92-2844-CR

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 92-2844-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. NEUMANN,

Defendant-Appellant.

Appeal From The Judgment Entered
In The Circuit Court for Milwaukee County,
The Honorable Michael J. Barron,
Circuit Judge, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

STEPHEN M. GLYNN
ROBERT R. HENAK
CRAIG W. ALBEE
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

Attorneys for Defendant-
Appellant

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STATEMENT OF ISSUES

1. Whether the trial court committed reversible error by instructing the jury that it could not consider the complainant's prior consensual sexual conduct with the defendant in determining whether she consented to the charged acts of sexual intercourse.

The trial court so instructed the jury over defense objection.

2. Whether specific intent is an essential element of second degree sexual assault under Wis. Stat. §940.225(2)(a), non-consensual sexual intercourse by use or threat of force or violence, such that the trial court erred (1) by refusing to instruct the jury on that element of the offense, (2) by refusing to instruct the jury on the defense of voluntary intoxication, and (3) by excluding expert testimony concerning the effects of intoxication upon one's state of mind.

The trial court concluded that intent is not an essential element of the offense.

3. Whether general intent is an essential element of second degree sexual assault under Wis. Stat. §940.225(2)(a), non-consensual sexual intercourse by use or threat of force or violence, such that the trial court erred (1) by refusing to instruct the jury on that element of the offense, (2) by refusing to instruct the jury that voluntary intoxication may negate the general intent, and

(3) by excluding expert testimony concerning the effects of intoxication upon one's state of mind.

The trial court concluded that intent is not an essential element of the offense.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a). At such time as counsel for appellant have had sufficient opportunity to review the brief of respondent, it may be that the briefs fully present and meet the issues on appeal, rendering oral argument technically unnecessary under Wis. Stat. (Rule) 809.22(2)(b). Appellant, however, agrees with Kenneth W. Starr, previously a Federal Court of Appeals Judge, that oral argument is an important part of the appellate process:

> [I]n the age of overcrowded dockets, the importance of oral argument will, ironically, be enhanced. The paradox is this: with the appellate case load rising, the pressures will increase to dispense with oral argument, and concomitantly with published opinions as well. And yet the enhanced importance of the work of the court of appeals means that, for those questions of significance, oral argument is all the more important.
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> * * *
>
> [W]hat is needed is a vision of the importance of oral argument. That is, in a time of centrifugal forces driving appellate judges into the comfortable womb of their chambers -- with their own books and briefs and able law clerks to assist them -- oral argument is a time of the judges themselves coming together, of reasoning and deliber-

> ating together and with counsel. And, thus, oral argument should increasingly be viewed as a time for moving away from the pressures of the clogged pipeline of cases to be decided, and as a time for focusing on the cases, one case at a time, together, collaboratively.

Starr, Kenneth W., The Courts of Appeal and the Future of the Federal Judiciary, 1991 Wis. L. Rev. 1, 6-7.

Publication is also appropriate in this case. Decision on issues presented will clarify important legal questions concerning proper application of Wisconsin's "rape shield" law and the necessary mens rea elements of sexual assault offenses involving sexual intercourse. As such, publication is appropriate under Wis. Stat. (Rule) 809.23(1)(a)1. Publication also is appropriate under Wis. Stat. (Rule) 809.23(1)(a)5, as this presents a case of substantial and continuing public interest.

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 92-2844-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. NEUMANN,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

Nature Of The Case

Defendant-Appellant, Christopher W. Neumann, appeals from the judgment of conviction and sentence entered on August 6, 1992. This appeal is filed pursuant to Wis. Stat. §808.03 and Wis. Stat. (Rule) 809.30(2)(h).

Procedural History Of The Case

By criminal complaint filed on November 12, 1990, Mr. Neumann was charged with false imprisonment in violation of Wis. Stat. §940.30 (Count 1); with non-consensual sexual intercourse (finger to vagina) by use of force in

violation of Wis. Stat. §940.225(2)(a) (Count 2); and with non-consensual sexual intercourse (penis to vagina) by use of force, also in violation of Wis. Stat. §940.225(2)(a) (Count 3). (R2).[1]

Mr. Neumann waived preliminary hearing (R1:3; R4) and was arraigned on an Information alleging the same three charges (R1:3; see R5).

The case proceeded to jury trial on June 15, 1992, before the Honorable Michael J. Barron, Circuit Judge (R1:5-6; R30-32). At the state's request, the trial court dismissed Count 1, the false imprisonment charge, and Counts 2 and 3 were renumbered 1 and 2 respectively (R1:5; R30:14-15). The jury returned verdicts on June 17, 1992, finding Mr. Neumann guilty on both of the remaining counts (R1:6; R18; R19; R32:39-41).

On August 6, 1992, Judge Barron sentenced Mr. Neumann to four years incarceration on Count 1 (the original Count 2) and a consecutive four year term of probation on Count 2 (the original Count 3) (R1:7; R33:67-69). The Court entered judgment the same date (R24; App. 1-2) and denied Mr. Neumann's motion for continued release on bail pending appeal (R1:7; R33:70-72; see R26 & 27).

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[1] Throughout this brief, reference to the record will take the following form: (R__:__), with the "R__" reference denoting the record document number and the following ":__" reference denoting the page number of the document. Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as "App. __."

Mr. Neumann timely filed his notice of intent to pursue post-conviction relief on August 6, 1992 (R25). He timely filed his Notice of Appeal on Monday, November 2, 1992 (R28), the final transcript having been served on September 2, 1992 (R1:8).

Statement Of Facts

(i) Trial Evidence

Christopher W. Neumann and Jennifer Harkins were high school sweethearts who began dating in 1988 or 1989 (R31:7, 45, 177). It was not an easygoing relationship; they argued quite often and they occasionally broke up for a couple of days (R31:44, 47; 144-45, 159). Nevertheless, they continued going steady until soon before the date of this incident in November, 1990. By that time, they were both students at the University of Wisconsin-Milwaukee (R31:7-8).

Sometime prior to November, 1990, Mr. Neumann moved into an apartment at 2727 North Maryland Avenue in Milwaukee, Wisconsin (R31:8). Although Ms. Harkins lived at her parent's home, she visited that apartment almost daily leading up to November, 1990, and stayed overnight at Mr. Neumann's apartment "[m]aybe once a week" (R31:8-9; 179-80). Ms. Harkins' relationship with Mr. Neumann was an intimate one, involving sexual intercourse on a number of occasions (R31:7, 47-48, 178-79). Mr. Neumann testi-

fied that they had sexual intercourse as recently as two days prior to the charged incident (R31:180).

On November 9, 1990, Mr. Neumann and Ms. Harkins went to a formal fraternity dinner-dance together (R31:9-10). Prior to the dance, the two got dressed at Mr. Neumann's apartment and drank a bottle of champagne, although they were both underage (R31:10-11, 55, 58, 184-85). They then rode in a limousine with two other couples to the site of the dance, the Bank One Building in downtown Milwaukee. During the ride, the six passengers shared two or three more bottles of champagne (R31:11-12, 56-61, 186-89). When they arrived at the dance, Mr. Neumann purchased another bottle of champagne and more drinking took place (R31:12, 63).

After the dinner, Mr. Neumann and Ms. Harkins danced for a while and then went for a ride with another couple in a horse drawn carriage to the Marc Plaza Hotel (R31:12-14). The couples consumed another bottle of champagne during this ride (R31:14).

At the Marc Plaza, Mr. Neumann and Ms. Harkins joined an after-formal party held in one of the suites (R31:14-15). Mr. Neumann "was very intoxicated" by that point. He began yelling at Ms. Harkins concerning a minor incident in the carriage and then got into a fight with another party goer (R31:15-16, 70, 101). Ms. Harkins became disgusted with Mr. Neumann, ignored him and left the room (R31:16). She later learned that a security

guard had told Mr. Neumann to leave (R31:18, 76-77).

Mr. Neumann called the party suite from a telephone in the lobby and asked Ms. Harkins to leave with him, but she hung up on him (R31:19). She caught a ride with two other couples who were leaving the party. Mr. Neumann was waiting outside, however, and insisted on riding with them (R31:20-21, 118-19, 132). He was still heavily intoxicated (R31:134).

