STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2017 AP 001932

JAMES C. FAUSTMANN,

Defendant-Appellant.

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An Appeal From a Judgment of Conviction Entered by the
Honorable Allan Torhorst, Circuit Judge, Branch 9,
Racine County

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# BRIEF OF PLAINTIFF-RESPONDENT

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## STATEMENT OF THE ISSUES

1. Should the Circuit Court have given the jury a lesser included offense instruction of disorderly conduct?

Circuit Court Answer: No.

2. Was the other acts evidence admissible under *Sullivan*?

Circuit Court Answer: Yes.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent ("State") submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

## STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant James C. Faustmann, the State exercises its option not to present a statement of the case. *See* Wis. Stat. (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

## ARGUMENT

### I. STANDARD OF REVIEW

Whether the evidence supports the submission of a lesser-included offense is a question of law, which an appellate court reviews de novo. *State v. Kramar*, 149 Wis. 2d 767, 791, 440 N.W.2d 317 (1989). Admission of evidence lies within the circuit court's discretion. *State v. Ringer*, 2010 WI 69, ¶ 24, 326 Wis. 2d 351. An appellate court will not disturb the circuit court's decision to admit evidence unless the circuit court erroneously exercised its discretion. *Id.* The circuit court erroneously exercises its discretion if it applies the wrong legal standard or the facts of record fail to support its decision. *Id.*

Whether the circuit court properly admitted other acts evidence requires this Court to determine whether the circuit court properly exercised its discretion. *State v. Sullivan*¸ 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Id.* at 780-

81, (citing *Loy v. Bunderson*, 107 Wis. 2d 400, 414–15, 320 N.W.2d 175 (1982)). "When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." *Sullivan*, 216 Wis. 2d at 781 (citing *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983)).

## II. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S RULING THAT DISORDERLY CONDUCT IS NOT A LESSER INCLUDED OFFENSE OF UNLAWFUL USE OF A COMPUTERIZED DEVICE, THUS IT WAS PROPER NOT TO INSTRUCT THE JURY ON DISORDERLY CONDUCT.

This Court should affirm the Circuit Court's decision denying the Defendant's request to submit the disorderly conduct to the jury as a lesser included offense. As a matter of law, disorderly conduct is not a lesser included offense of unlawful use of a computerized communication system because disorderly conduct requires an element to be proven that is not required in unlawful use of a computerized communication system. If this Court does find that as a matter of law disorderly conduct is a lesser included offense of unlawful use of a computerized communication system, this Court should still affirm the Circuit Court's decision because

there was not a reasonable basis for an acquittal on the greater offense and a conviction on the lesser offense.

### A. As a matter of law, disorderly conduct is not a lesser included offense of unlawful use of a computerized system, so the Circuit Court properly denied the Defendant's request to instruct the jury of disorderly conduct as a lesser included offense.

When considering a request for a lesser included offense instruction, the court must first determine whether the lesser offense is, as a matter of law, a lesser included offense of the crime charged. *State v. Moua*, 215 Wis. 2d 511, 517, 573 N.W.2d 2002 (Ct. App. 1997). Under Wisconsin Statute Section 939.66(1), a lesser included crime is, "a crime which does not require proof of any fact in addition to those which must be proved for the crime charged." (2017). The test, "concerns legal, statutorily defined elements of the crime, not peculiar facts of case." *State v. Verhasselt*, 83 Wis. 2d 647, 266 N.W.2d 342 (1978). For one crime to be included in another, it must be utterly impossible to commit the greater crime without committing the lesser. *Randolph v. State*, 83 Wis. 2d 630, 266 N.W.2d 334 (1978).

In *State v. Chacon*, the Supreme Court of Wisconsin analyzed if, as a matter of law, disorderly conduct is a lesser included offense of criminal damage to property. 50 Wis. 2d

73, 183 N.W.2d 84 (1971). The Court concluded that disorderly conduct is not a lesser included offense because violence, abusiveness, indecency, profanity, or boisterousness are not essential elements of criminal damage to property and neither is the tendency to create a disturbance. *Id*. at 87. Furthermore, intentionally damaging property is not an element of disorderly conduct. *Id*. The Court reasoned that one can criminally damage property without creating a disturbance and conversely, one may create a disturbance by violent acts without damaging property of another. *Id*. Disturbance is an additional element in the crime of disorderly conduct and therefore, disorderly conduct cannot be a crime included in the offense of criminal damage. *Id*.

