

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-2039-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT J. KILCOYNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
MICHAEL W. HOOVER, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Scott J. Kilcoyne appeals from the judgment of conviction, following a jury trial, for third-degree sexual assault. He argues that the trial court erred in admitting “other acts” evidence and, as a result, that he was denied a fair trial. Kilcoyne is correct and, therefore, we reverse.

Kilcoyne and Dayna R. had a serious relationship lasting from about February 1994 to January 1995, including a brief period during which they were engaged to be married. Dayna testified that during substantial periods of their relationship, she and Kilcoyne stayed together about five nights per week and, on these occasions, had consensual sex “two to three times” each night.

On February 7, 1995, soon after Dayna and Kilcoyne had broken up, Kilcoyne’s parole agent, John Hanson, called Dayna’s mother. During their conversation, Dayna’s mother asked Hanson whether Dayna had told him that Kilcoyne had sexually assaulted her (Dayna). That same day, Hanson contacted Dayna who denied that any sexual assault had occurred. Hanson testified, however, that on March 27, 1995, Dayna spoke with him “about the money that Scott had owed her and she was asking what could be done about that. And we had some further discussion and she then disclosed ... that she had been sexually assaulted by Scott.” At Hanson’s direction, Dayna then reported the alleged assaults to the appropriate police departments and, ultimately, Kilcoyne was charged with two counts of third-degree sexual assault.

The first count involved an incident in March 1994. Dayna testified that she and Kilcoyne had gone to a bar with friends after work. Dayna said that she had “maybe four drinks” and “was a little intoxicated.” She and Kilcoyne then went to his apartment where “[h]e gave me a shower, to sober me up a little.” She then “took some aspirin and [they] went to bed.” Dayna testified that Kilcoyne “wanted to have sex with me and I said no.” She testified that Kilcoyne continued to ask, repeatedly saying, “Come on,” but that she moved away from him in the bed and repeatedly said that she was too tired and did not want to have sex. Dayna testified that as she kept saying “no,” Kilcoyne pulled her on top of him and had penis to vagina intercourse with her.

The second count involved an incident in December 1994. Dayna testified that she and Kilcoyne had had consensual sex “previously that night” but, because “it did cause me a lot of pain,” she said “no” when Kilcoyne wanted to have sex again. Dayna testified that she was almost asleep when, after she had said “no,” Kilcoyne got on top of her. She testified: “He was on top of me. He spread my legs apart and he entered me and I was crying at that point, and he said, he pulled out right away and said, ‘See, I didn’t.’”

The jury found Kilcoyne guilty of count one; not guilty of count two.

The issue in this appeal relates to the trial court’s admission of “other acts” evidence involving Kilcoyne’s alleged sexual assault of two other females, Jamie S. and Sara G. Jamie testified that in January 1995, she and Kilcoyne were romantically involved. She testified about a night when they went to a hotel and had consensual sex. She also said, however, that later that same night Kilcoyne again had sex with her, entering her “back part,” despite the fact that she twice told him, “no.” Sara testified that on two occasions in February 1990, when she was fourteen years old and Kilcoyne was seventeen, she reluctantly went to Kilcoyne’s house where, despite her protests, he kissed and fondled her, tried to remove her clothes, and exposed himself.

The trial court allowed Jamie and Sara to testify only after conducting extensive pretrial and trial hearings and considering offers of proof. While allowing the State to introduce Jamie’s and Sara’s testimony, the trial court also declined to allow testimony from four other women who, the State maintained, also would have described Kilcoyne’s “sexually assaultive, forceful conduct” and his refusals to take “no” for an answer. The trial court carefully examined the six lines of potential evidence, concluded that four were not

sufficiently similar to be probative of Kilcoyne’s “absence of mistake,” but that Jamie and Sara would be allowed to testify because they, like Dayna, had consented to some contact with Kilcoyne only to have him insist on sex after their refusals.

