

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN

Plaintiff,

STATE OF WISCONSIN'S
SUPPLEMENTARY
MEMORANDUM IN SUPPORT
OF OTHER ACTS EVIDENCE

vs.

STEVEN A. AVERY,

Defendant,

Case No. 05-CF-381

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

JUL 28 2006

BACKGROUND

CLERK OF CIRCUIT COURT

The State has filed nine separate motions to allow the introduction of other acts evidence. Within those motions, the State set forth the theory of admissibility (under § 904.04(2), Wis. Stats.); a detailed description of the facts to be offered at trial; and has set forth in a memorandum to the Court the legal framework required by this Court in considering admissibility of each proposed piece of evidence.

Within the State's original memorandum, the State contemplated arguing the facts of each "other act" to the law (applying the Sullivan three-part analysis). This Court has invited the State to instead argue each motion in writing, as oral argument will not be entertained.

Therefore, the State below submits what it believes the Court should find as to each proposed other act evidence, and why that evidence is admissible applying the Sullivan analysis.

MOTION #1 – PHYSICAL VIOLENCE AND THREATS TO EX-WIFE, LORI AVERY

Steven Avery's intent (for this motion, intent to kill) will be relevant at trial. As the State previously argued, even if the defense concedes that intent will not be "at issue" in the trial, when the State must prove an element, evidence relevant to that element is admissible, even if the defendant does not dispute the element. State v. Hammer, 236 Wis. 2d 686, 704 (2000).

Steven Avery's intent to kill Teresa Halbach must be found by the jury. The fact that Avery previously threatened to kill his wife Lori Avery (as Judge Hazelwood described as not

simply a threat to kill her, but a “grandiose mutilation-type scheme”) is highly relevant. Avery’s history of physically assaultive behavior towards women (here Lori Avery) is also relevant as to his intent to kill.

The defense suggests that the physical violence against Lori Avery, and the threats to mutilate her, are too remote for this Court to deem them admissible. The fact that other acts are distant in time does not end the inquiry. In considering time, courts 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. State v. Kuntz, 160 Wis. 2d 722, 747 (1991). Specifically, courts consider the time that individuals spent incarcerated, and do not include that timeframe in the other acts remoteness analysis.

In Sanford v. State, 76 Wis. 2d 72 (1977), the Wisconsin Supreme Court noted that any issue as to remoteness of the prior incident is almost completely diffused by the fact that during the time gap between the prior incident and the rape [the current charged case], defendant was in confinement in a correctional institution. Id. at p. 82. When the Court considered the time that Sanford spent incarcerated, the span between the prior incident and the present offense became a matter of days, not months or years. Id.

When considering Steven Avery’s case, it would appear that the prior acts sought to be introduced and the instant case may be separated by as much as 23 years. Under more critical analysis, however, Steven Avery was incarcerated in one fashion or another for approximately 20 of those 23 years.

The animal cruelty conviction caused Steven Avery’s probation for two burglary convictions to be revoked on November 18, 1982, and Steven Avery was ordered to serve two years prison concurrent to the nine-month sentence for animal cruelty. Subsequent to his release from prison on the burglary charges in 80-CR-772, 80-CR-773 and 80-CR-774 on August 12,

1983, Steven Avery was taken into custody on January 3, 1985, and charged with endangering safety by conduct regardless of life (the incident regarding Sandra Morris). Avery was held in the Manitowoc County Jail until bond was posted on February 14, 1985, and Avery was subsequently arrested on July 29, 1985, for first degree sexual assault, attempted murder and false imprisonment. Avery was later sentenced to six years prison after his conviction for endangering safety as well as felon in possession of a firearm as a repeater; those sentences ran concurrent to a 32-year sentence for the sexual assault and attempted murder case, for which Avery was later exonerated. Avery was released from prison on September 11, 2003.

Therefore, when removing periods of incarceration, instances of physical abuse to Lori Avery and the instant homicide case are separated by no more than 3-1/2 years. This remoteness analysis should be applied to each of the acts the State seeks to be introduced, committed prior to Avery's incarceration in 1985.

The defendant's motive will also undoubtedly be at issue in this case. Although not an "element," motive is usually at issue in criminal prosecutions.

Motive is simply the state of mind or emotion that causes a person to act in a certain way; the reasons which lead the mind to desire the result of the act. State v. Fishnick, 127 Wis. 2d 247, 260 (1985). Evidence of a generalized urge, such as jealousy, has been admitted as motive for murder. See State v. Wyss, 124 Wis. 2d 681, 712 (1985).

Finally, the defendant's "plan" to kill (rape, torture, mutilate and dispose of) Teresa Halbach will also be relevant evidence for this jury to consider. When considered in connection with previous statements to inmates (demonstrating a clear plan to rape, torture and murder young women), the defendant's acts of violence perpetrated against another woman, here Lori Avery, bring the crimes committed against Ms. Halbach into sharper focus. Other acts necessary

to give a context of the story of the case have previously been approved as reasons for admissibility. See State v. Bergeron, 162 Wis. 2d 521, 529-31 (Ct. App. 1991).

Finally, the defense “explanation” that Avery had a reason to be angry with his wife, Lori Avery, and the argument that physical abuse perpetrated against her and threats to kill and mutilate Lori should be distinguished from what happened to Teresa Halbach is simply an attempt to distinguish the facts, while misdirecting this Court’s attention from the true theory of admissibility. The fact that this defendant previously engaged in substantial physical abuse of women, and further evidence exists of this defendant’s threats to kill and mutilate the mother of his children, is highly probative as to the defendant’s intent, motive and plan.

**MOTION #2 – PHYSICAL VIOLENCE TOWARDS
GIRLFRIEND JODI STACHOWSKI**

The defendant’s pattern of physical violence towards women continues with Jodi Stachowski, a woman Avery developed a relationship with after his release from prison in 2003. Physical abuse towards Stachowski has included slapping, choking, punching and throwing to the ground. The defense argues that this behavior is dissimilar to violence causing the death of Teresa Halbach (stabbing or shooting) and therefore is not relevant as to the defendant’s intent or motive.

Once again, the State argues that the defendant’s violence towards women is highly relevant on the issues of intent and motive, and though violence towards Ms. Halbach lead to her death, that behavior is simply different in “degree” rather than different in “kind.”

The State disagrees that it offers evidence of physical violence towards women to show that the defendant is a “bad man,” but rather argues its relevance for the jury to consider on issues of intent, motive and plan.

The State should also be allowed to show the escalating nature of Avery's violence towards women, beginning with slapping his ex-wife Lori Avery, continuing with punching and choking Jody Stachowski, and culminating with causing the death of Teresa Halbach. The theory of the prosecution 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 women, and should therefore be admissible.

MOTION #3 – ACT OF VIOLENCE TOWARDS AN ANIMAL (KILLING A CAT)

The State believes that the violence demonstrated towards a live cat on August 31, 1982, is highly relevant, and has such substantial probative value that it should be considered by the jury.

The State's theory, as has been previously revealed to the Court, is that the defendant exhibits sadistic qualities, and derives pleasure from causing pain (and death) to other living beings. Soaking a live cat with gas and oil, and throwing it, alive, on a bonfire so clearly demonstrates the defendant's sadistic personality, as to be highly relevant on issues of intent, motive, plan and identity regarding the murder and mutilation of Ms. Halbach.

The State argues that facts at trial will include after stabbing Teresa Halbach, the defendant took a rifle and shot her several times, including in the head while in his garage. Importantly, the cat in which Avery threw on the fire (alive), jumped off the fire, while burning, and the defendant was forced to re-apply flammable liquid to the cat, and once again, throw the cat on the fire until it burned to death. The State argues that to ensure a similar episode would not occur with the victim, Teresa Halbach, the defendant "made sure" the victim was dead by shooting her with a rifle (for up to ten times); without knowledge of the burning cat story, the

jury may be left to speculate as to why the defendant would shoot Ms. Halbach so many times, after having possibly caused life-ending injuries to her minutes before by stabbing.

The State agrees that burning a live cat is disgusting and sensational behavior, however, it is behavior the defendant alone engaged in, and its relevance cannot be ignored due to what is sure to be a graphic description of the animal's killing. Efforts will, of course, be made to present the facts in as neutral a fashion as possible, and the State anticipates the Court providing a limiting instruction to the jury as to the proper consideration of this evidence.

