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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1565-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RYAN HUGH MULHERN,

Defendant-Appellant.

ON REVIEW FROM A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION ENTERED IN PIERCE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH D. BOLES, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUES PRESENTED

The manifest purpose of Wisconsin's rape shield statute is to bar evidence that is generally irrelevant and that operates to harass and humiliate sexual assault victims, that prevents them from reporting these crimes, and that deters them from participating in these prosecutions.

1. Given that purpose, must the rape shield bar relevant evidence of the victim's lack of sexual conduct that the State offers to corroborate her claim of sexual assault, that is not prejudicial to the victim or to the defendant, and that causes none of the harms that the statute protects against?

The court of appeals did not address this question. This Court should say, "No."

2. Here, the State elicited testimony from the victim that she did not have sex the week before defendant-appellant Ryan Mulhern sexually assaulted her. The State introduced that statement to help satisfy its burden of proving that intercourse occurred and that Mulhern was the probable source of male touch DNA found in the victim's vagina the day after the assault.

Assuming that the rape shield statute barred the victim's statement, was the error harmless, given that the victim's version of events had strong corroboration beyond the DNA evidence, Mulhern's version of events was inconsistent and improbable, and the barred evidence was otherwise relevant and nonprejudicial?

The court of appeals concluded that the error was not harmless. If this Court reaches harmless error, it should reverse the court of appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case on which this Court grants review, publication and oral argument are warranted.

INTRODUCTION

This case demonstrates that something is awry with courts' and parties' understanding of Wisconsin's rape shield statute and its scope. The statute, Wis. Stat. § 972.11, was originally enacted as part of reforms designed to prevent the common-law practice of sexual assault defendants harassing and humiliating complainants by making their sexual history an issue at trial. Section 972.11 keeps out evidence of a victim's sexual conduct or behavior, unless it satisfies one of a few select exceptions. In that way, the law serves as a shield to protect victims.

Here, the State introduced evidence that the victim did not have sex for the week before the assault. That evidence was relevant to corroborate the victim's claim that Mulhern had intercourse with her. But under our courts' understanding of the rape shield statute, admission of evidence of lack of sexual conduct violates the statute. And under the court of appeals' application of the harmless-error test, and without any determination that Mulhern's rights were violated, that error was reversible. Accordingly, because of a violation of a statute designed to protect sexual assault victims, Mulhern will get a new trial at which the victim will have to testify again to the violent assault Mulhern committed. In effect, the statute is acting as a sword.

This Court should hold that evidence of a victim's lack of sexual conduct does not fall under the rape shield statute, but rather is subject to standard admissibility rules. This holding finds support in a plain-language reading of the

statute, its manifest purpose, and other sources reflecting the Legislature's intent. Alternatively, even if such evidence is barred by the statute or was otherwise inadmissible, it is clear beyond a reasonable doubt that a rational jury would have convicted Mulhern absent the victim's statement. This Court must reverse.

STATEMENT OF THE CASE

In the early morning hours of Tuesday, November 22, 2016, Mulhern sexually assaulted his friend, "Lisa," in her home. The State charged Mulhern with one count of second-degree sexual assault and one count of strangulation and suffocation. (R. 1; 8.)

A. Lisa testified that Mulhern violently pinned her by her neck and sexually assaulted her.

Late on Monday night, November 21, Mulhern called Lisa sounding upset, depressed, and "almost frantic" over some personal issues. (R. 85:127–30.) Lisa, who had known Mulhern for just over a year, was concerned for his mental health. (R. 85:128, 132.) So, despite her having an important exam the next day, Lisa invited Mulhern over to talk, but made clear that if he stayed over, he would sleep on the living room futon and that "[she] would be there for him as a friend" only. (R. 85:128–29.)

Mulhern arrived at around midnight. (R. 85:128, 153.) Lisa tried to get Mulhern to talk about what was upsetting him, but he avoided discussing himself and repeatedly turned the conversation to Lisa. (R. 85:129–30.) Lisa eventually told Mulhern she needed to go to sleep; she told Mulhern that he should go to sleep, too, and directed him to the living room futon. (R. 85:129–30, 132.)

Instead, Mulhern continued to ask Lisa about her life. (R. 85:132.) Lisa got into her bed and under the covers.

(R. 85:133.) Instead of going to the futon, Mulhern laid on top of Lisa's covers and put an arm over her. (R. 85:133.) Lisa tolerated that contact, saying that she "continued to try to make it abundantly clear that I needed to go to bed, I was not interested in anything else, and so an arm around me while I'm under the covers and he's above the covers, fine." (R. 85:134.)

But "it didn't stop at that." (R. 85:134.) Mulhern then began kissing Lisa, who pushed him away, told him no and to stop, and reminded him that he had a girlfriend. (R. 85:134.) After a few minutes, Mulhern promised that he would leave if Lisa gave him one kiss. (R. 85:134–35.) After asking Mulhern to reiterate his promise, Lisa "pecked him on the lips" and told Mulhern to go. (R. 85:135.) Instead, Mulhern became more aggressive, holding Lisa's face and shoulders to immobilize her as he kissed her mouth, face, and neck. (R. 85:135–37.) When Lisa could speak, she told Mulhern that she didn't "want this"; otherwise, when Mulhern's hands and mouth made it hard to talk, she pressed her mouth closed and didn't reciprocate to convey her disinterest. (R. 85:136–37.)

Mulhern then got out of the bed, and Lisa thought that he finally was leaving the room. Instead, he took off all his clothes and got under the covers with her; when Lisa turned her body away from him and toward the wall, he pressed his erect penis against her bottom. (R. 85:137–39.) He began trying to put his hands up her shirt and down her pants. (R. 85:138–40.) Lisa reacted by yelling at Mulhern to get off her, pushing his hands away, slapping at him, and trying to prevent him from removing her clothes. (R. 85:140–42.) Mulhern grew "more angry and more forceful." (R. 85:141.) Despite Lisa's using all her strength to try to push Mulhern away, she was pinned between Mulhern and the wall and had limited mobility. (R. 85:141–43.) Besides, Mulhern was simply stronger. He overpowered Lisa and removed her pants.

(R. 85:141–43, 145.) Lisa started crying and yelled at Mulhern to get out. (R. 85:144.) Instead of leaving, Mulhern put his arm across Lisa's throat to press Lisa onto her back, got on top of her, and used his body weight to maneuver between her legs. (R. 85:144–45).

Lisa then felt Mulhern's penis enter her vagina. (R. 85:145–46.) She struggled to push him away, but Mulhern kept pressing his forearm across her throat and she could not gain any leverage. Lisa's head hung over the edge of the bed, her neck and throat hurt, and she struggled to breathe. (R. 85:145–46.) She tried to yell for a roommate (who, it turned out, was not home), but she "could barely get her name out." (R. 85:145–46.) She tried to tell Mulhern that she couldn't breathe. (R. 85:146.)

As Lisa tried to scream, Mulhern pulled his arm from Lisa's throat and covered her mouth and nose with his hand. (R. 85:145–46.) Lisa believed that she bit Mulhern's hand and attempted to call out for her roommate once or twice more. (R. 85:146–47.)

Lisa's next recollection was that she was curled up and crying and Mulhern was standing at the end of the bed. (R. 85:147–48.) Mulhern seemed confused that Lisa was upset and disregarded her commands that he leave. (R. 85:147–48.) Lisa said that Mulhern left only after she threatened to call the police. (R. 85:148.)

