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COURT OF APPEALS

STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2019AP1989-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

OMAR S. CORIA-GRANADOS,

Defendant-Respondent.

APPEAL FROM AN ORDER DENYING THE STATE'S MOTION TO ADMIT EVIDENCE ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE ELLEN K. BERZ, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

KATHERINE D. LLOYD
Assistant Attorney General
State Bar #1041801

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7323
(608) 294-2907 (Fax)
lloydkd@doj.state.wi.us

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ARGUMENT

I. The circuit court erroneously exercised its discretion when it denied the State's motion to admit Coria-Granados's other acts.

A. Relevant law.

To determine whether to admit evidence of other acts, courts employ the familiar three-step framework set forth in *State v. Sullivan*, 216 Wis. 2d 768, 771–72, 783, 576 N.W.2d 30 (1998). Under the first step, the court asks whether the party offers the evidence for a permissible purpose under Wis. Stat. § 904.04(2). *Sullivan*, 216 Wis. 2d at 772. Permissible purposes include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2)(a). Under the second step, the court asks whether the evidence is relevant. *Sullivan*, 216 Wis. 2d at 772. This question has two facets: whether the evidence relates to a fact of consequence and whether the evidence tends to make that fact "more probable or less probable than [the fact] would be without the evidence." *Id.*

In assessing whether the other-acts evidence relates to a fact of consequence, "the court must focus its attention on the pleadings and contested issues in the case." *State v. Payano*, 2009 WI 86, ¶ 69, 320 Wis. 2d 348, 768 N.W.2d 832.

If the party seeking to introduce other acts satisfies these first two steps by a preponderance of the evidence, the burden shifts to the party opposing the admission of the evidence to show that its admission would be outweighed by substantial prejudice or confusion. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399.

In addition, Wisconsin employs the longstanding principle that in child sexual assault cases, courts allow greater latitude in the admission of other-acts evidence. *See*

State v. Dorsey, 2018 WI 10, ¶¶ 31–33, 379 Wis. 2d 386, 906 N.W.2d 158.

B. Under the greater latitude rule applicable in child sexual assault cases, the circuit court erroneously exercised its discretion in excluding evidence of Coria-Granados's other acts concerning the victims.

The State charged Coria-Granados with the attempted first-degree sexual assault of a child under the age of 13; and fourth-degree sexual assault. (R. 1:1; A-App. 102.) To prove the former charge, the State must prove that Coria-Granados tried to have sexual contact with Evelyn, who was not yet 13 years old at the time of the crime. (R. 1:1, A-App. 102.) *See* Wis. Stat. § 948.02(1)(e). To prove the latter charge, the State must prove that Coria-Granados had sexual contact with Michaela without her consent. *See* Wis. Stat. § 940.225(3m). "Sexual contact" means that the contact must be for the purpose of sexually degrading or humiliating the victim or sexually arousing or gratifying the defendant. Wis. Stat. §§ 940.225(5)(b), 948.01(5)(a), .

Here, the State sought to admit five of Coria-Granados's other acts. (R. 32:32; A-App. 112.) As explained in the State's brief-in-chief, the circuit court failed to properly apply the *Sullivan* test to the State's motion.[1] In so doing, the court erroneously exercised its discretion. *State v. Muckerheide*, 2007 WI 5, ¶ 17, 298 Wis. 2d 553, 725 N.W.2d 930 (stating that a court erroneously exercises its discretion when it fails to apply the proper legal standard).

The circuit court properly concluded that the State's satisfied its burden to show it sought to admit the other-acts evidence for a permissible purpose. (R. 32:37; A-App. 117.) After this step, the court next needed to ask if the other acts

[1] State's Br. 12–23.

were relevant. *See Sullivan*, 216 Wis. 2d at 772. As part of its relevance inquiry, a court must determine whether a jury could find by a preponderance of the evidence that the other acts occurred. *See State v. Gribble,* 2001 WI App 227, ¶ 40, 248 Wis. 2d 409, 636 N.W.2d 488. The circuit court failed to employ this step. (R. 32:37; A-App. 117.)

Coria-Granados argues that the State "mischaracterizes" the court's decision by stating that the circuit court "found that the State had failed to show that a reasonable jury could find that the other acts in fact occurred."[2] Coria-Granados then addresses each other act and points out that "the State is incorrect when it argues that the court found that no reasonable jury could believe that" the acts happened.[3] Coria-Granados misunderstands the State's argument.

