STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2018-AP-1069-CR

vs.

Trial No. 15-CF-2058

CHRISTOPHER L. GEE,

Defendant-Appellant.

Appeal from a judgment of conviction entered May 31, 2016 in the
Circuit Court of Milwaukee County,
Honorable J.D. Watts, Judge, presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

JOHN T. WASIELEWSKI
Bar ID No. 1009118
Attorney for Defendant-Appellant

Wasielewski & Erickson
1429 North Prospect Avenue
Suite 211
Milwaukee, WI 53202

(414) 278-7776
jwasielewski@milwpc.com

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ARGUMENT

The trial court erred in allowing admission of the 1993 and 1996 Indiana convictions in the event Mr. Gee were to testify

A. §904.04(2)(b)2 violates Due Process despite its limited applicability

The State maintains that the terms of §904.04(2)(b)2, which make it applicable to only a small proportion of criminal defendants, "help protect a defendant's due process rights." State's br. 24. In so arguing, the State addresses four aspects of the statute. State's br. 24-25.

The State notes that §904.04(2)(b)2: 1) applies only in first degree sexual assaults; 2) allows admission only of prior first degree sexual assaults; 3) requires that the prior offenses be "similar" to the current offenses; and, 4) limits admission of prior offenses to those which resulted in convictions. State's br. 24-25. Mr. Gee agrees that the State correctly describes the limited circumstances in which §904.04(2)(b)2 applies. These four limitations necessarily mean that §904.04(2)(b)2 will apply, by its own terms, in only a tiny fraction of criminal cases which involve an allegation of first degree sexual assault against

a defendant with a prior first degree sexual assault which is similar to the charged conduct and which resulted in a conviction. The statute is thus very narrow.

The State suggests that the narrow terms of §904.04(2)(b)2 protect the Due Process rights of vast majority of criminal defendants. Defendants not falling within the four criteria of the statute will not be subjected to admission of prior offenses solely to prove propensity. The State is essentially arguing that a statute "protects" Due Process rights of defendants to the extent such defendants fall outside the scope of the statute. However, the circuit court found Mr. Gee to fall within the scope of §904.04(2)(b)2. The narrowness of the criteria of §904.04(2)(b)2 offers no protection of the Due Process rights of any defendant falling within those criteria.

B. Due process analysis properly focuses on historical practice, which does not allow propensity evidence

As a general principle, as the State acknowledges, a Due Process challenge requires a court to determine whether the challenged law or procedure violates fundamental conceptions of justice. State's br. 16, citing *Dowling v. United States*, 493 U.S. 342, 352 (1990). Such

a standard is easy to state, but not so clear in application.

One way to assess if a legal principle is fundamental is to review its historical legal basis. One federal case upholding federal law allowing use of propensity evidence rejected this approach. *United States v. Enjady*, 134 F.3d 1427, 1432 (10th Cir. 1998): "That the practice is ancient does not mean it is embodied in the Constitution." However, rejection of consideration of the history of a practice was wrong. *Montana v. Egelhoff*, 518 U.S. 37, 43-44 (1996): "Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice."

The State recognizes the importance of historical practice, for it devotes a section of its brief to assessing it. State's br. 22-23. Of course, the historical practice the State reviews is not the practice of admitting prior acts solely for the purpose of propensity, for such practice has no history. Rather, the State reviews the "long Wisconsin common law tradition of relaxed admissibility requirements for other-acts evidence of sexual assault cases." State's br. 22.

The State acknowledges that §904.04(2)(b)2 changes the law, but asserts that it does so only in

furtherance of a tradition of allowing more liberal admission of other-acts evidence in sexual assault cases, especially those involving children. However, the greater latitude rule allows for a more liberal weighing of the *Sullivan* factors when considering admission of other acts evidence under §904.04(2)(b)***1***. See, *State v. Dorsey*, 2018 WI 10, 379 Wis.2d 386, 906 N.W.2d 158. Such a weighing must still involve consideration of a proper (i.e. non-propensity) basis for admitting the other acts evidence. *Dorsey*, ¶¶40-43.

Wis. Stat. §904.04(2)(b)***2*** does not represent an evolutionary step, but a complete break with the prior historical prohibition on prior act evidence to prove propensity. The State acknowledges that *Whitty v. State*, 34 Wis.2d 278, 149 N.W.2d 557 (1967) "did discuss the 'universally established' character rule that evidence of prior crimes is not admitted to prove 'general character, criminal propensity, or general disposition'". State's br. 26-27. The State asserts that *Whitty's* comments on this rule is of no consequence because *Whitty* did not address whether propensity evidence could ever be constitutionally admissible. State's br. 27. This simply reflects a basic historical fact: in no case, before *Whitty* or

since, has any appellate court in Wisconsin been asked to review an assertion by the State that it could, without violating Due Process, proffer prior acts evidence solely to show propensity. The lack of any such case shows how deeply engrained is the rule against propensity evidence.

C. Wis. Stat. §904.03 review does not remedy the Due Process deficiencies of §904.04(2)(b)2

The State, when arguing for the protections to a defendant's rights afforded by §904.04(2)(b)2, noted that "Wis. Stat. §904.03 still provides that evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." State's br. 25. Indeed, one federal court found this to be a crucial consideration in upholding a federal rule allowing propensity evidence. *United State v. Enjady,* 134 F.3d at 1433: "[W]ithout the safeguards embodied in Rule 403 we would hold the rule unconstitutional." However, the Iowa Supreme Court provided sound reasoning for rejecting the notion of the federal courts that balancing prejudicial and probative aspects of propensity evidence could adequately protect a defendant's Due Process rights:

> Under the traditional balancing applied when evidence of prior bad acts is admitted for a legitimate issue other than propensity, the trial court must weigh the probative value of the evidence as it relates to the legitimate issue, compared with the unfair prejudice that results from evidence which may inevitably be considered as demonstrating propensity. Under the federal courts' rulings, a trial judge must balance the probative value of general propensity evidence against the prejudicial effect of general propensity evidence. Stated another way, that which makes the evidence more probative — the similarity of the prior act to the charged act — also makes it more prejudicial.

State v. Cox, 781 N.W.2d 757, 768-769 (Iowa 2010). Thus, the protective value of the weighing is illusory, for as the probative value of the propensity evidence increases or decreases, so also increases or decreases the prejudicial effect. Thus, an evaluation under §904.03 of the probative value versus the prejudicial effect of propensity evidence offers no meaningful protection to a defendant's Due Process rights.

CONCLUSION

Christopher L. Gee prays that this court vacate his convictions and sentences and remand the case for a new trial.

Respectfully submitted,

_____

John T. Wasielewski
Attorney for
Christopher L. Gee

FORM AND LENGTH CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1463 words.

_____
John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this reply brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

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John T. Wasielewski