STATE OF WISCONSIN
SUPREME COURT
****
CASE NO. 2019AP001876-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT-PETITIONER,

-vs- **Case No. 2010 CF 222**
(Juneau County)

DONALD P. COUGHLIN,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN JUNEAU COUNTY CIRCUIT COURT, THE HONORABLE JOHN ROEMER (JURY TRIAL), JAMES EVENSON (SENTENCING), AND STACY SMITH (POSTCONVICTION MOTION) PRESIDING.

DEFENDANT'S RESPONSE TO PETITION FOR REVIEW

BY:

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Defendant's response to petition for review

The issues raised by the defense during the postconviction proceedings involved the sufficiency of evidence for each of the criminal convictions, ineffective assistance of counsel related to trial counsel's failure to raise issues regarding the sufficiency of the evidence; and an assertion that a new trial was necessary in the interest of justice (242). Trial counsel died before the postconviction motion hearing. The trial court found there was sufficient evidence to support each conviction and that a new trial was not warranted (309:9-20). Defendant appealed.

The court of appeals reversed on some, but not all of counts, concluding there was insufficient evidence to support some of the convictions (State's Appendix at 106-116). The State now petitions for review. Despite the State's well-written petition, when one looks at the relevant criteria of Rule 809.62(1r), it is apparent review is neither necessary nor appropriate.

The State cites two reasons why the Wisconsin Supreme court should review this case. First, it asserts there is a novel issue of statewide importance to be resolved (State's Petition at 1). Second, the State asserts the decision of the court of appeals conflicts with decision of other published opinions in the State of Wisconsin on the issue of sufficiency of evidence (State's Petition at 1). Neither supports review.

The novel issue is moot as it relates to this case.

As to the first reason, the State correctly points out that an issue relevant to the analysis of the court of appeals did not appear to be resolved by existing case law, that is how a reviewing court deduces a theory of guilty when an inconsistency exists between the jury instructions and the verdict form (State's Petition at 13, court of appeals decision at ¶¶16-19). In its analysis, the court of appeals recognized the verdict form for each of the relevant charges included the specific sexual act of defendant touching the penis of the victim (court of appeals decision, ¶17). The relevant jury instruction given was broader to include both "an intentional touching of the penis of [the victim] by Donald P. Coughlin" and "an intentional touching by the victim of the penis of Donald P. Coughlin if the defendant intentionally cause or

allowed the victim to do that touching" (court of appeals decision, ¶17). The court of appeals accepted the defense invitation to conduct a sufficiency of the evidence analysis limited to whether the there was sufficient evidence to support the specific sexual act listed in the verdict forms (court of appeals decision at ¶19). **However,** later in the opinion, the court of appeals decision reads:

> We note that our ultimate conclusion about the sufficiency of the evidence would be the same if we measured the sufficiency of the evidence against the jury instructions. This is because there is no evidence from which a jury could reasonable determine that Coughlin "intentionally caused or allowed" any of the victims to touch Coughlin's penis during the charged time periods but not that Coughlin intentionally touched that victim's penis (court of appeals decision at ¶37, n. 13).

What this cited paragraph ultimately means is that regardless of how the identified issues were to be resolved, the end result is the same *in this case.* Regardless of how the issue may be resolved by the Wisconsin Supreme Court, the result in this case would not change. In *McFarland State Bank v. Sherry,* 2012 WI App 4, ¶9, 338 Wis.2d 462, 809 N.W.2d 58, the court wrote:

> An issue is moot when its resolution will have no practical effect on the underlying controversy. *State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶ 19, 252 Wis.2d 404, 643 N.W.2d 515. Conversely, a case is not moot when "a decision in [a litigant]'s favor ... would afford him some relief that he has not already achieved." *Id.*

As the identified issue is moot, there is no reason for the Wisconsin Supreme Court to resolve it. While there are exceptions to this rule, there does not appear to be a compelling reason for this court to rule on the issue. There probably is no case law on the issue because this type of error does not frequently occur.

The decision of the court of appeals does not conflict with other precedent.

As to the second reason for review, the State argues the decision of the court of appeals is at odds with other precedent addressing sufficiency of the evidence claims. That simply is not true. Consistent with *Poellinger,* the court of appeals conducted a de novo review of the evidence presented at trial to determine whether there was sufficient evidence to support each of the convictions. While it found there was sufficient evidence to support some of the convictions, the court of appeals found there was insufficient evidence to support all of the convictions.

In its petition, the State suggests there were reasonable inferences to support each of defendant's original convictions (State's petition at 28). The court of appeals obviously disagreed. The State argues the court of appeals ignored cases that suggest that vagueness and credibility in the testimony by a victim is to be weighed by the jury, not an appellate court (State's brief at 18-19). In support of its argument, it points to cases that hold a child victim need not testify with precision as to the date of his or her assault (State's brief at 17-18). It cites a case where a child victim's statement she was touched in her "private" and "potty place" was sufficient to prove sexual assault (State's brief at 18). These examples of vagueness of victim testimony have little to do with this case.

In this case, two of the victims were never asked whether they were sexually assaulted as alleged. Nevertheless, the State now argues the jury had the ability to conclude the victims were in fact sexually assaulted as alleged. A jury may find guilt based on reasonable inferences. A jury may not find guilt based on speculation. If the victims did not confirm they were sexually assaulted as alleged, there is no basis for a finding of guilt. As identified by the court of appeals, this is mere speculation. Nothing about the decision of the court of appeals upsets any precedent.

Finally, the decision of the court of appeals involves an issue regarding the sufficiency of the evidence. It required a fact-intensive review of the record. It required an application of the facts of the case to well-established law, the antithesis of an issue normally appropriate for review by the Wisconsin Supreme Court.

CONCLUSION

For the reasons set forth above, the State's Petition for Review should not be granted.

Dated: April 10, 2021

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CERTIFICATION AS TO FORM AND LENGTH

I certify this response meets the form and length requirements of Rule 809.62(4) in that it is: 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 and maximum of 60 characters per line of body text. This response is 1112 words.

Dated: April 10, 2021

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Philip J. Brehm

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12). I certify: This electronic response is identical in content and format to the printed form of the response filed on or after this date and that a copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated: April 10, 2021

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Philip J. Brehm