STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 18AP1667 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROSS HARRIS JR,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 12, THE HONORABLE David T. Flanagan, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Oral argument is not requested nor is publication necessary. *See* Wis. Stats. § 809.23(1)(b)4.; 751.31(2)(f).

STATEMENT OF THE ISSUES

1. Whether the victim's reference at trial to a theft allegedly committed by a victim, referenced as the cause for the underlying crime at issue at trial, constitutes impermissible other acts that subsequently constitutes sufficient grounds for a mistrial.

2. Whether new statements made by a victim at trial that are not contained within discovery sent by the State pursuant to § 971.23(1)(b) constitute sufficient grounds for a mistrial.

Trial Court Answered as to both issues: No.

SUPPLEMENTAL STATEMENT OF FACTS

a. The issue of "theft" and the motion in limine

Immediately prior to the beginning of the trial, the Court and the parties discussed motions in limine. (66:3.) One of the defense's motions in limine was a request to preclude all witnesses from the state and the Assistant District Attorney from mentioning in front of the jury any allegation that the defendant committed a theft against any other person related to this case. (66:12.)

After argument by both parties, the Court made a ruling on the issue:

> THE COURT: It seems to me that the jury is going to -- probably going to want to have and probably should have some context for whatever happened. Obviously, from what you are telling me, there's some -- a little bit of ill-will between Mr. Delgado and the defendant. I think what I -- I understand that the prosecution to be saying they will not be accusing Mr. Harris of having stolen something or taken something improperly.
>
> I think the best way to deal with it is not to cut it out artificially from the story of what happened, but for me to craft an instruction if appropriate at the end to make it very clear to the jury that there is no allegation of theft that's any part of this case. That there is no charge or suggestion that Mr. Harris was – had wrongfully stolen something. We will have to see where the testimony goes. If it goes too far in the direction of suggesting theft, I certainly will entertain an objection. But I think if it doesn't go very far, we should be able to take care of it if necessary by a curative instruction. (66:14-15.)

b. The issue of new statements made by victim A.D. at trial

In discovery, the State produced its copies of police reports, which were discussed and at least briefly reviewed by the Court at trial. (66:78.) Included in the reports was a section devoted to memorializing an interview between an officer and the victim, A.D. as to what occurred during the crime. *Id.* Within that section, an officer wrote:

> "[H]owever, that after approximately ten minutes that Harris had go discuss the issue regarding the property." *Id.*

At trial, A.D. testified on this subject on direct:

Q. And upon finding the defendant in the hospital room, did you have any sort of interaction with him?
A. Oh, I went to talk to him.
Q. And what did you go to talk to him about?
A. I asked him if he wanted to go outside to talk about the stuff he had that belonged to Rachel.
Q. When you say "go outside", why did you want to go outside?
A. Because they just had the baby. They just had the baby. I didn't want to bother nobody. But it was just -- dumb. I thought it would be better to go outside and talk personal man-to-man. I mean, we are grown. That's what I just figured. We were grown, we would just talk outside. That's what I figured.
Q. Were you asking him to go outside to fight?
A. No. I had money. I was going to try to get Rachel's belongings. (66:69.)

Additionally during the trial, the State called Ms. Rachel Amos to testify. (66:108.) The State met with Ms. Amos before trial to prepare for trial. (66:120.) During Ms. Amos's testimony, she provided a statement from the defendant that she had heard that was not discussed during preparation for the trial. (66:119.)

