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CLERK OF WISCONSIN

COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LOU ARCHIE GRIFFIN,

Defendant-Appellant.

**PETITION FOR LEAVE TO PURSUE
PERMISSIVE APPEAL
AND SUPPORTING MEMORANDUM**

Permissive Appeal from Non-final Order
Brown County Circuit Court
Hon. Timothy Hinkfuss, presiding
Case. No. 2020 CF 1704

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Petition and Memorandum

Mr. Lou Griffin, by counsel, now seeks leave to appeal a non-final order from the Circuit Court. The order, filed on April 18, 2022, memorialized the oral ruling on March 3, 2022, granting the State's Motion to Introduce Other Acts Evidence at trial. The Defendant files this petition and supporting memorandum pursuant to Wis. Stat. §§ 808.03(2), 809.50(1).

Statement of Issues

1. Did the circuit court err by granting the State's motion to introduce Other Acts by Mr. Griffin at trial?

The circuit court granted the State's Other Acts motion, not under the "greater latitude rule" of Wis. Stat. § 904.04(2)(b)1., but under the standard three-part analysis under *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), and Wis. Stat. § 904.04(2)(a).

Statement of Facts

This is a "cold case." Per the probable cause portion of the criminal complaint filed in this case, on August 12, 1986, the decedent L.A.H.'s boyfriend reported her missing; he had last seen her between 1:30 and 2:00 am when they had an argument, and L.A.H. jumped out of his car and walked off. (App. 2.) Later that day, L.A.H.'s body was found in the water in an industrial park on the northwest side of Green Bay, Wisconsin. (Id.) Per the autopsy report, the cause of death was ruled strangulation. (Id.). Decades later, DNA testing linked Mr. Griffin to semen on tampon that had been recovered from L.A.H. (App. 2-4). In October 2020, Mr. Griffin spoke with investigators; while he admitted that he was living in that

area of Green Bay at that time in 1986, he denied sexually assaulting or killing L.A.H.. (App. 4). The State then charged Mr. Griffin with a single offense, First Degree Intentional Homicide, in violation of Wis. Stat. § 940.01(1)(a). (See the single-count Criminal Complaint and Information, App. 1-5 and 6, respectively.)

The State later sought to introduce Other Acts evidence relating to a criminal case against Mr. Griffin that predates the present allegation, Racine County 1981 CF 382. (App. 7-17). As exhibits in support of its motion, the State filed three court documents from that Racine case. (App. 18-23).¹

Exhibit 1 is a redacted re-issued criminal complaint. (App. 18). The probable cause portion of the complaint is brief: on 5/21/1981, in the late evening hours Mr. Griffin entered the bedroom of a 12-year old sleeping child and then forced her to have sexual intercourse with him. (Id.) Exhibit 2 is a redacted Racine County citation and complaint, which gives more detailed allegations, *e.g.*, Mr. Griffin grabbed the victim's throat and squeezed, he struck her face several times, and he also forced her to have oral intercourse (App. 19-20). Exhibit 3 is the Racine County Judgment of Conviction, showing that Griffin was ultimately convicted of Second Degree Sexual Assault [of a child], in violation of Wis. Stat. § 940.22(2)(e) (App. 23). He was sentenced to an indeterminate term of 9 years in the Wisconsin State Prison system (Id.).

In its brief in support of admitting the Other Acts, the State made an offer of proof that expands considerably upon the facts alleged in their Exhibits 1 and 2. (App. 7-8). For example, the State alleges that on that night, Mr. Griffin was

¹ Though the e-filing documents are labeled Exhibits 1-3, the State did not actually mark the Exhibits that it filed, so as a courtesy and for clarity and ease of reference, in the Appendix the defense has written in ink in the upper right-hand corner of the filed documents "Ex. 1," "Ex. 2," and "Ex. 3."

out drinking with his cousin (who was dating the child victim's mother) until after bar close (App. 7). Upon request of counsel for Mr. Griffin for more information about this old Racine case, the State provided the defense copies of several additional Racine County court filings, including a transcript of a preliminary hearing held on 6/12/1981 (at which the child victim did not testify); and a transcript of a change of plea hearing held on 10/27/1981 (Mr. Griffin plead no contest to the single count). However, the State did not file either of these transcripts as exhibits here; they are not in the record.

The defense response brief argued first that the "greater latitude rule" of Wis. Stat. § 904.04(2)(b)1. did not apply as the State claimed in its brief. (App. 16-17); the State had not charged Mr. Griffin here with a statutorily applicable sex offense (App. 24-29).

The defense next argued that the proffered other acts failed to satisfy all three prongs of the standard test of *State v. Sullivan*, distinguishing between the allegations here and the facts of *State v. Gordon R. Anderson*, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct. App. 1999). (App. 29-35). It appears that *Anderson* is the only citable case involving a similar type of case as the one at hand: a prosecution for first-degree intentional homicide (and not an additional charge for sexual assault), in which the State sought to admit other acts evidence of a prior sexual assault. (App. 30).

After a motion hearing on 3/3/2022, the circuit court issued an oral ruling granting the State's Other Acts motion. (Transcript, App. 36-61). The court rejected the State's argument that the "greater latitude rule" of Wis. Stat. § 904.04(2)(b)1. applied. (App. 52-57). However, the court found that the other acts satisfied the standard three-part analysis under *Sullivan*. (Id.)

