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COURT OF APPEALS
DISTRICT I

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OF WISCONSIN

Case No. 2018AP1507-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JEFFREY D. LEE,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER DENYING POSTCONVICTION RELIEF,
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE MARK A. SANDERS,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Whether the trial court erroneously exercised its discretion in allowing the State to present evidence of Defendant-Appellant Jeffrey D. Lee's other bad acts.

The trial court said no.

This Court should say no.

2. Whether Lee waived his right to challenge the jury instructions when he failed to object to them at the conference.

The trial court did not answer this question.

This Court should say yes.

3. Whether Lee's sentence is unduly harsh.

The trial court said no.

This Court should say no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

In the summer of 2015, a brave young teenage girl disclosed to her mom that Lee, an old boyfriend of her great-aunt's, had repeatedly sexually assaulted her when she was six years old and in her great-aunt's care. After the State charged Lee with the repeated sexual assault of the girl, it successfully sought to admit evidence that several other girls had credibly accused Lee of similar crimes. The jury convicted Lee of the crime.

On appeal, Lee argues that the trial court erroneously exercised its discretion in admitting the evidence of Lee's other bad conduct, the jury instructions concerning his other

bad conduct was confusing, and his 60-year sentence for repeatedly sexually assaulting a six-year-old girl was too severe. None of Lee's claims have merit.

STATEMENT OF THE CASE

In June 2015, 13-year-old Monica¹ told her mom, Sophie, that when she was six years old and attending her great-aunt² Beverly's in-home child care center, Lee repeatedly sexually assaulted her. (R. 96:106–16, 121; 97:8–9, 15–18, 22–23.) Monica explained that Lee, who was Beverly's boyfriend at the time, assaulted her when Beverly was not home. (R. 96:110–13.) Sophie reported Monica's allegations to the police the next day. (R. 97:17.)

A. The State successfully moved to admit other-acts evidence that Lee was accused or convicted of assaulting five other young girls.

Based on Monica's claims, the State charged Lee with the repeated sexual assault of the same child. (R. 1; 5.) Before trial, the State moved to admit evidence that Lee had sexually assaulted six other children. (R. 11.) As part of this evidence, the State sought to admit—pursuant to Wis. Stat. § 904.04(2)(b)2.—Lee's prior conviction for the repeated sexual assault of a child. (R. 11:9.) The State asserted that the court should admit all of its other-acts evidence because, under the application of the greater latitude rule and the

¹ To comply with Wis. Stat. § (Rule) 809.86, the State uses pseudonyms in place of the victims'—and their family members'—names.

² Monica described the owner of the daycare as her aunt, but Monica's mom explained that Beverly was Monica's great-aunt. (R. 96:110; 97:10.) The State refers to Beverly as Monica's great-aunt throughout its brief.

*Sullivan*³ test, the State offered the evidence for a proper purpose, the evidence was relevant, and it was not unduly prejudicial. (R. 11.)

The court largely agreed with the State, granting the State permission to introduce evidence relevant to five of the six girls whom Lee had either been convicted of, charged with, or accused of sexually assaulting. (R. 90:11–29.) Specifically, the court concluded that the first two other acts that the State sought to admit related to his conviction for the repeated sexual assault of a child. (R. 11:2–3; 90:12–13.) The conviction stemmed from allegations that Lee had assaulted two sisters, six-year-old Amy and seven-year-old Amanda,⁴ who were the daughters of a woman he had been dating at the time of the assaults. (R. 11:2–3; 90:18–19.) The State explained to the court that although Lee had originally been convicted of assaulting both girls, the postconviction court reversed the convictions after concluding that Lee had received ineffective assistance of counsel with regard to a jury instruction. (R. 11:3 n.1.) After the reversal, Lee entered a guilty plea to the repeated sexual assault of Amy while the State read-in conduct related to Amanda at sentencing. (R. 11:3 n.1.)

In its ruling on the other-acts evidence, the court recognized that it was bound by the limitation of its use under Wis. Stat. § 904.04 and the flexibility of the greater latitude rule in child sexual assault cases. (R. 90:12–14.) But because Lee had previously been convicted of the repeated

³ *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998).

⁴ Again, the State’s brief employs pseudonyms to protect the identity of the victims in compliance with Wis. Stat. § (Rule) 809.86(4). Lee’s brief improperly uses the victims’ names. (Lee’s Br. 12–13.) That the victims Lee identifies were victims in a different case is of no import.

sexual assault of a child, the court noted that the prior conviction was admissible under Wis. Stat. § 904.04(2)(b)2.⁵ (R. 90:12–13.) The court remarked that section 904.04(2)(b)2 was “designed to allow” the admission of the conviction. (R. 90:13.) But the court further found that the evidence relating to Amy was admissible under Wis. Stat. § 904.04(2). (R. 90:16–20.)

The State argued that evidence of Lee’s other bad acts relating to Amy and Amanda was admissible to show Lee’s motive and plan to date women who had access to preteen girls so that he could be alone with the young girls in order to have sexual contact with them. (R. 90:14–16.) Applying the rule in *Sullivan* and well-established other-acts law, the court agreed that the State offered the evidence for a permissible purpose. (R. 90:16–17.) The court then concluded that the evidence related to both Amy and Amanda was also relevant and not unduly prejudicial in light of its probative value.⁶ (R. 90:17–20.)

The State next argued that evidence should be admitted that three other girls had accused Lee of assault. (R. 11.) The State presented evidence that Girl One had accused Lee of touching her vagina in 2007 when she was eight years old; Girl Two said that Lee put his fingers in her vagina in 2007 when she was 14 years old; and Girl Three said that Lee touched her vagina outside of her clothes in 2006 when she was 11 years old. (R. 11:2–4.) According to

⁵ The court mistakenly stated that the relevant statute was Wis. Stat. § 904.04(b)(2) but it is clear that it was referencing Wis. Stat. § 904.04(2)(b)2.