When they reached Mr. Neumann's apartment, he pulled Ms. Harkins out of the car with him (R31:22-23). Ms. Harkins ran up the street and the car left. Mr. Neumann caught up with her and forced her to walk to his apartment. Mr. Neumann's roommates were present in the apartment and one of them told him to have Ms. Harkins quiet down. (R31:25-27).

In Mr. Neumann's bedroom in the apartment, Ms. Harkins attempted to scream, but he covered her mouth with his hand and hurt her jaw (R31:29). Mr. Neumann began kissing her, but then suggested that she get up and change clothes because she was still wearing her formal (R31:30-31).

Ms. Harkins testified that she was changing into Mr. Neumann's sweat pants and a t-shirt when he pushed her back on the bed and began kissing her again (R31:31-32). During this time, Ms. Harkins was screaming and trying to get away (id.). He then pulled the sweat pants down, forced her legs apart, and put his finger inside her

vagina (R31:32-34). Mr. Neumann then placed his penis in her vagina. After several minutes, Ms. Harkins was able to push him off and the two fell asleep (R31:34-36). At one point, Ms. Harkins awakened and attempted to dial 911. However, she was interrupted by Mr. Neumann who took the phone out of her hand and took her back into the bedroom where they both again fell asleep. (R31:37).

The next morning, Ms. Harkins attempted to leave the apartment. Mr. Neumann grabbed her and lifted up her t-shirt in front of his roommates in order to humiliate her, but then permitted her to get dressed and leave. (R31:38-40). Ms. Harkins then went to the apartment of a friend who lived nearby and who convinced her to call the police (R31:41-42).

One of Mr. Neumann's roommates, called as a state witness, testified that both Mr. Neumann and Ms. Harkins were intoxicated when they arrived at the apartment (R31:155-56). He also testified that he had no concerns about Ms. Harkins and Mr. Neumann yelling at each other in the bedroom that night because they had often argued and acted that way, especially when they had been drinking (R31:144-45, 157). He also testified that Mr. Neumann still was incoherent and appeared intoxicated the next morning (R31:158-59).

Mr. Neumann testified that he could remember that he was drinking heavily at the dinner-dance but could not remember how much or what he was drinking. He could not

remember leaving the dance, the incidents at the Marc Plaza, the ride home, arriving at his apartment, or the incident in his bedroom that night. (R31:198-200, 204-09, 214-17).

Mr. Neumann further testified that he loved Jennifer Harkins and would never have forced her to have sexual intercourse with him (R31:205-06).

(ii) Offer of proof re expert testimony.

Prior to trial, Mr. Neumann requested a ruling on the admissibility of expert testimony by Dr. Michael Levy, the director of Northbrooke Hospital and clinical director of Addiction Medicine. Mr. Neumann's offer of proof indicated that Dr. Levy would have testified concerning the dynamics of an alcohol blackout and what the term "blackout" means. Dr. Levy would have testified that, once a person reaches a certain stage of blackout, that person does not know what he or she is doing and is incapable of forming intent. (R30:8-9).

To avoid admission of this testimony, the state dismissed the false imprisonment count (R30:14-15). The trial court then excluded Dr. Levy's testimony. The Court concluded that the sexual assault charges "do not require the element of intent and since intoxication only relates to vitiating the intent of the defendant to commit the crime, ... [t]here's no relevance to Dr. Levy's testimony." (R30:15; App. 8).

Prior to resting, Mr. Neumann made an additional offer of proof including Dr. Levy's resumé (Trial Exhibit 3).[2] Counsel stated that Dr. Levy would have testified concerning the nature of an alcohol blackout and "that an individual that drinks to the point where he suffers a blackout does not know what he's doing during the blackout and does not form intent to do the acts he does during the blackout. ... In other words, there would be no knowledge at the time it's happening and he would have no intent to do those incidents as it's happening." (R32:5-7). Mr. Neumann previously had testified concerning his blackout at the time of the alleged offenses (R31:198-200, 204-09, 214-17). Again, the trial court excluded the expert testimony as irrelevant (R32:11, 20-23; App. 10-14).

ARGUMENT

I.

THE TRIAL COURT'S "RAPE SHIELD" INSTRUCTION MISSTATED THE LAW AND DENIED MR. NEUMANN JURY CONSIDERATION OF RELEVANT EXCULPATORY EVIDENCE.

Prior to trial, defense counsel moved the Court pursuant to Wis. Stat. §§971.31(11) and 972.11(2)(b) for an order allowing testimony concerning the complainant's prior sexual conduct with the defendant on the grounds

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[2] The trial exhibits originally were omitted from the appeal record. Mr. Neumann has moved this Court to supplement the record to include those exhibits.

that such evidence was relevant to the issues of consent and use of force (R9; see R30:3-4). The trial court heard the motion prior to trial (R30:2-7). It permitted summary evidence of the sexual relationship prior to Mr. Neumann's moving into the apartment at 2727 Maryland Avenue and more detailed evidence of their conduct after the move (R30:7; App. 4). The state did not object to admission of such evidence, and indeed proposed the resolution ultimately adopted by the court (R30:4-6). As is noted in the Statement of Facts, supra, such testimony in fact was admitted at trial.

Although the court admitted the evidence as requested by Mr. Neumann, it subsequently instructed the jury, over defense objection (R32:12-13), that jurors could not use the evidence for the very purpose for which it was admitted:

> Evidence of prior sexual conduct on the part of Jennifer Harkins has been introduced in this case. Do not consider this evidence in determining whether Jennifer Harkins consented to the alleged sexual intercourse.

(R17:5; R32:30-31). The Court arrived at this instruction by modifying the pattern jury instruction concerning evidence of an alleged victim's prior sexual conduct with someone other than the defendant (see R32:12-13). See Wis. J.I.--Crim. 1200F; Wis. Stat. §972.11(2)(b)2.

Whether the trial court correctly instructed the jury is a question of law reviewed de novo. State v.

Wilson, 149 Wis. 2d 878, 440 N.W.2d 534, 541 (1989).

The jury instruction here clearly misstated the law. While trial courts may issue instructions limiting the purposes for which the jury properly may use evidence "which is admissible ... for one purpose but not admissible ... for another purpose," Wis. Stat. §901.06, there was no legal basis for the limitation imposed here. Contrary to the state's argument below (R32:19) and the trial court's conclusion (R32:23; App. 14), evidence of the complainant's prior sexual conduct with Mr. Neumann was both highly relevant to the issue of her consent and admissible for that purpose.

Where, as here, the complainant and the accused engaged in a series of amicable and amorous encounters over an extended period of time, "the relevancy of this evidence [on the issue of consent] is ... beyond question." Testerman v. State, 486 A.2d 233, 236 (Md. App. 1985); see Milenkovic v. State, 86 Wis. 2d 272, 272 N.W.2d 320, 323-25 (Ct. App. 1978) (evidence of complainant's recent prior sexual conduct with the accused relevant to consent although such prior conduct with others is not). "Consensual sexual activity over a period of years, coupled with a claimed consensual act reasonably contemporaneous with the act complained of, is clearly material on the issue of consent." State v. Gonyaw, 507 A.2d 944, 947 (Vt. 1985); see, e.g., United States v. Saunders, 736 F. Supp. 698, 702 (E.D. Va. 1990), aff'd, 943 F.2d 388 (4th

Cir. 1991), cert. denied, 112 S.Ct. 1199 (1992). See also Annot., Rape--Complainant's Prior Sexual Acts, 94 A.L.R.3d 257 §9 (1979 & 1992 Pocket Part) (and cases cited therein); Comment, Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions Of Evidence, 1985 Wis. L. Rev. 1219, 1237 & n.65 (and authorities cited therein). Professor Galvin, for instance, notes that "[e]ven the most ardent reformers acknowledged the high probative value" of such evidence on the issue of consent. H. Galvin, Shielding Rape Victims In The State And Federal Courts: A Proposal For The Second Decade, 70 Minn. L. Rev. 763, 807 (1986).

