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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

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

REPLY BRIEF OF DEFENDANT-RESPONDENT

CASE NO.: 2021AP1399-CR

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STATEMENT OF THE ISSUE

1. Did the Circuit Court properly exercise its discretion in denying the State's motion to admit other acts evidence at trial?

The Circuit Court concluded that the other acts evidence did not meet a permissible purpose for admission and denied the motion. This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Seaton does not request oral argument or publication. Oral argument is not requested because the issues are fully developed by the parties' briefs. Publication is not warranted because this case involves the application of well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF THE CASE

Procedural History

On June 1, 2020, the State charged Morris Seaton with one count of Third-Degree Sexual Assault, contrary to Wis. Stats. Sec. 940.225 (3)(a) for an allegation that he had sexual intercourse with Anna¹ without her consent on June 13, 2019. (R.2:1) The State filed a motion to introduce other acts evidence, pursuant to Wis. Stat. §904.04(2), of a prior uncharged allegation from another county regarding Jane. (R.21) Mr. Seaton filed a brief opposing the introduction of this other acts evidence. (36) At a subsequent hearing, the Circuit Court, the Honorable Jennifer R. Dorow, considered the parties' briefs and oral

¹Mr. Seaton uses the State's pseudonyms, "Anna" and "Jane", to refer to the two females.

arguments and orally denied the State's motion. (R.46:10-27). After the Court issued a written order denying the motion, the State filed a Notice of Appeal, pursuant to Wis. Stat. §974.05(1)(d)2. (R.53, 54)

Relevant Facts

Anna's allegations

Anna accused Mr. Seaton, her former "close friend", of having sexual intercourse with her without her consent in her bed on June 13, 2019, after he had been invited to her home to spend time together and drink alcohol. (R.2:2-4) Mr. Seaton admitted the intercourse, but asserted Anna consented to it. (R.46:10,12)

The complaint detailed Anna's first report to the police on September 6, 2019 and her September 10, 2019 forensic interview. (R.2:2-3) Anna (DOB: 4/10/02) stated that on June 13, 2019, while her mother worked overnight, she and her older sister, invited two male friends, Dayveon and Mr. Seaton, to their home where they all drank alcohol. (R.2:2) Anna, then a Brookfield East High School student, knew Mr. Seaton, a former student at the school. (R.2:2) Mr. Seaton had been to her home approximately fifteen (15) times, while Anna had been to his home a handful of times. (R.2:2) Months later, Anna referred to having been assaulted on June 13, 2019 by "what used to be, a close friend of hers." (R.2:3)

After the four of them had been drinking alcohol for "some time", both Anna and her sister felt tired and drunk and went into their shared bedroom. (R.2:2) Her sister texted Dayveon that she and Anna were drunk, heading to bed, and that he and Mr. Seaton could stay as long as they wanted, and asked them to lock the door when they left. (R.2:2-3)

Anna fell asleep, and after an unknown period of time, Dayveon and Mr. Seaton came into the bedroom. (R.2:2-3) Dayveon

got into her sister's bed and Mr. Seaton got into Anna's bed. (R.2:2-3) Anna's sister had a previous intimate relationship with Dayveon, which Anna knew about. (R.2:2) Anna heard Dayveon and her sister kissing; they later left the bedroom to have sex in her mother's bedroom. (R.2:2-3)

Mr. Seaton touched Anna's thigh, which she moved away. (R.2:2-3) Although her memory was "foggy", Anna recalled Mr. Seaton's fingers inside of her and that he took off her clothes. (R.2:2-3) Mr. Seaton was behind her and pushed her up against the wall. (R.2:2-3) As Anna was on her knees, with her hands against the wall, Mr. Seaton put his penis in her vagina. (R.2:2-3) Anna told Mr. Seaton to stop because it hurt, but he did not stop. (R.2:2-4) Anna "began to sober up" and pushed Mr. Seaton off of her. (R.2:2,4)

Mr. Seaton then tried to cuddle with Anna, but she did not want to be touched. (R.2:2) Anna told the forensic investigator that Mr. Seaton said words to the effect that he did not understand why she was so upset and they were not going to have sex again after telling the police that he asked her why she was so nervous and said he did not need to have sex again. (R.2:2,4) Anna asked Mr. Seaton when he was going to leave and later a girl picked him up from Anna's home. (R.2:2,4)

Anna told her sister about the incident the next morning, and her sister said she considered it consensual sex and not rape. (R.2:2-3) Anna also told two friends and her current boyfriend about the incident. (R.2:3) According to Anna, she and Mr. Seaton never had a "boyfriend/girlfriend type relationship" and they had never had sex in the past. (R.2:2)

