STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP648-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTON R. DORSEY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN THE EAU CLAIRE COUNTY CIRCUIT COURT,
THE HONORABLE PAUL J. LENZ PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

Cases

Page

Page

Page

Statutes

Other Authorities

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication. While this case will likely be the first case to address the newly enacted Wis. Stat. § 904.04(2)(b)1 (2013-14), this case presents a straightforward application for the greater latitude rule to the consideration of other acts evidence.

SUPPLEMENTAL STATEMENT OF THE CASE

Anton R. Dorsey, the defendant-appellant, was charged with one count of strangulation and suffocation, one count of misdemeanor battery, one count of disorderly conduct, and one count of aggravated battery (1:1-2). Dorsey was charged as a repeat offender on all counts and the counts of disorderly conduct and aggravated battery included the domestic abuse surcharge (1:1-2). After a jury trial, Dorsey was acquitted of the charge of strangulation and suffocation, but found guilty on all other counts (15:1-4).

All charges concerned Dorsey's actions against C.B., who was Dorsey's girlfriend at the time (1:3). The charge of strangulation and suffocation arose from Dorsey's actions in October of 2013, while Dorsey and C.B. were dating but not living together (1:1-3). Dorsey met C.B. and her friends out at a bar in downtown Eau Claire (34:76). Someone came into the bar that Dorsey did not like, so he told C.B. that he was going to leave and wait in the car for C.B. (34:77-78). C.B. told Dorsey that he did not need to wait and that he could just go home (34:78). Dorsey did not leave the bar at that time (34:78).

Later that evening, Dorsey drove C.B. and C.B.'s friends to their homes (34:78). After dropping off C.B.'s friends, C.B. and Dorsey stopped at a gas station (34:78). At that time, Dorsey became upset with C.B. about what had occurred at the bar (34:79). Dorsey accused C.B. of not trusting him and not thinking well of him (34:79). During the argument, Dorsey began to drive towards C.B.'s home (34:79). C.B. told Dorsey that she was sick of arguing and she was "done" with their unhealthy relationship (34:80). Dorsey then pulled the car over to the side of the road, locked the car doors, pushed C.B.'s head against the window, and accused C.B. of seeing someone else (34:80).

C.B. was able to get out of the car and began walking towards her home (34:80). Dorsey followed and when he reached C.B., he grabbed her by the neck (34:80-81). The next thing C.B. remembered was Dorsey pulling C.B. off the ground and asking her why she was doing this to him (34:81). C.B. took Dorsey's question to mean that Dorsey was upset with the situation because Dorsey was still on

"papers" and he did not want to get in trouble (34:81). Dorsey then apologized profusely and followed C.B. home (34:82).

The charge of misdemeanor battery arose from Dorsey's actions in December of 2013 or January of 2014 (1:1-2; 34:84-85). Dorsey was at C.B.'s home when he became upset (34:85). C.B. was on her bed, facing away from Dorsey because she did not want to talk to him (34:85). Dorsey insisted on discussing the issue, turned C.B. around and "flipped" his finger at her lip, causing her to bleed (34:85). He then threw a Kleenex box at C.B. and asked her why she lies to him all the time (34:85). Dorsey then grabbed C.B. by the arm and the waist to force C.B. to make eye contact with him, at which point he spat in her face (34:85-86). When C.B. tried to turn away, Dorsey hit her with an open hand on the side of her head (34:86). C.B. claimed that Dorsey would hit her behind her hairline so that he would not leave a mark (34:87). Dorsey did not want C.B.'s children to know that he abused her (34:87).[1]

Dorsey began living with C.B. in February of 2014 (34:88-89). The charges of disorderly conduct and aggravated battery arose from Dorsey's actions in March of 2014 (1:1-2). Dorsey and C.B. had planned to go out for a drink when Dorsey began to question why C.B. was talking to her husband, from whom she was separated (34:90). While still in the car, Dorsey demanded to see C.B.'s phone and began to read her text messages (34:90). He discovered some messages between C.B. and a male friend and accused C.B. of sleeping with that male friend (34:90). Out of fear, C.B. got out of the car and tried to get the attention of a person in an office located near the bar (34:91). Dorsey followed her and pushed her against the side of the building (34:91). At that time, some people walked by, and Dorsey and C.B. went back to the car to talk briefly (34:91). Dorsey stayed at the bar and C.B. returned home (34:91-92).

