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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

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

**I. The Circuit Court Erred In Denying Griffin
the Opportunity to Present Denny Evidence
to the Jury.**

In his motion to the circuit court seeking admission of Denny evidence, that these crimes had in fact been perpetrated by Airrealle Smart, Griffin met his burden of demonstrating Smart's motive, opportunity, and direct connection to the crime, and the circuit court erred in denying his request to present that evidence to the jury. As has been

clearly set forth in prior briefs, there is no dispute from the parties that Griffin demonstrated both motive and opportunity. This appeal turns on whether Griffin's proffered evidence demonstrates a direct connection between Smart and the injuries to her children. The evidence presented by Griffin did in fact demonstrate that direct connection.

In demonstrating Smart's direct connection to the crimes committed, Griffin presented the trial court with an abundance of evidence that Smart caused the injuries to her children. In its response brief, the state acknowledges that Smart admitted to disciplining the 14-month old twins by beating them with a belt. (Resp. Brief p. 24). The state also concedes that CJ, in his statement to the police, described Smart kicking the twins in the days prior to MHP's death. (Resp. Brief p. 24).

The state refuses to concede, however, that Smart admitted to stepping on the twins. In its responsive brief the state downplays Smart's admission to such conduct by reducing them only to unproven allegations by Griffin. (Resp. Brief p. 25). This could not be further from the truth. In his motion to the circuit court seeking admission of the Denny evidence, Griffin first raised Smart's admission to stepping on the twins. (R. 31: 2). At no point before the circuit court was this disputed by the state.

Taking it one step further, the circuit court itself recognized that Smart admitted to such conduct. (R. 91: 31). The court explicitly noted that Smart admitted to stepping on her children, and that her efforts to minimize that conduct by calling it "playful" was absolutely nonsensical. (R. 91: 31). Again, the state did not object to or dispute this statement from Smart cited by the court.

This court should accept as fact that Smart told officers, in her interview with police, that she did step on the twins on prior occasions, and that she attempted to downplay this act by calling it playful.

Despite her admissions to stepping on her children, the court failed to find a direct connection. By doing so, the court erroneously exercised its discretion. All of the proffered direct connection evidence; the admissions by Smart, coupled with the statements from CJ, satisfied the requirements under Denny.

II. The Circuit Court Erred in Admitting the Cell Phone Videos.

Griffin was charged with 1st Degree Reckless Homicide and two counts of Child Abuse- Intentionally Causing Great Bodily Harm. (R. 1). The cell phone videos that were allowed to be shown to the jury depicted Griffin startling the children awake by shouting at them as they slept. At no point in these videos was Griffin depicted as being physically violent with the twins. At no point in these videos was Griffin depicted as threatening violence against the twins. Their admission was not for any acceptable purpose.

Wis. Stat. § 904.04(2)(a) sets forth the standard for what constitutes an acceptable purpose for the admission of other acts evidence. The state asserts in its responsive brief, that the court's determination that the videos established both context and intent. (Resp. Brief p. 29-30). The videos did neither. The videos offered no insight into whether Griffin committed the alleged offense of standing on the children for several seconds on the morning of July 7, 2015. Shouting at two children to wake them up, apparently for the entertainment value of waking them up in a sudden manner as

evidenced by Griffin laughing in the videos, does nothing to establish Griffin's intent to cause substantial and devastating injuries to the children. The videos also failed to provide any context that Griffin, unlike Smart by her own admissions, was physically violent or physically abusive towards the children.

Rather, the videos were only offered for the purpose of prejudicing the jury against Griffin. Griffin's behavior in the videos is certainly inappropriate, and no doubt demonstrate that he is not an ideal person to assist in raising young children. However, the videos themselves offer no insight into Griffin's intent or motive, nor do they provide context of violent behavior. The videos fail at meeting any of the acceptable purposes set forth in Wis. Stat. § 904.04(2)(a) or any other acceptable purposes articulated by the courts in prior decisions.

III. The Errors in Excluding the Denny Evidence and Admitting the Videos Were Not Harmless.

By not being allowed to present the Denny evidence to the jury, Griffin was left with a limited defense. Although Griffin was able to argue to the jury that he did not cause the injuries to the twins, he was unable to present an alternative theory as to how the twins were injured, specifically, that Smart was the cause of the injuries.

In arguing that this was a harmless error, the state assumes that CJ's statement would not have been admissible. (Resp. Brief p. 36). Even assuming this to be true, the statements from Smart, in particularly her admission to stepping on the children, could reasonably lead the jury to a

different outcome. Had CJ's statement also been included, the jury would have had even more information which could have reasonably lead them to a different conclusion during their deliberations.

In arguing that the errors were harmless, the state discusses the evidence against Griffin, which was largely circumstantial. (Resp. Brief p. 34-35). Griffin's behavior during his interviews with police, and subsequent relocation to Texas are by no means indicative of guilt. The testimony from Angel Luciano was also questionable, and largely cam down to Luciano's credibility. Had the Denny evidence been presented to the jury, it certainly could have lead the jurors to contextualize Luciano's testimony in a different manner, as it would have presented an alternative theory of how the children were injured. The jury would have needed to weigh the Denny evidence against Luciano's testimony and credibility problems. Again, if presented with the Denny evidence, there is a reasonable probability the jury would have reached a different conclusion.

CONCLUSION

For the above stated reasons, as well as the reasons set forth in the Appellant's Brief, Griffin respectfully asks this court to reverse the judgement of conviction entered against Griffin. The case should then be remanded to the circuit court for a new trial with instructions to allow for the presentation of Denny evidence, and an order to deny the state's other acts motion.

Dated this 27th day of February 2019

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 1158 words.

Dated this 27th day of February, 2019.

Signed:

JAYMES K. FENTON
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State Bar No. 1084265

**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.

Dated this 27th day of February, 2019.

Signed:

JAYMES K. FENTON
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CERTIFICATION OF MAILING

I hereby certify that:

This brief was, on February 27, 2019, delivered to the US Postal Service 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 27th day of February, 2019.

Signed:

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