STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1069-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER L. GEE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE J.D. WATTS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Has Defendant-Appellant Christopher L. Gee met his burden to prove that Wis. Stat. § 904.04(2)(b)2—which permits the admission of evidence of similar convictions to show action in conformity therewith in first-degree sexual assault trials—is unconstitutional?

The circuit court concluded that Gee did not prove that Wis. Stat. § 904.04(2)(b)2 is unconstitutional.

This Court should hold, "No."

2. The circuit court held that the State would not be able to admit evidence of Gee's 1996 Indiana aggravated rape conviction in its case-in-chief; instead, it would only be able to do so in rebuttal, if Gee presented affirmative evidence to suggest the victims consented to sex. Did the circuit court erroneously exercise its discretion when it concluded that, in that situation, the probative value of his prior conviction would not be substantially outweighed by the danger of unfair prejudice?

The circuit court made the ruling.

This Court should hold, "No."

3. Alternatively, are Gee's other-acts evidence challenges properly before this Court, where Gee chose not to testify and the jury never heard the other-acts evidence?

The circuit court did not address this question.

This Court should hold, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not seek oral argument. As a matter of first impression in Wisconsin, publication is warranted to clarify that Wis. Stat. § 904.04(2)(b)2 does not violate due process.

INTRODUCTION

Gee challenges the circuit court's decision permitting the State to admit other-acts evidence in rebuttal—evidence the jury never heard.

Gee cannot prove that Wis. Stat. § 904.04(2)(b)2 is unconstitutional on its face or as applied to him.

His facial challenge fails for multiple reasons: Wisconsin's statute is narrower than the related federal rule of evidence, which has survived due process challenges. Other states also have similar statutes, many of which have been held by the respective state courts to not violate due process. Additionally, Wisconsin has a long tradition of relaxed requirements for the admission of other-acts evidence in sexual assault offenses. Lastly, Wis. Stat. § 904.04(2)(b)2's limitations protect due process; it only applies in the most egregious sexual assault cases, where the defendant has a prior conviction for a similar offense.

This Court should also reject any as-applied challenge. Gee appears to argue that he did not have notice, but the complaint itself mentioned his prior Indiana conviction. Gee also asserts that he chose not to testify because of the court's rulings, but the court's rulings were proper and he does not establish any infringement on his right to testify. Gee's arguments are forfeited and undeveloped.

Gee also fails to show that the court erroneously exercised its discretion when it concluded that the probative value of his 1996 Indiana conviction would not be outweighed by the danger of unfair prejudice, if and only if Gee opened the door in his defense case. Gee simply disagrees with the court's decision. Gee's challenges fail.

Alternatively, this Court should hold that Gee abandoned his other-acts evidence challenges by choosing not to testify at trial. This Court should affirm.

STATEMENT OF THE CASE

Procedural overview. The State charged Gee with two counts of first-degree sexual assault with the use of a dangerous weapon, in violation of Wis. Stat. § 940.225(1)(b), for sexually assaulting two women. (R. 1.)

Pre-trial, the State filed a motion to admit other-acts evidence, including Gee's 1996 Indiana aggravated rape conviction. (R. 6.) Gee objected on multiple grounds. (R. 14.) The court ruled the evidence was admissible, but it held that it would not allow the State to admit it in its case-in-chief. (R. 22, A-App. 101–13.) Instead, it would only allow the State to present it in rebuttal if Gee presented affirmative evidence suggesting consensual encounters. (R. 22, A-App. 101–13.)

The first jury was unable to reach unanimous verdicts. (R.148:9–16.) The second jury convicted Gee on both counts. (R. 93.)

During the court's colloquies about his decisions as to whether to testify, Gee indicated that he chose not to testify because of the court's other-acts decision. (R. 146:94; 160:91.) Gee did not testify at either trial. (R. 146:94; 160:91.) Neither jury heard anything about Gee's criminal history.

The complaint. The complaint, filed May 7, 2015, alleged that on March 28, 2015, Gee raped A.M. at 1200 East Singer Circle in Milwaukee. (R. 1:1–2.) It alleged Gee came up behind her in an apartment, put a knife to her throat, and had penis to vagina intercourse without her consent. (R. 1:1–2.)

The complaint further alleged that on April 27, 2015, at 1200 East Singer Circle, Gee raped J.P. at knifepoint. (R. 1:1–2.) It stated that J.P. went to the address for a prostitution date; when she arrived, a man appeared, told

her he was security, pulled out a knife and put it to her neck, and had oral and vaginal sex without her consent. (R. 1:2.)

The complaint explained that Gee told police he responded to a prostitution ad on April 27, 2015; he at first said he did not have sex with J.P., but then said he did have sex with her. (R. 1:3.) He denied having a knife and said he did not pay her for the sex. (R. 1:3.) He told police he did not recognize a photo of A.M. and did not know whether his DNA would be found on her. (R. 1:3.)

The complaint also noted that, in 1996, Gee pled guilty to rape in Indiana. (R. 1:3.)

Other-acts evidence litigation. Wisconsin Circuit Court Case Access (CCAP) records from an off-the-record hearing reflect that within one month of filing the complaint, the State advised that it would be filing an other-acts evidence motion.[1]

On August 19, 2015, the State filed that motion; it sought the admission of: (1) a 1996 Indiana aggravated rape conviction, (2) a 1993 Indiana rape conviction, and (3) two 1980s dismissed Milwaukee County rape charges. (R. 6.)

The State argued that the 1996 Indiana rape conviction, to which Gee pled guilty, was admissible to show Gee's action in conformity therewith, pursuant to Wis. Stat. § 904.04(2)(b)2. (R. 6:6–8.) The State presented case records; Gee was charged with approaching a woman from behind in an apartment complex in 1993, shoving her into an empty apartment, brandishing a gun, and raping her. (R. 6:2–3; 7:1–5.)

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[1] Circuit court log for June 4, 2015. Milwaukee County case number 2015-CF-2058, Wisconsin Circuit Court Case Access (CCAP), available online at http://wcca.wicourts.gov.

The State also argued that the 1996 conviction was relevant to show his conduct was "planned and motivated by his desire to force women to submit to him under threat of deadly force." (R. 6:8.) The State noted Gee had only been out of custody for five years when charged here. (R. 6:6–10.)

The State argued that Gee's 1993 Indiana rape conviction should be admitted to show preparation and plan, modus operandai, and motivation. (R. 6:10–11.) The State presented records reflecting that Gee was charged with shoving a woman into a vacant apartment and forcing vaginal intercourse. (R. 6:3–4; 8:1–8.)

The State also explained that Milwaukee police investigated Gee at least seven times for sexual assault in the 1980s; two occasions resulted in charges. (R. 6:4.) Both cases were dismissed because the victims failed to appear and were unwilling to cooperate. (R. 6:5.) The State argued that these dismissed charges would be relevant to explain how Gee would have been "so bold as to rape two women near his own house." (R. 6:10–11.)

Gee, by counsel, filed a response in opposition to the State's motion. (R. 14.) First, he argued Wis. Stat. § 904.04(2)(b) violates the Due Process Clauses of the United States and Wisconsin Constitutions by allowing proof of prior offenses to show action in conformity therewith. (R. 14:1–5.) He argued such evidence has been historically disfavored, and he cited cases from Iowa and Missouri striking down statutes he asserted were similar to Wisconsin's statute. (R. 14:1–5.)

