

STATE OF WISCONSIN
IN THE SUPREME COURT
DISTRICT II

FILED

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OF WISCONSIN

CASE NO: 2018 AP 000018 CR

STATE OF WISCONSIN,
Plaintiff-Respondent

vs.

WILLIE E NELSON JR.,
Petitioner-Defendant-Appellant

PETITION FOR REVIEW

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ISSUES PRESENTED

I. CAN A TRIAL COURT EXCLUDE CHARACTER EVIDENCE OF THE COMPLAINING WITNESS EVEN THOUGH IT WAS EVIDENCE OF THE COMPLAINING WITNESS'S PRIOR UNTRUTHFUL ALLEGATIONS OF SEXUAL ASSAULT?

II. CAN A TRIAL COURT ADMIT EVIDENCE OF AN ALLEGED BATTERY OF THE COMPLAINING WITNESS EVEN THOUGH ITS FACTS WERE DISSIMILAR TO THE CHARGED OFFENSES?.

CRITERIA FOR REVIEW

This appeal involves issues of law, including the need to establish clearer standards as to how far a trial court can go in excluding evidence under the Rape Shield statute and what limits there are on the court's power to admit peripherally relevant other conduct evidence. In this case, the Court of Appeals dangerously narrows the statutory exceptions to the Rape Shield statute by saying that a prior untrue and blatantly false accusation of sexual assault against a Defendant is merely a "mistake" and denying admissibility of otherwise relevant evidence. The narrowing of this exception by this linguistic juggling impermissibly voids the clear intent of

legislature and the Rape Shield statute and should be reviewed by this court.

The Court of Appeals and the trial court erred in over broadening the application of the other acts provisions of Sullivan to allow the admission of unverified, merit less accusations of a battery which had little or nothing to do with the charged offenses. Lower courts need additional guidance in determining what evidence is admissible under the rape shield statute or if prior totally dissimilar acts can be admitted as other conduct evidence .

The decision of the Court of Appeals which narrowed the false accusation exception to the Rape Shield law in these facts is wrong. The Court of Appeals decision in broadening the reach of Sullivan to allow the admission of unverified, marginally relevant allegations of dissimilar crimes is also wrong. Based on these two issues, the Wisconsin Supreme Court should grant the present Petition for Review and review the Appellate Court's decision denying Defendant-Appellant-Petitioner's Appeal.

STATEMENT OF THE CASE

DEFENDANT-APPELLANT Willie Nelson was originally charged with four counts in a Criminal Complaint filed on or about August 24, 2014 in Milwaukee County Circuit Court. Count One charged the Defendant with Trafficking of a Child for the purpose of engaging in commercial sex acts pursuant to Wis. Stats. Sec. 940.302(l)(a), 948.05(1) during the period December 12, 2012 and March 16, 2013 in Milwaukee County, Wisconsin. Count two charged defendant with Second Degree Sexual Assault of Child under the age of 16 (intercourse) during that same period pursuant to Wis. Stats. Sec. 948.02(2). Count Three charged Defendant with

Second Degree Sexual Assault of a Child(intercourse) between April 21, 2014 and April 28, 2014 pursuant to Wis. Stats. Sec. 948.02(2). Count Four charged Defendant with Trafficking of a child for the purpose of engaging in commercial sex acts pursuant to Wis. Stats. Sec. 948.302(1)(a) and 948.051 during the same period as Count Three. The victim in each case was M.B. (DOB 5/20/1988). Each Count was a Class C felony which exposed Defendant Nelson to a maximum of 160 years in prison.

The criminal complaint alleges that during the time periods 12/2/12- 3/16/13 and 4/21/14- 4/28/14, Defendant would take MB to various places for prostitution. During these periods, MB resided with defendant in either a hotel in Franklin, Wisconsin or at Defendant's father's house on North 27th in Milwaukee, Wisconsin. Additionally, the criminal complaint alleges that during each of these time periods defendant had sexual intercourse with defendant at these locations. At the time of these alleged offenses MB was under the age of 16 .

On May 20, 2014 Defendant Nelson waived his preliminary hearing and entered a not guilty plea as to each count. During the pendency of these proceedings, several attorneys represented Defendant. Two attorneys withdrew because of conflicts(Louis Epps, Michael Meetz), and another (Eamon Guerin)withdrew at defendant's request. Defendant-Appellant was represented at trial and sentencing by Attorney Scott Anderson.