⁶ Throughout the pretrial proceeding, the transcript refers to the “prohibitive value” of the other acts evidence, but it is clear that the court was referring to the evidence’s probative value. (R. 90:19–27.)

the State, Lee was dating the girls' mothers at the time of the alleged assaults. (R. 11:3–4.)

The circuit court again applied the three-prong *Sullivan* analysis to the State's motion and concluded that the State correctly identified permissible purposes for the admission of this evidence. (R. 90:11–28.) And the court concluded that the evidence was relevant and its relevancy was not outweighed by a risk of unfair prejudice. (R. 90:20–28.)

But the court denied the State's motion to admit a sixth other act involving a sixth child, concluding that its probative value was so low that it was outweighed by the risk of unfair prejudice to Lee. (R. 90:27–28.)

B. At trial, numerous witnesses testified that Lee was frequently at the in-home center during its open hours, and Monica testified that Lee sexually assaulted her 10 to 20 times while she was there.

The case proceeded to trial. (R. 96; 97; 98; 99; 100.) At trial, Monica testified that when she was six years old, her mom took her to an in-home child care center at her great-aunt Beverly's house. (R. 96:106–11.) She said that when she was at the center, Beverly's boyfriend at the time—Lee—would call her upstairs and into Beverly's bedroom. (R. 96:110–13.) Lee would then put Monica on the bed, take off her underwear, and lick and touch her vaginal area. (R. 96:110–15.) Monica estimated that the assaults happened between 10 to 20 times. (R. 96:113–16.) Monica explained that the assaults occurred when Beverly was away from the center and a woman named Marla⁷ was in charge.

⁷ Sophie and her mother explained that Marla was Sophie's half-sister. (R. 97:10, 12, 41.)

(R. 96:112–14.) Monica’s brother, James, who is two years younger than Monica, testified that when he and his sister attended Beverly’s center, Lee “constantly” called Monica upstairs to where the bedroom was. (R. 96:130–34.) He said that Lee treated “going upstairs” as a reward for which James never qualified. (R. 96:134.)

Sophie testified that in 2006, she enrolled Monica and James in Beverly’s in-home child care center. (R. 97:8–9.) But Sophie said that she removed her children in “probably . . . late 2008” because Beverly was so frequently absent from the center. (R. 97:10–13.) According to Sophie, in June 2015, Monica told her that Lee—who had been in a serious relationship with Beverly during the time Monica attended the center—had assaulted her when she was there. (R. 97:13–22.) Sophie reported Monica’s accusations to police the day after Monica disclosed them to her. (R. 97:23.)

Sophie’s mother, Ruby, echoed Sophie’s account that Beverly was often absent from the center. (R. 97:42.) She too said that it was Marla who most often worked at the center. (R. 97:41–42.) Ruby said of Beverly, “She mostly always went out of town and had [Marla] to stay there with the kids.” (R. 97:42.) Ruby said that she had seen Lee at the center and alone with the kids on occasion when he drove them home. (R. 97:42–43.)

A woman who dated Sophie in 2007 or 2008 testified that she had dropped Monica and James off at Beverly’s child care center during that same time period. (R. 97:33–35.) She said that there were times when she would “drop the kids off and [Beverly] wouldn’t be there.” (R. 97:35.) But she confirmed that she had seen both Marla and Lee at the center. (R. 97:36.)

Milwaukee Police Department Officer Louise Brey testified that she met Monica in 2015 when Sophie brought her into the station to report the assaults. (R. 97:50–51.)

Brey said that Monica told her that when she was six years old, her “uncle Jeff had raped her.” (R. 97:52.)

C. The State presented other-acts evidence relating to Lee’s assaults of Amy and Amanda.

Milwaukee Police Department Sergeant Colleen Sturma testified that a 2008 investigation into allegations against Lee led to his conviction for the repeated sexual assault of Amy. (R. 97:66–72.) Lee had pleaded guilty to charges that he assaulted Amy between April 2007, and August 2008, when she was six and seven years old. (R. 97:71–72.)

The State successfully admitted, over Lee’s objection, the following evidence related to Lee’s assault against Amy: the complaint, the amended information, the judgment of conviction, the judgment roll, and medical records related to time Amy spent in the hospital and medical center related to her allegations. (R. 97:74–75.). The medical records revealed that Amy had complained that Lee touched her “in the behind and in the front.” (R. 97:76.)

And Sturma explained that the charges against Lee that concerned Amy also included allegations that Lee had assaulted Amanda, Amy’s sister. (R. 37:6; 97:73–74.) Sturma said that Amanda had complained to a sexual assault examiner that Lee had taken her into his room while instructing her siblings not to follow because Amanda had been “bad.” (R. 37:6; 97:77.) And Amanda said that when she and Lee were in the room, Lee did “stuff that children aren’t suppose[d] to do—like humping [and she] told him to stop.” (R. 37:6; 97:77.) The State admitted into evidence the medical record from Amanda’s sexual assault examination, which showed that Amanda was seven years old at the time of the alleged assault and indicated that she had tested positive for chlamydia. (R. 37:6; 97:75.) On cross-

examination, Sturma further explained that Amy's allegations concerned "touching and fondling," whereas Amanda's claims were "of actual sexual intercourse." (R. 97:78–79.)

D. Lee's defense was that he lacked opportunity because he was never at the in-home center when it was open, much less alone with Monica or other children.

In his defense, Lee presented testimony from Beverly, Beverly's son, and Beverly's mom, Brenda. (R. 99.) Beverly's son testified that he lived with Beverly at the in-home child care center in 2008 and that Lee did not live there during that time. (R. 99:10–11.) Brenda testified that she never went to Beverly's child care center. (R. 99:19–21.) And Beverly testified that from 2006 through 2008, she did not leave the child care center during the time when it was open. (R. 99:51, 53.) She explained that during that period of time, she had only one employee and the center could not operate with only one employee; thus, if the center was open, Beverly was there. (R. 99:53.)

