STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP648-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTON R. DORSEY,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR EAU CLAIRE COUNTY, THE HONORABLE PAUL J. LENZ, PRESIDING

# BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

Page

**Statutes**

Page

**Other Authorities**

## ISSUES PRESENTED

1. Is it permissible to use other-acts evidence to show a motive on the part of the defendant to control the victim in the context of a domestic relationship?

   The circuit court concluded that motive to control was a permissible purpose for other-acts evidence.

   The court of appeals concluded that motive to control was a permissible purpose and held that Wis. Stat. § 904.04(2)(b)1. expressly allowed for the admission of evidence of similar acts committed against a different victim.

   This Court should conclude that establishing a motive to control is a permissible purpose for other-acts evidence and the Court should make clear that a permissible purpose is any purpose other than to establish propensity.

2. Is other-acts evidence relevant to the issue of intent if the defense is that the victim is lying and the charged acts never occurred?

   The circuit court concluded that the other-acts evidence was relevant.

   The court of appeals held that the other-acts evidence was relevant and highly probative to the issue of intent and motive.

   This Court should conclude the same.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

## INTRODUCTION

The petitioner, Anton R. Dorsey, was convicted of misdemeanor battery, disorderly conduct, and aggravated battery for physically assaulting his girlfriend, C.B., on two separate occasions. He appealed his conviction, arguing that the jury should not have heard evidence about similar abuse of his former girlfriend, R.K. He now seeks review of the court of appeals' decision affirming his conviction. *See State v. Dorsey II*, No. 2015AP648-CR, 2016 WL 7108525 (Wis. Ct. App. Dec. 6, 2016) (unpublished per curiam). (R-App. 102–10.)[1]

Dorsey argues that the other-acts evidence was improperly admitted because it was admitted for an improper purpose—to establish a motive to control the victim—and because it was not relevant to the issue of intent. Dorsey is wrong. There are an infinite number of proper purposes for other-acts evidence, of which motive is one. And the other-acts evidence here was relevant because it directly related to and was probative of the jury's determination of motive and intent.

In rejecting Dorsey's arguments, this Court will need to address what effect Wis. Stat. § 904.04(2)(b)1. has on a

---

[1] On August 30, 2016, the court of appeals issued an authored opinion that it withdrew sua sponte on September 27, 2016. That opinion will be referred to as *Dorsey I*. On December 6, 2016, the court of appeals issued a new per curiam opinion. That opinion will be referred to as *Dorsey II*.

circuit court's determination to admit or exclude other-acts evidence. That subparagraph, new in 2014, is specific to the admission of other-acts evidence in sensitive crimes, like domestic abuse. The court of appeals determined that subparagraph (2)(b)1. had little effect and allowed latitude in the sense that the other-acts evidence can be an act committed against a different victim. This Court should reject the court of appeals' interpretation because it read language out of the statute and rendered subparagraph (2)(b)1. superfluous to Wis. Stat. § 904.04(2)(a).

Rather, this Court should conclude that Wis. Stat. § 904.04(2)(b)1. has a plain language interpretation that permits the use other-acts evidence of the accused in a criminal proceeding alleging a specified crime so long as the other act is similar to the charged conduct, and without regard to who was victimized. Alternatively, if the Court disagrees with the State's plain language interpretation, it should conclude that Wis. Stat. § 904.04(2)(b)1. permits a greater latitude of proof in establishing that other-acts evidence is admissible, and thus provides for the more liberal admission of that evidence. Under either interpretation, and in any event, the circuit court did not err when it concluded that R.K.'s testimony was relevant and admissible other-acts evidence. Thus, Dorsey's conviction should be affirmed.

## SUPPLEMENTAL STATEMENT OF THE CASE

Dorsey 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. (R. 1:1–2.) He was charged as a repeat offender on all counts and the counts of disorderly conduct and aggravated battery included the domestic abuse surcharge. (R. 1:1–2.) After a jury trial, Dorsey was acquitted of the

charge of strangulation and suffocation, but found guilty on all other counts. (R. 15:1–4.)

All charges concerned Dorsey's actions against C.B., who was Dorsey's girlfriend at the time. (R. 1:3.) The charge of strangulation and suffocation arose from Dorsey's actions in October 2013. (R. 1:1–3.) Dorsey met C.B. and her friends out at a bar in downtown Eau Claire. (R. 34:76, A-App. 63.) Someone came into the bar whom Dorsey did not like, and he told C.B. that he was going to the car and would wait for her. (R. 34:77–78, A-App. 64–65.) C.B. told Dorsey that he could leave and go home. (R. 34:78, A-App. 65.) Dorsey did not leave the bar. (R. 34:78, A-App. 65.)

Later that evening, the couple left the bar with C.B.'s friends. (R. 34:78, A-App. 65.) Dorsey drove, and after dropping off C.B.'s friends at their homes, Dorsey became upset with C.B. about what had occurred at the bar. (R. 34:78–79, A-App. 65–66.) Dorsey accused C.B. of not trusting him and not thinking well of him. (R. 34:79, A-App. 66.) C.B. told Dorsey that she was sick of arguing and she was "done" with their unhealthy relationship. (R. 34:80, A-App. 67.) Dorsey 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. (R. 34:80, A-App. 67.)

C.B. was able to get out of the car and began walking towards her home. (R. 34:80, A-App. 67.) Dorsey followed and when he reached C.B., he grabbed her by the neck. (R. 34:80–81, A-App. 67–68.) The next thing C.B. remembered was Dorsey pulling C.B. off the ground and asking her why she was doing this to him. (R. 34:81, A-App. 68.) Dorsey then apologized profusely and followed C.B. home. (R. 34:82, A-App. 69.)

The charge of misdemeanor battery arose from Dorsey's actions in December 2013 or January 2014. (R. 1:1–2; 34:84–85, A-App. 71–72.) Dorsey was at C.B.'s home when he became upset. (R. 34:85, A-App. 72.)[2] C.B. was on her bed, facing away from Dorsey because she did not want to talk to him. (R. 34:85, A-App. 72.) Dorsey insisted on discussing the issue, turned C.B. around and "flipped" his finger at her lip, causing her to bleed. (R. 34:85, A-App. 72.) He then threw a Kleenex box at C.B. and asked her why she lies to him all the time. (R. 34:85, A-App. 72.) Dorsey 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. (R. 34:85–86, A-App. 72–73.) When C.B. tried to turn away, Dorsey hit her with an open hand on the side of her head. (R. 34:86, A-App. 73.)