B. Lisa immediately reported the assault and had significant injuries consistent with sexual assault and strangulation.

After Mulhern left, Lisa called one of her roommates, told her what happened, and asked her to come home. (R. 85:149–50.) While the roommate was on her way, Lisa also rinsed off in the shower, though without using soap. (R. 85:149–50, 154.)

Lisa disclosed the assault right away to multiple people. When Lisa's roommate returned, Lisa told her in general terms what had happened. (R. 85:149–50.) Later that morning, Lisa called a local sexual assault resource team (SART). (R. 85:155–56.) That evening, Lisa also disclosed the assault to a friend, JH, who testified and confirmed that Lisa was "distraught" and crying when she disclosed the assault. (R. 86:12.) Lisa also reported the assault to police the following day, November 23. (R. 85:157.)

Officer Logan Dohmeier, a River Falls police officer, interviewed Lisa after the assault. Dohmeier relayed what Lisa said occurred that night—that she had been concerned about Mulhern's well-being and invited him over to talk, that he wouldn't share what was bothering him, that he started to kiss her, that she told him to stop, that he got undressed, and that he pinned her down and forcibly penetrated her. (R. 86:26–33.) Lisa also told her mother about the assault later that week, when she was home for Thanksgiving. (R. 85:151.)

Shortly after Lisa called SART on November 22, she went to the hospital. (R. 85:155–56.) The nurse who examined Lisa testified that Lisa had numerous injuries and reports of pain, including tenderness and tightness on her neck, a sore throat, a semicircular wound on her right shoulder, and tenderness on her right chest wall, inner thighs, and inner calves. (R. 85:207–08.) Lisa also had significant injuries to her genital area, including tenderness on her inner and outer labia, a linear tear to the left inner labia, an abrasion on her right vaginal wall, and redness on the left vaginal wall. (R. 85:208.)

The nurse explained that Lisa's complaints of pain and tenderness around her throat were consistent with strangulation and that "visible outside marks" on a strangulation victim's neck "are not necessarily the norm," particularly if a perpetrator pressed his forearm on the

victim's neck. (R. 85:209.) The nurse, who had received a report of Lisa's description of the assault, said that the injuries were consistent with Lisa's "stated history." (R. 85:209.)

C. Forensic testing revealed the presence of Mulhern's DNA on Lisa's neck and male touch DNA in her vagina.

DNA analyst Vincent Purpero tested a series of swabs taken from Lisa during the SANE exam. (R. 85:185, 188.) A swab taken from Lisa's neck revealed the presence of saliva-based DNA that matched Mulhern. (R. 85:189, 192–93.) Purpero also identified the presence of male DNA from vaginal swabs, but the amount reflected that it was touch, or skin-cell DNA, and Purpero could not identify whose DNA it was. (R. 85:191, 196–97.) Purpero explained that he would expect to find "some skin cells . . . at minimum" in the vagina after penetrative assault, but he also noted that showering and the body's natural processes will remove foreign DNA. (R. 85:188, 191–92, 197.)

Before the State rested, it sought to recall Lisa and Purpero. (R. 86:38–39.) It did so to ask Lisa whether she had "sexual intercourse or sexual contact with anyone for one week prior to November 22nd, 2016." (R. 86:41.) Over counsel's objections, the circuit court allowed the testimony. It reviewed the language in Wis. Stat. § 972.11(2)(a) defining sexual conduct as "any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior sexual intercourse or sexual contact, use of contraceptives, living arrangement, lifestyle, et cetera." (R. 86:44.) Reading that language to define sexual conduct as affirmative acts, the court ruled that the proposed testimony fell outside the rape shield statute because it involved lack of

sexual conduct. (R. 86:44.) The court also rejected Mulhern's relevance-based objection. (R. 86:45–46.)

When asked, Lisa stated that she did not have sexual contact or intercourse with anyone in the week before Mulhern's assault. (R. 86:51–52.) The State also recalled Purpero to elicit his opinion that "foreign DNA deposited in the vagina" generally would be gone within "five days after an assault." (R. 86:57–58.)

D. Mulhern denied any nonconsensual sexual contact and denied that any intercourse occurred.

Mulhern testified. He agreed that he went to Lisa's house at around midnight on November 22. He denied that they had oral, vaginal, or anal sex and that he had "any other kind of sexual contact with her" below her waist, though he also stated that he touched her breasts, bottom, and hips over and under her clothes. (R. 86:90–99, 101, 115–16.)

Mulhern's testimony had other contradictions. He testified that on that Monday night, he and Lisa were casually texting back and forth and that she invited him over after he asked whether they could talk "and kind of catch up." (R. 86:89–90.) He denied expressing he was having issues that he wanted to talk about. (R. 86:90, 105.) He acknowledged that that testimony was wrong, however, after reviewing text messages reflecting that he persistently asked to come over and told Lisa he was "about to have a nervous breakdown." (R. 86:106.)

Mulhern also initially denied that Lisa had set ground rules that they were to remain just friends, that she did not want sex, and that he would sleep on the futon if he came over. (R. 86:90, 109, 117.) Again, he had to recant those statements when he reviewed text messages and conceded that Lisa had

made clear that he would sleep on the futon and that she didn't want sex with him. (R. 86:109–10, 118.)

Mulhern nevertheless testified that when he arrived, he and Lisa went to her bedroom, sat on her bed, and talked about school and work. (R. 86:93, 95.) He said that after a while, Lisa said that they should go to sleep and got under her covers. Mulhern laid on top of the covers next to her, started touching her hair, and claimed that they kissed consensually. (R. 86:97.) He said that Lisa brought up that he had a girlfriend and that they talked about that, but he denied that Lisa ever said no, told him to stop, resisted or fought him, or expressed disinterest. (R. 86:98–99.)

Mulhern said that they each removed their own clothes, and that they progressed toward sex. (R. 86:95–97, 113.) Mulhern claimed that he touched Lisa on her breasts, hips, and butt, both clothed and unclothed. (R. 86:115–16.) Mulhern denied that Lisa did or said anything to lead him to believe that she did not want the contact until he was about to put his penis into her vagina. (R. 86:97–100, 112.) At that point, Mulhern said, Lisa suddenly and without explanation yelled, "what the fuck," he stopped the contact, and he left her home. (R. 86:100–02, 112.) Mulhern denied hurting Lisa or forcing her to do anything. (R. 86:104.)

Several of Mulhern's family members saw him days after the assault and testified that they did not notice any injuries, bruises, or scrapes on him. (R. 86:61, 63–64, 66, 70–71.) Dohmeier took photographs of Mulhern when he arrested him seven days after the assault. (R. 86:24–25.) According to Dohmeier, Mulhern did not have "any significant injuries," scrapes, or bruises, though Dohmeier stated that he did not expect to see any visible injuries based on Lisa's description of the assault and her limited mobility during it. (R. 86:24–25, 36–37.)

E. After the jury convicted Mulhern, the court of appeals granted Mulhern a new trial, holding that Lisa's statement about her lack of sex violated the rape shield statute and the error was not harmless.

The jury found Mulhern guilty of count one—second-degree sexual assault—but acquitted him of the strangulation and suffocation count. (R. 86:161.) The court sentenced him to nine years of initial confinement and seven years of extended supervision. (R. 90:54.)

