STATE OF WISCONSIN
COURT OF APPEALS
Appeal No. 2005AP002782-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHAD ZIEGLER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MARQUETTE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD O. WRIGHT, PRESIDING

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented by this appeal are governed by well-settled law and there is little dispute over the facts. Therefore, the appellant recommends neither oral argument nor publication.

STATEMENT OF THE ISSUES

I. Whether the trial court abused its discretion in admitting "other acts" evidence that on an occasion eighteen months after the forcible sexual assault of Samantha alleged in the complaint in this case that Ziegler went to his family cabin with his fifteen year-old girlfriend, Kimberly, and had consensual sex with her.

ANSWERED BY THE TRIAL COURT: No.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in admitting evidence that after the incident alleged in the complaint that Ziegler went to the family cabin with his fifteen year-old girlfriend, Kimberly, and had consensual sex with her there. Although the court reasoned that the evidence established a "plan" on the part of Ziegler (apparently to have sex whenever he went to the cabin with a girl), the reasoning of the trial court failed to appreciate the significant distinction between consensual sex between teenagers of roughly the same age (which is "sexual assault" under the statutes) and a forcible rape (which is what the victim, Samantha, described in this case though it, too, is called "sexual assault"). This significant dissimilarity between the acts alleged in the complaint and the other acts evidence made it

particularly inappropriate to admit the evidence under the "plan" exception even under the "greater latitude" granted to trial courts in sexual assault cases. Consequently, the jury confused the issues and they likely found Ziegler guilty not because of Samantha's testimony but because Ziegler had escaped punishment in the Kimberly incident(s). The error was not harmless because there was literally no evidence of Ziegler's guilt other than Samantha's testimony.

STATMENT OF THE CASE

I. PROCEDURAL BACKGROUND

The defendant-appellant, Chad Ziegler ("Ziegler") was charged with first degree sexual assault of a child [Sec. 948.02(1), STATS][1] and false imprisonment [Sec. 940.30, STATS][2] arising out of an incident that occurred on July 23, 1999. (R:1) The complaint alleged that Ziegler took a twelve year-old girl, Samantha H., to a cabin owned by the Ziegler family and there Ziegler kept Samantha against her will for a brief period and during that time he had forcible sexual contact with her. Ziegler entered not guilty pleas to both charges.

The State filed a motion to admit other acts evidence pursuant to Sec. 904.04(2), STATS.[3] The evidence in question was the

1 Sec. 948.02(1)(1), STATS: "**First degree sexual assault**. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony."

2 Sec. 940.30, STATS: "**False imprisonment**. Whoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class H felony.

3 904.04(2), STATS: "**Other crimes, wrongs, or acts**. Evidence of other crimes,

testimony of Kimberly B. who claimed that in March, 2001 when she was fifteen years old she was dating Ziegler. (R:77-3, 4) According to Kimberly, on two occasions she and Ziegler went to the cabin and had sexual intercourse. (R:77-4). Kimberly admitted that she went to the cabin freely and that Ziegler never coerced her in any way to have sex. (R:77-6).

The State argued that Kimberly's testimony was offered to prove a plan on the part of Ziegler but the plan was never explained (R:77-12)[4] Ziegler objected.

The trial court ruled that Kimberly's testimony was admissible in the State's case. After noting that the facts of the two incident were dissimilar (R:77-18; App. B-1) the court said,

> According to what's before the Court on the allegations it is obvious-- it does go to motive, intent, and plan. It is relevant.
>
> For the Court, really, what Sullivan and Davidson tell us is really, the Court needs to make a-- to ascertain whether or not it is . . . piling on . . . the dissimilarities, I don't think, are so dissimilar as to rule it out.
>
> What does bother the Court in this case is that the motive, intent, and plan on the case we're dealing with here is pretty apparent from just the evidence of what her testimony is. He's not, basically, in a situation-- Mr. Benavides is probably not going to be approaching the case from the situation where-- or from the-- trying to say, well, yeah, he did these things but that wasn't-- it wasn't for sex and, you know, it was an accident and he wasn't really planning anything.
>
> I mean, if we're to believe the testimony of the child, that's

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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."

