STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2013AP911-CR

JOHN M. LATTIMORE,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION MOTIONS, ENTERED IN THE LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE TODD BJERKE, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

1. **DID THE TRIAL COURT ERRONEOUSLY ALLOW OTHER ACTS EVIDENCE OF A SECOND SEXUAL ASSAULT ALLEGATION THAT SERVED NO REAL PURPOSE OTHER THAN DEMONSTRATING PROPENSITY TO COMMIT SEXUAL ASSAULT?**

Although it initially severed count 3 on the defendant's motion, the trial court later ruled that those allegations were admissible as other acts evidence under sec. 904.04(2), which led to the allegations being re-joined for trial.

2. **DID THE TRIAL COURT ERRONEOUSLY EXCLUDE EVIDENCE OF A THREAT MADE BY AN ALLEGED VICTIM'S**

BROTHER AGAINST THE DEFENDANT, EVEN AFTER THE STATE OPENED THE DOOR AT TRIAL?

The trial court held that the defense could ask witnesses about their knowledge of the threat, but the defense could not admit the actual threat as evidence. Despite a State's witness mischaracterizing the content of the threat at trial, the court still precluded evidence of the actual threat.

3. **DID THE TRIAL COURT ERRONEOUSLY ALLOW INADMISSIBLE CHARACTER EVIDENCE DESIGNED TO ELICIT SYMPATHY FOR THE ALLEGED VICTIM?**

The trial court found that the character evidence was admissible.

4. **DID TRIAL COUNSEL'S FAILURE TO SUFFICIENTLY OBJECT TO THE IRRELEVANT AND PREJUDICIAL CHARACTER EVIDENCE REGARDING S.M., AS WELL AS FAILING TO SUBMIT SIGNIFICANT IMPEACHING EVIDENCE REGARDING S.M.'S MOTIVE TO LIE, VIOLATE THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?**

The trial court found that the character evidence was admissible and that trial counsel did not perform ineffectively.

5. **WAS THE REAL CONTROVERSY NOT FULLY TRIED BECAUSE THE JURY DID NOT HEAR CRUCIAL EVIDENCE REGARDING S.M.'S MOTIVE TO LIE, AND BECAUSE THE JURY WAS ALLOWED TO HEAR IRRELEVANT AND PREJUDICIAL OTHER ACTS AND CHARACTER EVIDENCE, ENTITLING THE DEFENDANT TO A NEW TRIAL IN THE INTEREST OF JUSTICE ?**

The trial court held that the real controversy was fully tried.

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument, but is fully willing to provide oral argument if the court deems it helpful in addressing the merits of the appellant's claims.

STATEMENT ON PUBLICATION

The appellant believes publication is warranted based on two of the issues involved. First, the appellant believes publication is warranted pursuant to Wis. Stat. sec. 809.23(1)(a)5 because this case involves a substantial and continuing public interest – reaffirming the holdings of ***State v. Sullivan,*** 216 Wis. 2d 768, 576 N.W.2d 30 (1998) placing great emphasis on the similarity of facts between the prior bad acts and the underlying charges in order for the probative value to outweigh prejudice to the defense.

This case involves allegations that John Lattimore, a college student at UW-La Crosse, sexually assaulted two separate coed students approximately one month apart in the fall of 2010. Aside from involving the same defendant and same general time period, the incidents were factually dissimilar in virtually every respect. Both alleged assaults involved a consent defense, and as Wisconsin courts have found, one accuser's consent or lack thereof is irrelevant to whether the other accuser consented. Despite the lack of factual similarity, the trial court found the second sexual assault allegation admissible as other acts evidence at the trial of the first assault allegation, resulting in substantial prejudice to the defense. A published opinion by this court reaffirming the importance of factual similarity for other acts evidence espoused by ***Sullivan*** could halt the sprawling use of factually dissimilar other acts evidence that causes substantial and unwarranted prejudice to defendants at trial.

Second, the appellant believes publication would be appropriate because this identifies an issue of first impression, specifically whether Wisconsin must recognize a constitutional exception to the rape shield law for situations

where an accuser's prior sexual history provides their motive to falsify evidence, as required by the US Supreme Court in ***Olden v. Kentucky,*** 488 U.S. 227 (1988) (per curiam)**.** No published Wisconsin cases have addressed the application of Wisconsin's rape shield law in this context. Thus publication is appropriate pursuant to Wis. Stat. sec. 809.32(1)(a)2. Further, as this brief asks the court to modify Wisconsin's constitutional exception to the rape shield law to recognize the exception mandated by ***Olden v. Kentucky,*** publication is also warranted under Wis. Stat. sec. 809.32(1)(a)1, as it would be modifying an existing rule of law.

STATEMENT OF THE CASE

The State filed a complaint on November 2, 2010, charging Lattimore with committing 2nd degree sexual assault with the use of force and false imprisonment against S.M. on September 18, 2010 (R3: 1-2). The complaint alleged Lattimore invited S.M. to his UW-La Crosse dorm room, and the two began kissing before Lattimore pinned S.M. to the bed with his arm and removed her jeans (R3: 1-2). S.M. claimed that Lattimore then had nonconsensual intercourse with her, while she unsuccessfully attempted to push him off (R3: 2).

The State subsequently amended the complaint by adding an allegation that on October 18, 2010, Lattimore committed 3rd degree sexual assault against M.H., another student at UW-La Crosse (R5: 1-2). The complaint described a four-day period where M.H. and Lattimore had consensual sexual contact, such as kissing and oral sex, at Lattimore's dorm, each ending with M.H. spending the night (R5: 2-3). M.H. alleged that Lattimore repeatedly attempted to have intercourse with her, but she refused and Lattimore desisted (R5: 2). M.H. alleged that on the final night, Lattimore forced her to have vaginal intercourse despite her protests (R5: 2).

Lattimore was bound over for trial after a preliminary hearing (R124).

Lattimore's trial counsel, Todd Schroeder, moved to sever the M.H. allegations from the S.M. allegations, arguing they were improperly joined (R27). The motion argued the

allegations were not of the same or similar character because counts 1 and 2 involved an immediate forced rape of an acquaintance, over her unequivocal verbal and physical resistance, while count 3 involved a relationship where M.H. spent 3-4 nights with Lattimore and performed consensual sex acts on him multiple times before the allegedly nonconsensual intercourse (R27: 4-5). The motion argued joinder would cause Lattimore substantial prejudice because the jury would be left assessing Lattimore's credibility against two separate accusers (R27: 5-6). Further, the motion argued the allegations would not be admissible in as other acts in separate trials (R27: 6-10).

On March 14, 2011, the court ruled that joinder of the M.H. allegations with the S.M. allegations was improper. The court found the M.H. allegation would not be admissible as other acts because there was no acceptable purpose (R130: 20). Specifically, the court found that (1) intent was not an issue; (2) the 'motive' of having sex with many women was just a propensity argument; (3) the plan of taking these women to his dorm was not really a plan, it was just his residence; (4) identity was not an issue; (5) absence of mistake was not an issue because each alleged rape is unique (R130: 18-20). Further, the court found that any probative value was outweighed by prejudice (R130: 20).

The State subsequently filed an other acts motion[1] seeking to admit the M.H. allegations at trial on the S.M. allegations (R38). The State claimed the evidence was admissible for the purposes of proving motive and context, specifically Lattimore's "motive to sexually degrade, hurt and humiliate women," (R38: 8). A hearing was held on April 27, 2011. The court found the M.H. allegations admissible for the purposes of motive, opportunity, intent, plan, absence of mistake, and context (R133: 12-15). When attorney Schroeder requested clarification on how the other acts were admissible for motive, the court replied Lattimore's motive was "to try to achieve conquests" (R133: 17).

