

FILED

08-17-2020

CLERK OF WISCONSIN  
SUPREME COURTSTATE OF WISCONSIN  
SUPREME COURT

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

vs.

Appeal No. 2019AP000802-CR

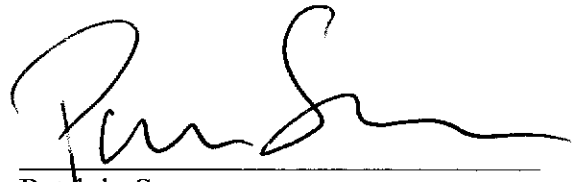
SAMUEL L. NICHOLS, JR.,  
Defendant-Appellant.

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DEFENDANT-APPELLANT SAMUEL L. NICHOLS, JR.  
PETITION TO REVIEW AND APPENDIX

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Petition for review from the decision of the Court of Appeals, District IV, affirming the judgment of the circuit court for Monroe County, the Honorable Todd L. Ziegler, judge.



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Patricia Sommer

State Bar No. 1031925

Attorney for Samuel L. Nichols, Jr.

Sommer Law Office, LLC

509 Nova Way

Madison, WI 53704

(608) 957-4959

## TABLE OF CONTENTS

<b>ISSUES PRESENTED.....</b>	<b>2</b>
<b>CRITERIA FOR REVIEW.....</b>	<b>2</b>
<b>STATEMENT OF THE CASE .....</b>	<b>3</b>
<b>ARGUMENT.....</b>	<b>3</b>
<b>A. Nichols' Prior Sexual Offense Should Have Been Excluded.....</b>	<b>4</b>
<i>The Standard of Review is Mixed.....</i>	<i>4</i>
<i>Nichols' Prior Offense Should Have Been Excluded.....</i>	<i>5</i>
<b>CONCLUSION.....</b>	<b>5</b>

### ISSUES PRESENTED

Did the circuit court erroneously admit other acts evidence of Nichols' offense of seventeen years previous?

The circuit court said no.

### CRITERIA FOR REVIEW

First, a real question of state law is presented, as Nichols past was brought before the jury contrary to the protection provided to the defendant by the other acts rule.

Second, this case presents a need for the Supreme Court to exercise its authority and clarify the boundaries of the other acts rule.

Third, this case offers the Supreme Court the opportunity to help develop the law on other acts evidence.

## **STATEMENT OF THE CASE AND THE FACTS**

This case is about a passed-out woman's accusation that the defendant, Sam Nichols, put his hands down her shirt and pants and took pictures of her private body parts. Nichols denied the accusation and took the case to trial. He was convicted by a jury of third-degree sexual assault and capturing an image of nudity.

Prior to trial, the State moved to admit evidence of a previous conviction of Nichols. R.54. The conviction arose out of a 1998 incident, where Nichols touched a girl's breasts and genitals. R.54:2. Nichols opposed the admission, arguing that the consciousness of the victim, the age of the victim (in that case 15) and facts of the alleged assault differed enough that the previous case should be excluded. The circuit court ruled that that case could come in, relying on the doctrine that other acts evidence may come in to show the identity of the defendant. R.59.

## **ARGUMENT**

### **A. Nichols' Prior Sexual Offense Should Have Been Excluded.**

#### ***The Standard of Review Is Discretionary.***

The circuit court's decision to admit or exclude other acts evidence is reviewed under the erroneous exercise of discretion standard. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998).

***Nichols' Prior Offense Should Have Been Excluded.***

The circuit court erred in ruling that the other acts evidence could come in as proof of identity. The other crime occurred in 1998; this incident occurred in 2015. The other crime involved an underage victim; this incident involved a grown woman. The other crime involved touching; this crime involved photographs. There are no similarities sufficient to identify Nichols as the perpetrator in this 2015 crime based on his 1998 conviction.