Lee testified in his own behalf. (R. 100.) He denied having ever been alone with Monica "or any other kids." (R. 100:14.)

On cross-examination, Lee confirmed that he was in a romantic relationship with Beverly from 2006 through 2014. (R. 100:19–20.) And Lee admitted that he spent the night at Beverly's home, but claimed that he left the house early in the mornings. (R. 100:20, 22–23.) Lee denied assaulting Monica. (R. 100:31–32.)

The State asked Lee about his prior conviction for repeated sexual assault of a child. (R. 100:14–19.) Lee admitted that he had been in a relationship with a woman and had then pleaded guilty to repeatedly sexually

assaulting her child, Amy. (R. 100:14–19, 30.) He said that although he pleaded guilty, he had not committed the conduct underlying the conviction. (R. 100:14–19.) He further admitted that Amanda, Amy’s sister, had also accused him of sexually assaulting her. (R. 100:30–31.)

The State asked Lee about other accusations of sexual assault that children had brought against him. (R. 100:27–30.) Lee conceded that he had dated two other women who each had young daughters. (R. 100:27–30.) He had a child with one of these women. (R. 100:27:29.) The State asked Lee if he knew that the woman’s other daughter, Girl One, had accused him of touching her vagina in 2007. (R. 100:29–30.) Lee said, “See, that one was told that she didn’t say that, that’s why she -- they not cooperating with y’all because -- supposed to lie. She didn’t say that.” (R. 100:30.) When the State asked Lee to clarify his answer, he replied, “She didn’t say that. I was told she didn’t say that.” (R. 100:30.) But Lee admitted that Girl Two and Girl Three, the daughters of yet another ex-girlfriend, had each accused him of sexual assault.⁸ (R. 100:29.)

On rebuttal, the State called Megan, Sophie’s sister and Monica’s aunt, to testify. (R. 100:36–37.) Megan said that she sent her children to Beverly’s child care center in 2007 and 2008. (R. 100:37–38.) Megan said that Beverly “wasn’t around like she [was] supposed to [be] as a provider” at the center, and instead Megan saw both Marla and Lee at the center. (R. 100:38–39.) When asked how often she would see Beverly at the center when she expected to see her, Megan replied, “I wouldn’t. She wasn’t really there, like she would be out of town sometimes and she wasn’t there. She would have [Marla] working for her, that employee.”

⁸ Other than the questions to Lee on cross-examination regarding Girls One, Two, and Three, the State did not enter evidence of these other acts.

(R. 100:38–39.) She further explained that when she saw Lee in the morning and the afternoons, he was “walk[ing] back and forth throughout the whole house[,] the daycare.” (R. 100:39.)

E. The jury instructions, guilty verdict, sentence, and postconviction motion.

Before and during the trial, the court and the parties discussed the various instructions pertaining to other-acts evidence that the court intended to give the jury before it deliberated. (R. 94:2–5; 97:90–91, 93–94; 98:4–17; 99:68; 100:5–6.) Without objection, the court instructed the jury that it could—but was not required—to consider Lee’s previous *conviction* for sexual assault of a child to find that he had a particular character trait and that he acted in conformity with that trait with regard to the charges in this case. (R. 100:52–53.) But the court told the jury that it could consider Lee’s other bad *conduct*—if it found that it had occurred—only “on the issues of motive, lack of mistake and intent”; the court instructed the jury that it could not use this evidence to conclude that Lee had a “certain character trait and that [he] acted in conformity with that trait or character with respect to the offenses charged in this case.” (R. 100:53–54.)

The jury found Lee guilty of repeated sexual assault of a child.⁹ (R. 45; 52; 73:1 n.2.) The court sentenced him to 40

⁹ The verdict form says that the jury found Lee guilty of the repeated sexual assault of a child as charged “in the manner and form as charged in the information.” (R. 45.) The Information charged Lee with the repeated sexual assault of a child contrary to Wis. Stat. § 948.025(1)(a) for at least three violations of Wis. Stat. § 948.02(1)(b) or (c). (R. 5.) Because the Information alleged that Lee had violated Wis. Stat. § 948.02(1)(b) or (c), it should have stated that his actions were contrary to Wis. Stat. § 948.025(1)(b).

years' initial confinement, to be followed by 20 years' extended supervision.¹⁰ (R. 52.)

Lee moved for postconviction relief, arguing that the court should vacate his conviction because it erred in admitting the other-acts evidence and the jury instructions concerning the other-acts evidence were confusing and unduly prejudicial. (R. 68.) He also argued that the court should modify his sentence because it was excessive and unduly harsh. (R. 68.) The court denied the motion, concluding that none of Lee's claims warranted relief. (R. 73.)

Lee appeals.

ARGUMENT

I. The trial court properly exercised its discretion in admitting evidence of Lee's other acts.

A. Standard of review and relevant law.

This Court reviews "a circuit court's admission of other-acts evidence for an erroneous exercise of discretion." *State v. Marinez*, 2011 WI 12, ¶ 17, 331 Wis. 2d 568, 797 N.W.2d 399. "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, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." *State v. Hunt*, 2003 WI 81, ¶ 34, 263 Wis. 2d 1, 666 N.W.2d 771.

"[T]he admissibility of other acts evidence is governed by Wis. Stat. §§ (Rule) 904.04(2) and 904.03." *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998).

¹⁰ Lee's judgment of conviction says that the jury found him guilty of sexual assault of a child under 12. (R. 52.) The postconviction court ordered the judgment amended to reflect the correct verdict and conviction. (R. 73.)