Moreover, the evidence was properly admitted on the issue of consent. The rape shield law, Wis. Stat. §972.11(2), generally excludes evidence of the complainant's prior sexual conduct, but specifically exempts "[e]vidence of the complaining witness's past conduct with the defendant." Wis. Stat. §972.11(2)(b)1. The statute does not limit the purposes for which such exempted evidence may be used. Compare Wis. Stat. §972.11(2)(b)2 (exempting for limited purposes evidence of prior sexual conduct with persons other than the defendant); Fed. R. Evid. 412(b)(2)(B) (limiting evidence of past sexual behavior with the accused to issue of consent). Also, although "sexual conduct" evidence admissible under §972.11(2) still may be excluded unless it is "of sufficient probative value to outweigh its inflammatory and

prejudicial nature," Wis. Stat. §971.31(11), the state conceded admissibility of the evidence and the court accepted that concession. Indeed, the state itself first introduced evidence of the sexual relationship (R31:7-9).

The limiting instruction thus had the effect of improperly excluding jury consideration of admissible and highly relevant exculpatory evidence.

This error was not harmless. See State v. Dyess, 124 Wis. 2d 525, 370 N.W.2d 222, 231-32 (1985). The evidence reflects that the relationship at issue here was punctuated by both frequent loud arguments and frequent consensual sexual intercourse over a long period of time and as recently as a few days before the alleged assault. This evidence demonstrates the nature of the particular relationship and of the complainant's particular mind set toward Mr. Neumann. See Galvin, 70 Minn. L. Rev. at 807. Mr. Neumann also testified that he loved Ms. Harkins and never would do anything to hurt her (R31:205-06).

Given this testimony and the nature and history of this relationship, the jury reasonably could have determined that the state failed to meet its burden of proving beyond a reasonable doubt that Ms. Harkins did not consent to the intercourse in this case. E.g., Gonyaw, 507 A.2d at 947. The state thus cannot "establish that there is no reasonable possibility that the error contributed to the conviction." Dyess, 370 N.W.2d at 232.

In addition, the trial court's erroneous instruc-

tion arbitrarily deprived the defendant of relevant evidence in violation of his rights to due process and to present a defense. See, e.g., Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) (recognizing criminal defendants' "right to put before a jury evidence that might influence the determination of guilt"); Crane v. Kentucky, 476 U.S. 683, 690 (1986). See also New Jersey v. T.L.O., 469 U.S. 325, 345 (1985):

> [I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Quoted in McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 1232 (1990).

The rape shield statute itself cannot be used to bar the defendant from presenting such highly relevant evidence. See, e.g., State v. Moats, 156 Wis. 2d 74, 457 N.W.2d 299, 315-17 (1990); State v. Pulizzano, 155 Wis. 2d 633, 456 N.W.2d 325 (1990). The constitutional right certainly is no less violated when such evidence is effectively excluded even though clearly admissible under that statute.

The limiting instruction improperly denied Mr. Neumann jury consideration of critical relevant evidence on the issue of consent -- just as if the court had excluded the evidence totally. Because this error plainly

was not harmless, Mr. Neumann's conviction must be reversed.

II.

BECAUSE INTENT IS A REQUIRED ELEMENT OF NON-CONSENSUAL SEXUAL INTERCOURSE BY THREAT OR USE OF FORCE OR VIOLENCE, THE TRIAL COURT ERRED BY DENYING INSTRUCTIONS ON THAT ELEMENT, BY NOT INSTRUCTING ON THE DEFENSE OF VOLUNTARY INTOXICATION, AND BY EXCLUDING RELEVANT EXPERT TESTIMONY.

Prior to trial, Mr. Neumann submitted five alternative jury instructions defining the elements of non-consensual sexual intercourse by use or threat of force or violence and a memorandum of law in support of those instructions. Each proposed instruction set forth an alternative formulation of the requisite mens rea element and properly set forth the voluntary intoxication defense. Mr. Neumann also requested the standard Wisconsin Jury Instruction on voluntary intoxication, Wis. J.I.--Crim. 765. (R8, R11-R16; see R32:7-11). As previously noted, Mr. Neumann also proffered the expert testimony of Dr. Levy concerning the effect of an alcohol induced blackout on the ability to know or to form intent.

There can be no question but that Mr. Neumann was extremely intoxicated at the time of the actions underlying the charges in this case. Wisconsin law provides that such an intoxicated condition is a defense when, as here, that condition "[n]egatives the existence of a state of mind essential to the crime." Wis. Stat. §939.42(2).

The trial court, however, concluded that there is no state of mind essential to the crime of non-consensual sexual intercourse by the threat or use of force or violence under Wis. Stat. §940.225(2)(a). As such, the court denied the requested instructions and excluded the expert testimony. (R30:13-15; R32:11, 20-23; App. 6-8, 10-14).

The trial court was wrong. For the reasons which follow, Wisconsin's "sexual intercourse" crimes do require proof of intent. See Sections II,A & B, infra. The trial court's error also was not harmless. See Section II,C, infra.

Whether intent is an element of second degree sexual assault and whether voluntary intoxication is a defense to that charge are issues of statutory interpretation which are reviewed de novo by this Court. E.g., In Re T.L., 151 Wis. 2d 725, 445 N.W.2d 729, 731 (Ct. App. 1989). Whether expert testimony should be admitted is largely a matter of trial court discretion. State v. Friedrich, 135 Wis. 2d 1, 398 N.W.2d 763, 769 (1987). When that decision is based upon an erroneous view of the law, however, it will be reversed as an abuse of discretion. See State v. Daniels, 160 Wis. 2d 85, 465 N.W.2d 633, 638 (1991).

A. Specific Intent Is A Required Element Of Non-Consensual Sexual Intercourse By The Threat Or Use Of Force Or Violence.

Whoever "[h]as sexual contact or sexual inter-

course with another person without consent of that person by use or threat of force or violence" is guilty of a Class C felony. Wis. Stat. §940.225(2)(a). Pursuant to Wis. Stat. §940.225(5)(c),

> "Sexual intercourse" includes the meaning assigned under s. 939.22(36) as well as cunnilingus, fellatio, or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

Wis. Stat. §939.22(36) provides that "'[s]exual intercourse' requires only vulvar penetration and does not require emission."

Despite the apparent absence of a specific intent element in the definitions of "sexual intercourse" in the Wisconsin statutes, the legislature clearly did not intend to criminalize all conduct proscribed by the "sexual intercourse" crimes without proof of specific criminal intent.[3] If interpreted as strict liability or general

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[3] "A specific intent, when an element of the mens rea of a particular offense, is some intent other than to do the actus reus thereof which is specifically required for guilt." R. Perkins, Criminal Law 671 (1957). The definition of "sexual contact" in Wis. Stat. §940.225(5)(b), for example, expressly requires proof not only that the touching be intentional, but also that it was committed "for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery... ." By contrast, a general intent crime "requires only that the prohibited acts be voluntarily committed and

FOOTNOTE CONTINUED ON NEXT PAGE

intent offenses, these statutes proscribe a substantial amount of beneficial and harmless conduct. Certainly the legislature did not intend, for example, to subject a mother to a felony prosecution for first degree sexual assault under Wis. Stat. §948.02(1) for taking her two-year-old's temperature with a rectal thermometer. Yet, if the "sexual intercourse" crimes are construed as not requiring proof of criminal intent, there are numerous such absurd and frightening applications of the statute. Furthermore, if specific intent is not an element of these crimes, then the statutes violate due process and equal protection.

1. **The legislature intended that the statutes proscribing sexual intercourse require proof of specific criminal intent.**

The Wisconsin Supreme Court has recognized that, even where a criminal statute contains no words denoting mens rea, the state may have to prove criminal intent to obtain a conviction if the legislature so intended. See, e.g., State v. Stoehr, 134 Wis. 2d 66, 396 N.W.2d 177, 180 (1986); State v. Collova, 79 Wis. 2d 473, 255 N.W.2d 581

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[3] FOOTNOTE CONTINUED FROM PREVIOUS PAGE

that the actor have the capacity to understand that his act is wrong." State v. Wells, 51 Wis. 2d 477, 187 N.W.2d 328, 334 (1971) (Heffernan, J., dissenting). See also Remington and Helstad, The Mental Element In Crime -- A Legislative Problem, 1952 Wis. L. Rev. 644, 664 (discussing the distinction between general and specific intent crimes).

