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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP000467-CR & 2019AP00468-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BOBBY L. MCNEIL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable Carolina Stark, Presiding and an Order Denying a Motion for Postconviction Relief, the Honorable Frederick C. Rosa, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. McNeil is entitled to resentencing as the court's reliance on inaccurate information was not harmless.

The State concedes that the circuit court relied on inaccurate information in sentencing Mr. McNeil. (State's Br. at 6). Accordingly, the State must demonstrate "that the error did not affect the circuit court's selection of sentence; that there is no reasonable probability that the error contributed to the sentence; or that it is clear beyond a reasonable doubt that the same sentence would have been imposed absent the error." *State v. Travis*, 2013 WI 38, ¶ 86, 347 Wis. 2d 142, 832 N.W.2d 491.

The State cannot satisfy their burden under the facts of this case. While Mr. McNeil concedes that the court gave Mr. McNeil a concurrent sentence for possession of allegedly fentanyl-tainted cocaine, the record demonstrates that the circuit court also relied on this information in sentencing Mr. McNeil on the governing prison sentence for felony bail jumping. As Mr. McNeil pointed out in his brief-in-chief, the underlying drug charge was factually linked to that conviction, as Mr. McNeil was convicted of committing a new crime while on bail and his possession of cocaine satisfied those elements. (R1 9:1).

Second, a plain reading of the court's comments indicates that this information "affect[ed] the circuit court's selection of sentence." *Travis*, 2013 WI 38, ¶ 86. To that end, the circuit court transitioned from its discussion of the aggravating fentanyl information directly into a discussion of the felony bail jumping charge, asserting that the crime was "aggravated for all of the reasons that I've already stated"—an obvious callback to the lengthy discussion of the highly-aggravating fentanyl information which had just occurred. (R1 78:55; R2 99:55). It explicitly stated it was considering "all of the circumstances" in sentencing Mr. McNeil to prison on that count, which would, again, presumably include that highly aggravating material. (R1 78:55; R2 99:55). In addition, the court was also clear that primary goal of its sentence was protection of the public—and it defies common sense to assert that information about Mr. McNeil exposing both users and innocent police to fatal overdoses did not factor into that thought process. (R1 78:59; R2 99:59)

The State's entire argument is that there were other factors discussed in the court's sentencing comments and that the court referenced many other legitimate sentencing considerations which were unconnected to the fentanyl misinformation. (State's Br. at 10-11). The State is correct that the circuit court's sentencing explication was lengthy and included discussion about many different topics. However, they must prove that the fentanyl information, if removed from the calculus, would cause the same sentence to result. *Travis*, 2013 WI

38, ¶ 86. They simply cannot satisfy that test given: (1) the highly aggravating nature of this information; (2) the circuit court's explicit (and lengthy) discussion of it; and (3) the obvious linkages between the sentence and the challenged inaccurate information given the court's unambiguous oral pronouncement of sentence.

Finally, the State argues that this case is distinguishable from the facts of *Travis*. (State's Br. at 11). However, the determination of whether a given error is harmless must be assessed on a case-by-case basis. Here, the error did have an overall impact on the sentence and the State cannot prove that the same result would have obtained absent the error.

Accordingly, Mr. McNeil is entitled to resentencing.

II. Mr. McNeil is entitled to sentence modification.

The State makes several arguments as to why modification is not warranted. First, they incorporate, by reference, their harmless error arguments which have been replied to above. (State's Br. at 12).

Second, the State asserts that "McNeil cannot establish that the fentanyl information was a 'new' factor." (State's Br. at 12). The State claims that Mr. Eberhardy's testimony already put the parties on notice that the information discussed at sentencing

was inaccurate and, therefore, there is no "new" factor. (State's Br. at 12). That assertion misapprehends Mr. McNeil's new factor claim. Here, the analyst told the court, via his testimony at trial, that fentanyl was present in the cocaine, albeit in a "much smaller amount." (R1 74:64; R2 95:64). Both the State and the court directly relied on this misleading testimony in making their fentanyl remarks at the eventual sentencing. However, the expert report submitted by Mr. McNeil establishes numerous deficiencies in that opinion. Dr. O'Donnell identified problems with the underlying data and, based on his expert opinion, concluded that it cannot be said "with reasonable scientific certainty" that there is any fentanyl present in the sample. (R1 50:70; R2 71:70). Assuming, arguendo, fentanyl was present, however, Dr. O'Donnell opined that this was a trace reading that would have no pharmacological effects. (R1 50:70; R2 71:70). This is truly "new" information which was not reasonably inferable from Mr. Eberhardy's testimony, as the State suggests.

