

IN THE ARIZONA COURT OF APPEALS
STATE OF ARIZONA, DIVISION ONE

STATE OF ARIZONA,

Appellee,

-vs-

STEPHEN FRANK KARBAN,

Appellant.

Court of Appeals Case No.:
1 CA-CR08-0810

Maricopa County Superior Court
Case No. CR2005-011629-001 DT

APPELLANT'S REPLY BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion when it denied Appellant's motion to introduce evidence of his prior Michigan acquittal involving identical charges and the same three victims?

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REPLY TO STATE'S ANSWERING ARGUMENTS

Appellant, **STEPHEN FRANK KARBAN**, hereby replies in full to argument III of the State's Answering Brief while relying on his earlier discussions in his Opening Brief to rebut the State's remaining positions.

LAW and ARGUMENTS

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISALLOWED EVIDENCE OF APPELLANT'S PRIOR MICHIGAN ACQUITTAL IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS UNDER THE 5TH, 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 2, SECTIONS 4 AND 24 OF THE ARIZONA CONSTITUTION.

The State asserts that Appellant's argument concerning the admission of his Michigan acquittal ignores "numerous well-reasoned cases, which follow the general rule that a defendant is not entitled to inform the jury that he has previously been acquitted of other conduct". *United States v. De La Rosa*, 171, F. 3d 215, 219-20 (5th Cir. 1999); AB at 51. The State cites a host of additional cases from other jurisdictions in support of its proposition. *United States v. Gricco*, 277 F.3d 339, 352-53 (3rd Cir. 2002); *United States v. Thomas*, 114 F.3d 228, 249-50 (D.C. Cir. 1997); *United States v. Jones*, 808 F.2d 561, 566-67 (7th Cir. 1986); *United States v. Viserto*, 596 F.2d 531, 537 (2nd Cir. 1979); *Prince v. Lockhart*, 971 F.2d 118, 122 (8th Cir.1992); and *United States v. Kerley*, 643 F.2d 299, 300-01 (5th Cir. 1981). AB at 52. These cases, however, address hearsay in terms of collateral estoppel and do not present independent reasons for exclusion. *Hess v. State* 20 P.3d 1121(2001). Significantly, unlike the cases cited by the State, Appellant's acquittal stemmed from identical charges and the *same* victims.

Hess explained that an acquittal is an act that has legal effect, much like the classic example of a contract that is formed out of court, but which is **not** hearsay. Such "statements" additionally are not testimonial, but are acts to which the law attaches legal significance. 20 P.3d

at 1121.

Evidence of

an acquittal has legal significance. It shows that a jury harbored reasonable doubt about at least one element of a crime. The prior acquittal does not prove the “truth” of the historical facts of the first case; it proves only that the previous jury did not find that the state proved all elements of the crime beyond a reasonable doubt.

Although the acquittal does not prove that Appellant was innocent of the prior charges, the jury might plausibly have reasoned that the fact of the acquittal of *fifteen* charges against the very same adopted daughters in Appellant’s Michigan case made it less likely that Appellant committed identical acts in Arizona against the same victims *knowing* the girls were not afraid to prosecute and would not keep his alleged conduct secret. Appellant’s acquittal was therefore relevant to the jury’s consideration, particularly in a case such as this where, contrary to the State’s assertion, there was no “direct” evidence Appellant ever committed the sexual acts described by the children. *cf.* AB at 60. Notably, rebutting evidence of a defendant’s propensity to commit the present acts differs from attempting to establish or challenge the defendant’s *actual* prior conduct. *Hess*, 20 P.3d at 1121.