According to Wisconsin Jury Instruction 1908, the elements of unlawful use of a computerized communication system, in violation of Wisconsin Statute Section §947.0125(2)(a), are: (1) the defendant sent a message to a victim on an electronic mail system; (2) the defendant sent the message to the victim with intent to frighten, intimidate, threaten, abuse, or harass the victim; and (3) in the message, the defendant threated to inflict physical harm to, damage to the property of any person. According to Wisconsin Jury

Instruction 1900, the elements of disorderly, in violation of Wisconsin Statute Section §947.01, are: (1) the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct and (2) the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

In the present case, the Defendant asked the Circuit Court to instruct the jury on disorderly conduct stating it was a lesser included offense. (R. at 54-146). The Circuit Court properly concluded that disorderly conduct is not a lesser included under all of the circumstances and the elements. (R. at 54-147). Like criminal damage to property, unlawful use of a computerized device does not require a disturbance. It does not even require that the person who received the message felt threatened. Disorderly conduct requires an act to tend to create a disturbance, which is not an element of unlawful use of a computerized device, thus, this Court should rule that as a matter of law, disorderly conduct is not a lesser included offense of unlawful use of a computerized communication.

Furthermore, someone can commit unlawful use of a computerized communication system without committing disorderly conduct and vice versa. As seen in *State v. Chacon*,

a person can send a message with intent to intimidate or frighten someone without creating a disturbance. Conversely, one may create a disturbance by sending email messages to someone without threatening the person or intimidating that person. In fact, that is what occurred in *State v. Schwebke*, the Wisconsin Supreme Court Case that the Defendant relies his argument upon. (Appellant Br. at 5).

In *State v. Schwebke*, the defendant sent a victim four letters with newspaper clippings where the victim's name was mentioned and the letters contained intimate details about the victim's life. 2002 WI 55, ¶6-7, 253 Wis. 2d 1, 644 N.W.2d 666. The victim testified that she became more frightened and she had to make significant changes to her life, such as getting a new telephone number and moving several times. *Id*. ¶¶13-14. The mailings did not contain any threats or abusive language, however the Supreme Court of Wisconsin ruled the defendant's actions still constituted disorderly conduct because the mailings caused disturbances to the lives of the recipients and it was conduct that would be disruptive to peace and good order in the community. *Id*. ¶¶32-42. The Court stated, however, that the lack of an intent element in

disorderly conduct may have been concern if the statute were applied only to the defendant's speech. *Id*. ¶39.

In the present case, the focus is on the content of the Defendant's message to the victim, not the course of conduct like in *Schwebke*. Here, the Defendant was convicted for intentionally sending an email with threats to inflict physical harm to the victim. If the Defendant sent multiple messages to the victim, even if they had similar conduct, the State contends that disorderly conduct could have been charged for the course of conduct, sending multiple messages with threatening content. However, that did not occur here. Like the Court stated in *Schwebke*, someone can commit disorderly conduct by sending multiple messages but if unlawful use of a computerized communication system was charged, the State would have had a problem because the messages did not explicitly show they were sent with the intent to harm, annoy, or disrupt the victim's life given the non-threatening content of the messages. In the present case, it is one message with threats specific to the victim, so the facts in this case are distinguishable from *Schwebke* and the Defendant's actions did not constitute disorderly conduct so an instruction would be improper.

The Defendant argues that the only element differing between disorderly conduct and unlawful use of a computerized communication system is that unlawful use of a computerized communication system requires intent. (Appellant Br. at 6). The Defendant goes on to argue that both statutes deal with abusive or otherwise disorderly conduct and although they use different adjectives, they are used to describe similar behavior. *Id*. If this Court accepts the Defendant's argument, then disorderly conduct would be a lesser included offense for every single statute. Under the Defendant's argument, disorderly conduct is a lesser included offense of criminal damage to property because breaking a table, improper or otherwise disorderly conduct, could create a disturbance, the only difference being that of intent. However, the Supreme Court of Wisconsin has previously ruled that it is not a lesser included offense.

**B. If this Court does find as a matter of law that disorderly conduct is a lesser included offense of unlawful use of a computerized communication system, this Court should still affirm the Circuit Court's decision because there was not a reasonable basis for an acquittal on the greater offense and a conviction on the lesser offense.**

The Defendant argues that a jury could have found the Defendant's behavior abusive but that it was frustration,

rather than any intent to abuse. (Appellant Br. at 8). The Defendant argues that the jury could have found that the Defendant did not intend to be abusive or harassing to the victim and that they were, "mere empty words lacking any real intent." (Appellant Br. at 8). The Defendant completely ignores the elements of the offense and the jury instructions. The jury was given the standard jury instructions under Wisconsin Jury Instruction 1908 and the jury was instructed, "it is not necessary that the person making the threat have the ability to carry out the threat." (R. at 54-155). It does not matter if the Defendant's words were 'empty.'

