**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 11, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**

**NOTICE**

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

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

**Appeal No. 03-2537-CR** **Cir. Ct. No. 02CF000032**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SHOUA VANG,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Reversed and cause remanded with directions*.

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 DEININGER, P.J. Shoua Vang appeals a judgment convicting him of third-degree sexual assault and false imprisonment. Vang argues that he should have a new trial because the trial court erroneously exercised its discretion when it

admitted evidence of other acts that did not meet the requirements of WIS. STAT. § 904.04(2) (2001-02)[1] for admissibility. Because the other acts evidence at issue cannot reasonably be deemed to serve any purpose other than establishing Vang's propensity to commit sexual assaults, and because the trial court's error in admitting the evidence was not harmless, we reverse the appealed judgment of conviction and remand for further proceedings.

## BACKGROUND

¶2 X.Y. testified that while she was on a shopping errand, Shoua Vang, a co-worker at her place of employment, called to her from his car and asked her to come over to speak with him. She said that Vang asked her to get into his car, as it was a cold March evening. After she entered the car, according to X.Y., Vang locked the doors and drove off, refusing to allow her to get out of the car despite her requests that he do so. She testified that Vang drove her to a secluded location in a park some distance away, and upon arrival, repeatedly ordered X.Y. to get into the back seat, which she reluctantly did. She said that Vang removed her pants and had sexual intercourse with her, without her consent and despite her attempts to "struggle" with him. X.Y. related that afterward, Vang said he was "sorry for doing what he did to me" but warned her not to tell anyone or he would "harm me and my family." Vang then took her back to her car and she drove to her home.

¶3 Some three weeks later, X.Y. went to the police and reported the incident. The police questioned Vang, who initially denied having had any sexual

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

contact with X.Y. He later told police that he had been having an affair with her. The police arrested Vang and the State charged him with second-degree sexual assault and false imprisonment.

¶4 The State moved prior to trial to admit evidence that about one year before Vang's assault of X.Y., he had sexually assaulted M.K.Y. According to the State, Vang assaulted M.K.Y., then a tenth-grader, on several occasions by enticing her into his car, driving her to a secluded location and forcing her to have sexual intercourse. The State argued that this sequence of events was similar to X.Y.'s allegations. The State contended that the evidence of Vang's other acts satisfied the "acceptable purpose" requirement of WIS. STAT. § 904.04(2) because the similarity of the prior acts to the current charge tended to show Vang's motive for the sexual assault of X.Y., as well as his intent when he transported X.Y. to a secluded location. The State also argued that the similarity showed a plan or scheme on the part of the defendant, and tended to negate any claim of mistake concerning the victim's nonconsent to sexual intercourse.

¶5 The trial court ruled that the State had offered the evidence for acceptable purposes under WIS. STAT. § 904.04(2). The court concluded that "such evidence would provide or fall under one of the acceptable purposes, particularly motive, intent, preparation, plan, and absence of mistake." The court also concluded that the evidence was relevant because it related to "issues of consent or force" that were of consequence in the case, and that M.K.Y.'s allegations had "sufficient similarity" to X.Y.'s allegations to render them probative. Finally, the court determined that the probative value of the other acts evidence was not substantially outweighed by unfair prejudice or confusion of the issues.

¶6 At trial, the State called M.K.Y. in its case in chief. She testified that about a year before the charged offenses, Vang had sexually assaulted her on "three or four" occasions. She also testified that Vang would wait in his car for her after school, call her over and have her get into his car. Once in the car, Vang would drive her to remote locations and force her to have sex, threatening to harm her if she refused. Afterward, Vang would drive her back to the school or to her home, threatening her harm if she told anyone about the encounter. M.K.Y. acknowledged on cross-examination that, although she had reported Vang's actions to police, charges were not filed because a detective found "problems" with some of her statements based on other evidence that had been gathered.

¶7 The trial court instructed the jury to consider the other acts evidence only for the purposes of establishing "motive, intent, preparation or plan, absence of mistake or consent." During its closing remarks the State reminded the jury of M.K.Y.'s testimony, noting the similarities between her testimony and X.Y.'s regarding the method Vang used to commit sexual assaults. The State argued that M.K.Y.'s testimony demonstrated the "[s]ame motive, same plan" on Vang's part and established his "mode of operation."

