STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018 AP 649 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL A. GRIFFIN,

Defendant-Appellant.

On Appeal From Judgment of Conviction Entered in Fond du Lac County, Circuit Court Branch 1, The Honorable Dale L. English Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was Griffin entitled to present evidence to the jury that the crimes were actually committed by Arriella Smart pursuant to State v. Denny.

   The circuit court answered no.

2. Should videos depicting Griffin shouting at the victims to startle them from sleep have been suppressed as inadmissible other acts evidence?

   The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the defendant-appellant, Daniel A. Griffin (hereinafter "Griffin") anticipates case can be decided by the party's briefs. Publication would be appropriate as the published opinion would establish a new rule of law or modify, clarify, or criticize an existing rule. Wis. Stats. §§ 809.22 and 809.23(1)(a)1.

STATEMENT OF THE CASE AND FACTS

On July 21, 2015, Griffin was charged with 1st Degree Reckless Homicide and two counts of Childs Abuse-Intentionally Causing Great Bodily Harm. (R. 1). The charges stemmed from injuries caused to twin brothers, MHP, who died as a result of his injuries, and MDP. (R. 1).

On July 7, 2015, MHP, a 14 month old infant, died as a result of a significant and traumatic injury, with a cause of death likely the result of a lacerated liver. (R. 1: 1). His twin brother, MDP, was also hospitalized that day for injuries substantially similar to MHP. (R. 1: 1). Both brothers (hereinafter when referred to collectively "the twins") had broken ribs, bruising across their torsos and genitals, lacerated livers, and other internal injuries, as well as having alcohol present in their bloodstreams. (R. 1: 1). There is no dispute that their injuries were intentionally caused and not accidental in nature.

Griffin was, on that date, involved in a romantic relationship with Airrealle Smart (hereinafter "Smart"), the mother of the twins, although he was not their father. (R. 1: 2). Griffin and Smart had recently moved to the city of Fond du Lac, in Fond du Lac County, to look for employment, and had been staying with Smart's friend, Shakita Pillow (hereinafter "Pillow"). (R. 1: 2-3). Griffin and Smart, along with the twins, moved into Pillow's residence on July 4, 2015. (R. 102: 213). Pillow's 5 year old son, C.H, was also a resident there. (R. 102: 248). [1]

On July 7, 2015, three days after Griffin and Smart arrived in Fond du Lac, emergency personnel were dispatched to Pillow's residence at approximately 1:56 p.m. following an emergency call about MHP, who was unresponsive. (R. 1: 2). MHP ultimately died that day as a result of substantial injuries to his torso. (R. 1: 1).

Following the death of MHP, both Griffin and Smart were interviewed multiple times by police regarding the injuries to the twins. (R. 1: 2-5). Both initially denied any knowledge of how the twins sustained their injuries. (R. 1: 2-3). Also questioned was C.H., who was forensically interviewed three days after the death of MHP. (R. 32; App 106). During that interview, C.H. stated that he observed both Smart and Griffin commit violent acts against the twins in the days before MHP's death. (R. 31, R. 91: 47-48; App. 106-108, 165-166).

[1] Throughout the transcripts and pre-trial filings, some of which are included in the appendix to this brief, the court and parties refer to C.H. by his first name of C.J. Because the child's initials are C.H., he will be referred to as such in this brief. It is noted for clarity however, that C.H. and C.J. are the same person.

During his interview, C.H. made a number of allegations against Smart. (R. 31: 1-2; App. 106-107). These include allegations that C.H. was personally "whoop[ed]" and hit with a belt by Smart, that he observed Smart "whooping" and striking both of the twins with a belt, that Smart had screamed profanities at the twins, that Smart kicked the twins, and "cracked the hands" of one of the twins. (R. 31: 1-2; App. 106-107).

In one of her interviews with law enforcement officers, Smart admitted to stepping on the twins "in a playful manner" on past occasions. (R. 31: 2; 91: 31; App. 107, 149). In a video recorded interview from July 15, 2015 which was reviewed by the court, Smart made a number of incriminating statements. (R. 92: 10; App. 180). Specifically, she admitted to using a belt to strike the twins, says "it might seem like I did this", says that C.H. would not lie about witnessing her physically abusing the twins, and that she needs to take the blame for MHP's death. (R. 31: 2; 92: 10-13; App. 107, 180-183). At one point during the interview she begins questioning whether she could have killed MHP, even if it was accidental. (R. 92: 13; App. 183).