Jane's allegations

Jane accused Mr. Seaton of having forcible, nonconsensual,

sexual intercourse with her in the backyard of a Whitewater house on September 2, 2018. (R.21:2) Unlike Anna's accusations in which he admitted having consensual sexual intercourse, Mr. Seaton completely denied having had any sexual intercourse with Jane. (R.46:10,12) The Walworth County District Attorney's Office declined to issue charges against Mr. Seaton for Jane's accusations. (R.46:11,13)

The State's motion to admit other acts evidence outlined Jane's allegations. (R.21:2) On May 1, 2019, Jane reported to Whitewater police that Mr. Seaton sexually assaulted her on September 2, 2018 when she was 17 years old and a student Brookfield East High School. (R.21:2) Jane was in Whitewater helping her sister on college move-in day. (R.21:2) In her sister's yard, Jane drank two to three beers while with a group of other people, including Mr. Seaton, whom Jane knew from Brookfield East High School. (R.21:2) Mr. Seaton, a graduate of the school, had been in the class one year ahead of Jane. (R.21:2)

At 10 p.m., Jane decided to leave to look for her cousin. (R.21:2) Mr. Seaton knew her cousin's boyfriend and offer to help look for them. (R.21:2) As Jane and Mr. Seaton walked, he suggested that they go in a backyard a couple of houses from her sister's house. (R.21:2) They sat next to each other on the grass and talked for some time. (R.21:2) According to Jane, Mr. Seaton then pushed her back onto the grass, held her hands about her head with one hand, and pushed her pants down with his other hand. (R.21:2) As Mr. Seaton started having intercourse with Jane, she told him to stop. (R.21:2) He told her it was fine and to be quiet, while putting his arm over her mouth. (R.21:2) After Mr. Seaton finished, he walked away. (R.21:2) Jane said that the intercourse was painful, and she felt pain from it for about a week. (R.21:2) According to Jane, she did not report the incident for approximately eight months, but did so after she saw that Mr. Seaton was still coming around the school and she realized how much the assault was affecting her. (R.21:2)

Jane's allegations were investigated by Walworth County law enforcement who referred the matter to the District Attorney's office, which did not issue charges against Mr. Seaton. (R.46:11,13) Defense counsel explained at the motion hearing that the authorities took Mr. Seaton's phone to examine its GPS data and "they still don't have any corroboration that he was even in Whitewater at the time." (R.46:11)

Parties' arguments and the Circuit Court's decision

The State offered Jane's allegations, under Wis. Stat. §904.04(2)(a), for the purpose of showing Mr. Seaton's identity, plan, and modus operandi, and to bolster Anna's credibility. (R.21:6-7) It argued that the two similar incidents showed Mr. Seaton's modus operandi of choosing younger victims he knew from school, at the time the victim had been drinking alcohol and was isolated from family or friends, and initiated intercourse and then refuses to stop when asked to by the victim. (R.21:6)

The State argued that the other acts evidence was relevant to proving whether Mr. Seaton engaged in sexual intercourse without Anna's consent because of the similarity between Jane's and Anna's allegations. (R.21:7) It further argued that the other acts evidence was relevant because it provided context, supported Anna's credibility and proved "not only that the events in question did occur, but also that [Anna] is a reliable witness who is telling the truth." (R.21:7) Admitting that the other acts evidence was prejudicial to the defense, the State asserted that its probative value was not substantially outweighed by the danger of unfair prejudice, without any explanation, other than stating that the greater latitude rule provides for more liberal admission of other acts evidence. (R.21:8-9)

Mr. Seaton asserted that the State's justification for Jane's proffered testimony was merely an attempt to prove that he acted in conformity with the alleged character trait and that he is a bad person

and, therefore, is guilty. (R.36:4,6) He argued, *arguendo*, that if the Court found that the other acts evidence met a permissible purpose under §904.04(2), it was not relevant to the instant case. (R.36:3-5) Mr. Seaton also argued that other acts allegation were not similar to, but rather differed with, the allegations in the instant case, including that Jane's allegation was that of a forced rape and the instant case involved an allegation of nonconsensual sexual intercourse in a home he had been invited to. (R.36:4-5; R.46:18-19)

Mr. Seaton further argued that if the Court found that the other acts evidence was offered for a permissible purpose and relevant, the Court should exclude the evidence because its probative value is outweighed by the risk of unfair prejudice. (R.36:3-7) He argued that Jane's allegations were disputed and unsubstantiated and the introduction of her uncharged allegations would cause the jury to try him on, and he would have to defend against, both the charged incident here and Jane's uncharged allegation, which was unfair and prejudicial. (R.36:1-2,4) Mr. Seaton further argued that the admission of the other acts evidence would threaten his right to a fair trial. (R.36:3)

