

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 5

DANE COUNTY

STATE OF WISCONSIN

Plaintiff,

Court Case No.: 1989CF000946

vs.

Richard E Beranek

Defendant,

For Official Use

STATE'S MOTION TO DISMISS PROSECUTION

The State of Wisconsin, by Assistant District Attorney Erin Hanson and District Attorney Ismael Ozanne, hereby requests that, pursuant to Wis. Stat. Sec. 968.03(2) and this Court's authority under *State v. Kenyon*, 85 Wis. 2d 36, 45, 270 N.W.2d 160 (1978), this Court grant this motion to dismiss the complaint and prosecution in this case. The State hereby elects to present a statement in connection with its motion, based in substantial part upon the severe victim impact to the victim in this case, K.D. See Wis. Stat. Sec. 950.04(1v)(pm). The State also elects to make a statement regarding this case so that this Court is informed as to why, despite the State's strong belief in the defendant's guilt, this Court should find that dismissal is in the public interest.

THE CRIMES

On March 2, 1987, K.D.'s life changed forever. KD was a twenty-eight-year-old mother of two, living in a residential area approximately one mile away from a highway. On that day, she received several obscene and lewd telephone calls in the afternoon. K.D. left her residence in the Town of Pleasant Springs, Dane County, Wisconsin, to drop her children off. When she returned at approximately 4:00 p.m., she walked into her bedroom and heard a noise coming from her closet or bathroom. KD was then accosted by a white male who grabbed her by the arms and said something to the effect of, "I'm finally going to get you." KD stated that she had never seen this person before, and eventually identified him as the defendant, Richard Beranek. It was light in KD's bedroom and she was able to see the defendant. The defendant ripped her shirt open, causing the buttons to fall off, grabbed her breasts and forcefully took her bra off. The defendant had a "pliers-like thing" in his hand. The defendant threw her onto her bed and ripped her underwear off with the pliers-type object and his hands. When KD told the defendant she had her period, he laughed at her.

The defendant told KD to suck his penis, put his knees on her shoulders and straddled her, with his penis exposed. KD tried to get away and grabbed at the defendant, scratching him. The defendant then "got really angry" and slammed KD's head on the headboard, pulled her hair, put the pliers to her neck and told her to knock it off or he would cut her hair and cut her. The defendant kept telling her to suck his penis, and when she did, he jammed it into her

mouth and gagged her. KD was scared, crying and rolled up in a ball. The defendant then jammed his hand into her vagina, causing her pain. KD was screaming, and the defendant stuck his penis into her. In an attempt to dissuade the attack, KD told the defendant that she had herpes. The defendant “got really, really mad” and started screaming at her, calling her names like “bitch” and “slut.” The defendant “got really furious then” and picked her up and turned her around, bending KD over the bed. The defendant stuck his penis into her anus. KD was hurt, scared and crying, but the defendant was laughing and said he should make her “suck it again.” KD testified that she observed the defendant by her bedroom door, holding the plier-type object and his shirt. The defendant told KD that she better not tell anybody or he would get her children. KD laid on her bed even after hearing the back door close, crying, scared and not knowing what to do.

Approximately 10 days after the attack, KD sat down with a sketch artist from the Madison Police Department and helped him do a sketch of her attacker. KD testified at trial that the sketch seemed “about ninety percent accurate.” KD did not remember seeing a mustache, but described the attacker’s face as being “potted” and having a “mark” in the chin.

KD met with Dane County Sheriff’s Office Detective Kevin Hughes on a number of occasions and looked at at least fourteen photo arrays before she identified anyone as being her attacker. KD looked at hundreds of photos before identifying anyone. Two years after the attack, on April 12, 1989, detectives visited KD and wanted her to look at pictures, despite KD not wanting to because she got “really scared.” Detective Hughes laid the photos out on the kitchen table while KD sat in the living room. After a brief time, KD went to get a drink of water in the kitchen and walked past the table where the pictures were. KD then “got scared” and “started crying” because she saw “his eyes.” Detective Johnson observed KD walk past the kitchen table, look down at the photographs and immediately gasp and start to cry. KD stated that she would never forget those eyes. KD knew immediately when she saw the photo that it was the person who attacked her—the defendant, Richard Beranek.

KD was then shown the photos one at a time and she again picked out the defendant as being the person who raped her. Detective Johnson noted that KD was “very scared” when she picked out the defendant. The eyes were the feature that made KD know the defendant was her attacker. In addition to the eyes, KD stated that the general structure of the face, his shoulders and a general “mean, cold appearance” were other features shared by the photograph of the defendant and her attacker.