Mulhern appealed to the court of appeals, arguing that the trial court violated the rape shield statute when it admitted Lisa's statement that she had sex with no one else in the week before the assault. *State v. Ryan Hugh Mulhern*, No. 2019AP1565-CR (Wis. Ct. App. Oct. 6, 2020) (per curiam) (Pet-App. 101–12). The State acknowledged that under this Court's precedent in *State v. Gavigan,* 111 Wis. 2d 150, 158–59, 330 N.W.2d 571 (1983), and *State v. Bell*, 2018 WI 28, ¶ 63, 380 Wis. 2d 616, 909 N.W.2d 750, the rape shield statute barred Lisa's statement that she hadn't had sex the week before the assault. (Pet-App. 108.) It argued for affirmance on harmless error grounds.

The court of appeals disagreed and reversed, holding that the error in admitting Lisa's statement was not harmless. In its analysis, the court relied heavily on the State's closing remarks emphasizing Lisa's statement. It also discounted the strength of the State's case, though it did not address the corroborative evidence of Lisa's injuries, her immediately reporting the assault, her lack of motivation to wrongfully accuse Mulhern, and the contradictions and weaknesses in Mulhern's testimony. (Pet-App. 109–11.)

The State petitioned for review, and this Court granted its petition.

STANDARD OF REVIEW

The issues presented implicate the following standards of review:

Whether evidence of a victim's lack of sexual conduct falls under the rape shield statute involves statutory interpretation, which is a question of law that this Court reviews de novo. *See State v. Dinkins*, 2012 WI 24, ¶ 28, 339 Wis. 2d 78, 810 N.W.2d 787.

This Court reviews a circuit court's admission of evidence for an erroneous exercise of discretion. *See State v. DeSantis*, 155 Wis. 2d 774, 777, 456 N.W.2d 600 (1990).

If the circuit court erroneously admitted evidence in violation of the rape shield statute, that decision is subject to harmless-error analysis, which this Court reviews de novo. *State v. Monahan*, 2018 WI 80, ¶ 31, 383 Wis. 2d 100, 913 N.W.2d 894.

ARGUMENT

I. Wisconsin's rape shield statute does not bar evidence of a victim's lack of sexual conduct.

Recently, this Court wrote that evidence of a victim's lack of sexual conduct is rape shield evidence under Wis. Stat. § 972.11 and thus is barred from admission in sexual assault trials. *See Bell*, 380 Wis. 2d 616, ¶ 63. In *Bell*, however, the question was not contested and the *Bell* Court's reasoning on that point was a reiteration of an adopted concession in a case decided over three decades ago. *See Gavigan,* 111 Wis. 2d at 158–59. Accordingly, this case presents the first opportunity for this Court to consider fully, and with the benefit of argument, whether the statute bars a victim's lack of sexual conduct.

This Court should hold that it does not. This holding has support in the plain language of Wis. Stat. § 972.11(2), its manifest purpose, and other evidence reflecting the Legislature's intent.

Since this Court is not starting from an entirely clean slate with this analysis, the State begins with a summary of prior relevant case law before discussing the plain language, manifest purpose, and other evidence.

A. This Court has adopted past State concessions that the rape shield statute bars evidence of a victim's lack of sexual conduct.

Gavigan was the first case in which this Court expressly considered whether the rape shield statute barred evidence of a complainant's lack of sexual conduct.[1] 111 Wis. 2d at 158–59. There, Gavigan claimed error based on the State's introduction of testimony suggesting that the victim had been a virgin. The State conceded that the evidence fell under the rape shield statute, and the Court accepted that concession with a brief reference to language in Wis. Stat. § 972.11(2)(b):

> Sec. 972.11(2)(b), Stats., precludes the admission of "any evidence" pertaining to a complainant's prior sexual conduct or reputation. Nothing in the statute limits its applicability to prior affirmative acts. Rather, the plain meaning of the words "prior sexual conduct" [in section 972.11(2)(b)] includes the lack of sexual activity as well.

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[1] Before *Gavigan*, this Court decided *State v. Clark*, 87 Wis. 2d 804, 817, 275 N.W.2d 715 (1979), a sexual assault case in which the victim testified that she had been a virgin before the assault. There, the Court summarily adopted the State's concession that the victim's statement was inadmissible, but it affirmed the conviction on harmless error grounds. *Id.* at 818.

Id. at 158–59. This Court nevertheless held that the virginity evidence was admissible because it was relevant and highly probative to the issue of consent, and any prejudicial effect was blunted. *Id.* at 161. Accordingly, the victim's statements were nevertheless admissible notwithstanding the rape shield bar. *Id.*

In response to *Gavigan*, the Legislature amended Wis. Stat. § 972.11 to bar courts from doing what this Court did in *Gavigan*, i.e., admitting rape shield evidence beyond the exceptions in Wis. Stat. § 972.11(2)(c). When the issue next arose—again, when a jury heard testimony suggesting that the victim had been a virgin before the assault—this Court recognized "that the legislature intended to exclude evidence of a complainant's prior sexual conduct unless it falls within the three exceptions stated in the statute." *State v. Mitchell*, 144 Wis. 2d 596, 619, 424 N.W.2d 698 (1988). In *Mitchell*, the Court did not reconsider whether the virginity evidence was "prior sexual conduct"; instead, it affirmed the conviction on harmless error grounds. *Id.* at 620.[2]

Finally, the issue of a victim's lack of prior sexual conduct arose again in a different context in *Bell*, 380 Wis. 2d 616. In *Bell*, that issue involved whether Bell could show prejudice under *Strickland* based on counsel's failure to seek redaction from exhibits in which a 14-year-old complainant told a police officer that she had been a virgin before the assault. *Id.* ¶¶ 60, 65.

This Court assumed, based on the adopted concession in *Gavigan*, that counsel was deficient for failing to redact the material:

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[2] *See also State v. Childs*, 146 Wis. 2d 116, 121–23, 430 N.W.2d 353 (Ct. App. 1988) (deeming complainant's testimony suggesting a lack of prior sexual experience inadmissible based on *Gavigan* but affirming on harmless error grounds).

> Prior sexual conduct includes a lack of sexual conduct, meaning that evidence that a complainant had never had sexual intercourse is inadmissible. This prohibition extends to indirect references to a complainant's lack of sexual experience or activity. Evidence of this nature is prohibited because it "is generally prejudicial and bears no logical correlation to the complainant's credibility."

Bell, 380 Wis. 2d 616, ¶ 63 (citing *Gavigan*, 111 Wis. 2d at 156, 159). Nevertheless, Bell could not show prejudice under the circumstances of his case. *Id.* ¶¶ 68–69.

These cases, taken together, teach the following: First, this Court in *Gavigan* adopted the State's concession that evidence of a victim's lack of sexual conduct is inadmissible under section 972.11. Its reasoning in support was a brief discussion referencing only part of the rape shield statute, the issue was not contested, and the Court believed that the evidence was relevant and should have been admitted. To that end, the *Gavigan* Court's brief discussion, and the *Bell* Court's summary reliance on it, are not reasoned holdings carrying precedential value. *See State v. Jackson*, 2011 WI App 63, ¶ 14, 333 Wis. 2d 665, 799 N.W.2d 461 ("[A] concession for the sake of argument, which is adopted by the supreme court and is not thereafter the subject of studied discussion, cannot be considered as a holding worthy of precedential value.").

