STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal Number 2021AP001732 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC J. DEBROW,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, AND SENTENCE, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JOHN D. HYLAND, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. The trial court had granted Debrow's motion in limine prohibiting the state from introducing evidence of Debrow's prior conviction for sexual assault. One of the State's witnesses testified that he observed Debrow enter the alleged victim's room.

Did the trial court err in failing to grant a mistrial where the witness, having been asked by the prosecutor, whether he had learned of anything that led him to be on alert, testified that he looked Debrow up on CCAP.

The trial court denied Debrow's mistrial motion.

II. Did the trial court err where it allowed evidence that Debrow watched a video entitled "Stepdaughter is scared to

get fucked while wife sleeps."

The trial court allowed the evidence over Debrow's objection on the ground that Debrow used the specific search terms to find the video, where there was no evidence that he used such search terms.

III. Did the trial court err in allowing M.M.W. to testify, as an other act, that on a previous occasion, she woke up to Debrow in her room, where there was no testimony that Debrow touched her inappropriately.

The trial court allowed the testimony over Debrow's objection.

IV. Should this court grant Debrow a new trial in the interest of justice because improper evidence obscured the real controversy-whether Debrow sexually assaulted M.M.W.

The trial court did not rule on this because it is raised under this court's discretionary authority.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The briefs of the parties should fully present the issues on appeal and develop the relevant theories and legal authorities. Therefore, the defendant-appellant does not believe oral argument is necessary.

Publication is not requested

STATEMENT OF CASE

February 1, 2018, the state charged Eric Debrow with

the second degree sexual assault of M.M.W. as a persistent repeater.(1).

February 27, 2018, following a preliminary hearing, Debrow was bound over for trial. (126:15). An information was filed alleging the same charge.(Id:15; 13). Debrow pled not guilty.(126:15-16).

November 27, 2019, the state moved to joint this case with a complaint filed in Dane County Case Number 2018CF001787, ***State of Wisconsin vs. Eric J Debrow,*** wherein Debrow was alleged to have engaged in First Degree Sexual Assault of N.N.M. as a persistent repeater (63). At the same time, the state sought to join Dane County Case No. 2018CF002281, ***State of Wisconsin vs. Eric J Debrow***, alleging seven counts of felony bail jumping and Dane County Case 2018CF002409, ***State of Wisconsin vs. Eric J Debrow***, alleging eight counts of felony bail jumping.(Id)

February 12, 2020, the trial court joined the two sexual assault cases but denied the state's motion to join the bail jumping cases.(127: 33).

March 10, 2020,over Debrow's objection, the court permitted the state to present evidence that Debrow watch pornography entitled, "Stepdaughter is scared to get fucked while wife sleeps."(120:14,23).

March 10, 2020, over Debrow's objection, the court allowed state to introduce other acts evidence, including testimony by M.M.W. "where she would testify that she woke up one time when Debrow was in her room, but she could not say how he

was touching her, but she screamed."(120:32,39).
March 9 through March 12, 2020, the trial court held a jury trial.(130, 120, 129, 119, 118).

March 12, 2020, the jury found Debrow guilty of 2nd degree sexual assault of M.M.W. and not guilty of 1st degree sexual assault of N.N.M. (118:99; 85; 86).

August 4, 2020, Debrow was sentenced to life without possibility of parole. (111: 33; 106).

October 1, 2021, Debrow filed a timely notice of appeal.(135).

FACTS

Pretrial

In case number 18 CF 202, the state charged Eric J. Debrow with second degree sexual assault of 13 year old M.M.W, as a persistent offender.(1). Shortly, thereafter, in case number 18 CF 1787, the state charged Debrow with first degree sexual assault of eleven year old N.N.M., as a persistent offender.(63).

Over Debrow's objection, the cases were joined for trial.(63, 68, 127: 30). One reason for Debrow's objection was that the joinder was prejudicial and it violated his right to present a defense because he intended to testify in 18 CF 202 but not in 18 CF 1787.(127:16, 17). As it turned out, he did not testify and he was acquitted in 18 CF 1787 and convicted in 18 CF 202.(118:99; 85; 86).

In his motion in limine, Debrow asked that,

> The State be prohibited from introducing any evidence from Dane County Case No. 2004CF384 [1st Degree

> Sexual Assault of a Child. 948.02(1)]. The evidence is not relevant (Wis. Stats. §904.01 and §904.02) and the probative value of such evidence, if any, "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (Wis. Stats. §904.03).(75).

The state agreed that the prejudicial nature of the 2004 conviction would outweigh its relevance. (120:6). The court granted Debrow's motion excluding the evidence.(Id.:12).

Over Debrow's objection, the court permitted the state to present evidence that Debrow watch pornographic film entitled, "Stepdaughter is scared to get fucked while wife sleeps."(120:14,23). The court reasoned that if Debrow used those search terms it would be "highly relevant and probative of the sexual gratification element" of the charge.(Id. 22).

