STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1399-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MORRIS V. SEATON,

Defendant-Respondent.

ON CERTIFICATION BY THE COURT OF APPEALS FROM A STATE'S APPEAL OF A FINAL ORDER ENTERED IN WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE JENNIFER DOROW, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT STATE OF WISCONSIN

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ISSUES PRESENTED

Morris V. Seaton is charged with sexual assault based on allegations by 17-year-old "Anna" that he 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," upon whom Seaton forced nonconsensual intercourse after they had been drinking together. The State moved to admit that evidence pursuant to multiple "permissible" purposes, including to bolster Anna's credibility. The circuit court suppressed the evidence.

The State appealed, raising one issue:

Did the circuit court correctly deny the State's request to admit the evidence, based primarily on its view that the different settings (the assault of Jane occurred outdoors while Anna was assaulted indoors) made them too dissimilar to be relevant?

The court of appeals certified the appeal to this Court, asking specifically:

1. In sexual assault prosecutions where consent is the primary issue, are the holdings in *Alsteen* and *Cofield*,[1] suppressing past other-acts of sexual misconduct by the defendant as irrelevant to consent, still good law?

2. Is bolstering a victim's credibility or undermining of the defendant's credibility a "permissible purpose" under the first prong of the *Sullivan* analysis, especially in cases where the greater latitude rule applies?

[1] *State v. Alsteen*, 108 Wis. 2d 723, 324 N.W.2d 426 (1982); *State v. Cofield*, 2000 WI App 196, 238 Wis. 2d 467, 618 N.W.2d 214.

This Court should reverse the decision of the circuit court suppressing the other-acts evidence. It should further hold that *Alsteen* and *Cofield* are no longer good law. And it should hold that bolstering a victim's credibility and undermining a defendant's credibility are permissible stand-alone purposes to admit other-acts evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court normally hears oral argument and publishes its cases.

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, the greater latitude rule applies to each step of the above analysis to ease admission of other-acts in these often difficult-to-prove credibility contests.[2]

[2] Because the oft-used descriptor "he said, she said," for sexual-assault cases reflects an outdated bias against the veracity of female victims alleging sexual misconduct, the State uses the phase "credibility contests" in this brief to describe cases in which the primary evidence is witness testimony. *See* Allison Leotta, *I Was a Sex-Crimes Prosecutor. Here's Why 'He Said, She Said' Is a Myth*, Time, Oct. 3, 2018, https://time.com/5413814/he-said-she-said-kavanaugh-ford-mitchell/.

Here, the State satisfied its low burdens of showing multiple permissible purposes and strong probative value in the proposed other-acts evidence of Jane's claims that Seaton sexually assaulted her under similar circumstances to what Anna claimed Seaton did to her about a year or two later. 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 that decision.

As for the certified questions, the other-acts analyses in *Alsteen* and *Cofield* are inconsistent with significant subsequent case law. Their decisions on other-acts have been effectively overruled. This Court should make clear that those analyses are no longer good law. And finally, credibility has long been held to be a permissible purpose under the first step of *Sullivan*.

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. 2:1–2.) 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. 2:1–2.)

"[A]fter 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.) 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.)

At some point after that, Anna noticed that Dayveon and Seaton had come into the bedroom. (R. 2:2.) 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.)

Anna said that her sister and Dayveon left the bedroom. (R. 2:2.) 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.) 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 did not stop." (R. 2:2.) Anna said that she "began to sober up and pushed [Seaton] off of her." (R. 2:2.) 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.) 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.) She said that "[s]ometime later, a girl picked [Seaton] up from the apartment." (R. 2:2.)

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.) 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. 2:2–3.) Anna also told two friends and her current boyfriend about the incident. (R. 2:3.)

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 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.)

The charge and "Jane's" allegations

The State charged Seaton with third-degree sexual assault. Wis. Stat. § 940.225(3); (R. 2:1; 10). 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.) In its motion, the State indicated that Jane reported the assault in May 2019. (R. 21:2.) Jane, who was then a Brookfield East student, was in Whitewater helping her sister on college move-in day. (R. 21:2.) 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 had already graduated. (R. 21:2.)

Jane said that around 10 p.m., she decided to leave the gathering to look for her cousin. (R. 21:2.) Seaton offered to help her, and the two left on foot. (R. 21:2.) 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.) 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.) Seaton forced intercourse with her despite Jane's telling him to stop; according to Jane, he put an arm over her mouth and told her "that it was fine and to be quiet." (R. 21:2.) When Seaton finished, he got up and walked away. (R. 21:2.) Jane said "that the intercourse was painful and she continued to feel pain [from it] for about a week." (R. 21:2.)

