03-0795

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 03-0795
(Milwaukee County Case No. 97-CR-973930)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY M. ZIEBART,

Defendant-Appellant.

Appeal From The Final Order Entered In The Circuit Court For Milwaukee County, The Honorable Jeffrey A. Conen, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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1. Whether Ziebart was denied the effective assistance of counsel on the grounds that trial counsel failed to object on proper grounds to an overly broad "limiting instruction" which allowed the jury to use Ziebart's prior acts as evidence of the complaint's non-consent.

The circuit court concluded without a hearing that the "limiting instruction" was not overbroad and that trial counsel accordingly was not ineffective for failing to object to the instruction on that ground.

2. Whether Ziebart was denied the effective assistance of post-conviction counsel based on the failure to challenge the effectiveness of trial counsel.

The circuit court concluded without a hearing that trial counsel was not ineffective and that post-conviction counsel accordingly was not ineffective for failing to make such a challenge.

3. Whether the circuit court erred in denying Ziebart's ineffective assistance of counsel claims without a hearing.

Having determined that the "limiting instruction" was not overbroad, the circuit court denied Ziebart's motion without a hearing.

4. Whether Ziebart was entitled to post-conviction discovery regarding the manner in which the state compelled the complaint's attendance and testimony at trial.

The circuit court denied Ziebart's request for post-conviction discovery on this ground.

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).

Ziebart does not seek publication under Wis. Stat. (Rule) 809.23. His entitlement to relief is clear under established Wisconsin and Federal authority.

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TIMOTHY M. ZIEBART,

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

By criminal complaint filed September 15, 1997, the state charged Timothy Ziebart with one count of second degree sexual assault, one count of robbery, one count of kidnapping, and habitual criminality (R2).[1] The charges arose from an incident late on August 23, 1997, during which, depending on who is to be believed, Ziebart either had consensual sex with a prostitute and then kicked her out of his car when she began using crack cocaine, or he raped and robbed her.

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[1] Throughout this brief, references to the record will take the following form: (R__:__), with the R__ reference denoting 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. __.

Ziebart waived preliminary examination and the state filed an information alleging the same three charges (R4; R5; R42). However, on March 2, 1998, the date originally set for trial, the state filed an amended information adding a second count of second degree sexual assault, and charges of impersonating a peace officer, and intimidation of a victim (R11; R12). The Circuit Court, Hon. Diane S. Sykes, presiding, granted leave to file the amended complaint on May 8, 1998 (R47), and the case proceeded to trial on May 26, 1998 (R49-R53).

The trial evidence disclosed that, at about 10:00 p.m. on August 23, 1997, Ziebart offered the complainant, Mary Sandlin, a ride home (R50:109). Sandlin, who was a prostitute and crack cocaine addict, admitted at trial that she had been prostituting herself and using crack cocaine for three straight days (R50:100-04; *see* R52:125). Sandlin claimed that she decided that she had had enough cocaine at about 8:00 p.m., and that she told Ziebart at the time he offered her a ride that she was no longer working as a prostitute. Ziebart nonetheless offered to give her a ride home. (R50:104-05, 110-12, 200).

Sandlin indicated at trial that Ziebart was a perfect gentleman throughout the drive, until they neared her home and she tried to leave the car (R50:111-17). At that point, she claims that Ziebart suddenly turned on her, grabbed her wrist, threatened her, and then took her to a secluded side-street. There, she claims, he both raped her and forced her to perform oral sex on him. (R50:117-21, 126-30). According to Sandlin, he then drove her to a park and said he was going to kill her (R50:133-35, 226-27). When she tried to escape, he tackled her and stole her wallet and money (R50:136-37). She again escaped and ran screaming to the middle of a baseball field in the park where he succeeded in tripping her. While she pretended to be unconscious, he kicked her and called her a "crack whore." He then told her not to bother reporting him because he was a police officer, that he and his fellow officers would stick together, and that no one would believe her. He then left and she allegedly ran screaming to a bar just outside the park, where an ambulance and police officers had arrived. (R50:140-48).

Although reporting the alleged assault to the police, Sandlin refused to cooperate in a sexual assault examination (R50:150, 228; R52:7-9, 26-28, 56, 126). Neither the police nor the nurse who treated her at the hospital that night viewed any visible injuries or marks on Sandlin (R50:188; R52:49, 56, 127). Nor did they view any mud or grass stains on her white shirt, although it had been raining that night and she claimed that Ziebart had held her to the ground with a knee in her back (R50:136-38, 107; R52:50, 84, 132).

A woman who lived across from park, however, testified that no one was chasing Sandlin as she crossed the baseball field, and that Sandlin appeared intoxicated and her speech was slurred as she walked across the field (R50:56-58, 64, 71-72, 75-76, 81).

Although Ziebart did not testify, his prior statements to the police were admitted as substantive evidence. When first confronted by the police, Ziebart admitted giving Sandlin a ride, but denied any sexual activity with her. However, he then admitted that he had given her $20 for sex and that they stopped first at a house so she could get something. After attempting the act of prostitution in the car, Sandlin then pulled out a pipe and began to smoke crack, at which point Ziebart became upset because he was on parole and kicked her out of the car. She became very upset, ranting and raving that he should take her back to Archie's house. (R52:151-53, 156-162, 223-24).

Also admitted at trial over defense objection was evidence that, while a teenager several years earlier, Ziebart had participated in the assault and kidnapping of a man and that, during that episode, he had claimed to be a police officer and had berated the victim for drug use. (R53:9-31, 33-42).

On May 29, 1998, the jury returned verdicts convicting Ziebart on all counts as charged (R54). On October 6, 1998, the Court, Hon. Diane S. Sykes, presiding, sentenced Ziebart to consecutive maximum terms on each count for a total of 148 years incarceration (R57:45).

Ziebart, represented by new counsel, Attorney Jeffrey W. Jensen, sought post-conviction relief pursuant to Wis. Stat. §974.02 and (Rule) 809.30 on grounds of newly discovered evidence and ineffec-

tiveness based on trial counsel's failure to discover the evidence prior to trial, and alternatively sought sentence modification (R35-R38). Following denial of that motion (R39), Ziebart appealed, raising the same issues, as well as a claim that the trial court erred in admitting the "other acts" evidence. This Court, however, affirmed on May 22, 2001 (R59), and the Supreme Court denied review (R60).

On October 4, 2002, undersigned counsel filed a motion on behalf of Mr. Ziebart pursuant to Wis. Stat. §§973.13 and 974.06, alleging ineffectiveness of trial and post-conviction counsel and insufficiency of the evidence of impersonating an officer, and seeking post-conviction discovery (R64). The parties briefed the issues (R66; R70), and, by Decision and Order dated February 18, 2003, the Circuit Court, Hon. Jeffrey A. Conen, granted the motion in part and denied it in part. The Court vacated the conviction and sentence for impersonating an officer but otherwise denied the motion. (R74; App. 1-8).

Ziebart timely filed his notice of appeal to this Court on March 17, 2003. (R76).

ARGUMENT

I.

ZIEBART WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Contrary to the decision below, Ziebart was denied the effective assistance of counsel at trial guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution.

Ziebart's post-conviction motion under Wis. Stat. §974.06 sought an order vacating his conviction on the grounds that he was denied the effective assistance of his trial counsel, Gerald Boyle and Bridget Boyle. Specifically, trial counsel failed to object to the trial

court's substantially overbroad *Whitty* instruction,[2] which instruction advised the jury that it could use evidence of Ziebart's prior bad acts as evidence of non-consent. (R64:10-17). Because the Supreme Court expressly held such evidence to be irrelevant to the issue of consent in *State v. Alsteen*, 108 Wis.2d 723, 324 N.W.2d 426 (1982), trial counsel's failure to object on this ground was objectively unreasonable. Because the central issue at trial focused on the issue of consent, moreover, and the state's case was far from overwhelming, counsel's failure to object on these grounds substantially prejudiced Ziebart's right to a fair trial. He accordingly was denied the effective assistance of counsel and is entitled to reversal.

Because the circuit court held otherwise in denying Ziebart's motion without a hearing (R74:4-7; App. 4-7), Ziebart is entitled to vacation of that order and remand for a full *Machner* hearing on his claim.[3]

A. Standard for Ineffectiveness

Effective assistance of counsel at trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. The test for ineffective assistance of counsel is two-pronged. A defendant alleging ineffective assistance of counsel first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" *State v. Johnson*, 133 Wis.2d 207, 395 N.W.2d 176, 181 (1986), *quoting Strickland v. Washington*, 466 U.S. 668, 688 (1984). In analyzing this issue, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690; *see Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

It is not necessary, of course, to demonstrate total incompetence

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[2] *See Whitty v. State*, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967).

[3] *See State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

of counsel, and the defendant makes no such claim here. Rather, a single serious error may justify reversal. *Kimmelman*, 477 U.S. at 383; *see United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective assistance of counsel ... may in a particular case be violated by even an isolated error ... if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The deficiency prong of the *Strickland* test is met when counsel's performance was the result of oversight or ignorance rather than a reasoned defense strategy. *See Kimmelman*, 477 U.S. at 385; *State v. Moffett*, 147 Wis.2d 343, 433 N.W.2d 572, 576 (1989).

Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "[A] counsel's performance prejudices the defense when the 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Johnson*, 395 N.W.2d at 183, *quoting Strickland*, 466 U.S. at 687. "The defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *Moffett*, 433 N.W.2d at 576, *quoting Strickland*, 466 U.S. at 693. Rather, under the constitutional standard,

> The test is whether defense counsel's errors undermine confidence in the reliability of the results. The question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt.

Moffett, 433 N.W.2d at 577 (citation omitted).

"Reasonable probability," under this standard, is defined as "'probability sufficient to undermine confidence in the outcome.'" *Id.*, *quoting Strickland*, 466 U.S. at 694. In addressing this issue, the Court normally must consider the totality of the circumstances. *Strickland*, 466 U.S. at 695. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. *Williams v. Taylor*, 529 U.S. 362 (2000).

Once the facts are established, whether counsel's representation was deficient and, if it was, whether it was prejudicial are reviewed *de*

novo. *State v. Cummings*, 199 Wis.2d 721, 546 N.W.2d 406, 416-17 (1996).

B. Factual Background

Ziebart's trial counsel fought valiantly to exclude as irrelevant and highly prejudicial evidence that, while a teenager, he had participated in the assault and kidnapping of a man and that, during that episode, he had claimed to be a police officer. (R47:3-8; R48; R49:2-15; App. 10-15, 17-21, 24-25).

Despite the substantial differences between the two incidents, and the fact that Ziebart admitted sexual contact and only disputed lack of consent in the present case, the trial court nonetheless admitted the evidence, emphasizing that the similarities in terms of the alleged degrading of the victims and claiming to be a police officer suggested that "the two incidents are highly similar and therefore the prior incident would be highly relevant to the issue of consent or non-consent in this case among other issues." (R47:7-8; App. 14-15). The Court asserted that, given these similarities, "the chances of this being a coincidence or a mere consensual encounter between this defendant and the present victim is reduced and that's precisely why the State wants this evidence in front of the jury and precisely why it is in fact so very, very probative . . .." (R48:21-22; App. 13-14). While acknowledging the danger of unfair prejudice, the Court concluded that the danger could be overcome by a cautionary instruction that it should use the evidence "merely to help them decide the issues in this case, that being whether this was a consensual encounter or not a consensual encounter," as well as the defendant's intent. (R48:22-23; App. 14-15).