The court also held that the state could present other act evidence including testimony from M.M.W. that there was another time she awoke to find Debrow in her room, but she did not recall how he was touching her but she did recall screaming. (120:32

Prior to jury selection, the state presented a plea offer to Debrow, by which Debrow would plead to two counts of second degree sexual assault, the state would drop the persistent offender allegations, carrying the mandatory sentences of life without the possibility of parole, and cap its recommendation at 10 years initial confinement; the defense would be free to argue.(130: 3). The state recognized that Debrow was considering an ***Alford*** plea[1].(Id.) Pursuant to the

[1]***North Carolina v. Alford***, 400 US 25 (1970), allows the acceptance of a plea of guilty where the defendant protests innocence.

deal, two bail jumping cases would also be dismissed.(Id.4). Debrow decided to go to trial.(130:5).

The parties discussed the plea offer again, the first day of trial.(120:59). Because of the enormity of the penalty should Debrow loose at trial, Defense counsel asked the court for an early lunch break so that Debrow could again consider the offer.(Id.:60-61). Following the break, Debrow pleaded with the court for more time to decide whether to take the plea deal.(129:5,6). Because the jury was empaneled and waiting, the court denied Mr. Debrow's request for more time.(129: 6-7). Debrow decided to go to trial.(129:8).

Trial

Debrow lived in an apartment with his girlfriend, Kim, and her three children; Ivan[2], M.M.W, and N.N.M.[3] (129:39, 41; 119:64). Kim and Debrow shared a bedroom.(119:72). Next to their bedroom was a bedroom shared by M.M.W and N.N.M.(93[4]; 129;43). M.M.W and N.N.M. slept on bunk beds that were arrange perpendicular to each other; M.M.W slept on the bottom and N.N.M. slept on top.(129: 51,48). Next to M.M.W and N.N.M.'s bedroom and diagonally across from the door to Kim and Debrow's bedroom was the door to Ivan's bedroom. (93;129:43,106).

M.M.W testified that she woke up either in the early

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[2] Ivan was 19 at the time of trial.(129:108).

[3] Kim and N.N.M said that Debrow's son, L, shared a room with Ivan and was there that night, M.M.W and Ivan said that L was not staying with them that night.(129:82. 106; 119:23. 125).

[4] Exhibit 1 is a mirror image of the floor plan of the apartment.(129:43-44).

morning[5] hours of January 17, 2018, or late hours of night with someone touching her buttocks and thigh over her clothing.(129: 41, 51-52). She identified Debrow as the person involved because he is darker and taller than anyone else in the household.(Id.66, 67, 54-55). She screamed and the family's dogs started barking.(Id 51). According to M.M.W., Kim came and got Debrow out of the room.(Id.)

M.M.W also testified about another night that Debrow came into her bedroom when she and N.N.M., were sleeping on a blowup bed.(129:60). She did not say he touched her.

M.M.W admitted she didn't like Debrow before this happened.(Id. 79). In fact, she said she once threw a book at his head and broke window.(Id. 67).

On direct examination, Ivan testified that he was awake when the incident happened.(Id.94). He saw Debrow go into girls' room.(Id.). Ivan immediately thought Debrow was going to do something.(Id.96). Debrow was in the room five to ten minutes.(Id.96). Ivan heard M.M.W scream, "Get out!" (Id.). The dogs started barking.(Id.99). Debrow came out and went into Kim's room.(Id.96).

Ivan said that when he came home from school the apartment was quiet.(Id.102). There was no fighting.(Id. 102). No one had told Ivan what had happened.(Id.97). Nevertheless, he called the police because he had the feeling that something was going on.(Id.97).

Ivan admitted that he and Debrow would fight including punching and kicking. (Id100)

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[5] She told the police 5:30.(129:74).

On cross examination, Ivan said his sisters didn't tell him anything so he didn't know if they were telling the truth.(Id.102). He had a feeling when M.M.W yelled so he called police.(Id.). When he got home after school, there was no arguing going on; the house was quiet. (Id.) But his mom was upset because his sister had yelled, "Get out." (Id.103). Ivan did not see his mom get up when his sister screamed. (Id.107). He did not get up either.(Id.108).

> Q And at that point, you just went back to sleep, right?
> A I didn't go to sleep that night, I stayed up the whole night.
> Q Okay. I wonder because a little bit ago you said when you woke up in the morning to go to school -- so you're saying you didn't sleep at all?
> A I didn't -- I can't go back to sleep because I'm on medication to go to sleep. My meds make me go to sleep. I can't control how I sleep. So I stayed up that whole night. And plus, I stayed up that whole night just to see if he was going to go back in there. (Id. 108)

On redirect, the state wanted to ask Ivan why he thought something strange was going on in M.M.W's room.(Id.110). Ivan had told the prosecutor that he was aware of Debrow's prior history.(Id. 111). The prosecutor wanted to show that Ivan was not irrational for being suspicious of Debrow.(Id.).

