STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2019AP1780-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

FRANK P. SMOGOLESKI,

Defendant-Respondent.

ON APPEAL FROM AN ORDER DENYING A MOTION TO ADMIT FORMER TESTIMONY AND AN ORDER DENYING A MOTION TO ADMIT OTHER-ACTS EVIDENCE, BOTH ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE LAURA F. LAU, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

1. Is the preliminary hearing testimony of Defendant-Respondent Frank P. Smogoleski's friend admissible at Smogoleski's trial?

The circuit court answered "no."

This Court should answer "yes" and reverse.

2. Is the State's evidence of Smogoleski's previous sexual assault admissible at trial as other-acts evidence?

The circuit court answered "no."

This Court should answer "yes" and reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the briefs should adequately set forth the facts and legal principles. Publication of this Court's decision might be warranted.

INTRODUCTION

Smogoleski had penis-to-vagina contact with an unconscious, intoxicated teenage girl at an underage drinking party. The State charged him with second-degree sexual assault as a result.

The only eyewitness to the crime was Smogoleski's friend, Jon,[1] who entered the bedroom where the sexual assault was happening. Jon testified about the assault at a preliminary hearing, where defense counsel extensively cross-examined him. Jon died about a month after the preliminary hearing.

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[1] The State's brief uses two pseudonyms. "Jon" is the person who is referred to as J.K. or J.J.K. in the record. "Emily" is the person who is referred to as E.E.K. in the record.

The State filed two motions that are relevant to this appeal: (1) a motion to introduce Jon's preliminary hearing testimony at trial, and (2) a motion to introduce other-acts evidence about a similar sexual assault that Smogoleski committed against another teenage girl at a different party.

The circuit court denied both motions. It determined that using Jon's testimony at trial would violate Smogoleski's Sixth Amendment constitutional right to confront his accusers. Regarding the other motion, the court thought that the probative value of the other-acts evidence would not substantially outweigh its risk of unfair prejudice.

The court erred on both points. The Sixth Amendment's Confrontation Clause allows the State to use Jon's preliminary hearing testimony at trial. Defense counsel had an adequate opportunity to cross-examine Jon at the preliminary hearing. That cross-examination satisfies Smogoleski's right to confrontation. As for the other motion, the State's other-acts evidence was admissible, and the court reached a contrary conclusion by applying the wrong legal standard. Other-acts evidence is inadmissible if its risk of unfair prejudice would substantially outweigh its probative value. The court applied that balancing test backwards, requiring the probative value to substantially outweigh the risk of unfair prejudice.

STATEMENT OF THE CASE

A high school senior, Jon, hosted an underage drinking party at his parents' house in Elm Grove on Saturday, June 23, 2018, while his parents were out of town. (R. 56:5–7.) Emily, who was then 17 years old and a friend of Jon, was at the party. (R. 56:6–7.)

Later in the night, Jon became concerned about Emily because she "had too much to drink and she fell off the stairs." (R. 56:7.) So, Jon helped Emily into his sister's bedroom and

told her to go to sleep. (R. 56:7–8.) Emily was fully clothed and seemed to be asleep and passed out when Jon left the bedroom. (R. 56:11.)

About ten minutes later, one of Jon's friends told him that Smogoleski had gone into the bedroom where Emily was. (R. 56:13–14.) Jon responded by going into the bedroom. (R. 56:14.)

When Jon entered the bedroom, he saw Smogoleski lying on top of Emily, slightly more toward her left side. (R. 56:15.) Emily was unconscious. (R. 56:44.) She "did not have a shirt on," "[h]er pants and underwear were down around her ankles," and "[h]er legs were spread." (R. 56:15.) Smogoleski's pants were down and he did not have underwear on. (R. 56:17.) Jon pulled Smogoleski off Emily and helped get his pants up. (R. 56:19, 27.) Smogoleski told Jon to stop and tried to pull away. (R. 56:64.) Jon removed Smogoleski from the bedroom and tried to find someone to take him home, but nobody would. (R. 56:19.)

Smogoleski went to the basement and told Jon that he and Emily "were going to fuck." (R. 56:27.) Smogoleski "passed out" on the basement floor. (R. 56:19.) During a subsequent conversation on Snapchat, Smogoleski told Emily that they might have had sex the night of the party and that he was unsure whether they had done so. (R. 56:53.)

On Monday, June 25, 2018, Elm Grove Detective Craig Mayer interviewed Jon about the sexual assault. (R. 56:49–50.) The detective interviewed Jon two more times to figure out where Smogoleski's penis was in relation to Emily's vagina during the assault. (R. 56:31–32, 66–68.) During the second interview, Jon said that Smogoleski's penis was by,

but not penetrating, Emily's vagina. (R. 56:64.)[2] Jon repeated that information during the third interview and said that Smogoleski's penis was touching Emily's leg. (R. 56:68.) The detective interpreted Jon's use of the word "by" to mean that Smogoleski's penis was "outside the vagina but still touching" it. (R. 56:66.) Jon, in fact, used the word "by" to mean that the penis was touching the vagina. (R. 56:36, 40.)

Detective Mayer also spoke to Emily, who told him that she drank "quite a bit" at the party. (R. 56:50.) She remembered going into Jon's sister's bedroom around 11:00 or 12:00 the night of the party, but she did not remember anything from that point until she woke up around 2:00 or 2:30 a.m. and got a drink of water. (R. 56:50–51.) Emily further said that when she awoke the next morning, her vagina and hips felt sore, and "she found scratches on her belly." (R. 56:52.) She did not have the soreness and scratches the night before. (R. 56:52.)

Detective Mayer also interviewed Jon's mother. (R. 56:54.) She said that she found a condom wrapper in the bedroom where Emily had slept. (R. 56:54–55.)

On June 26, 2018, the State charged Smogoleski with one count of second-degree sexual assault for having sexual contact with Emily while she was too intoxicated to give consent, in violation of Wis. Stat. § 940.225(2)(cm). (R. 1:1.) Smogoleski waived his right to a preliminary hearing. (R. 54:3–4.) After he received discovery, however, he and the

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[2] Technically, Jon likely meant that Smogoleski's penis was by Emily's vulva, but this difference does not matter. The statutory definition of "intimate parts" includes the word "vagina," which this Court has construed "to mean the female external genitalia, or vulva." *State v. Morse*, 126 Wis. 2d 1, 5, 374 N.W.2d 388 (Ct. App. 1985). This brief uses the term "vagina" to be consistent with the testimony.

State agreed that the circuit court should hold a preliminary hearing. (R. 55:2.)

The circuit court held a preliminary hearing in September 2018. (R. 56.) Jon and Detective Mayer testified to the facts discussed above. Defense counsel had police reports at the hearing and used them repeatedly during cross-examination of Jon and Mayer. (R. 56:20–21, 24, 26–27, 32–33, 43 (Jon), 58–59 (Mayer).) Defense counsel extensively cross-examined Jon. (R. 56:20–46.) He also cross-examined Mayer about Jon's prior statements. (R. 56:60–68.) At the end of the hearing, the circuit court bound Smogoleski over for trial. (R. 56:79.)

