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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

The circuit court wrongly denied the State's motion to admit other acts evidence.

The State reiterates that the circuit court unsoundly denied admission of the other-acts evidence in this case. The circuit court incorrectly stated that the law treated the admission of other acts as "exceptional" (as in rare), when the law actually favors admissibility, especially when, as here, greater latitude applies. (State's Br. 22–23.) It misapplied the first step of *Sullivan* by declining to recognize the permissible purposes for which the State was seeking to admit the evidence. (State's Br. 23–25.) It unreasonably determined that the other act (allegations by Jane, a 17-year-old, that a high-school acquaintance, Seaton, isolated her after she had been drinking and forced sexual intercourse) was too dissimilar to be relevant to the charged act (allegations by Anna, a 17-year-old that a high-school friend, Seaton, isolated himself with her after she had been drinking and forced sexual intercourse). (State's Br. 26–27.) And Seaton cannot demonstrate that the probative value of admitting evidence of Jane's allegations is substantially outweighed by the risk of unfair prejudice. (State's Br. 19–21.)

Accordingly, this Court should reverse. Seaton's responsive arguments do not compel a different conclusion.

A. The State offered the evidence for permissible purposes, thus satisfying the first prong of *Sullivan*.

Seaton focuses his brief on the first step of the *Sullivan* analysis, arguing that the State failed to identify a permissible purpose to admit the evidence of Jane's assault, which justified the circuit court's decision. (Seaton's Br. 17–19.) Seaton fails to recognize that this step merely sets "up the relevancy analysis of the second step." 7 Daniel D. Blinka,

Wisconsin Evidence § 404.604 (4th ed., Aug. 2021). "Properly understood, the first step [in *Sullivan*] is hardly demanding." *Id.* All that the proponent has to do is "articulate a proper, relevant purpose" for the evidence other than as propensity evidence. *Id.*; *see also State v. Hurley*, 2015 WI 35, ¶ 62, 361 Wis. 2d 529, 861 N.W.2d 174. And that "hardly demanding" burden to satisfy the first step of *Sullivan* is even less difficult to satisfy when, as here, the greater latitude rule applies.

Here, before both the circuit court and this Court, the State explained that the evidence could go to three groups of purposes: (1) opportunity and motive; (2) identity, plan, intent, and mode of operation; and (3) context and credibility. (State's Br. 14–15; R. 21:6.) The State explained that the similarities between the acts reflected a mode of operation in which Seaton chooses a younger high school acquaintance and a distinct opportunity, i.e., "when the younger victim has been drinking and is isolated from family or friends," he initiates sexual intercourse, and he refuses to stop when the victims ask him to. (R. 21:6.)

All of those are recognized permissible purposes. Wis. Stat. § 904.04(2); *see, e.g.*, *State v. Hunt*, 2003 WI 81, ¶ 60, 263 Wis. 2d 1, 666 N.W.2d 771 (motive or opportunity); *State v. Ziebart*, 2003 WI App 258, ¶ 20, 268 Wis. 2d 468, 673 N.W.2d 369 (prior nonconsensual act related to mode of operation, motive, plan, and intent); *State v. Dorsey*, 2018 WI 10, ¶ 50, 379 Wis. 2d 386, 906 N.W.2d 158 (bolstering witness credibility in sexual assault case). The State, by identifying those purposes and briefly explaining how Jane's testimony would apply, satisfied its low burden on this "hardly demanding" step.

Seaton points out that the State included "motive" in its brief but did not "otherwise develop an argument about how or why motive was a permissible purpose" in the brief or at the hearing. (Seaton's Br. 18.) He likewise complains that the State did not list "intent" as a permissible purpose in its

motion, and that the court "found" that the State did not offer the evidence as proof of motive or opportunity. (Seaton's Br. 18.) He asserts that the only purposes that the State offered and developed were for "identity, plan, and modus operandi" and to bolster Anna's credibility. (Seaton's Br. 19.)

Seaton demands significantly more of the proponent in this first step than the law requires. To start, the State soundly identified numerous relevant and interrelated permissible purposes below. To the extent it potentially left one out, the identified permissible purposes in section 904.04(2) are interrelated and "are not mutually exclusive. The exceptions slide into each other; they are impossible to state with categorical precision and the same evidence may fall into more than one exception." *Hunt*, ¶ 29 (quoting *State v. Tarrell*, 74 Wis. 2d 647, 662, 247 N.W.2d 696 (1976) (Abrahamson, C.J., dissenting)). Again, here, the State offered permissible purposes and explained how Jane's testimony could serve those purposes.

In focusing on the first *Sullivan* step in Part I of his brief, Seaton essentially mixes that step with the second step. *See State v. Normington*, 2008 WI App 8, ¶ 21, 306 Wis. 2d 727, 744 N.W.2d 867. "The first step requires only that the other acts evidence be offered for a permissible purpose." *Id.* Accordingly, the State addresses Seaton's arguments in the context of *Sullivan*'s second step, below.