Kilcoyne argues that, under *State v. Alsteen*, 108 Wis.2d 723, 324 N.W.2d 426 (1982), the “other acts” evidence was inadmissible. Kilcoyne is correct. As the supreme court reiterated in *Alsteen*:

The general rule in Wisconsin is that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” Sec. 904.04 (2), Stats. In *Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967), *cert. denied*, 390 U.S. 959 (1968), this court set forth four reasons for excluding such evidence:

“(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.”

There are, however, several exceptions to the general rule prohibiting evidence of other misconduct. Sec. 904.04 (2), Stats., provides that such evidence is admissible as “proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident.”

Alsteen, 108 Wis.2d at 728-29, 324 N.W.2d at 428-29.

Kilcoyne argues that, given that the issue in his trial was consent, and given the uncertainties that may surround consent in a consensual relationship, and particularly given that Jamie’s allegations involved an incident *after* Dayna’s, and that Sara’s allegations involved incidents between juveniles *four years before*

Dayna's, the "other acts" evidence "fails the test of relevance." Additionally, Kilcoyne argues that even if the evidence were marginally relevant, its "probative value was so minimal and the prejudicial value so great" as to preclude admission. Further, Kilcoyne contends that "[t]he Jamie S. incident was particularly prejudicial ... because it involved a sex act that many view as deviant ...[,] an act of anal intercourse [,which]... may [have] be[en] so abhorrent to the jurors that it scarcely mattered whether it was consensual or not."

At the pretrial motion hearing, the State offered the "other acts" evidence under several theories, but ultimately settled on "absence of mistake." Ultimately, however, the trial court admitted Sara's testimony as relevant to "absence of mistake," and Jamie's testimony as probative of Dayna's credibility. On appeal, the State also offers a "contextual" theory:

In this case, as in most sexual assault cases, there are no witnesses to the events other than the alleged victim and the defendant. Although "intent" is not a formal element of the crime, proving that the defendant had the motive to commit such a heinous violation upon another person is essential to the state's case. In order for the jury to know the complete story, they need to understand why the defendant would sexually assault a woman he was intimately involved with.... In this case, the testimony of Jamie S. and Sara G. is necessary to "fully understand the context of the case."

Thus, the State maintains, the "other acts" evidence was probative of Kilcoyne's "motive" – his "desire to be in control of his sexual relationships, even when being in control means going against the expressed refusal of his partner." We conclude, however, that whatever may be the plausibility of the State's speculation about Kilcoyne's motive, *Alsteen* precludes the admission of Jamie's and Sara's testimony.

The admission of evidence is a matter for the trial court's discretion, and we will not reverse a trial court's decision absent an erroneous exercise of discretion. *See State v. Mordica*, 168 Wis.2d 593, 602, 484 N.W.2d 352, 356 (Ct. App. 1992). The failure to apply a proper legal standard constitutes an erroneous exercise of discretion. *See Beaupre v. Airriess*, 208 Wis.2d 238, 243, 560 N.W.2d 285, 287 (Ct. App. 1997). Here, although the trial court attempted to carefully review the proposed "other acts" evidence, it failed to apply the *Alsteen* rule, which precludes the introduction of "other acts" evidence on the issue of consent.

Whether viewed as evidence of "absence of mistake," "credibility," or "context," Jamie's and Sara's testimony directly aimed at one theory: as an acquaintance and as a girlfriend of Kilcoyne, they were sexually assaulted despite their protests and refusals; therefore, Dayna's allegations of non-consent are credible. In short, if Kilcoyne would not take Jamie's or Sara's "no" for an answer, he probably did not take Dayna's either. In *Alsteen*, however, the supreme court rejected essentially that same theory.