Gee also argued the Indiana convictions had "little to no probative value" because of their age and factual differences. (R. 14:6–7.) He argued that the dismissed Milwaukee charges were not admissible for any proper purpose. (R. 14:8.)

The defense filed its own motion to admit other-acts evidence. (R. 15.) Gee sought to admit evidence that in 2014, a different woman working as a prostitute accused Gee of sexual assault, and police determined her allegation to be baseless. (R. 15.) According to Gee, it was consensual sex, and the woman became upset because he refused to pay her. (R. 15.) Gee argued this was admissible to show "prostitutes have a *motive* to lie when they are not paid for their sexual services," and Gee had the intention and plan to not pay prostitutes he solicits. (R. 15.)

At an initial hearing on the motions, defense counsel agreed that the 1996 Indiana aggravated rape conviction had the same elements as a first-degree Wisconsin sexual assault offense. (R. 138:11.)

The court denied the State's motion to admit evidence of the dismissed 1980s Milwaukee charges. (R. 138:22.) The court also denied the defense motion to admit the 2014 Milwaukee allegation. (R. 138:34.)

The State filed written replies in support of its remaining arguments. (R. 18–19.) It asserted Gee could not prove that Wis. Stat. § 904.04(2)(b)2 was unconstitutional for multiple reasons. (R. 18:11–21.)

Prior to the court's ruling, the defense filed a motion seeking to admit evidence that A.M.—after her encounter with Gee—had been charged with prostitution in another county. (R. 21.)

The court issued a written decision on the State's other-acts evidence motion. (R. 22, A-App. 101–13.)

First, the court rejected Gee's constitutional challenge to Wis. Stat. § 904.04(2)(b)2. (R. 22:1–10, A-App. 101–10.) The court concluded the statute was constitutional both on its face and as applied to Gee. (R. 22:1–10, A-App. 101–10.) It explained that Wisconsin courts generally hold that Wisconsin's constitutional due process right should be

interpreted the same as the federal constitutional right. (R. 22:3, A-App. 103.) It noted federal courts have upheld Federal Rule of Evidence 413, which has a provision similar to Wis. Stat. § 904.04(2)(b)2. (R. 22:3–5, 8, A-App. 103–05, 108.)

It found the Iowa and Missouri courts' decisions unpersuasive, as both applied "their respective State Constitutions." (R. 22:6, A-App. 106.) It explained that other states have upheld provisions similar to Wisconsin's statute. (R. 22:6–7, A-App. 106–07.) It noted that section 904.04(2)(b)2 is subject to the *Sullivan*[2] analysis and is limited to the most serious sexual assault convictions. (R. 22:10, A-App. 110.)

The court further ruled that the 1996 Indiana aggravated rape conviction was a similar offense pursuant to Wis. Stat. § 904.04(2)(b)2. (R. 22:10, A-App. 110.) It noted both parties "tacitly admit[ted]" that "similar" must mean more than the same elements; to hold otherwise would render the "rest of the words in the statute meaningless." (R. 22:11, A-App. 111.)

It would not "guess or arbitrarily choose probative factors to assess similarity," when Gee provided the "organizing principle for identifying proper factors to assess similarity—the defendant's modus operandi." (R. 22:12, A-App. 112.) Gee's motion, the court reasoned, explained that his theory of defense would be that he arranges to meet with prostitutes, has sex, and then reneges on payment, resulting in false rape accusations as payback. (R. 22:12, A-App. 112.)

The court declined to allow the State to introduce the 1996 Indiana aggravated rape conviction in its case-in-chief. (R. 22:13, A-App. 113.) "This eliminates the possibility of

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

undue prejudice against the defendant because the State must prove their case beyond a reasonable doubt without it." (R. 22:13, A-App. 113.)

The court explained Gee was free to explore any relevant issue on cross-examination, including whether the women were engaged in prostitution, without risk of opening the door to admission of the 1996 Indiana conviction. (R. 22:12–13, A-App. 112–13.) If, however, Gee presented evidence in his defense case "attack[ing] the credibility of the State's witnesses . . . the State may cross-examine and introduce in rebuttal the conviction and underlying facts." (R. 22:13, A-App. 113.)

The court elaborated at a subsequent hearing: if Gee "chooses to testify, that's fine. If he chooses not to testify, that's fine. If he chooses to defend on any number of defense's, such as I wasn't there . . . I didn't do it, they've mistaken me for somebody else or any number of other defenses, he's free to do so." (R. 139:6.) The court explained that if, however, Gee decided to offer "affirmative evidence" that he engaged in consensual prostitution encounters and then failed to pay, it would be fair game for the State to introduce his prior 1996 Indiana conviction and its facts. (R. 139:6–7.)

The court also held that the facts of the 1993 Indiana rape conviction would be admissible to show modus operandi, but here too limited the admissibility to the State's rebuttal if Gee opened the door. (R. 139:19–24.)

The hung jury. At the start of the initial trial on November 30, 2015, the court put on the record a discussion it had with the attorneys, reiterating its other-acts evidence ruling. (R. 140:4.) Its goal was to take the evidence out of the "realm of the State's case in chief," such that the strength of the State's case would be tested without it. (R. 140:5.)

Following the State's evidence, the court engaged in a colloquy with Gee about his decision whether to testify. (R. 146.) The court explained he had the right to testify and the right not to testify; it noted that there would be advantages and disadvantages to either decision. (R. 146:91–92.) Gee told the court he had enough time to talk about it with counsel and would not be testifying; when asked whether anyone had threatened or pressured him, he answered, "No." (R. 146:93.)

After the court concluded its colloquy, Gee stated: "I just wanted to make it certain that the record did reflect my decision not to testify is made in light of the Court's ruling." (R. 146:94.) The court told Gee it thought his point was "fair," but it had already explained its ruling. (R. 146:95.) Gee signed a written waiver of his right to testify. (R. 27.)

The next morning, Gee expressed concern with signing the waiver, as he feared it would "affect the assertion of the claim if [he] were convicted on appeal that [he] chose not to assert or exercise [his] right to testify because of the Court's ruling on the admissibility of prior bad acts." (R. 147:6.) The court explained it would leave the paper record as it stood, and the verbal exchange would be in the record. (R. 147:10.)

The defense did not call any witnesses. (R. 146:96.) The State presented no evidence of Gee's Indiana convictions.

The first jury could not reach unanimous verdicts; the court declared a mistrial. (R. 147:78–83; 148:3–6, 9–14, 16.) The prosecutor later indicated she learned the jury had been deadlocked on the verdicts at 11 to 1, guilty. (R. 152:4.) The case proceeded to another trial.

The final jury trial. The second jury also did not hear about Gee's prior Indiana rape convictions. (R. 154–62.)

In opening, defense counsel told the jury it would learn that both A.M. and J.P. were at Gee's apartment as prostitutes to have sex for money. (R. 154:69–70.)

J.P. testified that on April 27, 2015, she went to 1200 East Singer Circle after a man responded to an escort ad she placed online. (R. 155:9–15.) She called and spoke to the man, who directed her to a particular location of the building; a man then approached her and told her he was security. (R. 155:14–17.) They started walking, and he pushed her into the mud; she tried to use her phone and he took it away and told her she could have it when he was done. (R. 155:17–26.)

