STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP000648-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

ANTON R. DORSEY,

Defendant-Appellant-Petitioner

**On Review of a Decision of the Court of Appeals, District III,
Affirming a Judgment of Conviction entered in the
Circuit Court for Eau Claire County,
The Honorable Paul J. Lenz, presiding**

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF THE DEFENDANT-APPELLANT-PETITIONER ANTON R. DORSEY

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A. Recent legislative enactments did not relieve the proponents of other acts evidence from identifying a proper purpose for which the evidence is offered to prove, nor abrogated the applicability of *State v. Sullivan* to crimes identified in § (Rule) 904.04(2)(b)1., Wis. Stats.

The State in its brief argues the following:

> 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.

(State's Brief, p. 10). This is a bold claim, namely, that there has been a previously unnoticed (and previously unargued) legislative abrogation of *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998). It would appear to be the State's position that so long as the charged offense is listed under subparagraph (2)(b)1., any prior act of the criminally accused which bears a similarity to the charged offense is admissible, notwithstanding whether a proper purpose is ever identified by the proponent of that evidence.

The State's argument largely hinges on the existence of "... a comma before the word `and'...," from which it divines a plain and unambiguous plan to abrogate *Sullivan* for all crimes listed under subparagraph (2)(b)1. (State's Brief, p.12). With regard to punctuation this Court has stated, "[i]n giving construction to a statute the punctuation is entitled to small consideration, for that is more likely to be the work of the engrossing clerk or the printer, than the legislature." *Thompson v. Craney*, 199 Wis.2d 674, 683, 546 N.W.2d 123 (1996), quoting, *Morrill v. State*, 38 Wis. 428, 434 (1875), *rev'd on other grounds*, 154 U.S. 626, 14 S.Ct. 1206, 23 L.Ed. 1009 (1877). Such a sweeping change in the law as the abrogation of a long-standing precedent as *Sullivan* should ride on more than the presence of a comma.

More problematic to the State's position, however, is the clear and unambiguous language of § (Rule) 904.04(2)(a), Wis. Stats., which states that "... *except as provided in par (b) 2.*, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." The "enumeration of exceptions in a statute creates a strong inference that the legislature intended no others." *Wisconsin Housing & Economic Development Authority v. Verex Assur., Inc.*, 166 Wis.2d 636, 480 N.W.2d 4903 (1992), *quoting*, 3A Sutherland, Statutory Construction sec. 70.05 (Supp.1991). This is another formulation of the Latin maxim *expressio unius est exclusio alterius*. The fact that subparagraph (2)(b)2. is specifically excepted from the provisions of subparagraph (2)(a) creates a strong inference that the provisions of subparagraph (2)(b)1. are not excepted from the proscriptions of paragraph (2)(a), nor from *Sullivan* framework which interprets that rule.

Indeed, the State acknowledges that subparagraph "(2)(b)1. is not excepted from the prohibition against propensity evidence," but simultaneously argues that there is no need show a proper purpose for crimes listed under subparagraph (2)(b)1. The State position appears to be that so long as the crime is a listed crime, and the other acts are similar to that crime, the evidence is admissible. (State's Brief, p. 13-18). However, by acknowledging that the "prohibition against propensity evidence" applies to subparagraph (2)(b)1. the State has undercut its entire argument. After all, evidence of other crimes, wrongs, or acts which are similar to the crime for which defendant is charged, will always have the effect of suggesting that the defendant has a propensity to act in accordance with a certain type of criminal behavior. In this case, a propensity towards domestic violence. The question then is whether the evidence is being offered for some other proper purpose, and not merely for the purpose of showing that the defendant has a propensity towards acting in a certain manner. If there is a prohibition against propensity evidence, then it will always be a necessary for the proponents of other

acts evidence to identify some proper purpose for its introduction. Which is, of course, the first step in the *Sullivan* framework.

B. The Court of Appeals was correct in its holding that the text of § (Rule) 904.04(2)(b)1., Wis. Stats., does not reflect a clear legislative intent to codify the judicially created "greater latitude rule" for cases of domestic abuse.

1. The text of the statute is clear and unambiguous in its language; there is no need examine the legislative record.

The interpretation of a statute is a question of law that this Court reviews de novo. *In re Commitment of Curiel*, 227 Wis.2d 389, ¶ 26, 597 N.W.2d 697 (1999). This Court has written that "[t]he purpose of statutory interpretation is to discern the intent of the legislature. *Id*. In discerning the intent of the legislature, we first consider the language of the statute." *Id*. This Court has also noted that "[o]ver the years, we have demonstrated a pattern of giving "the literal meaning of the language of the statute ... full force." *Seider v. O'Connell*, 2000 WI 76, ¶ 31, 236 Wis.2d 211, 612 N.W.2d 659. This Court has explained that "... our goal in interpreting statutory provisions is to give effect to the intent of the legislature, which we assume is expressed in the text of the statute." *State v. Stenklyft*, 2005 WI 71, ¶ 7, 281 Wis.2d 484, 697 N.W.2d 769, *citing*, *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110. "To this end, absent ambiguity in a statute, we do not resort to extrinsic aids of interpretation and instead apply the plain meaning of the words of a statute in light of its textually manifest scope, context, and purpose. *Stenklyft*, 2005 WI 71, ¶ 7. "Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity." *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 25, 260 Wis.2d 633, 660 N.W.2d 656.