Dorsey began living with C.B. in February 2014. (R. 34:88–89, A-App. 75–76.) The charges of disorderly conduct and aggravated battery arose from Dorsey's actions in March 2014. (R. 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. (R. 34:90, A-App. 77.) While still in the car, Dorsey demanded to see C.B.'s phone and began to read her text messages. (R. 34:90, A-App. 77.) He discovered some messages between C.B. and a male friend and accused C.B. of sleeping with that male friend. (R. 34:90, A-App. 77.) 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. (R. 34:91, A-App. 78.) Dorsey followed her and pushed her against the side of the building. (R. 34:91, A-App. 78.) At that time, some people walked by, and Dorsey and C.B. went back to the car

---

[2] C.B. could not remember what started the argument. (R. 34:85, A-App. 72.)

to talk briefly. (R. 34:91, A-App. 78.) Dorsey stayed at the bar and C.B. returned home. (R. 34:91–92, A-App. 78–79.)

When Dorsey returned home that night, there was no discussion of what occurred. (R. 34:92, A-App. 79.) The next morning, C.B. awoke to find Dorsey approximately four inches from her face. (R. 34:92, A-App. 79.) Dorsey was upset with C.B., but C.B. attempted to ignore Dorsey and get out of the house as quickly as possible. (R. 34:92, A-App. 79.) 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. (R. 34:92–93, A-App. 79–80.) When C.B. tried to get away, Dorsey pulled her back by her hair and hit C.B. in the head, this time with an open hand. (R. 34:93, A-App. 80.)

Dorsey accused C.B. of seeing someone else, asked why she kept lying to him, and hit her again. (R. 34:93, A-App. 80.) 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. (R. 34:93–94, A-App. 80–81.) Dorsey had C.B.'s cell phone and threw it at C.B.'s chest, which resulted in a bruise to C.B.'s chest. (R. 34:94, A-App. 81.) C.B. grabbed the phone and ran out of the house. (R. 34:95, A-App. 82.) She was able to drive away and call her friend Lori to tell her what happened. (R. 34:95, A-App. 82.)

A few days later, C.B. reported the abuse to the police. (R. 1:2–3.) Based on her report, the State charged Dorsey with one count of strangulation and suffocation, one count of misdemeanor battery, one count of disorderly conduct, and one count of aggravated battery. (R. 1:1–2.)

Before trial, the State moved the court to admit evidence that Dorsey committed acts of domestic violence

against his previous girlfriend, R.K. (R. 9, A-App. 58–62.)[3] In 2011, Dorsey was convicted of domestic battery, with two counts of domestic false imprisonment and disorderly conduct dismissed but read in. (R. 9:1, A-App. 58.) The State attached the criminal complaint to its motion to establish what R.K. would testify to at trial. (R. 9:6–10, R-App. 133–37.)

According to the complaint, in June 2011, R.K. was pregnant with Dorsey's child. (R. 9:9, R-App. 136.) R.K. was sure Dorsey was the father of her baby, but did not want Dorsey to disclaim his child one day if Dorsey became angry with her. (R. 9:9, R-App. 136.) She asked Dorsey to take a paternity test. (R. 9:9, R-App. 136.) Dorsey became upset and accused R.K. of being unfaithful. (R. 9:9, R-App. 136.) Dorsey left, but later that night R.K. picked up Dorsey after he got into some trouble. (R. 9:9, R-App. 136.) At that time, Dorsey spat on R.K. (R. 9:9, R-App. 136.) After R.K. and Dorsey had returned home, the argument continued and Dorsey dragged R.K. down the stairs and out of the home. (R. 9:10, R-App. 137.) This resulted in abdominal trauma, for which R.K. sought medical treatment. (R. 9:10, R-App. 137.)

In November 2011, R.K. and Dorsey got into an argument because Dorsey felt that R.K. was not respecting him. (R. 9:8, R-App. 135.) Dorsey told R.K. to leave, and as she was leaving, Dorsey threw a baby's bottle and a shoe at her. (R. 9:8, R-App. 135.) He then got up and pulled R.K. back by her hair, locked the door to the home, and hit her in

---

[3] 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. (R. 33:11, A-App. 52.)

the head with a shoe, pushed her, and kicked her as she fell to the floor. (R. 9:8–9, R-App. 135–36.)

The State's purpose for seeking to introduce the evidence was 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." (R. 9:2, A-App. 59.) 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. (R. 9:2–3, A-App. 59–60.)

Regarding the similarity of the acts, all of the acts occurred in or near the home of the victims and when Dorsey did not believe he was being properly respected. (R. 9:3, A-App. 60.) The acts were also similar in that Dorsey restricted movement of his victims. (R. 9:3, A-App. 60.) The State then submitted that any undue prejudice could be mitigated through the use of a cautionary instruction. (R. 9:4–5, A-App. 61–62.)

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. (R. 33:3–4, 6–7, A-App. 44–45, 47–48.) The defense argued that the State was attempting to admit the evidence simply to bolster the credibility of C.B. (R. 33:4, A-App. 45.)

The circuit court concluded that pursuant to Wis. Stat. § 904.04(2)(b)1., the greater latitude rule applied to this case and the other-acts evidence was probative of Dorsey's motive to control C.B. (R. 33:11–12, A-App. 52–53.) 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. (R. 33:12, A-App. 53.) 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. (R. 33:12, A-App. 53.)

At trial, R.K. testified consistently with the information in the criminal complaint. (R. 34:187–95, A-App. 115–23.) Dorsey was convicted of misdemeanor battery, disorderly conduct, and aggravated battery. (R. 20, 21, A-App. 38–41.) He was acquitted of the strangulation charge. (R. 15:1.) Dorsey appealed his conviction, arguing that the circuit court erroneously admitted other-acts evidence.

On appeal, the court of appeals concluded that the circuit court misinterpreted Wis. Stat. § 904.04(2)(b)1., but the other-acts evidence was admissible pursuant to *Sullivan* without the use of the greater latitude rule. *See generally, Dorsey II*, 2016 WL 7108525. (R-App. 102–10.) The court concluded that establishing Dorsey's intent and motive to cause bodily harm to C.B. and to control her within the context of a domestic relationship were proper purposes for other-acts evidence and the other-acts evidence was relevant. *Dorsey II*, 2016 WL 7108525, ¶ 25–27, 34. (R-App. 107–08.)

Dorsey petitioned this Court for review and the State asked the Court to accept Dorsey's petition to interpret Wis. Stat. § 904.04(2)(b)1.

## STANDARD OF REVIEW

Statutory interpretation presents a question of law that is reviewed de novo. *State v. Stenklyft*, 2005 WI 71, ¶ 7, 281 Wis. 2d 484, 697 N.W.2d 769.