When Dorsey returned home that night, there was no discussion of what occurred (34:92). The next morning, C.B. awoke

[1] C.B.'s youngest son and Dorsey had a good relationship. Dorsey would often assist him with his football training (34:77).

to find Dorsey approximately four inches from her face (34:92). Dorsey was upset with C.B., but C.B. attempted to ignore Dorsey and get out of the house as quickly as possible (34:92). C.B. knew that Dorsey would not hurt her while her two sons were still in the home (34:92). C.B. was not able to leave the home before her sons left for school, and after her sons had left the home, Dorsey hit C.B. in the head with a fist (34:92-93). When C.B. tried to get away, Dorsey pulled her back to him by her hair and hit C.B. in the head again, this time with an open hand (34:93). The blows to the head caused ringing in C.B.'s ear, gave her a headache, and made her feel sick to her stomach (34:93).

Dorsey again accused C.B. of seeing someone else, asked why she kept lying to him, and hit her again (34:93). The conversation went back and forth for a while until C.B. was able to convince Dorsey that she had to call into work before someone came looking for her (34:93-94). Dorsey had C.B.'s cell phone and threw it at C.B.'s chest (34:94). This resulted in a bruise to C.B.'s chest (34:94). C.B. grabbed the phone and ran out of the house (34:95). She was able to drive away and call her friend Lori to tell her what happened (34:95).

Before trial, the State moved the court to admit evidence that Dorsey committed acts of domestic violence against his previous girlfriend, R.K. (9).[2] In 2011, Dorsey was convicted of domestic battery, with two counts of domestic false imprisonment and disorderly conduct dismissed, but read-in (9:1). The State attached the criminal complaint against Dorsey to its motion to establish what R.K. would testify to at trial (9:6-10).

According to the complaint, in June of 2011, R.K. was pregnant with Dorsey's child (9:9). She had a discussion with Dorsey about an acquaintance who was not sure who fathered the acquaintance's baby (9:9). R.K. was sure Dorsey was the father of her

[2] There was also potential other acts evidence concerning a third woman. The State, however, did not seek admittance of that evidence because it did not believe the actions were similar to the charged conduct (33:11).

baby, but did not want Dorsey to disclaim his child one day if Dorsey became angry with R.K. (9:9). R.K. asked Dorsey to take a paternity test so there would be no question that Dorsey was the father (9:9). Dorsey became upset and accused R.K. of being unfaithful (9:9). Dorsey left, but later that night R.K. picked up Dorsey after he got into some trouble (9:9). At that time, Dorsey spat on R.K. (9:9). When R.K. and Dorsey reached their home, the argument continued and Dorsey dragged R.K. down the stairs and out of the home (9:10). This resulted in abdomen trauma, for which she sought medical treatment (9:10).

In October of 2011, R.K. was on the phone with a doctor or a nurse regarding R.K.'s and Dorsey's infant daughter (9:9). Dorsey became upset with R.K. because R.K. did not discuss the issue with Dorsey first (9:9). Dorsey struck R.K. with an open hand, causing her to fall down, and resulting in a black eye and a cut lip (9:9). Later that same month, Dorsey became upset with R.K. because their baby kicked off her blankets during the night (9:9). Dorsey accused R.K. for not wrapping the baby tight enough and threatened to kill R.K. (9:9). He said no one would care if R.K. died and he would go on with his life like nothing happened (9:9).

In November of 2011, R.K. and Dorsey got into an argument because Dorsey felt that R.K. was not respecting him (9:8). Dorsey told R.K. to leave, and as she was leaving, Dorsey threw a baby's bottle and a shoe at R.K. (9:8). He then got up and pulled R.K. back by her hair, locked the door to the home, and hit R.K. in the head with a shoe, pushed her, and kicked her as she fell to the floor (9:8-9).

The State sought to admit the other acts evidence concerning the June and November assaults (9:1). The State wished to admit the evidence to establish Dorsey's "intent and motive to cause bodily harm to his victim and to control her within the context of a domestic relationship" (9:2). The State believed the other acts evidence was relevant because the acts of domestic violence against R.K. were similar to the charged acts in this case and the evidence related to Dorsey's intent and motive to harm C.B. (9:2-3).

Regarding the similarity of the acts, the State pointed out that all acts occurred in or near the home of the victims and when Dorsey

did not believe he was being properly respected (9:3). The acts were also similar in that Dorsey restricted movement of his victims (9:3). The State then submitted that any undue prejudice could be mitigated through the use of a cautionary instruction (9:4-5).

