STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2010-AP-2154
(Walworth County Case No. 04-CF-220)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY L. PRINEAS,

Defendant-Appellant.

Appeal From The Final Orders Entered In The Circuit Court For Walworth County, The Honorable Robert J. Kennedy Circuit Judge, Presiding

---

REPLY BRIEF OF DEFENDANT-APPELLANT

Robert R. Henak
State Bar No. 1016803

HENAK LAW OFFICE, S.C.
316 North Milwaukee Street, Suite 535
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES. i

ARGUMENT. 1

EXCLUSION OF KAC'S REMARKS DENIED PRINEAS DUE PROCESS, THE RIGHT TO PRESENT A DEFENSE, AND THE EFFECTIVE ASSISTANCE OF COUNSEL. . . 1

A. KAC's remarks made during her encounter with Prineas were not hearsay... 2

B. KAC's remarks were admissible as statements of her present state of mind, emotion, or belief, Wis. Stat. §908.03(3) and are not excludable under Wis. Stat. §§906.13 or 908.01(4)(a).. 3

C. The Improper Exclusion Prejudiced Prineas' Defense at Trial and Was Not Harmless. 3

CONCLUSION. 9

RULE 809.19(8)(d) CERTIFICATION.. 10

RULE 809.19(12)(f) CERTIFICATION. 10

TABLE OF AUTHORITIES

Cases

Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp., 90 Wis.2d 97, 279 N.W.2d 493 (Ct. App. 1979). 1

Powell v. State, 714 N.E.2d 624 (Ind. 1999). 3

State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). 4

State v. Kutz, 2003 WI App 205, 267 Wis.2d 531, 671 N.W.2d 660. . . . . 2, 3

State v. Long, 2009 WI 36,
317 Wis.2d 92, 765 N.W.2d 557. 6

State v. Moffett, 147 Wis.2d 343,
433 N.W.2d 572 (1989). 4

Strickland v. Washington, 466 U.S. 668 (1984).. 4

Washington v. Smith, 219 F.3d 620 (7th Cir. 2000). 4

Wilson v. Plank, 41 Wis. 94 (1876). 4

Constitutions, Rules and Statutes

Wis. Stat. §906.13. 3

Wis. Stat. §908.03(3). 3

Wis. Stat. §908.01(4)(a).. 3

Wis. Stat. §940.225(4). 3

Wis. Stat. §974.06(4). 2

Other Authorities

Black's Law Dictionary (7th ed. 1999). 4

Blinka, Daniel, *Wisconsin Evidence,*
§607.6 at 469-70 (3d ed. 2008). 7

Blinka, Daniel, *Wisconsin Evidence*
§613.2 at 538 (3d ed. 2008). 7

Blinka, Daniel, *Wisconsin Evidence*
§701.1 at 557 (3d ed. 2008). 6

McCormick, *Evidence* §109 (3d ed.). 7

McCormick, *Evidence* §34 (6th ed.). 7

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2010-AP-2154
(Walworth County Case No. 04-CF-220)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY L. PRINEAS,

Defendant-Appellant.

REPLY BRIEF
OF DEFENDANT-APPELLANT

ARGUMENT

EXCLUSION OF KAC'S REMARKS DENIED PRINEAS DUE PROCESS, THE RIGHT TO PRESENT A DEFENSE, AND THE EFFECTIVE ASSISTANCE OF COUNSEL

Although it quibbles over the grounds, the state does not dispute, and therefore concedes, that KAC's comments to Prineas during, immediately before, and immediately after their sexual encounter were admissible and that the trial court accordingly erred in excluding that evidence. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (that not disputed is deemed conceded). *See* State's Brief at 21-27. Although arguing waiver, *Id.* at 15-18, the state likewise fails to dispute. and thus concedes, Prineas' argument that the Court should overlook that waiver

or grant relief on plain error grounds, especially since the trial court admitted knowing that the remarks likely were admissible, just not on the specific grounds argued by trial counsel (R101:25-26, 85-87; App. 18-20). *See* Prineas' Brief at 24-25.

The state also concedes that Prineas' trial counsel acted unreasonably by failing to properly object to that exclusion and making a proper offer of proof. State's Brief at 27. Finally, the state concedes that, if Prineas' substantive claim is valid, then he also has demonstrated ineffectiveness of post-conviction counsel and sufficient reason under Wis. Stat. §974.06(4) for raising his claims now. State's Brief at 14-15.