In a written order filed on 4/18/2022, the circuit court memorializing the oral ruling granting the State's motion to introduce Other Acts evidence at trial. (App. 62).

Statement of Grounds

A permissive appeal here will serve the following two statutory purposes of interlocutory consideration for this Court.

*1. Materially Advance Termination of Litigation or
Clarify Further Proceedings*

This appeal would clarify further proceedings—in particular, the scope of the other acts that the trial court admitted, but which remain to this day undefined and could require further litigation if not resolved.

At the end of the Other Acts motion hearing, the defense expressed concerns about the nature and scope of the proffered other acts. (App. 55- 56). In contrast, in the case that the defense had distinguished, **Anderson**, the trial court had limited the prior sexual assault victim's testimony to specific details. (App. 31, 230 Wis. 2d at 127-128). These permissible details included, for instance, that the prior victim had testified at the earlier jury trial. (Id.)

In this case, however, there was no prior jury trial; Mr. Griffin entered a no contest plea. The victim did not testify even at the preliminary hearing. While the State offered exhibits with allegations (e.g., Ex. 1 and 2), the factual basis for this old plea is not in the record (e.g., a copy of the transcripts of either the Racine County case's preliminary hearing or the change of plea hearing). At the Other Acts motion hearing, the State did offer to craft a mutually

agreeable stipulation of the other act facts (App. 56-57), but to date that has not occurred. If there is not an agreement, then this issue will have to be litigated.

2. Protect Defendant from Substantial or Irreparable Injury

If Mr. Griffin is found guilty of the charge in this case, a life sentence is mandatory. Even if he is granted the possibility of release, he is 66 years old, so realistically any sentence will be a life sentence. As argued in the defense brief and at the Other Acts hearing, the danger of unfair prejudice to Mr. Griffin substantially outweighs the evidence's probative value. (App. 34-35, 48-49). Arousing a sense of horror in the jury with an unrelated prior child sexual assault will cause Mr. Griffin substantial and irreparable injury.

The defense asserts that there is a substantial likelihood of success on the merits of this permissive appeal, as required under *State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108, 112 (1991). While the standard of review on a trial court's discretionary decision to admit other acts evidence is deferential (*Anderson*, 230 Wis. 2d at 128, citing *Sullivan*, 216 Wis.2d at 780-81), Mr. Griffin respectfully argues that the trial court erred in that discretion. While the court did address the three *Sullivan* factors (App. 52-55), the court never even mentioned the binding precedent of *Anderson*, the only citable case found that addressed this type of case at hand. The defense brief methodically distinguished the *Sullivan* analysis in *Anderson* from the allegations of this case, and for brevity's sake incorporates those arguments by reference. (App. 32-35).

The chief example of the trial court's error is in the first *Sullivan* prong: permissible purpose. *Anderson* found that the permissible purpose was the strong motive to kill (and thereby silence his subsequent victim) based on that defendant's alleged statement that "a dead bitch can't anything." Here there is no such similar inculpatory evidence. The State wants to ascribe such a specific motive to Mr. Griffin—that he murdered the victim here after sexually assaulting her, because he had just been released from prison for the prior sexual assault and wanted to avoid going back to prison. But this is speculation and conjecture. There are a variety of possible intents and motives for taking another person's life, not just the rational-actor risk-benefit calculus of escaping punishment and reincarceration. Especially regarding cases of alleged strangulation, there could be a lesser intent like recklessness or criminal negligence (e.g., erotic asphyxiation gone too far).

On this issue, in its oral ruling the trial court recited all four offered permissible purposes from the State's motion, and then held *ipse dixit*, "And I think that is for an acceptable purpose." (App. 53). With the use of the singular "purpose" (rather than the plural "purposes"), grammatically and logically, it is unclear if the court accepted all four claimed permissible purposes. With respect, this is not a "demonstrative rational process" that the law mandates (*Anderson*, 230 Wis. 2d at 128); this is just repeating the State's verbiage, without analytic engagement of the facts or case law or the defense arguments.

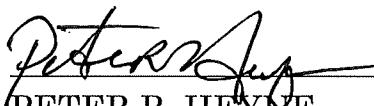
In sum, there is a substantial likelihood of success on the merits in this permissive appeal that the trial court erred in admitting the other acts.

Conclusion

Mr. Griffin asks this Court to grant leave to pursue a permissive appeal, challenging the trial court's granting of the State's Other Acts motion. This appeal will clarify further proceeding and protect Mr. Griffin from substantial and irreparable injury.

Dated this 21th day of April, 2022.

Respectfully Submitted



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CERTIFICATION

I certify that this petition conforms with the rules contained in Wis. Stat. §§ 809.50(1) and is produced with proportion serif font. The length of this petition and supporting memorandum is **2,210** words. *See* Wis. Stat. § 809.50(4).

Dated this 21th day of April, 2022.



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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition and memorandum, either as a separate document or as a part of this brief, is an appendix that compiles with § 809.19(2)(a) and that contains, at a minimum: a table of contents; the findings of opinion of the circuit court; and portions of the record essential to an understanding of the issues raised, including oral or written decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.



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