STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2019AP802-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMUEL L. NICHOLS, JR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE MONROE COUNTY CIRCUIT COURT, THE HONORABLE TODD L. ZIEGLER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Whether the exclusionary rule applies to photographs found on Nichols's cell phone.

The circuit court answered, "no."

This Court should answer, "no."

2. Whether the circuit court erred in admitting other-acts evidence of a prior sexual assault by Nichols.

The circuit court admitted the evidence.

This Court should answer, "no."

INTRODUCTION

During the night, while B.B. slept, Defendant-Appellant Samuel L. Nichols, Jr., began groping her breasts. B.B. met Nichols that evening at the home of a mutual friend, and after falling asleep awoke to Nichols touching her face and breasts. B.B. pretended to be asleep while Nichols groped her bare breasts and placed his hand underneath her pants and underwear, eventually inserting his finger into her vagina. B.B. saw Nichols take photographs of the assault with his cell phone. After B.B. reported the assault, Marshal Brandon Arenz spoke with Nichols at the police department. Nichols admitted to being with B.B. on the night in question, but denied assaulting B.B. or photographing her. Nichols confirmed that he had his cell phone with him that night and showed the phone to Marshal Arenz. During a cursory search of the phone, Marshal Arenz did not find any incriminating images. However, Marshal Arenz knew that phones can store images in hidden locations and that forensic analysis can reveal deleted data, and therefore seized Nichols's phone and applied for a search warrant. Execution of the warrant revealed four nude photographs of B.B.

Prior to trial, Nichols moved to suppress the photographs because Marshal Arenz's seizure was unlawful.

The circuit court denied the motion, finding that exigent circumstances justified the seizure to prevent the destruction of evidence. The State also moved to introduce other-acts evidence of Nichols's sexual assault of M.R. in 1998. M.R. went to sleep and awoke to Nichols groping her breasts. She batted his hand away but Nichols continued to touch M.R. underneath her clothing on her breasts and genital area. The State argued that this evidence was admissible to show, among other things, identity. The circuit court agreed, holding that the evidence was admissible as to the issue of identity and was relevant given the similarities between the incidents. The court also held that the evidence was not unduly prejudicial and explained that it would give the jury a limiting instruction. After a two-day trial, a jury found Nichols guilty.

Nichols argues both that the circuit court should have excluded the photographs and that the court erred in admitting the other-acts evidence, but his arguments fail.

As to the photographs, Marshal Arenz reasonably seized Nichols's phone to prevent the destruction of evidence. Given B.B.'s report and Nichols's statement that he had his phone with him on the night in question, Marshal Arenz had probable cause to believe that the phone contained evidence of a crime. And because Nichols could have deleted the photographs or destroyed the phone if Marshal Arenz had returned it, Marshal Arenz had probable cause to believe there was a risk that evidence would be destroyed during the delay attendant to procuring a warrant. Thus, Marshal Arenz's seizure of the phone was reasonable. And even if the seizure was not reasonable, Marshal Arenz discovered the photographs as a result of a search warrant, a source entirely independent of the seizure. Thus, the photographs were admissible under the independent-source doctrine.

Regarding the other-acts evidence, the circuit court considered the relevant facts, applied the proper legal

standard, and came to a reasonable conclusion that the evidence was admissible, especially in light of the greater-latitude rule. The State articulated a permissible purpose for the evidence: establishing identity. The other-acts evidence was relevant to that purpose because of the similarity between the other act and the crime charged: Nichols awoke a sleeping woman by inappropriately touching her. And although the incidents were separated in time and not entirely identical, they were sufficiently similar to be probative of Nichols's identity. Finally, because the court provided a limiting instruction, there was little danger of unfair prejudice. Moreover, the greater-latitude rule applies, reinforcing the reasonableness of the circuit court's decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves only the application of settled law to the facts and the briefs adequately address the issues presented.

STATEMENT OF THE CASE

On April 21, 2015, B.B. reported to police that, while visiting the home of a mutual friend, Nichols sexually assaulted her while she slept and took photographs of the assault with his cell phone. (R. 1:2–3.) B.B. explained that she met Nichols at the home of a mutual friend on April 18, 2015. (R. 1:3.) That evening she drank alcohol, fell asleep on the living room floor, and awoke to someone touching her face and then her breast. (R. 1:3.) She opened her eyes slightly and saw that the person was Nichols. (R. 1:3.) B.B. froze in place, pretending to be asleep, while Nichols proceeded to touch her breasts and genital area, eventually inserting his finger into her vagina. (R. 1:3.) B.B. reported that Nichols masturbated while he assaulted her and photographed the event with his

cell phone. (R. 1:3.) B.B. also provided to law enforcement the pants and underwear she was wearing that night. (R. 1:3; 145:214, 223.)