4 Actually, the State initially argued that the evidence was admissible to show that Ziegler acted with the intent to be sexually gratified. However, when the court pointed out that when a boy puts his hand down a girl's pants and puts his finger in her vagina (along with the other behavior described by Samantha) the boy's intent is crystal clear. Thereafter the State abandoned this argument and adopted the court's opinion that this evidence established Ziegler's plan.

> really what the issue is: Whether or not he did any of this. That's what the issue in the case is: Whether or not he did what she says he did; not why he did it. Because I think the motive and intent are pretty obvious. IF you weight that, then we're talking about the probative effect of it versus the prejudicial effect of it.
>
> The only place where that would differ would be on the aspect of it on the plan. Because the-- going to the cottage, that's a very similar thing there, going to the cottage. That might be an issue that he didn't have any plan to do this, and that would be something that the State could use this for . . .
>
> * * *
>
> The Court thinks it's appropriate here-- I don't think motive and intent are appropriate. I think that's just, you know, throwing another kick at the cat, here, which wouldn't be proper. But on the plan part of it, I think particularly under Davidson, with the greater latitude, that is is admissible for that.

(R:77-18 to 22; App. B)

The case proceeded to trial on July 1st and 2nd, 2004. The jury returned verdicts finding Ziegler guilty of first degree sexual assault of a child but not guilty of false imprisonment. (R:80-359).

Ziegler filed a post-verdict motion challenging the sufficiency of the evidence and also seeking judgment of acquittal notwithstanding the verdict for the reason that the jury's verdict was inconsistent. (R:52) Essentially, Ziegler argued that Samantha testified that he (Ziegler) held her down and then sexually assaulted her. Thus, her testimony on each count was "interlocked" and, therefore, it is inconsistent to find Ziegler not guilty of false imprisonment but guilty of the sexual assault. The trial court denied the motion finding that there was sufficient credible evidence in the record to permit a reasonable jury to find Ziegler guilty of sexual assault beyond a reasonable doubt (R:81-12)

The court later sentenced Ziegler to six years in prison. (R:63)

II. FACTUAL BACKGROUND

In July, 1999, Samantha was twelve years-old. (R:79-92) On July 23, 1999 Samantha was "downtown" in Ripon at the Village Green listening to music. (R:79-92) Later, while she was standing on the street corner, Chad (Ziegler) and Dale (Newman) pulled up in a pickup truck and invited Samantha to go to Princeton for pizza. Ziegler was nineteen years old (R:1). Samantha called her mother and got permission but was told to be home by nine o'clock p.m. (R:79-95)

According to Samantha's testimony the three of them drove to Princeton and picked up a pizza but they then drove to Ziegler's cabin. (R:79-96). While at the cabin Dale announced that he needed to go to the bathroom and he left the room. Samantha claimed that Chad then went and locked the door to the cabin. He walked over to where she was seated on the floor and then pulled her onto the lower of a bunk bed. (R:79-99) At that point, according to Samantha's testimony, Ziegler began rubbing her leg. (R:79-99). Samantha testified that:

> What happens is he took his left hand, was holding me down like across my shoulder which would had to have been my right side, and he-- what happened was he like put all of his weight on me so I could not move, and he starts to unbutton my pants . . .
>
> What I do is I start wiggling around, trying to tell him no. I am screaming as loud as I can, but by then it was too late. He already put his fingers down my pants and started putting his fingers in my vagina.

(R:79-100). Samantha told the jury that after that point Chad put his hands beneath her bra and was feeling her breasts. (R:79-102)

Samantha further claimed that Dale was at the door pounding for Chad to let him in. (R:79-102)

Dale Neumann testified that he did recall the evening in July, 1999 when he and Chad took Samantha to the cabin. (R:79-147) According to Neumann, when they got to the cabin they smoked several "bowls" of marijuana- including Samantha. (R:79-147) Neumann claimed that Chad then said (out of Samantha's earshot) that he wanted to have sex with Samantha and asked whether he (Neumann) wanted to be involved in "raping" Samantha. (R:79-147) Neumann told the jury that he declined. Neumann said that he was sitting in the truck waiting when he heard screams. Moments later he saw Samantha and Chad coming out of the cabin and "she was shaking." (R:79-148).

