STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2013AP911-CR

JOHN M. LATTIMORE,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION MOTIONS, ENTERED IN THE LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE TODD BJERKE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. REGARDLESS OF WHETHER PROPERLY LABELLED AS AN ISSUE OF OTHER ACTS OR JOINDER, LATTIMORE FULLY BRIEFED THE ISSUE AND THE LEGAL ANALYSIS IS THE SAME, SO THIS COURT SHOULD REACH THE MERITS

A. Summary of Arguments

On appeal, Lattimore challenged whether the trial court erroneously concluded that evidence of M.H.'s sexual assault allegations would be admissible as other acts evidence at trial for the S.M allegations (Appellant's brief-in-chief: 17-23).[1] The State argues Lattimore "abandoned" that issue

[1] As will be discussed *infra*, section V, Lattimore also argued this ruling supported a reversal in the interest of justice (Appellant's brief-in-chief: 43-44).

because Lattimore's brief mislabels the issue as one of other acts, when it would be more appropriately raised as whether the allegations were properly joined (State's brief: 4-5).

The State's argument is essentially that by not challenging joinder on appeal, Lattimore forfeited the right to have this court address the merits. *See, e.g.*, ***State v. Ndina***, 2009 WI 21 ¶29, 315 Wis.2d 653, 761 N.W.2d 612 (forfeiture is the failure to make the timely assertion of a right). Lattimore asserts no forfeiture occurred, and if this court finds a technical forfeiture, the court should exercise its discretion to address the merits.

B. No Forfeiture Occurred Because the Substantive Issue – Whether the Court's 904.04(2) Analysis Was Correct – Is Exactly the Same Whether Labelled An Issue of Joinder or Other Acts

Whether the issue is properly labelled "joinder" or "other acts" is a distinction without a difference in this case. The factual considerations and legal analysis are exactly the same. Wis. Stat. sec. 971.12(1) allows joinder when the crimes are of the same or similar character, are based on the same act or transaction, or constitute parts of a common scheme or plan. However, the trial court's analysis focused exclusively on whether the two assaults would be admissible as other acts at separate trials, because otherwise joinder would not prejudice Lattimore. *See* ***State v. Hall***, 103 Wis.2d 125, 307 N.W.2d 289 (1981) (joinder is not prejudicial when the same evidence would be admissible under sec. 904.04 at separate trials).

When it granted Lattimore's severance motion, the court determined that the M.H. allegations would not be admissible under 904.04(2) (R130: 18-20). When the court reversed its decision on reconsideration, it again relied exclusively on the 904.04(2) analysis (R133: 12-15). Regardless of whether properly labelled as joinder or other acts, the question is the same – whether the trial court erroneously determined that the M.H. allegations would be admissible under 904.04(2) at the trial for the S.M. allegations, because that's the ruling that compelled rejoining the charges for trial.

C. If a Technical Forfeiture Occurred, the Court Should Exercise Its Discretion to Address the Merits

The Wisconsin Supreme Court has stated:

> The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

Ndina, 2009 WI 21, ¶30.

Forfeiture is a rule of judicial administration, and whether the court applies the rule is a discretionary matter. *See id.,* 2009 WI 21, ¶38. Lattimore submits that applying forfeiture to this case would be a drastic example of putting form over substance.

This issue was fully litigated below. Lattimore's trial counsel made several timely objections, including (1) moving for severance, (2) opposing the State's other acts motion, and (3) moving to reconsider the court's other acts reversal. The State acknowledges trial counsel's acquiescence to rejoining the charges should not constitute forfeiture because rejoinder only occurred due to the court granting the State's other acts motion (State's brief: 4).

On appeal, Lattimore fully briefed the same substantive objections. There are no factual issues to develop. There is no lack of diligence, and no "sandbagging" has occurred. Both parties have had notice of the issue and a fair opportunity to address the legal question. Despite knowing the court had the discretion to ignore forfeiture, the State chose not to make an alternative argument addressing the merits. Unrefuted arguments are generally deemed

conceded. *See* ***Charolais Breeding Ranches v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).[2]

Lattimore asks only that the court address the merits. Support for doing so is found in ***Ndina,*** where the substantive issue was whether Ndina's right to a public trial was violated when his family members were excluded during trial. ***Id.,*** ¶1. The State argued Ndina's failure to object to the exclusion forfeited his challenge, while Ndina argued the State's failure to raise a forfeiture argument during post-conviction proceedings forfeited that argument on appeal. ***Id.,*** ¶¶26-27. The Supreme Court declined to apply the rule of forfeiture to either side, noting that "[a]lthough two wrongs do not make a right," the circumstances warranted addressing the merits because the substantive issue was fully briefed. ***Id.,*** ¶31.