¶8 The jury acquitted Vang of second-degree sexual assault but found him guilty of the lesser-included offense of third-degree sexual assault and of false imprisonment. Vang appeals the judgment convicting him of the two offenses, citing as error the admission of M.K.Y.'s testimony.

## ANALYSIS

¶9 WISCONSIN STAT. § 904.04(2) governs the admissibility of other acts evidence and provides as follows:

> 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.

¶10 The Wisconsin Supreme Court has provided specific guidance on the methodology a trial court is to follow when determining whether to admit evidence of other acts:

> The three-step analytical framework is as follows:
>
> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (RULE) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § (RULE) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* WIS. STAT. § (RULE) 904.03.

***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) (footnote omitted).

¶11 We review a trial court's challenged admission of other acts evidence to determine whether the court exercised "appropriate discretion." ***Id***. at 780. We will sustain the evidentiary ruling if we find that the trial court examined

the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. ***Id***. at 780-81. If the trial court fails to delineate the factors that influenced its decision, it has erroneously exercised its discretion, but we will nonetheless independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. ***Id***. at 781.

¶12 As to the first question in the ***Sullivan*** test, whether the other acts evidence was offered for an acceptable purpose, the trial court gave no explanation of its conclusion that evidence of Vang's encounters with M.K.Y. fell "under one of the acceptable purposes, particularly motive, intent, preparation, plan, and absence of mistake." The trial court in ***Sullivan*** similarly listed a number of acceptable purposes ("motive, intent, knowledge, absence of mistake or accident, and credibility," ***id***. at 784) without explaining how or why the proffered testimony related to any of the cited purposes. ***Id***. at 773-74. The supreme court observed that a trial court's failure to "carefully probe the permissible purposes for the admission" of other acts, and the failure to articulate its reasoning for admitting the evidence is problematic:

> Without careful statements by the proponent and the opponent of the evidence and by the circuit court regarding the rationale for admitting or excluding other acts evidence, the likelihood of error at trial is substantially increased and appellate review becomes more difficult….

***Id***. at 774.

¶13 Because the trial court did not explain its rationale for concluding that the State had offered M.K.Y.'s testimony for acceptable purposes, we will independently review the record to determine whether the record supports that determination. *See* ***id***. at 781. In conducting our review, we are mindful that the

State, as the proponent of the evidence, bears the burden of persuading us "that the three-step inquiry is satisfied." ***Id***. at 774. In the paragraphs that follow, we consider each of the acceptable purposes that the trial court cited in its ruling, as well as several additional purposes proffered by the State, either in the trial court or on appeal. Our review confirms that the various acceptable purposes for admitting other acts evidence are not mutually exclusive, and that "'they are impossible to state with categorical precision.'" ***State v. Hunt***, 2003 WI 81, ¶29, 263 Wis. 2d 1, 666 N.W.2d 771 (citation omitted).

¶14 In order to affirm the trial court's ruling, we need only identify one acceptable purpose for the introduction of M.K.Y.'s testimony. ***Id***. We find none in the present record.

¶15 **Motive and Intent**: The offense with which Vang was charged, second-degree sexual assault can be committed in one of two ways, by engaging in "sexual intercourse" with the victim or by having "sexual contact" with him or her, in either case, without consent and by the "use or threat of force or violence." WIS. STAT. § 940.225(2)(a). Vang was charged with the first alternative, sexual intercourse, which is defined to include several specified acts but requires no specific intent or purpose. *See* § 940.225(5)(c). "Sexual contact," on the other hand, requires the State to prove that a defendant engaged in "intentional touching" for one of several specified purposes, "sexually degrading; or … humiliating the complainant or sexually arousing or gratifying the defendant." § 940.225(5)(b)1.