B. Jane's allegations were material and probative to those purposes.

While the proponent's burden on the second *Sullivan* step is higher than on the first step, it is still "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 *State v. Sullivan*, 216 Wis. 2d 768, 785–86, 576 N.W.2d 30 (1998)). Again, the greater latitude rule applies to this step to make admission of other acts even more liberal.

1. Jane's allegations relate to facts or propositions of consequence in this case.

As discussed (State's Br. 14–17), Jane's allegations relate to facts or propositions of consequence in Anna's case:

Opportunity and motive/intent. Seaton denies that motive and intent are facts of consequence because intent and purpose are not elements of third-degree sexual assault. (Seaton's Br. 24–25.) Yet, 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). Intent is implicit within the element to prove sexual intercourse. "[S]exual assault, involving either sexual contact or sexual intercourse, requires an intentional or volitional act by the perpetrator." *Hurley*, 361 Wis. 2d 529, ¶ 73 (quoting *Hunt*, 263 Wis. 2d 1, ¶ 60). Other-acts evidence is "properly admitted to prove motive because purpose is an element of sexual assault, and motive and opportunity are relevant to purpose." *Hunt*, 263 Wis. 2d 1, ¶ 60.

Notably, here, Seaton is raising a consent defense. Accordingly, the State seeks to use the other-acts evidence to rebut that defense and to prove that Seaton seized an opportunity and had motive and intent to have sexual intercourse with Anna without her consent.

And given that, allegations of previous sexual assaults can relate to opportunity, intent, and motive in cases alleging similar assaults. In *Hunt*, for example, Hunt's motive or

opportunity to sexually assault the victim in that case "was part of the corpus of the crimes charged," and therefore evidence of Hunt's other acts of physical and sexual abuse was relevant to those purposes. *Hunt*, 263 Wis. 2d 1, ¶ 60; *see also Hurley*, 361 Wis. 2d 529, ¶ 74 (other-acts evidence was admissible relative to motive to commit sexual assaults).

Seaton asserts that since the statutory definition of sexual intercourse does not contain the "sexual arousal or sexual gratification" language from the sexual contact definition, intent or purpose are not elements when the charge is based on sexual intercourse. (Seaton's Br. 24–25, 28.) But *Hurley*, *Hunt*, and other cases[1] have rejected that argument by recognizing that purpose is an element of sexual assault, regardless of whether it is based on contact or intercourse, because sexual assault implicitly requires a volitional act by the defendant. That "purpose" is not exclusive to the "sexual gratification" language defining sexual contact, nor does the implicit purpose element disappear when the crime involves an act of sexual intercourse.

Finally, Seaton disputes that the evidence is admissible to prove opportunity, based on his understanding that opportunity is limited to showing that a defendant had access to the scene of the crime or used distinctive skills during the crime. (Seaton's Br. 26.) But "opportunity," like the other purposes listed in section 904.04(2), "is a broad term." 7 Blinka § 404.715. And opportunity is linked to motive: "purpose is an element of sexual assault, and motive and opportunity are relevant to purpose." *Hunt*, 263 Wis. 2d 1,

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[1] *See, e.g.*, *State v. Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606; *State v. Plymesser*, 172 Wis. 2d 583, 593–96, 493 N.W.2d 367 (1992); *see also State v. Olson*, 2000 WI App 158, ¶ 10, 238 Wis. 2d 74, 616 N.W.2d 144 (the crime of sexual assault by intercourse implicitly requires that the defendant affirmatively engaged in the act of intercourse).

¶ 60. Here, Jane's allegations are relevant to opportunity to show that Seaton seized upon opportunities to take sexual advantage of younger and inebriated female acquaintances.

Identity, plan, intent, and mode of operation. As argued, the other-acts evidence is alternatively admissible to go to mode of operation, identity, plan, and intent. (State's Br. 14–17.) The rationale under this set of purposes is not significantly different from the rationale under opportunity, intent, and motive: Jane's allegations could show that Seaton's mode of operation is to isolate younger female acquaintances after they have been drinking, initiate sex, and continue his assault despite their pleas to stop.

Seaton says that identity can't be a permissible purpose because it is undisputed in this case. (Seaton's Br. 20.) He likewise says that plan is an extremely limited purpose of showing that the prior act was a "step" to the commission of the later act. (Seaton's Br. 20 (citing *State v. Cofield*, 2000 WI App 196, ¶ 13, 238 Wis. 2d 467, 618 N.W.2d 214).) To start, courts have not viewed the "plan" purpose that narrowly; rather, other acts can go to show a similar set of plans to commit a crime. *See, e.g.*, *Hurley*, 361 Wis. 2d 529, ¶ 64; *State v. Davidson*, 2000 WI 91, ¶ 60, 236 Wis. 2d 537, 613 N.W.2d 606 (evidence of other crimes is admissible "when there is a concurrence of common elements between the two incidents").

And furthermore, identity and plan are broad concepts tied to mode of operation, *see* 7 Blinka at § 404.718. As discussed, and given that the primary issue at trial was whether Seaton proceeded with forcing sex with Anna without her consent, Jane's allegations relate to Seaton's mode of operation (reflecting his identity, plan, and intent) with Anna.