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.)

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; isolating himself with them after they had been drinking; initiating intercourse; and refusing to stop when asked. (R. 21:6.) 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. 21:6–7.) It argued that the greater latitude rule applied and supported admission. (R. 21:7–8.) Finally, it argued that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. (R. 21:8–9.)

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 generally 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. 36:2–4.) 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 arguments, 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.) 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.)

After the court memorialized its decision in a final order, (R. 53), the State appealed 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.) It argued, as it does again before this Court, that the circuit court wrongly suppressed the evidence based on its reasoning that the settings of the two acts were different.

After the parties submitted briefs to the court of appeals, that court certified the appeal seeking clarification on the status of *Alsteen* and *Cofield,* and on whether credibility is a proper purpose under *Sullivan*. This Court granted the court of appeals' certification request.

STANDARDS 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 Cnty.*, 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)).

Moreover, when reviewing a circuit court's determination regarding other-acts evidence, this Court may consider acceptable purposes supporting "admission of evidence other than those contemplated by the circuit court."

State v. Hunt, 2003 WI 81, ¶ 52, 263 Wis. 2d 1, 666 N.W.2d 771 (citing *State v. Sullivan*, 216 Wis. 2d 768, 784–85, 576 N.W.2d 30 (1998)). It also independently reviews the record if the circuit court does not provide an explanation or basis for its decision. *State v. Alsteen*, 108 Wis. 2d 723, 728–29, 324 N.W.2d 426 (1982).

Whether and to what extent *Alsteen* and *Cofield* remain good law, and whether a sexual assault victim's credibility is a permissible purpose under the first step of *Sullivan*, are questions of law that this Court reviews de novo. *State v. Walker*, 2008 WI 34, ¶ 13, 308 Wis. 2d 666, 747 N.W.2d 673 ("Interpretation of our own case law presents a question of law that we review de novo.").

ARGUMENT

I. 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 *Sullivan*, 216 Wis. 2d at 771–72, 783. The first step asks whether the party has offered the evidence for a permissible purpose under Wis. Stat. § 904.04(2). *Id.* at 772. The next step asks whether the evidence is relevant. *Id.*

When the party seeking admission of the other-acts evidence establishes these two steps by a preponderance of the evidence, the burden shifts to the opposing party for the third step of the test. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399. This step asks 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 section 904.04 as stating a "general rule . . . of exclusion" because its first sentence 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 sentence 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 identifies the evidentiary requirements that the parties must satisfy to use other-acts evidence. Far from discouraging admissibility, 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 originated in common law and 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 (citation omitted). This evidentiary rule is codified in Wis. Stat. § 904.04(2)(b)1. and applies when, as here, the charges involve a "serious sex offense." Wis. Stat. § 904.04(2)(b)1.; *State v. Dorsey*, 2018 WI 10, ¶¶ 31–33, 379 Wis. 2d 386, 906 N.W.2d 158. The greater latitude rule, which relaxes the evidentiary burden for admitting other-acts evidence in sexual assault cases, applies to all three steps 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). Third-degree sexual assault 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. 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 Seaton's purpose or intent an express element of the crime, it is implicit within the element of proving 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." *Hunt*, 263 Wis. 2d 1, ¶ 60.

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 with greater latitude applying.

1. The State offered the evidence for permissible purposes.

The first prong of the *Sullivan* analysis is a low bar for the proponent to satisfy. *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 proponent 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, which can "provide greater information from which the jury could assess [the victim's] credibility." *Marinez*, 331 Wis. 2d 568, ¶ 26.

Here, the State sought to admit testimony from Jane that, around nine months before Seaton allegedly assaulted Anna and when Jane 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), could go to the following purposes:

Opportunity and motive. The other-act involving Jane (given her age, familiarity with Seaton, and intoxicated state) could go to show that Seaton acted on an opportunity to exploit Anna's vulnerability (due to her age, familiarity with him, and 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.

Credibility. For those same reasons, Jane's description of Seaton's alleged assault of her will assist the jury in assessing Anna's and Seaton's credibility regarding what happened the night of Seaton's alleged assault of Anna. *See Marinez*, 331 Wis. 2d 568, ¶ 27.