Later in the interview, Smart begins to implicate Griffin as being responsible for the injuries sustained by the twins. (R. 92: 14; App. 184). Smart tells officers that she observed Griffin standing on one of the twins with his foot for a period of 5-6 seconds. (R. 92: 14; App. 184). After telling this to officers, Smart placed a phone call to Griffin with officers in the room, utilizing the speaker phone function of the phone. (R. 92: 14; App. 184). During that conversation Griffin denied any wrongdoing and disputed that he had stood on or injured the twins in any way. (R. 92: 14-15; App. 184-85).

Based substantially on the statements from Smart implicating Griffin, Griffin was charged for the injuries sustained by the twins and the death of MHP. (R. 1).

During pretrial proceedings, the state filed a memorandum seeking to preclude the introduction of any evidence suggesting a third party perpetrator. (R. 20; App. 104). The state's motion specifically sought to exclude evidence that the injuries to MHP and MDP were caused by Smart or Pillow as being inadmissible under State v Denny. (R. 20; App. 104). Griffin filed a response detailing the evidence that would be shown to demonstrate the injuries to the twins were caused by either Smart or Pillow. [2] (R. 31: App. 106). The primary basis for seeking admission of evidence pursuant to Denny was twofold, first, the statements made by Smart to investigators, and second, the statements made by C.H. to the forensic interviewer. (R. 31; App. 106).

Along with the responsive filing seeking admission of evidence pursuant to Denny, Griffin also filed a motion seeking to admit the recorded statement of C.H. (R. 32). At a later hearing, it was made clear that this request was contingent upon the court's decision to admit third-party perpetrator evidence pursuant to Denny. (R. 92: 22; App. 192).

At a motion hearing on August 12, 2016 the court heard arguments relating to the admissibility of third-party

[2] Although the pretrial Denny motions dealt with evidence against both Smart and Pillow, Griffin now concedes that evidence suggesting that Pillow caused the injuries would be inadmissible under Denny, as such, this appeal, as it relates to the Denny evidence, will only apply to the court's ruling denying the admissibility of evidence that Smart committed the crimes.

perpetrator evidence pursuant to Denny. (R. 91: 17-52; App. 135-170). Following arguments from both sides, the court decided that it would watch the entire video of the July 15, 2015 interrogation of Smart. (R. 91: 50-51; App. 168-169).

At a subsequent hearing held on August 19, 2016, the court ultimately barred the Griffin from introducing evidence that Smart caused the injuries to the twins pursuant to the Denny standard. (R. 92: 21; App. 191).

The court examined all three prongs of the Denny standard in issuing its ruling. First, the court determined that Griffin would be able to demonstrate that Smart had motive to cause the injuries to the twins. (R. 92: 16-17; App. 186-187). Second, the court concluded that Griffin would be able to demonstrate that Smart had the opportunity to commit the crime based on her proximity to the twins during the general time period when the injuries would have to have been inflicted. (R. 92: 17-18; App. 187-188).

However, when assessing the third prong, direct connection, the court determined that Griffin could not show that Smart was directly connected to the crime. (R. 92: 21; App. 191). As such, the court denied Griffin's request to introduce evidence that the crime was caused by Smart. (R. 92: 21; App. 191). The court's reasoning was as follows:

> So, with respect to Ms. Smart, we've got C.J.'s statement that she used physical discipline with the twins – belt, hangar, and kicked them. Ms. Smart admitted using the belt on the kids for discipline. Attorney Toney argues, and I think there's validity to it, that the kicking that was alleged would not be in the area so where the mechanism of de3ath per the coroner existed.

Actually, per the coroner, the mechanism of injuries was consistent with somebody stepping on the child. And then we've got the hangar and the belt. C.J. also implicated other though, including Mr. Griffin, as far as physical discipline involving the kids.

