

MAITOWOC COUNTY
STATE OF WISCONSIN
FILED

JUN 15 2006

CLERK OF CIRCUIT COURT

STATE V. STEVEN A. AVERY
CASE #05-CF-381

STATE'S MOTIONS FILED UNDER SEAL:
MOTIONS / OTHER ACTS EVIDENCE
MOTION IN LIMINE
MOTION RE: THIRD PARTY LIABILITY
(DENNY MOTION)

55

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

MOTION TO ALLOW THE
INTRODUCTION OF OTHER
ACTS EVIDENCE (1 OF 9)

vs.

Plaintiff, JUN 15 2006

STEVEN A. AVERY,

CLERK OF CIRCUIT COURT PHYSICAL VIOLENCE -
LORI AVERY

Defendant,

Case No. 05-CF-381

The State of Wisconsin, by Special Prosecutor Kenneth R. Kratz, hereby moves the Court for an order allowing the introduction of other acts evidence at the trial in the above-captioned matter; specifically, prior acts of physical violence and threats of the defendant, Steven Avery, against his ex-wife, Lori Avery.

The State seeks to introduce evidence of these other acts of the defendant, pursuant to Wis. Stat. § 904.04(2), and offers this evidence on the admissible issues of intent, motive and plan.

SPECIFIC FACTS OFFERED

The State has reviewed a transcript of Judge Hazelwood's findings of April 15, 1993, in Manitowoc County Case 87-FA-118 (a copy of said transcript was previously filed with the Court). "There's plenty to be worried about with a man like this when he makes threats" (Transcript-Page 6); "The kind of threats he made to his wife, not simply a threat to kill her, but this grandiose mutilation-type scheme, the drawings and everything else indicate that this is not simply a thought of an instant, this is something that he has brooded over for some period of time and has not been able to deal with in any effective manner, but to simply let it out and to create another victim." (Transcript-Page 9). Steven Avery admitted to being physically abusive before and during the marriage to Lori Avery (Transcript-Page 6).

Lori Avery also described to Investigator Wendy Baldwin of the Calumet County Sheriff's Department that her marriage with Steven Avery was very rocky, with a lot of domestic and physical abuse, including instances of choking, hitting and punching (CCSD Report-Page 213).

Steven Avery has also demonstrated an intent, plan and motive to kill, as evidenced by correspondence sent to Lori Avery while incarcerated in the Wisconsin Corrections System. The correspondence included letters sent through his minor children indicating, "I hate mom" and "she will pay"; "I will kill you"; "I will get you when I'm out"; and "Daddy will git (sic) mom when daddy gits (sic) out, love, daddy." These letters served as a partial basis for the family court's decision to discontinue visitation between the defendant, Steven A. Avery, and his children while Mr. Avery was incarcerated.

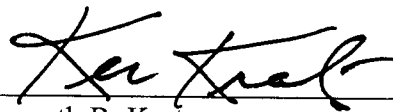
Dangerousness of Steven Avery to members of the community, including family members, was the subject of specific findings of the court, in Manitowoc Case 87-FA-118, including the defendant being impulsive; had threatened to kill and mutilate his wife (using his children to deliver the messages); and had refused to participate in counseling or other programming while in prison.

CONCLUSION

The State argues that evidence of prior acts of physical violence and threats by the defendant against his ex-wife, Lori Avery, should be admitted into evidence at the trial of Steven Avery, pursuant to Wis. Stat. § 904.04(2).

AS GROUNDS THEREFORE AND IN SUPPORT OF THIS MOTION, the State relies upon Wis. Stat. §904.04(2) and the attached memorandum of law.

Respectfully submitted this 9th day of June, 2006.



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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN

vs.

STEVEN A. AVERY,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
Plaintiff,
JUN 15 2006

CLERK OF CIRCUIT COURT
Defendant,

MOTION TO ALLOW THE
INTRODUCTION OF OTHER
ACTS EVIDENCE (2 OF 9)

PHYSICAL VIOLENCE -
JODI STACHOWSKI

Case No. 05-CF-381

The State of Wisconsin, by Special Prosecutor Kenneth R. Kratz, hereby moves the Court for an order allowing the introduction of other acts evidence at the trial in the above-captioned matter; specifically, prior acts of physical violence of the defendant, Steven Avery, against his girlfriend, Jodi Stachowski. The State seeks to introduce evidence of these other acts of the defendant, pursuant to Wis. Stat. § 904.04(2), and offers this evidence on the admissible issues of intent, motive and plan.

SPECIFIC FACTS OFFERED

The State informs the Court that on February 20, 2006, Jodi Stachowski informed Investigator Mark Wiegert of the Calumet County Sheriff's Department that she began dating Steven Avery in May or June of 2004.

On November 11, 2005, DCI Special Agent Debra Strauss and Investigator John Dederling of the Calumet County Sheriff's Department interviewed Jodi Stachowski. Stachowski indicated that there has been a long history of physical abuse between her and Avery, including an incident during 2004, where Steven Avery "slapped her," and that she had to call the police and have Avery arrested. Stachowski further indicated that while in Crivitz, Steven Avery threw her to the ground and hit her. Stachowski further indicated that on three or four occasions, Avery struck her hard enough where she received a bruise, including being struck hard enough during one occasion where she received a big bruise on her right cheekbone (DCI Report 05-1776/39).

On February 20, 2006, Investigator Mark Wiegert of the Calumet County Sheriff's Department again interviewed Jodi Stachowski. Stachowski recalled an argument she had with Steven Avery in which Avery backhanded her in the jaw. Stachowski was unsure of the date that this occurred.

Stachowski also recalled an incident wherein Steven Avery came up to her in front of her and began choking her, placing both of his hands around her neck. Stachowski stated that Avery choked her until she blacked out, and that she remembers blacking out because she remembers falling to her knees. Stachowski stated that when she came to, she was lying on the floor, and Avery was trying to drag her out the front door of the trailer. Stachowski stated that eventually got up to her feet, and Avery grabbed her by the sweatshirt and dragged her over to his truck, which he forced her to get into.

On January 19, 2006, Jodi Stachowski told Investigator John Dederling of the Calumet County Sheriff's Department that Avery is a controlling individual, and the only time she ever told Steven no was the incident that lead up to the choking incident.

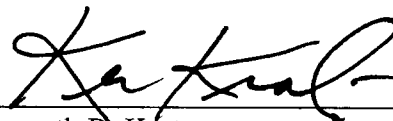
Stachowski stated that the last incident occurred in the spring of 2005 when they had gone to Crivitz, in which Avery slapped her across the face with an open hand.

CONCLUSION

The State argues that the evidence of prior acts of physical violence by the defendant against his girlfriend, Jodi Stachowski, should be admitted into evidence at the trial of Steven Avery pursuant to Wis. Stat. § 904.04(2).

AS GROUNDS THEREFORE AND IN SUPPORT OF THIS MOTION, the State relies upon Wis. Stat. §904.04(2) and the attached memorandum of law.

Respectfully submitted this 9th day of June, 2006.



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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN

Plaintiff,

vs.

STEVEN A. AVERY,

Defendant,

MOTION TO ALLOW THE
INTRODUCTION OF OTHER
ACTS EVIDENCE (3 OF 9)

PHYSICAL VIOLENCE -
ACT OF ANIMAL CRUELTY

Case No. 05-CF-381

The State of Wisconsin, by Special Prosecutor Kenneth R. Kratz, hereby moves the Court for an order allowing the introduction of other acts evidence at the trial in the above-captioned matter; specifically, a prior act of cruelty to an animal committed by the defendant, Steven Avery.

