State-FWA

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 95-0156-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MAURICE M. HARDY,

Defendant-Appellant.

PETITION FOR REVIEW

The State of Wisconsin, by its undersigned attorneys, hereby petitions the Wisconsin Supreme Court, pursuant to sec. 808.10 and Rule 809.62, Stats., to review the decision of the Wisconsin Court of Appeals, District I, dated October 3, 1995 (P-Ap. 101-07), which reversed the judgment of the circuit court for Milwaukee County, the Honorable John A. Franke, presiding, convicting the defendant-appellant of second degree sexual assault.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court erroneously exercise its discretion when it barred defense counsel from cross-examining the victim about allegedly false statements she had made to Colorado correctional officials in a matter unrelated to the charged crime?

The court of appeals found that the trial court had erroneously applied sec. 906.08(2), Stats., in restricting cross-examination but did not discuss whether there were other reasons to support the trial court's ruling.

2. Where the jury's determination of guilt or innocence hinges on whether it believes the victim or the defendant, is an erroneous ruling on the admissibility of evidence bearing on the victim's credibility always prejudicial error?

The court of appeals implicitly answered yes.

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CRITERIA FOR REVIEW

The first issue presented satisfies the criteria for review contained in Rule 809.62(1)(d), Stats., in that the court of appeals' opinion conflicts with controlling opinions of the Wisconsin Supreme Court as well as other court of appeals' decisions which hold that if a trial court reaches the proper result for the wrong reason, it will be affirmed. See, e.g., State v. Patricia A.M., 176 Wis. 2d 542, 549, 500 N.W.2d 289 (1993); State v. Holt, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

Ignoring this rule, the court of appeals concluded that the trial court's restriction on cross-examination of the victim was error because "RULE 906.08(2), STATS., permits inquiry into collateral matters on cross-examination if those matters are 'probative of truthfulness or untruthfulness and not remote in time.'" P-Ap. at 103 (footnote omitted). The court of appeals failed to acknowledge that there was an alternative reason for upholding the trial court's ruling. Specifically, the court ignored the state's argument that, regardless of the rationale the trial court gave, its ruling was correct because the evidence Hardy wished to elicit from the victim on cross-examination was of little or no probative value.

The second issue presented also satisfies the criteria for review set forth in Rule 809.62(1)(d), Stats. With respect to this issue, the court of appeals apparently concluded that an erroneous ruling on the admissibility of

evidence bearing on a victim's credibility can never be harmless if the determination of guilt or innocence "boil[s] down to an issue of credibility." P-Ap. at 103. This conclusion conflicts with State v. Patricia A.M., 176 Wis. 2d at 556-58, wherein this court found that admitting evidence of anal contact between one of the victims and defendant's husband--even if error under sec. 906.08(2)--was harmless under State v. Dyess, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985), even though such evidence enhanced the credibility of the victim.

Similarly, the court of appeals in State v. Hilleshiem, 172 Wis. 2d 1, 20-21, 492 N.W.2d 381 (Ct. App. 1992), found harmless error where the trial court incorrectly disallowed opinion testimony as to the character for truthfulness of the state's chief witness, an undercover agent in a narcotics investigation.

Instead of examining other evidence impugning the credibility of the victim, however, the court of appeals summarily concluded that the erroneous exclusion of evidence bearing on the truthfulness of a victim is always prejudicial where the case amounts to a credibility battle between the victim and the defendant. The court of appeals failed to conduct even a cursory analysis under State v. Dyess, and its failure to do so is inconsistent with Dyess and with State v. Grant, 139 Wis. 2d 45, 406 N.W.2d 744 (1987). In Grant, this court held that in assessing whether trial court error is harmless under Dyess, the reviewing court must focus on

whether the error undermines the court's confidence in the verdict. 139 Wis. 2d at 53. In doing so, the reviewing court must analyze the error in the context of the entire trial and not in isolation. Id. The court of appeals failed to conduct the type of harmless error analysis envisioned by Dyess and Grant.