During the hearing on the State's motion, the defense argued that the other acts evidence was not relevant because Dorsey was denying all of C.B.'s accusations (33:3-4, 6-7). The defense argued that the State was attempting to admit the evidence simply to bolster the credibility of C.B. (33:4).

The State renewed its argument that the other acts evidence established Dorsey's motive to control C.B. and argued that motive is always relevant (33:7). The State then pointed to additional similarities between the other acts and the charged conduct. In both cases, Dorsey threw an object at his victims and demanded answers from the victims as to why the victims were not properly respecting Dorsey (33:8-9). The State argued that the other acts evidence also established why C.B. did not report the incidents when the incidents occurred (33:8). Dorsey was on probation for the acts committed against R.K., and C.B. did not want to get Dorsey in trouble (33:8).

The court found that Dorsey's probation would be relevant if the defense was to make an issue of why C.B. did not report that Dorsey abused her until after the March incident (33:9). The court then concluded that the greater latitude rule applied to this case and the other acts evidence was probative to Dorsey's motive to control C.B. (33:11-12). While the acts occurred approximately two years apart, the gap in time could be attributed to the fact that Dorsey was on probation for the previous assaults (33:12). The court concluded that the acts were similar and that, with the use of a cautionary instruction, the probative value of the other acts evidence would outweigh any prejudice (33:12). Dorsey challenges the court's conclusion.

ARGUMENT

Dorsey has failed to show that the circuit court erroneously exercised its discretion in admitting other acts evidence. While the court's reasoning was admittedly short, the court actively

participated during the other acts hearing and the totality of the record demonstrates that the court applied the relevant facts to the proper legal standards.

The circuit court properly applied the greater latitude rule to the *Sullivan*[3] factors before concluding that the other acts evidence could be admitted. The court's use of the greater latitude rule was proper because the Legislature expanded the greater latitude rule to apply to domestic abuse crimes. In employing the greater latitude rule, the court examined the *Sullivan* factors and concluded that the State was seeking to admit the other acts evidence for a proper purpose, that the other acts evidence was relevant, and that the use of other acts evidence would not result in unfair prejudice. Dorsey does not allege that the court improperly applied the relevant legal standards, and in reality, he is simply asking this Court to decide the issue differently. Therefore, this Court should affirm the judgment of conviction.

I. The court properly applied the greater latitude rule in considering the State's motion to admit other acts evidence.

In April 2014, the Legislature codified and expanded the greater latitude rule in Wis. Stat. § 904.04(2)(b)1. The greater latitude rule now applies to many sensitive crimes, not just sexual assaults. Section 904.04(2)(b)1 reads:

> In a criminal proceeding alleging a violation of s. 940.302 (2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615 (1) (b), or of domestic abuse, as defined in s. 968.075 (1) (a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

[3] *State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

The greater latitude rule was expanded to apply to crimes involving human trafficking, contrary to Wis. Stat. § 940.302(2), all crimes against children as defined in Wis. Stat. ch. 948, all serious sex offenses as defined in Wis. Stat. § 939.615(1)(b), and domestic abuse crimes as defined in Wis. Stat. § 968.075(1)(a) or domestic abuse crimes subject to the domestic abuse surcharge under Wis. Stat. § 973.055.

Dorsey asserts that the greater latitude rule *may* apply to the case under Wis. Stat. § 904.04(2)(b)1 (Dorsey's Br. at 22). The greater latitude rule *does* apply. Unless otherwise specified, the effective date of an act is the day after publication. Wis. Stat. § 991.11. The publication date of 2013 Wisconsin Act 362, which contained the newly created § 904.04(2)(b)1, was April 24, 2014. Therefore, the laws contained therein became effective on April 25, 2014. The State moved to admit other acts evidence in August of 2014 and that motion was heard on August 26, 2014 (9; 33). Therefore, Wis. Stat. § 904.04(2)(b)1 applied to the case.

Further, Wis. Stat. § 968.075(1)(a) defines domestic abuse, in part, as an adult person intentionally inflicting physical pain or injury, or inflicting the fear of imminent pain or injury against an adult with whom the person resides. Wis. Stat. § 968.075(1)(a)1 and 4. The charges of disorderly conduct and aggravated battery resulted from actions that occurred in March of 2014, when Dorsey was living with C.B. (34:88-89). Dorsey's actions resulted in physical pain and injury to C.B. (34:92-94). And those charges were subject to the domestic abuse surcharge under Wis. Stat. § 973.055 (1:1-2). Section 904.04(2)(b)1 was in effect at that time and because Dorsey was charged with domestic abuse crimes, the court properly applied the greater latitude rule.[4]

[4] For the sake of completeness, the State notes that there is no *ex post facto* concerns with the application of the greater latitude rule in this case. While Dorsey committed his crimes before the rule was codified and expanded, the new law does not affect the type of evidence necessary to convict Dorsey of the crimes committed. Rather Wis. Stat. § 904.04(2)(b)1 modifies the test for admissibility. Changes to evidentiary rules that only

II. The greater latitude rule applied to the consideration of other acts of domestic abuse is the same rule that has been in existence since 1893.