Defense counsel strenuously objected on the ground that the defense did not raise the issue of Ivan being suspicious on cross examination; the state elicited it on direct and the defense merely followed up on it.(Id.112). The defense objected to the state bringing out evidence that was ruled impermissible.(Id. 113).

The state wanted to question Ivan as to why he watched the M.M.W's door after Eric came out.(Id. 114). The state argued that the point of the defense cross examination was to show

> [t]hat it's ridiculous that he was just sitting there watching this door, saw him walk in, then decides randomly not hearing anything to call law enforcement. All of those questions Defense Counsel asked him about that was directly to get at this point for closing argument.(Id.115).

Over the defense objection, the court allowed the state to ask Ivan a question that would not elicit the 2004 conviction as his reason for watching the door.(Id. 116).

The state questioned Ivan as follows,

> Ivan, I want to draw your attention to the time frame of when you moved into 15 Adeline with Eric and your two sisters and your mom, okay?
>
> At any point from when you moved in, had you learned anything or heard anything that led you to be on alert that night on January 17th of 2018?
> A Yes.
> Q And were those based on things your sisters had mentioned?
> A No.
> Q Are those things that you heard from your mom?
> A It's things that I --
> Q -- I don't want to get into that --
>
> (Unreportable simultaneous interjections byCounsel.)
>
> THE COURT: -- yeah, we can't get --
> MR. HESS: -- Ivan, I don't want to get into that.
> THE COURT: You got to be responsive to the ques --
> MR. JONES: -- Objection, Your Honor. Objection, move to strike. Another motion in a minute.(Id. 118).

While the court reporter was unable to take it down, all of the parties agreed that Ivan said he "looked him up on CCAP."(Id 122, 123, 124).

The transcript goes on,

> THE COURT: I'll -- I'll move to strike.
> The question was were those things you heard from your mother, and if you can just give yes or no as far as whether those were things you heard from your mother. We can't get into what they are, because that's hearsay.
> THE WITNESS: Well, my mom did tell me --
> THE COURT: -- all right, that's fine.
> That's all.
> MR. HESS: I just wanted to say --
> THE COURT: -- that's all --
> MR. HESS: -- yes or no.
> THE COURT: We can't -- we can't put her words into your mouth in front of the jury. That's why she's a witness if she testifies.
> MR. HESS: And that's why I had to speak over you, and I apologize for doing that.
> Your Honor, I have no further questions.(Id.119).

The court then addressed the jury,

> THE COURT: All right.
> And -- and to the extent that -- as the State was -- was raising an interjection the answer beyond what he gave just now will be -- I'll direct the jury to strike anything else that they -- they heard beyond the witness's statement that he heard from his mother but not the content of anything.(Id)..

The defense moved for a mistrial on the ground that the jury was bound to wonder what Ivan saw on CCAP that

caused him to be suspicious.(Id. 123). A curative instruction would not help.(Id.) Given this is a sexual assault case, it would be easy for the jury to assume that Ivan found a sexual assault conviction.(Id. 124).

The court denied a mistrial, opining that the jury might not even know what CCAP is or what it might have shown.(Id. 128-129). In addition, according to the court, the court and prosecutor directed the jurors' attention not to the substance of Ivan's remark but to the fact that it was hearsay.(Id. 129). Further, if a juror knew that on CCAP, one could find public records, the juror might presume it was something such as criminal, small claims, civil or a divorce.(Id. 130,131).

N.N.M. testified about her allegation that Debrow assaulted her. She said did not remember telling the interviewer at Safe Harbor that when she was sick, she was sleeping between Kim and Debrow with her head toward the foot of the bed and her feet toward the head of the bed, and Debrow rubbed her vagina with his fingers.(119:38-39). She said she did tell the truth to the Safe Harbor interviewer.(Id.42).

As an other act, she testified that Debrow came in one night and stood on the M.M.W's bunk and unbuttoned N.N.M.'s pants while she was sleeping on the top bunk. (119:26, 27, 52).[6] Also, as an other act, N.N.M. said that when she had a nightmare and went to sleep with her mother, she also slept with her head toward the foot of the bed and her feet toward the top, Debrow touched her in her vagina. (Id.

[6] Although, N.N.M. said that Debrow was standing on M.M.W's bed, M.M.W. did not testify about this incident.

30-33).

Regarding M.M.W's allegation, N.N.M. also testified that she was awakened on January 17, 2018, by M.M.W screaming, " Get out!" (119:148-149). She saw a silhouette of someone leaving the room.(Id. 149, 150). She could tell it was Debrow because Ivan had an Afro.(Id.150). Prior to N.N.M. coming home from school that afternoon, M.M.W had not told N.N.M. why she had screamed.(Id. 151).