(1977) (crime of operating after revocation requires proof of criminal intent despite lack of mens rea element on face of statute); State v. Alfonsi, 33 Wis. 2d 469, 476, 147 N.W.2d 550 (1967) (crime of bribery requires proof of criminal intent despite lack of mens rea element on face of statute). The reason for looking beyond the language of the statute is that, although the legislature may create crimes in which criminal intent is not an element, "criminal intent is the rule in our criminal jurisprudence." Stoehr, 396 N.W.2d at 181.

Among the factors Wisconsin courts have considered in determining whether the legislature intended to require proof of mens rea are the language of the statute, the legislative history of the statute, the seriousness of the penalty, the purpose of the statute, and the practical requirements of effective law enforcement. Stoehr, 396 N.W.2d at 180. Application of these factors compels a conclusion that the legislature did not intend the "sexual intercourse" crimes to be strict liability or even general intent offenses.

The sexual assault statute, Wis. Stat. §940.225, was enacted in 1975, replacing the former rape statute, Wis. Stat. §944.01 (1973), which stated: "Any male who has sexual intercourse with a female he knows is not his wife, by force and against her will, may be imprisoned not

more than 30 years."[4] Under the rape statute, "sexual intercourse" was narrowly defined to include only penis-to-vagina intercourse. See Wis. Stat. §939.22(36) (1973); State v. Baldwin, 59 Wis. 2d 116, 207 N.W.2d 630, 633-34 (1973).

On two occasions the Wisconsin Supreme Court held that the crime of rape, despite its substantial penalties, did not require proof of specific criminal intent to have intercourse by force and against the complainant's will because the statute did not expressly require proof of criminal intent. Redepenning v. State, 60 Wis.2d 471, 210 N.W.2d 673, 678 (1973); Brown v. State, 59 Wis. 2d 200, 207 N.W.2d 602, 609 (1973). In view of the fact that the rape statute proscribed only forceful, non-consensual

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[4] The sexual assault statute also replaced Wis. Stat. §944.02 (1973) which provided:

> 944.02 Sexual intercourse without consent. Any male who has sexual intercourse under any of the following circumstances with a female he knows is not his wife may be imprisoned not more than 15 years: (1) If she is incapable of resisting or consenting because of stupor or abnormal condition of the mind and he knows of her incapacity; or (2) If she is mentally ill, mentally inform or mentally deficient and he knows of her incapacity; or (3) If she submits because she is deceived as to the nature of the act or because she believes that the intercourse is marital and this deception or belief is intentionally induced by him.

penis-to-vagina intercourse, there was perhaps a rational basis for the legislature not to require proof of specific criminal intent. Under the rape statute it would be quite unlikely that "sexual intercourse" would not cause harm to the victim, and there would be few, if any, instances in which intercourse would not be culpable.

Redepenning and Brown do not control here, however. The Supreme Court more recently has repudiated the rationale of those decisions, which looked solely to the statutory language. See, e.g., Stoehr, 396 N.W.2d at 180-81 (lack of statutory intent language only one factor to consider).

Also, the significantly different language of the present sexual assault statute applies to a much wider range of conduct and circumstances and also includes a substantially broader definition of sexual intercourse:

> "Sexual intercourse" [means vulvar penetration] as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction.

Wis. Stat. §940.225(5)(c). The same definition is applied to "sexual intercourse" crimes against children. Wis. Stat. §948.01(6).

No Wisconsin appellate court has analyzed the question of whether the "sexual intercourse" element of the current sexual assault statutes requires proof of

criminal intent.[5] The only reasonable interpretation of the "sexual intercourse" crimes is that the legislature intended to require proof of specific intent, despite its failure expressly to include an intent element in the definition of "sexual intercourse." It would be ludicrous to believe that the legislature intended to criminalize every intrusion into "a genital or anal opening" that occurs under proscribed circumstances, regardless of whether the person acted with a wrongful purpose.

In addition to the rectal thermometer example described previously, a strict liability or general intent reading of these "sexual intercourse" offenses would criminalize a substantial amount of other beneficial conduct, particularly in the medical and health fields. A doctor or nurse would violate Wis. Stat. §940.225(2)(c), (d) or (g) by inserting a suppository, inserting a catheter, or performing a routine proctological examination if the patient is in a state treatment facility, suffers from

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[5] In Hagenkord v. State, 100 Wis. 2d 452, 302 N.W.2d 421, 437 n.9 (1981), the court assumed in dicta, without analyzing or deciding the issue, that first degree sexual assault, like rape, did not require proof of criminal intent. Because of the distinctions between the rape and sexual assault statutes, and the court's cursory consideration of intent in Hagenkord, Hagenkord is not dispositive. In State v. Lederer, 99 Wis. 2d 430, 299 N.W.2d 457, 460-61 (Ct. App. 1980), the court did not address the question of whether the legislature actually intended to require proof of criminal intent for third degree sexual assault, but merely rejected the defendant's claim that the legislature does not have the authority to create a strict liability offense with such severe penalties. Id., 299 N.W.2d at 460-61.

the type of mental illness or deficiency described in sub (c), or is unconscious. Consent of such patients is not a defense to such "sexual assaults." See Wis. Stat. §940.225(4). If a patient attempted to prevent such necessary care, the doctor or nurse could further subject herself to prosecution under Wis. Stat. §940.225(2)(a) and (2)(f) by using force or by obtaining assistance from other persons.

Under strict liability or general intent readings of these statutes, it would also be a felony to deliver a baby, conduct routine medical examinations of the genital and anal areas, or apply salve to a rash in these areas for the benefit of children under the age of 16, see Wis. Stat. §948.02, and a misdemeanor if the child is between 16 and 18, see Wis. Stat. §948.09. Without stretching the imagination, one can conceive of numerous other harmless activities that fall within the broad definition of "sexual intercourse."[6]

These examples clearly demonstrate that the purpose of the statutes proscribing "sexual intercourse" is not to criminalize every intrusion into "a genital or anal opening," but to criminalize only those intrusions

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[6] Compare Ill. Rev. Stat., Ch. 38, para. 12-18 (1991) which provides an exemption from criminal liability for otherwise proscribed "sexual penetration" if the "sexual penetration" constitutes a "medical examination or procedure which is conducted by a physician, nurse, medical and hospital personnel, parent, or caretaker for purposes and in a manner consistent with reasonable medical standards... ."

accomplished with criminal intent. "The cardinal rule in interpreting statutes is to favor a construction that fulfills the purpose of the state statute over a construction that defeats it." Stoehr, 396 N.W.2d at 180. Furthermore, statutes must be interpreted in such a way as to avoid "an absurd or unreasonable result." State v. Pham, 137 Wis. 2d 31, 403 N.W.2d 35, 36 (1987). To interpret "sexual intercourse," as defined in Wis. Stat. §§940.225(5)(c) and 948.01(6), as not requiring proof of specific intent would do violence to the obvious legislative intent in creating such a broad definition of "sexual intercourse."

While the need to preclude such absurd applications of the "sexual intercourse" statutes is reason enough to require proof of specific intent, other factors also strongly favor the conclusion that these crimes are neither strict liability nor general intent offenses. The seriousness of the penalty for "sexual intercourse" crimes demonstrates a legislative intent only to punish culpable offenders. See, e.g., Collova, 255 N.W.2d at 587 (holding that the legislature did not intend to impose the severe penalties associated with a conviction for operating after revocation without some requirement of guilty knowledge as an element of the offense). Further, to require the state to prove criminal intent would not impose an undue burden to the practical requirements of effective law enforcement as demonstrated by the fact that the state must prove

criminal intent in prosecutions for "sexual contact" crimes. See Wis. Stat. §940.225(5)(b); Wis. J.I.--Crim. 1209.