After receiving B.B.'s report, Marshal Brandon Arenz spoke with Nichols and seized Nichols's cell phone. On April 23, 2015, Marshal Arenz spoke to Nichols outside of Nichols's home and Nichols agreed to speak with Marshal Arenz at the police department. (R. 135:7–9.) During their conversation, Nichols informed Marshal Arenz that he was studying to be a computer programmer. (R. 135:15.) Marshal Arenz asked Nichols about the evening of April 18 and Nichols admitted that he was with B.B. at their mutual friend's home but claimed that he left the friend's home during the night and that nothing eventful happened. (R. 135:10–11; 145:192.) Marshal Arenz then informed Nichols of B.B.'s allegations, which Nichols denied. (R. 145:192–93.) Marshal Arenz asked Nichols whether he had a cell phone with him on the evening in question and Nichols explained that he did have his phone with him. (R. 135:11, 14–15.) Marshal Arenz asked to see the phone, and Nichols consented and led Marshal Arenz to his van to retrieve the phone. (R. 135:11–12.) Nichols unlocked the phone, which was a "smartphone" and "capable of storing images and videos," and gave it to Marshal Arenz. (R. 135:12–14.) When Marshal Arenz could not find photographs on the phone, Nichols directed Marshal Arenz to a location where images were stored on the phone. (R. 135:12.) Marshal Arenz saw only three photographs there: one of a superman cartoon and two of a computer drawing. (R. 135:12.) Then, knowing that Nichols was studying computer programming, that data can be hidden on or deleted from smartphones, and that technicians can retrieve such data, Marshal Arenz seized Nichols's phone and retained it while he applied for a warrant to forensically search the phone's data. (R. 135:13–15.)

After receiving and executing a search warrant for the data on Nichols's phone, police discovered nude photographs

of B.B. First, Marshal Arenz applied for a warrant to "forensically examine" Nichols's phone, which a judge granted. (R. 28.) In the warrant application, Marshal Arenz explained that B.B. reported that Nichols sexually assaulted her and that she saw Nichols taking pictures with his cell phone during the assault, that Nichols admitted to being with B.B. on the night of the alleged assault and to having the phone with him at the time, and that digital data could be stored on and recovered from the phone. (R. 28:2–3.) Then, the Division of Criminal Investigation executed the warrant, retrieving the data from Nichols's phone and transferring it to an "Optical Disk." (R. 28:4; 145:195.) Marshal Arenz reviewed the disk and showed four images to B.B. that were timestamped in the early morning hours of April 19. (R. 145:195, 211–13.) B.B. identified the images in the photographs as her breast and vaginal area, based on the clothing she wore and her stretch marks. (R. 145:164–68, 213.) Marshal Arenz confirmed that the clothing B.B. provided for examination matched the clothing depicted in the photos. (R. 145:223.)

The State charged Nichols with one count of third-degree sexual assault and four counts of capturing an image of nudity without consent. (R. 1; 23.)

Nichols moved to suppress the photographs, arguing that Marshal Arenz unlawfully seized his phone and therefore the photographs should be excluded from evidence. (R. 25.) The court held a hearing on the motion at which Marshal Arenz testified. (R. 135.) The State argued that Marshal Arenz had probable cause to believe the phone contained evidence of a crime, which did not dissipate when Marshal Arenz failed to immediately find incriminating images, and that exigent circumstances existed justifying the seizure, namely, the danger that Nichols would destroy evidence on his phone. (R. 29:2–3; 135:21–25.)

The circuit court denied Nichols's motion to suppress. (R. 139.) The court found that Nichols agreed to speak with Marshal Arenz at the police department, denied the allegations against him, and agreed to allow Marshal Arenz to look at his cell phone. (R. 139:3–4.) The court found that Nichols unlocked his phone for Marshal Arenz and showed Marshal Arenz "where some photos were" on the phone, and that "based on a quick cursory search, Marshall Arenz saw three images," none of which implicated Nichols. (R. 139:4.) The court also found that "Nichols confirmed that th[is] was the phone that he had with him [on] the night in question and had previously advised that he was going to school to be a computer programmer." (R. 139:4–5.) Finally, the court found that, "[b]ased on his training, Marshall Arenz was aware that the phone in question was capable of storing video or images . . . where they're not readily found" and "that even images that are deleted can be recovered by a forensic analyst." (R. 139:5.) The court then held that Marshal Arenz "had the requisite probable cause" to believe the phone contained evidence of a crime. (R. 139:6.) The court further held that the fruitless "cursory review" of the phone did not negate the probable cause because the images could have been stored in other, less readily accessible locations, or could have been deleted but still recovered by a forensic analyst. (R. 139:6–7.) The court also held that an exigency existed justifying Marshal Arenz's seizure of the phone because, especially in light of Nichols's knowledge of computer programming, Nichols could have destroyed the images or the phone itself had Marshal Arenz returned it. (R. 139:7.)