Kim testified that N.N.M. did not sleep with her and Debrow.(119:126). If N.N.M. fell asleep in their bed, when Debrow came to bed they put N.N.M. in her room.(119:72). If N.N.M. was in bed when Debrow was also in bed, Kim said she would put herself between N.N.M. and Debrow.(119:141).

She said she did not get up when she heard M.M.W screaming.(Id.78). She did not hear from M.M.W what happened until M.M.W came home from school.(119:79,80, 137). Nevertheless, she told Debrow he had to move out before M.M.W came home because he was not supposed to be in M.M.W's room.(119:80). She testified that she pulled a gun on Debrow when she told him to leave.(Id.82).

Officer Ravelle Gillard testified that he was one of the first officers on the scene on the afternoon of January 17, 2021.(119:154). He spoke with Kim and with Ivan.(119: 157,158). Ivan told him that Debrow entered his sisters' room and M.M.W screamed, "Get out."(119:160). Ivan also told Gillard that Debrow had touched M.M.W's buttocks.(119:160). Gillard decided to take Debrow into custody.(119: 162). He led Debrow into the hallway and took him into custody.(Id 163).

Sergeant Joseph Engler testified that he was present during the investigation.(119:169). He had Debrow step out into the hallway to place him under arrest.(Id.:171). He told Debrow they were arresting him for second degree sexual assault of a child.(Id.:172). Debrow asked why it had to be second degree sexual assault of a child and not fourth degree sexual assault.(Id.) On cross examination, Engler explained that fourth degree sexual assault is a misdemeanor involving sexual contact between a non-consenting adult and another adult.(Id.). For a fourth degree sexual assault, Debrow could post bail, but for a second degree sexual assault he would be taken to the jail.(Id. 177).

Amelia Levett was a neighborhood resource officer who upon hearing there was a dispatch to her neighbor assigned herself to the case.(119: 183, 185). When she arrived, M.M.W recognized her as the neighborhood officer.(Id. 187). When M.M.W recognized her, she put her head on Levett's chest and cried.(Id. 188). Levett talked with M.M.W with her mother present.(Id:187). Then, she talked with N.N.M..(Id).

Prior to talking with M.M.W, Levett had been informed by one of the officers present that a likely sexual assault had occurred.(Id. 189). She just tried to get basic information from M.M.W because a more thorough forensic interview would occur later at Safe Harbor.(Id. 190).

When she talked with N.N.M. she asked about events of that day and if anything like this had happened to M.M.W before.(Id.191).

Levett said that the girls' bedroom was cluttered with clothing books and toys; there was a narrow walkway to the

bed.(Id. 196,197).

Detective Lisa Wing, the case detective, testified that Ivan told her he was present when his mom and Debrow had a confrontation and that his mom had a gun.(119: 205). He did not say that in court and did not say that in his initial interviews.(Id.: 205-206).

According to Wing, because in this case, where the allegation that Debrow touched M.M.W on her buttock outside of her clothing, and where they both lived in the same house, whether or not the police recovered DNA would have meant nothing.(Id.: 207-208).

Wing was present when N.N.M. was interviewed at Safe Harbor.(119:208). During the Safe Harbor interview, N.N.M. said when she had been sick, she had gone to sleep in her mom and Debrow's bed because it was closer to the bathroom.(Id.213). She lay in the bed with her head towards the foot of the bed, feet towards the head of the bed when she then felt Debrow touch her with his fingers on her vagina over her clothing.(Id. 213-214). Based on information she got from Kim as to when N.N.M. had been sick, this happened between November 21 and November 27, 2017.(Id.214, 216).

The state displayed texts and played a jail call between Kim and Debrow, wherein Debrow there was discussion of Debrow having been molested and where in Kim said she checked his computer and saw he had watch a pornographic video entitled “Stepdaughter is scared to get fucked while wife sleeps.".(119:221; 140, 94). The state also played several clips of messages Debrow put on N.N.M.’s phone expressing a desire to come home and asking N.N.M to

admit it didn't happen.(119: 232-233; 139).[7]

Debrow chose not to testify.(118:7). The defense rested without presenting any witnesses.(Id.28).

The jury found Debrow guilty of 2nd degree sexual assault of M.M.W and not guilty of 1st degree sexual assault of N.N.M. (118:99; 85; 86).

Debrow was sentenced to life without possibility of parole. (111: 33; 106).

Debrow now appeals.

ARGUMENT

I. The trial court erred in failing to grant a mistrial where the witness, having been asked by the prosecutor whether he had learned of anything that led him to be on alert, testified that he looked Debrow up on CCAP.