The State agrees with Coria-Granados that the circuit court did *not decide* whether a reasonable jury would find that the other acts occurred. That *is* the gist of the State's argument. The circuit court erroneously exercised its discretion because it *failed to decide* whether a reasonable jury would find by a preponderance of the evidence whether the acts occurred. *See Muckerheide*, 298 Wis. 2d 553, ¶ 17. Instead, the circuit court refused to admit the evidence because it said that it was not corroborated. (R. 32:37; A-App. 117.) Confusingly, the court said that "[r]elevance is not the issue," (R. 32:37; A-App. 117) but a conclusion that evidence is not sufficiently corroborated is a conclusion that the evidence is not relevant. *See Gribble*, 248 Wis. 2d 409, ¶ 40.

Whether evidence is sufficiently corroborated and therefore relevant is a question of law, which this Court reviews de novo. *See Gribble*, 248 Wis. 2d 409, ¶ 40. The girls'

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[2] Coria-Granados's Br. 14.

[3] Coria-Granados's Br. 15–17

testimony concerning the other-acts evidence is ample evidence from which this Court can conclude that a reasonable jury would find that the other acts occurred. *See State v. Gray*, 225 Wis. 2d 39, 59, 590 N.W.2d 918 (1999).

Coria-Granados argues that the circuit court properly denied the State's motion for two reasons. One, Coria-Granados says that two of the five acts—the texting and the bra incident—"were so dissimilar to the charged acts as to have no relevance to any purpose other than the forbidden purpose of proving Coria-Granados's general propensity to engage in sexualized interactions with underage girls."[4] Two, Coria-Granados argues that the other acts' probative value was outweighed by the danger of undue prejudice or confusion.[5] Coria-Granados is incorrect on both points.

First, evidence is relevant if it tends to make any consequential fact more or less probable than it would be without the evidence. *See* Wis. Stat. § 904.01. To prove Coria-Granados guilty of the fourth-degree sexual assault of Michaela, the State must prove that when Coria-Granados grabbed Michaela's butt, he did so for the purpose of his own sexual arousal or gratification. *See* Wis. Stat. § 940.225(3m), 940.225(5)(b). Evidence that Coria-Granados sent Michaela sexually explicit texts and picked up her bra show that he engaged in a pattern of sexual behavior around her; the evidence shows Coria-Granados's intent and absence of mistake in committing the charged crime. Thus, the acts are relevant.

Second, Coria-Granados has not met his burden to prove that any undue prejudice or confusion outweighs the significant probative value of the other acts. *See Marinez*, 331 Wis. 2d 568, ¶ 41. On this step of the *Sullivan* test, the scale

[4] Coria-Granados's Br. 11.

[5] Coria-Granados's Br. 14.

tilts "squarely on the side of admissibility." *Id*. And given the greater latitude rule in cases of child sexual assault, the scale leans even further toward admissibility. *See Dorsey*, 379 Wis. 2d 386, ¶ 36. Coria-Granados has not overcome the presumption that the evidence is admissible.

Coria-Granados argues that the circuit court concluded that the other acts were inadmissible because the danger of undue prejudice and jury confusion was too high.[6] Coria-Granados emphasizes the court's use of the word "prejudice."[7] According to Coria-Granados, the probative value of the other acts was low because "the evidence consisted solely of allegations from the same two alleged victims" and the "evidence was only weakly supported."[8] Against this low probative value, argues Coria-Granados, is the high risk that the jury will not understand what it is to decide or conclude that he is of "bad character" because of the acts.[9] Coria-Granados's arguments ignore the record and the law.

In the State's view, the circuit court did not properly address the third part of the *Sullivan* test. The court's use of the word "prejudice" and reference to jury confusion were made with respect to the court's complaint that the State had not adequately corroborated the other acts. (R. 32:37; A-App. 117.) And a question of corroboration concerns relevancy, not prejudice. *See Gribble*, 248 Wis. 2d 409, ¶ 40. To the court, the lack of corroboration made the other acts of low probative value. But as shown above and the State's brief-in-chief, this conclusion was an erroneous exercise of the court's discretion in light of the greater latitude rule as applied to the facts.

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[6] Coria-Granados's Br. 19–21.

[7] Coria-Granados's Br. 19–21.

[8] Coria-Granados's Br. 19, 21.

[9] Coria-Granados's Br. 20.

But even if the circuit court addressed the third step in *Sullivan*, it failed to acknowledge that it was Coria-Granados's burden to show how he would be prejudiced, and that prejudice must be assessed in light of the greater latitude rule. (R. 32:30–38; A-App. 110–18.) Thus, the court erroneously exercised its discretion. *See Muckerheide*, 298 Wis. 2d 553, ¶ 17.