Generally, other-acts evidence may not be admitted “to prove the character of a person in order to show that the person acted in conformity therewith.” *See* Wis. Stat. § 904.04(2)(a). An exception to this rule is found in Wis. Stat. § 904.04(2)(b)2. when, as in this case, the State has charged a defendant with first-degree sexual assault of a child. Under section 904.04(2)(b)2., the State may present evidence that the defendant was previously convicted of first-degree sexual assault of a child for the express purpose of showing the defendant’s character and that the defendant acted in conformity with that character.

Otherwise, other-acts evidence may be admitted only for a permissible purpose, such as show “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Sullivan*, 216 Wis. 2d at 781. To determine whether other-acts evidence should be admitted, courts employ a three-step analysis. *Id.* Courts first ask whether the evidence is offered for a permissible purpose under Wis. Stat. § 904.04(2) and then whether the evidence is relevant under Wis. Stat. § 904.01. *Id.* at 783–90. The party seeking to admit the other-acts evidence has the burden to establish that these first two prongs are met by a preponderance of the evidence. *Marinez*, 331 Wis. 2d 568, ¶ 19. If these prongs are satisfied, the burden then shifts to the opposing party to show that the probative value of the evidence is outweighed by prejudice or confusion to the jury. *Id.*

In addition to “this general framework, there also exists in Wisconsin law the longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a ‘greater latitude of proof as to other like occurrences.’” *State v. Davidson*, 2000 WI 91, ¶ 36, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted). The greater-latitude rule applies to each prong of the *Sullivan* analysis. *Marinez*, 331 Wis. 2d 568, ¶ 20. The rule is now

codified in Wis. Stat. § 904.04(2)(b)1. *State v. Dorsey*, 2018 WI 10, ¶¶ 31–33, 379 Wis. 2d 386, 906 N.W.2d 158.

B. The court properly admitted the other-acts evidence.

Before trial, the State sought to admit other-acts evidence involving accusations that Lee had assaulted six other young girls. (R. 11.) At a hearing on the State’s motion, the court concluded that evidence relating to five of the six girls was admissible. (R. 90:11–28.) The court’s decision was a proper exercise of its discretion.

1. The admission of Lee’s conviction for repeatedly sexually assaulting Amy.

The State had charged Lee with the repeated sexual assault of a child. Lee had previously been convicted of the repeated sexual assault of a child. When a defendant faces a charge of the sexual assault of a child, the State may present evidence of the defendant’s similar previous conviction and the jury may infer from that conviction that the defendant has a particular character and conclude that he acted in conformity with that character as it relates to the charges before it. *See* Wis. Stat. § 904.04(2)(b)2.

Here, the State successfully sought to admit Lee’s previous conviction for the repeated sexual assault under Wis. Stat. § 904.04(2)(b)2. (R. 11; 90:13.) At trial, and over Lee’s objection that the evidence was prejudicial, the State admitted the complaint that charged Lee with the assaults against Amy. (R. 97:68–69.) The State also admitted, over Lee’s objection that the evidence was both prejudicial redundant, the amended information concerning the same assaults, the plea agreement, the judgment of conviction and

the judgment roll.¹¹ (R. 97:68–70.) All of this was admissible evidence as contemplated by Wis. Stat. § 904.04(2)(b)2. that Lee was previously convicted of sexually assaulting a child. And in accord with Wis. JI–Criminal 276, the court instructed the jury that based on this conviction, it may conclude—but was not required to conclude—that Lee had “a certain character” and that he “acted in conformity with that character.” (R. 100:53.) The circuit court properly applied the relevant statute to the State’s motion and employed the applicable jury instruction at trial.

On appeal, Lee does not argue that evidence of the conviction was not admissible under Wis. Stat. § 904.04(2)(b)2. Instead, he argues that some of the evidence that the State relied upon to prove the conviction should not

¹¹ Some of these exhibits referenced Amanda’s allegations, as well. (R. 27; 28; 29; 31; 32.) It was undisputed that Lee was not convicted of assaulting Amanda. (R. 97:73; 100:30.) But the exhibits were admitted to prove Lee’s previous conviction for assaulting Amy. (R. 90:12–13; 97:73.) That they referenced Amanda did not alter their admissibility. Lee did not ask the court to redact Amanda’s allegations from the exhibits, nor did he object to their admission on the grounds that they included reference to Amanda.

But even if he had done so, the inclusion of Amanda’s allegations in the exhibits was harmless because the court—as shown in the next section of the State’s argument—properly exercised its discretion in allowing the admission of the other-acts evidence concerning Amanda. Because the State was permitted to introduce evidence that Lee had assaulted Amanda—even though he was not convicted of it—it is of no import that the jury saw those same allegations in the complaint and other exhibits concerning Amy.

Finally, because the court properly cautioned the jury on how it could use the evidence of Lee’s prior conviction, as opposed to how it could evaluate the other-acts evidence, this Court presumes the jury followed the court’s instructions and properly assessed the evidence. (R. 100:52–54.) *See State v. LaCount*, 2008 WI 59, ¶ 23, 310 Wis. 2d 85, 750 N.W.2d 780.

have been admitted.¹² According to Lee, it was error for the court to allow the State to present the complaint and the judgment roll.¹³

But Lee’s argument fails to account for the plain text of Wis. Stat. § 904.04(2)(b)2., which allows the State to present “evidence that a person was convicted” of a previous sexual assault of a child. The statute does not state that the judgment of conviction is the only piece of evidence that the State may produce to conform to the statute, for good reason: because the jury is permitted to conclude that the defendant acted in conformity with the character that can be inferred from the previous conviction, the jury must be informed of details of the previous conviction. And in Lee’s case, because his previous conviction stemmed from a guilty plea, the details of the crime were found in the complaint and the judgment roll. Thus, the circuit court properly exercised its discretion in allowing the State to present evidence of Lee’s prior conviction for assaulting Amy, which included the complaint, the amended information, the judgment roll and the judgment itself.

