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Okay?

But today, that doesn't mean much because we're here on other acts anyways.

I'm assuming, Mr. Henderson, you have an interest in those issues independently of what I uttered that I -- hopefully now we've straightened out. Okay?

MR. HENDERSON: Okay.

THE COURT: That's fine. Okay.

With regards to then the other acts you've put forth in your motion.

MS. TANCK-ADAMS: I'm asking the Court to allow the jury to hear about the Dr. Hammes robbery. The Merlots had a robbery to their residence that during the preliminary -- well, an attempted robbery. That during the preliminary hearing the court commissioner found that the State had not met its burden of proof and were not bound over. I would like to elicit testimony from Rachel Ritacco that she had dropped off Martell Rogers at the residence and she believed they walked through their ravine and believe that he had pointed a handgun at them.

In addition, I had put forth in my motion about the Lomira robbery; the robbery at the Kenosha gas station; as I indicated, the gentleman at the grave site; and then Rachel also talks on her interview

1 reporting about a time with a glass boat; attempting to
2 set up a man and rob him again at his house because,
3 again, a weakness being that he lived down a dead-end
4 street. So I'm basically seeking those six other acts.

5 THE COURT: Your position?

6 MR. HENDERSON: Okay. I'm going to start with the
7 amending the Information issue, then I'll go into the
8 other acts if that's okay with the Court.

9 The State also filed an Information trying to
10 bring in a charge involving a Mr. Therkelsen, Richard
11 Therkelsen, allegedly occurred on July 28th, 2006.

12 That charge was a part of the original complaint,
13 that was part of the preliminary hearing that was held
14 on this matter on May 6th of 2009. And that transcript
15 should be in the file also, I hope.

16 The State at that time made an affirmative motion
17 to dismiss that count stating that they could not prove
18 that allegation. So the State made a -- actually moved
19 to dismiss that count at preliminary hearing. They
20 didn't include it in the Information, hasn't been part
21 of the Information that we've been working off of all
22 this time, over a year-and-a-half, and I don't believe
23 the State can -- should be allowed now to turn around
24 and say now let's put this in as a charge.

25 It's not an issue where they may have just

1 forgotten about it, that evidence wasn't even presented
2 at the preliminary hearing because no evidence was
3 presented at the preliminary hearing regarding the
4 Therkelsen matter.

5 So again, the State makes an affirmative motion to
6 dismiss that count and take it off the table as part of
7 the preliminary hearing. So I don't think the State
8 has any legal ability now to come in and ask that now
9 become part of the information a year-and-a-half later
10 and ask us now to prepare and have to deal with that
11 issue.

12 So I think the State should be estopped, whatever
13 word we want to use with regards to this, from being
14 able to add this into this Information and have to
15 defend on this. If the State feels at some future time
16 they want to re-charge it and start from square one
17 that might be their prerogative. I don't think they
18 can take inconsistent positions and dismiss it at a
19 preliminary hearing and now come back a year-and-a-half
20 later and ask that this matter be part of the charges
21 that Mr. Rogers now has to face because he's
22 essentially been put on notice the State didn't think
23 they could have support to have probable cause at a
24 preliminary hearing.

25 THE COURT: Well, has an amended Information been

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filed?

MR. HENDERSON: Yes, it was.

MS. TANCK-ADAMS: Yeah.

THE COURT: Including those acts?

MR. HENDERSON: No -- including that charge, not the other --

THE COURT: That's what I meant.

MR. HENDERSON: That charge, yes.

MS. TANCK-ADAMS: Your Honor, the State believes that if the Court were to deny that, we could file on that and that incident date --

THE COURT: Yeah, Mr. Henderson said that, that if you want to file it separately you can. Did I hear you right?

MR. HENDERSON: No jeopardy's attached so I can't think of any legal reason why.

MS. TANCK-ADAMS: Sure. And then my argument would be I can file a motion to consolidate because the first couple counts took place on June 27th, the Therkelsen robbery took place on June 28th. Then three days later the false imprisonment took place with Anthony Scacco and James McDonnell. And then on the 31st the armed -- oh, that was also the armed burglary. So the State believes it falls within three days of the other crimes.