In June of 1989, KD viewed an in-person line-up at the police department. KD was present when the persons came out onto a stage and she started crying when she observed the defendant in the line-up. KD stated that she knew the defendant was her attacker as soon as he walked through the door onto the stage. When she saw the defendant, KD gasped and immediately started to cry.

Following a three-day jury trial in February of 1990, the defendant was convicted of nine felony counts, all with the repeater enhancer. The convictions were for multiple counts of first-degree sexual assault, multiple counts of burglary with intent to commit a felony, endangering safety and intimidation of a victim. On April 5, 1990, the defendant was sentenced to the maximum sentence on all counts, to be served consecutively, totaling 243 years in the Wisconsin State Prison system.

OTHER CRIMES

If this case proceeded to trial, the State would file a motion under Wis. Stat. Sec. 904.04(2) to introduce evidence of Other Crimes, Wrongs, or Acts. The other crimes the State would have sought to have introduced at a new trial are outlined below.

1. In a statement to a Sheriff's Detective in 1990, the defendant's ex-wife, L.N. described the defendant's violent behavior, lack of conscience and his disregard for others. LN stated that she has been a victim of the defendant's anger and violence, including being pushed down the stairs when she was three months pregnant with the defendant's child. LN stated that the defendant would punch her in the face for waking him up, but would also physically beat her if she failed to wake him up. LN stated that the defendant focused his violence on her head, neck and chest. The defendant seemed to favor choking her neck, while pushing her against objects or the wall. The defendant also pulled her hair and would hold both of her arms and squeeze tightly. LN stated that the defendant had used weapons with which to strike her. The defendant used verbal degradation, calling LN: "stupid fucking cunt"; "fat fucking bitch"; "fucking slut"; and, "fucking whore." LN stated that oftentimes after a confrontation, the defendant would be gone from the residence for a period of eight hours to four days without any contact.

LN stated in the winter of 1979, the defendant became angry at her because she would not give him the keys to her vehicle because the defendant was intoxicated. The defendant began to verbally berate and shout obscenities at LN. The defendant exited the residence and reappeared a short time later, carrying LN's puppy by the scruff of its neck. The puppy was bloody and obviously deceased. The defendant screamed, "See what you made me do?" The defendant approached LN, and pushed the dead puppy's fur in her face, screaming, "Look what you made me do!" LN stated that the defendant beat her puppy to death with a hammer. The defendant slapped and punched her in the face. The defendant then forced LN to drive into the woods, while he continued to yell, swear and occasionally punch her while she was driving. The defendant rolled down the window and threw the deceased dog from the vehicle.

LN stated that she was a victim of two sexual assaults by the defendant during their brief relationship. Physical beating accompanied the sexual assaults. During the sexual assaults, the defendant swore at her, crawled on top of her and pinned her to the bed, with his knees on each of her shoulders. He then pulled her underwear off. LN stated that the defendant hit her about the face, pulled her hair and strangled her. While strangling her, he would push her head to the bed. Before and during the sexual assaults, the defendant would call her a "slut" and a "whore." LN stated that she was forced to submit to various sexual acts, including anal intercourse, which was painful. LN stated that the defendant seemed to feed sexually off of her resistance and seemed to enjoy the power and control he was exerting over her, as he was exhibiting a different type of gratification in comparison to their "normal" sex life.

LN stated that she believes if the defendant were ever to get out of prison, the lives of many people would be in danger and that the defendant will never accept responsibility for his actions.

2. On March 10, 1981, the defendant was convicted of First Degree Sexual Assault, in Chippewa County, Wisconsin, for a crime committed on July 11, 1980. He served approximately 20 months on a five year sentence. The offense involved the defendant sexually assaulting the 11-year-old sister of LN. The victim reported that the defendant threatened to drown her if she refused to have intercourse with him (the sexual assault occurred near a body of water). The defendant refused to accept responsibility for the offense. The defendant participated in few, if any, any educational programs, psychotherapy or counseling during his incarceration. By 1988, the defendant did admit to having sexual intercourse with the 11-year-old girl in 1980. LN stated that when she had a conversation with the defendant after he was released from prison, he stated that prison wasn't really so bad and that he wouldn't mind going back again. LN stated that she felt coerced by the defendant's family to stand by him, but she did divorce him. LN stated that the defendant's mother told her that if LN had been "a good wife" the defendant wouldn't have been driven to go after her 11-year-old sister.