Second, after the Legislature modified Wis. Stat. § 972.11, subsequent courts did not revisit whether the *Gavigan* Court's adopted concession was correct, but they instead focused on harmless error or prejudice, which has invariably favored the State and the convictions.

In effect, the case law has developed somewhat of a workaround. Courts and parties have assumed, based on *Gavigan*, that the State's introduction of evidence of a victim's lack of sexual conduct violates the rape shield statute, but the

error is almost invariably harmless and results in affirmance.[3] Accordingly, there's not been a fitting occasion to take a fresh look at the reasoning in *Gavigan*, until now. As discussed below, this Court should withdraw the language in *Gavigan* adopting the State's concession and the *Gavigan*-based language in *Bell*, to reflect that Wis. Stat. § 972.11(2) does not bar a victim's lack of sexual conduct or behavior.

B. A victim's lack of sexual conduct is not rape shield evidence, given the plain language of paragraph (2)(a) and the law's manifest purpose.

1. Legal standards governing statutory interpretation.

To interpret a statute, this Court begins with its plain language and "generally give[s] words and phrases their common, ordinary, and accepted meaning." *Dinkins*, 339 Wis. 2d 78, ¶ 29 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). "For purposes of statutory interpretation or construction, the common and approved usage of words may be established by consulting dictionary definitions." *State v. Sample*, 215 Wis. 2d 487, 499, 573 N.W.2d 187 (1998).

Courts must interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes." *Dinkins*, 339 Wis. 2d 78, ¶ 33 (citing *Kalal*,

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[3] The State has identified only one example in Wisconsin law where the court reversed a sexual assault conviction based on the use of evidence of a victim's lack of sexual conduct. *State v. Penigar*, 139 Wis. 2d 569, 586, 408 N.W.2d 28 (1987). There, this Court reversed on real-controversy grounds after the State introduced virginity evidence that was not probative, highly prejudicial, and later proved to be false. *Id.*

271 Wis. 2d 633, ¶ 46). Further, a reviewing court must interpret statutory language reasonably, "to avoid absurd or unreasonable results." *Id.* ¶ 49 (citing same). "An interpretation that contravenes the manifest purpose of the statute is unreasonable." *Id.* ¶ 29 (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

"A statute is ambiguous if it is susceptible to more than one reasonable understanding." *State v. Grady*, 2007 WI 81, ¶ 15, 302 Wis. 2d 80, 734 N.W.2d 364 (citing *Kalal*, 271 Wis. 2d 633, ¶ 47). If a statute is ambiguous, a reviewing court may examine extrinsic sources to guide its interpretation. *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 50).

2. The plain language defining "sexual conduct" contemplates affirmative sexual conduct, not its absence.

The rape shield statute begins with a definition of "sexual conduct" followed by its explanation of when evidence of that conduct is (and isn't) barred.

> In this subsection, "sexual conduct" means *any conduct or behavior relating to sexual activities* of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.

Wis. Stat. § 972.11(2)(a). In paragraph (2)(b), the statute provides that in cases in which a defendant is accused of a sexually motivated crime, "*any evidence concerning the complaining witness's prior sexual conduct . . . and reputation as to prior sexual conduct* shall not be admitted into evidence" at trial or referenced when the jury is present. § 972.11(2)(b). The statute then lists three narrow exceptions all related to specific instances of a complainant's past sexual conduct or allegations of sexual assault. § 972.11(2)(b)1.–3.

In asking whether "sexual conduct" includes the lack thereof, the logical place to start the plain-language analysis is the definition in paragraph (2)(a) providing that sexual conduct means "any conduct or behavior relating to sexual activities" of the complainant.

To start, "any" has several definitions, but it is considered a synonym for "every."[4] That choice of a broad modifier suggests that the Legislature intended a broad reach for the statute.

Yet "any" refers to "conduct or behavior," which the Legislature further limited with the phrase "relating to sexual activities." "Conduct," "behavior," and "sexual activities" connote affirmative acts. "Conduct" means "to cause (oneself) to act or behave in a particular and especially in a controlled manner."[5] "Behavior" is "the way in which someone conducts oneself or behaves," including "an instance of such behavior."[6]

Even if "conduct" or "behavior" can be understood to also encompass the absence of those things, the Legislature further modified and limited those words with the phrase "relating to sexual activities." And "activity" means an affirmative action, that is, "the quality or state of being active . . . a pursuit in which a person is active."[7] So, taken together,

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[4] *Any*, Merriam-Webster Online Dictionary (2021), https://www.merriam-webster.com/dictionary/any (defining "any" as "one or some indiscriminately of whatever kind: . . . EVERY—used to indicate one selected without restriction").

[5] *Conduct*, Merriam-Webster Online Dictionary (2021), https://www.merriam-webster.com/dictionary/conduct.

[6] *Behavior*, Merriam-Webster Online Dictionary (2021), https://www.merriam-webster.com/dictionary/behavior.

[7] *Activity*, Merriam-Webster Online Dictionary (2021), https://www.merriam-webster.com/dictionary/activity.

the phrase "conduct or behavior relating to sexual activities" most logically means a person's affirmative sexual behavior or conduct, not its absence.

This reasoning is sensible. Wisconsin courts have excluded from the statute's scope certain acts by the victim having to do with sex—for example, a victim's expression of sexual desire—as not "prior sexual conduct" under Wis. Stat. § 972.11(2)(b). *See State v. Vonesh*, 135 Wis. 2d 477, 490, 401 N.W.2d 170 (Ct. App. 1986) (holding that "the act of writing about sexual desires or activities is not itself prior sexual conduct"). If a victim's affirmative expression of sexual desire is not sexual conduct, it is difficult to square how a victim's nonengagement in any sexual activity is.

To that end, this Court's explanation why it adopted the concession in *Gavigan* is not persuasive. That explanation focuses solely on paragraph (2)(b) and its "any evidence" language to define "sexual conduct." But that explanation did not address paragraph (2)(a), in which the Legislature expressly defined sexual conduct using terms reflecting affirmative acts. To understand the scope of sexual conduct in paragraph (2)(b) without reference to (2)(a) was contrary to directives to interpret statutory language "in the context in which it is used; not in isolation but as part of a whole." *See Dinkins*, 339 Wis. 2d 78, ¶ 29.

Moreover, as for the statement in *Gavigan* that "[n]othing in the statute limits its applicability to prior affirmative acts," nothing in the statute expressly expands its applicability to "negative acts." As discussed, "conduct," "behavior," and "sexual activities" all reflect affirmative acts. So too, the examples listed in the statute reflect affirmative acts, including "prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style." Wis. Stat. § 972.11(2)(a). "[T]he meaning of 'sexual conduct' gains more precision when considered with . . .

[t]hese associated examples, [which] all relate directly to physical experiences and activities sexual in nature or which permit inferences to be drawn as to the nature and extent of a person's physical sexual experiences or activities." *Vonesh*, 135 Wis. 2d at 488.

Further, the exceptions to the rape shield bar all reflect affirmative acts: evidence of the complainant's past conduct with the defendant, of the complainant's prior untruthful allegations of sexual assault, and "evidence of specific instances of sexual conduct" introduced for narrow purposes. Wis. Stat. § 972.11(2)(b)1.–3. Taken together, the definition of sexual conduct and the examples provided reflect intent that "sexual conduct" is limited to affirmative acts.

