STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2021AP1399-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MORRIS V. SEATON,

Defendant-Respondent.

ON APPEAL FROM AN ORDER DENYING THE STATE'S MOTION TO ADMIT OTHER ACTS EVIDENCE ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE JENNIFER DOROW, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUE PRESENTED

Morris V. Seaton is charged with sexual assault based on allegations by 17-year-old "Anna" that her friend Seaton (an acquaintance) forced nonconsensual intercourse with her in her home after they had been drinking together.

The State sought to admit other-acts evidence of uncharged accusations from 17-year-old "Jane," who claimed that less than a year earlier, her acquaintance Seaton forced nonconsensual intercourse with her in a Whitewater backyard after they had been drinking together.

The State sought to admit that evidence to show motive and opportunity; intent, plan, and method of operation; and to bolster Anna's credibility.

Did the circuit court correctly deny the State's request to admit the evidence, based primarily on its view that the differences in the settings (the other-acts assault occurred outdoors while the charged assault was indoors) made them too dissimilar to be relevant?

Because the evidence is admissible under a sound application of the law, this Court should say no 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. This issue has arisen with some frequency in the past few years in the circuit courts, suggesting that published guidance from this Court would be beneficial.[1]

---

[1] This Court recently reversed circuit court decisions suppressing other-acts evidence in *State v. Coria-Granados*, No.

INTRODUCTION

Wisconsin law makes clear that the admission of other-acts evidence is generally favored. So long as the proponent can identify at least one permissible purpose and show that the proposed other acts are relevant to that purpose, the evidence is admissible unless the opponent can overcome the much-more onerous burden of showing that the probative value is substantially outweighed by the risk of unfair prejudice.

The scale tips toward admission even more when, like here, the defendant is charged with sexual assault. In those cases and here, the greater latitude rule applies to each step of the above analysis to encourage admission of other acts in these often difficult-to-prove credibility contests.

Here, the State satisfied its low burdens of showing multiple permissible purposes and strong probative value in the proposed other-acts evidence, and Seaton cannot show that that value is substantially outweighed by an unfair risk of prejudice under the circumstances. The circuit court did not soundly apply the law or reach a reasonable decision when it declined to admit the proposed other acts here. This Court should reverse.

STATEMENT OF THE CASE

Anna's allegations.

In September 2019, "Anna" told Brookfield police that on June 13, 2019, while her mother was working a night shift, she and her older sister invited two male friends to their home, where they all drank alcohol. (R. 2:2; A-App. 131.)

2019AP1989-CR, 2021 WL 503323 at *2–*15 (Wis. Ct. App. Feb. 11, 2021) (unpublished) (A-App. 134–48); and *State v. Smogoleski*, No. 2019AP1780-CR, 2020 WL 6750487 at *4–*6 (Wis. Ct. App. Nov. 18, 2020) (unpublished) (A-App. 149–54).

Anna, who was then 17 years old and a Brookfield East High School student, said that one of the men was named Dayveon and that the second man, Seaton, was her friend and a recent Brookfield East alumnus. (R. 2:2–3; A-App. 131–32.)

After the four of them had been drinking in the apartment "for some time," Anna felt tired and drunk and got into her bed; her sister joined her in their shared bedroom. (R. 2:2; A-App. 131.) Anna's sister texted Dayveon telling him that he and Seaton could stay as long as they wanted and asking them to lock the door when they left. (R. 2:2; A-App. 131.)

At some point after that, Anna noticed that Dayveon and Seaton had come into her bedroom. (R. 2:2; A-App. 131.) She saw Dayveon (who previously had an intimate relationship with her sister) get into her sister's bed, while Seaton got into Anna's bed with her. (R. 2:2; A-App. 131.)

Anna said that her sister and Dayveon left Anna's bedroom. (R. 2:2; A-App. 131.) After they left, Seaton remained and touched Anna's thigh, put his fingers inside her, took off her clothes, and then penetrated her with his penis. (R. 2:2; A-App. 131.) Anna described her recollection as "foggy" but recalled that Seaton pushed her, that she had her hands on the wall while he was assaulting her, and that she told him to stop because it hurt, but he didn't stop. (R. 2:2; A-App. 131.) Anna said that she "began to sober up" and pushed Seaton off of her. (R. 2:2; A-App. 131.) Anna said that Seaton then tried to cuddle, but Anna didn't want to be touched and she asked Seaton when he was going to leave. (R. 2:2; A-App. 131.) Anna claimed that Seaton asked her why she was so nervous and told her that he "didn't need to have sex again." (R. 2:2; A-App. 131.) She said that sometime later, a girl picked Seaton up from the apartment. (R. 2:2; A-App. 131.)