The defense moved to reconsider, and another motion

[1] The motion also sought to admit three other instances of Lattimore's alleged aggression toward other women. None of those allegations were admitted as evidence at trial.

hearing was held on May 9, 2011 (R135). The court upheld its prior ruling, stating the M.H. allegations were admissible for the purpose of showing "Lattimore's discretions toward women," (R135: 10). The court also found the evidence admissible for proving the use of force alleged in the S.M. incident (R135: 10). However, the court did not explain how the M.H. incident was relevant to use of force, considering force was not alleged in the M.H. allegations.

Since the court found the M.H. evidence admissible, the defense and State agreed that count 3 should be un-severed and tried jointly with counts 1 and 2 (R135: 12-14).

Jury trial was held from June 8-10, 2011. Lattimore was found guilty on counts 1 and 2 (S.M. allegations) and acquitted on count 3 (M.H. allegation) (R86). On August 31, 2011, the court sentenced Lattimore to six years initial confinement and six years extended supervision on count 1, and a consecutive sentence of one year initial confinement and two years extended supervision on count 2 (R94).

On September 12, 2012, Lattimore filed post-conviction motions alleging (1) the court erroneously admitted character evidence regarding S.M., (2) trial counsel performed ineffectively by insufficiently objecting to the character evidence and failing to submit evidence that S.M. lied to a SANE nurse, and (3) the real controversy was not fully tried because of those errors (R105).

Following an evidentiary hearing and written briefs, the court issued a written decision denying the defendant's motions (R117). The court held that the evidence related to S.M.'s character or changes in her demeanor was probative to the issue of consent (R117: 5). The court found no ineffective assistance regarding attorney Schroeder's handling of this evidence, since Schroeder made multiple objections, and the court held the evidence was admissible anyway (R117: 9-10).

The court further found that attorney Schroeder did not perform deficiently for failing to submit evidence of S.M.'s lie to the SANE examiner regarding her sexual history because (1) counsel correctly determined it was barred by rape shield, and (2) counsel strategically chose not to raise the

issue because it was factually dissimilar (R117: 12-14). Further, the court found no prejudice because it found a weak correlation between S.M.'s lie to the SANE examiner and the defense theory that S.M. lied about whether this incident was consensual (R117: 14-15). For the same reasons, the court found the real controversy was fully tried (R117: 15-19).

Lattimore filed a timely notice of appeal (R146).

STATEMENT OF FACTS

a. Allegations of S.M.

S.M. testified that she first knew Lattimore from high school, and saw him again at a college party, where she hugged and kissed him (R141: 61, 83-84). S.M. admitted that she was flirting with Lattimore that night, and she had been drinking (R141: 85). The next day they exchanged text messages, where S.M. apologized for being drunk, and Lattimore asked what would happen if they hung out (R141: 86, 92). S.M. replied they would have to "wait and see" (R141: 92).

On September 18th, at 10:00 pm, S.M. texted Lattimore to ask if they were going to meet up (R141: 92). Lattimore replied that he would meet her in his dormitory lobby (R141: 64). S.M. testified that once they went to his dorm room, Lattimore locked the door (R141: 65). S.M. and Lattimore engaged in consensual kissing on his bed (R141: 66).

According to S.M., when Lattimore tried kissing her again, she told him "no," but he got aggressive (R141: 67). S.M. said Lattimore pinned her down on the bed, and she tried unsuccessfully to get free (R141: 67-68). Lattimore didn't use a condom, and when S.M. told him she wasn't on birth control, Lattimore allegedly told her "that's what Plan B is for" (R141: 69). S.M. stated Lattimore removed her pants while simultaneously holding her down (R141: 108-09). S.M. testified Lattimore had no permission to restrain her or penetrate her (R141: 70). S.M. testified that she was telling Lattimore "no," and wasn't using a normal voice, but admitted she didn't yell anything and previously testified she said "no" in a normal voice (R141: 116-17).

Lydia Caldwell testified that she spoke with S.M. shortly after the incident, and S.M. initially told her "I fooled around with John" (R142: 232). Caldwell admitted she gave a statement to police indicating S.M. told her "I did something really bad," specifically that she had sex with Lattimore (R142: 236-37). According to Caldwell, S.M. subsequently stated she "didn't want to," and that Lattimore became "aggressive" (R142: 232).

S.M's father Joel testified they received a call from S.M. around 2 am, at which point S.M. described being raped (R141: 180). Joel and Lori M., S.M.'s mother, drove to meet S.M. and took her to Meriter Hospital to get a SANE exam (R141: 180-81).

SANE nurse Susan Liddle examined S.M., and observed a tear down S.M.'s posterior fourchette and redness to the labia, which she believed was consistent with blunt force trauma (R142: 141-42). Liddle believed her physical findings were "consistent" with S.M.'s account of sexual assault (R142: 151-52). However, Liddle admitted that injuries to the posterior fourchette and redness could both be consistent with consensual sex (R142: 152, 159).

Dr. Therese Zink, a physician at the University of Minnesota, testified that sexual assault studies showed injuries occurred during consensual sex 55% of the time, including tears (R142: 176, 180). Zink reviewed the SANE exam findings and explained that redness to the labia demonstrates only that there's been friction (R142: 189). Zink concluded that the presence of a tear cannot distinguish between consensual or nonconsensual intercourse – just that it is consistent with intercourse (R142: 190).

S.M. testified that the day after the alleged assault, she spoke to Officer Miller about the allegation, but did not report than an assault occurred (R141: 79). S.M. testified she didn't confirm the allegation out of shame and embarrassment (R141: 79). On October 27, 2010, nearly six weeks after the alleged assault, S.M. reported to Officer Miller that Lattimore had assaulted her (R141: 80). S.M. told Officer Miller that Lattimore had asked to meet up with her, but failed to

mention any of the texts S.M. sent to Lattimore about meeting up (R141: 112-13). Further, S.M. didn't mention anything about the fact that she kissed, hugged, and flirted with Lattimore previously (R141: 133-34). S.M. made this report five days after learning that Lattimore claimed he was getting S.M.'s brother Josh banned from campus for sending Lattimore a threat on Facebook (R141: 132) (see section II, *infra*).

b. Allegations of M.H.

Although the jury found Lattimore not guilty of assaulting M.H., her testimony will be summarized as it pertains to whether it should have been admissible as other acts.

M.H. met Lattimore at a sub shop on campus, after which they began talking and exchanged phone numbers (R141: 201-02). She and Lattimore spent three nights together; no intercourse occurred on their first night together, but they "cuddled" together and were "making out" (R142: 13-14, 30). The next morning, when Lattimore tried to have intercourse with her, M.H. said no, and Lattimore did not force her (R142: 14). M.H. admitted that she and Lattimore kissed and she performed oral sex on him (R142: 37). That night, M.H. again performed oral sex on Lattimore (R142: 15). Lattimore attempted to have anal intercourse with M.H., but she asked him to stop, and he stopped and they continued to kiss (R142: 15). M.H. testified that the next morning, Lattimore again wanted sex, but M.H. refused and Lattimore again desisted (R142: 16).

On their third night, M.H. watched a movie with Lattimore and his roommates before going into Lattimore's bedroom, laying on his bed, and kissing him (R142: 43-44). M.H. claimed Lattimore then had nonconsensual intercourse with her despite telling him she didn't want to (R141: 224). M.H. claimed it was "uncomfortable" but didn't tell Lattimore that it hurt (R142: 45). Despite allegedly being raped, M.H. admitted that she and Lattimore had "a little morning sex" the next morning (R142: 49). Later that day M.H. sent text messages asking Lattimore what happened between him and M.H.'s friend Angela, as well as telling

Lattimore things were moving too fast and that he didn't respect what M.H. wanted (R142: 52).

c. Testimony of Lattimore

John Lattimore testified that the day after S.M. flirted with him at the party, they began texting about meeting up (R143: 44-45, 51-53). Lattimore tried to meet S.M. somewhere other than his room, but she suggested his dorm (R143: 54-55). Lattimore testified that he and S.M. went into his bedroom and began kissing on the bed, at which point they each removed their shirts (R143: 56-57). S.M. performed oral sex on him, after which they had intercourse for a couple minutes (R143: 57-58). Lattimore admitted that when S.M. told him she wasn't on birth control, Lattimore stated "that's what Plan B is for" (R143: 58). According to Lattimore, after they had sex, S.M. wasn't in a good mood anymore (R143: 59). Lattimore denied holding S.M. down or doing anything against her will (R143: 67).