The greater latitude rule has been a part of Wisconsin jurisprudence since 1893. *See Proper v. State*, 85 Wis. 615, 55 N.W. 1035 (1893) ("A greater latitude of proof as to other like occurrences is allowed in cases of sexual crimes."). The rule affects the *Sullivan* analysis and allows courts more latitude in determining whether other acts evidence meets the tests for admission. *See State v. Marinez*, 2011 WI 12, ¶ 20, 331 Wis. 2d 568, 797 N.W.2d 399; *State v. Davidson*, 2000 WI 91, ¶¶ 44, 51, 236 Wis. 2d 537, 613 N.W.2d 606. Until recently, the greater latitude rule was used almost exclusively in cases concerning sexual offenses against children. *See, e.g., Davidson*, 236 Wis. 2d 537, ¶ 51. And the use of the rule, its bounds, and its application were well settled in this state. *See generally, Hendrickson v. State*, 61 Wis. 2d 275, 212 N.W.2d 481 (1973) (collecting cases); *Day v. State*, 92 Wis. 2d 392, 284 N.W.2d 666 (1979); *State v. Fishnick*, 127 Wis. 2d 247, 378 N.W.2d 272 (1985); *State v. Friedrich*, 135 Wis. 2d 1, 398 N.W.2d 763 (1987); *State v. Plymesser*, 172 Wis. 2d 583, 493 N.W.2d 367 (1992); *State v. Hammer*, 2000 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629; *State v. Veach*, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447; *State v. Hunt*, 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771; *State v. Hurley*, 2015 WI 35, 361 Wis. 2d 529, 861 N.W.2d 174, *reconsideration denied*, 2015 WI 78, 865 N.W.2d 505.

When the Legislature codified the greater latitude rule, it broadened the use of the rule, but did not otherwise change how the rule is applied. Contrary to Dorsey's assertion, it is clear what the Legislature intended when it created Wis. Stat. § 904.04(2)(b)1. The Legislative Reference Bureau's drafting record numbered 3538 part

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concern the admissibility of evidence do not implicate the *ex post facto* clause. *See Carmell v. Texas,* 529 U.S. 513, 533 n.23 (2000) (Rules of evidence "simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption[,]" and therefore, those types of rules do not implicate the *ex post facto* clause.).

one of two, contains an email from Mark Rinehart, which explains that Wis. Stat. § 904.04(2)(b)1 was drafted to highlight the similarity with the case law developing the greater latitude rule (R-Ap. 135).[5] The Legislature did not intend to create different rules of latitude for the different crimes enumerated in Wis. Stat. § 904.04(2)(b)1. Rather the Legislature intended that the greater latitude rule, the one that has been in use for more than 120 years, be used by the courts when evaluating whether other acts evidence should be admitted in cases alleging human trafficking, offenses against children, serious sex offenses, and crimes of domestic abuse.

The expansion of the rule incorporates crimes that, like sexual assault, are secretive offenses, grounded in unique relationships between the victim and perpetrator, and resulting in shame and embarrassment to the victim. *See, e.g., People v. Jennings*, 81 Cal. App. 4th 1301, 1313 (2000) (comparing crimes of domestic abuse with sexual assault). Because these crimes share similar traits and because the greater latitude rule is only a rule of latitude, there was and is no need to create different rules for the different types of crimes enumerated in the statute. Section 904.04(2)(b)1 simply expanded the use of the greater latitude rule and clarified that the rule is applied to the evaluation of similar acts committed by the defendant, regardless of whether the victim of the similar act is the same victim of the crime alleged. Wis. Stat. § 904.04(2)(b)1. The rule itself was not changed.

III. The circuit court, applying the greater latitude rule, properly admitted the testimony of R.K. as relevant other acts evidence.