2. The admission of evidence of Lee’s assaults of Amy and Amanda.

The State asked the court to allow it to present evidence that Lee had sexually assaulted Amy and Amanda when they were little girls. (R. 11.) The State argued that it sought to admit the evidence for a permissible purpose—to

¹² Lee’s Br. 13–17.

¹³ Lee also complains that Amy and Amanda’s medical records should not have been admitted, but because these were admitted under the greater latitude rule and not the evidentiary rule on prior convictions, the State will address Lee’s complaint in the next subsection.

show Lee's motive, plan, and absence of mistake. (R. 90:14–15.)

Applying *Sullivan* and recognizing that the State's burden on the first prong of the test is “low,” the court agreed that the evidence pertained to a permissible purpose under Wis. Stat. § 904.04(2). (R. 90:16.) The court then examined whether the evidence was relevant. (R. 90:16.) The court noted that the evidence of Lee's assaults against Amy and Amanda “relate to a fact or proposition that is of consequence” in the case before it and then asked whether the assaults were similar enough to crimes against Monica to be deemed relevant. (R. 90:16–17.) The court recognized that “the greater the similarity between the two acts, the greater the relevance and [probative] value.” (R. 90:17.)

The court noted the similarities between the crimes Lee was accused of perpetrating against Monica to those that he had been accused of committing against Amy and Amanda. (R. 90:18–20.) Amy and Amanda and Monica were all between six to eight years of age at the time of the assaults. (R. 90:18–19.) The crimes allegedly occurred in 2007 and 2008, so the timeframes overlapped. (R. 11:1–3; 90:19.) The assaults all took place in Milwaukee. (R. 90:19.) In both cases, Lee had some sort of a relationship with the victims' mother. (R. 90:19.) And the criminal conduct at issue all concerned allegations that Lee touched the girls' vaginas. (R. 11:1–3; 90:19.) The court concluded that the evidence was relevant, calling it “of significant [probative] value.” (R. 90:20.)

Finally, the court said that the “high degree” of probative value of the evidence outweighed any risk of prejudice to Lee. (R. 90:23–26.) This was particularly true because the court intended to give the jury an instruction on how it was allowed to use the evidence and, significantly, how it was not allowed to use the evidence. (R. 90:25–26.)

The court's other-acts analysis was thorough, sound, and a proper exercise of its discretion. Its reasoning demonstrates that it understood the three-prong *Sullivan* test and the necessity that it evaluate each piece of evidence that the State sought to admit. And the decision shows that the court properly assessed each prong of the test and carefully concluded that the evidence of Lee's conduct with regard to Amy and Amanda was admissible.

Lee argues that the court should have excluded Amy and Amanda's medical records and their statements in those records because both were hearsay and irrelevant.¹⁴ Lee's argument misses the mark.

As the circuit court correctly concluded, Amy and Amanda's medical records and their statements therein were admissible under the medical diagnosis and health care records exceptions to the hearsay rules set forth in Wis. Stat. § 908.03(4) and (6m). (R. 97:75–76.) Thus, the court did not err in admitting the evidence on the ground that it was hearsay.

And despite Lee's assertion to the contrary, the records and their included statements were relevant. To determine whether other-acts evidence is relevant in a child sexual assault case, Wisconsin courts couple the greater latitude rule with the *Sullivan* analysis. *See Davidson*, 236 Wis. 2d 537, ¶¶ 36–44. This is because of the “difficulty sexually abused children experience in testifying, and the difficulty prosecutors have in obtaining admissible evidence in such cases.” *Id.* ¶ 42.

Here, evidence that Amy and Amanda told health care providers that Lee had assaulted them “was corroborative of the evidence of the prosecutrix in respect to other indecent or criminal assaults, such as are charged in the information,

¹⁴ Lee's Br.15–17.

and would tend to sustain and render more credible her evidence of other such occurrences.” *Id.* ¶ 38 (quoting *Proper v. State*, 85 Wis. 615, 629, 55 N.W. 1035 (1893)). Thus, the evidence was relevant.

And finally, Lee’s argument that the probative value of the evidence concerning Amy and Amanda was outweighed by its prejudicial nature fails.¹⁵ First, it is Lee’s burden to satisfy this prong of the *Sullivan* test and he has failed to allege how he was unfairly prejudiced. *See Marinez*, 331 Wis. 2d 568, ¶ 41. Although the evidence of his previous bad conduct was by its nature inherently prejudicial, it was not unfairly so. Second, the court instructed the jury that it could not use Lee’s behavior as alleged by Amy and Amanda “to conclude that [Lee] has a certain character or a certain character trait and that [he] acted in conformity with that trait” with respect to the charge against him. (R. 100:54.) Thus, the court mitigated any potential undue prejudice with the cautionary instruction. *See Marinez*, 331 Wis. 2d 568, ¶ 41. And because this Court “presume[s] that juries comply with properly given limiting and cautionary instructions, [it] consider[s] this an effective means to reduce the risk of unfair prejudice to the party opposing admission of other acts evidence.” *Id.*

3. The allegations that Lee assaulted the daughters of his other ex-girlfriends.

The circuit court likewise correctly applied the three-prong *Sullivan* analysis to the State’s request for the admission of evidence concerning Girls One, Two, and Three. (R. 90:11–28.) The court concluded that the State properly identified permissible purposes—motive, plan, and absence of mistake—for the admission of this evidence. (R. 90:11–28.)

¹⁵ Lee’s Br. 18–19.

