STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP965-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CLINTON D. CLUCAS,

Defendant-Respondent.

ON APPEAL FROM A FINAL ORDER PARTIALLY DENYING THE STATE'S MOTION TO ADMIT OTHER ACTS EVIDENCE, IN PORTAGE COUNTY BRANCH 1, THE HON. THOMAS EAGON PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

A. The Respondent's Brief incorrectly claims this court should utilize an erroneous exercise of discretion standard.

The Respondent's brief argues that this court should utilize an erroneous exercise of discretion standard when reviewing the circuit court's decisions in this matter because *de novo* review is only appropriate when there is a clear error of law. Respondent's Brief pgs. 12-13 (citing *State v. Dorsey*, 2018 WI 10, ¶ 24, 379 Wis. 2d 386, 403–04, 906 N.W.2d 158, 167)

What the Respondent's brief fails to acknowledge in its argument is that admission of other acts evidence under Wis. Stat. 904.04(2)(b)1 requires interpretation of the statute, which is a *de novo* review. *Dorsey*, 2018 WI 10, ¶ 23 ("Determining what standard for admission of other-acts evidence applies under… Wis. Stat. § 904.04(2)(b)1 requires us to interpret the statute.") (citation omitted).

This information is the paragraph directly preceding the paragraph the Respondent relies upon. The error in this case is a misapplication of Wis. Stat. 904.04(2)(b)1, as the State's primary appellate brief makes clear, requiring a *de novo* review. Appellant Brief pgs. 4, 13-15.

Further, with respect to the paragraph the Respondent relies upon, *Dorsey* specifically states that if a circuit court relied on an "improper legal standard" then a circuit court has erroneously exercised its discretion. *Dorsey*, 2018 WI 10, ¶ 24 (citing *State v. Jackson*, 2014 WI 4, ¶43, 352 Wis. 2d 249, 841 N.W.2d 791).

To briefly summarize, the circuit court's analysis when determining the admissibility of Acts 1 through 3 failed to consider the requirements in Wis. Stat. 904.04(2)(b)1 which states explicitly that other acts evidence against the same defendant "is admissible" and that it is admissible "*without regard* to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act" or, in more plain terms, *without regard* for the fact that the other acts of domestic abuse occurred against a previous domestic partner. Appellant Brief pgs. 13-15; Wis. Stat. 904.04(2)(b)1 (emphasis added).

The circuit court, in making its determinations with respect to the first two other acts, explicitly considered the fact that they had occurred in a prior relationship with a prior girlfriend of Clucas'. A-AP 24, 25: 13-15, 10-13.

The Respondent's brief argues that considering whether other acts occurred against a previous victim is a permissible consideration, however this is in *direct contradiction* of the text of the statute. Respondent's Brief pg. 27 (citing *State v. Gutierrez*, 2020 WI 52, ¶ 34, 391 Wis. 2d 799, 823, 943 N.W.2d 870, 882). The

Respondent's brief argues that *Gutierrez* shows how the identity could be a factor the court could consider, but fails to acknowledge that in *Gutierrez* the Wisconsin Supreme Court noted, when examining the probative value of the other acts, that the other acts involved "the same victim and assailant" rather than the same defendant and different victims. *Id*. *Gutierrez* is inapplicable and does not stand for the proposition that the Respondent's brief claims, indeed it cannot, because to permit a court to consider whether the other acts involved a different victim would be in *direct* contradiction of Wis. Stat. 904.04(2)(b)1. In other words, per *Gutierrez*, it's perfectly acceptable for the circuit court to *admit* other acts evidence because it includes the *same* victim, but the circuit court cannot *exclude* other acts evidence because it involved a *different* victim. That is what Wis. Stat. 904.04(2)(b)1 requires.

When the circuit court interpreted Wis. Stat. 904.04(2)(b)1 it committed a clear error of law in its analysis when it considered that the first two other acts involved a prior girlfriend victimized by Clucas, a *de novo* review is appropriate to correct the error. *Dorsey*, 2018 WI 10, ¶ 23.

B. The Respondent's Brief incorrectly claims the State conceded the other proper purposes that were referenced in the original circuit court motion by not arguing them at the motion hearing.

At the very beginning of the motion hearing, the State indicated it would rely primarily on the arguments outlined in the motion presented to the circuit court. A-AP 6:18-21. The State did not at any point concede that only a pattern of behavior argument would be applicable to admit these other acts as the Respondent's brief argues. Respondent's Brief pg. 19. In fact, throughout the motion hearing the State referenced it was relying on a pattern of behavior argument, in addition to all of the other proper purposes originally outlined in its motion. A-AP 6:17-20; 7:4; 10:13-19; 15:2-4, 7-16.

