FILED
09-08-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2020-AP-32-CR

vs.

Trial No. 07-CF-1

OSCAR C. THOMAS,

Defendant-Appellant.

Appeal from a judgment of conviction entered August 1, 2018
and an order denying postconviction relief entered December 26, 2019
in the Circuit Court of Kenosha County,
Honorable Bruce E. Schroeder, Judge, presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

JOHN T. WASIELEWSKI
Bar ID No. 1009118
Attorney for Defendant-Appellant

Wasielewski & Erickson
1429 North Prospect Avenue
Suite 211
Milwaukee, WI 53202

(414) 278-7776
jwasielewski@milwpc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

I. The evidence as to first degree sexual assault was insufficient, as it consisted entirely of Mr. Thomas' uncorroborated statement.

Mr. Thomas asserts that nothing in the record outside of his confessions proves that any sexual assault occurred. Mr. Thomas and the State agree that the State bore the burden of presenting "at least one significant fact that gives confidence that the crime the defendant has been convicted of actually did occur." *State v. Bannister*, 2007 WI 86, ¶31, 302 Wis.2d 158, 734 N.W.2d 892. Br. 20; State's br. 12.

The State asserts two facts corroborate Mr. Thomas' confession: First, that Mr. Thomas said he watched a porn video before getting in bed with the victim, and a porn video was found; Second, that Mr. Thomas said the victim said she loved him and told him to stop, and that a downstairs neighbor testified hearing a woman say "Stop, stop, I love you, I love you." The State asserts these two facts "satisfy the standard for corroboration of confession." State's br. 13. They do not. The mere facts that a porn video was found and that a witness heard a

woman say "stop, I love you" do not establish do not give "confidence that the crime [of sexual assault] *actually did occur*." *Bannister*, ¶31 (emphasis added).

The State notes that its prosecution theory is based on sexual contact over clothing and bemoans the difficulty of proving, outside of Mr. Thomas' statements, that such contact occurred. State's br. 13-14. This is all but an admission that the porn video and the statement heard by the witness *do not show any sexual contact*. Indeed, the porn video and the statement heard by the witness no more show that a sexual assault occurred than did the bloody hat show that the missing man in *Perry's Case* had been murdered. See *Bannister*, ¶24.

Mr. Thomas prays that this Court order the sexual assault count vacated and dismissed with prejudice.

II. The Circuit Court erred in permitting the prosecutor to introduce hearsay DNA evidence through cross-examination of the defense expert and to argue therefrom that the DNA evidence was substantive evidence of guilt

In the course of cross-examining the defense medical examiner, the prosecutor asked about crime lab reports, and Mr. Thomas' counsel objected "to going into the details of reports that haven't been introduced into evidence." Apx. 106; 320: 88. In overruling this objection, the Court's sole express rationale was: "If he examined it, then it's presumably something he discounted or relied upon." Apx. 106; 320: 88. In support of the Court's ruling, the State acknowledges that this rational "may have been abbreviated," but asserted "it is not necessarily wrong." State's br. 17. This is so, the State argues, because according to a 1967 civil case, "'[hearsay] reports may . . . be introduced by the adverse party into evidence for the purpose of impeachment.'" State's br. 16, quoting *Vinicky v. Midland Mut. Cas. Ins. Co.*, 35 Wis.2d 246, 256, 151 N.W.2d 77 (1967). This analysis has at least two flaws: First, it does not comport with other more recent criminal

cases, which the State concedes are the governing law; Second, while the DNA reports may have initially been brought up in an attempt to impeach the defense expert, such impeachment purpose was abandoned in closing argument and DNA results were argued as substantive evidence.

Under the heading "the governing law," the State notes that the rule allowing an expert's opinion to be based on inadmissible hearsay "does not transform the inadmissible hearsay into admissible evidence" and such hearsay may not be put in "either through 'the front door' of direct examination of the expert or 'the back door' of cross-examination of the expert." State's br. 15, citing and quoting *State v. Watson*, 227 Wis.2d 167, 199, 595 N.W.2d 403 (1999). Yet, the DNA report was introduced through the back door of cross-examination of the expert, and the State makes no claim to the contrary. Moreover, the State acknowledges that introducing laboratory test results through a witness who did not perform the tests may violate a defendant's right to confrontation. State's br. 15, citing *State v. Heine*, 2014 WI App 32, ¶9, 354 Wis.2d 1, 844 N.W.2d 409.

The State asserts that *Vinicky* is somehow an

exception to the language in *Watson* quoted above. Yet *Vinicky* is a civil personal injury case which did not consider Constitutional Confrontation. Under the Sixth Amendment the right to Confrontation is enjoyed by the "accused" in "all criminal prosecutions."

The State asserts that the DNA report was properly admitted for impeachment. The State summarizes the defense expert's findings in his direct examination, apparently to suggest that these findings might be challenged or impeached with the DNA report. State's br. 15-16. Yet, after introducing the findings of the DNA report, the prosecutor asked no questions to suggest that the DNA report undercut the expert's findings, but rather moved on to matters not concerning DNA. Apx. 107: 320: 89 et seq. Thus, the prosecutor did not use the DNA findings to impeach during cross-examination of the defense expert, as the State now argues. Rather, the prosecutor argued the DNA findings as substantive evidence in closing argument, without any connection to impeaching the defense expert: "Her DNA is found under his fingernails." Apx. 109: 321: 38.

The State argues that admission of the DNA findings did not violate Mr. Thomas' right to

Confrontation; the State first asserts waiver, and then repeats its claim that the DNA was used solely to impeach. State's br. 18-19.

The State asserts that a hearsay objection does not preserve an objection on constitution confrontation grounds, citing *State v. Nelson*. 138 Wis.2d 418, 439, 406 N.W.2d 385 (1987). However, the State makes no attempt to show how this *Nelson* rule applies to Mr. Thomas. In fact, Mr. Thomas' objection did not mention either hearsay or confrontation; nonetheless, Mr. Thomas clearly objected to admission of the DNA findings in broad terms: "I'm objecting to going into the details of reports that haven't been introduced into evidence, though. It's a back door --" Apx. 106; 320: 88. The objection is clear, and is not expressly limited either to hearsay or to confrontation, but can fairly be construed to encompass both. Moreover, the Court did not allow counsel to complete his objection before interrupting with its ruling. Thus, Mr. Thomas should not be deemed to have waived the issue of Confrontation.

The State also asserts that "there is no confrontation right for impeachment testimony." State's br. 18. The State cites no authority for this proposition, but instead

goes on to assert that "a statement is not hearsay, and the Confrontation Clause is not implicated, if the statement is offered for a purpose other that for its truth." State's br. 18. However, the State undercuts its own argument by pointing out that prosecutor referred to the DNA evidence in response to Mr. Thomas' objection that "'no evidence'" supported the theory of the struggle between the victim and Mr. Thomas. State's br. 19. By citing the DNA evidence as substantive evidence in support of the theory of prosecution, the prosecutor belied the assertion that the DNA findings were merely for impeachment. The State used DNA test results as substantive evidence without affording Mr. Thomas an opportunity to confront the person who conducted the tests.

CONCLUSION

Oscar C. Thomas prays that this Court order that the sexual assault charge be dismissed with prejudice, and that this court vacate his other convictions and sentences and remand for a new trial.

Respectfully submitted,

_____

John T. Wasielewski
Attorney for
Oscar C. Thomas

FORM AND LENGTH CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1579 words.

_____
John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this reply brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

_____
John T. Wasielewski