STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2018-AP-1069-CR

vs.

Trial No. 15-CF-2058

CHRISTOPHER L. GEE,

Defendant-Appellant.

Appeal from a judgment of conviction entered May 31, 2016 in the
Circuit Court of Milwaukee County,
Honorable J.D. Watts, Judge, presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

1. Whether application of Wis. Stat. §904.04(2)(b)2 violated Mr. Gee's rights under the Wisconsin and United States Constitutions.

2. Whether allowing admission of the prior Indiana conviction was unfairly prejudicial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are requested in this appeal.

STATEMENT OF THE CASE

Procedural history

A complaint dated May 6, 2015 charged Mr. Gee with two counts of first degree sexual assault in violation of Wis. Stat. §940.225(1)(b). On November 30 through December 7, 2015 the case was tried to a jury before the Honorable J.D. Watts; the jury deadlocked and the court declared a mistrial. On March 28 through April 1, 2016, the case was again tried to a jury before Judge Watts; the jury returned a verdict of guilty as to each count.

On May 26, 2016 Judge Watts imposed a sentence on each count of 30 years imprisonment consisting of 20 years initial confinement and 10 years extended supervision, to run consecutively.

The offenses

Count 1 (AMM)

AMM testified that on March 28, 2015 she, her friend Jessica and Jessica's boyfriend went to 1200 East Singer Circle in Jessica's car. 155: 75-76. They went there because it was a safe place to smoke marijuana. 155: 77. Jessica's boyfriend knew who lived there, but AMM did not. 155: 77-78. Jessica and her boyfriend entered an apartment unit ahead of AMM, and there did not appear to

be anyone else present. 155; 78-79.

The three of them smoked marijuana until they ran out of Rellos (Cigerellos used to smoke marijuana). 155; 79-80. Jessica and her boyfriend left to get more Rellos, saying they would be right back. 155: 80. When they did not return after 10 or 15 minutes, AMM tried calling Jessica and got no answer. 155: 80. AMM then called her cousin and told her she had been left somewhere and needed a ride; the cousin agreed to come pick up AMM. 155: 80-82.

AMM used the bathroom in the apartment. 155: 82. Upon leaving the bathroom, AMM saw Defendant Christopher Gee. 155: 82. AMM turned away from Mr. Gee, and then AMM felt heat against her body and a knife at her neck. 155: 82-83. AMM identified this knife in court as exhibits 1 (photo) and 52 (object). 155: 84-85.

Mr. Gee took AMM to a bedroom, closed and locked the doors and, while holding the knife to AMM's neck, told her to disrobe. 155: 86. He then directed AMM to lay on the bed, and he got on top of AMM while holding the knife and had vaginal sex with AMM. 155: 88-92. After ejaculating, Mr. Gee told AMM she could get her stuff and leave. 155: 92.

When she left the apartment, AMM found the cousin she had called was waiting for her in her car. 155: 92-93. AMM and the cousin went to pick up AMM's child, and then they went to the hospital. 155: 93. At the hospital, AMM told what happened, had a physical exam and the nurse took samples as evidence. 155: 93; 157: 77, 81-82.

The DNA analyst who later tested the samples from the hospital found that Mr. Gee is the "source" of semen on AMM's vaginal swabs, cervical swabs and labial swabs. 161: 12. "Source" is defined as a DNA profile that is rarer than one in 7 trillion individuals. 161: 13.

On a date after AMM went to the hospital, police contacted AMM, and AMM told them what happened. 155: 94-95. At some point, AMM viewed photos and selected a photo of Mr. Gee as the person who assaulted her. 155: 95-96.