3. At the defendant's sentencing in the present case, on April 5, 1990, T.M. testified about the crimes the defendant committed against her on July 25, 1988, when she was 16 years old. TM testified that she was a high school student and was out riding her bicycle when she observed the defendant drive by her in his pick-up truck and then turn around and come back to her location. TM was riding her bicycle near the girl scout camp at which she worked. He then ran after her and she fell off her bike into a ditch. TM testified that the defendant grabbed her, put his hands over her mouth and she continued to struggle. TM stated that she got away and ran down a hill, with the defendant running after her. The defendant then caught up to her and forcibly sexually assaulted her. The defendant told TM he did it because she was such a nice girl. TM sought help at a nearby farm, and was taken to a hospital where a SANE exam was performed and biological specimens were taken. TM testified that after the sexual assault, she could not concentrate at school and became physically ill whenever she went out in public. TM stated that despite receiving counseling, she believes she will always be scared and unable to speak with strangers. The defendant was arrested days after the assault, after having his girlfriend help hide his truck. He was arrested at his home, after he and his mother were found hiding from the police. The defendant was convicted of this Sexual Assault against TM in Chippewa County and was sentenced to 10 years imprisonment on December 29, 1988.

4. The defendant also admitted to being involved in another incident, just 14 hours before the sexual assault of TM, this time in Marathon County. In that case, the defendant was accused of Attempted Second Degree Sexual Assault of a 17-year-old girl. The victim indicated that her car broke down and that the defendant picked her up. The defendant was supposed to give her a ride to her boyfriend's house, but instead, drove by the house and went to a remote area in a parking lot. According to the victim, the defendant put his hand over her mouth and forced her down on the

seat, while locking the truck's doors. Witnesses from a nearby store came to the pick-up truck and the victim took the opportunity to run away. The victim selected the defendant from a photo line-up. The defendant admitted to being the person involved, but denied locking the truck doors or making any attempt to assault her. That case was pending at the time of sentencing in Dane County, and was ultimately dismissed because of the length of the sentence he received in Dane County (243 years).

5. A female victim identified the defendant as the person who sexually assaulted her on July 4, 1988, in Lodi, Wisconsin. The victim stated that on July 4, she was returning from a trip to Michigan, with stops in Chicago and the Madison area, to her home in Lodi at approximately 7:30 p.m. She stated that she entered her apartment, quickly unpacked, and then left her apartment to take care of some things at work. She then returned to apartment around 8:30 p.m. and was grabbed and thrown to the floor when she walked into her living room area. The defendant told her to be quiet and held her arms. The defendant stated, "You're just what I've been looking for." The defendant began to laugh and pulled her hair in order to control her. When she tried struggling, the defendant hit her. The victim stated that the defendant pulled off her shirt and forced her bra and shorts off. The defendant put his fingers into her vagina and then put his penis into her vagina. The victim stated that as she cried, the defendant laughed at her, then became angry and hit her in the face. The victim stated, "he said he'd cut me up all inside, and I'd never have kids." She stated that the defendant then put his finger into her anus and then attempted to put his penis into her anus, but was unsuccessful. The defendant then became angry and started yelling at her. The defendant then placed an unknown object into the victim's vagina and moved it around. She stated that the defendant then licked and sucked on her breasts and pubic area, using his teeth on her pubic area, causing her pain. The victim stated that the defendant made comments like "you like it." The defendant forced her to touch him and to masturbate his penis. She stated that the defendant became quiet for a while, laying on her, then grabbed her head and slammed it on the floor very hard. The defendant got up and said "you never saw me" and "you don't know me."

The victim stated that she laid on the floor for a long time and thought that the defendant had left. She stated that when she rolled over, she saw that the defendant was standing in front of the bathroom mirror, with the light on. The victim stated that she started crying and the defendant came over to her and slapped her and started pulling on her. She stated that he told her that he would kill her if he had to. The victim stated that the defendant climbed on top of her, with his knees on her shoulders and his penis near her mouth. The defendant said, "lick me." The defendant forced her to perform oral sex on him. She stated that the defendant warned her that if she told anyone, he would come back and hurt her family. The defendant said he knew her family and they were dead if she said anything. The defendant also said, "you never saw me."

The victim described the perpetrator to police as having dark hair, approximately six feet tall, having a mustache and "dark, cold mean eyes." She also described that the perpetrator had pitted-type acne scars or pockmarks on his cheeks.