The language of § (Rule) 904.04(2)(b)1., Wis. Stats. is as follows:

> 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.

There is no ambiguity to this statute. The statute lists a number of crimes, including crimes of domestic abuse, and states that "evidence of any similar acts by the accused is admissible." Now there is no doubt that such evidence *is* admissible, subject of course to the provisions of subparagraph (2)(a). The meaning of the text is clear and raises no ambiguity as to the general admissibility of other acts evidence in the listed crimes. The statute further states that such 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." This is also not in doubt. The meaning of these words is equally clear and subject to only one meaning. "The words of this statute are neither obscure, doubtful nor ambiguous as to their meaning, and they therefore afford but little room for interpretation." *Seider*, 2000 WI 76, ¶ 31, *quoting*, *Reilly v. Franklin Ins. Co.*, 43 Wis. 449, 454, 28 Am. Rep. 552 (1877).

Nonetheless, the State argues that this language is "arguably ambiguous," by asserting that it "... has been subject to more than one reading by reasonably well-informed persons." (State's Brief, p. 18). However, this Court has stated that "... it is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute `to determine whether 'well-informed persons should have become confused,' that is, whether the statutory ... language reasonably gives rise to different meanings.'" *Kalal*, 2004 WI 58, ¶ 47, *quoting*, *Bruno*, 2003 WI 28, ¶ 21; *see also, Seider*, 2000 WI 76, ¶ 30 ("[w]e will not find a statute ambiguous simply because either the parties or the courts differ as to its meaning."); *and, Coutts v. Wisconsin Retirement Bd*., 209 Wis.2d 655, 562 N.W.2d 917 (1997) ("a statute is not rendered ambiguous merely by virtue of the parties' disagreement over its meaning."). In this case, the language, as the Court of Appeals correctly ruled, does not reasonably give rise to

different meanings, it simply has a meaning different from that which the State desires.

Nor can the title of the statute create an ambiguity. "[T]hough statutory titles `may be resorted to in order to resolve a doubt as to statutory meaning, we will not resort to them in order to create a doubt where none would otherwise exist.'" *State v. Holcomb*, 2016 WI App 70, ¶ 14, 371 Wis.2d 647, 886 N.W.2d 100; *see also, Pulsfus Poultry Farms, Inc. v. Town of Leeds*, 149 Wis.2d 797, 806, 440 N.W.2d 329 (1989) ("Titles should not be resorted to in order to create a doubt where none would otherwise exist."); *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 25, 315 Wis.2d 350, 760 N.W.2d 156 ("... a title may not be used to alter the meaning of a statute or create an ambiguity where no ambiguity existed"); *State v. Smith*, 2010 WI 16, 323 Wis.2d 377, 780 N.W.2d 90. ("[W]hen a statute's language is unambiguous, ... sound principles of statutory construction require that we not look to the title for guidance or instruction."); and § 990.001(6), Wis. Stats. ("titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are not part of the statutes").

By any fair reading of the text, the meaning of this statute is clear and unambiguous. Indeed, the State's argument that the statute is "arguably ambiguous" exposes the State's awareness that the statute's text is in fact quite clear. Nothing in the actual text of the statute even hints at a codification of the judicially created "greater latitude rule" in cases of domestic abuse. There is no need to examine the legislative record.

2. The legislative record does not reflect a clear intention on the part of the Legislature to codify the judicially created "greater latitude rule" in cases of domestic abuse.

Even if the text of § (Rule) 904.04(2)(b)1., Wis. Stats., were ambiguous, Dorsey would assert that the legislative record does not reflect a clear intention on the part of the Legislature to codify the judicially created "greater latitude rule." The State in making its argument relies heavily on emails which were received by

the Legislative Reference Bureau (LRB) from Representative Amy Loudenbeck, and from Mark Rinehart, legislative liaison with the Department of Justice. While these emails may be interesting, memoranda prepared by the LRB and the Wisconsin Legislative Council (WLC), are far more authoritative as to what was the intent of the Wisconsin Legislature as a whole. And these memoranda do not reveal a clear legislative intent to codify the judicially created "greater latitude rule".

The LRB in its "Analysis" of 2013 Assembly Bill 620, had this to say about the changes to § (Rule) 904.04(2)(b)1., Wis. Stats.:

> Under current law, with exceptions, evidence of other crimes, wrongs, or acts may not be admitted in a criminal proceeding to prove the person acted in character. This bill states that, in a prosecution alleging human trafficking, an offense against a child, a serious sex offense, or a crime of domestic abuse or alleging the defendant committed a crime against his or her spouse, an individual with whom the defendant cohabited, or an individual with whom the defendant has a child, evidence of similar acts is generally admissible, and is admissible regardless of whether the victim of the other act is the same as the offense that is the subject of the prosecution.