The Circuit Court denied the State's motion to admit the other acts evidence. (R.46:19-27) In its decision, the Circuit Court applied Wis. Stat. § 904.04(2) (a) and (b), including the greater latitude rule, and the *Sullivan*² test for other acts evidence. (R.46:20-21,24-27) The Court examined the facts of the charged offense and the other act and found both similarities and differences between them. (R.46:21-27). The Judge found that the other act did not meet the State's proffered purposes of identity, plan, and modus operandi. (R.46:24-27) It also found that bolstering Anna's credibility was not itself a permissible purpose. (R.46:24,26-27). The Court concluded that, even with the

² *State v. Sullivan*, 216 Wis. 2d 268, 576 N.W.2d 30 (1998).

application of the greater latitude rule, the other acts evidence was not similar enough to the instant case and not offered for a permissible purpose and denied the motion to admit this evidence. (R.46:27)

Additional facts will be stated as necessary below.

ARGUMENT

I. THE CIRCUIT COURT EXAMINED THE RELEVANT FACTS, APPLIED A PROPER LEGAL STANDARD, AND REACHED A REASONABLE CONCLUSION, THUS PROPERLY EXERCISED ITS DISCRETION IN DENYING THE STATE'S OTHER ACTS MOTION

A. Standard of Review

A Circuit Court's decision to admit or exclude evidence is entitled to great deference. *State v. Jackson*, 2014 WI 4, ¶45, 352 Wis. 2d 249, 841 N.W.2d 791 (citation omitted). The decision to admit or exclude evidence is left to the discretion of the Trial Court, which an Appellate Court upholds unless there was an erroneous exercise of discretion. *State v. Mayo*, 2007 WI 78, ¶31, 301 Wis. 2d 642, 734 N.W.2d 115 (citation omitted). An Appellate Court will sustain a decision to exclude evidence if the Circuit Court "examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." *Id.* The question is not whether this Court would have admitted the evidence but whether the Circuit Court exercised its discretion in accordance with accepted legal standards and the facts of record. *State v. Payano*, 2009 WI 86, ¶51, 320 Wis. 2d 348, 768 N.W.2d 832 (citations omitted). "The [trial] Court's decision will be upheld 'unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.'" *Id.* (quoted source citation omitted).

If the Circuit Court fails to set forth its reasoning, the Appellate

Court reviews the record to determine if there is a reasonable basis for the Circuit Court's discretionary decision. *State v. Davidson*, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted). Appellate courts "look for reasons to sustain a Trial Court's discretionary decision." *State v. Wiskerchen*, 2019 WI 1, ¶18, 385 Wis. 2d 120, 921 N.W.2d 730 (citation omitted).

B. General Principles of Law Regarding the Admissibility of Other Acts Evidence

Wisconsin Statute Section 904.04(2)(a) prohibits the admission of evidence that the accused committed some other act which tends to show that the accused has a particular character trait, and that the accused acted in conformity with that trait. *Sullivan*, 216 Wis. 2d at 782. In so doing, this statute "forbids a chain of inferences running from act to character to conduct in conformity with the character." *Id.* Such "propensity" evidence is inadmissible because its "invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." *Id.* at 783.

However, other acts evidence may be admitted under the statute "if its relevance does not hinge on an accused's propensity to commit the act charged." *Id.* Other acts evidence may be admitted when offered for other purposes, such as proof of motive, opportunity, intent, preparation, identity, or absence of mistake or accident. Wis. Stat. § 904.04(2)(a) (2019-2020).

The proper analysis for admitting or excluding other acts evidence was set forth in *Sullivan*. There are three steps: 1) is the evidence offered for an acceptable purpose under Wis. Stat. §904.04(2)(a); 2) is the other acts evidence relevant; 3) is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury. *Sullivan*, 216 Wis. 2d at 772-73. The proponent of the other acts evidence has the burden of proving the first two steps and if met, the burden shifts to the party opposing the admission of the other acts evidence to show the third step. *State v. Hurley*, 2015 WI 35, ¶58, 361 Wis. 2d 529, 861 N.W.2d 174 (citations omitted).

Further, Wis. Stat. §904.04(2)(b)1, *greater latitude*, applies to a charge of third-degree sexual assault, permitting a Circuit Court to admit evidence of similar acts by the accused regardless of whether the victim of the current offense and the similar act are the same person. Wis. Stat. §904.04(2)(b)1. The greater latitude rule permits “a more liberal admission of other acts evidence” and applies to each prong of the Sullivan test. *State v. Marinez*, 2011 WI 12, ¶20, 331 Wis. 2d 568, 797 N.W.2d 399 (quoted source, citation, and footnote omitted).