¶16 A defendant's commission of prior assaults by sexual contact are often deemed probative of the defendant's motive and intent in a presently charged offense involving sexual contact. *See, e.g.*, ***State v. Friedrich***, 135 Wis. 2d 1, 21-

22, 398 N.W.2d 763 (1987). This is especially true if the victim is a child. *See* ***State v. Davidson***, 2000 WI 91, ¶¶36-44, 51, 57-59, 236 Wis. 2d 537, 613 N.W.2d 606 (discussing the "greater latitude rule"). The same is not true, however, when the charged assault involves intercourse because the State need prove only the commission of the act but no motive, purpose or state of mind on the defendant's part. *See* ***State v. Cofield***, 2000 WI App 196, ¶11, 238 Wis. 2d 467, 618 N.W.2d 214 (noting that intent is *not* an element of sexual assault based on acts of intercourse). Where intent is not an element of a charged offense, other acts are not admissible to show intent. *See* ***State v. Danforth***, 129 Wis. 2d 187, 202-03, 385 N.W.2d 125 (1986); ***Cofield***, 238 Wis. 2d 467, ¶11.[2]

¶17 Likewise, motive is not an acceptable purpose for introducing evidence of Vang's alleged past sexual assaults because there is no connection whatsoever between the prior acts and the charged offense, and second-degree sexual assault by an act of intercourse includes no "purpose" element. *See* ***id***., ¶12. The State offers no logical reason, and we can think of none, that Vang's having sexually assaulted M.K.Y. provided him with a motive to sexually assault X.Y. a year later. Evidence of the prior assaults tends to show only that Vang has a propensity to have intercourse with women without their consent, which is not an acceptable purpose under WIS. STAT. 940.04(2), and indeed, is the very prohibited purpose the statute forbids.

¶18 The State argues, however, that the similarity between Vang's alleged prior acts and the present offense tends to show his "motive in

[2] The State argues that the prior acts to which M.K.Y. testified tended to show that Vang's intent was to have intercourse with X.Y. regardless of her consent, and thus they are probative of X.Y.'s nonconsent. We address the consent issue separately below.

approaching the victim, convincing her to get in the car and driving her to a secluded park." We first note that none of these actions, in and of themselves, are criminal in nature, and none are elements of the sexual assault with which Vang was currently charged. More importantly, however, the cited actions are equally consistent with a motive to engage in consensual intercourse as with a motive to engage in nonconsensual intercourse, and, thus, the prior acts are not probative of the disputed issue of consent. Finally, as we discuss below, other acts evidence is only rarely, and under unique circumstances, deemed probative of nonconsent in a sexual assault prosecution.

¶19 In short, we find no basis in the record to conclude that M.K.Y.'s testimony was admissible under WIS. STAT. § 904.04(2) to establish Vang's motive or intent in assaulting X.Y. The charged offense contains no purpose or intent elements, and Vang's prior actions, despite their similarity with the current offense, do not serve to establish a motive for Vang to assault X.Y.

¶20 **Preparation and Plan**: Although the trial court included "preparation" in its list of acceptable purposes for the evidence, the State does not separately argue that Vang assaulted M.K.Y. in order to prepare for his assault of X.Y. Instead, the State argues that there is no requirement that a prior act be done in preparation for the charged offense in order to conclude that the prior act is evidence of a common plan or scheme. We interpret the State's argument as abandoning any claim that admission of the disputed evidence can be justified on the basis of "preparation," and we do not address that purpose further.

¶21 As to plan or scheme, the State points to the similarities in the assaults on M.K.Y. and on X.Y. In each, Vang is alleged to have enticed a woman he knew into his car, drove her to a secluded location and forced her to have

sexual intercourse with him against her will. The State also notes that Vang drove the same car on each occasion, and that at least one of the incidents with M.K.Y. took place at or near the location of Vang's assault of X.Y. The State would have us conclude that the assaults bear such a marked and striking resemblance to each other that they serve to establish a common plan or scheme and were thus admissible for that purpose under the holdings in ***Friedrich*** and ***Davidson***. We disagree.

¶22 The defendant in ***Friedrich*** faced charges of second-degree sexual assault for acts committed against his fourteen-year-old niece by marriage. ***Friedrich***, 135 Wis. 2d at 7. The State sought to admit evidence that the defendant had sexually assaulted a ten-year-old and a thirteen-year-old five and seven years before the charged offense. ***Id***. at 17-18. The State also sought to admit evidence that the defendant had propositioned an eighteen-year-old four years earlier. ***Id***. The trial court admitted evidence of all three prior incidents, concluding that they demonstrated the defendant's plan or motive to seek sexual gratification from young girls. ***Id***. at 18.

