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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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ARGUMENT

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

As argued in the State's brief-in-chief (State's Br. 11–23), Wisconsin courts have been operating for years on a seemingly not-fully-vetted holding that Wisconsin's rape shield statute bars the State from introducing evidence of a victim's lack of sexual conduct. A full analysis of the plain language of the statute does not support that holding. Rather, Wis. Stat. § 972.11 paragraphs (2)(a) and (2)(b), read together, reflect that the Legislature intended the rape shield statute to bar evidence of a victim's affirmative sexual conduct, not its absence. That plain-language reading comports with the statute's manifest purpose and finds support in extrinsic sources, including the legislative history and persuasive case law.

Mulhern does not persuade otherwise. He asserts that this Court's interpretation of the statute in *Gavigan*[1] is correct and that it is "preposterous" to suggest that it did not consider language in Wis. Stat. § 972.11(2)(a). (Mulhern's Br. 8–10.) But the *Gavigan* decision only mentions language in paragraph (2)(b); it does not reference the definition of "sexual conduct" in paragraph (2)(a). To that end, the State in *Gavigan* conceded that a victim's lack of sexual conduct was barred based wholly on paragraph (2)(b) and supported generally by its concession in a previous case. (R-App. 106–07 (citing *State v. Clark*, 87 Wis. 2d 804, 817, 275 N.W.2d 715 (1979)).) Under those circumstances, it is wholly reasonable to surmise that the Court in *Gavigan* limited its review to the language in paragraph (2)(b) and declined to engage in a

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[1] *State v. Gavigan*, 111 Wis. 2d 150, 158–59, 330 N.W.2d 571 (1983).

deeper analysis than what the parties had advanced on an uncontested point.

Mulhern seems to suggest that the State is criticizing this Court for accepting its concession in *Gavigan*. He argues that the State has not asked this Court to revisit the issue in the nearly 40 years since *Gavigan* issued. He further suggests that the State is only now arguing for a reassessment of the question because it cannot benefit from the harmless error analysis in this case. (Mulhern's Br. 10–12.)

To start, the State was forthcoming in its opening brief that it had conceded this point in *Gavigan* and in cases involving the admission of evidence of a victim's virginity or choice to abstain from sex. (State's Br. 11–14.) It certainly does not fault this Court for adopting its concessions and relying on its previous holdings in cases in which the admitted evidence of the victim's virginity was not relevant and was ultimately harmless.

As for the "why now?" question that Mulhern raises, the evidence in this case is different from and more probative than the virginity evidence that was at issue in past cases. In the few rape-shield cases other than *Gavigan* involving a victim's lack of sexual conduct, the evidence involved nonprobative evidence that the victim had been a virgin.[2] In *Bell* and *Clark*, where that evidence was not especially relevant, the State had no reason to argue that the evidence

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[2] *See, e.g.*, *State v. Bell*, 2018 WI 28, ¶ 63, 380 Wis. 2d 616, 909 N.W.2d 750; *State v. Mitchell*, 144 Wis. 2d 596, 619, 424 N.W.2d 698 (1988); *State v. Clark*, 87 Wis. 2d 804, 809, 817–18, 275 N.W.2d 715 (1979); *see also State v. Childs*, 146 Wis. 2d 116, 121–22, 430 N.W.2d 353 (Ct. App. 1988) (holding that admission of evidence that victim viewed going home from a bar with a strange man as morally improper was harmless).

fell outside the rape shield statute.[3] And none of those previous cases involved a statement that was probative to partial DNA results.

Here, in contrast, the evidence is not that Lisa was a virgin, but rather she did not have sex with anyone else in the week before the assault. That evidence, considered along with the male touch DNA found inside Lisa, is probative to whether Mulhern forced intercourse with her. It assists the jury in its truth-seeking function, and it supports the State's right to a fair trial and to present evidence supporting its case. The mere fact that the statement references sex should not bar it. Given that, it is reasonable to ask why Wisconsin courts should continue to hold that the rape shield statute bars such evidence, especially when it does not appear that this Court has ever interpreted the statute as a contested question.

