Put to the Proof: Evidentiary Considerations in Wisconsin Hate Crime Prosecutions

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PUT TO THE PROOF: EVIDENTIARY CONSIDERATIONS IN WISCONSIN HATE CRIME PROSECUTIONS

I. INTRODUCTION

Wisconsin, like numerous other states, has enacted a hate crime statute, increasing the penalty for certain offenses if the victim was selected due to his or her membership in one or more enumerated categories. Many commentators have viewed these statutes with alarm, arguing that the statutes represent the prosecution of individuals entirely for prohibited thought or speech. The Supreme Court


addressed these concerns in *Wisconsin v. Mitchell*, holding that since such statutes remain tied to prohibited conduct, they do not chill free speech and are thus constitutional.

Even though hate crime statutes have been ruled constitutional, prosecutors rarely invoke such statutes despite a federal law requiring states to track hate crimes and a public perception that such laws are necessary. This is in part because incidents motivated by bias (or "hate crimes") comprise a tiny percentage of all crimes, but also because a prosecutor seeking a conviction under Wisconsin's hate crime statute faces a daunting challenge. In order for a violation of Wisconsin's hate crime statute to result in conviction, the prosecutor must be confident in her ability to convince a jury beyond a reasonable doubt that the defendant had an impermissible motive in selecting the victim. In the absence of a tell-tale clue, such as a spontaneous outburst by the defendant or a long history of biased acts, convincing a jury is an

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5. *Id.* at 488-89. The Court noted:

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "over-breadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement.

*Id.*


8. Of thirty-one incidents labeled hate crimes and reported in Wisconsin in 2003, sixteen were serious, or index, crimes, consisting of eight incidents of simple assault, five aggravated assaults, and one burglary. There were a total of 168,761 index crimes in 2003, so hate crimes represented 0.008%. Office of Justice Assistance, *Crime and Arrests in Wisconsin 2003*, 4, 257, available at http://oja.state.wi.us/docs_view2.asp?docid=3836 (last visited Feb. 15, 2005).

arduous task. Consequently, a prosecutor must carefully examine the evidence before deciding to charge a violation of section 939.645.

This Comment addresses the practical questions involved with hate crime prosecutions; namely, what events convince a prosecutor to charge the penalty enhancement, what evidence may be introduced, and what evidence will convince a trier of fact that the requisite intent existed. Viewed through the lens of recent prosecutions, including that of four individuals from start to finish for an incident in 2003, we can gain some insight into how those questions are answered in light of practical experience.

This discussion is broken into five sections. Section II describes the historical background of the statute, outlining the reasons for the electorate's demand for such a statute, the legislature's reaction to that pressure, and how the statute was affected by Wisconsin's recent adoption of "truth-in-sentencing." Section III outlines the constitutional validity of section 939.645 as addressed by the Wisconsin Supreme Court and the United States Supreme Court in the first prosecution under section 939.645. Section IV discusses the specific evidentiary issues involved in a hate crime prosecution, including the types of evidence generally produced, the rules governing their admissibility, and how specific facts can affect the decision to charge a violation of section 939.645 and the chances for a conviction. Section V shows how the considerations raised in Section IV affected the prosecution of four individuals involved in a 2003 hate crime, and Section VI, shows what trends can be gleaned from the real-life application of section 939.645.

II. HISTORICAL BACKGROUND OF THE STATUTE

In the mid-1980s, the Wisconsin electorate became concerned that crimes motivated by the race, sex, religion, or sexual orientation of the victim, commonly known as hate crimes, were both widespread and under-penalized.10 Specific events in Wisconsin supported this belief. One commentator described three widely discussed incidents where "because the damage caused by these acts in monetary terms was modest, the crimes were treated as minor misdemeanors worthy only of minor punishment."11 The legislature reacted to the public's perception

11. Id.
by creating section 939.645 of the Wisconsin Statutes, commonly described as the “hate crime” provision.\(^\text{12}\) The sponsor, State Representative David E Clarenbach, stated, “[T]here has been an alarming increase in crimes that seem to have been motivated by bigotry.”\(^\text{13}\) Regardless of whether there had been a great increase or merely the perception of one,\(^\text{14}\) the legislature saw it as important enough to pass the bill. Section 939.645, as enacted, increases the penalty for a crime committed when the actor “intentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.”\(^\text{15}\) Section 939.645 is one of seven sentence-enhancing provisions retained under Wisconsin’s “truth-in-sentencing” scheme enacted in 2001.\(^\text{16}\)

The legislature viewed the law as akin to other penalty enhancement provisions, comparing it to the statutory provision providing for an increased penalty where the offender attempts to conceal his or her identity or wears body armor.\(^\text{17}\) Consequently, the law provides for increased penalties for any crime in the Wisconsin Criminal Code.\(^\text{18}\)

In order for section 939.645 to apply, the actor must have selected the victim specifically “because of the actor’s belief or perception regarding” a prohibited category of people.\(^\text{19}\) This raises a clear practical question, namely, how does one prove a belief or perception? The author of the statute, Bruce Fuestel, felt that “the questions involved in trying to prove a motive of an offender” put the effectiveness of the

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\(^\text{14}\) In 2004, law reviews published 194 articles concerning hate crimes.