(Suppl. Appx. 3). Nowhere in this analysis is there any mention that this amendment was intended to codify the judicially created "greater latitude rule" for cases of domestic abuse. Surely, if the LRB was of the impression that this amendment would affect such a momentous change in the law, some mention of this change would have been included in its analysis. Instead, there is only silence. Note, that this analysis was appended to the beginning of this bill. Consequently, members of the Legislature were far more likely to be reading this analysis when voting on this amendment, than to be reading the emails of their colleagues.

The WLC in its "Act Memo" had this to say about the changes to § (Rule) 904.04(2)(b)1., Wis. Stats.:

- Provides that evidence of similar acts may be admissible without regard to whether the victim of the crime is the same as the victim of the similar act in criminal proceedings for any of the following:

- Human trafficking.
- Any offense against a child.
- A serious sex offense.
- Domestic abuse.
- Any offense that is subject to a domestic abuse surcharge.

(Suppl. Appx. 5). Again, nowhere in this memorandum is there any mention that this amendment was intended to codify the judicially created "greater latitude rule". Surely, if the WLC was of the impression that this amendment had affected such a momentous change in the law, some mention of this change would have been included in its memorandum as well.

This Court has warned that "[w]e should not read into the statute language that the legislature did not put in." *Brauneis v. State, Labor and Industry Review Com'n*, 2000 WI 69, ¶ 27, 236 Wis.2d 27, 612 N.W.2d 635, *citing, In the Interest of G. & L.P.*, 119 Wis.2d 349, 354, 349 N.W.2d 743 (1984). Ultimately, the State's grievance lies not in any "arguable ambiguity" in what the text says, but in disappointment in what the text does not say. The text does not say the judicially created "greater latitude rule" is hereby codified and shall now apply in cases of domestic abuse cases. It does not even hint at such a result. No doubt the State wishes it said this, but it does not. This Court should not read into this statute a codification of the judicially created "greater latitude rule" in cases of domestic abuse, based upon a wink and a nod contained in the title of the statute and emails from one representative and one employee of the Department of Justice. If the Wisconsin Legislature had intended to codify the judicially created "greater latitude rule" in cases of domestic abuse it would have said so in the text.

C. Admission of R.K.'s testimony was harmful error.

Dorsey will largely rely on the arguments made in his initial brief concerning the admission of R.K.'s testimony. However, he would briefly

comment on two out-of-state cases that the State submitted to bolster its case, *State v. Sanders*, 716 A.2d 11, 168 Vt. 60 (Vt., 1998) and *Smith v. State*, 501 S.E.2d 523, 232 Ga.App. 290 (Ga. App., 1998). (State's Brief p. 35). What is striking about these cases is that neither case is comparable to Dorsey's case. In *Sanders*, the State of Vermont sought to introduce other acts evidence of past domestic abuse by the defendant, *of the same victim*, thereby establishing some linkage between these past acts of violence and the crime for which the defendant was being tried. *Sanders*, 716 A.2d at 13. The other acts evidence would provide, the *Sander's* court held, context concerning "the history of the relationship between the defendant and the victim" and the victim's recantation of prior statements. In *Smith*, a Georgia Court of Appeals upheld the introduction of other acts evidence concerning past domestic abuse to a different victim, when the defendant's defense in the case sub judice was that the victim was massaging him with alcohol and when he went to light his cigarette he accidentally ignited her hand. *Smith*, 501 S.E.2d at 526. The court in *Smith* held that "[i]n domestic violence cases, evidence of prior bad acts is especially probative in overcoming a defense based on mistake." *Id.* at 528. In both of these cases, there was a clear linkage between the other acts evidence and the case being tried. That kind of linkage, between the other acts evidence and the case being tried, is sorely lacking in Dorsey's case.

As for harmless error, the admission of R.K.'s testimony was not harmless. With R.K.'s testimony the jury was presented with not one, but two women, who testified to acts of domestic abuse at the hands of Dorsey. There were no witnesses to the alleged acts of violence against C.B., other than the alleged victim herself. The acts violence against R.K., on the other hand, were admitted to by Dorsey himself. (R.34:237-40; Appx. 136-39). It was an open invitation to the jury to draw the inference that Dorsey was a jealous and controlling man, who abuses the women with whom he is in a domestic relationship. In fact, the State asked the jury to draw that very inference. (R.34:284-85; Appx. 154-55). The

State cloaked that invitation behind the word "motive" but it was clearly an argument based on propensity. *Dyess* requires that the State show that there "was no reasonable possibility that the error contributed to the conviction." *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985). Here, there was more than a reasonable possibility that R.K.'s testimony contributed to Dorsey's conviction.

IV. Conclusion.

Wherefore, Mr. Dorsey humbly requests that this Court vacate his judgment of conviction and remand his case to the trial court for a new trial.

Respectfully submitted June 30, 2017.

/S/

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V. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3000 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

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 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.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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 June 30, 2017.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in:

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