The State seeks to introduce evidence of this other act of the defendant, pursuant to Wis. Stat. § 904.04(2), and offers this evidence on the admissible issues of intent, motive, plan and identity.

SPECIFIC FACTS OFFERED

The State informs the Court that on November 23, 1982, Steven A. Avery was convicted of being party to the crime of cruelty to an animal, committed on or about September 2, 1982, in the Town of Gibson, Manitowoc County, Wisconsin contrary to Sections 948.02 and 939.05 of the Wisconsin Statutes. There were two witnesses to the animal mistreatment: Jerry L. Yanda and Peter A. Dassey. Both men provided written statements. The incident occurred at the residence of Steven Avery. The cat belonged to Steven Avery. Steven Avery built a bonfire and chased down a live cat in his yard. After Avery caught the cat, he soaked it in gas and oil. The live cat was then thrown into the bonfire where it caught fire and crawled out of the burning pit. After the cat crawled out, Avery again doused the animal with gas before it died.

On September 2, 1982 Jerry Yanda provided the following written statement:

I was at Steve Averys house on Monday afternoon 8-31-82. We decided to build a bonfire. Steve built the bonfire. Steve then said lets burn the cat. Steve then chased the cat around the yard until he caught it. Steve then poured gas and oil on it. I then picked the cat up when Steve told me to. I then threw it on the fire. The cat then jumped out of the fire and ran around until it ran out of power and

died. I think it is still out there. I came looking for the police because the incident made me feel bad.

The statement was signed "Jerry Yanda".

On September 1, 1982 Peter Dassey provided the following written statement:

Steve said lets burn the cat. He started a fire first. They got the cat. Steve poured gas and oil on it. Jerry threw the cat into the fire. It burned up.

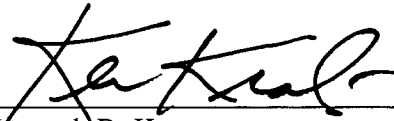
The statement was signed "Peter Dassey".

CONCLUSION

The State argues that evidence of a prior act of animal mistreatment committed by the defendant should be admitted into evidence at the trial of Steven Avery pursuant to Wis. Stat. § 904.04(2).

AS GROUNDS THEREFORE AND IN SUPPORT OF THIS MOTION, the State relies upon Wis. Stat. §904.04(2) and the attached memorandum of law.

Respectfully submitted this 9th day of June, 2006.



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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

MOTION TO ALLOW THE
INTRODUCTION OF OTHER
ACTS EVIDENCE (4 OF 9)

vs.

Plaintiff
JUN 15 2006

STEVEN A. AVERY,

CLERK OF CIRCUIT COURT

ENDANGERING SAFETY
OF SANDRA MORRIS

Defendant,

Case No. 05-CF-381

The State of Wisconsin, by Special Prosecutor Kenneth R. Kratz, hereby moves the Court for an order allowing the introduction of other acts evidence at the trial in the above-captioned matter; specifically, a prior act of recklessly endangering the safety of Sandra Morris committed by the defendant, Steven Avery.

The State seeks to introduce evidence of this other act of the defendant, pursuant to Wis. Stat. § 904.04(2), and offers this evidence on the admissible issues of intent, motive, plan and identity.

SPECIFIC FACTS OFFERED

The State informs the Court that that on September 20, 1984, Sandra L. Morris contacted the Manitowoc County Sheriff's Department to report that she was having problems with Steve Avery. Sandra Morris reported that Steven Avery had been repeatedly exposing himself to her while standing in or on the edge of the roadway as she drove past the Steven Avery residence on her way to work. Morris indicated that on some occasions Steven Avery would masturbate as she was driving past his residence. Sandra Morris indicated that she was able to identify Steven Avery as the person who was exposing himself because Steven Avery is her second cousin. Morris indicated that Avery had exposed himself on a number of occasions all occurring at approximately 5:30 in the morning. Sandra Morris reported that Steven Avery again had jumped into the middle of the road without any clothing at approximately 5:45 a.m. on November 27, 1984. Sandra Morris indicated that she almost struck Avery as it was raining. Sandra Morris indicated that she had spoken with family members in an effort to get Steven Avery to stop exposing himself to her while she drove to work.

Sandra L. Morris reported that on January 3, 1985 at approximately 5:30 a.m. she was traveling past the Steven Avery residence on Old Highway Y. Morris indicated that as she passed the residence she did not observe anything unusual, but a short time later she noticed a vehicle coming up behind her at a rapid pace. Morris indicated that the vehicle then pulled out to pass her and rammed in to the side of her vehicle forcing her off of the roadway. Sandra Morris indicated that she was confronted by Steven Avery. Morris indicated that Steven Avery was angry, yelling and armed with a rifle. Morris indicated that Steven Avery pointed the rifle at her twice, Avery verbally ordered Morris to get in his vehicle. Morris indicated that she begged and pleaded with Avery to let her go because her baby was on the front seat of her vehicle. Morris explained to Avery that the child would freeze to death if she wasn't allowed to take the child to her parent's home. Morris indicated that Avery looked into her vehicle, saw the child on the seat and allowed her to get into the vehicle and take the child to her parent's residence. Morris indicated that Avery followed her in his vehicle for a short period of time. When Morris arrived at her parent's residence she immediately called the sheriff's department using the 911 emergency line.

Later in the day on January 3, 1985 Detective Larry Conrad of Manitowoc County Sheriff's Department interviewed Steven Avery. During the course of the interview, Steven Avery admitted that earlier in the day on January 3, 1985 he had noticed Sandra Morris drive past his residence and enter his vehicle, a 1978 Ford LTD, and began following her. Avery identified Sandra Morris as a relative on his Dad's side of the family. Avery admitted using his vehicle to strike Sandra Morris' vehicle on the side and causing her vehicle to skid to a stop on the side of the road. Avery indicated that he then got out of his vehicle with a 30-06 rifle and pointed the gun toward Sandy Morris and her vehicle. Avery indicated that he ran Sandy Morris off the road because she was telling everyone that he was "bare-ass in the road" while she was driving by his residence. Avery indicated that this bothered him and that he was intending to frighten Sandy Morris in an attempt to get her to stop making statements about his being naked in the roadway. Avery indicated that after the confrontation on the roadway he returned home and hid the 30-06 rifle underneath one of the kids' beds in his home.

Officers from the Manitowoc County Sheriff's Department later recovered the 30-06 rifle hidden underneath the bed in which children were sleeping in their pajamas. A subsequent inspection of the 30-06 rifle found underneath the child's bed in the Steven Avery residence

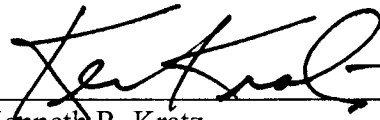
revealed a live round in the chamber. Officers found paint transfer between Steven Avery's 1978 Ford and Sandra Morris' Plymouth Volare.

CONCLUSION

The State argues that the evidence of a prior act of recklessly endangering the safety of Sandra Morris committed by the defendant should be admitted into evidence at the trial of Steven Avery pursuant to Wis. Stat. § 904.04(2).

AS GROUNDS THEREFORE AND IN SUPPORT OF THIS MOTION, the State relies upon Wis. Stat. §904.04(2) and the attached memorandum of law.

Respectfully submitted this 9th day of June, 2006.



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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN

vs.

STEVEN A. AVERY,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
Plaintiff,
JUN 15 2006

CLERK OF CIRCUIT COURT
Defendant,

MOTION TO ALLOW THE
INTRODUCTION OF OTHER
ACTS EVIDENCE (5 OF 9)

POSSESSION OF FIREARM
BY CONVICTED FELON

Case No. 05-CF-381

The State of Wisconsin, by Special Prosecutor Kenneth R. Kratz, hereby moves the Court for an order allowing the introduction of other acts evidence at the trial in the above-captioned matter; specifically, evidence of a prior act of being a convicted felon and possessing a firearm committed by the defendant, Steven Avery.