A. Legal principles and standard of review.

The decision whether to grant or deny a motion for a mistrial is committed to the "sound discretion" of the circuit court. ***State v. Seefeldt***, 2003 WI 47, ¶ 13, 261 Wis. 2d 383, 661 N.W.2d 822. "The trial court must

[7] It appears that Debrow intended to call M.M.W,'s phone rather than N.N.M's phone.(119:230)

determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial." ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 932 (Ct. App. 1995).

While the trial court's ruling on a defense motion for a mistrial is accorded great deference on appeal, the defendant may still prevail by making "a clear showing of an erroneous exercise of discretion." *Id*. "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." *Id.*

"An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." ***Bruton v. United States,*** 391 U.S. 123, 132 (1968).

Here, the trial court's decision to deny Mr. Debrow's motions for mistrial was an abuse of discretion because the jury heard a very prejudicial statement that Ivan had looked Eric up on CCAP "that led [him] to be on alert that night on January 17th of 2018" Anything that would prejudice a jury in the case, is worsen by the fact that Debrow faced mandatory life without the possibility of parole if he were convicted of either charged offense. That is the most extreme penalty one can face in Wisconsin

B. The court erroneously exercised its discretion in failing to grant a

mistrial

1. It was the state not the defense that elicited evidence that Ivan was suspicious of Debrow for no apparent reason.

The state's direct examination brought out testimony that Ivan was suspicious of Debrow. On direct the state elicited from Ivan that he saw Debrow go into girls' room.(129:94). He immediately thought Debrow was going to do something.(Id.96). Although no one had told him what had happened, he called the police because he had the feeling that something was going on.(Id.97).

On cross examination, Ivan testified that he had a feeling when M.M.W yelled, so he called police.(Id.102). Defense asked him if he went back to sleep after the incident, and Ivan said

> "I didn't -- I can't go back to sleep because I'm on medication to go to sleep. My meds make me go to sleep. I can't control how I sleep. So I stayed up that whole night." (Id. 108)

Then he volunteered. "And plus, I stayed up that whole night just to see if he was going to go back in there. "(Id.).

There was no basis for the state to argue, that it was entitled to bring out Ivan's knowledge of Debrow's

prior history because the defense questioning was intended to show that Ivan had no reason to be suspicious or to call the police. The evidence that Ivan was suspicious and called the police for no apparent reason was already brought out by the state on direct.

2 The state's question elicited impermissible evidence.

When the state asked Ivan if he had learned anything "that led [him] to be on alert that night." It is undisputed that Ivan said "I looked him up on CCAP."

Once Ivan said that, pandemonium broke out. The judge, the prosecutor and soon thereafter defense counsel jumped in to stop him. Neither the court, the prosecutor, nor the defense claimed the jury would not have heard Ivan's response. The jury had to have noticed the Ivan's statement created a furor.

3. In denying the mistrial the court attempted to underplay the significance of Ivan's statement.

First the judge suggested that the jury might not know about CCAP.(129:128-129). However, it is highly unlikely that not one of the twelve people deciding Debrow's fate, would know about CCAP. After all, Ivan knew about CCAP. Why would one assume that no one

on the jury would know about it.

Further, the judge reasoned that even if the jury knew that one could get public records regarding Debrow on CCAP,

> then they may be presuming criminal, they may be presuming small claims, they may be presuming civil, whatever --divorce, whatever.(129:130).

That supposition, again, is highly unlikely. If the jury had known about CCAP - given the prosecutor's question whether Ivan had information "that let [him] to be on **alert**," and Ivan's response, "I looked him up on CCAP" - the jury would not have inferred that Debrow had a small claims action. They would have inferred that CCAP had highly inflammatory information about Debrow. Since this was a sexual assault case, it is likely the jury inferred that Ivan was on alert because he knew Debrow had committed a sexual assault.

Finally, the court claimed that the court and the prosecutor hid the significance of Ivan's utterance by saying suggesting they were stopping Ivan not for what he was saying but because what he was saying was hearsay.(129:129). But judge ignored the fact that Ivan was not talking about what someone said; he said, as everyone agreed, he "looked [Debrow] up on CCAP."

The hubbub that occurred when Ivan mentioned CCAP had to have alerted the jury to its importance. No such hubbub occurred where there had been any other

instance of a hearsay objection.[8]

Further, whether it was hearsay or not–the jury still heard "CCAP." The information on CCAP might be hearsay, but the jury still heard that whatever the information was it was from CCAP. Again what kind of

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[8] For example compare what occurred in the following instances of hearsay objections:

> And what was that explanation?
> A He said --
> MR. JONES: Hearsay.
> THE WITNESS: I'm sorry.
> THE COURT: Hold on one second.
> MR. JONES: Objection, hearsay.(119:76)

> Q And a few other times he tells you, in effect, that he didn't do it, right?
> MR. HESS: I'm going to object, Your Honor, hearsay.
> THE COURT: Are you referring to the –(Id.:132)

> A I was telling him he had to go. He was walking around like -- he was telling me that he didn't want to go.
> MR. HESS: Objection, Your Honor, hearsay.
> THE COURT: Sustained. Go ahead and rephrase or get directed more towards what you're looking for.(Id.:137

> Q What did he say his understanding was at that time?
> A He said that --
> MR. JONES: I guess I'm going to object on hearsay grounds at this point and I'm not certain. May we approach?(Id.:159

information from CCAP would put Ivan on "alert"? Information that was damaging to Debrow.

