STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2020AP001197-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS C. STRONG, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Outagamie Circuit Court,
the Honorable Mitchell J. Metropulos Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Court Erroneously Excluded Evidence That T.W. Lied to Police About a Physical Altercation Four Months before She Alleged the Physical Altercation in This Case.

The State's response on this claim begins with a mistake of fact. The State asserts that Mr. Strong *did* introduce evidence of T.W.'s prior lie to police. Response at 5, 12) (emphasis added). In fact, the State objected and the court sustained the State's objection.

> THE DEFENDANT:
>
> Q. Wasn't there a point, though, that you had said that you had called the police back and said that everything you said was not true?
>
> A. No.
>
> Q. What was that that you had said that you called the police back and said everything was not true? I thought that was --
>
> A. Never, I never said that.
>
> Q. Was that you that had said that or Crystal? I'm not sure.
>
> MR. DUROS: Judge, --
>
> THE WITNESS:

A. That's a totally different case.

MR. DUROS: Judge, objection.

THE COURT: The objection's sustained

The court admonished the jury not to consider any question or answer for which it sustained an objection. R.296:172. This was the full extent of the treatment of incident at trial. Mr. Strong did not introduce any of the specifics of the incident. This is consistent with the court's pretrial ruling that he could not do so. R.295:15.

Alternatively, the State argues that the evidence was not admissible because "a single instance of falsehood cannot imply a character for untruthfulness," citing *State v. Eugenio*, 219 Wis. 2d 391, 404, 579 N.W.2d 642. *Eugenio* is inapt. That case involved Wis. Stat. § 906.08(1), "opinion and reputation evidence of character." There, the controversy was regarding the propriety of rehabilitating a witness' character for truthfulness when the opposing party attacked the witness' character by *opinion* or *reputation* evidence. Mr. Strong's claim is under a separate provision, Wis. Stat. § 906.08(2), "specific instances of conduct." There is a significant distinction between the admissibility of opinion and reputation testimony and specific instances of untruthful conduct. *See* Daniel D. Blinka, 7 Wis. Prac., Wis. Evidence § 608.1 (4th ed.).

The State notes that in general, a specific instance of untruthful conduct may not be proven by

extrinsic evidence, meaning that the party may cross-examine on the instance but must accept the answer (response at 11); however, the State omits an important caveat. Although this line of impeachment excludes extrinsic evidence, it "does not preclude the impeaching party from confronting the witness with a prior statement or document . . . in an attempt to get the witness to 'back down' and admit the impeaching fact." Blinka, § 608.2. Here, either T.W. would have to admit that she did lie to police, or she would be confronted with the evidence proving she did.

In a footnote, the State argues that T.W. lying to police about a physical assault mere months before reporting an alleged physical assault here does not indicate untruthfulness, but rather truthfulness because she admitted her lie. Response at 12-13. It is the jury's province to weigh the evidence. And truthful conduct would be to refuse to lie to police in the first place.

II. The State Elicited Unlawful Testimony That Warrants a New Trial in the Interest of Justice.

The State repeatedly emphasizes that Mr. Strong did not contemporaneously object to the State's unlawful evidence. Mr. Strong acknowledged this in his appellant's brief, which is why he presents this claim pursuant to the interest of justice doctrine. The State makes no effort to engage with the interest of justice doctrine.

A. The State erroneously elicited other acts evidence about Mr. Strong.

The State argues that evidence about Mr. Strong's allegedly threatening demeanor toward a police officer after Mr. Strong had been arrested was admissible to show consciousness of guilt. Response at 14. As the State acknowledges, the jury heard testimony about Mr. Strong's demeanor during the relevant timeframe as well as evidence that Mr. Strong was found in a closet. The gratuitous introduction of other acts evidence by the State through leading questions[1] and body camera footage added nothing proper to the State's case. Instead, it served the improper purpose of trying to show that Mr. Strong is a bad guy who escaped punishment for other criminal conduct.[2]

It was further error for the court not to permit Mr. Strong to play a different part of the body camera footage wherein he discussed the speedy-trial timelines in order to contextualize the "see you soon" comments. Response at 13. The State posits that

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[1] "Was he argumentative in an odd, sort of creepy way?"; "When he stared at you sometimes did he say, 'See you Soon?'"; "And sometimes when he said that did he have a smile on his face?"; But despite that smile did you still sort of get the heebie-jeebies?"; "did he look at you and sort of smile and wink and then make vague threats?" R.295:248-250.