The Court reiterated this ruling when Ziebart sought reconsideration at trial:

> Under the circumstances that is a signature crime and that is precisely what the Whitty decision is designed to get at. And so I perceive, and you're directing my main focus here for purposes of the Whitty 904.04(2) ruling is that aspect of these two crimes, the fact that the representation was made the defendant was a police

> officer, and that the victims in each of these cases had better not report these crimes because nobody would believe them because the police officers would stick together, and that is how he is proposing to get away with it. That makes this a signature crime with [sic] the meaning of the Whitty decision, and this is precisely the kind of prior crimes, wrongs or act evidence which of course courts should admit under the circumstances. Not only because it identifies the defendant to the crime, this isn't an ID case so it is not so important as to that issue, *but it meshes out the character of the assailant. And in particular it goes to the specific nature of the defense in this case which is consent, and it is strong, probative, relevant evidence of nonconsent.*

(R49:14-15; App. 24-25 (emphasis added)).

While trial counsel argued that the evidence did not legitimately go to the issue of consent because he did not claim he was a police officer until after the crimes were committed (R49:15; App. 25), they did not object to the Court's limiting instruction on this or any ground (*see* R53:57-58).

The Court's "limiting instruction" allowed the jury to use the other acts evidence, not only for purposes of showing intent, motive, and plan, but on the issue of non-consent as well:

> Evidence has been received in this case regarding other crimes committed by the defendant and conduct of the defendant for which the defendant is not now on trial. Specifically, evidence has been received that the defendant engaged in certain conduct against Daryl Huck and was convicted of the crimes of battery, false imprisonment, kidnapping and burglary as a result of that conduct. *If you find that this conduct did occur, you should consider it only on the issues of the defendant's motive, intent, preparation or plan and on the issue of nonconsent in this case.* You may not consider this evidence to conclude that the defendant has a certain character or certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case. The evidence was received

> on the issues of motive, that is, whether the defendant has a reason to desire the result of the crimes; intent, that is, whether the defendant acted with the state of mind that is required for these offenses; preparation or plan, that is whether such other conduct of the defendant is evidence of a design or scheme that is related to or encompasses the commission of the offenses now charged; *and non-consent, that is, whether the victim freely consented or did not consent to the alleged acts of the defendant in this case.*
>
> You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged.

(R53:78-79; App. 28-29 (emphasis added)).

C. Trial Counsels' Failure to Object to the Overbroad "Other Acts" Instruction was Unreasonable

The circuit court denied Ziebart's post-conviction motion, holding that the "limiting instruction" was not overbroad and that the performance of Ziebart's trial counsel in failing to object on those grounds accordingly was not deficient (R74:4-6; App. 4-6). The circuit court was wrong.

While Ziebart is bound by this Court's conclusion on his direct appeal that the other acts evidence was admissible to show plan, motive or intent (R59:4-9; App. 33-38), the trial court's theory, expressed in the "limiting instruction," that such evidence *also* is admissible to show non-consent is squarely at odds with *State v. Alsteen*, 108 Wis.2d 723, 324 N.W.2d 426 (1982). This Court did not address whether the evidence was properly admissible on the issue of non-consent, and neither the defense nor the state argued admission of the evidence on that ground. *See* Briefs of Defendant-Appellant and of Plaintiff-Respondent in *State v. Timothy Ziebart*, Appeal No. 00-1612-CR.

In *State v. Alsteen*, 108 Wis.2d 723, 324 N.W.2d 426 (1982), the

defendant was charged with non-consensual sexual intercourse. Like Ziebert, Alsteen admitted having intercourse but claimed that the complainant consented. 324 N.W.2d at 427. As here, the state sought admission of the defendant's prior similar conduct with others, and the circuit court admitted the evidence.

The Supreme Court held that the trial court had misused its discretion by admitting irrelevant evidence. Evidence is relevant and admissible only if probative of some fact that is of consequence to the determination of the action. *Id.* at 429. "Therefore, evidence which does not have a tendency to prove any fact that is of consequence to a material issue in the case is irrelevant and should be excluded." *Id.*

After reviewing the entire record, the Court concluded that the other acts evidence was irrelevant to any issue in the case and therefore improperly admitted:

> Because Alsteen admitted having sexual intercourse with Norton, the only issue was whether Norton consented to the act. Evidence of Alsteen's prior acts has no probative value on the issue of Norton's consent. Consent is unique to the individual. "The fact that one woman was raped . . . has no tendency to prove that another woman did not consent." *Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948). Thus the testimony of R.B. and Linda Slack was irrelevant and should have been excluded.

Alsteen, 324 N.W.2d at 429. The Court rejected the state's claim that the evidence was relevant to show the defendant's general scheme or plan:

> . . . [T]he only issue in the instant case was whether Norton consented to having sexual intercourse with Alsteen. Evidence of prior acts may be relevant to prove the identity of a sex offender. As already noted, however, such evidence has no probative value on the issue of the complainant's consent. . . ..

Id. at 430.

It matters not whether one describes the issue as one of

"consent," as the Court does in *Alsteen*, or as "credibility" regarding the complainant's allegations of non-consent, as the state and trial court attempted to recast it here. They are in fact the same thing. Under either formulation, the question is whether a prior, non-consensual act by the defendant has any relevance to the complainant's thought process in the present case. If it is not relevant to consent, as *Alsteen* squarely held, then such evidence cannot properly "bolster" the complainant's credibility on that issue.

Of course, the issue here is not whether the "other acts" evidence was properly admitted. This Court already has held that it was on the issues of plan, motive, and intent, and Ziebart is bound by that ruling. Rather, the issue is whether reversal is required because, even assuming that the "other acts" evidence was properly admitted on the grounds found by this Court, the trial court's "limiting" instruction permitted, and indeed encouraged, the jury to use that evidence for what the Supreme Court has recognized to be an improper purpose, proof of non-consent.

Because the other acts evidence was not admissible to show non-consent, the limiting instruction was erroneous, even though the evidence might have been admissible for other, valid purposes. That instruction permitted the jury to use the evidence for an illegitimate purpose. Trial counsel, however, failed to object to the instruction on this ground at the instructions conference, and accordingly waived the claim. *See, e.g.*, *State v. Smith*, 170 Wis.2d 701, 490 N.W.2d 40, 46 n.5 (Ct. App. 1992).

Ziebart can imagine no possible legitimate ground on which counsel rationally would have declined to make a proper objection to this instruction. Rather, in light of their recognition of the significant prejudicial effect of the "other acts" evidence as reflected in their efforts to keep it from the jury, it appears that they simply overlooked controlling Wisconsin law and this error in the instruction.

Trial counsel's failure to object to the overbroad "limiting instruction" on this ground thus was unreasonable. Counsel may be excused from objecting where the controlling law is unsettled or

obscure. *See State v. McMahon*, 186 Wis.2d 68, 519 N.W.2d 621, 628 (Ct. App. 1994) ("Counsel is not required to object and argue a point of law that is unsettled"); *State v. Hubert*, 181 Wis.2d 333, 510 N.W.2d 799, 802 (Ct. App. 1993); *but see Moffett*, 433 N.W.2d 576 (error resulting from oversight rather than reasoned defense strategy is deficient performance). However, the same is not true when, as here, the issue has been long settled by a published decision of the State's highest court. *See McMahon*, 519 N.W.2d at 628 (ineffectiveness arises "where the law or duty is clear such that reasonable counsel should know enough to raise the issue").

Trial counsel knew prior to trial that the controlling issue in dispute was one of consent; they knew prior to trial that the trial court viewed the other acts evidence as powerful evidence of non-consent; and they knew prior to trial that any consideration by the jury of such evidence on the issue of consent could be devastating. Their apparent ignorance of directly controlling Supreme Court authority thus cannot reasonably be excused.

D. Ziebart's Defense was Prejudiced by Counsel's Errors

There can be no reasonable dispute but that trial counsels' failure to object to the mistaken "limiting instruction" prejudiced Ziebart's defense and that, but for that error, there exists a reasonable probability of a different result in this case. The error allowed the jury to use Ziebart's other acts for exactly the reasons such evidence may not legitimately be used. Because such evidence has no legitimate probative value on the issue of consent, *Alsteen*, *supra*, the only way the jury could have followed the instruction and used the evidence on that issue is via the impermissible propensity inference. That is, by finding it more likely that this was a non-consensual sexual assault because Ziebart is the kind of person who would commit such a crime. The Circuit Court applied a similar analysis in finding the evidence probative of non-consent. (R47:7-8; R48:21-22; App. 14-15, 19-20).

Where, as here, the state's case already is of marginal sufficiency, even otherwise minor errors can have a great impact on the

jury. *United States v. Agurs*, 427 U.S. 97, 113 (1976). Given the weakness of the state's case, therefore, there can be little doubt that allowing the jury to use Ziebart's prior acts to show non-consent could have been the decisive factor in its verdict.

The state conceded at trial that its case was not a strong one (R49:7),[4] and the trial evidence bears that out. The central issue at trial was the relative credibility of Ziebart and the complainant, a prostitute and crack cocaine addict who admitted using the drug virtually continuously for the three days leading up to this incident. There were no other eye-witnesses and, due to the complainant's refusal to submit to a sexual assault examination, the jury was denied physical evidence which would either corroborate or rebut her claim.

The only independent eye-witness to any of the incident directly rebutted Sandlin's assertions that Ziebart chased her across the ball field, and corroborated Ziebart's testimony that Sandlin had started to use crack cocaine just before he ejected her from his car. The woman who lived across from the park testified that no one was on the ball field with Sandlin (R50:56-58, 71-72), and that Sandlin appeared intoxicated and her speech was slurred as she walked across the field, consistent with Archie Sharp's testimony that Sandlin slurs her speech when she is high. (R50:75-76; R52:101). While the police failed to detect signs of intoxication when Sandlin later spoke with them, she admitted that a crack high lasts for less than 10 minutes (R50:101, 103). Ziebart's statement also reflected that, as he ejected Sandlin from

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[4] In arguing for admission of the "other acts" evidence, the trial prosecutor argued:

> I suppose the tendency of the parties to view the case through their own prism, but certainly an argument can be made from the state's perspective that this is a victim, by her own admission, that used substantial amounts of cocaine and was engaged in prostitution in the hours immediately preceding this assault and consequently I don't agree that the state has an overwhelmingly strong case and that this Whitty evidence constitutes piling on as characterized by the defense.

(R49:7).

his car for smoking crack, she wanted to be returned to Archie's house (R52:223-24), but there was no testimony from Sandlin that she ever told Ziebart about Archie, and she never told that police that she had done so (R52:223-24). He thus is unlikely to have known about Archie unless his testimony on that point were true. Also, the independent witnesses failed to detect any injuries on Sandlin of the type one would expect given her description of what happened to her, nor did they see any mud or grass on her shirt, even though she claimed that Ziebart had held her to the wet ground with a knee to her back (R50:36-38, 107; R52:150, 84, 132).

Given all these circumstances, a reasonable jury easily could have chosen to disbelieve Sandlin's tale and acquitted had the "limiting instruction" not directly skewed the core dispute at trial by allowing jury consideration of the other acts evidence for a wholly improper purpose. Absent the prejudicial effect of allowing the jury to consider the evidence essentially as showing propensity, there is more than a reasonable probability that the jury could have found a reasonable doubt in this case. Ziebart's right to a fair trial accordingly was prejudiced by trial counsel's failure to make a proper objection to that instruction.

II.

INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL

For similar reasons, the Circuit Court erred in concluding that Ziebart was not denied the effective assistance of post-conviction counsel. Because the "limiting instruction" was overbroad under long-established Wisconsin law and severely prejudiced Ziebart's defense, and because trial counsel thus were ineffective for failing to object on that ground, Mr. Jensen's failure to include this claim in Ziebart's initial postconviction motion was unreasonable. Because an ineffectiveness claim on this ground would have resulted in a new trial, moreover, post-conviction counsel's failure to raise it prejudiced

Ziebart.