Context and credibility. Seaton writes that the other act of Jane's allegations cannot go to Anna's credibility. He reasons that since Seaton's defense is that the sexual

intercourse with Anna was consensual, the question of Anna's credibility turns on whether the jury believes Anna's claim that she did not consent. (Seaton's Br. 21.) Seaton invokes *State v. Alsteen*, 108 Wis. 2d 723, 730, 324 N.W.2d 426 (1982), and *Cofield*, 238 Wis. 2d 467, ¶ 10 (which is based on *Alsteen*), for the proposition that a nonconsensual other-act cannot be introduced to prove lack of consent in the new case. (Seaton's Br. 21–22, 27–28.)

Alsteen has never stood for the proposition "that other-acts evidence can never be probative of the issue of consent or that the other acts evidence is not probative of the issue of the victim's credibility." *Ziebart*, 268 Wis. 2d 468, ¶¶ 19–20 (preclusion of such other acts evidence is not absolute). Rather, when other-acts establishing previous nonconsent are also relevant to the defendant's "strikingly similar" mode of operation, the other acts can be admissible to establish motive, intent, preparation, or plan under Wis. Stat. § 904.04(2), to effectively rebut the defendant's consent defense. *Id.*

Moreover, *Alsteen* was a pre-*Sullivan* case, and both *Alsteen* and *Cofield* were decided before the greater-latitude statute was enacted. Accordingly, those decisions have limited applicability post-*Sullivan* and post-Wis. Stat. § 904.04(2)(b). Indeed, where testimony from an other-acts victim operated to bolster the present victim's credibility, the supreme court recognized that credibility is always consequential, and that such evidence is especially probative in sexual assault cases that turn on credibility. *Dorsey*, 379 Wis. 2d 386, ¶ 50 (citing *State v. Marinez*, 2011 WI 12, ¶ 34, 331 Wis. 2d 568, 797 N.W.2d 399). To that end, the greater-latitude rule is particularly geared toward admissibility in sexual assault cases: "the difficult proof issues in these kinds of 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.'" *Id.* (citation omitted) (alterations in original).

Seaton also argues that application of the greater latitude rule "does not override" the holding in *Alsteen* because this case does not involve a child victim. (Seaton's Br. 28.) He disregards that the greater latitude rule applies to all sexual assault cases given that they often come down to credibility contests, *see Dorsey*, 379 Wis. 2d 386, ¶ 50, regardless whether the victim is a young child, a teenager, or an adult. *See* Wis. Stat. § 904.04(2)(b).

Accordingly, based on *Sullivan* and application of greater latitude, Jane's allegations relate to facts of consequence in Anna's case. The circuit court, to the extent that it considered this first part of the second step of *Sullivan*, did not reach a reasonable conclusion.

2. Jane's allegations have "a tendency to make a consequential fact more probable or less probable than it would be without the evidence."

The second part of *Sullivan*'s relevancy test considers probative value, i.e., whether the proffered evidence tends to make a consequential fact more or less likely. *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).

Again, Jane's accusations are very similar to Anna's and therefore have high probative value: (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

victim'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. The distinctions that the circuit court leaned on, particularly that one assault occurred outside while the other was indoors, should not have diminished the probative value of the other-acts evidence.

Seaton writes that the similarities between Jane's and Anna's ages, the fact that they were drinking, how Seaton knew them, and the circumstances of the sexual intercourse are not unusual or unique. (Seaton's Br. 28–29.) In his view, that lack of uniqueness somehow lessens the probative value of Jane's accusations. But the test for probative value is simply similarity between the acts; it doesn't require that those similarities are uncommon or rare occurrences. Further, Seaton disregards that it is the collected combination of these individually unremarkable facts that make the link between Anna's and Jane's allegations striking and probative.

C. Seaton cannot show that the danger of unfair prejudice substantially outweighs the high probative value of the other-acts evidence.

Finally, Seaton argues that "Jane's allegations are disputed and unsubstantiated" and risked confusion and distraction by tempting the jury to try Seaton on (or punish him for) those additional allegations as well. (Seaton's Br. 29.) Seaton, however, does not acknowledge that he can bring out at trial that Jane's allegations are disputed and unsubstantiated, and that the jury would be instructed on the limited purposes for which it could consider Jane's allegations.

Seaton writes that Jane's allegations reflect an "arguably more serious" crime "due to the alleged degree of force." (Seaton's Br. 29.) The State fails to understand Seaton's degree-of-force distinction: both victims alleged that Seaton initiated intercourse, that they told him to stop, that it "hurt" or was "painful," and that he didn't stop when they asked. (R. 2:2–4; 21:2.) While it is true that Jane claimed that Seaton put his arm over her mouth during the assault, the acts themselves were similarly violent inasmuch as Seaton forced intercourse over the victims' objections. Nothing about Jane's testimony alleging sexual assault would create a substantial risk of unfair prejudice against Seaton in a trial in which he is accused of committing a similar sexual assault.

CONCLUSION

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

Dated this 3rd day of February 2022.

Respectfully submitted,

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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 2,898 words.

Dated this 3rd day of February 2022.

Electronically signed by:

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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 3rd day of February 2022.

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