A. The standard of review and relevant legal principles.

The admission or rejection of evidence is within the circuit court's discretion. *State v. Alsteen*, 108 Wis. 2d 723, 727, 324 N.W.2d

[5] This drafting record can be found by going to docs.legis.wisconsin.gov, and following this path: "Drafting Files," "2013-14 Drafting Files," "Wisconsin Acts," "2013 Act 362 (AB620)," "(#02) AB620," "13-3538df_pt01of02" (last accessed August 14, 2015).

426 (1982). This court will uphold the circuit court's exercise of discretion in admitting other acts evidence so long as the relevant facts were applied to the proper legal standards and the circuit court reached a conclusion that a reasonable judge could reach. *State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

Other acts evidence may be used in the prosecution of any criminal case so long as the evidence is not used to show that the person acted in conformity with character evidence and: (1) the evidence is offered for an acceptable purpose; (2) the evidence is relevant; and (3) the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. *Sullivan*, 216 Wis. 2d at 772-73; Wis. Stat. § 904.04(2)(a).[6]

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[6] Dorsey asserts that Wis. Stat. § 904.04(2) is generally a rule of exclusion (Dorsey's Br. at 16). That characterization of Wis. Stat. § 904.04(2) can first be found in *State v. Rutchik*, 116 Wis. 2d 61, 67-68, 341 N.W.2d 639 (1984). Over the years, that statement caused some confusion and in 1993, the Wisconsin Supreme Court clarified that while the statement in *Rutchik* was supported by the language of the statute, there was no practical effect in characterizing Wis. Stat. § 904.04(2) as a rule of exclusion. *State v. Speer*, 176 Wis. 2d 1101, 1114-15, 501 N.W.2d 429 (1993). The Court went on to explain that Wis. Stat. § 904.04(2) actually favors admissibility, mandating exclusion *only if* the evidence is admitted to show propensity. *Id.* at 1115.

When codifying the greater latitude rule, the Legislature also made slight modifications to Wis. Stat. § 904.04(2). One of those modifications was the addition of the title of "General admissibility" to Wis. Stat. § 904.04(2)(a). Significantly, that title was modified from the originally suggested title of "General inadmissibility" after it was explained that the title of "General inadmissibility" was not a correct statement of the law. *See* Legislative Reference Bureau's drafting record numbered 3538 part two of two (R-Ap. 160-61) (This drafting record can be found by going to docs.legis.wisconsin.gov, and following this path: "Drafting Files," "2013-14 Drafting Files," "Wisconsin Acts," "2013 Act 362 (AB620)," "(#02) AB620," "13-3538df_pt02of02" (last accessed August 14, 2015)). The use of the title "General admissibility" reflects the analysis in *Speer* that Wis. Stat. § 904.04(2) actually favors the admission of other acts evidence.

"[T]he greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial." *Davidson*, 236 Wis. 2d 537, ¶ 51. In applying the rule, "courts still must apply the three-step analysis set forth in *Sullivan*." *Davidson*, 236 Wis. 2d 537, ¶ 52. The rule simply functions as a mechanism for the "more liberal admission of other crimes evidence." *Davidson*, 236 Wis. 2d 537, ¶ 51.

"'The party seeking to admit the other-acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence.'" *Hurley*, 361 Wis. 2d 529, ¶ 58, (quoting *Marinez*, 331 Wis. 2d 568, ¶ 19). "'Once the proponent of the other-acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice.'" *Id*.

B. The circuit court properly concluded that the other acts evidence was offered for an acceptable purpose.

Dorsey asserts that the use of other acts evidence to establish a "motive to control" the victim is not an acceptable purpose under Wis. Stat. § 904.04(2)(a) (Dorsey's Br. at 23-27). Dorsey latches on to the legal definition of motive and asserts the use of other acts evidence establishing motive is only permissible if there is a relationship between the other acts and the charged offense or if there is a purpose element of the charged crime (Dorsey's Br. at 23-24).

Dorsey further asserts that unless motive is an element of the crime charged, other acts evidence of motive is inadmissible (Dorsey's Br. at 24). Dorsey is incorrect. *See, e.g., State v. Normington*, 2008 WI App 8, ¶ 30, 306 Wis. 2d 727, 744 N.W.2d 867 ("there is no requirement that the purpose for which evidence of another act is proffered be an element of the crime") (citing *Sullivan*, 216 Wis. 2d at 772). Moreover, the list of permissible uses for other acts evidence in Wis. Stat. § 904.04(2)(a) is not exhaustive. *Hunt*, 263 Wis. 2d 1, ¶ 54. Other acts evidence is permissible to show the context of the crime, to provide a complete explanation of the case, and to establish the

credibility of victims and witnesses. *Hunt*, 263 Wis. 2d 1, ¶¶ 58, 59 (citing *State v. Pharr*, 115 Wis. 2d 334, 348-49, 340 N.W.2d 498 (1983); and *State v. Shillcutt*, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983)). *See also*, *Marinez*, 331 Wis. 2d 568, ¶ 27.