No curative instruction would have been adequate. The jury could not un-hear what it already heard. The prejudicial nature of the testimony was too great for the jurors to simply put it out of their minds. *See, e.g.* ***Dunn v. United States***, 307 F.2d 883, 886 (5th Cir. 1962) ("[I]f you throw a skunk into the jury box, you cannot instruct the jury not to smell it").

A trial court addressing a motion for a mistrial "must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial." ***State v. Ford***, 2007 WI 138, ¶ 29, 306 Wis. 2d 1, 742 N.W.2d 61. Here, the fact there was something on CCAP that led Ivan to be alert, watch the bedroom door and call the police, would have led the jury to infer that Ivan found that Debrow had a sexual assault listed on CCAP. Thus, the jury was likely to infer the very fact that the state conceded was so prejudicial that its prejudice outweighed any possible relevance.

4. The instructions the court gave were inadequate

After defense counsel moved to strike, the judge said,

> THE COURT: I'll -- I'll move to strike.
> The question was were those things you heard from your mother, and if you can just give yes or no as far as whether those were things you heard from your mother. We can't get into what they are, because

> that's hearsay.

Later after Ivan started to say what his mother said, the judge stopped the questioning and the judge gave the following instruction,

> THE COURT: All right.
> And -- and to the extent that -- as the State was -- was raising an interjection the answer beyond what he gave just now will be -- I'll direct the jury to strike anything else that they -- they heard beyond the witness's statement that he heard from his mother but not the content of anything.(Id)..

Even assuming an adequate curative instruction could be given, these instructions were not adequate. It is not clear what the judge was instructing the jury to do. The judge did not, specifically, order the statement about CCAP stricken. He repeated what the defense attorney said, "I move to strike." He did not make clear to the jury that they were to disregard anything they might have heard.

Further the second instruction does not make any sense. What was the jury to make of that instruction. What was the jury to strike? The judge might have known what he meant but the jury was not inside the mind of the judge. This court must not assume the jury divined the judge's meaning.

Finally, at the end of the trial the court instructed the jury,

> During the trial the Court has ordered certain testimony to be stricken. Disregard all stricken testimony.(118:37).

If the first two instructions at the time Ivan mentioned CCAP where inadequate, this instruction was no help. At best, if the jury knew what the judge was referring to, they would have thought, we are supposed to disregard that very important information that Debrow was on CCAP. That is like saying, "Don't think of an elephant." But, more likely, since the earlier instructions did not make clear what was to be stricken, the jury did not know what this referred to.

II. The trial court erred when it allowed evidence that Debrow watched a pornographic film entitled, "Stepdaugher is scared to get fucked while wife sleeps."

A. The standard of review.

In reviewing evidentiary determinations, this court must determine whether the trial court properly exercised its discretion in accord with accepted legal standards and the facts of record. ***State v. Allsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). And, if the trial court provided a reasonable basis for its ruling, then this court must conclude that it properly exercised its discretion. Id.

B. The trial court did not base its discretion on facts in the record and its explanation does not provide a reasonable basis for allowing the evidence .

The state wanted to admit evidence from Debrow's jail call with Kim, wherein, Kim said

> "Also, I want you to know I looked on your computers and I looked up your web history, I know that there is a porn hub and one of the titles that you watched was 'Step daughters scared to get fucked while wife sleeps.'"

(140 at 3:18-3:32; 120:14).

The state also sought to admit text between Debrow and Kim wherein Kim wrote, "So what about that porn?
STEPDAUGHTER AFRAID TO GET FUCKED WHILE WIFE SLEEPS"(emphasis original).(95; 120:14). The state argued that each was to show intent and sexual gratification.(120:15).

The defense argued that the title of the video implied sexual intercourse which has not been alleged in his case. Further, hearing that title would cause the jurors to think that Debrow acted in conformity with what the title suggested; the prejudicial affect would be beyond any possible relevance.(Id. 16).

The defense also pointed out that the state did not access the computer so it is not clear that Kim's statement is even accurate.(Id. 17).

The state admitted that the state did not search the computer but argued that Debrow did not deny watching the video.(Id.17-18). The state made clear that there was no allegation that this video was child

pornography.(Id.18).