¶23 The supreme court concluded that the evidence concerning the sexual assaults of the two younger girls was properly admitted. ***Id***. at 23-24. The court noted the similarities between the prior and the charged assaults: all involved under-aged girls who were members of the defendant's family or shared a quasi-familial relationship with him, the nature of the sexual contact was "virtually identical," and the defendant "was seen gratifying his sexual desires through the physical contact." ***Id***. at 24. The "presence of these common elements" convinced the court that evidence of the prior acts "serves to establish the existence of a scheme or plan within the meaning of section 904.04(2)." ***Id***. As to the propositioning of the older girl, the court found that evidence "more

prejudicial than probative," but concluded that the error in admitting it was harmless. ***Id***. at 26-27.

¶24 ***Davidson*** involved acts that were arguably less similar and further separated in time, but the supreme court nonetheless also deemed them to be evidence of a "plan or scheme." ***Davidson***, 236 Wis. 2d 537, ¶60. The defendant was charged with second-degree sexual assault for having sexual contact with his thirteen-year-old niece in a camping trailer while other family members were sleeping nearby. ***Id***., ¶6. The State moved to admit evidence that the defendant had been convicted ten years earlier of first-degree sexual assault for having sexual contact with a six-year-old girl in the basement of a church while services were being conducted upstairs. ***Id***., ¶10. The court acknowledged that the two victims were different in age, the assaults occurred in different settings, they involved touching different body parts and were separated by ten years. ***Id***., ¶60. The court, however, found a plan or scheme stemming from the following "striking similarities": the victims were both vulnerable girls, the assaults both occurred in unlikely locations involving a considerable risk of the defendant being caught in the act, and both included "touching the girls between the legs." ***Id***., ¶61.

¶25 We acknowledge that we are bound by the holdings in ***Friedrich*** and ***Davidson***, but we disagree with the State's contention that those precedents require us to find a "plan" rationale for admitting the other acts evidence in this case. We relied in ***Cofield*** on the following definition of "plan" as an acceptable purpose for admitting other acts under WIS. STAT. § 904.04(2):

> The word "plan" in sec. 904.04(2) means a design or scheme formed to accomplish some particular purpose…. Evidence showing a plan establishes a definite prior design, plan, or scheme which includes the doing of

> the act charged. As Wigmore states, there must be 'such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations.

***Cofield***, 238 Wis. 2d 467, ¶13 (citing ***State v. Spraggin***, 77 Wis. 2d 89, 99, 252 N.W.2d 94 (1977)). A "similarity of facts is not enough to admit other acts" as showing a plan; some additional "linkage" must be present. ***Id***.; *see also* ***State v. Roberson***, 157 Wis. 2d 447, 453, 459 N.W.2d 611 (Ct. App. 1990).

¶26 We conclude that the "linkage" in ***Friedrich*** and ***Davidson*** stemmed from the fact that the past acts and present charges all involved sexual contact with minors. In both cases, because the current complainants alleged sexual contact, the State was required to prove the defendants' specific intent and purpose, i.e., intentional touching for sexual gratification. In both cases, the other acts evidence was thus also deemed to serve another acceptable purpose: proof of the defendants' motive or intent. ***Davidson***, 236 Wis. 2d 537, ¶59; ***Friedrich***, 135 Wis. 2d at 22. Moreover, because both cases involved sexual assaults of children, both triggered the greater latitude rule, whereby a "'greater latitude of proof as to other like occurrences' is evident in Wisconsin cases dealing with sex crimes, especially those dealing with incest and indecent liberties with a child." ***Id***. at 19 (citation omitted); *and see* ***Davidson***, 236 Wis. 2d 537, ¶62.

