COURT OF APPEALS DECISION DATED AND FILED

July 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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Appeal No. 2009AP1596-CR

Cir. Ct. No. 2009CF48

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CHAD W. VOELLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Reversed and cause remanded with directions.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 NEUBAUER, P.J. The State appeals from a pretrial order denying its request to introduce other acts evidence at the criminal trial of Chad W. Voeller. Voeller is charged with numerous offenses, including attempted burglary, burglary, and stalking. The State contends that the trial court applied an

improper standard of law and failed to demonstrate the exercise of discretion on the record in analyzing the proffered other acts evidence. We agree. We conclude that the trial court's decision reflects a misapplication of the law as to certain aspects of the other acts evidence and, for this reason, the trial court's determination requires further analysis. We therefore reverse and remand the matter with directions.

BACKGROUND

¶2 The State filed charges against Voeller on February 25, 2009. The information alleges a total of ten counts, including one count of stalking, one count of criminal trespass, three counts of disorderly conduct, two counts of obstructing an officer, one count of criminal damage to property, one count of burglary and one count of attempted burglary, all as repeat offenses. The stalking charge was based on contact with Tammy Warriner and conduct occurring between August 2008 and February 2009. All of the remaining charges, except the criminal damage to property charge, pertained to two incidents occurring on September 16, 2008, and February 19, 2009.

¶3 The probable cause set forth in the criminal complaint outlines the events underlying the charges. In September 2007, Warriner's four minor daughters were interviewed by an officer and an agent of the department of social services. One of Warriner's daughters, R.L.J., reported that Voeller touched her inappropriately and that Voeller would come into the house while her mother was asleep. She reported that this would occur every couple of weeks for several hours at a time. However, Warriner's eldest daughter, B.L.J., reported that her sister was lying and that she never witnessed Voeller engaging in the alleged acts. The allegations made by R.L.J. were pursued by the Fond du Lac County District

Attorney's Office and the matter proceeded to a jury trial at which Voeller was found not guilty of second-degree sexual assault of a child.[1]

¶4 Following the April 22, 2008 acquittal, Voeller contacted Warriner by telephone, sometimes claiming to be a bill collector. Warriner told Voeller that she had contacted the district attorney's office and told Voeller to stop calling her. When Voeller continued to escalate the harassment, making more telephone calls, Warriner engaged the help of a police officer who contacted Voeller and told him not to contact, call or text Warriner and warned Voeller that continued conduct could result in arrest.

¶5 On September 16, 2008, police officers were dispatched to a residence on East Second Street following a report of a noise heard by the downstairs resident, Peggie Stafford, who believed there had been an attempted break-in. Warriner resides in the upper unit of the East Second Street residence. While en route to the location, the officers spotted Voeller walking nearby with wet boots and wet grass on his boots; however, Voeller denied being off the sidewalk or attempting to enter the East Second Street residence. He later indicated that he was on wet grass in order to urinate, but continued to deny being at Stafford's residence. Stafford reported that she was awakened at 3:00 a.m. by a "metal like noise." She went into her twelve-year-old daughter's bedroom, at which time her daughter reported hearing noises at her window and the bathroom window and seeing someone outside her bedroom window who she thought was

[1] The district attorney then initiated charges related to allegations made by B.L.J. and Warriner's youngest daughter, S.A.W. These charges were later dismissed without prejudice at the State's request after receiving a clinical opinion regarding the allegations and concluding that it could not prevail "beyond a reasonable doubt at trial." The report detailing the clinical opinion will be discussed in greater detail later in this opinion.

trying to get in. At one window, a partially installed air conditioning unit had been moved farther into the window and the brackets that were resting on top of the unit had fallen to the floor inside the home. Stafford's daughter later identified Voeller as the person who attempted to enter through her bedroom window. Finger and palm prints obtained from the bedroom window matched those of Voeller.

