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**DISTRICT II**

October 16, 2019

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

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2018AP1338-CR                      State of Wisconsin v. Timothy B. Gentry (L.C. #2015CF1047)

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).**

Timothy Gentry appeals from a judgment convicting him of three counts of first-degree sexual assault of a child (sexual contact and intercourse).<sup>1</sup> On appeal, Gentry challenges an

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<sup>1</sup> Although the notice of appeal specified the August 1, 2017 judgment, the circuit court entered a corrected judgment on November 29, 2017, to address an error in one of the sentences. We deem the appeal to be taken from the November 29, 2017 judgment.

evidentiary ruling that excluded from trial evidence regarding the ten-year-old victim's alleged prior sexual conduct to show an alternate source of knowledge about sexual matters. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>2</sup> We affirm the evidentiary ruling as a proper exercise of circuit court discretion.

Whether to admit or exclude evidence is discretionary with the circuit court. *State v. Dunlap*, 2002 WI 19, ¶31, 250 Wis. 2d 466, 640 N.W.2d 112. As explained in *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), in cases where the sexual assault victim is a child, “past sexual experience [may] provide an alternate source of a child’s sexual knowledge ... [and such experience] might be relevant to a defendant’s case.” *Dunlap*, 250 Wis. 2d 466, ¶¶19-20. To support a motion to admit *Pulizzano* alternate source evidence, a defendant must make an offer of proof establishing the following: (1) “the prior acts clearly occurred;” (2) “the acts closely resembled those of the present case;” (3) the prior acts are “clearly relevant to a material issue;” (4) “the evidence is necessary to the defendant’s case;” and (5) “the probative value of the evidence outweighs its prejudicial effect.” *Pulizzano*, 155 Wis. 2d at 656. A defendant has the burden to make this showing. *Id.*

The allegations against Gentry arose from penis-vagina intercourse and sexual contact with the victim’s intimate body parts (touching the victim’s breasts and genital area). Pretrial, Gentry moved the circuit court to admit two incidents as *Pulizzano* evidence because the incidents closely resembled the acts alleged against him. In incident one, Gentry alleged that the

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

nude victim was found in bed with a nude male child who had an erect penis, and Gentry saw the victim and the other child pulling up their pants or clothes. Gentry argued that incident one closely resembled a charge against him because both incidents involved a penis. In incident two, Gentry allegedly observed the victim sleeping in bed with a nude male child. Gentry argued that incident two closely resembled the charges against him because both incidents involved the victim and a bed (the victim and Gentry were allegedly on the same bed when he sexually assaulted her). Gentry stated in his custodial interview that incidents one and two occurred when the victim and the other involved child were between five and nine years old. Gentry argued that these incidents constituted admissible alternate sources of the victim's sexual knowledge.

At the hearing on the admissibility of Gentry's proffered *Pulizzano* evidence, the State disputed Gentry's description of the incidents. The State referred to an investigator's report which included the investigator's interview with Gentry's then co-inhabitant who stated what others had told her about the incidents; the report also did not contain some of the details alleged by Gentry (such that the other child was nude in incident two). The State argued that because the incidents were not evidence of sexual activity or exposed intimate body parts, the incidents should be excluded from evidence because they did not closely resemble the conduct with which Gentry was criminally charged.

The circuit court granted the State's motion to bar Gentry's proffered *Pulizzano* evidence. In its decision, the circuit court found that the incidents described by Gentry did not include any indication of intercourse or sexual contact with intimate body parts, the conduct for which Gentry faced charges. Therefore, the circuit court found that incidents one and two did not closely resemble the allegations against Gentry and did not show an alternate source of the victim's sexual knowledge. Because Gentry did not meet his burden under *Pulizzano* to show a

close resemblance between incidents one and two and the charges against him, the circuit court granted the State's motion to exclude the two incidents.

Gentry challenges the circuit court's evidentiary ruling. On this record, we agree with the circuit court that incidents one and two did not closely resemble the conduct of which Gentry was accused: intercourse and touching the victim's breasts and genital area. The alleged conduct of five to nine-year-old children was not relevant to the charges against Gentry because there was no evidence that the conduct could have been an alternate source of sexual knowledge. Because Gentry failed to satisfy two of the five *Pulizzano* requirements, close resemblance and probative value, the circuit court properly exercised its discretion in refusing to admit this evidence.<sup>3</sup> See *Dunlap*, 250 Wis. 2d 466, ¶31.

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.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*

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<sup>3</sup> Gentry argues that his constitutional rights were violated by the exclusion of his proffered evidence. In *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990), the court addressed the constitutional issues arising from the exclusion of this type of evidence and established the five-prong test for admitting evidence of an alternate source of sexual knowledge. *Id.* at 645-48, 656. Because Gentry did not make the required showing under the five-prong test, we need not address his argument that his constitutional rights were violated by the circuit court's evidentiary ruling.