The proper admission or rejection of other-acts evidence is a question of discretion. *State v. Sullivan*, 216 Wis. 2d 768, 780–81, 576 N.W.2d 30 (1998). This Court will

uphold the circuit court's exercise of discretion if the circuit court applied the relevant facts to the proper legal standards and reached a conclusion that a reasonable judge could reach. *Id.*

## SUMMARY OF THE ARGUMENT

Before 2014, the admission of other-acts evidence in cases of domestic abuse was controlled by Wis. Stat. § 904.04(2) and the three-pronged *Sullivan* analysis. Pursuant to Wis. Stat. § 904.04(2)(a) and *Sullivan*, the State may use other-acts evidence in a criminal case so long as the evidence: (1) is offered for an acceptable purpose; (2) is relevant; and (3) its probative value is not substantially outweighed by the danger of unfair prejudice. *Sullivan*, 216 Wis. 2d at 772–73.

In 2014, the Legislature modified Wis. Stat. § 904.04(2) by adding Wis. Stat. § 904.04(2)(b)1., which applies to the use of other-acts evidence for specific crimes, including domestic abuse. The plain language of that new subparagraph establishes that in specific circumstances, evidence of a similar act by the accused is admissible. Thus, subparagraph (2)(b)1., not *Sullivan*, controls the admission of other-acts evidence when the accused has been charged with one of the specified crimes. Here, Dorsey was charged with a similar act of domestic abuse, subparagraph (2)(b)1. controls, and under that subparagraph the other-acts evidence was plainly admissible. Thus, the circuit court did not erroneously exercise its discretion when it admitted the evidence.

Alternatively, when the Legislature enacted Wis. Stat. § 904.04(2)(b)1., it codified and expanded the judicially created greater latitude rule to permit a greater latitude of proof as to other like occurrences. That rule "applies to the entire [*Sullivan*] analysis of whether evidence of a

defendant's other crimes was properly admitted at trial." *State v. Davidson*, 2000 WI 91, ¶ 51, 47, 236 Wis. 2d 537, 613 N.W.2d 606. Here, the circuit court properly admitted the other-acts evidence because the evidence satisfied the *Sullivan* factors. The State offered the evidence for a proper purpose, the evidence was relevant to the issues of Dorsey's motive and intent, and the evidence was not unduly prejudicial. If it was questionable whether the other-acts evidence was admissible under *Sullivan,* the application of the greater latitude rule tipped the scales in favor of admission.

## ARGUMENT

### I. Wisconsin Stat. § 904.04(2)(b)1. provides a circuit court with more discretion to admit similar other-acts evidence than that provided under the traditional *Sullivan* analysis.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. The Court begins with the plain language of the statute. *Id.* ¶ 45. If the statutory language is unambiguous, the Court simply applies the ordinary and accepted meaning of the language to the facts presented in the case. *Id.* ¶¶ 45–46.

"[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.* ¶ 47. "Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous." *Id.* ¶ 50. "Extrinsic sources" are "resources outside the statutory text—typically items of legislative history." *Id.*

### A. The plain language of Wis. Stat. § 904.04(2)(b)1. reads that similar other-acts evidence is admissible in the prosecution of specified crimes.

A plain language reading of the Wis. Stat. § 904.04(2)(b)1. establishes that other-acts evidence is admissible in a criminal proceeding alleging the specified crime(s) without regard to who was victimized.[4] Subparagraph (2)(b)1. reads in relevant part:

> 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.

Wis. Stat. § 904.04(2)(b)1.[5]

The State's plain language interpretation is based upon two important factors. First, there is a comma before the word "and." Thus, the sentence contains two independent clauses. *See* The Chicago Manual of Style § 6.28 (16th ed. 2010). The second clause does not modify the first.

Second, the phrase "is admissible" is repeated in both clauses. If the second clause modified the first, there would be no reason to repeat that phrase. Rather, the sentence reads that the evidence is admissible, and if the other act was committed against a different victim, that does not change the fact that the evidence is admissible. Thus, as

---

[4] The State is purposely not including any titles in its plain language analysis. *See* Wis. Stat. § 990.001(6) ("The titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are not part of the statutes.").

[5] A copy of Wis. Stat. § 904.04 can be found in the appendix at page 101.

long as the evidence is relevant under Wis. Stat. § 904.01 and not subject to exclusion under Wis. Stat. § 904.03, any similar act by the accused is admissible.[6] Period.

Thus, the court of appeals misread the statute when it concluded that "the only greater latitude provided in admission of evidence in domestic abuse cases is the ability to admit other acts evidence '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.'" *Dorsey II*, 2016 WL 7108525, ¶ 22. (R-App. 106.) That interpretation reads the "is admissible, and" language out of subparagraph (2)(b)1.

The State acknowledges that its plain language interpretation potentially runs afoul of Wis. Stat. § 904.04(2)(a), which provides that "other-acts evidence cannot be used to prove a person's character through circumstantial evidence of conduct, but instead must be used for a permissible purpose." *See State v. Hurley*, 2015 WI 35, ¶ 56 n.15, 361 Wis. 2d 529, 861 N.W.2d 174.[7] The only exception is Wis. Stat. § 904.04(2)(b)2., which allows the use of propensity evidence in cases of first-degree sexual assault and first-degree sexual assault of a child if that evidence is a prior conviction. *See* Wis. Stat. § 904.04(2)(a) and (2)(b)2.

Subparagraph (2)(b)1. is not excepted from the prohibition against propensity evidence. However, "[i]t is well-settled 'that where two conflicting statutes apply to the same subject, the more specific controls.'" *State ex rel.*

---

[6] The admissibility of all evidence is subject to the relevancy and general exclusionary statutes.

[7] *See Kalal*, 271 Wis. 2d 633, ¶ 49 ("It is certainly not inconsistent with the plain-meaning rule to consider the intrinsic context in which statutory language is used . . . .").

*Hensley v. Endicott*, 2001 WI 105, ¶ 19, 245 Wis. 2d 607, 629 N.W.2d 686 (citation omitted). Subparagraph (2)(b)1. is undeniably more specific than paragraph (2)(a). Subparagraph (2)(b)1. is specific to criminal prosecutions and is limited to the use of evidence of similar acts committed by the accused in cases in which the accused is charged with a specific crime. Paragraph (2)(a), on the other hand, is not specific to criminal prosecutions, it is not specific to similar conduct, and it is not specific to conduct of the accused. Thus, this Court should conclude that Wis. Stat. § 904.04(2)(b)1. controls and establishes that other-acts evidence of similar conduct by the accused is admissible in the prosecution of specific crimes without regard to who was victimized.

As applied here, this Court should find that the other-acts evidence was admissible under subparagraph (2)(b)1. First, Dorsey was charged with a crime of domestic abuse which is defined, in part, by Wis. Stat. § 968.075(1) 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. *See* 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. (R. 34:88–89, A-App. 75–76.) Dorsey's actions resulted in physical pain and injury to C.B. (R. 34:92–94, A-App. 79–81.) And those charges were subject to the domestic abuse surcharge under Wis. Stat. § 973.055. (R. 1:1–20.) Because Dorsey was charged with domestic abuse crimes, subparagraph (2)(b)1. controlled the consideration of other-acts evidence.