2. The evidence was relevant to those purposes.

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; *Payano*, 320 Wis. 2d 348, ¶ 69 n.15 (evidence that bears on an undisputed element of a crime is still relevant). And other-acts evidence can bolster (or undercut) 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. By the same token, "'similarity' and 'nearness' are not talismans. Sometimes dissimilar events will be relevant to one another" based on their connection with other facts. *Payano*, 320 Wis. 2d 348, ¶ 70 (citation omitted).

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 and Seaton's credibility are the central determinations for the jury. *See Marinez*, 331 Wis. 2d 568, ¶ 34. The State's other-acts evidence can bolster Anna's credibility and undercut Seaton's to the extent that Seaton is asserting that her version of events is not credible or false.

Further, the proposed other-act 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. Jane's accusations correspond closely 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 teens while they were isolated from friends or family; (5) Seaton initiated sexual contact, removed each teen'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.[3]

In light of these marked similarities, the other-acts evidence of Jane's accusation has strong probative value. It is powerful evidence of Seaton's motive to obtain sexual gratification. It indicates a mode of operation that is probative of Seaton's intent to choose an intoxicated younger acquaintance (potentially because she would be more likely to trust him than a stranger would be), 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 lack physical evidence, *id.* ¶ 28, and prosecutors have difficulty obtaining admissible evidence to prove the elements of those crimes. *Davidson*, 236 Wis. 2d 537, ¶ 42.

[3] The State assumes that Jane will 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 in 2017, based on a later police report stating that Jane said the assault was in 2017. (R. 46:10–11, 17.) Still, even if the span between the alleged assaults was actually a year and nine months, that gap does not make Jane's allegations 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 dissimilar given their other commonalities).

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 and challenge Seaton'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.* ¶ 50. That reasoning likewise applies to this case.

In short, the State's other-acts evidence is probative of facts of circumstance relating to opportunity and motive; identity, plan, intent, and mode of operation; and credibility. 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. (R. 46:27.) While the circuit court did not reach *Sullivan*'s third prong, this Court independently reviews the record for "any reasonable basis for the trial court's discretionary decision." *Payano*, 320 Wis. 2d 348, ¶ 92 (citation omitted). Here, the record establishes that there is no reasonable basis to find 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.

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). "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 contact 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 mode of operation, his motive and intent with regard to Anna, and it also bolsters Anna's credibility and diminishes Seaton's.[4]

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 is alleging. Further, the circuit court can give a limiting instruction to the jury to not

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[4] In *Smogoleski*, which has persuasive value and aligns factually with this case, the court of appeals correctly held that other-acts of the defendant "engaging in sexual acts with an unconscious teenager who had been drinking alcohol 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. *State v. Smogoleski*, No. 2019AP1780-CR, 2020 WL 6750487, ¶ 23 (Wis. Ct. App. Nov. 18, 2020) (unpublished). (A-App. 72–73). The court of appeals also recently (and correctly) reversed a circuit court's other-act suppression in a second persuasive case, *State v. Coria-Granados*, No. 2019AP1989-CR, 2021 WL 503323, ¶¶ 28, 34, 41, 56, 83 (Wis. Ct. App. Feb. 11, 2021) (unpublished). (A-App. 53–64.)

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 in this case: similar offenses 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 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.) But that Jane's accusations 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 and that Seaton was not on trial for Jane's claim.

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 applied the wrong standard of law and therefore erroneously exercised its discretion.

The circuit court started its analysis off on the wrong foot by stating that admission of other-acts "is still 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.) The court later repeated the "exception" language, 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.) It reiterated at the end of its discussion that admission of other-acts "is the exception, not the rule." (R. 46:27.)

These statements reflected two things: (1) that the court believed that there was a general presumption against admission of other-acts; and (2) that the court preemptively believed that Seaton would be unfairly prejudiced since Jane's allegations were unproven.

Neither of those premises correctly reflects the controlling legal standards. As discussed, any presumption in other-acts decision-making skews *toward* admissibility. *Marinez*, 331 Wis. 2d 568, ¶¶ 26, 33, 41 ("The bias . . . is squarely on the side of admissibility." (citation omitted)). And that lean toward admissibility is even more pronounced when, as here, greater latitude applies. Wis. Stat. § 904.04(2)(b). 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 and considered limiting instructions.

