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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2012AP000186 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL K. ROGERS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
AND SENTENCE ENTERED IN THE
CIRCUIT COURT FOR WOOD COUNTY
THE HONORABLE TODD P. WOLF PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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Table of Contents

ISSUE PRESENTED 1

POSITION ON ORAL ARGUMENT
AND PUBLICATION 1

STATEMENT OF CASE 2

FACTS 3

ARGUMENT 11

 The trial court erroneously exercised its
 discretion in admitting other crimes
 evidence. 11

 A. Standard of Review 11

 B. The Sullivan framework for
 analyzing whether other act
 evidence is admissible 11

 C. The trial court erroneously
 exercised its discretion in
 allowing evidence that
 Rogers choked DeVries in
 June, 2010. 12

 1. The choking
 evidence was not
 admitted for a
 proper purpose. 12

 2. The choking
 evidence was

irrelevant.	14
3. The choking evidence was prejudicial.	15
CONCLUSION	16
CERTIFICATION	17
APPENDIX	101

Table of Cases

<i>State v. Pharr</i> , 115 Wis.2d 334, 340 N.W.2d 498(1983)	11
<i>State v. Sullivan</i> , 216 Wis.2d 768, 576 N.W.2d 30(1998).	3,4,11,14,15,16
<i>Whitty v. State</i> , 34 Wis.2d 278, 149 N.W.2d 557 (1967)	13,14

Statutes Cited

Wis. Stat. § (Rule) 904.01	14
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Wisconsin Jury Instructions

Wis JI- Criminal 275	11
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ISSUE PRESENTED

I. Did the trial court erroneously exercise its
discretion in admitting other crimes
evidence?

The trial court by implication answered: No.

**POSITION ON ORAL ARGUMENT
AND PUBLICATION**

The briefs of the parties should fully present the
issues on appeal and develop the relevant theories and

legal authorities. Therefore, the defendant-appellant does not believe oral argument is necessary.

Publication is not requested.

STATEMENT OF CASE

March 4, 2010, Complaint filed charging Rogers with one count of second degree sexual assault(2).

April 19, 2010, Preliminary hearing held wherein Rogers was bound over for trial.(29: 17).

April 19, 2010, Information filed charging Rogers with one count of second degree sexual assault.(5).

April 19, 2010, Rogers arraigned and entered a plea of not guilty.(29:17).

September 28, 2010, The state moves for joinder or in the alternative to introduce other acts evidence.(14).

October 13, 2010, Court allowed other act evidence.(33:6).

December 15, 2010, Jury trial held wherein Rogers was found guilty.(34:222;18).

February 17, 2011, Rogers was sentenced to nine years confinement and eight years extended supervision.(35:31;24).

January 23, 2012, a notice of appeal was filed.(27).

FACTS

The state alleged that Daniel Rogers sexually assaulted his live in girlfriend, Andrea DeVries, by use of threat of force or violence on February 25, 2010.(5).

Before trial, the state moved the court to join this case with two other cases that were pending against Rogers or in the alternative to allow other acts evidence.(13). One of those cases, Wood County case number 10 CF 239, alleged Rogers choked Andrea DeVries on June 15, 2010, resulting in felony strangulation and suffocation and felony bail jumping charges against Rogers.(Id.)

The defense opposed both motions.(14). The trial court denied the state's motion to join the various cases, but did grant the state's motion to allow testimony that Rogers choked DeVries in June, 2010.(33:3,6).

In arguing for other acts evidence the state said,

...the State moves in the alternative to introduce evidence of other acts, that being to allow the information contained in the other cases to show the Defendant's motive, that his intent, plan or absence of mistake or accident in that the Defendant perpetrated these acts all on the same victim, intimidating the victim, subjecting that victim to abuse and violating the conditions of his bond in prior cases.

(31:3).

When asked by the court if the state wanted to argue anything as for as the *Sullivan* analysis., the prosecutor said only,

I don't believe that it unduly prejudices the Defendant, that this - - these are not surprises, that the facts are - - that the balancing act, that this does not

unduly prejudice the Defendant.

(Id).

To reach its conclusion the trial court invoked the *Sullivan*¹ analysis. The court held that using strangulation as a method Rogers uses to get DeVries to submit is an acceptable purpose.(33:4). The court further found that the strangulation evidence was relevant to show intentional force.(Id.)

...and the victim is indicating a very common pattern or scheme that is used by the Defendant to show his intent, and that is that he would get her to submit while one crime (sic) and the other one submit on the sexual intercourse, grabbing her by the throat and indicating that is how he is going to get her to submit.

(Id.).

Finally, under the *Sullivan* analysis, the court held that any danger of prejudice could be overcome by a cautionary instruction.(Id. 5).

At trial, Rogers stipulated to the fact that he and DeVries had intercourse on February 25, 2010,(34:7-9), but claimed that it was consensual.(Rogers 34: 158).