¶27 We conclude that, when a defendant is accused of having sexual contact with a minor, the current offense and past acts involving similar facts may constitute a "plan" because the acts are linked to each other by the defendant's abnormal desire to seek sexual gratification from fondling young children. That linkage is not present in this case. The victim of Vang's present offense was thirty-two years old, making her some ten years older than Vang. There is nothing extraordinary or abnormal in an adult man desiring to have sexual intercourse with

an adult woman, or in his seeking a private or secluded location to accomplish that end. Furthermore, at the time of the incidents with M.K.Y., Vang was nineteen or twenty years old, and M.K.Y., a tenth-grader would presumably have been about sixteen. Thus, the past act can hardly be indicative of a plan on Vang's part to sexually assault "older" women, and the current offense belies any plan of his to assault minors.

¶28 The State also argues, however, that the incidents with M.K.Y. are linked to the current charge against Vang because they are so similar as to constitute a unique or distinctive "method of operation" employed by Vang to assault women. Although the existence of a "signature" method of committing crimes would most often bear on the question of identity, a distinctive or unique method of operation may also be deemed indicative of a common plan or scheme. *See* ***State v. Ziebart***, 2003 WI App 258, ¶¶21-23, 268 Wis. 2d 468, 673 N.W.2d 369. We address this argument below under the heading "Lack of Consent," but conclude for present purposes that the record does not support a conclusion that M.K.Y.'s testimony was admissible to show that Vang had an ongoing plan or scheme to commit sexual assaults.

¶29 **Absence of Mistake**: Vang argues that this cannot be an acceptable purpose for admitting M.K.Y.'s testimony because he never asserted a defense of mistake or accident. The State does not refute this assertion and offers no argument that absence of mistake is an acceptable purpose for admitting M.K.Y.'s testimony on this record. Accordingly, we do not address it further.

¶30 **Lack of Consent**: Whether X.Y. consented to have sexual intercourse with Vang was very much at issue in this case. Vang took the stand and testified that he had an affair with X.Y. for several months in the winter of

2000-01, and that he never had "sexual relations" with her against her will. X.Y., of course, testified that she did not consent to intercourse with Vang on the date in question, and she also denied having had an affair with Vang. The State argues that M.K.Y.'s testimony was relevant to, and probative of, the issue of consent because it showed that Vang employed a specific method of operation in luring women into his car and taking them to secluded locations to engage in forced sexual intercourse with them. This proffered acceptable purpose appears to be a blend of "intent," in that the past acts purportedly show that Vang's intent in this case was to again have intercourse without a woman's consent, and "plan," because his method was allegedly so distinctive that when he employed it, it invariably meant that any intercourse that ensued was nonconsensual.

¶31 For support of its present contention, the State relies heavily on our decision in ***Ziebart***, which it claims created an exception to the general rule we espoused in ***Cofield*** that "'consent is unique to the individual. The fact that one woman was raped … has no tendency to prove that another woman did not consent.'" ***Cofield***, 238 Wis. 2d 467, ¶10 (citing ***State v. Alsteen***, 108 Wis. 2d 723, 730, 324 N.W.2d 426 (1982)). The ***Ziebart*** exception, in the State's view, is spelled out in the following passage, where we quoted from a prior unpublished decision in the same case: "Ziebart, claiming consent, was disputing his intent to commit any crime. Thus, the State could use other acts evidence of Ziebart's assault of Daryl to help prove Ziebart's intent to commit the strikingly similar crimes against Mary." ***Ziebart***, 268 Wis. 2d 468, ¶18 (emphasis omitted).

¶32 We further explained our rationale for concluding that, in certain circumstances, other acts evidence may be probative of nonconsent:

> Although, as the supreme court explained, consent, in the context of sexual conduct, "is unique to the

> individual," [***Alsteen***], and although, therefore, the prior non-consent of one person to sexual contact may not be introduced *solely* to prove the non-consent of another person to sexual contact, the preclusion of such other-acts evidence is not absolute. Where, as here, the other-acts evidence of non-consent relates not only to sexual contact but also to a defendant's *modus operandi* encompassing conduct inextricably connected to the strikingly similar alleged criminal conduct at issue, the evidence of non-consent may be admissible to establish motive, intent, preparation, plan, and absence of mistake or accident under WIS. STAT. § 904.04(2).