Overall, the circuit court recognized the *Sullivan* framework, but it failed to apply it soundly or hold consistently with controlling case law and the greater latitude rule in the following ways:

The court did the relevance analysis before it found permissible purposes. Here, the State identified multiple permissible purposes that satisfied the first *Sullivan* prong as a matter of law. (R. 21:6; 46:15.) Indeed, the circuit court acknowledged that the other-act could bolster Anna's credibility, (R. 46:24), (which, as explained below, the court wrongly viewed as not functioning as a stand-alone permissible purpose).

Yet the court's discussion ping-ponged between the permissible-purpose prong and the relevance prong. Every time it started to address a permissible purpose under the first prong, it returned to questions of similarity under the second prong:

> Is it being offered for motive? No, I don't see that here. Is it 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.) The court also acknowledged that intent could be a valid purpose, but the court declined to consider it because the State did not develop it in its written motion. (R. 46:25.) It rejected identity, plan, and mode of operation as permissible purposes, though seemingly based on *Sullivan*'s second prong: in its view, the settings of the two assaults were too different from each other to be relevant. (R. 46:26.) The court then summarized that since the other-act was not similar to Anna's allegations, it was "not being offered for a permissible purpose." (R. 46:27.)

That analysis incorrectly put the cart before the horse: the circuit court supplanted the first prong of *Sullivan*—a very low bar in which the proponent merely identifies permissible purposes other than propensity—with the relevance analysis under the second prong in *Sullivan*. Though the permissible purpose guides the relevance analysis, the opposite is not true. What's more, the circuit court did this under the view that other-act admission is generally disfavored, which was also incorrect both generally and in this greater-latitude case.

Hence, when the court denied the State's motion because the other-acts evidence was "not being offered for a permissible purpose," (R. 46:27), that was an incorrect application of the first *Sullivan* prong, especially in light of the greater-latitude rule. And to the extent that the court concluded that the outside-vs.-inside distinction between the assaults failed the second *Sullivan* prong, (R. 46:23–24, 26), that conclusion was also an incorrect application of the law.

The court discounted Anna's credibility as a permissible purpose. The circuit court viewed bolstering credibility as not a "stand-alone" purpose and as requiring "some other acceptable purpose." (R. 46:20, 26.) 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.)

That decision does not square with controlling law. Wisconsin courts have long recognized the complainant's credibility to be a permissible purpose under the *Sullivan* analysis. *See, e.g.*, *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, ¶¶ 58–59 ("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.").

Credibility is often grouped with context and background because those purposes operate together with a common aim: to provide additional evidence to assist the jury's credibility determinations. *See Marinez*, 331 Wis. 2d 568, ¶ 26 n.18 (stating that admission of other-acts for this purpose can "allow the jury to better assess [the complainant's] credibility and to provide a more complete story for the jury"). Bolstering a complainant's credibility (or rebutting a defendant's) is also a recognized avenue to ease admission of other-acts in greater-latitude cases. *See Dorsey*, 379 Wis. 2d 386, ¶ 50 (observing that the "difficult proof issues" in sexual assault credibility contests justify application of the greater latitude rule, which allows for the more liberal admission of other-acts to assist a jury in assessing credibility); *Marinez*, 331 Wis. 2d 568, ¶ 34 (same).

The circuit court's view that credibility had to accompany "some other acceptable purpose" is wrong. Indeed, the proponent need only offer one permissible purpose. *Marinez*, 331 Wis. 2d 568, ¶ 25. Credibility is a recognized stand-alone permissible purpose, especially in credibility contests where the greater-latitude rule applies.[5] In all events, the State here identified multiple permissible purposes, including mode of operation, motive, and intent, 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

[5] In light of the court of appeals' certification asking this Court to specifically answer whether bolstering a victim's or discounting a defendant's credibility is a permissible purpose, the State addresses the issue more fully in Part III below.

its sticking point was that Jane was assaulted in a yard while Anna was assaulted inside a 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.)

But that difference cannot be dispositive under a reasonable 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 involve a different location and different details. Hence, distinguishing one assault for occurring outdoors while the other happened inside is as insignificant a difference under greater latitude as the facts that Anna and Jane are different 17-year-olds, and that the assaults occurred on different dates and in different towns.

Moreover, under the *Sullivan* analysis, whether similarities are relevant and probative (and whether dissimilarities discount that relevance) depends on how the proponent wants to use the evidence. Here, as discussed above, the State proposed that the other-act would go to motive, intent, plan, mode of operation, opportunity, and credibility. (R. 21:6–7.) The other-act was relevant to those purposes based on its similarity to the assault charged in this case: 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 forced touching and 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 exclude the other-act, particularly with greater latitude applying.

