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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2019AP1780-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

FRANK P. SMOGOLESKI,

Defendant-Respondent.

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 HONORABLE LAURA F. LAU, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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The circuit court erred when it determined that Jon's preliminary hearing testimony and the State's proffered other-acts evidence are inadmissible at Smogoleski's trial. Smogoleski has not adequately developed arguments to the contrary or responded to many of the State's arguments. This Court should reverse.

I. Jon's preliminary hearing testimony is admissible at Smogoleski's trial.

The State has explained how the Sixth Amendment's Confrontation Clause works in this context. (State's Br. 7–11.) Smogoleski does not seem to disagree with the State's recitation of the law. He "agrees that the issue at hand is whether Smogoleski had sufficient opportunity to confront Jon during the preliminary hearing." (Smogoleski's Resp. Br. 6.)

Despite agreeing with the State's constitutional framework, Smogoleski precedes his argument by providing the wrong standard of review. (Smogoleski Resp. Br. 4.) He mistakenly claims that review is under the erroneous exercise of discretion standard. (Smogoleski Resp. Br. 4 (citing *State v. James*, 2005 WI App 188, ¶ 8, 285 Wis. 2d 783, 703 N.W.2d 727).) But he ignores that the court in *James* explained that "[w]hether the trial court properly interpreted the law presents a question of law that we review independently." 285 Wis. 2d 783, ¶ 8. He similarly ignores that the State's brief correctly explained that "[t]his Court independently reviews a claim involving a defendant's constitutional right to confront his accusers." (State's Br. 6 (citing *State v. Manuel*, 2005 WI 75, ¶ 25, 281 Wis. 2d 554, 697 N.W.2d 811).)

Smogoleski opens his argument by asserting that *State v. Norman*, 2003 WI 72, 262 Wis. 2d 506, 664 N.W.2d 97, "is factually different from the case at bar." (Smogoleski's Resp. Br. 6.) The State, however, relied on *Norman* for its statement of the law, not for any factual similarity to Smogoleski's case.

Smogoleski states that he "disagrees" with the State's reliance on *Ohio v. Roberts*, 448 U.S. 56 (1980), but he does not adequately explain why. (Smogoleski's Resp. Br. 6–7.) This Court generally declines to consider undeveloped arguments. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Smogoleski next argues that the circuit 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." (Smogoleski's Resp. Br. 7.) He notes one time where the circuit court sustained an objection at the preliminary hearing on the grounds that defense counsel was going too far into credibility, an issue for the trial. (*Id.* at 10–11.) But Smogoleski does not even clearly explain what topic trial counsel was unable to explore due to that objection.

More generally, Smogoleski does not develop an argument explaining *what* areas of Jon's credibility he could have explored at trial but not at the preliminary hearing. The State has already explained that defense counsel was able to thoroughly cross-examine Jon at the preliminary hearing. (State's Br. 12–16.) The State discussed six rulings that limited the questioning at the preliminary hearing, but it explained why those rulings did not significantly limit Smogoleski's ability to explore Jon's credibility. (State's Br. 17–21.) Smogoleski does not respond to many of those arguments. He contends that "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." (Smogoleski's Resp. Br. 5.) Yet his argument entirely ignores the "content" of the cross-examination.

The State argued that one of the circuit court's six sustained objections at the preliminary hearing did not significantly limit Smogoleski's cross-examination of Jon for two reasons. "First, Jon answered a similar question moments later." (State's Br. 20.) "Second, this entire line of questioning about Emily's statements to Jon would be inadmissible hearsay at trial." (*Id.* at 20–21.) Smogoleski challenges only this second point, arguing that Emily's statements could be admissible at trial as excited utterances or as a statement by a party opponent. (Smogoleski's Resp. Br. 12–13.) But Smogoleski does not develop that argument, so this Court should decline to consider it. *Pettit*, 171 Wis. 2d at 646. And, tellingly, Smogoleski does not address the State's first point that "Jon answered a similar question moments later." (State's Br. 20.) This first point is enough reason for this Court to conclude that this sustained objection did not significantly interfere with Smogoleski's cross-examination of Jon.

Smogoleski contends that the circuit court did not err in "its discretionary authority." (Smogoleski's Resp. Br. 12.) The circuit court's ruling on Smogoleski's confrontation claim was not a discretionary act. This Court review that ruling de novo, not for an erroneous exercise of discretion. *Manuel*, 281 Wis. 2d 554, ¶ 25.