The State then moved to admit other-acts evidence of a prior sexual assault that Nichols committed against M.R. (R. 54.) Specifically, the State sought to introduce evidence that, in 1998, Nichols and M.R. were staying at a home with Nichols "and others." (R. 54:1–2.) At the time, Nichols was 19 years old and M.R. was 15. (R. 54:11.) During the night, M.R.

awoke to someone touching her breasts over her clothing. (R. 54:2.) M.R. batted the hand away and saw that it belonged to Nichols. (R. 54:2.) Shortly thereafter, Nichols began touching M.R.'s breasts again, eventually placing his hands underneath her clothing and touching her bare breasts. (R. 54:2.) Nichols proceeded to touch M.R.'s genital area underneath her clothing and suck on her breasts. (R. 54:2.) Nichols was later convicted of sexual assault of a child as a result of this incident. (R. 54:1.) The State argued that this other-acts evidence was admissible to show Nichols's motive, intent, and mode of operation, as well as to show absence of mistake. (R. 54:6–7.) At a later motion hearing, the State argued that the evidence was also admissible to show identity. (R. 151:14.) The State argued that the evidence was relevant because of the similarities between the two incidents, including that Nichols awoke the sleeping women by touching them without their consent, and would not unduly prejudice Nichols, including because the court could provide a limiting instruction. (R. 54:7–8; 151:15.) Nichols opposed the other-acts evidence, arguing that the incidents were not sufficiently similar to be probative and that the evidence would be unduly prejudicial. (R. 151:8–13.)

The circuit court admitted the other-acts evidence. (R. 59.) After considering the arguments of the parties, the court applied the three-pronged analysis for the introduction of other-acts evidence. (R. 59; 151:17–18.) The court held that, while motive and intent were not relevant to the charges, identity was, and so the evidence was offered for a permissible purpose. (R. 59:1.) The court also held that the evidence was relevant, given the similarities between the incidents. (R. 59:1.) Specifically, the court explained that both women "knew the defendant prior to the incident and spent time with him that day," both incidents occurred "in a residence where each had presumably spent the night," both women "had fallen asleep" and awoke "to Mr. Nichols touching their

breasts, and both situations proceeded to Mr. Nichols' hand inside their pants." (R. 59:1.) And while there were some differences between the incidents, the court did not find those differences compelling, as there were enough "significant similarities" between the incidents to "constitute[ ] the imprint of [the] defendant." (R. 59:1.) Finally, the court held that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence because the State would present only one witness from the prior incident and because the court would give the jury a limiting instruction. (R. 59:2.) Thus, the court found the evidence admissible, "especially . . . given that the greater latitude rule applies to this case." (R. 59:2.)

The case proceeded to trial and a jury found Nichols guilty on all counts. At trial, B.B. testified about the events that transpired on April 18, 2015—including meeting Nichols, drinking and falling asleep on the living room floor, and waking to Nichols sexually assaulting her—providing a detailed description of the assault. (R. 145:155–64.) B.B. also identified the four nude photographs of her body taken from Nichols's phone. (R. 145:164–68.) Marshal Arenz testified about speaking with Nichols, seizing Nichols's phone, and later searching the phone's data. (R. 145:189–95.) Marshal Arenz also testified that the data pulled from Nichols's phone showed that the photographs of B.B. were "modified" in the early morning hours of April 19, 2015. (R. 145:211–13, 218–19.) Finally, Marshal Arenz testified that B.B. provided him with the clothing she wore on the night of April 18, that he sent the clothing to the crime lab for DNA testing, and that the clothing B.B. provided appeared to match the clothing depicted in the photographs found on Nichols's phone. (R. 145:214, 223.) The parties stipulated that Nichols's DNA was not found on the items of clothing B.B. gave to law enforcement (R. 145:14–15, 18–19), and a DNA analyst testified about the mechanics of touch DNA, explaining that

DNA analysis may or may not be able to discover an individual's DNA on an item that they have touched, depending on the circumstances (R. 146:19, 23–25). Detective Karen Ruff testified about the other-acts evidence of Nichols's 1998 sexual assault on M.R. (R. 145:237–40.) Detective Ruff testified that she investigated the case and that Nichols admitted to her that he touched M.R.'s breasts and vaginal area while she was sleeping. (R. 145:238–39.) Finally, Nichols testified in his own defense, admitting that he had been at his friend's home with B.B. on the night of April 18, but denying that he ever assaulted B.B. or took photographs of her. (R. 146:31–36.) However, Nichols testified that his cell phone was in his possession during the time the data indicated that the nude photographs of B.B. were taken. (R. 146:45–46.)

Prior to closing statements, the court instructed the jury, including a particularized instruction on the other-acts evidence. (R. 146:65–66.) The court instructed that "[e]vidence has been presented regarding other conduct of the defendant for which the defendant is not on trial. Specifically, evidence has been presented [that] the defendant touched the breasts and vaginal area of [M.R.] while she was sleeping in November 1998." (R. 146:65.) The court instructed the jury that if they found the conduct occurred, they "should consider it only on the issue of identity" and "may not consider th[e] evidence to conclude [that] the defendant has a certain character or a certain character trait and that the defendant acted in conformity" therewith. (R. 146:66.) The court defined the "issue of identity," explaining that the issue is "whether the prior conduct of the defendant is so similar to the offense charged it tends to identify the defendant as the one who committed the offense charged." (R. 146:66.) Finally, the court admonished the jury that they may not use the other-acts evidence "to conclude the defendant is a bad person or for that reason is guilty of the offense charged." (R. 146:66.)

