

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 17, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1658-CR

Cir. Ct. No. 01CF000283

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL L. MARKS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Reversed and cause remanded with directions.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Michael L. Marks appeals from judgments convicting him of three counts of second-degree sexual assault contrary to WIS. STAT. § 940.225(2)(a) (1999-2000) and one count of attempted third-degree sexual assault contrary to WIS. STAT. §§ 940.225(3) and 939.32 (1999-2000). He also

appeals from the order denying his postconviction motion for a new trial. We find one issue dispositive on appeal: whether the circuit court erroneously exercised its discretion when it admitted evidence of other instances in which Marks allegedly had nonconsensual sexual contact with women. We conclude that the evidence was inadmissible under *State v. Cofield*, 2000 WI App 196, 238 Wis. 2d 467, 618 N.W.2d 214, and *State v. Alsteen*, 108 Wis. 2d 723, 324 N.W.2d 726 (1982). We further conclude that the evidence was not admissible under WIS. STAT. § 904.04(2) (2001-02)¹ as other acts evidence. Because this error was not harmless, we reverse and remand for a new trial.

¶2 Marks was charged with three counts of second-degree sexual assault and one count of attempted third-degree sexual assault.² The complaint alleged that Marks had nonconsensual sexual contact by use or threat of force or violence with a neighbor, Irene N. Irene claimed that after Marks gave her a ride to her brother's workplace, Marks took her to a secluded place, removed his clothes, pulled off her shirt and bra, and had nonconsensual contact with her breasts and vagina despite her protestations. Irene managed to push Marks off of her, and he broke off the assault and drove Irene home.

¶3 Prior to trial, Marks filed a motion in limine asking the circuit court to bar introduction of evidence that he had nonconsensual sexual contact with Gina N., Irene's sister-in-law, and Suzanne S. Gina alleged that Marks rubbed up against her as he was talking about having had sexual contact with Irene. Suzanne

¹ All subsequent references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² Marks was also charged with bail jumping contrary to WIS. STAT. § 946.49(1)(b) (1999-2000). The jury acquitted him of that charge.

alleged that while Marks was in her home as a cable company representative, he grabbed and squeezed her buttocks and asked if she wanted to engage in sexual contact with him.³ Because the State indicated that it would not present any of this information in its case-in-chief, the court denied the motion in limine and permitted Marks to object to such testimony at trial should it be offered.

¶4 At trial, Irene and other witnesses testified that Marks assaulted her without her consent. Marks testified that he and Irene had consensual sexual contact and that when she asked him to stop, he did. In its rebuttal case, the State sought to present the testimony of Suzanne. The State also argued that her testimony was admissible because it was an incident in which another woman claimed that she did not consent to sexual contact with Marks. The State argued that the evidence was relevant to Marks' intent, motive, plan, absence of mistake, opportunity and knowledge regarding the issue of consent in the pending prosecution.

¶5 Marks objected to this evidence on the grounds that it was not proper other acts evidence under *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). Marks also argued that Suzanne's testimony shed no light on the issue of consent between Marks and Irene. The circuit court ruled that Suzanne's testimony was relevant and not unfairly prejudicial. The circuit court found that the evidence satisfied WIS. STAT. § 904.04(2), which permits other acts evidence which is relevant to opportunity, motive and plan. Thereafter, Suzanne testified to the incident with Marks.

³ As a result, Marks was charged with fourth-degree sexual assault in Waukesha county. However, the Waukesha county case was dismissed and read in pursuant to a plea agreement in another case involving misdemeanor negligent use of a motor vehicle.

¶6 The State also offered the testimony of Gina that Marks told her he did not feel guilty about having had sexual contact with Irene. Marks objected that the testimony was not relevant. The circuit court concluded that it was, and Gina testified that Marks made the remark as he rubbed up against her outside their apartment building.

¶7 During closing arguments, the prosecutor argued that the jury had to consider witness credibility on the issue of consent. The prosecutor argued the evidence favoring the State's theory that Irene did not consent to sexual contact with Marks. Marks argued that Irene was not credible. Marks further argued that neither Suzanne nor Gina could shed any light on what happened between him and Irene. In rebuttal, the State again referred to the incidents involving Gina and Suzanne. The jury convicted Marks of three counts of second-degree sexual assault and one count of attempted third-degree sexual assault.