Finally, the rationale for imposing strict liability is inapplicable to "sexual intercourse" crimes. As the court noted in Collova, 255 N.W.2d at 586-587, strict liability crimes usually arise in the context of regulatory criminal statutes and generally are not concerned with the question of moral culpability. See also Morissette v. United States, 342 U.S. 246, 253-259 (1952). "The usual rationale for strict liability statutes is that the public interest is so great as to warrant the imposition of an absolute standard of care -- the defendant can have no excuse for disobeying the law." Collova, 255 N.W.2d at 585. "The inquiry, reduced to its simplest terms, may be stated to be whether the statute appears on balance to be designed to punish wrongdoers or to implement a high standard of care on the part of the public." Id. at 587. Because the "sexual intercourse" offenses are not regulatory statutes designed to implement a high standard of care, but rather are concerned with the question of moral culpability, it is especially unlikely that the legislature intended these crimes to be strict liability offenses.

For the reasons stated above, and to eliminate the need to consider the constitutional questions raised if the "sexual intercourse" crimes are defined as strict

liability or general intent offenses, see Section II,B,2, infra, this Court should construe the sexual assault statutes as requiring proof that a defendant's act of "sexual intercourse" as defined in §940.225(5)(c) must be performed for the purpose of sexually degrading or humiliating the complainant, sexually arousing or gratifying the defendant, or with intent to cause bodily harm. Cf. Wis. Stat. §940.225(5)(b). Such a construction would be consistent with the legislature's intent not to punish citizens for these serious felonies without proof of moral culpability.

2. If Specific Intent Is Not An Element Of the Sexual Intercourse Crimes, Then These Statutes Violate Due Process And Equal Protection.

The Wisconsin Supreme Court has held that, "[g]iven a choice of reasonable interpretations of a statute, this court must select the construction which results in constitutionality." State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434, 450 (1978). Where, as here, a possible interpretation raises the potential for unconstitutionality, that interpretation must be rejected in favor of an interpretation which upholds the constitutionality of the statute. See, e.g., State ex rel. Lynch v. Conta, 71 Wis. 2d 662, 239 N.W.2d 313, 332 (1976).

a. Due Process.

The "sexual intercourse" crimes, if they are construed as not requiring proof of specific intent, violate substantive due process because they proscribe conduct which the state has no authority to condemn. The statute's prohibitions against non-consensual "sexual intercourse" cannot stand because they rest upon the unjustified conclusive presumption that all non-consensual "sexual intercourse," even as so broadly defined by the Wisconsin statutes, is harmful and culpable. Because these statutes criminalize beneficial and harmless conduct, they are arbitrary, unreasonable, and oppressive, and therefore invalid.

"Due process requires that the means chosen by the legislature bear a reasonable and rational relationship to the purpose or object of the enactment; if it (sic) does, and the legislative purpose is a proper one, the exercise of the police power is valid." State v. McManus, 152 Wis. 2d 113, 447 N.W.2d 654, 660 (1989). Furthermore, the court may consider hypothetical applications of a statute because a police regulation must be reasonable under all circumstances. State v. Starks, 51 Wis. 2d 256, 186 N.W.2d 245, 249 (1971); Mehlos v. Milwaukee, 156 Wis. 591, 598-99, 146 N.W. 882 (1914).

The question of whether a statute exceeds the police power of the state is usefully approached by break-

ing the analysis into two separate questions. First, does the police power of the state extend to the evil with which the legislation purports to cope? Second, has that power been reasonably exercised? See Starks, 186 N.W.2d at 249. There can be no dispute that the "sexual intercourse" crimes are directed at an evil which the legislature has the power, indeed the duty, to regulate. The statutes, however, to the extent that they do not require proof of specific intent, are void as an unreasonable exercise of that regulatory power.

As emphasized above, the "sexual intercourse" crimes prohibit a substantial amount of conduct that is not considered criminal or immoral. It is neither fair, nor rational, for the legislature so broadly to define "sexual intercourse" as to encompass the numerous useful activities that are proscribed by these statutes. As the Wisconsin Supreme Court emphasized long ago in State v. Redmon, 134 Wis. 89, 109-110, 114 N.W. 137 (1907), in striking down a law as an unlawful exercise of the police power:

> To take a view of a possible extreme running into the absurd is sometimes a most helpful method of illustrating that which must be regarded as false from its very absurdity. Law can never legitimately go clearly beyond the boundaries of reason.

In Starks, 186 N.W.2d at 249, the Wisconsin Supreme Court declared that Wisconsin's vagrancy statute was unconstitutional because the statute failed "to define

with precision the distinction between criminal and non-criminal conduct and thus may be used to 'criminalize' conduct which is beyond the legitimate reach of the state's police power." The court noted that sightseers, window-shoppers, and other innocent persons whom the legislature did not intend to reach would fall within the clear wording of the vagrancy statute. Id. The court concluded that because no one could reasonably believe that these hypothetical situations amounted to criminal conduct, the statute proscribed conduct that the state is not entitled to regulate.

Other courts have voided criminal statutes as an unlawful exercise of the police power on the ground that the statute failed to require proof of criminal intent, thus allowing the state to prosecute innocent conduct. In State v. Birdsell, 235 La. 396, 104 So.2d 148 (1958), the Supreme Court of Louisiana concluded that a statute making it unlawful to possess hypodermic needles except with a doctor's prescription was unreasonable because it rested upon the unjustified premise that "the possession is for an illegal purpose -- an unrebuttable presumption which factually runs counter to human experience." Similarly, in State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948), the New Mexico Supreme Court held that the state's embezzling statute constituted an unconstitutional exercise of the police power because the statute failed to require proof of intent, thus subjecting innocent and culpable conduct

alike to prosecution under the statute. In People v. Estreich, 272 App. Div. 698, 75 N.Y.S.2d 267 (1947), aff'd, 297 N.Y. 910, 79 N.E.2d 742 (1948), the court held that a New York statute proscribing the receipt of stolen property constituted an unconstitutional exercise of the police power because it failed to impose any element of guilty knowledge. See also People v. Nangapareet, 29 Misc.2d 446, 210 N.Y.S.2d 446, 448 (Erie County Ct. 1960) (statute proscribing possession of hypodermic needles was unconstitutional because "the classes of persons specifically excepted from the operation and criminal sting of the statute does (sic) not embrace the entirety of those who may put a hypodermic syringe or hypodermic needle to some perfectly proper occupational use... .").

As in the cases described above, the Wisconsin "sexual intercourse" crimes subject persons to prosecution for serious felonies regardless of whether their alleged conduct involved beneficial activity undertaken for the well-being of the "victim" or if it involved heinous activity universally condemned. The presumption that all non-consensual "sexual intercourse," as defined by the Wisconsin statutes, is harmful and engaged in for a wrongful purpose is irrational in view of the numerous applications of this definition to innocent conduct. Accordingly, these statutes, including Wis. Stat. §940.225(2)(a) with which Mr. Neumann is charged, are an unconstitutional

and invalid exercise of the police power unless specific criminal intent is an element of these offenses.

b. Equal Protection.

Wis. Stat. §940.225(2)(a) also violates equal protection if intent is not an element of "sexual intercourse." There is no rational basis for the legislature to require proof of intent for crimes involving "sexual contact," but not to require such proof for crimes involving "sexual intercourse," given that both types of crimes regulate essentially the same conduct.

Equal protection requires that there exist reasonable and practical grounds for the classifications drawn by the legislature. McManus, 447 N.W.2d at 660. A legislative enactment cannot be sustained if it is "patently arbitrary" and bears no rational relationship to a legitimate government interest. Id. at 660-61.

Non-consensual "sexual contact" by use of force, like non-consensual "sexual intercourse" by use of force, constitutes second degree sexual assault, a Class C felony. The grouping together of these two offenses under one statute reflects a legislative determination that these offenses are equally serious. Nevertheless, despite this determination that offenders should be treated similarly whether they have violated the "sexual intercourse" or the "sexual contact" provision of the statute, defendants charged with "sexual contact" must be proven to have

acted with criminal intent, while defendants charged with "sexual intercourse," under the trial court's interpretation, need not be proven to have acted with such intent.