While there was minimal elaboration during the motion hearing with regard to some of those proper purposes, a strategic choice to use the limited time present at a motion hearing to make arguments to the circuit court does not mean the State has forfeited the other arguments that were presented in the original written motion or conceded anything with respect to being able to argue them on appeal. *State v. Williams*, 47 Wis. 2d 242, 249–50, 177 N.W.2d 611, 615–16 (1970) (pre-arraignment written motion by the defense attorney was sufficient to preserve challenge to a warrant for appeal without formal argument on the motion).

The State's primary appellate brief provides supplementary information to this court for the purposes of bolstering its already existing arguments presented to the circuit court.

C. The Respondent's Brief incorrectly claims that the State's pattern of behavior argument is actually a propensity argument and argues the State's argument on appeal is inconsistent with its argument at the circuit court.

At the motion hearing and in its original motion, the State argued that one of the many permissible proper purposes for which it sought to admit the other acts evidence was that it was probative of a pattern of behavior by Clucas with respect to how he behaves when his domestic relationship is showing signs of deterioration. A-AP 6:18.

The term pattern is not defined as a matter of law, so therefore it is appropriate to turn to the common and ordinary meaning of the term, which under Black's Law dictionary is defined as "[a] mode of behavior or series of acts that are recognizably consistent." Black's Law Dictionary 1308 (10th ed.2014); *State ex rel. Kalal v. Circuit Court*, 2004 WI 58 ¶ 45.

The prohibition on propensity only applies if the State were offering these other acts evidence as evidence of the defendant's character and that he "acted in conformity therewith." Wis. Stat. 904.04(1).

The State explicitly stated that it was offering these other acts because they went to the probative value of analyzing Clucas' behavior *in that moment* of the crime and it sought to use these other acts to show that in similar moments in the past Clucas behaved in similar ways which makes it more probable than not that he behaved similarly in the present case. A-AP 15:7-16.

The State was *not* arguing that because Clucas committed these other acts that meant he *must* have committed the act in the present case, the State's argument is that because these other acts are acts of domestic abuse committed by Clucas the nature and facts of the prior offenses are probative of his behavior at the time of the present offense. A-AP 15:7-16.

The State's primary appellate brief further elaborates on the foundation of the State's arguments that these other acts are admissible under *both* a *Sullivan* analysis *and* Wis. Stat. 904.04(2)(b)1, with or without the greater latitude rule. A-AP 39 ¶2-3.

The State does not argue that these other acts are automatically admissible like the Respondent's brief implies, the State acknowledges the burden of proving

that these other acts are sought for proper purposes and the State must make a showing they are similar acts under the statute. Wis. Stat. 904.04(2)(b).

There are many ways to engage in abusive behavior, just because the other acts the State sought to admit are not *completely identical* in nature to the present case does not mean these other acts are not *similar* in fact and context, however, and each of the other acts the State sought to admit either are included as domestic abuse offenses, with regard to the first two other acts, or would otherwise fall under the law as a domestic abuse offense, with regard to the third other act. Wis. Stats. 973.055, 968.075(1)(a); A-AP 48-69.

Once the showing that each of the other acts was a "similar act" and offered for a proper purpose was made at the circuit court level, the burden then fell to Clucas to show how his fundamental due process rights would be denied. *State v. Gee*, 388 Wis.2d 68 ¶ 35, 931 N.W.2d 287 (2019). The State met its burden both in its original motion to the circuit court and at the motion hearing, Clucas did not.

D. The Respondent's Brief utterly fails to address the State's argument with respect to *Gee* and *Dowling*.

In the Respondent's brief, there is not a single citation or reference to *Dowling* or *Gee*. The Respondent's brief only argues that a pure *Sullivan* analysis, which requires the court find Clucas would face undue prejudice by admission of the other acts evidence and such undue prejudice outweighs any probative value, is applicable. Respondent's Brief pgs. 16-29.

However there is no current case law indicating when other acts evidence may be denied admissibility under the greater latitude standard when the text of the statute directly states such evidence "is admissible" upon a showing that the other acts are sought for proper purposes and are similar acts.

