

SEALED

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

STEVEN A. AVERY,

Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

AUG 1 2006

Case No. 2005-CF-381

CLERK OF CIRCUIT COURT

**DEFENDANT'S REPLY OPPOSING
UNCHARGED MISCONDUCT EVIDENCE**

I.

INTRODUCTION

The state now explains why it wants to offer nine different episodes of uncharged misconduct in Steven Avery's trial, some dating back almost 25 years. "The theory of the prosecution," the state posits, "is that the defendant treated women as sexual objects, believed he was 'entitled' to physically abuse them and cause them harm, and intended to rape, torture and murder women; the acts committed against Teresa Halbach demonstrate the culmination of the defendant's progression of physical violence towards [sic] women, and should therefore be admissible." State's Supplementary Memorandum at 5 (July 26, 2006).

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(1)

That in itself sounds much like a bad character theory. Indeed, the state later argues that Avery “exhibits sadistic qualities,” *id.* at 5, and had a belief that he was “somehow ‘entitled’ to obtain sexual gratification from young women.” *Id.* at 8.

More importantly, the state’s theory as to all nine incidents overlooks a crucial point.

II.

REPLY

A reader of the state’s supplementary memorandum might suppose that the state has evidence that Avery raped Teresa Halbach or at least attempted to force sexual intercourse with her. Almost every argument for admission of stale and dissimilar misconduct the state founds on Avery’s desire for sex with young women who make his acquaintance, against their will if necessary.

But the reader would be wrong. The state has no evidence that Avery raped Teresa Halbach, had sex with Halbach, or ever tried to have sex with her. Avery assumes here that Brendan Dassey’s statements or testimony ought to be considered. Dassey’s most recent version of events (on May 13), which does not co-exist with his February 27 or March 1 versions, renounced the claim of a sexual assault by Avery himself.

Only Dassey had sex with Halbach on that version, albeit with Avery's encouragement. Dassey told investigators on May 13 that Avery told him to have sex with Halbach. Calumet County Sheriff's Report, page 765. Prior to that assault by Dassey, he now places Avery in the yard cleaning up and putting debris in a bonfire, not in his trailer and sweating in an undershirt as if he was interrupted in raping Halbach. Calumet County Sheriff's Report, page 764, 804-05. Even a few days earlier, according to Dassey the plan was only that he, Dassey, would have sex with Halbach. Calumet County Sheriff's Report, page 796. Avery's only plan was to kill her. Calumet County Sheriff's Report, page 799, 800. Specifically, there was no plan to have sex with Halbach. Calumet County Sheriff's Report, page 800, 815. Even during the time they had Halbach tied up, when the topic of sex arose, Avery said only that he would do it later. Calumet County Sheriff's Report, page 801. But again, it appears that the plan was only for Dassey to have sex with Halbach and Dassey claims only that he did. Calumet County Sheriff's Report, page 802. Although Dassey guessed that Avery "probably" had sex with her, he expressly denied that Avery had told him so. Calumet County Sheriff's Report, page 803, 804-05, 845. He also did not see Avery have sex with Halbach. Calumet County Sheriff's Report, page 845.

Dassey's March 1 statement by contrast implied that Avery had sexually assaulted Halbach. But even there, Dassey only implied it: he did not claim to have

seen a rape or to have heard Avery admit it. And, as noted, Dassey largely repudiated his March 1 version on May 13. He changed so many basic allegations that the two statements cannot be reconciled into one series of events.

The state has no other evidence of a sexual assault, either. There is no physical evidence. There is no admission. There is not even any physical evidence that would invite an inference of a sexual assault.

Less strikingly, but worthy of note all the same, the state has no evidence that Avery ever pointed a gun at Teresa Halbach to gain her compliance. Dassey did not make such a claim – not in any of his three statements, which cover considerable (and considerably different) ground. There is no other evidence. For all the evidence suggests, at most Avery pointed a rifle at, and shot, Teresa Halbach after she was dead or at least mortally wounded and wholly immobilized. Dassey expressly denied knowing how Avery got Halbach to come into his trailer. Calumet County Sheriff's Report, page 833-34.

Without these links to evidence of this crime, the state's reliance on long-past misdeeds has no probative force. The other misconduct evidence would not prove motive, plan, or intent. Certainly it would not prove plan or intent to rape, or a pattern of raping: on the state's own evidence, at its best, Avery did not rape Halbach and did not plan to rape her. And not even remotely does the other misconduct evidence suggest that Avery wanted to watch others have sex.

Rather than prove something permissible, then, the uncharged misconduct evidence would beg the jury to speculate inappropriately that perhaps Avery raped Halbach when there is no evidence of such a rape and when the state's star witness disavows one. It would invite the jury to speculate wildly that he had a plan aborning for two decades to rape and kill Halbach, when there is no evidence at all that he did rape her. It would ask the jury to speculate that he pointed a gun at Halbach to force her compliance, when there is no evidence that he ever pointed a gun at her at all until she was dead already or unable to move.

Whatever it is, WIS. STAT. § 904.04(2) is not a license for unbounded imagination. So the state would use it.

III.

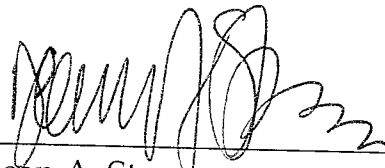
CONCLUSION

Steven Avery asks the Court again to deny the state's nine motions to admit old, weak evidence of other misconduct. The state should try Avery on the crimes it charged here, not on long past allegations either once adjudicated or never charged. If the state's case is half as strong as it has boasted for months, it does not need weak and old uncharged bad acts in any event. If by chance the state's case is not that strong, and it has puffed, speculation still is no proper way to make the case stronger.

Dated at Madison, Wisconsin, July 31, 2006.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.



Dean A. Strang
Wisconsin Bar No. 1009868
Counsel for Steven A. Avery

10 East Doty Street, Suite 320
Madison, Wisconsin 53703
[608] 257-0945

BUTING & WILLIAMS, S.C.

400 Executive Drive, Suite 205
Brookfield, Wisconsin 53005
[262] 821-0999

Jerome F. Buting
Wisconsin Bar No. 1002856
Counsel for Steven A. Avery