Prior to trial, the State filed two evidentiary motions. First they filed a Motion Exclude Improper character Evidence of the victim on April 7, 2015. This Motion alleged that any evidence of defendant's past illegal conduct as a prostitute in other counties and her pregnancy by a man other than defendant should be excluded from the trial as being in violation of the Rape

Shield Act. Wis. Stats. Sec. 972.11(2)(b)(1-3). On June 10, 2015, after hearing arguments, Hon. Judge Timothy Dugan granted the Motion and excluded this evidence. A copy of the court's decision is included in the Appendix. The trial court erred by doing so.

The second evidentiary motion by the State was a Motion to Admit Prior Bad Acts which was filed on August 11, 2015. This Other Acts Motion requested that evidence of an uncharged battery by defendant of MB which did not occur in the time periods stated in the Criminal information be admitted as evidence of other bad acts. On February 15, 2016 a different trial Judge, Ellen Brostrom, granted the Motion, thereby admitting evidence of the uncharged battery incident. A copy of the court's decision is included in the Appendix. This decision was erroneous and should be reversed.

The matter proceeded to trial on June 6, 2016 before the Honorable Ellen Brostrom. During the four day trial the State's key witness was M. B. who testified that she had been trafficked by Defendant and had sexual intercourse with him during the above mentioned two time periods. She also testified that she had been choked and hit by Defendant April 13, 2013 which was not during these time periods but allowed as other acts by the court. No evidence was presented that she had initially falsely claimed that Mr. Nelson was the father of her child.

On the third day of trial (June 8, 2016) defendant, who was out of custody, did not appear in court. A bench warrant was issued however the trial proceeded. Obviously, due to his absence, Defendant did not testify at trial. After testimony was concluded, the jury began deliberations on the morning of the next day, June 9th. The jury deliberated all that day and continued its deliberation the next day until 1:45 pm. The jury found Defendant Nelson Not Guilty of Counts

One, Three and Four of the Information and Guilty of Count Three, Second Degree Sexual Assault of a Child, a class C felony.

Subsequently there was a return on the warrant and defendant appeared in court for sentencing on Count Three. A sentencing hearing, with defendant in custody, was scheduled for September 23, 2016 before the trial Judge. On that date, Judge Brostrom sentenced Defendant-Appellant on the single remaining count of the Information to eight years initial confinement followed by 9 years of extended supervision.

Defendant -Appellant ,by his counsel, filed a Motion for Post Conviction Relief in a timely manner. The Motion alleged three issues including the following: 1). The court erred by failing to admit evidence of a prior sexual assault at trial 2). The court erred in admitting evidence of a prior uncharged battery at trial and 3). Trial counsel performed ineffectively in failing to inform the sentencing court that Defendant-Appellant had previously testified in a unrelated homicide trial on behalf of the State.

On November 2, 2017 the court ruled on Defendant-Appellant's Post Conviction Motion. Without any explanation or specific discussion , it denied the Defendant's Motion as to the first two evidentiary issues. It did, however, grant a new sentencing hearing on Defendant's third issue ---that trial counsel erred by failing to inform the trial court at sentencing of the mitigating factor of defendant's cooperation with the State. On December 22, 2017, after hearing arguments from the parties, Judge Wagner re sentenced Defendant-Appellant to a term of confinement of seven years, one less year than his previous sentence in order to give him credit for his cooperation.

Defendant - Appellant-Petitioner is not appealing the Judge's discretionary decision to reduce Defendant's sentence by one year in order to take into account the mitigating factor of defendant's cooperation.

Defendant-Appellant-Petitioner is, however, appealing the trial courts decision to affirm the trial court's erroneous evidentiary rulings concerning a prior sexual assault and a prior uncharged dissimilar battery . These ruling were improper and unsupported by applicable case law. The present Petition for Review of the Court of Appeals decision should be granted.

The trial court's erroneous granting of the State's Motion to Exclude Character Evidence of the complaining witness.

On April 7, 2015 the State filed a Motion to Exclude Improper Character Evidence of the victim. The motion sought to exclude evidence that M.B. had given birth to a child from another man(her father). It also sought to exclude testimony concerning evidence that M.B. was being trafficked in other counties(Sheboygan, Green Bay, Milwaukee) or at other periods of time . The State's Motion relied upon Wis. Stats. Sec. 972.11(2)(b) which excludes any evidence of the complaining witnesses prior sexual conducts unless the evidence fits in with three narrow exceptions to the rule: 1.evidence of defendant's past conduct with defendant 2. evidence that would explain the presence of semen, disease, or the source of a pregnancy, or 3.evidence prior untruthful allegations of sexual assault made by the complaining witness. Defense counsel opposed the Motion. It was argued before the trial Judge at the time, Timothy Dugan on June 10, 2015. Among other things, the defense attorney argued as follows:

Court: How do you get around the rape shield statute and why is any of that relevant?