\(^\text{15}\) WIS. STAT. § 939.645 (1987-1988). Section 939.645 was amended in 1991 to include age, creed, physical condition, marital status, sex, political affiliation, and arrest or conviction record as prohibited categories.


\(^\text{18}\) Specifically, raising the penalty for all misdemeanors below Class A to a maximum fine of $10,000 and a one-year term in the county jail, raising any Class A misdemeanor to a felony, with a maximum fine of $10,000 and a maximum prison term of two years, and increasing the maximum fine for any felony by $5,000 and five years. WIS. STAT. § 939.645 (2001-2002).

\(^\text{19}\) WIS. STAT. § 939.645(1)(b)(2001-2002).
The statute specifically requires a special finding of fact, stating that "the court shall direct that trier of fact find a special verdict as to all of the issues specified," a requirement reinforced by the Supreme Court's decision in *Apprendi v. New Jersey*.

Unlike other mens rea crimes, a hate crime, by its nature, is seen as a societal concern because the victim is selected not because of a personal animus, but because of a categorization over which the victim has no control and consequently has no warning that he or she has been selected as a target. Hate crimes, then, are seen as particularly harmful. It was with this social policy in mind that the Code Reclassification Subcommittee of the Criminal Penalties Study Committee, tasked with reclassifying the "hundreds of felonies" then existing under Wisconsin law to comport with Wisconsin's truth-in-sentencing scheme, elected to recommend that section 939.645 remain as a penalty enhancer rather than be "reclassified as a sentencing aggravator." Despite the rarity of section 939.645 prosecutions, "the Subcommittee concluded that, although it is not charged very often, the policies underlying the provision were significant." Specifically, the hate crime enhancer was charged in sixty prosecutions in 2000, and seventy-four in 2001. It is worthy to note that the revision of the structure of the truth-in-sentencing regime provided for "enough penalty exposure to encompass the commission of crimes under the aggravating circumstances addressed by most penalty enhancement statutes."

22. 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").
25. E-Mail from Professor Thomas Hammer, Chairman of the Code Reclassification Subcommittee of the Criminal Penalties Committee to the author (October 27, 2004) [hereinafter E-mail from Thomas Hammer] (on file with the author).
26. Id.
28. E-mail from Thomas Hammer, supra note 25.
Section 939.645 was thus retained as a penalty enhancer for policy reasons despite the rarity of its use and the increase in penalty being readily encompassed within the felony reclassification scheme of "truth-in-sentencing." Again, under Wisconsin law and Apprendi, a prosecutor seeking a conviction under section 939.645 must charge the violation in the criminal complaint and prove the prohibited motive beyond a reasonable doubt, which would not be required had the enhancement been reclassified as a sentencing aggravator. At least partially because of this high standard and low effect, section 939.645 is generally the subject of plea negotiations and the charges are often dropped in return for a guilty plea.

As with other hate crime statutes, section 939.645 was eventually challenged as unconstitutional because it seemed to prohibit not only an action, but an abstract belief. The next section discusses this challenge to Wisconsin's hate crime statute.

III. WISCONSIN V. MITCHELL: THE CONSTITUTIONAL VALIDITY OF SECTION 939.645

In 1989, Todd Mitchell was among a group of black males who severely battered Gregory Reddick, a fourteen-year-old white male, and stole his shoes. The appellate court, in considering Mitchell's appeal, noted that "Reddick was severely injured; he was comatose for about four days; and his injuries might have been fatal had he not received medical treatment." Mitchell was convicted of aggravated battery, party to a crime, and "[t]he jury separately found that Mitchell intentionally selected Reddick as the battery victim because of Reddick's race." The separate finding caused the court to sentence Mitchell to a term of imprisonment two years greater than that for the aggravated battery alone.

29. See WIS. JI CRIMINAL 996 ("Selecting the person against whom a crime is committed because of Race, Religion, Etc.").
32. Burnett, supra note 3, at 390.
33. State v. Mitchell, 485 N.W.2d 807, 809 (Wis. 1992)
35. Mitchell, 485 N.W.2d at 809.
36. Id.
Central to Mitchell’s conviction were two statements he made prior to the attack. Specifically, Mitchell said, “Do you all feel hyped up to move on some white people?” and “You all want to f—k somebody up? There goes a white boy; go get him.”

The Wisconsin Supreme Court reasoned that the conviction rested on these statements, finding that the statute impermissibly restricted speech: “the fact remains that the necessity to use speech to prove ... intentional selection threatens to chill free speech. Opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state.” The court also took an expansive view of “speech,” stating that “[b]ecause the circumstantial evidence required to prove the intentional selection is limited only by the relevancy rules of the evidence code, the hate crimes statute will chill every kind of speech.”

The United States Supreme Court disagreed. Because the statute prohibits the selection of a victim rather than the speech itself, the Court concluded that hate crime statutes such as section 939.645 punish the impermissible act of committing a crime with a particular motive. A unanimous Court upheld the statute, ruling that “[t]he First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” The Court reasoned that in order to qualify a defendant for punishment under section 939.645, bigoted speech must be connected to an underlying crime, and accordingly, cannot place the actor in jeopardy unless that actor commits a crime. The Supreme Court found that even though the statute reaches a wide variety of speech, the statute does not chill speech, rejecting “the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against persons or property. This is simply too speculative . . . .”