Jon "died the month after the [preliminary] hearing." (R. 43:1.)

In May 2019, the State filed a motion to admit Jon's preliminary hearing testimony at trial. (R. 38.) Smogoleski filed a brief opposing the motion. (R. 39.) The circuit court held a hearing on the motion and ordered letter briefs, which the parties later filed. (R. 41; 42; 60:4–5.) The circuit court entered a written decision on September 3, 2019, denying the State's motion. (R. 43.) The court determined that using Jon's preliminary hearing testimony at trial would violate Smogoleski's Sixth Amendment right to confrontation because defense counsel did not have an adequate opportunity to cross-examine Jon at the preliminary hearing. (R. 43:5–7.)

Before the circuit court's decision about use of the preliminary hearing transcript, the State filed a motion to admit other-acts evidence in October 2018. (R. 30.) The State proffered that Smogoleski performed cunnilingus on M.G., a then-16-year-old girl, when she was "passed out" on a couch at a house party after "drinking substantially." (R. 30:4–5.) That incident happened in March 2017, and M.G. reported it in late June 2018 after hearing about Smogoleski sexually assaulting Emily. (R. 30:4.)

Smogoleski filed a brief opposing the other-acts motion. (R. 36.)

The circuit court held a hearing on the motion and denied it. (R. 59:29.) The court stated that it had "extreme concern that the probative value would not substantially outweigh the prejudice, the danger of prejudicial effect to the Defendant and does believe that this other bad act information could also mislead the jury." (R. 59:29.) The court said that it "may reconsider this decision" depending on whether Smogoleski testifies and "how testimony comes in during the trial." (R. 59:29.) The circuit court entered a written order denying the State's other-acts motion on September 16, 2019. (R. 45.)

The State timely appealed the circuit court's orders denying the State's motion to admit Jon's preliminary hearing testimony at trial and its other-acts motion. (R. 46.)

STANDARD OF REVIEW

This Court independently reviews a claim involving a defendant's constitutional right to confront his accusers. *State v. Manuel*, 2005 WI 75, ¶ 25, 281 Wis. 2d 554, 697 N.W.2d 811.

This Court "will uphold a circuit court's evidentiary rulings if it examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." *Pinczkowski v. Milwaukee Cty.*, 2005 WI 161, ¶ 15, 286 Wis.2d 339, 706 N.W.2d 642. "Whether the circuit court applied the proper legal standards, however, presents a question of law subject to independent appellate review." *Id.*; *see also State v. Sarnowski*, 2005 WI App 48, ¶ 11, 280 Wis. 2d 243, 694 N.W.2d 498 ("A trial court's admission or exclusion of evidence is a discretionary decision that we will sustain if it

is consistent with the law. We review *de novo* whether that decision comports with legal principles." (citation omitted)).

ARGUMENT

I. Jon's preliminary hearing testimony is admissible at Smogoleski's trial.

A. An unavailable witness's prior testimony is admissible at a criminal trial if the factfinder would have a reasonable basis for evaluating the truthfulness of the prior testimony.

"The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them." *Manuel*, 281 Wis.2d 554, ¶ 36 (citation omitted). Consistent with that right, "[t]estimonial hearsay statements are admissible against a criminal defendant only if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *State v. Reinwand*, 2019 WI 25, ¶ 22, 385 Wis. 2d 700, 924 N.W.2d 184 (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).

Here, there is no dispute that Jon's testimony at the preliminary hearing was "testimonial." *See State v. Stuart*, 2005 WI 47, ¶ 28, 279 Wis. 2d 659, 695 N.W.2d 259 (noting that, under *Crawford*, 541 U.S. at 68, prior testimony at a preliminary hearing is testimonial). There is also no dispute that Jon, who is deceased, is unavailable because "[i]ntervening death of a witness clearly satisfies the unavailability requirement." *State v. Dorcey*, 98 Wis. 2d 718, 722, 298 N.W.2d 213 (Ct. App. 1980), *aff'd*, 103 Wis. 2d 152, 307 N.W.2d 612 (1981).

So, the confrontation issue here hinges on whether Smogoleski had "a prior opportunity to cross-examine" Jon at the preliminary hearing. *Reinwand*, 385 Wis. 2d 700, ¶ 22.

An unavailable witness's preliminary hearing testimony may sometimes be admitted at a criminal trial. *State v. Norman*, 2003 WI 72, ¶ 35, 262 Wis. 2d 506, 664 N.W.2d 97. "Although cross-examination during the preliminary examination is formally limited to the issue of probable cause (plausibility), the witness's credibility often becomes a subject of inquiry." *State v. Bauer*, 109 Wis. 2d 204, 220–21, 325 N.W.2d 857 (1982), *abrogated on other grounds by Crawford*, 541 U.S. 36. "These issues overlap, allowing defense counsel to reach credibility while cross-examining as to plausibility." *Id.* at 221. "For example, inconsistencies in a witness's story which have been drawn out during cross-examination at the preliminary examination are not only relevant to plausibility but also work to discredit the witness." *Id.*

Further, "the fact that cross-examination during a preliminary hearing is limited does not necessarily render the testimony inadmissible." *Norman*, 262 Wis. 2d 506, ¶ 35 (citing *Bauer*, 109 Wis. 2d at 218). Indeed, "[i]n upholding the introduction of an unavailable witness' preliminary hearing testimony, the Supreme Court has never said that the opportunity for cross-examination afforded at the preliminary hearing must be identical with that required at trial." *Bauer*, 109 Wis. 2d at 218 (alteration in original) (citation omitted).

Rather, "when a witness is unavailable for trial, hearsay evidence may be admitted when there has been 'substantial compliance with the purposes behind the confrontation requirement. Those purposes are satisfied when the trier of fact has a reasonable basis for evaluating the truthfulness of the prior statement.'" *Norman*, 262 Wis. 2d 506, ¶ 36 (quoting *Bauer*, 109 Wis. 2d at 214; and citing *Ohio v. Roberts*, 448 U.S. 56, 64–65 (1980), *abrogated on other grounds by Crawford*, 541 U.S. 36). "The purpose of confrontation and cross-examination is to test both the

witness's memory and credibility in the presence of the fact finder." *Id.*

In other words, an unavailable witness's prior testimony is admissible at trial if the defense lawyer "was not 'significantly limited in any way in the scope or nature of his cross-examination.'" *Roberts*, 448 U.S. at 71 (quoting *California v. Green*, 399 U.S. 149, 166 (1970)).