Despite the more liberal admission of other acts evidence “such evidence is not automatically admissible.” *Davidson*, 236 Wis. 2d 537, ¶52 (citations omitted). The greater latitude rule does not relieve the Court of its “duty to ensure that the other acts evidence is offered for a proper purpose, is relevant, and its probative value is not substantially outweighed by undue prejudice.” *State v. Gutierrez*, 2020 WI 52, ¶29, 391 Wis. 2d 799, 943 N.W.2d 870 (citation omitted).

C. The Court Reached a Reasonable Conclusion to Exclude the Other Act Evidence by Applying the Proper Legal Standard to the Relevant Facts.

Here, as the Appellant, the State has the burden of proving that the Circuit Court erroneously exercised its discretion in excluding the other acts evidence. *See Winters v. Winters*, 2005 WI App 94, ¶18, 281 Wis. 2d 798, 699 N.W.2d 229. It cannot so prove.

1. The Circuit Court applied the proper legal standard to the relevant facts.

The Court applied the proper legal standard. The Circuit Court started its decision by quoting the statutory language of the Wis. Stat. §904.04(2), including Subsections (a) and (b). (R.46:19-21) The judge noted that the admission of other acts evidence for a permissible purpose (in the second sentence of Subsection (a)) is an exception to the general rule of its inadmissibility (in the first sentence of Subsection (a)). (R.46:19-20) The Court also noted that the greater latitude rule of Subsection (b) applied to its analysis of the other acts motion due to Mr. Seaton's criminal charge. (R.46:20-21)

The record also reflects that the Court also applied the proper legal framework for evaluating the admissibility of other acts evidence -- the three-prong analysis promulgated in *Sullivan*. The judge repeatedly returned to the first prong of the test to determine if the State had offered the other act evidence for a permissible purpose. (R.46:24,26,27) In the end, the Court concluded that the evidence was not offered for a proper purpose and therefore denied the motion. (46:27)

The Court also examined the relevant facts of the charged offense and the other act and analyzed the similarities and differences between them. (R.46:21-27) The Court noted similarities: the female's ages, 17, however, the Court found that Mr. Seaton was their peer; both females knew Mr. Seaton from attending the same high school, had consumed alcohol, and claimed that Mr. Seaton forced sexual intercourse with them without their consent and that he did not stop when they asked him to. (R.46:21-24)

The Court also found several differences between the two accusations:

- the type of relationship differed, as Anna and Mr. Seaton were more known to each other and had been spending time together, while Jane and Mr. Seaton knew each

other from school, but were not friends (R.46:22-23);

- the circumstances of how Mr. Seaton came into contact with Anna and Jane differed, as Anna had invited him to her home where they consumed alcohol, while Mr. Seaton happened to come into contact with Jane and tried to help her (R.46:22-24,26);
- the location of the assaults differed, as the intercourse with Anna occurred in a bedroom in her home to which Mr. Seaton had been invited while the alleged intercourse with Jane occurred outside on the grass (R.46:22-24,26);
- the force allegedly used by Mr. Seaton differed between Anna's and Jane's accusations. (R.46:23)

Contrary to the State's suggestion, the Court, therefore, did not find that the differences between the two incidents were based on the fact that one occurred inside while the other occurred outside.

2. The Court's conclusion that none of the State's proffered purposes constituted an acceptable purpose for admission of the other act evidence was a proper and reasonable exercise of its discretion.

Under the first prong of the *Sullivan* test, the State offered Jane's accusations to establish Mr. Seaton's identity, plan, and modus operandi, and to bolster Anna's credibility. (R.21:6-7) The record reflects that the Court considered these proffered purposes and found that none were permissible purposes and was within its discretion in so holding.

The State's motion sought to introduce the other act evidence for the purpose of showing Mr. Seaton's identity, plan, and modus

operandi, and to bolster Anna's credibility:

In addition to bolstering the credibility of the victim, the "other acts" evidence serves to establish the defendant's identity, plan and modus operandi...The prior incident against [Jane] and the current incident against [Anna] are highly similar and show a pattern of behavior by [Mr. Seaton]. His modus operandi includes choosing younger victims that he knows through his time at Brookfield East High School. The defendant chooses a time of opportunity when that younger victim has been drinking and is isolated from family or friends. The defendant then initiates penis to vagina intercourse and refuses to stop when asked to by the victims.

(R.21:6)

In oral argument, the prosecutor erroneously stated the proffered purposes in her written motion included intent and motive. (R.46:15) However, while the State included "motive" in its list of proffered purposes in its brief³, the State did not otherwise develop an argument about how and why motive was a permissible purpose for the admission of Jane's allegations. *See* R.21. Nor did it so argue at the hearing. *See* R.46:13-18, 25. Additionally, the State's motion did not list "intent" as one of its proffered purposes and the State did not develop an argument about how and why intent was a permissible purpose in its motion or at the hearing. *See* R.21; 46:13-18, 25.