The Supreme Court upheld Mitchell, then, on the grounds that protected speech may be introduced as evidence of a particular motive.

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37. *Id.* at 815-16.
38. *Id.* at 816.
39. *Id.*
41. *Id.* at 486.
42. *Id.* at 489.
43. *Id.*
44. *Id.*
45. *Id.* at 489; see also *Haupt v. United States*, 330 U.S. 631, 642 (1947).
As a practical matter, simple advocacy of an unpopular or odious opinion generally is not enough to convict an actor. In fact, the legislature considered limiting the evidence upon which the trier of fact may base the special verdict, originally stating that “[t]he trier of fact may not base a finding that an intentional selection under sub. (1)(b) occurred solely upon words spoken by the actor.”46 This limitation was later revised to read “the actor’s thoughts,” before being dropped entirely.47

Section 939.645 withstands constitutional scrutiny because actions normally constituting “free speech” provide proof of motive. The Supreme Court compared the connection as akin to state statutes punishing murders for “pecuniary gain” more harshly than other cases of intentional homicide.48

Accordingly, a prosecution under section 939.645, considered in light of Wisconsin v. Mitchell, may rest on the introduction of evidence to prove the actor’s motive, which presents a practical problem of relevance and admissibility. Under Wisconsin Statute 904.04, evidence of other acts is not admissible to prove acts in conformity with a character trait, such as a bias against a particular group, but does allow such acts as proof of motive.49 The Wisconsin Supreme Court, in finding that section 939.645 prohibits a crime committed with a particular motive rather than prohibiting an abstract viewpoint, not only salvaged the statute, but described the theory under which “other act” evidence is admissible, as evidence of motive.50 The next section discusses how this theory of admissibility affects the State’s decision to charge a violation of section 939.645 and what the State will attempt to introduce as evidence.

IV. EVIDENTIARY CONSIDERATIONS IN HATE CRIME PROSECUTIONS

As a practical matter, a prosecutor alleging a violation of section 939.645 will often develop a variety of sources as evidence of the

47. Id.
49. WIS. STAT. § 904.04 (2003-2004) (“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.”).
defendant’s motive in selecting a victim.  

Possible sources include "confessions or admissions by the defendant[,] . . . contemporaneous statements made in the course of committing the act, statements to third parties (if admissible), membership in and association with members of known 'hate groups.' " Other sources of evidence could include the defendant’s clothing or tattoos, possession of literature, or music reflecting a bias, or the defendant’s choice of interior décor. In order to prove the forbidden motive, the prosecutor will likely seek more evidence than a single racist statement or act, particularly if a statement consists of an inaccurate racial slur.

For example, in 2001, two Asian-American men were assaulted and beaten by assailants describing them as “niggers.” Despite the rapid arrest of the perpetrators and a clear racial motivation, the Dane County District Attorney’s Office stated “the chance of convicting the two men of a hate crime were slim” because the two offenders used the word “nigger,” a racial slur not often applied to Asians. While the language of statute 939.645 clearly contemplates this situation, providing that the penalty enhancement applies “whether or not the actor’s belief or perception was correct,” the Dane County District Attorney’s office felt that it could not prove the impermissible motive without evidence of the correct perception. The failure to prosecute this incident illustrates a practical concern imposed on 939.645 prosecutions—the difficulty of distinguishing an attack from an attack with an impermissible motive. A victim selected randomly is not necessarily the victim of a hate crime and a person selected because of personal, preexisting animus probably does not meet the standards of section 939.645.

51. Menninger, supra note 1, § 11.
52. Id.
54. Menninger, supra note 1, § 19.
56. Id.
57. Id.
59. WIS. STAT. § 939.645(3). The statue requires that the victim be selected “in whole or in part” because of a person’s race, religion, color, disability, sexual orientation, national origin, or ancestry. If the victim is selected randomly, then these categories play no part in the selection. If the victim is selected because of a preexisting animus, the prosecutor would have to prove beyond a reasonable doubt that the defendant’s animus was motivated by the victim’s race, religion, color, disability, sexual orientation, national origin, or ancestry, an
In fact, a history of hostility or a personal relationship may be enough to convince a jury or a prosecutor that a crime does not qualify as a hate crime under section 939.645. In 2001, a defendant was found guilty of disorderly conduct as a result of an incident where he drove his truck onto a neighbor’s property, then pounded on the front door and screamed “profanities such as ‘you (expletive) lesbians will go to hell.’” The jury, however, did not find that he targeted the victims due to their sexual orientation. The defendant, Dary Byczek, had had prior dealings with the victims, and the defense successfully argued that “if a heterosexual couple, a normal husband and wife, would have lived in the house, Dary’s behavior would have been the same.”

Similarly, the murder of Juana Vega, a well-known lesbian, by her ex-lover’s brother, was determined not to be a hate crime, even after extensive investigation at the behest of community activists. Simply put, the Milwaukee County District Attorney did not find enough evidence that Ms. Vega had been killed because she was a lesbian rather than because of events between her and her ex-partner.