¶6 On February 19, 2009, just after 4:00 a.m., an officer was again dispatched to the East Second Street residence for another complaint of a possible break-in. Stafford and her boyfriend indicated that a few nights prior they had heard noise in the basement and found the door leading into the residence from the basement pushed open with noticeable damage to the door frame. Stafford's boyfriend had pushed a dresser in front of the door in an effort to barricade the entrance. On this night, they again heard a noise and Stafford's boyfriend found that the exterior door had been pushed open and the dresser had been pushed with it. The officer noted that an outside screen was bent with signs of forced entry. Stafford indicated that it was not previously damaged. Footprints in the snow at the basement exterior door leading away from the East Second Street property traced to and from Voeller's residence. An officer went to make contact with Voeller and noticed Voeller's boots were still wet on the floor near the front door. The treads of Voeller's boot were an exact match for the footprints found at the East Second Street property.

¶7 Voeller's footprints also led to the First Street home of Scott Borndahl, where the officers discovered that one of the windows leading to the basement of the home had been disturbed—the dryer vent was knocked off and the window was open. Borndahl indicated that he had received a text message from Voeller at 3:46 a.m. asking if anyone was still awake. Borndahl's twelve-year-old

son reported hearing noise at 4:00 a.m. Voeller's wife reported that she and Voeller had been to the Borndahl residence two to three weeks prior and Voeller knew that the Borndahls have young children.

¶8 Prior to the preliminary hearing, the State filed an offer of proof for the use of audiovisual recordings of the September 2007 interview of Warriner's daughter in relation to the alleged sexual assault. The State then filed a motion to allow the use of "other acts" evidence to prove motive, intent, plan, and absence of mistake or accident under WIS. STAT. § 904.04(2) (2007-08).[2] The other acts evidence was identified as follows:

> (a) the testimony of three minor girls who will state that in 2007 defendant sexually assaulted them, late at night while their mother was asleep;
>
> (b) the testimony of the mother, Tammy Warriner, who will describe having caught the defendant in her laundry room approximately 1:00 a.m., which entry was unauthorized and made through her laundry room window without any legitimate explanation for his presence; and
>
> (c) the testimony of Jordan Kloetzke and Joanne Gurno who in December 2008 observed Chad Voeller viewing child pornography at the Fond du Lac Public Library on-line computers, along with the testimony and report of Library Staff Member Debbie Rosenberg who took the complaint, prepared the report, and who revoked his on-line privileges due to prior reports of the same conduct.

The State's motion provided its statement of the case, noting that Voeller committed the alleged offenses within months of the sexual assault trial. The State offered the "other acts" evidence in support of the three felony charges—stalking (based on the phone calls and September 2008 attempted break-in), attempted

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

burglary (based on the September 2008 break-in), and burglary (based on the February 2009 break-in).

¶9 The State set forth the following as grounds for admissibility under WIS. STAT. § 904.04(2).

> I. Burglary/attempted Burglary—motive, intent, plan and absence of mistake or accident: Intent to commit a felony is an essential element of the crime of burglary. The State contends that it was [Voeller]'s intent to commit further sexual assaults of children when attempting to break into homes where children were either visible or known to reside. He did so in the middle of the night while adults were sleeping. His prior acts are similar and establish his motive for entry, the element of intent for the burglary charges, his plan to enter in the middle of the night while adults were sleeping, and that his attempted break-ins and presence at the homes of others in the middle of the night was by design (to go after the minor girls), not accident or mistake. His habit of viewing child pornography on the internet at the Public Library also evidences such intent by his apparent sexual attraction to underage girls.
>
> II. Stalking—motive, intent, mental distress: The context of the prior sexual assault provides the context as to why any continued contact from [Voeller] would cause distress to Tammy Warriner. Obviously, the mother of the prior victims would be seriously distressed by contact from the prior assailant. The fact and existence of the prior sexual assaults provides the evidence to the jury to understand why defendant was motivated to contact Ms. Warriner, why it was distressing, and what he planned to do when attempting to enter her home.