1 THE COURT: Why is that significant, three days?

2 MS. TANCK-ADAMS: Because it's transactionally
3 related. It's the same group of three people using
4 guns, looking --

5 THE COURT: Mr. Henderson's argument is you
6 charged it, dismissed it, and now you're bringing it
7 back in, not so much you can't do that but you said we
8 can't prove it.

9 MS. TANCK-ADAMS: At that point we didn't have
10 that witness under subpoena, your Honor, so at the
11 preliminary hearing I didn't have anything to proceed
12 on.

13 THE COURT: It wouldn't have made any difference
14 at a preliminary hearing whether the witness was there
15 or not --

16 MS. TANCK-ADAMS: Because it's transactionally
17 related.

18 THE COURT: -- you wanted to prove them all.

19 MS. TANCK-ADAMS: Right.

20 THE COURT: At prelim.

21 MR. HENDERSON: But I think it's an important
22 distinction how it went down.

23 THE COURT: I agree, that's what I'm saying.

24 MR. HENDERSON: Yeah.

25 THE COURT: How it came out --

1 MR. HENDERSON: How it came out.
2 THE COURT: -- of the Information is important.
3 MR. HENDERSON: Yeah.
4 THE COURT: And not to minimize though the fact
5 the State could at this point file and consolidate, but
6 recognizing we're set for trial in less than a --
7 MR. HENDERSON: In a month.
8 THE COURT: Well, in a little over a month.
9 MR. HENDERSON: Yeah.
10 THE COURT: And your argument is unfair.
11 MR. HENDERSON: Unfair.
12 MS. TANCK-ADAMS: Well, that amended Information
13 was filed September 1st. So there was notice certainly
14 that far back. But I see where the Court is headed.
15 THE COURT: Correct.
16 All right. What about the other acts?
17 MR. HENDERSON: Okay. Thank you. I'll go into
18 that.
19 With regards to the three counts that Mr. Rogers
20 has pled to, I believe -- he's plead to those, he's
21 pled guilty to them, he's admitted to his involvement
22 in them, and it's his expectation that those matters
23 are going to be dealt with at some other time by at a
24 sentencing, whether it be by themselves depending on
25 the outcome of the case, or with other charges

1 depending on the outcome of the case.

2 I think what's important here is that by him to
3 enter pleas and have those come in as evidence anyway,
4 I think it puts a burden on Mr. Rogers' decision as to
5 whether he's going to have to testify now to explain
6 himself of the ones he's pled to already versus not
7 wanting maybe to take the witness stand in the other
8 cases if he feels that the evidence isn't sufficient
9 enough that requires him to get on the stand to testify
10 and explain anything. Again, we have no burden of
11 proof. But I think that Mr. -- because obviously if
12 the State's allowed to bring in that evidence they
13 would certainly probably bring in the evidence that
14 Mr. Rogers gave a statement admitting to his
15 involvement in those first three matters, and
16 Mr. Rogers may then have to make a decision to have to
17 explain that versus what's going on with the other
18 charges. And I think that puts an unfair burden on him
19 with regards to making a decision whether to testify or
20 not testify in this trial if it goes forward with those
21 three other acts.

22 With regards to the Merlot residence, I -- unless
23 I'm missing a police report or discovery, I don't
24 believe Ms. Ritacco ever indicated -- this is the 3025
25 Spring Street incident alleged to occur on July 19th,

1 2006 -- that she ever drove Mr. Rogers or Mr. Halcsik
2 to this location. I have a statement as part of the
3 discovery where she indicated she heard Gerald and
4 Mr. Rogers allegedly talking about this robbery but
5 that she had no personal involvement in bringing them
6 there, taking them from there, advising them of this
7 location or any active involvement in this particular
8 robbery. So I dispute the State's position that --
9 unless I'm missing something, and that's not out of the
10 realm of possibility, but I don't think so, that Rachel
11 Ritacco ever admitted involvement in the 3025 Spring
12 Street incident as being the driver or get-away driver
13 of any kind. So I don't think the factual basis is
14 correct regarding that issue.