Anna told police that she and Seaton never had a sexual relationship in the past, that she had been to his house a

handful of times, and that he had visited her apartment over a dozen times. (R. 2:2–3; A-App. 131–32.) When asked by police who else knew about the assault, Anna said that she told her sister, but her sister disputed that the incident was rape. (R. 2:3; A-App. 132.) Anna also told two friends and her current boyfriend about the incident. (R. 2:3; A-App. 132.)

According to the criminal complaint, within a few days of talking to police, Anna also spoke with a forensic interviewer for the Brookfield Police Department. (R. 2:3; A-App. 132.) A summary of that interview in the criminal complaint reflects that Anna reported facts consistent with what she had told police a few days earlier. (R. 2:3–4; A-App. 132–33.)

The charge and "Jane's" allegations

The State charged Seaton with third-degree sexual assault. *See* Wis. Stat. § 940.225(3). (R. 2:1; 10; A-App. 130.) The State filed a pretrial motion to admit other-acts evidence of allegations that Seaton had sexually assaulted 17-year-old "Jane" in Whitewater in September 2018, less than a year before Anna was assaulted. (R. 21:2; A-App. 122.) In its motion, the State indicated that Jane reported the assault in May 2019. (R. 21:2; A-App. 122.) Jane, who was then a Brookfield East student, was in Whitewater helping her sister on college move-in day. (R. 21:2; A-App. 122.) Jane and a group of others were drinking in her sister's front yard; in that group was Seaton, whom Jane knew from Brookfield East, though he was a year older than her and at that point he had already graduated. (R. 21:2; A-App. 122.)

Jane said that around 10 p.m., she decided to leave the gathering to look for her cousin. (R. 21:2; A-App. 122.) Seaton offered to help her, and the two left on foot. (R. 21:2; A-App. 122.) Seaton suggested that they go to a backyard a few houses from Jane's sister's house, where the two sat and talked on the grass "for some time." (R. 21:2; A-App. 122.)

According to Jane, Seaton then pushed her back onto the grass, held her hands above her head with one hand, and pulled down her pants with the other. (R. 21:2; A-App. 122.) Seaton forced intercourse with her despite Jane's telling him to stop; according to Jane, he put a hand over her mouth and told her "that it was fine and to be quiet." (R. 21:2; A-App. 122.) When Seaton finished, he got up and walked away. (R. 21:2; A-App. 122.) Jane said that the intercourse was painful and she continued to feel pain from it for about a week. (R. 21:2; A-App. 122.)

Jane, like Anna, did not immediately report the assault; rather, she reported it in May 2019 when she saw that Seaton was still "coming around the high school" and she came to realize "how much the assault was affecting her." (R. 21:2; A-App. 122.)

The State, in its motion, offered the other acts evidence to show Seaton's "motive, identity, plan, opportunity, and modus operandi," through his pattern of choosing younger victims he knew from Brookfield East, in situations where the victim had been drinking, where the victim is isolated from friends or family; initiating intercourse; and refusing to stop when asked. (R. 21:6; A-App. 126.) The State argued that Jane's allegations of the circumstances and manner of the assault were similar to what Anna reported, that Jane's allegations were relevant to provide context and support Anna's credibility, and that any gap in time or dissimilarity between the acts was minimal. (R. 21:7l A-App. 127.) It argued that the greater latitude rule applied and supported admission. (R. 21:7–8; A-App. 127–28.) Finally, it argued that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. (R. 21:8–9; A-App. 128–29.)

Seaton's counsel, in response, wrote that Jane's allegations were unsupported and "in serious dispute" and that introduction of her allegations would cause the jury to

try Seaton on Jane's claims in addition to Anna's. (R. 36:2.) Seaton argued that other acts should be admitted sparingly, and argued that even if the State was offering the Whitewater incident for a permissible purpose here, it was not relevant and its probative value was substantially outweighed by the risk of unfair prejudice. (R. 36:3–4.) Seaton cited multiple cases in support, though none from within the past 20 years, none recognizing the development and codification of the greater latitude rule, and none applying it to the *Sullivan* analysis. (R. 36:2–6.)

