**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

July 7, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-3506-CR**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**MICHAEL W. CARLSON,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Brown County: J. D. MCKAY, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. The State appeals an order denying its motion to admit other acts evidence at a sexual assault trial. The trial court ruled that ***State v. Alsteen***, 108 Wis.2d 723, 324 N.W.2d 426 (1982), prohibits admitting evidence

that Carlson had nonconsensual sex with another woman two years earlier.[1] The State argues that the trial court erred by failing to perform the three-part test for admissibility set out in ***State v. Sullivan***, 216 Wis.2d 768, 576 N.W.2d 30 (1998). Because we conclude that the evidence was not admissible under the ***Sullivan*** test, we affirm the order denying the State's motion to admit other acts evidence.

In ***Sullivan***, the court held that evidence of other acts or crimes are admissible if they meet a three-part test: (1) the evidence must be offered for an acceptable purpose under § 904.04(2), STATS.; (2) it must be relevant, that is, it must relate to a fact or proposition that is of consequence to the determination of the action and must tend to make the consequential fact or proposition more or less probable than it would be without the evidence; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. ***Id***. at 772, 576 N.W.2d at 32-33. In this case, consent is the only issue in dispute. The State argues that evidence another woman did not consent two years earlier bolsters the complainant's testimony that she did not consent.

Assuming, without so holding, that bolstering the complainant's credibility on the consent question meets the first ***Sullivan*** test and does not merely constitute evidence of propensity, the proffered evidence does not satisfy the second and third ***Sullivan*** tests. While the complainant's credibility on the consent question is a proposition of consequence to the determination of the action, evidence that Carlson had nonconsensual sex with another woman two years earlier does not tend to establish whether consent occurred in this case. In ***Alsteen***, the court held that one woman's lack of consent to intercourse with a

[1] The offer of proof suggests that the charges in the other incident were dropped following some undisclosed financial transaction between Carlson and the woman.

defendant has "no tendency to prove that another woman did not consent." ***Alsteen***, 108 Wis.2d at 730, 324 N.W.2d at 429. The State does not attempt to distinguish ***Alsteen***, but merely notes disagreement with its holding and the case law it relied upon. This court has no authority to overturn decisions of the Wisconsin Supreme Court. *See* ***Livesey v. Copps Corp.***, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979).

The proffered evidence also fails to meet the third ***Sullivan*** test. Because the proffered evidence has no tendency to prove that the complainant did not consent, it has no probative value. It has substantial risk of prejudice, however, because the jury may believe Carlson is guilty merely because he is a person likely to do such acts or it may condemn him, not because of the evidence presented in this case, but because he has escaped punishment in the past. *See* ***Whitty v. State***, 34 Wis.2d 278, 292, 149 N.W.2d 557, 563 (1967).

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.