He pulled out a knife; the "blade was weird," it "was shaped like a crescent." (R. 155:18.) J.P. identified a knife found in Gee's apartment as the knife her attacker used. (R. 36; 155:71; 158:56–59.)

He told her he wanted "pussy," held the knife up to her neck, and asked if she wanted to "end up in the river." (R. 155:19, 26.) J.P. testified that he pulled her to a door stop and tried to have vaginal sex from behind; he then told her to lay on the ground and had penis to vagina sex with her, without her consent and without a condom. (R. 155:12–25.) She identified photographs showing where the assault occurred. (R. 43–46; 48–55; 155:36–44.)

J.P. testified he then returned her phone, and she ran to her friend, who drove her there and had been waiting in the car. (R. 155:7, 12, 28.)

J.P. acknowledged she had been convicted of a crime three times, was under a deferred prosecution agreement for heroin possession, and that she continued to engage in prostitution after her assault. (R. 155:28–45.) She was also brought to court to testify on a body attachment. (R. 155:68.)

J.P. testified she did not immediately report the assault to police because she had a "warrant out for her

arrest." (R. 155:28.) On April 30, when arrested, she told police she had been assaulted, but she did not tell them she planned to engage in prostitution; she was "embarrassed" and "it's, obviously, illegal." (R. 155:30, 47, 50–51.)

The nurse who examined J.P. on April 30 confirmed that J.P. reported she had been sexually assaulted at 1200 East Singer Circle and the man had a "crescent" knife. (R. 158:15–16.)

At trial, J.P. did not recall her attacker commanding her to first perform oral sex, but the nurse testified J.P. reported that he did first force oral sex. (R. 155:30–31, 57–58; 158:15–16.)

The nurse testified that J.P. had swelling on her nose, redness by her jaw, swelling and redness to her left buttocks, a patterned injury to her lower back, and small abrasions to the center of her back. (R. 158:22–24.)

On May 1, J.P. acknowledged the prostitution ad to police and identified Gee in a photo array. (R. 56; 155:23–35, 61–68.) She initially circled "no" to his picture, but then circled "yes" and told police that it "appears to be him." (R. 56; 155:32–34, 61–62; 161:48, 65.)

A.M. testified that on March 28, 2015, she went to an apartment with a friend and her friend's boyfriend to smoke marijuana. (R. 155:76–79.) After smoking for a while, her friend and friend's boyfriend left to get more "Cigarellos." (R. 155:80–81.) A.M. called her cousin to come get her and went to the bathroom; when she came out, she saw Gee (who she identified in court) in the apartment. (R. 155:83–84.)

He put a knife to her neck; she described it as "weird looking" and identified the same knife J.P. identified. (R. 36; 155:85.) Though that knife is not serrated, police testified that A.M. originally described the knife as "serrated" with a "six-inch" blade. (R. 155:86, 126; 158:77.)

A.M. testified that, with the knife to her throat, Gee took her into a bedroom, told her to stop crying or he would kill her, closed and locked the door, and told her to get undressed and lay down on the bed. (R. 155:87–89.) He had penis to vagina sex with her, without her consent and without a condom. (R. 155:90, 108.) He kept telling her to "shut up or he was going to kill" her. (R. 155:90–91.) When he finished, he told her she could "get [her] stuff and leave" and he let her out. (R. 155:93–94.) She grabbed her things and ran to her cousin's car. (R. 155:93–94.). A.M. went to the hospital. (R. 155:94.)

A.M. identified Gee in a photo array; she "knew his face" as soon as she saw it. (R. 84; 155:97; 157:95–114.)

A.M. testified that the apartment looked like an "old lady lived there." (R. 155:98.) A.M. explained that the bedroom where Gee assaulted her had a "chair that spun around sitting by the door," where she put her clothes. (R. 155:99–100.) A.M. identified photographs of the apartment building; when shown photos of the apartment itself, she said some of the household items looked different, but she recognized the bedroom, the bed, and the chair. (R. 39; 155:106–07.) Detective Geri Dunn testified that 1200 East Singer Circle is a very large apartment complex, and that A.M. identified the specific building and indicated it was a middle apartment in that building. (R. 158:34.)

A.M. testified she also worked with a "sketch artist," and "they came really close to the picture." (R. 155:97.) Detective Dunn, however, testified that the sketch was not completed. (R. 158:44.)

A.M. stated she wanted a medical screening and answered "every question" asked at the hospital. (R. 157:9.) According to the nurse, A.M. provided a number of details (including that she "went with her friend to her friend's boyfriend's friend's house," that her attacker held a "knife to

her throat," and that he had vaginal sex with her), but declined a full exam and declined to answer some questions. (R. 40; 157:77–81, 87–94.)

A.M. acknowledged she worked as a dancer at a gentleman's club at the time, and that, since her assault, she had been arrested for and pled guilty to prostitution in another county. (R. 155:120–22.) She testified she was not intending to be involved in prostitution when Gee raped her. (R. 157:12.)

Both A.M. and J.P. testified they did not know each other. (R. 155:64; 157:11.)

The sexual assault nurses collected J.P. and A.M.'s underwear and swabs for DNA. (R. 157:83–85; 158:18–22; 161:24–27.)[3] Gee consented to provide a buccal swab. (R. 161:88–92.) Gee's semen matched A.M.'s vaginal, cervical, and labial swabs. (R. 78–79; 160:13–14.)

The analyst only found a low quantity of male DNA from evidence taken from J.P., and she found multiple sources of male DNA. (R. 160:18–22.) Gee's DNA was consistent with the profile found from J.P.'s vaginal swabs and the interior of her underwear. (R. 160:18–22.) "Consistent" meant the profile would not occur in more than one in every 433 African-Americans. (R. 160:20.)

Police used the phone number J.P. communicated with prior to her assault to determine Gee's name and address. (R. 161:54, 77.) On J.P.'s phone, police found text messages and call records between J.P.'s number and Gee's on April 27, 2015. (R. 161:78–87.)

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[3] The transcripts of the morning and afternoon sessions of trial on March 31, 2016, are in reverse order in the appellate record. (R. 160–61.)

Detective Dunn testified Gee told her he lived at Unit 3 of 1200 East Singer Circle with his son; his mother lived there too until she passed away in April 2015. (R. 158:49–55.) "He stated he knew what this was about"; "it was because he had met a female on Backpage and her boyfriend attempted to rob him." (R. 158:55.)

In Gee's apartment, police found the knife A.M. and J.P. identified as the knife used during their attacks. (R. 36; 158:56–59.)

The defense called two witnesses. First, the defense called a detective who interviewed J.P. at the hospital on April 30, 2015, who testified that J.P. had not been fully honest at first as to why she went to the apartment complex. (R. 160:32–39.) He also testified that J.P. reported that her attacker told her to "suck his dick" and she performed oral sex, before he had vaginal sex with her. (R. 160:34–39.)

Second, the defense called the detective who worked with A.M. on a composite sketch. (R. 160:52–56.) She testified they did not complete the sketch, and A.M. did not like the way the sketch looked. (R. 160:55–56.)

The court then performed a colloquy with Gee about his decision whether to testify. (R. 160:60–64.) The court again advised that Gee could absolutely testify or not testify, and it verified that Gee had enough time to discuss this with his attorney. (R. 160:60–61.)

