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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP002207-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALVIN JAMES JEMISON, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an
Order Denying Postconviction Motion, Both Entered
in Milwaukee County Circuit Court, the Honorable
Jeffrey A. Wagner, Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

CHRISTOPHER D. SOBIC
Assistant State Public Defender
State Bar No. 1064382

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
sobicc@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

I. The State did not meet its burden to show Mr. Jemison had “sexual intercourse” with T.S.

The State did not produce sufficient evidence at trial to show beyond a reasonable doubt that Mr. Jemison had “sexual intercourse” with T.S.

During trial, T.S. testified that she woke up to Mr. Jemison “trying” to put his penis in her anus. (65:36). However, T.S. stated that Mr. Jemison’s penis “was almost in [her anus]” but was “not quite in [her] anal.” (65:36). The only reasonable interpretation from this testimony was that Mr. Jemison’s penis did not enter T.S.’s “anal opening,” as required to prove “sexual intercourse.” *See* Wis. JI—Criminal 1200B.

Although Nurse Allison Lopez testified that T.S. told her at the hospital that Mr. Jemison’s penis “penetrated” her anus, this testimony, in light of T.S.’s conflicting trial testimony, only allowed the jury to speculate that T.S.’s statement to Nurse Lopez was accurate and her actual trial testimony was not. (65:87). Since any inference the jury made that Mr. Jemison’s penis entered T.S.’s anus was merely speculative, the State did not meet its burden to prove that “sexual intercourse” took place, as a jury’s inferences “cannot be based on speculation or conjecture.” *State v. W.T.D.*, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988).

The State points out that Mr. Jemison's lawyer conceded that Mr. Jemison had sex with T.S. during her opening statement and closing argument. (State's Response at 17-19). However, Mr. Jemison's attorney's opening statement and closing argument were not evidence. *State v. McDowell*, 2004 WI 70, ¶63 n. 19, 272 Wis. 2d 488, 681 N.W.2d 500. As such, the State was still required to prove through evidence that Mr. Jemison had "sexual intercourse" with T.S.

Accordingly, for the reasons here and those stated in Mr. Jemison's initial brief, the State failed to prove that Mr. Jemison had "sexual intercourse" with T.S.—an essential element necessary to convict him of second-degree sexual assault of an unconscious victim. Therefore, Mr. Jemison asks this Court to remand this case with instructions that the circuit court enter an order of acquittal on that charge.

II. The circuit court committed plain error when it permitted the State to admit other acts evidence related to Mr. Jemison's prior convictions for second-degree sexual assault at trial.

During Mr. Jemison's trial, the circuit court allowed four fundamental, obvious, and substantial errors to occur related to its admission of other acts evidence: 1) the State introduced remote and dissimilar other acts evidence related to Mr. Jemison's prior convictions for two counts of second-degree sexual assault, 2) the jury was told the other acts could be used to prove "identity," 3) the State informed the

jury that Mr. Jemison had previously been *convicted* of two counts of second-degree sexual assault, and 4) the State read the criminal complaints from Mr. Jemison's prior convictions to the jury. *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis.2d 138, 754 N.W.2d 77; *State v. Sonnenberg*, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984).

The State argues that the circuit court properly admitted the evidence of Mr. Jemison's two prior sexual assaults because those other acts had probative value. (State's Response at 23-29). Mr. Jemison disagrees. The "probative value of the other acts evidence...depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." *State v. Sullivan*, 216 Wis. 2d 768, 786, 576 N.W.2d 30 (1998).