The trial court's distinction between the mental elements of the two types of second degree sexual assault offenses is unwarranted, arbitrary, and irrational. The purpose of each prohibition is to criminalize non-consensual sexual conduct by use of force. The harm to the victim is of the same nature regardless of how the assault is accomplished. The statute, however, unjustifiably permits non-culpable acts of "sexual intercourse" to serve as a basis for prosecution while requiring proof of criminal intent for "sexual contact" offenses. Because both statutes are concerned with the same type of harm, and because many non-culpable actions are proscribed by the "sexual intercourse" statute, equal protection demands that the standard of care for each offense be the same.

The lack of an intent element for the "sexual intercourse" crimes also seriously impacts on the defenses that an accused can raise. An accused charged with a "sexual contact" crime can raise a voluntary intoxication defense, arguing that his high level of intoxication rendered him incapable of forming the criminal intent necessary for conviction under Wis. Stat. §940.225(5)(b). A defendant charged with "sexual intercourse," who was also intoxicated to such a degree that he was incapable of forming the requisite criminal intent, could not raise the

same defense, even though he is no more culpable than the "sexual contact" offender and has caused the same type of harm to the victim. It is unfair to deny the defendant charged with "sexual intercourse" the same defenses that are available to the offender charged with "sexual contact," an equally serious crime of the same nature.

There is no rational basis for distinguishing sexual assault offenders by reference to whether the assault was committed by "sexual contact" or "sexual intercourse." If culpability of the offender is the legislative concern with regard to sexual assault offenses, then criminal intent should be a required element whether the gravamen of the offense is intercourse or contact. If, on the other hand, the legislature is concerned about the harm caused to the victim, without regard to the culpability of the offender, then both definitions should impose an absolute standard of care. Because there is no rational basis for imposing strict liability on "sexual intercourse" defendants, while requiring proof of specific intent for "sexual contact" defendants, Wis. Stat. §§940.225(2)(a) and 940.225(5)(c), as interpreted by the trial court, violate equal protection.

B. General Intent Is A Required Element Of Non-Consensual Sexual Intercourse By Threat Or Use Of Force Or Violence Even If Specific Intent Is Not.

The trial court's interpretation of second-degree

sexual assault as a strict liability offense likewise is erroneous because Wisconsin's "sexual intercourse" crimes, if not specific intent offenses, are "general intent" offenses. As discussed previously, the rationale for imposing strict liability is inapplicable to "sexual intercourse" crimes in view of the harsh penalties involved, the non-regulatory nature of these offenses, and the fact that requiring the state to prove criminal intent does not impose an undue burden on the practical requirements of effective law enforcement. See Section II,B,1, supra.

Moreover, the common law crime of rape historically has been considered a general intent crime. See, e.g., People v. Leonard, 526 N.E.2d 397, 399 (Ill. App.) ("The crime of aggravated criminal sexual assault, formerly constituting the crime of rape, is a general intent crime..."), appeal denied, 535 N.E.2d 407 (1988), cert. denied, 490 U.S. 1008 (1989); People v. Brewer, 101 Mich. App. 194, 300 N.W.2d 491, 492 (1980); United States v. Lavallie, 666 F.2d 1217, 1219 (8th Cir. 1981); W. LaFave and A. Scott, Substantive Criminal Law §4.10 at 553 n.20 (1986) (categorizing rape as a "general intent" offense and recognizing that "rape requires an intent to do the physical act of accomplishing sexual intercourse with the victim"); cf., State v. Wells, 51 Wis. 2d 477, 187 N.W.2d 328, 334 (1971) (Heffernan, J., dissenting) ("Normally, to prove a felony, the prosecution must establish two ele-

ments, referred to at common law as actus rea and mens rea -- a guilty act and a guilty mind"), cert. denied, 406 U.S. 909 (1972).[7]

C. The Trial Court's Misinterpretation Of The Statute As Not Requiring Intent Denied Mr. Neumann A Fair Trial.

Regardless whether the sexual intercourse statutes require specific intent or merely general intent to commit the physical act constituting intercourse, the trial court's misinterpretation of those statutes denied Mr. Neumann a proper defense and thus deprived him of a fair trial. As a result of that error, the trial court failed to instruct the jury concerning a required element of the offense, refused to instruct on a valid defense supported by the evidence, and excluded relevant expert testimony supporting that defense.

"It is axiomatic that the State must prove all of the elements of a crime beyond a reasonable doubt to convict a defendant." State v. Kuntz, 160 Wis. 2d 722, 467 N.W.2d 531, 536 (1991) (citation omitted). Instructions, such as those here, which fail to require the jury to judge the sufficiency of the state's proof on all essen-

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[7] Redepenning and Brown did not hold otherwise. Those decisions held merely that the old rape statute did not require proof of specific criminal intent to have sexual intercourse by force and against the complainant's will. Redepenning, 210 N.W.2d at 678; Brown, 207 N.W.2d at 609. Neither addressed whether the statute required general intent to commit the act constituting intercourse.

tial elements violate due process. Id.

This case does not fall within any of those "rare situations" in which such an error may be harmless. See Kuntz, 467 N.W.2d at 537-38. The defendant was not acquitted on the charge for which the erroneous instruction was given, nor did he admit the missing element of intent. Id. at 537. Nor can it be said that the jury's findings here necessarily encompassed a finding on the intent element omitted from the instructions. See id. at 538 (citation omitted). The error here thus simply cannot be deemed harmless.

The trial court's erroneous interpretation of the statute also is not harmless because it deprived Mr. Neumann of the statutory defense of intoxication and crucial evidence supporting that defense. As previously noted, voluntary intoxication is a defense when it "[n]egatives the existence of a state of mind essential to the crime." Wis. Stat. §939.42(2).

Even if specific intent is not an element of the sexual intercourse crimes, the trial court erred by not giving the defendant's requested instruction on voluntary intoxication because voluntary intoxication is a defense to general intent crimes in Wisconsin. The Wisconsin Supreme Court has held:

> Although intoxication will not negate the depraved mind element of a crime, ... it may be in a proper case, a sufficiently high degree of intoxica-

> tion could negate the existence of a general intent to do the acts. As this court has stated, intoxication is a defense if the accused is so completely intoxicated as to be "'... incapable of forming intent to perform an act or commit a crime... .'" Staples v. State, 74 Wis. 2d 13, 21, 245 N.W.2d 679, 684 (1976), quoting State v. Guiden, 46 Wis. 2d 328, 331, 174 N.W.2d 488 (1970) (Emphasis added.)

State v. Verhasselt, 83 Wis. 2d 647, 266 N.W.2d 342, 352 (1978).

Professors LaFave and Scott also have recognized that voluntary intoxication should be a defense to the crime of rape regardless of whether it is classified as a crime of general or specific intent. See W. LaFave and A. Scott, Criminal Law §4.10 at 389-90 (1986) ("One is not guilty of rape, or of assault with intent to rape, if he is intoxicated to such an extent that he is unable to entertain the intent to have sexual intercourse"); Substantive Criminal Law §4.10 at 553 ("[I]f intoxication does in fact negative an intention which is a required element of the crime (whether it be called specific or general intent), the crime has not been committed"). See also Bowen v. State, 478 N.E.2d 44, 46 (Ind. 1985) (holding that voluntary intoxication is a defense to rape and criminal deviate conduct); Terry v. State, 465 N.E.2d 1085, 1087-88 (Ind. 1984) (holding that voluntary intoxication is a defense to any crime because "'if intoxication, whether it be voluntary or involuntary, renders that individual so completely non compos mentis that he has no

ability to form intent, then under our constitution and under the firmly established principles of the mens rea requirement in criminal law, he cannot be held accountable for his actions, no matter how grave or how inconsequential they may be'") (quoting Sills v. State, 463 N.E.2d 228 (Ind. 1984) (Givan, J., concurring)).