As for whether the evidence of Lee's other acts concerning Girl One were relevant, the court noted that Girl One had been eight years old at the time of the assault, which was slightly older than Monica had been but was "similar." (R. 90:20.) The court called "[t]he circumstances of the conduct" at issue "similar" and said that Girl One's allegations against Lee were "close in time" to those that Monica alleged. (R. 90:20.) The court also recognized that like Monica, Girl One was connected to Lee through her mother. (R. 90:20.) The court concluded that the evidence that Lee assaulted Girl One was relevant. (R. 90:20–21.) And given the high probative value of the evidence and the intended cautionary instruction, the danger of undue prejudice did not outweigh the admissibility of the evidence. (R. 90:26.)

Likewise, the evidence that Lee assaulted Girl Two and Girl Three was relevant. (R. 90:21.) The court first noted that Girl Two was 14 years old at the time of the alleged offense, which was "essentially double the age of the alleged victim in the instant case." (R. 90:21.) It called the age difference between a seven-year-old and a 14-year-old "an important and significant difference." (R. 90:21.) But the court found that the conduct at issue was similar and it again occurred in the context of Lee's relationship with the child's mom. (R. 90:21.) The court said that the evidence related to Girl Two was less probative compared to Girl One, but it concluded that it was nonetheless relevant. (R. 90:26–27.)

The court found that the evidence related to Girl Three was probative because Girl Three was somewhat close in age to Monica and Lee had been in a relationship with Girl Three's mother. (R. 90:22, 27.) The court recognized that the conduct at issue was "slightly different," but that there were still enough similarities to qualify it as relevant. (R. 90:22.)

And finally the court assessed the prejudicial nature of the evidence in light of its probative value. (R. 90:25–28.) The court said that the probative nature of the evidence related to Girls Two and Three was less significant than that of Amy, Amanda, and Girl One, but that it remained relevant. (R. 90:26–27.) The court called the application of the third-prong of the *Sullivan* test to both of these other acts a “close case.” (R. 90:26–27.) But because “[c]lose cases should be resolved in favor of admission,” the court granted the State’s motion to admit the evidence. (R. 90:27.) *Marinez*, 331 Wis. 2d 568, ¶ 42 (citation omitted).

The court properly exercised its discretion in granting the State’s motion to admit the other-acts evidence. The State indisputably sought to admit the other bad acts for the permissible purpose to show Lee’s plan, motive, and absence of mistake in assaulting Monica. *See* Wis. Stat. § 904.04(2)(a). And the evidence was relevant. All of the other acts involved Lee’s highly inappropriate sexual conduct with underage girls who were the daughters of women with whom he was in a romantic relationship. All of the acts took place in 2006 or 2007. All involved Lee touching the girls’ vaginas. And given the application of the greater latitude rule, all of the evidence was probative of Monica’s credibility. *See Davidson*, 236 Wis. 2d 537, ¶¶ 37–44. And the evidence was not unfairly prejudicial. Otherwise admissible other-acts evidence should be excluded only when the defendant has shown that the probative value of the evidence is “*substantially outweighed* by the danger of unfair prejudice.” *Marinez*, 331 Wis. 2d 568, ¶ 41. Lee failed to meet that burden here. Thus, the circuit court properly admitted the evidence.

Lee’s only argument regarding Girls One, Two, and Three is that the evidence of their accusations was not relevant because a jury could not find by a preponderance of

the evidence that he committed the acts they alleged.¹⁶ But Lee's argument is forfeited.

In the trial court, Lee failed to object to the admission of this evidence on the ground that a jury would not be able to find that Lee had committed the acts at issue. (R. 90:28–29.) Thus, he is precluded from making this argument now. *See State v. Polashek*, 2002 WI 74, ¶ 25, 253 Wis. 2d 527, 646 N.W.2d 330.

In any event, Lee is also incorrect that the evidence was not relevant. The State acknowledges that to be relevant evidence of other acts, the jury must be able to find by a preponderance of the evidence that Lee committed the other bad acts. *See State v. Gray*, 225 Wis. 2d 39, 59, 590 N.W.2d 918 (1999). Yet here, there was ample evidence from which the jury could conclude under this burden of proof that Lee committed the bad acts that these young girls had leveled against him. Multiple witnesses testified that Lee was often at the child care center during its open hours while Lee claimed he never remained at the center when it was open. That testimony alone would have provided a reasonable basis for the jury to find all of Lee's testimony incredible. And with this finding, the jury could reasonably have also found that Lee lied when he denied committing all of the horrific assaults of which the young girls accused him.

In sum, given the court's well-reasoned analysis and the greater latitude rule applicable in child sexual assault cases, Lee has not shown how the court's decision to admit the other-acts evidence was an erroneous exercise of the circuit court's discretion. *See Hunt*, 263 Wis. 2d 1, ¶ 34.

¹⁶ Lee's Br. 17.

C. Any error in the admission of the other-acts evidence was harmless.

An error in admitting other-acts evidence is subject to the harmless error rule. *Hunt*, 263 Wis. 2d 1, ¶ 79. The “harmless error analysis requires [the Court] to determine whether the error in question affected the jury’s verdict.” *State v. Rocha-Mayo*, 2014 WI 57, ¶ 23, 355 Wis. 2d 85, 848 N.W.2d 832. If it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error, then the error was harmless. *Id.*

Here, any error that the circuit court made in the admission of the other-acts evidence was harmless. This is because had the jury not heard evidence that Lee had been previously convicted of sexually assaulting Amy and accused of sexual assaulting the other girls, the jury still would have heard Monica’s compelling testimony. Monica remembered details of the assaults, including in what room they occurred and how Lee would summon her to the room. In addition, the jury would have heard Monica’s brother’s testimony that corroborated Monica’s statements that Lee repeatedly asked her to come upstairs alone. And the jury would have heard from Sophie, Sophie’s ex-girlfriend, and Sophie’s sister that Lee was often at the child care center when Beverly—the center’s owner—was not there. This testimony, too, would have corroborated Monica’s allegations that Lee assaulted her at the center when Beverly was absent. Further, the jury would have heard Lee’s self-serving testimony denying that he was ever at the center during its open hours. The circuit court properly exercised its discretion in admitting the other-acts evidence, but any evidentiary error was harmless here.