Neumann claimed that he drove the truck home and, while he was driving, he turned around and saw Ziegler kissing Samantha's breasts and putting his hand in her pants. (R:79-156)

Ziegler testified at trial. He told the jury that he did remember the night that he and Dale picked up Samantha in Ripon. However, Ziegler told the jury that they never went to Princeton for pizza; rather, they drove to a location to purchase some marijuana. (R:79-233). They then drove to the cabin to smoke it. (R:79-235) Ziegler testified that he never had any sexual contact with Samantha and he denied that he ever suggested to Neumann that they rape the girl. (R:79-242 to 245)

Significantly, Samantha did not report the alleged assault until over three years later. (R:79-106)

Kimberly B. testified as an "other acts" witness for the State.

At the outset of her testimony the court instructed the jury as follows:

> Ladies and gentlemen of the jury, I believe that the evidence that is being presented now is regarding other conduct with the defendant for which the defendant is not on trial.
>
> Specifically, the evidence is being presented that the defendant has sexual intercourse with a minor, Kimberly B. If you find that this conduct did occur, you should consider it only on the issue of plan.
>
> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with respect to the charge in this case.
>
> The evidence was received on the issue of plan. You may consider this evidence only for the purpose that I have described, giving it the weight that you determine it deserves. It is not to be used to determine that the defendant is a bad person and for that reason is guilty of the offense charged.

(R:79-137, 138).

Kimberly testified that she started dating Ziegler when she was fifteen years-old. On one occasion in March, 2002 she, Ziegler, and "Brian", drove to the cabin. They drank some alcohol and then went to bed. While in bed, "We started messing around. One thing led to another and we had sex." (R:79-139) The same thing happened again two days later. (R:79-140) Kimberly freely admitted that Ziegler employed no force or coercion in order to have sex with her. (R:79-143)

Ziegler called two girls who were acquaintances of Samantha's and these girls told the jury than in their opinion Samantha was not a truthful person. (R:79-205; R:80-275)

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE STATE TO PRESENT THE TESTIMIONY OF KIMBERLY B. THAT SHE AND ZIEGLER HAD SEX IN THE CABIN WHEN SHE WAS FIFTEEN YEARS OLD.

While recognizing that Ziegler's "intent" was clear without the use of the "other acts" evidence[5], the trial court nonetheless found that the other acts evidence was admissible to prove Ziegler's "plan". The plan that the other acts evidence supposedly establishes is never delineated- one must assume that the court believed it to be Ziegler's plan to have sex with Samantha once he got her to the secluded cabin. However, as will be set forth in more detail below, when other acts evidence is offered to show "plan" this necessarily includes the doing of the act in question. Under such circumstances the danger of unfair prejudice is much greater because the distinction between a "plan" and "acting in conformity with one's bad character" (one is permissible and the other is not) is in most cases extremely difficult to grasp. The courts have held that where other acts evidence is offered to prove plan (or *modus operandi)* there must be a high degree of similarity between the two acts- to the point where one might fairly describe the acts as a signature crime. Here, there was some similarity between the two acts- Ziegler had sex with an underage girl while at his family cabin. There the similarity ends, though. The incident with Kimberly was

5 That is, Samantha testified that Ziegler, among other things, put his hands down her pants and inserted his finger into her vagina. If this is true, Ziegler's intent to be sexually gratified is unambiguous.

consensual sex between boyfriend and girlfriend who are of the same age cohort. The incident with Samantha, on the other hand, was a forcible rape. For this reason, the trial court abused its discretion in admitting evidence of the Kimberly incident.

On appeal the standard of review of a trial court's admission of other crimes evidence is whether the court exercised appropriate discretion. ***State v. Sullivan***, 216 Wis.2d 768, 780, 576 N.W.2d 30, 36 (1998). "An appellate court will sustain an evidentiary ruling if it finds that the circuit 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*. It is an erroneous exercise of discretion for the circuit court to fail to delineate the factors that influenced its decision. *See id*. at 781, 576 N.W.2d at 36.

Sec. 904.04, STATS., provides:

> 904.04 **Character evidence not admissible to prove conduct; exceptions; other crimes.**
>
> (1) Character evidence generally. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> * * *
>
> (2) Other crimes, wrongs, or acts. Evidence 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.

Although the admission of other acts evidence is clearly within the trial court's discretion, to determine whether evidence of

other acts is admissible, the trial court must engage in a three step analysis. First, the court must determine if the proffered evidence fits within one of the exceptions of RULE 904.04(2), STATS.; second, the trial court must determine if the other acts evidence is relevant under RULE 904.01, STATS.; third, pursuant to RULE 904.03, STATS., the trial court must decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *See* ***Sullivan***, 216 Wis.2d at 772-773.