The Court later found that the State had not offered the other act evidence for the purposes of motive and opportunity:

Is it being offered for motive? No. I don't see that here. Is it being offered for opportunity? Not really.

(46:25)

The Court then clarified with the prosecutor that the State's proffered purposes were identity, plan and modus operandi, which the prosecutor confirmed:

³ "The State seeks to admit the proffered other acts evidence for the purposes of showing the defendant's motive, identity, plan, opportunity, and modus operandi" (R.21:6)

THE COURT: ...As I understand it – and [the Prosecutor], you can correct me if I'm wrong – but you really were trying to argue for admissibility under identity, plan and modus operandi, correct?

[THE PROSECUTOR]: Those are the ones I fleshed out the most, yes. But I did list all of the statutory language, permissible purposes, and I believe that intent can certainly be considered as well.

THE COURT: It may be, but I'm gonna hold the State to what it believed in this particular case...

(R.46:25)

The Circuit Court's decision to limit its analysis of permissible purposes to Mr. Seaton's identity, plan, and modus operandi and to bolster Anna's credibility was a proper exercise of its discretion. The State had not developed any arguments of how the other acts evidence was admissible to show Mr. Seaton's motive or intent. The Circuit Court was not required to develop the State's arguments for the State. *See State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) (stating "[a] party must do more than simply toss a bunch of concepts into the air with the hope that either the Trial Court or the opposing party will arrange them into viable and fact-supported legal theories.")

The Court concluded that the State's proffered purposes for Jane's allegations to show Mr. Seaton's identity, plan or modus operandi were not permissible purposes. (R.46:24-27) It also found this evidence could not be properly offered to bolster Anna's credibility without its connection to another permissible purpose. (R.46:24,26-27) The Court concluded that, even with greater latitude, because the prior act was not "offered for a permissible purpose" it was denying the State's motion to admit the other act evidence. (R.46:21)

Evaluating each of these proffered purposes, the court reached

a reasonable decision that the State failed to prove that any of them apply:

Identity. The Court did not explain its rationale for concluding that the other act evidence did not “fit” the permissible purpose of identity. (R.46:26-27) However, there is a reasonable basis in the record for the court’s conclusion. Mr. Seaton’s identity is not at issue in the instant case, as he is the person who admittedly had sexual intercourse with Anna.

Plan. The Court did not explain its rationale for concluding that Jane’s accusations did not “fit” the permissible purpose of showing Mr. Seaton’s plan. (R.46:26-27) However, there is a reasonable basis in the record for the court’s conclusion. Under the “plan” acceptable purpose, similarity of facts between the prior incident and current charge is not enough. *State v. Cofield*, 2000 WI App 196, ¶13, 238 Wis. 2d 467, 618 N.W.2d 214. Rather, the proponent must demonstrate that the prior act constitutes a step in a plan leading to the charged offense, or some other result where both acts are part of one plan. *Id.* Here, there is no linkage between the acts with Jane and Anna or evidence that the incident with Jane was a step in a plan to assault Anna.

Modus Operandi. The Court reasoned that the other acts did not meet the purpose of modus operandi, due to the differences between the two allegations it had discussed earlier, that Mr. Seaton had been invited to Anna’s home and the intercourse took place inside her home, and in Jane’s accusations, Mr. Seaton happened to run into her and then had intercourse with her outside. (R.46:24,27)

The Court’s conclusion that the State failed to meet its burden to prove that modus operandi was a permissible purpose for the admission of the other act evidence was a reasonable conclusion. Evidence of a defendant’s distinctive modus operandi can be admissible if probative of the purpose for which it is offered,

including identity, plan and intent. *See e.g. State v. Hall*, 103 Wis. 2d 125, 144, 307 N.W.2d 289 (1981) Here, the State offered the other act evidence to try to show Mr. Seaton's alleged modus operandi for the purposes of his identity and plan. Because, as argued above, Mr. Seaton's identity and plan were not permissive purposes, the Court's finding that modus operandi was not itself a permissible purpose for the admission of Jane's allegations was a reasonable conclusion.

Additionally, any argument that the Court improperly considered and analyzed the similarities and differences of the two incidents fails. Because the State proffered modus operandi as a permissible purpose, the Court was required to consider the similarities, and differences, between the two incidents to determine if Mr. Seaton's conduct was distinctive.

Bolstering Anna's credibility.

The Court was correct that Jane's testimony was not admissible to bolster Anna's credibility. Because Mr. Seaton's defense will be that Anna consented to the sexual intercourse, Wisconsin caselaw does not permit Jane's testimony to be admitted on the issue of Anna's consent. In *State v. Alsteen*, a case that predates *Sullivan*, the Wisconsin Supreme Court held that past acts of nonconsensual sexual intercourse cannot be introduced to prove lack of consent in the current offense. 108 Wis. 2d 723, 730, 324 N.W.2d 426 (1982). The Supreme Court explained:

Consent is unique to the individual. "The fact that one woman was raped...has no tendency to prove that another woman did not consent."