Lattimore testified that the first night he and M.H. hung out, she performed oral sex on him at his dorm (R143: 73). They did not have intercourse because M.H. was on her period (R143: 74). The next day M.H. texted him to say she was "thinking about him," and they again spent the night at his dorm (R143: 76). More sexual contact occurred that night, as well as the following morning (R143: 79-80). Lattimore confirmed that during these incidents, M.H. was never forced to do anything sexual (R143: 80). Lattimore testified that on their third night he and M.H. went to the Cellar with his roommate, and then took food back to the dorm (R143: 83). Lattimore testified he and M.H. had sexual intercourse, and after M.H. again spent the night, they had sex again in the morning (R143: 84-85). M.H. subsequently sent a text message asking what happened between him and Angela, after which M.H. broke up with him (R143: 85).

Additional facts will be provided where needed.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY

ALLOWED OTHER ACTS EVIDENCE OF A SECOND SEXUAL ASSAULT ALLEGATION THAT SERVED NO REAL PURPOSE OTHER THAN DEMONSTRATING PROPENSITY TO COMMIT SEXUAL ASSAULT

A. Standard of Review

Lattimore submits that the evidence regarding M.H. (count 3) was not admissible as other acts evidence at the trial regarding the S.M. allegations because only real purpose was to show propensity. Admission of this evidence improperly forced Lattimore to defend not just against the individual allegations, but against the inference that he was a serial rapist.

Appellate courts review a trial court's decision on whether to admit other acts evidence for whether the trial court erroneously exercised its discretion. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. Whether the admission of evidence meets statutory requirements is a question of law subject to de novo review. ***State v. Doss***, 2008 WI 93, ¶20, 312 Wis. 2d 570, 754 N.W.2d 150.

B. Since Consent was the Only Issue at Trial, Allegations that Lattimore Assaulted M.H. Were Not Admitted for a Permissible Purpose, and Constituted Improper Propensity Evidence

Other acts evidence "is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Wis. Stat. sec. 904.04(2)(a). Other acts evidence may be admissible if it is offered for non-character-inference purposes such as to prove motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* ***id***. Other acts evidence must also be relevant, and the danger of unfair prejudice must not substantially outweigh the probative value of the proffered evidence. *See* ***Sullivan***, 216 Wis. 2d at 772. The proponent of the evidence bears the burden of persuading the court that these three elements are satisfied. ***Id***. at 774.

The only defense raised at trial was consent. Whether or not one female consents to sex is irrelevant to whether or not another female consents to sex. ***State v. Alsteen,*** 108 Wis. 2d 723, 730 (1982) ("Evidence of [defendant's prior acts] has no probative value on the issue of consent. Consent is unique to the individual"); *see also* ***Lovel v. U.S.,*** 142 F.2d 85 (4th Cir. 1948) ("[t]he overwhelming weight of authority is that such evidence is not admissible in prosecution for rape…The fact that one woman was raped…has no tendency to prove that another woman did not consent").

Regardless, the circuit court found the M.H. allegations satisfied several of the enumerated permissible purposes for other acts evidence, specifically motive, opportunity, intent, plan, absence of mistake, and context (R133: 13-15). The defense contends the only real purpose for admitting the M.H. evidence on the S.M. allegations is to show propensity. Indeed, in denying the defendant's motion to reconsider, the court characterized the permissible purpose of the evidence as "showing Mr. Lattimore's discretions toward women," (R135: 10). There can be no clearer code for propensity.

A closer look at the evidence of the two alleged assaults shows that none of those statutorily enumerated purposes are applicable.

a. Motive

Prior acts are relevant to establish motive under two broad categories. First, when the other act creates or establishes the motive to commit the specific crime alleged. *See* ***State v. Cofield,*** 2000 WI App 196, ¶ 12, 238 Wis. 2d 467, 618 N.W.2d 214. Since the M.H. assault occurred after the alleged assault of S.M., those acts cannot provide the motive for committing sexual assault against S.M.

The second category is where the other act is sufficiently similar to the crime charged and where the State must prove that the defendant had the specific motive at issue. Under this category, motive is only relevant when the element of the charged offense involves a specific purpose requirement. *See* ***Cofield,*** ¶12 (despite similarities, prior

sexual assault convictions were not relevant to prove motive because "there is no purpose element in the crimes charged").

There is no purpose element to either counts 1 or 2. Thus the allegations involving M.H. were not admissible to establish motive. Note that when asked for clarification on how the other acts evidence established motive, the trial court explained that the motive at issue was Lattimore's perceived motive to try to "achieve conquests" (R133: 17). Again, this is nothing more than propensity evidence.

b. Opportunity

There was no dispute that Lattimore had sexual intercourse with S.M. in his dorm, which the defense acknowledged in its pretrial pleadings (R37: 12), and Lattimore confirmed this in his trial testimony (R143: 56-59). Opportunity was simply not an issue at trial. Moreover, the fact that Lattimore was alleged to have assaulted M.H. approximately one month later had absolutely no bearing on whether he had an opportunity to assault S.M. Opportunity was not an applicable purpose.

c. Intent

The trial court found the other acts evidence was relevant to show Lattimore's intent to have intercourse, whether consensual or not (R133: 13). However, the intent exception to the prohibition on other acts evidence is not applicable when the crime alleged does not have an element of specific intent. *See* ***State v. Rushing***, 197 Wis. 2d 631, 541 N.W.2d 155 (Ct. App. 1995) ("Because the State does not have to prove intent, the evidence of Rushing's prior act is not admissible to show proof of motive or intent"). Lattimore was charged under sec. 940.225(2)(a), and intent is not an element of sub. (2)(a). ***State v. Neumann***, 179 Wis. 2d 687, 508 N.W.2d 54 (Ct. App. 1993). Thus intent is not a valid purpose for admitting other acts evidence.

d. Plan

The trial court found the other acts were admissible to show Lattimore's "plan to go through with what he wants

regardless of consent" (R133: 14). This shows a fundamental misunderstanding of the caselaw defining a 'plan' for other acts purposes. The court in ***State v. Spraggin*** stated that "Evidence showing a plan establishes a definite prior design, plan, or scheme which includes the doing of the act charged. As Wigmore states, there 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.'" 77 Wis. 2d 89, 99, 252 N.W.2d 94 (1977); *see also* ***State v. Harris***, 123 Wis. 2d 231 (Ct. App. 1985) (Other acts which are separate incidents, not related to steps in a plan, are not admissible under this exception).

There was no evidence presented that Lattimore's alleged assault of S.M. was one step in a plan so that a month later he could enter into a relationship with M.H. and force her to have intercourse. And it would be absurd to suggest Lattimore entered a relationship with M.H. and assaulted her in October so that he could assault S.M. a month earlier.

Since there is no evidence showing any sort of scheme or plan linking the two alleged assaults together, the other acts were not admissible to show a plan.

e. Absence of Mistake or Accident

Evidence showing absence of mistake would only be valid if the defendant claims mistake or accident. ***State v. Meehan***, 2001 WI App 119, 244 Wis. 2d 121, 630 N.W.2d 722. Lattimore made no claim of mistake or accident (R143: 56-69). Indeed, since sec. 940.225(2)(a) does not require proof of intent, mistake or accident would not be a defense to the crime. ***Neumann***, 179 Wis. 2d at 693. The only issue was whether or not S.M. consented to the sexual intercourse. And mistake is not a defense to the issue of consent. *See* Wis. JI-Criminal 1208, comment 6*:* "If the jury finds that the victim did not in fact consent, it apparently is not defense that the defendant believed there was consent, even if the defendant's belief is reasonable." Thus whether or not Lattimore was "mistaken" as to the issue of consent was not relevant and would not justify admission of the other acts.

f. Context

The trial court also held that the jury wouldn't have the full context of the alleged assault of S.M. without evidence regarding the alleged assault of M.H. (R133: 14). The court provided no further elucidation of why that was the case.