In summary, 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.

II. This Court should clarify that *Alsteen* and *Cofield* have no remaining viability to the analysis of other-acts decisions in sexual assault cases.

The court of appeals asks this Court to clarify whether *Alsteen* and *Cofield* are still good law to the extent that they require suppression "of prior nonconsensual sexual wrongs in cases involving an adult victim of an alleged sexual assault where consent is the primary issue." (Cert. at 1–2; A-App. 24–25.) It asks this based on the codification of the greater latitude rule and this Court's decision in *Dorsey*. (Cert. at 1–2; A-App. 24–25.)

For the reasons below, *Alsteen* and *Cofield* were effectively overruled long before *Dorsey* and the codification of greater latitude.

A. *Alsteen* and *Cofield* suppressed defendants' other-acts in cases where consent was disputed.

In *Alsteen*, this Court observed that where "the only issue" in a sexual assault case was whether the 15-year-old victim consented, Alsteen's previous acts of sexual misconduct with an 11-year-old and with a woman were not relevant to any issue in that case (under the then-equivalent to the second step of the *Sullivan* analysis). *Alsteen*, 108 Wis. 2d at 730. It stated that "[e]vidence of Alsteen's prior acts [of sexual misconduct] has no probative value on the issue of [the 15-year-old victim's] consent. Consent is unique to the individual." *Id.* at 730. "The fact that one woman was

raped . . . has no tendency to prove that another woman did not consent." *Id.* (quoting *Lovely v. United States*, 169 F.2d 386, 390 (4th Cir. 1948)). There was no mention of greater latitude, and it did not appear that the State argued any other permissible purposes for admission of the evidence.

Cofield is another sexual assault case in which the defendant raised consent as a defense. There, the victim claimed that Cofield threatened her with a knife. *State v. Cofield*, 2000 WI App 196, ¶¶ 2, 10, 238 Wis. 2d 467, 618 N.W.2d 214. The trial court allowed the State to admit evidence that Cofield had been twice convicted of sexually assaulting two women at knifepoint to show motive and common plan or scheme. *Cofield*, 238 Wis. 2d 467, ¶ 10. The court of appeals reversed, first noting that to the extent that the trial court said that the other-acts were relevant to the issue of consent, that statement was inconsistent with the holding in *Alsteen*. *Id.* The court also considered but rejected other proposed purposes for admitting the evidence. *Id.* ¶¶ 11–12. Like the court in *Alsteen*, the court of appeals did not mention or apply the common-law greater latitude rule.

B. The holdings in *Alsteen* and *Cofield* regarding the admissibility of other-acts in sexual assault cases turning on consent have been implicitly overruled.

In light of subsequent appellate cases interpreting *Alsteen* and *Cofield*, cases addressing the admission of other-acts in sexual assault prosecutions, and the codification of the greater latitude rule, those portions of *Alsteen* and *Cofield* have no remaining practical applicability to contemporary other-acts analyses in sexual assault cases. This Court should overrule the portion of *Alsteen* discussing the other-acts evidence and the entire discussion in *Cofield*.

1. Subsequent courts have interpreted *Alsteen*'s holding narrowly.

In *Ziebart*, the circuit court admitted other sexual misconduct by a defendant in a sexual assault case where consent was disputed. *Ziebart*, 268 Wis. 2d 468, ¶¶ 8–9. The court instructed the jury that the other-acts evidence could be considered as to "whether the victim freely consented or did not consent to the alleged acts of the defendant in this case." *Id.* ¶ 9. Ziebart challenged counsel's effectiveness for not objecting to that instruction as contrary to *Alsteen*. *Id.* ¶ 13.

The court of appeals rejected Ziebart's position, agreeing with the State that "*Alsteen* does not stand 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." *Id.* ¶ 19. Instead, the court distinguished Ziebart's case from *Alsteen* and held that prior acts similar to the charged act were admissible and relevant when it was probative of a modus operandi rebutting a consent defense:

> [w]here, as here, a defense of consent is inextricably connected to a defendant's conduct surrounding and including sexual contact, and where other-acts evidence is probative of a *modus operandi* rebutting that defense, *Alsteen* does not preclude an instruction advising the jury that it may consider the evidence on the issue of whether an alleged victim consented to the defendant's conduct.