¶8 Postconviction, Marks sought a new trial. He argued that the circuit court erroneously admitted Suzanne's testimony because evidence of other incidents of nonconsensual sex is inadmissible under *Alsteen* and *Cofield*. The court did not agree that *Alsteen* barred the admission of this evidence as it related to consent, and even if it did, the evidence was properly admitted as WIS. STAT. § 904.04(2) other acts evidence.

¶9 On appeal, Marks argues that the testimony of Suzanne was admitted in violation of *Alsteen* and *Cofield*. We review whether the circuit court properly exercised its discretion in admitting this evidence. *Cofield*, 238 Wis. 2d 467, ¶7. The proper exercise of discretion requires the circuit court to apply the pertinent law. *Id.* We conclude that under *Alsteen* and *Cofield*, Suzanne's testimony was not probative on the issue of consent.

¶10 In *Alsteen*, the defendant claimed that the victim had consented to sexual intercourse. *Alsteen*, 108 Wis. 2d at 725-26. At trial, the circuit court permitted evidence of two other occasions in which the defendant had sexual contact or intercourse without the consent of the victim. *Id.* at 726-27. The sole question before the *Alsteen* court was “whether it was error for the trial court to admit evidence concerning prior acts of sexual misconduct allegedly committed by the defendant.” *Id.* at 727.

¶11 The *Alsteen* court considered whether such evidence would be admissible under WIS. STAT. § 904.04(2). Section 904.04(2) bars “[e]vidence of other crimes, wrongs, or acts ... to prove that character of a person in order to show that he acted in conformity therewith.” *Alsteen*, 108 Wis. 2d at 728 (citation omitted). However, such evidence may be admissible if it is relevant to motive, opportunity, intent, plan or absence of mistake. *Id.* at 729; *see also Sullivan*, 216 Wis. 2d at 783. Such evidence must be relevant to and probative of an issue in the case, *Sullivan*, 216 Wis. 2d at 785-86, and may not be unfairly prejudicial, *id.* at 789.

¶12 Applying these principles, the *Alsteen* court concluded that it was error to admit evidence of the defendant’s past sexual misconduct. Because the defendant admitted having sexual intercourse with the victim in the charged case, the only issue was whether the victim had consented. *Alsteen*, 108 Wis. 2d at 730. The court held that evidence of the defendant’s prior acts of sexual misconduct had no probative value on the issue of consent in the charged case because “[c]onsent is unique to the individual.” *Id.* Therefore, evidence of the defendant’s prior sexual misconduct was not relevant and should not have been admitted. *Id.* at 730-31. The court rejected the State’s argument that evidence of the defendant’s prior sexual misconduct was admissible to show plan under WIS.

STAT. § 904.04(2). *Alsteen*, 108 Wis. 2d at 731. Even if the nonconsent evidence fit within an exception to § 904.04(2), the evidence still had to be relevant to an issue in the case in order to be admissible. *Alsteen*, 108 Wis. 2d at 731.

¶13 Similarly, in *Cofield*, the defendant claimed that the sexual conduct was consensual; the victim claimed it was not. *Cofield*, 238 Wis. 2d 467, ¶4. The circuit court admitted evidence of two other alleged sexual assault victims to show motive or plan. *Id.*, ¶5. The circuit court found that the other acts were also relevant on the issue of consent and not unduly prejudicial. *Id.*, ¶10. The *Cofield* court reversed on the grounds of *Alsteen*, holding that the other acts were not admissible under any exception set forth in WIS. STAT. § 904.04(2). *Cofield*, 238 Wis. 2d 467, ¶¶10-13.

¶14 In the case before us, the State argued that Suzanne's testimony was relevant to whether Irene consented. However, *Alsteen* and *Cofield* hold that where consent is an issue, evidence of nonconsent by another party is not relevant. The State's respondent's brief does not meaningfully distinguish *Alsteen* and *Cofield* from this case. Therefore, Suzanne's testimony was not relevant to consent, and it should have been excluded under *Alsteen* and *Cofield*.

