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

REPLY BRIEF

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REPLY BRIEF

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.

The problem the state attempted to solve when it elicited the "CCAP" comment, was one of its own making.

Following cross examination, the prosecutor sought to be allowed to ask leading questions about past incidents that Defense Counsel was alluding to, arguing that because of the defense questioning, the jury was left to think that Ivan just jumped to a conclusion based on absolutely nothing when he called law enforcement. (129: 110, 111, 115).

The defense denied ever asking about past incidents and objected to bringing up Ivan's knowledge of his reasons why he was suspicious of Debrow because the state would likely get into subjects already ruled impermissible. (129:111, 113. 132-133). The defense argued that it was the prosecution not the defense, that gave rise to Ivan's statement that he called the police because he had a feeling.(Id. 111).

Indeed on direct, Ivan had testified,

- that he was awake already when he saw Debrow go into the girls' room(129: 94);
- That he immediately thought Debrow was going to do something (Id. 96);
- that he heard his sister scream and saw Debrow come out of the room(Id.);
- that he was angry all day and wanted to call the police while he was at school(129 :93);
- that no one told him anything about what had happened(Id.97);
- that after school he came home, and because he had a feeling, he called the police(Id. 96-97).

On cross-examination, the defense established that when Ivan got home from school the house was peaceful.(Id. 103). Ivan affirmed that because he had a feeling, he called the police.(Id.). Further, Ivan testified that he did not go back

to sleep because he was on medication that controls his sleep.(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.).

The court prohibited the state from asking a leading question but allowed the state to elicit an explanation - as to why Ivan watched the girl's bedroom- but not get into testimony about Debrow's 2004 conviction.(Id:116).

The prosecutor, then, asked Ivan, if he had "learned anything or heard anything that led [him] to be **on alert** that night on January 17th of 2018" (129:118) (Emphasis supplied). It is undisputed that Ivan said "I looked him up on CCAP." (Id. 122).(State's brief at 22).

When Ivan answered, "I looked him up on CCAP," what was a jury likely to infer? That Ivan was watching the girl's bedroom door like a hawk because he found something trivial like a small claims action on CCAP? That is unlikely.

The state asserts that the jury would have followed the court's instruction to disregard the inadmissible evidence (State's brief at 24); the state completely ignores the fact that the instruction, here, was nearly incomprehensible.

While courts often assume that a jury will follow a properly given curative instruction, that assumption does not hold where the evidence is highly prejudicial to the core issue at trial. ***State v. Pitsch***, 124 Wis.2d 628, 644 n.8, 369 N.W.2d 711, 720.See ***Francis v. Franklin***, 471 U.S. 307, 323 n.9 (1985).

The "CCAP" comment presented a devastating blow to Debrow's case - in that the jury would infer that Ivan learned something so damaging that it caused Ivan to be on the lookout and to call the police without knowing what M.M.W. claimed had happened. Given the likely inference, there was an "overwhelming probability" that the jury would have been unable to follow even an intelligible instruction. See ***Greer v. Miller***, 483 U.S. 756, 767 n.8 (1987) (citations omitted).

The CCAP comment, itself, was highly prejudicial. Further, as the transcript showed (129:118), the reaction of the judge, prosecutor and defense to Ivan's statement, alerted the jury to the fact that Ivan said something that was very damaging. It would unrealistic to expect a jury to ignore the comment and the reactions of the court and parties.

"There are some contexts in which the risks that the jury will not, or cannot, follow instruction is so great, and the consequence of failure is so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." ***Bouton v. United States***, 391 U.S. 123, 135 (1968).

Here the consequence for Debrow of the jury not being able to follow the instruction was life in prison without the possibility of parole.

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."

This is what the court said about admission of evidence that Debrow had a video entitled *Stepdaughter Afraid To Get Fucked While Wife Sleeps* in his web history.

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. **It's not whether he accessed the pornography itself or whether the pornography sought to depict or involve children** or even whether he -- or whether it was of a certain nature still on the phone or exposed to anyone else. **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.** Technically not stepdaughters, but within that framework as I understand the facts, allegations of the mother of the children actually sleeping, I think on the instances where it's alleged he went into the children's bedroom. I'm presuming she's in another room sleeping. I know there are allegations that they're all in the same bed together and I presume the mother is sleeping, **but the fact of a searching for pornographic materials under those search terms is highly relevant**. It is prejudicial, but if we were talking about search terms that sought out true child pornography or there were indications that there was actually child pornography accessed or anything that takes it to that level, I would agree that the prejudice outweighs the probative value, **but I can't agree when the charge requires as an element proof of purposeful sexual gratification and these search terms are very demonstrative of that. So I agree with No. 13 that the mere fact of possession of**

pornography on a computer isn't relevant.

(120: 21-23)(Emphasis supplied).

The state argues that the video was relevant, (State's brief at 25). But that was not the trial court's ruling.

The court did not find that the fact that Debrow might have watched the video or that it was on his computer relevant. The court found it relevant only because the court presumed that Debrow used search terms to bring it up. The use of the search terms in the court's mind went to show that Debrow was seeking sexual gratification.(Id. 21-22).

The holding that it was not relevant merely because it was on his computer or because he might have watched it was within the trial court's discretion, and this court should disturb it. ***State v. Pharr***, 115 Wis.2d 334, 345, 340 N.W.2d 498, 502-03 (1983).

The trial court's finding that **search terms** were relevant to sexual gratification is not supported. There is absolutely no evidence that Debrow used any search terms. The state has never argued, neither here nor in the trial court, that there was such evidence.

In exercising discretion, a court must engage in reasoning based on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. ***State v. Ladewig***, 514 N.W.2d 724, 179 Wis.2d 852 (Wis. App. 1993).