ARGUMENT

I. The victim's mention of the reason for why the argument was initiated does not constitute other acts.

"Trial courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial." *State v. James*, 2005 WI App 188, ¶ 8, 285 Wis. 2d 783, 703 N.W.2d 727. This Court will reverse a trial court's evidentiary ruling only when the court has erroneously exercised its discretion. *Id.* "The trial court acts erroneously when its discretionary ruling contravenes nondiscretionary statutes or is based on an incorrect interpretation of the law." *Id.*

One interpretation of the law that the circuit court must commonly perform in evidentiary matters involves "other acts" under Wis. Stat. § 904.04(2)(a). This statute "prohibits the admission of a defendant's other bad acts to show that the defendant has a propensity to commit crimes." *State v. Marinez*, 2011 WI 12, ¶ 18, 331 Wis. 2d 568, 797 N.W.2d 399. But "other-acts evidence that is offered for a purpose other than the prohibited propensity purpose is admissible if it is relevant to a permissible purpose and is not unfairly prejudicial." *Id.*

"'[S]imply because an act can be factually classified as "different"—in time, place and, perhaps, manner than the act complained of—that different act is not necessarily "other acts" evidence in the eyes of the law.'" *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515 (*quoting State v. Bauer*, 2000 WI App 206, ¶ 7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902). When confronting the admission of evidence involving past bad acts, the trial court and parties should ask "'what is the purpose of the [party's] intention to admit the evidence?'" *Bauer*, 238 Wis. 2d 687, ¶ 7 n.2 (citation omitted). If it is not to show a similarity between the other act and the alleged act, then perhaps the parties should entertain the question of whether it is "other acts" evidence at all. *Id.*

Additionally, "[e]vidence is not 'other acts' evidence if is it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *Dukes*, 303 Wis. 2d 208, ¶ 28; *see also State v. Jensen*, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482, ¶ 81; *State v. Johnson*, 184 Wis. 2d 324, 350, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, J., concurring).

There was no other acts evidence at trial in this case. The purpose of the testimony regarding an alleged theft, in the underlying trial, was to show why the victim and defendant would have a reason to argue. Discussion of it was not other acts, but the act, of committing a crime. While defining the purpose of evidence can often result in differing answers, as to this at-issue piece of evidence, there is no reasonable connection between it and the cautionary issues associated that otherwise lay with inadmissible evidence.

Furthermore, the State did not submit any evidence of any alleged theft beyond the fact that the victim, seconds before the defendant committed a crime, had the mental state and belief that the defendant had stolen something from him. This nuance is important in the sense that it explains the temporal relationship between the offered evidence and the rest of the relevant evidence as to the committed crime. Instead of describing a theft on another date and time, all we have in this underlying matter is evidence of a victim's state of mind moments before the crime then occurred. With that in mind, what the victim's reasoning for wanting to speak with the defendant—the theft—is inextricably intertwined as discussed in *Dukes et al*.

The Court had the same notion in mind when it expressed that to leave out all indication of the theft would confuse the jury, by leaving too gaping of a hole in what occurred that day between the parties.

Lastly, per the analysis offered by the court in *Bauer*, there is no connection between the evidence of an alleged theft and the eventual disorderly conduct in this matter. Beyond the fact that both acts are either crimes or components or crimes, these alleged acts share no commonality. The jury heard no information about this alleged theft and how it would somehow substantively relate to a propensity to commit acts of disorderly conduct. Therefore, this case does not involve other acts evidence, because there is no reasoning that would allow any fact finder to believe that, based on the testimony, the defendant would act in a similar matter.

II. The State did not commit a discovery violation.

The defense raises issues with statements of the defendant mentioned by two State's witnesses during trial. Because there is zero evidence to suggest that the State or law enforcement knew such statements existed before trial, and because the relevant case law and discovery statute only require disclosure of known evidence, there is no reversible

error in the underlying court's decision to deny a mistrial after such evidence was received at trial.

Whether the State has violated the discovery statutes is a question of law reviewed by this court de novo. *State v. Rice*, 2008 WI App 10, ¶ 14, 307 Wis. 2d 335, 743 N.W.2d 517. The burden to show good cause for the non-disclosure rests with the State, and whether the State has satisfied this burden is a question of law that this court reviews de novo. *State v. DeLao* ("*DeLao I*"), 2001 WI App 132, ¶ 23, 246 Wis. 2d 304, 629 N.W.2d 825, aff'd by *State v. DeLao* ("*DeLao II*"), 2002 WI 49, 252 Wis. 2d 289, 643 N.W.2d 480.