The State also argues that this information was not "highly relevant" despite also conceding that there was "reliance" on it. (State's Br. at 13). The State appears to argue that it was irrelevant because, in their view, it did not impact the overall sentence. (State's Br. at 13). Mr. McNeil has already shown why that is not so in addressing the request for resentencing, above.

The State further criticizes Mr. McNeil's argument that the circuit court's reasoning was

"incomplete." (State's Br. at 13). Here, the circuit court made a conclusory finding that modification was not warranted as a result of its prior (erroneous) finding that resentencing was not legally necessary. The circuit court did not meaningfully grapple with the "nuts and bolts" of the modification claim, instead relying to a large extent on that prior ruling. Accordingly, it only makes sense that if that ruling was in error, a remand is appropriate so that the circuit court can adequately exercise its discretion and address the new factor claim on the merits.

III. Joinder was unduly prejudicial under these facts and circumstances.

The State proffers three reasons why the circuit court ruling was appropriate under these circumstances. (State's Br. at 16).

First, the State points out that Mr. McNeil was charged with felony bail jumping, so information about the first case would be admissible at a separate trial for the second case. (State's Br. at 16). The State suggests that, in any case involving felony bail jumping, the State would be permitted to bring in the facts underlying that earlier felony for which the defendant was released on bond—even if the defendant stipulates. (State's Br. at 17). The State's position is: "To prove felony bail jumping, the State had to establish that McNeil was on bail for prior felony counts. Thus, the facts of the counts from the first case were admissible in the second case." (State's Br. at 17). There is, however, a logical gap here, as

proof of the former does not appear to require admission of the latter. The State could prove its case simply by calling an employee from the clerk of court to testify to the fact that the defendant was released on bond for a felony; it does not appear necessary or appropriate to establish the facts of that offense.

Second, the State argues that proof of possession of drugs in both cases operates as proof of knowledge and lack of mistake. (State's Br. at 16-18). Yet, these are essentially propensity arguments, even if they are being concealed under some other asserted "permissible" purpose.

Third, the State observes that a jury instruction was utilized. (State's Br. at 16). They also argue that Mr. McNeil has failed to demonstrate why this evidence was unfairly prejudicial. Yet, Mr. McNeil did make an explicit prejudice argument in his brief. (Brief-in-Chief at 37). While Mr. McNeil did not address the existence of the jury instruction, Mr. McNeil believes that the evidence in this case overwhelmed any attempted remediation represented by those instructions.

The State also argues that Mr. McNeil "is in no position to fault the circuit court's lack of analysis, given that he did not request a full other-acts assessment from the court." (State's Br. at 17). However, that is the controlling legal standard, as the State recognizes. (State's Br. at 15). Why the court is therefore excused from faithfully applying it in this case is unclear to Mr. McNeil, especially when

his motion did make the undue prejudice by virtue of propensity claim that Mr. McNeil has renewed on appeal. (R1 8; R2 21). The State also disputes Mr. McNeil's argument regarding a "propensity-free" chain of reasoning, claiming that this is not the law. (State's Br. at 17). Mr. McNeil acknowledges that the case cited in support of that proposition is interpreting the analogous federal evidentiary rule. *See United States v. Gomez*, 763 F. 3d 845, 856 (7th Cir. 2014). Yet, Wisconsin's evidentiary statute functions in similar fashion, as it also works to ban evidence which relies on an underlying propensity inference. *See* 7 Wis. Prac., Wis. Evidence § 404.601 (4th ed.).

Finally, the State makes a lengthy harmless error argument. It is worth noting that it is their burden to prove harmlessness beyond a reasonable doubt. *State v. Mayo*, 2007 WI 78, ¶ 29, 301 Wis. 2d 642, 734 N.W.2d 115. The State fails to satisfy this substantial burden. Their main argument is that the two cases are factually distinct. (State's Br. at 19-20). Mr. McNeil concedes that there are factual differences between the two cases, yet, as he pointed out in his brief-in-chief, there are numerous similarities as well. Here, the issue is that the jury could impermissibly use the existence of multiple, similar, allegations to infer guilt when the evidence does not actually support that conclusion. Thus, it does not matter—as the State suggests—that the jury acquitted on some counts. (State's Br. at 20). Here, the risk to Mr. McNeil is that he may have been acquitted on both cases but-for an improper

assumption that he could not have been innocent of the same crime, under similar circumstances, twice. That impermissible propensity inference is directly caused by the improper joinder of these two cases and therefore the motion for severance should have been granted.