Id. ¶ 24.

Thus, the court in *Ziebart* correctly recognized that *Alsteen* did not stand for the broad proposition that a defendant's past sexual misconduct is not relevant in sexual assault prosecutions turning on consent. Rather, it understood *Alsteen* to be limited to its facts, where there was no argument or evidence that the proposed other-acts would have been admissible to prove modus operandi.

2. *Alsteen* is inconsistent with black-letter law regarding the burden of proof and admissibility of evidence.

To start, *Alsteen*, like the circuit court here, framed admission of other-acts in Wisconsin to be generally a rule of exclusion. *Alsteen*, 108 Wis. 2d at 729–30. As noted, the rule is generally one of admission, not suppression. *See Marinez*, 331 Wis. 2d 568, ¶¶ 26, 33, 41 ("The bias . . . is squarely on the side of admissibility." (citation omitted)). Further, *Alsteen* deemed the proposed other-acts evidence irrelevant because "the only issue" in Alsteen's case was whether the victim in the underlying conviction consented. *Alsteen*, 108 Wis. 2d at 730–31. That reasoning has three interrelated flaws.

First, consent is never "the only issue" in a sexual assault case. Consent may be the primary *element* in *dispute*, but even so, the State must prove all elements of the crime, even those that are not disputed. *State v. Plymesser*, 172 Wis. 2d 583, 594, 493 N.W.2d 367 (1992) ("The state must prove all the elements of a crime beyond a reasonable doubt, even if the defendant does not dispute all of the elements."). Accordingly, the accused's chosen theory of defense does not control the elements that the State must prove at trial. *Veach*, 255 Wis. 2d 390, ¶ 121; *see also Davidson*, 236 Wis. 2d 537, ¶ 65 ("[E]vidence relevant to [undisputed] element[s] is admissible.").

Second, and relatedly, the *Alsteen* court misconstrued the standard for relevance to implicate only facts proving disputed *elements* of a crime. *Alsteen*, 108 Wis. 2d at 730–31. It correctly noted the rule that evidence is relevant when it has "any tendency to make the existence of *any fact that is of consequence* to the determination of the action more probable or less probable than it would [be] without the evidence." *Id.* (quoting Wis. Stat. § 904.01). It also correctly stated that evidence that "does not have a tendency to prove any fact that is of consequence to a material *issue* in the case is irrelevant

and should be excluded." *Id.* (emphasis added) (citing *Rogers v. State*, 93 Wis. 2d 682, 688, 287 N.W.2d 774 (1980)).

But "any fact that is of consequence to a material issue" is broader than "any fact that is of consequence to a contested element." And motive, plan, and modus operandi are related to the defendant's purpose in committing sexual assault, which is part of the "sexual contact" element. *See Plymesser*, 172 Wis. 2d at 593; *State v. Friedrich*, 135 Wis. 2d 1, 22, 398 N.W.2d 763 (1987). Similarly, while "intent" is not its own element of sexual assault, it is part of the definition of sexual contact. Hence, prior acts of nonconsensual sexual conduct are relevant to a defendant's intent or motive or plan in a later case alleging similar acts, which is probative to facts of circumstance that the jury determines. *See, e.g.*, *Friedrich*, 135 Wis. 2d at 23–24 (concluding that other sexual assaults acts were relevant to establish a scheme or plan, which related to the accused's intent to commit the charged sexual assault).

Third, to call "consent" the only issue in a sexual assault case is an oversimplification. To determine whether an act was consensual, the jury must assess the credibility of the respective witnesses, and "[a] witness's credibility is always 'consequential' within the meaning of Wis. Stat. § 904.01." *Marinez*, 331 Wis. 2d 568, ¶ 34 (citation omitted). That is especially so in sexual assault or domestic violence cases, given that they are typically credibility contests with difficult proof issues. *See Dorsey*, 379 Wis. 2d 386, ¶ 50. Accordingly, *Alsteen* is incorrect to the extent that it could be read to say that any other-acts bearing on the issue of consent are not relevant.

3. *Cofield*'s other-acts analysis conflicts with controlling cases.