Id. (quoted source omitted)

The *Alsteen* Court's decision was based on a finding that the prior act was not relevant. *Id.* at 729-731. However, as a pre-*Sullivan* framework

case, it did not reach the issue of whether the other act evidence met a permissible purpose under Wis. Stat. § 904.04(2). *See Id.*

This Court followed *Alsteen* in *Cofield*. As in this case, the defendant claimed that sexual intercourse was consensual. The Court of Appeals, relying on *Alsteen*, reversed the Trial Court's admission of an earlier non-consensual act. 238 Wis. 2d 467, ¶10. The Cofield Court concluded that "the prior acts were improper propensity evidence use to prove that Cofield acted in conformity with his prior conviction." *Id.*

Moreover, the greater latitude rule, providing for more liberal admission of other acts evidence, does not override this established Supreme Court law that past sexual assaults by nonconsensual intercourse are inadmissible to show that the victim in the current case did not consent. If a Court were to so conclude, the greater latitude rule would in effect overrule §904.04(2)(a). The Circuit Court would not be required to find a permissible purpose for admissibility and such evidence would be automatically admissible.

Contrary to the State's assertion, the Court's conclusion that bolstering Anna's credibility could not be a standalone permissible purpose was proper. The State admits that the caselaw shows that "credibility is often grouped with context and background." App. Brief, p.25. The cases the State relies on do not find that bolstering the victim's credibility to be a stand-alone permissible purpose and present unique circumstances related to victims' credibility. For example, in *State v. Hunt*, the defendant was charged with sexual assaults of his wife and stepdaughter, who later recanted and were uncooperative with the prosecution. 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771, ¶¶8-14. The Circuit Court admitted Hunt's prior acts of drug use, and physical and sexual abuse of his family, for multiple purposes: opportunity, intent, absence of mistake, and context. *Id.*

¶57. The other acts evidence provided a context for the victims' and witnesses' fear of Hunt and their pattern of recantations and helped establish the victims' and witnesses' credibility "in light of their recantations." ¶¶58-59. Similarly, in *Marinez*, a child sexual assault case, *Marinez's* prior act of burning the victim's hand was admissible for the purposes of establishing the five-year-old victim's identification of the defendant and to provide a more complete context for the child victim's statements for the jury to assess the victim's credibility. 331 Wis. 2d 568, ¶26.4

Mr. Seaton's case, however, does not involve the contextual complexities of the difficulties presented by child sexual assault victim testimony or the dynamics of recanting family victims and witnesses. Therefore, bolstering Anna's credibility is not a permissible purpose in this case and the Circuit Court's decision so finding was a reasonable exercise of its discretion.

Any argument that the Court failed to apply the correct legal standard fails. The Circuit Court's statements that admissibility of other acts evidence was an exception to the general rule that propensity evidence was not admissible, was not, as the State suggests, incorrect. The admissibility of other acts evidence is an exception to the rule of exclusion of this evidence as propensity evidence, as demonstrated by the statute. Nor did the Court demonstrate a bias against the admission of other acts evidence or preemptively believe that Mr. Seaton would be prejudiced by the admission of Jane's allegations. Rather, the Court took seriously its duty to ensure that the other acts evidence met each step of the *Sullivan* test. After finding that the first step, permissible purpose, was

4 In *State v. Dorsey*, a domestic violence case, the Court admitted the prior acts for the permissible purposes of intent and motive. 2018 WI 10, ¶41, 379 Wis. 2d 386, 906 N.W.2d 158. The victim's credibility was not itself a permissible purpose under the first *Sullivan* prong, but was analyzed under the relevancy prong. *Id.* at ¶50.

not met, the court did not decide the other two prongs of the test.

3. The State forfeited any argument that motive, intent, context, and opportunity are permissible purposes by not so arguing in the Circuit Court, and in any event, these arguments fail on the merits.

The State argues before this Court that Jane's allegations meet the permissible purposes of motive, intent, context, and opportunity. However, the State forfeited these arguments on appeal by not arguing these purposes in the Circuit Court. *See Northbrook Wisconsin, LLC v. City of Niagara*, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 668, 843 N.W.2d 851, 856 ("Arguments raised for the first time on appeal are generally deemed forfeited.") The forfeiture rule's purpose is to "enable the Circuit Court to avoid or correct any error with minimal disruption to the judicial process, eliminating the need for appeal." *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (citation omitted).

