COURT OF APPEALS OF WISCONSIN
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2019AP1565-CR

RYAN HUGH MULHERN,

Defendant-Appellant.

Defendant-Appellant's Reply Brief

Appeal from the circuit court for Pierce County, Judge Joseph Boles.

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ARGUMENT

A. The State's Argument Misses the Point.

Unsurprisingly, the State claims that the improperly admitted evidence did not contribute to the jury's verdict, based in large part on the alleged strength of the State's case at trial. The problem is that this strength is founded primarily upon the State's belief that Peg's testimony was "compelling" (State's brief, p.10) and that, it would seem, the fact that someone reports an alleged assault to a number of people must mean that such an assault actually took place.

While the State is free to believe what it wishes, it cannot meet its primary burden of establishing that there is not a reasonable probability that the erroneously admitted evidence contributed to Mr. Mulhern's conviction. It attempts to minimize the importance of Peg's improperly admitted statement about not having had sex in the week before the alleged assault by claiming that her answer had nothing to do with whether she or Mulhern's version of events was more credible, but that is just not the case.

Defense counsel's cross examination of the State's expert revealed that Mulhern's DNA was not found in Peg's vagina, which led to the logical question of whose DNA it might be, and the State's primary reason for wanting Peg to testify that she had not had sex during the week prior to the alleged assault was for the express purpose of convincing the jury that the unidentifiable amount of DNA found in her vagina must have been from the sexual assault it accused Mulhern of committing, which is exactly what the prosecutor referenced repeatedly during his closing

arguments and rebuttal. R.86:141, 154-55.

To suggest that this improper evidence did not contribute to the jury's verdict, under the circumstances, is to ignore reality. If not for this evidence, there is a reasonable probability that the outcome of the trial would have been different. As the supreme court held long ago, "... the reviewing court must set aside the verdict unless it is sure that the error did not influence the jury or had such slight effect as to be *de minimus*." *State v. Dyess*, 124 Wis.2d 525, 619-20, 370 N.W.2d 222 (1985).

CONCLUSION

For the foregoing reasons and those set out in his opening brief, Mr. Mulhern respectfully requests that the judgment of conviction be reversed and that he be granted a new trial.

RESPECTFULLY SUBMITTED this 5th day of February, 2020.

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Dennis S. Schertz

CERTIFICATION REGARDING BRIEF LENGTH

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Dated: February 5, 2020

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