In *Roberts*, the Supreme Court held that the defendant had an adequate opportunity to cross-examine a witness at a preliminary hearing such that the testimony from that hearing was admissible at trial without violating the Confrontation Clause. *Roberts*, 448 U.S. at 70–71. The Court reasoned that defense counsel had asked the witness many leading questions, explored the witness's memory and perception, challenged the witness's veracity, and "explore[d] the underlying events in detail." *Id.*

The Supreme Court in *Crawford* abrogated a different aspect of *Roberts* (and *Bauer*). "Prior to *Crawford*, the test applied by the Supreme Court to determine admissibility in Confrontation Clause cases was [*Roberts*]." *State v. Doss*, 2008 WI 93, ¶ 43 n.5, 312 Wis. 2d 570, 754 N.W.2d 150. "The *Roberts* two-prong test was unavailability coupled with an 'indicia of reliability,' defined as evidence that 'falls within a firmly rooted hearsay exception,' or has a 'particularized guarantee of trustworthiness.'" *Id.* (quoting *Roberts*, 448 U.S. at 66). The *Crawford* Court abrogated *Roberts* "by replacing the 'indicia of reliability' factor (for surviving a Confrontation Clause challenge once evidence is concluded to be testimonial) with the prior opportunity for cross-examination factor." *Id.* So, after *Crawford*, "the reliability analysis of *Roberts/Bauer* is no longer good law with respect to the admission of testimonial hearsay evidence." *Stuart*, 279 Wis. 2d 659, ¶ 26.

But the *Bauer/Roberts* test on the adequacy of prior cross-examination is still good law after *Crawford*. The *Crawford* Court did "not overrule or contradict" the "holding that the cross-examination that occurs at a preliminary hearing can 'afford[ ] . . . substantial compliance with the purposes behind the confrontation requirement.'" *State v. Aaron*, 218 S.W.3d 501, 517 (Mo. Ct. App. 2007) (alterations in original) (citation omitted). "Although the requisites for satisfying the Confrontation Clause have evolved since [*Roberts* and other cases], the [Supreme] Court's reasoning concerning cross-examination at a preliminary hearing remains valid." *Commonwealth v. Wholaver*, 989 A.2d 883, 904 (Pa. 2010). So, "although the reliability of a prior statement is no longer an inquiry for purposes of satisfying the Confrontation Clause, the [*Roberts*] Court's rationale that the preliminary hearing questioning served the function of cross-examination remains persuasive for purposes of evaluating whether *Crawford*'s cross-examination requirement has been met." *Id.* at 903.

In fact, the *Crawford* Court approvingly discussed the aspect of *Roberts* concerning the defendant's prior cross-examination of the witness. The *Crawford* Court discussed *Roberts* and other Supreme Court cases, noting that *Roberts* "admitted testimony from a preliminary hearing at which the defendant had examined the witness." *Crawford*, 541 U.S. at 58. The Court further noted that in *Roberts* and those other cases, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. The Court concluded that those "results" were faithful to the Confrontation Clause, but their "rationales" were problematic. *Id.* at 60. The Court noted two problems with the *Roberts* reliability rationale: "[i]t applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony," and "[i]t admits statements that do

consist of *ex parte* testimony upon a mere finding of reliability." *Id.*

So, "[i]t is clear from a reading of *Crawford* that the United States Supreme Court in fact approved of the ultimate holding in *Roberts*" that the witness's prior testimony was admissible at the defendant's trial. *Blyden v. Virgin Islands*, 53 V.I. 637, 654 n.11 (V.I. 2010), *aff'd sub nom. Virgin Islands v. Blyden*, 437 F. App'x 127 (3d Cir. 2011). "*Crawford* abrogated *Roberts* only with respect to *Roberts*'s rationale that former testimony is admissible where there are adequate indicia of reliability." *Id.*

After *Crawford*, many courts have concluded that admitting preliminary hearing testimony of an unavailable witness at trial does not run afoul of the Confrontation Clause. *See State v. Goins*, 423 P.3d 1236, 1244 (Utah 2017) (citing cases upholding admission of prior testimony in Arkansas, California, Hawaii, Kansas, Michigan, Missouri, Nevada, New Mexico, and Oklahoma); *see also Massey v. Commonwealth*, 793 S.E.2d 816, 827–29 (Va. 2016) (upholding admission of preliminary hearing testimony at the defendant's trial against a Confrontation Clause challenge); *State v. Mohamed*, 130 P.3d 401, 403–06 (Wash. Ct. App. 2006) (same); *State v. Mantz*, 222 P.3d 471, 473–79 (Idaho Ct. App. 2009) (same). Courts have done so even while recognizing the limitations of cross-examining a witness before discovery has begun. *See, e.g., Aaron*, 218 S.W.3d at 510–11.

In short, "[w]hen a witness is unavailable to testify at trial, her testimony at a preliminary hearing or previous trial is admissible, assuming a proper opportunity for cross-examination at the previous hearing. *Crawford* did not change this well-established rule." *Mohamed*, 130 P.3d at 403.

B. Jon's prior testimony is admissible at trial because Smogoleski had a prior opportunity to cross-examine him.

As explained above, an unavailable witness's prior testimony is admissible at trial if "the defendant had a prior opportunity to cross-examine the witness." *Reinwand*, 385 Wis. 2d 700, ¶ 22 (citing *Crawford*, 541 U.S. at 59). This requirement is met "when there has been 'substantial compliance with the purposes behind the confrontation requirement'"—that is, "when the trier of fact has a reasonable basis for evaluating the truthfulness of the prior statement." *Norman*, 262 Wis. 2d 506, ¶ 36 (quoting *Bauer*, 109 Wis. 2d at 214); *accord Roberts*, 448 U.S. at 71, 73 (requiring "substantial compliance with the purposes behind the confrontation requirement" and "a satisfactory basis for evaluating the truth of the prior statement" (quoting *United States v. Green*, 408 U.S. 125, 166, 216 (1972))). Relatedly, the defendant must not have been "significantly limited in any way in the scope or nature of his cross-examination." *Roberts*, 448 U.S. at 71 (citation omitted).

Both of those tests are met here. First, the cross-examination of Jon at the preliminary hearing would give a jury a reasonable basis (or, in the words of *Roberts*, a satisfactory basis) for evaluating his truthfulness. Defense counsel thoroughly cross-examined Jon about several topics bearing on his credibility, including his ability to see the assault and his prior inconsistent statements to police. Second, the circuit court did not *significantly* limit the cross-examination of Jon at the preliminary hearing. Although the court sustained objections to several of defense counsel's questions for Jon, counsel still got answers to similar questions. Counsel was therefore able to elicit the testimony that he was seeking.

1. The cross-examination of Jon at the preliminary hearing would give a jury a reasonable basis for evaluating his prior statements.

At the preliminary hearing, Smogoleski's lawyer explored many issues that affected Jon's credibility. Smogoleski's counsel engaged in a robust cross-examination, having the benefit at the hearing of the police reports that recorded Jon's statements. (R. 56:20–21, 24, 26–27, 32–33, 43.) This cross-examination will give the jury a reasonable basis for assessing the truthfulness of Jon's statements.