STATEMENT OF THE CASE

The defendant-appellant, Maurice Hardy, was convicted in Milwaukee County Circuit Court of second degree sexual assault, contrary to sec. 940.225(2)(a), Stats. Hardy and the victim, Julie P., were social acquaintances and had been drinking together in a tavern on the night of the assault. The victim testified she was "drunk" at the time. Later, she and Hardy drove to her apartment. Ms. P.'s account of what occurred inside her apartment differed radically from the defendant's version of events.

Ms. P. testified Hardy came in and they talked (52:208). At some point, his attitude changed, she asked him to leave, he refused and they argued (id.:213). Hardy pushed her, causing her to fall and strike her head (id.:214). He prevented her from getting up by putting one knee on either side of her torso (id.:215). When she yelled "[l]eave me alone," Hardy told her to shut up (id.:216). He choked and hit her and ordered her to remove her pants (id.:217-18). He pulled down her pants and unbuttoned and pulled down his own

(id.:218-19; 53:12-13). He then forced his penis into her vagina, while she kicked the floor and screamed for help (53:13-14).

Hardy gave a very different account of what occurred. He testified that after entering Ms. P.'s apartment with her, she flopped on the sofa and he announced he would be leaving (54:58). She then asked him to get her medication and a glass of water, complaining that her arm hurt (id.). Ms. P. then rolled off the couch and started screaming and kicking the floor (id.:58-59). Thinking she was choking, Hardy helped her up, putting his hand behind her neck (id.:59). She said "'don't rape me'" and threatened to call the police (id.). Hardy asked "what the hell is wrong with you," stated he was leaving and unplugged the telephone (id.). Ms. P. then jumped up, stood in front of the door and told Hardy he wasn't going anywhere (id.). Hardy moved out of her way and saw Virgil Laffin, a neighbor, at the door (id.). After reaching the bottom of the stairs leading from the apartment, Hardy pointed at Ms. P. and said "'[t]hat lady is crazy'" (id.).

Hardy raised two issues on appeal: 1) whether the trial court violated his right to due process when it refused to conduct an in camera review of the victim's mental health and other records; and 2) whether the trial court erroneously exercised its discretion in barring defense counsel from cross-examining Ms. P. about two separate incidents in which she allegedly made false statements. In the first incident, Ms. P. allegedly made a false report to Colorado correctional

officials indicating that her daughter was near death so that she would be allowed to speak with a Colorado inmate, David Webster. Hardy characterized Webster as the child's apparent father.

The second incident involved a 1993 report by Ms. P. in which she first told police she had received threatening phone calls from an unknown person and then later identified the caller as Webster, her former boyfriend. At trial, defense counsel wanted to cross-examine the victim about these incidents and also wanted to present extrinsic evidence relating to them.

On October 3, 1995, the court of appeals reversed Hardy's conviction on the ground the trial court had erred in barring him from cross-examining the victim about the first incident. P-Ap. at 102. The appeals court did not even mention the second incident in its opinion. However, the court of appeals upheld the trial court's refusal to conduct an in camera review of the victim's mental health and other records.

ARGUMENT

I. REGARDLESS OF WHETHER THE TRIAL COURT'S REASON FOR RESTRICTING CROSS-EXAMINATION WAS ANALYTICALLY SOUND, ITS RULING WAS CORRECT.

This court and the court of appeals have long recognized that a trial court's evidentiary ruling should be upheld if the ruling is correct but the trial court's rationale is wrong. See, e.g., State v. Patricia A.M., 176 Wis. 2d at 549;

State v. Martinez, 150 Wis. 2d 62, 72, 440 N.W.2d 783 (1989); State v. Holt, 128 Wis. 2d at 124-25.

In reversing Hardy's conviction, however, the court of appeals failed to apply this rule. Instead, once that court determined that the trial court had misapplied sec. 906.08(2), Stats., it ended its analysis. P-Ap. at 103.