Voeller opposed the State's motion, arguing that the evidence was inadmissible as irrelevant and probative of nothing more than the defendant's propensity to act a certain way. Following a hearing on May 5, 2009, the trial court denied the State's motion and, in a written order entered June 11, 2009, the court advised that "the State shall not be allowed to use any of the evidence requested in the motion

at the time of trial nor mention or reference any such evidence nor use the term sex or sexual assault." The State appeals.[3]

DISCUSSION

Applicable Law

¶10 WISCONSIN STAT. § 904.04(2) governs the admissibility of other acts evidence and provides as follows:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Our supreme court's decision in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), sets forth a three-part test to be employed when determining the admissibility of other acts evidence. The three-step analytical framework was recently discussed in ***State v. Payano***, 2009 WI 86, 320 Wis. 2d 348, 768 N.W.2d 832. First, if other acts evidence is offered for a purpose not associated with proving an individual's character and propensity to act in conformity therewith,

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[3] The State filed a notice of appeal and, in the alternative, a petition for leave to appeal a nonfinal order. In support, the State averred that the trial court's ruling would result in its dismissal of the charges against Voeller.

Contrary to the State's certification, the appendix does not include the trial court's findings or opinion. The transcript of the oral findings and opinion should have been included in the appendix. WISCONSIN STAT. RULE 809.83(2) provides that failure to follow the rules of appellate procedure is grounds to impose a penalty on counsel or take any other action the court considers appropriate. Therefore, a $150 sanction is imposed against the State for filing a false appendix certification. *See* ***State v. Bons***, 2007 WI App 124, ¶¶20-25, 301 Wis. 2d 227, 731 N.W.2d 367. The State shall pay the $150 sanction within fourteen days of this opinion.

including context, motive and intent, the evidence is not prohibited by § 904.04(2), and the first step of ***Sullivan*** is satisfied. *See* ***Payano***, 320 Wis. 2d 348, ¶¶62-63. Turning to the second ***Sullivan*** inquiry, the question of relevance, the court must assess whether the evidence has *any tendency* to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence or, in other words, whether it has probative value. ***Payano***, 320 Wis. 2d 348, ¶67 (citing WIS. STAT. § 904.01). If the other acts evidence is relevant and offered for a proper purpose, under the third step it is admissible under ***Sullivan*** unless the opponent demonstrates that "its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ***Payano***, 320 Wis. 2d 348, ¶80 (citing WIS. STAT. § 904.03). The probative value of the evidence largely turns on the relevancy analysis from step two. ***Payano***, 320 Wis. 2d 348, ¶81. As the probative value of relevant evidence increases, so will the fairness of its prejudicial effect. ***Id.***, ¶¶85-87.

Standard of Review

¶11 Whether to admit other acts evidence is within the trial court's discretion. *See* ***Sullivan***, 216 Wis. 2d at 780. We review the trial court's decision for an exercise of "appropriate discretion," and we will sustain the trial court's evidentiary ruling if we find that the trial court examined the relevant facts; applied a proper standard of law; and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. ***Id.*** at 780-81. A trial court erroneously exercises its discretion when it fails to delineate the facts that influenced its decision; however, we will independently review the record to determine whether it provides a basis for the court's decision. ***Id.*** at 781. The

necessity of cautious and detailed decision making is stressed in ***Sullivan***: "Without careful statements by the proponent and opponent of the evidence and by the circuit court regarding the rationale for admitting or excluding other acts evidence, the likelihood of error at trial is substantially increased and appellate review becomes more difficult." ***Id.*** at 774. The State contends that the trial court erred in applying the ***Sullivan*** test to its proffered other acts evidence and, therefore, erroneously exercised it discretion in denying its motion. The State raises several specific challenges to the trial court's ruling as they pertain to the three categories of its proffered other acts evidence. We address each of the State's arguments in turn.

The Necessity of the Other Acts Evidence to Provide Context and Prove an Essential Element of Stalking—The Victim's State of Mind

¶12 The State argues that the trial court erroneously applied the law to evaluate other acts evidence offered to prove context and an essential element of stalking—the victim's state of mind. The State contends that the supreme court's analysis in ***Payano*** provides guidance. We agree.