In *Cofield*, the court of appeals erred in stating that the other-acts could not be relevant to show intent, motive, or purpose because intent, motive, and purpose were not elements of first-degree sexual assault. *Cofield*, 238 Wis. 2d 467, ¶¶ 11–12. Again, Wisconsin courts have long held that intent and purpose are implicit elements in the crime of sexual assault, since the definition of "sexual contact" requires a volitional act for the purpose of sexual gratification. *See Davidson*, 236 Wis. 2d 537, ¶ 59; *see also Plymesser*, 172 Wis. 2d at 595–96; *State v. Fishnick*, 127 Wis. 2d 247, 260, 378 N.W.2d 272 (1985). Motive is probative of purpose, an element of sexual assault; therefore, "[e]vidence relevant to motive is . . . admissible, whether or not the defendant disputes motive." *Davidson*, 236 Wis. 2d 537, ¶ 65 (quoting *Plymesser*, 172 Wis. 2d at 594–95).

In addition, the *Cofield* court's understanding of motive and plan or common scheme within the other-acts analysis was incorrectly narrow. The court considered other-acts admitted for purposes of motive and common plan or scheme to require a link between the other-act and the charged crime showing that the other-act was a step in or reason for committing the later crime. *Cofield*, 238 Wis. 2d 467, ¶¶ 12–13. But the only link required for establishing a plan or scheme is "a concurrence of common elements between the two incidents." *Davidson*, 236 Wis. 2d 537, ¶ 60 (citing *Friedrich*, 135 Wis. 2d at 24). For example, evidence of Davidson's assault of a six-year-old girl ten years earlier bore "striking similarities" to his charged assault of a thirteen-year-old girl, despite the differences in the victims' ages and the decade between the assaults. *Id.* ¶¶ 60–61.

Similarly, the permissible purpose of establishing motive does not require the other-act to supply a specific motive for a defendant to assault the victim in the charged case. *See, e.g.*, *Friedrich*, 135 Wis. 2d at 22 (citing *Fishnick*, 127 Wis. 2d at 260–61) (admitting other-act of previous sexual assault of a different victim as relevant to "motive, which in turn is related to his purpose for committing the crime—sexual gratification—which is an element of the charged offense"). Accordingly, to the extent that *Cofield* held that the purposes of common plan or scheme and motive must reflect a link or a step in the course of the charged crime, that reasoning is incorrect and should be overruled.

4. *Alsteen*'s and *Cofield*'s reasoning contradicts the greater latitude rule, both before and after its codification.

It does not appear that the parties raised, or that the courts considered applying, the greater latitude rule in *Alsteen* or *Cofield*. Both cases are incongruent with the greater latitude rule in common law and as codified in Wis. Stat § 904.04(2)(b). In light of that rule, neither case can be read to limit other-acts in sexual assault cases based on a raised defense of consent, or to provide guidance on the *Sullivan* analysis.

"Wisconsin courts permit 'a more liberal admission of other crimes evidence' in sexual assault cases than in other cases." *Davidson*, 236 Wis. 2d 537, ¶ 44 (quoting *Friedrich*, 135 Wis. 2d at 31). The rationale for this rule stems from the "difficult proof issues" inherent in credibility-based sexual assault cases. *Marinez*, 331 Wis. 2d 568, ¶ 34. That rationale is warranted because that evidence "has a tendency to assist the jury in assessing" the reliability and credibility of the witnesses in these cases. *Id.*

The greater latitude rule had its origins in *Proper v. State*, 85 Wis. 615, 629, 55 N.W. 1035 (1893). It has been recognized and applied as a common-law rule in sexual assault prosecutions with increasing regularity since the 1970s. *See, e.g., Hurley*, 361 Wis. 2d 529, ¶ 82; *Hunt*, 263 Wis. 2d 1, ¶ 86; *State v. Mink*, 146 Wis. 2d 1, 14, 429 N.W.2d 99 (1998); *Fishnick*, 127 Wis. 2d at 257; *Hendrickson v. State*, 61 Wis. 2d 275, 277, 212 N.W.2d 481 (1973).

If there were any dispute about the applicability of greater latitude in adult sexual assault cases, that question was answered in 2016, when the Legislature codified the greater latitude rule in Wis. Stat. § 904.04(2)(b). That statute provides that greater latitude applies in all crimes involving sexual and domestic violence. Wis. Stat. § 904.04(2)(b)1. (stating that the rule applies in any "criminal proceeding . . . alleging the commission of a serious sex offense, as defined in s. 939.615(1)(b)"); *Dorsey*, 379 Wis. 2d 386, ¶ 26 & n.20.