***Id***., ¶20 (footnote omitted). Thus, in order to qualify for this "method of operation" exception to the ***Alsteen*** rule, past conduct must be "strikingly similar" to the conduct involved in the charged offense. The conduct must also be "strikingly singular" or unique, and the consent defense must be "inextricably connected to a defendant's conduct surrounding and including sexual contact." ***Id***., ¶¶20-24. We conclude that the present facts do not meet these criteria.

¶33 The defendant in ***Ziebart***, in both the charged offense and in the prior acts, impersonated a police officer, engaged in "physical and sexual degradation" of the victims, and expressed a "vigilante-like *modus operandi*" of wanting to rid the streets of "crack whores" in the present assault and "drug addicts" in the prior one. ***Id***., ¶¶5, 8, 21. Here, although there are similarities between Vang's acts as testified to by M.K.Y. and X.Y., the conduct can hardly be described as "singular" or unique. Inviting a woman into one's car and driving to a remote or secluded location to engage in sexual intercourse is not a rare or unusual occurrence, at least as compared to the "signature" features of Ziebart's method of operation—impersonating a police officer, degrading the victim and voicing a vigilante motivation. Moreover, we cannot conclude that Vang's consent defense is somehow "inextricably connected" to the conduct in question,

given that the similar features of the conduct, unlike in ***Ziebart***, are as consistent with consensual sexual encounters as with assaultive behavior.

¶34 We conclude that the present facts are much closer to those in ***Cofield***, and should thus be governed by the general rule that past acts of nonconsensual sexual intercourse cannot be introduced to prove the lack of consent in the current offense. The State argued in ***Cofield*** that the prior acts demonstrated a "common scheme or plan" because both the prior sexual assaults and the current one involved the use of a knife; the victims were of the same race and similar in age; all had been seen by the defendant before; and he told each of them that they would not be hurt if they complied. ***Cofield***, 238 Wis. 2d 467, ¶13. We rejected the State's contention, and instead deemed the prior acts probative of only "propensity," concluding that the other acts evidence was not admissible for any acceptable purpose. ***Id***., ¶¶13-14.

¶35 The same is true here. If we were to conclude that Vang's past acts with M.K.Y. are admissible to show that X.Y. did not consent to sexual intercourse, it would be hard to imagine any set of circumstances where evidence of past sexual assaults could not be admitted at the trial of a sexual assault charge. The applicable rule would then not be one of "greater latitude," but that WIS.

STAT. § 904.04(2) simply does not apply in prosecutions for sexual assault. We do not believe that to be the law in Wisconsin, at least not yet.[3]

¶36 **Victim Credibility**: The State also argues on appeal that bolstering a victim's credibility is an acceptable purpose for admitting evidence of other acts under WIS. STAT. § 904.04(2). In support, it cites ***Hunt***, where the supreme court noted that the proffered other acts evidence had been properly admitted in that case because, among other reasons, it provided "an independent source as to the victims' credibility, as well as their state of mind, in light of their recantations." ***Hunt***, 263 Wis. 2d 1, ¶4.

¶37 We agree with the State that the acceptable purposes for admissibility are not limited to those specifically enumerated in WIS. STAT. § 904.04(2), and that in certain circumstances, as in ***Hunt***, past acts of a defendant involving the same victim as the currently charged offense may indeed serve to explain necessary context or a victim's state of mind or recantation. Those circumstances are not present here, however. Vang's other acts involved a person other than, and unrelated to, the complaining witness in the current prosecution, and the complainant did not recant her allegation that Vang had sexually assaulted her. In short, M.K.Y.'s testimony provided jurors with no context for the assault of X.Y., and neither did it shed any light on X.Y.'s state of mind or her credibility.

[3] Some jurisdictions have adopted such a rule. *See, e.g.,* FED. R. EVID. 413(a) ("In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."); CAL. CODE § 1108 (West 2003) ("In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Cal. Analogue of WIS. STAT. § 904.04(2)], if the evidence is not inadmissible pursuant to [CAL. RULE requiring balancing of probative value against unfair prejudice, confusion of issues, etc.]."