It is Coria-Granados's burden to prove that the probative value of the other-acts evidence would be *substantially* outweighed by its undue prejudice. *See Marinez*, 331 Wis. 2d 568, ¶ 41. Under the greater latitude rule, the presumption is that the evidence is admissible. *Id.* Coria-Granados has failed to rebut this presumption. Instead, he suggests that the acts may not have taken place and complains that the evidence comes from the victims. But as stated, Coria-Granados's first complaint concerns relevancy, not prejudice. And because a jury could find that the events occurred, the evidence is relevant. And whether the evidence came from the victims has no bearing on its prejudicial nature. Further, Coria-Granados's complaints that the jury may be confused or conclude that he has bad character are not concerns that substantially outweigh the probative value of the State's evidence. The State must prove that Coria-Granados actions toward the girls was sexual in nature. The other-acts evidence is needed to prove Coria-Granados's intent and absence of mistake. Courts must err on the side of including this evidence. *See id.* Any confusion or slight prejudice the other acts may cause can be cured with a limiting or cautionary instruction. *See id.*

II. The circuit court erroneously exercised its discretion by denying the State's motion to admit Evelyn's recorded statement under Wis. Stat. § 908.08(4).

A. Relevant law.

Wisconsin Stat. § 908.08(3)(a)2. allows the admission of a recording of a child's hearsay statement when the child is between the ages of 12 and 16 at trial and the "interests of justice warrant its admission." The statute sets forth a non-exhaustive list of nine factors that the court may consider to determine whether the interests of justice warrant the admission of the recording. *See* Wis. Stat. § 908.08(4).

The decision to admit the statement is discretionary. *State v. Tarantino*, 157 Wis. 2d 199, 211, 458 N.W.2d 582 (Ct. App. 1990). But a trial court erroneously exercises its discretion when it fails to apply the accepted legal standards to the facts of record. *State v. Huntington*, 216 Wis. 2d 671, 680–81, 575 N.W.2d 268 (1998).

B. The circuit court erroneously exercised its discretion by failing to properly apply Wis. Stat. § 908.08(4).

1. The circuit court misstated the law.

The circuit court stated that Wis. Stat. § 908.08(4) creates a "presumption" that a 13-year-old child's audiovisual statement is inadmissible. (R. 33:4, A-App. 122.) This is incorrect. "The [L]egislature's purpose in enacting Wis. Stat. § 908.08 was to make it easier, not harder, to employ videotaped statements of children in criminal trials and related hearings." *State v. Snider*, 2003 WI App 172, ¶ 13, 266 Wis. 2d 830, 668 N.W.2d 784. When a child is between the ages of 12 and 16, the court "shall admit" the recording when the interests of justice warrant its admission. *See* Wis. Stat. § 908.08(3)2. There is no presumption against its admission,

and the circuit court's statement otherwise demonstrates its misunderstanding of the law.

Coria-Granados argues that the circuit court's statement vis-à-vis a presumption was correct because hearsay is inadmissible absent an exception.[10] But the circuit court was not referring to hearsay generally. It began its process of applying Wis. Stat. § 908.08 from a presumption that the child's statement was inadmissible. This is not the law.

Wisconsin Stat. § 908.08 concerns "the social policy of protecting children from unnecessary trauma"; the trial court is not to alter it by creating an unwritten presumption. *See State v. James*, 2005 WI App 188, ¶ 25, 285 Wis. 2d 783, 703 N.W.2d 727. The circuit court's decision thus erroneously required the State to overcome a nonexistent presumption under the statute.

2. The circuit court's factual findings are not supported by the record.

As stated in its brief-in-chief, the circuit court failed to acknowledge the significant role that Coria-Granados had played in Evelyn's life, the sexual nature of the allegations against him, the physical pain Evelyn had suffered, the mental anguish she was in, her confusion over how to discuss with others what had happened, and the difficulty that children have in testifying.[11] Coria-Granados responds that the State "quibble[es] with virtually all aspects of the circuit court's fact-findings," but "does not allege that any of the court's findings" but two are clearly erroneous.[12] According to Coria-Granados, the State has therefore conceded the circuit

[10] Coria-Granados's Br. 22–24.

[11] State's Br. 35–37.

[12] Coria-Granados's Br. 27.

court's factual findings were not clearly erroneous.[13] Coria-Granados is incorrect.