In any event, if arguendo, despite the State's forfeiture, this Court chooses to address these arguments, the State's arguments that each of these were permissible purposes for the admission of Jane's evidence fail on the merits:

Intent. If arguendo, this Court chooses to address whether intent is an acceptable purpose for the other acts evidence, Mr. Seaton asserts that it is not a permissible purpose because intent is not an issue in his case. A defendant's prior act of sexual intercourse is not admissible to show intent in a case of sexual intercourse because intent is not an element of the crime. *See Cofield*, 238 Wis. 2d 467, ¶¶1-5,11, (noting, in a case of sexual assault by acts of sexual intercourse, that intent is not an element of the charged offense) Intent is not an element of Mr. Seaton's charged offense. Mr. Seaton is charged with third degree sexual assault which can be committed by two different ways -- either engaging in "sexual intercourse" with the

victim or by having “sexual contact” with them -- in either case without their consent. *See* Wis. Stat. §940.225(3)(a) and (b). Mr. Seaton is charged with the “sexual intercourse” alternative pursuant to §940.225(3)(a). Sexual intercourse is defined by several specific acts but requires no specific intent or purpose. *See* Wis. Stat. §940.225(5)(c). On the other hand, “sexual contact” requires the State to prove that a defendant engaged in “intentional touching” or “intentional” ejaculation or emission of feces or urine, for one of several purposes. *See* Wis. Stat. §940.225(5)(b).

Motive. If arguendo, this Court chooses to address whether motive is an acceptable purpose for the other acts evidence, Mr. Seaton asserts that it is not a permissible purpose because motive is not an issue in his case. Other acts evidence may be admissible to establish motive for the charged offense if there is a relationship between the other acts and the charged offense or if the charged offense has a purpose element. *Cofield*, 238 Wis. 2d 467, ¶12. Here, neither can be satisfied. First, as explained above, Mr. Seaton is charged with third degree sexual assault by “sexual intercourse” which requires no specific intent or purpose. *See* Wis. Stat. §940.225(5)(c). Second, there is no connection between the prior allegation from Jane and the instant case, nor is there a link between the two incidents or that the prior act provided a reason for committing the instant case.

Context. If arguendo, this Court chooses to address whether context is an acceptable purpose for the other acts evidence, Mr. Seaton asserts that it is not a permissible purpose because context is not an issue in his case. Other acts evidence may be admissible to show context or background to prove a complete story for the jury to understand something unique to that case. *See e.g. Hunt*, 263 Wis. 2d 1, ¶59. (Finding other acts evidence admissible for purpose of establishing context to provide insight into unique circumstances in

the Hunt household and to provide a context for the jury to understand the victims' and witnesses' fear of Hunt and their pattern of recantations.) Here, Jane's incident itself was not related to, or part of the same narrative as, Anna's allegations. Jane's testimony was not part of the background or context of the incident with Anna and thus was not admissible for the permissible purpose of providing context.

Opportunity. If arguendo, this Court chooses to address whether opportunity is an acceptable purpose for the other acts evidence, Mr. Seaton asserts that opportunity is not a permissible purpose. McCormick on Evidence has explained opportunity in the context of other act evidence as follows:

Uncharged crimes can be admissible to establish opportunity by demonstrating that defendant had access to or was present at the scene of the crime or possessed certain distinctive or unusual skills or abilities employed in the commission of the crime charged. For example, a defendant might be shown to have neutralized sophisticated burglar alarm systems in other burglaries, to be a skilled shoplifter, or to know how to build pipe bombs with "a time delay and ... an explosive filler, igniter, power source, and wiring." Of course, the skill or knowledge must be rare if it is to possess enough probative value to offer a meaningful alternative to propensity reasoning.

McCormick On Evid. § 190.6 (8th ed.) (citations and footnotes omitted)

Here, Jane's allegations themselves occurring months earlier than the charged crime do not place Mr. Seaton in Anna's bedroom or give him access to Anna's bedroom. Nor do her allegations demonstrate that Mr. Seaton had unusual skills or abilities used to commit the crime charged, unlike the neutralizing alarm systems, building pipe bombs or shoplifting skills described by McCormick.

The Circuit Court's decision to exclude the other acts evidence was a proper exercise of its discretion. Despite the State's contentions, the Circuit Court did what the law requires. In making its decision,

addition to the considering the parties' written and oral arguments, the Court reviewed the case law, the applicable statute, the criminal complaint and the proffered facts of the other uncharged act and made a reasonable decision. It applied the correct statute, the *Sullivan* test along with the greater latitude rule, and reached a conclusion that a reasonable judge could reach using a demonstrated, rational process. The record shows that there is a reasonable basis for the Court's decision. That decision should be given great deference by this Court.

II. IF THIS COURT CONCLUDES THAT THE CIRCUIT COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN FINDING THAT THE OTHER ACT EVIDENCE DID NOT MEET A PERMISSIBLE PURPOSE, THIS EVIDENCE MUST STILL BE EXCLUDED BECAUSE IT IS NOT RELEVANT AND BECAUSE ANY ARGUABLE RELEVANCE IS SUBTANTIAALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE, CONFUSION OF THE ISSUES, OR MISLEADING THE JURY.