The jury found Nichols guilty on all counts and the court sentenced him to two and a half years' initial confinement followed by five years' extended supervision on Count One, and two years' probation, sentence withheld, on Counts Two through Five. (R. 109.)

Nichols appeals. (R. 129.)

STANDARD OF REVIEW

When reviewing a circuit court's decision on a motion to suppress, this Court employs a two-step standard. *State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625. First, this Court upholds the circuit court's findings of fact "unless they are clearly erroneous." *Id.* Second, this Court will "review the application of constitutional principles to those facts *de novo*." *Id.*

"This court will not disturb a circuit court's decision to admit or exclude evidence unless the circuit court erroneously exercised its discretion." *State v. Jackson*, 2014 WI 4, ¶ 43, 352 Wis. 2d 249, 841 N.W.2d 791 (citation omitted). This Court will therefore "uphold a circuit court's evidentiary ruling if it '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. Hurley*, 2015 WI 35, ¶ 28, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted). And if, when making a discretionary decision, the circuit court "fails to set forth its reasoning," this Court will "independently . . . review the record to determine whether it provides an appropriate basis for the court's decision." *State v. Hunt*, 2003 WI 81, ¶¶ 34, 263 Wis. 2d 1, 666 N.W.2d 771.

ARGUMENT

I. The exclusionary rule does not apply to the photographs found on Nichols's phone.

When law enforcement commits a constitutional violation in gathering evidence, courts may exclude the evidence from trial, but only in limited circumstances. As an initial matter, the exclusionary rule applies only when law enforcement has obtained evidence via a constitutional violation. *See Hudson v. Michigan*, 547 U.S. 586, 592 (2006). And even if law enforcement commits a constitutional violation, the exclusionary rule imposes such "substantial social costs" that it is a "last resort" of the courts, only to be applied in the limited circumstances where its costs are justified. *Id.* at 591 (citation omitted); *see also State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97.

Here, Marshal Arenz committed no constitutional violation in seizing Nichols's phone, so the exclusionary rule does not apply. And even if Marshal Arenz did unlawfully seize Nichols's phone, law enforcement obtained the photographs via an independent source—the search warrant—so the costs of exclusion are not justified and the exclusionary rule does not apply.

A. Marshal Arenz reasonably seized Nichols's phone to prevent the destruction of evidence.

The Fourth Amendment protects against only unreasonable searches and seizures by the government. The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the

persons or things to be seized." U.S. Const. amend. IV.[1] "[T]he text of the Fourth Amendment does not specify when a . . . warrant must be obtained." *Kentucky v. King*, 563 U.S. 452, 459 (2011). Instead, "[t]he touchstone of the Fourth Amendment is reasonableness." *State v. Purtell*, 2014 WI 101, ¶ 21, 358 Wis. 2d 212, 851 N.W.2d 417 (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001)). Thus, "certain categories of permissible warrantless searches [and seizures] have long been recognized" because they are reasonable. *Fernandez v. California*, 571 U.S. 292, 298 (2014). One of these "well-recognized" categories of permissible searches and seizures is when "'the exigencies of the situation' make the needs of law enforcement so compelling that a warrantless search [or seizure] is objectively reasonable." *King*, 563 U.S. at 460 (alteration omitted) (citation omitted). Such exigent circumstances include when law enforcement faces "the need 'to prevent the imminent destruction of evidence.'" *Id.* (citation omitted).

Exigent circumstances justify seizing property to prevent the destruction of evidence when two criteria are met.

First, law enforcement must have probable cause to believe that the property is or contains evidence of a crime. *State v. Carroll*, 2010 WI 8, ¶ 26, 322 Wis. 2d 299, 778 N.W.2d 1; *see also State v. Parisi*, 2014 WI App 129, ¶ 9, 359 Wis. 2d 255, 857 N.W.2d 472. Law enforcement has probable cause when considering "the totality of the circumstances, given all the facts and circumstances . . . there is a fair probability that contraband or evidence of a crime will be found." *State v. Sutton*, 2012 WI App 7, ¶ 10, 338 Wis. 2d 338, 808 N.W.2d 411

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[1] Article I, Section 11 of the Wisconsin Constitution contains identical language, Wis. Const. Art. I, § 11, and this Court therefore interprets Wisconsin's constitutional provision consistent with the Fourth Amendment. *Milewski v. Town of Dover*, 2017 WI 79, ¶ 27, 377 Wis. 2d 38, 899 N.W.2d 303.