At a hearing, after the State and Seaton presented argument, the circuit court denied the State's motion. The court stated multiple times that admission of other acts is "an exception to the general rule" of exclusion. (R. 46:19–20; A-App. 112–13.) It noted that while there were some similarities between the two acts, essentially the fact that the alleged assault of Jane occurred outdoors while Anna was allegedly assaulted indoors rendered the two acts too dissimilar to be relevant or probative of a permissible purpose, even with greater latitude applying. (R. 46:22–27; A-App. 115–20.)

After the court memorialized its decision in a final order (R. 53; A-App. 101), the State appealed from that order as a matter of right under Wis. Stat. § 974.05(1)(d)2. and *State v. Eichman*, 155 Wis. 2d 552, 555–56, 456 N.W.2d 143 (1990). (R. 54.)

STANDARD OF REVIEW

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

The circuit court's decision excluding the other acts evidence did not comport with legal principles.

A. Admission of other acts is favored—not exceptional—particularly when greater latitude applies.

To determine whether to admit evidence of other acts, courts employ the three-step analytical framework outlined in *State v. Sullivan*, 216 Wis. 2d 768, 771–72, 783, 576 N.W.2d 30 (1998). The first step asks whether the party has offered the evidence for a permissible purpose under Wis. Stat. § 904.04(2). *Sullivan*, 216 Wis. 2d at 772. The next step asks whether the evidence is relevant. *Sullivan*, 216 Wis. 2d at 772.

When the party seeking admission of the other-acts evidence establishes these two prongs by a preponderance of the evidence, the burden shifts to the opposing party for the third prong of the test. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399. This prong requires the court to weigh whether the probative value of the evidence is substantially outweighed by the risk of unfair prejudice or confusion to the jury under Wis. Stat. § 904.03. *Id.*

Courts have described the first sentence of section 904.04 as stating a "general rule . . . of exclusion" because it generally bars other acts evidence offered for no other purpose than "to prove the criminal disposition of the defendant." *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993).

But that statement is merely descriptive; it does not reflect a bias or presumption against other acts admissibility. *Id.* ("The case law in no way indicates that a circuit court should predispose itself against the admission of other crimes evidence.") Rather, section 904.04 simply provides core evidentiary requirements that the parties must satisfy to permit the use of other acts evidence. Far from discouraging admissibility of other acts, 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." *Speer*, 176 Wis. 2d at 1115.

In addition, admissibility is especially favored when the greater latitude rule applies. Greater latitude is a "longstanding principle that in sexual assault cases . . . courts permit a 'greater latitude of proof as to other like occurrences.'" *State v. Davidson*, 2000 WI 91, ¶ 36, 236 Wis. 2d 537, 613 N.W.2d 606 (quoted source omitted). This evidentiary rule is codified in Wis. Stat. § 904.04(2)(b)1. and applies when the charges involve a "serious sex offense." *State v. Dorsey*, 2018 WI 10, ¶¶ 31–33, 379 Wis. 2d 386, 906 N.W.2d 158. The rule applies to each prong of the *Sullivan* analysis. *Marinez*, 331 Wis. 2d 568, ¶ 20.

B. Jane's allegations are admissible under a sound analysis of the three *Sullivan* prongs and application of the greater latitude rule.

Two threshold matters guide the *Sullivan* analysis here. First, the greater latitude rule applies. The State charged Seaton with third-degree sexual assault in violation of Wis. Stat. § 940.225(3)(a). That is a "serious sex offense" as defined by Wis. Stat. § 939.615(1)(b) and thus activates the greater latitude rule, which applies to each prong of the *Sullivan* analysis. *See* Wis. Stat. § 904.04(2)(b)1.