In this case, Dorsey denied all of the charges and claimed that C.B. was injured in March of 2014, because she fell while she was in the shower (1:3). This case, then, was about credibility. The jury was required to determine if Dorsey's or C.B.'s version of events was more credible. "One reason for a 'greater latitude' standard . . . is to corroborate the victim's testimony against a credibility challenge by the defense." *Fishnick*, 127 Wis. 2d at 257 n.4. *See also*, *Davidson*, 236 Wis. 2d 537, ¶ 40. In child sexual assault cases, like domestic abuse cases, common defense strategies include denying the allegations and "rais[ing] the possibility of fantasy, unreliability, or vindictiveness on the part of the [ ]victim." *Fishnick*, 127 Wis. 2d at 257 n.4. The greater latitude rule tips the scale in favor of admitting other acts evidence that "buttresses the victim's credibility against such a defense challenge." *Fishnick*, 127 Wis. 2d at 257 n.4.

The State sought admission of the other acts evidence to establish Dorsey's intent and his motive to control in the *context* of a domestic relationship (9:1-2). Establishing a motive to control in the context of a domestic relationship assists the jury in making credibility determinations by providing a more complete explanation of the case. That is an acceptable purpose for the use of other acts evidence. *Hunt*, 263 Wis. 2d 1, ¶¶ 58, 59. And in employing the greater latitude rule, which applies to each step of the *Sullivan* analysis, the circuit court properly concluded that the State was offering the other acts evidence for a permissible purpose.

C. The circuit court properly concluded that the other acts evidence was relevant to the case at hand.

"Relevance under Wis. Stat. § 904.01 has two components; the evidence must relate to some fact that is of consequence to the determination of the action, and it must have some tendency to make that fact more or less probable than it would be without the evidence." *Davidson*, 236 Wis. 2d 537, ¶ 64 (citing Wis. Stat. § 904.01; *Sullivan*, 216 Wis. 2d at 772). "'The measure of probative value in

assessing relevance is the similarity between the charged offense and the other act.'" *Davidson*, 236 Wis. 2d 537, ¶ 67. (quoting *State v. Gray*, 225 Wis. 2d 39, 58, 590 N.W.2d 918 (1999)).

1. The other acts evidence related to credibility, which is always a fact of consequence.

Dorsey argues that the other acts evidence should not have been admitted because Dorsey was not disputing motive or intent of the alleged act, but rather denying the alleged acts occurred (Dorsey's Br. at 27-31). This is similar to the argument proffered by the defense in *Veach. See Veach*, 255 Wis. 2d 390, ¶ 60. Dorsey's argument must fail for the same reason Veach's argument failed – "the State is required to prove all elements of the crime beyond a reasonable doubt even if an element is not disputed." *Veach*, 255 Wis. 2d 390, ¶ 77 (citing *Davidson*, 236 Wis. 2d 537, ¶ 65; *Hammer*, 236 Wis. 2d 686, ¶ 25). "Evidence relevant to any element is admissible even if the element is undisputed." *Id.*

Dorsey further argues that R.K.'s testimony could not be used to negate an innocent explanation for Dorsey's assaults on C.B. because he never asserted an innocent explanation (Dorsey's Br. at 30). Dorsey, did, however, offer an innocent explanation for the injuries C.B. suffered in March of 2014. Dorsey asserted that C.B. called him when he was out of town and told him that she fell in the shower (1:3; 34:231). As Dorsey notes, other acts evidence is relevant to "undermine the defendant's innocent explanation for his act" (Dorsey's Br. at 29 quoting *State v. Roberson*, 157 Wis. 2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990); *State v. Evers*, 139 Wis. 2d 424, 407 N.W.2d 256 (1987)). However, under Dorsey's theory, because he was denying that the assault ever occurred, the only evidence that is truly relevant is evidence that would establish whether the assaults actually occurred.