(citation omitted). Probable cause "is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *Id.* (citation omitted). "An officer's knowledge, training, and experience are germane to the court's assessment of probable cause." *Carroll*, 322 Wis. 2d 299, ¶ 28. And courts have held that credible information from an informant or victim is sufficient to establish probable cause that evidence of a crime will be found. *See State v. Kilgore*, 2016 WI App 47, ¶¶ 39–40, 370 Wis. 2d 198, 882 N.W.2d 493. Moreover, probable cause does not dissipate simply because a brief, cursory search does not reveal incriminating evidence. *See United States v. Bowling*, 900 F.2d 926, 934 (6th Cir. 1990) (holding that probable cause did not dissipate after first search proved fruitless because first search was brief and did not encompass the area where evidence was found during second search).

Second, law enforcement must have probable cause to believe that "there is 'a risk that evidence will be destroyed' if time is taken to obtain a warrant." *Parisi*, 359 Wis. 2d 255, ¶ 9 (citation omitted) (footnote omitted); *accord Carroll*, 322 Wis. 2d 299, ¶ 26. Such probable cause exists when "a police officer, under the facts as they were known at the time, would reasonably believe that delay in procuring a . . . warrant would . . . risk destruction of evidence." *Parisi*, 359 Wis. 2d 255, ¶ 9 (citation omitted). For example, in *Carroll*, the Wisconsin Supreme Court held that exigent circumstances justified the seizure of a cell phone because, had law enforcement returned the cell phone to the defendant, the defendant "could have deleted incriminating images and data." *Carroll,* 322 Wis. 2d 299, ¶ 32.

The fact that law enforcement had probable cause to believe that evidence of a crime would be found prior to the existence of exigent circumstances does not render unreasonable a warrantless seizure to prevent the destruction of evidence. "There are many entirely proper

reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired." *King*, 563 U.S. at 466. For example, police "may think that a short and simple conversation may obviate the need to apply for and execute a warrant" or "may want to ask . . . for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant." *Id.* at 466–67. Thus, police are not required to "apply for a search warrant at the earliest possible time after obtaining probable cause," and the fact that police had probable cause prior to the existence of exigent circumstances does not render unreasonable a subsequent warrantless search or seizure to prevent the destruction of evidence. *Id.* at 466–67.

Here, exigent circumstances justified Marshal Arenz's seizure of Nichols's phone. Marshal Arenz had probable cause both to believe that Nichols's phone contained evidence of a crime and that the delay in procuring a warrant would risk the destruction of evidence.

First, Marshal Arenz had probable cause to believe that Nichols's phone contained evidence of a crime, and the probable cause did not dissipate when Marshal Arenz found no incriminating images during a cursory search of the phone. B.B. reported that Nichols had recently sexually assaulted her and that she had seen him photograph the assault with his cell phone. (R. 1:2–3.) And Nichols confirmed to Marshal Arenz that he had been with B.B. on the night in question and that he had his cell phone with him. (R. 135:10–11, 14–15.) This was sufficient to establish probable cause that Nichols's cell phone contained evidence of a crime. *See Kilgore*, 370 Wis. 2d 198, ¶¶ 39–40 (finding probable cause because the victim said that she lost consciousness in the defendant's presence and then awoke to discover that she had been sexually assaulted). And the fact that Marshal Arenz did not find any incriminating images during a cursory search of the

phone did not negate probable cause. Marshall Arenz's initial search of the phone was only a brief search of one location where images were stored on Nichols's phone. (R. 135:12; 139:4.) This brief search did not encompass anywhere near the entirety of the data on Nichols's phone that could be recovered in a forensic search (R. 139:5), and thus the initial fruitless search did not negate probable cause to believe the phone contained evidence of the assault. *See Bowling*, 900 F.2d at 934 (holding that a fruitless cursory search did not negate probable cause).

Second, Marshal Arenz had probable cause to believe that the delay in procuring a warrant would risk the destruction of evidence. As in *Carroll*, had Marshal Arenz returned the phone to Nichols, Nichols "could have deleted incriminating images and data," *Carroll*, 322 Wis. 2d 299, ¶ 32—especially given that Nichols was studying computer programming and therefore familiar with technology (R. 135:15; 139:7)—or Nichols could have destroyed the phone entirely. And because Marshal Arenz told Nichols that he suspected the incriminating photographs would be on Nichols's phone, it was reasonable for Marshal Arenz to believe that Nichols would take steps to destroy those images if given the opportunity. *See State v. Hughes*, 2000 WI 24, ¶¶ 26–27, 233 Wis. 2d 280, 607 N.W.2d 621 (explaining that it was reasonable to believe that the defendant would attempt to destroy drug evidence when he knew that police were outside his door waiting for a warrant to enter). Thus, Marshal Arenz reasonably seized Nichols's phone to prevent the destruction of evidence.

Nichols claims that Marshal Arenz did not have probable cause to believe his phone contained evidence of a crime because Marshal Arenz did not see any sexual images on the phone during his initial, cursory search. (Nichols's Br. 2–3.) However, Nichols's argument ignores the totality of the circumstances. B.B. reported that Nichols sexually assaulted

her and photographed the assault with his cell phone, and Nichols confirmed that he was with B.B. on the night in question and had his phone with him. (R. 1:2–3; 135:10–11, 14–15.) Like the information provided by the victim in *Kilgore*, 370 Wis. 2d 198, ¶¶ 39–40, this information was sufficient to establish probable cause. And to the extent Nichols argues that probable cause dissipated because Marshal Arenz did not find incriminating evidence during a cursory search of the phone, as explained *supra* p. 15, probable cause to search the entirety of the phone's data did not dissipate simply because a cursory search of the phone did not reveal any incriminating images.