Of course, the most convincing evidence of an impermissible motive is the defendant’s own statement. In fact, a hate crime prosecution in Wisconsin is extremely rare without the actor making a biased remark immediately prior to or during the incident. In the most notorious “hate crime” on record in Wisconsin, James Langenbach claimed that he committed two murders because voices in his head instructed him to begin a “Race War.” Few defendants are so forthcoming as to their motive. Attacks motivated by bias do not originate in a vacuum. The actors are generally aware of the strong social odium placed on attacks motivated because of a bias towards race, religion, and other protected categories. However, an actor in the heat of the moment may indulge assertion easily defeated by, for example, introducing incidents where the defendant showed no animus towards individuals belonging to the same category.


61. Ortiz, supra note 60.


63. Id.

64. State v. Langenbach, No. 1999CF000494 (Kenosha Co.) (May 17, 1999).

65. See, e.g., id. The court explained:

Mr. Langenbach, the first thing I need to talk to you about is the acts that you
in speech that falls within the ambit of the statute.  

Furthermore, the State must walk a fine line in its theory of admissibility. Under section 904.04 of the Wisconsin Statutes, which prohibits character evidence "for purposes of showing that the accused had a corresponding character trait and acted in conformity with that trait," evidence of racism may not be admissible. According to the Wisconsin Supreme Court, section 904.04 prohibits "a chain of inferences running from act to character to conduct in conformity with the character." The prohibited chain in a prosecution under section 939.645 would run, for example, "the defendant owns racist material, therefore the defendant is a racist, therefore he committed this crime because of the victim's race." The State needs to demonstrate that the "other act" evidence is probative not just of a belief, but probative that a particular act was committed because of "the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. If the State introduces evidence of racism, for example, it is not enough to demonstrate that the defendant holds racist beliefs, but the State must also show that these beliefs found expression in the selection of a victim. Indeed, demonstrating an undifferentiated racism or prejudice may be detrimental to the State's theory of admissibility. The defendant may hold all sorts of prejudices, but section 939.645 requires a finding that this particular victim was selected for an impermissible reason.

Other possible sources of evidence would be prior activity by the defendant, possession of particular literature, or tattoos. Under the committed. There are no words that are adequate to describe the repugnance and revulsion that a civilized person should feel over what you did in running down these two young boys because of the color of their skin. You are deserving of the contempt and scorn of a civilized society. It was a despicable act. It was a horrific act. It was a terrifying act, and it ought to terrify all of us that you were capable of doing that and it ought to terrify you that you were capable of doing that.

Id. See also State v. Langenbach, 2004 Wis. App. 205, ¶ 4, 688 N.W.2d 783 (unpublished opinion) (holding that despite the severity of the language, such remarks, considered in light of the totality of the record, did not constitute abuse of discretion).


67. Sullivan, 576 N.W.2d at 36. See also Menninger, supra note 1, § 11.


69. Sullivan, 576 N.W.2d at 36.

70. WIS. STAT. § 939.645.

71. Menninger, supra note 1, § 19.

72. 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE § 404.6, at 141.

73. See Dawson v. Delaware, 503 U.S. 159, 165 (1992) ("We therefore conclude that the Constitution does not erect a per se barrier to the admission of evidence concerning one's
law established in *Wisconsin v. Mitchell*, items normally protected by the First Amendment, such as tattoos, clothing, or personal possessions, may be used as evidence of particular elements of a crime;\(^74\) therefore, items used to prove the impermissible motive for the crime are properly evaluated as "other act" evidence.

"Other act" evidence in Wisconsin is governed by *State v. Sullivan*,\(^75\) which provides a three-part analysis.

First, the evidence must be offered as one of the permissible uses of character evidence, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,"\(^76\) which, in the case of a hate crime, will usually be motive, or absence of motive other than the defendant’s bias.\(^77\)

Second, the evidence must be relevant, that is, probative of a consequential issue in the case.\(^78\) The evidence must relate to at least one fact or inference that can determine the outcome of the trial, and it must make that fact or inference more or less probable.\(^79\) The proponent, that is, the party seeking to have the item admitted into evidence, "must articulate the fact or proposition that the evidence is offered to prove."\(^80\)

Finally, even if the "other act" evidence is offered for a permissible reason and makes a consequential issue or inference more likely, the trial judge must follow section 904.03 of the Wisconsin Statutes and weigh the probative value of the evidence against "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."); see also State v. Jeske, 541 N.W.2d 225, 228 (Wis. Ct. App. 1995) ("It is well established that verbal statements may be admissible as other acts evidence even when not acted upon.").

74. See *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like."); see also *Haupt v. United States*, 330 U.S. 631 (1947).


76. WIS. STAT. § 904.04(2) (2003–2004).


78. *State v. Davis*, 645 N.W.2d 913, 921 (Wis. 2002).