The ruling that the state could present the testimony

about the video because Debrow used search terms to elicit that video was not within the court's discretion because it was not based on any facts of record. Testimony about the video should not have been admitted.

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.

M.M.W. - not only - did not testify that Debrow touched her in any improper way; she did not testify that he touched her at all. (129:60-61). Nevertheless, the state claimed that Debrow touched M.M.W. as another act in its opening statement and its closing argument. (129: 28; 118:57-58).

The greater latitude rule does not apply here. That rule requires the other act to be a similar act. Wis. Stat. §904.04(2)(b)1. Here, this is not a similar act. There was no touching involved. Surely, evidence that Debrow did not touch M.M.W. at another time, does make it more probable that Debrow did touch her this time. See Wis. Stat. §904.01

Contrary to the state's assertion (State's brief at 29), Debrow, not touching M.M.W. during the "other act" - when presumably he could have - does not show that in this instance he was seeking sexual gratification or that he intentionally did anything improper.

Also, contrary to the state's assertion (State's brief at 30), the fact that the testimony and the state's opening and closing, offered no more than innuendo does not go to weight, it goes to relevance. That evidence was irrelevant because it

did not make it more likely that Debrow improperly touched M.M.W.; it should not have been admitted.

IV. There is no basis for this court to find harmless error.

Chapman v. California, 386 U.S. 18 (1967), requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Id.*** at 24. The Court rejected any suggestion that this constitutional standard is met merely because the remaining evidence untainted by the error could be deemed sufficient for conviction. ***Id.*** at 25-26.

State v. Dyess, 124 Wis.2d 525, 540-41, 370 N.W.2d 222 (1985) holds that regardless whether the error is constitutional, an error is not harmless unless the state meets its burden "to establish that there is no reasonable possibility that the error contributed to the conviction." ***Id.*** at 543.

If indeed, the "other act" and the video, *Stepdaughter Afraid To Get Fucked While Wife Sleeps*, were improperly admitted, this court should be wary of finding harmless error.

> It is always perilous to speculate on what the effect of evidence improperly admitted was on a jury, or what the effect of evidence improperly excluded would have been. *See* Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 Wis.L.Rev. 1147. The lay mind evaluates evidence differently from the legal mind, and while many appellate judges have substantial experience with juries and perhaps great insight into the thinking process of juries, others do not. This is a reason to be wary about

> invoking the doctrine of harmless error . . . with regard to evidentiary rulings in jury cases.

United States v. Cerro, 775 F.2d 908, 915-16 (7th Cir. 1985) (citations omitted). This court must account for the fact that a reasonable jury will not necessarily view the evidence the same as the court does.

Given the state's burden of proving harmlessness beyond a reasonable doubt, it necessarily follows that the evidence and impact of the trial error must be viewed most favorably to the defense. If a reasonable juror, based on the evidence untainted by the error, could have a reasonable doubt that he or she did not have at the original, defective trial, then the state necessarily has not proven harmlessness beyond a reasonable doubt. And, in assessing whether a reasonable juror reasonably could reach a particular result, it is necessary to view the evidence most favorably to that result. *E.g.*, ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990).

In this case, a reasonable juror could have had a reasonable doubt. The gravamen of M.M.W.'s allegations is not corroborated. The only corroboration is that Debrow entered the room and M.M.W. screamed.(129: 95-96; 119:76–78) M.M.W.'s mother testified that she told M.M.W. to scream if Debrow came into her room - not if he molested her.(119:68). M.M.W. admitted she did not like Debrow.(129:69). There is no evidence that M.M.W. made any allegation against Debrow until after Ivan called the police. Although, M.M.W.'s mother said she talked to the girls before school that morning, they did not tell her what allegedly happened.(119: 79, 80). Ivan called the police based only on a feeling; no one had told him what supposedly happened.(129:96-97). According to Ivan, M.M.W. was not

even home from school, when he called the police.(Id.97). According to M.M.W., she arrived home from school, she stayed in the kitchen while Debrow and Kim argued, then Ivan called the police.(129:59).

Without the tainted evidence a reasonable juror could have concluded that M.M.W. came up with the idea of accusing Debrow after she knew the police were coming.

In considering whether there was harmless error, this court should consider the cumulative effect of all of the errors, including the "CCAP" statement. ***State v. Mayo***, 2007 WI 78, ¶64 & n.8, 734 N.W.2d 115, 301 Wis. 2d 642.

Finally, the fact that the state alerted the jury to the "other act" in its opening and it argued that the "other act" and the video showed Debrow's intent in closing, belie the claim that the evidence was unimportant to the state's case. (129:28; 118: 43. 58).

This court should not conclude that there is no reasonable doubt that the jury would have convicted Debrow without the improperly admitted evidence.

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

Debrow refers the court to his brief-in-chief.

Further, the state claims that because Debrow was acquitted of first degree sexual assault of N.N.M., the tainted evidence could not have affected the verdict of second degree sexual assault of M.M.W.(State's brief at 34). The State is wrong.

At trial N.N.M could not recall most of the allegations she made against Debrow. N.N.M 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).

Kim, N.N.M's mother, 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 would 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).

It is most likely that the jury found Debrow not guilty of sexually assaulting N.N.M because the evidence supporting the charge was so weak, and Kim's testimony indicated, the assault simply could not have happened.

The acquittal on the first degree sexual assault, does not imply that the tainted evidence did not influence the jury on the second degree sexual assault.

CONCLUSION

For the reasons stated above and in his brief-in-chief, Debrow J. Debrow asks this court to grant him a new trial.

Dated: April 8, 2022

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 2608 words.

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: April 8, 2022

Electronically signed by Patricia A FitzGerald