15 With regards to the Country Corners gas station,
16 Lomira. Again, Mr. Rogers has never been charged with
17 that crime and so I -- there's no pending charge in
18 Dodge County regarding that. So I don't believe that's
19 a relevant factor or anything relevant about that
20 incident that would help prove any of the allegations
21 that happened in Racine County.

22 Also, with regard to the Kenosha incident, again,
23 Mr. Rogers has not been charged with or any pending
24 case in Kenosha County regarding any alleged robbery
25 that was supposed to have occurred. Again, I don't see

1 how any facts there are going to be relevant to proving
2 any facts that are concerning the Racine County cases.

3 The -- the next incident involving the person with
4 the glass boat --

5 THE COURT: Let me stop you a minute. Let's
6 assume all that's true.

7 MR. HENDERSON: Right.

8 THE COURT: What's that got to do with admission
9 of other acts?

10 MR. HENDERSON: In terms of?

11 THE COURT: Well, you're saying maybe they weren't
12 involved or charged in Racine County.

13 MR. HENDERSON: Um-hum.

14 THE COURT: Other acts essentially go to evidence
15 of a propensity or opportunity or something of that
16 nature.

17 MR. HENDERSON: I understand.

18 THE COURT: We never have that on other acts.
19 Why --

20 MR. HENDERSON: Not always.

21 THE COURT: Well, correct. Not -- why would that
22 prevent it from being an other act that she could use?

23 MR. HENDERSON: I'm saying because of the nature
24 of the allegation of it being an armed robberies, and
25 they are not charged, I think kind of diminishes their

1 weight or -- their weight or relevance to this case. I
2 mean, we're not just talking about some minimal stuff.

3 THE COURT: Your argument is it's unduly
4 prejudiced based upon --

5 MR. HENDERSON: And I was going to be getting to
6 that, too. That's true. And I think when we add these
7 all up it does become unduly prejudice and the jury may
8 look to this person and say, Hey, this guy sounds like
9 a bad guy, he must be guilty of something. And they
10 are not going to look at the evidence anymore in terms
11 of assessing each separate incident in trying to weigh
12 out the evidence, the credibility of the witnesses and
13 make a fair determination as to whether the State can
14 meet its burden of proof that Mr. Rogers is guilty of
15 these offenses beyond a reasonable doubt.

16 The State's evidence are these two people
17 basically, Halcsik, Mr. Halcsik, and Ms. Ritacco.
18 Those are their witnesses to these incidences in terms
19 of what other person may have been involved here. What
20 other things they might be able to talk about doesn't
21 change anything. Either the jury is going to believe
22 their versions of what happened on the events we're
23 supposed to be going to trial on or they're not.

24 THE COURT: Okay. You're saying the cumulative
25 effect of these other matters is so great it's going to

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affect -- could affect the jury's decision.

MR. HENDERSON: Absolutely.

THE COURT: But if these other acts are true, isn't that what we're dealing with? They may be other acts that individually don't have much of an impact but as we consolidate them in this case, they become -- they may give the jury the impression you've just argued.

MR. HENDERSON: Right, right.

THE COURT: Is that your position?

MR. HENDERSON: Yes, yes.

THE COURT: Okay.

MS. TANCK-ADAMS: Your Honor, as I set forth in my motion, I believe that the whole question is going to come down to, number one, identity, and number two, if there was a plan. And clearly the theory of the State's case is that Mr. Rogers is planning to select victims that are weaker than him, an older gentleman and younger kids. And I think that's bore out by the fact that he goes to these gas stations that are in the middle of nowhere, Lomira, Dodge County, late at night; a Kenosha gas station; and again, these people that are in July sitting in their screen house minding their own business. So I believe that the State is using a legitimate means to paint the picture for the jury of

1 intent, which I have to prove as elements of these
2 crimes.

3 MR. HENDERSON: Just briefly. The State talks
4 about kids and old people. Kids and old people
5 generally don't work at gas stations, so I don't see
6 the -- I'm not seeing the connection.

7 MS. TANCK-ADAMS: Again, I believe that was
8 someplace that's isolated in the middle of the night.

9 MR. HENDERSON: And the State -- and the Court's
10 going to have to give jury instructions to the jurors
11 to use different burdens of proof in terms of how they
12 look at other acts evidence versus how they are going
13 to make the decision on the ultimate issues regarding
14 the charges beyond a reasonable doubt versus by a
15 preponderance of the evidence for other acts evidence.

