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 APPELLANT'S SUR-REPLY TO PETITION FOR REVIEW

BY:

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Defendant's sur-reply to petition for review

The State argues review is appropriate for several reasons. While the State presents a well-written document in support of review, this case is not as complicated or nuanced as suggested by the State. The State argues a reviewing court must be very deferential to a jury verdict and that in this case the court of appeals usurped the role of the jury in this case.

As previously argued, this case presents a simple sufficiency of the evidence issue related to defendant's actions against three alleged victims. This is not the type of case that normally justifies review by the Wisconsin Supreme Court.

The three relevant victims were all adults at the time of trial. On 5/1/17, John Doe 1 (G.F.), then 41, testified during trial (299:122-294). On 5/4/17, John Doe 2 (J.C.), then 40, testified during trial (303:11-68). On 5/3/17, John Doe 3 (A.F.), then 38, testified at trial (301:24-270). None of these witnesses presented with any apparent cognitive issues. All testified in a coherent and responsive fashion.

The argument raised by the defense and accepted as correct by the court of appeals did not involve ambiguous testimony that invited competing inferences for the jury. It involved *an absence of relevant testimony* about the charged offenses. As previously argued, the State asked John Doe 2 and 3 whether they had engaged in sexual conduct or activity with defendant Coughlin during several time periods. They indicated that had. The prosecutor's definition of sexual conduct or activity was broader than that charged sexual conduct in each count of the information. John Doe 1 and 2 were never asked whether *the charged* sexual conduct had occurred against them during each time period. The prosecutor never asked them this question. John Doe 1 and 2 never otherwise answered this question during their testimony at trial. How does the jury get to reasonably infer that, notwithstanding no testimony from John Doe 1 and 2 that they were sexually assaulted as alleged during each time period, that they were in fact sexually assaulted as alleged? One cannot possible know the answer to the unasked questions to each alleged victim. The jury could only speculate as to the answer to the answer of these questions. That is why the evidence is insufficient. The court of appeals is correct in its analysis.

As to the mootness issue, the State argues that there is a legitimate issue for the court to resolve as to whether, when determining the sufficiency of the evidence, the reviewing court should look at the charged offense as defined by the jury instructions or as defined in the verdict form (State's Reply at 2). It has argued John Doe 2 and 3 testified that defendant Coughlin touched their penises at unspecified times. The State makes much of the fact that John Doe 2 testified that he never touched defendant Coughlin's penis, but that John Doe 3 said he did (State's Reply at 3). The State argues:

> While Coughlin may attempt to argue no conflict in the theory of guilt regarding John Doe 2 based upon his testimony, he cannot make the same claim with respect to John Doe 3. A reviewing court cannot determine whether the evidence was sufficient regarding John Doe 3 without first identifying the theory of guilt that establishes the boundaries of the court's review (State's Reply at 3).

This answer to the question as to whether sufficiency of the evidence is determined by applying the law from the jury instruction or the verdict form would not be very important or interesting in this case. It is truly moot. Whether that issue is resolved one way or another, it does not change the fact John Doe 2 and 3 were never asked specifically whether they had been sexually assaulted by defendant Coughlin by his touching of their penises during each time period. John Doe 3 was never asked whether he touched defendant Coughlin's penis during each of the time periods. Either way, the evidence would still not be sufficient.

Review is unnecessary in this case. The real issue raised is fact-intensive. The resolution of a fact-intensive issue will end up being limited to the case before the Court.

CONCLUSION

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

Dated: July 14, 2021

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CERTIFICATION AS TO FORM AND LENGTH

I certify this sur-reply 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 body text. This response is 717 words.

Dated: July 14, 2021

Philip J. Brehm
Attorney for Defendant-Appellant

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: July 14, 2021

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