Second, the elements that the State must prove at trial inform the *Sullivan* analysis. To prove third-degree sexual assault, the State must establish that (1) Seaton had sexual intercourse with Anna and (2) Anna did not consent to the intercourse. Wis. JI–Criminal 1218A (2018). Though the statute does not make intent an express element of the crime, it is implicit within the element to prove sexual intercourse. "There is no doubt that sexual assault, involving either sexual contact or sexual intercourse, requires an intentional or volitional act by the perpetrator." *State v. Hunt*, 2003 WI 81, ¶ 60, 263 Wis. 2d 1, 666 N.W.2d 771.

Against that backdrop, and as discussed below, the State's proposed other-acts evidence of Jane's allegations satisfies all three prongs of the *Sullivan* test, especially when greater latitude applies.

1. The State offered the evidence for permissible purposes.

The first prong of the *Sullivan* analysis is a low bar for the proponent to overcome. *Marinez*, 331 Wis. 2d 568, ¶ 25. "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). In addition, the greater latitude rule operates to increase the ease with which the State satisfies the first prong of the *Sullivan* test. *See Dorsey* 379 Wis. 2d 386, ¶¶ 32–33.

Permissible purposes include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2)(a). Other permissible purposes include providing the jury

additional context and information to assess the victim's credibility. *Marinez*, 331 Wis. 2d 568, ¶ 26.

Here, in its motion, the State sought to admit testimony from Jane that, around nine months before Seaton allegedly assaulted Anna and when she was 17, she encountered Seaton (whom she was familiar with from their time together at Brookfield East) at a gathering; he had reason to know that Jane was drinking alcohol; he eventually found himself alone with her in an isolated spot; he became intimate with her; he ignored her pleas to stop; and he forced intercourse with her. That evidence, the State asserted (R. 21:6; 46:15; A-App. 108, 126), could go to the following purposes:

Opportunity and motive. The other act involving Jane (given her age, her familiarity with Seaton, and her intoxicated state) could go to show that Seaton acted on an opportunity to exploit Anna's vulnerability (due to her age, her familiarity with him, and her intoxicated state). It also could establish Seaton's motive to commit the assault by going into her room, pressing her for sex, and disregarding her requests to stop. *See, e.g.*, *Hunt*, 263 Wis. 2d 1, ¶ 60 (holding that other-acts evidence of similar assault "was properly admitted to prove motive because purpose is an element of sexual assault, and motive and opportunity are relevant to purpose"). Here, Jane's claims, if believed, can help prove that Seaton targeted another intoxicated 17-year-old acquaintance from high school for sexual gratification.

Identity, plan, intent, and mode of operation. Method or mode of operation is "one of the 'factors that tends to establish the identity of the perpetrator.'" *State v. Hammer,* 2000 WI 92, ¶ 24, 236 Wis. 2d 686, 613 N.W.2d 629. It also can relate to issues of non-consent when the other acts share similarities with the charged acts. *See State v. Ziebart*, 2003 WI App 258, ¶ 20, 268 Wis. 2d 468, 673 N.W.2d 369. Here, the similarities between the circumstances and allegations of the

two assaults (both on 17-year-olds whom Seaton knew from high school, both of whom had been drinking, both of whom Seaton caused or found to be isolated, both of whom he forced intercourse with despite their pleas to stop) show a mode of operation that could prove identity, plan, and intent.

Context and credibility. For those same reasons, Jane's claims of Seaton's assault of her provide context for Seaton's actions with regard to Anna and assist the jury in assessing Anna's credibility. *See Marinez*, 331 Wis. 2d 568, ¶ 27.

2. The evidence was relevant to those purposes as well as Anna's credibility.

Relevance, the second *Sullivan* prong, "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. Since other-acts evidence always has the potential to operate as impermissible character or propensity evidence, the core question is whether the other act is relevant to prove anything other than character and propensity. *State v. Payano*, 2009 WI 86, ¶ 67, 320 Wis. 2d 348, 768 N.W.2d 832; *Hurley*, 361 Wis. 2d 529, ¶ 76.