16 THE COURT: Isn't that exactly what the
17 instruction says?

18 MR. HENDERSON: Yes, I know. For whatever that's
19 worth.

20 THE COURT: Well --

21 MR. HENDERSON: I know. I know.

22 THE COURT: -- this is not an uncommon situation
23 with other acts where they exist. You know, the State
24 always wants them in. The defendant never wants them
25 in. And really what we deal with is should they be

1 admitted. My conclusion is generally they should be if
2 time and place are truly relevant and close enough
3 because many of the situations don't meet that
4 observation.

5 And if they exist and the State wants to utilize
6 them in an effort to prove -- and I think
7 Ms. Tanck-Adams was close to the real reason was to
8 help establish the Defendant's, bad word, but what I
9 want to say is state of mind. It encompasses
10 everything: Planning, the situation, the purpose, the
11 way the events occurred, things of that nature. It
12 shows a -- that method because in some cases it's more
13 important than others. But helping the jury reflect
14 upon whether the Defendant did in fact have the
15 intellect, ability, and purpose to commit the crime for
16 which he's being tried.

17 MR. HENDERSON: And just one more comment, not to
18 interrupt your train of thought.

19 THE COURT: Certainly.

20 MR. HENDERSON: When we were ready to go to trial
21 on August 31st, these other acts had been out there.
22 The State hadn't filed the request for other acts to
23 come in even as of August 31st.

24 THE COURT: Tough. No trial until there is a
25 trial. You know, that may be the case. I'll say this,

1 that is the case, and -- but it wasn't tried and that
2 shouldn't be a basis in my view to not allow the State
3 full opportunity to present a case. *Yes he denied mine*

4 My conclusion, and after reflecting on the
5 arguments and being familiar with this situation is the
6 other acts as requested to be presented to the jury in
7 the manner suggested is appropriate. I'm going to
8 allow those others acts.

9 Now, I am -- I do have some difficulty with the
10 admission of the new charge so to speak. You know,
11 it's a situation where I think you've both got
12 meritorious arguments. And what drives it is as much
13 as I would like to see all the matters resolved in one
14 trial --

15 Did the notice from August, with the history of
16 this case and the statements made at the prelim, give
17 Mr. Rogers a chance to appropriately react knowing that
18 the State has a reasonable basis as to why they
19 withdrew the charge, meaning "we didn't have a
20 witness", but also reflecting on the fact that it
21 probably could have stayed in there, transactionally
22 related, because it was charged properly to start with
23 is what creates the dilemma for me. Should I, quite
24 simply, give Mr. Rogers an opportunity for another
25 trial on that based upon the equities as argued?

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Legally I think the State's probably on pretty good grounds to include it. It's a matter of equity. That's a bad word in a criminal case but that's really what it boils down to is what should we do to be fair to Mr. Rogers because ultimately fairness is what I'm really looking at with every defendant.

Understanding that the charge was there from the beginning and known to Mr. Rogers, it didn't develop later, I'm going to allow the State to proceed on the amended Information with that charge.

I've considered the balances both directions, but on the overall, I'm satisfied that Mr. Rogers can mount a defense to that allegation just as easily today as he could at any point. It's not a matter of significant additional discovery and it does include, as I recall the file, a witness that was known, just simply unavailable.

For that reason we'll proceed as requested on the motions.

(Proceedings concluded.)

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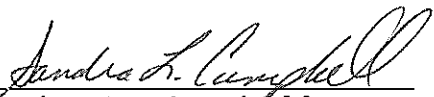
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COUNTY OF RACINE)

I, Sandra L. Campbell, do hereby certify that I reported in shorthand the proceedings held in the above-entitled matter before the Honorable Allan B. Torhorst, Circuit Judge, at Racine, Wisconsin.

I further certify that the foregoing and attached pages constitute a full, true and correct transcription of my shorthand notes then and there taken.

8-22-11


Sandra L. Campbell,
Court Reporter