As in ***Hunt,*** 2003 WI 81, ¶¶58-59, other acts are admissible to show context when those acts involve the defendant and a victim or witness to the particular crime alleged. In other words, the other acts focus on the larger context of the crime alleged, not the context of the defendant's alleged propensity to engage in other arguably similar conduct. In Lattimore's case, the other acts involving M.H. demonstrate nothing about the context of the alleged assault against S.M. from a month earlier. There was no connection between these alleged victims aside from attending the same university. The only context the allegation regarding M.H. added was the alleged propensity of Lattimore to be aggressive toward women, which is exactly what sec. 904.04(2) prohibits.

C. The Alleged Assault Against M.H. was Irrelevant to the Alleged Assault Against S.M. Because Whether One Victim Consented was Irrelevant to the Consent of Another, and the Facts Were Dissimilar

The trial court found the allegations regarding M.H. relevant as other acts because "the other acts seem to be very similar," and because "it goes toward the allegation of sexual intercourse by use of force…[and] overcoming consent by use of force" (R133: 14).

In ***Sullivan***, the court noted that probative value of the other-acts evidence depended on the similarity of the other event to the charged behavior. 216 Wis.2d at 786-87. Greater similarity means greater probative value. See ***id.*** While the court noted that the degree of similarity necessary for admission cannot be quantified, it made it clear that "[t]he greater the similarity, complexity, and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." ***Id.*** at 787.

The trial court did not explain why it believed these alleged assaults were "very similar." The two allegations shared only superficial similarities – the same location (Lattimore's dorm room), the same general time frame (September and October 2010), and aggression by Lattimore. Beyond that, the allegations were not remotely similar.

According to S.M., aside from some flirting at a party, she and Lattimore had not spent any time together in advance of the alleged assault. S.M. claimed that after some brief kissing on his bed, Lattimore physically restrained her and forcibly raped her over her protests. S.M. claimed that none of the sexual contact was consensual. All of this happened on a single night, and they engaged in no other activities aside from sex.

By contrast, M.H. was in an ongoing (if brief) relationship with Lattimore, where they went out to eat, watched movies, and spent time with friends. They engaged in various acts of consensual sexual contact (including M.H. willingly performing oral sex on Lattimore on both the morning and night of the second day (R142: 15, 37)). They spent each night sleeping and "cuddling" in the same bed (R142: 13-14). M.H. even described multiple instances where she refused certain acts (vaginal intercourse the second morning (R142: 14), anal intercourse the second night (R142: 15)) and Lattimore willingly desisted. M.H. made no allegation that Lattimore restrained her against her will during the alleged assault. Further, M.H. admitted to having "a little morning sex" with Lattimore again the morning after the alleged assault (R142: 49).

The M.H. allegations were too factually dissimilar to have any real probative value regarding the S.M. allegations. The trial court seemed to believe that the relevance accrued from the theory that Lattimore used force to overcome S.M.'s consent, and the fact that he allegedly was aggressive with M.H. was relevant to the issue of consent. However, whether or not one female consents to sex is of no relevance to whether another female consents, because "[c]onsent is unique to the individual." ***Alsteen,*** 108 Wis. 2d at 730. And unlike S.M., M.H. made no allegation that Lattimore used

force or physically restrained her.

D. Admitting Evidence of the M.H. Allegation at Trial on the S.M. Allegation was Unduly Prejudicial Because it Suggested a Pattern of Predatory Behavior

The State portrayed Lattimore as a sexual predator taking advantage of naïve young women (R143: 200) ("The defendant is not a player. He is a rapist. He exploits vulnerabilities, they're (sic) naiveté, their poor judgment"). As a result, rather than being able to focus on whether Lattimore committed the assault on one girl or the other, the defense was forced to counter the inference that Lattimore was a serial rapist, suggesting that Lattimore was a "player" or a "womanizer," but not a rapist (R141: 54-55).

The fact that the jury acquitted Lattimore on count 3 does not change the fact the M.H. allegations likely influenced the jury's credibility determination negatively against Lattimore. The S.M. allegations were essentially a "he-said-she-said" credibility contest over whether S.M. consented to sexual intercourse. The jury had to evaluate Lattimore's credibility against not just the allegation of S.M., but also the unrelated allegation of M.H. The evidence regarding M.H. was clearly weaker, considering the ongoing relationship involving consensual sexual contact, but the jury was likely left with the belief that Lattimore was sexually aggressive and did not respect the wishes of his partners. Adding M.H.'s allegations about Lattimore's aggressive behavior, repeatedly attempting to have sex with her until she protested, culminating in an assault, almost certainly undercut Lattimore's credibility with the jury.

Since the two allegations were factually dissimilar, and the M.H. allegations served no acceptable purpose, the court erred by finding them admissible as other acts. If not for this erroneous finding, trial counsel would not have stipulated to re-joining the charges for trial. The resulting prejudice of making Lattimore defend against two unrelated rape charges violated his due process rights and necessitates a new trial.

II. EXCLUSION OF THE FACEBOOK THREAT MADE BY S.M.'S BROTHER AGAINST LATTIMORE DENIED HIM DUE PROCESS AND THE RIGHT TO PRESENT A DEFENSE

A. Standard of Review

The defense sought admission of a threatening Facebook message sent by S.M.'s brother, Josh, to Lattimore (hereafter "Facebook threat") because it was a link in the chain of events that resulted in S.M.'s delayed reporting of the alleged assault (R44). Although the court allowed witnesses to testify regarding their knowledge of the existence of the Facebook threat, the court excluded the actual threat from trial, even after a witness completely mischaracterized its substance. This exclusion was erroneous and denied Lattimore's right to present a defense.

The decision to admit or exclude evidence is discretionary, reviewed for whether the trial court erroneously exercised that discretion. ***Hunt***, ***id.***, ¶34. However, whether the admission of evidence meets statutory requirements is a question of law subject to de novo review. ***Doss***, ***id.***, ¶20.

B. Relevant Facts

The day after the alleged assault, S.M.'s brother Josh sent Lattimore a Facebook message stating as follows:

> We both know what you did. I want you to know that this situation isn't even close to settled. There is concrete medical proof proving that you did not have consent. Legal action will be taken as well as an order of protection enforced. Do not text, call, or contact her in anyway (sic) or the ramifications will effect (sic) your safety.

(R44: 4) (emphasis added).

The defense argued this threat was relevant to S.M.'s late reporting and her motive to lie, because S.M. initially would not confirm to police she was assaulted, and told police she was assaulted on October 27, 2010 (R44: 2-3). This came five days after Lattimore told S.M.'s friend Amber Schade that Lattimore got S.M.'s brother banned from campus (R44:

2-3).

The court initially ruled that the defense could ask witnesses about the Facebook threat, but the actual message could not be used at trial (R137: 10, 15). The court believed the Facebook threat itself constituted hearsay (R138: 12-15). Attorney Schroeder contended it would not be used for the truth of the matter asserted (i.e. that statements in Josh's message to Lattimore were true), but for the effect it had on S.M. once she learned Lattimore said he hired a lawyer and that Josh was banned from campus, but the court disagreed (R138: 12-15). The court subsequently concluding that the Facebook threat's content was irrelevant, and affirmed its exclusion (R139: 16).