Second, there is no dispute that the acts of domestic

abuse that Dorsey committed against R.K. were similar to the acts committed against C.B. The similarities include:

1. The arguments that preceded the assaults against R.K. and C.B. generally concerned Dorsey's allegations that his partners were unfaithful or disrespectful. (R. 34:79, 90, 93, A-App. 66, 77, 80; 9:8–9, R-App. 135–36.)

2. All of the assaults occurred when the victim was isolated in her home or vehicle or when no other persons were in the area. (R. 34:79–82, 85–87, 90–93, A-App. 66–69, 72–74, 77–80; 9:8–10, R-App. 135–37.)

3. 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. (R. 34:91–92, A-App. 78–79; 9:9–10, R-App. 136–37.)

4. In both the November 2011 and October 2013 incidents, Dorsey attempted to lock both of his victims in spaces under his control. (R. 34:80, A-App. 67; 9:8–9, R-App. 135–36.)

5. In both the June 2011 and January 2013 incidents, Dorsey spat on his victims. (R. 34:85–86, A-App. 72–73; 9:9, R-App. 136.)

6. 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. (R. 34:93–94, A-App. 80–81; 9:8–9, R-App. 135–36.)

7. 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.

Finally, there was no basis for excluding the evidence as irrelevant or pursuant to Wis. Stat. § 904.03. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Wis. Stat. § 904.01. That is an expansive definition, and that "expansive definition . . . is the true cornerstone of the Wisconsin Rules of Evidence." 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence*, § 401.1 at 97 (3d ed. 2008). Due to the expansive definition of relevance and the express statement in Wis. Stat. § 904.04(2)(b)1. that the other-acts evidence can be acts committed against a different victim, there are very narrow grounds upon which to exclude other-acts evidence as irrelevant.[8]

A court can exclude relevant evidence pursuant to Wis. Stat. § 904.03, which "invests the trial court with the authority to balance the probative value of the evidence against countervailing facts such as unfair prejudice, confusion of the issue, and waste of the court's time." Blinka, *supra*, § 403.1 at 134. However, as applied to Wis. Stat. § 904.04(2)(b)1., section 904.03 presents little barrier to the admission of other-acts evidence for sensitive crimes. This is because Wis. Stat. § 904.04(2)(b)1. is specific to similar conduct of the accused and in the other-acts context, the probative value of the evidence is generally related to the

---

[8] This is consistent with the "overarching purpose of the relevancy provisions in ch. 904," which "limit the power of the trial judge to *exclude* evidence on relevancy grounds." Blinka, *supra*, § 401.1 at 97 (emphasis added).

similarity of the accused's conduct in both acts. *See Sullivan,* 216 Wis. 2d at 786–87. Thus, in practice, if the evidence is admissible under Wis. Stat. § 904.04(2)(b)1., it would be unlikely that its probative value would be outweighed by other considerations.

Here, the case against Dorsey turned on credibility, and evidence that establishes who to believe is always relevant. *State v. Marinez,* 2011 WI 12, ¶ 34, 331 Wis. 2d 568, 797 N.W.2d 399 (citing Blinka, *supra,* § 401.101 at 98). R.K.'s testimony would aid the trier of fact in determining who to believe by providing context for the domestic relationship between Dorsey and C.B. R.K.'s testimony would also assist the trier of fact in determining whether Dorsey intended to harm C.B. by providing the jury with a theory of motive—control.

R.K.'s testimony was relevant and there was no reason to exclude her testimony pursuant to Wis. Stat. § 904.03. R.K. testified to two specific instances of assault. The limited nature of the evidence would not result in undue delay, waste of time, or needless presentation of cumulative evidence. There was no threat that the jury would confuse the issue or that the other-acts evidence would mislead the jury. R.K.'s testimony was not inflammatory in the sense that the acts she testified to were not disproportionally more egregious than the acts committed against C.B. Thus, there was no substantial threat of unfair prejudice. As the court of appeals concluded, "the State established that the other-acts evidence would be probative—indeed, highly probative—to the issue of motive and intent, and is relevant in that sense." *Dorsey II,* 2016 WL 7108525, ¶ 40. (R-App. 109–10.)

In sum, a plain language reading of the Wis. Stat. § 904.04(2)(b)1. establishes that other-acts evidence is admissible in a criminal proceeding alleging the specified

crime(s) without regard to who was victimized. Here, the other-acts evidence was admissible pursuant to Wis. Stat. § 904.04(2)(b)1. because Dorsey was charged with a crime of domestic abuse, the other-acts evidence was similar to the charged conduct, and there was no basis for excluding the evidence under Wis. Stat. §§ 904.01 or 904.03. Thus, the circuit court did not err when it admitted the other-acts evidence.

### B. Alternatively, Wis. Stat. § 904.04(2)(b)1. provides that similar other-acts evidence should be admitted with greater latitude.

#### 1. The Legislature enacted an arguably ambiguous statute when it created Wis. Stat. § 904.04(2)(b)1.

Even if this Court disagrees with the State's plain language interpretation, the circuit court's decision to admit the other-acts evidence should be affirmed. As addressed below, subparagraph (2)(b)1. is arguably ambiguous. However, reading the subparagraph in conjunction with the rest of the statute, its title, and its legislative history, makes clear that the subparagraph is a codification of the greater latitude rule. If this Court rejects the State's plain language interpretation, the next best reading of subparagraph (2)(b)1. is that it codified and expanded the judicially created greater latitude rule, which allows courts to permit a greater latitude of proof as to other like occurrences.

The subparagraph is arguably ambiguous because it has been subject to more than one reading by reasonably well-informed persons. The court of appeals has twice interpreted Wis. Stat. § 904.04(2)(b)1. The court first briefly addressed the subparagraph in *State v. Hall*, No. 2015AP479-CR, 2016 WL 1564201 (Wis. Ct. App. Apr. 19, 2016) (unpublished per curiam). (R-App. 129–32.) It

concluded that the Legislature "codified and expanded the greater latitude rule in WIS. STAT. § 904.04(2)(b)1., to include a greater latitude of proof with regard to other acts evidence in domestic abuse cases." *Hall*, 2016 WL 1564201, ¶ 10. (R-App. 131.)

In this case, the court of appeals originally concluded the same. *See State v. Dorsey I*, No. 2015AP648-CR, ¶¶ 15–16 (Wis. Ct. App. Aug. 30, 2016) (*opinion withdrawn and superseded sub nom.*). (R-App. 111–28.) The court, however, withdrew its original opinion and issued a new opinion in which it concluded that Wis. Stat. § 904.04(2)(b)1. only provided greater latitude in the sense that the other-acts evidence 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." *Dorsey II*, 2016 WL 7108525, ¶ 22. (R-App. 106.)[9] As addressed above, such an interpretation of the subparagraph ignores the "is admissible, and" language. However, it does more. It also renders Wis. Stat. § 904.04(2)(b)1. completely superfluous to Wis. Stat. § 904.04(2)(a).