80. *Id.* at 38.
considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In a Wisconsin hate crime prosecution, then, the prosecution must tread carefully. It has 'the challenging task of proving a defendant’s racist or other evil intent and specific ill will towards the victim, based on their protected status," without running afoul of section 904.03’s prohibition against unfair prejudice and cumulative evidence. Mere membership in a racist or otherwise biased organization is not enough to convict a defendant, since the statute punishes deeds, not words, and abstract beliefs are protected by the First Amendment.

The vast majority of hate crime prosecutions never reach a jury, so it is difficult to state with a great deal of certainty what a jury finds convincing. The Wisconsin jury instructions for section 939.645 require a finding beyond a reasonable doubt that the victim was selected “in whole or in part” because of bias, but in the real world, prosecutors apply section 939.645 to cases in which “in part” means “in large part.” The following section discusses how this consideration affected the prosecutions of four individuals accused of committing a hate crime.

V. THE CRUZ CASE: EVIDENTIARY CONSIDERATIONSPOSED BY SECTION 939.645 IN ACTION

In August 2003, three men, Mark A. Davis, Mark W. Lentz, and Jeffrey Gerloski, urged on by Davis’ girlfriend, Kasey Bieri, assaulted Armando Cruz outside a bar in Waukesha, Wisconsin.

The prosecution argued that Bieri, who pled no contest to a racially motivated crime two days before the incident, lured Cruz outside the bar because "he was looking at her and it pissed her off." When Cruz

81. WIS. STAT. § 904.03 (2003–2004), see also Sullivan, 576 N.W.2d at 38.
82. Nearpass, supra note 3, at 570.
exited the bar, Bieri "called him a fucking wet back," and Davis then struck Cruz with a bottle, with the three men kicking him once he fell to the pavement. Despite the close proximity and rapid intervention of police officers, Cruz was beaten so severely that his injuries required seventeen stitches. Because the four selected their victim because of his race, all four individuals were subject to section 939.645. All four eventually pled guilty to crimes ranging from disorderly conduct to substantial battery, but each plea agreement included an Alford plea to section 939.645.

After the attack on Armando Cruz and the arrest of all four actors, the district attorney obtained search warrants for the homes of the defendants, seizing, among other items, "an English copy of 'The Last Will and Testament of Adolf Hitler,' Aryan race record albums, Confederate flags, 'skinhead/white power' compact discs, pamphlets with anti-Jewish propaganda and a bumper sticker declaring 'White Men Unite and Fight.'" Since the defendants had not confessed, the district attorney sought to use the seized items as "other act" evidence to demonstrate the intent required by section 939.645. The State also motioned for the admission of the t-shirt worn by one of the defendants as well as various tattoos.

The initial impetus for charging the hate crime enhancer came at the

87. Id. at 4.
89. Id.
92. "[A]n Alford plea is simply a guilty plea, with evidence in the record of guilt, typically accompanied by the defendant's protestation of innocence and his or her unequivocal desire to enter the plea." United States v. Mackins, 218 F.3d 263, 268 (3rd Cir. 2000) (citing North Carolina v. Alford, 400 U.S. 25, 38 (1970)).
93. Davis and Bieri were apprehended at the scene. Gerloski and Lentz were allowed to leave the scene but were arrested later. Criminal Complaint, supra note 86, at 5.
94. Doege, supra note 84.
95. Id.
96. Id.
prosecutor's review of the arrest. The arresting officer recognized the clothes and appearance of the suspects as indicative of people holding white supremacist beliefs. One of the suspects, Lentz, was wearing "Aryan Wear" boots, which featured a tread made from the gothic SS used by the Schutzstaffel and swastikas. Bieri used a racial slur, "wetback," in addressing Cruz immediately prior to the assault, and she had a prior record of a racially motivated assault. However, none of the four defendants made a statement to the police that indicated that they selected Cruz because of his race. In the absence of such a statement, the officers' observations and the statements they collected from witnesses and the victim provided the first indication that a hate crime had occurred. There was little doubt of guilt; Davis was caught literally red-handed, as his arms and hands were covered with Cruz' blood. Moreover, the police actually witnessed the battery.

The prosecutor decided, in reviewing the arrest report, that the incident constituted a "hate crime," fitting neatly into the classification developed when the legislature enacted the statute. Despite the usual concern about proving the motive beyond a reasonable doubt, "the hate crime enhancer was never on the table," and all four defendants ultimately pleaded guilty to charges that included the enhancement.

As the prosecution developed, it was clear that the chief issues were the evidentiary considerations involved in proving a violation of section 939.645; the two less culpable defendants, Gerloski and Lentz, were successful in severing their cases, and, in a move unusual for a low level felony prosecution, the State filed a motion in limine to clarify the

97. Interview with Susan Opper, Waukesha County Assistant District Attorney, in Waukesha, Wis. (Nov. 5, 2004).
98. Photograph from Case File, State v. Lentz, No. 2003CF000485 (Waukesha Co.).
100. Interview with Susan Opper, supra note 97.
101. Id.
102. Photograph from Case File, State v. Lentz, No. 2003CF000485 (Waukesha Co.).
103. Interview with Susan Opper, supra note 97.
105. From the facts established by the initial investigation, it became apparent that Gerloski and Lentz did not strike the initial blow, nor did they confront Cruz directly. At the preliminary hearing, Cruz was unable to identify Lentz or Gerloski as striking him. Preliminary Hearing, State v. Lentz, No. 2003CF000485 (Waukesha Co.); E-Mail from M. Elizabeth Weathers, Attorney for Mark Lentz, Waukesha County Public Defender's Office, to the author (Nov. 15, 2004) (on file with author).
admissibility of the evidence obtained from the search warrants.\textsuperscript{106}