S.M. admitted she became aware that Josh sent Lattimore a Facebook message because her parents told her (R141: 130-31). S.M. testified she didn't see the actual message, but her parents told her about its content (R141: 148). On October 22, 2010, S.M. learned about Lattimore's statement to Amber Schade, who told her Lattimore asked about the threat from S.M.'s brother (R141: 132). According to S.M., Amber told her Lattimore said Josh could be banned from the university campus, and that Lattimore had spoken with an attorney (R141: 132). S.M. first reported the assault to police five days later (R141: 132).

Schade confirmed that she told S.M. about her conversation with Lattimore (R141: 172). When she began to relate what Lattimore told her, the court held a sidebar, where the defense made an offer of proof consisting of Schade's testimony – specifically that Amber told S.M. that Lattimore had told Amber S.M. lied about the allegation, that S.M.'s brother had been banned from campus, and that Lattimore hired a lawyer (R141: 173). The defense argued this was not for the truth of the matter asserted, but to show S.M.'s state of mind and why she made the report at that time (R141: 173). The court ruled Schade could testify that she'd advised S.M. of her contact with Lattimore, but that anything about the nature of the Facebook threat was irrelevant (R141: 174).

Consistent with the court's pretrial ruling that the defense could ask witnesses about their awareness of the

Facebook threat (R137: 10), Schroeder asked S.M.'s mother Lori if she was aware of the Facebook message (R141: 195). Lori replied, "it was more a big deal of what [Lattimore's] response was. All the Facebook message was as a brother was saying, please do not have any contact with - - with - - with his sister, and if he did - - all he wanted was for him to stay away from her," (R141: 195). Lori clarified that she personally read the message and Lattimore's response (R141: 195). However, when attorney Schroeder asked her what the message said, the court precluded Lori from answering (R141: 195).

Attorney Schroeder argued the witness opened the door, because his initial question didn't ask about the message's content, but the witness volunteered incorrect information about what the message said (R141: 196). The court responded that Schroeder opened the door himself (R141: 196). When Schroeder pointed out the witness misquoted both parts of the Facebook message, the court stated, "I don't care," and precluded further testimony (R141: 197).

The Facebook threat's actual content was never submitted to the jury.

C. The Facebook Threat Was Not Hearsay and Was Relevant to Explain S.M.'s Motive For Reporting the Allegation To Police

The Facebook threat was clearly not hearsay. A statement is only hearsay when admitted for the truth of the matter asserted. Wis. Stat. sec. 908.01(3). The defense was not seeking to prove the truth of the matter asserted here – that the ramification of Lattimore attempting to contact S.M. would affect his safety. The Facebook threat was offered to show how it motivated the chain of events that led to S.M. reporting the assault to police (R44: 3); *see, e.g.,* ***State v. Kutz,*** 2003 WI App 205, ¶36, 267 Wis. 2d 531, 671 NW2d 660 ("There is no dispute that an out-of-court instruction to do something is not hearsay when offered to prove that the instruction was given and, accordingly, to explain the effect on the person to whom the instruction was given").

The content of the threat was also relevant for numerous reasons. It explained why Lattimore did not contact S.M. after the night in question, why he asked Amber Schade about the threat, and why he told Schade he was taking legal action against Josh. Most importantly, it provided a reason for S.M. to be concerned that legal action would be taken against Josh. This, in turn, provided S.M. motive to falsely tell police Lattimore raped her, which she did five days after learning Lattimore was supposedly getting Josh banned from campus. Since S.M.'s motive to lie is clearly a fact "of consequence to the determination of the action," the Facebook threat was relevant. *See* Wis. Stat. sec. 904.01.

D. Exclusion of the Facebook Threat Denied Lattimore's Right to Present a Defense

Since this case was a credibility contest, developing S.M.'s motive to fabricate the assault was crucial to the defense. The defense argued that S.M. initially told her friend and parents that the intercourse was nonconsensual out of shame and embarrassment, but initially didn't spread the lie to Officer Miller. The defense further argued S.M. subsequently changed her mind after Lattimore claimed to be getting S.M.'s brother banned from campus due to the Facebook threat. Lattimore was entitled to present a full defense, which required explaining the chain of events.

Simply allowing witnesses to testify about the existence of the Facebook threat was insufficient to satisfy that right. The persuasive nature of a motive to lie depends heavily upon whether that motive is credible and compelling. If S.M. had no legitimate reason to believe that Josh's Facebook message could actually get him banned, S.M. would have no motive to get Lattimore in trouble. Thus the content of Josh's message was relevant to S.M.'s state of mind and whether Lattimore's threat of legal action actually gave cause for concern, and therefore motive to lie. Preventing the jurors from learning the content of the message blunted the impact of the alleged motive to lie.

The impact was further diminished when Lori M.

completely mischaracterized the message by essentially denying its threatening nature ("All the Facebook message was as a brother was saying, please do not have any contact with - - with - - with his sister, and if he did - - all he wanted was for him to stay away from her") (R141: 195). The court exacerbated the problem exponentially by prohibiting the defense from presenting the actual threat to the jury.

Thus the jury was left with the completely incorrect impression that the 'Facebook threat' contained no actual threat. In the absence of any actual threat, the jury wouldn't find credible the claim that S.M. had reason to believe Lattimore could get Josh banned from campus. If Lattimore's statement was not a credible threat, then the motive to fabricate is not credible either.

The court's rulings excluding the Facebook threat, both before and during trial, constituted an erroneous exercise of discretion and denied Lattimore's right to present a full defense.

III. THE TRIAL COURT ERRONEOUSLY ALLOWED INADMISSIBLE CHARACTER EVIDENCE DESIGNED TO ELICIT SYMPATHY FOR S.M.

A. Standard of Review

Over defense objections, numerous witnesses testified regarding S.M.'s positive character traits and how her personality supposedly changed after the alleged assault. None of this evidence was relevant to guilt or innocence. It was improper character evidence designed to play on juror sympathy, posing undue prejudice. The trial court's admission of this evidence was erroneous and violated Lattimore's due process rights.

Whether testimony is relevant and admissible is addressed to the trial court's discretion. ***State v. City of La Crosse***, 120 Wis. 2d 263, 268, 354 N.W.2d 738 (Ct. App. 1984). The exercise of discretion, however "is not the equivalent of unfettered decision making," and reviewing

courts will reverse such a decision if based on an error of law, ***State v. Daniels***, 160 Wis. 2d 85, 100, 465 N.W.2d 633 (1991).

B. Relevant Facts

The State began discussing S.M.'s character in opening arguments, stating that people who know S.M. describe her as fun and confident with contagious laughter (R141: 21). Attorney Schroeder objected to this as character evidence, and the court overruled. The State continued by discussing where S.M. grew up and the fact that she was away from home for the first time (R141: 21). The State noted that S.M. once intended to be an adolescent physical therapist or a pediatrician, and now wanted to own a day care (R141: 21). The State then argued that following her encounter with Lattimore, S.M. was now fearful, doesn't let her guard down, was no longer happy-go-lucky, and suffered from depression and anxiety (R141: 27).

S.M. testified that she intended to become an adolescent physical therapist, but switched to a double major in business and child education, as she wanted to own a day care business (R141: 59). She was asked how her personality changed since the incident, and described a lack of trust, the fact that she was missing school, and took medication for anxiety and depression (R141: 81). Further, she testified that now her guard was up, she didn't trust people, and wouldn't go into rooms alone (R141: 81). She testified that she was not sleeping well, had night terrors, and made people sleep with her (R141: 82). She was asked to describe the night terrors, and attorney Schroeder objected to relevance, but the court overruled (R141: 82). S.M. testified that she had dreams about the night of incident, and that she cried for Lattimore to stop (R141: 82).