Smogoleski further argues that, under *State v. Stuart*, 2005 WI 47, 279 Wis. 2d 659, 695 N.W.2d 259, the State may not use Jon's preliminary hearing testimony at Smogoleski's trial. (Smogoleski's Resp. Br. 7–9.) The State has already explained why that case does not help Smogoleski. (State's Br. 21–22.) It stands on those arguments.

In short, Jon's testimony at the preliminary hearing is admissible at Smogoleski's trial under the Sixth Amendment's Confrontation Clause.

II. The State's other-acts evidence is admissible at Smogoleski's trial.

The State argued that the circuit court erred by excluding other-acts evidence showing that Smogoleski had sexually assaulted M.G. like how he sexually assaulted Emily in this case. Smogoleski does not dispute the State's argument that this other-acts evidence is relevant and offered for a proper purpose.

He instead repeats the circuit court's concern about "whether the probative value of the other-acts evidence outweighed the prejudice to Smogoleski." (Smogoleski's Br. 14.) But he does not respond to the State's specific arguments on this part of the other-acts test. He just states some legal principles and repeats what the circuit court said. (*Id.* at 13–15.) He does not adequately respond to the State's argument that the circuit court applied a wrong legal standard when performing the balancing test under Wis. Stat. § 904.03. (*Id.*) He alleges that "[t]he 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." (*Id.* at 13.) The State construes this quote to mean that, according to Smogoleski, the State has misinterpreted the circuit court's discussion of the greater latitude rule. It makes sense to construe Smogoleski's argument this way because the State has acknowledged that "[i]t is unclear whether the court applied the greater latitude rule." (State's Br. 31.) But Smogoleski has not adequately explained how to interpret the circuit court's statements on the greater latitude rule.

More importantly, Smogoleski has not developed an argument to support his apparent position that the circuit court applied the correcting balancing test under Wis. Stat. § 904.03. There is no basis in the record for reaching that conclusion. The circuit court twice misstated this balancing test. When explaining the third prong of the test for admitting other-acts evince, the court incorrectly said that it had to determine whether "the probative value of the other acts evidence substantially outweighs the danger of prejudice or confusion of the issues, doesn't mislead the jury, cause undue delay, waste time or result in an unnecessary presentation of evidence." (R. 59:28.) Then, when applying this prong, the court said that it had "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." (R. 59:29.) Under the correct legal standard, however, relevant evidence is admissible unless those concerns substantially outweigh the probative value, not the other way around. Wis. Stat. § 904.03.

Smogoleski seems to argue that the State did not prove by a preponderance that this assault of M.G. happened. (*See* Smogoleski's Br. 13, 15.) But he does not develop an argument to that effect, so this Court should decline to consider it. *Pettit*, 171 Wis. 2d at 646. And the circuit court did not conclude that the State had failed to meet this burden of proof. It just noted this burden of proof without saying whether the State had met it. (R. 59:28.) The circuit court instead relied exclusively on its incorrect view of the balancing test under Wis. Stat. § 904.03 (R. 59:29.)

And Smogoleski's undeveloped argument on the burden of proof has no merit. "One of the prerequisites to the admission of other-acts evidence is that a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act." *State v. Arredondo*, 2004

WI App 7, ¶ 48, 269 Wis. 2d 369, 674 N.W.2d 647. This issue gets *de novo* review. *State v. Gribble*, 2001 WI App 227, ¶ 40, 248 Wis. 2d 409, 636 N.W.2d 488. Here, the State proved by a preponderance that Smogoleski had sexually assaulted M.G. Specifically, M.G. told a police detective that (1) she was at a house party where no adults were present, (2) everyone was drinking liquor, (3) Smogoleski arrived at the party, (4) she "passed out on the couch for a short time," (5) she awoke to find Smogoleski performing cunnilingus on her exposed vagina, (6) Smogoleski pulled a condom from his wallet and asked her to have sex, (7) she refused, (8) Smogoleski walked away, and (9) she realized that there was ejaculate on her belly and that her vagina was bleeding. (R. 30:4–5.)

Again, however, whether the State met this burden of proof is not an issue on appeal because the circuit court did not rely on that rationale. The circuit court instead erroneously excluded the State's other-acts evidence based on its application of a balancing test that is incorrect under Wis. Stat. § 904.03.

In short, the circuit court applied an incorrect legal standard when it erroneously excluded the State's proffered other-acts evidence of Smogoleski's sexual assault of M.G.

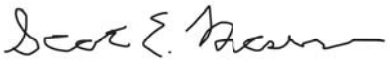
CONCLUSION

This Court should reverse the orders excluding Jon's preliminary hearing testimony and the State's other-acts evidence at Smogoleski's trial.

Dated this 15th day of June 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1679 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 15th day of June 2020.

Scott E. Rosenow

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