If the court declines to address the merits, Lattimore may be foreclosed from doing so in the future. See ***State v. Escalona-Naranjo***, 185 Wis.2d 169, 517 N.W.2d 157 (1994) (discussing serial litigation bar). "[T]he law prefers, whenever reasonably possible, to afford litigants their day in court." ***Wisconsin Pub. Serv. Corp. v. Krist***, 104 Wis.2d 381, 395, 311 N.W.2d 624 (1981). If the court deems the issue forfeited based on counsel's labelling error, Lattimore may claim ineffective assistance of appellate counsel in a collateral appeal. However, the most judicially economical approach would be to address the merits on direct appeal.

Finally, Lattimore again raised the substantive issue in his request for a new trial in the interest of justice (Brief-in-chief: 43-44). Even if the court found forfeiture with regards to joinder, the court would have to address the merits of joining those allegations for trial under the interests of justice. Clearly Lattimore did not intend to forfeit the underlying substantive issue. Considering the focus of the trial court's analysis was entirely on whether the M.H. allegations would have been admissible under 904.04(2), appellate counsel

[2] Likewise, when addressing Lattimore's request for a new trial in the interest of justice, the State ignored Lattimore's claim that the real controversy was not fully tried because the court improperly found the M.H. evidence admissible pursuant to sec. 904.04(2), which prompted re-joinder (State's brief: 27-28). Thus, although Lattimore raised the substantive issue twice, the State failed to address the merits either time.

believed the issue was properly preserved by labelling the issue a 904.04(2) question. If there is an error, it was counsel's error alone. That is not a valid basis upon which to invoke forfeiture.

II. EXCLUSION OF THE FACEBOOK THREAT MADE BY S.M.'S BROTHER DENIED LATTIMORE DUE PROCESS AND THE RIGHT TO PRESENT A DEFENSE

The State argues that the trial court properly excluded the Facebook message because it was not relevant (State's brief: 6). First, the State argues that the defense claims that the threat is relevant because it explained why Lattimore asked Amber Schade about the threat, and why he told Schade he was taking legal action against S.M.'s brother, are undeveloped (State's brief: 6). To be clear, Lattimore is not asserting those facts are independently relevant, but are relevant because they are links in the chain leading to the primary inference – the threat explained S.M.'s motive for reporting the allegation to police.

Essentially, the argument is as follows – S.M.'s brother Josh made the threat, which led Lattimore to ask Amber Schade about the threat and indicate he was taking legal action against Josh, which led Amber to warn S.M. about the threat and Lattimore's intent to get Josh banned from campus, which provided S.M. motive to report to police that Lattimore raped her. Those connecting facts are relevant because they lead to an inference of consequence. *See, e.g.*, ***Hicks v. State***, 47 Wis.2d 38, 43, 176 N.W.2d 386 (1970) ("[a]ny fact which tends to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable.") (emphasis added).

The State does not directly challenge Lattimore's argument that the Facebook message is relevant because it caused Lattimore's statements about taking legal action against her brother, which provided S.M. a motive to falsely tell police that Latimore raped her. Instead, the State argues that S.M. didn't know about the Facebook message's threatening content, and that's why the message's content is

irrelevant (State's brief: 7-10) ("But Lattimore's theory of relevance requires one additional step – that S.M. knew that her brother had made a credible threat against Lattimore. That is where Lattimore's theory of relevance falls apart").

The State makes the same argument regarding whether the defense should have been able to present the Facebook threat after S.M.'s mother inaccurately characterized it as non-threatening, asserting "Once again, that argument founders on the lack of any evidence that S.M. had knowledge of the actual content of the Facebook message," (State's brief: 8).

There are two problems with this – (1) the jury was free to disbelieve S.M.'s testimony denying knowledge of the threat's content, and, more importantly (2) the trial court specifically prohibited Amber Schade from testifying that she told S.M. about the Facebook threat, declaring "[t]he nature of the threat is not really relevant" (R141: 172-74). Thus the defense was barred from proving up the link in the chain which the State argues was necessary to establish relevance.