The *combination* of the other acts significant dissimilarity to the offense here and the remoteness of the other acts made the other acts lack probative value. Both of the other acts the State introduced at trial involved child victims. (65:119-122). In one other act, the victim was 13 years old and, in the other one, the victim was 16 years old. (65:119-122) To the contrary, T.S. was an adult when Mr. Jemison was alleged to have sexually assaulted her. (65:17). Further, both other acts cases involved Mr. Jemison sexually assaulting victims while he was staying at or invited into the residence where the assaults occurred. (65:119-122). Whereas here, Mr. Jemison was alleged to have entered T.S.'s home without permission and without her knowledge before committing the sexual

assault. (65:32). Additionally, the two other acts involved Mr. Jemison touching victims with his hand, while the offense here involved alleged penis to anus sexual intercourse. (65:35-36, 119-122). Moreover, the other acts were nearly 23 and 13 years prior to the offense here. (65:35-36, 119-122).

Furthermore, the combination of the remoteness of the other acts along with the other acts' factual dissimilarities to this case diminished the probative value of the other acts to the point where the probative value did not substantially outweigh the prejudice of their admission. *State v. Cofield*, 2000 WI App 196, ¶9, 238 Wis. 2d 467, 618 N.W.2d 214. Here, the jury was unnecessarily told that Mr. Jemison committed prior sexual assaults against children—in a case that did not involve a child sex assault.

Notably, the State admits that in assessing the unfair-prejudice balancing test, the court must consider the State's *need* to present the other acts. (State's Response at 28). Based on the evidence in this case, the State did not need to present the other acts evidence. A GPS monitoring device placed Mr. Jemison at T.S.'s home at the time of the assault, Mr. Jemison's DNA was found on T.S., and T.S. identified Mr. Jemison as the perpetrator. (65:15-16, 36, 100, 115-116; 66:36). A nurse also testified that T.S. told her that Mr. Jemison had sex with her without her consent. (65:87). Considering this evidence, the other acts evidence was unnecessary and was only used to show Mr. Jemison acted in conformity with the other

acts, which is prohibited. *State v. Marinez*, 2011 WI 12, 331 Wis. 2d 568, 797 N.W.2d 399.

The State also argues that the other acts were properly admitted to show “identity.” (State’s Response at 22). Again, Mr. Jemison disagrees.

“Identity” was not a proper purpose for the submission of the other acts to the jury because Mr. Jemison’s identity was not truly at issue at trial. As stated above, Mr. Jemison conceded that he was present when T.S. was assaulted, a GPS monitoring device placed him at T.S.’s home at the time of the assault, Mr. Jemison’s DNA was found on T.S., and T.S. identified Mr. Jemison as the perpetrator. (65:15-16, 36, 100, 115-116; 66:36).

Importantly, the State must meet an additional burden to present other acts for the purpose of “identity.” Other acts evidence is admissible to show “identity” if the other acts have “such a concurrence of common features and so many points of similarity with the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant.” *State v. Gray*, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999). Based on the dissimilarities between the other acts and this case and the remoteness of the other acts discussed previously, the State did not meet this burden and the circuit court should not have allowed it to introduce the other acts at trial to prove “identity.”

Next, the State claims that the circuit court did not err when it allowed the State to admit evidence of

Mr. Jemison's prior *convictions* for second-degree sexual assault, asserting that a prior conviction is "evidence of other crimes" under Wis. Stat. §904.04(2)(a). (State's Response at 29-30). The State is wrong.

The State does not offer any support for its claim that "evidence of other crimes" is synonymous with prior convictions. Wis. Stat. §904.04(2)(a) does not specifically state that prior convictions are admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, nor does it define "evidence of other crimes" to include prior convictions.¹ In reality, when Wis. Stat. §904.04 intends for prior convictions to be admissible, it specifically says that prior convictions—as opposed to just "evidence of other crimes"—are admissible. *See* Wis. Stat. 904.04(2)(b)2.²

A defendant's conviction for a crime in itself is not relevant to prove one of the proper purposes under Wis. Stat. §904.04(2)(a). That is because it is the

¹ The State cited several cases in an effort to show that this Court and the Wisconsin Supreme Court have allowed other acts evidence of convictions in other cases. (State's Response at 29-30). However, none of the cases dealt with a specific challenge to the fact of conviction as improper.