Like the instant case, *Alsteen* also considered a sexual assault case in which "the only issue was whether [the complaining witness] consented to the act." *Id.* at 729-30, 324 N.W.2d at 429. Reviewing somewhat similar circumstances in which the trial court had admitted testimony from two other females as "other acts" evidence of sexual assault, the supreme court declared:

Evidence of Alsteen's prior acts has no probative value on the issue of [the complaining witness's] consent. *Consent is unique to the individual. "The fact that one woman was raped ... has no tendency to prove that another woman did not consent."* Thus the testimony of [the two witnesses] was irrelevant and should have been excluded.

Id. at 730-31, 324 N.W.2d at 429 (emphasis added) (citation omitted). We conclude that *Alsteen* controls; therefore, the trial court erred in admitting the “other acts” testimony of both Jamie and Sara.

The State, doing little more than invoking the legal standard, briefly argues that any error was harmless:

In the present case, the other acts evidence consisted only of two witnesses’ brief testimonies and was a small part of the two day trial. Without the evidence regarding the other acts, there remained ample evidence on which a jury could have convicted the defendant of third-degree sexual assault. Therefore, if any error was made, it was a harmless error and should not result in reversal of the defendant’s conviction.

We disagree.

“[T]he judgment should be reversed unless we can be sure that the error did not contribute to the guilty verdict.” *State v. Dyess*, 124 Wis.2d 525, 547, 370 N.W.2d 222, 233 (1985). In this case, for several powerful reasons, we certainly cannot be sure.

First, the State relied substantially on the “other acts” evidence. Indeed, in its pretrial argument, the prosecutor offered the utterly remarkable proposition that precisely *because* its evidence might otherwise be weak, the “other acts” evidence was all the more essential and, thus, admissible:

Again, Judge, the case law allows ... more leeway by courts in granting other acts ... evidence in these circumstances when the rest of the case, the rest of the evidence is not as strong. In other words, if there was a confession in this case, obviously we’d have a whole different scenario. But what we have is a case where you can anticipate, again, the defense being that this woman has other motivations for deciding that these are nonconsensual things now and this defendant either mistook the communications that took place in the bedroom when she

was undressed on that day. We know what's coming; we see what the motion is by defense counsel today, and that he had consent that day. And in circumstances as complex as that, the truth of this case in terms of the jury knowing whether there is an absence of mistake in this case is in the context of hearing other acts that also are relevant to that question of absence of mistake.

Second, contrary to the State's claim on appeal, the prosecutor continued to rely substantially on the "other acts" evidence, devoting significant portions of his closing arguments to the testimonies of Sara and Jamie. Moreover, in doing so, the prosecutor referred to Kilcoyne's victims in the plural, arguing that the jury should convict him because of his conduct toward all three women, not just Dayna. In one of several such passages, he asserted:

Most importantly, ladies and gentlemen, your verdict today, will be a message to Scott Kilcoyne about what conduct can be tolerated, what can be ignored, what pleas can be ignored when they are expressed by *people* who trust you and are so broken up and so confused by the fact that the person who *they* trust would violate them in this fundamental way.... Should your message to Scott Kilcoyne be, that as long as you have an active sex life, the *people* you have sex with are not *people* whose messages about "Yes," or "No," need to be listened to?

(Emphasis added.) In doing so, the prosecutor bridged to some of the areas of most obvious concern that traditionally have led to the exclusion of such evidence: the "tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts," and "the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses." *Alsteen*, 108 Wis.2d at 728, 324 N.W.2d at 428-29 (internal quotation marks and quoted source omitted).

Third, without the testimony of Sara and Jamie, the State's case rested almost exclusively on the testimony of Dayna. Despite what may have been the truth of her claims, she still faced serious credibility challenges given her long-

term consensual relationship with Kilcoyne, her initial denial of any misconduct by him, and her subsequent allegations, after their breakup, in a conversation alleging that he owed her money.

Finally, even with the testimony of Sara and Jamie, and even though the strength of the evidence does not appear to have been significantly different on the two counts, the jury convicted Kilcoyne of only one count.

Thus, we conclude not only that the “other acts” evidence was inadmissible, but also that the error was not harmless. Accordingly, we reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

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