In this case, the other acts evidence is relevant to that issue. The trial boiled down to credibility. And like many child sexual assault cases, the other acts evidence in this case was relevant to the central issue of credibility. Establishing that Dorsey's motive was to control C.B. in the context of a domestic relationship would assist the jury in making credibility determinations by providing a more

complete explanation of the case. "'"A witness's credibility is always 'consequential' within the meaning of Wis. Stat. § 904.01."'" *Hurley*, 361 Wis. 2d 529, ¶ 81 (quoting *Marinez*, 331 Wis. 2d 568, ¶ 34; 7 Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence § 401.101, at 98 (3d ed. 2008)).

Evidence of the assaults committed against R.K. related to whether the assaults against C.B. occurred because that evidence aided the jury in assessing credibility, which was the central determination in this case. *Hurley*, 361 Wis. 2d 529, ¶ 82. One purpose of the greater latitude rule is to allow "for the more liberal admission of other-acts evidence that has a tendency to assist the jury in assessing" the allegations of the victim. *Hurley*, 361 Wis. 2d 529, ¶ 82.

2. The other acts evidence was probative because they were similar to the acts of violence committed against C.B.

Like in *Davidson*, the acts here are not identical, but that is not what is needed to establish that the other acts evidence is probative. *Davidson*, 236 Wis. 2d 537, ¶ 72. The probative value of the other acts evidence is not dependent on identical prior offenses; rather it is assessed based on the similarities between the offenses. *Id.* In this case, the acts share a large number of similarities:

- The arguments that preceded the assaults against R.K. and C.B. generally concerned Dorsey's allegations that his partners were unfaithful or disrespectful (34:79, 90, 93; 9:8-9).

- All of the assaults occurred when the victim was isolated in her home or vehicle or when no other persons were in the area (34:79-82, 85-87, 90-93; 9:8-10).

- In both the June 2011 and February 2014 incidents, the assaults occurred well after the arguments had ended, and in both incidents Dorsey had spent time at a bar after the arguments (34:91-92; 9:9-10).

- In both the November 2011 the October 2013 incidents, Dorsey attempted to lock both of his victims under his control (34:80; 9:8-9).

- In both the June 2011 and January 2013 incidents, Dorsey spat on his victims (34:85-86; 9:9).

- In both the November 2011 and February 2014 incidents, Dorsey threw objects at his victims and pulled his victims back under his control by their hair (34:93-94; 9:8-9).

- Both victims had similar responses to Dorsey's assaults and, as is common in domestic abuse situations, maintained their relationships with Dorsey for an extended period after the abuse began.

As the circuit court concluded, the similarities of the other acts and the charged crimes established a motive to control (33:12). Further, any remoteness in time between the prior acts and the charged crimes would not alter the relevancy determination. Remoteness in time impacts relevancy if it "negate[s] all rational or logical connections between the fact to be proven and the other acts evidence." *State v. Opalewski*, 2002 WI App 145, ¶ 20, 256 Wis. 2d 110, 647 N.W.2d 331 (citation omitted).

Here, the gap between the other acts and the charged crimes does not negate all rational and logical connections. Not only was Dorsey on probation for much of that time, but relationships take time to establish. Dorsey's relationship with R.K. presumably ended sometime after November 3, 2011 when R.K. reported the domestic abuse (9:8). C.B. alleged that Dorsey first abused her in October of 2013 (1:3). Two years is not a significant period of time in that context.

The similarities between the other acts and the charged crimes in this case established that the other acts evidence would be probative to the issue of C.B.'s credibility. Therefore, in employing the greater latitude rule, the circuit court properly concluded that Dorsey's motive to control C.B. was relevant.

D. The circuit court properly concluded that the probative value was not substantially outweighed by the danger of unfair prejudice.

"'Once the proponent of the other-acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice.'" *Hurley*, 361 Wis. 2d 529, ¶ 58, (quoting *Marinez*, 331 Wis. 2d 568, ¶ 19). The circuit court concluded that Dorsey did not meet that burden (33:12).

Almost all evidence is prejudicial. *State v. Johnson,* 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994). The test is whether the resulting prejudice is *fair*. *Id.* The more probative the evidence is, the fairer its prejudicial effect will be. *Id.* "Thus, the standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by 'improper means.'" *Id.*

The circuit court found the other acts evidence similar enough that its probative value would not be outweighed by its prejudicial effect (33:12). The court then concluded that any prejudicial effect could be mitigated through the use of a cautionary instruction (33:12). Dorsey again asserts that the evidence was unduly prejudicial because he was not contesting intent or motive (Dorsey's Br. at 33). However, Dorsey again fails to acknowledge that the other acts evidence was highly probative to the issue of credibility, which was the central issue in dispute.