The State provided a method by which a court could find such other acts inadmissible under the greater latitude standard, by a showing by Clucas that some fundamental due process right would be denied by their admissibility at trial. Appellant Brief pgs. 9-10. A factor which is not at issue in the present case due to Clucas' adoption of the facts by his guilty pleas and the availability of the victim who was the same victim in the third other act.

Dorsey and later *Gee* rejected the pure *Sullivan* analysis method the Respondent relies on when the greater latitude standard applies and *Gee*, which adopted *Dowling* as a foundation for its ruling, has the most applicable method to make such a determination in the present case. Appellant Brief pgs. 9-10.

The Court of Appeals in *Gee* essentially further refined the ruling in *Dorsey* providing the foundation that dictates a proper greater latitude analysis could only deny admission of other acts evidence under greater latitude by application of the law being unconstitutional as applied to a particular defendant. *State v. Gee*, 388 Wis.2d 68 ¶ 35, 931 N.W.2d 287 (2019); See also *State v. Pulizzano*, 456 N.W. 325, 155 Wis.2d 633 (1990).

E. The Respondent's Brief incorrectly claims circuit court conducted a proper *Sullivan* analysis utilizing the greater latitude standard required under Wis. Stat. 904.04(2)(b)1 and *Dorsey*.

As the State outlined in its primary appellate brief, the circuit court failed to conduct a proper greater latitude analysis under *Dorsey*. Appellant Brief pgs. 12-15. To briefly summarize again, the circuit court impermissibly considered the first two other acts involved a prior girlfriend, did not properly consider all of the State's proper purposes, and failed to make a showing supported by the record that Clucas' fundamental due process rights would be denied by admission of the other acts. A-AP 24, 25: 13-15, 10-13; Appellant Brief pgs. 13-15.

Further, at issue here on appeal, as noted in the State's primary appellate brief, *Dorsey* fails to address when a court may *deny* admission of other acts evidence under 904.04(2)(b)1. Appellant Brief pg. 15. However, *Gee*, which the Respondent fails to acknowledge in its brief, provides the roadmap for this court and that road leads directly to a conclusion that the three other acts should be admitted at trial. Appellant Brief pgs. 9-10.

The Respondent's brief argues further that the State conceded the method used by the *Dorsey* court was the proper way to conduct a greater latitude *Sullivan* analysis, but that is incorrect as the State clearly references *Gee*'s refinement of the *Dorsey* analysis which the Respondent utterly fails to address in its brief. Appellant Brief pgs. 9-10.

F. The Respondent's brief incorrectly argues the State's argument with respect to the methods of presenting the other acts evidence is moot.

As the State referenced in its primary appellate brief, and which the Respondent's brief fails to properly address, Clucas adopted the facts of the criminal complaints through his guilty pleas and the criminal complaints and judgments of conviction are public records, making multiple hearsay exceptions applicable to the other acts in the present case. Appellant Brief pgs. 11, 15; Wis. Stats. 908.01(4)(b)2, 908.03(8).

There are much less intrusive ways to admit the other acts evidence without any concerns of the Confrontation Clause, and that is through the methods which

the State argued in its original motion to the circuit court. A-AP pgs. 13, 14: 23-25, 1-4; *Huddleston v. U.S.*, 485 U.S. 681 (1988). Further, the Respondent's brief appears to have confused the reason the State cited *Hezzie R.* in its primary appellate brief. Respondent Brief pgs. 30-31; Appellant Brief pg. 16.

The reason the State referenced *Hezzie R.* is because it stands for the longstanding practice of reading federal and state constitutions similarly and is utilized by the *Gee* decision to support the adoption of the *Dowling* ruling from the U.S. Supreme Court and it further bolsters the State's application of *Huddleston*. Appellant Brief pg. 9; *Gee*, 388 Wis.2d 68 ¶ 35, 931 N.W.2d 287 (2019) (citing *State v. Hezzie R.*, 219 Wis.2d 848, 891, 580 N.W.2d 660 (1998)).

The circuit court overstepped by requiring steps beyond what is required by *Huddleston* for the State to present its evidence of the other acts at trial and such an issue is ripe for review on appeal should these three other acts be deemed admissible by this court.

CONCLUSION

It is for the reasons and argument stated above that the State respectfully requests the Court of Appeals overturn the trial court's decision denying the State the chance to present the first three other acts as evidence at trial and permit the State to introduce its evidence through documentation without requiring witnesses with personal knowledge.

Dated this 2nd day of December, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2935 words.

Dated this 2nd day of December, 2022.

Electronically signed by:
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

Dated this 2nd day of December, 2022.

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