II. Lee waived his right to challenge the jury instructions by not objecting to the instructions at trial.

A. Standard of review and relevant law.

Under Wis. Stat. § 805.13(3), a defendant must object to a jury instruction at trial. “Failure to object at the conference constitutes a waiver of any error in the proposed instructions.” Wis. Stat. § 805.13(3).

When a defendant has waived his or her rights under Wis. Stat. § 805.13(3), this Court does not have the “power to reach” the merits of a challenge to the “unobjected-to instructions.” *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

B. Because Lee failed to challenge the jury instructions at trial, this Court should decline to review his claim.

Lee complains that the court’s instructions on how the jury could assess both the other-acts evidence and his prior conviction were confusing and unduly prejudicial.¹⁷ But Lee has waived this Court’s review of the argument.

The trial court held multiple discussions on the topic of proposed jury instructions. (R. 97:90–94; 99:3; 100:5–6.) At no point did Lee object to the court’s instructing the jury on other-acts evidence or the use of his prior conviction. And Lee does not argue on appeal that he did so. In the absence of a contemporaneous objection in the trial court, Lee has waived his right to challenge the instructions and this Court lacks the authority to review his claim. *See* Wis. Stat. § 805.13(3); *Schumacher*, 144 Wis. 2d at 409.

¹⁷ Lee’s Br. 20–22.

And even if this Court were to conclude that it has the power to review Lee's challenge, it should decline to do so because "[i]t is a fundamental principle of appellate review that issues must be preserved at the circuit court." See *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 15, 273 Wis. 2d 76, 681 N.W.2d 190 (citation omitted).

III. Lee's sentence for first-degree sexual assault of a child was neither unduly harsh nor excessive.

A. Standard of review and relevant law.

This Court reviews a circuit court's sentencing decision for an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. Similarly, this Court "review[s] a trial court's conclusion that a sentence it imposed was not unduly harsh and unconscionable for an erroneous exercise of discretion." *State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). A circuit court erroneously exercises its discretion when its sentencing explanation is unreasonable or unjustifiable. *State v. Bizzle*, 222 Wis. 2d 100, 105, 585 N.W.2d 899 (Ct. App. 1998). A circuit court also erroneously exercises its discretion if it makes an error of law. *King v. King*, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999).

In reviewing a sentence, this Court must "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). So long as the circuit court set forth its objectives and explained its reasoning, the court properly exercised its discretion and this Court will not disturb the decision. *Id.* at 281. This is because reviewing courts adhere to "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." *Gallion*, 270 Wis. 2d 535, ¶ 18 (quoting *McCleary*, 49 Wis. 2d at 281). This Court "should

not substitute [its] preference for a sentence merely because, had [it] been in the trial judge's position, [it] would have meted out a different sentence." *McCleary*, 49 Wis. 2d at 281.

"[S]entencing courts must individualize the sentence to the defendant based on the facts of the case by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives." *State v. Harris*, 2010 WI 79, ¶ 29, 326 Wis. 2d 685, 786 N.W.2d 409. The primary sentencing factors are the seriousness of the offense, the defendant's character and rehabilitative needs, and the need to protect the public. *State v. Gallion*, 2002 WI App 265, ¶ 26, 258 Wis. 2d 473, 654 N.W.2d 446.

A sentence is considered harsh or unconscionable only when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

B. Lee's 40-year term of initial confinement and 20-year term of extended supervision for repeatedly sexually assaulting a 6-year old girl is not harsh or excessive.

At sentencing, the court heard from Monica, Sophie, and Sophie's grandfather. (R. 103:8–14.) Monica told the court how Lee's actions had caused her to try to kill herself and how she had "been in and out of hospitals" as a result of the assaults. (R. 103:9.) She said to Lee of his crimes, "It haunted me. You haunted me. You made me not respect, love and even make me hate myself." (R. 103:9.)

To assist the court in accurately evaluating Lee's character, the State detailed the numerous sexual assault allegations that children and women had lodged against Lee over the years. (R. 103:14–22.) In 1995, Lee went to trial and

was acquitted of two counts of second-degree sexual assault based on charges that he raped his girlfriend's 24-year-old sister. (R. 103:15–17.) In 2006, Girl Two, the 14-year-old daughter of his then-girlfriend, accused him of telling her that “she could date older men and make money doing it.” (R. 103:17–18.) She said that Lee put his fingers inside of her vagina and then gave her \$100. (R. 103:18.) Girl Two's friend told police that she did not want to go to her friend's house because she was scared that Lee “would try to pimp her out the way he tried to pimp out” her friend. (R. 103:18.) And Girl Two's sister, Girl Three, described how Lee would “always” come into the bathroom when she was taking a shower, show her “his private part and tell[] her ‘you're going to have to deal with this when you're ready.’” (R. 103:18.)

The State explained how Lee had destroyed Amy's family. (R. 103:18–21.) He sexually assaulted both her and her sister, vaginally assaulting one of the girls with a toothbrush and giving her chlamydia. (R. 103:19–20.) Lee was convicted of assaulting both girls, but the conviction was reversed and Lee pleaded guilty to one count and received approximately seven years of initial confinement for the crimes. (R. 103:20.) As a result of Lee's actions, both girls “no longer got along with each other” and had been removed from their mother's home. (R. 103:21.)

In 2007, authorities discovered that an eight-year-old girl—Girl One, the daughter of another of Lee's girlfriends—had gonorrhea. (R. 103:21.) Girl One eventually revealed that Lee had put “[h]is hand inside her underwear, touch[ed] her vagina and told her not to tell her mother.” (R. 103:22.)