Regardless of whether the charged offense is a crime of general or specific intent, the evidence was sufficient to raise the defense of intoxication for determination by the jury. The defendant's "intoxicated condition is a negative, rather than an affirmative defense. Therefore, the state may only require the defendant to come forward with 'some' evidence in rebuttal of the state's case." Barrera v. State, 109 Wis. 2d 324, 325 N.W.2d 722, 725 (1982) (citation omitted). Such evidence need only be "credible and sufficient to warrant the jury's consideration of the issue as to whether the defendant was intoxicated to the extent it materially affected his or her ability to form the requisite intent." State v. Schulz, 102 Wis. 2d 423, 307 N.W.2d 151, 157 (1981).

The evidence of Mr. Neumann's extreme intoxication was ample and uncontroverted and thus plainly met this standard. A reasonable jury could have found the defense applicable on these facts. The error in not instructing on the defense thus was not harmless. See also Schulz, 307 N.W.2d at 156, 158 (possibly misleading

instructions on intoxication defense not harmless where primary issue at trial was intent of defendant).

The trial court's error also denied Mr. Neumann crucial expert testimony on his intoxication defense. Dr. Levy's proffered testimony "that an individual that drinks to the point where he suffers a blackout does not know what he's doing during the blackout and does not form intent to do the acts he does during the blackout" (R32:5-6), is supported by the evidence and amply satisfies the requirements for admission of such testimony. See State v. Schael, 131 Wis. 2d 405, 388 N.W.2d 641, 643 (Ct. App.) ("an expert's testimony on the effect of intoxication upon intent, in order to be admissible, must state that the intoxication negatived the defendant's intent"), rev. denied, 131 Wis. 2d 594, 393 N.W.2d 297 (1986).

Given the effect of the trial court's erroneous interpretation of the statute, the state thus cannot "establish that there is no reasonable possibility that the error contributed to the conviction." State v. Dyess, 124 Wis. 2d 525, 370 N.W.2d 222, 232 (1985). The error was not harmless. Id.

CONCLUSION

The trial evidence demonstrated that Christopher W. Neumann and the complainant were involved in a long-standing and amicable sexual relationship leading up to the time of the alleged offenses. The trial court, how-

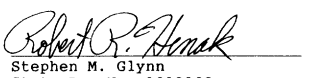
ever, denied Mr. Neumann jury consideration of such highly relevant and admissible evidence on the issue of consent. The trial evidence further demonstrated Mr. Neumann's extreme intoxication at the time of the alleged offenses. Yet, the trial court likewise denied Mr. Neumann jury consideration of such evidence by misconstruing the charged offenses as strict liability crimes. Because these errors denied him a fair trial, Mr. Neumann respectfully asks that this Court reverse the judgment of conviction against him and grant him a new trial.

Dated at Milwaukee, Wisconsin, January 28, 1993.

Respectfully submitted,

CHRISTOPHER W. NEUMANN,
Defendant-Appellant.

SHELLOW, SHELLOW & GLYNN, S.C.



Stephen M. Glynn
State Bar No. 1013103

Robert R. Henak
State Bar No. 1016803

Craig W. Albee
State Bar No. 1015752

P.O. ADDRESS:

222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

0021p

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 92-2844-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. NEUMANN,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT

0031p

WISCONSIN | CIRCUIT BRANCH # 08CR | MILWAUKEE COUNTY

State of Wisconsin, Plaintiff
-vs-
NEUMANN, CHRISTOPHER, Defendant
07-22-71
Defendant's Date of Birth

TYPE OF CONVICTION (Select One)
XX Sentence to Wisconsin State Prisons
___ Sentence Withheld, Probation Ordered
___ Sentence Imposed & Stayed, Probation Ordered

COURT CASE NUMBER F-903969

The defendant entered plea(s) of: [ ] Guilty [XX] Not Guilty [ ] No Contest
The [ ] Court [XX] Jury found the defendant guilty of the following crime(s):

CRIME(S)	WIS STATUTE(S) VIOLATED	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
#1) DISMISSED				
#2) Second Degree Sexual Assault (Count I on judgment roll and transcripts.)	940.225(2)(a)	F	C	11-10-90
#3) SEE ATTACHED PROBATION ORDER (Count II on judgment roll and transcripts.)				

IT IS ADJUDGED that the defendant is convicted on June 17, 1992 as found guilty and:

[XX] on August 6, 1992 is sentenced to prison for Four (4) years, credit for 2 days.

[ ] on _____ is sentenced to intensive sanctions for _____

[ ] on _____ is sentenced to county jail/HOC for _____

[ ] on _____ is placed on probation for _____

CONDITIONS OF SENTENCE/PROBATION

Obligations: (Total amounts only)

Fine (includes jail assessments; drug assessments; penalty assessments) $ _____

Court costs (includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees) $ _____

Attorney fees $ _____

Restitution $ _____

Other $ _____

Mandatory victim/witness surcharge(s)
felony _____ counts $ _____
misdemeanor _____ counts $ _____

Jail: To be incarcerated in the county jail/HOC for _____

Confinement Order For Intensive Sanctions sentence only - length of term: _____

Miscellaneous

VICTIM / WITNESS SURCHARGE
NOT ORDERED BY THE COURT

IT IS ADJUDGED that -02- days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of WAUPUN, County of Dodge

NAME OF JUDGE: Michael J. Barron
DISTRICT ATTORNEY: Mel Flanagan
DEFENSE ATTORNEY: Russell Stewart

BY THE COURT: _____
Circuit Court Judge/Clerk/Deputy Clerk

August 06, 1992
Date Signed

DEPARTMENT OF CORR[redacted]onsin Statutes, Sections 939.50, 939.51, 972.13 & Chapter 973
DOC-20 (Rev. 02/92) JUDGMENT OF CONVICTION AND SENTENCE

State of Wisconsin, Plaintiff

-vs-

Christopher W. Neumann, Defendant

07/22/71
Defendant's Date of Birth

JUDGMENT OF CONVICTION

[ ] Sentence to Wisconsin State Prisons

[xx] Sentence Withheld, Probation Ordered

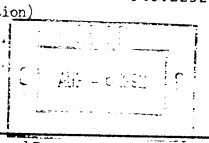
[ ] Sentence Imposed & Stayed, Probation Ordered

COURT CASE NUMBER

The defendant entered plea(s) of: [ ] Guilty [xx] Not Guilty [ ] No Contest

The [ ] Court [xx] Jury found the defendant guilty of the following crime(s):

CRIME(S)	WIS STATUTE(S) VIOLATED	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
Second Degree Sexual Assault (Count II) (Formerly Count III on Information)	940.2252	F	C	11/10/9



The defendant is convicted on 17 day of June 19 92.

The defendant is sentenced on 06 day of August 19 92.

IT IS ADJUDGED that the defendant is convicted as found guilty, and:

[ ] is sentenced to the Wis. prison for _____.

[xx] is placed on probation for four years (to be served consecutive, to Count I prison term)

[xx] is to pay:

fine of ..... $ _____

attorney fees of ..... _____

court costs of 60.00

restitution of ..... To be determined by probation dept.

TOTAL $ _____

[xx] is to pay mandatory victim/witness surcharge(s):

felony _____ counts ..... $ 50.00

misdemeanor _____ counts..... _____

TOTAL $ 50.00

[ ] is to be incarcerated in the County Jail:

period of ..... _____

and

[ ] is granted work/study release privileges.

[xx] other: Conditions of probation include: no alcohol consumption, no contact, direct or indirect with victim; continue psychological counseling, and restitution to victim.

IT IS ADJUDGED that -0- days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of _____.

NAME OF JUDGE
Michael J. Barron

PLAINTIFF'S ATTORNEY
ADA Mel Flanagan

DEFENSE ATTORNEY
Russell Stewart

BY THE COURT:

Michael J. Barron
Circuit Court Judge/~~Clerk/Deputy Clerk~~

AUGUST 6, 1992
Date Signed

DEPARTMENT OF CORRECTI[redacted]

DOC-20 (Rev. 01/90) Statutes, Sections 939.50, 939.51, 972.13 & Chapter 973

JUDGMENT OF CONVICTION AND SENTENCE

TRIAL COURT'S ORAL DECISION
AND STATEMENT OF REASONS RE
IN LIMINE RAPE SHIELD MOTION
(R30:7)

left.