Count 2 (JNP)

On April 27, 2015 (about a month after events above regarding AMM) JNP received text messages from a person responding to JNP's ad on Backpage.com, which led to JNP reaching an agreement to meet the person for an act of prostitution. 155: 5-6, 8-9. JNP's friend Rebecca

drove JNP to 1200 East Singer Circle about 10:00 p.m. 155: 6, 11. JNP called the person, who directed her to a door and garage. 155: 12. While Rebecca waited in the car, JNP met a man near a door who told JNP that he was security, and that he would conduct her to the meeting. 155: 11, 13-14. As JNP walked ahead of the man, he grabbed by the neck and forced JNP to the ground and pulled out a knife which JNP described as "weird" and "shaped like a crescent" with a curved blade. 155: 14-17, 22. JNP pulled out her phone to try to call for help, but when the light on the phone went on, the man took JNP's phone, saying he would return it when he was done. 155: 24-25, 26. JNP screamed: what do you want? and the man replied "pussy" and directed JNP to take down her pants. 155: 18. Initial attempts at intercourse in a standing position did not work due to the height disparity: he was tall and JNP was short. 155: 18-21, 23. The man then told JNP to get on the ground and the man had penis-to-vagina sex. 155: 23-24. JNP did not consent, but complied because she was scared. 155: 24. When he was done, the man returned JNP's phone and pointed the way out; JNP pulled up her pants and ran to the car. 155: 27, 43.

In the car, JNP told Rebecca what had happened.

155: 27. Rebecca encouraged JNP to call police, but JNP did not do so because she had an outstanding arrest warrant. 155: 27.

JNP first reported the encounter to police on April 30, 2015 after she was arrested on her warrant. 155: 46. In her initial report to police, JNP said she went to the Singer Circle address to meet a friend, and did not mention prostitution. 155: 29. JNP admitted that she told more than one story, and that she admitted lying to Det. McClain. 155: 49. JNP denied telling Det. McClain or Det. Dunn that the encounter involved oral sex. 155: 56.

Other acts litigation

At a pretrial on August 15, 2015, about three months after the preliminary hearing, the prosecutor indicated he had just received records regarding Mr. Gee's prior convictions from Marion County, Indiana. 136: 2. Noting the provision in §904.04 allowing use of other acts in serious sexual assault cases to show the defendant acted in conformity, the prosecutor indicated he may be filing an "other acts exception motion" to admit evidence of the Indiana convictions. 136: 3-4.

On August 18, 2015 the prosecutor filed a document entitled "State's motion to admit other-acts." 6: 1-12

(capitalized omitted). This motion sought to admit evidence of Indiana rape convictions from 1993 and 1996 and dismissed Wisconsin sexual assault cases from 1987 and 1988. 6: 12. Three appendices to the motion contain charging documents regarding these cases. 7: 1-21; 8: 1-15; 9: 1-4.

On September 3, 2015 Mr. Gee's counsel requested time to respond to the State motion. 137: 2, 3, 7. Because of this request and unresolved discovery issues, the court adjourned the trial to allow time to respond. 137: 23-24. On October 1, 2015 Mr. Gee's counsel filed a response brief. 14: 1-9. In this brief, the defense argued that §904.04(2)(b) is unconstitutional (14: 1-5), that factual dissimilarities make the Indiana convictions of little probative value (14: 6-7) that admission of the Indiana convictions would result in unfair prejudice (14: 7-8) and that the prior Wisconsin dismissed cases have no relevance (14: 8-9).

At a hearing on October 22, 2015 the court addressed the third of these defense arguments concerning the admission of prior Wisconsin dismissed cases. 138: 19-22. The court determined that these are not admissible. 138: 21-22.

On November 16, 2015 the State filed a reply brief. 18: 1-23. On November 18, 2015 the State filed a letter and supplemental documents, most of which relate to 2005 amendments of §904.04(2). 19: 1-43.