The State seeks to introduce evidence of this other act of the defendant, pursuant to Wis. Stat. § 904.04(2), and offers this evidence on the admissible issues of knowledge

SPECIFIC FACTS OFFERED

Sandra L. Morris reported that on January 3, 1985 at approximately 5:30 a.m. she was traveling past the Steven Avery residence on Old Highway Y. Morris indicated that as she passed the residence she did not observe anything unusual, but a short time later she noticed a vehicle coming up behind her at a rapid pace. Morris indicated that the vehicle then pulled out to pass her and rammed in to the side of her vehicle forcing her off of the roadway. Sandra Morris indicated that she was confronted by Steven Avery. Morris indicated that Steven Avery was angry, yelling and armed with a rifle. Morris indicated that Steven Avery pointed the rifle at her twice, Avery verbally ordered Morris to get in his vehicle.

Later in the day on January 3, 1985, Detective Larry Conrad of Manitowoc County Sheriff's Department interviewed Steven Avery. Avery indicated that he got out of his vehicle with a 30-06 rifle and pointed the gun toward Sandy Morris and her vehicle. Avery indicated that after the confrontation on the roadway he returned home and hid the 30-06 rifle underneath one of the kids' beds in his home.

Officers from the Manitowoc County Sheriff's Department later recovered the 30-06 rifle hidden underneath the bed in which children were sleeping in their pajamas. A subsequent

inspection of the 30-06 rifle found underneath the child's bed in the Steven Avery residence revealed a live round in the chamber.


The State further informs the Court that on March 23, 1981, the defendant, Steven A. Avery, was convicted of two counts of felony burglary, contrary to sec. 943.10(1)(a), Wis. Stats. As a result of the incident that occurred on January 3, 1985, involving Sandra Morris, Avery was prosecuted in State of Wisconsin vs. Steven A. Avery, Manitowoc County Case number 85-FE-3. In that case, on September 22, 1986, Steven Avery was convicted of felon possessing a firearm as a repeat offender, contrary to secs. 941.29(2) & 939.62(1)(b), Wis. Stats.

CONCLUSION

The State argues that the evidence of a prior act of being a felon in possession of a firearm should be admitted into evidence at the trial of Steven Avery pursuant to Wis. Stat. § 904.04(2).

AS GROUNDS THEREFORE AND IN SUPPORT OF THIS MOTION, the State relies upon Wis. Stat. §904.04(2) and the attached memorandum of law.

Respectfully submitted this 9th day of June, 2006.



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ORIGINAL

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
Plaintiff
JUN 15 2006
CLERK OF CIRCUIT COURT
Defendant,

MOTION TO ALLOW THE
INTRODUCTION OF OTHER
ACTS EVIDENCE (6 OF 9)

vs.

STEVEN A. AVERY,

SEXUAL MISCONDUCT
WITH M.A., DOB: 06/14/1987

Case No. 05-CF-381

The State of Wisconsin, by Special Prosecutor Kenneth R. Kratz, hereby moves the Court for an order allowing the introduction of other acts evidence at the trial in the above-captioned matter; specifically, prior acts of sexual misconduct of the defendant against M.A., DOB: 06/14/1987, The State seeks to introduce evidence of these other acts of the defendant, pursuant to Wis. Stat. § 904.04(2), and offers this evidence on the admissible issues of intent, motive and plan.

SPECIFIC FACTS OFFERED

The State informs the Court that on January 27, 2006, Investigator Wendy Baldwin of the Calumet County Sheriff's Department interviewed M.A., DOB: 06/14/1987, regarding an alleged sexual assault. M.A. stated that Steven Avery had forced sexual intercourse with her in the summer months of 2004. M.A. stated that Steven Avery had physically forced her hands over her head and had penis to vagina intercourse with her. (CCSD Report-Page 361).

On January 25, 2006, DCI Special Agent Tom Fassbender spoke with C.A., mother of alleged sexual assault victim, M.A. The victim's mother indicated that the victim does not wish to speak about the sexual assault between her and Steven Avery, because Steven Avery told the victim that if she "told anyone about their activities together, he would kill her family" (DCI Report 05-1776/212).

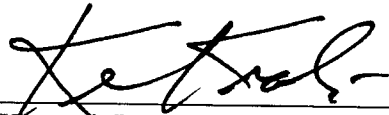
On November 11, 2005, DCI Special Agent Debra Strauss interviewed Jodi Stachowski. Stachowski stated that she spoke with Steven Avery regarding his relationship with M.A. Stachowski stated that Avery admitted, "Yea, I fucked her." On January 19, 2006, Investigator John Dederling of the Calumet County Sheriff's Department again interviewed Jodi Stachowski, who stated that Avery admitted having sex with M.A. "at least twice."

CONCLUSION

The State argues that the evidence of prior acts of sexual misconduct of the defendant against M.A., DOB: 06/14/1987, should be admitted into evidence at the trial of Steven Avery pursuant to Wis. Stat. § 904.04(2).

AS GROUNDS THEREFORE AND IN SUPPORT OF THIS MOTION, the State relies upon Wis. Stat. §904.04(2) and the attached memorandum of law.

Respectfully submitted this 9th day of June, 2006.



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ORIGINAL

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

MOTION TO ALLOW THE
INTRODUCTION OF OTHER
ACTS EVIDENCE (7 OF 9)

vs.

Plaintiff
JUN 15 2006

STEVEN A. AVERY,

CLERK OF CIRCUIT COURT

SEXUAL MISCONDUCT
WITH J.A.R., DOB: 11/09/1964

Defendant,

Case No. 05-CF-381

The State of Wisconsin, by Special Prosecutor Kenneth R. Kratz, hereby moves the Court for an order allowing the introduction of other acts evidence at the trial in the above-captioned matter; specifically, a prior act of sexual misconduct against J.A.R., DOB: 11/09/1964.

The State seeks to introduce evidence of this other act of the defendant, pursuant to Wis. Stat. § 904.04(2), and offers this evidence on the admissible issues of intent, motive and plan.

SPECIFIC FACTS OFFERED

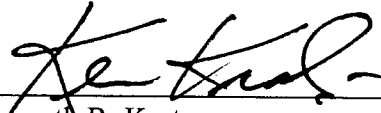
The State informs the Court that on January 20, 2006, Investigator Mark Wiegert of the Calumet County Sheriff's Department interviewed J.A.R., DOB: 11/09/1964. J.A.R. stated that in 1982 or 1983, while she was residing with Steven and Lori Avery, she was sexually assaulted by Steven Avery. J.A.R. stated that during the assault, Avery held his hand over her mouth and told her that if she yelled or screamed, that there was going to be trouble. (CCSD Report Pages 345-346).

CONCLUSION

The State argues that the evidence of a prior act of sexual misconduct of the defendant against J.A.R., DOB: 11/09/1964, should be admitted into evidence at the trial of Steven Avery pursuant to Wis. Stat. § 904.04(2).

AS GROUNDS THEREFORE AND IN SUPPORT OF THIS MOTION, the State relies upon Wis. Stat. §904.04(2) and the attached memorandum of law.

Respectfully submitted this 9th day of June, 2006.



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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN

vs.

