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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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The state's argument focuses entirely on the substance of Ziebart's ineffectiveness and post-conviction discovery claims. It does not dispute that, if those claims are meritorious, 1) they are not barred by *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), *see* State's Brief at 5, 2) Ziebart was entitled to a hearing on the claims, *id.* at 10-11, and 3) they are properly before this Court. The sole issue before the Court thus is the substantive merit of Ziebart's claims. *E.g.*, *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 279 N.W.2d 493, 499 (Ct. App. 1979) (failure to controvert opponent's claims constitutes concession).

I.

ZIEBART WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

A. Ziebart's Claim is Not Barred by the Decision on His Direct Appeal

Contrary to the state's assertion, State's Brief at 2-4, neither the parties nor this Court even suggested on Ziebart's direct appeal that the other acts evidence was properly admissible on the issue of nonconsent.

The state's revisionist reading of what it wishes it had argued on the direct appeal, *id.* at 2-3, is not borne out by what it in fact argued, i.e., that

> [t]he evidence of Ziebart's prior criminal act . . . was offered for the acceptible purposes of showing intent, *modus operandi*, and motive under Wis. Stat. §904.04(2).

Brief of Plaintiff-Respondent at 4, *State v. Timothy Ziebart*, No. 00-1612-CR. At no time did it suggest that the evidence was properly admitted on the issue of nonconsent, even in the two obscure and undeveloped references it relies upon here. *See id.* at 6, 8. One referred obliquely to "undermin[ing] Ziebart's innocent explanation of the acts committed against Mary S.," while the other, in a footnote, consists of a similarly undeveloped reference to the complainant's credibility. *Id.*

Even if the state had not previously focused solely on the arguably proper bases for admission of the evidence while abandoning the clearly improper basis of proving nonconsent, this Court at no time suggested, let alone held, that the evidence was admissible to establish the complainant's nonconsent. The only permissible purposes cited by the Court were plan, motive and intent. The Court deemed the other acts relevant to Ziebart's consent defense *only* in terms of *his own intent*, and made no suggestion they were relevant or permissible as evidence of the complainant's nonconsent. (R59:6-7, ¶s 14-15). That

evidence may be relevant to the defendant's intent does not suggest that the evidence likewise is probative of the purported victim's state of mind.

Indeed, the same panel had warned circuit courts (and the state) to the contrary less than a year earlier in rejecting the same argument the state makes here:

> We remind the trial court that "[c]onsent is unique to the individual. 'The fact that one woman was raped . . . has no tendency to prove that another woman did not consent.'"

State v. Cofield, 2000 WI 196, ¶10, 238 Wis.2d 467, 618 N.W.2d 214 (quoting *State v. Alsteen*, 108 Wis.2d 723, 324 N.W.2d 426, 429 (1982)). It is unlikely that the same court which only recently had acknowledged *Alsteen* as controlling would choose to effectively overrule that decision in a case in which the issue was not even raised by the parties.

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

The state does not dispute that, if the other acts instruction was overbroad, then Ziebart's trial counsel acted unreasonably in not objecting to it. Rather, it limits its argument to the assertion that the instruction's directive that the jury use the other acts as evidence of the complainant's nonconsent was proper. State's Brief at 6-9. Because the state does not otherwise dispute trial counsel's deficient performance, the sole issue is whether the instruction was correct. *E.g. Charolais Breeding Ranches,* 279 N.W.2d at 499 (failure to controvert opponent's claims constitutes concession).

As explained in Ziebart's opening brief at 9-11, the question of whether a defendant's prior acts with a third party are relevant to the complainant's consent is controlled by *State v. Alsteen*, 108 Wis.2d

723, 324 N.W.2d 426 (1982). *See also Cofield*, ¶10.[1]

The state claims that Ziebart has misconstrued *Alsteen*, and that *Alsteen* in fact permits a defendant's prior acts to be used, in the words of the instruction here, on the issue of "non-consent, that is, whether the victim freely consented or did not consent to the alleged acts of the defendant in this case." (R53:78-79; App. 28-29). *See* State's Brief at 6. According to the state, "*Alsteen* does not stand for the proposition that other acts evidence can never be probative of consent." *Id.* at 8.

It is unclear, however, on what the state bases this novel assertion. The language and holding of *Alsteen* could not have been more clear in rejecting it:

> 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).
>
> * * *
>
> . . . [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. . . ..

324 N.W.2d at 429-30.

The instruction here encouraged the jury to use Ziebart's prior acts as evidence of the complainant's nonconsent; *Alsteen* expressly holds that "such evidence has no probative value on the issue of the complainant's consent." *Id.* at 430. The instruction thus directly contradicted established Wisconsin law. *See also Cofield, supra.*

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[1] Contrast the situation in which the defendant's prior acts involved the same complainant and thus may be relevant to her state of mind. *See State v. Hunt*, 2003 WI 81, ¶s 58 & 59, __ Wis.2d __, __ N.W.2d __ (defendant's other acts against victim admissible to show context of her recantation).

