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Dunn County, WI
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STATE OF WISCONSIN CIRCUIT COURT DUNN COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 18 CF 125

EZRA J. McCANDLESS,

Defendant.

DEFENSE'S RESPONSE TO STATE'S BRIEF IN OPPOSITION TO EZRA J. McCANDLESS'S MOTION TO INTRODUCE CHARACTER/*McMORRIS* EVIDENCE

EZRA J. McCANDLESS ("McCandless"), appearing by her attorneys, AARON A. NELSON and NELSON DEFENSE GROUP, LLC, submits this response to the State's Brief in opposition to McCandless's Motion to introduce character/*McMorris* evidence, submitted to this Court on March 14, 2019.

As acknowledged by the State, both ***McMorris v. State***, 58 Wis. 2d 144, 152, 205 N.W.2d 559 (1973) and ***State v. Jackson***, 2014 WI 4, ¶ 82, 352 Wis. 2d 249, 841 N.W.2d 791, allow other acts and character evidence of the decedent, pursuant to Wis. Stat. § 904.04(1)(b) and (2), to be introduced to support a self-defense argument only if the individual maintaining self-defense was aware of the other acts. (*See* State's Resp. Br. at 3–4; March 14, 2019.)

As articulated in the Defense's original *McMorris* Motion, McCandless was aware and did have knowledge of all of Alexander L. Woodworth's ("Woodworth") writings authored on or before February 25, 2018, particularly those contained in his journals. As such, the State's contention that McCandless does not claim she actually read Woodworth's journal writings is unsupported and contrary to the Defense's Offer of Proof in its *McMorris* Motion. (State's Resp. Br. at 1.) In the Defense's *McMorris* Motion, it is clearly established that "McCandless's belief

that there was an unlawful interreference being done to her and that she needed to use the force she did [on March 22, 2018] was based in part on Woodworth's character, as well as his *past behavior* and *statements* (both verbal and *in writing*), which McCandless was *aware of and/or knew*." (Def.'s Amend. Mot. at 4; March 12, 2019 (emphasis added).)

The State's appears to argue that McCandless could not have had knowledge of Woodworth's journal writings simply because he authored them over an extended period of time prior to his death. (*See* State's Resp. Br. at 1.) This assertion is not based in fact or logic. For instance, defense counsel recently read Søren Kierkegaard's *Fear and Trembling*, and in doing so, now has knowledge of its contents, despite the fact that Kierkegaard wrote it more than a century before counsel read it. Woodworth shared the contents of his journals with McCandless over a period of time and by March 22, 2018, McCandless had complete knowledge of his writings.

The remainder of the State's brief is an attempt to diminish the gravity of Woodworth's character, reputation, past behavior, statements, and specific acts that McCandless was aware and had knowledge of as asserted in the Defense's *McMorris* Motion in support of her self-defense claim. To diminish the gravity of McCandless's claims that Woodworth subjected her to his violent and aggressive erotics, the State argues that she "never describes any of the choking including doing so to the extent that it caused her to even come close to losing consciousness." (State's Resp. Br. at 5.) The State references the popularity of *Fifty Shades of Grey* (State's Resp. Br. at 5.) to devalue McCandless's assertion that:

> [She] was routinely subjected to Woodworth's sexual sadism. Woodworth would do whatever he wanted to McCandless sexually. He would ignore her pleas for him to stop certain sexual acts when she told him that he was hurting her, sometimes directing her to "bite the pillow" or to adjust herself.[1] In most instances, he would simply order her to hold still. Woodworth confessed to McCandless that she made

[1] McCandless's Statements to Prock 3/23/2018 (DOJ M at approximately 19:37 mark; DOJ 2611-2631 (Ex. G) at 14:599–617) and 3/24/2018 (DOJ L at approximately 18:35 mark; DOJ 2632-2694 (Ex. H) at 16:699–721; 17:733–744).