The Defendant's argument that there was a reasonable basis for an acquittal on the greater offense and a conviction on the lesser offense relies upon the jury not finding intent and thus, convict the Defendant of disorderly conduct. The jury was given that option to not find intent; the jury could have found the State did not prove intent in element two beyond a reasonable doubt and could have found the Defendant not guilty, but they did not do that. This specific crime requires a person to go on a website, type in a threatening message, and click send. There is not a reasonable basis for the jury to find that deliberately typing a threatening

message and clicking 'send' was unintentional or that the Defendant did not have any intent when he sent the message, thus the Circuit Court was correct in not giving disorderly conduct as a lesser included offense.

## III. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE OTHER ACTS EVIDENCE

Whether the Circuit Court properly admitted other acts evidence requires this Court to determine whether the Circuit Court properly exercised its discretion. *State v. Sullivan*¸ 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Id*. at 780-81, (citing *Loy v. Bunderson,* 107 Wis. 2d 400, 414–15, 320 N.W.2d 175 (1982)). "When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." *Sullivan,* 216 Wis. 2d at 781 (citing *State v. Pharr,* 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983)).

**A. The other acts evidence was properly admitted because the other acts fulfill all three prongs of the *Sullivan* analysis.**

The analysis of other acts evidence is a three prong test set out in *Sullivan*, 216 Wis. 2d 768:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § 904.04(2)?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § 904.01?
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence?

In this case, the Defendant does not argue that the other acts evidence failed to meets prong one or two, so the discussion will be focused around the third prong. As to the prejudice prong of the analysis, the obvious purpose of all relevant evidence is to prejudice a defendant. *State v. Parr*, 182 Wis. 2d 349, 361, 513 N.W.2d 647, 650 (Ct. App. 1994). Thus, the test is not prejudice, but *unfair* prejudice. *See State v. Grande*, 169 Wis. 2d 430, 485 N.W.2d 284. The probative value of other acts evidence depends on "the similarity between the charged offense and the other act." *State v. Veach*, 2002 WI 110, ¶ 81, 255 Wis. 2d 390, 424, 648 N.W.2d 447, 464

(quoting *State v. Gray*, 225 Wis. 2d 39, 58, 590 N.W.2d 918 (1999) (citing *Sullivan*, 216 Wis. 2d at 786, 576 N.W.2d 30)).

"It is not necessary that prior crime evidence be in the form of a conviction; evidence of the incident, crime or occurrence is sufficient." *Whitty v. State*, 34 Wis. 2d 278, 293, 149 N.W.2d 557, 564 (1967). In *State v. Gray*, the Supreme Court of Wisconsin stated that uncharged cases are admissible as other acts evidence. 225 Wis. 2d 39, 590 N.W.2d 918 (1999). In *Gray*, the defendant was charged with attempting to obtain a controlled substance by misrepresentation. *Id*. at 45. The State filed a motion to introduce other acts evidence including the defendant's prior convictions for obtaining controlled substances and uncharged forged prescriptions. *Id*. at 46. The Court ruled that evidence of uncharged forged prescriptions was similar enough to the charged crime to show identity and that it constituted the imprint of the defendant and therefore it was admissible. *Id*. at 53 (quoting *State v. Fishnick*, 127 Wis. 2d at 263-64, 378 N.W.2d 272). The Court stated that a court must consider all of the evidence presented to the jury to determine whether there was sufficient evidence that a reasonable jury could find by a preponderance of the evidence

that the defendant was connected to the uncharged crime. *Id*. at 61-2. In *Gray*, the Court found that the uncharged crime was connected to the defendant because his fingerprint was on it, the prescriptions were all for the same drug, all of the prescriptions were forgeries, thus the State showed there was a high probability that the same person forged the printed portions of the prescriptions and presented sufficient evidence to fulfill the conditional fact, the other acts evidence, was relevant. *Id*. The Court ruled that the evidence was not unduly prejudicial as it was probative due to the nearness in time, place, and circumstances of the uncharged act with the charged offense. *Id*. at 65.