Nothing in *State v. Roberson*, 157 Wis.2d 447, 459 N.W.2d 611 (Ct. App. 1990), or *State v. Parr* 182 Wis.2d 349, 513 N.W.2d 647 (Ct. App. 1994), undermines *Alsteen's* holding that a defendant's prior acts are irrelevant to the complainant's nonconsent. *Roberson* dealt with inferring a defendant's intent to possess stolen property from his subsequent similar act. Consent was not in issue there, and nothing in that decision held or suggested that the evidence "could be admitted to make it more probable in the eyes of the jury that the victim was telling the truth." State's Brief at 8. *Roberson* had nothing to do with the victim's credibility.

Parr likewise is irrelevant here. Once again, the other acts were admitted there, not as proof of the complainant's nonconsent or credibility, but to establish the defendant's motive and intent. 513 N.W.2d at 648-49, 650. The evidence was deemed relevant to the relative credibility of Parr and the complainant *only* because of its effect on Parr's intent and motive, and not because of any rational or direct relationship to the complainant's credibility.

The foreign cases cited by the state likewise do not support its claim, even if this Court had the authority to overrule *Alsteen*. Indeed, *People v. Oliphant*, 250 N.W.2d 443 (Mich. 1976), reinforces *Alsteen*, expressly holding that a defendant's prior acts are irrelevant to whether a different complainant consented to sex. *Id.* at 450. The other acts evidence in *Oliphant* was admitted, not as evidence of the complainant's nonconsent, but to show the defendant's plan or *modus operendi* to orchestrate the circumstances so as to preclude his victims from proving their nonconsent. *Id.*

Each of Oliphant's prior victims described a situation orchestrated by him which, other than the sexual assault, gave every appearance of an ordinary social encounter, culminating in consensual sex, which had simply gone sour for some reason. *Id.* at 447-49. The evidence was admitted, not because the prior assaults made it less likely the present victim consented, but because Oliphant's prior acts showed similar attempts to nullify a claim of nonconsent. *Id.* at 450.

The state's reliance upon *Oliphant* overlooks the fact that,

because Ziebart's alleged other acts demonstrated no such plan or scheme, this theory of admissibility is wholly inapplicable here.

The state similarly overlooks the fact that the California Supreme Court overruled the holding in *People v. Jackson*, 167 Cal. Rptr. 915 (Ct. App. 1980), on which it relies here. *See People v. Bruce*, 256 Cal. Rptr. 647, 651 n.2 (Ct. App. 1989) (citing *People v. Tassell*, 201 Cal. Rptr. 567, 679 P.2d 1 (1984)).[2] California law does not permit admission of other acts evidence on the issue of actual consent -- only on the issue of whether the defendant reasonably believed the victim consented. *Bruce*, 256 Cal. Rptr. at 650 ("In the case at bar, evidence of the 1981 rape of Veronica--a different incident involving a different victim--had no tendency to prove or disprove whether L.A. consented. The evidence of the prior rape was therefore irrelevant to the ultimate fact of consent or lack of it"). As in Wisconsin, other acts evidence may be relevant and admissible regarding the defendant's own state of mind, but it is irrelevant on the issue of another's consent.

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

As explained in Ziebart's opening brief at 12-14, there can be no reasonable dispute but that the instruction encouraging the jury to use the other acts evidence on the core disputed issue of consent prejudiced his right to a fair trial. It is irrelevant that other parts of the instruction advised the jury in general terms not to use the evidence improperly. State's Brief at 9, because the instruction specifically directed the jury that it could use the evidence on the issue of nonconsent

It is a rare juror who would recognize the conflict between the general and the specific directives of that instruction, and even rarer that one would know which of the conflicting directives to follow. Especially given the requirement to follow the law as given by the court (R53:61), and the presumption jurors follow the instructions given, the jury must be presumed to have concluded that the court knew what it

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[2] *Tassell*, itself, was overruled on other grounds in *People v. Ewoldt*, 7 Cal.4th 380, 867 P.2d 757, 768 (1994).

was doing, that there was no conflict, and that they were therefore free to use the other acts evidence as proof of nonconsent. The instruction thus enhanced, rather than mitigated, the resulting prejudice. *Cf. Graves v. United States*, 150 U.S. 118 (1893) (court's failure to sustain proper objections to improper prosecutorial remarks concerning absence of defendant's wife essentially told jury that it could use that absence against defendant when legally it could not; conviction reversed).

State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833, does not hold otherwise. The other acts evidence there was properly admitted expressly to show intent and motive, *id.* ¶40, although the instruction also permitted its use to show opportunity, preparation or plan. *Id.* ¶46. Unlike here, nothing in *Derango* suggests that the defense on appeal challenged inclusion of this language in the instruction, or that it asserted that use of the evidence to show opportunity, preparation or plan (as opposed to motive or intent) was either improper or prejudicial. Unlike nonconsent, each of the cited uses is a proper basis for admission of other acts evidence. The *Derango* Court simply was not confronted with a situation in which a supposed limiting instruction was challenged as permitting the jury to use other acts evidence for an impermissible purpose, and its non-decision on that point accordingly has no application here.