Gee chose not to testify. (R. 160:61.) When the court asked whether anyone had made any threats or promises, or used any pressure, to get him to choose not to testify, Gee answered: "If the Court's ruling can be construed as such, then yes." (R. 160:61.) The court noted it looked at its ruling as a "consequence," and Gee verified no threats or promises had been made. (R. 160:61–64.) The court again provided a written waiver for Gee to sign, but Gee wrote "declined to sign." (R. 90; 163:63–64.)

The defense rested, and the State presented no rebuttal. (R. 160:72.) Following closing arguments on April 1, 2016, the jury was excused to begin deliberations at 9:58 a.m. (R. 162:52.) The jury returned with guilty verdicts the same day, at 1:48 p.m. (R. 93; 162:54–57.)

Sentencing. The court sentenced Gee to 20 years of initial confinement followed by 10 years of extended supervision on each count, consecutive. (R. 102.)

Gee now appeals. He does not challenge the circuit court's ruling as to his 1993 Indiana rape conviction; he only challenges the court's rulings as to his 1996 Indiana aggravated rape conviction.

ARGUMENT

I. Gee cannot prove that Wis. Stat. § 904.04(2)(b)2. is unconstitutional.

A. Standard of review

Whether a statute and its application are constitutional are questions of law reviewed independently. *Gwenevere T. v. Jacob T.*, 2011 WI 30, ¶ 16, 333 Wis. 2d 273, 797 N.W.2d 854.

B. Legal principles

Statutes are presumed constitutional. *Gwenevere T.*, 333 Wis. 2d 273, ¶ 46. A facial constitutional challenge attacks the statute itself, claiming that the law "cannot be constitutionally enforced under any circumstances." *Gwenevere T.*, 333 Wis. 2d 273, ¶ 46 (citation omitted). An as-applied constitutional challenge attacks the application of the statute to the particular facts. *Id.* ¶ 47.

A party raising either a facial or as-applied challenge must meet a heavy burden to overcome the presumption of a statute's constitutionality, and he or she must prove beyond

a reasonable doubt that the statute is unconstitutional. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63. This Court resolves any reasonable doubt in favor of upholding the statute. *State v. O'Brien*, 2014 WI 54, ¶ 17, 354 Wis. 2d 753, 850 N.W.2d 8.

Though the presumption of a statute's constitutionality holds true in an as-applied challenge, courts do not presume that the State has applied the statutes in a constitutional manner. *Gwenevere T.*, 333 Wis. 2d 273, ¶ 48.

Both the U.S. and Wisconsin Constitutions guarantee due process. U.S. Const. amends. V, XIV; Wis. Const. art. I, § 8. "A due process challenge concerns the fairness of governmental action or proceedings." *O'Brien*, 354 Wis. 2d 753, ¶ 46.

The Wisconsin Supreme Court has "repeatedly stated that the due process clauses of the state and federal constitutions are essentially equivalent and are subject to identical interpretation." *In the Interest of Hezzie R.*, 219 Wis. 2d 848, 891, 580 N.W.2d 660 (1998); *but see State v. Ward*, 2009 WI 60 n.3, 318 Wis. 2d 301, 767 N.W.2d 236 (noting that the Wisconsin Supreme Court has, "on occasion," "interpreted Article I, Section 8 more broadly" than the Fifth Amendment's Due Process Clause).

When evaluating a due process challenge to the admission of other-acts evidence, the United States Supreme Court asks whether the "introduction of [the] type of evidence is so extremely unfair that its admission violates 'fundamental conceptions of justice.'" *Dowling v. United States*, 493 U.S. 342, 352 (1990) (citation omitted).[4]

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[4] In addition to his due process arguments, on appeal, Gee for the first time briefly cites to a defendant's right to "demand

Wisconsin Stat. § 904.04(2) addresses the admissibility of other-acts evidence. Subsection (2)(a) provides that "[e]xcept 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." Wis. Stat. § 904.04(2)(a). It also provides that this rule does not exclude evidence offered for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2)(a).

Wisconsin Stat. § 904.04(2)(b) sets forth the two provisions of what is known as Wisconsin's "greater latitude rule." At issue here is Wis. Stat. § 904.04(2)(b)2., which provides, in full:

> In a criminal proceeding alleging a violation of s. 940.0225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

Wis. Stat. § 904.04(2)(b)2.

Wisconsin Stat. § 940.225 prohibits first-degree sexual assault, which requires proof of non-consensual sexual contact or intercourse (a) that causes pregnancy or great bodily harm, (b) occurs by use or threat of a dangerous weapon or something fashioned to make the victim reasonably believe it is a dangerous weapon, or (c) is aided

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the nature and cause of the accusation against him" and "right to be heard," set forth in Article I, Section 7 of the Wisconsin Constitution. (Gee's Br. 16–17, 20.) As discussed in Section I.C.2, *infra*, his arguments on these provisions are forfeited and undeveloped, and they fail.

and abetted by at least one other person and is accomplished by use or threat of force or violence. Wis. Stat. § 940.225(1)(a)–(c).

Wisconsin Stat. § 948.02 prohibits first-degree sexual assault of a child. Wis. Stat. § 948.02(1)(am)–(e).

C. Gee cannot prove that Wis. Stat. § 904.04(2)(b)2. is unconstitutional on its face or as-applied to him.

Gee argues that Wis. Stat. § 904.04(2)(b)2. violated his due process rights to a fair trial under the United States and Wisconsin Constitutions, by permitting proof of a prior, similar offense as proof of action in conformity therewith. (Gee's Br. 10–20.)

As a preliminary matter, it is unclear whether Gee raises a facial challenge to the statute, an as-applied challenge, or both. Though Gee uses language suggesting he challenges the validity of the statute "as applied" to him, he focuses on general arguments without developing claims that certain facts specific to him, which would not be true in other situations, render its application unconstitutional. (*Compare* Gee's Br. 10 ("[a]pplication of Wis. Stat. § 904.04(2)(b)2 violated Mr. Gee's rights") *with* Gee's Br. 18 ("No sound rationale exists to single out sex offenses.").) The State therefore addresses each type of challenge.

1. Gee cannot prove that Wis. Stat. § 904.04(2)(b)2. is unconstitutional on its face.

Gee cannot meet his high burden to prove that Wis. Stat. § 904.04(2)(b)2. is facially unconstitutional for multiple reasons. If this Court finds "*any* reasonable doubt"—i.e., any reasonable basis to conclude that the statute is not unconstitutional—this Court must uphold the statute. *O'Brien*, 354 Wis. 2d 753, ¶ 17 (emphasis added).

a. Federal courts have upheld the constitutionality of Federal Rule of Evidence 413, which is far broader than Wis. Stat. § 904.04(2)(b)2.

Federal Rule of Evidence 413(a), enacted in 1994, provides: "In a criminal case in which a defendant is accused of sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant." Fed. R. Evid. 413; Violent Crime Control and Law Enforcement Act of 1984, Pub. L. No. 103-322, § 320935(a) (1994). Federal Rule of Evidence 414(a) provides the same for cases of "child molestation." Fed. R. Evid. 414.

Rule 413 "expressly allows the government to use a defendant's prior conduct to prove the defendant's propensity to commit the types of crime described in the rule." *United States v. Rogers*, 587 F.3d 816, 821 (7th Cir. 2009).