Accordingly, this Court should overrule *Alsteen* and *Cofield* to the extent that they assessed the admissibility of other-acts evidence without applying greater latitude. This Court should declare that those cases provide no precedential guidance to courts currently considering the admissibility of other-acts in sexual assault cases.

III. Bolstering a sexual assault victim's credibility is a permissible purpose to admit other-acts evidence.

Finally, the court of appeals asks this Court to answer "whether the bolstering of an alleged victim's credibility or the undermining of the defendant's credibility for that matter, which are two sides of the same coin in a case such as this, is itself a 'permissible purpose'" under the first prong of *Sullivan*, "especially in light of the greater latitude rule."

(Cert. at 16; A-App. 39.) The answer to this question has been, and should remain, "Yes."

A permissible purpose to admit other-acts, with greater latitude applying to the first *Sullivan* step, includes the victim's state of mind, corroboration, and to establish credibility. *Hunt*, 263 Wis. 2d 1, ¶ 59; *see also Marinez*, 331 Wis. 2d 568, ¶¶ 26–27 (emphasis added) (reiterating "that context, *credibility*, and providing a more complete background are permissible purposes under Wis. Stat. § 904.04(2)(a)"). The court of appeals also has identified credibility as a permissible purpose for other-acts admissions. *See State v. Schaller*, 199 Wis. 2d 23, 43, 544 N.W.2d 247 (Ct. App. 1995) (other-acts were admissible and relevant to "severe issues of credibility" in the victim's description of events); *State v. C.V.C.*, 153 Wis. 2d 145, 162, 450 N.W.2d 463 (Ct. App. 1989) (other-acts went to victim's state of mind on issue of whether she consented to intercourse).

That bolstering a witness's credibility can be a permissible purpose under the first prong of *Sullivan* is sensible. One core reason that greater latitude facilitates the admission of other-acts in sexual assault cases is because witness credibility is always consequential in these cases. In addition, greater latitude applies to all three prongs of the *Sullivan* analysis. *Davidson*, 236 Wis. 2d 537, ¶ 51. Hence, bolstering a victim's credibility has also routinely been recognized as a basis for finding relevance under the second prong of *Sullivan*, and balancing the probative value against the risk of undue prejudice in the third. *See, e.g.*, *Dorsey*, 379 Wis. 2d 386, ¶ 50 (credibility was always "consequential" and particularly probative in credibility contests); *Marinez*, 331 Wis. 2d 568, ¶ 34 (holding that the proposed other-acts evidence "has a tendency to assist the jury in assessing" the credibility of the victim, which is "always 'consequential'" and especially so in a sexual assault case); *Plymesser*, 172 Wis. 2d at 595 (noting need and probative value of other-acts evidence

"to corroborate the victim's testimony"); *Fishnick*, 127 Wis. 2d at 257 n.4; *Proper*, 85 Wis. at 629; *State v. Parr*, 182 Wis. 2d 349, 361, 513 N.W.2d 647 (Ct. App. 1994) (evidence that the defendant had sexually assaulted other young boys in a strikingly similar fashion to the instant charges was relevant to support the victim's credibility).

In sum, the circuit court did not apply correct legal standards in considering the State's motion. The other-act evidence here is admissible for multiple permissible purposes, including motive, plan, modus operandi, intent, and credibility. It is relevant and probative to those purposes, which ultimately go to intent, purpose, and credibility—all facts of consequence in this case. The risk of undue prejudice does not significantly outweigh that probative value. The circuit court's decision suppressing the other-acts resulted from a nonapplication of greater latitude and a misapplication of the controlling legal standards, resulting in a decision that no reasonable jurist could make.

Further, *Cofield* and *Alsteen* are no longer good law and do not direct a different result. This Court should overrule the portions of those decisions addressing other-acts.

CONCLUSION

This Court should reverse the order of the circuit court denying the State's motion to admit other-acts evidence and remand this matter for further proceedings consistent with its decision.

Dated this 8th day of June 2023.

Respectfully submitted,

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FORM AND LENGTH 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 9882 words.

Dated this 8th day of June 2023.

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 Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 8th day of June 2023.

Electronically signed by:

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1399-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MORRIS V. SEATON,

Defendant-Respondent.

APPENDIX OF PLAINTIFF-APPELLANT STATE OF WISCONSIN

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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 Wis. Stat. § (Rule) 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 § (Rule) 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 instead of full names of persons, 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 8th day of June 2023.

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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 Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 8th day of June 2023.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General