STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,
Plaintiff- Respondent,

v.

Appeal No. 2018AP001507-CR

Case No. 2015CF005197

JEFFREY D. LEE,
Defendant- Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. MARK A. SANDERS, , PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. MARK A. SANDERS, PRESIDING

REPLY BRIEF OF DEFENDANT- APPELLANT

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POINT I

THE ISSUES RELATING TO THE OTHER ACTS EVIDENCE

The first issue raised dealt with the admission of other acts evidence relating to the five other alleged female victims. The three prong test of *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W. 2d 30 (1998), was discussed.

It was argued that one of the important factors to prove relevancy was that the state was required to prove that the defendant had actually committed the other acts. It was noted that under §904.04(2), "other acts evidence is relevant only when a jury could find by a preponderance of the evidence that the defendant had committed the other acts." *State v. Gribble*, 248 Wis. 2d 409, 443, 636 N.W. 2d 488 (2001).

It was argued that many of the documents and testimony that had been received to establish other acts relating to both Alexis and Brittany were inadmissible. First, it was argued that the Criminal Complaint and the Amended Information should not have been received because they contained great detail relating to Brittany's allegations, even though the defendant had not been convicted of them. Also, they both contained hearsay and were not admissible under any hearsay exception- especially the statements dealing with Brittany.

In the Respondent's Brief, the state acknowledged that the defendant had not been convicted of assaulting Brittany. It noted that although the accusatory instruments had referred to Brittany, that did not alter their admissibility in regard to the conviction relating to Alexis. However, it cited no authority for that argument. It merely stated that it would be admissible as evidence of other acts against Brittany. However, the statements in those documents were hearsay and did not establish the defendant's guilt of those allegation by a preponderance of the evidence.

Further, it was argued that it was improper for the Court to receive in evidence the entire 19 pages of the CCAP record of the case against the defendant as it related to Alexis and Brittany. It was argued that it had been prepared by the clerks of the Court and consisted entirely of hearsay, for which there was no hearsay exception. The importance of its receipt in evidence was emphasized by the fact that it was one of the few documents that the jury asked to see during its deliberations.

In the Respondent's Brief, the state never set forth any argument as to the reason an entire CCAP record of a previous case could be received in evidence to establish other acts evidence. It argued that §904.04(2)(b)(2), which allows the state to introduce evidence that a person was convicted of the same crime, allowed for the receipt into evidence of the entire record. However, that statute does not eliminate the hearsay rules in attempting to establish the prior crime.

Another violation of the hearsay rules was the introduction of the medical records of Alexis and Brittany and allowing a police officer to read them. Most of the statements in those medical records were irrelevant regarding their allegations against the defendant and their statements to the medical staff regarding the defendant's conduct towards them lacked sufficient indicia of trustworthiness to allow the jury to rely on them.

In the Respondent's Brief, the state argued that these statements to the medical staff, although hearsay, were covered by §908.03(4) and (6m). However, subsection 6 of that statute also states that if the sources of information given to the medical staff or other circumstances in the case indicate a "lack of trustworthiness" of the statements, they are not covered by this hearsay exception. The state did not set forth facts establishing that the statements made to the medical staff by the two girls, and especially Brittany, had been trustworthy.

There was a great problem with the Court allowing the state to mention the allegations made by the three other girls. The defendant had never been charged with any offense relating to those allegations. Further, there was no proof introduced to establish that the jury could find, by a preponderance of the evidence, that the defendant had ever committed any of those offenses.

In the Respondent's Brief, not only did the state fail to point out any such proof, it made a serious error. When the defendant was asked on cross-examination if he was aware of those allegations, he replied that he was, but he never made any statement about the validity of them. The state argued that the defendant had denied committing the assaults against these girls, but that was not correct. (Resp. Brief, p. 21).

Another issue that was raised was that the probative value of all of this other acts evidence had been completely outweighed by the tremendous prejudicial effect it had had on the defendant's right to a fair trial. The Court itself had recognized at a pretrial hearing that such evidence could constitute a risk of prejudice to the defendant and could cause the jurors to ignore the evidence and convict him simply because they believed he was a danger to children.

In the Respondent's Brief, the state argued that the defendant had not shown how he would be unfairly prejudiced by the admission of the other acts evidence. The state acknowledged that evidence of the defendant's previous bad acts "was by its nature inherently prejudicial" but, it argued, it had not been unfairly prejudicial. (Resp. Brief, p. 18). Whatever prejudice it caused the defendant, it argued, could be cured by the Court's instructions to the jury.

While jury instructions may help guide the jury, they cannot undo the image of the defendant that the piling on of other acts evidence would cause the jury to consider. The general rule is still the same, that other acts evidence may not be used to allow a jury to convict a

defendant because he is a person "likely to commit such acts". The defendant is still entitled to a fair trial based on the evidence presented of the crime itself and is still entitled to due process of law. *Whitty v. State,* 34 Wis. 2d 278, 297, 149 N.W. 2d 557.