Mulhern also suggests that the State advances this argument now because it lost the "benefit" of the current interpretation under *Gavigan*. (Mulhern's Br. 8, 12.) But it is hard to say how the operation of the holding in *Gavigan* benefits anyone. True, the harmless error analysis virtually always resolves in the State's favor. But that is because evidence of a victim's lack of sexual activity is generally neither important nor ever reasonably likely to impact the verdict. And even so, the State still must prove harmless error, which is not a particularly beneficial burden. To that end, appellate courts do not benefit when, as here, they are tasked with assessing harmless error based on the admission

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[3] In *Mitchell*, the State conceded that a victim's lack of sexual experience fell under the rape shield statute, but it also argued that it was probative and should have been admitted based on the exception in Wis. Stat. § 972.11(2)(b)2. This Court rejected that argument but held that the error was not prejudicial. 144 Wis. 2d at 612, 620.

of relevant and probative evidence. Moreover, circuit courts certainly don't benefit, given that they are left with the conundrum of either excluding otherwise admissible evidence that would assist the jury in its truth-seeking function, or admitting the evidence, creating an appellate issue, and risking the finality of the conviction.

And if Mulhern suggests that the State is advancing the statutory interpretation argument because it cannot win on harmless error, that is not so. The admission of Lisa's statement here, under all the circumstances of this case, was harmless. (State's Br. 26–37.) This Court certainly may reverse the court of appeals on that ground alone. That said, the State urges this Court to address both issues presented. If the holding in *Gavigan* is contrary to the statute—as its application to the facts of this case suggests—this Court is the only court that can address it. Further, while issues involving the admission of a victim's lack of sexual conduct have arisen infrequently, the issue has potential to come up in future cases with continued advancements in DNA testing and the parties' use of partial results at trials.

Mulhern's remaining arguments similarly lack development. He does not address Wis. Stat. § 972.11(2)(a) other than to write, without explanation, that the definition of sexual conduct includes its absence. (Mulhern's Br. 10–11.) He concedes that the State correctly identifies the rape shield statute's victim-centric manifest purpose, but he writes that its intent is "certainly not . . . to deprive a defendant of his right to a fair trial." (Mulhern's Br. 11.) Yet it is unclear how a defendant's right to a fair trial would be violated—or even implicated—if this Court were to hold that a victim's lack of sexual conduct is not rape shield evidence and that it is admissible if it is relevant and not unduly prejudicial.

Further, the State agrees with Mulhern (Mulhern's Br. 11) that the operation of the rape shield statute is imperfect

and may, at times, result in the exclusion of relevant evidence of a victim's prior sexual conduct. True, but that will remain true regardless how this Court rules here. That perfection is not reachable is no reason to avoid interpreting the statute consistently with its plain language, consistently with its manifest purpose, and in a way that allows it to operate less imperfectly.

Finally, Mulhern argues that Lisa's statement that she did not have sexual intercourse with anyone else the week before the assault was prejudicial to him because it supported the State's case. (Mulhern's Br. 12.) That's true of any relevant evidence that the State offers to prove its case. The question is whether the probative value of the evidence is substantially outweighed by the danger of *unfair* prejudice. *See* Wis. Stat. § 904.03; *State v. Sullivan*, 216 Wis. 2d 768, 798, 576 N.W.2d 30 (1998). As argued (State's Br. 25–26), Lisa's statement was probative to whether intercourse occurred. It would not have unfairly prejudiced Mulhern by impermissibly bolstering her character or diminishing Mulhern's.

In all, Mulhern does not substantively counter the State's statutory interpretation argument. For the reasons provided (State's Br. 15–26), this Court should hold that evidence of a victim's lack of sexual conduct does not fall under Wis. Stat. § 972.11(2), but rather is subject to standard admissibility requirements under Wis. Stat. §§ 904.01 and 904.03. It should further hold that Lisa's statement regarding her lack of sexual contact the week before the assault was admissible and, in doing so, it should reverse the decision of the court of appeals.

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

As argued (State's Br. 27–36), the admission of Lisa's statement that she did not have sexual intercourse with anyone else in the week before the assault was harmless. The jury would have found Mulhern guilty without the statement because Lisa's version of events was corroborated by her significant injuries, her immediate reporting to both law enforcement and acquaintances, her consistent retelling of the assault, and her lack of motive to fabricate the allegations. The verdict was further supported given Mulhern's demonstrated inconsistencies in his testimony and less credible version of events.