> him feel more confident and dominant. He would painfully bite McCandless in the bedroom during his sexual acts with her.[2] When Woodworth desired sexual gratification, he would inform McCandless that he was "hungry." McCandless observed that Woodworth became less sexually aroused when engaging in normal, typical sexual acts. However, he would become exceptionally more aroused and more able to perform sexually when the sexual acts became darker, more depraved, more violent, and more domineering in nature.

(Def.'s Amend. Mot. at 7.) However, the popularity of a novel or film making more mainstream certain types of sexual activities does not negate the moral and legal requirement that those acts be consensual. The having of sex in the missionary position does not give men permission to have sex with women in that position simply because it is popular. In addition, the State attempts to further depreciate McCandless's claims by offering: "[A] collage of photographs including at least three photos depicting female bondage." (State's Resp. Br. at 5.) The State appears to argue that because a female has previously been interested in bondage or similar activities, when she later states a male subjected her to violent or aggressive sexual acts without her consent that go beyond any activity that the female may have been interested in, then she cannot be believed because of her prior interests. As baffling as such an argument is, it does not address the admissibility of the *McMorris* evidence. The State is free to argue to the jurors that McCandless's previous interest in an activity equates to lifelong consent to all future activities. However, regardless of whether such an argument is permissive, does not make the *McMorris* evidence offered by the Defense inadmissible.

Woodworth's predilection for violent and aggressive erotics that McCandless experienced firsthand are clearly admissible under both ***McMorris*** and ***Jackson***. As stated by the ***Jackson*** court, "We have held that specific prior acts of violence by the [decedent] may be admissible when the defendant is aware of the acts." 2014 WI 4 at ¶ 82. These specific acts of violent and aggressive

[2] McCandless's Statements to Prock 3/24/2018 (DOJ L at approximately 19:51 mark; Ex. H at 17:733–744).

erotics detailed in the Defense's *McMorris* Motion that McCandless states Woodworth personally subjected her to are highly relevant, for "a person obsessed with violence is more likely to commit murder," ***Dressler v. McCaughtery***, 238 F.3d 908, 914 (7th Cir. 2001), and may be offered since Woodworth's turbulent and violent character is an essential element of McCandless's self-defense claim, pursuant to Wis. Stat. § 939.48, that being that Woodworth was the first aggressor, *see* Wis. Stat. §§ 904.04(1)(b) and (2)(a); ***McMorris***, 58 Wis. 2d at 152. Further, as highlighted by the Court in ***Jackson***, for prior violent acts to be admissible, "[i]t's got to be something that the defendant knew." 2014 WI 4 at ¶ 81. McCandless thoroughly established in her *McMorris* Motion that she had prior specific instances of violence by Woodworth, including but not limited to the violent, aggressive, sado-masochistic sexual activities Woodworth had subjected her to, within her knowledge at the time of the event in the backseat of her car on March 22, 2018. She also had knowledge of his personal philosophy and his writings reflecting the same.

The State then argues that even if Woodworth's violent and aggressive activities he subjected McCandless to or that she was aware of, including his pushing of McCandless, his interest in tripping others, or his own self-harm, for example, are relevant, any such relevance would be substantially outweighed by the prejudicial effect of the testimony. (State's Resp. Br. at 5–6.) However, this claim by the State is contrary to law. As stated by the Wisconsin Supreme Court in ***McMorris***:

> When the accused maintains self-defense, [s]he should be permitted to show [s]he knew of specific prior instances of violence on the part of the [decedent]. It enlightens the jury on the state of [her] mind at the time of the affray, and thereby assists them in deciding whether [s]he acted as a reasonably prudent person would under similar beliefs and circumstances.

58 Wis. 2d at 151. As Court further emphasized in ***State v. Daniels*** that "[t]he past violent conduct of the [decedent] of which the accused is aware . . . affects what the accused might reasonably

expect of the [decedent] in the future." 160 Wis. 2d 85, 95, 465 N.W.2d 633 (1991). Therefore, any and all evidence of Woodworth's violent, aggressive, sado-masochistic activities, past behavior, and statements (both verbal and in writing) that he personally subjected McCandless to or that she was aware of and/or had knowledge of helps to establish her privilege of self-defense, namely, her state of mind and the reasonableness of her beliefs. ***Id.*** at 109. This evidence is highly relevant to the claim of self-defense and is needed to bolster McCandless's credibility. ***Id.*** Contrary to the State's assertions, the admission of this evidence is not only accorded by law, but would result in the jury properly basing its decision on the truth. This search for the truth would neither confuse the jury nor result in undue delay and a waste of time.