Pursuant to *State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 668, 556 N.W.2d 136 (Ct. App. 1996), claims that postconviction counsel was ineffective for failing to file a postconviction motion under Wis. Stat. §974.02 and (Rule) 809.30(2)(h) regarding particular issues not otherwise preserved for appeal must be pursued in the circuit court under Wis. Stat. §974.06

A criminal defendant is constitutionally entitled both to a direct appeal from his conviction or sentence, Wis. Const. art. I, §21, and to the effective assistance of counsel on his first appeal as of right in the state courts, *Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387 (1985). As more fully discussed *supra*, the test for ineffectiveness is two-pronged. First, counsel's performance must have been deficient, and second, the deficiency must have prejudiced the defense. *See, e.g., Strickland v. Washington,* 466 U.S. 668, 687 (1984). The same standard applies, with appropriate modifications, to assess the constitutional effectiveness of post-conviction or appellate counsel. As explained by the Seventh Circuit:

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient . . . and when that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial," we will deem the lack of effective assistance prejudicial.

Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) (state appellate attorney's failure to raise preserved hearsay issue constituted ineffective assistance of appellate counsel, mandating federal habeas relief); *see, e.g., Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994) (failure to raise preserved discovery issue on appeal deemed ineffective); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) ("His lawyer failed to raise either claim, instead raising weaker claims . . .. No tactical reason--no reason other than oversight or incompetence--has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had").

As discussed in Section I, *supra*, the ineffectiveness of trial

counsel was a "significant and obvious issue." *See Mason*, 97 F.3d at 893. As alleged in Ziebart's motion below, moreover, there is no indication in Mr. Jensen's file that he even considered the substantive issues raised on this motion, let alone that he considered them and made a rational decision to raise others instead (R64:8). Nor can omission of such a claim be rationalized as a reasonable strategic decision. The trial ineffectiveness claim raised here would have blended seamlessly into the weaker "other acts" argument raised on direct appeal and could only have strengthened Ziebart's case on appeal. It thus appears that post-conviction counsel simply did not see this issue, and that his failure to raise it in post-conviction motions and on direct appeal was due to oversight and not a strategic choice.

For the reasons already discussed in Section I, D, *supra*, moreover, Ziebart was prejudiced by counsel's failure to raise this claim on his initial post-conviction motion and on direct appeal. The ineffectiveness of trial counsel in not objecting on proper grounds to the supposed "limiting" instruction on the use of the "other acts" evidence is manifest from the record, mandating grant of a new trial.

III.

BECAUSE ZIEBART'S MOTION ESTABLISHED HIS ENTITLEMENT TO RELIEF, THE CIRCUIT COURT ERRED IN DENYING HIS INEFFECTIVENESS CLAIMS WITHOUT A HEARING

While Ziebart's motion demonstrated his entitlement to relief, *see* Sections I & II, *supra*, an evidentiary hearing is necessary on an ineffectiveness claim to allow prior counsel to state his or her reasons for the challenged acts or omissions. *See, e.g., State v. Mosley*, 102 Wis.2d 636, 307 N.W.2d 200, 212 (1981). The question is whether counsel's acts or omissions were the result of reasonable strategy. Having erroneously found that the "limiting instruction" was not overbroad, the circuit court denied Ziebart's motion without such a hearing (R74:4-7; App. 4-7).

A defendant is entitled to an evidentiary hearing if the motion "alleges facts which, if true, would entitle the defendant to relief . . .." *Nelson v. State*, 54 Wis.2d 489, 195 N.W.2d 629, 633 (1972) (motion to withdraw guilty plea); *see State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50, 53 (1996). Sufficiency of the motion is reviewed *de novo*. *Id.*

The court below concluded that Ziebart is not entitled to relief on his ineffectiveness claims; Ziebart has demonstrated to the contrary. *See supra*. Accordingly, he is entitled to remand for a hearing on these claims. *See State v. Washington*, 176 Wis.2d 205, 500 N.W.2d 331, 336 (Ct. App. 1993) ("Were Washington to have alleged sufficient facts to support his claim that he was denied the effective assistance of counsel, we would have to remand for an evidentiary hearing on the issue").

IV.

THE TRIAL COURT ERRED IN DENYING ZIEBART'S REQUEST FOR POST-CONVICTION DISCOVERY

By post-conviction motion, Ziebart sought an order requiring the state to disclose the means by which Sandlin's appearance at trial was accomplished, whether she was either housed or held in custody by the state pending her testimony, and the circumstances of any such housing or incarceration. (R64:17-20).

As grounds for his request, Ziebart observed that, on the initial trial date, the prosecutor disclosed that Sandlin had not appeared to testify and that she had ignored the prosecutor's letters. (R45:2-5). While the prosecutor subsequently was able to obtain Sandlin's appearance (R46:2-3), and Sandlin appeared to testify at trial, the motion further alleged that Sandlin's friend, Archie Sharp, informed a defense investigator in March, 2002, that he had to help the police track down Sandlin at a drug house and that Sandlin was held in some form of state custody during the trial (R64:18).

In its response, the state implicitly conceded that it had to use extraordinary measures to ensure that the complainant would appear and testify as desired by the state. The state nonetheless asserted in conclusory terms that its efforts did not constitute "custody" or "coercion," and declined to inform the Court or the defense what those extraordinary measures might have been. (R66:14-16).

Without holding a hearing on the matter, the Circuit Court concluded that Ziebart likely could not prove the factual allegations of his motion and therefore denied the requested relief (*See* R74:7-8; App. 7-8).

The Circuit Court erred in denying the discovery request without so much as an evidentiary hearing. The facial sufficiency of the motion is reviewed *de novo*. *Bentley*, 548 N.W.2d at 53.

Ziebart's request was based on *State v. O'Brien*, 223 Wis.2d 303, 588 N.W.2d 8, 16 (1999). The Court there held that "a defendant has a right to post-conviction discovery when the sought-after evidence is consequential to the case," or "is relevant to an issue of consequence." *Id.* This entitlement is based on the established principle that due process mandates that the defendant be given a meaningful opportunity to present a complete defense. *Id.* at 15 (citing *State v. Shiffra*, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App. 1993)).

The *O'Brien* Court construed "consequential to the case" in terms of the traditional due process standard for materiality set forth in *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion). Under that standard,

> "[E]vidence is [consequential] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." . . . Evidence that is of consequence then is evidence that probably would have changed the outcome of the trial.

588 N.W.2d at 15-16 (fn and citations omitted). Under that federal due process standard, the defendant need not show that the information more likely than not would have changed the result of the trial. *Kyles*

v. Whitley, 514 U.S. 419, 434 (1995).

As explained in Ziebart's motion (R64), the requested information is potentially consequential because, had it been timely disclosed to the defense, it may have provided grounds on which to exclude or discredit Sandlin's statements and testimony. While the state, like any party, may use a subpoena or material witness order to coerce a witness to attend the trial and answer questions put to her, it cannot legally force the witness to answer in a manner desired by the state. A defendant thus has the right to challenge admission against him or her of a coerced statement or testimony given by another.

As the Alaska Supreme Court recently recognized, "both our case law and that of other jurisdictions uniformly recognize a defendant's ability to assert a due process violation based on the coercion of witnesses whose statements are used against the defendant at trial." *Raphael v. State*, 994 P.2d 1004, 1008 (Alaska 2000). *See, e.g., United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999); *Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997) ("[B]ecause the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person"); *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause"), *cert. denied,* 513 U.S. 1085 (1995); *United States v. Merkt*, 764 F.2d 266, 274 (5th Cir. 1985) ("A defendant may assert her own fifth amendment right to a fair trial as a valid objection to the introduction of statements extracted from a non-defendant by coercion or other inquisitional tactics" (footnote and citations omitted)); *United States v. Cunningham v. DeRobertis*, 719 F.2d 892, 896 (7th Cir. 1983) (violation of another's Fifth Amendment rights may violate one's own right to a fair trial); *Bradford v. Johnson*, 476 F.2d 66 (6th Cir. 1973), *aff'g* 354 F.Supp. 1331 (E.D. Mich. 1972). *See also LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. 1974):

> It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should

> be admitted at the government's behest in order to bolster its case . . .. Yet methods offensive when used against an accused do not magically become any less so when exerted against a witness.

Justice Rutledge, dissenting in *Malinski v. New York*, 324 U.S. 401 (1945), agreed:

> Due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation of trial by ordeal.

Id. at 430-31 (Rutledge, J., dissenting). *See also Bradford v. Michigan*, 394 U.S. 1022 (1968) (Warren, Douglas, & Marshall, JJ., dissenting from denial of certiorari).

The right to suppression applies not only to coerced out-of-court statements, but to coerced testimony as well. *People v. Badgett*, 895 P.2d 877, 884 (Cal. 1995) (defendant has standing to challenge witness testimony on "continuing coercion" grounds); *see Bradford v. Johnson*, 354 F. Supp. 1331, 1336 (E.D. Mich. 1972) (admission of testimony violates due process where witness subject to continued coercion while testifying); *Raphael*, *supra* (witness incarcerated during trial deemed coerced to provide inculpatory testimony; conviction reversed).

This right to suppression of coerced witness statements or testimony is based in the due process right to a fair trial. As such, it is wholly independent of the defendant's right to be free from compelled self-incrimination or from use of his or her own coerced statements at trial. *E.g.*, *Gonzales*, 164 F.3d at 1289.

Wisconsin law is in accord. *State v. Samuel*, 2002 WI 34, 252 Wis.2d 26, 643 N.W.2d 423, *cert. denied*, 123 S.Ct. 550 (2002).

The fact and circumstances of Sandlin's state custody or other status during trial apparently were not disclosed at that time. While it may be that those circumstances do not rise to the level of improper coercion or impeachment mandating reversal of Ziebart's conviction, that cannot be known without disclosure of those circumstances. The

state's conclusory legal assertions that Sandlin was subjected to neither custody nor coercion is no more controlling here than in any other context. Whether the measures taken by the state were proper and whether they might have had an effect on the complainant's testimony are matters for the Court to decide following full disclosure. There is nothing privileged about such measures, and the state has suggested no valid reason for its refusal to disclose them.

The circuit court's doubts that Ziebart could prove his factual allegations are not enough to deny him relief. The state below it effectively conceded that Ziebart was correct that it had used extraordinary measures to ensure that Sandlin appeared and testified as the state desired. The only question is whether the specific means accused by the state rendered Sandlin's testimony inadmissible or otherwise subject to attack, or whether the state's failure to disclose them at the time of trial violated its obligations under *Bagley*, *supra*. So long as the state is permitted to conceal those measures from Ziebart and this Court, however, it is impossible to make that determination.

Ziebart having alleged "facts which, if true, would entitle the defendant to relief," i.e., disclosure, he was entitled at the least to an opportunity to prove his factual allegations in an evidentiary hearing. *Nelson,* 195 N.W.2d at 633; *Washington*, 500 N.W.2d at 336.

V.

THE ISSUES RAISED HERE ARE NOT BARRED BY *STATE v. ESCALONA-NARANJO*, 185 Wis.2d 168, 517 N.W.2d 157 (1994) OR WIS. STAT. §974.06(4)

While the Circuit Court addressed Ziebart's claims on the merits, the state asserted below that Ziebart's claims are barred by Wis. Stat. §974.06(4) as interpreted in *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994) (R66:5-6). Although meritless, Ziebart anticipate that the state will attempt to make the same argument in this Court. The state would be wrong.

A. Wisconsin's Post-Conviction Remedy Under Wis. Stat. §974.06

Section 974.06 of the Wisconsin Statutes provides a procedure for post-conviction relief applicable following either completion of a direct appeal or expiration of the time for filing such an appeal. Under §974.06, a person in custody may, after the time for direct appeal expires, move the court which imposed sentence to vacate or set aside that sentence on the grounds, *inter alia*, that it "was imposed in violation of the U.S. constitution or the constitution or laws of [Wisconsin], [or] that the court was without jurisdiction to impose such sentence...." Wis. Stat. §974.06(1).