¶38 The State also cites ***State v. Parr***, 182 Wis. 2d 349, 513 N.W.2d 647 (Ct. App. 1994), and ***Roberson***, 157 Wis. 2d 447, in support of its victim credibility argument. Neither case, however, supports the proposition that bolstering victim credibility, by itself, is an acceptable purpose for introducing other acts evidence under WIS. STAT. § 904.04(2). We determined in ***Parr*** that the other acts evidence in that case "served to establish a motive and intent to assault," and our observation that the evidence thus bore on the truthfulness of the conflicting versions of the charged offense was a comment on the effect of the evidence, not its purpose. *See* ***Parr***, 182 Wis. 2d at 361. We concluded in ***Roberson*** that the disputed other acts evidence tended to establish only the defendant's intent, and we did not mention "victim credibility" at all. ***Roberson***, 157 Wis. 2d at 455.

¶39 If we were to conclude in this case that evidence of Vang's other acts having no connection whatsoever to X.Y. satisfies the acceptable purpose requirement of WIS. STAT. § 904.04(2) solely because the evidence tends to bolster X.Y.'s credibility, virtually all proffered other acts evidence would arguably fulfill the purpose requirement under § 904.04(2). To the extent that M.K.Y.'s testimony may have served to enhance X.Y.'s credibility, it did so because the jury could conclude that, because Vang had forced intercourse upon M.K.Y., he probably did the same to X.Y., thus rendering X.Y.'s testimony more credible than Vang's. Evidence of a defendant's undesirable character or

propensities will arguably always tend to bolster a complainant's credibility,[4] and nothing would be left of § 904.04(2) or the first step in the ***Sullivan*** analysis. We therefore reject "victim credibility" as an acceptable purpose for the evidence admitted in this case.

¶40 **Identity**: The State argued in the trial court that because "[t]he defendant has denied having sex with the victim in this particular case," the testimony from M.K.Y. would also tend to "show identity for the defendant as the person who did have sexual contact with our victim." It is unclear whether the State's reference to Vang's denial was to his initial denial to police or to his subsequent claim that he had an ongoing affair with X.Y. but did not have intercourse with her on the day in question. Regardless, the identity of X.Y.'s assailant was not at issue in this case. If X.Y.'s testimony was truthful, it was Vang who assaulted her, and it could not have been anyone else. The trial court did not cite "identity" as one of the acceptable purposes for admitting the evidence, and the State does not renew its identity argument on appeal. We thus conclude that identity was not an acceptable purpose for introducing M.K.Y.'s testimony in this case.

¶41 **Summary**: Because the trial court did not explain its rationale for concluding that the other acts evidence in this case was offered for several acceptable purposes, we have independently reviewed the record to determine

[4] As some courts and commentators have noted, "the rationale for excluding [other acts] evidence is not that it lacks probative value, but that it is too relevant. 'It may almost be said that it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much.'" ***People v. Fitch***, 55 Cal. App. 4th 172, 63 Cal. Rptr. 2d 753, 757 (Cal. App. 3d 1997) (citing 1A Wigmore, *Evidence*).

whether we can nonetheless affirm the trial court's discretionary determination. *See* ***Hunt***, 263 Wis. 2d 1, ¶¶44-45. We have considered all of the purposes cited by the trial court in its ruling and by the State, either in the trial court or on appeal. We find none are supported by the present record. Accordingly, we conclude that the trial court erred in admitting M.K.Y.'s testimony, and it is not necessary for us to proceed with the second and third steps in the ***Sullivan*** analysis. *See* ***Sullivan***, 216 Wis. 2d at 789.

¶42 Our conclusion that the trial court erred in admitting the other acts evidence does not complete our review; we must also determine whether the error was harmless. *See* ***id***. at 792. An error is harmless "if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. A reviewing court may initially focus on the error itself when conducting harmless error analysis, but it must also evaluate the error in the context of the entire case. ***State v. Tucker***, 2003 WI 12, ¶26, 259 Wis. 2d 484, 657 N.W.2d 374. We may deem the erroneous admission of evidence harmless if, although it had some probative value, the evidence was not a significant part of the State's case. *See* ***State v. Weed***, 2003 WI 85, ¶31, 263 Wis. 2d 434, 666 N.W.2d 485.