¶15 We turn to whether Suzanne's testimony was admissible for one of the purposes under WIS. STAT. § 904.04(2). The circuit court admitted the

testimony of Suzanne as relevant to the § 904.04(2) other acts exceptions of opportunity, motive and plan. We disagree.⁴

¶16 There are no similarities between the incidents involving Suzanne and Irene indicating opportunity, motive and plan. *Sullivan*, 216 Wis. 2d at 786-87 (probative value of other acts evidence depends on the other act's nearness in time, place and circumstances to the charged crime). Motive was not at issue because Marks admitted having sexual contact with Irene. There was also no indication of a plan because the conduct with Irene (Marks trapped Irene in a van, took her to an isolated place, disrobed and assaulted her) occurred in a vastly different manner than did the contact with Suzanne (Marks was in Suzanne's home, remained clothed, came up behind her and squeezed her buttocks). Additionally, the incidents are not relevant to opportunity. When coupled with the fundamental relevancy problem of evidence relating to nonconsent, we conclude that Suzanne's testimony was inadmissible under WIS. STAT. § 904.04(2). Because the evidence was not admissible under § 904.04(2), its only purpose was to show that Marks had a propensity to touch women sexually without their consent. Such evidence is not allowed. *Alsteen*, 108 Wis. 2d at 730-31.

¶17 Having determined that the circuit court misused its discretion when it admitted the testimony of Suzanne, we turn to whether the error was prejudicial.

⁴ In *State v. Ziebart*, 2003 WI App 258, ¶20, ___ Wis. 2d ___, 673 N.W.2d 369, the court held that other acts evidence of nonconsent may be admitted for one or more of the permissible purposes under WIS. STAT. § 904.04(2), such as opportunity, motive or plan, if the other acts evidence relates to "a defendant's modus operandi encompassing conduct inextricably connected to the strikingly similar alleged criminal conduct at issue." In *Ziebart*, the defendant engaged in strikingly similar activity in the course of his sexual assaults. *Ziebart*, 673 N.W.2d 369, ¶21. As discussed later in this opinion, Marks' contact with Suzanne was not sufficiently similar to his contact with Irene to render the former admissible as evidence of opportunity, motive or plan.

See id. at 731. Even though the court instructed the jury not to consider Suzanne's testimony as proof of Marks' guilt, this instruction was not sufficient to render the error harmless. *See id.* The central issue in this case was consent, and the credibility of the involved persons, Marks and Irene, was crucial on this score. Consent is an issue for which evidence of prior nonconsensual sexual conduct is not admissible. Because Suzanne's testimony was not relevant to opportunity, motive or plan, her testimony related exclusively to the issue of consent and served to buttress the State's theory that Irene did not consent to sexual contact with Marks. Because there is a reasonable possibility that the admission of this evidence contributed to the conviction, the error was not harmless. *Sullivan*, 216 Wis. 2d at 792.

¶18 Because we reverse due to the error in admitting the testimony of Suzanne, we need not discuss in detail the testimony of Gina. In arguing for the admissibility of Gina's testimony, the prosecutor noted that it was offered to rebut Marks' defense of consent. This flies in the face of the *Alsteen/Cofield* bar on nonconsent evidence, and Gina's testimony did not enlighten the jury regarding opportunity, motive or plan due to the lack of similarity of the incidents involving Gina, Suzanne and Irene.

¶19 Finally, Marks argues that the prosecutor's improper closing argument deprived him of a fair trial. Marks contends that the prosecutor unfairly urged the jury to sympathize generally with sexual assault victims who face hard cross-examination about their conduct and demeanor.

¶20 The State notes, and we agree, that Marks did not object to this argument. Because this issue is waived, we do not consider it. *State v. Guzman*, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717.

¶21 Because the circuit court erroneously exercised its discretion when it admitted otherwise inadmissible evidence, we reverse and remand to the circuit court for a new trial.

By the Court.—Judgments and order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