In, ***State v. Davidson,*** 236 Wis.2d 537, 555, 613 N.W.2d 606 (2000) the Supreme Court elaborated upon the "greater latitude" that trial courts possess in the evaluating other acts evidence in sexual assault cases- and in particular those involving children. The Supreme Court wrote:

> This is the general framework that governs the admissibility of other crimes evidence in all Wisconsin cases. However, alongside this general framework, there also exists in Wisconsin law the longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a "greater latitude of proof as to other like occurrences."

This, of course, does not mean that whenever the defendant is charged with sexual assault of a child the case is an "other acts" free-for-all. The ***Davidson*** court, 236 Wis.2d at 563, went on to explain:

> We conclude that in sexual assault cases, especially those involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial. The effect of the rule is to permit the more liberal admission of other crimes evidence in sex crime cases in which the victim is a child. Although the greater latitude rule permits more liberal admission of other crimes evidence, such evidence is not automatically admissible. *See, e.g.,* ***Friedrich***, 135 Wis.2d at 265-66 (holding that at the defendant's trial for sexually assaulting a fourteen-year-old girl, evidence that the defendant made sexual advances toward an

> eighteen-year-old employee was inadmissible because it was more prejudicial than probative); ***Fishnick***, 127 Wis.2d at 281-82 (finding that, as the State conceded, evidence that the defendant stood in front of the window of his trailer home was not relevant and therefore should not have been admitted at the defendant's trial for sexual assault). This is because: [T]he greater latitude standard does not relieve a court of the duty to ensure that the other acts evidence is offered for a proper purpose under sec. 904.04(2) . . . . Nor does it relieve a court of the duty to ensure the other acts evidence is admissible under sec. 904.03 and the other rules of evidence. ***Plymesser***, 172 Wis.2d at 598. In other words, courts still must apply the three-step analysis set forth in Sullivan.

A. Is the evidence offered for a permissible purpose under the statute?

Here, the State argued that the other acts evidence was offered to establish Ziegler's "plan"- though the exact "plan" is never delineated.

> The word "plan" in sec. 904.04(2) means a design or scheme formed to accomplish some particular purpose. . . . Evidence showing a plan establishes a definite prior design, plan, or scheme ***which includes the doing of the act charged***. . . . [T]here must be "such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations."

(emphasis provided) ***State v. Spraggin***, 77 Wis.2d 89, 99, 252 N.W.2d 94 (1977) (citing 2 Wigmore, Evidence § 304 (3d ed. 1940)). Additionally, the Supreme Court has warned that, in judging admissibility under the "doing of the act charged" exception, the court must bear in mind this caution:

> We think the standards of relevancy should be stricter when prior-crime evidence is used to prove . . . the doing of the act charged than when the evidence is offered on the issue of knowledge, intent or other state of mind. McCormick, Evidence (hornbook series), p. 331, sec. 157. In identity cases the prejudice is apt to be relatively greater than the probative value.

Whitty v. State, 34 Wis.2d 278, 294, 149 N.W.2d 557, 564 (1967), U.S. cert. denied, 390 U.S. 959 (1968).

In effect, the State suggests here that Ziegler had an established *modus operandi* of taking underage girls to his family cabin in order to have sex with them. "*Modus operandi*" means nothing more than, "[A] particular way of doing things" To constitute an "MO" in legal parlance, though, there must be some unique behavior which sets the method of committing the crime apart from other garden variety means of the committing the same crime. For example, in ***State v. Rutchik***, 116 Wis.2d 61, 341 N.W.2d 639 (Wis. 1984), the court found an MO where the defendant scanned the obituary columns to locate burglary victims (i.e. he chose the homes of people who were likely to be attending a funeral).

In the analysis of the present case, then, there appear to be competing principles. Since this case is a sexual assault case involving a child the trial court is granted greater latitude in the analysis; however, because the purpose for which the other acts evidence is offered is to show plan the court must at the same time give close scrutiny to the similarity of the acts alleged.

At least nominally, though, the other acts evidence was offered for a permissible purpose under the statute.