There was no unfair prejudice in this case because the State limited the other acts evidence to that evidence that was similar in nature and the jury was specifically instructed that it could not consider the other acts evidence to conclude that Dorsey acted in conformity (34:276-77). "Cautionary instructions help to limit the danger of unfair prejudice that might result from other crimes evidence." *Davidson*, 236 Wis. 2d 537, ¶ 78 (citations omitted). The lack of unfair prejudice is demonstrated by the fact that the jury acquitted Dorsey of the charge of strangulation and suffocation. That acquittal is clear evidence that the jury appropriately sorted the

evidence in the case. *See State v. Bettinger*, 100 Wis. 2d 691, 699, 303 N.W.2d 585 (1981) (Bettinger's acquittal of the bribery charge supported the conclusion that the jury properly sorted the evidence).

Dorsey has not shown that a reasonable judge would have found that the resulting prejudice substantially outweighed the probative value of the other acts evidence. Other acts evidence, by its definition, will always be prejudicial; the question for the circuit court to consider is whether the other acts evidence is so prejudicial that the resulting prejudice would substantially outweigh the probative value. *Sullivan*, 216 Wis. 2d at 773. Here, the circuit court properly exercised its discretion in deciding that issue. Dorsey has not shown otherwise and cannot succeed with a simple assertion that the other acts evidence was prejudicial and therefore should not have been admitted.

IV. Any error in admitting R.K.'s testimony was harmless.

The State maintains that R.K.'s testimony was properly admitted at trial and will not proffer an unnecessary lengthy harmless error argument. However, assuming *arguendo* that the other acts evidence should not have been admitted, any error in doing so was harmless. "Wisconsin's harmless error rule is codified in Wis. Stat. § 805.18 and is made applicable to criminal proceedings by Wis. Stat. § 972.11(1)." *State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing *State v. Harvey*, 2002 WI 93, ¶ 39, 254 Wis. 2d 442, 647 N.W.2d 189) (footnote omitted). The harmless error test applies to claims that the circuit court erroneously admitted other acts evidence. *State v. Thoms*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999) (citing *State v. Grant*, 139 Wis. 2d 45, 52-53, 406 N.W.2d 744 (1987)).

> The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. The beneficiary of the error, here the State, has the burden to establish that the test has been met. . . . In determining if harmless error exists, we focus on whether the error undermines our confidence in the case's outcome, and to do

> so, we must consider the error in the context of the entire trial and consider the strength of untainted evidence.

Thoms, 228 Wis. 2d at 873-74 (internal citations omitted). The claimed error did not contribute to the verdict if this Court concludes, beyond a reasonable doubt, that a rational jury would have found the defendant guilty absent the error. *Harvey*, 254 Wis. 2d 442, ¶ 49.

The central issue in this case was credibility. And therefore, this Court can find instruction in *Thoms. See Thoms*, 228 Wis. 2d at 874 (the conviction in *Thoms* depended on the jury's credibility determinations). In *Thoms*, the court found that the admission of evidence that the defendant had sexually assaulted other victims was not harmless error. The complainant's credibility was problematic in that case because the trial testimony was inconsistent with the complainant's signed affidavit and other prior statements. *Id*. Accordingly, the court said, any evidence that tended to support one version over the other necessarily influenced the jury. *Id*. Given the weakness of the evidence against the defendant absent the other acts evidence and the emphasis the prosecution placed on the other acts evidence, the court concluded, admission of that evidence seriously undermined confidence in the result. *Id.* at 875.

In this case, in contrast, lengthy cross-examination of C.B. failed to uncover a single discrepancy of substance between C.B.'s trial testimony and her earlier statements. There was no weakness in C.B.'s testimony that made it likely that the testimony of R.K. tipped the balance. Therefore, unlike *Thoms*, this is not a case in which the "untainted evidence . . . pales in comparison to the other acts evidence used to attack [the defendant's] credibility." *Thoms*, 228 Wis. 2d at 875. The prosecution presented a strong and consistent case against Dorsey wholly apart from the corroborating other acts testimony. And even if the circuit court should not have admitted R.K.'s testimony, there is no reasonable possibility that the error contributed to the conviction.

CONCLUSION

For the reasons above, this court should affirm the judgment of conviction.

Dated this 19th day of August, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,598 words.

Dated this 19th day of August, 2015.

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Tiffany M. Winter
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of August, 2015.

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