S.M.'s father, Joel M., testified that Lattimore "took away her laughter," and that S.M. is now fearful, reserved, and sleeps with her mother (R141: 182-83). Joel testified that S.M. was scared and untrustworthy of others, whereas she used to be open and was there for others (R141: 183). Joel began testifying about how S.M. used to help little kids at

school, when attorney Schroeder objected to relevance, and the court sustained (R141: 183).

When the State asked S.M.'s mother Lori similar questions, Schroeder objected and requested a sidebar (R141: 186-87). Schroeder explained that the defense objected to questions designed to elicit sympathy for S.M., as they were irrelevant and duplicative (R141: 187). The court ruled that observations about S.M. and changes in her personality were relevant and not duplicative, but counsel could renew objections to particular questions (R141: 188). Lori then testified that S.M. had always been high spirited, fun loving, but stated S.M. is now more needy and has some insecurity (R141: 193). Lori testified that sometimes S.M. is dreaming, shaking her head back and forth going "no, no, no," and would wake up crying (R141: 194).

Lydia Caldwell testified that now S.M. hates being alone, was not herself, and doesn't argue anymore (R142: 243). She made observations of S.M. while staying overnight with her (R142: 244). Defense counsel objected to relevance, but the court overruled (R142: 244). Lydia testified that now S.M. talks in her sleep, saying "no, no," and starts crying (R142: 244).

The State again referred to S.M.'s character in closing arguments, stating, "[S.M.], whose laughter was contagious, independent, who is now needy and anxious and sleeping with her mother," (R143: 204).

C. The Character Evidence Was Irrelevant

There are two prongs to consider in determining whether evidence is relevant under sec. 904.01: "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….The second consideration in assessing relevance is whether the … evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." ***Sullivan***, 216 Wis. 2d at 785-86.

Lattimore submits that the character evidence regarding S.M. fails both considerations of relevance. In support, see ***State v. Jacobs***, where the court of appeals determined that testimony from a victim's mother about the victim's character and personal history was irrelevant. 2012 WI App 104, 344 Wis. 2d 142, 822 NW2d 885. Jacobs had been convicted of homicide by use of a vehicle with a prohibited alcohol concentration for running a stop sign, colliding with another car and killing the victim. ***Id.,*** *¶*1. Jacobs argued his trial counsel was ineffective for failing to object to character testimony from the victim's mother regarding the victim's personal history at trial. ***Id.*** The court of appeals concluded that testimony was "blatantly irrelevant," and further concluded that the jury's possible negative reaction to an objection was not a sufficient tactical reason for counsel's failure to object. ***Id.,*** *¶¶* 28-30.[2]

The character evidence submitted here was similarly irrelevant to guilt or innocence. None of the character evidence cited above made the existence of any fact of consequence in this case more or less probable. Testimony about S.M.'s "contagious laughter" made nothing of consequence more or less probable. Testimony that S.M. was away from home for the first time made nothing of consequence more or less probable. Testimony that S.M. intended to be an adolescent physical therapist or pediatrician made nothing of consequence more or less probable. This evidence was only designed to garner juror sympathy for S.M..

Likewise, testimony about S.M.'s personality changes, the fact that she missed school, the fact that she started seeing a therapist, and the fact that she made someone sleep with her and had night terrors did not make any facts of consequence more or less probable.

D. The Character Evidence Was Unduly Prejudicial and Outweighed Any Possible Probative Value

[2] The court upheld Jacobs's conviction because it found the evidence of Jacobs's guilt was overwhelming, so there was no prejudice despite the admission of the irrelevant character evidence. ***Id.,*** *¶*1.

Even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Wis. Stat. sec. 904.03. Therefore, assuming *arguendo* the evidence was relevant, it should not have been admissible due to undue prejudice and improperly playing on jury sympathy.

"Evidence is prejudicial if it has a tendency to influence the outcome by improper mans 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." ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 138, 403 N.W. 2d 747 (1987). The evidence should be excluded if it contains an underlying message about character "that a jury would find hard to ignore." ***State v. Jackson***, 216 Wis. 2d 646, 667, 575 N.W. 2d 475 (1998).

"The standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome by 'improper means.'" ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W. 2d 463 (Ct. App. 1994). In making this determination, courts are to remember that "as the probative value of relevant evidence increases, so will the fairness of its prejudicial effect." ***Id.***

The probative value (if any) of the character evidence is extremely low. By contrast, the danger of unfair prejudice was extremely high, considering the State portrayed Lattimore as a sexual predator taking advantage of naïve young women (R143: 200). Testimony about S.M. growing up in a small town and being away from home for the first time, while shedding no light on whether or not Lattimore committed these offenses, improperly appealed to jury sympathy and promoted a desire to punish. Likewise, testimony that S.M. was high-spirited with contagious laughter until Lattimore "took away her laughter" (R141: 182) was designed only to play on the jurors' heart strings. Just like in ***Jacobs,*** the evidence had nothing to do with guilt or innocence. Admission of this evidence constituted an erroneous exercise of discretion, and warrants a new trial.

IV. TRIAL COUNSEL'S FAILURE TO SUFFICIENTLY OBJECT TO IRRELEVANT AND PREJUDICIAL CHARACTER EVIDENCE, AS WELL AS FAILING TO SUBMIT SIGNIFICANT IMPEACHING EVIDENCE REGARDING S.M.'S MOTIVE TO LIE, VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Although attorney Schroeder zealously advocated on Lattimore's behalf, even a single mistake by an attorney can be significant enough to warrant a new trial when that mistake prejudices the defense. Lattimore submits that Schroeder performed ineffectively on two important issues; first, that he did not sufficiently object to the improper character evidence; and second, he failed to submit crucial impeaching evidence to attack S.M.'s credibility and motive to lie.

Criminal defendants are constitutionally guaranteed the right to the assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's representation was deficient. ***Strickland***, 446 U.S. at 687. The defendant must also show that he or she was prejudiced by the deficiency. ***Id.***

Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. ***Id.*** at 688. When evaluating counsel's performance, courts must avoid the "distorting effects of hindsight." ***Id.*** at 689. To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. Thiel***, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694.

B. Counsel Performed Deficiently By Failing to Sufficiently Object to Inadmissible Character Evidence

While attorney Schroeder lodged several objections to character evidence, Schroeder failed to object on certain occasions, which arguably waived his right to challenge that evidence. An objection is only sufficient to preserve an issue for appeal if it appraises the court of the specific grounds upon which it is based. ***State v. Nelis,*** 2007 WI 58, ¶31, 300 Wis. 2d 415, 733 N.W.2d 619.

As discussed in section III*, supra,* Schroeder objected to the State's opening arguments referencing character evidence, and was overruled (R141: 21). Counsel then made no objections to the statements that S.M. was away from home for the first time, that S.M. once intended to be an adolescent physical therapist or a pediatrician, and now wanted to own a day care, and that S.M. was now fearful, doesn't let her guard down, was no longer happy-go-lucky, and suffered from depression and anxiety (R141: 21, 27). Each statement was objectionable on the grounds of relevance, prejudice, or character evidence.

S.M. testified about her educational goals with no objections from counsel for relevance, prejudice, or character evidence (R141: 59). S.M. testified about her lack of trust, missing school, anxiety and depression, inability to go into rooms alone, sleeping problems, and night terrors (R141: 81-82), all without objections from the defense for relevance, prejudice, or character evidence. Only when the State asked S.M. to describe the night terrors did counsel object to relevance, which was overruled (R141: 82). Counsel did not object on the grounds of undue prejudice.

Joel M. testified that John "took away her laughter," and that S.M. is now fearful, reserved, untrustworthy of others, and sleeps with her mother, with no objections to relevance, prejudice, or character evidence by the defense (R141: 182-83). Only when Joel began testifying about how S.M. used to help kids at school did counsel object (R141: 183).

