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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 BOLES, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court should take a "fresh look" (State's brief, p.15) at its reasoning in past cases regarding the applicability of the rape shield statute to evidence of a complainant's lack of sexual conduct when the State has had numerous opportunities to do so over the past three decades, but failed to do so.

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

2. The State was allowed to introduce evidence at trial in violation of this Court's well-established holding that evidence of a claimant's lack of sexual conduct is barred by the rape shield statute and conceded, in the court of appeals, that its admission was an erroneous exercise of the trial court's discretion, but argued that its admission was harmless. Was the admission of this evidence harmless?

The court of appeals found that the admission was not harmless and remanded the case for a new trial. This Court should affirm the decision of the court of appeals.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Mulhern agrees with the State that publication and oral argument are warranted.

INTRODUCTION

This case demonstrates that the State is upset that its long-standing "workaround" (State's brief, pp.14-15) of admitting improper rape shield evidence at trial – then having the court of appeals find that the error was harmless – did not work in its favor as it has for nearly four decades. It has had the opportunity to challenge this Court's interpretation of Wis. Stat. § 972.11(2) in *State v. Gavigan*, 111 Wis. 2d 150, 330 N.W.2d 571 (1983), following the subsequent amendments to the statute, but has not done so until now, when it is no longer getting the benefit of this "workaround." The State's displeasure at this turn of events is no reason for this Court to take another look at its long-standing decision, but even if it does, the State fails to demonstrate any ambiguity in the plain language of the statute that would require a withdrawal of this Court's original interpretation of the statute. The State says that the rape shield law serves as a shield to protect victims and accuses Mulhern of attempting to use it as a sword. The reality is that he is just asking that it be used according to its plain meaning, which can shield both the accuser and the accused.

STATEMENT OF THE CASE

The appellant, Ryan Mulhern, was charged in a complaint with second degree sexual assault, strangulation and suffocation, and misdemeanor bail jumping, all as a result of an incident that occurred in the early morning hours of November 23, 2016. R.1. He appeared for a trial on those counts on March 7, 2018.

During the complainant, Alyssa's, direct testimony, she told the jury that she had showered after the alleged sexual assault (R.85:149) and under cross-examination she testified that she had not used soap when she showered and that she had not given the clothes she had been wearing during the assault to the police (for analysis, presumably) because they did not ask for them. R.85:154, 176.

On the second day of trial, when the DNA analyst from the crime lab testified, he told the jury that the only DNA from Mulhern that was found on Alyssa was on her neck. R.86:189. On cross-examination, he testified that no semen was found in her vagina, despite her previous testimony that Mulhern had engaged in intercourse with her, without a condom, for around five minutes. R.86:196. After two more witnesses testified, the State asked to re-call Alyssa to the stand, to which defense counsel objected initially because he believed she could only be re-called in rebuttal. R.86:261-62.

After the court determined that the State could re-call her, defense counsel argued that it was unfair to do

so without explaining what questions were to be asked, which the prosecutor was happy to do, as he had just two, the second of which was "... did you have sexual intercourse or sexual contact with anyone for one week prior to November 22nd, 2016?" R.86:264. Defense counsel argued that the prosecutor could not ask the second question "... under the rape shield law. He hasn't filed a motion, he hasn't brought that up. I can't ask for those questions, he can't, either, number one." *Id.*

After hearing from the prosecutor, the court stated that the problem it had with the second question was "... under 972.11, any conduct or behavior relating to sexual activities of complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and lifestyle is not admissible, and so I think that applies to both sides. I don't see – I don't see how we can do that." Pet.Ap., 113-15; R.86:264-66. The prosecutor then argued that his understanding of the rape shield law was that it dealt with "... prior sexual acts. I mean, this is abstinence, it's the lack of sexual history. I mean, it's not – " Pet.Ap., 116; R.86:267. Defense counsel argued that it was "... sexual history, whether it's lack or not, after which the court stated:

> Sexual conduct means – this is what's prohibited: any conduct or behavior relating to sexual activities of complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and lifestyle, etc. And so I – I think [the prosecutor]'s correct on that, that it is conduct not lack of conduct, so I'm

> going to permit that, that testimony, as well.

Id.