The statute does not prohibit the selection of a particular victim. Rather, it prohibits the selection of a victim because of an intent to harm individuals of a class or because that individual belonged to a class. In terms of the attack on Cruz, Bieri stated that she did not like the way Cruz was "looking at her."\textsuperscript{107} For purposes of section \textsuperscript{939.645}, it is vital that Bieri found it offensive that a man of a particular race was looking at her and the four defendants then attacked Cruz because of it. Absent a finding that it was his race that was the deciding factor, the defendants would not have violated section \textsuperscript{939.645}.

It was the absence of prior dealings that convinced the assistant district attorney that Cruz had been the victim of a hate crime.\textsuperscript{108} Witness statements to the effect that the four actors had stated, "I want to kill somebody tonight" prior to the attack on Cruz, coupled with their use of racist language in that context, reinforced this conclusion.\textsuperscript{109}

Both Lentz and Gerloski gave statements to police in which they denied that Cruz was attacked because he was Hispanic.\textsuperscript{110} Lentz admitted that he, Bieri, and Davis believed that "blacks and Hispanics belong with their own kind," stating that they were friends because they shared this belief.\textsuperscript{111}

The State was thus relying on extrinsic evidence to prove the motive in selecting Cruz as a victim. The State accumulated a variety of evidence from several sources: the tattoos on bodies of the actors, the actors' possessions, their clothing, and the contents of their vehicles.\textsuperscript{112} The State also sought to try the four defendants together, enabling them to combine the evidence gathered from Lentz's clothing, the items in his car, and the items in Davis' and Bieri's apartment.\textsuperscript{113}

The defendants moved for severance, believing that the evidence was cumulatively damning, but considered separately, raised a reasonable doubt regarding whether Cruz had been selected because of his race.\textsuperscript{114}

Once severed, each defendant filed motions opposing the State's

\textsuperscript{106} Interview with Susan Opper, \textit{supra note 97}.
\textsuperscript{107} Criminal Complaint, \textit{supra note 86}, at 6.
\textsuperscript{108} Interview with Susan Opper, \textit{supra note 97}.
\textsuperscript{109} Criminal Complaint, \textit{supra note 86}, at 5.
\textsuperscript{110} \textit{Id.} at 6, 7.
\textsuperscript{111} \textit{Id.} at 6.
\textsuperscript{112} Interview with Susan Opper, \textit{supra note 97}.
\textsuperscript{113} Criminal Complaint, \textit{supra note 87}, at 1-2.
\textsuperscript{114} E-mail from M. Elizabeth Weathers, \textit{supra note 105}. 
motion *in limine*.

Drawing heavily on *State v. Sullivan*, the defendants argued the following: (1) that items seized from Bieri's and Davis' shared apartment could not be attributed to a particular defendant; (2) that items of personal property, such as Lentz's clothing and the CD and DVD collection, and the literature obtained from Davis' and Bieri's shared residence, were not properly considered to be acts, and (3) that even if the evidence met the first and second prongs of the *Sullivan* test, it failed the third prong, being so prejudicial that it should be excluded under section 904.03 of the Wisconsin Statutes. Furthermore, Davis and Bieri argued that none of the literature or other items of propaganda seized at their apartment showed an anti-Hispanic animus.

These arguments were partially successful. Certain items of evidence, for example, a Confederate flag and a Nazi flag, were excluded as being either irrelevant or non-probative.

The defendants were also successful in introducing items of evidence that would seem to contradict the State's claim of racial animus. Gerloski introduced numerous photographs showing him with friends


120. It is worthy of note that what is commonly described as "the Confederate Flag," and the item of evidence seized in this case is not, properly speaking, "the" Confederate Flag. That flag, that of a blue St. Andrew's cross on a red, rectangular field, was not the Confederate National Flag, but was the battle flag of the Army of Tennessee and adopted by the Ku Klux Klan by its founder, Nathan Bedford Forrest, who had served with that army. The equivalent would be a U.S. Army Divisional Flag.

121. E-Mail from M. Elizabeth Weathers, *supra* note 105; Interview with Susan Oppenheimer, *supra* note 97. Mere possession of racially charged material, of course, is not evidence of racism. An examination of the author's library, for example, would reveal several diaries of prominent Nazis and a great number of works describing the rise and fall of the Third Reich and the Holocaust, including several by David Irving, a historian who denies the existence of the Holocaust.
and relatives of various colors and ethnicity. A Hispanic cousin even wrote a letter to the court on Gerloski's behalf. Lentz introduced a variety of photographs showing his entire DVD collection as well as his collection of books, thus undercutting the impact of the State's photographs implying that Lentz had focused his choice of entertainment on racial issues. After the court's ruling on the motion in limine and the severance of the prosecutions, it appeared that the evidence of bias was strongest against Bieri. She had committed a previous assault that appeared to be motivated by her racist beliefs, and she objected to the way Cruz was looking at her. Lentz's statement to police also indicated that Bieri pointed out Cruz. He also stated that Davis told Bieri to lead Cruz outside the bar and that Davis had taken the lead in battering the victim.