Lee's counsel argued that the accusations all stemmed from a discreet period of time, as opposed to “something that is occurring over 20 years of” his life. (R. 103:27–28.) In an effort to bolster Lee's character, counsel pointed out that Lee

had a family, a GED, a work history, and minimal infractions when incarcerated. (R. 103:28–29.)

Lee continued to deny that he had assaulted Monica, telling the court that he had expected Sophie “to do a little more investigating than what she did.” (R. 103:33.) Of the crime, he said, “It didn’t happen. I wasn’t even around -- I wasn’t around [Monica] like that.” Everybody know I wasn’t around her like that.” (R. 103:34.) Lee said that he felt that the reason the jury found him guilty was “because of the other acts evidence.” (R. 103:35.)

After explaining to Lee that it must consider the nature of the crime, his character, and the needs of the public, the court told Lee that it believed the victim and thought that Lee had “explicitly lied” at trial and was lying to the court at sentencing. (R. 103:36–37.) The court said to Lee,

[I]t is completely clear to me that you not only committed this crime, but the other crimes of which you were convicted. The jury agreed with that. They found your testimony to be not credible. They believed, as did I, [Monica]. It should be said out loud so she can hear, and her family can hear, and so that you can hear that I believe one hundred percent what she told me and I believe zero percent of what you have told me.

(R. 103:37.)

The court found the crimes aggravating due to the “extreme levels of degradation.” (R. 103:38.) The court emphasized the inherent vulnerability of a six-year-old and the anguish Lee’s actions caused Monica and her family. (R. 103:38.) The court called attention to its inability to “fully describe the depths of inhumanity” of Lee’s behavior. (R. 103:39.)

Although the court recognized that there were some positive aspects to Lee’s character—he had achieved a GED,

was a good reader, and had some work history—it concluded that his overall character was “poor.” (R. 103:39–42.) The court noted Lee’s criminal history, which included an armed robbery, a burglary, and the previous sexual assault conviction. (R. 103:40–41.) With regard to the host of other sexual assault allegations, the court said that it would not assume that the accusations were true—and instead it would see them as “merely allegations—but remarked that “[t]hey are noteworthy only because of the[ir] presence.” (R. 103:41.) Significantly, the court found that Lee’s “complete lack of acceptance of responsibility in this case and in other cases” was a stain of his character. (R. 103:41.)

Finally, the court said that the “needs of the public here are straightforward and simple”: it needs to be protected from Lee. (R. 103:42.) “The public has had a strong need to protect those that are vulnerable, particularly children because children are not in a position where they can defend themselves, not just physically, but psychologically and emotionally.” (R. 103:42.) In addition, the court found that “[t]he public has a very strong interest in the incarceration of those that victimize children, and particularly when those people don’t accept responsibility for their conduct.” (R. 103:42.)

Given all of this, the court sentenced Lee to 40 years’ initial confinement, to be followed by 20 years’ extended supervision. (R. 103:44.) The court’s thorough remarks amply demonstrate that the court reached its conclusion based on the appropriate sentencing factors. The sentence reflects a reasonable, prudent exercise of the court’s discretion.

Lee’s effort to undermine the reasonableness of the court’s decision-making falls short. He argues that he was not sentenced for the crime for which he was convicted, but

instead “for all of his alleged other sexual conduct that the state had described at the hearing.”¹⁸ And although Lee admits that his crimes were “heinous,” he says that because they did not involve “penis to vagina sexual conduct,” they could have been “more aggravated.”¹⁹ Presumably, because the crimes could have been “more aggravated,” his sentence should be less severe. Lee’s argument fails.

The starting point for the court’s sentence was 25 years of confinement time. This is because Lee was convicted of the repeated sexual assault of a child, contrary to Wis. Stat. § 948.025(1)(b).²⁰ Under Wis. Stat. § 939.616(1r), a conviction for a violation of section 948.025(1)(b) subjects a defendant to a mandatory minimum term of 25 years’ initial confinement. Thus, Lee could receive no fewer than 25 years of time in prison.

But it was surely more than reasonable for the court to conclude that Lee’s conduct and character justified significantly more confinement time than 25 years. There was ample support for the court’s decision to impose upon Lee the maximum term of confinement. First, Lee failed to take any responsibility for his criminal behavior—behavior that damaged a little girl’s sense of self-worth and safety. Second, Lee sought out a vulnerable victim when he was in a position of power and trust and then repeatedly violated her. Third, Lee had been convicted of sexually assaulting another young girl and had been accused of assaulting many. And although the court emphasized that it had not determined whether the myriad allegations against Lee were true, it

¹⁸ Lee’s Br. 25.

¹⁹ Lee’s Br. 25.

²⁰ The State uses the 2007–08 version of the Wisconsin statutes in its discussion of the statutes applicable to Lee’s crimes.

would have been irresponsible to ignore them. As Lee admits, his crimes are “heinous”; the court’s sentence was fair and sound. There is nothing harsh or unconscionable about a man who repeatedly sexually assaults children receiving 40 years of confinement time and 20 years of time on supervision.²¹ *See Ocanas*, 70 Wis. 2d at 185.

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm the judgment of conviction and the order denying postconviction relief.

Dated this 28th day of December, 2018.

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²¹ Lee states that “taking into account [his] ongoing mental illness,” his sentence was “unduly harsh and severe.” (Lee’s Br. 27.) The State assumes Lee is referring to the sentencing court’s remark that “at one point in time” Lee was diagnosed with bipolar disorder. (R. 103:40.) But because Lee fails to explain how this diagnosis makes his sentence unduly harsh, the State will not address the argument further. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

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 8,684 words.

Dated this 28th day of December, 2018.

KATHERINE D. LLOYD
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 28th day of December, 2018.

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