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COURT OF APPEALS

STATE OF WISCONSIN COURT OF APPEAL
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

FRANK P. SMOGOLESKI,

Defendant-Respondent. Appeal No. 2019AP001780

ON APPEAL FROM AN ORDER DENYING A MOTION TO ADMIT FORMER TESTIMONY AND AN ORDER DENYING A MOTION TO ADMIT OTHER ACTS EVIDENCE, BOTH ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HON. LAURA F. LAU PRESIDING
Circuit Court Case No. 2018CF000968

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because the arguments of the parties are adequately presented in the briefs.

STATEMENT OF THE ISSUES

I. THE CIRCUIT COURT CORRECTLY RULED THAT THE PRELIMNARY HEARING TESTIMONY OF JON SHOULD BE EXCLUDED AS IT DENIED SMOGOLESKI SUBSTANTIAL COMPLIANCE UNDER THE CONFRONTATION CLAUSE OF THE CONSTITUTION AND HIS COUNSEL WAS SIGNIFICANTLY LIMITED IN THE CROSS-EXAMINATION OF JON.

II. THE CIRCUIT COURT CORRECTLY RULED THAT THE PROFFERED OTHER ACTS EVIDENCE SHOULD BE EXCLUDED.

STATEMENT OF THE FACTS

The relevant facts related to this appeal center around an alleged sexual assault by Smogoleski of EEK (hereinafter "Emily") and the statements/testimony of a witness to the assault, JJK (hereinafter "Jon").

On or about June 23, 2018, Jon alleged to have witnessed Smogoleski engage in the sexual assault of Emily at a house party hosted by Jon while his parents were traveling out of town. R. 1:1. Jon alleged that Emily had been drinking too much and wanted to go to sleep so he took her to his sister's bedroom. R. 1:1. After hearing from another friend that Smogoleski was in the room with Emily, Jon went to the bedroom to check on Emily. R. 1:2. Jon alleged that he observed Smogoleski naked on top of Emily on the bed. R. 1:2. In Jon's description, Emily was not wearing a shirt, pants or underwear (however, he also stated that her pants and underwear were pulled down to her knees). R. 1:2. Jon further noted that Emily's legs were spread open. R. 1:2. Jon stated he pulled Smogoleski off of Emily and relocated him to the basement of the residence. R. 1:2. Neither Emily nor Smogoleski had any memory of what occurred during the party at Jon's residence. R. 1:2.

STATEMENT OF THE CASE

Smogoleski was charged on June 26, 2018 in a single count complaint alleging second-degree sexual assault in violation of Wis. Stat. §940.225(2)(cm). R. 1:1.

On September 24, 2018 the court held a preliminary hearing which, for the purposes of this appeal, centered around the testimony of Jon. R. 55.

The State filed a Motion to Admit Prior Bad acts on October 2, 2018. R. 30. Smogoleski filed his objection to that motion on March 3, 2019. R. 36. The Circuit Court held a motion hearing on that issue on August 19, 2019 in which it denied the State's Motion to Admit Prior Bad Acts. R. 59.

After the death of Jon in approximately October 2018, the State filed a Motion to Admit JK's Prior Sworn Testimony on May 29, 2019. R. 38. Smogoleski subsequently filed his objection to that motion on July 30, 2019. R. 39. The Circuit Court held a hearing on that motion in which it denied the State's request to have Jon's prior sworn testimony admitted at trial. R. 58.

STANDARD OF REVIEW

Whether a court erred when it admitted or denied the admission of evidence is reviewed as an erroneous exercise of discretion standard. *State v. James,* 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727.

Circuit courts have "broad discretion to admit or exclude evidence[,]…[and] we will upset their decisions only where they have erroneously exercised that decision." *Id.* at ¶8.

The appellate court will uphold a circuit court's decision if the court examined the relevant facts, applied a proper legal standard and reached a reasonable conclusion after using a reasonable and rational process. *Martindale v. Ripp,* 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

Argument

I. THE CIRCUIT COURT CORRECTLY RULED THAT THE PRELIMNARY HEARING TESTIMONY OF JON SHOULD BE EXCLUDED AS IT DENIED SMOGOLESKI SUBSTANTIAL COMPLIANCE UNDER THE CONFRONTATION CLAUSE OF THE CONSTITUTION AND HIS COUNSEL WAS SIGNIFICANTLY LIMITED IN THE CROSS-EXAMINATION OF JON.