Paragraph (2)(a) is not limited to any specific type of crime or to particular type of other-acts evidence. It does not exclude other acts committed against different victims. Thus, it already permits the admission of other-acts evidence involving the crimes described in subparagraph (2)(b)1. even if the other act involved a different victim. Subparagraph (2)(b)1. is unneeded if it merely specifies that an act committed against other victim is potentially admissible other-acts evidence.

---

[9] Dorsey adopts that interpretation. (Dorsey's Br. 23.)

Thus, if this Court rejects the State's plain language interpretation, it should similarly reject the court of appeals' interpretation in *Dorsey II* and look beyond the plain language to determine if a superfluous construction can be avoided. *State v. Sher*, 149 Wis. 2d 1, 9, 437 N.W.2d 878 (1989) ("A statute will be construed so as to not render any part of it superfluous if such a construction can be avoided.").

### 2. The title of Wis. Stat. § 904.04(2)(b)1. and its legislative history clarify any ambiguity and establish that the subparagraph codified and expanded the judicially created greater latitude rule.

The judicially created greater latitude rule allows courts to permit a greater latitude of proof as to other-acts evidence, especially in cases concerning sexual offenses against children. *See, e.g., Davidson*, 236 Wis. 2d 537, ¶¶ 36, 51. "[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." *Id.* ¶ 51.

Legislative history reveals that Wis. Stat. § 904.04(2)(b)1. broadened the rule to additional types of crimes. As expanded by the subparagraph, the rule now extends to 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.

These crimes 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. And while Wis. Stat. § 904.04(2)(b)1. broadens the scope of the rule, it does not otherwise change how it is applied.

Subparagraph (2)(b)1. was a part of a proposal by the Wisconsin Department of Justice in the 2013–14 "Human Trafficking & Sensitive Crimes Legislation." *See* excerpts from The Legislative Reference Bureau's ("LRB") drafting record LRB-3538 pt01of02. (R-App. 138–41.)[10] Subparagraph (2)(b)1. was the product of modifying and renumbering Wis. Stat. § 944.33(3) (2011–12), the statute that allowed for the admission of other-acts evidence "for the purpose of showing the accused's intent and disposition" for pandering.

In the draft submitted to the LRB by the Office of Representative Amy Loudenbeck, the proposed Wis. Stat. § 904.04(2)(b)1. read:

> In a criminal proceeding alleging a violation of a serious sex offense as defined in s. 939.615 (1) (b), human trafficking in s. 940.302, a crime against a child under ch. 948, or domestic abuse as defined in s. 968.075 (1) (a) or subject to the surcharge in s. 973.055, evidence of any similar acts by the accused

---

[10] Available at http://docs.legis.wisconsin.gov/2013/related/drafting_files/wisconsin_acts/2013_act_362_ab_620/02_ab_620/13_3538df_pt01of02.pdf (last visited June 1, 2017).

> is admissible. The victim of the charged crime does not have to be the same as the victim of the other crime, wrong or act.

*See* excerpt from LRB-3538 pt01of02. (R-App. 141.)

The initial draft entitled the proposed Wis. Stat. § 904.04(2)(b) "Greater latitude." *See* excerpt from LRB-3538 pt01of02. (R-App. 139.)

When the LRB composed its "Preliminary Draft," it modified the language submitted in the initial draft by reordering the enumerated crimes and conjoining the two sentences. LRB's draft read:

> 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 is the subject of the proceeding is the same as the victim of the similar act.

*See* excerpt from LRB-3538 pt01of02. (R-App. 144–45.)[11]

LRB chose not to entitle Wis. Stat. § 904.04(2)(b) "Greater latitude." In response, Mark Rinehart, then legislative liaison for the Department of Justice, requested that the "Greater latitude" title be included and offered the following explanation:

> Adding the proposed title *Greater latitude* expands upon concepts and a phrase used within court decisions for over a hundred years. *See Proper v. State*, 85 Wis. 615, 630, 55 N.W. 1035, 1040 (1893)

---

[11] As finally enacted, Wis. Stat. § 904.04(2)(b)1. included this language.

> ("[a] greater latitude of proof as to other like occurrences is allowed in cases of sexual crimes."); *See also State v. Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606, ¶ 51 (2000) (reaffirming the greater latitude rule). Although a title is not necessary, its inclusion was to reflect case law referring to "greater latitude" for other acts evidence in certain classes of crimes. Although the statutory change is not simply a codification of case law, including the "greater latitude" title alerts a reader to the similarity between the case law and the new statutory section.

*See* excerpt from LBR-3538 pt01of02. (R-App. 146.) In reaction to Rinehart's response, LRB included the title in subsequent drafts and the "Greater latitude" title is printed in the official statutory reports.

The significance of Rinehart's response is twofold. First, it establishes that the "Greater latitude" title is applicable to "the new statutory section." The only "new statutory section" is Wis. Stat. § 904.04(2)(b)1.; subparagraph (2)(b)2. was created in 2005 and simply renumbered from paragraph (2)(b) to subparagraph (2)(b)2. *See* 2005 Wisconsin Act 310.[12] Second, it establishes that Wis. Stat. § 904.04(2)(b)1. is to be read consistently with case law developing the judicially created greater latitude rule.

Under the judicially created greater latitude rule, the other-acts evidence must be proffered for an acceptable purpose. *See State v. Tabor*, 191 Wis. 2d 482, 491, 529

---

[12] Available at: docs.legis.wisconsin.gov/2005/related/acts/310. (last visited June 1, 2017.)

N.W.2d 915 (Ct. App. 1995).[13] As noted earlier, the new subparagraph is a modified version of Wis. Stat. § 944.33(3) (2011–12), the old pandering statute, which allowed for the use of evidence of similar acts to prove the accused's disposition. In creating Wis. Stat. § 904.04(2)(b)1., the Legislature removed that language and deliberately did not exempt subparagraph (2)(b)1. from paragraph (2)(a)'s prohibition on propensity evidence.

Similarly, Wis. Stat. § 904.04(2)(b)1. does not exempt the proponent of the evidence from establishing that the evidence is relevant and that the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. *See Sullivan*, 216 Wis. 2d at 772–73. Therefore, like the judicially created rule, the effect of Wis. Stat. § 904.04(2)(b)1. is to "permit the more liberal admission" of evidence of similar acts in the prosecution of crimes of human trafficking, all crimes against children, serious sexual assaults, and domestic abuse. *See Davidson*, 236 Wis. 2d 537, ¶ 51.