The circuit court issued a written decision on the State's motion. Apx. 101-113; 22: 1-13. In this decision, the court determined that: Wis. Stat. §904.04(2)(b)2 is Constitutional (apx. 101-110; 22: 1-10); the 1996 Indiana conviction is sufficiently similar to the charged conduct to warrant admission (apx. 110-112; 22: 10-12); and, to prevent undue prejudice,

> The State may introduce the defendant's 1996 Indiana rape conviction under Wisconsin Statute Section 904.04(2)(b)2 and the underlying facts of that rape conviction under Wisconsin Statute section 904.04(2)(b)1 only if the defendant testifies or "opens the door" by attacking the credibility of the State's witnesses in the defendant's case.

Apx. 113; 22: 13 (underlining in original). Thus, the State was prohibited from introducing the 1996 Indiana conviction in its case-in-chief, but permitted to use in to impeach Mr. Gee in the event he testified. Apx. 113; 22: 13.

At the next hearing after the court issued its written

decision, the court and counsel discussed the parameters of the court's decision. 139: 2-8. The court clarified the decision:

> And if the defendant chooses to testify, that's fine. If he chooses not to testify, that's fine. If he chooses to defend on any number of other [defenses], such as . . . alibi, I didn't do it, they've mistaken me for somebody else or any number of other defenses, he's free to do so; and the case would simply be decided on those issues.
>
> But if the defendant takes the stand and says that he engaged these women for prostitution and somehow has contact with them that he has sex and then [reneges] on payment and argues that they lied and that they're bias[ed] because they haven't been paid, then the Court clearly view an appropriate response for this, State, to use the 1996 Indiana rape conviction, both the conviction under 904.04(2)(b)(2) and the underlying facts under 904.04(2)(b)(1).

139: 5-6.

Mr. Gee elected not to testify at either of his trials. On both occasions, he advised the court that his decision not to testify was based on the court's ruling regarding admission of the Indiana conviction.

At Mr. Gee's first trial (which resulted in a mistrial) during a colloquy to waive the right to testify, the court addressed the advantages and disadvantages of testifying

and stated:

> And some of the disadvantages would be that, as I wrote in my decision, it would still have to be decided for sure, but assuming you said what I believed you might say, they might be able to then cross-examine you about the Indiana convictions[.]

146: 91. Mr. Gee acknowledge that he understood and this this would be a disadvantage to testifying. 146: 91. After the court found Mr. Gee's waiver to be voluntary and intelligent, Mr. Gee addressed the court:

> I simply – I just wanted to make it certain that the record did reflect my decision not to testify is made in light of the court's ruling.

146: 93.

At Mr. Gee's second trial (resulting in the convictions now appealed) the court again held a waiver colloquy during which the following exchange occurred:

> THE DEFENDANT: I'm going to remain silent.
>
> THE COURT: All right. Has anyone made any threats, promises or used any pressure to get you to choose not to testify?
>
> THE DEFENDANT: If the Court's ruling can be construed as such, then yes.

161: 60.

ARGUMENT

The trial court erred in allowing admission of the 1996 Indiana conviction in the event Mr. Gee were to testify

A. Application of Wis. Stat. §904.04(2)(b)2 violated Mr. Gee's rights under the Wisconsin and United States Constitutions.

A Wisconsin statute generally prohibits evidence of a defendant's character or prior bad acts to show a disposition to commit an offense:

> **904.04 Character evidence not admissible to prove conduct; exceptions; other crimes.**
>
> (1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> (a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;
>
> (b) *Character of victim.* Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of

peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) *Character of witness.* Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

(2) OTHER CRIMES, WRONGS OR ACT.

(a) *General admissibility.* Except as provided in par. (b) 2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(b) *Greater latitude.*

1. In a criminal proceeding alleging a violation of s. 940.302 (2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615 (1) (b), or of domestic abuse, as defined in s. 968.075 (1) (a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

2. In a criminal proceeding alleging a violation of s. 940.225 (1) or 948.02 (1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225 (1) or 948.02 (1) or a comparable offense in another jurisdiction, that is similar to

> the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

Wis. Stat. §904.04.