Defense Counsel : It is highly relevant because there are –let’s first address the April 7, 2015 Motion to Exclude Improper Character Evidence.In addition, that the alleged victim gave birth to a new child. Paternity test was conducted and the new born child is someone other than the defendant. Once again that is a statement made by the alleged victim pointing accusations at my client. There is...

Court: " Wait, wait, wait. She, because this child is from another man that’s directing allegations at defendant??

Defense Counsel: She did. She accused before the baby was born Mr. Nelson of being the father."

The court: Okay. And it turns out that he wasn't..... (154: 4-5).

Defense counsel summarized his arguments in opposition to the State’s motion as follows:

“There are—in addition—she’s claiming untruthful sexual allegations or sexual assaults. “ (154:6-7).

The Court granted the State’s motion and excluded evidence that the complaining witness had falsely accused defendant of being the father of her child. In reaching its decision, the trial court seemed to acknowledge that the allegations of the complaining witness that Mr. Nelson was the father of the child were untruthful. Nonetheless, the court still prohibited the admission of evidence of this false prior accusation. The court quoted the provisions of Wis. Stats. Sec. 971.11 almost verbatim in excluding this evidence. (154: 8).

The court’s decision was incorrect. MB had falsely claimed that Defendant was the father of her child. DNA established that he was not. Pursuant to the third exception in Wis. Stats Sec. 971.11, this untruthful allegation of prior sexual assault should have been presented to the jury to impeach the credibility of M. B. ’s testimony. The key evidence against defendant in this case was the testimony of M .B. M. B.’s prior untruthful allegations that defendant was the

father of her child were erroneously excluded as evidence at trial.

B. The trial court's erroneous admission of the other acts evidence of an unrelated and unproven battery offense..

On August 11, 2015 the State filed a Motion to Admit Prior Bad Acts pursuant to State vs. Sullivan, 216 Wis. 2d 768(1998) and Whitty vs. State, 34 Wis. 2d 278, 293(1967).

The State's Motion requested that evidence of an incident in which defendant allegedly struck MB on August 13, 2013 be admitted as a prior bad act to establish Defendant's intent in the present offense. This incident did not occur during either of the two periods of trafficking alleged in the four counts. This incident did not involve allegations of sexual assault as in the four counts of the criminal complaint. Defendant was not charged with battery or any other criminal offense as a result of this incident. When the victim was first questioned concerning this matter M.B. stated she was the victim of an "armed robber".

On February 15, 2016 the court addressed the State's Motion. Without hearing argument from defense counsel, the court granted the State's Motion. (Defense counsel never formally objected or agreed with this motion. As a consequence, defense counsel performed ineffectively in not specifically stating his objection to the admission of these bad acts on the record.) In its November 2, 2017 decision denying this issue, the trial court implicitly denied Defendant's request for a Machner hearing.

When the court granted the State's Motion it stated as follows:

Court: "So I guess it is probably worth making this a final resolution. I do think it is admissible and probably that is what I indicated on the record previously or maybe even CCAP is not accurate, maybe I actually ruled and that's why.

Do the parties remember if I did? I do think I offered it for a permissible purpose by establishing his motive and intent or modus operandi. The basic element of a sex trafficking charge like in this case is basically forced prostitution through violence and intimidation. So I think it is relevant to that modus operandi, the intent to traffic, et cetera, that's a permissible purpose.

It is obviously relevant to that, and I don't think that the allegation, frankly, in the context of the facts that are going to be alleged in association with the crimes charged, I don't think their prejudicial value substantially outweighs the probative value, so I will grant the motion." (165: 3-4).

The trial court erred in admitting this marginally relevant and highly prejudicial evidence. None of the allegations in support of the criminal complaint indicate that there was any sort of pattern of physical abuse of M. B. by defendant. Defendant was never charged with any offense arising out of this alleged incident and M. B. provided conflicting versions of what had actually happened. The trial court should not have admitted this evidence and trial defense counsel performed ineffectively in not specifically objecting to its admission.

The Decision of the Court of Appeals

On November 7, 2018 the Court of Appeals issued an order denying Defendant-Appellant-Petitioner's Appeal. A copy of this decision is included in the Appendix. First, the Appellate Court determined that the complaining witness was not untruthful about her accusations that defendant was the father of her child, only "mistaken". The court also held that even if she was untruthful, the prejudice resulting from admission of this evidence would outweigh any relevance it may have.

The Court of Appeals also concluded that notwithstanding the dissimilar conduct and different time frames of an uncharged, unsubstantiated battery and the charged offenses, the

unsupported allegations were relevant and therefore admissible.