DeVries and Rogers agreed that they had been living together for several months and that their on-again-off-again relationship had produced two children.(DeVries 34:65, 66, 78; Rogers 34: 146,147).

For a couple of weeks before February 24th, they had been having relationship problems.(DeVries 34:81; Rogers 34: 148) On February 24, 2010, they argued about whether Rogers had been cheating on DeVries

¹
State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30(1998).

with Kaitlin, a mutual friend.(DeVried 34: 80 Rogers 34: 150). DeVries left their apartment and went to her friend Amanda's house.(DeVries34: 65; Rogers 34: 151)². She returned about 11:00 p.m.(DeVries 34:65; Rogers 34:151).

DeVries was going to sleep on the couch. (DeVries34:66; Rogers 34:156) Rogers was in the bedroom and, according to DeVries, she was in the hallway smoking a cigarette when the two started texting each other.(DeVries34: 66; Rogers). DeVries wanted to continue to talking about their problems, but Rogers wanted to have sex.(DeVreis 34: 66; Rogers 34:153). DeVries declined, saying she was not in the mood.(DeBries 34:67; Rogers 34:153).

The parties stories diverge as to what happened next. According to DeVries, sometime after midnight, Rogers came out of the bedroom and talked nicely to her saying he wanted her to come into the bedroom.(34:67). She went in an sat on the bed and he lay down.(34:67, 87). They were just talking when Rogers jokingly made a comment, "I can take it but that wouldn't be very pleasant for you."(34:67-68). They started wrestling and he started touching her.(Id:68). She said, "No."(Id.). DeVries testified that Rogers, eventually penned her face down on the bed, pulled her pants down and said,"Either I am going to put it in your pussy or put it in your butt."(Id). DeVries begged him to stop but he put his penis in her anus, yelling, "I did not have sex with Kaitlin."(Id).

2

The parties disagree about how long DeVries was gone. DeVries claimed she was away about two hours (34:82); Rogers testified it was six to eight hours.(34:151).

According to DeVries, she told Rogers he was going to kill her because she could not breathe. (34:69) He had one hand on her mouth and he kept smothering her into the pillows and blankets that were bunched up in the corner of the bed.(Id.). She was screaming loudly. (Id).

DeVries claimed that afterwards, Rogers cried saying he did not want to go to prison and begged her not to tell anyone.(34:70). DeVries said he would not let her leave the bedroom.(Id.). She finally was allowed to leave the bedroom to smoke a cigarette.(34:71).

DeVries testified that she left the apartment and went to knock on the neighbor's wall unsuccessfully trying to get his attention.(Id).

She went into the bathroom and noticed that she was bleeding from her anus.(Id.). She ended up sleeping on the couch.(34:72).

She sent a text message to her cousin Adena at about 3:15 a.m.(Id).

Rogers left the apartment in the morning.(34:73).

DeVries denied that Rogers threatened to kill her that night.(34:93). She admitted that Rogers had told her that he was thinking of leaving the relationship.(34:81) She claimed she wanted to leave as well.(Id.).

Rogers account differed. According to Rogers, on the afternoon of February 24th, Andrea told him she did not want him to leave the relationship and made threats if he did and then took off.(34:151). After she returned home there was some more arguing and then they started texting.(34:151). Rogers denied he ever went into the

hallway to coax DeVries into the bedroom. (34:153).

At one point Rogers texted DeVries asking her to come into the bedroom; when she said no, he texted, "Goodnight."(34:154). About 15 or 20 minutes later she came into the bedroom.(Id.). He was half asleep when she came into the bedroom and sat on the bed.(Id.). The two talked and cried then started making out.(34:154-55). They began to have anal sex - which was not the first time -but it hurt her and she said stop; he stopped immediately.(34:155). They engaged for a very short time in vaginal sex but she was not comfortable so they stopped.(34:165).

They smoked a cigarette together then DeVries went to take a bath.(34:155.) Rogers noticed that she was bleeding from her anus and apologized for hurting her.(Id.) He kissed her goodnight.(34:156).

One of their children woke up and DeVries attended to him.(34:156). Rogers fell asleep in the bedroom; when he awoke at about 10:00 in the morning DeVries was asleep on the couch. (Id.) He ate his breakfast, kissed her good-bye and left.(34:160). He did not know that anything was amiss until he went to the bank and found that all of the money in their joint account had been withdrawn.(Id.) Shortly thereafter, he was taken in for questioning.(34:161).

Rogers denied ever saying he was going to kill DeVries, ever grabbing her or putting his hand over her mouth.(34:157). He never told her would take it from her if she did not voluntarily give it to him.(34:158).