3. This plain-language reading comports with the manifest purpose and avoids absurd results.

The manifest purpose of the rape shield statute is to protect sexual assault complainants at trial and "to counteract outdated beliefs that a complainant's sexual past could shed light on the truthfulness of the sexual assault allegations." *State v. Dunlap*, 2002 WI 19, ¶ 19, 250 Wis. 2d 466, 640 N.W.2d 112.

The statute serves four important purposes, all aimed at protecting complainants. "First, it promotes fair trials" by excluding evidence which is generally presumed to be "irrelevant, or if relevant, substantially outweighed by its prejudicial effect" on, typically, complainants. *See State v. Pulizzano*, 155 Wis. 2d 633, 647, 456 N.W.2d 325 (1990). "Second, it prevents a defendant from harassing and humiliating the complainant." *Id.* Third, it "prevents the trier of fact from being misled or confused by collateral issues and deciding a case on an improper basis." *Id.* And fourth, it encourages "effective law enforcement because victims will

more readily report such crimes and testify for the prosecution if they do not fear that their prior sexual conduct will be made public." *Id.*

Generally, evidence of a victim's lack of sexual conduct is not the harassing or humiliating evidence that the statute aims to bar. Barring it can hamper the State's rights to a fair trial and opportunity to convict when such evidence is probative to issues at trial, helpful to the fact-finder, and non-prejudicial. *See State v. Grande*, 169 Wis. 2d 422, 434, 485 N.W.2d 282 (Ct. App. 1992) (recognizing "the state's rights to a fair trial and the opportunity to convict").

Moreover, the facts here illustrate how sweeping a victim's lack of sexual conduct within the rape shield bar contravenes those four purposes. As for the first and third factors, Lisa's testimony was relevant to identifying the possible source of DNA evidence presented at trial. It was neither offered for an improper purpose, nor was it unduly prejudicial (i.e., by suggesting that Lisa was less likely to consent, or as "good" character evidence for Lisa or "bad" character evidence against Mulhern). Rather, the evidence provided additional context to allow the jury to contextualize and weigh the DNA evidence. Indeed, without it, the jury would have been left to speculate why the State did not ask Lisa the question and what her answer would have been.

As for the second and fourth purposes nothing about the introduction or use was aimed at harassing or humiliating Lisa. Nor would its use undercut effective law enforcement and victims' willingness to report these crimes and testify in these cases.

To read the statute to bar introduction of a victim's lack of sexual conduct also risks creating absurd results in two ways. First, it prevents the State from presenting relevant

evidence bearing on material facts to assist the jury.[8] As discussed, it deprives the jury of information helpful to its truth-seeking function while serving none of the purposes the statute was designed to promote.

Second, sweeping evidence of a victim's lack of sexual conduct within the rape shield bar puts lower courts in difficult positions. Circuit courts are left to exclude what otherwise appears to be probative and nonprejudicial evidence and hope that the jury can still fulfill its truth-seeking function. Alternatively, if the circuit court erroneously admits the evidence, the conviction is left to hang on a question of harmless error when the error was not "tainted" evidence or otherwise did not violate the defendant's rights. That all risks the result here: granting a defendant a new trial and requiring a victim to retestify based wholly on a violation of a statute designed to protect victims.

4. Extrinsic sources support the conclusion that a victim's lack of sexual conduct is not rape shield evidence.

Although "Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous," they may review legislative history without a determination of ambiguity "to confirm or verify a plain-meaning interpretation." *Kalal*, 271 Wis. 2d 633, ¶¶ 50–51. Extrinsic evidence—including the

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[8] Similar evidence to Lisa's statement here has been used in sexual assault trials in Wisconsin. In *Hagenkord v. State*, 100 Wis. 2d 452, 302 N.W.2d 421 (1981), for example, the victim testified that she had not had sexual intercourse for the six months leading up to the assault to support that intercourse occurred, though in that case there were no appellate issues involving the admissibility of that evidence.

legislative history and interpretation of similar statutes by other courts—supports the above plain-language reading.

The Legislature enacted section 972.11(2) as part of revisions to its sexual assault law, which went into effect in 1976. *See Vonesh*, 135 Wis. 2d at 483. The enactment was part of a national movement to reform state and federal sexual assault laws, many of which incorporated onerous common-law requirements that hampered prosecutions and made convictions difficult to obtain. *Id.*; *see also Rape Law Revision: A Brief Summary of State Action,* Legislative Reference Bureau, Informational Bulletin 75-1B-1 at 6 (April 1975). (Pet-App. 124.)

The reforms aimed to increase "the number of rape prosecutions by removing some of the potential for embarrassment or humiliation which inhibits victims from reporting crimes." *Rape Law Revision*, *supra* at 6. (Pet-App. 124.) Among the barriers to prosecutions was "the long-standing common law doctrine that permitted a defendant accused of rape to inquire into the complainant's 'character for unchastity.'" *Vonesh*, 135 Wis. 2d at 484 (citing Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 765 (1986)). Evidence of a complainant's unchastity was admissible to prove consent "based on the notion that women who had engaged in sexual intercourse outside of marriage had violated societal norms and therefore possessed the character flaw of unchastity, that is, the propensity to engage in nonmarital sexual activity." Galvin, *supra* at 783. Some courts also held "that unchastity in women is relevant . . . to credibility; they believed 'promiscuity imports dishonesty.'" *Id.* at 787.

Wisconsin, in implementing its statute, patterned it after a statute enacted in Michigan. *Id.* at 773, App. Tbl.1. Statutes modeled after the Michigan approach "prohibit the

introduction of sexual conduct evidence subject to certain enumerated exceptions." *Id.* Wisconsin's rape shield statute remains similar to Michigan's, inasmuch as it excludes evidence of the victim's sexual conduct unless a statutory exception applies. *Compare* Wis. Stat. § 972.11(2), *with* Mich. Comp. Laws § 750.520j. Accordingly, in addition to Wisconsin's legislative history, Michigan court decisions on its rape shield statute "are entitled to weight" when interpreting the plain meaning of Wisconsin's similar statute. *Vonesh*, 135 Wis. 2d at 488–89.

To that end, the Michigan Supreme Court recently held that a victim's lack of sexual conduct falls outside its rape shield statute. *People v. Sharpe*, 918 N.W.2d 504, 513 (Mich. 2018). In *Sharpe*, the victim testified that she did not engage in sexual intercourse with anyone but the defendant in 2014, and the defendant alleged that that statement violated the rape shield statute. Focusing on statutory language describing rape shield evidence as "specific instances" of sexual conduct, the court explained that testimony demonstrating an absence of conduct was not a "specific instance" and therefore did not fall under its rape shield statute. *Id.* It noted that that conclusion was consistent with "the purposes of the rape shield statute, [which] was designed to prevent unwelcome and unnecessary inquiry into a complainant's sexual activities, thereby protecting the complainant's privacy and protecting the complainant from suffering unfair prejudice based on her sexual history." *Id.*

To be sure, Michigan's and Wisconsin's rape shield statutes are not identical. Michigan's bars "specific instances of the victim's sexual conduct," whereas Wisconsin's bars "any evidence of prior sexual conduct," i.e., prior "conduct or behavior relating to sexual activities." *Compare* Wis. Stat. § 972.11(2), *with* Mich. Comp. Laws § 750.520j. But those distinctions are without difference. The language in both

refers to affirmative activity, not the lack thereof. Further, the manifest purpose of both states' rape shield statutes is identical: it is to bar evidence designed to harass and intimidate sexual assault complainants, not hamper them from providing relevant and nonprejudicial evidence to assist in the prosecution.[9]

Bluntly, the statute is a shield for victims. To read evidence of a complainant's lack of sexual conduct to fall within the statute's bar permits defendants to wield the statute as a sword. This Court should withdraw the language in *Gavigan* adopting the State's concession and withdraw the *Gavigan*-based language in *Bell* to reflect that Wis. Stat. § 972.11(2) does not bar evidence of a victim's lack of sexual conduct.