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 the evidence relates to a fact of consequence, "the court must focus its attention on the pleadings and contested issues in the case." *Payano*, 320

Wis. 2d 348, ¶ 69. 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 in these cases. *Id.* ¶¶ 73–74, 83. That point holds true even if the defendant does not dispute motive. *Davidson*, 236 Wis. 2d 537, ¶ 65; *see also Payano*, 320 Wis. 2d 348, ¶ 69 n.15 (evidence that bears on an undisputed element of a crime is still relevant). 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 proposed other-acts evidence related to facts of consequence. Seaton's intent and motive are consequential facts because his purpose is an element of the crime of sexual assault. *See Hurley*, 361 Wis. 2d 529, ¶¶ 73–74, 83. In addition, Anna's credibility is the central determination for the jury. *See Marinez*, 331 Wis. 2d 568,

¶ 34. The State's other-acts evidence will provide context behind Seaton's intercourse with Anna and can bolster Anna's credibility to the extent that her testimony will tend to incriminate Seaton.

Further, the State's proposed other acts will tend to make these consequential facts more likely and assist the jury in its credibility determinations, thus satisfying the second part of the relevancy analysis. As noted, Jane's accusations are very similar to Anna's and the two events share like circumstances: (1) both Jane and Anna were 17 years old when Seaton allegedly assaulted them; (2) both were Brookfield East students who knew Seaton from his time there; (3) both Jane and Anna had been drinking socially with Seaton before the alleged assaults; (4) Seaton created or found opportunities to be alone with the alleged victims while they were isolated from friends or family; (5) Seaton initiated sexual contact, removed each woman's clothing, and forced sexual intercourse; and (6) both Jane and Anna told Seaton to stop, but he didn't. Moreover, the alleged assaults occurred less than a year apart, with Jane's in September 2018 and Anna's in June 2019.[2]

In light of these marked similarities, the other-acts evidence of Jane's accusation has strong probative value. It is

---

[2] The State is proceeds on the assumption that Jane would testify that the assault took place in 2018, based on the police reports. That said, Seaton disputed at the hearing whether Jane thought the assault occurred in 2018 or a year earlier in 2017. That discrepancy was apparently based on a later police report stating that Jane said the assault was in 2017. (R.46:10–11, 17; A-App. 103–04, 110.) Even so, if the span between the alleged assaults was actually a year and nine months, that gap is not reasonably long enough to make the first alleged assault irrelevant or nonprobative. *See, e.g.*, *State v. Dorsey*, 2018 WI 10, ¶ 47, 379 Wis. 2d 386, 906 N.W.2d 158 (upholding circuit court's reasoning that two-year gap between acts did not render them too dissimilar given their other commonalities).

powerful evidence of Seaton's motive to obtain sexual gratification. It indicates a mode of operation that is probative of his intent to choose an intoxicated younger acquaintance (potentially because she would be more likely to trust him than she would a stranger), whom he could isolate, and whom he could press for intercourse. And its similar nature provides context for Anna's accusations and is probative to her credibility in relaying the details of her alleged assault.

And the greater latitude rule supports the conclusion that this other-acts evidence satisfies the *Sullivan* relevance prong. "[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. (citation omitted). Another reason is "difficult proof issues" in sexual assault cases. *Marinez*, 331 Wis. 2d 568, ¶ 34. Those cases often lacks physical evidence, *id.* ¶ 28, and prosecutors have difficulty obtaining admissible evidence to prove the elements of those crimes. *Davidson*, 236 Wis. 2d 537, ¶ 42.

These concerns ring true here. Anna delayed reporting Seaton's assault. Accordingly, if there was physical evidence supporting her claims of assault, it is long gone. Anna and Seaton were the only witnesses to the actual assault. These proof issues, combined with the State's need to corroborate Anna's credibility, require a liberal application of the *Sullivan* other-acts test.

Dorsey is instructive on these points. There, the claim was that Dorsey abused his girlfriend, and the circuit court admitted testimony from a former girlfriend that Dorsey was verbally and physically abusive to her a few years prior to the charged acts of abuse. *Dorsey*, 379 Wis. 2d 386, ¶¶ 16–17. There, the evidence was "of consequence" because it related to "the ultimate facts and links in the chain of inferences that are of consequence to the case." *Id.* ¶ 48 (quoting *Sullivan*, 216 Wis. 2d at 786). To that end, the evidence of Dorsey's abuse of his former girlfriend was relevant to intent and

motive because the two acts were similar in those respects, "namely that, in both instances, Dorsey became violent when he felt like he was being disrespected or lied to, and he isolated his victims and restricted their movements immediately prior to the assaults." *Id.* ¶ 49.