Although "[a] sec. 974.06 motion is not a complete substitute for an appeal," "[t]his simply means that not every issue which can or should be raised on direct appeal can also be raised by this post-conviction motion." *Loop v. State*, 65 Wis.2d 499, 222 N.W.2d 694, 696 (1974). Specifically, §974.06 is limited to jurisdictional and constitutional claims. *See, e.g., id.*, 222 N.W.2d at 695. "Issues of constitutional dimension can be raised on direct appeal and can also be raised on 974.06 motion." *Id.* at 696.

The right to seek relief from constitutional or jurisdictional violations under §974.06(1) is not unlimited, however. Pursuant to Wis. Stat. §974.06(4),

> (4) All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

Six years after §974.06 was enacted, the Supreme Court held in

Bergenthal v. State, 72 Wis.2d 740, 242 N.W.2d 199, 202-03 (1976), that criminal defendants were entitled to judicial consideration of constitutional challenges to their convictions and incarceration under §974.06 "[e]ven though the issue might properly have been raised" on the defendant's direct appeal.

For eighteen years, the lower courts in Wisconsin consistently followed that holding. *E.g.*, *State v. James*, 169 Wis.2d 490, 485 N.W.2d 436 (Ct. App.), *rev. denied*, 491 N.W.2d 766 (1992); *State v. Coogan*, 154 Wis.2d 387, 453 N.W.2d 186, 192 (Ct. App.), *rev. denied*, 454 N.W.2d 806 (1990); *State v. Klimas*, 94 Wis.2d 288, 288 N.W.2d 157, 162-63 (Ct. App. 1979), *rev. denied*, 95 Wis.2d 745, 292 N.W.2d 874, *cert. denied*, 449 U.S. 1016 (1980). In light of *Bergenthal* and the plain language of the statute, those courts had construed §974.06(4) as imposing such a "sufficient reason" requirement only where the defendant had omitted the claim from a prior motion under §974.06. *E.g. James, supra.*

In 1994, however, the Supreme Court overruled *Bergenthal* in *State v. Escalona-Naranjo*, 185 Wis.2d 169, 517 N.W.2d 157 (1994), and reinterpreted the "successive petitions" provision of §974.06(4). Pursuant to *Escalona-Naranjo*, when the defendant has filed a post-conviction motion under §974.02 and a direct appeal, he or she may not subsequently raise an issue under §974.06 which could have been raised on the prior motion absent showing of a "sufficient reason" for not having raised the issue in the original motion. *Id.*, 517 N.W.2d at 162.[5]

B. "Sufficient Reason" Exists For Not Raising Ziebart's Claims On Direct Appeal

Although Ziebart anticipates that the Supreme Court will have overruled *Escalona-Naranjo* by the time this appeal is decided, the

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[5] Ziebart respectfully submits that *Escalona-Naranjo* was wrongly decided and should be overruled. That very issue currently is before the Supreme Court in *State v. Anou Lo*, Appeal No. 01-0843. Because this Court is bound by that decision, however, he will reserve argument on that point for the proper court.

validity of that decision does not effect his entitlement to relief in this case. Even under that decision's misinterpretation of §974.06(4), "sufficient reason" exists for Ziebart not having raised the issues presented here at the time of his direct appeal.

1. Ineffective assistance of post-conviction counsel claim, *see* Section II, *infra*.

The same attorney, Jeffrey W. Jensen, represented Ziebart on both the original post-conviction proceedings and on direct appeal. Accordingly, Jensen's inability to argue on appeal his own ineffectiveness at the post-conviction stage constitutes "sufficient reason" under §974.06(4). *See, e.g., State v. Robinson*, 177 Wis.2d 46, 501 N.W.2d 831, 834 (Ct. App. 1993). *See also State v. Hensley*, 221 Wis.2d 473, 585 N.W.2d 683 (Ct. App. 1998).

2. Ineffectiveness of Trial Counsel Claim, *see* Section I, *infra*.

While the exact scope of the "sufficient reason" exception under §974.06(4) remains unclear, it is beyond rational dispute that ineffectiveness of post-conviction or appellate counsel in failing to raise an issue on direct appeal constitutes a "sufficient reason" under §974.06(4) authorizing pursuit of that issue under §974.06. *See State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 556 N.W.2d 136, 139 (Ct. App. 1996). *Accord Murray v. Carrier*, 477 U.S. 478 (1986) (ineffective assistance of appellate counsel meets "cause and prejudice" standard permitting federal habeas review despite failure adequately to present underlying issue to state courts). Indeed, it must be sufficient, as the ineffective assistance of counsel under those circumstances renders the initial appeal or post-conviction proceedings themselves constitutionally defective. *Murray*, 477 U.S. at 488; *see State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540, 540-41 (1992).

As demonstrated in Section II, *infra*, Ziebart was denied the effective assistance of post-conviction counsel by Mr. Jensen's failure to raise the claim raised here regarding the ineffectiveness of trial

counsel As such, sufficient reason is shown for raising that claim here.

While the facts here thus demonstrate ineffectiveness of post-conviction counsel for failing to raise the trial ineffectiveness claim, Ziebart respectfully submits that post-conviction or appellate counsel's conduct or omissions need not fall to the level of constitutionally ineffective assistance in order to meet the "sufficient reason" standard under §974.06(4). It is simply irrational to require constitutionally ineffective assistance of post-conviction or appellate counsel in order to establish "sufficient reason," since such a failure of counsel would constitute an independently sufficient constitutional basis for relief.

It also is significant that the "sufficient reason" standard, adopted from the Uniform Post-Conviction Procedures Act (1966), was established long before the United States Supreme Court appended the restrictive "cause and prejudice" standard at issue in *Murray* to the federal habeas statute. Indeed, the Commissioners' Comment to the Uniform Act states that the provision is intended to implement the relatively liberal standards for successive petitions controlling at that time:

> The Supreme Court has directed the lower federal courts to be liberal in entertaining successive habeas corpus petitions despite repetition of issues, *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). By adopting a similar permissiveness, this section will postpone the exhaustion of state remedies available to the applicant which *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) holds is required by statute for federal habeas corpus jurisdiction, 28 U.S.C. Sec. 2254. Thus, the adjudication of meritorious claims will increasingly be accomplished within the state court system.

11A U.L.A. 375 (Master Ed. 1995).

Fay and *Sanders* reflected the position that criminal defendants should not be penalized by the defaults of their attorneys in which they themselves did not participate. *Sanders* directed the federal courts to consider successive petitions on the merits unless: (1) the specific ground alleged was heard and determined on the merits on a prior

application, or (2) the prisoner personally either deliberately withheld an issue previously or deliberately abandoned an issue previously raised. 373 U.S. at 15-19. *Fay* similarly held that federal habeas relief would not be denied on the basis of "procedural default" unless the inmate had "deliberately by-passed the orderly procedure of the state courts," 372 U.S. at 438, by personal waiver of the claim amounting to "'an intentional relinquishment or abandonment of a known right or privilege,'" *id.* at 439 (citation omitted).

Only years after the adoption of §974.06(4) did the United States Supreme Court overturn the standards in *Fay* and *Sanders,* on which that statute's "sufficient reason" standard was based, in favor of the restrictive "cause and prejudice" standard for federal habeas. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). Construction of §974.06(4) thus must be made in light of the permissive standards of *Sanders* and *Fry*, not the preclusive standard of *Wainwright,* with the petitioner's lack of personal involvement in the failure previously to present an issue constituting "sufficient reason" to permit the person claiming unlawful confinement to raise his or her claims under §974.06.[6]

As alleged in Ziebart's motion below (R64:6), Attorney Jensen did not in fact advise Ziebart of the possibility of raising the trial ineffectiveness claim raised here at the time of his initial motion and direct appeal; Ziebart did not in fact understand that this claims could provide a basis for relief from his conviction; and he did not intentionally withhold that claim on his initial post-conviction motion or direct appeal. "Sufficient reason" accordingly is shown on this ground as well.

3. Post-conviction discovery, *see* Section IV, *supra.*

As indicated in Ziebart's motion (R64:18) and in Section IV, *supra*, Ziebart did not learn until long after the trial and after his direct

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[6] Where, as here, the defendant had no right to insist upon inclusion of any particular issues on the post-conviction motion or appeal, *see Jones v. Barnes,* 463 U.S. 745 (1983), imposing default on the defendant for counsel's errors is especially unfair.

appeal that the state had taken extraordinary measures to ensure that Sandlin appeared and testified as it desired. Only in March of 2002 did the defense finally learn of the state's actions from Sandlin's friend, Archie Sharp (R64:18). The state, in other words, succeeded in concealing this evidence from the defense until long after Ziebart could have made any use of the evidence either at trial or on direct appeal.

Because Ziebart did not in fact know of the state's concealment of this information until after his direct appeal, he could not reasonably have included his discovery request on his direct appeal. "Sufficient reason" accordingly is shown for his failure to do so. *See State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753, 762 (1997) (given defendant's prior subjective ignorance of the legal basis for his claim, claim not barred under §974.06(4) despite the theoretical availability of the claim at the time of his direct appeal). *See also Escalona-Naranjo*, 517 N.W.2d at 164 ("defendant should raise the constitutional issues *of which he or she is aware* as part of the original postconviction proceedings" (emphasis added)).

CONCLUSION

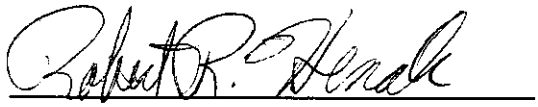
For these reasons, Ziebart asks that the Court reverse the Order denying his §974.06 petition and remand for hearings on his ineffectiveness and post-conviction discovery claims.

Dated at Milwaukee, Wisconsin, May 27, 2003.

Respectfully submitted,

TIMOTHY M. ZIEBART,
Defendant-Appellant

HENAK LAW OFFICE, S.C.



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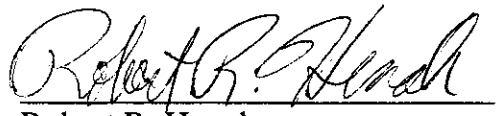
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,686 words.



Robert R. Henak

Brf cert.wpd

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 03-0795
(Milwaukee County Case No. 97-CR-973930)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY M. ZIEBART,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT

STATE OF WISCONSIN CIRCUIT COURT Branch 30 MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 97CF973930

TIMOTHY ZIEBART,

Defendant.

DECISION AND ORDER PARTIALLY GRANTING MOTION FOR POSTCONVICTION RELIEF AND PARTIALLY DENYING MOTION FOR POSTCONVICTION RELIEF

On October 4, 2002, the defendant by his attorney filed a motion for postconviction relief pursuant to section 974.06, Wis. Stats. Ziebart was convicted of two counts of second degree sexual assault with use of force as a habitual criminal, robbery with threat of force and kidnapping, and intimidating a victim as a habitual criminal, and impersonating a peace officer to commit a crime. On October 6, 1998, the Hon. Diane S. Sykes sentenced him to a cumulative total of 148 years in prison. On April 5, 2000, the defendant by postconviction counsel filed a motion for a new trial under Rule 809.30, Wis. Stats. The motion was predicated on the defendant's claim of newly discovered evidence. On May 31, 2000, the Hon. John DiMotto denied the motion on May 31, 2000. The case was administratively assigned to this court for review and decision because Judge Sykes is no longer a circuit court judge and Judge DiMotto is no longer in the felony division. The court adopts the summary of trial testimony as set forth in Judge DiMotto's decision.