The State’s argument that the admissibility of evidence is governed exclusively “first and foremost by the Arizona Rules of Evidence,” is misleading. The State cites *State v. Gibson*, 202 Ariz. 321, 323-24, 44 P.3d 1001, 1003, 04 (2002) for this proposition. *Gibson* held that admissibility of *third-party* culpability evidence was not subject to the “inherent tendency” test but to rules requiring that evidence be relevant and that the probative value not be substantially outweighed by the risk of prejudice or confusion. The court clarified that the manner of determining admissibility of evidence of *third-party culpability* was more appropriately analyzed in Rules 401, 402, and 403, *Arizona Rules of Evidence*.

The State asserts that “in light of *Gibson, Davis* (upon which Appellant relied)¹ is based on “clearly erroneous [legal] principles” presumably because *Davis* did not invoke any discussion of the Arizona Rules of Evidence, but more notably because it is a “thirty year old” “division 2 case.” AB at 54-55. First, a decision by the Arizona Court of Appeals has statewide application. Arizona Revised Statutes § 12-120 provides that the Court of Appeals shall constitute a single court with two divisions. Absent a decision by the Arizona Supreme Court compelling a contrary result, a decision by one division of the Court of Appeals is persuasive with the other division. *Scappaticci v. Southwest Sav. and Loan Ass'n*, 135 Ariz. 456, 662 P.2d 131 Ariz., 1983 (notably a 28 year old case the State cites).

Significantly, *Scappaticci* held:

[T]he principle of stare decisis and the need for stability in the law in order to have an efficient and effective functioning of our judicial machinery dictate that we consider decisions of coordinate courts as highly persuasive and binding, unless we are convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.

The State insists that *Davis* is decided on “clearly erroneous” principles; however, *Davis* is still good law whether or not it has ever been cited in another Arizona case. A judgment of acquittal, contrary to the State’s assertion, is neither hearsay nor irrelevant. Appellant’s Michigan acquittal had logical bearing on Appellant’s case not only because it involved the *same* victims but also because it concerned the same allegations, fifteen charges of which the jury found unsupportable.

Further, even an analysis under the Arizona Rules of Evidence favors admissibility since the danger of unfair prejudice is substantially outweighed by the probative value of the Michigan acquittal. Had the jury been privy to the fact that Appellant’s same adopted

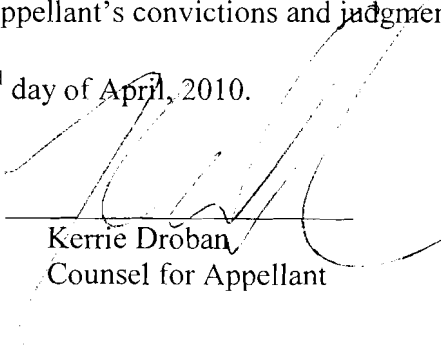
¹ *State v. Davis*, 127 Ariz. 285, 619 P.2d 1062 (App. 1980)

daughters made identical allegations against him in Michigan and he was acquitted of those multiple counts it would have contributed to the jury's ability to assess the credibility and veracity of the girls' allegations against Appellant in the instant proceeding. Here, the trial court's denial of Appellant's request to admit the Michigan prior cannot be construed as harmless error since there is a real possibility that the introduction of such evidence would have impacted the verdict. See *State v. Van Adams*, 194 Ariz. 408, 984 P.2d 16 (1999).

Accordingly, this Court should reverse Appellant's convictions and judgments.

RESPECTFULLY SUBMITTED this 2nd day of April, 2010.

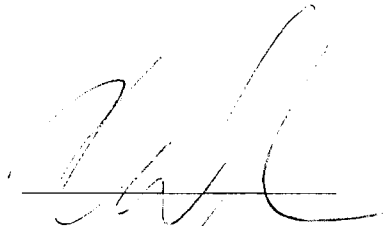
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13, Arizona Rules of Criminal Procedure, undersigned counsel certifies that this brief uses proportionately a 14-point (*Times Roman*) typeface, and contains 1,628 words.

Dated this 2nd day of April 2010.



Attorney for Appellant

CERTIFICATE OF SERVICE

COPIES of the foregoing **MAILED** this
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