Adena Sparks testified that her cellphone received a text from DeVries at 3 am the morning of February 25, 2010, saying,

Adena never in my life have I ever needed sum1 more
than rite now plz call me its horrible

(Sparks 34: 100; 16: Exhibit 1).

Sparks called DeVries at 8:00 am and DeVries sounded scared. (34:100). Sparks, who lives three-and one-half-hours away offered to come and pick DeVries up.(34:101).

Amanda Gallert testified that DeVries arrived at her house about 10:00 p.m. and spend a two to three hours there on the night of February 24th.(34: 106,107). The next day, DeVries contacted Gallert at about 10:00 a.m.; she was crying and told Gallert something bad happened.(34:105, 108). She told Gallert that Rogers raped her. (34:105). DeVries drove to Gallert's apartment and Gallert encouraged DeVries to call DeVries's mother.(34:105). Gallert and DeVries met DeVries's mother at DeVries's grandmother's house, where they left the children and went to the hospital.(34:106).

Marie DeVries also testified that she met DeVries and Gallert at Marie's parents' home and then they went to the hospital.(34:112). According to Marie, DeVries was shaking, crying and very upset.(34:113). She was unable to sit down.(Id.)

Linda Sparks, the Riverview Hospital nurse testified that the SANE exam revealed that DeVries had redness around her anal opening, consistent with anal sex.(34:115, 116) She also said DeVries has some bruises but there was no testimony as to where the

bruises were located.(34:116).³

Sparks testified as to what DeVries told her.

Q. She indicates on 23 hours on 2/24, 2010, they were arguing about having sex with a friend of hers. She left and went to Amanda's house?

A. Um-hum.

Q. He was texting messages to her. Came back to house, he came to couch where she was sitting?

A. Um-hum.

Q. She then got up and went to bed...It says she then got up and went to bed. He pushed her down on bed?

A. Um-hum.

Q. He left with her -

A. Car.

Q. Five to ten minutes later, came back and said meaning the perpetrator, said I'm going to take your life?

A. Um-hum.

Q. That is what she told you?

A. Yes.

(Sparks 34: 118-119).

3

Indeed, the jury, during deliberations, asked, "Where did the nurse see bruising on Andrea?"(34:218). The court discussed the possible answer with counsel and noted,"That was just left open that there was bruising on the alleged victim in this matter, but no clarification as to where those bruises were."(Id.). The state agreed."I think we have to go with the answer she gave, and she just stated bruising.(34:219).

Detective Julie Brueger testified that she interviewed DeVries at Riverview Hospital in the afternoon of February 25, 2010.(34:123, 134). DeVries's voice was quivering, her hands were shaking and she was crying intermittently.(34:123). DeVries reported that she had been sexually assaulted by Rogers.(Id.).

Brueger talked with Rogers that same day.(Id.). Rogers told Brueger that DeVries had gone to Amanda's house and she got back about 11:00 or 11:30 p.m.(34:124). They had an argument about Rogers cheating on DeVries and DeVries was going to sleep on the couch; he was going to sleep in the bedroom.(34:124, 129). He told Brueger that Andrea came into the bedroom and he apologized for hurting her.(Id.) He began touching her.(Id).

He told Brueger that before DeVries came into the bedroom, they had been texting each other.(34:125). He wanted sex and she said she was not interested in sex.(Id.). After Andrea came into the bedroom, Rogers started kissing her and playing with her,(34:132). Eventually, they had anal sex because Andrea wanted to do something different.(34:133). However, after they started, she told him to stop because it hurt.(Id.). Rogers told Brueger he did stop.(Id).

He said they did have sex and he thought he might have hurt her because there was blood.(Id.) After sex, she went to the bathroom and then to attend one of the children.(34:126).

Brueger noted in her report that there were no signs of injury on DeVries's neck or throat when she interviewed her.(34: 134).

In the states case-in-chief, DeVries also testified that in June, Rogers came to her and asked her to lie about what happened and then he choked her to the point

of being unconscious.(34:77). On rebuttal DeVries testified that Rogers choked her in June when he found out she had not lied for him.(34:171). However, she admitted on cross examination that she previously testified that Rogers did not ask her to lie.(34:173). DeVries claimed she lied under oath because she was afraid.(Id.)

Roger testified that he asked DeVries why she was lying about him.(34:166). He denied asking her to lie or choking her.(34:159).

The defenses chose to waive giving Wis JI-Criminal 275, cautioning the jury on the use of other acts evidence. (34:183).

ARGUMENT

The trial court erroneously exercised its discretion in admitting other crimes evidence?

A. Standard of Review

The standard of review for a trial court's admission of other acts evidence is whether the trial court properly exercised its discretion. See *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

B. The Sullivan framework for analyzing whether other act evidence is admissible.

State v. Sullivan, 216 Wis.2d 768, 772-73 576 N.W.2d 30(1998), sets out a framework for analyzing whether other acts evidence is admissible against a defendant.