Mulhern does not dispute much of the State's argument, other than to assert that its case was weak. He highlights the court of appeals' comment that without Lisa's statement, "the jury would have reason to question whether the unidentified DNA [in her vagina] 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 [Lisa]." (Mulhern's Br. 13–14.) Mulhern describes the State's eliciting Lisa's statement as its "one chance to convince the jury that intercourse had occurred and that it must have been with Mulhern." (Mulhern's Br. 14.)

Mulhern ignores the corroborative evidence supporting Lisa's claim, most notably, the substantial injuries to her labia (tears), vagina (abrasions), and redness and bruising to her thighs. No one sustains these types of injuries from the above-the-waist-only kissing and touching that Mulhern claimed occurred. Further, Lisa reported the assault and was examined the next day, so there wasn't a reasonable opportunity for a third party to have caused those injuries in the hours between when Mulhern left Lisa's home and the

SANE examination. Indeed, Mulhern offered no third-party theory to that effect.

Mulhern also disregards the many factors that made Lisa's testimony especially difficult to discredit. It is not unusual in sexual assault cases for the victim to delay reporting, to be inconsistent on details between telling police and testifying at trial, or to behave in ways that might seem incongruent with an assault. Defendants in sexual assault cases often seize on those things in trying to undercut credibility and introduce reasonable doubt, but Mulhern couldn't do that here. Lisa reported the crime right away. She was consistent in her explanation of what had happened to both law enforcement and personal confidantes. While there is no one way for a victim to behave or react to the trauma of a sexual assault, Lisa's distress when telling others about the assault was a reaction many would consider consistent with an assault.

Finally, Mulhern ignores that Lisa had no motive to concoct the allegations. She was friends with Mulhern. She had allowed him to her place to talk about his problems. Even if the night had progressed as Mulhern described, with Lisa's consenting just up to before they were about to have intercourse (despite evidence that Lisa made clear before Mulhern came over that they were meeting as just friends), there is no reasonable explanation why Lisa would have converted her "no" to intercourse into a false charge of sexual assault.

Yes, as Mulhern points out (Mulhern's Br. 15) and as the State acknowledged in its opening brief (State's Br. 32–33), the State in closing reminded the jury of Lisa's statement, argued that it informed the touch DNA evidence, and argued that those things supported the finding that Mulhern had intercourse with her. (R. 86:141.) It reiterated that point in rebuttal (R. 86:154–55), after Mulhern had argued that the

small amount of DNA found in Lisa's vagina was inconsistent with her allegation that Mulhern penetrated her (R. 86:150–51). Despite those statements, a fair reading of both parties' closing arguments in context reflects that the State relied much more on other evidence, including Lisa's significant injuries, her immediate reporting, her consistent description of what had happened, her lack of motive to lie, and Mulhern's demonstrated inconsistencies in his testimony and less credible explanation. (R. 86:138–46.)

Finally, Mulhern reiterates the court of appeals' reasoning that because the jury acquitted on strangulation, it must not have felt that Lisa's testimony was credible or convincing. (Mulhern's Br. 15–16.) That theory is speculative. As noted (State's Br. 36–37), there are countless reasons why the jury would not find guilt on strangulation, none of which have anything to do with how credible or compelling it found Lisa's testimony either generally or specifically as to the sexual assault. The jury's acquittal on strangulation does not support the inference that it questioned Lisa's credibility regarding the sexual assault.

In sum, admitting Lisa's relevant statement regarding her lack of sexual intercourse the week before the assault was not error. This Court should hold that this sort of evidence does not fall under the rape shield statute, but instead is subject to standard admissibility rules. Even if the admission of Lisa's statement violated the rape shield statute, its admission was harmless. This wasn't a close case: the jury would have still found guilt absent Lisa's statement.

Mulhern is not entitled to a new trial based on the operation of a statute that protects victims. This Court should reverse.

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 27th day of April 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 2,417 words.

Dated this 27th day of April 2021.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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

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

Dated this 27th day of April 2021.

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