On June 14, 1989, the victim viewed an in-person line-up, in which the defendant participated. Detective Anderson reports that when the defendant stepped forward to the center of the stage, the victim experienced a very difficult time--her eyes welling up with tears, covering her face with her hands, and her body trembling. Detective Anderson reports that the victim appeared to be about to select the box assigned to the defendant on the identification form, and did so five or six times, but then said, "I can't." Later that day, the victim called detectives and stated, "I had that stupid little box in front of me and I couldn't check it," and "I didn't even need to see the rest of them." She said she was reluctant to identify the perpetrator because she was afraid and because she had received harassing phone calls. On June 16, 1989, the Lodi victim called detectives again and positively identified the defendant as being the perpetrator. When asked if she was sure, she stated, "I know it is." The victim was crying and was very upset.

THE ORDER FOR A NEW TRIAL

In 2011, the defendant filed a Motion for Postconviction Relief, requesting DNA testing. On February 10, 2012, Judge Moeser, the original trial judge, signed the order for postconviction DNA testing. Testing was conducted from 2012 through 2016. In June of 2016, the defendant filed a Motion for New Trial based on DNA and other newly discovered evidence. A three day evidentiary hearing was held in February of 2017. Written briefs were submitted by the State and the Defendant in April and May 2017. Oral arguments were held on May 9, 2017. On June 9, 2017, Judge Moeser granted the defendant's motion for a new trial and vacated the original convictions.

Judge Moeser's decision was based only on the defendant's motion for a new trial based on "new evidence" (Decision and Order, 6/9/17, p. 8). Judge Moeser specifically found that the facts of the case did not rise to the level necessary to support "interests of justice" and/or "inherent authority" reasons for a new trial. Judge Moeser also found that the facts also do not support "due process" or "innocent person" arguments. Judge Moeser found that the defendant was entitled to a new trial based on the following: the hair from the trial which was allegedly consistent with the defendant's hair was tested for DNA and found to not be the defendant's hair; and, the FBI expert who testified about the hair at trial couched his testimony in a manner which could reasonably lead a jury to conclude that there was a valid statistical weight which supported the possibility of a match of the hairs (Decision and Order, 6/9/17, p. 6). Judge Moeser found that the hair evidence at trial was significant and important to the State's case, though not as important as the eye witness identification (Decision and Order, 6/9/17, p. 9). Given that Judge Moeser could not conclude that the new evidence would not materially impact the outcome at a new trial, he found there was a reasonable probability of a different result (Decision and Order, 6/9/17, p. 9).

CURRENT EVIDENCE

As Judge Moeser pointed out in his Decision and Order, KD's eyewitness identification of the defendant was more important than the hair evidence. That identification has not been

weakened. If anything, the eyewitness identification is stronger today than it was decades ago. In preparation for a possible retrial, the State had the identification reviewed by an eyewitness expert, John Wixted, Ph.D., a Distinguished Professor in the Department of Psychology at the University of San Diego in La Jolla, California. Dr. Wixted has written and collaborated on dozens of research articles published in scientific journals involving the reliability of eyewitness identifications and memory.

Dr. Wixted reviewed the eyewitness identification made in this case via the photographic lineup and found that KD identified the defendant with “high confidence.” High confidence was determined from her immediate emotional reaction to seeing the defendant’s photo and her verbal expression of confidence, that she was “almost positive” the defendant was her attacker. Dr. Wixted explains that many studies published since 1995 have established beyond any reasonable doubt that eyewitness confidence associated with a stranger identification made from a lineup is strongly related to accuracy. That is, when eyewitness confidence is high, the odds that an innocent suspect has been mistakenly identified are low.

Dr. Wixted further explains that it would be a mistake to assume that high-confidence identifications become less reliable as the time delay between the incident and identification increases. In this case, the incident occurred in 1987 and KD identified the defendant in 1989. Dr. Wixted explains that the delay between the crime and the first identification of the suspect is not a critical variable. Even after a long delay, an initial identification made with high confidence remains highly accurate. The difference between a short delay and long delay lies in how many high-confidence identifications will be provided by eyewitnesses, not in how accurate those high-confidence identifications are if they occur. High-confidence identifications are accurate either way. An initial identification made with high confidence remains highly accurate.

In summary, Dr. Wixted found:

The witness in this case (KD) made a high-confidence ID of the suspect (Beranek) on an initial test of memory using what appears to be a fair photo lineup. As a general rule, high-confidence IDs made from a fair lineup tend to be highly reliable (ie., the odds that the ID is in error are low). Counterintuitively, this is true even when the delay between the crime and the initial ID of the suspect is long. A long time delay makes it less likely that a high-confidence ID will be made without reducing the reliability of any high-confidence ID that happens to occur.