Clearly the Facebook threat is relevant to whether S.M. had a motive to lie against Lattimore. At the very least, the message should have been admitted after S.M.'s mother inaccurately characterized the Facebook message as non-threatening, because that damaged the credibility of the claim that this threat and Lattimore's response could have provided S.M. a motive to lie. The court erroneously excluded the threat's content and denied the defendant his constitutional right to present a defense.

III. THE CHARACTER EVIDENCE REGARDING S.M. WAS NOT RELEVANT TO WHETHER OR NOT SHE CONSENTED TO HAVING SEX WITH LATTIMORE

The State argues the court correctly concluded the S.M. character evidence was relevant to whether or not she consented to sexual intercourse (State's brief: 10-13). The State focuses on the court's ruling that evidence of a significant change in S.M.'s demeanor from "high spirited"

and "fun loving" to "scared" and "untrustworthy [*sic*] of others" supported her claim that she was raped and undermined the theory that she merely regretted having consensual intercourse (State's brief: 12, citing R117: 5).

This doesn't address much of the character evidence allowed by the trial court, such as testimony about S.M.'s "contagious laughter," evidence that S.M. was away from home for the first time, or that S.M. intended to be an adolescent physical therapist (R141: 21). This evidence was flatly irrelevant.

Further, neither the trial court nor the State provide an effective explanation of why S.M.'s personality changes are probative of whether this sexual encounter was consensual. The State's claim that changes in an individual's personality are the equivalent of using medical evidence of injury to show trauma occurred is absolutely preposterous (State's brief: 12). Emotional changes cannot be proven directly, and can be attributable to many other sources. By comparison, physical injuries can be directly attributable to an injury mechanism (e.g. a stab wound and a knife), supported by physical evidence and scientific testimony.

No expert testimony was presented regarding whether these supposed changes were somehow consistent with a sexual assault victim, which could have provided that link for the jury.[3] Instead, the State presented conclusory testimony from S.M.'s friends and relatives that S.M.'s personality changed and that it was directly attributable to the alleged rape. Such testimony is far too tenuous to be probative.

This evidence is particularly prejudicial (and therefore subject to exclusion under Wis. Stat. sec. 904.03) because Lattimore had no possible way to rebut such evidence. Surely any attempt to do so – such as presenting testimony that her personality didn't change, or regarding other events in S.M.'s life that could account for such changes – would be deemed irrelevant and inadmissible. Likewise, this character evidence should not have been permitted.

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[3] E.g. ***State v. Jensen*** , 147 Wis.2d 240, 432 N.W.2d 913 (1988).

IV. TRIAL COUNSEL'S FAILURE TO IMPEACH S.M. ABOUT LYING TO THE SANE NURSE WAS NOT OBJECTIVELY REASONABLE

The State asserts that attorney Schroeder sufficiently objected to the character evidence regarding S.M., such that all objections to that evidence are sufficiently preserved (State's brief: 15). Accordingly, Lattimore will address only the State's objections regarding the impeaching evidence.

The State makes no argument that evidence of S.M.'s lie to the SANE nurse (and in the presence of S.M.'s mother) about being a virgin at the time of the alleged assault would be inadmissible. Instead, the State focuses on attorney Schroeder's strategic reasons for not seeking to admit this evidence, specifically (1) counsel was concerned S.M. would deny lying and claim she didn't tell Officer Miller she wasn't a virgin, and (2) Schroeder didn't believe this evidence was necessary to the defense (State's brief: 24). The State argues that counsel's strategic decisions are virtually unassailable on appeal.

Although courts must not second-guess counsel's considered selection of trial tactics, even tactical decisions "must stand the scrutiny of common sense." ***Kellogg v. Scurr***, 741 F.2d 1099, 1102 (8th Cir. 1984); *see also* ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161 (1983). A reviewing court thus "will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic." ***Felton***, ***id.,*** at 503. The reasonableness of an attorney's decision also depends upon the investigation conducted into the facts and options. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." ***Strickland,*** 466 U.S. at 690-91.