FILED
CRIMINAL DIVISION
30 FEB 18 2003 30
JOHN BARRETT
Clerk of Circuit Court

The current motion sets forth claims of ineffective assistance of postconviction counsel pursuant to State ex rel. Rothering, 205 Wis.2d 675 (Ct. App. 1996). Under Rothering, a defendant may bring a claim under section 974.06, Wis. Stats., before the trial court alleging that postconviction counsel was ineffective. The Rothering court indicates that the ineffective assistance of postconviction counsel may be sufficient cause under State v. Escalona-Naranjo, 185 Wis.2d 169 (1994), for failing to raise an issue previously. Both sec. 974.06(4), Wis. Stats., and Escalona require a defendant to raise all issues in his or her original postconviction motion or appeal. Because the defendant contends that postconviction counsel failed to raise claims of trial counsel ineffectiveness, the motion is properly before the court, and the court will review all claims in the context of Rothering.

The defendant submits that postconviction counsel failed to raise the following claims: (1) sufficiency of the evidence on count five (impersonating a peace officer) and (2) ineffective assistance of trial counsel for failing to object to a limiting instruction on the use of other acts evidence. In the first instance, he seeks an order vacating his conviction and sentence on count five; and in the second, he seeks a new trial.

Impersonating a Peace Office under Sec. 946.70(2), Wis. Stats.

The statute with which the defendant was charged was section 946.70(2), Wis. Stats. That section provides as follows:

> **946.70 Impersonating peace officers.** (1) Except as provided in sub.(2), whoever impersonates a peace officer with intent to mislead others into believing that the person is actually a peace officer is guilty of a Class A misdemeanor.
>
> (2) Any person violating sub.(1) with the intent to commit or aid or abet the commission of a crime other than the crime under this section is guilty of a Class D felony.

The defendant argues that the commission of the crimes of sexual assault, robbery and kidnapping had been long completed before he told the victim he was a police officer, and therefore, insufficient factual evidence existed for the jurors to find him guilty of this offense. The particular jury instruction read to the jury was:

> Impersonating a peace officer as defined in s. 946.70(2) of the Criminal Code of Wisconsin is committed by one who impersonates a peace officer with intent to mislead others into believing that the person is actually a peace officer and with intent to commit a crime. Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present: The first element requires that the defendant impersonated a peace officer. To impersonate means to represent one's self to be or pretend to be another person without authority to do so. One may impersonate another by verbal declaration as well as by obvious physical impersonations as in wearing a badge or uniform. A peace officer is a person vested by law with the duty to maintain public order or to make arrests for crimes, whether or not that duty extends to all crimes or is limited to specific crimes.
>
> The second element requires that the defendant impersonated a peace officer with intent to mislead another person into believing the defendant was actually a peace officer. Intent to mislead another must be found as a fact before you can find the defendant guilty of impersonating a peace officer. You cannot look into a person's mind to find intent. Again, you may determine intent directly or indirectly from all the facts and evidence concerning this offense. You may consider any statements or conduct of the defendant which indicates state of mind. You may find intent to mislead others from such statement or conduct but you are not required to do so. You are the sole judges of the facts and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to mislead another into believing that the defendant was actually a peace officer.
>
> The third element requires that the defendant impersonated a peace officer **with intent to commit a crime.** The State claims that **the defendant impersonated a peace officer with intent to commit crimes of sexual assault, robbery and/or kidnapping,** and those crimes have previously been defined for you. If you are satisfied beyond a reasonable doubt that the defendant impersonated a peace officer with intent to mislead another into believing that the defendant was actually a peace officer and with intent to commit a crime, you should find the defendant guilty. If you are not so satisfied, then you must find the defendant not guilty.

(Tr. 5/29/98, pp. 70-72, emphasis supplied).

The clear purpose of section 946.70(2) is to render an act criminal if a person impersonates a peace officer with the intent to commit or facilitate a crime. The purpose for

which the defendant pretended he was a peace officer was to scare the victim so that she would not run to the police about the incident; he did not impersonate a peace officer for purposes of sexually assaulting the victim, robbing her, or performing a kidnapping -- all of which were virtually completed by the time the defendant represented he was a police officer. Although the State argues that the victim was still under the defendant's control when he made the statement, and hence, the kidnapping was not over, the court cannot find that the defendant claimed to be a police officer ***for purposes of kidnapping the victim.*** He clearly did it to further harass her, intimidate her, and terrorize her, but for none of the stated offenses in the jury instruction. The purpose of the statute is to use the identity of a peace officer *to aid or abet the commission of a crime* other than the crime of impersonating a peace officer. The State's theory was that Ziebart impersonated a peace officer to aid or abet the commission of a sexual assault, a robbery and/or a kidnapping. However, the testimony reveals that Ziebart did not impersonate a peace officer for any of these purposes, and therefore, the State did not sufficiently prove the elements of impersonating a peace officer under section 946.70(2), Wis. Stats. Consequently, there were insufficient facts upon which the jury could have found the defendant guilty of this offense. The court therefore orders Ziebart's conviction for impersonating a peace officer under section 946.70(2) vacated. State v. Wulff, 207 Wis.2d 143 (1997).

Whitty Instruction

The defendant next claims that trial counsel failed to object to the overbroad Whitty instruction with respect to other acts evidence. Strickland v. Washington, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second

prong, the defendant is required to show "'that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 694; also State v. Johnson, 153 Wis.2d 121, 128 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. State v. Moats, 156 Wis.2d 74, 101 (1990). "Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.' Strickland, 466 U.S. at 694 . . . . " State v. Erickson, 227 Wis.2d 758, 769 (1999).

The court gave the following cautionary instruction to the jurors, limiting their use of the other acts evidence for which testimony was given:

> Evidence has been received in this case regarding other crimes committed by the defendant and conduct of the defendant for which the defendant is not now on trial. Specifically, evidence has been received that the defendant engaged in certain conduct against Daryl Huck and was convicted of the crimes of battery, false imprisonment, kidnapping and burglary as a result of that conduct. If you find that this conduct did occur, you should consider it only on the issues of the defendant's motive, intent, preparation or plan and on the issue of non-consent [of the victim] in this case. You may not consider this evidence to conclude that the defendant has a certain character or certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case. The evidence was received on the issues of motive, that is, whether the defendant has a reason to desire the result of the crimes; intent, that is, whether the defendant acted with the state of mind that is required for these offenses; preparation or plan, that is whether such other conduct of the defendant is evidence of a design or scheme that is related to or encompasses the commission of the offenses now charged; and non-consent, that is, whether the victim freely consented or did not consent to the alleged acts of the defendant in this case.
>
> You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged.

(Tr. 5/29/98, pp. 78-79).

The defendant maintains that caselaw prohibited the court from permitting the use of

other acts evidence for purposes of establishing consent or non-consent.[1] Cited is State v. Alsteen, 108 Wis.2d 723 (1982), in support of his argument. The Alsteen court determined that where the defendant admitted to having sexual intercourse with the victim and consent was the sole issue (rather than identity, etc.), evidence of two other acts of sexual contact or intercourse was not relevant to the issue of consent. (Id. at 730-731). The court agrees with the State that the issue in Alsteen was limited to whether or not the victim had consented to sexual activity; here, however, there is more than a sexual assault that occurred. The State attempted to prove that the defendant kidnapped the victim, sexually assaulted her, and robbed her during the course of a harrowing evening. The other acts evidence, which was found to involve a common scheme or plan, was *relevant* as to whether the defendant committed the other offenses in the context of the sexual assaults. It is entirely unlike Alsteen, in which the sole issue was consent to have sexual contact, and in which evidence of other sexual assaults was irrelevant to the consent issue. Judge Sykes compared the two incidents and found the facts so unique as to characterize the former incident as a "signature crime" reflecting specifically on the defendant's character -- "because it identifies the defendant to the crime . . . ." (Tr. 5/26/98, pp. 14-15). Given the particular allegations surrounding the sexual assault offenses, the other acts evidence was both highly relevant and admissible. Further, Judge Sykes' limiting instruction was sufficient to overcome the danger of unfair prejudice. The defendant's motion for a new trial is denied on this basis, and the court also finds that because trial counsel was not ineffective for failing to raise this issue, the defendant's claim of postconviction counsel's ineffectiveness is also

[1] The current issue was neither raised nor addressed in Ziebart's appeal. On appeal, the Court of Appeals merely determined that the evidence of other acts was admissible in this case and that any danger of unfair prejudice was eliminated by the court's cautionary instruction. (Court of Appeals Decision dated May 22, 2001).

without merit.

Postconviction Discovery

The defendant seeks postconviction discovery under State v. O'Brien, 223 Wis.2d 303 (1999), in an attempt to ascertain "the means by which Ms. Sandlin's appearance at trial was accomplished, whether she was either housed or held in custody by the state pending her testimony, and the circumstances of any such housing or incarceration." (*Motion, p. 18*). His request is predicated on the statement of one of the victim's acquaintances, Archie Sharp, who purportedly told a defense investigator in March of 2002 that he had to help the State track down the victim, Mary Sandlin, at a drug house and that the victim was then held in some form of state custody during the course of the trial. Ziebart contends that discovery is necessary to determine if the victim's testimony was coerced due to her custodial arrangement with the state. The State strenuously objects to the defendant's request for discovery of this nature and vehemently denies that the victim was ever in some form of state custody.

The standard for postconviction discovery is set forth in O'Brien: "[A] party who seeks postconviction discovery must first show that the evidence is consequential to an issue in the case and had the evidence been discovered, the result of the proceeding would have been different." 233 Wis.2d at 323. "Evidence that is of consequence . . . is evidence that probably would have changed the outcome of the trial." Id. at 321. "'The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish '[a consequential fact]' in the constitutional sense.'" United State v. Agurs, 427 U.S. 97, 109-10 (1976). O'Brien requires a strong showing of success based on the particular postconviction evidence sought.

In this instance, the defendant has not provided a strong showing of success. In support of his request, Ziebart offers a vague and nebulous assertion made by an acquaintance of the victim long after the trial. No particulars are provided and no sworn statement from the acquaintance exists. Even if the court had been provided with a sworn statement, however, Sharp's statement (*or belief*) that the victim was in "some form of state custody" would be insufficient to demonstrate that postconviction discovery was warranted. No actual factual data is offered; rather, merely the belief of an acquaintance, or perhaps his repetition of something he had possibly heard at one time, is presented. It is an unsubstantiated statement, murky at best, completely insufficient to support a motion for postconviction discovery under O'Brien. There is simply no basis in fact to allow the request. For these reasons, the defendant's motion for postconviction discovery is denied.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion to vacate the conviction on count five (impersonating a peace officer) is **GRANTED;**

IT IS FURTHER ORDERED that the judgment of conviction shall be amended by vacating the conviction and sentence on count five (impersonating a peace officer), and the sentence on count six shall be amended by making it consecutive to the sentence on count four;

IT IS FURTHER ORDERED that the defendant's motion for a new trial on the second ground set forth in his motion is **DENIED;**

IT IS FURTHER ORDERED that the defendant's motion for postconviction discovery is **DENIED.**

BY THE COURT:

Dated this 18 day of February, 2003,

at Milwaukee, Wisconsin.

Jeffrey A. Conen
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 43

STATE OF WISCONSIN,

Plaintiff,

-vs- Case No. 97CF973930

TIMOTHY ZIEBART,

Defendant.

MOTION

May 8, 1998 Hon. Diane S. Sykes,
Circuit Judge, presiding

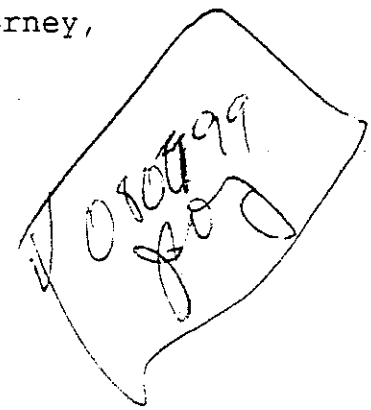
RECEIVED
MAY 13 1998
Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

APPEARANCES:

GALE SHELTON, Assistant District Attorney, appeared on behalf of the State.

