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DISTRICT II

July 19, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP1900-CR State of Wisconsin v. John D. Pettus, Jr. (L.C. #2013CF348)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

John D. Pettus, Jr., appeals from a judgment of conviction. He seeks a new trial based upon his contention that the trial court erroneously exercised its discretion in admitting at trial evidence of his use of marijuana on the night he sexually assaulted his then-girlfriend's thirteen-year-old daughter. Based upon our review of the briefs and the record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm.

Prior to his jury trial on the charge of second-degree sexual assault of a child under age sixteen, Pettus moved in limine for an order "disallowing any prior bad acts evidence, questioning, or testimony regarding any alleged past drug use by the defendant, or any speculative testimony regarding the defendant's or his family's income as the probative value is outweighed by the potential prejudice to the defendant." At the hearing on the motion, the trial court ruled admissible evidence relating to Pettus' use of marijuana in the home where the assault occurred on the night that it occurred on the basis that such evidence was "part of the panorama evidence … [a]nd the explanation as to the events that surrounded the actual alleged incident here." The court stated that if the evidence of marijuana use on the night of the assault was "part of what occurred during the course of the evening," then it was admissible. The court ruled inadmissible any evidence of Pettus using drugs at times other than the night of the assault or dealing drugs.

"The question of whether to admit evidence is within a circuit court's discretion." ***State v. Alexander***, 214 Wis. 2d 628, 640, 571 N.W.2d 662 (1997). Here, the trial court did not erroneously exercise its discretion in admitting the evidence at issue.

Testimony was presented at trial that on the night of the assault Pettus had smoked marijuana with others in the living room in front of the victim, and that he had left the residence earlier in the evening and returned looking "high" and having red eyes. After the victim went to

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

bed, Pettus entered the bedroom, had a "blank stare," and continued to stare blankly when he came into the victim's bed and touched her vagina. The victim was afraid due to Pettus' blank stare and his touching of her vagina. The victim told Pettus to stop and then left the bedroom, later returning in order to prevent anything from happening to her sister in the bedroom.

Pettus claims the marijuana evidence presented at trial was not relevant and even if relevant, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. We disagree.

To begin, the trial court did not err in its determination that the evidence at issue was "part of the panorama evidence" that helped explain "the events that surrounded the actual alleged incident." As the State points out, Pettus' "marijuana usage prior to the assault was intertwined with the assault and provided the factual nexus necessary to understanding Pettus' conduct during the commission of his crime and [the victim's] actions during and after the assault."

As the State also notes, the testimony as to Pettus' demeanor leading up to and during the assault is intertwined with the testimony of his marijuana usage that night. Indeed, the victim's description that Pettus had a "blank stare" when he entered her bedroom and assaulted her might be confusing to the jury without the marijuana testimony. The consistency between the marijuana usage and Pettus' demeanor may also have added to the credibility of the victim's account of the incident.

As to whether the probative value of the marijuana evidence was substantially outweighed by the danger of unfair prejudice, we conclude it was not. Directly contrary to arguments Pettus makes, in ***State v. Schutte***, 2006 WI App 135, 295 Wis. 2d 256, 720 N.W.2d

469, we concluded that evidence that the defendant "smoked marijuana on the evening in question" was "not the type of evidence likely to evoke horror or revulsion from jurors, prompting them to ignore the remaining evidence that her conduct either was or was not criminally negligent." ***Id.***, ¶55. Our view of such evidence has not changed, and we think it unlikely that evidence of Pettus' marijuana use in any way caused the jury to disregard evidence that Pettus did or did not sexually assault the victim. Significantly, even if there was some risk of prejudice based solely on the fact that he used marijuana, we are not convinced that the probative value was "substantially outweighed" by the danger of unfair prejudice.

Here, the trial court appropriately considered the drug-related evidence in question and very reasonably decided to permit evidence of Pettus' drug use on the night of the assault while prohibiting evidence of drug use by him on other occasions as well as any evidence related to him selling drugs. Pettus has failed to convince us the court erroneously exercise its discretion with this evidentiary decision.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals