

**IN THE DISTRICT COURT OF KEYA PAHA COUNTY, NEBRASKA**

**THE STATE OF NEBRASKA,**  
Plaintiff,

Case No. 2932

vs.

**SUPPLEMENTAL ORDER**

**JOSEPH “JOE”BAUER, also known as  
JOSEPH V. BAUER,**  
Defendant.

**DATE OF HEARING:** no further hearing held.

**DATE OF DECISION:** July 19, 1999.

**APPEARANCES:**

For plaintiff: no further appearance.  
For defendant: no further appearance.

**SUBJECT OF ORDER:** plaintiff’s motion to determine admissibility of other misconduct (“404 motion”) filed 3/12/99 (regarding matters identified by notice filed 3/2/99).

**FINDINGS:** The court finds and concludes that:

1. On July 8, 1999, this court entered an interlocutory order regarding the plaintiff’s motion to determine that certain evidence would be admissible at trial pursuant to NEB. REV. STAT. § 27-404(2) (Reissue 1995) (the “Rule 404” motion).

2. On July 16, 1999, the Nebraska Supreme Court announced its decision in *State v. Sanchez*, 257 Neb. 291, \_\_\_ N.W.2d \_\_\_ (1999). In that decision, the Supreme Court discussed the recent decision in *State v. McManus*, 257 Neb. 1, \_\_\_ N.W.2d \_\_\_ (1999), in the context of an alleged sexual assault. That discussion significantly limits the use of prior misconduct evidence in sexual assault cases and imposes new procedural requirements.

3. The Court in *Sanchez* discussed certain other cases relied upon by this court in the July 8 decision, stating:

In *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds*, *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997), we agreed with the reasoning of *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), that

other crimes evidence may have probative value as to identity where there are overwhelming similarities between it and the charged offense, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature. In *State v. Freeman, supra*, a prosecution for eight counts of first degree sexual assault, we concluded that evidence regarding a previous sexual assault committed by the defendant was properly admitted on the issue of identity where the manner in which it was committed and certain statements made by the assailant to the victim during its commission bore marked similarities to each of the charged offenses.

In both *State v. Carter, supra*, and *State v. Freeman, supra*, there was physical evidence that a sexual assault had occurred but no eyewitness identification of the assailant, thus leaving open the possibility that someone other than the defendant had committed the crime. In each of those cases, the other crimes evidence was held to be probative on the issue of the identity of the assailant and therefore properly admitted for that purpose. In the present case, there is no physical evidence of penetration necessary to establish first degree sexual assault, although there is medical testimony that the absence of such evidence does not mean that such an assault did not occur. The only evidence of the assault is the testimony of A.S., who described what happened and unequivocally identified Sanchez as the assailant. There is no evidence upon which the jury could have concluded that the assault occurred, but that someone other than Sanchez committed it. Thus, assuming without deciding that the other crimes evidence bears the requisite similarity to the charged offense, it could have no probative value on the issue of identity under the facts of this particular case. If the jury believed the testimony of A.S. that the acts which constitute first degree sexual assault occurred, it would have no basis for identifying anyone other than Sanchez as the assailant and his prior conduct would prove nothing necessary for conviction. On the other hand, if the jury did not believe the testimony of A.S. regarding the occurrence of the assault, it would be left with no evidence that a crime had been committed and thus no assailant to identify. Sanchez' prior acts could not fill this evidentiary void.

*State v. Sanchez, supra*, at \_\_\_\_\_. This discussion clearly limits the applicability of prior cases broadly stating that "in prosecutions for crimes of a sexual nature, testimony regarding similar prior sexual conduct of the defendant has independent relevance." E.g., *State v. Carter, supra*; *State v. Dreimanis*, 8 Neb. App. 362, \_\_\_\_ N.W.2d \_\_\_\_ (1999).

4. Further, the *Sanchez* decision imposes a new procedural rule. The Court directed that: [H]enceforth, the proponent of evidence offered pursuant to rule 404(2) shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered and that the trial court shall similarly state the purpose or purposes for which such evidence is received. See *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996). Any limiting instruction given upon receipt of such

evidence should likewise identify only those specific purposes for which the evidence was received. See *U.S. v. Merriweather*, 78 F.3d at 1077 (finding reversible error in limiting instructions which recited all permissible purposes of other crimes evidence set forth in Fed. R. Evid. 404(b), stating trial court must “‘clearly, simply, and correctly’ instruct the jury as to the specific purpose for which they may consider the evidence,” quoting *U.S. v. Johnson*, 27 F.3d 1186 (6th Cir. 1994)). See, also, NJI2d Crim. 5.3, comment (limiting instruction “‘must call the jury’s attention to the particular evidence being limited to a particular use’”).

*State v. Sanchez*, *supra*, at \_\_\_\_\_. Although this court previously entered its order regarding admissibility of the asserted 404 evidence, that order is interlocutory and has not become final. The court retains discretion to modify such order at will. Because the *Sanchez* decision will clearly apply at the trial in this case, discussion of its applicability to the prior interlocutory order becomes superfluous. The procedural directions of *Sanchez* will be followed in this case.

5. Moreover, the decision in *Sanchez* provides some guidance for trial courts on the means of accomplishing compliance with the new procedural requirement. The Supreme Court cited with approval federal case law suggesting that “it is advisable for a trial judge to insist that a party offering Rule 404(b) evidence place on the record a clear explanation of the chain of inferences leading from the evidence in question to a fact ‘that is of consequence to the determination of the action.’” *State v. Sanchez*, *supra*, at \_\_\_\_ (citing *U.S. v. Murray*, 103 F.3d 310, 316 (3d Cir. 1997)).

6. The court is not persuaded that the plaintiff has thus far directly articulated any such chain of inferences or the specific proper purpose or purposes required by *Sanchez*. Before such evidence is deemed admissible the plaintiff should be required to so state.

7. The *Sanchez* decision does not affect this court’s earlier determination that the of conduct identified in paragraphs 2, 7, and 8 of the plaintiff’s notice is not admissible. Consequently, the further procedures required by this order apply only to the conduct identified in paragraphs 1, 3, 4, 5, and 6 of the plaintiff’s notice.

**ORDER:**

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The plaintiff shall, on or before July 30, 1999, file a supplemental notice with the clerk of this court, separately stating with respect to each of the remaining paragraphs of the plaintiff’s previous

notice (paragraphs 1, 3, 4, 5, and 6) the specific purpose or purposes for which the evidence in that particular paragraph is being offered and specifically stating with respect to each such proffered purpose a clear explanation of the chain of inferences leading from the evidence in question to that specific purpose.

2. The original supplemental notice shall be filed with the court clerk, and copies served on opposing counsel and transmitted (electronically or by mail) to the trial judge at Ainsworth, Nebraska.

3. The copies served on opposing counsel and submitted to the trial judge may be accompanied by any further brief or legal memorandum that plaintiff may desire to submit therewith. Such brief or memorandum shall **not** be filed with the court clerk. However, the brief or memorandum shall not be considered for purposes of complying the requirements of *Sanchez* as set forth in paragraph 1 of this order; all identified specific purposes and the supporting chain of inferences shall be set forth in the filed supplemental notice.

4. The defendant is allowed until August 6, 1999, to submit to the trial judge and serve on opposing counsel any further brief or legal memorandum responding to the supplemental notice (and brief or memorandum, if applicable) of the plaintiff. Such brief or memorandum shall **not** be filed with the court clerk.

5. The portion of the prior interlocutory order deeming the conduct identified in paragraphs 1, 3, 4, 5, and 6 of the plaintiff's notice as admissible is vacated. The court deems such evidence inadmissible in the absence of identification of the specified purposes and logical inferences required as set forth above. Subject to further interlocutory order upon submission of the supplemental notice authorized above, the motion for admissibility of prior misconduct evidence is denied and the plaintiff is prohibited from offering such evidence at trial.

6. The filing of such supplemental notice shall be considered as a resubmission of the motion to determine admissibility for further consideration upon the evidence previously adduced, and shall be deemed as submitted on the date of filing of the supplemental notice. The court clerk is ordered to fax a copy of the filed supplemental notice to the trial judge immediately upon the filing thereof.

7. This order does not affect that portion of the prior order denying the motion in part, and precluding the plaintiff from offering evidence regarding paragraphs 2 and 7 of the notice and further

precluding the plaintiff from offering evidence regarding unspecified acts of misconduct in reliance on paragraph 8 of the notice.

Entered: July 19, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Upon filing of supplemental notice, fax a file-stamped copy to the judge as required by paragraph 6 above.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Note the decision on the trial docket as: 7/19/99 Signed "Supplemental Order" entered regarding admissibility of evidence of prior misconduct.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel, District Judge