IV. The Dana Marifke evidence was improperly admitted.

The State argues that this evidence was offered for a permissible purpose. (State's Br. at 25). The State argues that evidence that Mr. McNeil dealt drugs on other occasions was relevant to prove his possession of drugs in these two cases. (State's Br. at 25). However, as Mr, McNeil argued in his brief-in-chief, the evidence appears to be only thinly disguised propensity evidence. The State also believes that testimony about the van was relevant and permissible. (State's Br. at 25). However, Mr. McNeil's counsel already agreed that the State could put in evidence about the van; what she objected to was evidence of prior drug-dealing. (R1 71:59; R2 92:59). That is the evidence upon which Mr. McNeil asks this Court to focus.

The State also makes a cursory argument that the evidence was relevant, which Mr. McNeil would agree is exactly the problem—it is overly relevant, as character evidence almost always is. *See Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967). As to undue prejudice, the State does not develop much of an argument, beyond conclusory assertions that

the evidence was probative and not "unfairly" prejudicial. (State's Br. at 26). Finally, the State also points out that the usage of a cautionary instruction should have eliminated any prejudice. (State's Br. at 33). However, a cautionary instruction is not a per se protection against undue prejudice. *See State v. Sullivan,* 216 Wis. 2d 768, 791, 576 N.W.2d 30 (1998). Here, proof of Mr. McNeil's drug dealer past was overwhelmingly prejudicial in context of a case where he was alleged to have possessed various drugs on two separate occasions.

The State also makes a harmless error argument. (State's Br. at 27). The State claims that it is "improbable" that this evidence had an impact on the jury's verdict. (State's Br. at 27). The State somehow believes both that this evidence was relevant and needed to be introduced to prove its case at trial while also arguing it made no difference at all in the broader scheme of things. Given the prejudicial nature of this evidence, the State is simply incapable of satisfying its high burden with respect to harmless error.

V. Mr. McNeil was entitled to a hearing on postconviction motion.

The State claims there was no prejudice from admission of evidence that Mr. McNeil wanted to kill the bystander's children, pointing out that the prosecutor used this evidence in order to establish "that the drugs found near McNeil were his and that he was angry at the bystander for intervening."

(State's Br. at 31). The State therefore disclaims that the testimony was elicited for improper character evidence purposes, as Mr. McNeil argued in his brief-in-chief. (State's Br. at 32). The State's ostensible intentions are irrelevant, however, as the evidence appears plainly irrelevant for any purpose other than character assassination.

The State claims it would have been "meritless" to object, given its argument that the evidence was relevant and admissible under the other acts rubric in order to establish consciousness of guilt and possession of drugs. (State's Br. at 32). Yet, the argument seems to be a bit of a stretch, especially with respect to the prejudice prong. If evidence that a defendant threatened to kill someone and their children after being arrested, when that utterance is only tangentially connected to the underlying crime, is not unfairly prejudicial then what would ever satisfy that test?

Here, the evidentiary support for admission of this statement is weak. Mr. McNeil was angry about being arrested and, in response, lashed out at the citizen who helped arrest him. That does not appear to materially further the inferences the State claims. Moreover, admission of this statement was prejudicial, as it was character evidence that invited the jury to convict based on an improper consideration.

VI. The evidence was insufficient to convict Mr. McNeil of the drug charges.

The State rejects all of Mr. McNeil's arguments, arguing that there was sufficient circumstantial proof of possession presented to the jury. (State's Br. at 34-35). The State ignores several facts, including that the arresting officer conceded that the drugs could have been dropped by the citizen bystander who intervened. (R1 73:69; R2 94:69). Officer Ruegg's testimony establishes that she took possession of a baggie of THC—and she testified to no other drugs. (R1 73:62; R2 94:62). Yet, three substances were ultimately tested by the crime lab—with no chain of custody evidence being presented.

On that point, the State tries to have it both ways. First, they argue that Mr. McNeil should have objected to the admissibility of this evidence. (State's Br. at 37). They go on to assert, however, that any gap in the chain of custody goes to weight, not admissibility. (State's Br. at 37). This latter assertion is the more correct articulation of the legal principle at play here. If gaps in the chain of custody go to the weight of the evidence, then those gaps seem intuitively relevant to an assessment of whether there was sufficient evidence to convict.

The State argues that the jury was apparently entitled to presume that the drugs were handled properly and that the drugs tested by the crime lab were, in fact, seized from nearby Mr. McNeil's person. Yet, a criminal jury is required to accept no such

presumptions in determining whether the evidence is sufficient to convict. It was the State's burden to prove, beyond a reasonable doubt, that Mr. McNeil possessed the substances in question. To the extent that the State failed to concretely tie these two pieces of evidence together—the discovery of THC at the scene and the testing of various baggies at the lab—that is a basis for an acquittal.

CONCLUSION

Mr. McNeil therefore renews his requests for relief as outlined in the brief-in-chief.

Dated this 27th day of November, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,648 words.

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 November, 2019.

Signed:

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