¶13 In ***Payano***, the defendant shot and wounded a police officer during the execution of a no-knock search warrant. ***Payano***, 320 Wis. 2d 348, ¶7. The defendant claimed that he was acting reasonably in self-defense and defense of others. ***Id.***

¶14 The trial court admitted "other acts" testimony of a confidential informant about his observations of the defendant's possession of drugs and a handgun in the defendant's apartment on the day before the police executed the no-knock search warrant at the apartment. ***Id.***, ¶3. The trial court determined that evidence of the defendant's recent involvement with drugs and a gun at the place

where the shooting occurred was offered for a proper purpose under WIS. STAT. § 904.04(2), was relevant under WIS. STAT. § 904.01, and its probative value was not substantially outweighed by the danger of unfair prejudice. ***Payano***, 320 Wis. 2d 348, ¶4.

¶15 The defendant argued to the supreme court that the other acts evidence did not relate to any fact consequential to the charges, but rather unfairly prejudiced him by painting him as a drug dealer even though he was not charged with or tried on a drug-related crime. ***Id.***, ¶47. In reviewing the trial court's decision, the supreme court concluded:

> The informant's testimony provided context for an incident in which a police officer was shot by the defendant. It explained why the police were at the defendant's apartment, and it provided a plausible explanation of why the defendant fired his gun at a police officer trying to enter the apartment. The informant's testimony served to rebut the defendant's claim that he was acting reasonably in defense of himself and his family. It provided a motive for the shooting.

Id., ¶3. In confirming the trial court's determination that the other acts evidence was relevant, the ***Payano*** court observed that the central dispute at the defendant's trial was whether the defendant acted reasonably in self-defense and defense of others when he shot the officer; the jury had to choose between two competing motives for the shooting: to protect his family or to buy time to hide drugs. ***Id.***, ¶72. The court noted that "[i]n terms of context, the other acts evidence provided the jury with a greater understanding of the alleged circumstances that led to [the officer] being shot" and the context was of consequence because the circumstances were pertinent factors for the jury to consider in determining reasonableness. ***Id.***, ¶73. Significantly, the supreme court noted that offering the other acts evidence as a "contextual aid" provided the jury a more complete

explanation as to why the police descended on the defendant's apartment and "allowed the jury to hear the complete story of the crime from the State's perspective." ***Id.***, ¶77.

¶16 To prove stalking here, the State must prove beyond a reasonable doubt that Voeller's course of conduct would have caused a reasonable person in Warriner's position to suffer serious emotional distress or fear of bodily injury. *See* WIS JI—CRIMINAL 1284 (2009); WIS. STAT. § 940.32(2). The State argued that Voeller's past contacts with Warriner in the context of the sexual assault trial are probative as to Warriner's fear of Voeller—an essential element of the stalking charge.

¶17 In rejecting the proffered evidence, the trial court observed:

> We like to put all the eggs in the intent basket, but I think there has to be some concurrence of common features and so many points of similarity with the crime charged that it can be reasonably be [sic] said that the other acts and the present act constitute once again an imprint of that defendant's behavior. So the Court in looking at this takes this very seriously.

The court's conclusion that the other acts must be similar to the crime charged demonstrates a misunderstanding of the law as it applies to other acts evidence offered to demonstrate context and an essential element of the crime.

¶18 As discussed below, the court also rejected admission of the evidence based on its determination that the sexual assault allegations were not credible. However, as it relates to stalking, the State sought to introduce the other acts evidence to provide the history, or context, of Voeller's relationship with Warriner and her children. The State sought to introduce the fact that Warriner's three daughters had accused Voeller of sexually assaulting them in 2007 and,

whether true or false, this could cause Warriner to reasonably fear bodily harm to herself or her daughters when Voeller began harassing her in August 2008. *See* ***State v. Hunt***, 2003 WI 81, ¶59, 263 Wis. 2d 1, 666 N.W.2d 771 (other acts evidence relevant and admissible to prove victim's state of mind). It was the State's contention that these sexual assault allegations made in 2007 formed the launching pad for Voeller's increasingly harassing behavior toward Warriner—entering Warriner's laundry room through a window without her consent and repeated phone calls—which culminated in his alleged break-ins at the downstairs apartment of her residence in September 2008 and February 2009.