So I don't think there's enough there, as I said last Friday, solely with respect to C.J.'s statements to establish a direct connection between Ms. Smart and the crimes that are alleged, the reckless homicide and child abuse, which allegedly occurred on that date.

So then is there enough when one adds Ms. Smart's statements in the interview? And I guess I don't, I don't see that. Because when you actually watch the interview, as I said before not to be overly redundant, and you watch the comments in context and how things are said, I don't think there's enough there – unless one takes it out of context and just reads it on a piece of paper – that would establish evidence that suggested that she committed these crimes and not somebody else. I think that the direct connection is missing – even if you take C.J.'s statements which implicate her potentially and others and her own statements. So I think the direct connection is missing.

If I also include Attorney Toney's police reports, text messages between the defendant and Detective Hahn where Mr. Griffin is saying, you have the wrong person. You know it wasn't Ms. Smart. It was somebody else. It was Ms. Pillow. That even provides – that even further weakens any direct connection argument. But I think the direct

> connection is missing even before you tack on and add on the text messages attributed to Mr. Griffin saying she didn't do it.

(R. 92: 19-21; App. 189-91).

Consequently, Griffin then withdrew his motion to admit the recorded statement of C.H. as it was no longer relevant. (R. 92: 22; App. 192). Had the motion to allow Denny evidence been granted, Griffin would have sought admission of the C.H. statement, which would not have been opposed by the state. (R. 91: 17; App. 135).

One other significant pretrial motion was also filed by the state. Specifically, the state filed a motion seeking to introduce Other Acts Evidence pursuant to Wis. Stat. § 904.04(2), which was accompanied by an affidavit from District Attorney Eric Toney. (R. 21; 22; App. 109). The motion sought to introduce three videos recovered from the defendant's cell phone. (R. 21: 1-2).

The first two of these videos were made at approximately the same time and appear to have been made within the same minute as each other. (R. 21: 1-2). The videos were time and date stamped as having been created at 7:08 p.m. on July 5, 2015. (R. 21: 1-2). These two videos depict the twins sleeping next to one another with Griffin lying next to them on a bed. (R. 21: 1-2). Both videos show Griffin positioning himself to within 6-12 inches of the twin's heads and shouting loudly, apparently in an effort to startle the twins awake. (R. 21: 1-2). In the first of the two videos the twins are observed flinching. (R. 21: 1-2).

The third video the state sought to admit from Griffin's cell phone was one created on June 26, 2015 at 12:40 a.m. (R.

21: 2). This third video was ultimately ruled to be irrelevant and unfairly prejudicial to Griffin, and was excluded from being played to the jury at trial. (R. 100: 144-146).

Griffin filed a response to the state's motion seeking admission of the videos. (R. 34; App. 117). In his response, Griffin does not dispute the Toney's description of the videos, but does challenge the admissibility of the videos for not being relevant and being unduly prejudicial to Griffin. (R. 34: 1-2; App. 117-118). In challenging the relevance of the videos, Griffin argued that the attempts to scare or startle the twins does not establish any type of motive, opportunity, intent, preparation, plan, or any other factor required by Wis. Stat. § 904.04 (2). (R. 34: 2; App. 118). Griffin further argued that the videos did not depict any injuries to the twins nor did it support the state's position that Griffin caused the injuries to the twins because he was upset with them for wetting themselves and soiling a mattress. (R. 34: 2; App. 118).

The court ruled on this motion at the same hearing as the Denny evidence hearing on August 12, 2016 (R. 91: 2-17; App. 120-135). At the hearing, the court issued a lengthy oral decision in which it ultimately determined that the videos were admissible as they showed Griffin's intent and provided context for Griffin's relationship with the twins. (R. 91: 15-16; App. 133-134). The court also determined that the probative value of the videos was not outweighed by their unfair prejudice. (R. 91: 16; App. 134). As such, the court ruled that the videos were admissible. (R. 91: 17; App. 135).

The case against Griffin eventually proceeded to a 5-day jury trial. (R. 97-108). At the conclusion of the trial the jury rendered a verdict of guilty on all 3 counts. (R. 68; App 101). Griffin was subsequently sentenced to 40 years of initial

confinement and 20 years of extended supervision on count 1, 25 years of initial confinement and 15 years of extended supervision on count 2 to be served consecutive to count 1, and 25 years of initial confinement and 15 years of extended supervision on count 3 to be served concurrent to counts 1 and 2. (R. 68; App. 101). Griffin now appeals.