BRIDGET BOYLE, Attorney at Law, appeared on behalf of the Defendant.

Defendant appeared in person.



Barbara J. Bohl - Official Reporter

MS. SHELTON: That's right.

MS. BOYLE: That's true. For the record, I object to it being filed.

THE COURT: The objection is noted and overruled. I will permit the filing of the amended information in this case. It appears as though the additional charges which the state seeks to add are unquestionably transactionally related in this case. There is no issue of surprise or prejudice because it is my understanding that the factual basis for the additional charges is contained in the discovery; correct?

MS. SHELTON: Right.

THE COURT: All right. And so under those circumstances the state will be permitted to proceed on the amended information in this case. As far as an arraignment on the amended information, you obviously, Ms. Boyle, are in receipt of a copy of it?

MS. BOYLE: I am, Your Honor. We waive the reading and enter a plea of not guilty to all counts to the amended information.

THE COURT: Those pleas are noted. We also have the issue of the Whitty motion to deal with, and I have received this and I guess I just need to clarify one thing. Is the state proposing to have the victim of the prior offenses come to court to testify?

MS. SHELTON: Well, I guess I don't know the answer to that. We are in the process of attempting to locate the victim, and I may very well introduce that testimony. But the state would certainly also seek to introduce the fact of the convictions.

THE COURT: Well, the fact of the convictions doesn't get you anywhere for 904.04(2) purposes unless you have somebody here to tell about the circumstances and facts of the defendant's conduct because that is what is important for Whitty purposes.

MS. SHELTON: Well, I'm sorry. I guess I didn't quite explain what I was saying properly. The state would seek introduction of a judicial notice of the criminal complaint and the convictions of the conduct alleged in the criminal complaint.

It is the state's intention to attempt to ensure the testimony as well of the victim, but I can't tell the Court that as of now that we have located that person. We haven't exhausted all of our abilities to find that person so I don't know that we won't, but I can't tell you that for sure we have yet.

THE COURT: What is the defense position on this?

MS. BOYLE: Well, I object to having anything brought in about the '88 conviction. Whether it is the fact that the victim would come in and testify, and I

will address that in a moment. But also to have the criminal complaint have that '88 case read, I don't have the criminal complaint, I only have the discovery, but I can assume that the criminal complaint does not paint a very good picture of Mr. Ziebart. And besides the fact that the criminal complaint is not evidence. There is even by Mr. Ziebart's own admission for the prior acts, he did not do the sexual assault.

And I asked Ms. Shelton before we started today whether or not the two other individuals, Otto Robin Roberts and Michael Toppy which were juveniles at the time were convicted of the sexual assault in this matter. The victim himself says in his statement to the police that the sexual assault that occurred was someone took an object, and he did not think it was a pen, and placed it in the anal area of his body and that's it. And he said stop and that was the extent of the alleged sexual assault that occurred.

Now, granted, Ms. Shelton has informed the Court that he was not convicted of that sexual assault, and I know that that could have some bearing on the Court's ruling because we don't know if the decision was made at the time period when that sexual assault was dismissed in this '88 case or the state said we can't prove it or we have convicted someone else of it or it just didn't

happen with Mr. Ziebart. So I think it is fundamentally unfair.

Besides the fact I think there are some major differences between this case and what happened in 1988. The biggest difference being that the person in the '88 case was a male that was sexually assaulted. And that male is different than the female that is in this case. And if we were talking about a child molestation case, it might have, and the experts would probably say, that a person that molests a young child, whether it's a male or female, they can't differentiate between that male and female. But once you have a person that is a sexual offender who is sexually offending an adult, they do make a difference as to whether it is an adult male or female. So even the experts say that.

And since we are not dealing with a child case here, I think it extremely unfair that Mr. Ziebart have a jury hear that a person was sexually assaulted where it didn't even have a body part in the act that occurred in 1988. And Mr. Ziebart in this case, and I know Ms. Shelton knows what the theory of defense is, is that this was a concentual act and all of the sudden this woman gets out of the car and starts screaming and yelling and the cops come to her attention and she says I was raped.

The woman has got some problems. She wasn't at all looked at by any sexual assault units because of her prior conduct with other men, and so I think that the evidence in this case is overwhelmingly-- Strike that. I think the evidence in this case would show that Mr. Ziebart did have concentual sex with her and that the facts in the '88 case are different than what happened in this case.

THE COURT: Well, I think it is precisely because of the nature of offenses in this case that we consent to the state seeking to use that evidence, and that's one of the basis upon which or permitted purposes that the state is allegeding that the evidence is admissable to show. But putting that aside, I did note the difference in gender between the prior victim and the present victim. And whether or not that makes any difference here depends upon some further information about the prior assault or the present assault.

What I have is basically a generalized offer of proof in the state's motion of which I note some strong similarities between the prior conduct in terms of the person representing a police officer and the basic act of physical and sexual degradation that are common between the two incidents which lead me to conclude just at first blush that the two incidents are highly similar and

therefore the prior incident would be highly relevant to the issue of consent or nonconsent in this case among other issues.

But I need to know more and look at exactly what it is you're going to seek to present here, and if it is going to be judicial notice of a criminal complaint, then I need to see that. If it is going to be testimony of a victim, I need to have an offer of proof of what he's going to say, and in particular what he is going to say as to Mr. Ziebart's involvement of the sexual aspects of the case. I guess I read between the lines a little bit here and assumed that Mr. Ziebart didn't actually commit the sexual assault but could have been convicted of it as party to a crime because he was the ring leader and that aspect of it was dismissed because of the sufficient exposure on the other counts. But that is all reading between the lines on my part. So I need to know the answers to those questions.

MS. SHELTON: My request then would be, what I will try to do if the Court will give us a date to be back to provide that information. I will also try to be able to tell the Court with certainty whether we have located the victim and if so what he would say.

THE COURT: It would be my at least initial thinking on the issue would be that you need a victim

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
Branch 43

STATE OF WISCONSIN,

Plaintiff

-vs- #97CF973930

TIMOTHY ZIEBART,

Defendant.

CHARGES: COUNT 1: SECOND DEGREE SEXUAL ASSAULT
COUNT 2: ROBBERY
COUNT 3: KIDNAPPING

MOTION
May 19, 1998

Before the HONORABLE DIANE S. SYKES
Circuit Court Judge

APPEARANCES:

GALE SHELTON, Assistant District Attorney, appearing for the State of Wisconsin.

BRIDGET BOYLE, Attorney at Law, appearing on behalf of the defendant.

Defendant present in court.

Nancy M. Dosemagen - Official Court Reporter

which he supposedly exposed himself in 1997 and Judge Crooks at the time allowed that evidence to come in against the defendant and the Court of Appeals reversed that case saying because of the reasons that Judge Crooks stated on the record was because there was the use of a vehicle in both cases and because they both occurred in Green Bay, that the evidence should be allowed in, and the Court of Appeals said they need more, so the fact that one component is satisfied in the 1988 case and in this case, the present case, about the fact that he's a police officer, I still think it fails as to the aspect of the sexual assault, which is the common end that the State says that he used when he said he was a police officer. The common end was pretending he was a police officer in order to rape this woman, and I don't think we've established that in the '88 case, so I think under Whitty it fails. Just because the fact that he said that he's a police officer in '88 and the fact he said he was a police officer in these allegations, if that is true, then I think the fact that the sexual assault component in '88 fails and that his intent in '88 was to sexually assault this man, there is no evidence of that.

THE COURT: Well, the evidence is going to come from the victim when he says that he was in fact sexually assaulted or there was a significant attempt which was

practically consummated and at least consummated insofar as sexual contact without consent by threat of force or violence occurred and the fact that seems to me remains that we have the defendant, if the Whitty victim is to be believed, and that would be for the jury to decide, not me to decide for purposes of this motion, but we have the defendant using a ruse, a scheme, modus operandi of impersonating a police officer in order to facilitate terrorization and victimization of people in sexual ways, whether he's the one who has the sex or whether one of his companions has the sex. That appears to be what the situation is and that being the case, the Whitty evidence has extremely strong similarities, it's not sort of a generic use of a vehicle or a scenario focused on a child, it's a very specific imprint, a specific signature type of crime and that's precisely what 904.02 is supposed to permit the admission of.

MS. BOYLE: But if Mr. Ziebart when he picked this man up and threw him in the trunk, if the purpose was was to terrorize him and he brought him to this house to terrorize him and get money out of him and tell him he's a bad person and a waste in society and one of the co-actors kills him, it's not his intent the man would have died that he brought him in the house and it also wasn't his intent to have the man sexually assaulted if

his co-actors did that. Granted, under the law of party to a crime statute he could have been charged with that, but it's also very difficult to think that the sexual assault charges that were dismissed against him were dismissed because there was so much exposure out there already.

THE COURT: What I was trying to establish is whether or not the sexual assault charges in the prior case were dismissed as against all three defendants because there was a conclusion that the sexual assault did not occur, and that's apparently not the case. There was the conclusion that this victim wasn't going to testify about the defendant, that those degrading things ever happened to him and there was the thought that the many multiple years of exposure were sufficient under the circumstances and it wasn't necessary to put the victim through that. Not because this didn't occur. The sexual aspects did occur according to the victim who was party to the crime of those and he's going to testify to that and it seems to me, therefore, that the two episodes bear extremely strong similarities and that chances, to use the terminology in our new case of State of Wisconsin v. Kevin Sullivan, which governs the admission of Whitty evidence henceforward, the chances of this being a coincidence or a mere consensual encounter between this

defendant and the present victim is reduced and that's precisely why the State wants this evidence in front of the jury and precisely why it is in fact so very, very probative, so at this point I will pursuant to my evaluation and analysis of the prior acts and the present case find that, first, the evidence that the State seeks to admit in this case as other crimes, wrongs or acts evidence pursuant to 904.04(2) is offered for an acceptable purpose under that Statute, that being the defendant's intent and motive, modus operandi, signature type crime, and also on the issue of consent and the absence of consent, I believe it is being offered for all of those acceptable purposes.

I also believe and will so find that the evidence is highly relevant and highly probative of those issues for the reasons that I have already stated.

And as to the final prong of the analysis, which has to do with whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, clearly under the circumstances there is a danger of unfair prejudice, but I believe that can be minimized by the giving of a cautionary instruction to the jury that they should not use this evidence to conclude that the defendant is a bad person, but merely to help them decide the issues in this case, that being

whether this was a consensual encounter or not a consensual encounter and what in fact the defendant's intent was in the particular instance and that given the extremely high probative value of the other acts evidence, that the high probative value outweighs the danger of unfair prejudice and not vice versa and so I will grant the State's motion to admit the other crimes, wrongs or acts evidence in this case, that being the testimony of the prior victim. I'm not troubled by the separation in time. The evidence was in the 1988 incident, which the defendant was convicted in 1989, and he spent most of the intervening time period in prison and was released apparently about 18 months prior to the present incident having allegedly occurred and so basically we have functionally for purposes of this analysis a difference in time of about 18 months, which certainly is close enough for 904.04(2) purposes as far as I'm concerned.

We have a trial date of the 26th and I assume everybody is going to be ready on that date.

MS. SHELTON: Yes.

MS. BOYLE: Yes.

THE COURT: Okay. Anything else for today?

MS. SHELTON: The only other thing is I am requesting that the Court authorize the Probation

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 43

STATE OF WISCONSIN,

Plaintiff,

VS. Case No. 97CF973930

TIMOTHY ZIEBART,

Defendant.