In *United States v. Mound*, 149 F.3d 799 (8th Cir. 1998), and *United State v. Enjady*, 134 F.3d 1427 (10th Cir. 1998), the Eight and Tenth Circuits, respectively, held that Rule 413's permission of propensity evidence in sexual assault cases does *not* violate due process.

In *Enjady*, the Tenth Circuit stressed that just because the general "practice" of excluding propensity evidence in criminal cases "is ancient does not mean it is embodied in the Constitution." 134 F.3d at 1432.

The Tenth Circuit discussed important reasons for Rule 413, including that "[b]roader admissibility of prior rapes places before the jury evidence that the defendant 'lacks the moral inhibitions that would prevent him from committing rapes' and implies that the threat of sanctions has not deterred the defendant in the past." *Enjady*, 134

F.3d at 1432 (citation omitted). Additionally, it "focuses on the perpetrators, rather than the victims, of sexual violence"; thus, it "encourages rape reporting and increased conviction rates by directing the jury's attention to the defendant." *Id.* (citation omitted). The court also noted that Federal Rule of Evidence 403's balancing of the probative value of evidence against the risk of unfair prejudice would still apply. *Id.* at 1433.

Similarly, in holding that Rule 413 does not violate the Due Process Clause, the Eighth Circuit agreed with the Tenth Circuit in *Enjady* that the government had the power to create exceptions to the practice of excluding "prior-bad-acts evidence." *Mound*, 149 F.3d at 801.

The Wisconsin Legislative Reference Bureau's drafting file for 2005 Wisconsin Act 310, creating Wis. Stat. § 904.04(2)(b)2, reflects that the Legislature looked to Rule 413 when creating our statute. Legislative Reference Bureau Drafting Record for 2005 AB 970, 05-3785df; (*see also* R. 19:29–36) (Drafting Record, attached to State's circuit court supplemental response).

Yet, the Legislature enacted a much narrower statute than Federal Rule 413. Our statute only applies in first-degree sexual assault cases and only permits the admission of *similar* offenses that resulted in conviction. *Compare* Fed. R. Evid. 413 *with* Wis. Stat. § 904.04(2)(b)2.

Given the general rule that Wisconsin interprets our state due process protections in accordance with federal due process protections, *Hezzie R.*, 219 Wis. 2d at 891, and given that federal courts have concluded that the much broader federal rule does not violate due process, Gee cannot meet his high burden to prove *beyond a reasonable doubt* that Wis. Stat. § 904.04(2)(b)2. violates the due process protections of either the federal or Wisconsin Constitutions. *Wood*, 323 Wis. 2d 321, ¶ 15.

b. A number of other state courts have upheld the constitutionality of statutes similar to Wis. Stat. § 904.04(2)(b)2.

Wisconsin is also now one of over ten states with statutes similar to section 904.04(2)(b)2., permitting the admission of prior acts to show propensity in certain sex-crime trials. *See, e.g.*, Alaska R. Evid. 404(b)(3); Ariz. R. Evid. 404(c); Cal. Evid. Code § 1108; Conn. Code Evid. § 4-5; Fla. Evid. Code § 90.404(2)(b); Ga. Code. Ann. § 24-4-413(b); 75 Ill. Comp. Stat. 5/115-7.3; Kan. R. Evid. § 60-455(d); La. Code Evid. art. 412.2; Neb. Rev. Stat. § 27-414; Nev. Rev. Stat. § 48.045(3); and Okla. Stat. tit. 12, § 2413.[5]

Many of these statutes have already survived constitutional due process challenges in state court. *See, e.g.*, *McGill v. State*, 18 P.3d 77, 81 (Alaska Ct. App. 2001); *People v. Falsetta*, 986 P.2d 182, 187–93 (Cal. 1999); *McLean v. State*, 934 So. 2d 1248, 1261–63 (Fla. 2006); *Wagner v. State*, 560 S.E.2d 754, 757 (Ga. Ct. App. 2002) (as-applied challenge); *State v. Boysaw*, 372 P.3d 1261, 1266–71 (Kan. Ct. App. 2016); *Horn v. State*, 204 P.3d 777, 781–84 (Okla. Crim. App. 2009). Similarly, the Supreme Court of Illinois upheld its state's statute against an equal protection challenge's to the rule's limitation to sex offenses. *People v. Donoho*, 788 N.E.2d 707, 718–21 (Ill. 2003).

Consider, as an example, the Court of Criminal Appeals of Oklahoma's analysis of its statute in *Horn*. Its

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[5] Some states limit this rule to only child sex offenses. *See, e.g.*, Utah R. Evid. 404(c). The State cites as examples those other states that have rules similar to Wisconsin, permitting the admission of such evidence in both adult and child sex offense cases.

statute is akin to Federal Rule of Evidence 413. *Compare Horn*, 204 P.3d at 781 *with* Fed. R. Evid. 413. The court noted that Oklahoma's constitution provided the same due process protection as the Federal Constitution, though it could provide more. *Horn*, 204 P.3d at 781. It noted federal appellate decisions affirming the constitutionality of Rule 413. *Id.* at 781–82. It concluded that Oklahoma's history with the "greater latitude rule" was "ambiguous at best." *Id.* at 783–84. And it concluded that the defendant failed to show that the statute violates due process under either the state or Federal Constitution. *Id.* at 784. This Court should apply a similar analysis here.

The fact that multiple states have similar statutes and a number of those statutes have survived due process challenges further reflects that Gee cannot carry his heavy burden to prove beyond *any* reasonable doubt that our state statute violates due process. *Wood*, 323 Wis. 2d 321, ¶ 15.

c. Wisconsin Stat. § 904.04(2)(b)2. follows a long Wisconsin common law tradition of relaxed admissibility requirements for other-acts evidence in sexual assault cases.

The Legislature's enactment of Wis. Stat. § 904.04(2)(b)2. in 2006 builds upon a long Wisconsin tradition of allowing "more liberal admission of other-acts evidence" in "cases of sexual abuse, particularly those involving children." *State v. Dorsey*, 2018 WI 10, ¶ 32, 379 Wis. 2d 386, 906 N.W.2d 158; 2005 Wis. Act 310, §§ 2–3. The greater latitude rule has been recognized in Wisconsin since 1893, "and it has been so-applied in hundreds of cases since." *Dorsey*, 379 Wis. 2d 386, ¶ 32.

Wisconsin law applies these relaxed standards because of the challenges inherent in the prosecution of sexual

assault crimes—challenges scholar Anne Elsberry Kyl aptly describes as the "dual problems of corroboration and credibility." Anne Elsberry Kyl, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 Ariz. L. Rev. 659, 665 (1995); *see also, e.g.*, *State v. Hurley*, 2015 WI 35, ¶ 59, 361 Wis. 2d 529, 861 N.W.2d 174 (explaining, in a child sex assault case, that the need to corroborate the victim's testimony against credibility challenges is one reason for the greater latitude rule); *Hendrickson v. State*, 61 Wis. 2d 275, 280 n.13, 212 N.W.2d 481 (1973) (quoting, in an incest case, *People v. Covert*, 57 Cal. Rptr. 220, 224 (Cal. Ct. App. 1967) ("Although circumstantial evidence supplies occasional corroboration, conviction usually hinges upon the credibility of the prosecuting witness. In this kind of case, beyond any other, the defendant's plea of innocence challenges the credibility of the alleged victim . . . .").)