Following a discussion about the testimony of another witness, defense counsel asked the court to clarify its decision and the court stated: "If she – she can testify – I mean, if she didn't have any – it's the lack of sexual activity. It's not sexual conduct, it's the lack of it, and I think that is permissible, and that's what my ruling is because it's not testimony that's within the definition of sexual conduct under 972.11, it's the lack of it, so – " R.86:268. When Alyssa returned to the stand a few minutes later, she testified that she had not had sexual intercourse or sexual contact with anyone during the week prior to the alleged sexual assault. R.86:275.

During closing arguments, the prosecutor referred to the DNA analyst's testimony that DNA clears the vagina in five days, then went on to say that Alyssa had testified that she had had no sex in the week before the alleged assault "So the sex assault was November 22nd, it's the same date as the evidence collection, and there was male DNA found in the vagina. Given this information, I submit to you one reasonable hypothesis, given this information, this timeline, is that the male DNA is the Defendant." R.86:364.

The State returned again to this testimony in its rebuttal argument, stating:

> So again, I don't want to underestimate how important this timeline really is. This is really important and I want to make it understand-able

> and perfectly clear. DNA clears the vagina in five days. [Alyssa] did not have sex with anyone seven days up to the sex assault. Seven days. So the only DNA in [Alyssa's] vagina is her own DNA, okay?
>
> Then November 22nd, that's the date of the sex assault. That's the date she's saying Mr. Mulhern sexually assaulted her. The evidence, the swabs of her vagina, was taken that same day. There's male DNA found in her vagina, it's collected. I submit to you one reasonable hypothesis is that this male DNA is the Defendant's. This is important evidence that I want you to consider. I hope I'm clear on this point.

R.86:377-78.

After more than four hours of deliberation, the jury found Mr. Mulhern guilty of the sexual assault, but not guilty of strangulation and suffocation. R.86:384.

Mr. Mulhern appealed the judgment of conviction on the grounds that the trial court erred, as a matter of law, when it permitted the testimony of the alleged victim in violation of the rape shield law. The State acknowledged that under this Court's precedent, Alyssa's testimony violated the rape shield statute, but argued that the judgment should be affirmed because its admission was harmless. After the court of appeals reversed the convictions because it found that the error was not harmless, the State petitioned for review, which this Court granted.

ARGUMENT

I. Wisconsin's rape shield statute, given its plain meaning, bars evidence of a complainant's lack of sexual conduct.

Standard of Review

Statutory interpretation is a question of law subject to *de novo* review. *State v. Peters*, 2003 WI 88, ¶13, 263 Wis. 2d 475, 665 N.W.2d 171.

The State is attempting to convince this Court that the definition of sexual conduct as meaning "any conduct or behavior relating to sexual activities of the complaining witness ..." is somehow ambiguous, as a result of which there is a need to interpret these words to a meaning more beneficial to the State. Mr. Mulhern submits that this definition means just what it says, that "any conduct" clearly and unambiguously includes *both* engaging in sexual activity or not engaging in sexual activity. Had the legislature intended to limit it *only* to evidence of engaging in sexual activity, it could have done so by using different or additional words. It's failure to do so results in the ability (and necessity) to apply the plain meaning to this definition without resort to extrinsic sources of interpretation or further interpretation, as urged by the State.

A. This Court has previously addressed and interpreted the rape shield statute without the State ever contesting that interpretation until now.

The State attempts (State's brief, pp.12-15) to diminish this Court's past decisions involving the rape

shield statute in which it claims that this Court never fully interpreted the statute because of the State's repeated concession that the plain meaning of the statute meant that evidence of a claimant's lack of sexual conduct was barred by the statute, which is exactly what this Court held in *State v Gavigan*, 111 Wis.2d 150, 158-59, 330 N.W.2d 571 (1983). In the end, it argues that these past decisions are not "reasoned holdings carrying precedential value.", citing a case that held that a concession "for the sake of argument" that the supreme court adopts without "studied discussion" is not a "holding worthy of precedential value." State's brief, p.14.

The problem is that the State provides no facts to support its claim that its past concessions were merely for the sake of argument. With all due respect to the State, it did not have to concede that this Court's interpretation of the plain meaning of the statute was correct and could have challenged it (and engaged in a studied discussion) at that time or at the time of any other case in the nearly forty years that have passed since *Gavigan* was decided, most recently in *State v. Bell*, 2018 WI 28, 380 Wis. 2d 616, 909 N.W.2d 750.