The State argues that the Circuit Court erred by excluding the preliminary hearing testimony of Jon. The essence of the State's argument is that Smogoleski had amble opportunity to conduct cross-examination of Jon during the preliminary hearing, which included delving into the credibility of that testimony. In support of its argument, the State relies on the length of that testimony under cross-examination. Unfortunately, it is not the length of the cross-examination or the number of questions asked, it is the content of that examination and whether or not there was substantial compliance with the rights of the confrontation clause set forth in the Constitution. In this case, Smogoleski was significantly limited in his ability to cross-examine Jon which was stated specifically on the record by the Circuit Court throughout the proceedings.

To begin, Smogoleski agrees with the State that the preliminary hearing testimony of Jon was testimonial.

Plaintiff-Appellant Br. at 7. Smogoleski further agrees that the issue at hand is whether Smogoleski had sufficient opportunity to confront Jon during the preliminary hearing.

The State initially relies on *State v. Norman*, 2003 WI 72, 262 Wis. 2d 506, 664 N.W.2d 97 to support its argument that Jon's preliminary hearing testimony should be admissible. *Norman*, however, is factually different from the case at bar. In *Norman*, the preliminary hearing testimony of the unavailable witness left very little room for cross-examination as to credibility. *Id.* at ¶17-18, 262 Wis. 2d at 517-518, 664 N.W.2d at 103. In fact, the testimony at issue related to the purchase of a boat, the documents associated with that purchase and the amount the witness paid. *Id.* The defense in *Norman* asked only three questions because the testimony itself was essentially foundation for the admission of documents associated with a particular transaction. *Id.* The defendant in *Norman* was not denied a right to confront the witness because there were no issues of credibility to be attacked.

The State next relies on *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980). The State's reliance is based on its argument that Smogoleski, through counsel, was not

"significantly limited" in his cross-examination during the preliminary hearing. Smogoleski disagrees.

As argued in his Circuit Court brief and at oral argument in the Circuit Court, the court specifically stated on more than one occasion that it was limiting Smogoleski's counsel in his cross-examination and in the scope of the preliminary hearing.

As it did in the Circuit Court, the State relies on *State v. Bauer,* 109 Wis. 2d 204, 325 N.W.2d 857 (1982). Specifically, it relies on the following: "[w]hen unusual circumstances exist, the test for determining the admissibility of an unavailable declarant's prior statement is whether the purposes behind the confrontation clause have been satisfied." *Id.* at 219, 325 N.W.2d at 865. The State believes that Smogoleski's counsel was not hindered in his cross-examination of Jon and that he had sufficient opportunity in that cross-examination to afford a reasonable jury with enough testimony/cross-examination to determine credibility and any underlying reason for deception by Jon in his statements to police and his testimony.

Smogoleski still believes that the most accurate case to apply in this case is *State v. Stuart,* 2005 WI 47, 279

Wis. 2d 659, 695 N.W.2d 259. The State attempts to distinguish *Stuart* because the unavailable witness in that case was the defendant's brother and the witness had agreed to cooperate with authorities. Appellant Br. at 21-22. The State further focuses on the argument that Smogoleski has not shown that Jon had a motive to testify falsely as the witness in *Stuart* did. *Id.* at 22. Unfortunately, Smogoleski was not able to pursue any motive of Jon because his cross-examination was limited by the Circuit Court.

While Smogoleski quoted *Stuart* in his Circuit Court brief, is worth repeating here. "In Wisconsin, a defendant has a statutory right at a preliminary hearing to cross-examine witnesses against him. Wis. Stat. §970.03(5). *However, the scope of that cross-examination is limited to issues of plausibility, not credibility. State ex rel. Huser v. Rasmussen,* 84 Wis. 2d 600, 614, 267 N.W.2d 285 (1978). This is because the preliminary hearing 'is intended to be a summary proceeding to determine essential or basic facts' relating to probably cause, not a 'full evidentiary trial on the issue of guilty beyond a reasonable doubt.' *State v. Dunn,* 121 Wis. 2d 389, 396-97, 359 N.W.2d 151 (1984)." *Id.* at ¶ 30, 279 Wis. 2d at 673, 695 N.W. 2d at 265. (*Emphasis added*).