Because the State has not proven a permissible purpose for the admission of this evidence, the Court does not need to address this issue.

If, however, this Court concludes that the Circuit Court erroneously exercised its discretion in finding that the other act evidence did not meet a permissible purpose, Jane's accusations must still be excluded because they are not relevant. The State cannot meet its burden of proving that Jane's accusations meet the two relevancy requirements of Wis. Stat. §904.01.

First, the other acts does not have a probative value of a fact of consequence in this case given the facts of this case. As explained above, Mr. Seaton's defense will be that Anna consented to the sexual intercourse. In *Alsteen*, the Wisconsin Supreme Court held that other

acts evidence of another person's lack of consent may not be admitted to show lack of consent because it is not relevant. 108 Wis. 2d at 730. The *Alsteen* Court explained that "[e]vidence of Alsteen's prior acts have *no probative value* on [the victim in the current case's] consent. *Id.* (emphasis added) As in *Cofield*, the admission of Jane's accusations would constitute improper propensity evidence use to prove that Mr. Seaton acted in conformity with his prior act. Therefore, Jane's accusations cannot be used to bolster Anna's credibility on the issue of Anna's consent.

Second, contrary to the State's argument, Mr. Seaton's motive, intent, and purpose are not facts of consequence, because they are not elements of the charged crime. *See* argument above §I,C,3. This is a case of sexual intercourse, not sexual contact, so Mr. Seaton's intent to achieve sexual arousal or sexual gratification are not facts of consequence in this case. *See Id.*

The application of the greater latitude rule does not override application of the *Alsteen* rule on relevancy to Jane's testimony on Anna's consent. This case does not involve child victim witness testimony in a child sexual assault case, such as *Davidson* and *Marinez*, in which the need to corroborate a child victim's testimony can be an important consideration.

Additionally, the elements that the two incidents share are not unique or distinctive enough to be relevant to any issue of consequence in this case. Here, the elements that the two incidents share are not uncommon or unique. How Mr. Seaton knew both Anna and Jane, his peers, is not unusual given their ages. That both young women were consuming alcohol is unfortunately not uncommon. It is also not uncommon for people to have sexual intercourse in a secluded place or for one sexual participant to initiate the sex and remove the other person's clothing. It is also not

uncommon for one participant to claim that they asked the other person to stop, and they did not stop.

If *arguendo*, this Court concludes that somehow Jane's evidence is probative to consequential fact in this case, it must still be excluded because its probative value is substantially outweighed by the danger of unfair prejudice to Mr. Seaton, confusion of this issues or misleading the jury. *See Sullivan*, 216 Wis. 2d at 772. The Sullivan Court explained unfair prejudice:

Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decisions on something other than the established propositions in the case.

Id. at 789-90 (citations omitted).

There is a significant danger of unfair prejudice to Mr. Seaton if Jane's allegations are admitted at trial. This evidence has a tendency to influence the outcome in the charged case by improper means. Jane's allegations are disputed and unsubstantiated and the introduction of her uncharged allegations would cause the jury to try Mr. Seaton on, and he would have to defend against, both the charged incident here and Jane's uncharged allegation. This would distract the jury from the charged issue involving Anna. Additionally, Jane's allegations are arguably more serious than the charged offense, due to the alleged degree of force. There is a danger that this evidence would appeal to the juror's sympathies and horror because Jane's case was not charged. The jury might be so influenced by Jane's accusations that it would punish Mr. Seaton in the instant case and cast aside its duty to analyze the evidence regarding Anna's claims. Here, as in the *Sullivan* case, the danger of unfair prejudice was that the jury would be "so influenced by the other acts evidence that they

would be likely to convict the defendant because the other acts evidence showed him to be a bad man." *Id.* at 790.

Therefore, because the other acts evidence is not relevant and any probative value is substantially outweighed by the danger of unfair prejudice, this evidence must be excluded at Mr. Seaton's trial.

CONCLUSION

For the reasons stated above, Mr. Seaton respectfully requests that this Court find that the Circuit Court did not err in excluding the other acts evidence the State sought to have introduced at a trial and affirm the circuit court's decision and order denying the State's motion to introduce other acts evidence.

Dated at Milwaukee, Wisconsin, this 3rd day of December, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. This brief is 24 pages containing 6,921 words.

Dated at Milwaukee, Wisconsin, on December 3, 2021.

TERSCHAN, STEINLE, HODAN &
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CERTIFICATE OF EFILE/SERVICE

I hereby 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 at Milwaukee, Wisconsin on December 2, 2021.

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