In sum, a superfluous construction can be avoided. The plain language, read in concert with the subsection's title and its legislative history, provides that in a specified criminal proceeding, "evidence of any similar acts by the accused is admissible" with greater latitude. *See* Wis. Stat. § 904.04(2)(b) and (2)(b)1. "[A]nd 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." *See* Wis. Stat. § 904.04(2)(b)1. This Court should adopt

---

[13] "Although the greater latitude rule allows for greater admissibility under the § 904.04(2) framework, it does not allow for other crimes evidence to prove a deviant character trait of the defendant."

this non-superfluous construction and conclude that Wis. Stat. § 904.04(2)(b)1. is a codification and expansion of the judicially created greater latitude rule.

Thus, the circuit court did not err when it analyzed whether to admit the other-acts evidence pursuant to *Sullivan* and the greater latitude rule. As addressed more fully in Section II below, the other-acts evidence in this case was admissible pursuant to *Sullivan*, and if it was questionable whether the other-acts evidence was admissible, the application of the greater latitude rule tipped the scales in favor of admission.

## II. The circuit court properly admitted the testimony of R.K. as relevant other-acts evidence.

The circuit court properly concluded that R.K.'s testimony was relevant, admissible other-acts evidence. In *Sullivan*, this Court held that other-acts evidence may be used in the prosecution of any criminal case so long as: (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).

"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.*

There is no presumption of inadmissibility that the proponent must rebut. Dorsey incorrectly asserts that Wis. Stat. § 904.04(2) is generally a rule of exclusion. (Dorsey's Br. 13–14.) While this Court characterized Wis. Stat. § 904.04(2) as a rule of exclusion in *State v. Rutchik*, 116 Wis. 2d 61, 67–68, 341 N.W.2d 639 (1984), it later clarified that there was no practical effect of that characterization. *State v. Speer*, 176 Wis. 2d 1101, 1114–115, 501 N.W.2d 429 (1993).

In practice, Wis. "Stat. § 904.04(2) performs dual functions: (1) it acts as an *exclusionary* rule that 'precludes the use of a person's character as circumstantial evidence of conduct'; and (2) it acts as an *inclusionary* rule that allows 'other act evidence [to] be used to prove something other than the forbidden propensity inference.'" *State v. Payano*, 2009 WI 86, ¶ 63, 320 Wis. 2d 348, 768 N.W.2d 832 (citing Blinka, *supra*, § 404.6 at 171–72). Wisconsin Stat. § 904.04(2) actually favors admissibility, mandating exclusion *only if* the evidence is admitted to show propensity. *Speer*, 176 Wis. 2d at 1115.[14]

---

[14] 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* excerpt from LRB-3538 pt02of02. (R-App. 148–49) (Available at http://docs.legis.wisconsin.gov/2013/related/drafting_files/wisconsin_acts/2013_act_362_ab_620/02_ab_620/13_3538df_pt02of02.pdf (last visited June 1, 2017)). 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.

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

"The first step requires only that the other acts evidence be offered for a permissible purpose." *State v. Normington,* 2008 WI App 8, ¶ 21, 306 Wis. 2d 727, 744 N.W.2d 867. There is a list of permissible purposes in Wis. Stat. § 904.04(2)(a), but that list is not exhaustive. *State v. Hunt*, 2003 WI 83, ¶ 54, 263 Wis. 2d 1, 666 N.W.2d 771. The only impermissible purpose is to show that the person acted in conformity. *Marinez*, 331 Wis. 2d 568, ¶ 29. Thus, the "first step in the *Sullivan* analysis is not demanding." *Id.* ¶ 25 (citation omitted). "The purposes for which other-acts evidence may be admitted are 'almost infinite' with the prohibition against drawing the propensity inference being the main limiting factor." *Id.*

Here, the State sought 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." (R. 9:2, A-App. 59.) Those are acceptable purposes for other-acts evidence. *See* Wis. Stat. § 904.04(2)(a). And "[a]s long as the State and circuit court have articulated at least one permissible purpose for which the other-acts evidence was offered and accepted, the first prong of the *Sullivan* analysis is met." *Marinez*, 331 Wis. 2d 568, ¶ 25 (citation omitted).

The State offered three acceptable purposes: the other-acts evidence would be used to establish intent and motive to harm C.B. and Dorsey's motive to control C.B. in the context of a domestic relationship. The fact that the other-acts evidence establishes "context" and "motive" in a different manner than what has been previously approved of by appellate courts is of no consequence. *See, e.g., Marinez*, 331

Wis. 2d 568, ¶¶ 28–29. The first prong in the *Sullivan* analysis was met and no further analysis was needed.

Dorsey disagrees and 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. 18–23.) Dorsey argues that use of other-acts evidence to establish 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. 18.)

The court of appeals rejected Dorsey's argument and concluded that Wis. Stat. § 904.04(2)(b)1. "expressly allows the admission of evidence of similar acts committed by Dorsey against a different victim." *Dorsey II*, 2016 WL 7108525, ¶ 28. (R-App. 107–08.) And "[a]ccepting Dorsey's reasoning would directly conflict with the express language of [Wis. Stat.] § 904.04(2)(b)1." *Dorsey II*, 2016 WL 7108525, ¶ 28. (R-App. 107–08.)

The court of appeals and Dorsey, like many defendants, unintentionally combined the first two steps of the *Sullivan* analysis. *See, e.g., Normington,* 306 Wis. 2d 727, ¶ 21 (citation omitted). The "first step in the *Sullivan* analysis is not demanding." *Marinez*, 331 Wis. 2d 568, ¶ 25 (citation omitted). Whether the State sought to prove a generalized motive or specific one, and whether that matters, is an issue of relevance to be addressed by the second prong.

Dorsey mistakenly relies on *State v. Johnson*, 121 Wis. 2d 237, 358 N.W.2d 824 (Ct. App. 1984); *State v. Cartagena*, 99 Wis. 2d 657, 299 N.W.2d 872 (1981); and *State v. Rushing*, 197 Wis. 2d 631, 541 N.W.2d 155 (Ct. App. 1995), to argue that it is never permissible to use other-acts

evidence to establish a "generalized motive" unless motive is an element of the crime.

*Johnson* is the only court opinion in Wisconsin, published or otherwise, that uses the term "generalized motive." *Johnson*, 121 Wis. 2d at 255. There, the court of appeals used the term in its discussion of why Johnson's reliance on *Cartagena* was erroneous. The *Johnson* Court characterized this Court's conclusion in *Cartagena* as a determination that "the offending character of the other conduct evidence . . . was its demonstration of a generalized motive as opposed to a specific motive to commit a particular crime." *Johnson*, 121 Wis. 2d at 255. That is not completely accurate.

