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SUPREME COURT

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal Number 2021AP001732 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner,
v.

ERIC J. DEBROW,

Defendant-Appellant.

RESPONSE TO PETITION FOR REVIEW

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Eric J. Debrow opposes the state's petition for review in this case. The state seeks review of the court of appeals decision reversing Debrow's conviction and remanding to the trial court for a retrial.

Background

In Dane County Case Number 18 CF 202[1], the state charged Eric J. Debrow with second degree sexual assault of 13 year old A.B[2]., as a persistent offender.(1).

Over Debrow's objection, Dane County Case Number 18 CF 1787 , in which Debrow was charged with first degree sexual assault of eleven year old C.D. as a persistent offender, was joined with this case for trial.(63, 68, 127: 30). The jury found Debrow guilty of 2nd degree sexual assault of A.B. and not guilty of 1st degree sexual assault of C.D. (118:99; 85; 86).

Before trial, Debrow requested, and state agreed, to exclude evidence of Debrow's 2004 sexual assault of a child conviction because the prejudicial nature of that conviction would outweigh its relevance. (120:6; 75). The court ordered exclusion of any reference to the 2004 conviction.(Id.:12; 75).

Evidence at trial revealed that Debrow lived in an apartment with his girlfriend, G.H., and her three children; E.F.[3], A.B, and C.D. (129:39, 41; 119:64). G.H. and Debrow shared a bedroom.(119:72). Next to their bedroom was a bedroom shared by A.B and C.D.(93[4]; 129;43). Next to A.B

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[1] Appeal Number 2021AP001732 - CR

[2] Debrow refers to the alleged victim and her family by the initials the court of appeals used in its opinion to avoid confusion and to protect their identifies. Wis. Stats. Sections 809.19.(1)(g) and 809.86.

[3] E.F. was 19 at the time of trial. (129:108)

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

and C.D.'s bedroom and diagonally across from the door to G.H. and Debrow's bedroom was the door to E.F.'s bedroom. (93;129:43,106).

A.B testified that she woke up either in the early morning hours of January 17, 2018, or late hours of night before, with Debrow touching her buttocks and thigh over her clothing.(129: 41, 51-52,66, 67, 54-55). She screamed and the family's dogs started barking.(Id 51).

The state called E.F to testify. On direct examination, E.F. said that he was awake when the alleged touching incident happened.(Id.94). He saw Debrow go into his sisters' room.(Id.). E.F. immediately thought Debrow was going to do something.(Id.96). Debrow was in the room five to ten minutes.(Id.96). E.F. heard A.B scream, "Get out!" (Id.). The dogs started barking.(Id.99). Debrow came out and went into G.H.'s room.(Id.96).

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

On cross examination, E.F. said his sisters didn't tell him anything.(Id.102). He had a feeling when A.B yelled so he called police.(Id.). He did not get up when he heard his sister yell.(Id.108). He continued on cross examination,

> 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 E.F. why he thought something strange was going on in A.B's room.(Id.110). E.F. had told the prosecutor that he was aware of Debrow's prior history.(Id. 111). The prosecutor wanted to show that E.F. 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 E.F. 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 had already been ruled impermissible.(Id. 113).

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

The state questioned E.F. as follows,

> [E.F.], 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 by Counsel.)
>
> THE COURT: -- yeah, we can't get --
> MR. HESS: -- [E.F.], 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 E.F. said, " I looked 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 E.F. saw on CCAP that caused him to be suspicious.(Id. 123). He argued a curative instruction would not help.(Id.) Given that this is a sexual assault case, it would be easy for the jury to assume that E.F. found a sexual assault conviction.(Id. 124).

The state opposed a mistrial on the ground that it is too drastic; it was hard to know what the jury had heard; and the

court had already stricken the statement.(Id. 125). The state suggested either "leaving it be and drawing no attention to it, or if the Defense Counsel would like [giving] some sort of a curative instruction." (Id. 125-126). Nevertheless, the state asserted that the statement was so minimal, that "from my position, I don't think there's even a curative instruction, we just strike it."(Id. 126).

The trial court denied a mistrial, opining first, that the jury might not even know what CCAP is or what it might have shown; second, the court and prosecutor directed the jurors' attention not to the substance of E.F.'s remark but to the fact that it was hearsay; and third, 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. 128-131).

Finally the trial court concluded,

> So upon that basis and for those reasons, we're open to striking, I already told them to strike anything, we're open to giving the instruction on striking, we're open to curative instructions that don't redirect their attention to it two days from now.
>
> But the motion for mistrial itself will be denied on this record at this time.(Id. 131).

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).

Court of appeals decision

In a well reasoned opinion, the court of appeals reversed Debrow's conviction and remanded for a new trial. *Debrow,* 2022 WL 2838834 ¶4

The court of appeals held that

> from E.F.'s response, jurors would have reasonably

> understood that E.F. was on alert and watching the door to his minor sisters' bedroom at night because E.F. learned from the CCAP website that Debrow had a prior criminal conviction related to sexual misconduct involving a child. *Debrow,* 2022 WL 2838834 ¶2,

The court found that E.F.'s testimony was sufficiently unfairly prejudicial to warrant a new trial. *Debrow,* 2022 WL 2838834 ¶4 . The court also concluded,

> that the circuit court's instruction to the jury that was an attempt to cure the prejudicial effect of E.F.'s pertinent testimony did not sufficiently identify the prejudicial evidence that the jury was to disregard and did not instruct the jury in clear terms that the jury must not consider that evidence. *Debrow,* 2022 WL 2838834 ¶4.

The court of appeals noted the reasons, discussed above, that the trial court gave for denying a mistrial. *Debrow,* 2022 WL 2838834 ¶21.