At common law, propensity evidence or evidence of bad character has long been prohibited to show guilt; seventy years ago, Justice Jackson explained:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Mickelson v. United States, 335 U.S. 469, 475-476 (1948)

(internal citation and footnotes omitted). Wisconsin common law has been in accord with *Mickelson* for over a century. *Fossdahl v. State*, 89 Wis. 482, 62 N.W. 185 (1895); *Paulson v. State*, 118 Wis. 89, 94 N.W. 771 (1903).

Evidence of prior crimes or other bad acts may be admissible for proper purposes other than to prove criminal propensity. *Whitty v. State*, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967). The court in *Whitty* set forth the other-acts rule later incorporated in what is now Wis. Stat. §904.04(2)(a). See, Wis JI Crim 276, comments. However, while allowing other-acts evidence for permissible purposes, the court in *Whitty* noted that "the 'character rule' is universally established." 34 Wis.2d at 291. The *Whitty* court listed the four bases for excluding prior acts evidence on the issue of guilt:

> (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.

Whitty, 34 Wis. at 292, as quoted in *State v Sullivan*, 216 Wis. 2d 768, ¶42, 596 N.W.2d 30 (1998). The Court in *Sullivan* reaffirmed the vitality of *Whitty* in the face of concerns, expressed by the court of appeals, that the Supreme Court has signaled that motive may be shown by prior acts showing propensity. *Sullivan*, ¶17.

Whitty was based on Due Process principles:

> . . . the rule we adopt . . . is based upon the premise that the accused is entitled to a procedurally and evidentially fair trial. . .

Whitty, 34 Wis.2d at 295.

> . . . [when other acts evidence is admitted] it runs the danger . . . of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence.

Whitty, 34 Wis.2d at 297. Citing these two quotes, the Jury Instruction Committee concluded that the Court in *Whitty* was invoking a Due Process basis for the rule it adopted, as Due Process is directed at insuring the right to a fair trial. Wis. JI Crim. 276, comment.

In 2006, §904.04 was amended by the addition of §904.04(2)(b)2 allowing admission of evidence of prior convictions for first degree sexual assault or comparable

offenses from other jurisdictions in cases charging first degree sexual assault "as evidence of the person's character in order to show that the person acted in conformity therewith." *See*, Wis. JI Crim. 276, comment; *see also* 19: 2-21 (legislative documents regarding this enactment).

At least two jurisdictions have found provisions similar to §904.04(2)(b)2 to violate State constitutional protections. *State v. Ellison*, 239 S.W.3d 603 (Mo. 2007); *State v. Cox*, 781 N.W. 2d 757 (Iowa 2010).

In *Ellison*, the defendant was charged with child molestation. A Missouri statute allowed evidence of prior acts of crimes of a sexual nature against persons under the age of fourteen in prosecutions of crimes of a sexual nature involving a victim under fourteen to show propensity. *Ellison*, 239 S.W.3d at 606, (discussing and quoting section 566.025 RSMo 1994). A previous version of this statute mandated admissibility, stating such evidence "'shall be admissible.'" *Ellison* at 606. This version had been struck down. *Ellison* at 606, citing *State v. Burns*, 978 S.W.2d 759 (Mo. 1998). The version of the statute under consideration in *Ellison* provided for admissibility "'unless the trial court finds that the probative value of

such evidence is outweighed by the prejudicial effect.'" *Ellison* at 606, (quoting section 566.025). *Ellison* held that even though courts must construe statutes in a manner allowing validity and resolve doubts in favor of constitutionality, this modified statute could not be saved.

Ellison was based on two provisions of the Missouri Constitution: "'no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information'" and "'in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation.'" *Ellison* at 606, quoting art. I, sections 17 and 18(a) of the Missouri Constitution. From these provisions, the *Ellison* court found that a defendant has the right to be tried only on the offense charged. *Ellison* at 606. Thus, prior crimes are never admissible to show propensity to commit the crime presently charged.