Contrary to Coria-Granados's position, the State disputed the circuit court's factual findings with regard to Wis. Stat. § 908.08(4)(b), (c), (d), (e), (g), (h), (i).[14] Specifically, the court said that Evelyn was in "fine physical and mental health," but it failed to acknowledge that Evelyn had complained of stomachaches, nightmares, and peeing the bed.[15] The court ignored that the criminal behavior at issue is an attempted sexual assault. (R. 33:4; A-App. 122.) When this is the case, the court should consider the "duration and the extent of physical or emotional injury" on the child, which the court did not do. *See* Wis. Stat. § 908.08(4)(c). The court failed to consider that Coria-Granados had lived with Evelyn at one point and did not acknowledge how Evelyn's family had behaved in light of the allegations. *See* Wis. Stat. § 908.08(4)(d). The court largely glossed over Coria-Granados's close relationship with the family and how this may affect Evelyn. (R. 35:5; A-App. 123.) Because the court ignored the record in making its factual findings, its findings were clearly erroneous. *See Muckerheide*, 298 Wis. 2d 553, ¶ 17.

The court's finding that Evelyn understood that Coria-Granados's behavior was not her fault lacks support in the record. (R. 33:6; A-App. 124.) Instead, as the State pointed out in its brief-in-chief, Evelyn's tone, body language, and statements on the recording show symptoms of self-blame.[16] Coria-Granados disagrees, arguing that Evelyn "fully

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[13] Coria-Granados's Br. 27.

[14] State's Br. 32–36.

[15] State's Br. 32.

[16] State's Br. 33–34.

recognizes that the alleged assault was not her fault."[17] Again, Evelyn's tone, body language, and statements in the video show a child who is confused about how a person she trusted could have behaved in such a manner toward her. (R. 35:14:25–15:06, 30:07–10.) She wants answers; she wants to hear that it was not her fault. (R. 35:30:07–10.)

And the circuit court failed to properly weigh how the admission of the recording would minimize trauma to Evelyn. It did not account for the difficult task a *child* faces when she comes into a courtroom full of strangers and must confront her abuser, who was once a trusted family friend. Instead, the court said that "[c]oming into a courtroom is difficult for everyone, be they adults or children." (R. 33:6–7; A-App. 124–25,) The court dismissed Evelyn's trauma, saying, "I don't, quite frankly, see that [admitting the recording] would reduce any strain." (R. 33:6; A-App. 124.) Coria-Granados argues that this was a proper exercise of the court's discretion.[18] But both the court and Coria-Granados ignored the mandates of Wis. Stat. § 908.08, and in so doing ignored the significance of what the Legislature sought to accomplish with the statute.

The Legislature carved out a particular hearsay exception for children. *See* Wis. Stat. § 908.08(3). When a party seeks to admit a hearsay statement from a 13-year-old child, the court "shall admit" the statement when the party shows that the interest of justice warrants it. *See id.* The statute exists to make it *easier* to admit these statements. *See Snider*, 266 Wis. 2d 830, ¶ 13. The circuit court's ruling here—from its inception to its conclusion—made it only harder to admit Evelyn's statements. Indeed, under the court's application of the law, it is difficult to conceive of *any* statement from a 13-year-old child that would be admissible.

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[17] Coria-Granados's Br. 27.

[18] Coria-Granados's Br. 27–28.

The court is not free to ignore the law in this way. *See James*, 285 Wis. 2d 783, ¶ 25.

Finally, Coria-Granados disagrees with the State's argument that this Court may review the recording to determine its admissibility.[19] The State relies on under *State v. Jimmie R.R.*, 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 606 N.W.2d 196, in support of its argument. Coria-Granados argues that *Jimmie R.R.* is inapplicable here because it concerned this Court's review of a recording to determine only whether the child knew that a lie was punishable. *See id.* ¶¶ 37–40. But Coria-Granados offers no explanation for how this difference matters. In *Jimmie R.R.*, the court determined a fact: whether the child knew that a lie was punishable. Here, the State asks this Court to determine facts: whether the factors under Wis. Stat. § 908.08(4) support the admission of the recording. *Jimmie R.R.* permits the Court to do this in these circumstances.

[19] Coria-Granados's Br. 24.

CONCLUSION

For these reasons, the State respectfully requests that this Court reverse the order of the circuit court.

Dated this 31st day of August 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

KATHERINE D. LLOYD
Assistant Attorney General
State Bar #1041801

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7323
(608) 294-2907 (Fax)
lloydkd@doj.state.wi.us

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 2989 words.

_____
KATHERINE D. LLOYD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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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 31st day of August 2020.

_____
KATHERINE D. LLOYD
Assistant Attorney General