B. Is the other acts evidence relevant?

The next question is whether the evidence is relevant. That is, does it have a tendency to establish the reason for which is offered. Here, it plainly it does not. In, ***State v. Becker***, 51 Wis.2d 659, 666-67,

188 N.W.2d 449, 453 (1971) the court noted that in the courtroom the terms relevancy and materiality are often used interchangeably, but materiality in its more precise meaning looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue nor probative of a matter in issue, the evidence is properly said to be immaterial.

The State's argument appears to be that every time Ziegler goes to his family cabin with an underage girl he plans to have sex with her, either consensual or forcible if necessary. In order to properly establish a plan or *modus operandi* the various other acts must either be of a very well-established pattern or, if of a small number, they must have a high degree of similarity.

Here, there was no well-established pattern. Evidence was presented of two occasions on which Ziegler went to the family cabin with underage girls. This is plainly insufficient to establish that virtually every time Ziegler goes to the family cabin with a girl it is to have sex with her- such that one might fairly infer that if Ziegler took *any* girl to the cabin it was for the purpose of having sex. Rarely do two incidents establish a pattern.[6]

Likewise, even under the "greater latitude" rule, there is no high degree of similarity between these two incidents. Ziegler and Kimberly were "dating" prior to going to the cabin where they had plans to spend the night; Samantha was apparently a stranger to Ziegler until she got into his pickup truck in Ripon and, according to

6 One is reminded of the old saw that all soldiers walk in single file; at least the two I saw did.

her, was taken to the cabin against her will (or at least without her prior knowledge). Kimberly told the jury that once she and Ziegler went to bed she willingly had sexual intercourse with him. Samantha, on the other hand, claimed that she never consented to sex with Ziegler but that Ziegler then forced himself on her.

These are highly significant distinctions. In the case of Kimberly, surely Ziegler cannot be the first teenager in the history of the world to take his girlfriend (underage or otherwise) to a secluded place so that they could have sex.[7] It is illogical to infer from such (relatively) common behavior that the taking Samantha to the cabin, a girl with whom Ziegler has no prior relationship, is part of a plan to *rape* her[8]. Suppose that Ziegler and Kimberly had sex in Ziegler's rec-room instead of in his cabin. Certainly this does not mean that every time Ziegler goes to the rec room with a girl it is for the purpose of forcibly raping her.

Thus, there is minimal similarity between the two incidents at the Ziegler cabin. On the other hand there are profound dissimilarities. Even under the rule of greater latitude the trial court abused its discretion in admitting the evidence.

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7 If Ziegler were forty-five years old and had sex with a fifteen year-old girl at his cabin the State's argument might be significantly stronger. This would be the sort of unusual behavior that might rise to the level of being a signature crime. Most forty-five year-old men do not have sex with teenage girls. However, common experience teaches us that teenage boys think about little else than having sex with teenage girls. They are in the same age cohort and, although legally unable to consent to sex, the behavior itself is "normal" as compared to a middle-aged man having sex with teenage girls.

8 The word "rape" is used to distinguish it from a consensual act which is a "sexual assault" merely because the girl is under sixteen years old. What Samantha described here fits the common understanding of the word rape.

C. The unfair prejudicial effect patently outweighed any probative value.

The trial court recognized the possibility of unfair prejudice to Ziegler. Therefore, the court crafted a limited-use instruction intended to minimize the unfair prejudice. The instruction read:

> Ladies and gentlemen of the jury, I believe that the evidence that is being presented now is regarding other conduct with the defendant for which the defendant is not on trial.
>
> Specifically, the evidence is being presented that the defendant has sexual intercourse with a minor, Kimberly B. If you find that this conduct did occur, you should consider it only on the issue of plan.
>
> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with respect to the charge in this case.
>
> The evidence was received on the issue of plan. You may consider this evidence only for the purpose that I have described, giving it the weight that you determine it deserves. It is not to be used to determine that the defendant is a bad person and for that reason is guilty of the offense charged.

(R:79-137, 138).

As mentioned earlier, evidence offered to prove that the defendant had a plan to commit a crime (which includes the doing of the act in question) is barely distinguishable from evidence offered to prove that the defendant is of bad character and that at the time in question he was acting in conformity with his bad character. Here the trial court utterly failed to explain the distinction to the jury. Thus, there is a great likelihood that the jury found Ziegler guilty not because of the evidence presented but because they did not understand the fine distinction between plan evidence and character evidence.