Wisconsin Stat. § 904.04(2)(b)2. did, of course, change the law to expand the greater latitude rule to include—in limited circumstances, in limited cases—proof of a prior conviction to show propensity. The question is not, however, whether the statute expanded the law. The question is whether Gee can prove, beyond a reasonable doubt, that permitting the admission of this type of evidence in the limited statutory circumstances is "so extremely unfair that it violates 'fundamental conceptions of justice.'" *Wood*, 323 Wis. 2d 321, ¶ 15; *Dowling,* 493 U.S. at 352 (citation omitted). Where this statute follows a long history of relaxed standards for the admission of other-acts evidence in sexual assault cases, Gee cannot meet this onerous burden.

d. Wisconsin Stat. § 904.04(2)(b)2. is limited to only the most serious sexual assault crimes, and it only allows the admission of equally serious, similar offenses resulting in conviction.

Moreover, Wis. Stat. § 904.04(2)(b)2. has many self-imposed limitations to help protect a defendant's due process rights: First, it applies only in the most serious sexual assault trials—first-degree sexual assault (Wis. Stat. § 940.225(1), a Class B felony) or first-degree sexual assault of a child (Wis. Stat. § 948.02(1), a Class A felony). Wis. Stat. § 904.04(2)(b)2.

Second, it only allows admission of prior violations of the *same* two offenses "or a comparable offense in another jurisdiction." Wis. Stat. § 904.04(2)(b)2.

Thus, not only does the statute limit the admission of prior convictions to show propensity to only the most heinous sexual assaults, in so doing, it also limits the admission of such evidence to those situations where propensity evidence is likely to be highly probative.

Take, for example, the charges for which Gee was convicted. To be guilty of that subsection of first-degree sexual assault, a defendant has to have sexual contact or intercourse with another, without consent and by use or threat of use of a dangerous weapon (or something he pretends is a dangerous weapon). Wis. Stat. § 940.225(1)(b). It, in short, requires a particular type of egregious act by the defendant.

Whereas the probative value of a prior conviction for third-degree sexual assault (which broadly prohibits "intercourse" "without consent"), *see* Wis. Stat. § 940.225(3)(a), may not necessarily be probative to another charge of third-degree sexual assault, a prior first-degree

sexual assault conviction *is* likely to be probative because of the severity and type of actions required to commit the first-degree offense.

Third, Wis. Stat. § 904.04(2)(b) applies only to an offense "that is *similar* to the alleged violation." Wis. Stat. § 904.04(2)(b)2. As the circuit court here reasonably concluded, "similar" requires more than that the "prior conviction and the current offense have the same elements," as that would render the "rest of the words in the statute meaningless." (R. 22:11, A-App. 111.) Thus, the statute even further limits itself to those situations where the probative value of the evidence is likely to be quite high based on the similarity between the current and prior offense. On top of that, Wis. Stat. § 904.03 still provides that evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Wis. Stat. § 904.03.

Fourth, Wis. Stat. § 904.04(2)(b)2. limits the admissibility of prior offenses to prior *convictions*. Wis. Stat. § 904.04(2)(b)2. This also helps protect due process, by limiting the use of a prior offense to show propensity to those situations where the defendant was either convicted at trial or accepted responsibility through a plea.

Wisconsin Stat. § 904.04(2)(b)2. thus applies only in narrow circumstances where a defendant, charged with one of the most egregious forms of sexual assault, has been convicted of committing another, similar, egregious sexual assault. Given these limitations, Gee cannot prove beyond a reasonable doubt that the statute is "so extremely unfair" to violate due process. *Dowling*, 493 U.S. at 352.

e. Gee's arguments are unpersuasive.

Gee's arguments as to why Wis. Stat. § 904.04(2)(b)2. is unconstitutional boil down to three points: (1) "[n]o sound

rationale exists to single out sex offenses," (Gee's Br. 18–19); (2) in *Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967), the Wisconsin Supreme Court expressed disfavor for the admission of propensity evidence, (Gee's Br. 12–15); and (3) the supreme courts of Missouri and Iowa have struck down "provisions similar to § 904.04(2)(b)2" as unconstitutional. (Gee's Br. 15–18.) Gee's arguments do not meet his high burden.

First, sound reasons *do* exist to "single out sex offenses." (Gee's Br. 18–19.) We know this because Wisconsin has been allowing greater latitude in sex cases for over 100 years. *Dorsey*, 379 Wis. 2d 386, ¶ 32. The greater latitude rule addresses the unusual challenges of corroboration and credibility that arise in sex offenses. *See, e.g.*, *Hurley*, 361 Wis. 2d 259, ¶ 59; *Hendrickson*, 61 Wis. 2d at 280 n.13.

Second, *Whitty* does not help Gee because it addressed a different question. In *Whitty*, a 10-year-old girl accused Whitty of asking her to help him find a rabbit and then assaulting her in a basement; Whitty put on an alibi defense and testified that he never talked to any little girl about a rabbit, including an 8-year-old girl the night before the charged assault. 34 Wis. 2d at 284–85, 290. The State then called the 8-year-old girl in rebuttal, who testified that Whitty took her into a basement to look for a rabbit the night before the charged assault. *Id.* at 291.

The supreme court adopted the probative versus prejudicial balancing test, and concluded the evidence—admitted to establish identity—did not create the risk of undue prejudice and, in turn, did not violate Whitty's due process right to a fair trial. *Whitty*, 34 Wis. 2d at 291–97.

Though the Court did discuss the "universally established" character rule that evidence of prior crimes is not admitted to prove "general character, criminal

propensity, or general disposition," *Whitty*, 34 Wis. 2d at 291, the question of if or when propensity evidence could ever be constitutionally admissible was simply not at issue in *Whitty*. Moreover, *Whitty*'s broad comment concerning a "universally established" rule does not undermine Wisconsin's longstanding practice of relaxed rules for the admission of other acts in sexual assault cases. *See Dorsey*, 379 Wis. 2d 386, ¶ 32.

Lastly, Gee's reliance on the Missouri and Iowa Supreme Court's decisions in *State v. Ellison*, 239 S.W.3d 603 (Mo. 2007), and *State v. Cox*, 781 N.W.2d 757 (Iowa 2010), do not help him.

First, *Ellison* is no longer good law in Missouri. In 2014, Missouri voters added an article to the state constitution permitting propensity evidence in child sex cases; they did so "with the evident purpose of abrogating *State v. Ellison*." *State v. Williams*, 548 S.W.3d 275, 280 (Mo. 2018). In *Williams*, the Missouri Supreme Court then upheld the new constitutional provision against a due process challenge. *Id.* at 280–87.

Second, as the circuit court aptly recognized, *Cox* rested on Iowa's history and the *Iowa* Constitution: "Based on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, we hold the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity." *Cox*, 781 N.W.2d at 768; (R. 22:5–6, A-App. 105–06.)

On top of that, Iowa's statute was far broader than Wisconsin's. It held that that such evidence could be admissible in *any* case where the defendant was charged with "sexual abuse" and the State could show "clear proof" that the defendant committed another "sexual abuse." *Compare Cox*, 781 N.W.2d at 761 (citation omitted), *with*

Wis. Stat. § 904.04(2)(b)2. The fact that Iowa declared its broader statute to be a violation of the Iowa Constitution does not render Wisconsin's narrower statute unconstitutional under the U.S. or Wisconsin Constitutions.