For the same reason, Nichols's attempt to distinguish *Carroll* falls flat. (Nichols's Br. 3.) Nichols argues that *Carroll* is distinguishable because, in *Carroll*, police immediately noticed an image of drugs on Carroll's phone, which then established "probable cause to believe that the phone was an instrument of criminal activity and contained evidence linked to that activity." *Carroll,* 322 Wis. 2d 299, ¶¶ 23–25; (Nichols's Br. 3). But this distinction is immaterial. In both *Carroll* and the present case, police had probable cause to believe the defendant's cell phone contained evidence of a crime. Here, police had probable cause to believe that incriminating images were on Nichols's phone based on statements by B.B. and Nichols. So, under *Carroll*, there was a reasonable concern that Nichols would delete the incriminating images had Marshal Arenz returned the phone.

B. Even if the seizure was unreasonable, the photographs were admissible under the independent-source doctrine.

The exclusionary rule does not apply when law enforcement obtained evidence from a source independent of a constitutional violation. The exclusionary rule is meant to "put[ ] the police in the same, not a *worse*, position tha[n] they

would have been in if no police error or misconduct had occurred." *Murray v. United States*, 487 U.S. 533, 537 (1988) (citation omitted). "When . . . challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been absent any error or violation." *Carroll*, 322 Wis. 2d 299, ¶ 44 (alteration omitted) (quoting *Murray*, 487 U.S. at 537). Thus, the exclusionary rule does not apply if law enforcement obtains evidence from a source independent of any constitutional violation. *Murray*, 487 U.S. at 541–42; *see also State v. Gant*, 2015 WI App 83, ¶ 15, 365 Wis. 2d 510, 872 N.W.2d 137.

To determine whether law enforcement obtained evidence via a source independent of a constitutional violation, courts look to two factors. When the constitutional violation is an unlawful seizure and the independent source is a search warrant, courts ask (1) whether, absent the unlawful seizure, police would still have applied for the search warrant, and (2) whether the unlawful seizure influenced the magistrate's decision to grant the search warrant. *Gant*, 365 Wis. 2d 510, ¶ 16; *see also Murray*, 487 U.S. at 542.

In *Gant*, this Court determined that the independent-source doctrine applied to images that police obtained from the defendant's computer. Police seized Gant's computer during their investigation of his wife's suicide and never returned it. *Gant*, 365 Wis. 2d 510, ¶¶ 2–4. Several months later, police received information that Gant had child pornography on DVDs located on his computer desk and that Gant had told others that he had child pornography on his computer—the computer still in possession of police. *Id.* ¶¶ 5–6. Officers therefore sought and received a warrant to search Gant's computer, on which they found numerous images of child pornography. *Id.* ¶ 7. This Court, assuming without deciding that the continued police retention of Gant's computer was an unlawful seizure, nevertheless held that the

exclusionary rule did not apply to the images found on the computer. *Id.* ¶ 14. The information police received that led to their request for a search warrant was "completely independent of [their] retention of Gant's computer[ ]." *Id.* ¶ 16. Likewise, "[t]he search warrant was based on information independent from the basis for the retention of the computers." *Id.* Thus, the police obtained the images via a source independent of the constitutional violation and the exclusionary rule did not apply. *Id.* ¶¶ 14, 16.

Here, as in *Gant*, police obtained the images from Nichols's phone via a source independent of Marshal Arenz's seizure of the phone, so the exclusionary rule does not apply. Marshal Arenz obtained a search warrant for the data on Nichols's phone and the execution of this warrant revealed the incriminating images. (R. 28; 145: 164–68, 195, 213.) Marshal Arenz's seizure of the phone neither affected his decision to apply for the search warrant nor the magistrate's decision to issue the warrant. Before Marshal Arenz seized the phone, he had probable cause to believe that the phone contained evidence of a crime because B.B. reported that Nichols sexually assaulted her and took photographs of the assault with his phone, and Nichols confirmed that he was with B.B. and had his phone with him on the night in question. (R. 1:2–3; 135:10–11, 14–15); *Kilgore*, 370 Wis. 2d 198, ¶¶ 39–40 (finding probable cause on similar facts). Thus, Marshal Arenz would have applied for the search warrant even if he had not seized Nichols's phone. *See Gant*, 365 Wis. 2d 510, ¶ 16. And nothing in the probable-cause affidavit in the search warrant application originated from Marshal Arenz's seizure of the phone, but instead came from entirely independent sources. (R. 28:2–3.) Thus, the seizure of the phone did not affect the judge's decision to issue the warrant. *See Gant*, 365 Wis. 2d 510, ¶ 16. And because law enforcement obtained the images via execution of the search warrant, a

source entirely independent from the seizure of the phone, the exclusionary rule does not apply. *See id.* ¶¶ 14, 16.