Dr. Wixted’s findings that KD made a high confidence identification of the defendant, which is likely to be highly reliable, is confirmed by Judge Moeser’s comments regarding KD. Judge Moeser, who sat through the original trial, observed KD when she testified about the brutal assault on her and her identification of the defendant. Judge Moeser, in his Decision and Order, found that KD was an “extraordinary witness” and that “her identification of the defendant in the law enforcement sketch, scores of photo arrays, an in-person lineup and at trial was very believable” (Decision and Order, 6/9/17, p. 7 (Attached)). A jury in a new trial would also have the opportunity to see and hear from KD, and would undoubtedly also view her as very believable.

The State has conducted exhaustive testing on the physical evidence. Many mixtures of DNA were found on the items. On the victim's shirt, ripped off during the assault, were mixtures of DNA from at least four male individuals. These mixtures did not support comparisons to any DNA profiles due to the complexity of the mixtures. A low-level, partial DNA profile was detected from the male underwear located in the basement of the victim's house. The defendant was excluded from that profile. Two genetic types were detected from a sperm fraction found in the male underwear, but no comparisons to other profiles can be made due to the limited amount of genetic information. The crime lab analyst believes that the numerous low-level profiles and mixtures are most likely a result of degradation of 30-year-old evidence, along with contamination. Procedures and protocols have changed dramatically in both police work and laboratory handling over the last 30 years.

Many, if not most, sexual assault cases come down to "he said vs. she said." Often times there is no physical or scientific evidence. The original trial had the hair comparison as additional physical evidence. Even without the use of the hair or other physical evidence, and with the defendant being excluded from one partial DNA profile, the State believes that given the strength of KD's testimony, along with eyewitness identification expert Dr. Wixted, and the other acts evidence showing motive, opportunity, plan and identity, the jury would still find the defendant guilty.

CHAPTER 950

In compliance with Wisconsin Statutes section 950, the State has had consulted many times with KD and her family. KD was not only severely traumatized from the brutal attack, but now has been forced to relive that trauma by the defendant being released and by the possibility of a new trial. KD was extremely courageous when she testified in 1990. As Judge Moeser stated, she was "extraordinary" (Decision and Order, 6/9/17, p. 7 (Attached)). After meeting with KD and her family, the State recognizes that KD is still extraordinary, but that she is also weary. The possibility of a retrial can almost be physically seen weighing on her shoulders. She does not want the defendant to ever hurt anyone again and believes that given his past violent history he will hurt someone again; however, she also believes that even if she testifies at trial and the defendant is convicted, he may not get any additional prison time given the differences in sentencing practices between 1990 and now. KD agonizes that she will emotionally and physically suffer through months of anticipation of a trial, days of trial preparation, and lengthy testimony at a jury trial, only to have the defendant face no additional consequences.

As a victim in the State of Wisconsin, KD has the right to be treated with dignity, respect, courtesy and sensitivity. See Wis. Stat. Sec. 950.01. As a victim of multiple vicious sexual assaults who has already endured testifying in a jury trial, lived through decades of recovery, and faced her nightmare of having the defendant's convictions overturned through absolutely no fault of her own, KD's wishes deserve even more consideration and respect. KD has never wavered from her high-confidence identification of the defendant. KD knows that it was the defendant who brutally attacked her in 1987. However, KD does not want to testify in the new trial.

The State has carefully considered KD's wishes, and now requests the Court to do the same in granting this motion to dismiss.

CONCLUSION

There is no doubt the defendant is a violent sex offender. The State believes the defendant committed these horrific crimes against KD and knows that KD would once again be an “extraordinary witness” in the defendant’s retrial. The defendant was imprisoned for his crimes from 1990 until 2017. The defendant is a lifetime registrant on the Wisconsin Sex Offender Registry. Officials will be able to track his whereabouts for the rest of his life.

The human cost of this prosecution, the continued emotional trauma and physical stress to KD, is unacceptable to her and dismissal is the only way to end the process. The State therefore elects to move to dismiss this case in the interest of justice for KD, knowing that a jury found guilty beyond a reasonable doubt, that the defendant served a sentence and that KD will not have to relive her traumatic experience over yet again. The State respectfully requests that this Court order this case dismissed with a finding that it is in the public’s, specifically KD’s, interest to do so.