Had the court of appeals examined the record, it would have found the trial court's ruling to be correct. First, the record reveals Hardy failed to provide a legally sufficient explanation for why evidence of Ms. P.'s telephone call to David Webster was relevant so as to allow him to cross-examine her about this event. When defense counsel first asked the witness if she knew David Webster, the prosecutor objected, a sidebar discussion was held, and the trial court sustained the objection (53:32-33). Unfortunately, the sidebar was unreported, a practice recently cautioned against in State v. Mainiero, 189 Wis. 2d 80, 95 n.3, 525 N.W.2d 304 (Ct. App. 1994):

> We recognize that sidebar conferences and after-the-fact summations of those conferences are commonplace in some courtrooms. We caution, however, that appellate review is better served by counsel following the § 901.03(1)(a), STATS., procedure of stating objections and grounds on the record. If a matter is significant enough to invite appellate review, it is too important to subject to a remote summation procedure.

Following the sidebar, the trial court also sustained the prosecutor's objection to the question of whether the victim could "recall making false reports to police or corrections officials in order to get a phone call in to somebody"

(53:33). And when the trial court pointedly asked defense counsel why the Webster evidence was relevant, defense counsel's answer was "all over the board"[1] (see 53:56-57). Thus, the court of appeals could have upheld the trial court's ruling based on trial counsel's failure to provide a legally sufficient explanation for wanting to cross-examine the victim about the prior incident.

In addition, the court of appeals could have found that the incident about which Hardy wanted to cross-examine Ms. P. was more prejudicial than probative so that it was inadmissible under sec. 904.03, Stats. That Ms. P. may have lied to get through to Webster had little probative value to show she would falsely accuse a social acquaintance of sexually assaulting her. The circumstances of the two incidents are completely dissimilar. However, the jury's knowledge that the victim had had a relationship with a Colorado convict would undoubtedly have prejudiced them against Ms. P. Thus, regardless of whether the trial court erred in applying sec. 906.08(2), Stats., its ruling was correct under sec. 904.03.

Because the trial court's ruling was correct, the court of appeals should have upheld it despite any flaws in the lower court's reasoning.

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[1]The court of appeals agreed with this characterization of counsel's answer (P-Ap. 103-04 n.3).

II. HAD THE COURT OF APPEALS CONDUCTED AN ADEQUATE HARMLESS ERROR ANALYSIS, IT WOULD HAVE FOUND THAT BARRING THE DEFENDANT FROM CROSS-EXAMINING MS. P. ABOUT HER ALLEGED LYING TO COLORADO CORRECTIONS OFFICIALS IN AN UNRELATED MATTER DID NOT UNDERMINE CONFIDENCE IN THE VERDICT.

The court of appeals reversed Hardy's conviction based on a single evidentiary error, i.e., the trial court's ruling barring defense counsel from cross-examining the victim about a prior incident in which she allegedly made a false report to Colorado corrections officials indicating that her daughter was near death, so that she would be allowed to speak with a Colorado inmate named David Webster. In so doing, the appeals court eschewed any harmless error analysis whatsoever. Instead, it took the view that because the improper restriction on cross-examination affected the victim's credibility, the error was prejudicial per se. P-Ap. at 103.

Had the appeals court conducted the type of harmless error analysis envisioned by State v. Dyess and State v. Grant, supra, it would have concluded there was no reasonable probability that the improper restriction on cross-examination affected the verdict.