THE COURT: I think I'm ready to make a ruling. We are not going to go into any places that they had relations other than the building involved here; that is, the apartment on North Maryland Avenue.

You will be allowed to ask whether or not they had a sexual active life prior to the time that Mr. Neumann was in this particular apartment and for how long it had gone on. We are not going to get involved with Madison, Milwaukee, the father's house, mother's house, whatever.

You can indicate or ask questions relating to the fact that they have had a sexually active life back to Nicolet High School days and that's strictly on a summary basis. And then if you want to go into a little more detail as it concerns the apartment itself, that will be allowed.

But other than the apartment itself, that shouldn't take more than 30 seconds to summarize that they had a sexually active life even prior to the time that he occupied this apartment. So the fact that she kept clothes there, the fact she had a key certainly is relevant in my judgment.

Okay. That takes care of that issue.

TRIAL COURT'S ORAL DECISION
AND STATEMENT OF REASONS RE
IN LIMINE EXPERT TESTIMONY MOTION
(R30:13-15)

and the court has made no ruling that this could go further than the false imprisonment. It has to be clear once we get this in any format that it goes to the jury that we are not talking about intoxication being a defense to sexual assault until the court should rule that that's possible.

THE COURT: I certainly can't overrule the appellate courts in that situation. I assume that Mr. Stewart is doing that to preserve his record for any possible appeal to convince the court to reverse prior decisions because counts two and three do not require as part of one of the elements of the crime that there be -- the act be done intentionally, and the issue of voluntary intoxication goes towards making sure that the defense is able to establish through the intoxication defense that there was no intent to commit the crime.

Since counts two and three do not require intent under the current law from what I understand, there is no way that any expert who testifies concerning intoxication or blackout, whatever, is going to vitiate the elements of counts two and three because they don't require intent at all.

It's only count one that does so require; and on that count, of course, which is the false

imprisonment count that would be relevant to determine whether or not the defendant intentionally committed the act; but that's not a defense under current law --

MS. FLANAGAN: Your Honor, the state's concern --

THE COURT: -- for counts two and three. I would have to -- You know, if that ever comes out that way obviously we would have to tell the jury that any intoxication defense only relates to count one.

MS. FLANAGAN: That's my concern is the confusion this is going to cause for the jury having them to bifurcate their manner of thinking. On this case they can look at this testimony, on this case they can't. I think for that reason this is --

As I said, this was only given to me on Friday; and I'm not complaining about that, but I haven't had a lot of time to review this law in this area. And I think because of that possible confusion I think it would be in the interest of the state at this time to move to dismiss count one and proceed on count two and three to sexual assault charges only.

THE COURT: That's what you are going to

do?

MS. FLANAGAN: Yes, Your Honor.

THE COURT: Makes it simpler. Dr. Levy will not testify. You can make your offer of proof for preservation of the record, Mr. Stewart; but since those counts that are still remaining do not require the element of intent and since intoxication only relates to vitiating the intent of the defendant to commit the crime, then it doesn't become -- There's no relevance to Dr. Levy's testimony.

You can make your offer of proof as to what he would say in order to preserve your record, but I don't think he ought to testify. So all we have left is two counts.

MR. STEWART: I understand, Your Honor.

THE COURT: Anything else before we call the jury down?

MS. FLANAGAN: For the record, Your Honor, you are granting my motion to dismiss count one?

THE COURT: Oh, no question about it.

MS. FLANAGAN: Thank you. In reference to the jury, should we refer to count two as count one and count three as count two?

THE COURT: We'll just say there are two

TRIAL COURT'S ORAL DECISION
AND STATEMENT OF REASONS RE
IN LIMINE EXCLUSION OF EXPERT
TESTIMONY AND OBJECTIONS TO
JURY INSTRUCTIONS
(R32:11, 20-23)

instruction.

I note that we took the pattern jury instruction on second degree sexual assault and retyped it for the jury's perusal. And I specifically object to the wording of that pattern instruction, and I would ask that one of my five submissions best fitting the facts of this case in the court's opinion be submitted.

And that's my argument as to the jury instructions. Oh. I'm also specifically objecting to another jury instruction that we discussed.

THE COURT: Of course, we haven't gotten to the jury instructions yet. Go ahead.

MR. STEWART: Am I racing ahead too fast?

THE COURT: That's fine. I wanted to take them in order. I know you had some motions. We'll have Dr. Levy's curriculum vitae marked for identification as Exhibit No. 3, and there will be an offer and an objection and a refusal.

(Exhibit No. 3 was marked for identification.)

MR. STEWART: That was my understanding, Your Honor.

THE COURT: The issue of Dr. Levy, of course, dropped out at least in my judgment once the state amended the information to dismiss what had been count one, false imprisonment, because in that particular statute the issue of specific intent was present as an element which would permit then Mr. Stewart to bring in somebody to testify relating to the areas that he mentioned concerning the alleged voluntary intoxication.

I suspect that strategic move on the part of the prosecution was to dismiss that to eliminate any possibility of having the jury confused relating to testimony from somebody like a Dr. Levy which would permeate the other two main counts of the information; that is, the two sexual assault charges.

It's sometimes hard I suspect for a jury to hear testimony as it concerns one count and not transfer that over to the other two counts, and I suspected that's why Miss Flanagan moved to amend the information to dismiss that charge.

At any rate we deal with what is rather than what had been the situation because now all we've got are the two sexual assault charges, and Miss Flanagan is absolutely correct in my judgment

the Hagenkord case pretty well solidifies that.

It's true that Hagenkord did not have as one of its issue the issue that we are talking about now. And I suspect part of the reason it was not even raised was because the case law in the past had been pretty well definitive about the fact that when you have a sexual assault charge involving intercourse as opposed to contact that the specific criminal intent is not an element of the charge, and there are probably good reasons for it.

Sexual contact, of course, is a lot different than sexual intercourse. And the law probably should have the specific criminal intent attached to it when you are talking about contact as opposed to intercourse because there can be no doubt about what took place in intercourse as opposed to sexual contact which can involve something a lot less intrusive than would intercourse itself be.

But she's correct. In footnote nine they just mention in the Hagenkord case about the fact that the new jury instructions assert that criminal intent therefore continues to be absent as a required element of the crime creating a type of strict liability.

And that's because the new sexual assault

law that became the law back in 1975 also omits the use of any such words of intent which follow the old rape statutes before they were recodified into what we have today.

So without specific intent as an element, then the issue of whether or not the defendant in this case was voluntarily intoxicated becomes a non-issue because the only reason anyone would have that in the evidence relating to voluntary intoxication is to obviate the issue of specific criminal intent.

Since it's not an element of the case there's no reason to have anybody testify relating to that so-called criminal intent.

That takes care of both Dr. Levy and the issue of the jury instructions which Mr. Stewart has worked so hard at. He may have an issue with the Court of Appeals, but I have no right to overrule the Court of Appeals or the Supreme Court. Once they have made their determination I must as a good trial judge follow those precedence that will have been set down a number of times by the appellate courts in Wisconsin.

I think that takes care of both Dr. Levy and it also takes care of the issue of the

instructions on criminal intent but does not take care of the issue of criminal jury instruction 1200F.

It is true that in the comment the committee mentions that this instruction is intended to advise the jury on the proper use of evidence of prior sexual conduct admitted for limited purposes under (b)2. of section 972.11(2). That relates to the sentence that we omitted; that is, sentence two of the instruction itself.

The law also says that we are supposed to take these instructions and tailor them to the case that is before the court. The case before the court here involves second degree sexual assault intercourse, and it's pretty clear that the case law further says that prior sexual conduct between the parties is not to be given as an indication to the jury that the victim has in fact consented on this particular occasion. And that's the reason why we gave 1200F and agree with Miss Flanagan on her analysis of what the case law is relating to those issues.

Now, I believe that takes care of -- Unless there's something more you want to put on the record.