Further, in *Dorsey*, the evidence was admissible to bolster the victim's credibility, which "is always consequential" under Wis. Stat. § 904.01 and which is particularly probative when the case is a credibility contest. *Id.* ¶ 51. That reasoning likewise applies to this case.

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

C. This Court should conclude that Seaton cannot meet his burden to show that the probative value is substantially outweighed by the risk of unfair prejudice.

A court may exclude otherwise admissible evidence "only if the evidence's probative value is *substantially outweighed* by the danger of unfair prejudice." *Marinez*, 331 Wis. 2d 568, ¶ 41. This means that the scale tilts "squarely on the side of admissibility. Close cases should be resolved in favor of admission." *Id.* (citation omitted). Moreover, the greater latitude rule applies to the third prong of the *Sullivan* test. *See Dorsey*, 379 Wis. 2d 386, ¶ 36. Thus, a scale that already tilts toward admission tips even further in that direction when greater latitude applies.

Below, the circuit court concluded that the State failed to identify a permissible purpose or prove relevance, and thus did not reach *Sullivan*'s third prong. (R. 46:27; A-App. 120.) Nevertheless, this Court may independently review the record to determine if there was any reasonable basis for the trial court's discretionary decision. *Payano*, 320 Wis. 2d 348, ¶ 92. Here, the record establishes that there is no reasonable

basis to conclude that the probative value of the evidence of Jane's accusations would be substantially outweighed by the danger of unfair prejudice. *See Hurley*, 361 Wis. 2d 529, ¶ 87. Thus, this Court should find no basis for the circuit court's decision to prohibit the admission of the evidence. *See Payano*, 320 Wis. 2d 348, ¶ 92.

In assessing the unfair-prejudice balancing test, the Court must consider the State's need to present the other-acts "evidence given the context of the entire trial." *Hurley*, 361 Wis. 2d 529, ¶ 87. "Evidence that is relevant 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.'" *Id.* (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, the 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, the balancing test favors the State; Seaton cannot demonstrate otherwise. To prove Seaton's guilt, the State must show that in June 2019, Seaton had sexual intercourse with Anna without her consent. As discussed, the strikingly similar other-acts evidence of Jane's claims has significant probative value because it establishes Seaton's motive and intent with regard to Anna, it gives context to Seaton's encounter with Anna, and it also bolsters Anna's credibility.[3]

[3] In *Smogoleski*, which the State cites for persuasive value, this Court held that other acts of the defendant "engaging in sexual acts with an unconscious teenager who had been drinking alcohol

The risk of unfair prejudice is minimal and does not significantly outweigh that probative value. 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. Seaton stands charged with third-degree sexual assault in this case; the nature of Jane's allegations are no more likely to arouse horror than what Anna will be alleging. 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." *Id.* ¶ 89. "In some cases, limiting instructions eliminate the potential for unfair prejudice." *Id.*

And again, this Court examines this prong in light of the greater latitude rule, which 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 offenses despite their involving 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.

Finally, at the hearing, Seaton seemed to argue the evidence of Jane's accusations was either dissimilar or unfairly prejudicial because Seaton's defense to Jane's claims was that the encounter didn't happen (whereas he was

---

at a house party" was highly relevant to show context, intent, motive, consent, and witness credibility, and was probative because those features were similar to the charged act. *Smogoleski*, No. 2020 WL 6750487 at *6 (A-App. 152–53.)

claiming that his act with Anna was consensual); that despite an investigation, no charges arose from Jane's accusations; and her claims were uncorroborated. (R. 46:10–11; A-App. 103–04.) But that Jane's accusations were only accusations (and did not result in charges or a conviction) reflects that that evidence would be inherently *less* prejudicial to Seaton. To that end, the State will introduce the evidence through Jane's testimony, which would give Seaton the opportunity to bring out those points on cross-examination. And, as noted, limiting instructions would make clear to the jury that Jane's testimony had narrow purposes, that Seaton was not on trial for Jane's claim, and to avoid potential confusion.

In summary, the State has satisfied the permissible purpose and relevance prongs. Seaton cannot show that the other acts' probative value is substantially outweighed by the risk of unfair prejudice. Because there is no basis to exclude the evidence, this Court should reverse the order denying the State's other-acts motion.