First, Smogoleski's lawyer questioned Jon's ability to see the sexual assault. Counsel questioned Jon multiple times about his physical distance from the assault, and Jon said that he was about five or six feet away from Smogoleski and Emily. (R. 56:21, 40.) On direct examination, the prosecutor elicited Jon's testimony that no light except moonlight was penetrating the bedroom when he saw Smogoleski on top of Emily. (R. 56:16.) On cross-examination, defense counsel asked Jon whether any lights were on in the bedroom and questioned whether the moonlight was enough for him to see what was happening. (R. 56:21.) Counsel asked Jon whether he was drunk or had been drinking on the night in question, and Jon said no. (R. 56:42.) Counsel also asked Jon whether he was in a "vantage point" in the bedroom to see any genitalia. (R. 56:41.) Jon said that that Smogoleski's penis "would have been touching" Emily's vagina because "[h]is hips were over hers." (R. 56:41.) Indeed, on direct examination, Jon admitted that he thought Smogoleski's penis was touching Emily's vagina simply because of the way that Smogoleski was positioned on top of her. (R. 56:18.)

Second, counsel elicited a lot of testimony from Jon that suggested no intercourse happened between Smogoleski and Emily. Counsel got Jon to admit that Smogoleski was lying more toward Emily's left side and that Smogoleski and Emily

were not moving. (R. 56:22.) Counsel noted that Jon had told police that Smogoleski "was not moving and appeared to be sleeping" when he was lying on Emily. (R. 56:26.) Jon confirmed that this statement remained his position. (R. 56:26.) Jon also admitted that he did not know whether Smogoleski was sleeping when he was lying on top of Emily. (R. 56:26.) Jon further admitted that shortly after he pulled Smogoleski off Emily, Smogoleski said to Jon, "[W]e were going to fuck." (R. 56:27.) Counsel later raised a similar question, asking Jon if Smogoleski had said that he and Emily "were going to have intercourse." (R. 56:41–42.) Jon answered yes. (R. 56:42.) Counsel also asked Jon if Smogoleski ever said that he had intercourse with Emily, and Jon said that he did not remember. (R. 56:42.) Counsel asked Jon if Emily subsequently told him that "she didn't remember anything," and Jon said yes. (R. 56:45.) Based on all this testimony by Jon, Smogoleski may argue at trial that no intercourse happened.

Third, counsel questioned Jon about his prior statement that Smogoleski had raped Emily. On cross-examination, Jon admitted that he had told Emily via Snapchat that Smogoleski "had pretty much raped her." (R. 56:44.) Jon agreed with counsel that "rape" refers to "forced sexual intercourse." (R. 56:44.) Counsel asked Jon, "Did you see that occur?" (R. 56:44.) Jon responded, "I didn't see any like thrusting or anything." (R. 56:44.)

Fourth, counsel's cross-examination of Jon questioned whether Emily was asleep or drunk during the assault. This testimony was important because the State charged Smogoleksi with sexually assaulting Emily when she was too intoxicated to give consent. (R. 1:1.) On cross-examination, Jon testified that he thought Emily was drunk on the night in question because she had been drinking alcohol, needed help walking, and had slurred speech. (R. 56:26.) But Jon admitted that he "couldn't say for sure what [Emily's] level of

intoxication was." (R. 56:24.) Counsel also got Jon to admit that he was only assuming that Emily was asleep when he saw Smogoleski lying on her. (R. 56:23–24.)

Fifth, counsel cross-examined Jon in depth about how his statements to police appeared inconsistent with his testimony. Counsel noted that Jon's testimony differed from his first statement to police in that Jon had told police that Smogoleski's penis was "by" Emily's vagina, but Jon testified that Smogoleski's penis was touching Emily's vagina. (R. 56:27.) Counsel asked Jon why his testimony was different than his police statement. (R. 56:27.) Jon said that his first statement to police was general because he had been asked a general question. (R. 56:27.)

Counsel followed up by extensively questioning Jon about his second statement to police. This cross-examination was significant because Jon appeared to ultimately concede that he only told police that Smogoleski's penis was "by," not touching, Emily's vagina. During this cross-examination, Jon said that he had talked to police a second time because they wanted specific information about whether Smogoleski's penis was near Emily's vagina. (R. 56:31–32.) Counsel got Jon to admit that he had told a detective that he was "100% positive that [Smogoleski's] penis was touching [Emily's] leg near or by her vagina." (R. 56:36.) Counsel asked Jon whether this statement meant that Smogoleski's penis was not touching Emily's vagina, and Jon said no. (R. 56:36.) Jon testified that he had "meant touching the vagina" when he told a detective that Smogoleski's penis was "by" Emily's vagina. (R. 56:36.) Jon further testified, "I believe I specifically said that his penis was touching the vagina." (R. 56:37.) Counsel then asked Jon if he had told police that Smogoleski's penis was touching Emily's "leg near or by her vagina just outside her pubic hair area," and Jon said yes. (R. 56:40.) Counsel again challenged the notion that Jon had told police that Smogoleski's penis was touching Emily's

vagina. Specifically, counsel asked Jon, "At no time did you tell them that my client's penis was touching her vagina. Did you?" (R. 56:40.) Jon answered, "When I say by." (R. 56:40.) Counsel then asked Jon, "so when you said by, in your mind that meant touching?" (R. 56:40.) Jon said yes. (R. 56:40.) This cross-examination hurt the credibility of Jon's testimony that Smogoleski's penis touched Emily's vagina.

Counsel also cross-examined Detective Craig Mayer at the preliminary hearing about Jon's statements. Counsel used discovery by cross-examining Mayer about information in the police reports. (R. 56:58–59.) The detective testified that Jon never said, during their first interview, that Smogoleski's penis was touching or even near Emily's vagina. (R. 56:61.) Detective Mayer testified that during his second interview, Jon said that Smogoleki's penis was "by" Emily's vagina, but Jon did not say that the penis was touching the vagina. (R. 56:64–65.) Detective Mayer further testified that Jon said the same thing during a third interview, even though the purpose of that interview was to determine whether Smogoleski's penis touched Emily's vagina. (R. 56:67–68.)

In short, defense counsel's cross-examination of Jon provided a "reasonable basis for evaluating the truthfulness of" his statements. *Norman*, 262 Wis. 2d 506, ¶ 36 (citation omitted). It explored whether: (1) Jon could see the incident, (2) any intercourse happened, (3) Smogoleski's penis touched Emily's vagina, (4) and Emily was asleep or drunk. Besides questioning Jon's ability to see the incident, this cross-examination further challenged his credibility by thoroughly exploring his prior statements to police. The "reasonable basis" test is met.