Once the cases were severed and the evidence against each defendant was considered separately, what appeared to be a concerted race-based attack by a group splintered into what could plausibly be described as a drunken assault because of an insult to Bieri. As a deliberate tactical maneuver, Lentz and Gerloski successfully distanced themselves from the two more culpable defendants, and the only evidence connecting a defendant's bias with the attack was Bieri's "fucking wetback" remark.

Since Bieri selected Cruz and Davis struck him, Lentz and Gerloski could share in liability under section 939.645 if the battery was the result of concerted action, or under a theory of imputed knowledge, that they knew Bieri and Davis had selected Cruz because of his race and intended to harm him. Lentz did state that he, Davis, and Bieri all

122. Defendant's photographs, Case File, State v. Gerloski, No. 2003CF000982 (Waukesha Co.).
123. See Case File, State v. Gerloski, No. 2003CF000982 (Waukesha Co.).
124. Court File, State v. Lentz, No. 2003CF000985 (Waukesha Co.); E-mail from M. Elizabeth Weathers, supra note 105.
125. See State v. Bieri II, No. 2003CM002695 (Dane Co.). Lentz had been present on that occasion as well but had interceded to calm the situation. When the police arrived, the victim of that battery described Lentz as being of great assistance. E-mail from M. Elizabeth Weathers, supra note 105.
127. Id.
128. Id.
130. It is unclear whether party liability for a hate crime can be based on imputed knowledge—it is extremely unlikely, given that the statute is written with a strong mens rea component.
"think alike." Lentz was present at the earlier incident, and all four initially left the bar together and stood together in the alley until Bieri returned to the bar and re-exited, followed by Cruz.

Fundamentally, the State's case for a section 939.645 violation rested on the linking of four factors: (1) the defendant's prior statements predicting violence that evening; (2) the items seized from the defendants showing racial bias; (3) Bieri's racist remark; and (4) the lack of any other contact between the victim and the defendants. Taken together, these items form a pattern. Considered separately, it is clear why one defense attorney "smelled reasonable doubt all over this case."

Why, then, did the defendants plead guilty to a range of charges from substantial battery (a class I felony) to disorderly conduct (a class B misdemeanor)? Quite simply, it was because they were guilty of the underlying offense—battering Cruz. Mark Rosen, Davis' defense attorney, described his client's options as gambling a harsher sentence for the underlying offense against a finding that no hate crime occurred. As implied by the Alford pleas, the defendants preferred the deals offered by the State to their chances at trial. Nonetheless, the defense and the prosecution reached different conclusions regarding the likelihood of a jury reaching the conclusion that the defendants committed a hate crime in battering Cruz. In the following section, I compare these conclusions with those reached in other hate crime prosecutions.

VI. CONCLUSION

In a section 939.645 prosecution, as noted above, there are three likely sources of evidence to prove the impermissible motive: first, and most important, statements by the defendant; second, prior acts by the defendant; and third, the defendant's possessions. Where the defendant has not been forthcoming enough to provide a clear declaration of an impermissible motive, the State is forced to address the twin horns of a dilemma. The greater the defendant's likely motive for committing a

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132. Id. at 6-7.
133. Id. at 5.
134. Bieri's Motion, supra note 115, at 1.
135. Interview with Susan Opper, supra note 97.
136. E-mail from M. Elizabeth Weathers, supra note 105.
137. Interview with Mark Rosen, supra note 129.
hate crime, the closer the State comes to presenting pure character evidence, prohibited by section 904.04 of the Wisconsin Statutes. Moreover, an incident between individuals with a past history makes it more likely that the crime was committed for the purpose of harming a particular victim rather than because of the actor's belief regarding the victim.138

In many cases, the impermissible motive might well be obvious. It is difficult to conceive of an act of vandalism using racist, religiously prejudiced, or sexually prejudiced terms that would not be targeted due to a belief about the victim's race, religion, or sexual orientation. But, while such incidents were a major factor in the adoption of section 939.645,139 they are not the chief source of such prosecutions. Most section 939.645 prosecutions, at least those which receive press attention, are those concerning violence or the threat of violence, against a particular victim.140

A prosecution under section 939.645 generally has one chief, overriding characteristic: a public statement directly showing bias by at least one defendant.141 This may be a statement made in police custody,142 a statement made immediately prior to the crime to other actors143 or to the victim,144 or inherent in the nature of the crime charged, as in the case of an abusive telephone call.145 Incidents where the victim is subjected to abuse, even abuse of a clearly biased nature, may not be charged as a hate crime unless the "correct" slur is used.146 For example, without the racial slur used by Bieri, it is unlikely that the attack on Cruz would have been prosecuted as a hate crime.147 Absent such a statement, prosecutors generally will not charge the hate crime