STEVEN A. AVERY,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
Plaintiff,
JUN 15 2006

CLERK OF CIRCUIT COURT
Defendant,

MOTION TO ALLOW THE
INTRODUCTION OF OTHER
ACTS EVIDENCE (8 OF 9)

PRIOR SEXUAL HISTORY

Case No. 05-CF-381

The State of Wisconsin, by Special Prosecutor Kenneth R. Kratz, hereby moves the Court for an order allowing the introduction of other acts evidence at the trial in the above-captioned matter; specifically, information regarding the defendant's prior sexual history.

The State seeks to introduce evidence of these other acts of the defendant, pursuant to Wis. Stat. § 904.04(2), and offers this evidence on the admissible issues of motive.

SPECIFIC FACTS OFFERED

The State informs the Court that on November 8, 2005, Investigator John Dederling of the Calumet County Sheriff's Department interviewed Jodi Stachowski, the girlfriend of Steven Avery. Stachowski stated that she and Steven Avery had sex every day and sometimes they would have sex five times per day. Stachowski stated that this would consist of penile vaginal intercourse.

On February 20, 2006, Jodi Stachowski informed Investigator Mark Wiegert of the Calumet County Sheriff's Department that she began dating Steven Avery in May or June of 2004.

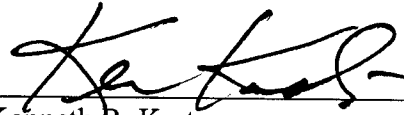
The State informs the Court that Steven Avery had a telephone conversation with Jodi Stachowski in which Avery suggested that Jodi's incarceration in October of 2005 was "the reason he [Avery] is in custody now."

CONCLUSION

The State argues that the evidence of the defendant's prior sexual history should be admitted into evidence at the trial of Steven Avery pursuant to Wis. Stat. § 904.04(2).

AS GROUNDS THEREFORE AND IN SUPPORT OF THIS MOTION, the State relies upon Wis. Stat. §904.04(2) and the attached memorandum of law.

Respectfully submitted this 9th day of June, 2006.



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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN

Plaintiff,

MOTION TO ALLOW THE
INTRODUCTION OF OTHER
ACTS EVIDENCE (9 OF 9)

vs.

STEVEN A. AVERY,

Defendant,

PHONE CONVERSATION
WITH MARIE LITERSKY

Case No. 05-CF-381

The State of Wisconsin, by Special Prosecutor Kenneth R. Kratz, hereby moves the Court for an order allowing the introduction of other acts evidence at the trial in the above-captioned matter; specifically, evidence of the content of a telephone conversation that occurred on October 30, 2005, between Steven Avery and Marie Litersky.

The State seeks to introduce evidence of this other act of the defendant, pursuant to Wis. Stat. § 904.04(2), and offers this evidence on the admissible issues of intent, motive and plan.

SPECIFIC FACTS OFFERED

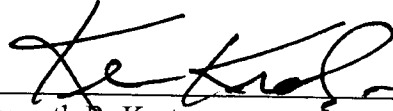
The State informs the Court that on November 8, 2005, DCI Special Agent Steven Lewis interviewed Marie Litersky, a former girlfriend of Steven Avery's nephew, Bryan Dassey. Litersky stated that on October 30, 2005, she had placed a telephone call to the cell phone of Bryan Dassey; however, Steven Avery answered the cellular telephone. Litersky stated that she then had a conversation with Avery. Litersky stated that a short time after that conversation, she received a call back from Steven Avery. Litersky stated that Avery asked her, "Would you like to come over and have a little fun. We can have the bed hit the wall real hard."

CONCLUSION

The State argues that the evidence of the content of a telephone conversation that occurred on October 30, 2005, between Steven Avery and Marie Litersky should be admitted into evidence at the trial of Steven Avery pursuant to Wis. Stat. § 904.04(2).

AS GROUNDS THEREFORE AND IN SUPPORT OF THIS MOTION, the State relies upon Wis. Stat. §904.04(2) and the attached memorandum of law.

Respectfully submitted this 9th day of June, 2006.



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ORIGINAL

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY
BRANCH I

STATE OF WISCONSIN

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
Plaintiff
JUN 15 2006

MEMORANDUM IN SUPPORT
OF STATE'S MOTION TO ALLOW
THE INTRODUCTION OF OTHER
ACTS EVIDENCE

vs.

STEVEN A. AVERY,

CLERK OF CIRCUIT COURT

Defendant,

Case No. 05-CF-381

FACTS

The defendant, Steven A. Avery, has been charged in Manitowoc County case number 05-CF-381 with party to the crime of first degree intentional homicide, contrary to Wis. Stat. §940.01(1)(a); party to the crime of mutilating a corpse, contrary to Wis. Stat. §940.11(1); possession of a firearm by a felon, contrary to Wis. Stat. §941.29(2)(a); party to the crime of first degree sexual assault, contrary to Wis. Stat. §940.225(1)(b); kidnapping, contrary to Wis. Stat. §940.31(1)(b) and false imprisonment, contrary to Wis. Stat. §940.30.

The State is seeking to introduce evidence of other acts of the defendant at the trial in the above-entitled matter. The State offers this evidence to prove motive, intent, preparation, plan and identity.

Specifically, the State seeks to introduce evidence of prior acts of the defendant including:

1. Prior acts of physical violence and threats:
 - a. against ex-wife Lori Avery
 - b. against girlfriend Jodi Stachowski
 - c. violence/cruelty toward an animal
 - d. endangering safety against Sandra Morris

2. Prior acts of sexual misconduct:
 - a. against M.A., DOB: 06/14/1987
 - b. against J.A.R., DOB: 11/09/1964

3. Prior sexual history with girlfriend Jodi Stachowski

4. Prior act of being a felon in possession of a firearm

5. Other evidence of motive and “targeting a victim” including a telephone conversation with Marie Litersky on October 30, 2005, requesting that she come to Steven Avery’s residence to have sexual intercourse with him.

ARGUMENT

Statutory Authority

The State believes that evidence of other acts of the defendant should be admitted into evidence in the Manitowoc County trial of Steven Avery, pursuant to Wis. Stat. §904.04(2). Wis. Stat. §904.04(2) outlines:

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.

This list of reasons to allow evidence of other crimes, acts or wrongs is not exclusionary but rather illustrative. Other crimes, acts or wrongs evidence is admissible where it furnishes part of the context of the crime or is necessary to a full presentation of the case. It can be admitted if it is necessary to fully understand the context of the case. State v Shillcutt, 116 Wis. 2d 227, 236-7 (Ct. App. 1980) aff’d 119 Wis. 2d 788 (1984); State v Edmunds, 229 Wis. 2d 67, 79 (Ct. App. 1999); State v Anderson, 230 Wis. 2d 121, 130 (Ct. App. 1999).

Sullivan Analysis

The Wisconsin Supreme Court established a three-step analysis for admission of other crimes evidence in State v. Sullivan, 216 Wis. 2d 768, 771 (1998), and subsequent cases have clarified the Sullivan test. The analysis requires the Circuit Court to examine the following factors:

- (1) Whether the evidence was offered for an acceptable purpose;
- (2) Whether the evidence was relevant; and
- (3) Whether the probative value is substantially outweighed by unfair prejudice.

Additionally, the relevance factor has two facets:

- (a) whether the proffered evidence relates to a fact that is of consequences to the defendant’s guilt or innocence; and

- (b) whether it has a tendency to make the consequential fact more or less probable.

Edmunds, 229 Wis. 2d at 80. See also sec. 904.01, Wis. Stats. The trial court must articulate its reasoning for admitting or excluding the evidence, applying the facts of the case to the analytical framework. Sullivan, 216 Wis. 2d at 774.