2. Further, Smogoleski's cross-examination of Jon was not significantly limited.

Because Smogoleski thoroughly questioned Jon at the preliminary hearing, he was not "*significantly* limited in any way in the scope or nature of his cross-examination." *Roberts*, 448 U.S. at 71 (emphasis added) (citation omitted). To be sure, the circuit court prevented Jon from answering six questions on cross-examination, but those rulings did not significantly limit Smogoleski's cross-examination of Jon.[3]

First, the circuit court sustained an objection when defense counsel asked Jon if he had "any instrument or any other item to determine whether or not [Emily] was intoxicated or passed out." (R. 56:22, 23.) But Jon effectively answered that question in the negative later at the hearing. Specifically, Jon later explained the reasons why he thought that Emily was drunk on the night in question: she had been drinking alcohol, needed help walking, and had slurred speech. (R. 56:26.) Further, Jon admitted that he "couldn't say for sure what [Emily's] level of intoxication was." (R. 56:24.) Smogoleski thus had an adequate opportunity to explore Jon's opinion that Emily was drunk.

Second, the circuit court sustained an objection to a similar question about Emily's intoxication. Specifically, defense counsel asked Jon, "So when you took her into the bedroom, as you sit here today there is no way for you to testify under oath that she was intoxicated. Can you?" (R. 56:24.) The court sustained an objection to that question. (R. 56:25–26.) But right after that objection was sustained, counsel essentially reworded the improper question and got

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[3] In holding Jon's testimony inadmissible at trial, the circuit court relied only on the third and sixth rulings discussed below. (R. 43:5–6.) The State discusses all six rulings for the sake of completeness.

an answer. Counsel asked Jon, "Based on your observations of what you saw [Emily] drink, in your opinion was she intoxicated in that bedroom?" (R. 56:26.) Jon answered, "Yes." (R. 56:26.) Counsel asked Jon, "What do you base that on?" (R. 56:26.) Jon responded by saying that Emily drank alcohol on the night in question, needed help walking, and had slurred speech. (R. 56:26.) So, this sustained objection did not significantly limit the cross-examination of Jon regarding his opinion on Emily's possible intoxication. Defense counsel re-phrased the question to which the State had successfully objected, and Jon gave an answer the second time around.

Third, the circuit court sustained an objection to counsel's question to Jon, "Now you are telling me that not only was [Smogoleki's penis] by the vagina but it was touching the vagina?" (R. 56:28.) Counsel asked that question right after Jon explained why he had initially told police that Smogoleski's penis was "by" Emily's vagina. (R. 56:27–28.) This sustained objection did not significantly limit the cross-examination of Jon. As explained above at pages 15–16, Smogoleski's lawyer extensively cross-examined Jon about his statements to police and what Jon meant when he told police that Smogoleski's penis was "by" Emily's vagina. (R. 56:31–41.) Jon testified, for example, that he meant that Smogoleski's penis was *touching* Emily's vagina when he told police that Smogoleski's penis was "by" Emily's vagina. (R. 56:36, 40.) Jon further testified that he had "[n]o doubt" that Smogoleski's penis "would have been touching" Emily's vagina because their hips were aligned. (R. 56:41.) Smogoleski was thus able to elicit on cross-examination what Jon's opinion was, why he had that opinion, and what he had told police.

Fourth, the circuit court stopped cross-examination of Jon about a motion that defense counsel had filed. (R. 56:30–31.) Counsel asked Jon, "Well you know that I raised an issue in this case legally as to whether or not there was sexual

contact. Are you aware of that or not, sir?" (R. 56:30.) Jon said, "What would you mean by that?" (R. 56:30.) Counsel asked, "That his penis was not touching her vagina, and I filed a legal motion. Were you aware of that or not?" (R. 56:30.)[4] Jon said, "Are you asking like did I know?" (R. 56:30.) The court determined that this questioning was not relevant at the preliminary hearing. (R. 56:30–31.)

That ruling did not significantly limit defense counsel's ability to cross-examine Jon about whether Smogoleski's penis touched Emily's vagina. Defense counsel extensively cross-examined Jon about that issue, as already explained. That cross-examination could hurt Jon's credibility if a jury believed that he gave prior inconsistent statements to police.

Further, those questions would be objectionable at trial on relevance grounds. The premise of those questions seems to be that only penis-to-vagina contact can be sexual contact. As defense counsel argued at the end of the preliminary hearing, a penis touching someone else's leg "is not sexual contact." (R. 56:76.) That premise is wrong. A person engages in sexual contact by intentionally touching his "intimate parts" to "any part of the body" of another person, "if done for the purpose of sexual humiliation, degradation, arousal, or gratification." Wis. Stat. § 939.22(34)(b). If Smogoleski acted with one of those purposes, then he had sexual contact with Emily if his penis intentionally touched "any part of [her body]," including her leg or vagina. *Id.* Defense counsel's mistaken view otherwise is not relevant.

In any event, "[t]he fact that the cross-examination may have been less extensive than would be allowed at trial is not determinative." *Bauer*, 109 Wis. 2d at 220. So, it does not matter that the circuit court maybe would have allowed cross-examination at trial about Jon's possible knowledge of a

[4] Smogoleski's lawyer might have been referring to a motion to dismiss the criminal complaint. (*See* R. 15.)

defense motion. For purposes of the Sixth Amendment's Confrontation Clause, what matters is that Smogoleski's cross-examination of Jon at the preliminary hearing would give a jury a "reasonable basis" for assessing the truthfulness of Jon's statements. *Norman*, 262 Wis. 2d 506, ¶ 36 (citation omitted).

Fifth, the circuit court sustained an objection about a police report. (R. 56:37.) Regarding his second police interview, Jon testified, "I believe I specifically said that his penis was touching the vagina. . . . I believe that was my final answer." (R. 56:37.) Counsel then asked, "I am just reading from the report, so it is your position that the report is in error then?" (R. 56:37.) The circuit court sustained the State's objection "as to the witness commenting as to what someone else wrote in their report." (R. 56:37.) The court's ruling did not prevent counsel from cross-examining Jon on the content of the statement; it pertained only to commenting about someone else's writing. As explained above at pages 15–16, Smogoleski's lawyer thoroughly cross-examined Jon about his statements to police regarding Smogoleski's penis's possible contact with Emily's vagina. This sustained objection did not significantly limit Smogoleski's ability to cross-examine Jon about this topic.

Sixth and finally, the circuit court sustained an objection to a question about Emily's out-of-court statements. (R. 56:43–44.) Defense counsel asked Jon, "[Emily], after this was over, didn't come to you and say words to the effect he had intercourse with me. Did that happen?" (R. 56:43.) The court sustained the State's objection on relevance grounds. (R. 56:43–44.) That ruling did not significantly limit the cross-examination of Jon for two reasons. First, Jon answered a similar question moments later. Specifically, counsel said to Jon, "But subsequent conversation you had with [Emily], she indicated to you she didn't remember anything." (R. 56:45.) Jon agreed. (R. 56:45.) Second, this entire line of questioning

about Emily's statements to Jon would be inadmissible hearsay at trial. "Hearsay is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *State v. Britt*, 203 Wis. 2d 25, 38, 553 N.W.2d 528 (Ct. App. 1996) (quoting Wis. Stat. § 908.01(3)). "Hearsay evidence is generally not admissible except as otherwise provided by rule or statute." *Id.* So, the circuit court allowed defense counsel to elicit some pretrial testimony from Jon that would be *inadmissible* at trial.[5]

In his circuit court brief, Smogoleski failed to "show any new and significantly material line of cross-examination that was not at least touched upon" at the preliminary hearing. *Mancusi v. Stubbs*, 408 U.S. 204, 215 (1972). He just alleged that the circuit court "clearly limit[ed] the scope of questions the defendant could ask and defendant was denied the right to challenge the credibility of [Jon] and confront him with other inconsistencies between his testimony at the hearing and his statements given to law enforcement during the investigation." (R. 39:6.) Smogoleski is wrong for the reasons stated above.