¶19 As in ***Payano***, the evidence was offered to provide a complete explanation of the circumstances surrounding Voeller's otherwise inexplicable behavior. Unlike other acts evidence offered to prove intent, the evidence need not be similar to the crime charged because it provided the context for the charged crime. *See* ***State v. Hereford***, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995) (other acts introduced for the purpose of providing background or context of a case is not prohibited by WIS. STAT. § 904.04(2)); *see also* ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984) (an accepted basis for the admissibility of other crimes evidence arises when the evidence provides part of the context of the crime or is necessary to the full presentation of the case). Moreover, the evidence is offered not to prove that Voeller acted in conformity therewith but as evidence critical to a complete understanding of the victim's state of mind. As the State correctly points out with respect to the stalking charge, the veracity of the sexual assault allegations is not essential to this context; rather, it is the fact that the allegations were made that is relevant.

¶20 In rejecting the State's other acts evidence, the trial court also reasoned:

> This is a pure stalking case. I don't know how the State intends to prove this, but they certainly can do whatever they want. But the stalking law is pretty clear. We got a situation here that this defendant was a friend of … Ms. Warriner in times past. That's how that relationship established. There's no question that he had permission to be in some of her residences from time to time. Goes back maybe a couple of years, I understand all that. All this might be history now. But there was a legitimate relationship that existed there. So it isn't like he's just taking some actress off Broadway here and he's just stalking on her and walking down the street and trying to make her life miserable. No, no, it has nothing to do with that. Does it have to do with other reasons? Well, maybe it does. But you know something, that's not the other acts that's warranted, given the ***Sullivan*** analysis, that this Court has to consider in this particular case.

Insofar as the trial court suggests that Voeller could not be found guilty of stalking based on his telephone calls and September 2008 entry into Warriner's home without permission because of a past "legitimate relationship" with Warriner, it is mistaken.

Burglary: Essential Element of the Crime—Intent

¶21 The State further asserts that the other acts evidence is also being offered to prove the essential state of mind elements for the burglary. With respect to the burglary charges, the State argues that the evidence sheds light on Voeller's state of mind "when he attempted and later successfully completed entry into the [East Second Street] residence occupied by Tammy Warriner and her daughters (upstairs) and by Peggie Stafford and her [twelve]-year-old daughter (downstairs), [on] September 16, 2008, and February 19, 2009."

¶22 The crime of burglary consists of three essential elements: (1) an intentional entry of a dwelling, (2) without the consent of the person in lawful possession, and (3) with intent to steal or commit a felony. WIS. STAT. § 943.10(1); WIS JI—CRIMINAL 1424 (2009); ***State v. O'Neill***, 121 Wis. 2d 300, 304-05, 359 N.W.2d 906 (1984). Therefore, the State must prove beyond a reasonable doubt that Voeller intended to commit a felony when he attempted to enter the Stafford residence on September 16, 2008, and when he did enter the basement of the home on February 19, 2009. *See* ***Bautista v. State***, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971) (the state must prove every essential element of the crime charged beyond a reasonable doubt). The State's theory is that Voeller entered the homes with the intent to commit sexual assaults against the children he believed resided there.

¶23 There is no question that evidence which serves to prove an element of a crime is relevant. ***State v. Alexander***, 214 Wis. 2d 628, 641, 571 N.W.2d 662 (1997). Here, as in ***Payano***, the other acts evidence was offered to provide the context and motive for the charged crime and was probative of intent.