Attorney Schroeder's concern about S.M. denying she told Officer Miller she wasn't a virgin is not objectively reasonable because it was based on insufficient investigation. Schroeder admitted he did not make any attempt to follow up with Officer Miller to confirm the statements, or contact other witnesses to investigate (R145: 34). Schroeder further admitted he was aware Lattimore believed that Ashton Brusca

had prior sexual activity with S.M. (R145: 34). Had Schroeder investigated Brusca, Brusca would have confirmed this, as demonstrated in the post-conviction pleadings.

And Schroeder's testimony about the evidence of S.M.'s lie about being a virgin revealed a fundamental misunderstanding of the evidence's significance. This evidence wasn't merely about S.M. "not disclosing the sexual encounter that happened a long time ago" (R145: 31). S.M.'s statement to the SANE nurse that she was a virgin had far greater significance. First, it was a lie, which is obviously probative of her credibility. Second, it was a lie regarding her sexual history told in her mother's presence, which arguably supported the defense claim that S.M. lied to her parents about her consensual encounter with Lattimore out of shame. Third, it was a lie to the SANE nurse attempting to collect evidence regarding this alleged assault, who ultimately evaluated the credibility of S.M.'s statements as being consistent with her findings when testifying at trial (R142: 151-52). Considering the circumstances under which this lie was told, attorney Schroeder's decision not to submit this evidence was objectively unreasonable.

These circumstances are also important to understand the prejudice Lattimore suffered. Both the trial court and the State ignored these circumstances when concluding the impeachment value was "tenuous at best" (State's brief: 26).

The State places significance on the trial court's finding that trial counsel already significantly attacked the victim's credibility through other means, as supporting the claim that Lattimore suffered no prejudice (State's brief: 26). Lattimore acknowledges that Schroeder impeached S.M. with inconsistencies, but nothing in counsel's impeachment of S.M. exposed an obviously false statement, such as S.M.'s lie about being a virgin. Further, the fact that an attorney attacks a witness's credibility to some extent doesn't preclude a finding of prejudice if the attorney failed to investigate and employ other significant evidence to attack that witness's credibility. In ***State v. Jeannie M.P.***, 2005 WI App 183, the court of appeals reversed a sexual assault based on ineffective assistance. ***Id.,*** ¶34. Although trial counsel attacked the credibility of the State's witnesses to an extent, the court

found that trial counsel's failure to investigate and present additional evidence attacking credibility prejudiced the defendant, given the case was a credibility contest, and the jurors only had to have a reasonable doubt regarding the credibility of the State's witnesses in order to acquit. ***Id.***

Lattimore submits that impeaching S.M. with her lie to the SANE nurse would have had a significant additive effect in attacking S.M.'s credibility. Considering this was a credibility contest, counsel's failure was prejudicial.

V. REVERSAL IS WARRANTED IN THE INTEREST OF JUSTICE

The State argues Lattimore's interest of justice claim only "rehashes his meritless claims" regarding the character evidence and S.M.'s lie to the SANE nurse (State's brief: 28). However, the State completely ignores Lattimore's argument that the real controversy was not fully tried because the trial court erroneously prevented the jury from hearing the actual content of the Facebook threat. The State also ignores Lattimore's argument that the real controversy was not fully tried because the jury erroneously heard testimony about the M.H. allegations based on the trial court's erroneous ruling that the M.H. allegations would be admissible as other acts (prompting re-joinder), thus failing once again to address the merits of that ruling. As those arguments are unrefuted, this court could deem them admitted. *See* ***Charolais***, at 109.

Lattimore submits the trial court's erroneous other acts ruling that prompted re-joinder prevented the real controversy from being fully tried because it unfairly forced Lattimore to defend not just against the individual allegations, but the belief that he was a serial rapist. Justice in this case requires reversal so that the allegations can be tried separately. Likewise, reversal is warranted in the interest of justice so that the jury can hear the other evidence supporting his defense – the Facebook threat and S.M.'s lie to the SANE nurse – that would support his defense and attack S.M.'s credibility.

CONCLUSION

For the reasons discussed in this brief, Lattimore respectfully requests that the court vacate the judgment of conviction and remand the case for a new trial.

Respectfully submitted: 5/22/2014:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,991 words.

Signed 5/22/2014:

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CERTIFICATE OF COMPLIANCE WITH 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 s. 809.19(12). I further certify that:

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

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

Signed 5/22/2014:

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