The Court of Appeals was wrong in both conclusions. The Complaining witness clearly lied by claiming that she was sexually assaulted by Defendant which led to her pregnancy. There was no equivocation or “maybe” in her false allegation that defendant was the father of her child. If this evidence had been admitted it would have substantially impaired the complaining witness’s credibility with little damage to her already besmirched reputation.

The Court of Appeals also stretched the limits of Sullivan to permit the admission of unverified, dissimilar accusations of battery which allegedly occurred outside the broad time frames of the charged offenses. The admission of this marginally relevant evidence labeled Defendant as a child beater in the eyes of the jury. This other acts evidence should have been excluded .

The Wisconsin Supreme Court should review these erroneous rulings and establish clearer standards on the application of the Rape Shield Statute and the Sullivan case.

ARGUMENT

I. CAN A TRIAL COURT EXCLUDE CHARACTER EVIDENCE OF THE COMPLAINING WITNESS EVEN THOUGH IT SHOWED THAT THE WITNESS HAD MADE A PRIOR UNTRUTHFUL ALLEGATION OF A SEXUAL ASSAULT?

Wis. Stats. Sec. 971.11(2)(b)3, the rape shield statute, restricts the admission of evidence of prior sexual contact as follows:

- b. If the defendant is accused of a crime under Sec. 940.225....any evidence concerning the complaining witnesses prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to sec. 971.11:

1. Evidence of the complaining witnesses past conduct with the defendant.
2. Evidence of specific instances of sexual conduct showing the source of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness

Before it admits evidence of prior untruthful allegations, the trial court must make three determinations under Sec. 972.11(2)(b)3 and 971.31(11): 1). Whether the proffered evidence fits within Sec. 972.11(2)(b)3 2). Whether the evidence is material to a fact at issue in the case 3). Whether the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature. State vs. DeSantis, 155 Wis. 2d 774, 456NW2d600.(1990)

The evidence that complaining witness falsely accused defendant of fathering her child meets each of these tests. First, the false allegations are clear and uncontested. The transcript of June 10, 2015 specifically states that the complaining witness had falsely accused defendant of being the father of her child. The transcript also states that DNA has established that defendant was not the father of the child. The actual father was the complaining witness's father, Mr. Yancy. The evidence that the complaining witness falsely accused defendant of being the father of her child is clear and unrefuted.

The Court of Appeals disagreed saying that the complaining witnesses statements were merely a "mistake" not a false allegation. Her statement that Defendant was the father of her child was no mistake. There was no confusion in her statement. The witness did not say that she had many partners and she was unsure who the father was. She was extremely clear in saying,

albeit falsely, that Mr. Nelson was the father of her child. This was a false claim not an honest mistake as claimed by the Court of Appeals. If she was unsure about her claim she should have said nothing. Instead, she falsely claimed that Defendant-Appellant Petitioner was the father of the child. The first prong of the State vs. DeSantis has been met in these facts.

Second, the false accusation is material to a key issue in this case—the credibility of the complaining witness. This was a close case on all counts. After deliberating for one and a half days the jury found defendant not guilty on three counts and guilty as to one. The primary evidence linking defendant to the offenses—the heart of the State’s case-- was M.B.’s testimony. There was no confession. There was no physical evidence linking defendant to the offenses other than semen on a blanket in Mr. Nelson’s father’s house.(where he often stayed) . There were no eyewitnesses. M. B.’s credibility was key to defendant’s conviction on Count three. Her credibility would have been substantially damaged in the eyes of the jury if the jury had known that she had falsely accused defendant of being her child’s father even though she had numerous other sexual partners (including her father) during that time. . She claimed defendant was the father of her child. This was a lie. This lie severely damages the credibility of her other statements. The trial court erred by not admitting this relevant evidence.

Finally, contrary to the conclusions of the Court of Appeals, the probative value of this evidence of untruthfulness far outweighs its prejudicial effect. It does not besmirch the complaining witnesses’s reputation since all the parties concede that she was offered as a prostitute during the periods mentioned in the criminal complaint. She testified that she was promiscuous repeatedly during the trial. Any minimal harm to her reputation by admission of

this evidence would be substantially outweighed by the jury hearing that she had lied to accuse Defendant-Appellant-Petitioner of a sexual act(fathering her child) that he did not commit. The third prong of DeSantis has been met in these facts.

Based on these facts, the three prongs established by DeSantis to admit evidence of untruthful statements are present in this case. The trial court erred to the great detriment of defendant in denying the admission of this evidence. Had the trial court permitted the admission of this evidence there is a reasonable probability that the outcome of the trial as to count three would have been different. This error was compounded by Judge Wagner's perfunctory opinion on November 2, 2017 which summarily, without further explanation, denied Defendant's Post Conviction Motion as to this issue. The trial court erred by excluding this relevant evidence.