In *Cartagena,* the defendant was convicted of injury by conduct regardless of life for the accidental shooting of L.B., which occurred on October 7, 1978. *Cartagena*, 99 Wis. 2d at 659–60. Cartagena was also convicted of attempted first-degree murder for an intentional shooting of M.F., which occurred on October 19, 1978. *Id.* The cases were tried together. *Id.*

M.F. was present when Cartagena shot L.B. *Id.* at 660. M.F. testified that after Cartagena shot L.B., Cartagena threatened to kill M.F. if he went to the police. *Id.* Eleven days after the shooting of L.B., M.F. tried to call the police. *Id.* The next day, Cartagena went to M.F.'s house and shot M.F. in the stomach. *Id.*

At trial, the State wanted to question Cartagena about a prior incident when he went to a home and fired numerous times into a house to scare a person who owed him money. *Id.* at 666. The State intended to use that information to show that Cartagena was dangerous, and was motivated to threaten, frighten, and intimidate people. *Id.*

This Court rejected the State's argument that the other-acts evidence was *relevant* to establish Cartagena's motive for the attempted murder charge. *Id.* at 669–70. The State's theory was that Cartagena shot M.F. because he was concerned that M.F. would tell police that Cartagena shot L.B. *Id.* This Court concluded that Cartagena's "acts in shooting through the windows of another person's house one month before the [M.F.] shooting does nothing to establish his motive for shooting [M.F.]." *Id.* It was for the purpose of intent, not motive, that the Court concluded that the use of other-acts evidence was limited to crimes with an intent element. *Id.* And other-acts evidence could not be used to establish Cartagena's intent to go to M.F.'s residence to intimidate M.F. *Id.*

Motive and intent are not the same thing. Intent is a criminal element that specifically means the intended result of a person's actions. For example, the intent element of the crime of battery is that the person acted with intent to cause bodily harm. Wis. Stat. § 940.19(1). Motive, on the other hand, is "a person's reason for doing something." *State v. Wilson*, 2015 WI 48, ¶ 62, 362 Wis. 2d 193, 864 N.W.2d 52 (citing Wis. JI—Criminal 175), *reconsideration denied*, 2015 WI 91, 870 N.W.2d 465, *and cert. denied*, 136 S. Ct. 1375 (2016). For example, a person may be motived to act with intent to cause bodily harm by jealously, or revenge, or any variety of reasons.

Unlike intent, "motive is not an element of any crime, [and] the State never needs to prove motive." *Id.* ¶ 63 (emphasis omitted). Evidence of motive is not evidence of guilt, but it is admissible because it can "'aid in establishing' a particular person's guilt." *Id.* ¶ 62 (citation omitted). Thus, Dorsey has misinterpreted the law. It cannot be true that motive is only a permissible purpose for other-acts evidence if motive is an element of the crime charged. Motive is never

an element of the crime, and "there is no requirement that the purpose for which evidence of another act is proffered be an element of the crime." *Normington,* 306 Wis. 2d 727, ¶¶ 20–21, 30 (citation omitted).

Dorsey's reliance on *Rushing* is also misplaced. *Rushing* was decided at a time when the court's consideration of other-acts evidence involved a two-part analysis. *Rushing*, 197 Wis. 2d at 645. The first part was to determine if the evidence was offered for a proper purpose. But "[i]mplicit in this first step is a determination that the proffered other acts evidence is *relevant* to the case." *Id.* (emphasis added). The court of appeals concluded that the other-acts evidence was not *probative* "[b]ecause the State does not have to prove intent, the evidence of Rushing's prior act is not admissible to show proof of motive or intent." *Id.* at 646. Thus the court decided that the evidence was not relevant. It did not decide that other-acts evidence can never be used to establish motive if intent is not an element of the charged crime. Dorsey simply takes the language in *Rushing* too far.

Dorsey also spends a considerable amount of space in his brief discussing cases relating to the use of other-acts evidence to show that the defendant acted for the purpose of sexual gratification. (Dorsey's Br. 19–23.) Again, Dorsey is confusing intent and motive and relying on cases that predate the *Sullivan* framework. Acting with the purpose for sexual gratification is an additional *intent* element of a crime.[15] The actor is intentionally committing the act with the *intent* that his actions will result in his own sexual gratification. There is nothing within the sexual gratification

---

[15] *But see Hurley*, 361 Wis. 2d 529, ¶¶ 72–74.

cases that should limit the use of other-acts evidence for the purposes of establishing a motive to crimes with a purpose element.

In sum, the State offered three acceptable purposes for the other-acts evidence. The circuit court did not err when it determined that the State satisfied the first prong of *Sullivan*. And this Court should make clear that establishing a permissible purpose is not as demanding as Dorsey asserts; a permissible purpose is any purpose other than to establish propensity.

### B. The circuit court properly concluded that the other-acts evidence was relevant.

The second step in the *Sullivan* analysis requires the court to determine if the other-acts evidence is relevant under the two relevancy requirements in Wis. Stat. § 904.01. *Marinez*, 331 Wis. 2d 568, ¶ 18. "This second prong is significantly more demanding than the first prong but still does not present a high hurdle for the proponent of the other-acts evidence." *Id.* ¶ 33.

"Relevance under Wis. Stat. § (Rule) 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)).

"Because other acts evidence is inherently relevant to prove character and therefore a propensity to behave

accordingly, 'the real issue is whether the other act is relevant to anything else.'" *Payano*, 320 Wis. 2d 348, ¶ 67 (quoting Blinka, *supra*, § 404.6, at 181).

Here, the other-acts evidence was relevant. Again, this case was about credibility, and evidence that establishes who to believe is always relevant. *Marinez*, 331 Wis. 2d 568, ¶ 34 (citing Blinka, *supra*, § 401.101 at 98). The jury was required to determine if Dorsey's or C.B.'s version of events was more credible. The State sought admission of the other-acts evidence to establish Dorsey's intent and motive to harm C.B. and his motive to control her in the context of a domestic relationship. (R. 9:1–2, A-App. 58–59.) Establishing intent, motive, and context assists the jury in making credibility determinations by providing a more complete explanation of the case. Thus, the other-acts evidence met the first prong of the two-pronged relevancy test.