Finally, the State charges the Defense with "severely mischaracterizing" the philosophies of Woodworth. (State's Resp. Br. at 7.) In arguing for why the purported testimony of McCandless and the writings of Woodworth should not be admitted by this Court pursuant to character/*McMorris* evidence, the State once again unilaterally seeks to change facts in dispute. As to Woodworth's philosophy of "Love and do as you will," the State offers only select, favorable passages of Woodworth's writings to argue that this philosophy "relates to a reference to love in the truest sense of the word love." (State's Resp. Br. at 8.) What the State offers in rebuttal is simply a regurgitation of the message that Saint Augustine sought to convey by this dictum, not what Woodworth conveyed to McCandless regarding his thoughts and interpretations of the material.

Certainly, the State is free to argue to the jury that McCandless's beliefs are unreasonable because she has misinterpreted Woodworth's journals and writings. However, the State has made no legal argument as to why the journals are not admissible under ***McMorris*** and ***Jackson***. At the trial the State will be allowed the opportunity to argue to the jury that Woodworth did not actually

mean what he wrote when he personally penned:

> Merely doing as one will, sexually, makes consent irrelevant, but merely letting another do as they will does the same. "We will the same, now we love. I'll do as you will, for I love. You'll do as I will, for you love." All of this risks and thus obligates. You love so I ought not ~~hurt~~ abuse. I love, do as you will, don't kill me.[3]

Or what Woodoworth meant in "Dilige, Et Quod Vis Fac," which translates to "Love and do what you will," when he declares, "I am still afraid of myself. Afraid I will come out again and hurt someone. Afraid I will use someone for redemption and self-mutilation. . . . Dilige, et quod vis fac. Love and do what you will."[4]

The State urges that Woodworth's philosophy, "to the extent he ever had one about cannibalism, related to this in terms of a perfect love, a giving of himself to nurture others rather than an intent to eat others." (State's Resp. Br. at 8.) The Defense implores the State to read Woodworth's journal entry entitled "The Cow that Wants to be Eaten" authored on December 22, 2017, in which Woodworth writes:

> Consume me. This is an odd request, a demonic and self-sacrificial plea. Yet, it fits nicely in my erotic invitations. Come just as you are. Love, and do as you will. It comes, not from "on high," but from the masochistic, factical, carnal world we lovely find ourselves in.[5]

The State cannot simply proffer select excerpts or particular passages and make a claim that Woodworth's philosophies are this or that. McCandless read Woodworth's various writings and journals up until February 25, 2018. Often, Woodworth himself read passages from these same journals to McCandless while he was practicing his "violent erotics" on McCandless.

Further, any and all writings by Woodworth that occurred after February 25 are admissible as well because McCandless clearly asserts in her *McMorris* Motion that their content was within

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[3] "Between Love and Obligation" dated December 3, 2017 at page 82.
[4] "Dilige, Et Quod Vis Fac" dated November 9, 2017 at page 25.
[5] "The Cow that Wants to Be Eaten" dated December 22, 2017 at page 128.

her knowledge at the time of the event in the backseat of her car on March 22, 2018. Thus, Woodworth's writings need to be considered in their entirety, because it is clear from reading Woodworth's works that from passage to passage, journal entry to journal entry, an obvious change in the writer is occurring. In sum, McCandless's testimony and Woodworth's writings are all clearly admissible under both ***McMorris*** and ***Jackson*** for all the same reasons provided above.

Based on the above and foregoing, this Court must allow all of the proffered character or *McMorris* evidence at trial. To not allow this evidence would be contrary to law.

Dated this 20th day of March, 2019.

Respectfully submitted,

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