Beyond the inherent prejudice that such evidence causes, prejudice was additionally shown by the fact that during its deliberations in this matter, the jury never requested any exhibits relating to the allegations against the defendant as it related to J.L. It merely asked for exhibits relating to other acts evidence as it related to Alexis and Brittany. Obviously, the other acts evidence played a key role in its determination.

Another issue that the state raised in the Respondent's Brief was the issue of defense counsel's objections to the receipt into evidence of all of this other acts evidence. The state argued that defense counsel had not properly objected to the receipt of that evidence. That was extremely far from the mark. Beginning with the first pretrial hearing on August 26, 2016, regarding the state's motion to introduce other acts evidence, defense counsel objected to the receipt of all of the other acts evidence.

At the trial, defense counsel repeatedly objected to the admission of the documents and testimony regarding the other acts evidence. Defense counsel objected to the 19 pages of the CCAP record in the case involving Alexis and Brittany on the ground that it was irrelevant to the issues of the case. (Record 100, p. 87). Defense counsel also objected to the medical records of both Alexis and Brittany being received in evidence, along with the officer's testimony reading from them, on the grounds that they were irrelevant, redundant and constituted hearsay. (R97, pp. 68, 70, 75, 82).

In fact, in the Decision of the Circuit Court of Milwaukee County, denying the Postconviction Motion, the Court noted that it "stands by its rulings on defense counsel's

objections to the use of this evidence at trial." (R73, p.1). There was no failure on the part of defense counsel to object to the receipt into evidence of the other acts evidence- he tried his best to keep them from being heard by the jury.

POINT II

THE ISSUES RELATING TO THE JURY INSTRUCTIONS FOR THE OTHER ACTS EVIDENCE.

It was argued that the jury instructions were completely contradictory and confusing to the jury. On the one hand, the Court told that jury that, based on the defendant's conviction relating to Alexis, it could believe that the defendant had a certain character and that he had acted in this case in conformity to that character.

However, in regard to the evidence relating to the sexual contact with Alexis, Brittany, and the others- meaning Lynita, Cheryl, and Ernasia- that could only be considered for the purpose of determining motive, lack of mistake and intent. And it said that the jury could *not* consider that testimony to conclude that the defendant had a certain character trait.

The instructions, then, were completely contradictory. No reasonable person could conclude that he or she could consider whether the defendant had a certain character or not and that he had acted in conformity with that character and, at the same time, conclude that he or she could not consider those factors.

In the Respondent's Brief, the state argued that defense counsel had failed to object to the jury instructions and that, therefore, the defendant could not challenge those instructions on appeal. Taking that stance, then, the state never made any arguments as to the merits of the issue.

Actually, defense counsel had raised some questions as to the Court's jury instructions. During the trial, on January 10, 2017, in the afternoon, the Court called a conference outside the presence of the jury to discuss certain matters. (R96, pp. 7-16). The Court began by discussing Jury Instructions 275 and 276, relating to other acts evidence. (R96, p. 7). The Court noted that there was a suggestion that the two instructions be given in the alternative. (R96, p. 7).

The Court noted that the prior conviction relating to Alexis allowed an instruction that the jury could consider it as evidence of the person's character and that the person acted in conformity with that character. (R96, p. 8). However, the Court also noted that as to the other evidence of other acts, a more limiting instruction was to be given. (R96, p. 8).

At that point, the prosecutor, Mr. Schindhelm stated that he felt the Court had to give both instructions. (R96, p. 8). He stated that in regard to the evidence regarding Brittany's allegations, the Court would have to give the instruction that the jury was *not* to conclude from that evidence that the defendant had a certain character trait that he had acted in conformity with. (R96, p. 10).

After further discussion, defense counsel, Mr. Guerin, stated that in regard to the instruction for Brittany, number 275, there was some confusion. (R96, pp. 13-14). The Court stated that, "So I will tinker with the language of 275 some more, and I will get that to the parties, and we will discuss it some more tomorrow morning." (R96, p. 14).

Turning to the language of the proposed instruction regarding Brittany's allegations, Mr. Guerin stated, "I guess this falls into my --- the unknown world, the dangling Brittany – well, technically it was a dismissed but read- in charge." (R96, p. 15). He continued, "It's just one of the things that… you know, you heard about Alexis and Brittany, but then I think you cover it because there was clear that there was no conviction. I'm just concerned about some of the testimony that Druma… where she kept on going off after the question was asked. I forget the exact working she used." (R96, p 15).

The Court stated that together, number 276 and 275 "sufficiently address there was just a conviction… relative to Alexis, and it was not a conviction relative to Brittany." The Court said

that it would "tinker with that, those instructions" and that it would give the parties a draft of it the next day. (R96, p. 16).