"Cross examination at a preliminary hearing is not to be used 'for the purpose of exploring the general trustworthiness of the witness.' *Huser,* 84 Wis. 2d at 614. Indeed, '[t]hat kind of attack is off limits in a preliminary hearing setting.' *State v. Sturgeon,* 231 Wis. 2d 487, 499, 605 N.W.2d 589 (Ct. App. 1999). *When this restriction is enforced, as it was in the present case, and the State attempts to use the preliminary hearing testimony at a later trial, a Confrontation Clause problem arises.*" *Id.* at ¶31, 279 Wis. 2d at 674, 695 N.W.2d at 266. (*Emphasis added*).

The Circuit Court, specifically Judge Lau, had the benefit of having presided over the preliminary hearing, as well as being the Circuit Court judge that ruled on the State's motion to admit Jon's preliminary hearing testimony. Judge Lau was certainly aware of her rulings during Jon's preliminary hearing testimony. The State addresses varies objections and how the sustaining of those objections did not diminish its claim that Smogoleski's counsel was not significantly hindered in his cross-examination of Jon. Conveniently, the State fails to point out the number of times that the Circuit Court specifically stated the purpose of the preliminary hearing and that it

was limiting the questions counsel for Smogoleski could ask.

As with the above case law, Smogoleski argued the Circuit Court's statements in support of his objection to the State's attempt to admit Jon's preliminary hearing testimony in his Circuit Court brief. Again, it is necessary to re-quote those statements from the record here.

Most significantly, at one point during the preliminary hearing, the State argued as follows regarding cross-examination by Smogoleski's counsel: "I think it appears that Attorney Bucher is trying to get into *the credibility of witnesses, not plausibility.*" R. 55:43-44. It is clear that even the State recognized that Smogoleski was, even though counsel tried, limited in his ability to challenge Jon's credibility during the preliminary hearing. In fact, Smogoleski's counsel tried to argue plausibility as the basis for some of his questions as a means to continue his cross-examination of Jon's credibility. These attempts were shut down by the court:

> "THE COURT: And we don't need to be more argumentative. This is a preliminary hearing, which is somewhat of a fact-finding mission. We know that, but with specific

parameters. So it is not going to become argumentative. *This isn't a trial with trial standards of cross-examination.*"

MR. BUCHER: I understand that.

MR. THURSTON: Thank you, ma'am.

THE COURT: So the witness answered the question and now, like I said, *you are going into more of a trial cross-examination question.*

MR. BUCHER: Judge —

THE COURT: So I am going to sustain the objection.

MR. BUCHER: *But we are going on plausibility.* He has indicated under oath today that his penis was touching the vagina. He has indicated twice previously, and I haven't started on the second time, that that did not occur. That —

THE COURT: Because — just a second. He answered. I know it is not necessarily the answer that you want to hear, perhaps, and *I understand that you want to go further investigate it, but that is not going to be a preliminary hearing type question.*" R. 55:28-29 (*Emphasis added*).

The Circuit Court throughout the preliminary hearing specifically stated that Smogoleski's counsel was asking

questions reserved for trial and not a preliminary hearing. Again, it is not the number of questions asked, it is the content of those questions and whether they provided Smogoleski with an opportunity be afforded the same right of confrontation at the preliminary hearing that he would have been afforded if he had gone to trial.

Finally, the Circuit Court issued a comprehensively researched and reasoned written decision which explained its application of the legal standards to case at bar. R. 43. The State provides nothing in this appeal that should convince this Court that the Circuit Court was wrong in application of the law, its legal reasoning or its discretionary authority.

One further specific objection the State addresses in its brief is the ability of Smogoleski's counsel to question Jon about statements made to him by the victim, Emily. Appellant Br. at 20-21. The State argues that this line of questioning would be inadmissible at trial as hearsay; however, that is not true. The admission of those statements would be discretionary to the trial court at the time of trial. Those statements could have been admitted as either an excited utterance, Wis. Stat. §908.03(2) or (3), or as an admission by a party/opponent. Wis. Stat.