In this case, the Defendant does not argue that the other acts evidence confused the issues, misled the jury, was a waste of time, or was cumulative. The Defendant claims that the danger of prejudice substantially outweighed the probative value of the evidence. (Appellant Br. at 10). The Defendant supports this argument by stating that the other acts evidence unfairly linked to charged offense and contributed to the Defendant's conviction. *Id*. at 11. Under *Sullivan*, all other acts evidence must link to the charged

offense in order to be admitted, so the Defendant's argument ignores the law.

The Defendant also argues that the other acts evidence was inadmissible because the other acts evidence were pending charges and the Defendant was not convicted of those crimes yet. (Appellant Br. at 10). However, the Supreme Court of Wisconsin has explicitly stated that other acts evidence is not limited to prior conviction, but it can even be uncharged acts so long as it fulfill the three prongs in *Sullivan*. The Defendant also states that if the Defendant is found innocent in his pending cases, the link would break and the other acts would be inadmissible. *Id*. at 11. However that is not true because the burden of proof at trial versus other acts evidence are different; the burden of proof for other acts evidence is preponderance of evidence. If the Defendant is found innocent of his pending cases it has no bearing on the admissibility of the other acts evidence.

In this case, the other acts evidence not only met the burden of proof of preponderance of the evidence, but it exceeded it. The other acts evidence admitted in this case is very similar to the acts submitted in *State v. Gray*. The other acts the State moved to introduce involved two messages

from the Defendant's pending case where the Defendant sent emails using the same "contact us" method on a website, used the same or similar email addresses, and used the same language. (R. at 8-1-2). There was also testimony at trial regarding IP addresses and the unique, identifying information obtained from them which linked the messages to the Defendant's address. (R. at 8-2). The similarities in the other acts evidence such as the email addresses, the method used, and the IP address linking directly to the Defendant exceeds the preponderance of the evidence standard to show that the Defendant was connected to the other acts evidence, his charged cases from another jurisdiction and the charged offense.

Lastly, the Defendant was also charged with bail jumping. The Defendant did not stipulate to the fact that he was out on bond, so the State had to provide the jury with evidence that the Defendant was out on bond for a misdemeanor crime at the time he committed his offense. Therefore, regardless of the other acts motion, the jury would have heard about the nature of the crime the Defendant was out on bond for.

**B. Although the Circuit Court did not give a curative instruction about other acts evidence, it was harmless error.**

The appellate court is bound by the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. *State v. Leighton*, 2000 WI App 156, ¶ 33, 237 Wis. 2d 709, 616 N.W.2d 126; *State v. Jones*, 181 Wis. 2d 194, 199, 510 N.W.2d 784 (Ct. App. 1993). The test for harmless error of nonconstitutional dimensions is not whether some harm has resulted, but rather whether the appellate court in it's independent determination can conclude there is sufficient evidence, other than and uninfluenced by the inadmissible evidence, which would convict the defendant beyond a reasonable doubt, based on reasonable probabilities. *Novitzke vs. State*, 92 Wis. 2d. 302, 308, 284 N.W.2d. 904, 907-08 (1979) quoting *Wold vs. State*, 57 Wis. 2d. 344, 356, 204 N.W.2d. 482, 490 (1973).

The primary danger of other acts evidence is the potential that jurors will think the other acts evidence shows that the defendant had a propensity to commit the *type* of crime charged. *See* Wis. Stat. § 904.04(2) (other acts evidence is not admissible "to prove the character of a person in order to show that the person acted in conformity therewith"). *State v.*

*Powell*, 2014 WI App 45, ¶ 39, 353 Wis. 2d 554, 846 N.W.2d 34. Courts typically give a curative instruction for how juries are to use the other acts evidence in their deliberations.

A curative instruction was not given to the jury, however it was harmless error if this Court find that an instruction was necessary. The State did request a curative instruction in the other acts motion filed; however, all parties failed to include it on the day of trial. (R. at 8-6). The Defendant has failed to show that the verdict would have been different and more favorable to the Defendant if an instruction was given. The evidence in this case was overwhelming and the State did not improperly argue how the jury was to use the other acts evidence in its closing argument. (R. at 54-171).

## CONCLUSION

For all the foregoing reasons, the State respectfully requests this Court affirm the Circuit Court's decision and deny the Defendant's to reverse the Circuit Court's conviction.

Dated this 27th day of December, 2017.

Respectfully,

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## CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with monospaced font. The length of this brief is 3,666 words long.

Dated this 27th day of December, 2017.

_____

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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. § 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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of December, 2017.

_____

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