In addition, the State's claim that its concession in these cases was for the sake of argument is particularly belied by its brief in *Gavigan*, which included the following:

> The trial court ruled that the state could introduce evidence of the defendant's (sic) virginity at the time of the sexual assault. The trial court ruled that the evidence of virginity was relevant to prove the victim's

> physical condition and state of mind at the time of the offense. The trial court indicated it would limit the evidence by instructing the jury that the evidence was not offered to show anything about the victim's prior sexual conduct (16:11- 12).
>
> The state concedes that the victim's prior chastity was not relevant evidence and that the trial court committed error to the extent that it concluded that the prosecution could elicit testimony that the victim was a virgin prior to the sexual assault. Section 972.11(2)(b), Stats., provides:
>
> [Statute cited in full]
>
> In *Milenkovic v. State*, 86 Wis. 2d 272, 280-81, 72 N.W.2d 320 (Ct. App. 1978), this court stated that "chastity reputation of the victim is not *a pertinent trait of character* of a rape victim" (emphasis by court). In *State v. Clark*, 87 Wis. 2d 804, 817, 275 N.W.2d 715 (1979) the Wisconsin Supreme Court accepted the state's concession "that the trial court erred in admitting D.T.'s testimony that she did not have intercourse before the incident in question." The state agrees with the defendant that a statement that a woman is a virgin is necessarily a comment on the woman's prior sexual activity. Ordinarily, testimony that a woman was a virgin prior to the sexual assault therefore falls within the prohibition of sec. 972.11 (2)(b), Stats.
>
> Ap.App. A106-07; State's brief in *Gavigan*[1], pp.3-5.

Perhaps the reason why the State did not contest the well-established holding in *Gavigan* was that there was no good reason to contest it, since this Court's holding was based upon a most basic principle of statutory

[1] Mr. Mulhern asks this Court to take judicial notice of the State's brief from *Gavigan*, which undersigned counsel obtained by emailing the Wisconsin State Law Library, whose staff scanned the State's and Mr. Gavigan's briefs and emailed PDFs of the same to counsel.

construction, that the plain meaning of words should be given their "common, ordinary, and accepted meaning." *State ex rel. Kalal v. Circuit Court,* 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. Why it believes there is now a need to challenge that basic principle most likely lies in the loss of its "workaround" by which its improper admissions in violation of *Gavigan*'s holding were almost always upheld in the court of appeals as harmless error. See State's brief, pp.14-15. Regardless of the reasons, it has not presented any reason, in its brief, to believe that the rape shield statute is ambiguous and that, as a result, there is a need for further interpretation and resort to extrinsic sources of interpretation.

B. A complainant's lack of sexual conduct is rape shield evidence, given the plain language of the statute.

In *Gavigan*, this Court stated that "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." 111 Wis.2d at 158-59. There is simply nothing that is incorrect in that passage. The plain meaning of the words "prior sexual conduct" does include the lack of sexual activity because the statute does not limit its applicability to prior

affirmative acts. It doesn't get much plainer than that. There is no ambiguity in this statute.

"Statutory interpretation begins with the plain language of the statute. *State ex rel. Kalal v. Circuit Court,* 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. We generally give words and phrases their common, ordinary, and accepted meaning. *Id.*" *State v. Dinkins*, 2012 WI 24, ¶ 29, 339Wis. 2d 78, 810 N.W.2d 787. If this process of analyzing statutory language yields a plain, clear statutory meaning, then the court ordinarily stops the inquiry and applies the plain meaning. *Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 8, 20, 260 Wis. 2d 633, 660 N.W.2d 656; *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶¶ 45, 51, 271 Wis. 2d 633, 663, 681 N.W.2d 110. ("We have repeatedly emphasized that 'traditionally, resort to legislative history is not appropriate in the absence of a finding of ambiguity.' ... [T]he rule prevents the use of extrinsic sources of interpretation to vary or contradict the plain meaning of a statute...")(citing *Seider v. O'Connell*, 2000 WI 76, ¶ 50, 236 Wis. 2d 211, 235-236, 612 N.W.2d 659).