Based upon the its analysis, the court of appeals determined,

> The circuit court properly concluded before testimony began that evidence of Debrows prior conviction for first-degree sexual assault of a child was "unfairly prejudicial" to Debrow, and such evidence was excluded; E.F.'s pertinent testimony heard by the jury violated that order; one or more jurors would have known that the CCAP website has criminal court records that are available to the public; and one or more jurors would have reasonably understood that E.F. was "on alert" about Debrow and was watching the door to his minor sisters' bedroom at night because E.F. learned from the CCAP website that Debrow had a prior criminal conviction related to sexual misconduct involving a child. Those conditions support our conclusion that, in light of the whole proceeding, E.F.'s pertinent testimony was "sufficiently prejudicial to warrant a new trial." *Debrow,* 2022 WL 2838834 ¶28**.**

The court of appeals rejected the state's argument on appeal that the instructions given to the jury immediately after E.T. testimony and the attempt by the trial court to divert

attention by suggesting it was not admissible as hearsay, ameliorated any prejudice. *Debrow,* 2022 WL 2838834 ¶29

Citing ***State v. Penigar***, 139 Wis. 2d 569, 581-82, 408 N.W.2d 28 (1987);***State v. Sullivan***, 216 Wis. 2d 768, 780, 790-92, 576 N.W.2d 30 (1998); and ***Peters v. State***, 70 Wis. 2d 22, 32, 233 N.W.2d 420 (1975), *disapproved of on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 504-05, 451 N.W.2d 752 (1990), the court held,

> A curative instruction is improper or insufficient if the instruction does not both sufficiently identify the prejudicial evidence that the jury is to disregard and instruct the jury in clear terms that the jury must not consider that evidence.*Debrow,* 2022 WL 2838834 ¶31

The court of appeals analyzed the content of the jury instruction and found it unclear and confusing; it did not identify for the jurors the exactly what they were supposed to disregard. *Debrow,* 2022 WL 2838834 ¶¶33-34.

The court of appeals, also, found that the trial court's attempt to divert attention away from the CCAP statement was unlikely to have negated the prejudicial effect of the statement. *Debrow,* 2022 WL 2838834 ¶35.

The opinion concluded,

> In sum, E.F.'s pertinent testimony was unfairly prejudicial to Debrow and violated the circuit court's order that evidence of Debrow's prior conviction be excluded from evidence. The court's attempts to cure the prejudicial effect of this testimony were insufficient and did not properly instruct the jury to disregard that testimony when deliberating. Thus, the circuit court erroneously exercised its discretion in denying Debrow's motion for a mistrial. *Debrow,* 2022 WL 2838834 ¶36

The petition for review

The state seeks review of the court of appeals decision.

The state claims that the court of appeals inappropriately considered the curative instruction the trial court gave in its analysis of whether the trial court erred in denying a mistrial.(Pet. 6). The state seems to say that once the trial court determined that a curative instruction could obviate the need for the mistrial the issue whether curative instruction sufficed was separate issue which Debrow waived.(Pet.18).

However, the court of appeals looked at the entire reason the trial court gave for denying the mistrial. It first concluded that the CCAP comment was sufficiently prejudicial to warrant a new trial. The state does not suggest that conclusion is in error. Secondly, it looked at the reasons the trial court gave for denying the mistrial motion, and found the trial court's reasoning was flawed. Again, the state does not suggest the court of appeals was wrong. Finally, the court looked at the instructions the trial court gave that were intended to ameliorate the prejudice and found, "The court's attempts to cure the prejudicial effect of this testimony were insufficient and did not properly instruct the jury to disregard that testimony when deliberating." *Debrow,* 2022 WL 2838834 ¶36.

Even if the state were right, that Debrow waived any further curative instruction, the trial court mentioned the instruction to strike the CCAP statement with its reason for denying the mistrial motion.(129:131). The court of appeals found that instruction insufficient for curing the prejudice because it did not make clear to the jury what specifically they were to disregard. *Debrow,* 2022 WL 2838834 ¶¶33-34. Contrary to the state's suggestion, where, the trial court considers the instruction as part of its basis for denying the mistrial, the sufficiency of that instruction it is not an issue independent from the denial of the mistrial.

The state tries to distinguish cases cited by the court of appeals where the court found instructions insufficient to cure prejudice from this case because the cited cases did not deal with mistrials.(Pet.17). But the principles applicable to whether an instruction cures prejudice depends on the

instruction and the prejudice not on whether it involves a motion for mistrial. The principles the court of appeals applied to this instruction were appropriate.

The state suggests that the court of appeals should have assumed that the jury followed the curative instruction.(Pet. 15-16). However, as the court of appeals points out, while the court of appeals would normally assume the jury followed the instruction, that assumption must be "explicitly predicated on the common sense observation that the circuit court must give the jury a 'proper' or 'sufficient' curative instruction." *Debrow,* 2022 WL 2838834 ¶31.

The petition does not meet any of the criteria of 809.62(1r), Stats, for granting review. The state claims that review would help "help develop, clarify or harmonize the law" because the issue presented "is a question of law of the type that is likely to recur unless resolved by the supreme court."(Pet. 6). But it is not clear what the question of law is that the state wants this court to decide.

The court of appeals decision was based on established law. Eric Debrow asks this court to deny the state's petition for review.

Dated: September 6, 20220

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and 809.62(4) for a response in proportional serif font. The length of this

response is is 2886 words.

I hereby certify that:

I have submitted an electronic copy of this response which complies with the requirements of Wis. Stats §§ 809.19(12) and 809.62(4)(b)(2019-20).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated: September 6, 2022.

Patricia A. FitzGerald