Gee's constitutional challenge to Wis. Stat. § 904.04(2)(b)2. fails.

2. Gee cannot prove that Wis. Stat. § 904.04(2)(b)2. is unconstitutional as applied to him.

Gee makes no argument that the application of Wis. Stat. § 904.04(2)(b)2. violated his due process rights because his 1996 Indiana conviction is not "similar" under the statute. As best the State can tell, Gee only raises two arguments that could be construed as as-applied challenges to Wis. Stat. § 904.04(2)(b)2.: (1) Gee did not have notice that his 1996 Indiana conviction or "history generally" "were the bases for the accusations against him," and (2) he "chose not to testify *because* of the court's ruling." (Gee's Br. 16–17, 20); *see also* Wis. Const. art. I, § 7 (providing that a criminal defendant has the right to "demand the nature of cause and action against him" and the "right to be heard").

First, this Court should reject Gee's arguments as forfeited. A fundamental principle in Wisconsin appellate law is that issues "not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis. 2d 486, 611 N.W.2d 727. Gee did not raise these arguments below. Instead, he argued that Wis. Stat. § 904.04(2)(b)2. violated the "Due Process Clauses of both the Wisconsin and United States Constitutions" because of the danger it "presents to a fair trial." (R. 14:5.)

Second, this Court should reject Gee's arguments as undeveloped. This Court has recognized that "[c]onstitutional claims are very complicated from an

analytic perspective, both to brief and decide. A one or two paragraph statement that raises the specter of such claims is insufficient to constitute a valid appeal." *Cemetery Servs., Inc. v. Dep't of Regulation & Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998). Gee's perfunctory citations to the Wisconsin Constitution's notice and right-to-testify provisions are insufficient to develop complex, as-applied constitutional claims.

Third, his notice argument is a non-starter. The State specifically noted his 1996 Indiana conviction in the *complaint*. (R. 1:3.) Moreover, within one month of filing the complaint, the State advised that it intended to file an other-acts evidence motion; it filed that motion in August 2015, well before Gee's first trial began at the end of November 2015. (*See* R. 6.) Gee cannot prove that he was denied due process because of a lack of notice.

Fourth, any right-to-testify claim also fails. Importantly, Gee does not argue that the court's ruling deprived him of his constitutional right to testify. (Gee's Br. 20.) How could he? At both trials, the circuit court conducted thorough colloquies, stressing that Gee had a right to testify if he wished. (R. 146:91–92; 160:60–61); *State v. Weed*, 2003 WI 85, ¶¶ 40–41, 263 Wis. 2d 434, 666 N.W.2d 485 (explaining that when a defendant waives his right to testify, a court must conduct an on-the-record colloquy to ensure it is a knowing waiver).

Instead, Gee notes that he "*chose*" not to testify because of the court's ruling. (Gee's Br. 20.) But accepting any argument that his choice was predicated in error first requires the conclusion that the Court's ruling—that the statute is constitutional—was wrong. It was not. *See supra* Section I.C.

Further, the fact that a pre-trial ruling may have affected a defendant's decision does not in-and-of-itself

establish a constitutional infringement on a defendant's right to testify. Consider what that would mean: courts make all sorts of pretrial evidentiary rulings (for example, the admissibility of expert testimony or third-party perpetrator evidence).

Many of these rulings may shape a defense strategy and a defendant's decision to testify. That does not mean these rulings unconstitutionally infringe on the defendant's constitutional right to testify. *See, e.g.*, *Neely v. State*, 97 Wis. 2d 38, 52, 292 N.W.2d 859 (1980) (rejecting an argument that subjecting a defendant to cross-examination about pending matters put an "intolerable burden" on his right to testify, and holding: "While the defendant obviously has an interest in defending against the state's accusations by testifying on his own behalf, neither the choice to testify nor the choice of alternatives defendant must make once he waives his privilege by testifying can be said to be unconstitutionally imposed on him.").

Gee fails to meet his heavy burden to prove that Wis. Stat. § 904.04(2)(b)2. is unconstitutional on its face, or as-applied to him. This Court should affirm.

II. The circuit court properly exercised its discretion in concluding that Gee's 1996 Indiana aggravated rape conviction would be admissible in the State's rebuttal, if the defense opened the door.

A. Standard of review

The admission of evidence is left to the circuit court's discretion. *State v. Sarfraz*, 2014 WI 78, ¶ 35, 356 Wis. 2d 460, 851 N.W.2d 235. The question is not whether a reviewing court "would have admitted" the evidence, "but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of the record." *State v. Payano*, 2009 WI 86, ¶ 51, 320

Wis. 2d 348, 768 N.W.2d 832 (citation omitted). "The circuit court's decision will be upheld "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion."' *Id.* (citation omitted).

B. Legal principles

Wisconsin Stat. § 904.03 provides, in relevant part, that evidence, even if relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Wis. Stat. § 904.03.

Under the *Sullivan* test, other-acts evidence is admissible if (1) it is offered for a permissible purpose under Wis. Stat. § 904.04(2)(a), (2) it is relevant under Wis. Stat. § 904.01, and (3) if its probative value is not substantially outweighed by the risk or danger of unfair prejudice under Wis. Stat. § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998).

In its recent decision in *Dorsey*, the Wisconsin Supreme Court addressed the applicability of the *Sullivan* test to Wis. Stat. § 904.04(2)(b)1., which allows the admission of "similar acts" of domestic abuse in certain cases. *Dorsey,* 379 Wis. 2d 386, ¶¶ 25–35. The Court concluded that, under that statutory provision, courts "should admit evidence of other acts with greater latitude under the *Sullivan* analysis to facilitate its use for a permissible purpose." *Id.* ¶ 33. Justice Rebecca Bradley wrote a concurrence, joined by Justice Kelly, agreeing with the result but disagreeing with the adoption of the *Sullivan* analysis to Wis. Stat. § 904.04(2)(b)1. *Id.* ¶¶ 61–79 (R.G. Bradley, J., concurring). Justice Bradley concluded the court should have adopted a plain language interpretation of the statute; under such an interpretation, the proffered evidence, "like all proferred evidence . . . may be excluded even if relevant under Wis. Stat. § 904.03's unfair prejudice test." *Id.* ¶ 71 (R.G. Bradley, J., concurring).

C. The circuit court properly exercised its discretion.

First, it is worth noting that Gee assumes that the three-part *Sullivan* analysis applies to a circuit court's exercise of its discretion to admit evidence under Wis. Stat. § 904.04(2)(b)2. The circuit court also held that *Sullivan* would apply. (R. 22:12, A-App. 112.) This Court need not decide whether the *Sullivan* analysis should also be adopted for Wis. Stat. § 904.04(2)(b)2., because Gee only challenges the circuit court's exercise of its discretion under Wis. Stat. § 904.03 (which, is also the third step in the *Sullivan* analysis). Thus, assuming the *Sullivan* analysis does apply, Gee's challenge fails because he cannot show the circuit court erroneously exercised its discretion under Wis. Stat. § 904.03.