C. The evidence was otherwise relevant and admissible under Wis. Stat. §§ 904.01 and 904.03.

To hold that a victim's lack of prior sexual conduct does not fall under the rape shield statute does not mean that such evidence is automatically admissible. It is still subject to the relevancy and admissibility requirements in Wis. Stat. §§ 904.01 and 904.03. Accordingly, testimony from a sexual assault complainant regarding her lack of sexual activity is admissible only if it is relevant, i.e., "having any tendency to make the existence of any fact that is of consequence to the

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[9] Other states have held that evidence of a victim's lack of sexual conduct does not fall under their rape-shield statutes. *See, e.g.*, *People v. Johnson*, 671 P.2d 1017, 1020 (Colo. Ct. App. 1983); *Forrester v. State*, 440 N.E.2d 475, 479 (Ind. 1982); *State v. Burke*, 804 A.2d 617, 620 (N.J. Super. Ct. Law Div. 2002); *State v. Pugh*, 640 N.W.2d 79, 83 (S.D. 2002). *But see State v. Wenthe*, 865 N.W.2d 293, 307 (Minn. 2015) (holding that rape shield statute barred State from introducing irrelevant evidence of victim's virginity).

determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Evidence determined to be relevant under section 904.01 nevertheless may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Wis. Stat. § 904.03.

Given that, evidence of the lack of sexual conduct offered to suggest that the victim is of a "good" character and is therefore more credible, that she is less likely to consent, or that she is more worthy of sympathy is inadmissible under section 904.01. Even such evidence, if offered for different purposes, might not be probative enough to be admissible under section 904.03.

And here, the evidence—Lisa's statement that she did not have sex the week before the assault—was relevant and admissible. Whether intercourse occurred was an issue in the case. Lisa had injuries consistent with it, yet Mulhern claimed that it hadn't happened. In addition to the other evidence presented, the jury learned that male touch DNA was identified from the vaginal swab. Lisa's statement was probative and relevant to the possible identity of the male touch DNA.

To that end, the State did not introduce the statement for improper purposes, such as bolstering its case on consent (consent wasn't an issue), to imply that Lisa had an especially good or moral character, or impugning Mulhern's character. Moreover, its probative value was not substantially outweighed by the concerns listed in section 904.03. That Lisa claimed not to have had other sexual intercourse or contact that week—which the State introduced to inform Purpero's testimony that foreign DNA would not last more than five days—was not prejudicial, let alone unduly so, to either her

or Mulhern. It did not risk confusing or misleading the jury. The question and answer took seconds and did not cause any delay, waste time, or saddle the proceedings with cumulative evidence.

Indeed, had the State not been able to elicit Lisa's statement, the jury would have been left to wonder why no one asked Lisa that question or whether the DNA could have been someone else's. Despite that the jury was instructed not to speculate (R. 86:134), the absence of Lisa's statement would have invited the jury to do just that.

In sum, this Court should hold that evidence of a victim's lack of sexual activity is not rape shield evidence and thus is not barred under Wis. Stat. § 972.11(2). Rather, such evidence is admissible if it satisfies the admissibility rules under Wis. Stat. §§ 904.01 and 904.03. And because here, Lisa's statement is not rape shield evidence and is admissible, this Court should reverse the court of appeals and reinstate the judgment of conviction.

II. The court of appeals wrongly concluded that the error was not harmless.

Even if this Court believes that the rape shield statute properly barred Lisa's statement that she did not have sex the week before the assault and the circuit court erroneously admitted it, a rational jury would have found Mulhern guilty even without her statement. Mulhern is not entitled to a new trial.

A. The harmless-error test asks whether the jury would have found the defendant guilty absent the error.

An erroneous admission of rape-shield evidence is subject to harmless-error analysis. *Mitchell*, 144 Wis. 2d at 619–20. For an error to be harmless, the party benefitting

from the error must demonstrate that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). The standard is "essentially consistent" with the standard for prejudice in ineffective-assistance cases, except that under *Strickland*, the defendant bears the burden of proof. *See id.* ¶ 41 (citing *State v. Dyess*, 124 Wis. 2d 525, 544–45, 370 N.W.2d 222 (1985)).

In assessing whether an error requires reversal, this Court must consider the totality of the evidence presented at trial. *State v. Hunt*, 2014 WI 102, ¶ 29, 360 Wis. 2d 576, 851 N.W.2d 434. While "[h]armless error is not subject to a precise mathematical formula," *Monahan*, 383 Wis. 2d 100, ¶ 63, multiple non-exhaustive factors may assist the analysis, including: the prevalence and importance of the erroneously admitted evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; the nature of the defense; the nature of the State's case; and the strength of the State's case. *Hunt*, 360 Wis. 2d 576, ¶ 27.

B. Based on all the evidence and the relevant factors, a rational jury would have convicted Mulhern absent Lisa's statement.

Applying the above factors in addition to other considerations, it is clear beyond a reasonable doubt that the admission of Lisa's statement was harmless.

1. The nature of the parties' cases and strength of the State's case demonstrate that the alleged error was harmless.

Starting with the factors considering the nature and strength of the parties' positions and the prosecution

evidence, the State had a strong case—even without Lisa's statement about the week preceding the assault—that Mulhern could not credibly undercut. To prove second-degree sexual assault without consent, the State had to prove the following three elements: that Mulhern had sexual intercourse with Lisa; that Lisa did not consent to the intercourse; and that Mulhern used or threatened force or violence to have that intercourse. *See* Wis. Stat. § 940.225(2)(a); Wis. JI–Crim 1200B (2010), 1208 (2016).[10]

Given Lisa's and Mulhern's diverging accounts of the events—Lisa's being that Mulhern forced sexual intercourse with her, Mulhern's being that no nonconsensual contact and no contact below Lisa's waist occurred—the only truly contested element at trial was the first, i.e., whether there was intercourse. In the end, the jury believed Lisa's account that, after she tolerated some hugging and a kiss, Mulhern physically forced sexual intercourse despite Lisa's objections and efforts to fend him off.

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[10] These elements of the crime are narrowed based on an error in the jury instructions given at trial. To convict in a second-degree sexual assault prosecution, the jury can find that the relevant act was sexual contact or sexual intercourse. Wis. Stat. § 940.225(2)(a); Wis. JI–Crim 1200A (2007), 1208 (2016). Here, the circuit court refused the State's request to instruct the jury on sexual contact. In support of its request, the State pointed to testimony from Lisa that she felt Mulhern's erect penis on her bottom and from Mulhern that he touched her breasts and bottom with his hands. (R. 86:115–16, 123–25, 127.) The circuit court denied the State's request because the Information charged intercourse and, in the court's view, the focus of trial had been intercourse, not contact. (R. 86:123–25, 128.)