¶43 We have concluded above that the introduction of other acts evidence in this case without an acceptable purpose under WIS. STAT. § 904.04(2) resulted in the jury hearing evidence that served only to impugn Vang's character and depict him as having a propensity to commit sexual assaults. As the supreme court has explained, there are several reasons why this type of evidence should not be put before jurors:

> (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do

> such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes….

***Whitty v. State***, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967). Put another way, other acts evidence "magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." ***Sullivan***, 216 Wis. 2d at 783.

¶44 We are not convinced beyond a reasonable doubt that a rational jury would have found Vang guilty absent the State's introduction of the other acts evidence. The State presented physical evidence and expert testimony establishing that Vang and X.Y. had had sexual intercourse in the back seat of Vang's car. X.Y., however, was the only witness who testified that the sexual intercourse was not consensual. In addition to his own testimony that he had a consensual sexual relationship with X.Y., Vang presented testimony from at least two other witnesses in support of that assertion.

¶45 We acknowledge that the State was able to cast considerable doubt on the credibility of Vang and the other the defense witnesses. As to the issue of consent, however, this remained a she-said-he-said case, and the State relied on M.K.Y.'s testimony in its summation to the jury. The prosecutor told jurors that they should believe X.Y. because "the same thing happened to [M.K.Y.] that happened to this victim with the same plan and preparation." He also argued that the past acts involved the "[s]ame motive, same plan," and that "the testimony of [M.K.Y.] certainly shows the defendant's mode of operation." The jury's acquittal of Vang on second-degree sexual assault shows that jurors did not accept

all of X.Y.'s testimony as to what took place at the time of the alleged assault.[5] We cannot conclude that, without M.K.Y.'s testimony, rational jurors would have necessarily concluded beyond a reasonable doubt that X.Y. had not had consensual sexual intercourse with Vang.

¶46 Finally, we note that the trial court instructed jurors that they were not to consider the other acts evidence "to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character" in committing the charged offense. We recognize that this instruction is generally deemed to minimize any "unfair prejudice" resulting from other acts evidence introduced for an acceptable purpose. *See* ***Hunt***, 263 Wis. 2d 1, ¶72. The instruction, however, does not cure the erroneous introduction of other acts evidence that serves no acceptable purpose in the prosecution of the charged offense. The court explained to jurors that they could consider M.K.Y.'s testimony for the following purposes:

> The evidence was received on the issues of motive; that is, whether the defendant has a reason to desire the result of the crime; or intent; that is, whether the defendant acted with the state of mind that is required for this offense; or preparation or plan; that is, whether such other conduct of the defendant was part of a design or scheme that led to the commission of the offense charged; or absence of mistake or consent; that is, whether the defendant acted with the state of mind required for this offense.

[5] In order to convict Vang of second-degree sexual assault, the State had to convince jurors, beyond a reasonable doubt, that (1) Vang had sexual intercourse with X.Y.; (2) X.Y. did not consent to the sexual intercourse; and (3) Vang had sexual intercourse with X.Y. by use or threat of force or violence. *See* WIS JI—CRIMINAL 1208. The jury found Vang not guilty of second-degree assault but guilty of third-degree sexual assault, which requires proof of the first two elements but not the third. *See* WIS JI—CRIMINAL 1218A.

¶47 As we have discussed at length, however, none of the cited purposes withstand scrutiny, and the jury should not have been allowed to consider M.K.Y.'s testimony at all.

¶48 We conclude that this was arguably a close case with conflicting testimony. M.K.Y.'s testimony may well have influenced jurors into accepting X.Y.'s testimony over Vang's on the rationale that if Vang had sexually assaulted M.K.Y., then he probably also assaulted X.Y. As we have explained, however, "consent is unique to the individual. 'The fact that one woman was raped … has no tendency to prove that another woman did not consent.'" ***Cofield***, 238 Wis. 2d 467, ¶10 (citation omitted). We cannot conclude that the trial court's error in admitting the other acts evidence was harmless. Accordingly, we reverse the appealed judgment and remand for further proceedings consistent with this opinion.

## CONCLUSION

¶49 For the reasons discussed above, we reverse the judgment of conviction and remand for further proceedings.

*By the Court.*—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.