Whether the Evidence was Offered for an Acceptable Purpose

When intent is an element of the charge, it becomes necessary, in many instances, to extend the examination beyond the particular transaction concerning which the accused is on trial. For the purpose of proving intent, it is often permissible to show other criminal transactions of the same sort springing from like mental conditions.

Barrera v State, 99 Wis. 2d 269, 280 (1980).

Evidence of a sexual assault was admissible under 904.04(2) when offered to prove the defendant's intent to hold the victim to service against her will, an element of a kidnapping charge against the defendant. State v. Plymesser, 172 Wis. 2d 583, 594 (1992).

Evidence of other wrongs can also be admissible to establish plan or scheme. Evidence of other crimes may be admitted for the purpose of establishing a plan or scheme when there is a concurrence of common elements between the two incidents. Friedrich, 135 Wis. 2d at 24; State v Spraggin, 77 Wis. 2d 89, 99 (1977); and Davidson, 236 Wis. 2d at 567.

Evidence of other crimes or wrongs is admissible to prove a perpetrator's modus operandi or mode or method of operation . To determine admissibility, the Court is to compare the similarity in method of operation between the two crimes as it helps establish identity. See State v Hammer 236 Wis. 2d at 704.

Wisconsin courts permit a more liberal admission of other crimes evidence in sexual assault cases. State v. Hunt, 263 Wis. 2d 1 (2003). The "greater latitude" rule, which permits a greater latitude of proof with regard to other acts evidence in sexual assault cases, is to be applied to each step in the three-step test for admissibility of other acts evidence articulated in State v. Sullivan. State v. Davidson, 236 Wis. 2d 537 (2000).

Is the Other Acts Evidence Relevant?

The substantive law determines the elements of the crime charged and the ultimate facts and the links in the chain of inferences that are of consequence to the case. Sullivan, 216 Wis. 2d at 785-6. Therefore, if intent, motive, plan or purpose is of consequence in the case, the evidence that is offered for those purposes is relevant.

Evidence is relevant when it is persuasive or indicative that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from the evidence. The criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry. Evidence of any fact is admissible as relevant which might establish the hypothesis of innocence, or show the defendant's guilt. Any evidence that assists in getting at the truth of the issue is relevant; in other words, *any fact which tends to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable. Relevancy is not determined by resemblance to, but by the connection with, other facts.*" Barrera v State, 99 Wis. 2d 269, 280 (1980).

The second consideration in assessing relevance is probative value; that is, whether the evidence has a tendency to make a consequential fact more or less probable than it would be without the evidence.

The required degree in similarity between the other act and the charged offense and the required number of similar acts cannot be formulated as a general rule. The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence. How many similar acts are enough depends on the complexity and the relative frequency of the event rather than the total number of occurrences." Sullivan, 216 Wis. 2d at 786-7. (cites omitted)

Although the case law speaks to the nearness in time of the other acts evidence, it does not mean that it must occur within weeks or months of the charged incident. In considering time, the Court must take into account not only the time that has passed but also the opportunities presented over that period for the defendant to repeat the acts. Sanford v State, 76 Wis. 2d 72, 82 (1977); State v Kunz, 160 Wis. 2d 722, 747 (1990). There is no precise point at which a prior act is considered too remote, and remoteness must be considered on a case-by-case basis. Even when evidence might be considered too remote, the evidence is not necessarily rendered irrelevant if the remoteness is

balanced by the similarity of the two incidents. Hammer, 236 Wis. 2d at 707.

Considering these factors, a gap of three years in Clark, ten years in Fishnick, thirteen years in Plymesser, 16 years in Kuntz and 22 years in Mink, were held not to be fatal to the admission of other crimes evidence under the circumstances in each case.

Other acts evidence need not be identical to the conduct charged, rather the probative value lies in the similarity between the acts and the charged crime. The stronger the similarity between the other acts evidence and the charged offense, the greater will be the probability that a like result was not repeated by mere chance or coincidence. State v DeRango, 229 Wis. 2d 1, 21 (Ct. App. 1999).

Whether the Probative Value is Substantially Outweighed by Danger of Unfair Prejudice

Where the State has several elements to prove (and several distinct charges), the State has no way of knowing what defense, if any, will be offered. The State cannot be required to confine other acts evidence to rebuttal since there may be no rebuttal if the defendant offers no evidence. Chenney v State, 440 Wis. 2d 454, 462 (1969); State v Clark, 179 Wis. 2d 484, 493 (Ct. App. 1993). The State must prove all the elements beyond a reasonable doubt even if the defendant does not dispute all the elements, or only disputes whether the incident occurred at all. *See* Veatch, 255 Wis. 2d at 415-16, 423. The Court noted in Veatch that the evidence can be graphic, disturbing and extremely prejudicial but still have tremendous probative value allowing admissibility. Veatch at 427.

All evidence that proves an element of the offense is prejudicial to the defendant. On that basis the defendant cannot claim that it should be excluded. Where the prejudice is outweighed by probative value, it is not unfairly prejudicial. State v Grande, 169 Wis. 2d 422, 434-5 (Ct. App. 1992); State v Bergeron, 162 Wis. 2d 520, 532 (Ct. App. 1991).

The question is not whether the other acts evidence is prejudicial but whether it is unfairly prejudicial.

Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses it's sense of horror, provokes it's instinct to punish or otherwise causes a jury to

base it's decision on something other than the established propositions in the case." Veach 255 Wis. 2d at 426.

The danger of unfair prejudice is minimized by giving the cautionary jury instruction as jurors are presumed to follow the Court's instructions. See State v DeKeyser, 221 Wis. 2d 435, 452 (Ct. App. 1998) and Anderson, 230 Wis. 2d at 132-3.

Application of Facts to Law

The State will apply the specific facts of each "other act" offered, using the Sullivan three-part framework. The State will argue how the other acts evidence relate to propositions that are of consequence to the determination of the action; that the other acts evidence have probative value; and that the probative value of the other acts evidence outweigh the danger of unfair prejudice.

As the defendant is charged with six separate criminal counts, some of the acts may be relevant as to one or more elements that the State must prove, on one or more charges.

CONCLUSION

The State argues the above listed evidence clearly fits into permissible purposes under Sec. 904.04(2) of the Wisconsin Statutes. The other acts evidence directly relate to motive and intent as well as establishing a common plan or scheme; identity of Teresa Halbach's assailant(s) also will be very much at issue in this trial.

The State notes that Wisconsin Jury Instruction 275 may be utilized by the court to explain the purpose of admitting other acts evidence. Any unfair prejudice to the defendant may be avoided with the appropriate jury instruction being given - the court may instruct the jury at the time the evidence is submitted and again during the reading of the completed jury instructions, regarding the limited purpose for which the evidence is admitted.

Based on the above and arguments to be presented at the time this motion is heard, the State requests that the court enter an order, prior to trial, permitting the State to use the above listed other acts evidence during the State's case in chief, during cross-examination and also during rebuttal testimony, if necessary.

Respectfully submitted this 9th day of June, 2006.



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05/11/06

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

Plaintiff,
JUN 15 2006

MOTION IN LIMINE
(SERIES 1)

vs.

STEVEN A. AVERY,

CLERK OF CIRCUIT COURT
Defendant.

Case No. 05-CF-381

The State of Wisconsin, by Special Prosecutor Kenneth R. Kratz, hereby seeks an advanced ruling from the Court on the following:

1. For an order precluding in the presence of the jury, both prior to and at trial, discussion of the defendant's prior "wrongful conviction" for sexual assault and the ramifications of that conviction on the defendant's life. It is inappropriate for the jury to consider this information in ascertaining whether or not the defendant has committed the present offenses. The State argues that such an attempt to illicit sympathy from the jury is improper and otherwise irrelevant pursuant to Sec. 904.03 and Sec. 904.02, Wis. Stats.