The state's one-sided summary of the evidence, State's Brief at 9-10, overlooks the fact that, apart from the complainant's story, every piece of evidence it cites is at least as consistent with Ziebart's account as with hers. The evidence that her clothes were somewhat disheveled and unbuttoned, that she had grass-stained knees, and that she was crying and upset is fully consistent with Ziebart's account that they had attempted consensual sex, that she became very upset when he ejected her from the car when she then started smoking crack cocaine, and that she fell during her intoxicated stumbling across the ball field.

This evidence, and Ziebart's account, likewise are fully consistent with that of the only independent eyewitness to any of the incident. Although ignored by the state, *see* State's Brief at 9-10, the

woman who lived across from the park testified that no one was on the ball field with Scandlin at the time she claimed Ziebart was chasing, beating, and threatening her, and that Scandlin appeared intoxicated and her speech was slurred at the time, contrary to Scandlin's claim that she had not used crack for hours before this incident.

The central issue at trial was consent; Ziebart claimed the incident was consensual, while Scandlin claimed it was not. Given the overriding weakness of the state's case, the independent corroboration for at least part of Ziebart's account, and the absence of independent corroboration for Scandlin's story, there is every reason to believe that the instruction, improperly encouraging the jury to use Ziebart's prior conduct as evidence of Scandlin's nonconsent, easily could have been decisive on that issue. In other words, but for the erroneous instruction on the evidence applicable to the core disputed issue at trial, there exists more than a reasonable probability of a different result in this case.

II.

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

Ziebart's post-conviction motion contained specific factual allegations to the effect that Sandlin's friend, Archie Sharp, had to help the state track her down at a drug house in order for her to appear for trial and that he knew Sandlin was held in some form of state custody during the trial (R64:18). While the state's circuit court response effectively conceded much of the factual basis for Ziebart's motion, it declined to provide any specifics regarding the extraordinary measures it had to take to ensure that Sandlin appeared and testified as the state desired. Instead, it merely claimed in conclusory terms that it used nothing amounting to custody or coercion. (R66:15).

While unclear, the state here appears to make two arguments in support of the denial of Ziebart's post-conviction discovery request. State's Brief at 11-12. First, it suggests, without citation to authority, that Ziebart's factual allegations had to be in the form of an affidavit.

Second, it cites as controlling the prosecutor's conclusory assertions that the extraordinary measures required to ensure that Sandlin testified as desired by the state did not legally constitute custody or coercion. Neither suggestion is supported by authority or rational argument, and neither holds water.

Unless specifically required by statute or rule, *e.g.*, Wis. Stat. §971.22(2) (change of venue motion must be supported by affidavit), factual allegations in a motion need not be supported by an affidavit. *E.g.*, *In Interest of Kywanda F.*, 200 Wis.2d 26, 546 N.W.2d 440, 447 (1996) (while better practice is to include affidavit, attorney allegations in motion are sufficient to raise factual issues mandating evidentiary hearing). *See also* Wis. Stat. §971.30 (defining motions generally, with no requirement of affidavit -- party need only "[s]tate with particularity the grounds for the motion and the order or relief sought").

The novel suggestion that the state's conclusory assertion of the facts and the law is somehow controlling is, of course, foreign to Wisconsin law and that of any other jurisdiction dedicated to due process of law. Factual and legal disputes are to be resolved by a neutral magistrate, not by a party with interest in the litigation. *E.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *State v. Walberg*, 109 Wis.2d 96, 325 N.W.2d 687, 692 (1982). Rather, in deciding a motion, "'it is incumbent on the trial court to form its independent judgment after review of the record and pleadings . . .'" *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50, 57 (1996) (citation omitted). Stated otherwise, the court must exercise its discretion when deciding a motion for post-conviction discovery, *State v. O'Brien*, 223 Wis.2d 303, 588 N.W.2d 8, 18 (1999) (Bradley, J., concurring), and it does not do so when it abdicates its responsibility for that decision to one of the parties to the action. *Cf. State v. Ogden*, 199 Wis.2d 566, 544 N.W.2d 574, 576 (1996) (predetermined conclusion constitutes abdication of judicial responsibility to review case independently).

CONCLUSION

For these reasons, as well as for those in his opening brief,

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, July 14, 2003.

Respectfully submitted,

TIMOTHY M. ZIEBART,
Defendant-Appellant

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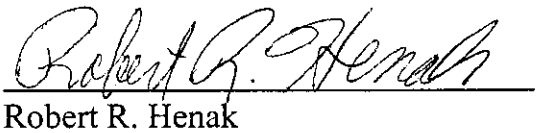

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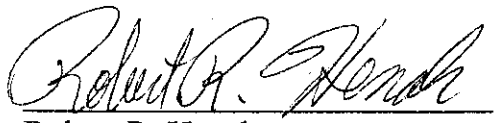
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,803 words.



Robert R. Henak

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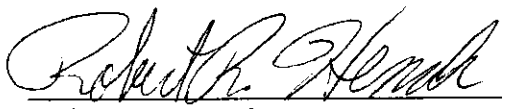
CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 14th day of July, 2003, I caused 10 copies of the Reply Brief 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.



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