138. See Pabst, supra note 62.
139. See Rofes, supra note 10, at 862.
140. Oritz, supra note 60 (quoting Howard Eisenberg, former dean of the Marquette University Law School).
141. Criminal Complaint, supra note 86, at 4-5; Interview with Susan Opper, supra note 97.
142. "Prosecutors charged Anschutz with a hate crime because an eyewitness testified he saw the first encounter between the two on Bagnall Road and heard Anschutz yelling a racial slur." Andy Neleson, Egg Harbor Man Gets 7 Years for Hate Crime, GREEN BAY PRESS-GAZETTE, Aug. 9, 2003, at 1B. See State v. Langenbach, 688 N.W.2d 783, 2004 WL 2100013 (Wis. Ct. App.).
144. Criminal Complaint, supra note 87, at 4.
146. Kalk, supra note 55.
147. Interview with Susan Opper, supra note 98.
enhancement.\textsuperscript{148}

Once alerted by the actor's statement, prosecutors will seek to introduce evidence supporting the actor's motive, or absence of other motives, but such evidence is far less important than the biased words themselves, as it is subject to attack on grounds of relevance, undue prejudice, and impermissible character evidence.\textsuperscript{149}

Even if the biased statement is made, the jury may not be convinced. While the jury instruction for section 939.645 emphasizes that the selection of victim must be made "in whole or in part" because of the religion, color, disability, sexual orientation, national origin or ancestry of the victim,\textsuperscript{150} it appears that a jury is disinclined to grant the State a great deal of leeway concerning "in part."

For example, in \textit{State v. Byczek},\textsuperscript{151} though the jury found Byczek guilty of the underlying crime, the jury did not believe that Byczek had berated his neighbors "in part" because of their sexual orientation. Also, since the prosecutor in the \textit{Cruz} case found the absence of other motives for the attack on Cruz compelling and the defense attorneys felt compelled to develop alternate theories of motive, one can conclude that the absence of other motives, more than the strength of the evidence supporting the impermissible motive, is likely the deciding factor. In effect, the jury generally requires exactly what the drafters contemplated—compelling proof of the actor's motive. As the drafters of section 939.645 envisioned,\textsuperscript{152} this is a difficult hill to climb.

It seems, then, that the statue does in fact regulate speech, as the Wisconsin Supreme Court believed.\textsuperscript{153} However, a second characteristic of hate crime prosecutions is that there is often no doubt as to the identity of the actor.\textsuperscript{154} The vast majority of hate crime prosecutions involve a defendant arrested almost immediately after the incident.


\textsuperscript{149} See \textit{7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE § 404.5}, at 136.

\textsuperscript{150} WIS. JJ CRIMINAL 996.

\textsuperscript{151} No. 2000CM000176 (Green Co.) (June 6, 2000).


\textsuperscript{153} State v. Mitchell, 485 N.W.2d 807, 816 (Wis. 1992).

close connection between the biased remark and the criminal act generally required for the prosecution to charge a violation of section 939.645, furthermore, underlines the point raised by the Supreme Court that the speech must be attached to a criminal act in order to be evidence of criminal intent.\textsuperscript{155}

This practical requirement for a close relation between biased speech and a criminal act makes sense in light of the fact that most hate crimes are committed on the spur of the moment, where hostility flashes into action.\textsuperscript{156} Most people are inclined to speak first and act second, and hate crimes are no exception. Jurors may well be swayed by very human motives in that they want to believe people do not act randomly.\textsuperscript{157} Defendants charged with a hate crime invariably seek to break the connection between their speech and the incident.\textsuperscript{158}

It may seem that these real-life considerations are obvious and axiomatic. Yet, hate crime prosecutions, with their heightened mens rea component, raise the challenge of trying to peer inside the actor’s motivation and experience. A mind is not easily divided, and it may well be that the actor does not know exactly why he or she selected the victim. Hate crime prosecutions are thus rife with reasonable doubt, and a prosecutor must first overcome his or her own doubts. Because the hurdle set by section 939.645 is so high, the prosecutor generally requires a clear, unequivocal indication of bias that an actor’s own statement provides. The jury’s predilection for finding reasonable doubt may also be due to a desire to believe that we are not a society where biased individuals roam the landscape.

In light of the practical application of section 939.645, it appears that the furor over the hate crime penalty enhancer is misplaced. The statute does what it was designed to do: punish instances where the victim is not merely a member of a protected class but is actively made the target of hostility because of his or her membership.

\textbf{Evan M. Read}


\textsuperscript{156} See The American Psychological Association, supra note 24. See also Office of Justice Assistance, supra note 8, at 237-39.

\textsuperscript{157} Obviously, the question of how a jury reaches a particular verdict is beyond the scope of this comment. However, the “story” theory suggests that jurors are swayed by narratives to which they can relate. Most people would feel a closer kinship with a jealous boyfriend or an irate neighbor than a bigot. See Reid Hastie & Nancy Pennington, The Story Model for Juror Decision Making, in INSIDE THE JUROR 193 (Reid Hastie ed., 1993).

\textsuperscript{158} Neleson, supra note 142. The defendant did not deny making a racist remark, but denied that it was addressed to the victim. Id. The jury did not believe him. Id.