Rather, the state's sole argument appears to be that the exclusion of KAC's actual words reflecting her freely given agreement to have sex somehow was harmless in a case where the jury already had deemed the complainant's allegations sufficiently incredible as to require acquittal on four of the six counts. State's Brief at 28-36. While the state properly concedes error, its analysis of resulting prejudice is lacking.

A. KAC's remarks made during her encounter with Prineas were not hearsay.

The state briefly quibbles with the fact that KAC's remarks were non-hearsay. State's Brief at 23-24. For instance, in response to Prineas' showing that six of the eight remarks at issue were questions intended to elicit information rather than as "expression[s] of a fact, condition, or opinion," Wis. Stat. §908.01(1); Prineas' Brief at 12, the state cites ***State v. Kutz***, 2003 WI App 205, 267 Wis.2d 531, 671 N.W.2d 660, for the proposition that *some* questions can contain factual assertions and thus be statements under §908.01(1). State's Brief at 23. However, it makes no effort to identify any actual assertions of fact contained in any of the questions at issue here. The fact that a question in context evidences the speaker's consent does not mean it was intended as an assertion of fact, and none of the questions at issue here

reflects such an assertion. Compare, for instance, the example given in ***Kutz***: "Joe, why did you stab Bill?" 2003 WI App 205, ¶41, citing ***Powell v. State,*** 714 N.E.2d 624, 628 (Ind. 1999). Evidence of consent is not limited to an affirmative assertion of consent.

The state does not dispute, and thus concedes, Prineas' showing that Wis. Stat. §940.225(4), by defining consent in terms of the complainant's "words or overt actions . . . indicating a freely given agreement" to sex rather than in terms of the complainant's actual consent, renders all such words admissible as non-hearsay with out regard to their truth. Prineas' Brief at 13. The state's "verbal acts" response in part reflects its failure in this regard. State's Brief at 23-24. Words that, in context, evidence consent do create legal rights under §940.225(4). This is because such words establish consent without regard to the speaker's actual intent. However, even if consent under §940.225(4) requires actual rather than merely apparent consent, consent still creates a legal right to freedom from conviction for sexual assault and evidence of consent, once again, is not limited to an affirmative assertion of consent.

B. KAC's remarks were admissible as statements of her present state of mind, emotion, or belief, Wis. Stat. §908.03(3) and are not excludable under Wis. Stat. §§906.13 or 908.01(4)(a)

Regardless of whether the remarks are hearsay or non-hearsay, the state properly concedes that they were admissible nonetheless as either statements of KAC's present state of mind or as prior inconsistent statements. State's Brief at 24-27. There thus is no dispute that the evidence was properly admissible.

C. The Improper Exclusion Prejudiced Prineas' Defense at Trial and Was Not Harmless

Although the state concedes error in the exclusion of evidence of KAC's words reflecting her freely given consent to her sexual encounter with Prineas and in trial counsel's failure adequately to

preserve that issue, it attempts to argue that the errors were nonetheless harmless. The burden of proving harmlessness is on the state. *See* ***State v. Dyess***, 124 Wis.2d 525, 370 N.W.2d 222, 231-32 (1985) (beneficiary of error must demonstrate harmlessness beyond reasonable doubt). Resulting prejudice from prior counsel's deficient performance turns on "whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." ***State v. Moffett***, 147 Wis.2d 343, 357, 433 N.W.2d 572 (1989), citing ***Strickland v. Washington***, 466 U.S. 668, 695 (1984). "The defendant is not required [under ***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, 147 Wis.2d at 354, *quoting* ***Strickland***, 466 U.S. at 693.

The state attempts to argue that the excluded evidence of KAC's actual words showing her freely given consent to her sexual encounter with Prineas would have been merely cumulative of Prineas' own description of her actions and would have had no effect on the convictions. State's Brief at 28-36. This argument overlooks a number of critical factors, however.

First, evidence is not "cumulative" unless it "supports a fact established by existing evidence." ***Washington v. Smith***, 219 F.3d 620, 634 (7th Cir. 2000), citing Black's Law Dictionary 577 (7th ed. 1999); *see* ***Wilson v. Plank***, 41 Wis. 94 (1876). KAC's actual consent to her sexual encounter was not "established by existing evidence" since KAC persisted in disputing that fact, as did (and does) the state. Moreover, the acquittal on four of the six counts demonstrates only that the jury had sufficient question regarding KAC's credibility as to raise reasonable doubt regarding those charges; it does not establish the fact that she consented.