Schroeder attempted to head off similar testimony from Lori M. at a sidebar, expressing concern about testimony regarding irrelevant and duplicative matters, indicating the questions were designed to elicit sympathy (R141: 186-87). But after the court directed counsel to renew objections to particular testimony, counsel raised no further objections to Lori's testimony that S.M. used to be high spirited, fun loving, but S.M. is now more needy and has some insecurity (R141: 193). Without objection, Lori testified that S.M. was needy and requested someone to sleep with her (R141: 194). Without objection, Lori testified that sometimes S.M. is dreaming, shaking her head back and forth going "no, no, no," and would wake up crying (R141: 194). Failure to lodge objections to those statements constitutes deficient performance.

When Lydia Caldwell testified that S.M. now hates being alone, was not herself, and doesn't argue anymore, Schroeder objected to the testimony being beyond the scope, which was overruled, but made no objection to relevance or prejudice (R142: 243). When Lydia testified about observations she made of S.M. while staying overnight with her, Schroeder objected to relevance, but the court overruled (R142: 244). Counsel did not object on the grounds of prejudice. Although some of this testimony should have been covered by attorney Schroeder's preemptive objection during Lori M.'s testimony, anything not covered that objection should have been objected to with specificity.

By failing to object to such evidence as irrelevant and prejudicial character evidence, Schroeder's conduct fell below an objective standard of reasonableness.

C. Counsel Performed Deficiently By Failing to Submit Impeaching Evidence Regarding S.M.'s Motive to Lie

Failure by trial counsel to adequately present facts helpful to the defense can constitute deficient performance. *See* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶25, 286 Wis. 2d 721, 703 N.W.2d 694 ("counsel's failure to investigate facts that were readily available to him, and his failure to employ those facts at trial to undermine the credibility of the

State's two key witnesses by showing their motives to fabricate the assault allegation, constituted representation that fell below an objective standard of reasonableness").

Attorney Schroeder devoted much of his efforts at undermining S.M.'s credibility, arguing that S.M. lied because she was ashamed, and that this little lie snowballed out of control when her parents became involved, into a lie she could not take back (R143: 226, 232).

Lattimore submits that counsel employed the proper strategy, but failed to sufficiently implement that defense by failing to present a crucial piece of evidence – specifically, that S.M. lied to the SANE nurse examiner, in the presence of her mother, by claiming she was a virgin at the time she and Lattimore had sex. This lie could have damaged S.M.'s credibility. More importantly, the context of the lie would have supported the motive to fabricate advanced by attorney Schroeder – that S.M. lied to friends and family about her sexual activity out of shame and embarrassment.

a. Evidence of S.M.'s dishonesty

When S.M. met with nurse Susan Liddle, S.M.'s mother accompanied her and remained in the room during the examination. The SANE nurse questioned S.M. about her past sexual history, specifically whether this was S.M.'s first sexual encounter, and if not, when her most recent consensual sexual encounter occurred. S.M. indicated this was her first sexual encounter, and therefore she had no previous consensual sexual encounters (R106: 2). However, both answers were false. When S.M. eventually reported to Officer Miller that Lattimore assaulted her, Miller asked S.M. if this was her first sexual encounter, and S.M. admitted it was not (R106: 8).

Further, Lattimore knew S.M. was not a virgin because he was aware S.M. had previously had sex with Ashton Brusca, who dated S.M. for approximately 2-3 months when they attended high school with Lattimore. Lattimore and Ashton were friends, and Lattimore knew S.M. through Ashton. This was confirmed at trial by both S.M. (R141: 83) and Lattimore (R143: 43-44). Brusca confirmed during post-

conviction proceedings that he and S.M. did have sex twice in one night in the summer of 2008 (R106: 11). Therefore, S.M. was not a virgin in September 2010 when she and Lattimore had sex.

The jury was never informed of S.M.'s lies to the SANE examiner. And Susan Liddle, who concluded that S.M.'s account of the incident was "consistent" with her injuries, was never informed that S.M. lied in response to those two questions.

b. These lies were relevant and important because they undermined S.M.'s credibility and supported the defense theory regarding her motive to fabricate

Lattimore has the constitutional right to present evidence which is grounded in his right to confrontation and compulsory process. *See* ***State v. Pulizzano,*** 155 Wis. 2d 633, 645-46, 456 N.W.2d 325 (1990). The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial. ***Chambers v. Mississippi***, 410 U.S. 284, 294-95 (1973). Lattimore asserts that these constitutional rights would have compelled admission of S.M.'s lies to the SANE nurse at trial.

As discussed *supra*, this case hinged on credibility. Evidence of S.M.'s dishonesty, particularly to the SANE nurse attempting to document evidence of an alleged assault, could obviously have been used to undercut S.M.'s credibility.

The evidence would also have been relevant to certain testimony at trial. Lattimore testified that when he and S.M. started hugging on his bed, S.M. asked what he thought that Ashton would think about what they were doing, to which Lattimore stated he didn't care what Ashton was thinking (R143: 57). The State argued in closing arguments that statement was not credible, pointing out that Ashton was not S.M.'s boyfriend, and she hadn't seen him in 4-5 years, so it made no sense that S.M. would ask Lattimore about Ashton (R143: 235). Evidence that S.M. previously had sex with

Ashton explains why she would ask Lattimore about what Ashton would think, and enhances Lattimore's credibility.

Further, and more importantly, the evidence would have supported the defense's theory regarding complainant's motive to lie. Schroeder argued that S.M. was particularly embarrassed to admit she'd had consensual sex to her parents. These lies to the SANE examiner, told in the presence of S.M.'s mother, further support that inference. They involve the same conduct – lying about the fact that she'd had consensual sex out of shame and embarrassment. Lattimore submits that S.M. lied to the SANE nurse and her mother about her prior consensual sex, just like she lied to the SANE nurse and her mother about her consensual sex with Lattimore.

c. Assuming this evidence was barred by rape shield, admission of this evidence would have been required by Davis v. Alaska and Olden v. Kentucky to show S.M.'s motive to fabricate

Wisconsin's rape shield law, Wis. Stat. sec. 972.11(2), generally prohibits a defendant from introducing evidence concerning the alleged victim's prior sexual conduct. In ***Pulizzano***, the Wisconsin Supreme Court held that Wisconsin's rape shield as applied may unconstitutionally infringe upon a defendant's rights to confrontation and compulsory process, because under some circumstances "evidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected." 155 Wis. 2d at 647-48. ***Pulizzano*** involved a challenge to a court's order prohibiting the defense from presenting evidence of the prior sexual assault of a child complainant to establish an alternative source for the child's sexual knowledge. The court articulated a 5-factor test that the defendant must satisfy in order "to present otherwise excluded evidence of a child complainant's prior sexual conduct for the limited purpose of proving an alternative source for sexual knowledge." ***Id.*** at 656-57.

Lattimore acknowledges his proferred evidence does not meet ***Pulizzano's*** 5-factor test, and that it qualifies as "sexual conduct" evidence normally barred by rape shield.

However, the purpose for the evidence offered in ***Pulizzano*** – establishing an alternative source for a child's sexual knowledge – is not the only constitutionally acceptable purpose for offering sexual history. The ***Pulizzano*** test is inapposite here because the proferred evidence is offered for a completely different purpose –establishing the accuser's motive to lie.

The ability to attack a complainant's motive to fabricate is paramount to the rights to confront one's accusers and present a defense, and these rights trump statutory rights to privacy. *See, e.g.,* ***Davis v. Alaska***, 415 U.S. 308, 319-21 (1974) (holding that the trial court should not have prevented the defendant from introducing a juvenile witness's prior criminal activity under a juvenile record-protection statute,' because referring to the record was necessary to show that the witness had a motive to fabricate).