D. The circuit court's decision was based on an incorrect application of the law and thus was an erroneous exercise of discretion.

The circuit court started its analysis off on the wrong foot by stating that admission of other acts "is an exception to the rule" and asking the State why it should allow admission in this case "and really create this situation where [Seaton] has to defend against not one, but two allegations?" (R. 46:13; A-App. 106.)[4] These statement suggested two things: (1) that the court viewed suppression of other acts to be the rule, that

[4] The court later repeated the "exception" language in its discussion, stating that "other acts evidence is an exception to the general rule that . . . evidence of other crimes, wrongs or acts are not admissible" as propensity evidence. (R. 46:19–20; A-App. 112–13.) It reiterated at the end of its discussion that admission of other acts "is the exception, not the rule." (R. 46:27; A-App. 120.)

is, that there is a general bias against admission of other acts; and (2) that the Court preemptively believed that Seaton would be unfairly prejudiced since Jane's allegations were merely allegations, not proven assault.

Neither of those premises is correct. As discussed, the general rule is not one of inadmissibility. Rather, if there is a bias in other-acts decision-making, it is toward admissibility. *Marinez*, 331 Wis. 2d 568, ¶¶ 26, 33, 41 ("The bias . . . is squarely on the side of admissibility.") And that bias toward admissibility is even more pronounced when, as here, greater latitude applies. Wis. Stat. § 904.04(2)(b). And as for the court's concern that admission of Jane's accusation would require Seaton to defend against two accusations (despite that the uncharged nature of allegations does not necessarily weigh against their admission), the court cannot balance the risk of unfair prejudice until it has assessed the proposed purposes and relevance.

The court's analysis, while it recognized the *Sullivan* framework, failed to apply it soundly or hold consistently with case law in the following ways:

The court, without analysis, rejected each of the State's proposed purposes. The court's discussion ping-ponged between the permissible-purpose prong and the relevance prong; every time it addressed the State's proposed purposes, it returned to questions of similarity and relevance:

> "Is it being offered for motive? No, I don't see that here. It is being offered for opportunity? Not really. Even though one could argue well, he came upon this person, or there was the situation, there's these factual differences that are concerning to the court.
>
> " . . . I'm not saying these things have to be identical. Clearly the law doesn't. But I don't see this as a crime of opportunity. That's not really what we see in sexual assault cases."

(R. 46:25; A-App. 118.)

The court acknowledged that intent could arguably be a relevant purpose, and the State confirmed as much, but the court declined to consider it because the State did not develop it in its written motion. (R. 46:25; A-App. 118.) It likewise rejected identity, plan, and mode of operation, again not because those weren't possible permissible purposes, but because in its view, the fact that the assault of Jane occurred outside while the assault of Anna was indoors rendered the other-acts too dissimilar to be relevant. (R. 46:26; A-App. 119.)

That analysis effectively put the cart before the horse: the court supplanted the first prong of *Sullivan*—a very low bar in which the proponent merely identifies permissible purposes that aren't propensity—with the relevance analysis under the second prong in *Sullivan*. Hence, to the extent that the court denied the State's motion because the other-acts evidence was "not being offered for a permissible purpose," that wasn't a sound application of the first *Sullivan* prong. Here, the State identified multiple permissible purposes; this satisfied the first *Sullivan* prong as a matter of law. Indeed, the court seemed to acknowledge that the other acts could support some of those permissible purposes, including the victim's credibility (which, as explained below, the court wrongly viewed as not functioning as a stand-alone purpose). What the court really was saying was that it viewed the outside-vs.-inside distinction between the assaults as being dispositive to relevance. (R. 46:23–24, 26; A-App. 116–17, 119.) As discussed below, that conclusion was also an incorrect application of the law.

The court discounted Anna's credibility as a permissible purpose. It viewed the complaining witness's credibility as "not as strong as perhaps the other" permissible purposes, stated that it could not be a "stand-alone" purpose, and that "some other acceptable purpose" was required. (R. 46:20, 26; A-App. 113, 119.) It acknowledged that the acts'

similarities would be relevant to bolster Anna's credibility but it returned to its point that assisting the credibility determination could not be a stand-alone purpose. (R. 46:26; A-App. 119.)