² Wis. Stat. §904.04(2)(b)2 states: "In a criminal proceeding alleging a violation of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was *convicted* of a violation of s. 940.225(1) or 948.02(1)...as evidence of the person's character in order to show that the person acted in conformity therewith." (emphasis added).

details of a defendant's acts and conduct that prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, and not the fact of conviction.

Additionally, the State says that it was appropriate for the court to allow the State to read the criminal complaints associated with Mr. Jemison's prior convictions to the jury, as opposed to calling witnesses at trial to testify about the prior bad acts. (State's Response at 31-33). Again, the State is wrong.

The State argues that the statements within the criminal complaints were not testimonial because the complaints were self-authenticating documents under Wis. Stat. §909.02(12).³ (State's Response at 32). For Wis. Stat. §909.02(12) to apply here, the complaints needed to be admissible under Wis. Stat. §908.03(6).⁴ See Wis. Stat. §909.02(12). Wis. Stat. §908.03(6) is an exception to the hearsay rule that allows for admission of records of regularly conducted activity. The criminal

³ Under Wis. Stat. §909.02(12), extrinsic evidence of authenticity as a condition precedent to admissibility is not required for "the original or a duplicate of a domestic record of regularly conducted activity that would be admissible under s. 908.03(6) if accompanied by a written certification of its custodian or other qualified person..."

⁴ Wis. Stat. §908.03(6) provides an exception to the hearsay rule for a "memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity..."

complaints here were not records of regularly conducted activity, as those complaints were drafted by the State based on statements from police and the victims in those matters. *See State v. Gilles*, 173 Wis. 2d 101, 496 N.W.2d 133 (Ct. App. 1992) (all declarants involved in the making of a record must be from the same organization for the records of regularly conducted activity hearsay exception to apply).

The information within the two criminal complaints consisted of testimonial statements from the victims in those matters made to law enforcement. (65:119-122). Those statements were testimonial because they were given to police in order to prosecute Mr. Jemison for the other acts offenses. *Davis v. Washington*, 547 U.S. 813, 821-22 (2006); *State v. Rodriguez*, 2006 WI App 163, ¶18, 295 Wis. 2d 801, 722 N.W.2d 136. The criminal complaints were also testimonial because they were “functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009). The criminal complaints were used as a substitute for the witnesses from the other acts cases testifying at trial in this matter.

And Mr. Jemison’s guilty pleas to the two prior acts did not waive his right to confrontation. (State’s Response at 33). Again, it is the factual details of a defendant’s prior acts and conduct that proves one of the proper purposes. A defendant’s guilty plea does not in itself admit all of the facts within a criminal complaint. The “opportunity to question one’s accusers

is central to our adversarial system. Without confrontation, potential errors, mistakes of fact, and ambiguities are neither examined nor tested by opposing counsel.” *Jorgensen*, 310 Wis.2d 138 at ¶36. Because witnesses were not required to testify regarding Mr. Jemison’s prior bad acts, Mr. Jemison was deprived of his right to test the accuracy of the factual details within the criminal complaints in the context of this case and his constitutional right to confrontation was violated.

Lastly, the State argues that even if the circuit court improperly admitted the other acts, that error was harmless. (State’s Response at 34-35). The admission of evidence of two prior child sexual assaults at Mr. Jemison’s trial was not harmless.

In order to show harmless error, the State must prove beyond a reasonable doubt that a rational jury would have found Mr. Jemison guilty even if the other acts had not been introduced into evidence. *See State v. Monahan*, 2018 WI 80, ¶33, 383 Wis. 2d 100, 913 N.W.2d 894. To begin, the State says that even if the other acts were erroneously admitted for identity purposes, they were admissible for one of the other permissible purposes under Wis. Stat. §904.04(2)(a), making the admission harmless. (State’s Response at 34). However, the jury was not instructed on any of the other permissible purposes, it was only instructed on “identity.” (66:21-22).