Smogoleski relied on *Stuart* in his circuit court brief, arguing that "the defense in that case was hindered in its questioning of the witness at the time of the preliminary hearing; exactly as [Smogoleski] was in the present case." (R. 39:2.) His reliance on *Stuart* is misplaced.

In *Stuart*, the Wisconsin Supreme Court agreed with both parties that "the use of [Stuart's] brother's preliminary hearing testimony at trial violated his right to confrontation." *Stuart*, 279 Wis. 2d 659, ¶ 38. Before Stuart's preliminary hearing, Stuart's brother John "agreed to cooperate with authorities," John gave a statement to police implicating

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[5] Hearsay is admissible at a preliminary hearing. *State v. O'Brien*, 2014 WI 54, ¶ 20, 354 Wis. 2d 753, 850 N.W.2d 8.

Stuart in a shooting death, the district attorney amended a charge against John to reduce his exposure from 52 years in prison to 12 years, and other possible charges against John "were not pursued." *Id.* ¶ 36. The supreme court thought that "these facts demonstrate a potential motivation to testify falsely on the part of John." *Id.* ¶ 37. At the preliminary hearing, however, Stuart "was unable to elicit evidence that John had been facing criminal charges in 1998 when he gave his statement to police implicating Stuart in the death of [the shooting victim]." *Id.* ¶ 35. The court noted that in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the "defendant's right to confrontation was violated when he was prohibited from cross-examining a prosecution witness about possible motive to testify falsely as a result of the State's dismissal of a pending charge against him." *Stuart*, 279 Wis. 2d 659, ¶ 32. The court thus adopted the State's concession "that Stuart's limited cross-examination of his brother at the preliminary hearing was insufficient to satisfy his right to confrontation." *Id.* ¶ 29. Given the State's concession, the main issue in *Stuart* was whether the inadmissible evidence was harmless error. *See id.* ¶¶ 39–57.

Smogoleski's case is distinguishable from *Stuart*. Unlike in *Stuart*, Smogoleski has not argued that Jon had a motive to falsely testify against him because of a dismissed charge against Jon. More broadly, Smogoleski has not alleged that Jon had a bias against him that went unexplored at the preliminary hearing. In *Stuart*, the defendant was unable to cross-examine a witness about his possible personal interest in testifying falsely. There was no such restriction at Smogoleski's preliminary hearing. The cross-examination of Jon raised several grounds for questioning the accuracy of his testimony.

In sum, the circuit court's rulings at the preliminary hearing did not "significantly" limit Smogoleski's cross-examination of Jon. *Roberts*, 448 U.S. at 71 (citation omitted).

Jon's testimony at that hearing is thus admissible at Smogoleski's trial under the Sixth Amendment's Confrontation Clause.

II. The State's other-acts evidence is admissible at Smogoleski's trial.

A. Wisconsin law favors the admissibility of other-acts evidence.

Other-acts evidence is admissible if it meets a three-part test: (1) it is offered for a permissible purpose under Wis. Stat. § 904.04(2); (2) it meets the two relevancy requirements under Wis. Stat. § 904.01; and (3) its risk of unfair prejudice under Wis. Stat. § 904.03 does not substantially outweigh its probative value. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 39 (citing *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998)). "Once the proponent of the other-acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice." *Id.*

Section 904.04(2) "favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). Indeed, the Wisconsin Legislature added the title "General admissibility" to section 904.04(2)(a) when it adopted the common-law "greater latitude rule" in 2014. 2013 Wis. Act 362, §§ 20, 38. Statutory titles "can be persuasive as to proper interpretation and indicative of legislative intent." *State v. Black*, 188 Wis. 2d 639, 651, 526 N.W.2d 132 (1994). The title "General admissibility" shows the legislative intent to generally admit other-acts evidence with even greater latitude for admission

in a case of a serious sex crime, such as the crime charged in this case.

The remaining prongs of the *Sullivan* analysis also favor admissibility of other-acts evidence. The second prong on relevance has a statutory presumption that relevant evidence is admissible. *See* Wis. Stat. § 904.02 (title stating "[r]elevant evidence generally admissible"). And the third-prong balancing test also "favors admissibility in that it mandates that other crimes evidence will be admitted unless the opponent of the evidence can show that the probative value of the evidence is *substantially* outweighed by unfair prejudice." *Speer*, 176 Wis. 2d at 1115; *see State v. Linton*, 2010 WI App 129, ¶ 26, 329 Wis. 2d 687, 791 N.W.2d 222 ("The balancing test of the probative value and danger of unfair prejudice favors admissibility.").

Further, "[i]n a sex crime case, the admissibility of other acts evidence must be viewed in light of the greater latitude rule." *State v. Hammer*, 2000 WI 92, ¶ 23, 236 Wis. 2d 686, 613 N.W.2d 629. "Under the common law, the greater latitude rule allows for more liberal admission of other-acts evidence." *State v. Dorsey*, 2018 WI 10, ¶ 32, 379 Wis. 2d 386, 906 N.W.2d 158. This rule "has traditionally been applied in cases of sexual abuse, particularly those involving children." *Id.* "This more liberal evidentiary standard applies to each prong of the *Sullivan* analysis." *Marinez*, 331 Wis. 2d 568, ¶ 20.

The Legislature adopted the common-law greater latitude rule in 2014 when it amended the other-acts statute. *Dorsey*, 379 Wis. 2d 386, ¶¶ 31, 35; *see also* 2013 Wis. Act 362, §§ 21, 38. Since then, the statute provides that "any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act." Wis. Stat. § 904.04(2)(b)1. Like the common-law rule, this statutory rule applies to all three prongs of the *Sullivan* analysis. *See Dorsey*, 379 Wis. 2d 386, ¶ 33. This statutory

greater latitude rule applies in, among other things, a criminal case "alleging the commission of a serious sex offense, as defined in s. 939.615(1)(b)." Wis. Stat. § 904.04(2)(b)1. The statute under which Smogoleski was charged, Wis. Stat. § 940.225(2), is a serious sex offense. Wis. Stat. § 939.615(1)(b)1.

B. The State's other-acts evidence meets all three requirements for admissibility.

The State's proffered other-acts evidence meets all three prongs of the *Sullivan* test, especially when applying the greater latitude rule.