2. If the defendant elects to testify on his own behalf, that the State be allowed to elicit the number of prior criminal convictions of the defendant, as impeachment, pursuant to Section 906.09(1), Wis. Stats.

3. For an order allowing the State to introduce portions of Teresa Halbach's life history to the jury. The State must prove that the defendant acted with the intent to kill Teresa Halbach, another human being. The state intends to offer testimony which will identify Teresa's family status, employment and leisure activities. Some photographs will be offered, which admissibility is a matter of discretion with the trial judge. Hayzes v. State, 64 Wis.2d 189, 198, 218 N.W.2d 717 (1974).

4. For an order allowing the State to introduce evidence of the defendant's prior felony conviction for Recklessly Endangering Safety and Felon in Possession of a Firearm (Manitowoc County case number 85-FE-3), proving an element of the offense of the pending charge of Felon in Possession of a Firearm.

5. The State intends to subpoena Brendan Dassey and provide "use and derivative use immunity" for testimony against Steven Avery, pursuant to Wis. Stats. Sec. 972.085.

6. For an order allowing the State to introduce statements made by the defendant, including:

- A. Statement to Marinette County Sheriff Detective Anthony O'Neill made on November 5, 2005.
- B. Statement to Calumet County Sheriff's Department Investigator Mark Wiegert and DCI Special Agent Tom Fassbender made on November 9, 2005.
- C. Recorded jail conversations of Steven Avery subsequent to his arrest on November 9, 2005.
- D. Statements of Steven Avery made to various media sources anytime after October 31, 2005.
- E. Statements of Steven Avery made to other jail or prison inmates:
 - i. Jessey Werlein—Green Bay Correctional Institution
On December 7, 2005, Officer Donn Adams of the City of Eau Claire Police Department made contact with Jessey Werlein, who indicated that he was an inmate at the Green Bay Correctional Institution with the defendant, Steven A. Avery. Werlein describes that while at Green Bay Correctional, Steven Avery had drawn up plans for a "torture chamber". Avery also described his plans, upon being released from prison, to abduct several females and use the torture chamber; Werlein indicated that Avery specifically told him that his plans were to catch girls, rape them, torture them, and get rid of them (City of Eau Claire Police Department Report No. 1-05-029178). On January 5, 2006, Special Agent Kim Skorlinski of DCI re-interviewed Jessey Werlein, and Werlein provided more details regarding the diagram of the torture chamber. Werlein indicated that the diagram was of a room approximately eight feet by ten feet, having a bed, a hole in the floor, and an air duct. Werlein said Avery talked about sound

proofing the walls, and building the torture chamber for kidnapping, raping and torturing, and then killing women. (DCI Report 05-1776/193).

ii. Anthony G. Myers—Green Bay Correctional Institution

On February 23, 2006, Special Agents Thomas Fassbender and Kim Skorlinski of DCI made contact with Anthony G. Myers while at the Oshkosh Correctional Institution. Myers indicated that he had previously been at the Green Bay Correctional Institution, and there had known the defendant, Steven A. Avery. Myers indicated that Avery talked about bondage and tying women to a wall and such. Avery described tying women's hands together with their palms facing each other, so that they could not lay flat, and even drew a diagram of such a scene and demonstrated that position for Myers. Myers indicated that Avery was always talking about dominance or anger towards women (DCI Report 05-1776/238).

iii. Daniel Luedke—Red Granite Correctional Institution

On November 15, 2005, Special Agent Kevin Heimerl of DCI made contact with Wisconsin Department of Corrections Inmate Daniel Luedke at the Red Granite Correctional Institution. Luedke recalls having previously been imprisoned with the defendant, Steven A. Avery, while they were both incarcerated at Fox Lake Correctional Institution. Luedke recalls having conversations with Steven Avery, including Avery telling him "the way to get rid of a body was to burn them" (DCI Report 05-1776/156).

7. For an order allowing the State to introduce statements of Teresa Halbach made to coworkers concerning Steven Avery, made prior to her death.

Wis Stat. § 908.045(2) provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

"The recent perception exception is similar to the hearsay exceptions for present sense impression and excited utterances, 'but was intended to allow more time between the observation

of the event and the statement.' " *State v. Weed*, 2003 WI 85, ¶ 15, 263 Wis.2d 434, 666 N.W.2d 485 (quoting *Kluever v. Evangelical Reformed Immanuel's Congregation*, 143 Wis.2d 806, 813-14, 422 N.W.2d 874 (Ct.App.1988)). The purpose of the exception is to " 'admit probative evidence which in most cases could not be admitted under other exceptions due to the passage of time.' " *Id.*, ¶ 15, 666 N.W.2d 485 (quoting *Kluever*, 143 Wis.2d at 814, 422 N.W.2d 874). Specifically, the exception " 'is based on the premise that probative evidence in the form of a noncontemporaneous, unexcited statement which fails to satisfy the present sense impression or excited utterance exceptions would otherwise be lost if the recently perceived statement of an unavailable declarant is excluded.' " *Id.* (quoting *Kluever*, 143 Wis.2d at 814, 422 N.W.2d 874).

The defendant forfeited his confrontation clause objection because he unlawfully and intentionally killed the victim. In *Reynolds v. United States* (1879) 98 U.S. 145, 158-159., the Supreme Court explained: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own [the accused's] wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." (*Reynolds, supra*, 98 U.S. at p. 158.) Stated more bluntly: "The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him." (*United States v. Thevis* (5th Cir.1982) 665 F.2d 616, 630, superseded by statute on other grounds as stated in *United States v. Zlatogur* (11th Cir.2001) 271 F.3d 1025, 1028.)

8. For an order requiring sequestration of all witnesses. The State would designate Investigator Mark Wiegert of the Calumet County Sheriff's Department and Special Agent Tom

Fassbender of the Wisconsin Department of Justice, Division of Criminal Investigation, as its court officers, pursuant to Section 906.15(2)(b), Wis. Stats.

Respectfully submitted this 9th day of June, 2006.



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SEALED

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

JUN 28 2006

Case No. 2005-CF-381

v.

CLERK OF CIRCUIT COURT

STEVEN A. AVERY,

Defendant.

**DEFENDANT'S MEMORANDUM ON
EVIDENCE OF WRONGFUL CONVICTION
AND ACCUSATIONS OF PRISONERS**

I.

INTRODUCTION

The state offers three sharply inconsistent motions. On the one hand, it wishes to exclude entirely any evidence of Steven Avery's wrongful conviction in 1985 and his ensuing mistaken imprisonment. On the other hand, it wants permission to offer evidence from three men who now make claims about what Avery told them *in prison* and it also wants to call Brendan Dassey, who on a 16-year old's hunch ascribes to Avery a novel motive to kill Teresa Halbach: to return to prison, which Dassey lately contends Avery wanted to do.

The state cannot have it both ways. If it wants evidence that Avery was in prison, that he spoke there with three prisoners, and that he wanted to go back, the jury must know that Avery ought not have been in prison in the first place and, far from enjoying that ill turn of fate, fought for 18 years to regain his freedom.

Indeed, even if the Court excludes evidence from the three inmates and Dassey's musings about Avery's motive, this jury should understand the reasons for bias of the Manitowoc County Sheriff's Department against Avery. Jurors otherwise cannot fairly weigh the testimony of Manitowoc County Sheriff's Department personnel. Manitowoc County deputies have prominent roles at every critical juncture of the investigation into Teresa Halbach's disappearance and death and at every critical point in the searches of the Avery property. Their bias against Avery is central to his defense.