Mr. Mulhern respectfully submits that this Court correctly found, in *Gavigan*, that there was no ambiguity in this statute and that, given its plain meaning, there was no need to continue its inquiry into the meaning of the statute. As a result, there is no need to now go down the road of statutory

interpretation down which the State is urging this Court to proceed. For the sake of argument, however, Mr. Mulhern will do just that.

The State begins by asserting that the language of paragraph (2)(b) contemplates affirmative sexual conduct, rather than negative. (State's brief, pp.16-18). The State is free to interpret as many words as it likes to try to reach such a conclusion, but there is every reason to conclude that the words "conduct" and "behavior," in particular, can mean the lack of conduct or behavior, which is exactly what this Court did in *Gavigan*. While the State is also free to suggest that the word "activity" should somehow limit or modify the words "sexual conduct," Mr. Mulhern would submit that it does not, and cannot, change the plain meaning of those words, which are at the core of this definition, to exclude the lack of such conduct.

The State then begins its critique of this Court's holding in *Gavigan*, finding fault in its failure to go beyond the plain meaning of the words of the statute and its purported failure to look at every single word the way the State would have wished it to do. (State's brief, p.18). It is as if the State believes that this Court was not looking at all of the language of the statute when it made its holding in *Gavigan*, which is preposterous. It also seems to have forgotten that its

own brief in *Gavigan* provided a partial basis for this Court's plain meaning interpretation of the statute.

Moving on, the State then discusses the primary purposes of the statute (State's brief, pp.19-21), with which Mulhern cannot disagree, however he can disagree that this Court's interpretation of the statute led to an absurd result in this case. While the statute was clearly intended to protect a complainant, it was certainly not intended to deprive a defendant of his right to a fair trial in accordance with all of the other statutes relating to trials and their conduct. Few statutes are perfect in their implementation. As this court aptly noted a few years after its decision in *Gavigan*:

> It is impossible to construct a general rule classifying evidence as inadmissible that will not on occasion result in the exclusion of relevant evidence, just as it is impossible to devise exceptions, however numerous, that will prevent relevant evidence from being excluded. By adopting the rape shield law, the legislature has balanced the advantages of a general classification of evidence for purposes of exclusion and the disadvantages that any such general rule creates. 1A Wigmore on Evidence, sec. 62, p. 1308, n. 29 (1983).
>
> *State v. Mitchell*, 144 Wis.2d 596, 618-19, 424 N.W.2d 698 (1988).

Next, the State discusses numerous extrinsic sources about the purposes behind the rape shield law in this state and one other (State's brief, pp.21-24), but none of these extrinsic sources provide a basis to

challenge this Court's plain meaning interpretation of the law.

Finally, the State notes that even if evidence of a complainant's lack of sexual conduct does not fall under the rape shield stature, it is still subject to statutes regarding relevancy and admissibility, including questions of prejudice. State's brief, pp.24-26. While the evidence may have been relevant, it was most certainly prejudicial to Mr. Mulhern, in that it almost certainly led the jury to conclude that it was his DNA that was found in Alyssa's womb, despite their being no scientific evidence of such a thing.

In the end, the State failed in its attempt to escape the consequences of the "workaround" from which it has benefited for almost 40 years. This Court's holding in *Gavigan* was well reasoned and correct, and should not be withdrawn. Mr. Mulhern is entitled to a new trial for this reason and because the admission of the rape shield evidence at his trial was not harmless.

II. The court of appeals correctly concluded that the trial court error was harmless.

Standard of Review

A trial court's admission of evidence in violation of the rape shield statute is subject to a harmless error analysis. *State v. Mitchell*, 144 Wis.2d 596, 619-20, 424 N.W.2d 698 (1988).

Under the harmless-error analysis, the State, as the party benefitting from the trial court's error, "must show that 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Martin*, 2012 WI 96, ¶45, 343 Wis. 2d 278, 816 N.W.2d 270 (citation omitted). Despite its best efforts, the State is unable to meet this very high burden, as the court of appeals correctly concluded.