ARGUMENT

I. Griffin Was Entitled To Present Evidence To The Jury That The Crimes Were Actually Committed By Arriella Smart Pursuant To State v. Denny.

A. Standard of Review

This court ordinarily reviews the circuit court's evidentiary decisions for an erroneous exercise of discretion. State v. Munford, 2010 WI App 168, ¶ 27, 330 Wis.2d 575, 794 N.W.2d 264. However, when the circuit court denies admission of proffered evidence that implicates a defendant's constitutional right to present a defense, the decision to bar the evidence is a question of constitutional fact that this court reviews de novo. State v. Wilson, 2015 WI 48, ¶ 47, 362 Wis. 2d 193, 864 N.W.2d 52 (citations omitted).

B. Third Party Perpetrator Evidence is Admissible Under the Standard Set Forth in State v. Denny.

"The law is well established that a defendant has due process rights under the United States and Wisconsin Constitutions to present a theory of defense to the jury." Wilson, 2015 WI 48, ¶ 3; Holmes v. South Carolina, 547 U.S. 319 (2006). Evidence that the crime was committed by a third party is admissible if it can be demonstrated that there was a "legitimate tendency" that the other suspect may have

committed the crime. State v. Denny, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (1984). To demonstrate this legitimate tendency, a defendant must make a showing that the third party had motive and opportunity to commit the crime, as well as make a showing that there is "evidence to directly connect [the] third person to the crime charged which is not remote in time, place, or circumstances." Id. Evidence of third party guilt is commonly called "Denny evidence" because it adheres to the test set forth in Denny. Wilson, 2015 WI 48, ¶ 56.

To determine the admissibility of Denny evidence, the court must complete an assessment of each prong. Id. The Supreme Court in Wilson laid out how each of these prongs must be analyzed:

> First, did the alleged third-party perpetrator have a plausible reason to commit the crime? This is the motive prong.
>
> Second, could the alleged third-party perpetrator have committed the crime, directly or indirectly? In other words, does the evidence create a practical possibility that the third party committed the crime? This is the opportunity prong.
>
> Third, is there evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly? This is the direct connection prong. Logically, direct connection evidence should firm up the defendant's theory of the crime and take it beyond mere speculation. It is the defendant's responsibility to show a *legitimate* tendency that the alleged third-party perpetrator committed the crime.

Id. ¶¶ 57-59.

Presence at the crime scene can be considered under both opportunity and direct connection, however presence alone does not ordinarily satisfy both of these prongs. Id. ¶ 60. Each piece of proffered evidence is not required to satisfy all three prongs of the Denny. Id. ¶ 53. "'Facts give meaning to other facts,' and certain pieces of evidence become significant only in the aggregate, upon the proffer of other evidence." Id. (citing State v. Vollbrecht, 2012 WI App 90, ¶ 26, 344 Wis.2d 69, 820 N.W.2d 443.)

C. The Circuit Court Erred in Denying Griffin's Request to Admit Denny Evidence

1. The Proffered Evidence was Sufficient to Satisfy the Denny standard.

In the present case, the circuit court did assess all three prongs in great detail at both the August 12, 2016 and August 19, 2016 hearings. (R. 91; 92). First, the circuit court concluded that Griffin had satisfied the motive prong by showing that Smart had a motive to cause the injuries to the twins. (R. 92: 16-17; App. 186-197). Second, the circuit court determined that Smart had opportunity to commit the crimes due to her presence in the house and being with the twins on July 7, 2015. (R. 92: 17-18; App. 187-188).

However, when determining whether Smart had a direct connection to the crime, the circuit court determined that Griffin had failed to satisfy this final prong, and denied the admission of the third-party perpetrator evidence. (R. 92: 21; App. 191).