The State disagrees with the court's decision and maintains that the jury should have been instructed on sexual contact as well as intercourse. That said, the State's harmless error argument is based on the instruction provided.

And to that end, the State's case was strong. Lisa offered compelling testimony, acknowledging that at first, she did not object to Mulhern's cuddling with her. (R. 85:133–34.) She also admitted that she kissed him on the promise that he would leave her room. (R. 85:134–35.) She described in detail how Mulhern's aggression progressed: his immobilizing her face and neck to kiss her forcibly; his disrobing and then forcibly removing her pants; his forcing her down on the bed; and his immobilizing her by pressing his forearm onto her neck, covering her mouth with his hand, impeding her breathing, and forcing himself between her legs. (R. 85:136–46.) She articulated how her mental state progressed throughout the encounter from annoyance and anger to fear and terror. (*See id.*)

Lisa's version of events had support in the testimony of the sexual assault nurse examiner, who testified to the tears, abrasions, and tenderness that Lisa suffered in her vagina, on her labia, her thighs, and other parts of her body. The nurse testified that she was aware of Lisa's claims and the injuries were consistent with her stated history. (R. 85:208–09.) These were significant injuries that Lisa sustained mere hours after an encounter with Mulhern in which he swore he did not contact her other than above the waist (though he later admitted that he touched her backside). There was no evidence that Lisa could have sustained those injuries some other way in the roughly 12 hours between when Mulhern left her house and when she went to the hospital for a SANE exam. Certainly, Mulhern could not offer an alternate explanation.

Lisa's version of events also was corroborated because she reported the assault right away to multiple people. The jury heard testimony confirming as much from JH and Dohmeier, to whom Lisa reported the assault the same and the next day, respectively. (R. 86:10–12, 26–28.) Lisa called

SART the morning of the assault and submitted to an exam that afternoon. (R. 85:155–56.) She also testified that she told her roommate that same morning and her mother a few days later. (R. 85:149–51.)

Finally, Lisa's version of events was compelling because she had no motive to falsely accuse Mulhern. Mulhern was a friend and she trusted him. She invited him over on a night when she needed to rest for an important exam; she did so after he asked multiple times and appeared to be having a mental health crisis. She had no reasonable motivation to accuse Mulhern of sexual assault and endure all that that entailed—a SANE exam, police interviews, a trial—if one didn't happen. There was no explanation why Lisa would have acknowledged some consensual contact with Mulhern before the assault if she was fabricating the allegations. Mulhern certainly couldn't come up with any theory why Lisa would make up the accusations or could have had such a dramatically different understanding of what had occurred.

In contrast, Mulhern's version of events was inherently less compelling and riddled with inconsistencies. He explained that he arrived at Lisa's house shortly after midnight on November 22, after asking if they could "kind of catch up," and denied that he was "having issues that he wanted to talk about." (R. 86:89–90.) Mulhern started to suggest that he went to Lisa's house because Lisa had either initiated the contact with him, affirmatively invited him over, or was possibly sexually interested in him. (R. 86:89–90, 105.) But he had to correct himself on those points when confronted with text messages in which Lisa made clear she wasn't interested in sex, he asked Lisa to invite him over, she initially resisted, and he told her that he needed to talk and was about to have a "nervous breakdown." (R. 24–25, 86:105–06.)

Mulhern also denied recalling any discussion about his sleeping on the futon, (R. 86:90–91, 117), until he reviewed texts showing that there was such a discussion, (R. 86:118). He further described, in very general terms, kissing and touching Lisa with her seeming consent just until his penis was about to enter her vagina, though that testimony was inconsistent. At one point, he denied having "any other kind of sexual contact with her, other than above her waist" (R. 86:101), but he told the prosecutor when asked that he touched Lisa's butt and breasts, both under and over her clothes, (R. 86:115–16). In all events, Mulhern claimed that Lisa suddenly, emphatically, and without explanation objected just before he was about to enter her. (R. 86:98–101.) While Mulhern's explanation of what happened wasn't impossible, the jury was entitled to weigh whether it was sensible and credible.

Given all that evidence, along with the DNA evidence, the nature of the case and the strength of the State's case compels the conclusion that even without Lisa's statement, the jury would have convicted Mulhern of sexual assault.

2. Lisa's statement was not so prevalent or important as to shake confidence in the trial outcome.

As for the factor considering the prevalence and importance of the erroneously admitted evidence, Lisa's statement certainly had value. As the State discussed in Part I, her statement provided context for the jury to weigh and consider the potential identity of the male touch DNA. It supported the State's position that the DNA was likely Mulhern's based on the following hypothesis: Lisa claimed Mulhern penetrated her, male touch DNA was found inside Lisa hours after the assault, the DNA was not likely there for more than five days, and Lisa stated that she'd had no sex in

the week preceding the assault. But that hypothesis was far from the State's strongest or most compelling evidence that intercourse occurred. Nor did the jury need to find that the touch DNA was Mulhern's to find Mulhern guilty.

As for the prevalence of Lisa's statement, she only made it once. (R. 86:51–52.) Yet, as the court of appeals noted (Pet-App. 110–11), the prosecutor in closing and rebuttal highlighted the above hypothesis suggesting the male touch DNA was Mulhern's, which went to prove that intercourse occurred. (R. 86:141, 154–55.) While the prosecutor's closing remarks are relevant to the harmless error analysis, they should not tip the scale meaningfully in either direction.

To start, the prosecutor's highlighting the hypothesis in closing made strategic sense. Courts, juries, and parties look to DNA evidence as the "gold standard" of proof in criminal cases. Any reasonably zealous prosecutor arguing their case to the jury would highlight DNA evidence in closing. And here, without Lisa's statement, the prosecutor would have still emphasized the touch DNA and the theory that it was likely Mulhern's, given its presence in Lisa hours after the assault, Purpero's testimony that it had not been there for more than five days, the unlikelihood that Lisa could have picked up the DNA from another source between the assault and the exam, and Lisa's fresh injuries to her vagina and labia consistent with forcible intercourse.

And even without Lisa's statement, the prosecutor likely would have placed the same emphasis on that hypothesis in rebuttal, given that Mulhern's closing focused on the inconclusive and inconsistent nature of the DNA evidence and the forensic testing that the State could have—but did not—undertake in this case. (R. 86:150–52.)

Even so, closing argument is not evidence, and that hypothesis was only a small part of the State's case and

closing presentation. Regardless what the parties say in closing, the jury weighs the totality of the evidence presented to it. Based on all that evidence, as discussed above, the most powerful evidence was Lisa's significant injuries, her immediate reporting, her credible and consistent version of events, her lack of motive to lie, and Mulhern's inconsistencies and less credible explanation. Indeed, the prosecutor emphasized those things in closing much more emphatically than the DNA hypothesis. (R. 86:138–46.) The State's hypothesis that the touch DNA was Mulhern's based in part on Lisa's statement was far from its strongest point. (R. 86:141.)

And in all events, Lisa's statement was simply a statement that the jury could choose to believe or not believe. Nothing about Lisa's statement prevented Mulhern from arguing, as he did, that the State could not prove that the touch DNA was his and that the small amount of touch DNA was inconsistent with Lisa's claim of minutes-long forced intercourse. (R. 86:150–51.) Moreover, even if the jury had been inclined to disbelieve Lisa's version of events, her statement about her lack of sex the week before cannot have changed their minds. If the jury disbelieved Lisa's accusations against Mulhern, it likely would have also rejected her testimony about not having sex the week before.