Moreover, contrary to the State’s assertions, the evidence against Mr. Jemison was not so

overwhelming that introduction of the other acts was harmless beyond a reasonable doubt. (State's Response at 35). As pointed out previously, T.S.'s statement at trial was inconsistent with her statement to the nurse who treated her.

In addition, because of the admission of the other acts, the jury was told that Mr. Jemison was convicted of two prior serious sexual assaults against children. In *State v. Whitty*, the Wisconsin Supreme Court recognized the dangers of admitting other acts:

- 1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts;
- (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses;
- (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated, and
- (4) the confusion of issues which might result from bringing in evidence of other crimes.

34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967). Once the jury heard that Mr. Jemison was previously involved in two sexual assaults against children, the risk that the jury determined that Mr. Jemison was guilty of this offense because he committed prior sexual assaults was far too great.

In sum, the circuit court committed plain error when it allowed the State to introduce the other bad acts of Mr. Jemison's prior convictions for second-degree sexual assault at trial. Plain error occurs when "a basic constitutional right has not been extended to

the accused.” *Jorgensen*, 310 Wis. 2d 138 at ¶21. Mr. Jemison’s constitutional due process right to a fair trial was violated when the jury was improperly informed that he was convicted of prior sexual assaults against children during the trial here. *Whitty*, 34 Wis. 2d 278 at 297. His constitutional right to confrontation was also violated when the State was simply permitted to read the criminal complaints related to his prior convictions to the jury without calling any witnesses. *State v. Hale*, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637. Based on these constitutional violations, Mr. Jemison asks this Court to order a new trial.

III. The circuit court erred in denying, without a hearing, Mr. Jemison’s postconviction claim that he received ineffective assistance of counsel when defense counsel failed to object to the introduction of the other acts of his prior sexual assaults.

The State asserts that the circuit court properly denied Mr. Jemison’s claim that he received ineffective assistance of counsel without a hearing because the record conclusively demonstrated that the other acts were properly admitted at trial. (State’s Response at 37-38).

But, as explained above and in Mr. Jemison’s initial brief, the circuit court improperly admitted the other acts evidence in this case, as the other acts were too remote, factually dissimilar to this case, and too prejudicial due to the impact of admitting evidence of child sex offenses in a non-child sex offense case. As

was also explained, the manner in which the circuit court allowed the State to introduce the other acts was improper—as the other acts were not relevant for “identity,” the introduction of Mr. Jemison’s prior convictions was impermissible, and admission of the criminal complaints violated Mr. Jemison’s right to confrontation.

Because the other acts were not properly admitted, it was deficient for defense counsel not to object to their introduction into evidence at trial and the circuit court erred in failing to order a *Machner*⁵ hearing in this case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Roberson*, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111.

⁵ *State v. Machner*, 92 Wis. 2d 797, 285 N.W. 2d 905 (Ct. App. 1979).

CONCLUSION

For the reasons stated here and in Mr. Jemison's initial brief, Mr. Jemison respectfully requests that this Court remand this case with instructions that the circuit court enter an order of acquittal on the charge of second-degree sexual assault. If this Court does not grant the order of acquittal, Mr. Jemison asks the court to order a new trial due to plain error. Finally, if this Court does not grant either of those remedies, Mr. Jemison asks the court to reverse the circuit court's order denying his postconviction motion and remand this case to the circuit court for a *Machner* hearing.

Dated this 14th day of October, 2022.

Respectfully submitted,

Electronically signed by

Christopher D. Sobic

CHRISTOPHER D. SOBIC

Assistant State Public Defender

State Bar No. 1064382

Office of the State Public Defender

735 N. Water Street - Suite 912

Milwaukee, WI 53202-4116

(414) 227-4805

sobicc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

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 2,939 words.

Dated this 14th day of October, 2022.

Signed:

Electronically signed by

Christopher D. Sobic

CHRISTOPHER D. SOBIC

Assistant State Public Defender