Wisconsin's Constitution provides that in criminal prosecutions, the accused has the right "to demand the nature and cause of the accusation against him." Wisconsin Constitution, Article 1, Section 7. Consistent with this provision, Mr. Gee was informed by the complaint and information that he was charged with first degree sexual assaults of AMM and JNP. 1: 1-3; 4: 1.

These documents never informed him that his past history generally, or his 1996 Indiana rape conviction in particular, were the bases for the accusations against him. As in *Ellison*, the right to be informed of the nature and cause of the accusation should include, as a necessary corollary, that a person should be tried only on the offense charged. In Mr. Gee's case, the offenses charged concern his interactions with AMM and JNP in Wisconsin in 2015. His offenses charged do not include his conviction or actions in Indiana in 1996, and evidence of such conviction or actions should not be allowed. A person should not be convicted except on evidence of the crime of which he is accused. No one should be convicted based on his prior misdeeds.

In *Cox*, the Iowa Supreme Court addressed a statute allowing evidence of prior sexual abuses in sexual abuse prosecutions. *Cox*, 781 N.W.2d at 761, quoting Iowa Code section 701.11. The Defendant in *Cox* raised a Due Process challenge to this statute under the Iowa Constitution. The *Cox* court noted a distinction between *general* propensity which might be shown by prior acts with *any* person, and prior acts involving the same person as the victim in the current charge. *Cox*. At 761-762. The

court in *Cox* thoroughly reviewed state and federal cases addressing Due Process challenges to similar statutes. *Cox* at 762-768. The court concluded that based on history and legal reasoning prohibiting propensity evidence "out of fundamental conceptions of fairness," the Iowa Constitution prohibits admission of prior bad acts based solely on general propensity. *Cox* at 768.

Wisconsin's Constitution also guarantees Due Process: that "no person may be held to answer for a criminal offense without due process of law." Wisconsin Constitution, Article I, Section 8(1). As in Iowa, the prohibition on propensity evidence is longstanding. *Fossdahl v. State*, 89 Wis. 482, 62 N.W. 185 (1895); *Paulson v. State*, 118 Wis. 89, 94 N.W. 771 (1903); *cf. Cox* at 764 (citing *State v. Vance*, 94 N.W. 204 (Iowa 1903).

No sound rationale exists to single out sex offenses. Under the statute at issue, a person charged with first degree sexual assault may have admitted against him a prior conviction for first degree sexual assault solely to show propensity to commit sexual assaults. However, a person charged with armed robbery or burglary faces no such concern. A prior armed robbery or prior burglary may not be introduced against a defendant solely to show

propensity to commit armed robbery or burglary, respectively. One cannot discern why it should be deemed fundamentally fair to admit prior sex offense to show propensity in a sex offense prosecution, but improper and unfair to admit a prior robbery conviction to show propensity in a robbery prosecution.

When other acts are introduced for some proper purpose other than to show propensity, the court must identify the proper purpose. This is the first step in the familiar three step *Sullivan* analysis. *State v. Sullivan*, 216 Wis.2d 768, ¶6, 576 N.W.2d 30 (1998). If the *Sullivan* analysis results in the admission of other acts evidence for a proper purpose other than the show propensity, then the jury is typically instructed that it may consider the other acts evidence only with regard to the proper purpose. The jury is then typically cautioned:

> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.

Wis JI Crim. 275. Such a cautionary instruction would be inconsistent with a prior conviction admitted under the

provisions of Wis. Stat. §904.04(2)(b)2, for such a conviction would be admitted for the purpose of showing action in conformity with a character or trait exemplified by the prior conviction.