II. The circuit court reasonably held that the other-acts evidence of a prior sexual assault by Nichols was admissible.

When the State seeks to introduce evidence of other acts by a criminal defendant, the evidence must meet certain requirements for admissibility. However, when the State seeks to admit such acts in a case where the defendant is charged with a serious sex offense, courts admit the evidence with greater latitude.

First, as a general matter, when the State seeks to introduce a defendant's other acts, the State must show that the evidence is offered for a permissible purpose. The Wisconsin Statutes provide a general rule that "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," but such evidence is admissible if 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). To show that evidence is offered for a permissible purpose, the State must merely "identify a relevant proposition that does not depend upon the forbidden inference of character as circumstantial evidence of conduct." *State v. Marinez*, 2011 WI 12, ¶ 25, 331 Wis. 2d 568, 797 N.W.2d 399 (citation omitted). Thus, so long as the State articulates "at least *one* permissible purpose for which the other-acts evidence was offered and accepted," the first requirement is met. *Id.*

Second, any evidence admitted must be relevant, which is a low threshold. The Wisconsin Statutes provide that "[e]vidence which is not relevant is not admissible." Wis. Stat. § 904.02. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Thus, "relevance has two facets." *State v. Sullivan*, 216 Wis. 2d 768, 785, 576 N.W.2d 30 (1998). First, the evidence must "relate[ ] to a fact or proposition that is of consequence." *Id.* In a criminal case, whether something is a "fact or proposition . . . of consequence" depends upon the "substantive law [that] determines the elements of the crime charged and the ultimate facts and links in the chain of inferences that are of consequence to the case." *Id.* at 785–86. Second, the evidence must have some "probative value." *Id.* at 786. In all, relevance is "not a high hurdle," as "evidence is relevant if it 'tends to cast any light' on the controversy." *State v. White*, 2004 WI App 78, ¶ 14, 271 Wis. 2d 742, 680 N.W.2d 362 (citation omitted).

In sexual-assault cases, other acts by a defendant that are similar to the crime charged are generally relevant and highly probative. The identity of the perpetrator is a fact in consequence when the defendant denies being the perpetrator. *See State v. Scheidell*, 227 Wis. 2d 285, 307, 595 N.W.2d 661 (1999) (holding that identity was at issue when victim identified defendant as her attacker and defendant "denied the accusation"). The State can establish the identity of the perpetrator through evidence showing "the alleged perpetrator's *modus operandi*, or mode or method of operation." *State v. Hammer*, 2000 WI 92, ¶ 24, 236 Wis. 2d 686, 613 N.W.2d 629. When the other act is similar to the crime charged, such that the two have a "concurrence of common features" so as to "constitute the imprint of the defendant," then the other-acts evidence will be highly relevant to the issue of identity. *State v. Gray*, 225 Wis. 2d 39, 51–52, 590 N.W.2d 918 (1999) (citation omitted). For example, in *Hammer*, the Supreme Court held that other-acts evidence was relevant to identity when, during both the other act and the crime charged, "the defendant awakened the victims in

the middle of the night by improperly touching them." *Hammer*, 236 Wis. 2d 686, ¶¶ 26, 31. And while a significant length of time between the incidents may lower the probative value of other-acts evidence, remoteness in time must be "balanced [with] the similarity in the two incidents," and incidents which are significantly similar will still be relevant even if separated by many years. *Id.* ¶ 33 (collecting cases).

Third and finally, courts may exclude any evidence that presents too great a risk of unfair prejudice. Relevant evidence "may be excluded if its probative value is substantially outweighed by," among other things, "the danger of unfair prejudice." Wis. Stat. § 904.03. The "probative value" of evidence is "[e]ssentially . . . the evidence's degree of relevance." *State v. Payano*, 2009 WI 86, ¶ 81, 320 Wis. 2d 348, 768 N.W.2d 832. "Evidence that is highly relevant has great probative value, whereas evidence that is only slightly relevant has low probative value." *Id.* "Unfair prejudice" on the other hand, "results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." *Sullivan*, 216 Wis. 2d at 789–90. When balancing the two, "[t]he bias . . . is squarely on the side of admissibility," *Marinez*, 331 Wis. 2d 568, ¶ 41 (alteration in original) (citation omitted), and "[i]f the probative value" of a piece of evidence "is close to or equal to its unfair prejudicial effect, the evidence must be admitted." *Hurley*, 361 Wis. 2d 529, ¶ 87. Additionally, "[c]autionary instructions eliminate or minimize the potential for unfair prejudice," *Hammer*, 236 Wis. 2d 686, ¶ 36, and are "most effective" when "tailored to the facts" of the case. *State v. Dorsey*, 2018 WI 10, ¶ 55, 379 Wis. 2d 386, 906 N.W.2d 158.