Judge Kloppenburg stated in her concurrence that the other acts rule has become “gutted by the cases applying it.” *State v. Nichols*, 2019AP802-CR, July 16, 2020 at §36 (quoted source omitted). Judge Kloppenburg went on to note the decades of misapplication of the other acts rule. She quoted *Whitty v. State*, 34 Wis. 2d 278, 292-93, 149 Wis. 2d 557 (1967):

Over sixty years ago this court in *Paulson v. State*, (1903), 118 Wis. 89, 98, 94 N.W. 771, pointed out and explained the rule that evidence against an accused should be confined to the very offense charged and neither general bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him [or her]. The exceptions pointed all were all based upon relevancy and probative value.

The other acts rule was codified in WIS. STAT. § 904.04(2)(a). However, the exceptions to the rule continue to swallow up its purpose, as Judge Kloppenburg notes in her quote from Judge Nettesheim:

My separate writing here is not to lobby for or against the wisdom of the de facto dismantling of § 904.04(2), STATS. Rather, my purpose is to again urge, as we did in *Johnson*, that [circuit] and appellate courts stop paying lip service to the statute and *Whitty* and, instead, recognize the

law for what it really is. As we said in *Johnson*, "Unless or until our supreme court reverses the direction of the law in this area, we should stop writing appellate opinions which pretend to honor *Whitty* but actually offend it." *Johnson*, 184 Wis. 2d at 431.

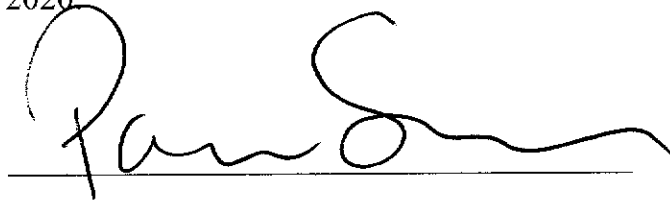
*State v. Tabor*, 1919 Wis. 2d 482, 497-98, 529 N.W.2d 915 (Ct. App. 1995)

(Nettesheim, J., concurring in part, dissenting in part; alteration in original).

### CONCLUSION

Nichols is entitled to a new trial based on the circuit court's errors in admitting the contents of Nichols' phone and admitting evidence of Nichols' 1998 conviction. Nichols previous conviction was more prejudicial than probative. It proved nothing. The seventeen-year-old conviction was with a young victim and involved no photographs. The admission of the previous conviction tainted these proceedings, and Nichols is entitled to a new trial. We respectfully request that this Court review his case.

Dated this 17<sup>th</sup> day of July, 2020

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Patricia Sommer  
SBN 1031925  
Attorney for Samuel J. Nichols, Jr.

Sommer Law Officer, LLC  
509 Nova Way  
Madison, WI 53704  
(608) 947-4959

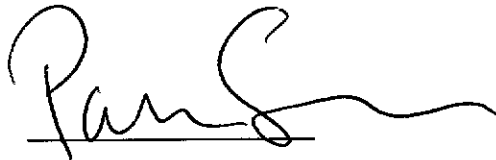
## CERTIFICATION

I certify that this brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a brief produced using the following font:

\_\_\_\_ Monospaced font: 10 characters per inch; double-spaced; 1.5-inch margin on left side and 1-inch margins on the other 3 sides. The length of this brief is \_\_\_\_ pages.

X\_\_\_\_ Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1133 words.

Dated: August 17, 2020

A handwritten signature in black ink, appearing to read 'Patricia Sommer', written over a horizontal line.

Patricia Sommer

SBN 1031925  
Sommer Law Office, LLC  
509 Nova Way  
Madison, WI 53704  
(608) 957-4959

**CERTIFICATION OF COMPLIANCE WITH WIS STAT. § 809.19(12)(f)**


I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. § 809.19(12)(f).

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.

  
\_\_\_\_\_  
Patricia Sommer

SBN 1031925  
Sommer Law Office, LLC  
509 Nova Way  
Madison, WI 53704  
(608) 957-4959