Olden v. Kentucky extended this principle to situations involving evidence of sexual history, concluding that interests in excluding that evidence were trumped by the defendant's right to effectively cross-examine a witness for bias. Olden and a friend were convicted for forcible sodomy. 488 U.S. at 229-30. The petitioner sought to introduce evidence that the victim, who was white, had motive to fabricate because she did not want to risk the chance that the black man with whom she was living would discover her infidelity. ***Id.*** The trial court excluded evidence that the white victim was living with a black man. ***Id.*** at 230. While the court held that Kentucky's rape shield statute did not bar the evidence, the court believed the potential prejudice in allowing evidence of an interracial living relationship outweighed the probative value. ***Id.*** at 230-31.

The United States Supreme Court reversed, holding that exclusion of the evidence of the victim's living relationship violated the petitioner's confrontation rights. ***Id.*** at 231. The Court stated that "[s]peculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the victim's] testimony." ***Id.*** at 232.

Lattimore has found no published cases in Wisconsin

balancing the interests protected by the rape shield law versus a defendant's right to confront his accusers regarding motive to fabricate. However, many courts applying ***Davis*** and ***Olden*** hold that the policy interests behind rape shield statutes cannot justify restricting the defendant's right to examine the victim's motive to fabricate due to the potentially devastating nature of such evidence. *See, e.g.:*

- ***United States v. Williams***, 37 M.J. 352, 359-60 (C.M.A. 1993) (trial judge erroneously denied motion to reopen sexual assault conviction in part because it erroneously held that the newly discovered evidence – that the victim had been involved in an extramarital affair and had fabricated the rape charges against Williams to prevent her lover from discovering her infidelity – would have been prohibited under the military rape shield statute);

- ***Commonwealth v. Joyce***, 415 N.E.2d 181, 186-87 (Mass. 1981) (trial court improperly invoked the state's rape shield statute to exclude evidence about the victim's prior arrests for prostitution when that history was relevant to her motive to fabricate); and

- ***Lewis v. State***, 591 So. 2d 922, 926 (Fla. 1991) (trial court erred by excluding evidence that was offered to show that the victim accused the defendant, her stepfather, of sexual assault to stop him from telling the victim's mother about her sexual activity with a third person, because this was relevant to the victim's motive to fabricate).

Similarly, evidence of S.M.'s lies to her mother and the SANE nurse would have been relevant to her motive to fabricate. Counsel's failure to seek admission of those lies was objectively unreasonable.

The beliefs of attorney Schroeder and the trial court that this evidence would have been barred were erroneous. Schroeder admitted he had not read ***Olden v. Kentucky***, and that he "didn't research that to that extent" (R145: 33-34). His conclusion was unreasonable as it was based on insufficient research and investigation.

Even if counsel believed S.M.'s lies were barred by rape shield, counsel could have sought admissibility of the lie in a limited capacity – i.e. simply that S.M. lied to the SANE examiner in the presence of S.M.'s mother when the SANE examiner was conducting her examination. The defense could have gotten the crucial point admitted – S.M. lying – without violating rape shield. Attorney Schroeder testified he did not think about that option, and did not have a strategic reason for failing to do so (R145: 43).

D. Lattimore Was Prejudiced By Counsel's Errors

There is no easy way to gauge the damage to Lattimore's case from the improper character evidence. This case hinged entirely on credibility. S.M. and Lattimore were the only two witnesses to the actual incident. The physical evidence was largely inconclusive, as both experts testified that the injuries S.M. received were consistent with both consensual and nonconsensual sex (Liddle – R142: 152-53, 159; Zink – R142: 190). The character evidence likely improperly enhanced juror sympathy for S.M. and interfered with the process of gauging credibility. None of it was relevant. The danger that this evidence affected the jury's credibility findings is tremendous.

The prejudice resulting from failure to submit S.M.'s lies to her mother and the SANE examiner is easier to gauge, as dishonesty is directly relevant to credibility, and anything that affected credibility would have affected the weight of the evidence. S.M.'s lies to the SANE nurse were crucial because the nurse was documenting and assessing evidence regarding the alleged assault, and because S. M. told this lie in front of her mother, whose esteem was very important to S.M. Thus the lie was relevant to credibility and also demonstrated her initial motive to fabricate the rape charge – that she was ashamed to have her parents learn that she had engaged in consensual sex.

Where credibility is key and evidence of guilt is not overwhelming, failure to submit important evidence attacking credibility is prejudicial. Counsel's errors negatively impacted the jury's credibility assessment, prejudicing his

case. Lattimore is entitled to a new trial.

V. THE REAL CONTROVERSY WAS NOT FULLY TRIED BECAUSE THE JURY DID NOT HEAR CRUCIAL EVIDENCE IN SUPPORT OF THE DEFENSE, AND BECAUSE THE JURY HEARD IRRELEVANT AND PREJUDICIAL OTHER ACTS EVIDENCE

A. Standard of Review

The Court of Appeals may exercise its discretionary authority to reverse a conviction when it appears that the real controversy has not been fully tried. Wis. Stat. sec. 752.35. The Court possesses this inherent power regardless of whether the proper objection was made below. ***State v. Harp***, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991). The Court owes no deference to the trial court's decision, and must make an independent determination of whether the ends of justice require reversal. ***Harp,*** 161 Wis. 2d at 779.

Situations in which the controversy may not have been fully tried have arisen in two ways: (1) when the jury was not given the opportunity to hear important testimony that bore on a significant issue; and (2) when the jury heard improperly admitted evidence which clouded a crucial issue enough that the real controversy was not fully tried. ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). The defendant need not demonstrate a substantial probability of a different result on retrial before the court may reverse. ***Id.***

Lattimore submits the jury did not get to hear important testimony that would have been essential to the defense, specifically the Facebook threat's actual content (section II, *supra*) and S.M.'s lie to the SANE examiner and in her mother's presence (section IV, *supra*). Moreover, the jury improperly heard evidence regarding M.H., erroneously admitted as other acts evidence (section I, *supra*), and impermissible character evidence regarding S.M., designed to play on the jury's sympathy (sections III and IV, *supra*).

B. The Real Controversy Was Not Fully Tried

Because the Jury Did Not Hear Important Evidence That Would Have Supported the Defense, and Because Improper Evidence Prejudiced Lattimore

There is no exact standard for determining at what point the controversy has not been fully tried. The question boils down to fairness to the defendant. In ***Hicks,*** the court held the real controversy was not fully tried when improperly admitted evidence "so clouded a crucial issue." 202 Wis. 2d at 160. The court determined that reversal was necessary because "[w]e cannot say with any degree of certainty that the [improperly admitted] evidence used by the State during trial played little or no part in the jury's verdict." ***Id.*** at 153.

Lattimore submits that the most important issue of this case – credibility – was not fully and fairly tried. Two major pieces of evidence that could have undercut S.M.'s credibility – the full context of the Facebook threat and S.M.'s lie to the SANE nurse in her mother's presence – were not heard by the jury. Further, this evidence would have supported Lattimore's theory on S.M.'s motives to fabricate.

Lattimore contends the issue of credibility was further clouded in this case by admission of evidence regarding M.H., as well as the State's appeals to juror sympathy by repeatedly introducing improper character evidence. This evidence was unduly prejudicial and irrelevant to the questions of whether or not Lattimore falsely imprisoned and sexually assaulted S.M. by force. The allegations regarding M.H. were particularly prejudicial, as they portrayed Lattimore as a serial rapist of young women, and left him defending against two completely unconnected rape allegations in the same trial. Adding a rape allegation from another accuser was a damning blow to Lattimore's credibility, as it required the jurors to ask whether it was possible that both girls were lying.

Lattimore submits that the reliability and fairness of the proceedings is dubious because S.M.'s credibility has not been fully tested, and the improperly admitted other acts and character evidence clouded this crucial issue. Accordingly, the real controversy has not been fully tried.

CONCLUSION

For the reasons discussed in this brief, the defendant-appellant respectfully requests that the court vacate the judgment of conviction and remand the case for a new trial.

Respectfully submitted: 1/3/2014:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,975 words.

Signed 1/3/2014:

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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 this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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