II.

FACTS

In 1985, a judge sentenced Steven Avery to 30 years in prison for a rape and brutal attack that he did not commit. Avery served 18 of those years before DNA established that another man, Gregory Allen, was the solo rapist the victim described, not Avery. For most of those 18 years, Avery pursued post-conviction

remedies intended to restore his freedom.¹ The state resisted those efforts successfully until 2003. A second round of DNA testing, as technology improved, established that Avery was not the rapist and also identified who was. An intelligent, articulate victim (who knew neither man) had said from the beginning that only one man was involved in the attack, so Avery was innocent. The state relented and Avery walked out of Stanley Correctional Institution on September 11, 2003.

Thirteen months later, on October 12, 2004, Avery filed a civil rights action against Manitowoc County in federal court. The suit alleged that the Manitowoc County Sheriff's Department had violated Avery's civil rights. He sought up to \$36 million in damages. In general, the suit arose from decisions of the Manitowoc County Sheriff's Department and the Manitowoc County District Attorney to ignore information from the City of Manitowoc Police Department suggesting that Gregory Allen, not Avery, had committed the rape. The sheriff's department brushed off the city police department's information and pursued Avery with myopic zeal. So the federal complaint alleged. Complaint ¶¶ 8-37, *Avery v. Manitowoc County*, No. 04-C-986 (E.D. Wis.). Time proved the Manitowoc Police Department right: Allen had committed the rape and assault, not Avery.

¹ The decision in *State v. Avery*, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997), sets forth some of that procedural history.

In the course of his lawsuit, Avery's lawyers deposed Kenneth Petersen on October 13, 2005. Petersen by then had become the Manitowoc County Sheriff. He also is the last sworn officer still employed by the Manitowoc County Sheriff's Department who was involved personally in the arrest and prosecution of Avery for the 1985 rape. His deposition occurred 18 days before Teresa Halbach disappeared.

While Petersen is the last officer in the department who played a role in 1985, he is not the last officer in the department linked to Avery's continued wrongful imprisonment. Both Lt. James Lenk and Sgt. Andrew Colborn may have played a role in 1994 or 1995, with Colborn acknowledging that he received a telephone call from a detective in another law enforcement agency relaying information that a person in custody had confessed to a Manitowoc County assault for which someone else was in jail. The Manitowoc County Sheriff's Department took no action on this information, and Avery spent another eight or nine years in prison.

According to another witness, Lenk may have known of that conversation well before Avery's release. Avery's lawyers deposed Lenk and Colborn in October 2005.

Roughly three weeks after their depositions in the federal civil suit, Lenk and Colborn both played significant roles in searches of Avery's property. Indeed, they were paired together during those searches. Lenk, for example, is the officer who

claims first to have seen the Toyota key lying in plain view on the floor of Avery's small bedroom, after earlier searches of the room had not disclosed such a key.

Although the state wishes to exclude information about why Avery was in prison, it does want the jury to know that he was there. Most directly, it wants that news to come from three men who met Avery in prison. According to the state's motion *in limine* (series 1, ¶ 6), it wishes to call Jessey Werlein, Anthony G. Myers, and Daniel Luedke. Myers and Luedke may be current state prison inmates. Werlein is not. All propose to testify to statements Avery made in prison, and two propose to supplement that testimony with claims that Avery drew diagrams for them. Dates of these supposed conversations are unclear, but at least in Werlein's case, they must have occurred before February 16, 1995.²

Finally, the state has announced its intention to call Brendan Dassey at Avery's trial. State's Motion *in Limine* (Series 1, ¶ 5). Dassey has spoken to the police several times. His most recent statement – to counsel's knowledge – was on May 13, 2006. During that statement to Investigator Mark Wiegert and Special Agent Thomas Fassbender, Dassey made a claim that Avery's reason for wanting to kill Halbach was to go back to prison. Dassey's theory was that Avery could not

² CCAP shows that Werlein committed a disorderly conduct offense in Dane County on that date, as a habitual criminal. He received an eight month jail sentence, but does not appear to have served time in a state prison since then.

adjust to the outside world and wanted to return to prison's confines. This testimony necessarily would inform the jury of Avery's prior prison experience.

III.

ARGUMENT

For three reasons, the Court should allow evidence of Avery's wrongful conviction, his subsequent imprisonment for 18 years, and his federal lawsuit against Manitowoc County stemming from that wrongful conviction and imprisonment. Avery addresses those reasons in order of narrowest to broadest.

A. *Context.*

1. If the state has its way, a jury may hear that Avery made statements in prison and that he longed to return to prison. A jury will need a fair context in which to weigh those claims. As to any statements Avery made in prison after 1989, a jury necessarily would assume that Avery had done something wrong and would think less of his character and truthfulness. *Compare* WIS. STAT. § 906.09 (allowing impeachment by prior convictions). But after 1989,³ that would be an incorrect and

³ Until 1989, Avery also was serving a concurrent six-year sentence for endangering safety by use of a dangerous weapon, as counsel understands his criminal history. Avery would have reached his mandatory release date on that sentence in four years, or in about 1989. After the mandatory release date on the endangering safety conviction, Avery's time in prison was attributable only to the rape case on which he was innocent.

unfairly prejudicial inference. Avery was in prison, yes, but he was innocent; he had not committed the crime for which he was serving a 30 year sentence. In assessing Avery, and for that matter in assessing his supposed statements in prison, the jury would need that information. It would remove the unwarranted cloud from Avery's character and his credibility, if he testifies, and also would make more understandable why he may have made statements in anger, frustration or bitterness while in prison.

The Court should not admit any of this testimony from fellow inmates, who have come forward only years after the supposed statements, after information became public that allowed them to contrive their versions, and under circumstances in which at least two (those still in prison) may seek a benefit from the state. Two of the witnesses claim that Avery spoke of torturing women and raping them, and those two both claim he drew diagrams. This is other misconduct evidence, years old, and not similar to the charged crimes other than at the general level of a forcible sexual assault. There certainly is no evidence here that Avery had a "torture chamber" or bound Halbach in the manner the prisoners allege.

Further, the prisoners' testimony is cumulative and so suspicious in its timing that its probative value is slight. The third man claims that Avery spoke of burning a body as the best way to get rid of it. That statement is devoid of context, and is quite unfairly prejudicial. For that matter, if Avery made these statements or drew

these diagrams at all, he necessarily did so some years before the crimes alleged here. These witnesses should be excluded altogether under WIS. STAT. § 904.04.

2. As to Dassey's hypothesis of Avery's motive, the jury also needs information about the wrongful conviction to weigh this evidence. If he repeats his May 13 statement on this point, Dassey would have the jury believe that Avery so missed prison that he was willing to kill a near-stranger just to get back to a life of incarceration. The fact that Avery should not have been in prison on the rape conviction in the first place, and that he consumed much of his 18 years in prison trying to win his freedom, is necessary context that rightly may undermine the weight the jury decides to give Dassey's claim.

The Court ought exclude Dassey's speculation in any event. It is exactly that: speculation about another person's motives. Dassey does not ascribe to Avery any statement expressing this motive. The motive theory is outside Dassey's personal knowledge, then, and he is not competent to testify to it. WIS. STAT. § 906.02.

