

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

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STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 18-AP-001144-CR

v.

Circuit Court No. 13-CF-001753

KEVIN B. HUTCHINS

Defendant-Appellant.

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**REPLY BRIEF OF DEFENDANT-APPELLANT  
KEVIN B. HUTCHINS**

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## ARGUMENT

### **I. HUTCHINS HAS DEMONSTRATED THAT THE CIRCUIT COURT ERRONEOUSLY ADMITTED OTHER ACTS EVIDENCE OF PAST ABUSE.**

Hutchins maintains that the statements in the opening arguments and testimony elicited on direct examination of M.U. were clearly other acts. These other acts were improper if applying an appropriate *Sullivan* analysis, and admittance of the other acts information was not harmless error. *See State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

#### **A. The Prosecutor's Statements During Opening Arguments And The Testimony Of M.U. Were Other Acts Evidence.**

The State suggests that M.U.'s testimony may not have even been other acts evidence at all because she never specifically said that Hutchins battered, sexually assaulted, or falsely imprisoned her in the past. (State's Br. 9). Hutchins disagrees.

It is clear from the opening argument that the prosecution was intent on having the withheld other acts

information entered into the record with M.U.'s testimony. The prosecution lead M.U. to answer that getting punched (a battery), "was more rough than normal." (R.97, at 55). M.U. also indicated that being physically punched and battered was "fairly typical." (R.97, at 54-55). Despite the State's contentions, M.U. clearly testified that Hutchins had committed acts in the past similar to the ones he was accused of, and her testimony was absolutely other acts evidence.

**B. The Other Acts Evidence Was Improper Under the Sullivan Analysis.**

Next, the State contends that if the testimony by M.U. was in fact other acts evidence, it was admissible under the three-step framework outlined in *Sullivan*. (State's Br. 10). As argued in Hutchins brief-in-chief he vehemently disagrees.

As to the first prong the State argues that M.U.'s testimony was admitted for the acceptable purpose of showing her state of mind and the context of how she reacted to the assault. (State's Br. 10). They argue that this evidence of past assaults was necessary to explain why M.U. reacted to protect herself by not immediately

reporting the assault. (State's Br. 10). This is clearly just inferring that Hutchins character for abusing M.U. is circumstantial evidence of his conduct before the jury. This is the sort of evidence that is in violation of the prohibitions under Wis. Stat. § 904.04(2).

The State goes on to argue that under the second prong of the *Sullivan* analysis the testimony was relevant because it bolstered M.U.'s testimony that Hutchins committed the crimes (or was circumstantial evidence of his conduct during this incident and thus impermissible as noted above). (State's Br. 10). As argued in Hutching brief-in-chief, this testimony was not relevant to M.U.'s credibility because the details were vague in time, place, and circumstances. The testimony was generally that Hutchins was a bad guy that punched me regularly without any context to go with what was otherwise a long marital relationship. Thus, it was not relevant.

Next, the State argues that under the third prong of the *Sullivan* analysis that the State's recitation of other acts evidence during opening statements was not prejudicial because the jury instructions indicated that attorney's

remarks are not evidence, and they argue that M.U.'s other acts testimony was not prejudicial because of the absence of details about Hutchins's past actions. (State's Br. 11-12). Again Hutchins disagrees.

While opening arguments are not evidence, they can be improper when the prosecution uses them to gain an unfair advantage. *See Arizona v. Washington*, 434 U.S. 497, 512, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) ("An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal"). That is what occurred here as the State used the opening argument to circumvent having a hearing on the admissibility of other acts evidence. This was highly prejudicial.

Additionally, the fact that M.U.'s testimony lacked details did not make her statements any less prejudicial. Instead the opposite is true. If she had identified a specific incident Hutchins may have been able to contest her version of events, but by stating vague references to being a spouse that was regularly battered made Hutchins sound like the sort of violent individual who would have committed the act

he was on trial for. Thus, any probative value was substantially outweighed by the unfair prejudice to Hutchins.

### **C. The Error Was Not Harmless.**

Finally, the State argues that even if the Court erred in admitting M.U.'s testimony it was harmless error since the dispute at trial was whether M.U. was telling the truth. (State's Br. 13). Hutchins disagrees that the Court committed harmless error, specifically because, as the State acknowledges, this was a credibility contest between Hutchins and M.U.

The claim that M.U. was essentially a battered spouse certainly was intended to bolster her credibility (as the State concedes). This was important evidence from the aspect of the jury viewing Hutchins as a habitual domestic abuser. This information certainly played a role in the jury's finding of guilt, and but for the introduction of these bad prior acts, the jury's findings of guilt would have been different because there existed reasonable doubt based on the remaining evidence.



A new trial should be ordered at which Hutchins's credibility regarding what happened in this case may be determined apart from the irrelevant and unfairly prejudicial evidence of his alleged prior acts.

**II. HUTCHINS HAS SHOWN THAT COUNSEL WAS INEFFECTIVE FOR HIS FAILURE TO MOVE FOR A MISTRIAL DURING THE STATE'S OPENING ARGUMENT**

Hutchins has raised sufficient facts to entitle him to an evidentiary hearing as to ineffective assistance of counsel. Further, counsel's performance in failing to move for a mistrial after the State offered information as to Hutchins prior bad acts during opening arguments was deficient and prejudiced Hutchins at the time the statements were made and later when the State elicited related testimony.

**A. Counsel Was Deficient In Failing To Move For A Mistrial During Opening Arguments And Hutchins Was Prejudiced By This Failure.**

The State indicates that Hutchins cannot show that the Court improperly admitted other acts at trial. (State's Br. 16). Hutchins agrees that if the other acts testimony was admissible that the State would be allowed to discuss it in its

opening, but as argued in section one of this argument, the circuit court erred in admitting M.U.'s testimony related to prior domestic abuse by Hutchins.

As Hutchins has argued in the brief-in-chief and the arguments above, the circuit court erred in overruling counsel's objection to the other acts being presented in the State's opening arguments. These statements clearly represented other acts that had not put through a proper *Sullivan* analysis.

As indicated in the brief-in-chief, after being improperly overruled counsel had a duty to move for a mistrial to preserve the issue for appellate review. His failure to do so was deficient.

This deficiency clearly prejudiced Hutchins by setting up further other acts testimony of M.U. that spoiled the jury's ability to determine credibility based on the facts of the case alone.

Thus, the court erred in determining that Hutchins had not alleged sufficient facts to obtain relief and denying a *Machner* hearing.

## CONCLUSION

As indicated in Hutchins's brief-in-chief, the circuit court erred in denying his motion for a new trial based on improperly admitted other acts evidence and it erred in denying his request for a *Machner* hearing, thus he requests that a new trial be granted, or, in the alternative, that the matter be remanded for a *Machner* hearing.

Dated: March 6, 2019

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this report conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,230 words.

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**CERTIFICATE OF COMPLIANCE  
WITH WIS. STAT. § 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic reply brief is identical in content and format to the printed form of the brief filed as of 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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