3. The corroborative-or-contradicting factor does not apply when the error involves the erroneous admission of rape shield evidence.

In this case, there is no corroborative, contradicting, or untainted duplicative evidence that Lisa did not have sex the week before Mulhern's assault. But there's a reason for that: if Lisa's statement should have been barred under the rape shield statute, so too was any corroborating, contradictory, or duplicative evidence. Accordingly, the absence of other

evidence does not inform the harmless error analysis when the erroneously admitted evidence is relevant and isn't "tainted" by an underlying constitutional violation. Rather, these factors simply shouldn't apply when the harmless error question involves the erroneous admission of rape shield evidence.

Instead, the question that better assists the harmless error analysis in these cases is whether, but for the application of the rape shield, the erroneously admitted evidence would have been admissible under standard evidentiary rules and otherwise did not violate the defendant's rights. If we are to accept that Wisconsin's rape shield's broad sweep will occasionally require the exclusion of relevant evidence that is offered by the State, that does not undercut any of the statute's purposes, and that does not violate the defendant's rights, those facts should compel against granting the defendant a new trial on harmless error grounds.

Here, as discussed above, Lisa's statement satisfied statutory admissibility requirements given that it was relevant and it was not unfairly prejudicial to her or to Mulhern, and it did not risk confusing the jury. Its admission did not violate Mulhern's rights. It would have been admitted at trial but for the operation of the rape shield statute. And while relevant, the statement was not so important to the State's case that it could have affected the verdict.

In light of all the factors and the totality of the evidence, the State's introduction and use of Lisa's statement regarding her lack of sex in the week before the assault was harmless beyond a reasonable doubt. A rational jury would have undoubtedly still convicted Mulhern without it. He is not entitled to a new trial.

C. The court of appeals' decision was flawed and does not provide guidance.

While this Court reviews harmless error de novo and need not reference the court of appeals' decision, the State nevertheless notes why that court's reasoning does not support its mandate granting Mulhern a new trial.

To start, the court of appeals framed the case as a "he said/she said," or solely Lisa's word against Mulhern's. (Pet-App. 110.) But the phrase, which suggests an uncorroborated dispute over consent, is an inappropriate and misleading descriptor of most, if not all, sexual assault cases.[11] Even so, this wasn't a consent case. Lisa said that Mulhern sexually assaulted her by forcing his penis into her vagina. Mulhern said that they had some consensual contact, nothing "other than above the waist," but they did not have intercourse. Consent wasn't an issue in the case.

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[11] "He said, she said" originated to describe how gender impacts communication. It became a descriptor of claims (and only those by a girl or woman against a man) of sexual harassment or assault with the Hill–Thomas hearings. There, it came to mean that when testimony conflicts, the "truth is therefore undiscoverable." *See* William Safire, *On Language; He-Said, She-Said*, N.Y. Times Magazine, Apr. 12, 1998, https://www.nytimes.com/1998/04/12/magazine/on-language-he-said-she-said.html; *see also* Lois Shepherd, *The Danger of the 'He Said, She Said' Expression*, The Hill, Oct. 12, 2018, https://thehill.com/opinion / judiciary / 411157 - the - danger - of - the - he - said - she -said-expression ("'He said, she said' implies that we throw up our hands in capitulation—the truth simply cannot be known.").

In addition to perpetuating the common-law myth that the "truth simply cannot be known" in sexual assault cases, "he said, she said" implicitly discounts the value of corroborative evidence, which can include (as this case did) text messages, medical and forensic reports, and witnesses to the aftermath. *See* Deborah Tuerkheimer. *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Pa. L. Rev. 1, 9–10 (2017).

Nor was this a mere credibility contest between Lisa's and Mulhern's testimony. Far from it: the State presented significant evidence corroborating Lisa's version of events that the court of appeals did not factor into its analysis. This evidence included that she reported the assault immediately; that she had significant injuries and tenderness on her neck, throat, shoulder, thighs, and tears and abrasions to her genitalia hours after her encounter with Mulhern; and that the State identified Mulhern's DNA on her neck and also found male touch DNA in her vagina.

Hence, the "nature" of this case reflected far more evidence in support of the charge than simply "she said." Yet the court of appeals weighed little of the corroborative evidence in its analysis, and worse, misconstrued other aspects of the trial.

For example, the court discounted the strength of the State's case on the sexual assault charge because the jury acquitted on strangulation. In the court's view, that acquittal suggested that the jury did not find Lisa's testimony generally compelling. (Pet-App. 111.) There are at least two flaws in this reasoning.

First, the only evidence that Lisa didn't have sex the week before the assault was Lisa's statement, which like the rest of Lisa's testimony, the jury was free to believe or disbelieve. The court of appeals' theory seems to hinge on the untenable premise that the jury had to believe Lisa's statement that she had no sex the week before the assault, yet it had reasonable doubt as to the rest of her testimony.

Second, strangulation, which requires a finding that the defendant intentionally impeded normal breathing or blood circulation by applying pressure to the neck or throat or covering the nose or mouth—generally is proved based on medical evidence, not solely the victim's credibility. There are

many reasons unrelated to credibility why the jury could have split its verdict. Perhaps Mulhern's counsel was effective in establishing reasonable doubt on the strangulation count. (*See* R. 85:210–17.) Perhaps the jury believed that they needed to hear evidence of more significant or strangulation-specific injuries. Perhaps it thought Mulhern intended to sexually assault Lisa, but that he did not intend to strangle her. Perhaps the jury decided that the strangulation was an intrinsic part of the force used in the assault and did not think it warranted a separate conviction.

But the jury's acquittal on strangulation cannot support the premise that the jury must have doubted Lisa's testimony supporting the elements of sexual assault. Moreover, the court of appeals did not weigh that Mulhern's credibility was also at issue, and that it was lacking given his unlikely version of events—that Lisa was on board with his conduct until she was very suddenly and inexplicably not—and his multiple inconsistencies.

In sum, in light of all the factors and evidence before the jury, any error in admitting Lisa's statement was harmless. A rational jury would have found Mulhern guilty without it. This Court should reverse the court of appeals' decision to the contrary.

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Again, the statute shields victims. It should not bar a victim's relevant testimony about her lack of sexual conduct. Even if it does, its admission cannot justify a new trial on harmless error grounds. To conclude otherwise transforms the rape shield into a sword that rewards defendants with an unjustified second trial and effectively punishes victims by requiring them to retestify. Mulhern cannot be entitled to the extraordinary relief that the court of appeals here granted.

CONCLUSION

This Court should reverse the decision of the court of appeals with instructions for the circuit court to reinstate the judgment of conviction.

Dated this 1st day of March 2021.

Respectfully submitted,

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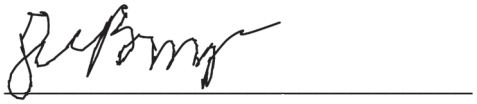
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,610 words.

Dated this 1st day of March 2021.



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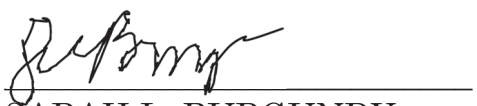
A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of March 2021.



SARAH L. BURGUNDY
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Ryan Hugh Mulhern
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 1st day of March 2021.

SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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Dated this 1st day of March 2021.

SARAH L. BURGUNDY
Assistant Attorney General