The State does not contest the argument that, absent good cause, prosecutors have a duty under *State v. DeLao*, 2002 WI 49, 252 Wis. 2d 289, and Wis. Stat. § 971.23(1)(b) to exercise due diligence to discover and turn over all statements made by the defendant that the State intends to produce or reference at trial—with the important caveat that the information must exist within the custody of either a law enforcement agency or the District Attorney's office. In *DeLao*, the prosecutor attempted to use a defendant's statement given to an investigator; the investigator having known of said statements for some time whereas the prosecutor having only learned of them the day of trial. *Id.* ¶ 9.

Wisconsin's Supreme Court held that such a practice was violative of Wis. Stat. § 971.23(1)(b), *Id.* ¶ 14, noting that s. 971.23 discovery duties extend to both the prosecutor and to law enforcement. *Id.* ¶ 14. Put plainly, *DeLao* established that the prosecutor had a duty to exercise due diligence to work with the law enforcement agency in order to fulfill his or her obligations under the discovery statute.

However, the facts in this case do not lend itself to such an argument against the State. In this matter, there is no allegation or evidence suggesting that the State did not disclose any statements that it, or any agency had. Put differently, there is zero evidence that the State possessed any written statements of any witness or defendant that it did not turn over to the defense.

Instead, what is being asked by the appellant is not mere production of discovery, but creation of new documents pursuant to Section 971.23(1)(b). The appellant writes: "The police report containing A.D.'s statement about what Harris said contained grammatical errors to the point it was rendered nonsensical. It was incumbent upon the prosecutor to verify what, exactly, A.D. had told police and to ensure that information was disclosed to the defense." (Citation omitted, emphasis added) (App. Br. p. 20).

What the appellants describe is above and beyond what is required by statute. The rule of law posited here by the appellant asks the Court to impose a new layer of obligation under Wis. Stat. § 971.23(1)(b) to not only provide all oral statements made by the defendant, but to ask law enforcement to consider writing supplemental reports in case officer witnesses felt compelled to charge reports that were arguably, originally confusing in nature, or, for reports that arguably appeared lacking in detail.

Instead, a plain language reading of Section Wis. Stat. § 971.23(1)(b) shows that the State has no such addition burden to reinvestigate portions of police reports that defense counsel might later argue constitute confusing or incomplete narratives. The subsection reads: “What a district attorney must disclose to a defendant … A written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements.” Wis. Stat. § 971.23(1)(b).

Additionally, the State—including prosecutor and law enforcement, per *DeLao*—under the statute, can only disclose statements that it knows exist. Again looking at the latter end of the above-cited statute, one of the predicates for

information to qualify under this subsection is that the State must intend to use the recorded statement at trial. For cases such as this, where the report does not include such a statement, but later on it is revealed through non-officer witnesses that such a statement may exist, it is an impossible burden to place on the State to furnish such statements before they exist.

Briefly conceding for purposes of argument that the police report containing a statement from the defendant was confusing, there are two reasons for why the report could have been written in such a way. First, it is possible that the officer poorly articulated the statement of the defendant in drafting his or her report. Second, it is just as possible that the defendant gave a nonsensical statement in the first place to said officer.

In the underlying trial, the victim provided testimony regarding a statement made by the defendant that was not included in any police report and not discussed in any preparation session between the prosecutor and the witness.

Similarly, Ms. Amos, another witness, provided a previously-nondisclosed (by her to the State) statement of the defendant at trial. Also as with the victim, there is

zero evidence to suggest that Ms. Amos provided the elicited statement to law enforcement or the prosecutor.

CONCLUSION

The State requests that this Court affirm the underlying circuit court's rulings.

Dated this 23rd day of September, 2019.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 10 pages.

Dated: _____.

Signed,

_____
Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic 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.

Dated this 23rd day of September, 2019.

_____

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