1. The State offered its other-acts evidence for a proper purpose.

"Identifying a proper purpose for other-acts evidence is not difficult and is largely meant to develop the framework for the relevancy examination." *State v. Hurley*, 2015 WI 35, ¶ 62, 361 Wis. 2d 529, 861 N.W.2d 174. "The proponent need only identify a relevant proposition that does not depend upon the forbidden inference of character as circumstantial evidence of conduct." *Id.* (citation omitted).

Here, the State offered its other-acts evidence to prove Smogoleski's motive and intent to sexually gratify himself and to provide context for his actions. (R. 30:5.) Motive and intent are proper purposes for admitting other-acts evidence. Wis. Stat. § 904.04(2)(a). So is context. *Marinez*, 331 Wis. 2d 568, ¶ 27.

The State thus satisfies the first prong of the *Sullivan* test.

2. The State's other-acts evidence is relevant.

The relevancy prong of the other-acts analysis "is significantly more demanding than the first prong but still does not present a high hurdle for the proponent of the other-acts evidence." *Marinez*, 331 Wis. 2d 568, ¶ 33. "Because other acts evidence is inherently relevant to prove character and therefore a propensity to behave accordingly, 'the real issue is whether the other act is relevant to anything else.'" *Hurley*, 361 Wis. 2d 529, ¶ 76 (citation omitted).

Again, "[t]his is not a high hurdle; evidence is relevant if it 'tends to cast any light' on the controversy." *State v. White*, 2004 WI App 78, ¶ 14, 271 Wis. 2d 742, 680 N.W.2d 362 (citation omitted). Evidence is relevant if it (1) "relates to a fact or proposition that is of consequence to the determination of the action," and (2) "has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." *Hurley*, 361 Wis. 2d 529, ¶ 77 (quoting *Sullivan*, 216 Wis. 2d at 785–86).

To determine whether other-acts evidence relates to facts of consequence, "the court must focus its attention on the pleadings and contested issues in the case." *State v. Payano*, 2009 WI 86, ¶ 69, 320 Wis. 2d 348, 768 N.W.2d 832. A defendant's motive and intent are always facts of consequence when they are elements of the crime charged. *State v. Veach*, 2002 WI 110, ¶ 78, 255 Wis. 2d 390, 648 N.W.2d 447. "There is no doubt that sexual assault, involving either sexual contact or sexual intercourse, requires an intentional or volitional act by the perpetrator." *Hurley*, 361 Wis. 2d 529, ¶ 73 (citation omitted). Because one element of sexual assault is a defendant's intent to achieve sexual arousal or gratification, motive and intent are facts of consequence when a defendant is charged with sexual assault. *Id.* ¶¶ 73–74, 83. That point holds true even if the defendant does not dispute his motive. *State v. Davidson*, 2000 WI 91, ¶ 65, 236 Wis. 2d

537, 613 N.W.2d 606; *see also Payano*, 320 Wis. 2d 348, ¶ 69 n.15 (noting that evidence that bears on an element of a crime is relevant even if the element is undisputed). And evidence providing context can bolster a witness's credibility, which is always a fact of consequence. *See Marinez*, 331 Wis. 2d 568, ¶¶ 28, 34.

The second part of the relevancy analysis—whether the proffered evidence tends to make a consequential fact more or less likely—focuses on the evidence's probative value. *Hurley*, 361 Wis.2d 529, ¶ 79. "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." *Id.* (citation omitted). "Similarity is demonstrated by showing the 'nearness of time, place, and circumstance' between the other-act and the charged crime." *Id.* (citation omitted). "The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." *Id.* (citation omitted). Further, "events that are dissimilar or that do not occur near in time may still be relevant to one another." *Id.* ¶ 80.

Here, the State's proffered other-acts evidence related to facts of consequence, thus satisfying the first part of the relevancy analysis. The State charged Smogoleski with second-degree sexual assault. (R. 20:1.) Smogoleski's motive and intent are thus consequential facts because his purpose is an element of the crime charged. *See Hurley*, 361 Wis. 2d 529, ¶¶ 73–74, 83. Further, Emily's and Jon's credibility is a fact of consequence. *See Marinez*, 331 Wis. 2d 568, ¶¶ 28, 34. The State's other-acts evidence will provide context behind Smogoleski's sexual contact with Emily and thus will bolster the credibility of Emily's and Jon's testimony that tends to incriminate Smogoleski.

And the State's proffered evidence will tend to make those consequential facts more likely, so it satisfies the second part of the relevancy analysis. The other-acts evidence is very similar to the charge against Smogoleski. As the State's other-

acts motion explains, its proffered evidence will show that Smogoleski performed cunnilingus on M.G., a then-16-year-old girl, when she was "passed out" on a couch at a house party after "drinking substantially." (R. 30:4, 5.) Smogoleski is charged with having penis-to-vagina contact with then-17-year-old Emily while she was passed out on a bed and intoxicated at a house party. (R. 30:1–2.) As the State's motion points out, those two sexual assaults "are nearly identical": (1) Emily was 17 and M.G. was 16 when Smogoleski assaulted them; (2) Emily and M.G. were so intoxicated at the time that they were unable to consent; (3) Smogoleski removed the clothing of both victims; (4) "a condom was present" at each assault; (5) Emily's vagina was sore and M.G.'s vagina was bleeding after the assault; (6) and each assault happened at a teenage party. (30:5–6.) Further, the assaults happened only 15 months apart: Smogoleski assaulted Emily in June 2018 and assaulted M.G. in March 2017. (R. 30:6.)

Given these striking similarities, this other-acts evidence has strong probative value. It is powerful evidence of Smogoleski's intent to be sexually aroused by having contact with Emily's vagina. And it would greatly enhance the credibility of Smogoleski's accusers in this case by providing the context behind his encounter with Emily—i.e., by showing that this encounter was not consensual but rather was a sexual assault against a person who was unconscious and intoxicated. Using this other-acts evidence to provide context and bolster witnesses' credibility "does not transform these purposes into prohibited propensity purposes." *Marinez*, 331 Wis. 2d 568, ¶ 28.

The greater latitude rule supports the conclusion that this other-acts evidence is relevant. "[O]ne of the reasons behind the [greater latitude] rule is the need to corroborate the victim's testimony against credibility challenges." *Davidson*, 236 Wis. 2d 537, ¶ 40. Another reason is "difficult proof issues" in child sexual assault cases. *Marinez*, 331

Wis. 2d 568, ¶ 34. That kind of case often lacks physical evidence, *id.* ¶ 28, and prosecutors have difficulty obtaining admissible evidence in those cases, *Davidson*, 236 Wis. 2d 537, ¶ 42. Those concerns ring true here. The State has little, if any, physical evidence of an assault of Emily by Smogoleski. And the circuit court ruled the testimony of the only eyewitness to the crime—Jon—inadmissible on confrontation grounds. (R. 43.) Even if this Court determines that Jon's preliminary hearing testimony is admissible at trial, a jury will likely be skeptical toward his testimony because he will not deliver it in person. These proof issues, combined with the need to corroborate Emily's and Jon's credibility, require a liberal application of the *Sullivan* other-acts test.