JURY TRIAL

May 26, 1998

HON. DIANE S. SYKES
CIRCUIT COURT JUDGE

CHARGE: Second Degree Sexual Assault - 2 counts
Robbery
Kidnapping
Impersonating a peace officer
Intimidation of victim
Habitual criminality

APPEARANCES

GALE SHELTON, Assistant District Attorney, appearing on behalf of the State.

BRIDGET BOYLE AND GERALD BOYLE, Attorneys at Law, appearing on behalf of the Defendant.

Defendant is present in court.

Barbara J. Bohl, Court Reporter

something 10 years ago to get in this statement as being so important to prove, what, that he is a liar? They got that all over the place.

But the fact of the matter is when she said the 9th thing, and I can't remember what it was now, is the reason they need it I must submit to you I don't have the brief in front of me. But the 9th thing is in both instances he falsely claimed that he was a police officer. Intimidating the victim is just not a basis under these circumstances to put this in and allow this case then to get into the question of whether or not there is any way he can have a fair trial with that other information coming in.

THE COURT: Well, what was just read from the discovery in the case, conferring the present offense comports quite accurately with what was in the offer of proof from the hearing last week and the state's brief and what was just related by the prosecutor as to what the present victim will testify about. And I assume based on what we discussed last week that your Whitty victim is going to testify substantially similarly to what you just told me he would say.

In other words, that the presentations were made during the course of the assault on him by the defendant. That the defendant was a police officer and so he better

not bother reporting this because the police officers will stick with him and nobody would believe him. And he is going to somehow use his official position of authority and position as a police officer to make sure that this case never would go anywhere if it in fact were reported. And it was part of his mission as a police officer to rid the world of the types of characters, as he perceived the victim to be in that case; is that right?

MS. SHELTON: That is right.

THE COURT: And that's what the discovery and the Whitty episode reflects.

MS. SHELTON: That is right.

THE COURT: Under the circumstances that is a signature crime and that is precisely what the Whitty decision is designed to get at. And so I perceive, and you're directing my main focus here for purposes of the Whitty 904.4(2) ruling is that aspect of these two crimes, the fact that the representation was made the defendant was a police officer, and that the victims in each of these cases had better not report these crimes because nobody would believe them because the police officers would stick together, and that is how he is proposing to get away with it. That makes this a signature crime with the meaning of the Whitty decision,

and this is precisely the kind of prior crimes, wrongs or act evidence which of course courts should admit under the circumstances. Not only because it identifies the defendant to the crime, this isn't an ID case so it is not so important as to that issue, but it meshes out the character of the assailant. And in particular it goes to the specific nature of the defense in this case which is consent, and it is strong, probative, relevant evidence of nonconsent.

And under those circumstances it should come in not because it makes it easier for the state to meet it's burden of proof because the state needs it otherwise it has a weak case, but because it is extremely relevant as the defendant MO and signature of this criminal episode.

MR. BOYLE: Okay, I hear you. I don't like arguing with the court, but I have a record made and the fact of the matter is this is after the alleged question of consent. This is after the crime was committed. It is not the same as the crime that was in '88. It was not a consent issue there, Judge. That is a consent issue and only a consent issue, and the statements were made after the act had been effectuated. If in fact there was at the place where she said he said that, that he was even there. So I think we have now made our record and we will proceed based upon the court's ruling.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
Branch 43

STATE OF WISCONSIN,

Plaintiff

-vs- #97CF973930

TIMOTHY ZIEBART,

Defendant.

CHARGES: COUNT 1: SECOND DEGREE SEXUAL ASSAULT
COUNT 2: SECOND DEGREE SEXUAL ASSAULT
COUNT 3: ROBBERY
COUNT 4: KIDNAPPING
COUNT 5: IMPERSONATING A PEACE OFFICER
COUNT 6: INTIMIDATION OF VICTIM

JURY TRIAL
May 29, 1998

Before the HONORABLE DIANE S. SYKES
Circuit Court Judge

APPEARANCES:

GALE SHELTON, Assistant District Attorney, appearing for the State of Wisconsin.

GERALD P. BOYLE, Attorney at Law, and BRIDGET BOYLE, Attorney at Law, appearing on behalf of the defendant.

Defendant present in court.

Nancy M. Dosemagen - Official Court Reporter

constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

The State has introduced evidence of statements which it claims were made by the defendant. It is for you, the jury, to determine how much weight if any to give to the statements. In evaluating the statements, you should consider three things. First, you must determine whether the statements were actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence.

Second, you must determine whether the statements were accurately restated here at trial.

Finally, if you find that statements were made by the defendant and accurately restated here at trial, you must determine whether each statement is trustworthy. Trustworthy simply means whether the statement ought to be believed.

You should consider the facts and circumstances surrounding the making of each statement along with all the other evidence in the case in determining how much weight each statement deserves.

Evidence has been received in this case regarding other crimes committed by the defendant and conduct of

the defendant for which the defendant is not now on trial. Specifically, evidence has been received that the defendant engaged in certain conduct against Daryl Huck and was convicted of the crimes of battery, false imprisonment, kidnapping and burglary as a result of that conduct. If you find that this conduct did occur, you should consider it only on the issues of the defendant's motive, intent, preparation or plan and on the issue of non-consent in this case. You may not consider this evidence to conclude that the defendant has a certain character or certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case. The evidence was received on the issues of motive, that is, whether the defendant has a reason to desire the result of the crimes; intent, that is, whether the defendant acted with the state of mind that is required for these offenses; preparation or plan, that is, whether such other conduct of the defendant is evidence of a design or scheme that is related to or encompasses the commission of the offenses now charged; and non-consent, that is, whether the victim freely consented or did not consent to the alleged acts of the defendant in this case.

You may consider this evidence only for the

purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged.

Evidence has been received that one of the witnesses in this trial has been convicted of crimes. This evidence was received solely because it bears upon the credibility of the witness. It must not be used for any other purpose.

An exhibit becomes evidence only when received by the Court. An exhibit marked for identification and not received is not evidence. An exhibit received is evidence whether or not it goes to the jury room with you for your deliberations.

An information is nothing more than a written, formal accusation against a defendant charging the commission of one or more criminal acts. You are not to consider it as evidence against the defendant in any way. It does not raise any inference of guilt.

The weight of the evidence is not to be decided merely according to the number of witnesses on each side, and as I have instructed you, the State has the burden of proof in this case and the defense has no obligation to present any witnesses whatsoever. You may find that the testimony of one witness is entitled to greater weight

COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1612-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

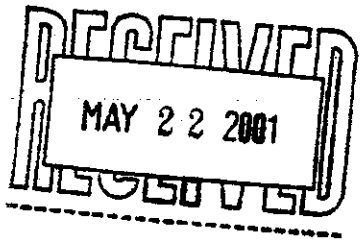
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY ZIEBART,

DEFENDANT-APPELLANT.



APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES and JOHN DiMOTTO, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

[1] The Hon. Diane Sykes presided over the trial and sentencing; the Hon. John DiMotto entered the order denying the motion for postconviction relief.

¶1 PER CURIAM Timothy Ziebart appeals from a judgment of conviction for robbery, kidnapping, impersonating a peace officer, intimidating a victim, and two counts of second-degree sexual assault, all as a habitual criminal, following a jury trial. He also appeals from an order denying his motion for postconviction relief. He argues that: (1) the trial court erred in admitting other acts evidence; (2) the postconviction court erred in denying his motion for a new trial based on newly discovered evidence; (3) the postconviction court erred in doing so without first granting an evidentiary hearing; and (4) his sentence is unduly harsh. We affirm.

I. BACKGROUND

¶2 Mary S. testified that on the evening of August 23, 1997, after spending the day engaging in prostitution to obtain cocaine, she was coming down from a cocaine high when she and her girlfriend had an altercation with some unknown individuals on National Avenue. At that moment, a stranger, later identified as Ziebart, drove up and asked her if she needed a ride. She testified that she told Ziebart that she "was not dating" (meaning that she was not offering to commit prostitution), but that she could use a ride. Ziebart told her that was fine, stating, "I can give a beautiful lady a ride home."

¶3 Upon entering the car, Mary told Ziebart that she lived in Cudahy and offered to pay him for the ride. Ziebart declined the offer and proceeded to a Marathon gas station where he offered to buy her a soda. After returning to the car, he stuffed something between the seats, but Mary did not see what it was. As they approached her home, Mary asked Ziebart to pull over and let her out of the car. Ziebart, however, reached across her, locked her door, grabbed her wrist, and told her to do what he said or he was going to kill her. After parking the car,

Ziebart ordered Mary to remove her pants and shoes; he then removed a box of condoms from between the seats, opened one, telling her he did not want to catch any diseases from a "crack whore," and had sexual intercourse with her. Afterwards, he ordered her to "suck his fat dick," while continually berating her for being a "crack whore."

¶4 Ziebart then drove to Sheridan Park, where Mary unlocked the car door and tried to escape. Ziebart pursued her, tripped her, robbed her of her money and wallet, and continually threatened to kill her. Ziebart told Mary that he was a St. Francis Police Officer and that she should not consider calling the police because he and his "police brothers" would "get her." He reiterated that he and his fellow officers were "sick of crack whores on the street," and repeatedly told her not to contact police because no one would believe her.

¶5 Moments later, Ziebart fled the scene and Mary screamed for help. Several neighbors testified that they heard screams from the park and called the police. Dana Gauerke testified that she called the police after she heard a woman screaming that she had been raped. Officer Glen Haase testified that when he arrived at Sheridan Park, he found Mary disheveled and terrified. After Mary was taken to the hospital, Haase interviewed her. Haase said that at the hospital Mary was alert, sober and calm, and that she gave a detailed account of the attack.

¶6 Mary testified that several days after the assault, she received a phone call in which the caller said, "Hello, Mary, this is fat dick...." The police traced the call to Ziebart. Officer Byron McManaman testified about his subsequent interview of Ziebart, in which Ziebart denied making the call, denied stopping at the gas station, and denied assaulting Mary. After being shown the gas

station's videotape showing him there, however, Ziebart changed his story, and eventually said that he had had sex with Mary for twenty dollars.

¶7 At trial the State also introduced the testimony of Daryl H., to rebut Ziebart's claim that Mary had consented to having sex with him. Daryl testified that, several years earlier, Ziebart and others had abducted him, sexually assaulted him, and robbed him. He testified that during the assault, Ziebart continually berated and threatened him, and claimed to be a vigilante police officer on a rampage to rid the streets of drug addicts.

¶8 After a three-day trial the jury convicted Ziebart of the charges and the court subsequently sentenced him to 148 years in prison with a parole eligibility date in 2035.

II. DISCUSSION

¶9 Ziebart argues that the trial court erred in admitting Daryl's testimony. Specifically, he contends that given the substantial differences between the crimes against Mary and Daryl, and the substantial passage of time between them, the testimony was inadmissible. We disagree.

¶10 Trial courts have broad discretion to determine whether to admit or exclude evidence. ***State v. Larsen***, 165 Wis. 2d 316, 319-20, 477 N.W.2d 87 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised this discretion. *See* ***id.*** at 320 n.1. We will not overturn a trial court's evidentiary ruling unless it has no reasonable basis. ***State v. McConnohie***, 113 Wis. 2d 362, 370, 334 N.W.2d 903 (1983).

¶11 WISCONSIN STAT. § 904.04(2), provides:

> Other crimes, wrongs, or acts. 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.

To determine whether evidence of "other acts" is admissible, the trial court must engage in a three-step analysis. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). First, the trial court must determine if the proffered evidence fits within one of the exceptions of § 904.04(2). Second, the trial court must determine if the other-acts evidence is relevant under WIS. STAT. § 904.01.[2] Third, pursuant to WIS. STAT. § 904.03,[3] the trial court must decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. ***Sullivan***, 216 Wis. 2d at 772-73.