One need look no further than the seminal case in this area, ***Whitty***, in order to understand the *unfair* prejudice of admitting the evidence that Ziegler had consensual sex with Kimberly at the cabin. The ***Whitty*** court wrote, 34 Wis. 2d at 291:

> It is a maxim in our jurisprudence that all facts having rational or logical probative value are admissible in evidence unless excluded by some specific rule. 1 Wigmore, Evidence (3d ed.), p. 293, sec. 10. Likewise, the "character rule" is universally established that evidence of prior crimes is not admitted in evidence for the purpose of proving general character, criminal propensity or general disposition on the issue of guilt or innocence because such evidence, while having probative value, is not legally or logically relevant to the crime charged. Indeed, Wigmore states such evidence is "objectionable, not because it has no appreciable probative value, but because it has too much." (P. 646, sec. 194.)
>
> The character rule excluding prior-crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

Here, two of these factors flew full-force against Ziegler at trial. The evidence invoked the jury's tendency to condemn because Ziegler may have escaped punishment in the Kimberly incident and the evidence also confused the issues.

Firstly, although Ziegler's behavior with Kimberly might be "normal" for a teenage boy it is still against the law- and for good reason. No one would debate the wisdom of the law that prohibits teenagers from having sex (no one, of course, except the teenagers). Thus, when the jury (made up of adults) learned that Ziegler had sex at the cabin with his fifteen year-old girlfriend they very likely

believed that Ziegler had wrongfully escaped punishment for those incidents.

More significantly, though, the issues the jury had to decide were hopelessly confused by the other acts evidence. Ziegler went to great lengths earlier in this brief to emphasize the distinction between consensual sex with a fifteen year-old girl and rape. Our law, though, at least as concerns the name of the offenses, makes no such distinction. Consensual sex with a fifteen year-old girlfriend is characterized as "sexual assault" by the statutes. Forcing sexual intercourse on an unwilling victim through the use of force is also characterized as "sexual assault." As explained earlier, it does not logically follow that because a teenage boy has (illegal) consensual sex with his teenage girlfriend that the boy is likely to later commit a rape. This important distinction was muddled by the court's limited-use instruction. The trial court seemed to be of the belief that a sexual assault is a sexual assault is a sexual assault. No real consideration was given to the profound difference in the *quality* of Ziegler's behavior on each occasion.

Thus, the jury may very well have concluded that because Ziegler went to his cabin with Kimberly and *sexually assaulted her* he therefore had a plan to take Samantha there so that he could *sexually assault* her too. Such reasoning is hopelessly confused because it fails to draw the critical distinction between the quality of Ziegler's behavior with Kimberly (consensual but illegal) and the quality of the behavior Samantha alleged (forcible rape).

Thus, whatever minimal probative value the other acts evidence had it was significantly outweighed by the unfair prejudice

resulting from confusion of the issues and the jury's tendency to punish Ziegler for other crimes.

D. The error was not harmless

The court of appeals will uphold a conviction if it can be shown beyond a reasonable doubt that the error did not contribute to the guilty verdict. ***State v. Flynn***, 190 Wis.2d 31, 54, 527 N.W.2d 343, 352 (Ct. App.1994). The appellate court must determine what effect the error had upon the guilty verdict in the present case. ***Sullivan v. Louisiana***, 508 U.S. 275 (1993).

Here, there was quite literally no evidence of Ziegler's guilt other than Samantha's testimony. It is difficult to imagine the jury returning a guilty verdict in the absence of the other acts evidence.

CONCLUSION

For these reasons it is respectfully requested that the Court of Appeals reverse Ziegler's conviction and remand the matter for a new trial with instructions that the other acts evidence involving Kimberly is not admissible.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2006.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 5033 words.

This brief was prepared using *Open Office* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated this _____ day of _____, 2006:

_____

Jeffrey W. Jensen

STATE OF WISCONSIN
COURT OF APPEALS
Appeal No. 2005AP002782-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHAD ZIEGLER,

Defendant-Appellant.

APPELLANT'S APPENDIX

A. Record on Appeal

B. Exerpt of trial court's decision on State's motion to admit other acts evidence (R:77)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so

reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of February, 2006.

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