The jury in Mr. Gee's case did not hear of the 1996 Indiana conviction. This does not mean he was not harmed, or his defense impaired, by the court's pretrial ruling. As Mr. Gee made clear during both of his colloquies with the court regarding his right to testify or remain silent, he chose not to testify *because of* the court's ruling. He construed the court's ruling as a threat or promise, outside of the plea agreement, which determined his decision not to testify. That Mr. Gee had the right to testify is not and never has been doubted. "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel." Wisconsin Constitution, Article I, Section 7. Waiver of this right was the purpose of the court's colloquies. 146: 91-93; 161: 59-62.

Mr. Gee prays that this court holds that Wis. Stat. §904.04(2)(b)2 is unconstitutional, and that its application improperly denied Mr. Gee his right to testify.

B. Allowing admission of the prior Indiana conviction was unfairly prejudicial.

Putting aside questions regarding the Constitutionality of admitting prior acts to show propensity (as discussed above), Mr. Gee asserts that the court in determining that admission of the prior Indiana conviction would not be unduly prejudicial. Stated in terms of the statute, Mr. Gee asserts that the probative value of the prior conviction is outweighed by the danger of unfair prejudice. Wis. Stat. §904.03.

In the circumstances of Mr. Gee's case, his prior conviction had almost no probative value. To prove the charged offenses, the state had to prove three elements: 1) sexual intercourse; 2) non-consent; and 3) threat or use of a dangerous weapon. Wis. Stat. §940.225(1); Wis. JI Crim. 1203. The second and third elements are connected in that the threat or use of a dangerous weapon is logically directed at overcoming or dissuading non-consent.

In Mr. Gee's case, the fact of sexual intercourse was never in dispute. In his opening statement, Mr. Gee's counsel told the jury that this case was about prostitution incidents gone awry. 154: 69-72. DNA evidence showed

Mr. Gee's semen or DNA was on vaginal swabs of both victims. 161: 12, 17-18. Mr. Gee's counsel stating in closing that issue is not whether sex occurred, but rather "how this sex occurred, whether it was consensual or was it rape, in both instances." 162: 3. Thus, the issue was consent.

The problem with admitting a prior acts involving a different person from the charged crime is that it has no relevance on the issue of consent. Consent is unique to the individual and the circumstances. Thus: "'The fact that one woman was raped . . . has no tendency to prove that another woman did not consent.'" *State v. Cofield*, 2000 WI App 196, ¶10, 238 Wis.2d 467, 618 N.W.2d 214, quoting *State v. Alsteen*, 108 Wis.2d 723, 730, 324 N.W.2d 426 (1982).

Judge Watt permitted the State, in the event Mr. Gee testified, to cross-examine Mr. Gee on 1996 Indiana conviction and underlying facts "to counter the defendant's attack on the credibility of the State's witnesses." Apx. 113; 22: 13. However, when the issue is consent, it has no probative value. The fact that a woman in Indiana did not consent to sex with Mr. Gee in 1996 has no tendency to prove that a woman in Wisconsin did not

consent to sex with Mr. Gee in 2015.

Other acts evidence, even when admitted for purposes other than to show propensity, presents the danger of unfair prejudice. Thus, the court in *Whitty* cautioned prosecutors to use other-acts evidence sparingly due to the danger of violating the right to a fair trial "because of its needless prejudicial effect on the issue of guilt or innocence." *Whitty*, 34 Wis. 2d at 297. Mr. Gee feared, justly, that introduction of his 1996 Indiana conviction on the issue of propensity would taint the jury's view of him. Therefore, to prevent this from happening, he gave up his valuable constitutional right to testify and to give his account of events.

CONCLUSION

Christopher L. Gee prays that this court vacate his convictions and sentences and remand the case for a new trial.

Respectfully submitted,

_____

John T. Wasielewski
Attorney for
Christopher L. Gee

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5188 words.

_____
John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

_____
John T. Wasielewski

APPENDIX CERTIFICATION

I hereby certify that I filed with this brief, an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

_____

John T. Wasielewski
Attorney for
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APPENDIX CONTENTS