[2] The court mentioned the crime of resisting or obstructing in front of the jury, suggesting that Mr. Strong's alleged threatening behavior *was* criminal conduct—conduct he was not on trial for. R.295:261-262.

because Mr. Strong was able to ask questions about the speedy trial timelines, the body camera footage would be cumulative. Response at 14.

This is an odd argument given that the State introduced both testimony and two portions of body camera footage to support its effort to paint Mr. Strong as a threatening person. R.295:247-251. Mr. Strong should have been able to show the other portion of the footage to refute the State's effort—particularly because this improper line of questioning depended on Mr. Strong's demeanor. A video best informs on the question of demeanor.

B. The State erroneously elicited testimony from a detective that vouched for T.W.'s veracity.

The State spends considerable time arguing why Lieutenant DelPlaine was an expert. Response at 17-18. This supports Mr. Strong's claim. Vouching testimony from an expert is particularly prejudicial because the jury will naturally give an expert witness' vouching more weight than it would a lay witness' vouching, for the simple reason that they are presented as an expert. *See State v. Haseltine*, 120 Wis. 2d 92, 396, 52 N.W.2d 673 (the expert's opinion, "with its aura of scientific reliability, creates too great a possibility that the jury abdicated its fact-finding role to the psychiatrist and did not independently decide [the defendant's] guilt."). To the extent the State is arguing this was admissible evidence because of the dynamic between Mr. Strong and T.W., that effort also fails. Intermittent intimacy

between long-time friends is not one of the enumerated relationships set forth in the definition of domestic abuse. *See* Wis. Stat. § 968.075(a) ("domestic abuse means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common.").

III. The State Made Improper Closing Arguments, Resulting in Plain Error.

The State's closing arguments improperly suggested that the jury reach a verdict by considering factors other than evidence. First, the prosecutor improperly vouched for police witnesses and himself, in part by asking the jury to rely on facts that were not in evidence. Second, the State encouraged the jury to rely on its sympathy for T.W. and asserted without evidence that she had to miss work and that Mr. Strong's supporters were upsetting her in the hallway. R.296: 187. The prosecutor also improperly personalized the case saying, "it hurts me just to know that she has to go through this." R.296:187.

The State misrepresents the record when it asserts that Mr. Strong "accused the prosecutor of 'bamboozling" the jury during his closing argument. Response at 6. This is not true. Mr. Strong argued that it was T.W. who had deceived the State: "I'm not asking you to doubt the State, he's doing his job, he was bamboozled." R.295:92. *See also*, R.296:208-209 (I'm going to ask that you return not guilty verdicts, because the State himself had not, even with the

bamboozle that they [witnesses] used yesterday, presentation that he [the prosecutor] had to take and run with."). There was no basis for the prosecutor to boost his own credibility because his own credibility was not challenged.

In addition, contrary to the State's assertion, Mr. Strong never argued that the police lied. *See* response at 6. Mr. Strong's defense was that T.W. was lying, not that the police were lying. He did question some of the officers' testimony as being convenient, but also said the officers were human, implying it could be inadvertence or mistake. R.296:194.

Finally, the State posits that any error in closing argument was insignificant because the only issue in the case was whether T.W. was telling the truth. The State does not explain why this lends to a conclusion that bootstrapping the credibility of its witnesses through improper means was harmless. Instead, logic dictates that the opposite is true.

CONCLUSION

For the reasons stated above and in Mr. Strong's appellant's brief, Mr. Strong respectfully asks the Court to reverse and remand with directions to vacate the judgment of conviction and order a new trial.

Dated and filed by U.S. Mail this 8th day of December, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,535 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 and filed by U.S. Mail this 8th day of December, 2020.

Signed:

COLLEEN MARION
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