¶24 Addressing the State's proposed admission of the prior allegations of sexual assault, the court stated:

> [W]e aren't going to use an alleged, unfounded, acquitted case of some bogus sexual assault allegation two years ago as the basis then to say that this is what this guy's behavior was. Absolutely not. Talk about prejudice, unfair prejudice to a defendant. There's not a clearer case of that than this.

The court stated that the molestation allegation had "never been established" and had "never been faintly supported by any credible evidence, at any time." Finally, the court stated:

> This guy had a two-day jury trial, got acquitted, and now we want to suggest we're going to bring some of that behavior back into the courtroom and use that as some justification to show that he's got some predisposed disposition here that would certainly support the intent element of the acceptable purpose in the ***Sullivan*** analysis. I disagree…. I don't think that's what ***Sullivan*** intended ….

¶25 The State contends, and we agree, that the trial court's statements reflect an erroneous application of other acts law as it pertains to the admission of conduct which was the subject of an acquittal. In ***State v. Landrum***, 191 Wis. 2d 107, 117, 528 N.W.2d 36 (Ct. App. 1995), this court clarified that a prior acquittal establishes only that there was reasonable doubt as to the defendant's guilt; however, the State need not establish guilt beyond a reasonable doubt in order to introduce other acts testimony in a subsequent trial. The ***Landrum*** court noted that, "[u]nder [WIS. STAT.] § 904.04(2), evidence of other acts is admissible if the evidence is such that a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act." ***Landrum***, 191 Wis. 2d at 117.

¶26 While the trial court's statements may reflect its determination that the girls' testimony is not at all credible, it failed to address the proffered evidence with any specificity. We recognize that the same judge ruling here presided over the prior trial; however, there is no analysis of the credibility beyond the fact of the acquittal as it related to one of the girls, R.L.J. Whether the other girls testified is unclear and the trial court provided no analysis beyond a broad conclusion that the entire family, including the mother, was not credible. If a court fails to delineate the factors that influenced its decision, then it erroneously exercises its discretion. ***Payano***, 320 Wis. 2d 348, ¶41. Moreover, the court failed to specifically assess the claims of the other daughters, which have never been tried.

Instead, the court misstated the findings of a State-retained psychologist who met with two of the girls, B.L.J. and S.A.W., as having found their claims "not credible," whereas the psychologist's report indicates her concerns about taking the case to trial because she could not determine whether Voeller had inappropriate physical or sexual contact with the girls.[4] Further, the State's motion for dismissal stated its belief that "it could not prevail *beyond a reasonable doubt* at trial." (Emphasis added.)

¶27 Because the court's blanket exclusion of the girls' and mother's testimony was based on an erroneous understanding of the law as it pertains to the effect of an acquittal on the admission of evidence, and because the court failed to address the evidence with any further specificity, the trial court erred in excluding the proffered testimony on this ground. Moreover, the court provided no analysis of the proffered evidence for purposes of establishing context and as essential to proving an element of the crime charged under ***Sullivan***. Thus, we must remand for further consideration.

[4] We note that Warriner has four minor daughters: B.L.J., R.L.J., J.S.J., and S.A.W. Voeller's acquittal relates to the allegations made by R.L.J. The subsequent charges brought by the State presumably related to the allegations of B.L.J. and S.A.W., the two daughters interviewed by the psychologist. Here, the State's motion to admit other acts evidence references testimony from Warriner's "three minor daughters," but does not specify which of the four daughters. The psychologist's report references allegations of sexual contact made by J.S.J., which appear to have not been the subject of any charges to date.

