

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

Appeal No. 2019AP000802-CR

SAMUEL L. NICHOLS, JR.,
Defendant-Appellant.

DEFENDANT-APPELLANT SAMUEL L. NICHOLS, JR. BRIEF AND APPENDIX

Appeal from judgment of the circuit court for Monroe County,
the Honorable Todd L. Ziegler, judge.

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ISSUES PRESENTED

Did the State impermissibly conduct a warrantless seizure and search of Nichols' cell phone and its content?

The circuit court said no.

Did the circuit court erroneously admit other acts evidence of Nichols' offense of seventeen years previous?

The circuit court said no.

STATEMENTS ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is warranted.

STATEMENT OF THE CASE AND THE FACTS

This case is about a passed-out woman's accusation that the defendant, Sam Nichols, put his hands down her shirt and pants and took pictures of her private body parts. Nichols denied the accusation and took the case to trial. He was convicted by a jury of third-degree sexual assault and capturing an image of nudity.

The following narrative is taken from the statement of Marshall Brandon Arenz of the Village of Kendal regarding his interview with Nichols. R. 88:3. Nichols went to a friend's house around 7:00 pm. He, BB, the victim, and two other friends were drinking at the house and occasionally going down to have a drink at the bar downstairs. Everyone fell asleep except Nichols. Nichols played a few games on his phone, then sobered up before he left between 2:30 and 3:00 am. Nichols denied any assault on BB and denied taking pictures of her.

Nichols testified that he was with the others drinking and that he helped BB to the bathroom when she was too intoxicated to get there, then helped her back to the floor where she passed out. R.146:33-34. Nichols, under oath, denied putting his hand on BB's breast, denied putting his hand on or in her vagina, and denied taking a picture of her breast or vagina. *Id.* 35.

When Arenz talked to Nichols about the night, Arenz asked Nichols if Nichols would allow Arenz to see Nichols' phone. R.88:3. Nichols gave Arenz the phone, and

Nichols gave Arenz the password. *Id.* Arenz found only three pictures on the phone and they were of a nonsexual nature. *Id.* Arenz told Nichols he would take the phone and apply for a search warrant to examine the contents. *Id.*

Nichols never gave Arenz permission to search the contents of the phone, though he had ample opportunity to do so. There was nothing in plain view on the phone that would support BB's accusations; the images Arenz saw on the phone were all nonsexual in nature.

Nichols contends that the contents of his phone should have been suppressed as he did not consent to the search of the phone, and there was nothing in plain view to justify seizure of the phone. Nichols also contends that his previous conviction should have been excluded. Additional facts will be set forth as necessary.

ARGUMENT

C. The Contents of Nichols' Phone Should Have Been Suppressed.

The Standard of Review is Mixed.

The questions of whether a search comports with the *Fourth Amendment* is a question of constitutional fact. We uphold the circuit court's findings of evidentiary or historical facts unless those findings are clearly erroneous. We determine the application of constitutional principles to those evidentiary facts independently of the circuit court ... , but we benefit from those ... analysis.

State v. Carroll, 2010 WI 8, ¶¶17, 322 Wis. 2d 299, 778 N.W.2d 1.

There Was No Probable Cause to Seize and Search Nichols' Phone.

The exclusionary rule requires the suppression of evidence obtained contrary to

the Fourth Amendment, which prohibits warrantless searches and seizures. *Id.* ¶¶18-19.

There are exceptions to the rule. One is when there is a danger the evidence will be destroyed while law enforcement seeks a warrant. *Id.* ¶ 21. Another is when a part of the object falls into plain view of the investigating officer and is subject to a valid seizure.

Id.

The circuit court relied on *Carroll*, in its decision, and indeed it is the lead Wisconsin case on this subject. R.135:31. In *Carroll*, the officer seized Carroll's phone after a high-speed chase, after frisking him when he exited the vehicle with a hidden object, after ordering Carroll to drop the object, and after retrieving the phone. *Carroll*, 2010 ¶23. Upon seizing the phone, the officer saw an image of Carroll smoking a long, thin, cigarlike object, which the officer recognized as a marijuana blunt. *Id.* ¶6. The image gave the officer probable cause to seize the phone. *Id.* ¶25. The seizure of the phone was justified. *Id.*

Here, Nichols turned the phone over to Arenz, but there was no image in plain view justifying seizure. In fact, even when Nichols showed Arenz how to get into his photo gallery, there were only nonsexual images. There was nothing to support BB's accusations. Nichols never gave Arenz permission to search the contents of the phone, though he had ample opportunity to do so. There was no reason for Arenz to conclude that there were other evidentiary photos on the phone. Arenz had no probable cause to seize and keep Nichols' phone.

D. Nichols' Prior Sexual Offense Should Have Been Excluded.

The Standard of Review Is Discretionary.

The circuit court's decision to admit or exclude other acts evidence is reviewed under the erroneous exercise of discretion standard. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998).

Nichols' Prior Offense Should Have Been Excluded.

Prior to trial, the State moved to admit evidence of a previous conviction of Nichols. R.54. The conviction arose out of a 1998 incident, where Nichols touched her breasts and genitals. R.54:2. Nichols opposed the admission, arguing that the consciousness of the victim, the age of the victim (in that case 15) and facts of the alleged assault differed enough that the previous case should be excluded. The circuit court ruled that that case could come in, relying on the doctrine that other acts evidence may come in to show the identity of the defendant. R.59. The State introduced the previous conviction through testimony from the deputy sheriff who investigated the crime in 1998. R.145:237.

The circuit court erred in ruling that the other acts evidence could come in as proof of identity. The other crime occurred in 1998 and this incident occurred in 2015. The other crime involved an underage victim, this incident involved a grown woman. The other crime involved touching, but this crime involved photographs. There are no similarities sufficient to identify Nichols as the perpetrator in this 2015 crime based on his 1998 conviction.

CONCLUSION

Nichols is entitled to a new trial based on the circuit court's errors in admitting the contents of Nichols' phone and admitting evidence of Nichols' 1998 conviction.

Dated this 8th day of July, 2019.

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CERTIFICATION

I certify that this brief conforms to the rules contained in WIS. STAT. § 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 ____ pages.

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1454 words.

Dated: July 8, 2019

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CERTIFICATION OF COMPLIANCE WITH WIS STAT. § 809.19(12)(f)

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. § 809.19(12)(f).

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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.

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