II.CAN A TRIAL COURT ADMIT EVIDENCE OF AN ALLEGED BATTERY AGAINST THE COMPLAINING WITNESS WHEN THE FACTS ARE TOTALLY DISSIMILAR TO THE CHARGE OFFENSES?.

In State vs. Sullivan, 216 Wis. 2d 768, 76 NW2d 30, 1998 the Wisconsin Supreme Court set out a three part test for admission of other acts evidence under Wis. Stats. Sec 904.04(2). The first step considers whether the other acts evidence is offered for a permissible purpose under Sec. 904.04(2) i.e intent, motive, plan. The second prong determines whether the other acts evidence is relevant i.e. whether the proffered evidence has a tendency to make the consequential fact more or less probable. The final step is to determine "whether the trial court erroneously exercised its discretion in weighing the probative value of the other acts evidence against the danger of unfair prejudice, confusion of the issues or misleading the jury, or

consideration of undue delay, waste of time, or presentation of cumulative evidence.”Sullivan, 216 Wis.2d at 789.

Applying the Sullivan analysis to the present facts, the trial court erroneously admitted evidence of Defendant’s alleged battery of M. B. on August 18, 2013. First, the alleged battery did not even occur during the two time periods listed in the criminal complaint when trafficking allegedly took place. Defendant was not charged with this battery or even arrested for it. Defendant’s allegations that Defendant struck and choked her on that day is impeached by her own statements to law enforcement/medical professionals that she was the victim of an armed robbery. There are no witnesses to this alleged incident other than her and no one can place her with the defendant during this time period.

Further, this other acts evidence of an unrelated battery offense did not in any way, shape, or form resemble the facts of a sexual assault. The other acts evidence of a battery was separate and apart in time, location, and substance from the allegations of sexual assault in the criminal complaint. The court’s assumption that one had to do with the other is based upon speculation and conjecture not the facts of this case.

Additionally, the court’s argument that “in context” there was a relationship between the battery offense and the sexual assault is just plain incorrect. There was no pattern of battery between defendant and M.B. to keep her in prostitution. In context, this was a one time occurrence and one based on the fluctuating change of testimony of the complaining witness.

Finally, the jury prejudice and confusion created by the admission of this marginally relevant other acts evidence far outweighs any probative value it may have had. Defendant

was now labeled not only as a sexual trafficker but also as a child beater , a bad person, who routinely hit and choked children. Any limited probative value this evidence may have had as to the facts pales in comparison to its actual effect of besmirching defendant's bad character in the eyes of the jury.

The trial court erred in admitting this evidence that merely marked defendant as a bad man. Additionally, trial defense counsel performed deficiently to the substantial prejudice of defendant in not formally objecting to this erroneously admitted other acts evidence. Had defense counsel properly objected and the trial court not admitted this bad character evidence, there was a reasonable probability that the outcome of the proceedings would have been different.

The Appellate Court's reasoning, which affirmed Judge Wagner's November 2, 2017 decision, finds that this single unsubstantiated instance of alleged battery demonstrated a pattern of physical intimidation and control. This conclusion is based on speculation not the facts of this case. There is no evidence that this unproven battery was part of a larger history of controlling physical abuse by defendant. There were no criminal charges of physical abuse against defendant. There were no witnesses to this pattern of abuse . There were no injuries to the witness from other physical assaults which could be attributable to this controlling pattern. The complaining witness even stated to the police that an armed robber not Defendant caused the injuries. Armed robbery has nothing to do with defendant's acts or the alleged "pattern" of abuse. Further, this battery is not even alleged to have occurred during the time periods in which defendant was supposedly trafficking the victim. The Appellate Court's conclusion that

Defendant-Appellant engaged in a pattern of physical intimidation and violence to control and abuse the alleged victim is based on over broad speculation, not the facts of the case.

CONCLUSION

Based on the above facts and arguments, the trial court erred in failing to admit evidence of the alleged victim's false statements about her prior sexual assault and by admitting evidence of an unrelated dissimilar battery. Defense counsel performed deficiently to the great prejudice of defendant by not objecting to both of these erroneous rulings. The Court of Appeals compounded this error by affirming the lower court rulings on these issues. The Wisconsin Supreme Court needs to review these rulings and establish clearer standards on the applicability of the Rape Shield Statute and the Sullivan standards.

This Petition for Review should be granted.

Dated this 12TH Day of November, 2018 in Waukesha, Wisconsin.

Respectfully Submitted



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