**MOTION #4 – ENDANGERING SAFETY OF SANDRA MORRIS
(POINTING A FIREARM AND FORCING OFF THE ROAD)**

The State argues that Teresa Halbach certainly had a firearm pointed at her by the defendant, Steven Avery (as evidenced by gunshot wounds found on Halbach's body; a bullet containing Teresa Halbach's DNA being found in Avery's garage; shell casings found in the garage matching the rifle hanging above Steven Avery's bed; and statements attributed to co-defendant Brendan Dassey). Based upon statements made to co-workers, it is clear that the victim would not enter Avery's trailer or other personal space, without being forced or accosted (based upon Avery appearing before Halbach on a previous occasion wearing only a towel); the State presents its theory of prosecution that the defendant, Steven Avery, pointed a firearm at Teresa Halbach to gain her compliance in accompanying him to his trailer, his garage, or both.

With that theory having been presented, the State argues that evidence of pointing a firearm at Sandra Morris on September 20, 1984 (after exposing himself to her), forcing her off the road, and making additional comments as to intent to cause further harm to Ms. Morris, or require her accompaniment to a remote location, is highly relevant on the issues of intent, motive, plan and identity. The similarity of these acts is quite remarkable.

The defense argues that there is no evidence that Avery intended to rape Morris, after forcing her off the road. The State points the defense to DCI report #05-1776/238 where Anthony G. Myers, inmate at Oshkosh Correctional Institute, provided information on February 23, 2006, that Steven Avery, in fact, intended to sexually assault Sandra Morris after forcing her off the road at gunpoint.

In any event, the striking similarities between what occurred between Sandra Morris and what the State believes occurred to Teresa Halbach suggest admissibility of this evidence. In both situations, Mr. Avery had sporadic contact with the victim; Ms. Morris, a distant relative, and Ms. Halbach, a business associate. Mr. Avery developed a fixation with both young women. He began by exposing himself to both Ms. Morris and Ms. Halbach. After these contacts failed to generate the desired result (sexual contact or sexual intercourse), Steven Avery used a firearm in an effort to force the unwilling victims to submit to sexual intercourse.

MOTION #5 – POSSESSION OF FIREARM BY A CONVICTED FELON

As part of the incident involving Sandra Morris, the defendant was convicted of being a felon in possession of a firearm. The State agrees that although knowledge by Steven Avery that it is unlawful for him to possess a firearm is not an element to the offense charged, it remains a relevant factor for the jury to consider under these circumstances.

Two rifles were found above the bed of Steven Avery upon a search of his trailer on November 5 and 6, 2005. As the State will need to rely, at least partially, upon “constructive” possession of those firearms, the defendant’s previous conviction for being a felon in possession of a firearm becomes highly relevant for the jury’s consideration.

Other circumstantial evidence including analysis of shell casings, bullets, and wounds caused to Ms. Halbach will be additional evidence for the jury to consider on whether the

defendant possessed a firearm; obviously, should Brendan Dassey testify at Avery's trial, additional evidence by that "direct witness" will be considered by the jury.

MOTION #6 – SEXUAL ASSAULT OF M.A.

The defendant concedes that the sexual assault of 17-year old M.A. is "probably the closest call" regarding other acts admissibility. The State argues that this act is not a "close call" at all, and that admissibility is obvious.

Sexually assaulting a young woman in the summer of 2004, while restraining her on a bed, is highly relevant as to issues of intent, motive and plan, when considering the allegations made against the defendant Steven Avery sexually assaulting Teresa Halbach.

The fact that physical restraints were employed to gain Ms. Halbach's incapacity are hardly persuasive in arguing these acts dissimilar. Furthermore, the fact that M.A. may have been related to Steven Avery is not relevant to the Court's analysis, as the facts will establish Avery's desire to engage in a "dating" relationship with M.A.; certainly one that included sexual contact and intercourse.

Once again, the State's theory of prosecution includes that Steven Avery believed himself somehow "entitled" to obtain sexual gratification from young women he came in contact with, and whether those women were girlfriends (Jodi Stachowski), acquaintances (J.A.R.), relatives (M.A.), friends of his nephew (Marie Litersky) or casual business acquaintances (Teresa Halbach), the defendant has demonstrated a willingness to seek, and oftentimes take, without consent, sexual gratification from these young women. The jury must be allowed to consider that pattern.

MOTION #7 – SEXUAL ASSAULT OF J.A.R.