As the state pointed out in its brief to the court of appeals, even if one assumes Hardy could lay a sufficient foundation to show that Ms. P. had been untruthful in her dealings with Colorado corrections officials, this incident was not particularly relevant to her truthfulness at trial since it involved David Webster, a convict and former boyfriend who had apparently battered the victim on numerous

occasions. That Ms. P. may have been untruthful in matters concerning Webster had very little probative value to show she would manufacture a claim of sexual assault against a person with whom she had had only a casual relationship. In contrast to the situation in Davis v. Alaska, 415 U.S. 308 (1974), where the excluded evidence was intended to show the bias or improper motivation of a prosecution witness, the excluded evidence in this case was designed solely to impeach the credibility of the complainant by showing that she had lied about unrelated matters in the past. Nothing in the excluded evidence suggests that Ms. P. had a motive to lie about the sexual assault or that she harbored any bias against Hardy. Impeachment of a witness's character as a truthful person, rather than for bias or motive, distinguishes this case from Davis and its progeny. United States v. Cameron, 814 F.2d 403, 406 (7th Cir. 1987). This is one reason any error in restricting cross-examination was harmless.

In addition, the record reveals that Hardy had ample opportunity to undermine the victim's credibility by presenting two witnesses to give opinion testimony regarding her veracity. The first witness, Gentile Philon, opined that Ms. P. is "a liar and she's an alcoholic" (54:16).[1] The second witness, Carolyn Williams, testified that the victim "will lie if she has to" (id.:30). Although Mr. Philon and

[1]The trial court immediately instructed the jury to disregard the witness's opinion about the victim's alcohol consumption but allowed the rest of his answer to stand (54:16).

Ms. Williams are Hardy's stepfather and mother (54:11, 26), so that the jury might not be expected to give as much credence to their opinions of the victim as it would if they were completely unrelated to the parties, Ms. P. described Ms. Williams as a friend whom she saw nearly every day (52:191-92). In light of the victim's friendship with Ms. Williams, the latter's opinion of her veracity would likely have some effect on the jury. This is the second reason any error in restricting cross-examination into the Webster incident was harmless.

In addition to presenting opinion testimony reflecting unfavorably on the victim's veracity, Hardy was also able to exploit the victim's admission that when the two of them left the bar before the assault, she was drunk and shouldn't have been driving (52:206). As a result of this admission, defense counsel extensively cross-examined Ms. P. about her drinking (see, e.g., 53:21-24, 27-30, 45-46, 49-50). The availability of this line of questioning further lessened the importance of cross-examination into an unrelated incident in which she may have lied. This is a third reason any error in restricting cross-examination could not have prejudiced Hardy.

Had the court of appeals conducted an appropriate harmless error analysis, it would not have reversed the defendant's conviction. Thus, if the court of appeals' opinion is left standing, the sexual assault victim will have to endure the unnecessary trauma of reliving her ordeal of October 29, 1993 (2). In this regard, the state submits there

is precedent for accepting review of a case where the only issue is whether an evidentiary issue was harmless under State v. Dyess, supra. In State v. Grant, 139 Wis. 2d at 52, this court noted that the single issue presented was "whether the admission of other acts evidence constitutes harmless error." Like the present case, Grant involved reversal of a sexual assault conviction.[2] There this court noted:

> We also note that an additional factor is present in the instant case which supports upholding the conviction: a concern for the victim. As noted in United States v. Mechanik, 106 S. Ct. 938, 942 (1986):
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> > "The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendant to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences." (Emphasis added.)
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> The United States Supreme Court has stated that "in the administration of criminal justice, courts may not ignore the concerns of victims" and the potential "ordeal" they would be forced and put through in a retrial. Morris v. Slappy, 461 U.S. 1, 14 (1982). Here there would be nothing gained in forcing the victim to relive the humiliating and degrading experience of a sexual assault.

139 Wis. 2d at 54-55.

This court should likewise consider the victim's interests in deciding whether to accept review in this case.

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[2]Grant had been convicted of two counts of second degree sexual assault and one count of robbery. 139 Wis. 2d at 46.

CONCLUSION

For the reasons set forth above, the state respectfully requests this court to grant the Petition for Review.

Dated this 2nd day of November, 1995.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in sec. 809.62(4) for a petition produced with a monospaced font. The length of this petition is 14 pages.

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