¶12 The trial court admitted the evidence under several theories, concluding that the evidence was relevant to show Ziebart's plan, motive, and intent. The court explained:

> [W]e have the defendant using a ruse, a scheme, modus operandi of impersonating a police officer in order to facilitate terrorization and victimization of people in sexual ways, whether he's the one who has the sex or whether one of his companions has the sex. That appears to be what the situation is and that being the case, the *Whitty* evidence has extremely strong similarities[;] it's not sort of a generic use of a vehicle or a scenario focused on a child, it's a very specific imprint, a specific signature type of crime and

[2] WISCONSIN STAT. § 904.01, provides: "'Relevant evidence' means evidence having 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."

[3] WISCONSIN STAT. § 904.03, provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

> that's precisely what 904.0[4(2)] is supposed to permit the admission of.

We agree with the court's analysis.

¶13 Ziebart argues, however, that consent was the sole issue for the jury to determine and, therefore, that the prior act evidence was irrelevant and inadmissible. We disagree. The supreme court has broadly defined the "plan" exception of WIS. STAT. § 904.04(2) to include "a system of criminal activity" comprised of multiple acts of a similar nature, not all necessarily culminating in the charged crime or crimes. ***State v. Friedrich***, 135 Wis. 2d 1, 24, 398 N.W.2d 763 (1987). The court explained:

> [R]eliance on the "plan" exception to sec. 904.04(2), Stats., requires that an inference be drawn. McCormick states that other-acts evidence sought to be introduced to establish the existence of a plan "will be relevant as showing motive, and hence the doing of the criminal act, the identity of the actor, or his intention." While identity is not at issue in this case, the doing of the act and the intent are at issue. Defendant has denied doing the act. Moreover, intent is an element of the crime. The other-acts testimony ... is thus relevant since the "plan" established by the facts of record relates to these contested issue of fact.

Id. at 23 (citation omitted).

¶14 Here, Daryl's testimony was offered for permissible purposes. It helped to prove the crimes against Mary by showing that Ziebart had employed a similar plan, and had acted with similar motive and intent on a previous occasion. Thus, the evidence impeached Ziebert's consent defense. *See* ***State v. Roberson***, 157 Wis. 2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990) (Prior act evidence can be admitted to prove intent because it "'tends to undermine the defendant's innocent explanation for his act.'").

¶15 As the supreme court recently reiterated, "If the state must prove an element of a crime, then evidence relevant to that element is admissible, even if the defendant does not dispute the element." ***State v. Hammer***, 2000 WI 92, ¶26. And here, of course, Ziebart, claiming consent, was disputing his intent to commit any crime. Thus, the State could use other acts evidence of Ziebart's assault of Daryl to help prove Ziebart's intent to commit the strikingly similar crimes against Mary.

¶16 In the instant case, Ziebart was charged with not only the second-degree sexual assaults, but also impersonating a police officer, kidnapping, intimidating a witness, and robbery. Consequently, the State had to prove intent for each of these crimes. Intent was an issue in the case because it was an element of all the crimes charged; motive was an issue because Ziebart offered innocent explanations for his conduct. Consequently, the evidence of the Ziebart's assault of Daryl was relevant to establish Ziebart's intent and motive for his crimes against Mary.

¶17 Ziebart also contends that even if Daryl's testimony was relevant, it still was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice. We disagree. "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." ***Hammer***, 2000 WI 96 at ¶ 31. Here, as the trial court explained, the acts bore striking similarities.

¶18 Ziebart and others abducted Daryl as he was walking in an alley, forced him into the truck of his car, and sexually assaulted him. Ziebart took Daryl's wallet, discovered a marijuana bud, and then threatened Daryl. Ziebart told Daryl that he was a police officer who was on a rampage to clean up the city

and rid it of low-life drug dealers and peeping Toms. Ziebart then took Daryl to a residence where Daryl was tied-up and blindfolded. The men then berated and sexually assaulted Daryl. After several hours, the men wrapped Daryl in a blanket and carried him to a car trunk.

¶19 Ziebart then told Daryl that they were going to Daryl's house to rob it. One man stayed behind with Daryl, repeatedly telling him that he would be killed unless he remained quiet. When the men returned to the car, they continued to torment Daryl, telling him that they had raped his wife during the burglary. When the car would not start, the men pushed it down a hill and abandoned it, leaving Daryl in the trunk. Daryl later escaped and ran for home. Although he saw police shortly after his escape, he testified that he was "hesitant to go talk to them" because he was worried whether it was safe to do so in light of Ziebart's warning that he was a police officer.

¶20 In the instant case, Ziebart also abducted, sexually assaulted and robbed the victim while berating her for being a prostitute and a drug addict. Like Daryl, Mary was robbed of her wallet, money and identification. Much as he had done by gaining access to Daryl's identification, Ziebart used Mary's identification to intimidate and torment her. Much as he had done in Daryl's case, Ziebart repeatedly told Mary that he was a police officer who was tired of crack addicts and was out to rid the streets of them. And, as he had done in Daryl's case, Ziebart also threatened Mary's life. Based on these similarities, we conclude that the trial court properly determined that the evidence was relevant.

¶21 Finally, we conclude that the trial court correctly determined that the probative value of Daryl's testimony was not substantially outweighed by the danger of unfair prejudice. As we have explained, the probative value was very

substantial. Any danger of unfair prejudice was effectively erased when the trial court correctly instructed the jury:

> [Daryl's testimony] was received on the issues of motive, that is, whether the defendant has a reason to desire the result of the crimes; intent, that is, whether the defendant acted with the state of mind that is required for these offenses; preparation or plan, that is, whether such other conduct of the defendant is evidence of a design or scheme that is related to or encompasses the commission of the offenses now charged; and non-consent, that is, whether the victim freely consented or did not consent to the alleged acts of the defendant in this case.
>
> You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged.

See ***State v. Grande***, 169 Wis.2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992) (jury is presumed to follow cautionary instruction). Accordingly, we conclude that the trial court properly admitted Daryl's testimony.

¶22 Ziebart next argues that the postconviction court erred in denying his motion for a new trial based on newly discovered evidence. We disagree.

¶23 As this court recently explained:

> A new trial will be granted on [the basis of newly discovered evidence] only if the defendant establishes by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the testimony introduced at trial; and (5) it is reasonably probable that, with the evidence, a different result would be reached at a new trial. The motion is addressed to the trial court's sound discretion and we will affirm the circuit court's decision if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record.

State v. Carnemolla, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999) (citations omitted), *review denied*, 2000 WI 2, ___ Wis. 2d ___, 607 N.W.2d 291.

¶24 Ziebart's proffered evidence was the testimony of Dawn Goldsmith, the woman who was walking down National Avenue with Mary at the time Ziebart picked her up. According to the affidavit submitted by Ziebart, Goldsmith told his investigator:

> [B]efore Mary was picked up by Timothy Ziebart, [she and Mary] were laughing, giggling, talking, and prostituting together. They were smoking crack also and were available for "dating" (term used for prostituting) should someone come along.
>
> When [Ziebart] came by and picked Mary up in his truck, Dawn said she was absolutely sure Mary was leaving to "date" (prostitute) with [him], and said, "I know it for sure."

Ziebart maintains that if the jury had known Mary was "dating" at the time he picked her up, there would have been a different result at trial, at least with respect to the sexual assault charges. We disagree.

¶25 The critical portion of the proffered evidence would have been inadmissible. As the postconviction court explained:

> Dawn Goldsmith would not have been allowed to testify that the victim and Ziebart struck a deal for a dope date before [Mary] got into the car. This court concludes that this testimony would have been totally inadmissible because Goldsmith is unavailable to testify to any conversation between Ziebart and [Mary]. There is no evidence that she overheard the conversation between them; all she saw was the two of them talk and the victim get in the car. It is total speculation that [Mary] arranged a dope date or a date for money with Ziebart.

Additionally, as the State notes, "the admissible part of Goldsmith's testimony—that she and Mary had used drugs earlier and had dope[-]dated—would have

corroborated Mary's testimony and thus would only have strengthened the State's case." As such, it would not have been a basis for a new trial. Ziebart offers no reply to the State's argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec., Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted). Accordingly, the postconviction court correctly concluded that "even assuming Goldsmith's testimony is newly discovered evidence, this particular testimony would not meet the fifth prong of the newly discovered evidence test as there is not a reasonable probability a new trial would produce a different result."

¶26 Ziebart also claims that the postconviction court erred in denying his motion for a new trial without a hearing. Again we disagree. A defendant is not automatically entitled to a hearing on a postconviction motion. ***State v. Bentley***, 210 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations, which fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the court may deny the motion on its face. ***Id.*** Whether a motion alleges facts warranting relief and thus entitling a defendant to a hearing is a question of law, which we review de novo. ***Id.*** at 310.

¶27 In the instant case, the postconviction court properly rejected Ziebart's request for an evidentiary hearing based on its conclusion that the motion failed to show that he was entitled to relief. Specifically, the court noted that Ziebart's contention that Goldsmith's testimony would have changed the results of his trial was purely speculative. This speculation was nothing more than a conclusory inference which failed to raise a question of fact warranting relief. ***Id.*** at 310-11. Consequently, the court properly denied Ziebart's request for an evidentiary hearing.

¶28 Finally, Ziebart argues that the trial court erroneously exercised sentencing discretion. We disagree. The principles governing appellate review of a court's sentencing decision are well established. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. ***Id.*** We will not remand for resentencing absent an erroneous exercise of discretion. ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). In reviewing whether a court erroneously exercised sentencing discretion, we consider: (1) whether the court considered the appropriate sentencing factors; and (2) whether the court imposed an excessive sentence. *See* ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. ***Larsen***, 141 Wis. 2d at 427. The weight to be given each factor, however, is within the sentencing court's discretion. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶29 Here, the record reflects the sentencing court's careful consideration of the required sentencing criteria. Considering the severity of the offense, the court noted that Ziebart committed "sadistic" acts and "an extremely brutal crime on an extremely vulnerable person." The court, concerned about the emotional and physical trauma the victim had suffered as a result of the attack, observed that Ziebart had caused "havoc" in the victim's already troubled life. In addition, the court noted that the victim was further traumatized by Ziebart's intimidation.

¶30 The court also considered Ziebart's rehabilitative needs. Specifically, the court expressed concern about Ziebart's failure to appreciate the consequences of his behavior, his history of violent offenses, and his need for in-depth, long-term treatment. The court added, "[Y]ou have a serious assaultive

history[;] ... three victims of your brutal and assaultive offenses ... are now scarred for life and ... will never recover from what it is you have done to them." The court also remarked that Ziebart committed these offenses while Ziebart on parole, and within one and one-half years of his release from prison. Consequently, the sentencing court, in considering the need to protect the public, concluded that "the community deserves maximum protection from [Ziebart's] further crimes" because he ramained "a high risk to reoffend." Accordingly, the sentencing court imposed a 148-year prison term.

¶31 The record reflects the sentencing court's proper consideration of the appropriate sentencing factors and its adequate explanation of the bases for the sentence. The court's sentencing comments reflect "a process of reasoning based on legally relevant factors." *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984) (appellate court has duty to affirm sentencing decision if trial court "engaged in a process of reasoning based on legally relevant factors").

¶32 Further, we do not conclude that "the sentence imposed is so excessive and unusual and so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Considering Ziebart's history and rehabilitative needs, and considering the emotional and physical trauma suffered by Mary, the sentence is not unduly harsh or excessive.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 27th day of May, 2003, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Timothy M. Ziebart to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Robert R. Henak

Cert. of Mailing.wpd