The next day, in the morning of January 12, Mr. Schindhelm brought up the instructions for number 275 and 276 again. He stated that he wanted to request that the Court use the words sexual contact rather than sexual intercourse as it related to Brittany. The Court agreed to do that. (R99, p. 68).

That afternoon, on January 12, right after both parties had rested and the Court was about to give its instructions to the jury, the Court made a rather strange remark. It stated, Mr. Guerin, I'll reverse any motions you might have." (R100, p. 43). Then the Court immediately began giving the jury its instructions, including the instructions on number 275 and 276.

The point is that Mr. Guerin showed a concern about the use of those two instructions in the same case and whatever motions he may have wanted to make about them were, apparently, according to the words of the official transcript, cut off by the Court. For that reason, it would not be a proper reading of the proceedings in regard to those instructions to state that defense counsel had not objected to the instructions.

The instructions were, on their face, improper. That is the reason that it had been suggested that they be given in the alternative. The manner in which they were given were much too confusing to be allowed to guide the jury in its determination as to how to consider the other acts evidence in the case.

POINT III

THE ISSUES REGARDING THE DEFENDANT'S SENTENCE OF 60 YEARS.

The third issue that had been raised dealt with the fact that the defendant's total sentence of 60 years, with 40 years of initial confinement and 20 years of extended supervision, for his conviction of Repeated Sexual Assault of a Child, had been unduly harsh and excessive. That offense is a Class C felony and carries with it a mandatory minimum sentence of 25 years, pursuant to §939.616(1).

It was argued that the Court did not merely sentence the defendant for the crime of which he had been convicted. Instead, based on the facts of the case and the prosecutor's detailed discussions at the sentencing regarding the allegations that had been made by not only Alexis and Brittany but also Cheryl, Ashley and Eranasia, and another alleged victim, Glenda, the Court accepted the recommendation of the state to impose the 60 year sentence. The Court's feelings about the defendant's other acts was summed up when it concluded, "That is the maximum sentence I can give- I would give you a longer sentence if I could." (R103, 44).

The Court did not deny that it had taken all of those other acts into account in determining the sentence of 69 years. In its Decision denying the Postconviction Motion, the Court stated that the Court "had an obligation to consider the defendant's background, including his prior sexual assault conviction and the allegations of prior sexual assault, as part of its duty to acquire full knowledge of his character and behavior." (R73, p. 2). The Court further stated that, "The sentence imposed is stiff, but the court finds that it is the only acceptable response to the aggravated nature of the defendant's conduct in this case, his poor character, and the strong interest in incarcerating persons who victimize children in this fashion." (R73, p. 2).

Taking into account the defendant's prior sexual assault conviction, for which the defendant had already served a lengthy prison sentence, and the allegations of prior sexual assaults by six alleged victims, was one thing. Sentencing him for that prior conviction and for the prior alleged sexual assaults was another. It is important to note that the Court emphasized that it was incarcerating the defendant for his actions against *children*, noting the plural, when, in fact, it was incarcerating him for his actions against only the one child in this case.

In the Respondent's Brief, the state argued that "it was more than reasonable for the court to conclude that Lee's conduct and character justified significantly more confinement that 25 years". (Resp. Brief, p. 29). The reasons noted by the state for that justification were that the defendant had failed to take responsibility for his behavior, that he had sought out a vulnerable victim and had repeatedly violated her, and that he had been convicted of assaulting another young girl and had been alleged to have assaulted many others.

First of all, the defendant was entitled to plead not guilty and go to trial- he was not required by the law to acknowledge any wrong-doing in regard to the alleged victim, J.L., in this matter. And the legislature was sufficiently aggrieved by the type of conduct for which the defendant had been convicted in this matter to call for a mandatory minimum prison sentence of 25 years for that conduct. However, it constituted an abuse of the Court's discretion to sentence him to another 15 years in prison, plus 20 more years of extended supervision, for other offenses for which he had been convicted or for which allegations of misconduct had been made. That was especially true since the defendant was already 44 years old at the time of the sentencing hearing.

It has been held that, "In exercising discretion, sentencing courts must individualize the sentence of the defendant based on the facts of the case by identifying the most relevant factors

and explaining how the sentence imposed furthers the sentencing objectives." *State v. Harris*, 326 Wis. 2d 685, 699, 786 N.W. 2d 409 (2010). In this case, there had been an abuse of that discretion because the sentence had not been based on the facts of the case itself or even the most relevant factors of the defendant's character. It had been based on his alleged past conduct and, therefore, resulted in a sentence greater than most defendants receive for similar convictions or for even greater convictions. For all of these reasons, the defendant has requested that his sentence be modified to a legally authorized lesser sentence.

Dated: January 14, 2019
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) Wis. Stats. for a brief produced with a proportional serif font.

The Reply Brief contains 2,998 words.

Dated: January 14, 2019

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