Second, evidence of KAC's actual words reflecting her consent would not be cumulative in any event. Denied the right to inform the jury of KAC's actual words, Prineas was limited to necessarily

ambiguous descriptions of their actions during the encounter, combined with an occasional necessarily conclusory statement that KAC "agreed" or "consented" to the conduct. Absent evidence of KAC's contemporaneous remarks to give context to Prineas' descriptions of their conduct, he was denied a full and fair opportunity to explain *why* her "words or overt actions . . . indicat[ed] a freely given agreement" to sex.

As the state helpfully notes, for example, evidence that Prineas put on a condom at KAC's request alone says nothing either way regarding whether KAC consented. State's Brief at 30. Only KAC's actual words provide the context necessary for the jury to assess whether this act reflects consent or non-consent.

Thus, evidence that, after hearing someone coming while they were making out in the game room, the two moved into the chapter room and KAC "asked [Prineas] to make sure [the door] was locked" (R101:103, 108), is substantially different from what Prineas was allowed to testify to at trial, i.e., that he ushered KAC into the chapter room after they heard someone (R93:179-80, 195-96, 202).

Absent KAC's actual words suggesting the change in position to provide context (R93:181), Prineas' testimony that, after he unsuccessfully "tried to vaginally penetrate her standing up," she "went down first on her hand and knees" and he entered her vaginally from behind (R93:180-81, 183, 216-18), similarly did nothing to rebut KAC's account of that incident at trial. Under KAC's account, Prineas grabbed her arms, pulled her to the floor, forced her onto her hands and knees, all while restraining her and she was calling him "disgusting." (R92:191-97). It is the added context of KAC's actual words at the time, asking if Prineas wanted to switch to the floor when the initial position proved unsuccessful, that demonstrates the consensual nature of the conduct.

Likewise, Prineas' permitted testimony at trial that KAC "laid

on her back, and I entered her vaginally, traditional way" (R93:183) hardly suggests consent absent evidence of the fact that, just prior to that, Prineas asked "if she wanted to switch, she said yes, [and] we went to [the] missionary position." (R101:108).

Third, although the state acknowledges both that "[a] failure to say no or to resist does not constitute consent in fact," ***State v. Long***, 2009 WI 36, ¶31, 317 Wis.2d 92, 765 N.W.2d 557, and that the jury was instructed accordingly (R94:53, 55), State's Brief at 32, it then ignores that principle. It is not enough under this principle that the defendant show ambiguous conduct by the complainant that may reflect mere acquiescence rather than actual consent. Yet, as shown above, the exclusion of KAC's actual words denied Prineas the opportunity to demonstrate that KAC in fact consented to, rather than merely acquiesced in, the sexual encounter.

Fourth, it is not enough to suggest, as the state does, that the jury knew Prineas was claiming consent. State's Brief at 30. There must be *evidence* to support that claim. Just as "[j]uries are unlikely to give much weight to a witness's unsupported opinion or conclusion," Blinka, Daniel, *Wisconsin Evidence* §701.1 at 557 (3d ed. 2008), they are even less likely to credit a criminal defendant's claim absent evidentiary support.

Fifth, the state's assertion of harmlessness in exclusion of evidence reflecting KAC's consent to the sexual encounter in general or to participation in particular activities preceding the acts for which Prineas was convicted (remarks 1 through 5) is misplaced. State's Brief at 29, 30, 32. The central issue in this case was the credibility of KAC's allegations of non-consent. It is true that the jury found her allegations of non-consent sufficiently incredible to create a reasonable doubt regarding the first four alleged sexual assaults. However, while it is clear that the jury found reasonable doubt regarding those claims, it did not wholly discredit her testimony or it would have acquitted Prineas on all counts.

The excluded evidence reflecting KAC's actual consent, if credited by the jury, would go beyond merely raising a reason to doubt her allegations on the first four counts and instead would create reason to doubt *all* of her allegations. It is well-established that evidence of a witness' prior inconsistent statements or evidence contradicting the witness' testimony at trial is a legitimate and effective means of undermining the witness' credibility, both with regard to the specific statements at issue and in more general terms. *See, e.g.*, Blinka, 7 *Wisconsin Evidence* §613.2 at 538 (3d ed. 2008):

> "The attack by prior inconsistent statements is not based on the theory that the present testimony is false and the former statement true. Rather, the attack rests on the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements."