The trial court, in holding that the state could elicit the evidence, explained,

> As I understand it, the State's evidence involves the mother of the two children confronting him twice, once in text, once in a phone call with the fact that he searched and used search terms that are highly relevant and probative of the sexual gratification element of the charge here.(120:21-22)
>
> ***
>
> The search terms which originate from the user were chosen according to this testimony, we presume, by Mr. Debrow in searching and those terms involve highly relevant factors that are present in the accusations here.(Id.22).
>
> ***
>
> [B]ut the fact of a searching for pornographic materials under those search terms is highly relevant. (Id.).
>
> ***
>
> I'm talking about the search terms, the fact that he utilized search terms, "stepdaughters assaulted while mother is sleeping" or anything of that nature -- I don't remember the exact quote -- that's relevant to the sexual gratification element and the State can introduce that testimony through Ms. Lange and through recordings where Mr. Debrow apparently is confronted with those searches and makes whatever statements he makes in response to those. That is relevant, probative and not unfairly prejudicial. (Id.23-24).

There is no evidence that Debrow used any search terms as assumed by the court.

The state, admittedly, did not check the computer.

We have no idea how Debrow came to have that particular video in his web history or even if he watched it. We do not know from what website he would have gotten this video or if that site required search terms. If one goes to www.youtube.com, any number of videos will be displayed for viewing without entering in any search term. If one clicks on one of those videos it will appear on one's web history.

There is no evidence in this record to suggest that the website that Debrow went to was any different.

Further, Debrow did not specifically admit watching that particular video. While, it is hard to hear his response in the jail call audio, he says he " I just be lookin at a lot of that type of stuff."(139: 3:53-3:58). On the text he says, "I uuatched (sic) all type of shit like step brother fucks sister."(95). It is possible that he clicked on the video and then got distracted and never watched it. We simply do not know. But more importantly, we do not have evidence that he sought it out. Nevertheless, the state, in closing, used the name of the video to support its argument that Debrow had touched M.M.W. for sexual gradification.(118:58)

Where Debrow faces life in prison without the possibility of parole, the court ought not allow evidence based on an assumption that Debrow used search terms to access the video where there was absolutely no evidence to support that assumption.

III. The court erred when it allowed, as other act evidence, testimony about

Debrow having been in M.M.W.'s bedroom where there was no evidence that Debrow did anything wrong.

A. The law regarding the admission of other acts.

> "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Wis. Stats.. § 904.04(2)(a).

However, under some circumstances, "evidence of other crimes, wrongs, or acts" is admissible. To determine whether to admit evidence of other acts, courts engage in the three-step analysis set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 771-72, 783, 576 N.W.2d 30 (1998).

The first step in the ***Sullivan*** analysis asks whether the party offers the evidence for a permissible purpose under Wis. Stats.. § 904.04(2)(a). ***Sullivan***, 216 Wis. 2d at 772. Permissible purposes include "proof of motive, opportunity,
intent, preparation, plan, knowledge, identity, or absence of mistake or accident." § 904.04(2)(a).

The second step in the ***Sullivan*** analysis asks whether the other-acts evidence is relevant. ***Sullivan***, 216 Wis. 2d at 772. The party seeking the admission of the other-acts evidence (in this case, the State) has the burden to establish the first two steps of this analysis "by a preponderance of the evidence."***State v. Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399.

If the first two steps of the ***Sullivan*** analysis are satisfied, the burden then shifts to the opposing party in the third step to "show that the probative value of the evidence is substantially outweighed by the risk" of confusion of the issues for the jury or unfair prejudice. Id., ¶¶19, 41; ***Sullivan***, 216 Wis. 2d at 772-73; see WIS. STAT. § 904.03.

B. The evidence that Debrow was in M.M.W.'s room on a previous occasion was not relevant.

Wis. Stats. § 904.01 states:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The second step in the ***Sullivan*** analysis is, an assessment of whether the evidence regarding the other acts is relevant under Wis. Stats. § 904.01. ***Sullivan***, 216 Wis. 2d at 772; ***Wisconsin v. Payano***, 2009 WI 86, ¶67, 320 Wis. 2d 348, 768 N.W.2d 832. Evidence of other acts is "inherently relevant to prove character" and, as a result, the issue is whether the other act is relevant to anything other than to prove character. ***Payano***, 320 Wis. 2d 348, ¶67; ***State v. Johnson***, 184 Wis. 2d 324, 337 n.1, 516 N.W.2d 463 (Ct. App. 1994).

There are two relevancy considerations within this second step. The first consideration is whether the other-acts evidence relates to a fact or proposition that is of consequence to the determination of the action. ***Payano***, 320 Wis. 2d 348, ¶68. The second consideration is whether the evidence is

probative; in other words, whether the other-acts evidence has the tendency to make a consequential fact or proposition more or less probable than it would be without that evidence. Id.

