STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2017AP2364-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID GUTIERREZ,

Defendant-Appellant.

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REPLY BRIEF OF DEFENDANT-APPELLANT DAVID GUTIERREZ

On Appeal From the Circuit Court For Green Lake County
Circuit Court Case No. 12-CF-115
The Honorable Andrew W. Voight, Judge Presiding

CHRIS A. GRAMSTRUP
Attorney for Defendant-Appellant
State Bar No.1014456
1409 Hammond Avenue #322
Superior, WI 54880
Telephone: 715-392-5700

DATED: October 25, 2018

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I. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCREDITION IN ADMITTING THE VICTIM'S TESTIMONY RELATED TO AN ALLEGED ASSAULT OCCURING SOME 6 YEARS BEFORE.

1. *The prior alleged assault was not part of the panorama of evidence.*

The State asserts that the testimony was admissible as "part of the panorama of evidence" or "inextricably intertwined...testimony relating to the chronological unfolding of events..." *State v. Jensen, 331 Wis.2d 440, 794 N.W.2d 482 (2011)* and *United States v. Miller, 327 F.3d 598 (7th Cir. 2003)*. The State is mistaken.

In *Jensen*, the defendant placed pornographic photos around the house, for his wife to see in an effort to upset her, leading up to her murder. *Jensen*, ¶ 83. These were facts necessary to explain the efforts of the defendant, chronologically, to the jury. This is nothing like the testimony the State was allowed to present against Mr. Gutierrez. Here, the state was allowed to present testimony that "about" six years prior, Mr. Gutierrez had allegedly committed a prior sexual assault of a child.

The testimony wasn't "inextricably intertwined" with the charged offenses. It wasn't necessary to explain the alleged efforts of Mr. Gutierrez to commit the charged

offenses. Those facts would reasonably include the circumstances surrounding the incidents that he was charged with, i.e., in his home, while delivering scrap metal and in a garage. It could include facts and details leading up to those events, such as time of day, who was home, what was said, where the parties were prior, etc. Clearly, an allegation of an uncharged assault, not directly linked to the charged crimes, from "about" six years prior is not part of the "panorama of evidence" surrounding the crimes for which Mr. Gutierrez stood trial.

2. *Any probative value of the evidence was substantially outweighed by the danger of unfair prejudice.*

The State's argument glosses over the high level of unfair prejudice that Mr. Gutierrez was subjected to by this evidence and just simply concludes that its "great probative value was not outweighed by its prejudicial impact." Brief of Plaintiff-Respondent, at 18.

It ignores the fact that at the first hearing on the matter, the Court properly noted that if the 6 year old allegations were to be presented to the jury, it would be "almost impossible" for Mr. Gutierrez to "raise any reasonable response" to it. This is the very definition of unfair prejudice.

> Unfair prejudice results when the proffered testimony has a tendency to influence the outcome by improper means or it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. *State v. Sullivan, 216 Wis.2d 768, 789-90, 576 N.W.2d 30 (1998)*.

Mr. Gutierrez was presented with testimony that undeniably provoked the jury's instinct to punish and was not related to the propositions in the case, further, as the Court originally indicated, he was unable to raise any reasonable response. The prosecution was free to argue that this was a course of conduct, that it's what the victim "has known since she was six years old." *Rec. 118, 114*.

II. THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN DENYING MR. GUTIERREZ'S MOTION TO ADMIT DNA EVIDENCE.

Although the State's cursory argument is technically correct, it ignores the principle issue raised by the Court's denial. The fact that Mr. Gutierrez's DNA was not present was relevant and was properly admitted. However, as anticipated, the State elicited testimony and then argued that DNA is easily removable. This, despite the fact that other male DNA was present and had not been washed out or destroyed.

The presence of DNA from others that was detected on A.R. and in her underwear disproved the State's claim that

Mr. Gutierrez's DNA would not be expected to remain. And it should not go unsaid that the state knew their argument to the jury on this point was specious. During closing arguments, the prosecutor noted the expert's testimony as to why there would not be any DNA from Mr. Gutierrez. *Rec. 118, 121.* The prosecutor made that argument, fully aware that DNA was present from other unknown individuals and that Mr. Gutierrez was prevented from rebutting it. "The right...to present testimony in defense of a criminal charge [is a] fundamental...right of a criminal defendant." *Milenkovoic v. State, 86 Wis.2d 272, 286, 272 N.W.2d 320, 327 (Ct. App. 1978).*

III. DEFENSE COUNSEL WAS INEFFECITVE FOR FAILING TO STRIKE JUROR GOLZ.

Juror Golz was undeniably subjectively biased. She didn't merely state that she didn't know if she could be impartial. She gave reasons for her inability to be impartial. She stated:

> "I don't know if I can be impartial. I work with kids. I drive school bus, so I deal with kids all the time, and I just, I don't know if I can be impartial." *Rec. 116, 69.*

In effect, she explained that her personal experiences would affect her ability to be fair and impartial.

...[S]ubjective bias refers to the bias that is revealed by

the prospective juror on vior dire: it refers to the prospective juror's state of mind. *State v. Faucher, 227 Wis.2d 700, 717, 596 N.W.2d 770 (1999).*

Defense counsel did not further question the juror, use a peremptory challenge or press the Court to exclude her for cause. This Court has found similarly, that these failures constitute deficient performance."... [C]ounsel failed to further question the juror's statement of admitted bias, failed to move to strike the prospective juror for cause and failed to use a preemptory challenge to remove him from the jury panel. A guilty verdict without twelve impartial jurors renders the outcome unreliable and fundamentally unfair." *State v. Carter, 250 Wis.2d 851, 860, 641 N.W.2d 517 (2002)*, citing *State v. Krueger, 240 Wis.2d 644, 623 N.W.2d 211(Ct. App. 2001).*

Conclusion

The Defendant-Appellant, David Gutierrez, by his counsel, Chris A. Gramstrup, respectfully requests an Order, vacating the Judgement of Conviction and remanding the matter back to the Circuit Court.

Dated: 10/26/18

Chris A. Gramstrup

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.18(8)(b) and (c) for a brief produced using a mono spaced font. The length of the brief is 9 pages.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12)(f). 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.

Dated: October 26, 2018

Chris A. Gramstrup
State Bar No.1014456