The circuit court engaged in a thorough consideration of Gee's 1996 Indiana aggravated rape conviction, weighing its probative value against the dangers of unfair prejudice. (R. 22:12–13, A-App. 112–13; R. 139:6–7.) In so doing, the court *denied* the State's request to introduce the conviction in its case-in-chief; this, the court thoughtfully reasoned, would eliminate the possibility of undue prejudice, because the State would have to prove its case without the evidence. (R. 22:12–13, A-App. 112–13.) If, and only if, Gee presented affirmative evidence in his defense case suggesting consensual encounters, would the balance of probative weight versus risk of undue prejudice shift to permit the State to admit the prior conviction in rebuttal. (R. 139:6–7.)

A reasonable judge, looking at these facts and law, could reach the same conclusion. *Payano*, 320 Wis. 2d 348, ¶ 51 (citation omitted). Indeed, a reasonable judge could have permitted the State to admit this evidence in its case-in-chief. The circuit court did not erroneously exercise its discretion in its thorough, balanced approach.

Gee's only argument to the contrary is that the question of whether a "different person" did not consent to sex with Gee has "no relevance" to whether A.M. and J.P. consented to sex with Gee. (Gee's Br. 21–23.) Gee is wrong.

First, Gee erroneously shifts the focus onto the victims and away from him. The evidence was relevant because it tended to make it more probable that *he* would engage in nonconsensual sex by use of a dangerous weapon with A.M. and J.P., because *he* engaged in nonconsensual sex with another woman by use of a dangerous weapon. Wis. Stat. § 904.04(2)(b)2.; *see also* Wis. Stat. § 904.01 (definition of relevant evidence).

Second, Gee's argument that "the issue was consent," (Gee's Br. 22), overlooks the tremendous probative value of his consistent use of a dangerous weapon: here, the State had to prove he committed the assaults by use or threat of a dangerous weapon. Wis. JI–Criminal 1203. The fact that he used a dangerous weapon to commit another sexual assault was highly probative.

Third, Gee also overlooks the court's consideration of the probative value of the evidence to rebut Gee's own purported modus operandi of arranging consensual prostitution encounters and then reneging on payment. (R. 22:12, A-App. 112.)

Gee disagrees with the circuit court's exercise of discretion. He cannot, however, prove that the court reached a decision no reasonable judge could reach. *Payano*, 320 Wis. 2d 348, ¶ 51. This Court should affirm.

III. Alternatively, Gee abandoned his other-acts evidence challenges by choosing not to testify.

A. Standard of review

Whether a defendant has lost the right on appeal to challenge a circuit court's ruling admitting other-acts

evidence presents a question of law reviewed independently. *State v. Jones*, 179 Wis. 2d 215, 223, 507 N.W.2d 351 (Ct. App. 1993).

B. Legal principles

"It is a well established maxim that 'an accused cannot follow one course of strategy at the time of trial and if that turns out to be unsatisfactory complain he should be discharged or have a new trial.'" *Jones*, 179 Wis. 2d at 225 (citation omitted).

The erroneous admission of other-acts evidence is subject to a harmless error analysis. *State v. Lock*, 2012 WI App 99, ¶ 42, 344 Wis. 2d 166, 823 N.W.2d 378. Harmless error asks whether the party benefiting from the error can show there is no reasonable possibility that the error contributed to the conviction. *State v. Barreau*, 2002 WI App 198, ¶ 42, 257 Wis. 2d 203, 651 N.W.2d 12.

C. By choosing not to testify, the jury never heard the other-acts evidence Gee challenges on appeal.

Gee abandoned his other-acts challenges by choosing not to present any affirmative evidence. The jury, in turn, never heard *any* evidence of his prior convictions. This Court therefore may choose not to address Gee's challenges.

Jones is illustrative. There, the defendant was charged with two robberies in separate cases, both in Kenosha County. *Jones*, 179 Wis. 2d at 217. The cases were assigned to different judges. *Id.* In the first case, the State filed a motion to introduce as other-acts evidence the facts of the other case. *Id.* at 218.

Defense counsel objected; the court granted the State's motion, noting it was unclear what the other judge would do if the State chose to file a similar motion in the second case. *Jones*, 179 Wis. 2d at 219–20. Based on the first judge's

decision granting the State's other-acts evidence motion, the defendant agreed to consolidate the cases for trial. *Id.* at 220–21. The defendant was convicted on both counts. *Id.* at 221. On appeal, he sought to challenge the first judge's decision granting the State's other-acts evidence motion. *Id.* at 222.

This Court concluded that though he lodged an objection to the admission of the other-acts evidence, and though he only "caved in" on consolidation *because* of the other-acts evidence ruling, he abandoned the issue on appeal by making the strategic choice to agree to consolidate the cases. *Jones*, 179 Wis. 2d at 222–28.

"Jones was at a fork in the road" and now wanted the "best of both worlds": "After conviction he asks that he be permitted to go back to that fork in the road and take the road of separate trials and, while traversing that road, he wants to challenge the ruling of the 'other acts' evidence." *Jones*, 179 Wis. 2d at 225–26 (citation omitted). This Court found "no sound reason" to allow him to "retrace his steps": "He chose which road he would walk down and is not to be returned to the fork or crossing so he can try the other one." *Id.* at 226 (citation omitted).

The same is true here. The facts that Gee (1) objected to the State's other-acts evidence motion, and (2) made a record reflecting that the court's ruling affected his decision not to testify, do not in turn mean his challenges are properly before this Court.

Instead, he abandoned these challenges when, like the defendant in *Jones*, he made a strategic decision in light of the court's ruling that, in essence, nullified the effect of the court's ruling. The court made clear that the other-acts evidence would only come before the jury if Gee presented affirmative evidence suggesting consensual encounters; he

chose not to present such evidence, and the jury, as a result, never learned of his prior convictions.

If he has not abandoned these claims, consider what that would mean for consideration of harmless error: Like the vast majority of trial errors in Wisconsin, the erroneous admission of other-acts evidence is subject to harmless error analysis. *Lock*, 344 Wis. 2d 166, ¶ 42. Thus, normally, if a defendant challenges a circuit court's proper admission of other-acts evidence on appeal, the State would—if grounds exist—make an alternative argument that even if the circuit court erred, the error was harmless.

But how can the State do that here, where (a) Gee chose to exercise his right not to testify, and (b) as a result, the jury never was presented with a consent defense or the other-acts evidence he challenges?

Circuit courts make countless pretrial rulings; permitting a defendant to litigate a challenge to a pretrial ruling on appeal because he objected, even though he then made a strategic pivot that nullified the ruling, would permit defendants to have the "best of both worlds," and potentially circumvent harmless error analysis. *See Jones*, 179 Wis. 2d at 226.

Indeed, though no error occurred, if Gee had testified and the jury did learn of his prior convictions, the State expects that any error *would* have been harmless, because of the significant corroborative strength of A.M. and J.P.'s accounts of Gee's assaults. Both A.M. and J.P. separately testified to Gee approaching them with the same curved knife at his apartment complex, making threatening statements, forcing vaginal intercourse, and then letting them go. (R. 155:6–28, 76–94.) Thus, even without evidence of Gee's history of forcible rape in Indiana in 1996, A.M. and J.P.'s accounts corroborated each other (in addition to the DNA and other corroborative evidence) to prove that these

were *not* consensual encounters, but instead assaults at knifepoint.

Gee "chose which road he would walk down." *Jones*, 179 Wis. 2d at 226 (citation omitted). He should not be "returned to the fork or crossing so he can try the other one." *Id.*

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 18th day of December, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,268 words.

Dated this 18th day of December, 2018.

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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 18th day of December, 2018.

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