Quoting McCormick, *Evidence* §34 (6th ed.). *See also* Blinka, §607.6 at 469-70 (evidence contradicting witness shows he "'is capable of error or lying, and this should be considered negatively in weighing his other statements.'" *Quoting* McCormick, *Evidence* §109 (3d ed.)).

Sixth, the erroneously excluded evidence impacts the counts of conviction. The sixth remark, responding "yes" to Prineas' inquiry whether she wanted to switch positions, directly concerns the conduct alleged in Count 5. KAC's asserted desire to switch to the missionary position is affirmative evidence of her consent that does not exist in Prineas' testimony, truncated by the trial court's erroneous hearsay rulings, that she "laid on her back, and I entered her vaginally." (R93:183).

KAC's request that Prineas not tell anyone, likewise omitted at trial due to the court's erroneous ruling, also reflects continued consent at the completion of the sexual encounter, albeit with some embarrassment. There would be no reason to ask that question if the sexual encounter had been without consent. Why would a rape victim, as KAC later claimed to be, ask her rapist not to disclose his misconduct?

Seventh, the state's attempt to minimize the prejudicial effect of excluding evidence of KAC's request for something to clean off with and Prineas' boorish response, State's Brief at 33-34, ignores the applicable legal standards. It is irrelevant that the jury might have viewed Prineas' post-coitus bad behavior as evidence of guilt rather than merely as explaining why KAC would be so upset despite her consent to the sexual encounter. Prineas' trial counsel made the strategic decision that the evidence was more helpful on the latter point (*see* R78:2) and there is no reason to dispute that conclusion. Nor does it matter why the jury chose to acquit on the first four counts while convicting on the last two. What matters is that this conversation would have provided the jury a rational explanation for KAC's transformation from consenting partner to outraged "victim," an issue that Prineas' trial counsel otherwise had problems explaining in closing argument (*see* R94:32-33).

The state's speculation, like the circuit court's, that the spanking incident drew the line between the acquittals and the convictions ignores the fact that the spanking took place during the third alleged assault, on which the jury acquitted Prineas. Prineas' Brief at 23-24, n.7. If the state were correct on the jury's intent, it would have convicted on that count. The suggestion that such conduct is "antithetical to consensual sexual activity," State's Brief at 34, also simply ignores reality. *See* Prineas' Brief at 22, n.6, and authorities cited. Also, direct evidence of KAC's expressed desire to change position and continue the sexual encounter *after* the spanking incident rebuts the state's theory, providing a reasonable jury reason to doubt KAC's allegations of non-consent to the final two acts.

Finally, the state's suggestion that the physical evidence somehow precludes a finding of prejudice from the erroneous exclusion of affirmative evidence of the complainant's consent, State's Brief at 35-36, ignores the SANE nurse's contrary admission that there was no way to tell whether the intercourse was consensual or not based on the

physical evidence (R93:82). Even separate from the nurse's admission, evidence of the handprint does not suggest non-consent. *See* Prineas' Brief at 22, n.6. Also, KAC attributed the bruise on her back to having been thrown on the floor, i.e., during the second alleged assault for which Prineas was acquitted (R93:26-30; *see* RR92:194-96), so that is no evidence of harmlessness here. The other minor scrapes and bruises also would appear to be what one might expect from the type of extended intercourse on a hard floor described by both Prineas and KAC.

The state's harmless error/resulting prejudice arguments thus have no merit. The state does not and cannot prove beyond a reasonable doubt that the exclusion of evidence of KAC's actual words reflecting her consent to the sexual encounter and demonstrating a noncriminal cause for her apparent distress after that encounter was harmless. Likewise, given that the central dispute in this case concerned the credibility of KAC's allegations of non-consent, such evidence directly contradicting her claims cannot help but create a reasonable probability of a different result.

CONCLUSION

For these reasons, as well as for those in his opening brief, Anthony L. Prineas respectfully asks that the Court reverse the order denying his postconviction motion and grant him a new trial.

Dated at Milwaukee, Wisconsin, April 5, 2011.

Respectfully submitted,

ANTHONY L. PRINEAS,
Defendant-Appellant

HENAK LAW OFFICE, S.C.

____
Attorney Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

316 North Milwaukee Street, Suite 535
Milwaukee, Wisconsin 53202
(414) 283-9300

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,610 words.

____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

____
Robert R. Henak

Prineas 974.06 COA Reply1.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 5th day of April, 2011, I caused 10 copies of the Reply Brief of Defendant-Appellant Anthony L. Prineas to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

____
Robert R. Henak

Prineas 974.06 COA Reply1.wpd