Evidence of other acts is also probative if the evidence "tends to undermine an innocent explanation for an accused's charged criminal conduct." ***Sullivan***, 216 Wis. 2d at 784.

In this case, the state had to prove that Debrow had sexual contact with M.M.W. and that he "acted with intent to become sexually aroused or gratified."(118: 33, 34).[9]

Over Debrow's objection, the state sought to introduce testimony of M.M.W. that,

> there was another time where she had woken up to the defendant. She doesn't even recall exactly how he was touching her because she was asleep but recalls screaming.(120:32,39).

Except for the insinuation that Debrow did something improper, there is no relevance to this "other act" evidence. Where there is no showing the Debrow touched M.M.W. in some improper way, what fact of consequence does it make more or less probable?

Nevertheless, the state presented the following testimony from M.M. W.:

> I want to kind of -- before we go forward now ask you was there any other time where you had woken up to Eric in your room?
>
> A Yes. When we had first moved into the apartment and me and Tinka were still sleeping on air mattresses, I

[9] There is no dispute that M.M.W. was under the age of 16 years.

remember waking up to him, like, sitting on my bed and saying that, shh, it's just a game and that you don't have to tell your mom about it.

Q Now did -- when you woke up, would you know what woke you up that time?

A No.

Q What's -- what's the first thing you remember when you woke up?

A That time?

Q Yes.

A I remember seeing Eric in my bed.

Q And then the next thing -- the next thing you remember hearing him say that?

A Yes.

Q Did you tell your mom about that?

A No.(129:60-61).

Although, the state knew that M.M.W. would not testify that Eric touched her in any improper way, in its opening the state implied that it was going to present prior bad act to support its charge against Debrow.

But you're also going to hear that there's another time when [M.M.W.] had woken up. The defendant had been touching her, she doesn't remember exactly where because she was asleep, she just remembers being woken up to the defendant having been touching her.(129: 28)

In its closing the state again implied that Debrow had touched M.M.W. in some improper way,

> I want to talk to you about those uncharged acts, those other acts... the inflatable sofa where she doesn't remember [M.M.W], where she was touched but she remembers feeling something on her that woke her up and, "shhhh,just a game. Don't tell your mom."..... I want to talk to you about those and why those are important in this case. Those are important because they show an intent. They show an absence of mistake, but they also show that the defendant was doing this for his sexual gratification.(118:57-58).

That supposed other bad act shows nothing of the sort. There is nothing but innuendo that Debrow touched M.M.W. in any improper way.

IV. This court should grant Debrow a new trial in the interest of justice.

Wis. Stats. § 752.35 states:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record ...

This court may exercise its discretionary reversal powers when the real controversy was not fully tried to the court. ***Vollmer v. Luety***, 156 Wis.2d 1, 19-20, 456 N.W.2d 797 (1990), Wisconsin Stat. § 752.35. When reversing on this basis, this court need not first conclude that the outcome would be different on retrial. Id. at 19, 456 N.W.2d 797. Instead, it may reverse to maintain the integrity of our system

of criminal justice and so that it can say with confidence that justice has prevailed. ***State v. Hicks,*** 202 Wis.2d 150, 171-72, 549 N.W.2d 435 (1996).

State v. Burns, 2011 WI 22, ¶ 24 332 Wis.2d 730, 798 N.W.2d 166, citing ***State v. Schumacher***, 144 Wis.2d 388, 417, 424 N.W.2d 672 (1988), holds that under the real controversy not fully tried category, two different situations were included: (1) Either the jury was not given an opportunity to hear important testimony that bore on an important issue in the case, or (2) the jury had before it testimony or evidence which had been improperly admitted, and this material obscured a crucial issue and prevented the real controversy from being fully tried.

In this case the jury heard evidence that Ivan looked Debrow up on CCAP, that Debrow had a pornographic video,“Stepdaugher is scared to get fucked while wife sleeps." on his web history, and evidence that Debrow was in M.M.W.’s room another time. For reasons stated above none of that evidence should have been disclosed to the jury. That evidence, taken together, obscured the crucial issue here, whether Debrow in fact sexually assaulted M.M.W.

In this case is exceptional. Debrow faced the a life sentence without the possibility of parole if he were convicted of either of the counts against him. This court can not be confident that the cumulative effect of that improper evidence did not influence the jury to find Debrow guilty of assaulting M.M.W. See ***State v. Hicks,*** 202 Wis.2d 150, 171, 549 N.W.2d 435 (1996).

CONCLUSION

For the reasons stated above, Debrow J. Debrow asks

this court to grant him a new trial.

Dated: December 27, 2021

Electronically signed by Patricia A. FitzGerald

_____

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 8253 words.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2) (a) and that contains, at a minimum:

(1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of

juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Electronically signed by
Patricia A. FitzGerald

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated: December 27, 2021

Electronically signed by Patricia A FitzGerald