B. *Bias as Impeachment.*

Wisconsin courts appreciate fully that "bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely." *State v. Missouri*, 2006 WI App. 74, ¶ 22, 714 N.W.2d 595, 601 (Ct. App. 2006) (reversed conviction because circuit court excluded other bad

acts showing police officer's bias); *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978), *overruled on other grounds*, *Manson v. State*, 101 Wis. 2d 413, 304 N.W.2d 729 (1981). As the Wisconsin Court of Appeals explained succinctly just over four months ago, "Inquiry into a witness's bias is always material and relevant." *State v. Yang*, 2006 WI App. 48, ¶ 11, 712 N.W.2d 400, 405 (Ct. App. 2006). Indeed, the *Yang* court held that the trial court's refusal to allow the defendant to explore a witness's bias on cross-examination denied his constitutional right to confront the witness. *Yang* reversed the conviction and remanded for a new trial. *See also State v. Seymer*, 281 Wis. 2d 739, 747-53, 699 N.W.2d 628, 631-34 (Ct. App. 2005) (reversing a conviction for denial of confrontation where the trial court limited cross-examination on bias; the "right of confrontation includes the right to cross-examine adverse witnesses to expose the witness's motivation in testifying and any potential bias").

The United States Supreme Court interprets the Sixth Amendment right of confrontation the same way. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) ("We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination"). In *Davis*, for instance, the trial judge precluded the defense from exploring the bias of a witness, Green; in part, the judge blocked the defense from showing that Green was on probation for

juvenile delinquency and had reason to please the prosecutor. The Supreme Court reversed the conviction. "The claim of bias that the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer." *Davis*, 415 U.S. at 317-18.

Here, Avery's wrongful conviction embarrassed the Manitowoc County Sheriff's Department and diminished its reputation – or so reasonable jurors could conclude. When he then filed a federal lawsuit, Avery put the actions of that department under a spotlight, and revealed the bias that led that department to ignore the true culprit, Gregory Allen, in favor of a single-minded pursuit of Avery. This further embarrassed and caused resentment within the department, jurors could find. It also raised the realistic specter of a huge judgment against the county. The prospect of being the cause of such a judgment reasonably could have affected the morale and attitude of all members of the sheriff's department and would have focused antipathy on Avery, jurors once again reasonably could conclude. Sheriff Petersen had a personal stake in this, in part because he is the current sheriff and in part because he was involved in the 1985 arrest and prosecution of Avery. As its top official, his attitudes and directives may affect the entire department. Indeed, they are supposed to do exactly that.

Lenk and Colborn also had a personal stake in Avery's lawsuit, although not dating to 1985. In 1994 or 1995, at least Colborn and perhaps Lenk had information

again pointing to Allen, and suggesting that the wrong man was in prison. Yet the Manitowoc County Sheriff's Department still took no action. Avery spent another eight or nine years in prison for a crime he did not commit. Shortly before Teresa Halbach disappeared, Petersen, Lenk, and Colborn all had been drawn into Avery's lawsuit for depositions. Their actions were in issue and they knew it.

A jury must have this information when it has to consider the import and weight of Lenk and Colborn, in particular, appearing at critical junctures in the current investigation and prosecution of Steven Avery. Although nominally the Calumet County Sheriff's Department was in charge of this investigation and had help from many other agencies, Lenk, Colborn, and other members of the Manitowoc County Sheriff's Department in fact played crucial roles. Despite more than one previous search of the small bedroom, for example, members of the Calumet County Sheriff's Department, the State Crime Lab, the Two Rivers Police Department, or other agencies did not find the Toyota key that the state contends bore Avery's DNA and was lying in plain view: Lenk did.

Without evidence of Avery's prior wrongful conviction, the role of the Manitowoc County Sheriff's Department in causing that injustice, and the basic facts of Avery's federal lawsuit, a jury could view Lenk and other members of the Manitowoc County Sheriff's Department simply as two-dimensional law enforcement officers doing a job. With this information, a very different, three-

dimensional view of them and their reasons for bias against Avery – even intense resentment of him – emerges for jurors’ proper consideration.

C. *Bias as a Defense.*

But not just as a matter of context and confrontation does Avery have a right to present his prior wrongful conviction and his federal lawsuit to show bias of the Manitowoc County Sheriff’s Department. This evidence goes to his basic right to present a defense to these charges.

Due process embraces, at its most fundamental, the right to be heard; to have one’s say in response to an accusation. That is why, in a criminal case, the Fourteenth Amendment guarantees the right to present a defense. *In re Oliver*, 333 U.S. 257, 273 (1948) (“A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence”); *Washington v. Texas*, 388 U.S. 14, 17-19 (1967); *Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (per curiam). As the United States Supreme Court has explained, “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Sometimes, even generally applicable evidentiary rules must bend to accommodate that constitutional right to present a defense. *Chambers*, 410 U.S. at 295-303. That basic is the right to defend.

Avery has made no secret of his defense. From the outset, he personally has said to the media in his simple way that the Manitowoc County Sheriff's Department is picking on him, is out to get him. The idea is that he is being blamed for something he did not do. It is a simple defense. But it also is sufficient. And, at least from Avery's perspective, the very same department has done it once before. Indisputably, the Manitowoc County Sheriff's Department did pursue and arrest the wrong man in 1985.

Avery surely has the right to show a jury that it has happened again in 2005. What more likely is in dispute here is Avery's opportunity to convince a jury, if he can, that the second mistaken arrest was not random coincidence — not as improbable as a second lightning strike in the same place. Bias and reason for prejudice against Avery is what removes or undermines the hypothesis of randomness. In the world of competing metaphors about things that happen twice, this is not like a second lightning bolt. It is more like baseball: when a pitch sails up and inside the zone at a batter's head the first time, it is an accident; the second time, it is a beanball. We assume an indifferent (and therefore randomizing) Mother Nature in electrical storms; we do not assume an indifferent or randomizing human on the pitching mound. Bias or motivation of the actor is the difference. It is the link between the two occurrences, the refutation of the null hypothesis.

So bias itself may be a defense. *See Holt v. Virginia*, 381 U.S. 131, 137 (1965) (both a lawyer charged with contempt and his lawyer were held in contempt for filing a motion alleging bias of the judge; the contempt convictions denied due process, where bias was alleged in plain English, in words themselves inoffensive, as part of presenting a defense). Recently, the Wisconsin Court of Appeals reversed a conviction in *Missouri* where the entire defense appears to have been a police officer's bias against black people. As the *Missouri* court noted, "The defense is entitled to present its best defense." *Missouri*, 2006 WI App. 74, ¶ 25, 714 N.W.2d at 602.

In part, bias is Avery's defense, too. His wrongful conviction and the allegations, embarrassment, resentment, and possible liability associated with his federal lawsuit all explain why the Manitowoc County Sheriff's Department may be biased against him, or why members of that department have reason to want to believe that Avery committed the terrible crimes alleged here. Worse, members of the department may have reason to want Avery convicted even if they believe he did not commit some or all of the alleged crimes. This is payback, a reasonable jury could infer.

And at least foreseeably, this case involves no requested indulgence in bending the rules of evidence. It is an easier case than *Chambers*. Avery seeks only

to offer documents and testimony on cross-examination and direct examination that readily are admissible under the ordinary rules of evidence.

IV.

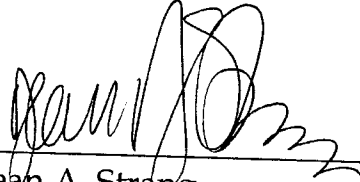
CONCLUSION

Steven Avery asks the Court to allow evidence, comment, and argument on his wrongful conviction, wrongful imprisonment, and lawsuit against Manitowoc County. These subjects bear directly and significantly on bias of members of the Manitowoc County Sheriff's Department against Avery. Members of that department are essential witnesses here; their credibility to the jury well may determine the outcome of this trial. Avery also asks the Court to exclude Brendan Dassey's speculation about his motives. Finally, he asks the Court to bar testimony from the three inmates.

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Respectfully submitted,

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