§908.01(4)(b)1. *See State v. Patino*, 177 Wis. 2d 348, 502 N.W.2d 601 (Ct. App. 1993).

II. THE CIRCUIT COURT CORRECTLY RULED THAT THE STATE'S PROFERRED "OTHER ACTS" EVIDENCE WAS NOT ADMISSIBLE AT TRIAL.

The State disagrees with the Circuit Court's determination that the probative value of the proffered evidence did not outweigh the prejudice to Smogoleski if admitted at trial. In fact, the State admits in its brief that admission of its other acts evidence will "require a liberal application of the *Sullivan* other-acts test." Appellant Br. at 29. For this, the State argues that the greater latitude test should apply in this case. The State argues that the Circuit Court applied the wrong legal standard and did not apply the greater latitude rule which is a misinterpretation of the Circuit Court's words. While the State contends that the other-acts evidence it wished to admit was similar in nature to the charged offense against Smogoleski, the State fails to point out there was little support for the verification of the other-acts and the fact that those acts were not reported until 15 months after they allegedly occurred.

It is important to point out that great deference should be given to the Circuit Court's ruling in regard to

the admission or exclusion of other-acts evidence. As stated in *State v. Dorsey*, 2018 WI 10, 379 Wis. 2d 386, 906 N.W.2d 158 the analysis of the admission or exclusion of other-acts evidence "'begins with the understanding that the circuit court's decisions to admit or exclude evidence are entitled to great deference. *State v. Jackson,* 2014 WI 4, 352 Wis. 2d 249, ¶45, 841 N.W.2d 791. We will uphold a circuit court's evidentiary ruling if it 'examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach.' *State v. Hurley,* 2015 WI 35, 361 Wis. 2d 529, ¶28, 861 N.W.2d 174."

Despite the contention of the State, the Circuit Court did exactly what the law requires. In its decision, the Circuit Court stated that, in addition to the oral arguments presented by the parties during the motion hearing, it reviewed the written submissions of the parties' arguments that were filed prior to the hearing, it reviewed all of the cases that were cited/relevant, and it reviewed the criminal complaint.

The Circuit Court's issue was the third prong of *Sullivan* and whether the probative value of the other-acts evidence outweighed the prejudice to Smogoleski. In

addressing the third prong, the Circuit Court stated "[s]o some of the things that the Court looked at, obviously the uncharged nature of this alleged other bad act in *State v. Gray* states that other acts evidence may consist of uncharged offenses. And then under 904.04(2), other acts evidence is relevant if a reasonable jury can find by a preponderance of the evidence that the Defendant committed the other act." R. 58:28.

The Circuit Court also addressed the greater latitude test which the State claims was not properly applied. The Circuit Court, however, did have some questions about the application, but ultimately stated that it applied the test in its analysis. R. 58:28-29.

Finally, the Circuit Court stated its specific concerns and why it ruled the other-acts evidence was not admissible. "After reviewing all of the information, the Court has extreme concern that the probative value would not substantially outweigh the prejudice, the danger of prejudicial effect to the Defendant and does believe that this other bad act information could also mislead the jury. It is, in essence, a trial within a trial, even with a different standard of proof." R. 58:29.

Conclusion

For the herein stated arguments, Smogoleski respectfully requests that the Court find that the circuit court did not err in (1) excluding the preliminary hearing testimony of Jon and (2) excluding the other-acts evidence the State sought to have introduced at trial.

Dated this 5th day of June, 2020.

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CERTIFICATION

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

Monospaced font: Courier New - 12, 10 characters per inch; double-spaced; a 1.5 inch margin on the left side and 1 inch margins on all other sides.

The length of this brief is 16 pages.

Dated this 5th day of June, 2020.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of 809.19(12) Wis. Stats.

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 5th day of June, 2020.

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APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality with appropriate references to the record.

Dated this 5th day of June, 2020.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on June 5, 2020, this brief and appendix was deposited in the U.S. Mail for delivery to the Clerk of the Court of Appeals by First-Class Mail, or other class of mail that is at least as expeditious. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated: June 5, 2020.

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