In Wilson, the Supreme Court provided substantial guidance on what constitutes a direct connection when

assessing Denny evidence. The Supreme Court instructed circuit courts to examine proffered evidence along with all other evidence to determine whether the proffered evidence suggests that the third-party actually committed the crime. Wilson, 2015 WI 48 ¶ 71 (citations omitted). One example provided by the court is that a third-party's self-incriminating statement can be used to prove the direct connection. Id. ¶ 71 (citing See Erwin v. State, 729 S.W.2d 709, 714-17 (Tex.Crim.App. 1987)).

Here, Griffin did establish that Smart had a direct connection to the commission of the crime. First, by Smart's own admissions, she had in the past stepped on the twins "in a playful manner." The twins were 14 months old on July 7, 2015. As the court itself noted, this claim is fairly nonsensical as it was unsure how one could stand on a 1 year old in a playful manner. (R. 91: 31: App. 149). An adult stepping on infants of that age could not be playful and would almost certainly result in substantial injuries to the child. Further, as noted by Dr. P. Douglas Kelley at trial, the injuries to the twins were certainly consistent with them being stood on or kicked by an adult. (R. 105: 151-52).

The evidence proffered by Griffin was sufficient to show a direct connection between Smart and the injuries caused to the twins. Smart was present in the home when they were injured. She was witnessed by C.H. kicking, "whooping", and beating the twins in the days before they died. Smart and Griffin moved into Pillow's residence only 3 days before the death of MHP, meaning that C.H.'s observations of Smart behaving in this manner necessarily occurred in the 3 days prior to MHP's death. Smart herself made incriminating statements, including that she had stepped on the twins and that she believes she caused the injuries. She also acknowledged that C.H. was a truthful witness and that

she physically abused the twins in the days before MHP's death.

By denying Griffin's request to admit Denny evidence implicating Smart as the perpetrator, Griffin was denied his constitutional right to present a defense as he was left with no defense whatsoever. The twins' injuries were clearly caused intentionally. Because he was not allowed to show evidence to the jury that Smart had motive, opportunity, and a direct connection to the crime, Griffin was effectively handcuffed in challenging the state's case against him. Although he was able to assert that he did not cause the injuries, Griffin was unable to present to the jury an alternative theory of who injured the twins.

Griffin satisfied the requirement under Denny to show a direct connection between Smart and the commission of the crimes. The proffered evidence did establish a direct connection, and Griffin should have been allowed to present the Denny evidence to the jury. By not allowing him to do so, the court violated Griffin's right to present a defense at trial.

2. The Circuit Court Abused Its Discretion by Improperly Considering Certain Evidence

When considering whether a defendant is allowed to present Denny evidence the circuit court must conduct its inquiry without reference to the state's evidence because it is unconstitutional to deny a defendant the right to present a defense based on seemingly overwhelming evidence against him. Wilson, 2015 WI 48, ¶ 61; see also Holmes, 547 U.S. at 330-31.

The circuit court abused its discretion when determining that Griffin would not be allowed to present Denny evidence when it took into consideration the strength

of the state's case. When issuing its oral ruling, the court evoked police reports and text messages sent from Griffin in which Griffin initially indicated that he believed Pillow was the perpetrator.

By relying in part on evidence proffered by the state, the court abused its discretion. Specifically, the court stated that Griffin's showing of a direct connection between Smart and the commission of the crime was hampered by text messages sent by Griffin in the days following the death of MHP (R. 92: 20-21; App. 190-91). Simply because Griffin initially thought that Smart couldn't have caused the injuries to the twins shouldn't preempt him from presenting such a theory to the jury, particularly when Griffin made those statements prior to being fully aware of the evidence suggesting that Smart was in fact the perpetrator.

By considering Griffin's texts, the court further erred in applying the Denny standard. By considering the state's evidence when weighing Griffin's proffered evidence under the Denny standard, the court abused its discretion and created a reversible error. Had this evidence not been considered, and had the court properly weighed the proffered evidence, the Denny evidence would have been admissible as it showed that Smart had motive, opportunity, and a direct connection to the crime.

II. The Circuit Court Erred in Admitting the Two Cell Phone Videos as Other Acts Evidence.

A. Standard of Review

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

B. The Cell Phone Videos Are Inadmissible under Wis. Stat. § 904.04 and Sullivan.

Generally, evidence of other, uncharged, bad acts, may not be presented to impugn the character of the defendant or to show that the defendant acted in conformity with the bad acts; however, such bad acts may be admitted for another proper purpose:

> [E]vidence 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.

