant's pattern of stalking, harassing and aggressively approaching those who have been or are associated with law enforcement. It also tends to corroborate the victim's statement. The evidence is offered to show the defendant's behavior toward the victim was deliberate, and not to be confused with accidental or mistaken conduct…" R-App. 146-147.

As noted above, this is a case where the appellant was alleged to have left his vehicle, on two occasions, and approached S.Z.'s vehicle. There are numerous reasons why this conduct may not be considered disorderly; however, given the background of the defendant's interactions with law enforcement, as outlined in the other acts, S.Z. felt terrified by the defendant's actions. R.25: 105; App. 131. Absent the other acts, S.Z.'s reaction would have been much more difficult to explain and the jury would have had a much more difficult time understanding why the appellant's actions were disorderly.

Further, the other acts show that the defendant's issues with law enforcement are what prompted his outburst, and not some other explanation, such as the defendant being followed too closely. These are not impermissible character references; rather, these add meat to the bone of why the S.Z. took the defendant's actions to be disorderly. S.Z.'s perception of the defendant's actions is a matter of consequence in the matter at hand and thus these other acts made that matter more probable.

While this extended logic is not fleshed out in the transcript, it seems apparent that all of the parties came to a similar conclusion as no one, including the trial counsel for the defendant, objected. Thus, the State concludes that the Court properly applied the second phase of the *Sullivan* analysis.

The Court also properly applied the third prong of the *Sullivan* analysis. As noted above, once the proponent of the other-acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice. In the case at hand, the defense trial counsel did not oppose the introduction of the other acts evidence. In fact, the defense trial counsel attempted to use the other acts to define the appellant's conduct as "normal". Since the defense trial counsel did not attempt to carry their burden, the third prong would not have precluded the admission of the evidence and thus the *Sullivan* analysis was properly completed and the other acts evidence was properly admitted into the case at hand.

For these reasons the State asks the Court to deny the defendant's motion.

III. SHOULD THIS COURT HOLD THE TRIAL COURT IMPROPERLY APPLIED THE *SULLIVAN* ANALYSIS, SUCH MISAPPLICATION WOULD CONSTITUTE A HARMLESS ERROR AS THE OTHER ACTS INFORMATION CONSTITUTED AN ESSENTIAL ELEMENT OF THE APPELLANT'S DEFENSE.

An erroneous admission of other acts evidence is subject to a harmless error analysis. *State v. Barreau*, 2002 WI App 198, ¶ 42, 257 Wis. 2d 203, 227, 651 N.W.2d 12, 24. Under this test, the appellant would be entitled to a new trial unless the State can show that there is no reasonable possibility that the error contributed to the conviction. *Id.*

Given the unique facts of this case, there is no reasonable probability that the error, should this Court find there was one, contributed to the conviction. This is evidenced by two factors. First, as is outlined above, the appellant's trail counsel did not object to acts one, two and four coming in. Second, trial counsel then proceeded to use acts one, two and four as the centerpiece of their defense, arguing that the conduct observed by S.Z. was normal for the appellant. R.25: 174; App. 136.

While there is an argument that the defendant waived the issue currently on appeal by proceeding as such at trial, and while the State does not waive this argument, trail counsel's actions suggest that a harmless error analysis is more appropriate. *See State v. Norwood*, 2005 WI App 218, 287 Wis. 2d 679, 706 N.W.2d 683. As outlined above, trial counsel argued that this type of conduct was normal for the defendant, and the parties involved were aware of the defendant's propensity to engage in such conduct; thus, the defendant's conduct should not be considered disorderly.

While there may be some argument that defense's trail counsel felt as though he would not be successful in arguing against the admission of these other acts, the Courts rulings do not tend to support this argument. This is evidenced by the Court throwing out the only act that was objected to. R.18: 4-5; App. 151-152.

Whatever his logic, trial counsel did not object and chose to use the other acts as examples of his defense, thus, the Court's decision to allow in the other acts in question should be deemed a harmless error and this Court should deny the appellant's motion.

CONCLUSION

Based upon the foregoing authorities and arguments, the State respectfully requests that this Court hold that the Circuit Court properly admitted the other acts evidence, or, in the alternative, that the Circuit Court's admission of the other acts evidence was harmless.

Respectfully submitted this 31st day of October, 2018.

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Nicholas P. Grode
Door County Assistant District Attorney
State Bar No. 1088007
Plaintiff-Respondent

CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font. The text is 13 point type and the length of the brief is 3187 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains (1) a Table of Contents; (2) relevant trial and record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regrading those issues. I 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. Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by First-Class mail or other class of mail that is at least as expeditious, on October 30th, 2018. I further certify that the brief and appendix was correctly addressed and postage was prepaid.

Respectfully submitted this 31st day of October, 2018.

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Nicholas P. Grode
Door County Assistant District Attorney
State Bar No. 1088007
Plaintiff-Respondent

APPENDIX