As similarly argued in the last motion, the defendant's intent, motive and plan regarding sexually assaulting young women is highly relevant for consideration by this jury. Recognizing that the defendant began sexually assaulting young women in 1982 or 1983 will be highly relevant for the jury's consideration of the defendant's motive; this defendant has believed himself entitled to physically and sexually abusing women who have crossed his path since the early 1980's.

MOTION #8 – SEXUAL HISTORY OF DEFENDANT

The State concedes that under usual circumstances, evidence of a defendant's "consensual" sexual history would be irrelevant for jury consideration. The State agrees with counsel that courts vigorously protect the sexual histories and practices of alleged victims, and appropriate comply with rape shield laws (§ 972.11(2), Wis. Stats.).

Jodi Stachowski's matter-of-fact assertion that the defendant engaged in sexual intercourse as much as five times per day becomes relevant when considering the State's theory of prosecution; that is, Teresa Halbach was "lured" by Avery to his trailer for a sexual purpose, as Avery's regular sexual partner, Ms. Stachowski, was incarcerated at the time of these crimes; this further explains the defendant's motive.

Although the State agrees with the defense that consensual sexual habits of boyfriend and girlfriend provide no motive to rape or murder a near stranger, the State disagrees that Avery did not seek out Teresa Halbach as a sexual partner; this defendant seems unconstrained by laws or societal sexual guidelines as demonstrated by his willingness to engage in non-consensual intercourse, intercourse with a child, and deviant sexual practices. If inmates that Avery had previously spoken to are to be believed, this defendant is so preoccupied with sexual sadism, that

he planned to build a torture chamber, and detailed for them plans to rape, torture and murder young women for his gratification.

Once again, as the defendant's motive is highly relevant, the defendant's obsession with sex (pornography, sexual "relationships" and possession of items created to enhance an individual's sexual experiences) are similarly relevant.

MOTION #9 – PHONE CONVERSATION WITH MARIE LITERSKY

The defendant's attempt to "lure" Marie Litersky to his trailer one day before Teresa Halbach is highly relevant on the issues of intent, motive and plan. Clearly, offers to a young woman to come to his trailer for sex less than 24 hours before Halbach was allegedly raped and murdered is so highly probative that its admissibility again appears obvious.

A jury could find that as part of the defendant's plan or scheme, his failed attempt to lure Marie Litersky to his property was a major factor in Avery calling Auto Trader Magazine the early morning of October 31, 2005, and inviting Ms. Halbach to his property.

Without evidence of the Litersky call, the jury may be left with the impression that Avery's call suggesting a "visit" by Halbach on October 31 was isolated in nature, and had no sexual motivation. Avery's clumsy attempt to secure Ms. Litersky's appearance at his trailer on October 30 satisfies the Sullivan three-prong test as evidence being offered for a permissible purpose, highly relevant and its probative value far outweighs any risk of unfair prejudice.

CONCLUSION

In the State's original memorandum to the Court supporting introduction of other acts evidence, the State invited the Court to apply the Sullivan three-prong analysis to each motion, considering the detailed facts already provided to the Court, and theories of admissibility under § 904.04(2), Wis. Stats. Although this supplemental memorandum may or may not have much

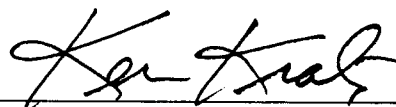
utility to the Court (as it provides little more than concrete application of the detailed facts to the applicable law), the State reasserts its belief that all nine prior acts of the defendant are admissible, and should be considered by the jury for the reasons stated above.

The State concedes that application of these specific facts to the Sullivan analysis is not an exact science, and this Court will be forced to thoughtfully consider the probable benefit to the jury, and balance whether any unfair prejudice would come to the defendant by granting admissibility.

The State urges the Court consider each motion individually, and not conclude that the State has “enough” evidence already available to it that inclusion of other acts would waste the jurors’ time.

The State has taken great care in limiting its list of potential other acts evidence to these nine most relevant (of dozens originally considered for inclusion), and reminds the Court that the State may, or may not, choose to introduce such evidence at the time of trial. Seeking an advanced ruling by the Court in no way requires the State introduce evidence, but rather obtains direction from the Court as to what may be admissible.

Respectfully submitted this 26th day of July, 2006.



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