Testimony Regarding Library Incidents

¶28 The State also challenges the trial court's reasoning for the exclusion of witness testimony as to Voeller's viewing of child pornography at the public library. The State's intent was to couple this testimony with the prior allegations of sexual assault in order to demonstrate Voeller's continued interest in minor girls and to prove motive for breaking into the Stafford and Borndahl residences. In denying the State's request, the court reasoned:

> [T]he mere fact that this individual now apparently has accessed some child porn over at the library, you know, that—it's deplorable, quite frankly, that in our society you can go into a public facility and access that, that they don't have some firewalls or something in there. So do I fault the defendant for doing that? Yeah, it's not right. Am I critical of the library for even facilitating that possibility? Yeah. Yeah, I'm real concerned about that. I'm real concerned about the perpetrators of child pornography because source is the problem, not the recipient, and that's the problem we're dealing with in this demented society that we're in. But having said that, do we then use that vehicle of child porn that took place in the library as some type of a carrot out there that we're going to hang in front of a jury and say well, this guy's got some warped behavior. Well, no, you don't. Because, quite frankly, that particular situation doesn't in any manner or form justify a ***Sullivan*** analysis as being included and admissible as an other acts. Absolutely none.

The State cites to this court's decision in ***State v. Normington***, 2008 WI App 8, ¶¶20-39, 306 Wis. 2d 727, 744 N.W.2d 867, in support of its contention that the repeated viewing of child pornography on library computers within the same time frame as the alleged burglary and attempted burglary is admissible to prove motive and intent. Indeed, ***Normington*** recognizes the probative value of such evidence. There, the court observed that the viewing of an unusual type of pornography provides a reasonable inference that the individual has a sexual interest in the type of images viewed, and such evidence would make it more probable that an

individual would engage in the type of conduct viewed than if there were no such evidence. ***Id.***, ¶24; *see also* ***id.***, ¶27 ("The pornography is evidence of [the defendant's] sexual interest, and it is reasonable to infer that he obtains some form of sexual arousal or gratification from viewing it.").

¶29 We agree with the State that the trial court's statements and ultimate exclusion of the testimony regarding Voeller's viewing of child pornography fails to address the ***Sullivan*** analysis in any substantive manner.

Failure to Consider Alternatives to Exclusion

¶30 The State notes that the trial court did not consider any viable alternatives to reduce the potential of unfair prejudice. As explained by the ***Payano*** court, "If evidence does carry the danger of unfair prejudice, the circuit court can mitigate that danger and lessen the unfair prejudicial effect by utilizing any of the following: (1) 'stipulations'; (2) 'editing the evidence'; (3) 'limiting instructions'; and (4) 'restricting argument.'" ***Payano***, 320 Wis. 2d 348, ¶99. The court noted that "precedent suggests that cautionary jury instructions can go a long way in limiting the unfair prejudice that may result from the admission of other acts evidence." ***Id.***

Independent Review

¶31 As a final matter, we acknowledge the supreme court's directive in ***Hunt***, 263 Wis. 2d 1, ¶¶44-45, that when a trial court fails to articulate its reasoning for admitting or excluding other acts evidence, applying the facts of the case to the analytical framework of ***Sullivan***, appellate courts independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. However, this case does not lend itself to our independent

review at this juncture. The trial court's decisions as to each proffered piece of evidence stemmed from its wholesale exclusion of any evidence relating to the prior allegations of sexual assault. As discussed earlier, the trial court erred in doing so. In order for this court to conduct a meaningful independent review of the record, we must first know the trial court's ruling as to the testimony of the other acts witnesses while applying the proper standard of law under ***Landrum***. We therefore remand for further proceedings.

CONCLUSION

¶32 In affirming the trial court decision in ***Payano***, the supreme court noted that it had "offered a cogent explanation for admitting the evidence in the circumstances presented" and had not erroneously exercised its discretion because it "reviewed the relevant facts, applied a proper standard of law, and using a rational process, reached a reasonable conclusion." ***Payano***, 320 Wis. 2d 348, ¶4. Here, the trial court failed to apply the proper standard of law in evaluating the admissibility of the proposed other acts evidence. Because we cannot independently assess the other acts evidence absent a proper application of the law by the trial court, we must reverse the trial court's order denying the State's motion and remand for further proceedings.[5]

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

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[5] The State requests, in its reply brief, that the case be remanded for further proceedings before an unbiased circuit court judge. We decline to address this argument, raised for the first time in the State's reply brief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998) (appellate court will not address arguments raised for first time in reply brief).