Dorsey disagrees and argues that the circuit court should have excluded the other-acts evidence because Dorsey was not disputing intent or motive; rather, he denied that the alleged acts occurred. (Dorsey's Br. 24–28.) This is similar to the argument proffered by the defense in *State v. Veach*, 2002 WI 110, ¶ 60, 255 Wis. 2d 390, 648 N.W.2d 447. Veach, like Dorsey, argued that the other-acts evidence is inadmissible to prove undisputed matters. *Id.* And Veach, like Dorsey, did not dispute intent or motive, rather, his defense was that it "just didn't happen." *Id.*

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." *Id.* ¶ 77 (citation omitted). And thus, "[e]vidence relevant to any element is admissible even if the element is undisputed." *Id.* Dorsey's denial that the assaults ever occurred did not somehow transform relevant

admissible evidence into prohibited propensity evidence. If that was the case, then any defendant could bar other-acts evidence by simply stating: "I didn't do it." Regardless of Dorsey's defense, intent was an element the State was required to prove. "[W]hen the occurrence of the act is disputed, the fact that defendant was motivated to commit the act increases the probability that it occurred. . . . [and] evidence of motive is admissible to prove defendant's intent." John E.B. Myers, *Myers on Evidence of Interpersonal Violence*, § 8.05 (6th ed. 2016).

Dorsey also asserts that "the State never showed how R.K.'s testimony might actually be relevant to the issue of intent, other than in making a forbidden character inference." (Dorsey's Br. 26.) Relatedly, Dorsey argues that his intent or motive to harm R.K. has nothing to do with his intent or motive to harm C.B. (Dorsey's Br. 18–19.) Dorsey fails to acknowledge other-acts evidence establishing intent, motive, and context is relevant circumstantial evidence.

Frequently, juries must determine intent from circumstantial evidence. *See, e.g., State v. Ambrose*, 181 Wis. 2d 234, 238, 510 N.W.2d 758 (Ct. App. 1993). "Intent may be inferred from the defendant's conduct, including his words and gestures taken in the context of the circumstances." *State v. Stewart*, 143 Wis. 2d 28, 35, 420 N.W.2d 44 (1988). "[C]ircumstantial evidence is often stronger and more satisfactory than direct evidence, and a finding of guilt may rest entirely on circumstantial evidence." *State v. Searcy*, 2006 WI App 8, ¶ 22, 288 Wis. 2d 804, 709 N.W.2d 497.

Here, the other-acts evidence, in conjunction with C.B.'s testimony, tended to show that domestic abuse characterized Dorsey's relationships with intimate partners, such that the assaults against C.B. represented Dorsey's

assertion of power and control over her. "Domestic violence cases usually encompass a broad range of uniquely violent and controlling acts which are dissimilar in their facts . . . . [But the] repeated acts of battering are similar in concept, as part of the cycle of violence to regain control and power . . . ." Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Cases of Domestic Violence*, 47 Santa Clara L. Rev. 157, 175 (2007). *See also* Andrea M. Kovach, *Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future*, 2003 U. Ill. L. Rev. 1115, 1129–30.

"Allegations of a single act of domestic violence, taken out of its situational context, are likely to seem 'incongruous and incredible' to a jury." *State v. Sanders*, 716 A.2d 11, 13 (Vt. 1998). "In cases of domestic violence, . . . there is a logical connection between violent acts against two different persons with whom the accused had a similar emotional or intimate attachment." *See, e.g., Smith v. State*, 501 S.E.2d 523, 527 (Ga. Ct. App. 1998). "[E]vidence of prior domestic violence is more probative for showing that a defendant committed the [charged domestic-violence-related] crime than it is in sexual assault cases, because the recidivism rate of domestic violence batterers is higher than that of sexual abuse offenders." Vartabedian, 47 Santa Clara L. Rev. at 180. This is "likely due to the larger scheme of dominance and control occurring in most relationships that involve domestic violence." *Id.* at 181.

Moreover, if the greater latitude rule is applicable, "[o]ne reason for a 'greater latitude' standard . . . is to corroborate the victim's testimony against a credibility challenge by the defense." *State v. Fishnick*, 127 Wis. 2d 247, 257 n.4, 378 N.W.2d 272 (1985). *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 raising the possibility of 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.

And like many child sexual assault cases, the central issue in this case was credibility. Establishing Dorsey's intent and motive to harm C.B. and to control her in the context of a domestic relationship assisted the jury in making its credibility determinations by providing a more complete explanation of the case. Many domestic abuse cases boil down to credibility. The abuser is generally not assaulting the victim in public. Rather, the offense is secretive, committed in the home or other discrete places. If other-acts evidence were irrelevant or prohibited simply because it bolstered the credibility of a witness, then other-acts evidence would almost always be inadmissible. That is contrary to established other-acts jurisprudence and to any interpretation of Wis. Stat. § 904.04(2)(b)1.

The other-acts evidence here was related to a fact of consequence: credibility. *Hurley*, 361 Wis. 2d 529, ¶ 81 (citation omitted). Thus, the first part of the relevancy analysis was satisfied and Doresy does not dispute that the evidence was probative. And as the court of appeals concluded, "the State established that the other-acts evidence would be probative—indeed, highly probative—to the issue of motive and intent, and is relevant in that sense." *Dorsey II*, 2016 WL 7108525, ¶ 40. (R-App. 109–10.)

### C. 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 and the court of appeals concluded that Dorsey did not meet that burden. (R. 33:12, A-App. 53.) *Dorsey II*, 2016 WL 7108525, ¶¶ 42–44. (R-App. 110.)

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.*

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. 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. Thus, Dorsey has not established that the circuit court improperly exercised its discretion in deciding that issue.

In sum, the other-acts evidence was properly admitted. It was offered for an acceptable purpose. It was relevant. And it was not unduly prejudicial. Thus, this Court should affirm Dorsey's judgment of conviction.

## III. If there was any error in admitting R.K.'s testimony, it was harmless.

The State maintains that the other-acts evidence was properly admitted at trial and will not proffer an unnecessarily 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 (citation 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) (citation omitted).

"The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction." *Thoms*, 228 Wis. 2d at 873 (citation omitted). "The beneficiary of the error, here the State, has the burden to establish that the test has been met." *Id.* (citation omitted). "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." *Id.* (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.

*State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189.

The central issue in this case was credibility, and this Court can find instruction in *Thoms*. 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 because the trial testimony was inconsistent with the complainant's signed affidavit and other prior statements. *Thoms*, 228 Wis. 2d at 874. 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.

Here, 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

Based on the foregoing, this Court should affirm Dorsey's judgment of conviction and conclude that Wis. Stat. § 904.04(2)(b)1. provides for the general admissibility of similar conduct by the accused in prosecutions for the specified crimes, or alternatively, that Wis. Stat § 904.04(2)(b)1. codified and expanded the judicially created greater latitude rule.

Dated this 15th day of June, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

## 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 10,821 words.

TIFFANY M. WINTER
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 15th day of June, 2017.

TIFFANY M. WINTER
Assistant Attorney General

# Supplemental Appendix
# State of Wisconsin v. Anton R. Dorsey
# Case No. 2015AP648-CR

## SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

TIFFANY M. WINTER
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 15th day of June, 2017.

TIFFANY M. WINTER
Assistant Attorney General