Notably, the Wisconsin Supreme Court has held that, in certain cases, courts should admit other-acts evidence with

greater latitude. The Wisconsin Statutes provide that "[i]n a criminal proceeding . . . alleging the commission of a serious sex offense, as defined in s. 939.615(1)(b) . . . evidence of any similar acts by the accused is admissible." Wis. Stat. § 904.04(2)(b)1. The Wisconsin Supreme Court has interpreted this provision to mean that, in cases alleging the commission of a serious sex offense, other-acts evidence should be admitted with "greater latitude." *Dorsey*, 379 Wis. 2d 386, ¶ 31.[2] This "greater latitude rule allows for more liberal admission of other-acts evidence" and "operate[s] to 'facilitate[ ] the admissibility of the other acts evidence under the exceptions set forth in [Wis. Stat.] § 904.02[(a)].'" *Id.* ¶¶ 32–33 (second, third, and fourth alterations in original) (citation omitted).

Here, the circuit court properly admitted the other-acts evidence of Nichols's prior sexual assault of M.R. The court considered the relevant evidence and applied the proper legal standard—the three-pronged *Sullivan* analysis. (R. 59; 151:17–18.) Then, the court reached a reasonable conclusion that the evidence was admissible. First, the State articulated identity as a permissible purpose for the other-acts evidence. (R. 59:1; 151:14); *Marinez*, 331 Wis. 2d 568, ¶ 25. Second, because Nichols denied perpetrating the assault, identity was a fact at issue in the case. *See Scheidell*, 227 Wis. 2d at 307. And given the similarities between the incidents, including that Nichols awoke both victims as they slept by touching them inappropriately on the breasts and genital area, the

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[2] The State contends that *Dorsey* was wrong on this point and that, under the plain language of the statute, "evidence of any similar acts by the accused is admissible" in cases alleging the commission of a serious sex offense, Wis. Stat. § 904.04(2)(b)1., without the need to undertake the three-part analysis described above. However, *Dorsey* is binding precedent upon this Court, *see Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), so this Court must apply the above analysis.

other-acts evidence was relevant and probative of identity. (R. 1:2–3; 54:2; 59:1); *Hammer*, 236 Wis. 2d 686, ¶¶ 26, 31. This is true even though the other act occurred nearly 17 years prior to the crime charged. (R. 59:2); *Hammer*, 236 Wis. 2d 686, ¶ 33 (collecting cases). Finally, the evidence did not present a danger of unfair prejudice (R. 59:2), especially because the court gave a particularized limiting instruction that the other-acts evidence could be used only for purposes of identity and not to show that Nichols was "a bad person" and therefore "guilty of the offense charged" (R. 146:65–66); *Hammer*, 236 Wis. 2d 686, ¶ 36. Moreover, because the crime charged—third-degree sexual assault in violation of Wis. Stat. § 940.225(3)(a); (R. 1)—is a "serious sex offense," Wis. Stat. §§ 904.04(2)(b)1., 939.615(1)(b), the greater-latitude rule applies, "allow[ing] for more liberal admission of other-acts evidence." *Dorsey*, 379 Wis. 2d 386, ¶¶31–33; (R. 59:2). Thus, the circuit court reasonably held that the other-acts evidence was admissible.

Nichols argues that the other-acts evidence was insufficiently similar to the crime charged "to identify Nichols as the perpetrator" because of the length of time between the incidents, the difference in age of the victims, and the fact that Nichols photographed the crime charged. (Nichols's Br. 4.) However, the other act and the crime charged were still sufficiently similar to be relevant and probative of identity. In each case, Nichols awoke the victims in the middle of the night by inappropriately touching their breasts and genital area. (R. 1:2–3; 54:2; 59:1.) The Wisconsin Supreme Court found other-acts evidence probative on very similar facts in *Hammer,* 236 Wis. 2d 686, ¶¶ 26, 31. And while M.R. was 15 at the time of the other act and B.B. was an adult, both M.R. and B.B. were members of Nichols's peer group at the time of the assaults and were therefore sleeping in the same residence as him. (R. 54:1–2; 145:155–61.) And, as the circuit court explained, Nichols was 19 and M.R. "was not an

extremely young child" when Nichols assaulted her. (R. 59:1.) Thus, the age of the victims is not a significant difference. *See Hammer*, 236 Wis. 2d 686, ¶ 32 (holding that difference in age of victims not significant because victims were "somewhat near the age of majority") (collecting cases). Finally, while Nichols photographed only his crime against B.B., the "defendant's past offense need not be identical to the charged offense in order to be probative." *State v. Davidson*, 2000 WI 91, ¶ 72, 236 Wis. 2d 537, 613 N.W.2d 606. Given the similarities between the assaults, the other-acts evidence was relevant and highly probative of identity, and was not unduly prejudicial, especially in light of the circuit court's limiting instruction. (*See supra* pp. 22–23.)

CONCLUSION

This Court should affirm Nichols's convictions.

Dated this 24th day of September, 2019.

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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 7,375 words.

Dated this 24th day of September, 2019.

_____
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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).

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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 24th day of September, 2019.

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