Wis. Stat. §904.04(2)(a).

The list of permissible purposes listed in §904.04(2)(a) is illustrative, and not exhaustive; thus, evidence which "'furnishes part of the context of the crime' or is necessary to a 'full presentation' of the case" may be admitted for that purpose. State v. Shillcutt, 116 Wis.2d 227, 237, 341 N.W.2d 716 (Ct. App. 1983) (citation omitted).

One reason 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." State v.Sullivan, 216 Wis.2d at 783. 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").

The Sullivan decision sought to reaffirm the vitality of Whitty. Sullivan, 216 Wis. 2d at 775. Thus, the court in Sullivan set forth a three-step method to evaluate proffered other acts evidence:

> Whether other acts evidence should be admitted requires the application of a three-part test: (1) is the other acts evidence offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

> accident; (2) is the other acts evidence relevant; that is, is the evidence of consequence to the determination of the action, and does it have probative value; and (3) is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.

State v. Cofield, 2000 WI App 196, ¶9, 238 Wis.2d 467, 618 N.W.2d 214, citing Sullivan, 216 Wis.2d at 772-73. Thus, the three prongs that the court must address can be abbreviated as: 1. acceptable purpose; 2. relevance; and, 3. probative value not outweighed by unfair prejudice.

In the present case, the court addressed all three of the Sullivan prongs at the August 12, 2016 motion hearing. (R. 91: 12-16; App. 130-134).

First, the court determined that the videos were being offered for an acceptable purpose, specifically, the court determined the videos were being offered to show intent and context. (R. 91: 14; App. 132). However, the videos do neither of those. Griffin shouting at the twins certainly does not establish that he had any intent to cause physical harm to the twins, nor does it establish any context that he was physically abusive towards the twins. It is illogical to jump from Griffin shouting at the twins whilst they slept to standing on the twins, as if the shouting has any indicia that he would cause substantial physical harm to the twins.

As such, the court erred in determining that the videos were being offered for an acceptable purpose. The sole purpose was to paint Griffin as a mean-spirited person who would deliberately attempt to startle sleeping toddlers.

Next, the court assessed whether the videos were relevant. (R. 91: 14; App. 132). Again, the court erred in its assessment of the relevance of the videos. Similar to the arguments made above regarding relevant purpose, the videos are simply not relevant towards any showing that Griffin had intent to cause the traumatic injuries sustained by the twins on July 7, 2015.

Finally, the circuit court erred when determining that the videos were not unfairly prejudicial to Griffin. 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, 216 Wis.2d at 789-90.

Here, the videos sought to do exactly what Sullivan is concerned with, appealing to jury's sympathies, arise a sense of horror, and provokes the jury's instinct to punish. The videos showed Griffin appearing to startle the twins awake for his own amusement. By showing the videos the state wanted to play on the sympathies of the jurors by depicting non-physical conduct of Griffin behaving in an outrageous manner.

For the above entitled reasons, the court erred in allowing the videos to be shown to the jury as "other acts evidence" under Wis. Stat. § 904.04.

CONCLUSION

For the above stated reasons, Griffin respectfully requests that this court order that the Judgement of Conviction be reversed, that the case be remanded for a new trial with the following instructions for the circuit court. First, to allow Griffin to present Denny evidence that the injuries to the twins were caused by Smart, including Smart's statements and the forensic interview of C.H.; and second, that the two videos taken from Griffin's cell phone be excluded pursuant to Wis. Stat. § 904.04 and Sullivan.

Dated this 10th day of August, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I 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, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4894 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATE OF MAILING

I hereby certify that:

This brief was, on August 13, 2018, delivered to the United States Postal Service (USPS) for delivery to the Clerk of Court of Appeals within three calendar days pursuant to Wis. Stat. § 809.80 (3)(b). I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 13th day of August, 2018.

Signed:

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A P P E N D I X

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CERTIFICATION AS TO APPENDIX

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 § 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.

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.

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