The court's view was inconsistent with the law. Wisconsin courts have long recognized the complaining witness's credibility to be a permissible purpose under the *Sullivan* analysis. *See, e.g.*, *Dorsey*, 379 Wis. 2d 386, ¶ 50 (recognizing that other-acts evidence is admissible to bolster a witness's credibility in sexual assault cases); *Marinez*, 331 Wis. 2d 568, ¶ 27 ("We have previously recognized that context, credibility, and providing a more complete background are permissible purposes under Wis. Stat. § 904.04(2)(a)."); *Hunt*, 263 Wis. 2d 1, ¶ 58 ("Other-acts evidence is permissible to show the context of the crime, . . . to provide a complete explanation of the case . . . and to establish the credibility of victims and witnesses.").

Though credibility is often grouped with context and background, those purposes all operate together with a common aim: to provide a full picture for the jury to assess credibility. *See Marinez*, 331 Wis. 2d 568, ¶ 26 n.18 (stating that admission of other acts for this purpose can "provide greater context to [the complainant's] sexual assault allegation in order to allow the jury to better assess [the complainant's] credibility and to provide a more complete story for the jury"); *see also Dorsey*, 379 Wis. 2d 386, ¶ 50 ("[T]he difficult proof issues in [sexual assault] cases 'provide the rationale behind the greater latitude rule. . . . [I]t follows that the greater latitude rule allows for the more liberal admission of other-acts evidence that has a tendency to assist the jury in assessing [credibility].").

The circuit court's view that credibility had to accompany "some other acceptable purpose" lacks support in the law. Indeed, the proponent need only offer one permissible purpose. *Marinez*, 331 Wis. 2d 568, ¶ 25. There's no law

stating that credibility is a lower-tier purpose that must accompany an additional purpose. In all events, the State identified multiple permissible purposes, not just context and bolstering credibility.

The court determined that the outside-vs.-inside nature of the acts rendered them too dissimilar to be relevant. The circuit court acknowledged that the assault of Jane and the assault of Anna shared many similarities, but its sticking point was that Jane was assaulted outside in a yard while Anna was assaulted inside her bedroom. The court reiterated through its discussion that that difference made the proposed other-acts evidence not relevant, even if the State had identified any permissible purposes. (R. 46:23–24, 26; A-App. 116–17, 119.)

But that difference cannot be dispositive under a sound application of *Sullivan* and greater latitude. To start, greater latitude does not demand that the acts are similar with respect to minor details. Indeed, greater latitude recognizes that the other acts need not involve the same victim, Wis. Stat. § 904.04(2)(b); implicit in that recognition is that other acts involving a different victim would almost necessarily take place in a different location and under different circumstances. To that end, saying that the fact that one assault occurred outdoors while the other was in a bed is just as insignificant a difference under greater latitude as it is that Anna and Jane are different 17-year-olds, that the assaults occurred on different dates, or that the assaults took place in different towns.

Moreover, under the *Sullivan* analysis, similarity necessarily turns on the proposed purpose for admission. Accordingly, whether similarities are relevant and probative (and whether dissimilarities discount that relevance) depends on how the proponent is proposing to use the evidence. Here, as discussed above, the State is proposing the other acts to go to motive, intent, plan, and opportunity, and to context and

credibility. These proposed uses are based on the points of similarity between the acts: in the course of less than a year, two 17-year-olds independently claimed that they were drinking with Seaton, who was their acquaintance from high school, and found themselves alone with him, at which point he aggressively initiated intercourse despite their pleas to stop. Given those proposed uses, that one assault was outdoors and the other inside is not a reasonably relevant difference to defeat the State's proposed purposes here.

In summary, and for the reasons discussed above, the proposed other-acts evidence of Jane's accusations against Seaton was admissible under all three steps of *Sullivan* and through the lens of greater latitude. This Court should reverse the circuit court's evidentiary ruling because it failed to soundly apply those legal standards and reach a reasonable conclusion.

CONCLUSION

This Court should reverse the order denying the State's motion to admit other-acts evidence.

Dated this 25th day of October 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,752 words.

Dated this 25th day of October 2021.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 25th day of October 2021.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Morris V. Seaton
Case No. 2021AP1399-CR

APPENDIX CERTIFICATION

I hereby certify that filed with 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; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of October 2021.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this appendix with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 25th day of October 2021.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General