In short, the State's other-acts evidence is relevant to motive, intent, and context. The greater latitude rule supports this conclusion.

3. The risk of unfair prejudice does not substantially outweigh the probative value of the State's other-acts evidence.

A defendant bears the burden of establishing that the danger of unfair prejudice substantially outweighs the other-acts evidence's probative value. *Marinez*, 331 Wis. 2d 568, ¶ 41. "Evidence that is relevant 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.'" *Hurley*, 361 Wis. 2d 529, ¶ 87 (quoting Wis. Stat. § 904.03 (2011–12)). "'Essentially, probative value reflects the evidence's degree of relevance. Evidence that is highly relevant has great probative value, whereas evidence that is only slightly relevant has low probative value.'" *Id.* (citation omitted). So, this assessment of probative value duplicates the relevancy analysis done under the second step of the *Sullivan* test. *See id.* ¶¶ 79, 91. "Prejudice is not based on simple harm to the opposing party's case, but rather

'whether the evidence tends to influence the outcome of the case by improper means.'" *Id.* (citation omitted).

Here, this balancing test favors the State. As explained above in the relevancy discussion, the State's other-acts evidence has high probative value because of its striking similarities to the charge against Smogoleski. And this evidence is not unfairly prejudicial. Unfair prejudice "results when the proffered evidence . . . appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." *Id.* ¶ 88 (alteration in original) (citation omitted). The other-acts evidence here does none of those things. It is not any more horrifying than the charge against Smogoleski. Further, the circuit court can give a limiting instruction not to use the other-acts evidence for an improper purpose. "Limiting instructions substantially mitigate any unfair prejudicial effect." *Hurley*, 361 Wis. 2d 529, ¶ 89. "In some cases, limiting instructions eliminate the potential for unfair prejudice." *Id.*

And, as explained above, the greater latitude rule applies in this case. It provides for the liberal admission of "any similar acts by the accused . . . without regard to whether the victim. . . is the same" in both the criminal proceeding and the similar act. Wis. Stat. § 904.04(2)(b)1. The rule was crafted for the very situation present in this case: similar sex offenses with different victims. This rule supports the conclusion that the risk of unfair prejudice does not substantially outweigh the probative value of the State's other-acts evidence.

In short, the State's other-acts evidence satisfies all three prongs of the *Sullivan* test and is therefore admissible at Smogoleski's trial.

C. The circuit court's decision is wrong on the law and thus an erroneous exercise of discretion.

In ruling the State's other-acts evidence inadmissible, the circuit court stated that it had "extreme concern that the *probative value would not substantially outweigh* the prejudice, the danger of prejudicial effect to the Defendant and does believe that this other bad act information could also mislead the jury." (R. 59:29 (emphasis added).) The court got the legal standard backwards. The probative value is not required to substantially outweigh the risk of unfair prejudice.

Rather, under the third prong of the *Sullivan* test, other-acts evidence "will be admitted unless the opponent of the evidence can show that the probative value of the evidence is substantially outweighed by unfair prejudice." *Speer*, 176 Wis. 2d at 1115. "The term 'substantially' indicates that if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted." *Id.* "Because [Wis. Stat. § 904.03] provides for exclusion only if the evidence's probative value is substantially outweighed by the danger of unfair prejudice, '[t]he bias, then, is squarely on the side of admissibility. Close cases should be resolved in favor of admission.'" *Marinez*, 331 Wis. 2d 568, ¶ 41 (second alteration in original) (citation omitted).

But the circuit court did not apply those principles here. It inverted the balancing test under section 904.03 in a way that improperly favored the exclusion of the State's proffered evidence.

The circuit court also failed to understand whether the greater latitude rule applied. It is unclear whether the court applied the greater latitude rule. The court said:

> We talked a little bit about the greater latitude rule. I really couldn't find anything that talked about the greater latitude rule when it dealt with two people

> under the age of 18 and whether you then, in fact, would continue to use the greater latitude rule.
>
> However I did, because in my analysis I still looked at how the greater latitude rule would affect *Sullivan* and just really expand upon how you could interpret the three-part test.

(R. 59:28–29.) If the circuit court did not apply the greater latitude rule, then it misapplied the law in this respect, too.

The circuit court should have had no difficulty understanding whether to apply the greater latitude rule. It applies "[i]n a criminal proceeding . . . alleging the commission of a serious sex offense." Wis. Stat. § 904.04(2)(b)1. The charge here, second-degree sexual assault of an intoxicated victim, is identified by statute as a serious sex offense. *Id.* § 939.615(1)(b)1. (including Wis. Stat. § 940.225(2) in the definition of serious sex offense). Before its statutory codification, the greater latitude rule applied for over 100 years in cases of sex crimes. *Dorsey*, 379 Wis. 2d 386, ¶ 32 (citing *Proper v. State*, 85 Wis. 615, 630, 55 N.W. 1035 (1893)). The circuit court was wrong to question whether this rule applies when people are under age 18. "[A] greater latitude of proof is to be allowed in the admission of other acts evidence in sex crime cases, *particularly those involving a minor child*." *State v. Mink*, 146 Wis. 2d 1, 13, 429 N.W.2d 99 (Ct. App. 1988) (emphasis added). The rule is so well established that "[i]t would be patently erroneous and usurpative for [a lower court] to reexamine the rule of 'greater latitude' and abandon it." *State v. Tabor*, 191 Wis. 2d 482, 486, 529 N.W.2d 915 (Ct. App. 1995).

This Court should reverse the circuit court's evidentiary ruling because it applied the wrong legal standard. "Whether to admit evidence is generally a discretionary decision by the circuit court." *State v. Raczka*, 2018 WI App 3, ¶ 7, 379 Wis. 2d 720, 906 N.W.2d 722. "However, 'if the exercise of discretion is based on an incorrect legal standard, it is an erroneous

exercise of discretion.'" *Id.* (citation omitted). "[E]ven evidentiary rulings may be held to account." *Brown County v. Shannon R.*, 2005 WI 160, ¶ 37, 286 Wis. 2d 278, 706 N.W.2d 269 (citation omitted). "[I]f this court's review of the record indicates that the circuit court applied the wrong legal standard, this court will reverse the circuit court's decision as an [erroneous exercise] of discretion." *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 471–72, 326 N.W.2d 727 (1982). The circuit court here applied the wrong balancing test under Wis. Stat. § 904.03, and it failed to recognize that the greater latitude rule clearly applies here.

In short, the State's other-acts evidence is admissible at Smogoleski's trial. The circuit court erred by applying an incorrect legal standard to exclude that evidence.

CONCLUSION

This Court should reverse the orders excluding Jon's preliminary hearing testimony and the State's other-acts evidence at Smogoleski's trial.

Dated this 2nd day of January 2020.

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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 9551 words.

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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 2nd day of January 2020.

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