The State argues that it had a strong case, even without Alyssa's testimony about not having had sex in the week before the alleged assault, but it seems to have forgotten exactly how important her testimony was in the jury's verdicts. Mr. Mulhern submits, and the State agreed in the court of appeals (State's responsive brief, p.10), that this was a "he said, she said" case in which the only question for the jury was whether sexual intercourse occurred (as Alyssa claimed) or did not occur (as Mulhern testified). "[T]he jury was required either to believe [Alyssa's] account and convict Mulhern, or to believe Mulhern's account and acquit him." *Id.*

Mr. Mulhern's DNA was not found in Alyssa's vagina, leaving the most logical source another individual. Without her erroneously admitted testimony about not having had sex with anyone else the preceding week, there is every reason to believe that the jury would have reached a different verdict on the sexual assault charge. There is more than a reasonable

probability that this error contributed to Mulhern's conviction. As the court of appeals observed, "Absent the erroneously admitted testimony, the jury would have reason to question whether the unidentified DNA belonged to Mulhern or to a third-party. With the testimony, however, the jury was provided with only one logical explanation—that, contrary to his version of events, Mulhern did have sexual intercourse with Alyssa." Pet.App., 110.

The State seems to have forgotten at what stage Alyssa's testimony was admitted, namely after she had already testified once and after its own DNA analyst then testified that Mulhern's DNA was not found in her womb, only on her neck. Faced with the lack of Mulhern's DNA in her womb, but with the presence of unknown male DNA, it had only one chance to convince the jury that intercourse had occurred and that it must have been with Mulhern.

Without her improper testimony, the State's case rested almost entirely on her earlier direct testimony that the assault took place (and her claims to others that it had happened), which Mulhern completely denied when he later took the stand to testify. If no intercourse occurred, as Mulhern testified, then it mattered not how many people Alyssa told that it did happen.

The State repeatedly claims that its case was strong, primarily because Alyssa's testimony was so compelling, but it remains to be seen why her

testimony should be considered compelling in the ordinary sense of that word. It was merely her version of the events of that evening as she recalled them. That they differed from Mulhern's version of the events does not make them any more compelling. And again, her testimony was not corroborated by the fact that she told a number of other people that same version of events. It just means that she repeated it to a number of people.

The State attempts to downplay the prevalence of Alyssa's rape shield testimony by noting that she only made it once and then tries to underscore the importance of that testimony by suggesting that it wasn't a big deal that the prosecutor mentioned it during closing arguments, which it argues should not tip the scale in either direction. State's brief, p.32.

The State seems to have forgotten that he commented on her testimony at length, not once, but twice during closing arguments, during which he used a timeline, based solely on Alyssa's rape shield testimony, to urge the jury to find Mulhern guilty under his hypothesis. The State's claim that this hypothesis based upon the improper testimony was "far from its strongest point" borders on the absurd. Without it, it is highly unlikely that it would have been able to convict Mulhern of the sexual assault count.

On the subject of convictions, the State would prefer that this Court forget that Mr. Mulhern was not

convicted of the strangulation and suffocation count, most likely because it casts doubt on how convincing, or some might say how compelling, Alyssa's testimony was if the jury did not return a guilty verdict on that count as well, given all the tenderness and injuries consistent with such an offense that she reported to a nurse. It offers a number of excuses for this not guilty verdict, none of which are particularly convincing.

Not surprisingly, the State faults the court of appeals for not applying the correct factors for its harmless error analysis under and, in essence, for not agreeing that its case was as strong as the State believes it was. State's brief, pp.35-37. The truth is that the State's case was not nearly as strong as it thinks it was, as a result of which it cannot meet its high burden of showing that there is no reasonable probability that this error contributed to Mulhern's conviction. For that reason, this Court should affirm the court of appeals' decision.

CONCLUSION

For the foregoing reasons, this Court should not withdraw its original application of the plain meaning of the rape shield statute to include a claimant's lack of sexual conduct. It should affirm the court of appeals' decision that Mr. Mulhern is entitled to a new trial because the trial court's error in admitting the rape shield evidence was not harmless.

RESPECTFULLY SUBMITTED this 29th day of March, 2021.

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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 3,934 words.

Dated this 29th day of March 2021.

Schertz Law Office

By: _____
Dennis Schertz

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State's brief (The State did not file a brief in the supreme court,
stood on its court of appeals' brief, according to staff at
Wisconsin State Law Library) A101-15

CERTIFICATION REGARDING APPENDIX CONTENTS

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 s. 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.

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