First, the trial court must determine whether the other acts evidence is offered for an acceptable purpose such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. If so, the second step then requires the trial court to decide if the evidence is relevant. With respect to relevance, before the evidence can be admitted the trial court must find that the proffered evidence is both related to a fact that is of consequence to the determination of the action and that the evidence has probative value. If the trial court decides that the other acts evidence passes steps one and two, the trial court then must weigh whether the probative value of this evidence is substantially outweighed by the danger of unfair prejudice.

C. The trial court erroneously exercised its discretion in allowing evidence that Rogers choked DeVries in June, 2010.

1. The choking evidence was not admitted for a proper purpose.

First of all, it should be noted that there is no evidence that Rogers choked DeVries on February 25th. All DeVries said is that Rogers had one hand on her mouth and he kept smothering her into the pillows and blankets that were bunched up in the corner of the bed, as she was screaming loudly.(34:69). She said nothing about him placing his hands on her neck.

State's stated purpose for offering evidence that Rogers choked DeVries in June was

to show the Defendant's motive, that his intent, plan or absence of mistake or accident in that the Defendant perpetrated these acts all on the same victim, intimidating the victim, subjecting that victim to abuse and violating the conditions of his bond in prior cases.

(31:3).

The charge against Rogers was second degree sexual assault, one wonders how an alleged choking incident - a completely different incident- three months later could show his intent or plan in February, 2010. Further, there was no suggestion that Rogers claimed he sexually assaulted DeVries by mistake. He claimed the sex was consensual.

The court ruled that the evidence could come in for the purpose of showing that Rogers grabbed DeVries by the throat to get her to submit.(33:4). However, as pointed out above, DeVries did not claim Rogers grabbed her by the neck to get her to submit to the sexual assault. Indeed, the detective saw absolutely no evidence of injury to DeVries's neck later the same day.(34: 134).

Whitty v. State, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967), holds that other acts evidence may not be used to show a defendant has a propensity to commit similar acts.

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

This *Whitty* holding has been reaffirmed by the supreme court in *Sullivan*, 216 Wis.2d at 783.

The other acts evidence that Rogers allegedly choked DeVries to unconsciousness in June, came in only to show that Rogers was a bad guy who used violence against DeVries. Following *Whitty, Sullivan* makes clear that kind of evidence of propensity for committing alleged acts is exactly the type of other acts evidence that may not be admitted.

2. The choking evidence was irrelevant.

Under Wis. Stat. § (Rule) 904.01, relevance has two facets. The first consideration in assessing relevance is whether the evidence relates to a fact or proposition that is of consequence to the determination of the action.

Sullivan, 216 Wis.2d at 785.

The “proponent of the evidence, here the State, must articulate the fact or proposition that the evidence is offered to prove.” *Sullivan*, 216 Wis.2d 786.

The state argued, “..the Defendant perpetrated these acts all on the same victim, intimidating the victim, subjecting the victim to abuse and violating the conditions to his bond in the prior case.” (31:3). It is not clear what the state was offering the evidence to prove, other than Rogers is a bad guy.

The court held that the evidence was relevant to Rogers intent - he uses grabbing DeVries throat to get

her to submit.(33:4). But, that evidence is completely irrelevant here, because DeVries did not say he grabbed her throat.

The second consideration in assessing relevance is probative value, that is, whether the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence.

The probative value of the other acts evidence in this case depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved.

Sullivan, 216 Wis.2d at 786.

Here, the choking incident was not probative. The time frame was several months apart and the circumstances of the alleged crimes were completely different.

3. The choking evidence was prejudicial.

A court should reach this issue only if the evidence has been shown to be admissible for a permissible purpose and is relevant. *Sullivan*, 216 Wis.2d 789. Nevertheless, even if the choking evidence had been admitted for a permissible purpose and was relevant, it was still unfairly prejudicial.

Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case

Sullivan, 216 Wis.2d 789-90.

The state referred to the June “choking” incident in its opening (34:59), its closing(34:191) and its rebuttal argument(34:200-201). Further it elicited DeVries testimony about the alleged incident on both its case-in-chief and its rebuttal case.(34:77, 171).

The evidence was repeatedly placed before the jury to arouse its horror at what a bad person Rogers is and to give the jury a sense that it should punish Rogers because he is the kind of person who chokes the mother of his children.

CONCLUSION

For the reasons stated above, Daniel K. Rogers asks this court to reverse his conviction and remand to the trial court for a new trial.

Dated: April 10, 2012

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional serif font, minimum printing resolution of 200 dots per inch, 14 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of the brief is 3892 words.

Patricia A.FitzGerald

I hereby certify that with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 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.

Patricia A. FitzGerald

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date .A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Patricia A. FitzGerald

cc:Wisconsin Department of Justice
Daniel K. Rogers